**ORAL ARGUMENT NOT YET SCHEDULED**

# In the United States Court of Appeals for the District of Columbia Circuit

**No. 16-1059**

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ASSOCIATION OF OIL PIPE LINES,
*Petitioner*,

v.

FEDERAL ENERGY REGULATORY COMMISSION
AND UNITED STATES OF AMERICA,
*Respondents*.

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ON PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL ENERGY REGULATORY COMMISSION

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## BRIEF FOR RESPONDENTS FEDERAL ENERGY REGULATORY COMMISSION AND UNITED STATES OF AMERICA

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Final Brief: October 11, 2016

## CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Respondents submit:

### A. Parties and Amici

The parties and intervenors appearing before this Court are identified in Petitioner's brief.

### B. Ruling Under Review

The ruling under review is *Five-Year Review of the Oil Pipeline Index*, 153 FERC ¶ 61,312 (2015), R. 25, JA 739-804.

### C. Related Cases

Counsel are not aware of any related cases pending before this Court or any other court.

*/s/ Susanna Y. Chu*
Susanna Y. Chu

October 11, 2016

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## GLOSSARY

| | |
|---|---|
| Association | Petitioner Association of Oil Pipe Lines. |
| *Association I* | *Association of Oil Pipe Lines v. FERC*, 83 F.3d 1424 (D.C. Cir. 1996). |
| *Association II* | *Association of Oil Pipe Lines v. FERC*, 281 F.3d 239 (D.C. Cir. 2002). |
| Commission or FERC | Respondent Federal Energy Regulatory Commission. |
| Form 6 | FERC Form 6 is an annual financial reporting requirement for oil pipeline companies. The form is available at: http://www.ferc.gov/docs-filing/forms/form-6/form-6.pdf. |
| Order | *Five-Year Review of the Oil Pipeline Index*, 153 FERC ¶ 61,312 (2015), R. 25, JA 739-804. |
| Page 700 | Page 700, an annual cost-of-service reporting requirement for oil pipelines, is part of FERC Form 6. Page 700 is reproduced in the Addendum to this brief. |

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## STATEMENT OF ISSUES

Over twenty years ago, pursuant to the Energy Policy Act of 1992, the Federal Energy Regulatory Commission ("FERC" or the "Commission") established an oil pipeline rate index that operates as a general ceiling on pipeline rates. The Commission reviews the index every five years. Petitioner Association of Oil Pipe Lines (the "Association") challenges the inputs used by the Commission to set the oil pipeline index for the five-year period beginning July 1, 2016. Specifically, the issues presented for review are:

(1) Whether the Commission reasonably decided to use a newly reliable source of interstate pipeline cost data to measure pipeline cost changes, rather than continuing to derive a proxy for such cost changes, as proposed by the Association; and

(2) Whether the Commission reasonably continued its practice of calculating the index using the middle 50 percent of pipeline cost data, rather than considering both the middle 50 and middle 80 percent, as proposed by the Association.

## STATUTORY AND REGULATORY PROVISIONS

Pertinent statutes and regulations are contained in the Addendum.

## INTRODUCTION

The Court reviewed aspects of the oil pipeline index in *Association of Oil Pipe Lines v. FERC*, 83 F.3d 1424 (D.C. Cir. 1996) ("*Association I*"), *Association of Oil Pipe Lines v. FERC*, 281 F.3d 239 (D.C. Cir. 2002) ("*Association II*"), and *Flying J Inc. v. FERC*, 363 F.3d 495 (D.C. Cir. 2004). As discussed in greater detail below, *Association I* addressed the Commission's initial setting of the pipeline index. *Association II* and *Flying J* concerned the Commission's first five-year review of the index. No party pursued appellate review of the Commission's second and third five-year reviews.

This case arises from the Commission's fourth five-year review of the pipeline index. In June 2015, the Commission announced a technical conference and invited comments regarding the index level for oil pipeline rates, which is based on the Producer Price Index for Finished Goods ("Producer Price Index"). Based on the existing methodology, the Commission initially considered an index level between Producer Price Index + 2.0 percent and Producer Price Index + 2.4 percent. During the proceedings, the Association proposed an index level of Producer Price Index + 2.47 percent, while various shippers proposed indices of Producer Price Index + 0.5 percent and Producer Price Index + 0.23 percent.

Upon carefully considering the competing proposals, and re-evaluating the inputs to the methodology, the Commission adopted shippers' proposal to use a newly reliable source of pipeline cost data to calculate the index, rather than deriving a proxy for such costs—as the agency had previously done in the absence of accurate, complete cost data. In addition, the Commission continued its practice of basing the index calculation on the middle 50 percent of pipeline cost changes. The Commission rejected the pipeline cost data sample proposals advanced by the Association (which would have resulted in a larger data sample and a higher index) and the shippers (which would have resulted in a smaller data sample and a lower index). The Commission found the middle 50 percent approach to be more objective and transparent than the parties' proposals, and most aligned with the

objective of the index to reflect normal, industry-wide cost changes. The Commission determined that the index level should be Producer Price Index + 1.23 percent.

The order on review is the product of the Commission's reasoned judgment, technical expertise, and years of experience overseeing the oil pipeline index. It reflects the Commission's commitment to maintaining just and reasonable oil pipeline rates, and not—contrary to Petitioner's suggestion—an improper, "results-oriented" effort to lower the index. The order should be upheld in all respects.

## STATEMENT OF THE CASE

### I. BACKGROUND: THE OIL PIPELINE INDEX

In response to energy price shocks in the 1970s and 80s, Congress enacted the Energy Policy Act of 1992 as part of a "comprehensive bill to reform national energy policy." *Association I*, 83 F.3d at 1429. Section 1801 of the Energy Policy Act directed FERC to "establish[ ] a simplified and generally applicable ratemaking methodology for oil pipelines." Pub. L. No. 102-486 § 1801(a), 106 Stat. 3010 (1992). Pursuant to that instruction, the Commission adopted an indexed ratemaking system "designed to enable pipelines to recover costs by allowing pipelines to raise rates at the same pace as they are predicted to experience cost increases." *Association I*, 83 F.3d at 1430.

In *Association I*, the Court upheld the index system adopted by the Commission. *Id.* at 1428. As explained in the Court's opinion, the system adopted by the Commission used, as a baseline, rates approved in the Energy Policy Act as meeting the Interstate Commerce Act's just and reasonable standard, and set annual caps for rate increases based on an adjusted inflation index. *Id.* at 1430. Under the index system, pipelines recalculate their ceiling levels every July 1 and may increase rates to any amount under the cap without making a traditional cost-of-service filing with the Commission. Order 561, Revisions to Oil Pipeline Regulations Pursuant to the Energy Policy Act of 1992, 58 Fed. Reg. 58,753, 58,761 (Nov. 4, 1993), *on reh'g*, Order 561-A, Revisions to Oil Pipeline Regulations Pursuant to Energy Policy Act of 1992, 59 Fed. Reg. 40,243 (Aug. 8, 1994). The Commission committed to review the index every five years under the just and reasonable standard established by the Interstate Commerce Act, beginning July 1, 2000. *Association I*, 83 F.3d at 1430.

The index system governs most oil pipeline rate increases. 18 C.F.R. § 342.3; Order 561, 58 Fed. Reg. at 58,754. However, a pipeline still has the option of filing for individualized cost-of-service rates, like those required prior to the advent of the index system, "if it shows that there is a substantial divergence between the actual costs experienced by the carrier and the rate resulting from the application of the index such that the rate at the ceiling level would preclude the

carrier from being able to charge a just and reasonable rate within the meaning of the Interstate Commerce Act." *Association I*, 83 F.3d at 1430-31 (quoting 18 C.F.R. § 342.4(a)). In addition, a pipeline may negotiate rate changes with its customers, 18 C.F.R. § 342.4(c), or, under certain circumstances, charge market-based rates, 18 C.F.R. § 342.4(b). The availability of such alternative ratemaking methodologies reflects the fact that "[t]he role of the index is to accommodate normal cost changes" and "not to guarantee recovery of all costs at any time and in full, regardless of other circumstances." Order 561-A, 59 Fed. Reg. at 40,247.

## II. METHODOLOGY

The index system is "fundamentally based upon costs," and operates on the principle that "changes in rate ceilings should reflect changes in costs to the pipeline industry." Order 561-A, 59 Fed. Reg. at 40,245. Thus, from the inception of the index, the Commission has sought to measure "actual cost changes experienced by the oil pipeline industry." *Id.* As explained in the order on review, the index approach uses a methodology developed by Dr. Alfred E. Kahn. Order P 5, JA 743. This method uses pipeline data from the prior five-year period to determine an adjustment to be applied to the current year's Producer Price Index. *Id.* First, each pipeline's cost change over the past five-year period, on a per

barrel-mile basis,[1] is calculated. *Id.* Second, in order to remove "statistical outliers and spurious data," the data set is trimmed to those pipelines in the middle 50 percent of cost changes. *Id.*; *see also id.* P 42 n.80, JA 770-71 (noting that Kahn's Order 561 methodology calculated the index based on the middle 50 percent). The Kahn methodology then calculates three measures of the middle 50 percent's central tendency: the median, the mean, and a weighted mean. *Id*. P 5, JA 743. The methodology calculates a composite by averaging these three measures of central tendency and measures the difference between the composite and the Producer Price Index over the prior five-year period. *Id.* The index level is then set at Producer Price Index plus (or minus) this differential, which tracks the relationship over the last five years between Producer Price Index and oil pipeline costs. *Id.*

The inputs to the first step (i.e., the data source to be used in calculating pipelines' cost changes) and the second step (i.e., trimming the resulting cost change data set to the middle 50 percent), are at issue in this appeal.

[1] A barrel-mile is one barrel of oil transported one mile. Office of Enforcement, Federal Energy Regulatory Commission, *Energy Primer: A Handbook of Energy Market Basics* 109 (Nov. 2015), *available at* http://www.ferc.gov/market-oversight/guide/energy-primer.pdf.

## III. FERC'S INDEX METHODOLOGY REVIEWS

### A. Initial Setting of the Index (1996-2001 period)

Over challenges brought by the Association and various shippers, the Court in *Association I* upheld the Commission's selection, based primarily on analysis by Dr. Kahn, of Producer Price Index – 1 percent as the "most suitable index" to "'accommodate normal cost changes.'" 83 F.3d at 1433 (quoting Order 561-A, 59 Fed. Reg. at 40,247).

In setting the index, the Commission used accounting data from FERC's "Form 6" as a "proxy for oil pipeline capital cost experience." *See* Order 561-A, 59 Fed. Reg. at 40,248. FERC's Form 6 is an annual financial reporting requirement for oil pipeline companies.[2] Addressing concerns raised by the Association regarding whether such data represented pipelines' actual cost change experiences, the Commission observed, "[t]he only capital cost data available for public analysis is in Form No. 6. Use of such a proxy may be imperfect, but [the Association] offers no better solution." Order 561-A, 59 Fed. Reg. at 40,248.[3]

[2] Form 6 can be found at http://www.ferc.gov/docs-filing/forms/form-6/form-6.pdf.

[3] The Association "took issue" with use of Form 6 data "as a proxy for oil pipeline capital cost experience." Order 561-A, 59 Fed. Reg. at 40,248. In particular, the Association argued that: "reported historical book investment has nothing to do with current costs of capital; reported net investment does not reflect the practice of using parent company equity for investment; and oil pipelines use

In keeping with Dr. Kahn's approach, the Commission trimmed the cost data to the middle 50 percent. On review, the Court rejected the Association's challenge to the Commission and Dr. Kahn's use of the middle 50 percent of pipeline cost data as allegedly "leading to a downwardly skewed result." *Association I*, 83 F.3d at 1434. As the Court held, "the Commission fully addressed this objection and explained that the use of the middle 50 [percent] of pipelines better captured the 'central tendency' of cost changes in the industry." *Id.* Moreover, "if [the Commission] were to select an index 'sufficiently high and generous to encompass even the most extraordinary costs, it would provide windfalls to many oil pipelines by allowing rate changes substantially above cost changes . . . . '" *Id.* (quoting Order 561-A, 59 Fed. Reg. at 40,247). Such a result would "effectively abdicate [the Commission's] responsibilities for rate regulation." *Id. See also* Order 561-A, 59 Fed. Reg. at 40,247 (rejecting Association's argument that the Producer Price Index – 1 percent index "would not permit pipelines with far-above-average costs to recover those costs within the index," because the index was "intended to permit pipelines to recover normal costs through normal operation of the index," and noting, "[e]xtraordinary costs can be recovered through . . . cost of service or settlement rates").

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trended original cost for determining rate base, which cannot be calculated from reported data." *Id.*

### B. First Five-Year Index Review (2001-2006 period)

In its first five-year review of the index, the Commission adhered to the prior index level of Producer Price Index - 1 percent, but arrived at that figure under a different methodology than it used in setting the initial index. *Association II*, 281 F.3d at 242.

Among other things, rather than using only the middle 50 percent of the cost change data set, the Commission used the entire data set without removing statistical outliers. *See id.* at 245. On review, the Court observed that "[s]tatistical outliers are data points so extreme as to raise a question whether they may be the result of recording or measurement errors or some other anomaly. . . . To minimize the risk that such extreme (and erroneous) observations will bias their results, statisticians commonly use only the middle portion (e.g., the middle 50% or 80%) of the dataset for their analyses . . . . " *Id.* The Court found that the Commission failed to adequately explain why it used the entire pipeline cost change data set without removing statistical outliers. *Id.*

On remand, the Commission returned to the Kahn methodology used in setting the initial index, arriving at an index level of Producer Price Index, with no adjustment. *Five-Year Review of Oil Pipeline Pricing Index*, 102 FERC ¶ 61,195 P 1 (2003). In particular, the Commission once again used the middle 50 percent of pipeline cost change data, dropping the highest and lowest 25 percent of cost

changes. *Id.* P 24. The Commission also observed that an 80 percent sampling of cost change data produced a similar cost change result. *Id.* The Court upheld the Commission's decision in all respects against a challenge brought by shippers. *Flying J*, 363 F.3d at 498-99.

### C. Second Five-Year Review (2006-2011 period)

In its second five-year review, the Commission again applied the Kahn methodology, using an average of both the middle 50 percent and middle 80 percent of cost data, rather than just the middle 50 percent. *Five-Year Review of Oil Pipeline Pricing Index*, 114 FERC ¶ 61,293 PP 33, 54 (2006) ("2006 Review Order"). Using both the middle 50 percent and middle 80 percent of data for this review period was not controversial. As the Commission observed, both the Association's and shippers' proposals relied on "trimmed data sets of the middle 50 percent and middle 80 percent;" thus, both parties used "the same sample . . . to describe the central tendency of the data." *Id.* PP 28-29.

The Commission arrived at an index of Producer Price Index + 1.3 percent. *Id.* P 2. No party appealed the Commission's order.

### D. Third Five-Year Review (2011-2016 period)

In its third five-year review, the Commission used a data sample comprising the middle 50 percent of pipeline cost changes. *Five-Year Review of Oil Pricing Index*, 133 FERC ¶ 61,228 P 60 (2010) ("2010 Review Order"), *on reh'g*, 135

FERC ¶ 61,172 (2011). The Commission explained that, while it had previously used a composite of the middle 50 and middle 80 percent of cost data, prior orders had not "weighed or discussed" the issue, because it was not controversial in the earlier proceedings. 2010 Review Order, 133 FERC ¶ 61,228 P 60.

By contrast, the third five-year review provided a "more fully developed record" on the issue and, based on that record, the Commission determined that returning to its approach in the orders setting the original index—i.e., using the middle 50 percent—represented the most appropriate method of trimming the data sample. *Id.* P 61. As the Commission explained:

> The purpose of the index is to permit a simplified recovery for normal cost changes, not to enable recovery for extraordinary cost increases or decreases. The middle 50 percent more appropriately adjusts the index levels for "normal" cost changes as opposed to the middle 80 percent, which, by definition, includes pipelines relatively far removed from the median. Furthermore, some of these more dramatic cost changes may be due to circumstances on a particular pipeline that are not broadly shared across the industry. Even when accurate data is reported, pipelines in the middle 80, as opposed to the middle 50, are more likely to have cost changes resulting from factors particular to that pipeline, such as a rate base expansion, plant retirement, or localized changes in supply and demand.

*Id*.

In the same review proceeding, the Commission declined to adopt shippers' proposal to use cost-of-service data found on page 700 of Form 6 ("Page 700")[4]—

[4] Page 700, a one-page summary of a pipeline's total cost-of-service and total interstate throughput in barrels and barrel-miles, appears in the FERC Form 6

rather than accounting data found elsewhere on Form 6—to measure pipeline cost changes. *Id.* PP 83-85. The Commission found that the data on Page 700, as reported at the time, was unreliable because, while the total cost-of-service data reported on Page 700 related solely to interstate costs, the throughput data on that page reported a combination of interstate and intrastate volumes. *Id.* PP 84-85. The Commission observed that the instructions provided to pipelines at that time may have resulted in the erroneous reporting of both interstate and intrastate volumes on Page 700. *Id.* P 84.

The resulting index level was Producer Price Index + 2.65 percent. *Id.* P 1. Shippers petitioned for review of the Commission's decision, but subsequently voluntarily dismissed their petitions.

### E. Fourth Five-Year Review (2016-2021 period)

In June 2015, the Commission issued a notice of inquiry, inviting comments and announcing a technical conference regarding its fourth five-year review of the pipeline index. Notice of Inquiry, 151 FERC ¶ 61,278 (June 30, 2015), R. 1, JA 3-8; Notice Organizing Conference (July 24, 2015), R. 3, JA 9-11. Based on the existing methodology, the Commission indicated that it was considering an index

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annual financial report required of all pipeline companies. *See* FERC Financial Report, FERC Form No. 6: Annual Report of Oil Pipeline Companies and Supplemental Form 6-Q: Quarterly Financial Report, available at: http://www.ferc.gov/docs-filing/forms/form-6/form-6.pdf. Page 700 is also reproduced in the Addendum.

level between Producer Price Index + 2.0 percent and Producer Price Index + 2.4 percent. Notice of Inquiry, 151 FERC ¶ 61,278 P 1, JA 3-4.

The Association proposed an index level of Producer Price Index + 2.47 percent. Order P 8, JA 745. The Association arrived at this proposed index level by using data reported in Form 6, and calculating an average of the middle 50 percent and middle 80 percent of that data to arrive at a cost data sample. *See id.* P 40, JA 769-70.

Various shippers, on the other hand, proposed index levels of Producer Price Index + 0.5 percent or Producer Price Index plus 0.23 percent. *Id*. P 8, JA 745. Generally, shippers arrived at these proposed index levels by again recommending (as they had in the last index proceeding) that the Commission base its calculation on Page 700 cost data, and further recommending that the Commission not only trim that data to the middle 50 percent, but also manually trim additional pipelines from the data set for a variety of reasons. *See id.* PP 19-39, JA 753-69 (rejecting various manual trimming proposals).

After careful consideration, the Commission adopted shippers' proposal to calculate the index using Page 700 cost data. *Id.* PP 10-12, JA 746-48. The Commission explained that Page 700, which did not exist when the Kahn methodology was first developed, is a superior data source because it represents a direct measure of pipeline cost changes, rather than a rough estimate derived from

accounting data found elsewhere on Form 6. *Id.* PP 12-18, JA 747-53. The Commission further explained that, because the Page 700 instructions had been revised, the inaccurate reporting of interstate and intrastate volumes that previously had precluded use of Page 700 cost data had been resolved. *Id.* P 12 n.24, JA 747-48.

In addition, the Commission determined it would continue to use the middle 50 percent of the cost data in calculating the index, rejecting both the Association's proposal to expand the cost data sample by using both the middle 50 and middle 80 percent of the cost data, and shippers' proposal to perform manual data trimming that would remove additional pipeline data beyond the middle 50 percent. *Id.* PP 19-46, JA 753-74.

The resulting index level was Producer Price Index + 1.23 percent. *Id.* P 2, JA 740.

## STANDARD OF REVIEW

This Court reviews Commission actions under the Administrative Procedure Act's arbitrary and capricious standard. 5 U.S.C. § 706(2)(A). "The scope of review under the 'arbitrary and capricious' standard is narrow," and the Court "may not substitute [its] own judgment for that of the Commission." *FERC v. Electric Power Supply Ass'n*, 136 S. Ct. 760, 782 (2016) (citation omitted); *see also Association I*, 83 F.3d at 1431 (same). FERC's decisions will be upheld so

long as the Commission "examine[d] the relevant [considerations] and articulate[d] a satisfactory explanation for its action, including a rational connection between the facts found and the choice made." *Electric Power Supply Ass'n*, 136 S. Ct. at 782 (citation and internal quotation marks omitted).

Congress delegated to FERC broad regulatory responsibility over oil pipeline rates, within the scope of the just and reasonable standard. Interstate Commerce Act, 49 U.S.C. app. § 15(1) (1988) ("Commission is authorized and empowered to determine and prescribe . . . the just and reasonable . . . rate").[5] In particular, Congress delegated to the Commission the task of establishing "a simplified and generally applicable ratemaking methodology for oil pipelines," i.e., the oil pipeline index. Energy Policy Act of 1992, Pub. L. No. 102-486 § 1801(a).

In this context, the Court reviews the Commission's judgment with particular deference. *Association I*, 83 F.3d at 1431 ("Because the subject of our scrutiny is a ratemaking—and thus an agency decision involving complex industry analyses and difficult policy choices—the court will be particularly deferential to

[5] FERC regulates oil pipelines under the Interstate Commerce Act, exercising the powers of the former Interstate Commerce Commission as they existed on October 1, 1977. *Resolute Nat. Res. Co. v. FERC*, 596 F.3d 840, 841 (D.C. Cir. 2010) (explaining that Congress transferred regulatory authority over oil pipelines from the Interstate Commerce Commission to FERC in the Department of Energy Organization Act, Pub. L. No. 95-91, § 402(b), 91 Stat. 565, 584 (1977), codified as 49 U.S.C. § 60502 (2010)). References to the Interstate Commerce Act in this brief are to the 1988 reprint.

the Commission's expertise."). "The court owes the Commission great deference in this realm because the statutory requirement that rates be 'just and reasonable' is obviously incapable of precise judicial definition, and the Commission must have considerable latitude in developing a methodology responsive to its regulatory challenge." *South Carolina Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 55 (D.C. Cir. 2014) (citations and internal quotation marks omitted). Likewise, "deference is due to the Commission's interpretation of its own precedent." *Missouri Pub. Serv. Comm'n v. FERC*, 783 F.3d 310, 316 (D.C. Cir. 2015).

The Supreme Court indicated in *FCC v. Fox Television Stations, Inc.* that an agency decision representing a policy change is subject to the same standard of review as a decision adopting a policy in the first instance. 556 U.S. 502, 514-15 (2009). An agency "need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates." *Id.*; *see also Nuclear Energy Inst., Inc. v. EPA*, 373 F.3d 1251, 1296 (D.C. Cir. 2004) ("an[ ] agency may well change its past practices with advances in knowledge in its given field or as its relevant experience and expertise expands") (citation omitted).

## SUMMARY OF ARGUMENT

In calculating the oil pipeline index, the Commission employed the existing just and reasonable methodology, updated with the best currently available pipeline cost data, and continued its established practice of basing the index on the middle 50 percent of that data. The Commission's transparent, objective approach produces an index that reasonably captures normal, industry-wide cost experiences, consistent with this Court's and the Commission's precedents.

Although pipeline cost-of-service information has been reported at Page 700 since 1994, the present five-year index review represents the first time that such information has been available to the Commission—in complete and accurate form—for use in calculating the index. Accordingly, the Commission reasonably determined that it would use the newly-reliable cost data.

Likewise, the Commission reasonably continued its established practice of using the middle 50 percent of pipeline cost data to calculate the index. In relying on the middle 50 percent, the Commission adhered to its previously-expressed view that the middle 50 percent better captures the central tendency of pipeline cost changes than the middle 80 percent.

## ARGUMENT

### I. THE COMMISSION REASONABLY UPDATED ITS INDEX CALCULATION TO USE A NEWLY RELIABLE SOURCE OF PIPELINE COST DATA

Page 700 did not exist when the Commission adopted the Kahn methodology in the Order 561 proceeding. Order P 12 n.24, JA 747-48. And, while Page 700 has existed since 1994, the present five-year review is the first index review in which complete, accurate Page 700 information is available for use in calculating the index. *Id*.

Shippers first proposed using Page 700 in the third five-year index review in 2010; the Commission considered adopting the proposal, but found the data—as reported at the time—unusable due to mismatches between interstate costs and throughput. *Id*. ("[E]rroneous reporting instructions on [P]age 700 [had] caused pipelines to report mismatching data, specifically, interstate-only costs and combined intrastate and interstate throughput."). Subsequently, the Commission corrected the Page 700 instructions, and required pipelines to file corrected data so that Page 700 could be used "'during the 2015 Five-Year Index Review if deemed appropriate.'" *Id.* (quoting Revision to Form No. 6, Order No. 767, FERC Stats. & Regs. ¶ 31,335 P 19 (2012)).

Prior to the advent of Page 700, the Commission estimated pipeline total cost changes using accounting data reported elsewhere in Form 6. Order P 12,

JA 747. The Commission recognized, however, that such estimates were "highly unsatisfactory" and "imperfect." Order 561-A, 59 Fed. Reg. at 40,246-47. In fact, "[w]hen lamenting the difficulty of estimating industry cost changes, Order No. 561-A specifically noted that industry-wide total cost-of-service data was not then available." Order P 13 n.25, JA 748. At the time, the Association agreed that the Form 6 data was an imperfect proxy for oil pipelines' capital cost experience, because the data failed to capture current cost of capital and oil pipelines' use of "trended original cost [i.e., the cost-of-service methodology set forth in Opinion 154-B, *Williams Pipe Line Co.*, 31 FERC ¶ 61,377 (1985), *on reh'g*, 33 FERC ¶ 61,327 (1985)] for determining rate base." *See* Order 561-A, 59 Fed. Reg. at 40,248.

Now that reliable, industry-wide total cost-of-service data is available via Page 700, the Commission concluded that this "superior data source" should be used in the index calculation. Order P 12, JA 747-48. Contrary to the Association's contentions, the Commission's conclusion is fully explained and supported.

### A. The Commission Provided a Reasoned Explanation for Using Page 700 Cost Data

The Association erroneously contends that the Commission's use of Page 700 cost-of-service data represents a major departure from the original purpose of the index—i.e., to measure "actual cost changes." Br. 35-42. According to the

Association, FERC deviates from measuring "actual cost changes" by measuring changes in costs that are "recoverable" under the Commission's cost-of-service methodology for oil pipelines, set forth in Opinion 154-B. *Id*. The Association's contention is meritless.

First, the Association did not raise this argument in the proceedings before the agency, and accordingly, it cannot be raised on appeal. *See Tesoro Refining & Mktg. Co. v. FERC*, 552 F.3d 868, 872 (D.C. Cir. 2009) (dismissing arguments raised for the first time on appeal because "[a] party must first raise an issue with an agency before seeking judicial review"). As the Court explained in *Tesoro*, "[i]t is true that the [Interstate Commerce Act] contains no rehearing requirement. But *ExxonMobil* specifically rejected this as an excuse for failing to exhaust administrative remedies, stating that the petitioners' 'error was not failing to seek rehearing, but rather failing to raise the issue at all.'" *Id.* (quoting *ExxonMobil Oil Corp. v. FERC*, 487 F.3d 945, 962 (D.C. Cir. 2007)).

In any event, the Commission's use of Page 700—which requires the reporting of data consistent with the Commission's Opinion 154-B cost-of-service methodology—is fully consistent with the index methodology. The Commission orders adopting the indexing methodology demonstrate that the agency would have calculated the index based on pipelines' FERC-jurisdictional costs-of-service were such information available at the time. *See* Opinion 561-A, 59 Fed. Reg. at

40,246-47 ("Form No. 6 does not contain the information necessary to compute a trended original cost . . . rate base or a starting rate base as allowed for in [Opinion] 154-B. Thus, all agree that the measure of the capital cost component of the cost of service is highly unsatisfactory."). The Commission thus stated its preference for using Opinion 154-B capital costs in the very proceeding the Association cites for the proposition that Opinion 154-B costs are different from the "actual costs" that should be used to calculate the index. *See* Br. 38.

Moreover, when the Commission developed the index methodology, it specifically created the summary Page 700 cost-of-service reporting requirement for the purpose of evaluating pipelines' annual index filings. Order 571, Cost-of-Service Reporting and Filing Requirements for Oil Pipelines, 59 Fed. Reg. 59,137, 59,141-42 (Nov. 16, 1994) (pipelines required to report "Total Annual Cost of Service (as calculated under the Order No. 154-B methodology), operating revenues, and throughput in barrels and barrel-miles"). Since the advent of indexing, the Commission has evaluated the reasonableness of individual pipelines' index rate changes by comparing those rate changes to the costs reported by the pipelines at Page 700. *Id.*; *see also, e.g.*, *SFPP, L.P.*, 143 FERC ¶ 61,140 P 5 (2013) (using Page 700 data to evaluate protest to index-based tariff filing).[6] In

[6] Under the index system, an individual pipeline's annually-calculated, indexed rate change may deviate from that particular pipeline's actual cost-of-service, but the pipeline's indexed rates are nonetheless bound by the just and

addition, when the Commission created Page 700, it stated that the data could be used to evaluate the effectiveness of the index as part of the five-year review process. Order 571, 59 Fed. Reg. at 59,142.

The Association misses the point with its argument that "indexing" is wholly distinct from a cost-of-service ratemaking methodology. Br. 38-39. The Commission adopted indexing in order to simplify and streamline agency ratemaking procedures, as mandated by the Energy Policy Act of 1992. Pub. L. No. 102-486 § 1801(a). Indexing satisfies Congress' mandate to simplify oil pipeline ratemaking procedures by avoiding the complexity of a fully litigated cost-of-service rate case. *See Association I*, 83 F.3d at 1430 ("[S]implification results from the elimination, with rare exceptions, of rate-specific examinations of costs."). Here, the Commission did not change the simplified and streamlined index approach to ratemaking, but rather selected the appropriate cost data to be used in calculating the index.

The Association also confuses the difference between the revenues a pipeline collects, which the Association refers to as the "costs and return that most

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reasonable standard and must remain within a certain range of the pipeline's actual cost changes. *See* Order 561, 58 Fed. Reg. at 58,758 ("Under an indexing system, . . . some divergence between the actual cost changes experienced by individual pipelines and the rate changes permitted by the index is inevitable. This is because the indexing system utilizes average, economy-wide costs rather than pipeline-specific costs to establish rate ceilings.").

pipelines actually recover," Br. 40, and the recoverable costs recognized by the Opinion 154-B methodology. However, industry-wide costs, not revenues, are relevant in determining industry-wide cost changes in the five-year review necessary to calculate the index level. *See Association I*, 83 F.3d at 1430; Order 561-A, 59 Fed. Reg. at 40,245.

As the Commission explained in the challenged order, now that Opinion 154-B cost-of-service data is reported in sufficiently accurate and complete form on Page 700, it is no longer necessary to estimate pipeline costs based on Form 6 accounting data. Order PP 14-15, JA 748-51. For example, Page 700 eliminates the need to use "net carrier property" as a proxy for capital costs and income taxes. *Id.* P 14, JA 748-49. This was a "highly unsatisfactory" and "imperfect" proxy for capital costs because, "[a]lthough net carrier property measures changes to the book value of the pipeline's asset base, it does not incorporate changes to the costs of financing the asset base (i.e., interest costs of debt and investor demanded equity return)." *Id.* Likewise, net carrier property is not a satisfactory proxy for income tax costs because income taxes are dependent upon the pipeline's return, not merely the size of the pipeline's asset base. *Id.*

Moreover, the Commission pointed out, because Page 700's total cost-of-service figure "incorporates an annual capital cost based on established ratemaking techniques," it is no longer necessary to calculate an "operating ratio" to estimate a

pipeline's annual total cost change. *Id.* P 15, JA 749-50. As the Commission explained, the operating ratio "provides, at best, a rough proxy for total pipeline cost changes." *Id.* In particular, the operating ratio "unrealistically assumes that pipelines incur no capital costs in years in which the operating expenses exceed revenues." *Id.* "This assumption is deficient because, at a minimum, a pipeline must service its debt obligations." *Id.* In response to this, the Association contends that "the index was never intended to measure 'recoverable' costs." Br. 45 (citing testimony).[7] As already discussed, however, that contention is mistaken. *See supra* pp. 20-24.

Finally, the Commission explained that Page 700 contains cost data exclusively related to interstate pipeline operations—i.e., operations subject to FERC's rate jurisdiction—as opposed to the commingled intrastate and interstate data from elsewhere on Form 6. *Id.* P 16, JA 751. While interstate and intrastate oil streams may be commingled on the same pipeline, *see* Br. 46-47, the Commission pointed out that they may not be. Order P 16 n.32, JA 751. In some

[7] The Association's citations to isolated excerpts from expert testimony (*e.g.*, Br. 23, 26-27, 35, 45, 48-53) fail to demonstrate that the Commission disregarded evidence. The challenged order addressed the arguments advanced by the Association to the agency; there is no requirement that the agency cite specific portions of the Association's expert testimony. *See Interstate Nat. Gas Ass'n v. FERC*, 617 F.3d 504, 511 (D.C. Cir. 2010) (explaining, in the context of a rulemaking proceeding, that FERC is "not obligated to address expert witnesses by name so long as the Commission provides a reasoned response to all significant comments").

cases, the same parent pipeline owns entirely separate interstate and intrastate facilities. *Id.* Accordingly, the Commission reasonably found that it is appropriate to use interstate-only data. *Id.* P 16 n.33, JA 751.[8]

The order on review reflects the Commission's reasoned, deliberate decision to use a previously unavailable, superior data source rather than continuing to rely on proxies and estimates in calculating the pipeline index. The order provides ample justification for the change of data source, and should be upheld. *See, e.g., Fox*, 556 U.S. at 515 (new policy sufficiently justified if it "is permissible under the statute, . . . there are good reasons for it, and . . . the agency *believes* it to be better"); *ANR Pipeline Co. v. FERC*, 205 F.3d 403, 407 (D.C. Cir. 2000) (FERC adequately explained that technological changes justified a new regulatory approach).

### B. The Commission Fully Addressed the Arguments Made By the Association in the Agency Proceedings

Contrary to the Association's contentions, the Commission reasonably addressed its arguments concerning the alleged drawbacks to using Page 700. Br.

[8] The Association argues, for the first time on appeal, that the Commission's "cost-of-service construct" allegedly "mask[s] inflationary cost changes," Br. 21-22. Because the Association failed to make this argument in the agency proceeding, it cannot be considered on appeal. *Tesoro*, 552 F.3d at 872; *ExxonMobil*, 487 F.3d at 962. In any case, while the Association asserts that FERC's cost-of-service methodology is "simply one way to measure capital costs," Br. 21, the Opinion 154-B methodology is the Commission's only method for determining an oil pipeline's total costs.

47-54. As an initial matter, the Association's arguments appear to center on a comparison between the relative advantages and disadvantages of using Page 700 cost data versus Form 6 accounting data. Such a comparison, however, is insufficient to demonstrate that the Commission's decision was somehow arbitrary or capricious. "FERC's statutory mandate under the Interstate Commerce Act requires oil pipeline rates to be set within a 'zone of reasonableness.'" *Farmers Union Cent. Exch., Inc. v. FERC*, 734 F.2d 1486, 1530 (D.C. Cir. 1984). There is no single just and reasonable index level, and there can be more than one just and reasonable approach to calculating the index. *Cf. Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 532 (2008) ("The [Federal Power Act's] requirement that rates be 'just and reasonable' is obviously incapable of precise judicial definition, and we afford great deference to the Commission in its rate decisions.").

Thus, even assuming it would be reasonable to continue using Form 6 accounting data to calculate the index, that would not demonstrate that using Page 700 cost-of-service data is somehow arbitrary or capricious. *See Electric Power Supply Ass'n*, 136 S. Ct. at 782 ("A court is not to ask whether a regulatory decision is the best one possible or even whether it is better than the alternatives. Rather, the court must uphold a rule if the agency has examined the relevant considerations and articulated a satisfactory explanation for its action . . . . ")

(internal quotation marks omitted); *Association I*, 83 F.3d at 1434 ("disagreements among competing reasonable options" insufficient "to show that the Commission's findings lacked substantial evidence").

In any event, the Commission reasonably responded to the Association's arguments, and, consistent with *Fox*, 556 U.S. at 514-16, fully justified its finding that Page 700 is a superior data source than the previously-used Form 6 accounting data. In response to the Association's position that various ratemaking "assumptions" and "allocations" render Page 700 data unreliable, Br. 49, the Commission explained that "[t]he mere presence of allocation methodologies is not a reason to reject the use of page 700 data." Order P 18, JA 752-53. "The allocation methodologies used by pipelines on [P]age 700 should reflect established ratemaking practices, and thus these allocation methodologies should be sufficiently robust to calculate the index." *Id.* Moreover, "some assumptions and allocations are necessary in any pipeline's measurement of its costs, including the Form No. 6 accounting data previously used in the Kahn [m]ethodology." *Id.*

The Association professes concern that a pipeline's ratemaking assumptions may change. Br. 48-49. However, as the Commission explained, "to the extent a pipeline's page 700 ratemaking assumptions change over a period of time, pipelines are obligated to note them on their [P]age 700." *Id.* Despite having this

information, the Association does not identify any instances in which a pipeline's change in ratemaking assumptions has caused any distortions in the index.

The Commission also reasonably responded to the Association's argument that using Page 700 data may "create illusory cost changes due to shifts involving interstate and intrastate volumes." Br. 51. As the Commission explained, this issue is likewise present when the combined interstate and intrastate Form 6 accounting data favored by the Association is used. "Under any circumstance, increasing intrastate barrel-miles absorb a larger portion of the pipeline's fixed costs and cause interstate barrel-mile costs to decline. Similarly, decreasing intrastate volumes absorb less of a pipeline's fixed costs, causing the pipeline's interstate per barrel-mile costs to rise." Order P 18 n.37, JA 752-53.[9]

Further, the Commission addressed the Association's argument that the return element included in the Page 700 cost-of-service data can be "highly variable," while the use of net carrier property data from Form 6 "avoids this concern." Br. 52. The Commission explained that the Association's concerns regarding volatility are misplaced: "The index is designed to capture changing

[9] Thus, for example, if intrastate barrel-miles decline and interstate barrel-miles remain constant, the total combined interstate and intrastate barrel-miles will decline. As a result, the pipeline's fixed costs will be distributed over fewer barrel-miles, meaning the cost change per barrel-mile used to calculate an index for interstate-only rates may increase. This potential distortion affects both the Page 700 data selected by the Commission and the Form 6 accounting data supported by the Association. Order P 18 n.37, JA 752-53.

capital costs, of which financing costs are an important component. To the extent that industry-wide equity costs change with market conditions, those changes should be captured by the index." Order P 17, JA 751-52.

On brief, the Association argues that the Commission ignores evidence submitted by its expert purportedly showing that "there was an approximately 1,000 basis point swing in the cumulative change in the rate of return on equity for the middle 50 percent of data during the 2009-2014 review period . . . . " Br. 53 (citing Reply Declaration of Ramsey D. Shehadeh, Ph.D, at 10 (Sept. 21, 2015), R. 16, JA 454). Dr. Shehadeh's testimony, however, does not characterize the reported data as representing a cumulative, "1,000 basis point swing." *See id*.

The Commission addressed the evidence submitted by Dr. Shehadeh, and concluded that it showed that the average rate of return on equity in the middle 50 percent "stayed within a roughly 100 basis point range throughout the 2009-2014 period." Order P 17, JA 751-52 (citing Shehadeh Reply Decl. at 10, JA 454). The Association's brief does not explain how it calculated the alleged cumulative 1,000 basis point swing, or why such an interpretation of the evidence should be considered "more meaningful," Br. 53, than the Commission's conclusion. The Commission cannot be faulted for "ignoring" evidence that was not presented to it. *See ExxonMobil*, 487 F.3d at 962 (requirement that party must first raise issues with agency before seeking judicial review ensures "simple fairness" to the agency

and litigants, and "provides the Court with a record to evaluate complex regulatory issues").

Similarly, the Association argues, for the first time on appeal, that Page 700 may provide a less accurate picture of overall industry-wide cost changes during a five-year period if rates of return on equity "happen to be unusually high or low during either the beginning or ending year of a given five-year review period." Br. 53 (citing no testimony or evidence in the record in support). Since the Association did not make this argument to the Commission, it cannot be considered now. *See Tesoro*, 552 F.3d at 872; *ExxonMobil*, 487 F.3d at 962. In any event, as the Commission stated, the rate of return on equity throughout the five-year period stayed within a relatively narrow band of 100 basis points. Order P 17, JA 751-52. The Association fails to point to any evidence in the record showing distortions caused by "unusually high or low" rates of return on equity at the beginning or end of this five-year review period.

## II. THE COMMISSION REASONABLY CONTINUED ITS PRACTICE OF RELYING ON THE MIDDLE 50 PERCENT OF PIPELINE COST DATA TO PRODUCE AN INDEX THAT REFLECTS NORMAL, INDUSTRY-WIDE COST CHANGES

As it has previously done, the Commission took an "objective and transparent" approach in trimming the full Page 700 pipeline cost data set to the middle 50 percent, thus excluding from consideration "outlying cost changes which could result from idiosyncratic factors particular to [a] pipeline." Order

P 44, JA 772. In adhering to the middle 50 percent, the Commission eschewed both the Association's proposal to use a composite of the middle 50 and middle 80 percent, and shippers' proposal to perform selective manual data trimming on top of the middle 50 percent.

Contrary to the Association's suggestions, the Commission did not determine to use the middle 50 percent of pipeline cost data in an arbitrary "results-oriented" effort to "skew the index" downward. *See, e.g.*, Br. 15. The Association's proposal to use the middle 80 percent would result in a higher index. As this Court previously observed, however, in rejecting the Association's challenge to the Commission's use of the middle 50 percent of pipeline cost data in setting the original index as "leading to a downwardly skewed result," it is appropriate to use the middle 50 percent of pipelines because it captures the central tendency of cost changes in the industry. *Association I*, 83 F.3d at 1434.

The index is "intended to permit pipelines to recover normal costs through normal operation of the index." Order 561-A, 59 Fed. Reg. at 40,247; Order P 43, JA 771-72 ("objective of the index [is] to reflect normal industry-wide cost changes"). The index is not designed to "enable recovery for extraordinary cost increases or decreases." 2010 Review Order, 133 FERC ¶ 61,228 P 61; *see also Association I*, 83 F.3d at 1434 (affirming Commission's conclusion that "if it were to select an index sufficiently high and generous to encompass even the most

extraordinary costs, it would provide windfalls to many oil pipelines," thus "abdicat[ing] [its] responsibilities for rate regulation under the [Interstate Commerce Act]"). Because the index is designed to accommodate pipelines with "normal" cost changes, pipelines with extraordinary costs should not be included in the index calculation; such pipelines may proceed for cost recovery through individualized cost-of-service hearings or settlement rates. *See* 2010 Review Order, 133 FERC ¶ 61,228 P 61; *see also* 18 C.F.R. § 342.4.

As the Association points out, the Commission has considered the middle 80 percent (along with the middle 50 percent) of cost data in the past, *see* Br. 32-33; however, the Commission has chiefly relied on the middle 50 percent of pipeline cost data in calculating the index. In setting the original index, the Commission based its index calculation on the middle 50 percent alone. *See* Order P 42 n.80, JA 770-71 (discussing 2010 Review Order which "returned the Commission's policy to the application of the Kahn [m]ethodology in Order No. 561, which based its calculation of the index on the middle 50 percent alone") (citation omitted).

Indeed, in the 2010 index review proceeding, the Commission explained that, while it had previously used a composite of the middle 50 and middle 80 percent of cost data, this 50/80 hybrid approach was acceptable to all parties and had not been "discussed or contested" in the relevant index orders. 2010 Review Order, 133 FERC ¶ 61,228 P 60. The third five-year review provided a "more

fully developed record" on the issue, and, based on that record, the Commission determined that using the middle 50 percent was "the most appropriate method for trimming that data sample," and returned to that original approach. *Id.* P 61.

As the Commission explained in that proceeding, "[t]he middle 50 percent more appropriately adjusts the index levels for 'normal' cost changes as opposed to the middle 80 percent, which, by definition, includes pipelines relatively far removed from the median." *Id.* "Even when accurate data is reported, pipelines in the middle 80, as opposed to the middle 50, are more likely to have cost changes resulting from factors particular to that pipeline, such as a rate base expansion, plant retirement, or localized changes in supply and demand." *Id.* Thus, "[u]sing the middle 50 ensures that pipelines with relatively large cost increases or decreases do not distort the index." *Id.*

Consistent with this reasoning, the Commission rejected the Association's proposal to use both the middle 50 and middle 80 percent in the current review, concluding that, "[a]s . . . in the 2010 Index Review, the middle 50 percent, more effectively than the middle 80 percent, excludes pipelines with anomalous cost changes while avoiding the complexity and distorting effects of subjective, manual data trimming technologies." Order P 42, JA 770-71. "Pipelines in the middle 80 percent, as opposed to the middle 50 percent, are more likely to have outlying cost changes which could result from idiosyncratic factors particular to that pipeline."

*Id.* P 44 n.83, JA 772; *see also id.* (noting that middle 80 percent contains significantly more pipelines identified by shippers as being affected by idiosyncratic factors than middle 50 percent).

As the Commission found, the record in this proceeding did not provide a basis for altering its reliance on the middle 50 percent:

> We are not persuaded by [the Association]'s argument that the middle 80 percent should be considered merely because it conforms to a lognormal distribution[[10]]. . . . [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 data conform[ ] 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.

Order P 43, JA 771-72.

The Commission also rejected the Association's argument that the middle 80 percent should be considered because it contains more barrel-miles (Br. 29-30). Order P 44, JA 772. The middle 50 percent here includes more than 50 percent of

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[10] As the Association's witness explained, "the expected distribution of pipeline cumulative cost change indices will reflect the fact that a pipeline's costs cannot fall below zero and its cost changes therefore cannot fall below negative 100%, while its cost change increase may exceed 100% (and generally is unbounded). The statistical implication is that the distribution of cost changes is expected to be lognormal (i.e., the distribution of a variable whose natural logarithm follows a normal distribution)." Shehadeh Reply Decl. at 20-21, JA 464-65.

industry barrel miles—which is not "a narrow or selective sector of the industry." *Id.* P 44 n.85, JA 772-73. While the Commission acknowledged that this was a lower percentage than in some prior reviews, it was not low enough to risk including more outlying data by using the middle 80 percent. *Id*. *See also* 2006 Review Order, 114 FERC ¶ 61,293 P 48 ("In defending Order No. 561-A on appeal to the D.C. Circuit on this very issue, the Commission stated that '[t]here is . . . no reason to believe that samples representing between 10% and 33% of the industry, taken from the median range of the industry cost data, were too small to produce reliable results.'").[11]

Moreover, as the Commission explained, "much of the difference in barrel-miles from the 2010 Index Review can be attributed to the fact that Enbridge Lakehead, a pipeline representing over 15 percent of the barrel-miles in the data set, was in the middle 50 percent in 2010, but is not in the middle 50 percent in this proceeding." Order P 44 n.85, JA 772-73.

[11] The Association takes out of context the Commission's statement that "it is preferable to apply the larger data set." Br. 11 (quoting Order Denying Request for Rehearing, Five-Year Review of Oil Pricing Index, 135 FERC ¶ 61,172 P 41 (2011)). In the quoted order, the Commission denied rehearing of the 2010 Review Order in which it had decided to use only the middle 50 percent, a ruling the Association did not challenge there. Rather, the quoted language referred to shippers' proposal to use a manually trimmed overall data set from which the middle 50 percent would be taken. In any event, the Commission has never articulated a bright line rule regarding the number of pipelines or barrel-miles that must comprise the data set for index calculation purposes.

In short, the Commission's decision to use the middle 50 percent as a data sample is an entirely lawful and reasonable exercise of its discretion. As in *Electric Power Supply Association*, the Commission addressed the issues raised in this proceeding "seriously and carefully, providing reasons in support of its position." 136 S. Ct. at 784. Accordingly, the Court should uphold the order on review.

## CONCLUSION

For the foregoing reasons, the petition for review should be denied.

Respectfully submitted,


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October 11, 2016

## CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32(a), I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 8,677 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in Times New Roman 14-point font using Microsoft Word 2010.

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October 11, 2016

# ADDENDUM

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injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 392; Pub. L. 94–574, § 1, Oct. 21, 1976, 90 Stat. 2721.)

HISTORICAL AND REVISION NOTES

| *Derivation* | *U.S. Code* | *Revised Statutes and Statutes at Large* |
|---|---|---|
| ..... | 5 U.S.C. 1009(a). | June 11, 1946, ch. 324, § 10(a), 60 Stat. 243. |

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

AMENDMENTS

1976—Pub. L. 94–574 removed the defense of sovereign immunity as a bar to judicial review of Federal administrative action otherwise subject to judicial review.

### § 703. Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 392; Pub. L. 94–574, § 1, Oct. 21, 1976, 90 Stat. 2721.)

HISTORICAL AND REVISION NOTES

| *Derivation* | *U.S. Code* | *Revised Statutes and Statutes at Large* |
|---|---|---|
| ..... | 5 U.S.C. 1009(b). | June 11, 1946, ch. 324, § 10(b), 60 Stat. 243. |

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

AMENDMENTS

1976—Pub. L. 94–574 provided that if no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer as defendant.

### § 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 392.)

HISTORICAL AND REVISION NOTES

| *Derivation* | *U.S. Code* | *Revised Statutes and Statutes at Large* |
|---|---|---|
| ..... | 5 U.S.C. 1009(c). | June 11, 1946, ch. 324, § 10(c), 60 Stat. 243. |

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

### § 705. Relief pending review

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 393.)

HISTORICAL AND REVISION NOTES

| *Derivation* | *U.S. Code* | *Revised Statutes and Statutes at Large* |
|---|---|---|
| ..... | 5 U.S.C. 1009(d). | June 11, 1946, ch. 324, § 10(d), 60 Stat. 243. |

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

### § 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 393.)

HISTORICAL AND REVISION NOTES

| *Derivation* | *U.S. Code* | *Revised Statutes and Statutes at Large* |
|---|---|---|
| ..... | 5 U.S.C. 1009(e). | June 11, 1946, ch. 324, §10(e), 60 Stat. 243. |

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

ABBREVIATION OF RECORD

Pub. L. 85–791, Aug. 28, 1958, 72 Stat. 941, which authorized abbreviation of record on review or enforcement of orders of administrative agencies and review on the original papers, provided, in section 35 thereof, that: ''This Act [see Tables for classification] shall not be construed to repeal or modify any provision of the Administrative Procedure Act [see Short Title note set out preceding section 551 of this title].''

## CHAPTER 8—CONGRESSIONAL REVIEW OF AGENCY RULEMAKING



### § 801. Congressional review

(a)(1)(A) Before a rule can take effect, the Federal agency promulgating such rule shall submit to each House of the Congress and to the Comptroller General a report containing—

(i) a copy of the rule;

(ii) a concise general statement relating to the rule, including whether it is a major rule; and

(iii) the proposed effective date of the rule.

(B) On the date of the submission of the report under subparagraph (A), the Federal agency promulgating the rule shall submit to the Comptroller General and make available to each House of Congress—

(i) a complete copy of the cost-benefit analysis of the rule, if any;

(ii) the agency's actions relevant to sections 603, 604, 605, 607, and 609;

(iii) the agency's actions relevant to sections 202, 203, 204, and 205 of the Unfunded Mandates Reform Act of 1995; and

(iv) any other relevant information or requirements under any other Act and any relevant Executive orders.

(C) Upon receipt of a report submitted under subparagraph (A), each House shall provide copies of the report to the chairman and ranking member of each standing committee with jurisdiction under the rules of the House of Representatives or the Senate to report a bill to amend the provision of law under which the rule is issued.

(2)(A) The Comptroller General shall provide a report on each major rule to the committees of jurisdiction in each House of the Congress by the end of 15 calendar days after the submission or publication date as provided in section 802(b)(2). The report of the Comptroller General shall include an assessment of the agency's compliance with procedural steps required by paragraph (1)(B).

(B) Federal agencies shall cooperate with the Comptroller General by providing information relevant to the Comptroller General's report under subparagraph (A).

(3) A major rule relating to a report submitted under paragraph (1) shall take effect on the latest of—

(A) the later of the date occurring 60 days after the date on which—

(i) the Congress receives the report submitted under paragraph (1); or

(ii) the rule is published in the Federal Register, if so published;

(B) if the Congress passes a joint resolution of disapproval described in section 802 relating to the rule, and the President signs a veto of such resolution, the earlier date—

(i) on which either House of Congress votes and fails to override the veto of the President; or

(ii) occurring 30 session days after the date on which the Congress received the veto and objections of the President; or

(C) the date the rule would have otherwise taken effect, if not for this section (unless a joint resolution of disapproval under section 802 is enacted).

(4) Except for a major rule, a rule shall take effect as otherwise provided by law after submission to Congress under paragraph (1).

(5) Notwithstanding paragraph (3), the effective date of a rule shall not be delayed by operation of this chapter beyond the date on which either House of Congress votes to reject a joint resolution of disapproval under section 802.

(b)(1) A rule shall not take effect (or continue), if the Congress enacts a joint resolution of disapproval, described under section 802, of the rule.

(2) A rule that does not take effect (or does not continue) under paragraph (1) may not be reissued in substantially the same form, and a new rule that is substantially the same as such a rule may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule.

(c)(1) Notwithstanding any other provision of this section (except subject to paragraph (3)), a rule that would not take effect by reason of subsection (a)(3) may take effect, if the President makes a determination under paragraph (2) and submits written notice of such determination to the Congress.

measure of the resources used by the Department of Transportation in the regulation of pipeline transportation; or

''(2) another basis of assessment would be a more appropriate measure of those resources.

''(b) CONSIDERATIONS.—In making the report, the Secretary shall consider a wide range of assessment factors and suggestions and comments from the public.''

## CHAPTER 605—INTERSTATE COMMERCE REGULATION



### § 60501. Secretary of Energy

Except as provided in section 60502 of this title, the Secretary of Energy has the duties and powers related to the transportation of oil by pipeline that were vested on October 1, 1977, in the Interstate Commerce Commission or the chairman or a member of the Commission.

(Pub. L. 103–272, §1(e), July 5, 1994, 108 Stat. 1329.)

HISTORICAL AND REVISION NOTES

| *Revised Section* | *Source (U.S. Code)* | *Source (Statutes at Large)* |
|---|---|---|
| 60501 ..... | 42:7155.<br>49:101 (note prec.). | Aug. 4, 1977, Pub. L. 95–91, §306, 91 Stat. 581.<br>Oct. 17, 1978, Pub. L. 95–473, §4(c)(1)(A), (2) (related to §306 of Department of Energy Organization Act), 92 Stat. 1470. |

The words ''duties and powers . . . that were vested . . . in'' are coextensive with, and substituted for, ''transferred . . . such functions set forth in the Interstate Commerce Act and vested by law in'' for clarity and to eliminate unnecessary words. The words ''on October 1, 1977'' are added to reflect the effective date of the transfer of the duties and powers to the Secretary of Energy.

ABOLITION OF INTERSTATE COMMERCE COMMISSION AND TRANSFER OF FUNCTIONS

Interstate Commerce Commission abolished and functions of Commission transferred, except as otherwise provided in Pub. L. 104–88, to Surface Transportation Board effective Jan. 1, 1996, by section 702 of this title, and section 101 of Pub. L. 104–88, set out as a note under section 701 of this title. References to Interstate Commerce Commission deemed to refer to Surface Transportation Board, a member or employee of the Board, or Secretary of Transportation, as appropriate, see section 205 of Pub. L. 104–88, set out as a note under section 701 of this title.

### § 60502. Federal Energy Regulatory Commission

The Federal Energy Regulatory Commission has the duties and powers related to the establishment of a rate or charge for the transportation of oil by pipeline or the valuation of that pipeline that were vested on October 1, 1977, in the Interstate Commerce Commission or an officer or component of the Interstate Commerce Commission.

(Pub. L. 103–272, §1(e), July 5, 1994, 108 Stat. 1329.)

HISTORICAL AND REVISION NOTES

| *Revised Section* | *Source (U.S. Code)* | *Source (Statutes at Large)* |
|---|---|---|
| 60502 ..... | 42:7172(b).<br>49:101 (note prec.). | Aug. 4, 1977, Pub. L. 95–91, §402(b), 91 Stat. 584.<br>Oct. 17, 1978, Pub. L. 95–473, §4(c)(1)(B), (2) (related to §402(b) of Department of Energy Organization Act), 92 Stat. 1470. |

The words ''duties and powers . . . that were vested . . . in'' are coextensive with, and substituted for, ''transferred to, and vested in . . . all functions and authority of'' for clarity and to eliminate unnecessary words. The word ''regulatory'' is omitted as surplus. The words ''on October 1, 1977'' are added to reflect the effective date of the transfer of the duties and powers to the Federal Energy Regulatory Commission.

ABOLITION OF INTERSTATE COMMERCE COMMISSION AND TRANSFER OF FUNCTIONS

Interstate Commerce Commission abolished and functions of Commission transferred, except as otherwise provided in Pub. L. 104–88, to Surface Transportation Board effective Jan. 1, 1996, by section 702 of this title, and section 101 of Pub. L. 104–88, set out as a note under section 701 of this title. References to Interstate Commerce Commission deemed to refer to Surface Transportation Board, a member or employee of the Board, or Secretary of Transportation, as appropriate, see section 205 of Pub. L. 104–88, set out as a note under section 701 of this title.

### § 60503. Effect of enactment

The enactment of the Act of October 17, 1978 (Public Law 95–473, 92 Stat. 1337), the Act of January 12, 1983 (Public Law 97–449, 96 Stat. 2413), and the Act enacting this section does not repeal, and has no substantive effect on, any right, obligation, liability, or remedy of an oil pipeline, including a right, obligation, liability, or remedy arising under the Interstate Commerce Act or the Act of August 29, 1916 (known as the Pomerene Bills of Lading Act), before any department, agency, or instrumentality of the United States Government, an officer or employee of the Government, or a court of competent jurisdiction.

(Pub. L. 103–272, §1(e), July 5, 1994, 108 Stat. 1329.)

HISTORICAL AND REVISION NOTES

| *Revised Section* | *Source (U.S. Code)* | *Source (Statutes at Large)* |
|---|---|---|
| 60503 ..... | 49:101 (note prec.). | Oct. 31, 1988, Pub. L. 100–561, §308, 102 Stat. 2817. |

The words ''the Act of January 12, 1983 (Public Law 97–449, 96 Stat. 2413), and the Act enacting this section'' are added for clarity. The words ''department, agency, or instrumentality of the United States Government'' are substituted for ''Federal department or agency'', and the words ''officer or employee'' are substituted for ''official'', for consistency in the revised title and with other titles of the United States Code.

REFERENCES IN TEXT

Act of October 17, 1978, referred to in text, is Pub. L. 95–473, Oct. 17, 1978, 92 Stat. 1337, the first section of which enacted subtitle IV of this title. For complete classification of this Act to the Code, see Tables.

Act of January 12, 1983, referred to in text, is Pub. L. 97–449, Jan. 12, 1983, 96 Stat. 2413, the first section of which enacted subtitles I and II of this title. For complete classification of this Act to the Code, see Tables.

Regulatory Commission, upon the request of the licensee of FERC project numbered 4656 (and after reasonable notice) is authorized, in accordance with the good faith, due diligence, and public interest requirements of section 13 and the Commission's procedures under such section, to extend until March 26, 1999, the time required for the licensee to acquire the required real property and commence the construction of project numbered 4656.

(5) The authorization for issuing extensions under paragraphs (1) through (4) shall terminate 3 years after the date of enactment of this section. To facilitate requests under such subsections, the Commission may consolidate the requests. The Commission shall provide at the beginning of each Congress a report on the status of all extensions granted by Congress regarding the requirements of section 13 of the Federal Power Act, including information about any delays by the Commission on the licensee and the reasons for such delays.

(d) EMINENT DOMAIN- Section 21 of the Federal Power Act is amended by striking the period at the end thereof and adding the following: `*Provided further,* That no licensee may use the right of eminent domain under this section to acquire any lands or other property that, prior to the date of enactment of the Energy Policy Act of 1992, were owned by a State or political subdivision thereof and were part of or included within any public park, recreation area or wildlife refuge established under State or local law. In the case of lands or other property that are owned by a State or political subdivision and are part of or included within a public park, recreation area or wildlife refuge established under State or local law on or after the date of enactment of such Act, no licensee may use the right of eminent domain under this section to acquire such lands or property unless there has been a public hearing held in the affected community and a finding by the Commission, after due consideration of expressed public views and the recommendations of the State or political subdivision that owns the lands or property, that the license will not interfere or be inconsistent with the purposes for which such lands or property are owned.'.

## TITLE XVIII--OIL PIPELINE REGULATORY REFORM

## SEC. 1801. OIL PIPELINE RATEMAKING METHODOLOGY.

(a) ESTABLISHMENT- Not later than 1 year after the date of the enactment of this Act, the Federal Energy Regulatory Commission shall issue a final rule which establishes a simplified and generally applicable ratemaking methodology for oil pipelines in accordance with section 1(5) of part I of the Interstate Commerce Act.

(b) EFFECTIVE DATE- The final rule to be issued under subsection (a) may not take effect before the 365th day following the date of the issuance of the rule.

## SEC. 1802. STREAMLINING OF COMMISSION PROCEDURES.

(a) RULEMAKING- Not later than 18 months after the date of the enactment of this Act, the Commission shall issue a final rule to streamline procedures of the Commission relating to oil pipeline rates in order to avoid unnecessary regulatory costs and delays.

(b) SCOPE OF RULEMAKING- Issues to be considered in the rulemaking proceeding to be conducted under subsection (a) shall include the following:

(1) Identification of information to be filed with an oil pipeline tariff and the availability to the public of any analysis of such tariff filing performed by the Commission or its staff.

**§ 15. Determination of rates, routes, etc.; routing of traffic; disclosures, etc.**

**(1) Commission empowered to determine and prescribe rates, classifications, etc.**

Whenever, after full hearing, upon a complaint made as provided in section 13 of this Appendix, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this chapter for the transportation of persons or property, as defined in section 1 of this Appendix, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this chapter, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this chapter, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

**(2) Orders of Commission**

Except as otherwise provided in this chapter, all orders of the Commission, other than orders for the payment of money, shall take effect within such reasonable time as the Commission may prescribe. Such orders shall continue in force until its further order, or for a specified period of time, according as shall be prescribed in the order, unless the same shall be suspended or modified or set aside by the Commission, or be suspended or set aside by a court of competent jurisdiction.

**(3) Establishment of through routes, joint classifications, joint rates, fares, etc.**

The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by carriers subject to this chapter, or by carriers by railroad subject to this chapter and common carriers by water subject to chapter 12 of this Appendix, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character. If any tariff or schedule canceling any through route or joint rate, fare, charge, or classification, without the consent of all carriers parties thereto or authorization by the Commission, is suspended by the Commission for investigation, the burden of proof shall be upon the carrier or carriers proposing such cancelation to show that it is consistent with the public interest, without regard to the provisions of paragraph (4) of this section. With respect to carriers by railroad, in determining whether any such cancellation or proposed cancellation involving any common carrier by railroad is consistent with the public interest, the Commission shall, to the extent applicable, (a) compare the distance traversed and the average transportation time and expense required using the through route, and the distance traversed and the average transportation time and expense required using alternative routes, between the points served by such through route, (b) consider any reduction in energy consumption which may result from such cancellation, and (c) take into account the overall impact of such cancellation on the shippers and carriers who are affected thereby.

**(4) Through routes to embrace entire length of railroad; temporary through routes**

In establishing any such through route the Commission shall not (except as provided in section 3 of this Appendix, and except where one of the carriers is a water line) require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, (a) unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established, or (b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation: *Provided, however,* That in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (a) and (b) of this paragraph, give reasonable preference to the carrier by railroad which originates the traffic. No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs. In time of shortage of equipment, congestion of traffic, or other emergency declared by the Commission, it may (either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleadings by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine) establish temporarily such through routes as in its opinion are necessary or desirable in the public interest.

**(5) Transportation of livestock in carload lots; services included**

Transportation wholly by railroad of ordinary livestock in carload lots destined to or received at public stockyards shall include all necessary service of unloading and reloading en route, delivery at public stockyards of inbound shipments into suitable pens, and receipt and loading at such yards of outbound shipments, without extra charge therefor to the shipper, consignee, or owner, except in cases where the unloading or reloading en route is at the request of the shipper, consignee, or owner, or to try an intermediate market, or to comply with quarantine regulations. The Commission may prescribe or approve just and reasonable rules governing each of such excepted services. Nothing in this paragraph shall be construed to affect the duties and liabilities of the carriers existing on February 28, 1920, by virtue of law respecting the transportation of other than ordinary livestock, or the duty of performing service as to shipments other than those to or from public stockyards.

§ 342.2 Establishing initial rates.

A carrier must justify an initial rate for new service by:

(a) Filing cost, revenue, and throughput data supporting such rate as required by part 346 of this chapter; or

(b) Filing a sworn affidavit that the rate is agreed to by at least one non-affiliated person who intends to use the service in question, *provided* that if a protest to the initial rate is filed, the carrier must comply with paragraph (a) of this section.

[Order 561, 58 FR 58779, Nov. 4, 1993, as amended at 59 FR 59146, Nov. 16, 1994]

### § 342.3 Indexing.

(a) *Rate changes.* A rate charged by a carrier may be changed, at any time, to a level which does not exceed the ceiling level established by paragraph (d) of this section, upon compliance with the applicable filing and notice requirements and with paragraph (b) of this section. A filing under this section proposing to change a rate that is under investigation and subject to refund, must take effect subject to refund.

(b) *Information required to be filed with rate changes.* The carrier must comply with Part 341 of this title. Carriers must specify in their letters of transmittal required in §341.2(c) of this chapter the rate schedule to be changed, the proposed new rate, the prior rate, the prior ceiling level, and the applicable ceiling level for the movement. No other rate information is required to accompany the proposed rate change.

(c) *Index year.* The index year is the period from July 1 to June 30.

(d) *Derivation of the ceiling level.* (1) A carrier must compute the ceiling level for each index year by multiplying the previous index year's ceiling level by the most recent index published by the Commission. The index will be published by the Commission prior to June 1 of each year.

(2) The index published by the Commission will be based on the change in the final Producer Price Index for Finished Goods (PPI-FG), seasonally adjusted, as published by the U.S. Department of Labor, Bureau of Labor Statistics, for the two calendar years immediately preceding the index year. The index will be calculated by dividing the PPI-FG for the calendar year immediately preceding the index year, by the previous calendar year's PPI-FG.

(3) A carrier must compute the ceiling level each index year without regard to the actual rates filed pursuant to this section. All carriers must round their ceiling levels each index year to the nearest hundredth of a cent.

(4) For purposes of computing the ceiling level for the period January 1, 1995 through June 30, 1995, a carrier must use the rate in effect on December 31, 1994 as the previous index year's ceiling level in the computation in paragraph (d)(1) of this section. If the rate in effect on December 31, 1994 is subsequently lowered by Commission order pursuant to the Interstate Commerce Act, the ceiling level based on such rate must be recomputed, in accordance with paragraph (d)(1) of this section, using the rate established by such Commission order in lieu of the rate in effect on December 31, 1994.

(5) When an initial rate, or rate changed by a method other than indexing, takes effect during the index year, such rate will constitute the applicable ceiling level for that index year. If such rate is subsequently lowered by Commission order pursuant to the Interstate Commerce Act, the ceiling level based on such rate must be recomputed, in accordance with paragraph (d)(1) of this section, using the rate established by such Commission order as the ceiling level for the index year which includes the effective date of the rate established by such Commission order.

(e) *Rate decreases.* If the ceiling level computed pursuant to §342.3(d) is below the filed rate of a carrier, that rate must be reduced to bring it into compliance with the new ceiling level; provided, however, that a carrier is not required to reduce a rate below the level deemed just and reasonable under section 1803(a) of the Energy Policy Act of 1992, if such section applies to such rate or to any prior rate. The rate decrease must be accomplished by filing a revised tariff publication with the Commission to be effective July 1 of

the index year to which the reduced ceiling level applies.

[Order 561, 58 FR 58779, Nov. 4, 1993, as amended by Order 561–A, 59 FR 40256, Aug. 8, 1994; 59 FR 59146, Nov. 16, 1994; Order 606, 64 FR 44405, Aug. 16, 1999; Order 650, 69 FR 53801, Sept. 3, 2004]

### § 342.4 Other rate changing methodologies.

(a) *Cost-of-service rates.* A carrier may change a rate pursuant to this section if it shows that there is a substantial divergence between the actual costs experienced by the carrier and the rate resulting from application of the index such that the rate at the ceiling level would preclude the carrier from being able to charge a just and reasonable rate within the meaning of the Interstate Commerce Act. A carrier must substantiate the costs incurred by filing the data required by part 346 of this chapter. A carrier that makes such a showing may change the rate in question, based upon the cost of providing the service covered by the rate, without regard to the applicable ceiling level under § 342.3.

(b) *Market-based rates.* A carrier may attempt to show that it lacks significant market power in the market in which it proposes to charge market-based rates. Until the carrier establishes that it lacks market power, these rates will be subject to the applicable ceiling level under § 342.3.

(c) *Settlement rates.* A carrier may change a rate without regard to the ceiling level under § 342.3 if the proposed change has been agreed to, in writing, by each person who, on the day of the filing of the proposed rate change, is using the service covered by the rate. A filing pursuant to this section must contain a verified statement by the carrier that the proposed rate change has been agreed to by all current shippers.

[Order 561, 58 FR 58779, Nov. 4, 1993, as amended at 59 FR 59146, Nov. 16, 1994]

## PART 343—PROCEDURAL RULES APPLICABLE TO OIL PIPELINE PROCEEDINGS

Sec.



AUTHORITY: 5 U.S.C. 571–583; 42 U.S.C. 7101–7352; 49 U.S.C. 60502; 49 App. U.S.C. 1-85.

SOURCE: Order 561, 58 FR 58780, Nov. 4, 1993, unless otherwise noted.

### § 343.0 Applicability.

(a) *General rule.* The Commission's Rules of Practice and Procedure in part 385 of this chapter will govern procedural matters in oil pipeline proceedings under part 342 of this chapter and under the Interstate Commerce Act, except to the extent specified in this part.

### § 343.1 Definitions.

For purposes of this part, the following definitions apply:

(a) *Complaint* means a filing challenging an existing rate or practice under section 13(1) of the Interstate Commerce Act.

(b) *Protest* means a filing, under section 15(7) of the Interstate Commerce Act, challenging a tariff publication.

[Order 561, 58 FR 58780, Nov. 4, 1993, as amended by Order 578, 60 FR 19505, Apr. 19, 1995]

### § 343.2 Requirements for filing interventions, protests and complaints.

(a) *Interventions.* Section 385.214 of this chapter applies to oil pipeline proceedings.

(b) *Standing to file protest.* Only persons with a substantial economic interest in the tariff filing may file a protest to a tariff filing pursuant to the Interstate Commerce Act. Along with the protest, a verified statement that the protestor has a substantial economic interest in the tariff filing in question must be filed.

(c) *Other requirements for filing protests or complaints*—(1) *Rates established under § 342.3 of this chapter.* A protest or complaint filed against a rate proposed or established pursuant to § 342.3 of this chapter must allege reasonable grounds for asserting that the rate violates the applicable ceiling level, or that the rate increase is so substantially in excess of the actual cost increases incurred by the carrier that the rate is

Check appropriate box:

☐ An Initial (Original) Submission

☐ Resubmission No. _____

Form 6 Approved
OMB No.1902-0022
(Expires 10/31/2016)

Form 6-Q Approved
OMB No.1902-0206
(Expires 08/31/2016)

# FERC Financial Report
# FERC Form No. 6: ANNUAL REPORT OF OIL PIPELINE COMPANIES and Supplemental Form 6-Q: Quarterly Financial Report

(Formerly ICC Form P)

These reports are mandatory under the Interstate Commerce Act, Sections 20 and 18 CFR Parts 357.2 and 357.4. Failure to report may result in criminal fines, civil penalties and other sanctions as provided by law. The Federal Energy Regulatory Commission does not consider this report to be of a confidential nature.

| **Exact Legal Name of Respondent (Company)** | **Year/Period of Report**<br>**End of** |
|---|---|

| Name of Respondent | This Report Is:<br>(1) ☐ An Original<br>(2) ☐ A Resubmission | Date of Report<br>(Mo, Da, Yr) | Year/Period of Report<br>End of |
|---|---|---|---|

**Annual Cost of Service Based Analysis Schedule**

1.) Use footnotes when particulars are required or for any explanations.
2.) Enter on lines 1-9, columns (b) and (c), the value the respondent's Operating & Maintenance Expenses, Depreciation Expense, AFUDC Depreciation, Amortization of Deferred Earnings, Rate Base, Rate of Return, Return, Income Tax Allowance, and Total Cost of Service, respectively, for the end of the current and previous calendar years. The values shall be computed consistent with the Commission's Opinion No. 154-B et al. methodology. Any item(s) not applicable to the filing, the oil pipeline company shall report nothing in columns (b) and (c).
3.) Enter on line 10, columns (b) and (c), total interstate operating revenue, as reported on page 301, for the current and previous calendar years.
4.) Enter on line 11, columns b and c, the interstate throughput in barrels for the current and previous calendar years.
5.) Enter on line 12, columns b and c, the interstate throughput in barrel-miles for the current and previous calendar years.
6.) If the company makes major changes to its application of the Opinion No. 154-B et al. methodology, it must describe such changes in a footnote, and calculate the amounts in columns (b) and (c) of lines No. 1-12 using the changed application.
7.) A respondent may be requested by the Commission or its staff to provide its workpapers which support the data reported on page 700.

| Line No. | Item<br>(a) | Current Year Amount<br>(in dollars)<br>(b) | Previous Year Amount<br>(in dollars)<br>(c) |
|---|---|---|---|
| 1 | Operating and Maintenance Expenses | | |
| 2 | Depreciation Expense | | |
| 3 | AFUDC Depreciation | | |
| 4 | Amortization of Deferred Earnings | | |
| 5 | Rate Base | | |
| 5a | Rate Base - Original Cost | | |
| 5b | Rate Base - Unamortized Starting Rate Base Write-Up | | |
| 5c | Rate Base - Accumulated Net Deferred Earnings | | |
| 5d | Total Rate Base -Trended Original Cost - (line 5a + line 5b + line 5c) | | |
| 6 | Rate of Return % (10.25% - 10.25) | | |
| 6a | Rate of Return - Adjusted Capital Structure Ratio for Long Term Debt | | |
| 6b | Rate of Return - Adjusted Capital Structure Ratio for Stockholders' Equity | | |
| 6c | Rate of Return - Cost of Long Term Debt Capital | | |
| 6d | Rate of Return - Real Cost of Stockholders' Equity | | |
| 6e | Rate of Return - Weighted Average Cost of Capital - (line 6a x line 6c + line 6b x line 6d) | | |
| 7 | Return on Trended Original Cost Rate Base | | |
| 7a | Return on Rate Base - Debt Component - (line 5d x line 6a x line 6c) | | |
| 7b | Return on Rate Base - Equity Component - (line 5d x line 6b x line 6d) | | |
| 7c | Total Return on Rate Base - (line 7a + line 7b) | | |
| 8 | Income Tax Allowance | | |
| 8a | Composite Tax Rate % (37.50% - 37.50) | | |
| 9 | Total Cost of Service | | |
| 10 | Total Interstate Operating Revenues | | |
| 11 | Total Interstate Throughput in Barrels | | |
| 12 | Total Interstate Throughput in Barrel-Miles | | |

## CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d) and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that, on October 11, 2016, I served the foregoing brief on all parties to this proceeding through the Court's CM/ECF system.

/s/ Susanna Y. Chu
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