185 FERC ¶ 61,126
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Willie L. Phillips, Acting Chairman;
James P. Danly, Allison Clements,
and Mark C. Christie.

Epsilon Trading, LLC, Chevron Products Company, and Valero Marketing and Supply Company v. Colonial Pipeline Company	Docket Nos.	OR18-7-003
BP Products North America, Inc., Trafigura Trading LLC, and TCPU, Inc. v. Colonial Pipeline Company		OR18-12-003
TransMontaigne Product Services LLC v. Colonial Pipeline Company		OR18-17-003
Southwest Airlines Co. and United Aviation Fuels Corporation v. Colonial Pipeline Company		OR19-1-002
Phillips 66 Company v. Colonial Pipeline Company		OR19-4-002
American Airlines, Inc. v. Colonial Pipeline Company		OR19-16-002
Metroplex Energy, Inc. v. Colonial Pipeline Company		OR19-20-001
Gunvor USA LLC v. Colonial Pipeline Company		OR19-27-001
Pilot Travel Centers, LLC v. Colonial Pipeline Company		OR19-36-001
Sheetz, Inc. v. Colonial Pipeline Company		OR20-7-001
Apex Oil Company, Inc. and FutureFuel Chemical Company v. Colonial Pipeline Company		OR20-9-001 (consolidated)

OPINION NO. 586

ORDER ON INITIAL DECISION [PART II]

(Issued November 16, 2023)

Paragraph Numbers

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OPINION NO. 586

ORDER ON INITIAL DECISION

(Issued November 16, 2023)

1. This order addresses briefs on and opposing exceptions to a partial initial decision issued on April 27, 2022 (Initial Decision) related to complaints that challenged Colonial Pipeline Company's (Colonial) cost-based transportation rates.[1]

[1] *Epsilon Trading, LLC v. Colonial Pipeline Co.*, 179 FERC ¶ 63,008 (2022) (Initial Decision). Issues related to Colonial's product loss allocation (PLA) charges and its market-based rate authority in origin markets from Texas to Alabama are addressed

2. As discussed below, we affirm the Initial Decision in part, reverse the Initial Decision in part, and direct Colonial to submit a compliance filing within 45 days of the issuance of this order.

I. Background

A. Parties

3. Colonial is an interstate refined products pipeline with a mainline system running from Houston, Texas, through Louisiana, Mississippi, Alabama, Georgia, South Carolina, North Carolina, Virginia, Maryland, Pennsylvania, and New Jersey and with local spurs including Tennessee and the New York Harbor. Colonial's Line 1 is used to ship grades of motor gasoline, and Line 2 is used to ship diesel, kerosene, jet fuel and fuel oil (both to Greensboro, SC) with Lines 3 and 4 shipping a mix of products north to Baltimore/Washington and Pennsylvania/New Jersey delivery points.[2]

4. The complainants in this proceeding (Complainants) are shippers on Colonial taking transportation service under Colonial's FERC Tariff Nos. 98 and 99, representing refineries, marketers and traders, wholesale and retail distributors, and consumers of various grades of refined petroleum.[3]

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in a December 1, 2021 Partial Initial Decision, *Epsilon Trading, LLC v. Colonial Pipeline Co.*, 177 FERC ¶ 63,017 (2021) (First Partial Initial Decision).

[2] Initial Decision, 179 FERC ¶ 63,008 at P 22 (incorporating by reference the detailed description of Colonial provided by the First Partial Initial Decision).

[3] *Id.* PP 17-21. Complainants filed exceptions in three groups: (A) Citgo Petroleum Corp. (Citgo), filing alone; (B) Joint Complainants, comprising American Airlines, Inc., BP Products North America, Inc., Chevron Products Co., Epsilon Trading, LLC, Metroplex Energy, Inc., Phillips 66 Co., Southwest Airlines Co., Trafigura Trading LLC, TCPU Inc., United Aviation Fuels Corp., and Valero Marketing and Supply Co.; and (C) Joint Shippers, comprising Apex Oil Co., Inc., FutureFuel Chemical Co., Gunvor USA LLC, Pilot Travel Centers LLC, Sheetz, Inc., and Saratoga RP East LLC (formerly TransMontaigne Product Services, LLC). Citgo was a complainant but withdrew its complaint on July 18, 2023, thereby terminating the docket on its complaint (OR18-21-000). Citgo, Withdrawal of Complaint, Docket No. OR18-7-002, *et al*. (filed July 18, 2023) (citing 18 C.F.R. § 385.216 (2022); Energy Policy Act of 1992, Pub. L. No. 102-486, § 1802(d)(2), 106 Stat. 2776 (1992) (codified at 42 U.S.C. § 712 note) (EPAct 1992)). Nonetheless, this order discusses Citgo's exceptions to the Initial Decision to the extent a remaining participant adopted them. In particular, on August 1, 2022, Joint Shippers and Joint Complainants filed supplemental briefs pursuant to Rule 711 of the

B. Procedural History

5. From November 22, 2017, through March 9, 2020, Complainants filed a series of complaints against Colonial under the Interstate Commerce Act (ICA).[4] Complainants challenged Colonial's indexed transportation rates, its market-based rate authority in certain origin markets, and its PLA charges and methodology.

6. The Commission consolidated the complaint proceedings and established a hearing to investigate issues related to (1) Colonial's PLA charges, (2) Colonial's transportation rates set pursuant to its market-based rate authority, and (3) Colonial's indexed transportation rates.[5] From September 15 through December 18, 2020, more than 25 participants participated in a 58-day virtual hearing that featured 25 witnesses and produced over a thousand exhibits and thousands of pages of testimony. The cost of service developed at hearing was based upon a base period from January 1, 2017, through December 31, 2017.[6] The nine-month adjustment period for test period changes is from January 1, 2018, through September 30, 2018. Accordingly, the test period for ratemaking purposes in this proceeding is the 12-month period from October 1, 2017, through September 30, 2018.[7] Participants filed initial briefs on January 29, 2021, and reply briefs on March 1, 2021.

Commission's Rules of Practice and Procedure incorporating some of Citgo's arguments from its brief on exceptions. 18 C.F.R. § 385.711(a)(1)(iii) (2022). Furthermore, we consider the testimony and exhibits sponsored by Citgo's witnesses because this evidence remains part of the record of these consolidated proceedings, notwithstanding the termination of the docket on Citgo's complaint.

[4] 49 U.S.C. app. § 1 *et seq.*

[5] *Epsilon Trading, LLC v. Colonial Pipeline Co.*, 164 FERC ¶ 61,202 (2018) (Hearing Order), *reh'g denied*, 169 FERC ¶ 61,035 (2019) (Rehearing Order), *consolidated with: Sw. Airlines Co. v. Colonial Pipeline Co.*, 166 FERC ¶ 61,094 (2019); *Am. Airlines, Inc. v. Colonial Pipeline Co.*, 166 FERC ¶ 61,214 (2019); *Metroplex Energy, Inc. v. Colonial Pipeline Co.*, 167 FERC ¶ 61,165 (2019); *Gunvor USA LLC v. Colonial Pipeline Co.*, 168 FERC ¶ 61,080 (2019); *Pilot Travel Ctrs., LLC v. Colonial Pipeline Co.*, 169 FERC ¶ 61,098 (2019); *Sheetz, Inc. v. Colonial Pipeline Co.*, 171 FERC ¶ 61,162 (2020).

[6] Initial Decision, 179 FERC ¶ 63,008 at PP 604, 607.

[7] *Id.* PP 605-606. The Commission uses a test period methodology for cost-of-service ratemaking. The test period consists of a 12-month base period of actual experience "adjusted for changes in revenues and costs which are known and are measurable with reasonable accuracy at the time of filing and

7. On December 1, 2021, the Presiding Administrative Law Judge (ALJ) rendered the First Partial Initial Decision regarding Colonial's market-based rates and PLA charges.[8] The ALJ reserved issues related to Complainants' cost-of-service challenge to Colonial's indexed transportation rates for a later partial initial decision.[9]

8. On April 27, 2022, the ALJ issued the Initial Decision addressing the challenges to Colonial's indexed rates.[10] On June 21, 2022, the participants submitted briefs on exceptions, and on August 1, 2022, the participants submitted briefs opposing exceptions.

9. As discussed below, we affirm the Initial Decision in part and reverse the Initial Decision in part.[11] In this order, we address the participants' exceptions regarding (1) threshold issues relating to the Commission's regulations and standards, (2) issues related to Colonial's cost of service, (3) whether Colonial's indexed rates remain protected by grandfathering under EPAct 1992, and (4) whether the Commission should retain the trended-original-cost methodology adopted in Opinion No. 154-B.[12]

II. Threshold Issues

10. In this section, we address (1) whether Complainants were required to satisfy section 343.2(c) of the Commission's regulations,[13] and (2) Colonial's proposal to defend

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which will become effective within nine months after the last month" of the base period. 18 C.F.R. § 346.2(a); *see also Chevron Prods. Co.*, Opinion No. 571, 172 FERC ¶ 61,207, at P 23 (2020).

[8] First Partial Initial Decision, 177 FERC ¶ 63,017. We address the First Partial Initial Decision in a concurrent order. *See Epsilon Trading, LLC v. Colonial Pipeline Co.*, Opinion No. 585, 185 FERC ¶ 61,125 (2023).

[9] First Partial Initial Decision, 177 FERC ¶ 63,017 at P 4.

[10] Initial Decision, 179 FERC ¶ 63,008.

[11] The record developed in this proceeding contains nonpublic information. The discussion in this order includes citations to nonpublic information, only to the extent necessary to identify where relevant nonpublic information may be found in the record. This order does not release any nonpublic information.

[12] *Williams Pipe Line Co.*, Opinion No. 154-B, 31 FERC ¶ 61,377, *order on reh'g and clarification*, Opinion No. 154-C, 33 FERC ¶ 61,327 (1985).

[13] 18 C.F.R. § 343.2(c) (2022).

its indexed rates using the Stand-Alone Cost (SAC) test and Incumbent Network Cost Analysis (INCA).

A. Applicability of Section 343.2(c)(1)

1. Background and Initial Decision

11. Section 343.2(c) of the Commission's regulations provides in relevant part:

> (1) 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 unjust and unreasonable, or that the rate decrease is so substantially less than the actual cost decrease incurred by the carrier that the rate is unjust and unreasonable.[14]
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> * * *
>
> (4) A protest or complaint that does not meet the requirements of [paragraph (c)(1)] of this section . . . will be dismissed.

Section 342.3, in turn, addresses rate changes pursuant to the Commission's indexing methodology.[15]

12. The Initial Decision held that section 343.2(c)(1) does not apply to the Complaints against Colonial's base rates,[16] because the Commission has applied this regulation to complaints against individual index rate changes[17] and has stated that it does not apply "to challenges to an underlying existing rate."[18] The Initial Decision found that shippers

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[14] *Id.* § 343.2(c)(1).

[15] *Id.* § 342.3. Under the indexing methodology, oil pipelines may change their tariff rates at any time so long as those rates remain at or below applicable ceiling levels, which change every July 1 based upon an index that tracks industry-wide cost changes. *E.g.*, *HollyFrontier Ref. & Mktg. LLC v. SFPP, L.P.*, 170 FERC ¶ 61,133, at P 3 (2020).

[16] Initial Decision, 179 FERC ¶ 63,008 at PP 566-567.

[17] *Calnev Pipe Line, L.L.C.*, 96 FERC ¶ 61,350 (2001).

[18] Initial Decision, 179 FERC ¶ 63,008 at P 566 (citing *ARCO v. Calnev Pipe Line, L.L.C.*, 97 FERC ¶ 61,057, at 61,311 (2001) (*ARCO v. Calnev*)).

may challenge existing base rates by filing complaints under ICA section 13(1) and that the Commission evaluates such complaints on a cost-of-service basis.[19]

2. Briefs on Exceptions

13. Colonial argues that section 343.2(c)(1) applies to the Complaints against Colonial's existing base rates. Colonial contends that the Complaints should be dismissed because Complainants have not satisfied the requirements of section 343.2(c)(1) by showing that Colonial's cumulative index rate increases since 1995 substantially exceed its cost increases over the same period.[20]

14. Colonial argues that although the Commission has held that section 343.2(c) only applies to challenges against individual index rate changes, these prior orders interpreting section 343.2(c) were preliminary decisions that did not result in appealable orders.[21] Colonial argues that even if those orders are precedential, the Commission's interpretation of section 343.2(c) conflicts with the regulation's plain language.[22] Colonial contends that section 343.2(c)(1) addresses challenges to rates "proposed *or established*" under indexing, not to rate changes *per se*.[23] Colonial states that construing section 343.2(c) as applying only to individual rate changes limits the regulation's reach to "proposed" rates and renders the words "or established" superfluous. Colonial argues that the regulatory history likewise indicates that the Commission intended for section 343.2(c) to apply broadly.[24]

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[19] *Id.*

[20] Colonial Br. on Exceptions at 27-29.

[21] *Id.* at 29 (citing *Tesoro Ref. & Mktg. Co. v. Calnev Pipe Line LLC*, 134 FERC ¶ 61,214 (*Tesoro*), *reh'g and clarification denied*, 136 FERC ¶ 61,083 (2011); *ARCO v. Calnev*, 97 FERC ¶ 61,057).

[22] *Id.* (citing *Kisor v. Wilkie*, 139 S. Ct. 2400, 2414-15 (2019)).

[23] *Id.* (quoting 18 C.F.R. § 343.2(c)(1)) (emphasis by Colonial).

[24] *Id.* (citing *Revisions to Oil Pipeline Reguls. Pursuant to Energy Pol'y Act of 1992*, Order No. 561-A, FERC Stats. & Regs. ¶ 31,000, at 31,092 (1994) (cross-referenced at 68 FERC ¶ 61,138)).

3. Briefs Opposing Exceptions

15. Complainants and Trial Staff agree with the Initial Decision's finding that section 343.2(c) does not apply to complaints against existing indexed base rates, but instead applies only to challenges to individual index rate changes.[25]

16. Joint Complainants and Joint Shippers argue that the Commission's prior interpretation of section 343.2(c) adheres to the text and structure of the regulation.[26] They observe that section 343.2(c) applies to rates proposed or established under section 342.3, which, in turn, addresses "rate changes" pursuant to the indexing methodology.[27] Joint Complainants argue that contrary to Colonial's claim, interpreting section 343.2(c) as applying only to individual rate changes does not render the words "or established" superfluous. Rather, Joint Complainants state that the regulation refers to rates "proposed or established pursuant to [indexing]" because shippers may challenge index rate changes both before and after they take effect.[28]

4. Commission Determination

17. We affirm the Initial Decision and reject Colonial's argument that the Complaints against Colonial's existing base rates must satisfy section 343.2(c)(1). As discussed below, our determination that section 343.2(c)(1) applies only to individual index rate changes is consistent with the regulatory text, Order No. 561 which established indexing, the purpose of section 343.2(c), and the Commission's prior interpretations of the regulation.

18. First, the text of section 343.2(c)(1) addresses challenges to individual index rate changes, not challenges to base rates. Both protests against "proposed" rates and complaints against "established" rates must show that "the *rate increase* is so substantially in excess of the actual cost increases incurred by the carrier that the rate is unjust and reasonable."[29] Because this language uses "rate increase" in the singular, we

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[25] Joint Complainants Br. Opposing Exceptions at 73-75; Joint Shippers Br. Opposing Exceptions at 17; Trial Staff Br. Opposing Exceptions at 22-23 & n.95.

[26] Joint Complainants Br. Opposing Exceptions at 74-75 & n.287; Joint Shippers Br. Opposing Exceptions at 17.

[27] Joint Complainants Br. Opposing Exceptions at 75; Joint Shippers Br. Opposing Exceptions at 17 (quoting 18 C.F.R. § 342.3(a) (2022)).

[28] Joint Complainants Br. Opposing Exceptions at 75-76.

[29] 18 C.F.R. § 343.2(c)(1) (emphasis added); *see also id.* (providing that protests and complaints may attempt to show that "that *rate decrease* is so substantially less than

find that section 343.2(c)(1) is best construed as addressing the effects of individual index rate changes. Furthermore, section 343.2(c)(1) applies to rates proposed or established under section 342.3 of the Commission's regulations,[30] which, in turn, addresses individual rate changes under the indexing methodology.[31]

19. Second, the Commission's explanation in Order No. 561, which established the indexing regime (including section 343.2), likewise supports the conclusion that section 343.2(c) applies only to challenges against individual index rate changes, not challenges to base rates (including base rates that reflect multiple cumulative index rate changes). The Commission adopted section 343.2(c) when it established the indexing methodology in response to EPAct 1992.[32] In adopting these regulations, the Commission explained that section 343.2(c)(1) would apply to individual rate changes. For instance, the Commission stated that section 343.2(c)(1) would "provid[e] shippers with a procedure to challenge *rate changes* that, while in compliance with applicable ceilings, are substantially in excess of actual cost changes incurred by the pipeline."[33] The Commission further explained that challenges under section 343.2(c)(1) "must show that the *increment of the rate change* produced by application of the index is substantially in excess of the individual pipeline's increase in costs."[34] In contrast, the Commission

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the actual cost decrease incurred by the carrier that the rate is unjust and unreasonable" (emphasis added)).

[30] *Id.*

[31] *Id.* § 342.2.

[32] *Revisions to Oil Pipeline Reguls. Pursuant to Energy Pol'y Act of 1992*, Order No. 561, FERC Stats. & Regs. ¶ 30,985 (1993) (cross-referenced at 65 FERC ¶ 61,109), *order on reh'g*, Order No. 561-A, FERC Stats. & Regs. ¶ 31,000, *aff'd sub nom. Ass'n of Oil Pipe Lines v. FERC*, 83 F.3d 1424 (D.C. Cir. 1996).

[33] Order No. 561, FERC Stats. & Regs. ¶ 30,985 at 30,951 (emphasis added).

[34] *Id.* at 30,952-53 (emphasis added); *see also* Order No. 561-A, FERC Stats. & Regs. ¶ 31,000 at 31,092 ("A protest may be filed against a *rate increase* that is within the applicable ceiling, if the *increase* is substantially in excess of the actual increases in costs experienced by the pipeline." (emphasis added)). Although Order Nos. 561 and 561-A refer to "protests" when discussing section 343.2(c), neither the regulatory text nor the Commission's statements in Order Nos. 561 and 561-A support adopting a different interpretation of section 343.2(c)(1) for complaints as opposed to protests. *Cf.* 18 C.F.R. § 343.2(c)(1) ("*In addition to meeting the requirements of [section 343.2]*, a complaint must also comply with all the requirements of § 385.206, except § 385.206(b)(1) and (2)." (emphasis added)).

clarified that "a complaint against an existing rate that has been indexed" must present "reasonable grounds for believing that the rate is unlawful" based upon a divergence between "the actual cost experienced by the pipeline and the *existing rate*."[35] Thus, rather than compare cumulative cost changes with cumulative rate changes as Colonial contends, Order No. 561 makes clear that complaints against indexed base rates need only compare the pipeline's current costs with revenues generated by its existing rate at the time of the complaint.

20. Third, our interpretation comports with the purpose of section 343.2(c)(1) within the Commission's oil pipeline ratemaking regime. Indexing allows pipelines to increase their rates up to ceiling levels, which change annually based on an index that tracks industry-wide cost changes.[36] In establishing this framework, the Commission adopted section 343.2(c) to allow shippers to challenge annual index rate changes that substantially diverged from the pipeline's annual cost changes. As discussed above, the Commission has distinguished these challenges from complaints against a pipeline's base rates, which address whether the revenues generated by the base rate diverge from the pipeline's costs such that the rate is unjust and unreasonable.[37] Applying section 343.2(c)(1) to the Complaints against Colonial's base rates would erase the distinction between these different types of proceedings and extend the scope of the regulation beyond its intended purpose.

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[35] Order No. 561, FERC Stats. & Regs. ¶ 30,985 at 30,956 (emphasis added).

[36] 18 C.F.R. § 342.3. In accordance with EPAct 1992, the Commission adopted indexing to provide a simplified and generally applicable ratemaking methodology for oil pipelines and create streamlined procedures related to oil pipeline rates. *E.g.*, *HollyFrontier*, 170 FERC ¶ 61,133 at P 3.

[37] Order No. 561, FERC Stats. & Regs. ¶ 30,985 at 30,955-56; *see also BP W. Coast Prods. LLC v. SFPP, L.P.*, 121 FERC ¶ 61,243, at PP 8, 10 (2007) (distinguishing (i) proceedings addressing "whether there are reasonable grounds to conclude that an index-based increase taken in a single year results in rates that are unjust and unreasonable" from (ii) "complaint[s] against the level of the base rate," including complaints challenging "the cumulative increases from the index-based increases over the years"), *reh'g denied*, 123 FERC ¶ 61,121 (2008), *petitions for review denied sub nom. ExxonMobil Oil Corp. v. FERC*, 363 F. App'x 752, 754 (D.C. Cir. 2010) ("FERC did not abuse its discretion in holding that the shippers' challenges to the pipeline's existing rates and reported costs and revenue were outside the scope of a § 343.2(c)(1) proceeding." (citing *Mobil Oil Expl. & Prod. Se. Inc. v. United Distrib. Cos.*, 498 U.S. 211, 230 (1991))).

21. Fourth, our finding is consistent with Commission precedent applying section 343.2(c). The Commission has consistently interpreted section 343.2(c) as governing challenges to individual rate increases and rejected Colonial's contrary interpretation. In *ARCO v. Calnev*, a shipper filed a complaint against the indexed portion of a pipeline's base rates.[38] Like Colonial, the pipeline argued that section 343.2(c) required the complainant to show that the pipeline's cumulative index rate increases substantially exceeded its cumulative cost changes.[39] The Commission rejected this argument, finding that section 343.2(c)(1) "applies to challenges to yearly indexing rate changes, not to challenges to an underlying existing rate."[40] Likewise, in *Tesoro*, the Commission rejected the pipeline's contention that section 343.2(c)(1) "applies to every indexed-base increase taken by [the pipeline] and includes the entire increase in excess of the grandfathered rate."[41] The Commission explained that because "the indexing methodology operates annually," the only "rate" to which section 343.2(c) applies is "the rate established in a particular index year and against which a complaint is filed in that year."[42] The Commission concluded that "[a]ny cumulative increases are outside the single year increase addressed by the regulations and are the consequences of rates filed in the past."[43] Moreover, the Commission found that the pipeline's argument "incorrectly conflates cumulative over-recoveries that may be caused by the indexing methodology with the rate increase in a single year" and affirmed that "shippers may challenge the cumulative increases . . . under section 13(1) of the [ICA]."[44]

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[38] 97 FERC at 61,310.

[39] *Id.* at 61,310-11.

[40] *Id.* at 61,311 (citing *Calnev Pipe Line, L.L.C.*, 96 FERC ¶ 61,311).

[41] 134 FERC ¶ 61,214 at P 65. Similar to Colonial, the pipeline in *Tesoro* argued that the complainants in that proceeding had "failed to present any evidence that the revenue indexed portion of" the pipeline's grandfathered rate "substantially exceeded the actual cost increases" in accordance with section 343.2(c)(1). *Id.* P 64.

[42] *Id.* P 65.

[43] *Id.*

[44] *Id.* The Commission also held that the pipeline's argument inaccurately implied that "an over-recovery that causes a rate to be unjust and unreasonable stems primarily from indexing" when in fact over-recoveries may result from multiple factors. *Id.* P 66. Thus, the Commission concluded that it would be improper to address complaints against base rates under section 343.2(c)(1), which addresses solely whether the pipeline's index rate increase substantially exceeds its cost increases. *Id.*

22. Colonial has not provided a persuasive basis for departing from these holdings.[45] Although Colonial argues that section 343.2(c)(1)'s reference to "rates established by indexing" applies to rates established through multiple cumulative index rate changes, the regulation's remaining clauses refute this interpretation. As discussed above, because section 343.2(c)(1) uses "rate increase" in the singular, it is best construed as addressing the effects of individual index rate changes. In contrast, Colonial does not explain how its interpretation coheres with the regulation's use of the singular "rate increase." To the contrary, Colonial's interpretation would depart from the regulatory text by expanding section 343.2(c)(1) to encompass challenges against existing rates that reflect the cumulative effects of multiple past rate changes, rather than a single "rate increase." Moreover, under Colonial's construction, complaints against existing base rates would have to make a separate showing not described in the regulatory text: that the pipeline's cumulative *rate increases* substantially exceed its cumulative cost changes.[46]

23. Moreover, we disagree with Colonial's claim that our interpretation limits the scope of section 343.2(c)(1) to challenges against "proposed" rates and renders the language addressing "established" rates superfluous.[47] In Colonial's view, a rate "proposed" pursuant to indexing is an individual index rate change and a rate "established" under indexing is a base rate reflecting the cumulative effects of multiple index rate changes.[48] However, this argument misconstrues the regulatory text. The fact that section 343.2(c)(1) refers to both "proposed" and "established" rates simply reflects that shippers can challenge index rate changes at two points in time: first, by filing protests against proposed rate changes before the change takes effect (rates "proposed"

[45] Colonial cites no examples where the Commission applied section 343.2(c)(1) to a complaint against base rates.

[46] The regulatory text identifies only one distinction between protests and complaints under section 343.2(c): complaints must generally comply with the Commission's regulation setting forth procedural requirements for complaints. Other than this lone exception, complaints under section 343.2(c) are subject to the same standards as protests. *See* 18 C.F.R. § 343.2(c)(1) ("In addition to meeting the requirements of [section 343.2], a complaint must also comply with all the requirements of § 385.206, except § 385.206(b)(1) and (2)."). Given that protests may only be filed against individual rate changes, this provides further support for interpreting section 343.2(c) as applying only to challenges against individual index rate changes.

[47] Colonial Br. on Exceptions at 29.

[48] *Id.* at 28-29.

pursuant to indexing);[49] and second, by filing complaints against rate changes that have already taken effect (rates "established" pursuant to indexing).[50] Accordingly, construing section 343.2(c)(1) as applying only to individual index rate changes gives full effect to the regulatory text.

24. In addition, contrary to Colonial's contention,[51] the Commission's prior interpretations of section 343.2(c) constitute established precedent. While hearing orders are nonfinal and generally do not establish binding policy, the Commission has explained that this principle does not apply to determinations that can be "construed as a final determination on an issue."[52] Here, although the Commission construed section 343.2(c) in orders setting proceedings for hearing, the Commission's interpretations of the regulation reflected final determinations regarding issues in those proceedings.[53] Thus, unlike orders where the Commission simply sets a proceeding for hearing, in *ARCO v. Calnev* and *Tesoro* the Commission made definitive determinations regarding the scope of section 343.2(c)(1). Colonial's assertion that these orders lack precedential weight merely because the Commission also established hearings in those orders is unpersuasive.[54]

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[49] *See, e.g.*, *SFPP, L.P.*, 168 FERC ¶ 61,043 (2019) (addressing protests to proposed index rate increases).

[50] *See, e.g.*, *BP W. Coast Prods. LLC v. SFPP, L.P.*, 121 FERC ¶ 61,243 (addressing a complaint against established index rate increases).

[51] Colonial Br. on Exceptions at 29.

[52] *Cove Mountain Solar, LLC*, 179 FERC ¶ 61,179, at P 5 (2022).

[53] *Tesoro*, 134 FERC ¶ 61,214 at PP 65-66; *ARCO v. Calnev*, 97 FERC at 61,311.

[54] Colonial's argument that *Tesoro* is nonprecedential is particularly unconvincing. First, the Commission later addressed a request for rehearing of *Tesoro*, indicating that both the Commission and the participants in that proceeding viewed *Tesoro* as final for purposes of Rule 713 of the Commission's Rules of Practice and Procedure. *Tesoro Ref. & Mktg. Co. v. Calnev Pipe Line LLC*, 136 FERC ¶ 61,083 (2011); *see also* 18 C.F.R. § 385.713(a) (2022). Second, as Trial Staff observes, Colonial itself relies upon *Tesoro* to support its argument that Complainants and Trial Staff have not established a substantial change in economic circumstances to justify altering Colonial's grandfathered rates under EPAct 1992. Colonial Br. on Exceptions at 13 (citing *Tesoro*, 134 FERC ¶ 61,214); *id.* at 17 (citing *Tesoro*, 134 FERC ¶ 61,214 at P 46); *id.* at 19, 23 (citing *Tesoro*, 134 FERC ¶ 61,214 at P 2); Colonial Br. Opposing Exceptions at 12 (citing *Tesoro*, 134 FERC ¶ 61,214 at P 47 n.87); *id.* at 15 (citing *Tesoro*, 134 FERC ¶ 61,214 at P 2). Colonial does not explain why the Commission's determinations

25. For these reasons, we continue to conclude that section 343.2(c)(1) is appropriately construed as governing challenges to individual index rate increases, not challenges to base rates. We therefore affirm the Initial Decision and hold that Complainants were not required to satisfy section 343.2(c)(1) in challenging Colonial's indexed base rates.

B. Stand-Alone Cost and Incumbent Network Cost Analyses

1. Background and Initial Decision

26. The Commission's long-standing methodology for evaluating challenges to oil pipeline indexed rates is the trended original cost (TOC) methodology established in Opinion No. 154-B. The TOC methodology is based upon the pipeline's historical costs, as applied elsewhere in this order. Colonial proposes two alternative methodologies for defending its indexed rates: a SAC analysis and an INCA.

27. The SAC test seeks to determine the competitive rate for transportation service that would prevail in a contestable market with no barriers to entry or exit.[55] This approach posits an efficient competitor that would enter the market to compete with the incumbent carrier for all or part of its business.[56] The SAC analysis estimates the current investment and operating costs necessary to construct and operate a subset of the incumbent carrier's system and uses these figures to determine the revenues the hypothetical competitor would require to recover its costs and obtain a reasonable return (SAC estimate). If the incumbent carrier's revenues fall below the SAC estimate, the incumbent's rates may be deemed just and reasonable, depending on other factors considered in concert.[57] Unlike the Commission's TOC methodology, the SAC test is not

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in *Tesoro* established Commission policy for purposes of grandfathering, but not for section 343.2(c).

[55] *PPL Mont., LLC v. Surface Transp. Bd.*, 437 F.3d 1240, 1242 (D.C. Cir. 2006) (*PPL Montana*) (citing *Coal Rate Guidelines, Nationwide*, 1 I.C.C.2d 520, 528 (1985)).

[56] *BNSF Ry. Co. v. Surface Transp. Bd.*, 526 F.3d 770, 777 (D.C. Cir. 2008).

[57] *E.g.*, *id.*; *PPL Montana*, 437 F.3d at 1242 (citing *Coal Rate Guidelines*, 1 I.C.C.2d at 528-29, 542-43); *Potomac Elec. Power Co. v. ICC*, 744 F.2d 185, 193 (D.C. Cir. 1984); *Consumers Energy Co. v. CSX Transp., Inc.*, Docket No. NOR 42142, 2018 WL 400611, at *23 (STB served Jan. 11, 2018), *vacated on other grounds*, 2019 WL 495735, at *1 (STB served Feb. 7, 2019); *Major Issues in Rail Rate Cases*, Docket

based on the pipeline's historical costs, but instead relies upon estimates of the current replacement costs necessary to construct a hypothetical replica of the pipeline.

28. In 2019, the Surface Transportation Board's (STB) Rate Reform Task Force proposed INCA as a potential alternative to SAC.[58] INCA is largely similar to SAC, but relies upon the costs and assets of the incumbent carrier rather those of a hypothetical new entrant.[59] First, a complaining shipper identifies the portions of the incumbent's network used to transport the shipper's goods (footprint).[60] Second, the complainant identifies the asset costs, overhead costs, and operating expenses associated with the footprint, with asset costs and overhead costs valued based on replacement cost.[61] Third, the complainant estimates an annual return component. Finally, the complainant compares the asset costs, overhead costs, operating expenses, and annual return (collectively, INCA costs) with the revenues the incumbent derives from the footprint. If revenues are less than the INCA costs, the rates for the footprint are deemed just and reasonable.[62]

a. Colonial's SAC and INCA Presentations

29. Colonial presents SAC analyses prepared by its witness Michael R. Baranowski. Mr. Baranowski applies the SAC test at three levels: Colonial's entire system; the portion of Colonial's system subject to its indexed rates (indexed system); and Colonial's individual indexed rates.[63] Mr. Baranowski assumes that a hypothetical competitor would construct a new pipeline system that replicates Colonial's existing system using current technologies and at current prices.[64] In addition, he assumes that the hypothetical

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No. STB Ex Parte 657, 2006 WL 3087168, at *6-7 (STB served Oct. 30, 2006); *Williams Pipe Line Co.*, Opinion No. 391-B, 84 FERC ¶ 61,022, at 61,104 (1998).

[58] Ex. S-00026 at 30-35 (STB Rate Reform Task Force Report).

[59] *Id.* at 31, 33-34.

[60] *Id.* at 33.

[61] Asset costs (e.g., rail, signals, bridges) and non-land overhead costs (e.g., repair shops, offices) are valued at 50% of replacement cost, while land is valued at 100% of replacement cost. *Id.* at 32.

[62] *Id.* at 33.

[63] Ex. CPC-00012 (Baranowski) at 6:17-20, 9:1-12.

[64] *Id.* at 10:3-14, 12:14-17, 13:11-16.

competitor would provide the same services, transport the same volumes, and serve the same shippers as Colonial in the base year. Finally, he assumes that the hypothetical competitor would benefit from the same economies of scope and scale as Colonial and have access to unlimited material, labor, and equipment at prevailing cost levels.[65]

30. Mr. Baranowski performs his system-wide SAC analysis by estimating the hypothetical competitor's investment costs,[66] operating expenses,[67] and annual capital-recovery costs.[68] Next, he uses a computerized Discounted Cash Flow (DCF) model to develop an annual capital-cost revenue requirement for the hypothetical competitor.[69] Mr. Baranowski adds this amount to the estimated operating expenses to determine a SAC estimate for 2017. Mr. Baranowski testifies that the SAC estimate exceeds Colonial's transportation revenues for 2017, which he claims, shows that Colonial's indexed rates are just and reasonable.[70]

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[65] *Id.* at 4:7-11, 11:6-9, 12:17-20.

[66] Investment costs include (i) replacement costs for major equipment and facilities, (ii) costs of land and rights of way, (iii) engineering, procurement, and construction management, and (iv) replacement costs for other assets supporting the hypothetical competitor's operations, such as a control center, office buildings, and office equipment. *Id.* at 14:15-20, 15:2-19, 16:7-18:15; Ex. CPC-00091 at 6-8; Ex. CPC-00094 at 1-18; Ex. CPC-00096; Ex. CPC-00097 at 2-21; Ex. CPC-00098 at 1-5.

[67] Mr. Baranowski uses Colonial's historical operating expenses as the starting point for estimating the operating expenses of the hypothetical competitor. Ex. CPC-00012 (Baranowski) at 19:2-3, 19:13-18. In addition, Mr. Baranowski reduces several expense items in areas where he expected the hypothetical competitor to incur lower costs than Colonial. *Id.* at 11:14-17. For example, he assumes that the hypothetical competitor would incur lower power expenses than Colonial because it would operate newer, more efficient motors at booster stations. *Id.* at 11:17-20.

[68] Mr. Baranowski estimates replacement costs for seven types of facilities, based upon plans and blueprints of each facility type: (1) a single-line pump station; (2) a dual-line pump station; (3) an injection facility; (4) a tank farm junction; (5) a smaller delivery facility, (6) a standard larger delivery facility, and (7) an airport delivery facility. *Id.* at 15:2-7. These replacement costs incorporate assumptions regarding terrain factors, unionized labor rates, prevailing equipment rental rates, and crew compositions. *Id.* at 14:15-20, 15:12-19.

[69] *Id.* at 4:16-20, 14:2-5, 32:5-13.

[70] *Id.* at 38:2-10.

31. Mr. Baranowski performs his indexed-system and individual-rate SAC analyses by disaggregating Colonial's system into 300 analysis segments,[71] estimating the revenues associated with each segment,[72] and allocating elements of his system-wide SAC estimate to each segment.[73] For his indexed-system analysis, Mr. Baranowski identifies the segments comprising the indexed system and adds together those segments' aggregated revenues and allocated SAC estimates.[74] Likewise, for his individual-rate analysis, Mr. Baranowski identifies the segments used to transport volumes under the rate at issue and allocates the revenues and SAC estimates for those segments.[75] He then compares the allocated revenues with the allocated SAC estimates. Mr. Baranowski testifies that both analyses indicate that Colonial's indexed rates are just and reasonable.[76]

32. Mr. Baranowski applies the INCA test using Colonial's indexed system and its individual indexed rates as footprints.[77] Mr. Baranowski determines INCA costs based upon the replacement costs,[78] operating expenses,[79] and cost-assignment practices used in

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[71] *Id.* at 39:7-40:11.

[72] Mr. Baranowski estimates segment-specific revenues by (i) assigning Colonial's 2017 delivered volumes to specific point-to-point movements, (ii) assigning point-to-point movements to particular segments to estimate the volumes shipped over each segment, and (iii) multiplying the estimated point-to-point volumes by the applicable tariff rate. *Id.* at 40:21-43:4.

[73] Mr. Baranowski develops estimated SAC estimates for each segment by allocating his system-wide facility replacement costs and operating expenses to individual segments and developing estimated capital costs for each segment. *Id.* at 43:11-45:22.

[74] *Id.* at 46:11-17; *see also* Ex. CPC-00015 at 1-7 (showing Mr. Baranowski's segment-specific replacement costs, SAC estimates, and revenues).

[75] Ex. CPC-00012 (Baranowski) at 47:9-48:3 & Table 20; *see also* Ex. CPC-00017 at 1-7 (showing results of Mr. Baranowski's individual-rate SAC analysis for the base year); Ex. CPC-00018 at 1-7 (showing results of Mr. Baranowski's individual-rate SAC analysis for the test year).

[76] Ex. CPC-00012 (Baranowski) at 46:20-47:1 & Table 19, 48:5-49:7 & Table 21.

[77] Ex. CPC-00236 (Baranowski) at 18:5-14.

[78] *Id.* at 18:15-20:5-16.

[79] *Id.* at 22:1-23:13.

his SAC analyses.[80] Next, he allocates INCA costs and revenues to individual segments.[81] Mr. Baranowski attests that the INCA costs exceed the allocated revenues at both the indexed-system and individual-rate levels.[82]

b. Initial Decision

33. The Initial Decision accorded no weight to Colonial's SAC and INCA presentations.[83] The Initial Decision found that the Commission has previously rejected proposals to justify oil pipelines rates using SAC.[84] The Initial Decision observed that, in Opinion No. 502, the Commission found that SAC conflicts with D.C. Circuit and Commission precedent because it relies upon the replacement costs necessary to construct a hypothetical replica of the pipeline, rather than relying upon the pipeline's trended original costs.[85] In addition, the Initial Decision found that SAC could permit unjust and unreasonable rates.[86] The Initial Decision stated that in *Farmers Union II*, the D.C. Circuit vacated an oil pipeline ratemaking methodology that would set rate ceilings "seldom reached in practice" and result in "handsome rate base writeups" that produce "creamy returns on book equity."[87] The Initial Decision concluded that Colonial's SAC analyses raise similar concerns because they allow rates that would double Colonial's existing revenue levels.[88] The Initial Decision found, moreover, that the Commission's

[80] *Id.* at 18:12-14.

[81] *Id.* at 23:15-19.

[82] *Id.* at 24:3-27:5.

[83] Initial Decision, 179 FERC ¶ 63,008 at P 553.

[84] *Id.* P 541.

[85] *Id.* PP 544, 546 (citing *BP Pipelines (Alaska) Inc.*, Opinion No. 502, 123 FERC ¶ 61,287, at PP 208-209 (2008)). The Initial Decision stated that the Commission has previously found that relying upon replacement costs is "inherently fallacious and should be confined to those rare cases where evidence of original cost or prudent investment cannot be reasonably assembled." *Id.* P 546 (quoting *Chi. Dist. Elec. Generating Co.*, 2 FPC 412, 419 (1941)); *see also id.* P 550.

[86] *Id.* PP 545, 551 n.1088, 552.

[87] *Id.* P 545 (quoting *Farmers Union Cent. Exch., Inc. v. FERC*, 734 F.2d 1486, 1497 (D.C. Cir. 1984) (*Farmers Union II*)).

[88] *Id.* (citing Tr. 3541:10-23, 3544:21-3545:13, 3548:3-10, 3549:18-24, 3551:5-9 (Baranowski)). The Initial Decision expressed concern that allowing Colonial to charge

existing ratemaking policies are sufficient to allow Colonial to recover its costs and obtain a reasonable return.[89] Finally, the Initial Decision concluded that INCA is indistinguishable from SAC and declined to rely upon Colonial's INCA evidence.[90]

2. Brief on Exceptions

34. Colonial argues that the Initial Decision erred by rejecting its SAC and INCA presentations. Colonial contends that these analyses show that its indexed rates are below the rate levels that would be observed in competitive markets and are thus just and reasonable.[91]

35. Colonial contends that SAC is a widely used benchmark applied by the Interstate Commerce Commission (ICC) and the STB in regulating railroad rates.[92] Colonial states that SAC is particularly useful for evaluating Colonial's rates because of its "unique combination of circumstances," including its size, age, and the fact that it operates both in competitive markets (where it charges market-based rates) and non-competitive markets (where it charges cost-based indexed rates).[93] Furthermore, Colonial states that it is an efficient provider of transportation services and highly valued by its shippers.[94] Because Colonial is significantly depreciated, Colonial states that a cost of service based upon historical costs such as the Commission's TOC methodology does not reflect Colonial's current productive value.[95]

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rates up to the SAC level would result in impermissible double recoveries of Colonial's original investment and return. *Id.* P 552.

[89] *Id.* P 550.

[90] *Id.* n.990.

[91] Colonial Br. on Exceptions at 31.

[92] *Id.* at 31-32.

[93] *Id.* at 32 (citing Tr. 3233-34, 3236-38, 3360-61 (Klick)). In addition, Colonial emphasizes that its indexed rates were grandfathered under EPAct 1992 and have only been adjusted pursuant to the indexing methodology. *Id.* at 35. Colonial further states that its indexed rates are lower than the rates of other products pipelines. *Id.* (citing Ex. CPC-00002 (Klick) at 3-4).

[94] *Id.* at 31-33 (citing Ex. CPC-00001 (Miller) at 7; Tr. 3622-23 (Miller)).

[95] *Id.* at 31 (citing Ex. CPC-00002 (Klick) at 3-4, 28-33).

36. Colonial argues that the ICA does not mandate historical-cost ratemaking and that the Commission retains discretion to adopt alternative approaches such as SAC. Colonial claims that contrary to the Initial Decision's conclusion, neither *Farmers Union II* nor Commission precedent precludes use of SAC.[96] Although *Farmers Union II* rejected a ratemaking methodology that would allow pipelines to obtain "creamy returns,"[97] Colonial contends that this concern does not apply here because it does not seek to use SAC or INCA to justify increases to its existing rates.[98] Colonial observes that in Opinion No. 391-B, the Commission concluded that the ICA does not prohibit pipelines from justifying their rates using a method other than the TOC methodology.[99]

37. Colonial contends that its SAC analysis should be accepted because it differs from the proposals rejected in Opinion Nos. 502 and 391-B. Colonial states that in contrast to the pipelines in those proceedings, which used SAC to justify new rates, it seeks to use SAC as a benchmark to defend its existing rates. Colonial further states that Mr. Baranowski corrects the flaws in the SAC proposals rejected in Opinion Nos. 502 and 391-B. Colonial states that Opinion No. 502 expressed concern that stand-alone costs could be allocated to individual movements to determine the maximum rate permitted for each movement, which would represent an improper exercise in ratemaking using hypothetical costs. Colonial states that Mr. Baranowski addresses this concern by refraining from "push[ing] SAC costs down" to individual point-to-point rates for comparison with Colonial's existing rates.[100] Instead, Colonial states that Mr. Baranowski determines whether the revenues from volumes moving between each origin-destination pair are sufficient to cover the costs of a new entrant entering the market to serve those locations. Colonial states that Opinion No. 391-B found that the pipeline failed to analyze whether there were cross-subsidies within the hypothetical competitor's system.[101] According to Colonial, Mr. Baranowski's analysis avoids

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[96] *Id.* at 34-35.

[97] 734 F.2d at 1503.

[98] Colonial Br. on Exceptions at 34.

[99] *Id.* at 35 (citing Opinion No. 391-B, 84 FERC at 61,103 & n.52).

[100] *Id.* at 36 (quoting Ex. CPC-00012 at 6 (Baranowski)) (citing Tr. 3592-94, 3597 (Baranowski)).

[101] *Id.* at 37.

cross-subsidies by aligning the costs of pipeline facilities with the barrels that use those facilities.[102]

38. Finally, Colonial claims that the Initial Decision erred by finding that INCA is indistinguishable from SAC.[103] Colonial argues that INCA is distinct from SAC and that its INCA presentation confirms that its existing rates are just and reasonable.[104]

3. Briefs Opposing Exceptions

39. Complainants and Trial Staff contend that the Initial Decision correctly accorded no weight to Colonial's SAC analysis. They argue that SAC conflicts with Commission policy because it uses replacement costs, rather than trended original costs,[105] and that the Commission rejected SAC in Opinion Nos. 502 and 391-B.[106] Moreover, they maintain that the STB's use of SAC in regulating railroads is inapposite and does not compel the Commission to adopt SAC for oil pipelines.[107]

40. Complainants and Trial Staff argue that Colonial has not justified departing from the Commission's precedent rejecting SAC. They submit that contrary to Colonial's contention, there is no meaningful distinction between using SAC to defend existing rates as opposed to justifying a rate increase.[108] They further contend that Colonial's

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[102] Specifically, Colonial states that Mr. Baranowski (i) develops the cost of each asset along the pipeline and (ii) separately assigns the barrels that use each asset within a given pipeline segment. *Id.* (citing Ex. CPC-00236 at 9-10 (Baranowski)).

[103] *Id.* at 37 (citing Initial Decision, 179 FERC ¶ 63,800 at PP 529, 534, 538, & n.990; Ex. CPC-00236 (Baranowski) at 15-27).

[104] *Id.* at 38.

[105] Joint Complainants Br. Opposing Exceptions at 66-67 (citing *Farmers Union II*, 734 F.2d at 1502); Joint Shippers Br. Opposing Exceptions at 13 (citing Opinion No. 502, 123 FERC ¶ 61,287 at P 208).

[106] Joint Complainants Br. Opposing Exceptions at 66-67 (citing Opinion No. 502, 123 FERC ¶ 61,287 at P 209; Opinion No. 391-B, 84 FERC at 61,105-07); Joint Shippers Br. Opposing Exceptions at 11-12; Trial Staff Br. Opposing Exceptions at 87 (citing Opinion No. 502, 123 FERC ¶ 61,287; Opinion No. 391-B, 84 FERC at 61,103).

[107] Trial Staff Br. Opposing Exceptions at 85 (citing 49 U.S.C. § 10701(d)(1); 49 U.S.C. app. § 1(5)).

[108] Complainants and Trial Staff state that the Commission previously rejected a similar proposal to use SAC Rates as "benchmarks" or a "ceiling" to evaluate oil pipeline

circumstances do not justify departing from trended original-cost ratemaking.[109] According to Complainants, the record shows that Colonial's witnesses propose to use SAC not because of Colonial's circumstances, but because they believe historical-cost ratemaking is never appropriate.[110] Furthermore, Complainants and Trial Staff argue that Colonial has not remedied the flaws in SAC identified in Opinion Nos. 502 and 391-B.[111] They contend that like the proposals in those proceedings, Colonial's analyses use replacement costs and rest upon extensive assumptions regarding the facilities needed to build the hypothetical pipeline system.[112]

41. Complainants state that SAC is conceptually flawed and inappropriate for regulating oil pipelines. They state that high capital costs form barriers to entry in the oil pipeline industry because an incumbent pipeline may profitably charge rates below what a new entrant would need to charge.[113] Complainants claim that SAC conflicts with sound economic principles because it assumes that a competitor can enter the

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rates. Joint Complainants Br. Opposing Exceptions at 68-69 (citing Opinion No. 502, 123 FERC ¶ 61,287 at P 206); Joint Shippers Br. Opposing Exceptions at 12-13 (same); Trial Staff Br. Opposing Exceptions at 89 (same).

[109] Joint Complainants Br. Opposing Exceptions at 69; Joint Shippers Br. Opposing Exceptions at 13. In response to Colonial's argument that SAC is appropriate because its system is large, older, highly depreciated, and does not use contract rates, Joint Shippers state that the Commission previously declined to apply the SAC test to a pipeline with similar circumstances. Joint Shippers Br. Opposing Exceptions at 13 (citing *BP Pipelines (Alaska) Inc.*, 119 FERC ¶ 63,007, at P 161 (2007), *aff'd*, Opinion No. 502, 123 FERC ¶ 61,287).

[110] Joint Complainants Br. Opposing Exceptions at 69 (citing Ex. JC-0279; Ex. S-00025; Tr. 3214:20-3219:11, 3233:15-19, 3239:25-3240:3 (Klick)).

[111] Joint Shippers Br. Opposing Exceptions at 14-16; Trial Staff Br. Opposing Exceptions at 88-89.

[112] Joint Shippers Br. Opposing Exceptions at 11, 15 (citing Ex. CPC-00090 (Wilder) at 8-12; Ex. CPC-00091; Ex. CPC-00092; Ex. CPC-00108 (Bryant) at 2-4); Trial Staff Br. Opposing Exceptions at 88.

[113] Joint Complainants Br. Opposing Exceptions at 70 (citing Tr. 3353:18-24 (Klick)). Joint Complainants state that a new firm will not enter a market if it could lose its substantial investment when an incumbent underprices it. *Id.*

market without facing these significant barriers to entry.[114] Complainants further state that allowing an incumbent pipeline to charge rates at the level required for a new entrant to construct a replica system creates economic inefficiency.[115]

42. Complainants and Trial Staff contend that adopting SAC could produce unjust and unreasonable results. They argue that because SAC estimates are based upon replacement costs rather than historical costs, SAC ignores the capital recovery and other costs that Colonial's shippers paid in prior periods.[116] Furthermore, they state that the SAC estimates proposed here would allow Colonial, which is highly profitable and recently achieved profit margins of 30-40%,[117] to double its revenues.[118] Thus, Complainants and Trial Staff contend that SAC would allow Colonial to achieve returns that far exceed its actual costs contrary to *Farmers Union II*.[119]

43. Complainants and Trial Staff argue that the Initial Decision correctly rejected Colonial's INCA presentation. They state that like SAC, INCA relies upon replacement costs and thus conflicts with the Commission's trended original-cost methodology.[120]

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[114] *Id.* at 70-71 (citing Ex. CPC-00002 (Klick) at 19-20; Ex. JC-0197 (Arthur); Ex. S-00022 (McComb) at 7-23; Ex. BE-0008 at 20-21, 216-17; Tr. 3355:1-7 (Klick)).

[115] *Id.* at 71 (citing Ex. JC-0197 (Arthur) at 18:23-22:5).

[116] Ex. JC-0197 (Arthur) at 12:11-15.

[117] Joint Complainants Br. Opposing Exceptions at 72.

[118] Joint Complainants Br. Opposing Exceptions at 72 (citing Tr. 3329:3-6, 3310:5-10 (Klick), 3556:3-10, 3557:18-24, 3558:9-12, 3559:5-9, 3561:15-3562:8, 3563:15-20, 3567:2-30 (Baranowski)); Joint Shippers Br. Opposing Exceptions at 14 (citing Tr. 3329:3-6 (Klick), 3556:3-10, 3557:18-24, 3561-67 (Baranowski); Trial Staff Br. Opposing Exceptions at 89.

[119] Joint Complainants Br. Opposing Exceptions at 72; Joint Shippers Br. Opposing Exceptions at 14 (citing Tr. 3329:3-6 (Klick), 3556:3-10, 3557:18-24, 3561-67 (Baranowski)); Trial Staff Br. Opposing Exceptions at 86, 89 (citing *Farmers Union II*, 734 F.2d at 1501-03).

[120] Trial Staff Br. Opposing Exceptions at 90 (citing Ex. S-00210 (McComb) at 8); *see also* Ex. JC-0197 (Arthur) at 12:11-15 n.35 (citing Ex. CPC-00236 (Baranowski) at 16-18).

4. Commission Determination

44. We affirm the Initial Decision. The Commission has firmly rejected the SAC test and the record here does not support a different result.[121] As discussed below, we find that Colonial's SAC proposal departs from Commission policy and does not comply with the ICA's just and reasonable standard. In addition, we conclude that adopting SAC would result in costly, burdensome, and protracted rate proceedings and that Colonial's application of the SAC test suffers from multiple flaws. We conclude, moreover, that Colonial's INCA presentation raises similar concerns. Accordingly, we decline to rely upon Colonial's SAC and INCA presentations in evaluating whether its indexed rates are just and reasonable.

a. SAC

45. We reject Colonial's proposal to rely upon the SAC test. First, the SAC test conflicts with the Commission's ratemaking policy. Where a pipeline charges indexed rates, the Commission's longstanding policy is to evaluate challenges to oil pipeline rates under Opinion No. 154-B, which determines the pipeline's cost of service based upon a trended original-cost rate base.[122] The Commission's TOC methodology provides oil pipelines with opportunity to recover just and reasonable rates.[123] Accordingly, the Commission rejected proposals to adopt the SAC test in Opinion Nos. 502 and 391-B. As the Commission explained in Opinion No. 502,[124] SAC conflicts with Opinion No. 154-B because it uses replacement cost, rather than trended original cost, to determine whether a rate is just and reasonable.[125] Moreover, the SAC test does not account for the

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[121] Opinion No. 502, 123 FERC ¶ 61,287 at PP 205-210; *see also* Opinion No. 391-B, 84 FERC at 61,103-07 (rejecting SAC analysis proposed in oil pipeline rate proceeding).

[122] Opinion No. 154-B, 31 FERC at 61,833-34; *see also, e.g.*, *Seaway Crude Pipeline Co.*, Opinion No. 546, 154 FERC ¶ 61,070, at P 90 (2016) ("Generally, when establishing the cost-of-service upon which a pipeline's regulated rates are based, the Commission employs original cost principles . . . .").

[123] *See AOPL v. FERC*, 83 F.3d at 1443 ("[T]he pipeline has the right only to recover just and reasonable rates, and the Commission's cost-based rate procedures provide the pipeline with that opportunity.").

[124] Opinion No. 502, 123 FERC ¶ 61,287 at P 208.

[125] *See, e.g.*, Ex. CPC-00091 at 5-8; Ex. CPC-00092 at 7-8; Ex. CPC-00095 at 1, 5-17; Ex. CPC-00096; Ex. CPC-00097 at 2-9, 12-20; Tr. 3585:10-23 (Baranowski). Colonial's argument that the Order on Interlocutory Appeal supports adopting its SAC analyses is unavailing. Colonial Br. on Exceptions at 35. Contrary to Colonial's claim,

capital recovery or other costs previously paid by the pipeline's shippers.[126] Thus, the SAC test is inconsistent with well-established Commission policy.

46. Second, in contrast to the Opinion No. 154-B methodology, we are concerned Colonial's proposed SAC test does not comply with the ICA's just and reasonable standard.[127] The D.C. Circuit has found that "[r]atemaking principles that permit 'profits too huge to be reconcilable with the legislative command' cannot produce just and reasonable rates" under the ICA.[128] In many cases, the SAC ceiling levels will significantly exceed the original-cost investment necessary to construct and operate the incumbent pipeline or any rate calculated under the TOC methodology.[129] Here, the record indicates that notwithstanding any circumstances unique to its system, Colonial acknowledges that it has recovered significant profits through its existing indexed rates, including profit margins of 30-50%.[130] Moreover, Colonial itself concedes that many of its existing rates would be significantly reduced under the Opinion No. 154-B

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the Order on Interlocutory Appeal did not address the merits of SAC or the weight Colonial's SAC evidence should be afforded. Order on Interlocutory Appeal, 170 FERC ¶ 61,149 at P 21 (finding that "the heavy burden for striking [the SAC evidence] has not been met" and clarifying that "the participants may litigate what weight, if any, to give Colonial's SAC testimony in the course of the proceeding"); *see also id.* at ordering para. (granting Colonial's interlocutory appeal "without reaching any merits issue as to weight and applicability").

[126] Opinion No. 502, 123 FERC ¶ 61,287 at P 208.

[127] 49 U.S.C. app. § 15(1). We note that Colonial seeks to apply the SAC methodology to its cost-based indexed rates, not to rates where it has shown that it lacks market power and thus may be able to charge rates above those that could be justified using indexing or a cost of service.

[128] *Farmers Union II*, 734 F.2d at 1502-03 (quoting *Pub. Serv. Comm'n of N.Y. v. FERC*, 589 F.2d 542, 550 (D.C. Cir. 1978)).

[129] As discussed above, the SAC test establishes rate ceilings at the level a hypothetical competitor would require to recover the costs of building a replica pipeline system with current technology and at current costs.

[130] *See* Ex. CPC-00413 at 1 (showing that Colonial's operating margins between 2009-2018 ranged from 31.9% in 2016 to 52.7% in 2012). Colonial's witness Mr. Klick acknowledged that the record indicates that Colonial is a highly profitable firm. Tr. 3389:24-3390:4, 3390:16-20 (Klick).

methodology.[131] Nevertheless, Colonial's proposed SAC ceilings would allow revenues at more than twice the level of Colonial's revenues in the base period.[132] Such a methodology that allows such excessive returns does not present an appropriate standard for evaluating whether rates are just and reasonable under the ICA.[133]

47. Third, adopting the SAC test would make it unreasonably expensive, burdensome, and time-consuming to challenge oil pipeline rates.[134] As discussed above, under the Commission's current policy, complainants challenging indexed oil pipeline rates must demonstrate that the rate is unjust and unreasonable on a cost-of-service basis under the

[131] *See* Ex. S-00354 at 34-40 (comparing Colonial's existing indexed rates with the base-period and test-period rates that Colonial's witness Mr. Wetmore proposes under the Opinion No. 154-B methodology). For example, Colonial's existing rates for transportation Boligee (Greene County), Oxford (Calhoun County), Atlanta-Chattahoochee (Fulton County), and Atlanta-Powder Springs (Cobb County) exceed its proposed test-period rates for those locations by up to 184.9%, 94.0%, 133.2%, and 140.5%, respectively. *Id.* at 34-39. Furthermore, these figures represent the differentials that would result from adopting Colonial's position on every cost-of-service issue in this proceeding. Because we do not adopt Colonial's position on each cost-of-service issue, the actual differentials between Colonial's existing rates and the rates resulting from application of the Opinion No. 154-B methodology exceed the figures listed above.

[132] Ex. CPC-00012 (Baranowski) at 47:1-2, Table 19; Tr. 3327:18-3328:8, 3328:21-3329:6 (Klick) (acknowledging that the SAC estimate for Colonial's indexed system is more than twice the revenues attributable to Colonial's indexed rates); *see also id.* 3330:5-10 (Klick) (stating that Colonial's rates would be just and reasonable if they produced revenues at the level permitted by the SAC test); *id.* 3356:3-10, 3557:18-24, 3559:5-9, 3580:24-3582:10 (Baranowski) (stating that various indexed rates on Colonial's system could be doubled and still considered just and reasonable under the SAC test). Colonial does not allege that the Commission's existing ratemaking methods are insufficient to allow Colonial to recover a reasonable return. *See FPC v. Hope Nat. Gas Co.*, 320 U.S. 591, 603 (1944) (citing *Mo. ex rel. Sw. Bell Tel. Co. v. Pub. Serv. Comm'n*, 262 U.S. 276, 291 (1923)) (explaining that a regulated entity's return "should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital").

[133] *See Farmers Union II*, 734 F.2d at 1507 (holding that the ICA requires "meaningful rate regulation"); *see also id.* at 1503 (vacating an oil pipeline ratemaking methodology that would allow for "creamy returns" and establish rate ceilings "at levels so high that they would 'seldom be reached in actual practice'" (quoting Opinion No. 154, 21 FERC at 61,649-50)).

[134] *See* Opinion No. 502, 123 FERC ¶ 61,287 at P 209 n.349.

Opinion No. 154-B methodology. Under Colonial's position, in addition to preparing an Opinion No. 154-B cost of service, complainants could also be required to develop detailed, technical SAC studies regarding the costs necessary to build and operate highly complex pipeline systems.[135] For instance, Colonial's SAC analyses involve estimating construction costs for multiple types of pipeline facilities,[136] estimating land valuation and rights-of-way necessary to construct the hypothetical system,[137] developing terrain and labor factors related to pipeline construction,[138] and analyzing pipeline crossings of roads, railroads, and bodies of water.[139] The Commission has explained that it "does not intend to involve itself in the details of pipeline engineering, construction and other costs for a hypothetical pipeline that will never be built, potentially every time it sets an oil pipeline rate case for hearing."[140] Allowing pipelines to defend their rates using SAC would substantially increase the complexity and number of issues in dispute, resulting in

[135] *See* Colonial Br. on Exceptions at 31 (stating that Colonial proposes to use SAC as "one means of evaluating the lawfulness of its existing rates" in addition to the Opinion No. 154-B methodology).

[136] For example, Colonial's SAC analyses incorporate estimates of the replacement costs for new pump stations, injection and delivery facilities, and storage tank farms. *E.g.*, Ex. CPC-00012 (Baranowski) at 15:2-10; Ex. CPC-00095 at 1-17. In addition, Colonial relies on estimated replacement costs for pipeline segments, which vary by location, diameter, and thickness and reflect assumptions regarding labor rates, rental rates, and crew compositions. *E.g.*, Ex. CPC-00012 (Baranowski) at 14:14-20; Ex. CPC-00092 at 12; Ex. CPC-00093 at "Pipe-Specs," "Lines," "Design Diameter," and "Pipeline Cost" tabs. Developing the investment and construction cost estimates in Colonial's SAC analyses required access to multiple expert consultants, databases, and a proprietary pipeline cost estimating model. *E.g.*, Ex. CPC-00090 (Wilder) at 9:9-12, 10:1-3; Ex. CPC-00098 at 1.

[137] Ex. CPC-00094 at 1-18; Ex. CPC-00108 (Bryant) at 3:14-4:16. Among other steps, this process involved (i) contacting land agents in fourteen states regarding the current costs of acquiring rights of way and (ii) estimating labor costs associated with field surveys, title research and review, construction support, and post-construction cleanup support. Ex. CPC-00108 (Bryant) at 3:17-21; Ex. CPC-00109 at 1-14, 17-21.

[138] Ex. CPC-00012 (Baranowski) at 15:15-16; Ex. CPC-00093 at "Cost Factors" tab.

[139] Ex. CPC-00090 (Wilder) at 9:23-25; Ex. CPC-00093 at "Wetlands," "Stream Xings," "Road Xings," and "Railroad Xings" tabs; Ex. CPC-00098 at 2.

[140] Opinion No. 502, 123 FERC ¶ 61,287 at P 209 n.349.

more costly,[141] onerous, and protracted oil pipeline rate proceedings.[142] Not only would this result frustrate EPAct 1992's goals of simplified and streamlined ratemaking,[143] but the additional costs and burdens could deter shipper challenges to oil pipeline rates,[144]

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[141] Ex. S-00026 at 8-9, 15; *see also* Ex. CIT-0065 at 1-2.

[142] In this regard, the STB's experience applying the SAC test is particularly instructive. Since its adoption in 1985, application of the SAC test in STB proceedings has "become too complicated, costly, and time consuming." Ex. S-00026 at 15 (STB Rate Reform Task Force Report); *see also id.* at 8-9, 30; Ex. CIT-0065 at 12 (Government Accountability Office (GAO) report finding that "there is widespread agreement that the [STB's] rate relief process does not provide expeditious handling and resolution of complaints, is expensive, time-consuming, and complex"). Whereas in early SAC proceedings the STB needed only to "resolve a handful of issues," the SAC test has "spiraled in complexity and cost to the parties" and now requires the STB to address "hundreds" of issues and devote "countless hours addressing minutiae that ha[ve] very little impact on the outcome of the case." Ex. S-00026 at 9, 25; *see also Consumers Energy Co.*, 2018 WL 400611 at *67 (Begeman, Member, commenting) (observing that "with every SAC case, it seems that more and more issues are raised for the [STB] to resolve pertaining to the [hypothetical competitor]"). In lamenting this trend, the STB's Rate Reform Task Force concluded that "the incentives exist for the parties . . . to make the SAC analysis more involved going forward as they continue to test the boundaries of what is acceptable." Ex. S-00026 at 30; *see also* Ex. S-00027 at 5 (Department of Justice, Antitrust Division, Economic Analysis Group Competition Advocacy Paper) ("Evidence with this degree of complexity inevitably invites further regulatory dispute and litigation over a seemingly endless list of details regarding the configuration, costs, and revenues of the hypothetical [competitor]."). The Task Force further concluded that "the complexity that already bedevils this [SAC] process will only grow in the future." Ex. S-00026 at 32.

[143] EPAct 1992 §§ 1801-1802; *see also, e.g.*, H.R. Rep. No. 102-474, pt. 1, 102d Cong., 1st Sess. 225 (1992), *reproduced in* Ex. BE-0010 at 1287 (explaining that Congress directed the Commission to adopt a simplified methodology and streamlined procedures for oil pipeline rates in order to "cut burdens" and "cut costs, delays, and uncertainties").

[144] Ex. CIT-0065 at 12 (GAO Report concluding that due to complex, expensive, and time-consuming nature of SAC proceedings, the STB's rate-relief complaint process "is largely inaccessible to most shippers"); *id.* at 17 (stating that among shippers who responded to GAO questions regarding the STB's rate complaint process, over 70% "believe[d] that the time, complexity, and costs of filing complaints are barriers that often preclude them from seeking rate relief").

thereby impeding the Commission's ability to fulfill its regulatory responsibilities under the ICA.[145] Given that the Commission's Opinion No. 154-B methodology applicable here provides pipelines with sufficient opportunity to recover a just and reasonable rate,[146] we find that any benefit of allowing pipelines to rely upon SAC is significantly outweighed by the additional burdens this approach would impose.[147]

48. Furthermore, we are unpersuaded that Colonial's SAC analyses mitigate the SAC test's complexities or reduce the potential for costly and burdensome litigation.[148] To the extent that Colonial's analyses incorporate assumptions designed to reduce complexity, they still require myriad determinations regarding the investment and operating costs necessary to construct a vast and complex pipeline system, including facility costs, land valuation, system construction and engineering, and labor expenses.[149] Moreover, contrary to Colonial's claim, these burdens and complexities would result regardless of whether the pipeline relies upon SAC to justify a proposed rate increase or to defend its existing rates from challenge. As a result, even with Colonial's modifications, we continue to find that adopting the SAC test would result in more costly, onerous, and time-consuming litigation.

49. Fourth, Colonial's application of the SAC test is flawed. As applied by the ICC and STB, the SAC test determines the hypothetical investment and operating costs of a

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[145] *See* Order No. 561, FERC Stats. & Regs. ¶ 30,985 at 30,967 ("The policy of streamlining and expediting the regulation of oil pipelines, as reflected in [EPAct 1992], supports the notion of relying primarily upon the affected parties to bring challenges to rates.").

[146] *See AOPL v. FERC*, 83 F.3d at 1443 ("[T]he pipeline has the right only to recover just and reasonable rates, and the Commission's cost-based rate procedures provide the pipeline with that opportunity.").

[147] *See, e.g.*, *BNSF Ry. Co. v. Surface Transp. Bd.*, 453 F.3d 473, 482 (D.C. Cir. 2006) ("The pursuit of precision in rate proceedings, as in most things in life, must at some point given way to the constraints of time and expense, and it is the agency's responsibility to mark that point."); *Burlington N. R.R. Co. v. ICC*, 985 F.2d 589, 597 (D.C. Cir. 1993) ("[T]he Commission is free to make reasonable trade-offs between the quality and cost of possible regulatory approaches.").

[148] *See* Ex. CPC-00236 (Baranowski) at 10:10-12:14 (attesting that Colonial's SAC analyses reduce the complexities present in SAC proceedings at the STB).

[149] *See* Ex. CPC-00012 (Baranowski) at 15:2-16; Ex. CPC-00090 (Wilder) at 9:23-25; Ex. CPC-00094 at 1-18; Ex. CPC-00098 at 2-5.

stand-alone system designed to serve a specific shipper or group of shippers.[150] However, rather than design a stand-alone system focused on specific shippers, Colonial estimates the costs of replicating its entire system, allocates those system-wide costs to individual segments on a fully-allocated-cost (FAC) basis, and uses the results to develop SAC estimates for the indexed system and individual origin-destination pairs.[151] Although this top-down approach may be useful in estimating the costs of serving individual routes using a replica of Colonial's entire system, Colonial has not shown that it produces a reasonable estimate of the relative costs of serving such routes on a stand-alone basis.[152] Moreover, Colonial improperly uses its proposed SAC estimates as a

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[150] *E.g.*, *BNSF*, 526 F.3d at 777 ("The [SAC] test determines the rate that the *shippers using the [hypothetical competitor] (the 'traffic group')* would be charged . . . ." (emphasis added)); *PPL Montana*, 437 F.3d at 1242 ("A SAC analysis seeks to determine the lowest cost at which a hypothetical efficient carrier could provide service to the *complaining shipper or a group of shippers* that benefits from sharing joint and common costs." (emphasis added) (citing *Coal Rate Guidelines*, 1 I.C.C.2d at 528-29)); *Consumers Energy*, 2018 WL 400611 at *25 ("A complainant creates a traffic group by using information on the types and amounts of traffic moving over the defendant's rail system . . . and selecting a subset of that traffic (including its own traffic to which the challenged rate applies) that the [hypothetical competitor] would serve."); Opinion No. 502, 123 FERC ¶ 61,287 at P 210 (holding that ICC and STB precedent "does not suggest that all shippers may be grouped into one overall group nor does it suggest that SAC may be used to develop an overall revenue requirement"); Opinion No. 391-B, 84 FERC at 61,104 (explaining that the hypothetical competitor's rate under the SAC test "is based on the cost of facilities and services that are required to meet *only a specific shipper's transportation needs*" (emphasis added)).

[151] Ex. CPC-00012 (Baranowski) at 43:11-45:25, 47:9-16.

[152] For instance, Mr. Baranowski presents an analysis of the costs a new entrant would incur if it transported the same barrels as Colonial between Lake Charles, Louisiana, and Moundville, Alabama. *Id.* at 48:1-4 & Table 20. However, rather than estimating the costs of a stand-alone pipeline serving only these points, Colonial estimates the costs of constructing the Lake Charles-Moundville portion of Colonial's existing system. Thus, for example, Colonial estimates the replacement costs of the existing 36 and 40-inch pipelines and pump stations on Colonial's Lake Charles-Moundville segment, even though these assets may not be necessary on a pipeline built to serve solely these points. *See* Ex. CPC-00015 at 1-2 (showing the Location Codes and SAC estimates for the analysis segments between Lake Charles and Moundville); Ex. CPC-00093 at Pipe_Specs tab, rows 476-1141, 4901-5601 (indicating that the mainlines used in Colonial's Lake Charles-Moundville analysis are 36 or 40 inches in diameter); *id.* at Design Diameter tab (indicating that 36 and 40 inches are the largest pipeline diameters on Colonial's system); *see also* Ex. CIT-0065 at 6 (data response from

bright-line threshold for rate reasonableness. As the Commission explained in Opinion No. 502, while the SAC test deems rates above the SAC level to be unlawful, it does not establish whether a rate below that threshold is just and reasonable. Rather, the SAC test "is only a starting point for additional assumptions and further studies" to "reconcile the difference between the SAC ceiling and an original cost rate."[153] To the extent that Colonial's indexed rates are below the SAC estimates, this does not demonstrate that its rates are just and reasonable under the ICA. In light of these flaws, even if we were inclined to consider the SAC test, we would decline to rely upon Colonial's SAC analyses.

50. Colonial's arguments in support of using the SAC test are unavailing. First, we are not persuaded by Colonial's contention that its proposed SAC test would ensure that rates are constrained to a competitive level. As discussed above, the SAC test establishes rate ceilings at the level a hypothetical new entrant would require to build a pipeline that provides the same services as the incumbent. Unlike the TOC methodology, the SAC test relies upon speculative estimates regarding the costs of constructing and operating the hypothetical system.[154] Given that the SAC test relies upon extensive unsupported assumptions, we find that Colonial has not established that the SAC thresholds reliably reflect the rates that would emerge in a competitive setting for Colonial's rates. For example, Colonial assumes that if a more costly competitor were *not* able to justify entering a regulated market, its projected costs nevertheless define the competitive price level.[155] The record does not support such an assumption. Accordingly, the SAC test does not provide a reliable measure of competitive prices.

51. Second, contrary to Colonial's argument, its particular circumstances do not provide a basis for adopting the SAC test. As the D.C. Circuit has affirmed, the Commission's Opinion No. 154-B methodology provides oil pipelines with the

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Colonial explaining that "[n]o alternative capacities, pipe diameters, pumping capacity, or other pump stations were considered" in developing its SAC analyses).

[153] Opinion No. 502, 123 FERC ¶ 61,287 at P 209 (citations omitted).

[154] For instance, as discussed above, the SAC test requires significant assumptions regarding the construction costs for multiple types of pipeline facilities, land valuation and rights-of-way necessary to construct the hypothetical system, and labor expenses related to pipeline construction. *See supra* P 47.

[155] Ex. CPC-00012 (Baranowski) at 38:4-10. Contrary to Colonial's claim, the fact that a pipeline's rates fall below the SAC level does not establish that they reflect rates that would prevail in a competitive market. Rather, this merely shows that the rates do not rise to the level of monopoly prices that would compel a shipper to provide its own pipeline transportation instead of continuing to use the incumbent pipeline.

opportunity to recover just and reasonable rates.[156] Here, the record establishes that notwithstanding any circumstances unique to its system, Colonial has recovered significant profits through its existing indexed rates, including profit margins of 30-50%.[157] Nevertheless, Colonial's proposed SAC ceilings would allow revenues at more than twice the level of Colonial's revenues in the base period.[158] Based upon this evidence, we are not persuaded that Colonial's circumstances justify adopting the SAC test.[159]

52. Third, we reject Colonial's argument that the SAC is an appropriate means for defending Colonial's rates so long as it is not being used to set (or increase) the pipeline's rates.[160] Because of the flaws discussed above, the SAC test is not an appropriate tool for determining whether Colonial's rates are just and reasonable.

53. Finally, although Colonial attempted to address the primary concerns raised by the Commission in Opinion No. 391-B, Colonial's analyses do not remedy the flaws described above or the more fundamental concerns identified in Opinion No. 502 and

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[156] *AOPL v. FERC*, 83 F.3d at 1443.

[157] *See* Ex. CPC-00413 at 1 (showing that Colonial's operating margins between 2009-2018 ranged from 31.9% in 2016 to 52.7% in 2012).

[158] Ex. CPC-00012 (Baranowski) at 47:1-2, Table 19; Tr. 3327:18-3328:8, 3328:21-3329:6 (Klick) (acknowledging that the SAC estimate for Colonial's indexed system is more than twice the revenues attributable to Colonial's indexed rates); *see also id.* 3330:5-10 (Klick) (stating that Colonial's rates would be just and reasonable if they produced revenues at the level permitted by the SAC test); *id.* 3356:3-10, 3557:18-24, 3559:5-9, 3580:24-3582:10 (Baranowski) (stating that various indexed rates on Colonial's system could be doubled and still considered just and reasonable under the SAC test). Colonial does not allege that the Commission's existing ratemaking methods are insufficient to allow Colonial to recover a reasonable return. *See Fed. Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591, 603 (1944) (citing *Mo. ex rel. Sw. Bell Tel. Co. v. Pub. Serv. Comm'n*, 262 U.S. 276, 291 (1923)) (explaining that a regulated entity's return "should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital").

[159] To the extent that Colonial's argument relies upon its size, age, rate structure, or the fact that there is a secondary market for Colonial's capacity, *see* Colonial Br. on Exceptions at 31-33, Colonial does not demonstrate that these circumstances support adopting SAC, particularly where the Commission's existing ratemaking methods have allowed it to recover significant returns.

[160] Colonial Br. on Exceptions at 34.

discussed above.[161] We therefore conclude that Colonial has not justified altering Commission policy to consider the SAC test in addition to the Opinion No. 154-B methodology.

b. INCA

54. We likewise affirm the Initial Decision's determination declining to rely upon Colonial's INCA presentation. As discussed above, Colonial's INCA study relies upon the same replacement costs included in its SAC analyses to determine the costs of assets and land associated with the relevant system footprint.[162] Thus, like SAC, INCA conflicts with the Commission's policy of evaluating challenges to indexed rates based upon the pipeline's trended original costs. In addition, as the STB's Rate Reform Task Force acknowledged,[163] INCA does not resolve the burdens and complexities associated with SAC. Although INCA evaluates rates using the incumbent carrier's costs, as opposed to the costs of a hypothetical new entrant, it nonetheless raises complex issues regarding the appropriate replacement costs of the incumbent's existing assets, the amount of overhead expenses, and the correct assignment of costs and revenues.[164] Finally, while the Task Force proposed INCA as a potential alternative to SAC in April 2019, the STB has not adopted INCA or applied it in a rate proceeding.[165] The fact that neither the STB nor any other regulatory agency has applied INCA provides additional support for our determination declining to adopt Colonial's INCA study.

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[161] Opinion No. 502, 123 FERC ¶ 61,287 at PP 208-210 & n.349.

[162] Ex. CPC-00236 (Baranowski) at 18:15-20:4, 22:1-11 (attesting that Colonial's INCA study incorporates the same replacement costs, operating expenses, and segment-specific cost allocations as its SAC analyses); Ex. CIT-0043 (Ashton) at 41:19-20; Ex. CIT-0065 at 19.

[163] Ex. S-00026 at 33 (stating that although INCA presents a simplified alternative to SAC, "it is not simple").

[164] *Id.* (explaining that while INCA would result in simpler and less expensive proceedings compared to SAC, there would be "much work to do to identify and assign all appropriate cost and revenue streams" and "[p]arties would have plenty of arguments to make regarding replacement costs of the existing assets, as well as arguments about the amount of overhead expenses"); *see also id.* at 33-34 (stating that the STB's task under INCA "would be fundamentally the same as in SAC, only using the existing carrier not a hypothetical entrant").

[165] Ex. CIT-0043 (Ashton) at 41:11-13.

c. Conclusion

55. For the foregoing reasons, we affirm the Initial Decision and decline to rely upon Colonial's SAC and INCA evidence in evaluating whether its indexed rates are just and reasonable.

III. Cost of Service

56. In this section, we address issues related to Colonial's cost of service, including throughput, capital structure, return on equity, carrier property, operating expenses, and cost allocation.

A. Test Period Throughput

57. The participants stipulated that one of the following test period throughput options would apply for ratemaking purposes in this proceeding: (a) 904,962,599 barrels and 833,120,708,557 barrel-miles if test period throughput is measured based on throughput from October 1, 2017, through September 30, 2018, or (b) 916,613,000 barrels and 845,165,032,000 barrel-miles if test period throughput is measured based on throughput during calendar year 2018.[166]

58. The participants also stipulated that Colonial's test period interstate fuel and power expense for ratemaking purposes in this proceeding shall be either (a) $194.7 million or (b) $198.2 million depending on whether the Commission adopts the throughput stipulation based the 12 months ending September 30, 2018, or calendar year 2018, respectively.[167]

59. For the reasons discussed below, we affirm the Initial Decision's determination that test period throughput in this proceeding shall be 904,962,599 barrels and 833,120,708,557 barrel-miles because test period throughput should be measured using actual throughput from October 1, 2017, through September 30, 2018. Consequently, we

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[166] Ex. BE-0003 ¶ 9 (Joint Stipulations) ("For purposes of ratemaking in this proceeding, Colonial's interstate throughput for the test period shall be deemed to be either: (a) 904,962,599 barrels and 833,120,708,557 barrel-miles ("Test Period Throughput Option A") or (b) 916,613,000 barrels and 845,165,032,000 barrel-miles ("Test Period Throughput Option B").").

[167] *Id.* ¶ 10 ("For purposes of ratemaking in this proceeding, Colonial's interstate fuel and power expense for the test period shall be deemed to be either: (a) $194.7 million if the Commission adopts Test Period Throughput Option A or (b) $198.2 million if the Commission adopts Test Period Throughput Option B.").

find that Colonial's test period interstate fuel and power expense shall be $194.7 million.[168]

1. Initial Decision

60. The Initial Decision accepted the participants' throughput stipulation based on actual throughput during a test period of October 1, 2017, through September 30, 2018.[169] The Initial Decision rejected Joint Shippers' proposal to use calendar year 2018 information and information concerning projected pipeline expansion projects to determine annualized and normalized quantities as of September 30, 2018.[170] The Initial Decision stated that the proponent of using post-test period information must demonstrate that using actual throughput will result in rates that are "substantially in error."[171] The Initial Decision found that Joint Shippers failed to meet this burden because their evidence of increasing throughput and construction plans merely indicated the possibility that a test period throughput adjustment is warranted.[172]

2. Brief on Exceptions

61. Joint Shippers argue that the Initial Decision erred in adopting the test period throughput stipulation based on actual throughput from October 1, 2017, through September 30, 2018, rather than calendar year 2018.[173] Joint Shippers state that the "substantially in error" standard for using post-test period data does not apply because Joint Shippers did not propose to base rates on post-test period data.[174] Rather, Joint Shippers state that they relied on post-test period data to normalize and annualize test period throughput to reflect more representative costs and revenues in the test period.[175] Moreover, Joint Shippers assert that the Initial Decision ignored evidence that throughput

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[168] *Id.*

[169] Initial Decision, 179 FERC ¶ 63,008 at P 655. The Initial Decision stated that Trial Staff, Joint Complainants, and Colonial supported the test period throughput option based on actual volumes from October 1, 2017, through September 30, 2018. *Id.*

[170] *Id.* PP 652-653, 655.

[171] *Id.* P 652.

[172] *Id.* PP 653-654.

[173] Joint Shippers Br. on Exceptions at 43.

[174] *Id.* at 44.

[175] *Id.*

is trending upwards based upon increasing throughput from 2017 to 2018 and approved expansion projects.[176]

62. Joint Shippers also claim that the Initial Decision misstated the standard for basing rates on post-test period data. Joint Shippers argue that the standard is broader, allowing exceptions to using test period data "if subsequent events indicate that the test period estimates were substantially in error or would yield unreasonable results,"[177] or if relying on such data is "necessary to achieve a rational result."[178]

3. Brief Opposing Exceptions

63. Trial Staff agrees with the Initial Decision's selection of the throughput stipulation based on actual throughput from October 1, 2017, through September 30, 2018 and opposes Joint Shippers' exception.[179] Trial Staff argues that Joint Shippers' proposal does rely on post-test period data, since Joint Shippers admit they proposed to "use actual throughput during calendar year 2018" and the participants stipulated that the test period in this proceeding ended on September 30, 2018.[180] Trial Staff also asserts that Joint Shippers failed to present evidence of the size of the divergence between the actual and proposed throughput levels that would demonstrate a substantial error.[181] Trial Staff further argues that any changes in throughput from expansion projects is not known and measurable as that construction is not complete.[182]

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[176] *Id.* at 45.

[177] *Id.* (quoting *Nat'l Fuel Gas Supply Corp*., 51 FERC ¶ 61,122, at 61,334 (1990)).

[178] *Id.* at 45-46 (quoting *Kuparuk Transp. Co*., 55 FERC ¶ 61,122, at 61,383 n.93 (1991)).

[179] Trial Staff Br. Opposing Exceptions at 80-81. We note that Colonial states that it opposes Joint Shippers' exception number 16, which concerns test period throughput, but presents no argument on this point. *See* Colonial Br. Opposing Exceptions at 11, 79 (referencing disagreement with Joint Shippers' test period throughput exception and proposal); Joint Shippers Br. on Exceptions at 5 (describing its exception number 16).

[180] Trial Staff Br. Opposing Exceptions at 82 (quoting Joint Shippers Br. on Exceptions at 43).

[181] *Id.* at 82-83.

[182] *Id.* at 83.

4. Commission Determination

64. We affirm the Initial Decision's finding that test period throughput should be measured based on actual volumes on Colonial's pipeline system from October 1, 2017, through September 30, 2018.[183] We also find that the Initial Decision appropriately rejected Joint Shippers' proposed adjustment to the test period throughput volumes.[184]

65. The Commission favors using actual throughput data from the test period when setting rates absent a showing that it is not representative.[185] The Commission "has a general policy against the use of post-test period data" and will make exceptions only where test period volumes are shown to be "substantially in error or would yield

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[183] Initial Decision, 179 FERC ¶ 63,008 at P 655.

[184] *Id.* We also reject Joint Shippers' request to reserve the right to challenge on compliance Colonial's lifting adjustment or "home-based billing"—*i.e.*, Colonial's discontinued practice where a shipper would record a single "home base" nomination point for Gulf Coast origins and then Colonial would adjust the shipper's invoice to account for the rate difference between the shipment's stated and actual origin point. Joint Shippers Br. on Exceptions at 46-47; Initial Decision, 179 FERC ¶ 63,008 at PP 365-368; Ex. JC-0063 at 2, 7. The Initial Decision found that the lifting adjustment was based on the tariff rates for the actual origin and destination points of the shipment and did not result in an additional transportation charge. Moreover, the Initial Decision found that Colonial's shippers were familiar with the lifting adjustment procedure and could calculate the expected lifting adjustment on their transportation charge. Colonial instituted a new data management system and stopped making lifting adjustments in October 2018. Initial Decision, 179 FERC ¶ 63,008 at PP 365-367; *see also, e.g.*, Ex. JC-0063; Ex. CIT-0001 (Ashton) at 120-24; Ex. JC-0130 (Levine) at 61-64; Ex. CPC-00019 (Wetmore) at 13-15. Although Joint Shippers state they reserve the right to challenge the lifting adjustment in the compliance phase of the proceeding, Joint Shippers presented no evidence or argument supporting such a challenge at hearing or on exceptions and the time to do so has passed. *Kern River Gas Transmission Co.*, 133 FERC ¶ 61,162, at P 87 (2010) (reiterating the "fundamental principal [sic] that new arguments and evidence may not be introduced in the compliance phase of a proceeding when the opportunity existed to introduce the issue during the hearing phase of the proceeding").

[185] *See* Opinion No. 571, 172 FERC ¶ 61,207 at P 23; *SFPP, L.P.,* Opinion No. 522, 140 FERC ¶ 61,220 at P 41 (2012); Opinion No. 511, 134 FERC ¶ 61,121 at P 27, *order on reh'g*, Opinion No. 511-A, 137 FERC ¶ 61,220, at PP 19-20 & n.24 (2011); *see also Enbridge Pipelines (KPC)*, 102 FERC ¶ 61,310, at P 84 (2003) ("The Commission uses a test period for cost of service ratemaking") (citing *Trunkline Gas Co.*, 90 FERC ¶ 61,017, at 61,048-49 (2000)).

unreasonable results."[186] Because Joint Shippers seek to depart from actual throughput levels, Joint Shippers have the burden to produce data that supports such a departure.[187]

66. We agree with the Initial Decision that Joint Shippers failed to meet their burden. The actual test period data provides quantifiable evidence of Colonial's throughput levels.[188] By contrast, the record fails to show that the actual test period throughput is "substantially in error" based on trending volumes, planned expansion projects, or post-test period data.[189] Although Joint Shippers assert that volumes on Colonial had a 1% growth rate during and after the test period,[190] Joint Shippers do not sufficiently establish that this trend will be sustained. Joint Shippers' witness Ms. Palazzari merely expresses

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[186] *Nat'l Fuel Gas Supply Corp.*, 51 FERC at 61,334. *See also Williston Basin Interstate Pipeline Co.*, 87 FERC ¶ 61,265, at 62,022 (1999) ("The Commission generally requires that the post-test period data show that projections based on test period data will be seriously in error"). For example, "the Commission [has] allowed the use of post-test period data" when it was shown that "the test period data produced rates 45 percent higher than the post-test period data suggested was appropriate." *Williston Basin Interstate Pipeline Co.*, 87 FERC at 62,022 (citing *DistriGas of Mass. Corp. v. FERC*, 737 F.2d 1208, 1220 (1st Cir. 1984)).

[187] Opinion No. 571, 172 FERC ¶ 61,207 at P 23. Because we find that the Initial Decision summarized this standard accurately, we reject Joint Shippers' claim of error. *See* Initial Decision, 179 FERC ¶ 63,008 at P 652; Joint Shippers Br. on Exceptions at 45. We also reject Joint Shippers' claim that the standard for basing rates on post-test period data is broader than that stated above given the Commission's prior assertion that it "may rely on evidence outside the test period if this is necessary to achieve a rational result." Joint Shippers Br. on Exceptions at 45-46 (quoting *Kuparuk Transp. Co*., 55 FERC at 61,383 n.93). This is not the typical formulation of the standard. Moreover, Joint Shippers do not explain how this formulation differs substantively from the formulation in *National Fuel* ("substantially in error or would yield unreasonable results") or how it would lead to a different result here.

[188] *See* Ex. CPC-00021 (calculation of jurisdictional barrels and barrel-miles); Ex. CPC-00019 (Wetmore) at 13:14-17 (explaining that Exhibit CPC-00021 presents actual volumes for the 2017 base period and the 12-month test period ending September 30, 2018).

[189] Initial Decision, 179 FERC ¶ 63,008 at PP 652-655.

[190] Ex. TMG-0076 (Palazzari) at 156:10-157:2 (citing Form 6 data for the first three quarters of 2019); *see also* Ex. TMG-0001 (Palazzari) at 96:18-97:4 (discussing monthly growth amount).

concern about revenues exceeding costs if billing determinants are too low.[191] Similarly, Ms. Palazzari admits that "it is not certain whether [the] system throughput total will increase" due to planned expansion projects.[192] Thus, any change from the planned expansion projects is speculative and does not support a departure from test period experience.[193] For these reasons, we find that Joint Shippers failed to show that actual test period throughput is unrepresentative of future levels let alone substantially in error.[194]

67. We reject Joint Shippers' claim that the Commission's standard for including post-test period information in rates is inapplicable because Joint Shippers did not propose "to base rates on post-test period data."[195] The participants stipulated that Joint Shippers' throughput proposal "shall apply if the Commission determines that test period interstate throughput should be measured on the basis of actual throughput during calendar year 2018, as proposed by Joint Shippers' witness Catherine Palazzari."[196] Ms. Palazzari states that her test period throughput proposal "uses" and is "based on" quantities from

[191] Ex. TMG-0076 (Palazzari) at 155:17-19 ("The rates produced here must provide sufficient revenue to cover all proper costs but if the billing determinants used to design rates are too low, then the revenues produced by the application of the rates will exceed Colonial's costs.").

[192] Ex. TMG-0001 (Palazzari) at 95:13-14; *see also id.* 95:16-96:6 (inferring from Colonial board approval of four expansion projects that "current system throughput will be sustained or increased"); Ex. TMG-0061..

[193] *See* 18 C.F.R. § 346.2(a)(1)(ii) (2022) (allowing test period adjustments for "changes in revenues and costs which are known and are measurable with reasonable accuracy at the time of filing and which will become effective within nine months after the last month of available actual experience utilized in the filing").

[194] We reject Joint Shippers' claim that the Initial Decision "ignores" evidence of increasing throughput and board-approved expansion projects in reaching its conclusion. Joint Shippers Br. on Exceptions at 45. The Initial Decision specifically addressed this evidence and found that it was speculative and insufficient to overcome the presumption in favor of using test-period information. Initial Decision, 179 FERC ¶ 63,008 at PP 652-654. Regardless, we reject Joint Shippers' proposal to adjust test period throughput for the reasons stated herein.

[195] Joint Shippers Br. on Exceptions at 44.

[196] Ex. BE-0003 ¶ 9.

calendar year 2018.[197] Because the test period in this proceeding ends on September 30, 2018, we find that Joint Shippers' proposal includes three months of post-test period data. Moreover, Joint Shippers cite expansion projects that were completed after the test period as support for an upward throughput adjustment.[198] Thus, the Commission's "general policy against the use of post-test period data" applies to Joint Shippers' throughput proposal.[199]

68. Accordingly, we adopt the participants' stipulated test period throughput of 904,962,599 barrels and 833,120,708,557 barrel-miles based on actual volumes on Colonial's system from October 1, 2017, through September 30, 2018. By consequence, we find that Colonial's interstate fuel and power expense shall be $194.7 million for the test period per the participants' stipulation.[200]

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[197] *E.g.*, Ex. TMG-0001 (Palazzari) at 96:8-9 ("I propose to use the . . . calendar year 2018 barrels as a representative total annual level of barrels transported by Colonial during the test period ending in September 2018."); *id.* 96:10-14 ("I used calendar year 2018 barrels transported"); *id.* 97:1-4 ("I conclude that the calendar year 2018 level is representative of test year volumes [and] I will base my billing determinants on the calendar 2018 quantities"); Ex. TMG-0076 (Palazzari) at 156:3-5 ("Because I use the 2018 barrels for billing determinants, as an equivalent volume level to the annualized and normalized September 30, 2018 amounts, I am also able to use Colonial's 2018 computed barrel-miles").

[198] *See* Ex. TMG-0001 (Palazzari) at 96:1-2 ("These board approved projects merely confirm that the annual billing determinants I support are reasonable for a system that continues to expand and improve."); Ex. TMG-0076 (Palazzari) at 154:23-155:1 (explaining that "Colonial had several board approved volume growth products that were to be completed that would increase volumes on a continuing normalized basis").

[199] *Nat'l Fuel Gas Supply Corp.*, 51 FERC at 61,334. Because Joint Shippers admit to using various post-test period information to develop their test-period throughput proposal, we need not address their suggested distinction between "proposing an adjustment based on a selective event that occurred beyond the test period" and relying on post-test period data to "normalize and annualize test period throughput to reflect more representative costs and revenues in the test period." Joint Shippers Br. on Exceptions at 44-45. Nonetheless, we note that Joint Shippers cite no authority indicating that this distinction bears on whether the "seriously in error" standard applies.

[200] Ex. BE-0003 (Joint Stipulations) ¶ 10. The participants also litigated Colonial's base-period throughput and fuel and power costs, stipulating that they should be based upon either (a) the actual levels for calendar year 2017 or (b) alternatively, adjusted upward to account for a non-recurring loss of volumes due to Hurricane Harvey. Ex. BE-0003 ¶¶ 11-12. Colonial supported actual data whereas Trial Staff and

B. Return on Equity and Capital Structure

1. Return on Equity

69. We affirm the Initial Decision's return on equity (ROE) determinations in part and modify them in part.

70. The Initial Decision calculated a nominal ROE of 12.53% and a real ROE of 10.20%.[201] All participants filed briefs on exceptions challenging aspects of the Initial Decision's ROE holdings.[202]

71. As discussed below, we affirm the Initial Decision and find that the appropriate ROE data period is the six-month period ending on February 29, 2020.[203] We also affirm that the appropriate proxy group consists of Enbridge Inc. (Enbridge), Enterprise Product Partners, L.P. (Enterprise), Magellan Midstream Partners, L.P. (Magellan), Phillips 66 Partners LP (Phillips 66), and Plains All American LP (Plains).[204]

72. However, we modify aspects of the Initial Decision's calculation of the DCF and Capital Asset Pricing Model (CAPM) returns. These changes result from updating the

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Complainants supported using the adjusted data. This issue appears to be moot given our reliance upon test period data, our decision discussed below to evaluate grandfathered rates on a systemwide basis, and our determination discussed below to use the test period (rather than the base period) for determining reparations. *See* Joint Complainants Br. on Exceptions at 31 n.69 (stating that base-period cost and volumes may be relevant if the Commission accepts Colonial's argument that "grandfathered rates be analyzed on a route-by-route basis versus on a system-wide basis"); Trial Staff Initial Post-Hearing Br. at 10 (stating that base period throughput "is only relevant to the extent Colonial prevails in arguing that reparations should be calculated based on base period rates"). *See also* Colonial Br. on Exceptions at 123-24.

[201] Initial Decision, 179 FERC ¶ 63,008 at PP 1076, 1092.

[202] Colonial's base period ROE has a limited impact on the cost-of-service calculation. The participants resolved the test and base period cost of debt by stipulation. Ex. BE-0003 ¶ 5 (Joint Stipulations).

[203] Initial Decision, 179 FERC ¶ 63,008 at P 1002.

[204] *Id.* PP 1024, 1036. Note that Enbridge Energy Partners, LP was acquired by Enbridge Inc. in 2018. Ex. CIT-0008 (Accepted Proxy Group Companies) at 1. Like the Initial Decision, we refer to both entities as "Enbridge." *See* Initial Decision, 179 FERC ¶ 63,008 at PP 1105, 1122.

long-term gross domestic product (GDP) growth rate and calculating the DCF and CAPM ROEs based on the median rather than the average of the proxy group. All participants support or do not oppose these modifications. As a result, we adopt a nominal ROE of 11.76% and a real ROE of 9.43%.[205]

a. Background

73. The Supreme Court has held that "the return to the equity owner should be commensurate with the returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital."[206] In order to attract capital, "a utility must offer a risk-adjusted expected rate of return sufficient to attract investors."[207]

74. Since the 1980s, the Commission has determined oil pipeline ROEs using the DCF model.[208] In the May 21, 2020 ROE Policy Statement, the Commission modified its ROE policy to determine the ROE by averaging the results of a DCF model and the CAPM analyses.[209] The ROE Policy Statement also clarified the Commission's policies governing the formation of proxy groups and the treatment of outliers.[210]

i. DCF Model

75. The DCF model is based on the premise that "a stock's price is equal to the present value of the infinite stream of expected dividends discounted at a market rate commensurate with the stock's risk."[211] The Commission uses the DCF model to estimate the return necessary for the pipeline to attract capital based upon the range of returns that the market provides investors in a proxy group of publicly traded entities with

[205] *See* Initial Decision, 179 FERC ¶ 63,008 at PP 1076-1092.

[206] *FPC v. Hope Nat. Gas Co.*, 320 U.S. 591, 603 (1944).

[207] *Canadian Ass'n of Petroleum Procs. v. FERC*, 254 F.3d 289, 293 (D.C. Cir. 2001) (*CAPP v. FERC*).

[208] *Composition of Proxy Grps. for Determining Gas & Oil Pipeline Return on Equity*, 123 FERC ¶ 61,048, at P 3 (2008) (2008 Policy Statement).

[209] *See Inquiry Regarding the Commission's Pol'y for Determining Return on Equity*, 171 FERC ¶ 61,155 (2020) (ROE Policy Statement).

[210] *Id.*

[211] *CAPP v. FERC*, 254 F.3d 289, at 293.

similar risk profiles. The Commission estimates the required rate of return for each member of the proxy group using the following formula:

$$k = D/P(1 + .5g) + g$$

where *k* is the discount rate (or investors' required return), *D* is the current dividend, *P* is the price of stock at the relevant time, and *g* is the expected growth rate in dividends based upon the weighted averaging of short-term and long-term growth estimates (referred to as the two-step procedure). The Commission multiplies the dividend yield (dividends divided by stock price or *D/P*) by the expression (1+.5g) to account for the fact that dividends are paid on a quarterly basis. For purposes of the (1+.5g) adjustment, the Commission uses only the short-term growth projection.[212]

76. In the two-step DCF model, the Commission computes the expected growth rate (*g*) by giving two-thirds weight to a short-term growth projection and one-third weight to a long-term growth projection.[213] For the short-term growth projection, the Commission uses security analysts' five-year forecasts for each company in the proxy group, as published by the Institutional Brokers' Estimate System (IBES).[214] The long-term growth projection is based on forecasts, drawn from three different sources,[215] of long-term growth of the economy as a whole as reflected in the Gross Domestic Product (GDP).[216] For proxy group members that are Master Limited Partnerships (MLP), the Commission adjusts the long-term growth projection to equal 50% of GDP.[217]

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[212] Opinion No. 546, 154 FERC ¶ 61,070 at PP 198-200.

[213] 2008 Policy Statement, 123 FERC ¶ 61,048 at P 6.

[214] *Id.*

[215] The three sources used by the Commission are Global Insight: *Long-Term Macro Forecast – Baseline* (*U.S. Economy 30-Year Focus*); Energy Information Agency, *Annual Energy Outlook*; and the Social Security Administration.

[216] 2008 Policy Statement, 123 FERC ¶ 61,048 at P 6 (citing *Nw. Pipeline Co.*, Opinion No. 396-B, 79 FERC ¶ 61,309, at 62,383 (1997); *Williston Basin Interstate Pipeline Co.*, 79 FERC ¶ 61,311, at 62,389 (1997), *aff'd sub nom. Williston Basin Interstate Pipeline Co. v. FERC*, 165 F.3d 54, 57 (D.C. Cir. 1999)).

[217] *Id.* P 96.

ii. CAPM

77. The Commission also uses CAPM analysis as a measure of the cost of equity relative to risk.[218] The CAPM is based on the theory that the market-required rate of return for a security is equal to the "risk-free rate" plus a risk premium associated with that security. The CAPM estimates cost of equity by adding the risk-free rate to the "market-risk premium" multiplied by "beta." The formula for the CAPM is as follows:

$$R = r_f + \beta_a(r_m - r_f)$$

r_f = risk free rate (such as yield on 30-year U.S. Treasury bonds)

r_m= expected market return

β_a= beta, which measures the volatility of the security compared to the rest of the market.

78. The risk-free rate is represented by a proxy, typically the yield on 30-year U.S. Treasury bonds. The market-risk premium is calculated by subtracting the risk-free rate from the "expected return," based on a DCF analysis of a large segment of the market, such as the dividend paying companies in the S&P 500.[219] Betas measure the volatility of a particular stock relative to the market and are published by several commercial sources.[220] An entity may also seek to apply a size premium adjustment to the CAPM zone of reasonableness to account for the difference in size between itself and the dividend paying companies in the S&P 500.[221]

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[218] *Ass'n of Bus. Advocating Tariff Equity v. Midcontinent Indep. Sys. Operator, Inc.*, Opinion No. 569, 169 FERC ¶ 61,129, at P 229 (2019), *order on reh'g*, Opinion No. 569-A, 171 FERC ¶ 61,154, *order on reh'g,* Opinion No. 569-B, 173 FERC ¶ 61,159 (2020), *remanded sub nom. MISO Transmission Owners v. FERC*, 45 F.4th 248 (D.C. Cir. 2022).

[219] *Id.* We estimate the expected market return using a forward-looking approach based on a one-step DCF analysis of all dividend paying companies in the S&P 500, and exclude S&P 500 companies with growth rates that are negative or in excess of 20%.

[220] ROE Policy Statement, 171 FERC ¶ 61,155 at P 8.

[221] *Id.*

iii. Proxy Group

79. Because most oil pipelines (including Colonial) are wholly owned subsidiaries and their common stocks are not publicly traded, the Commission must use a proxy group of publicly traded firms with corresponding risks to set a range of reasonable returns.[222] The firms in the proxy group must be comparable to the pipeline whose ROE is being determined, or, in other words, the proxy group must be "risk-appropriate."[223]

80. To ensure that companies included in pipeline proxy groups are risk-appropriate, the Commission has historically required that each corporation included in the proxy group satisfies three standards: (1) the company's stock must be publicly traded; (2) the company must be recognized as an oil pipeline company and its stock must be recognized and tracked by an investment information service, such as the Value Line Investment Survey (Value Line); and (3) oil pipeline operations must constitute a high proportion (historically 50%) of the company's business.[224] In the 2008 Policy Statement, the Commission extended potential proxy group membership to include MLPs. The Commission provided similar criteria for the inclusion of MLPs in proxy groups, namely: (1) the MLP should be tracked by Value Line; (2) the MLP should have been in existence for at least five years; and (3) the MLP should derive at least 50% of its operating income from or have 50% of its assets devoted to interstate oil pipeline operations.[225] The Commission further explained that individual entities that do not satisfy the criteria described above may still be risk appropriate for inclusion in the proxy group.[226]

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[222] *Petal Gas Storage, L.L.C. v. FERC*, 496 F.3d 695, 697 (D.C. Cir. 2007) (explaining that the purpose of a DCF proxy group is to "provide market-determined stock and dividend figures from public companies comparable to a target company for which those figures are unavailable. Market-determined stock figures reflect a company's risk level and when combined with dividend values, permit calculation of the 'risk-adjusted expected rate of return sufficient to attract investors.'" (quoting *CAPP v. FERC*, 254 F.3d at 293)); *see also Chevron Prods. Co. v. SFPP, L.P.*, Opinion No. 571, 172 FERC ¶ 61,207, at P 120 & n.204 (2020).

[223] *Petal Gas Storage, L.L.C. v. FERC*, 496 F.3d at 699; *see also Portland Nat. Gas Transmission Sys.*, Opinion No. 524, 142 FERC ¶ 61,197, at P 302 (2013), *reh'g denied*, Opinion No. 524-A, 150 FERC ¶ 61,107 (2015).

[224] Opinion No. 571, 172 FERC ¶ 61,207 at 149 (citations omitted).

[225] *Id*.

[226] *Id.*

81. Under Commission policy, a proxy group should consist of at least four, and preferably five members, if representative members can be found.[227] At the same time, the Commission has explained that while "adding more members to the proxy group results in greater statistical accuracy, this is true only if the additional members are appropriately included in the proxy group as representative firms."[228]

82. The range of the proxy group's returns produces the zone of reasonableness in which the pipeline's ROE may be set based on specific risks. Absent unusual circumstances showing that the pipeline faces anomalously high or low risks, the Commission sets the pipeline's cost-of-service ROE at the median of the zone of reasonableness.[229]

b. ROE Data Period

i. Initial Decision

83. The Initial Decision stated that the participants agreed that the data period for determining the ROE should be the six-month period ending on February 29, 2020.[230] The Initial Decision also concluded, over Trial Staff's objections, that it is reasonable on the record for the DCF analysis to use stock price data developed after February 25, 2020.[231]

ii. Brief on Exceptions

84. Trial Staff asserts that the Initial Decision erred when considering stock price data developed after February 25, 2020.[232] Trial Staff states that while all participants used

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[227] ROE Policy Statement, 171 FERC ¶ 61,155 at PP 58-66; *Kern River Gas Transmission Co.*, Opinion No. 486-B, 126 FERC ¶ 61,034, at P 104 (2009); Opinion No. 511, 134 FERC ¶ 61,121 at P 203.

[228] Opinion No. 486-B, 126 FERC ¶ 61,034 at P 104.

[229] *El Paso Nat. Gas Co.*, Opinion No. 528, 145 FERC ¶ 61,040, at P 592 (2013), *order on reh'g*, Opinion No. 528-A, 154 FERC ¶ 61,120 (2016), *order on compliance & reh'g*, Opinion No. 528-B, 163 FERC ¶ 61,079 (2018) (citing *Transcon. Gas Pipe Line Corp.*, Opinion No. 414-A, 84 FERC ¶ 61,084, *reh'g denied*, Opinion No. 414-B, 85 FERC ¶ 61,323 (1998), *aff'd*, *CAPP v. FERC*, 254 F.3d 289).

[230] Initial Decision, 179 FERC ¶ 63,008 at P 1002.

[231] *Id.* P 1078.

[232] Trial Staff Br. on Exceptions at 61.

the six-month data period ending February 29, 2020, to develop their DCF analyses, Trial Staff witness Mr. Keyton did not rely on stock prices from February 25, 2020, through February 29, 2020, because he found that data unreliable.[233] Trial Staff argues that stock prices and market capitalization figures for the proxy group companies were distorted during the last week of February 2020 due to the influence of the COVID-19 pandemic.[234] Trial Staff also asserts that a February 25, 2020 cut-off date would align the data periods for the DCF and CAPM results since Colonial witness Dr. Fairchild's CAPM analysis, which the Initial Decision adopted, used market capitalization data as of February 25, 2020.[235] Joint Shippers join Trial Staff's exception.[236]

iii. Brief Opposing Exceptions

85. Colonial opposes Trial Staff's exception, arguing that the pandemic-related stock market crash occurred after February 29, 2020, and that limiting the data period to February 25, 2020, is arbitrary and contrary to Commission policy.[237]

iv. Commission Determination

86. We affirm the Initial Decision and find that the appropriate data period for determining the ROE in this case is the six-month period ending on February 29, 2020.

87. Longstanding Commission policy favors using the most recent data in the record for determining the ROE even if such data is outside the test period.[238] The Commission typically relies upon the most recent data because "the market is always changing and later figures more accurately reflect current investor needs."[239] By incorporating these

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[233] *Id.* at 61-62 (citing Ex. S-00266 (Keyton) at 15-18, 33-34).

[234] *Id.* at 62-65.

[235] *Id.* at 62, 65-66.

[236] Joint Shippers Br. Incorporating Exceptions at 2.

[237] Colonial Br. Opposing Exceptions at 40-41.

[238] Opinion No. 571, 172 FERC ¶ 61,207 at P 122; *Portland Nat. Gas Transmission Sys.*, Opinion No. 510, 134 FERC ¶ 61,129, at P 242 (2011); *Williston Basin Interstate Pipeline Co.*, 84 FERC ¶ 61,081, at 61,382 (1998) ("It is true that the Commission prefers to use dividend yield data from the most recent six-month period available.").

[239] Opinion No. 510, 134 FERC ¶ 61,129 at P 242 (quoting *Trunkline Gas Co.*, Opinion No. 441, 90 FERC ¶ 61,017, at 61,117 (2000) (citations omitted)).

market changes, the most recent data is generally the most "representative of the conditions likely to happen while the rate is in effect"[240] indefinitely into the future.[241] Moreover, consistent adherence to this general policy discourages the pipeline and the shipper litigants from cherry-picking different data periods that distort the ROE upward or downward.[242]

88. In this record, the six-month period ending on February 29, 2020, provides the most recent data[243] and, consistent with the Commission's general policy, we will use that data for determining Colonial's ROE.

89. We reject Trial Staff's argument that stock market volatility related to the COVID-19 pandemic justifies excluding from the DCF analysis stock price data from February 26, 2020, through February 29, 2020.[244] Those dates preceded the President's declaration of a COVID-19 national emergency in March 2020.[245] Moreover, Trial Staff has not presented a basis for finding that market data from the last three business days of February 2020 were anomalous such that the Commission should adopt less recent data. In fact, Trial Staff witness Mr. Keyton states that he "could not determine that the nominal median DCF result was specifically impacted by stock price distortions for February 2020."[246] While Mr. Keyton calculates a small impact on the CAPM result from selecting data as of February 25, 2020, versus February 28, 2020, we do not agree

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[240] Opinion No. 511-A, 137 FERC ¶ 61,220 at P 258.

[241] Opinion No. 571, 172 FERC ¶ 61,207 at P 135; Opinion No. 511-A, 137 FERC ¶ 61,220 at P 258; Opinion No. 511, 134 FERC ¶ 61,121 at P 209.

[242] *Portland Nat. Gas Transmission Sys.*, Opinion No. 510-A, 142 FERC ¶ 61,198, at P 220 (2013) (explaining that using the most recent data discourages parties from subjectively selecting the ROE data that is most favorable to them).

[243] Initial Decision, 179 FERC ¶ 63,008 at P 1002; Trial Staff Br. on Exceptions at 61; Ex. S-00220 (Keyton) at 5:15-17 ("While the participants in this proceeding did not agree on a specific data period to use in testimony, the procedural schedule states that data up to February 29, 2020 may be used in applying the ROE Policy Statement.").

[244] Trial Staff Br. on Exceptions at 61. The last day of trading in this period was Friday, February 28, 2020.

[245] Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID–19) Outbreak, 85 Fed. Reg. 15,337 (Mar. 13, 2020); Ex. CPC-00268 (Fairchild) at 2:22-3:2.

[246] Ex. S-00266 (Keyton) at 16:21-17:3 (citing Ex. S-00220 (Keyton) at 22:8-13).

that this justifies truncating the data period.[247] In light of the foregoing, we see no reason to deviate from longstanding Commission policy of using the most recent data in the record for determining the ROE, which, in this case, is data from the six-month period ending on February 29, 2020.

c. ROE Proxy Group

90. The Initial Decision states that all participants agree that the ROE proxy group should include Enbridge, Enterprise, Magellan, and Phillips 66.[248] After considering arguments regarding a fifth proxy member, the Initial Decision added Plains to the proxy group.[249] Trial Staff supports the Initial Decision's proxy group.[250] Complainants contest the Initial Decision's inclusion of Plains in the proxy group.[251] Complainants further assert that, if the Initial Decision's proxy group includes a fifth member, it should be Kinder Morgan, Inc. (Kinder Morgan) and not Plains.[252] Colonial argues that if a fifth member is included it should not be Plains or Kinder Morgan, but ONEOK, Inc. (ONEOK).[253]

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[247] Likewise, we do not share Trial Staff's concern that Dr. Fairchild used data from different days in the last week of February 2020 in his CAPM analysis. *See* Trial Staff Br. on Exceptions at 62, 65-66.

[248] Initial Decision, 179 FERC ¶ 63,008 at P 1011.

[249] *Id.* PP 1024, 1036.

[250] Trial Staff. Br. on Exceptions at 56. Although Trial Staff states that the Initial Decision's rejection of its secondary alternative to Plains, TC Energy, is "unsupported," Trial Staff does not take exception given that the Initial Decision adopted Plains as a proxy group member. *Id.* at 56 n.215. Because we agree that Plains should be included in the ROE proxy group, as discussed below, we need not address whether TC Energy should also be included in the proxy group.

[251] Citgo Br. on Exceptions at 52; Joint Complainants Supp. Br. on Exceptions at 1 (incorporating Citgo Exception No. 12 by reference); Joint Shippers Br. Incorporating Exceptions at 3 (same). Joint Shippers and Joint Complainants adopted the arguments of Citgo witness Mr. Ashton for purposes of determining the appropriate ROE proxy group for the test period. Initial Decision, 179 FERC ¶ 63,008 at PP 1003-1004.

[252] Citgo Br. on Exceptions at 52. Nevertheless, Citgo asserts that the Commission "should not" find that a fifth proxy group member is necessary. *Id.*

[253] Colonial Br. on Exceptions at 107 n.54 ("Given the [Initial Decision's] correct adherence to the ROE Policy Statement, Colonial's dispute concerning the proper fifth

91. As discussed below, we affirm the Initial Decision and adopt a proxy group of Enbridge, Enterprise, Magellan, Phillips 66, and Plains.[254] No party filed exceptions regarding the Initial Decision's inclusion of Enbridge, Enterprise, Magellan, and Phillips 66 in the proxy group. Therefore, we discuss below whether to include Plains, ONEOK, or Kinder Morgan.

i. Plains All American Pipeline

(a) Initial Decision

92. The Initial Decision recommended including Plains in the proxy group.[255] The Initial Decision found that Plains is the only one of the proposed companies that meets all of the Commission's criteria for selecting ROE proxy group members.[256] The Initial Decision emphasized that approximately 50% of Plains' total assets are attributable to oil pipeline operations, which is "substantially higher" than the same metric for the other proposed fifth proxy group members.[257]

93. The Initial Decision rejected Colonial's objections to including Plains. Specifically, the Initial Decision found that Plains meets the Commission's investment grade criteria, despite having a Moody's rating below investment grade, because it has investment grade credit ratings from Standard & Poor's (S&P) and Fitch Rating Service (Fitch).[258] The Initial Decision also dismissed concerns about Plains halving its quarterly dividend in April 2020 because that occurred outside of the agreed-upon ROE data period

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member of a five-company proxy group is irrelevant to the result. Nevertheless, Colonial excepts (solely for preservation purposes) to the use of Plains All American Pipeline as the fifth member of the proxy group over ONEOK Inc." (citation omitted)).

[254] The Commission has consistently stated a preference for proxy groups of at least four members and preferably five. ROE Policy Statement, 171 FERC ¶ 61,155 at P 59. Because we find that a fifth proxy group member is appropriate here, as discussed below, we reject Citgo's argument that "the Commission should simply adopt the four-member proxy group to which all parties agree." Citgo Br. on Exceptions at 57.

[255] Initial Decision, 179 FERC ¶ 63,008 at P 1024.

[256] *Id.* (citing ROE Policy Statement, 171 FERC ¶ 61,155 at P 58).

[257] *Id*.

[258] *Id.* P 1025.

and the record lacked evidence of an ongoing trend.[259] Finally, the Initial Decision found the slight staleness of Plains' IBES growth rates data was outweighed by the other factors favoring Plains' inclusion in the proxy group.[260]

(b) Briefs on Exceptions

94. Colonial and Complainants except to the inclusion of Plains in the ROE proxy group.[261] Colonial and Complainants assert that Plains should be excluded because it did not have a current IBES growth rate as of February 2020.[262] Complainants argue that because the IBES earnings estimate for Plains had not changed since March 2019, Plains did not meet the Commission's data input requirements for ROE proxy group members.[263] Colonial also reiterates its earlier arguments that Plains is rated below investment grade by Moody's and halved its quarterly dividend in April 2020.[264]

(c) Brief Opposing Exceptions

95. Trial Staff supports including Plains as the fifth member of the ROE proxy group.[265] Trial Staff asserts that the record does not establish that Plains' growth rate is stale, as it "is equally plausible that the analyst(s) 'continued to reconfirm their forecasts'" from early 2019.[266] Trial Staff asserts that record evidence suggests that

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[259] *Id*.

[260] *Id*.

[261] Colonial Br. on Exceptions at 107 n.54 ("Colonial excepts (solely for preservation purposes) to the use of Plains All American Pipeline as the fifth member of the proxy group over ONEOK Inc."); Joint Complainants Supp. Br. on Exceptions at 1; Joint Shippers Br. Incorporating Exceptions at 3.

[262] Colonial Br. Opposing Exceptions at 40; Citgo Br. on Exceptions at 55.

[263] Citgo Br. on Exceptions at 55; *see also id.* (noting that Citgo witness Mr. Ashton "confirmed that as of January 31, 2020, Refinitiv, the owner of the IBES dataset, was still tracking Plains, but that no updated estimate had been provided by analysts").

[264] Colonial Br. Opposing Exceptions at 40.

[265] Trial Staff Br. on Exceptions at 56.

[266] *Id.* at 73-74 (quoting Ex. S-00196 (Keyton) at 12).

Plains' growth rate remained constant during the six-month period ending February 29, 2020, based on information from *Yahoo! Finance*.[267]

(d) Commission Determination

96. We affirm the Initial Decision's inclusion of Plains in the ROE proxy group. We affirm the Initial Decision's finding that Plains meets the Commission's criteria for selecting ROE proxy group members.[268] Notably, 50% of Plains' total assets are attributable to oil pipeline operations.[269] The other proposed fifth proxy group members fall far short of the 50% threshold, as discussed below.

97. We also reject the arguments for excluding Plains from the proxy group. Whereas the Commission has excluded companies for lacking an investment grade rating,[270] Plains had an investment-grade credit rating from both S&P and Fitch as of the ROE data period in this proceeding.[271] Further, we are not convinced to exclude Plains based on evidence of it halving its dividend after the ROE data period when the record does not show that this is an ongoing trend.[272] Nor do we find the age of the IBES data to be disqualifying. Value Line tracks Plains in addition to IBES.[273] One reason the Commission encourages using both Value Line and IBES data is because "IBES projections are updated on an

[267] *Id.* at 74 (citing Ex. S-00229 (Feb. 2020 DCF Results) at 1).

[268] Initial Decision, 179 FERC ¶ 63,008 at P 1024 (citing ROE Policy Statement, 171 FERC ¶ 61,155 at P 58); *see also* 2008 Policy Statement, 123 FERC ¶ 61,048 at P 8.

[269] Of Plains' total assets, 49.84% are attributable to oil pipeline operations, this rounds-up to 50%, thereby satisfying the Commission's 50% threshold. Ex. S-00066 (Potential Proxy Group: Total Assets and Net Income) at 1 (calculating that 49.84% of Plains' total assets were attributable to oil pipeline operations in the year ending March 31, 2019); *see also* Ex. S-00065 (Potential Proxy Group: Property, Plant and Equipment, and Operating Income) (noting 33.32% of Plains' operating income is attributable to pipeline operations).

[270] Opinion No. 486-B, 126 FERC ¶ 61,034 at P 141; Ex. S-00057 (Keyton) at 27:19-28:11.

[271] Initial Decision, 179 FERC ¶ 63,008 at P 1023; Ex. CIT-00028 (Ashton) at 34:2-12.

[272] Initial Decision, 179 FERC ¶ 63,008 at P 1025.

[273] *Id.* (citing Ex. S-00083 (Plains All American Pipeline Financial Data) at 7).

irregular basis as analysts revise their forecasts."[274] Moreover, the Commission has long applied its proxy group criteria flexibly to obtain a proxy group comprised of four or, preferably, five members.[275] As such, we find Plains is sufficiently risk appropriate and comparable to Colonial to be included in the ROE proxy group.

ii. ONEOK

(a) Initial Decision

98. The Initial Decision held that ONEOK should be excluded from the proxy group.[276] The Initial Decision explained that only a small portion of ONEOK's total assets and operating income are attributable to oil pipeline activities. The Initial Decision observed that the Commission typically excludes entities from an oil pipeline proxy group unless 50% of the income or assets come from the operation of oil pipelines.[277] The Initial Decision emphasized that ONEOK's primary business involves commodity sales not transportation.[278]

(b) Brief on Exceptions

99. Colonial argues that ONEOK is superior to Plains to include as a fifth member of the ROE proxy group for the same reasons that Colonial objects to Plains' inclusion above.[279]

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[274] ROE Policy Statement, 171 FERC ¶ 61,155 at P 56.

[275] *Id.* P 59 (citing Opinion No. 486-B, 126 FERC ¶ 61,034 at P 104).

[276] Initial Decision, 179 FERC ¶ 63,008 at P 1030.

[277] *Id.* PP 1027, 1030 (citing Ex. S-00065 (Potential Proxy Group: Property, Plant and Equipment, and Operating Income) at 1; Ex. S-00066 (Potential Proxy Group: Total Assets and Net Income) at 1; Ex. S-00198 (Keyton) at 1).

[278] *Id.* PP 1027-1030.

[279] Colonial Br. on Exceptions at 107 n.54.

(c) Brief Opposing Exceptions

100. Complainants assert that the Initial Decision correctly excluded ONEOK from the ROE proxy group.[280] Complainants reiterate the reasoning provided in the Initial Decision related to ONEOK's insignificant gas revenue and commodity sales.

(d) Commission Determination

101. We find that ONEOK should be excluded from the ROE proxy group. ONEOK does not meet the Commission's requirement for inclusion in the proxy group that oil pipelines account for "at least 50% of the company's assets or operating income over the most recent three-year period."[281] ONEOK's oil pipeline systems account for only 22.84% of the operating income and 23.05% of the company assets. Moreover, further supporting a finding that ONEOK is not risk appropriate, the vast majority (88%) of ONEOK's revenue is from the sale of commodities rather than pipeline transportation services.[282] These factors, together with the availability of five proxy group companies that meet the Commission's criteria,[283] outweigh the arguments for including ONEOK in the ROE proxy group.

iii. Kinder Morgan

(a) Initial Decision

102. The Initial Decision excluded Kinder Morgan from the proxy group. The Initial Decision found that only a small percentage of Kinder Morgan's operating income is attributable to oil pipeline activities, far short of the 50% threshold that the Commission

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[280] Citgo Br. on Exceptions at 58.

[281] ROE Policy Statement, 171 FERC ¶ 61,155 at P 58.

[282] Initial Decision, 179 FERC ¶ 63,008 at P 1030; *see also* Ex. CIT-0048 (Selected Excerpts from Various SEC Form 10-Ks) at 22 (ONEOK's 2019 Form 10-K reports 2019 revenues of $8,916.10 for "Commodity sales" and $1,248.30 for "Services," or approximately 88% and 12% of revenues, respectively). ONEOK is exposed to significant commodity price risk in all of its operating segments. To mitigate this risk, the company uses "financial instruments and physical-forward transactions." Ex. CIT-0045 (Ashton) at 15-16.

[283] ROE Policy Statement, 171 FERC ¶ 61,155 at P 61 ("The Commission has emphasized . . . that it will only include firms not satisfying the 50% standard until five proxy group members are obtained.").

uses for determining whether to include entities in the proxy group.[284] The Initial Decision also observed that Kinder Morgan's buying and selling activities expose the company to increased business risks compared to Colonial.[285] The Initial Decision further added that Kinder Morgan's gas pipeline business was significantly larger than its oil pipeline business.[286]

(b) Brief on Exceptions

103. Complainants argue that Kinder Morgan should be included in the ROE proxy group if the Commission requires five members.[287]

(c) Brief Opposing Exceptions

104. Colonial and Trial Staff support the Initial Decision, arguing that Kinder Morgan should be excluded from the proxy group due to the small portion of its operating income attributable to oil pipeline activities.[288] Trial Staff also asserts that Kinder Morgan should be excluded due to its frequent exposure to commodity price risk as part of its buying and selling activities for natural gas, natural gas liquids, and crude oil.[289]

(d) Commission Determination

105. We find that Kinder Morgan is properly excluded from the proxy group for determining Colonial's ROE.[290] Kinder Morgan does not meet the Commission's requirement for inclusion in the proxy group that oil pipelines account for "at least 50% of the company's assets or operating income over the most recent three-year period."[291]

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[284] Initial Decision, 179 FERC ¶ 63,008 at P 1031.

[285] *Id.* P 1033.

[286] *Id.* P 1032 (citing Ex. S-00268 (Fairchild) at 8).

[287] Citgo Br. on Exceptions at 57.

[288] Colonial Br. Opposing Exceptions at 40; Trial Staff Br. Opposing Exceptions at 74.

[289] Trial Staff Br. Opposing Exceptions at 74-75 (citing Ex. CIT-0045 (Ashton) at 12; Ex. CIT-0028 (Ashton) at 38).

[290] Initial Decision, 179 FERC ¶ 63,008 at P 1033.

[291] ROE Policy Statement, 171 FERC ¶ 61,155 at P 58.

Only 7.95% of Kinder Morgan's operating income and 12.8% of its asserts involve oil pipelines.[292]

106. Moreover, there are other reasons supporting our exclusion of Kinder Morgan from the proxy group. Kinder Morgan's gas pipeline assets and income are more than five times larger than its oil pipeline income and assets.[293] We also agree with the Initial Decision that Kinder Morgan's commodity buying and selling activities expose it to increased business risks that are not shared by Colonial.[294]

107. The above factors, together with the availability of five proxy group companies that meet the Commission's criteria,[295] outweigh the arguments for including Kinder Morgan in the ROE proxy group.

d. DCF Return

i. Initial Decision

108. For purposes of determining the DCF return, the Initial Decision averaged the proxy group's individual DCF results and calculated a nominal DCF ROE of 11.63% and a real DCF ROE of 9.30%.[296] Using the six-month study period ending February 29, 2020 discussed above,[297] the Initial Decision adopted the following inputs for the DCF

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[292] Ex. S-00267 at 1.

[293] Ex. CIT-0045 (Ashton) at 12:6-7, 14 tbl.1 (stating Kinder Morgan's 2019 assets as, *inter alia*, 12.8% "Products Pipelines" and 67.8% "Natural Gas Pipelines"); Ex. S-00267 at 1 (stating that 8.72% of Kinder Morgan's assets were dedicated to oil pipeline operations compared to 91.28% dedicated to natural gas operations). *See also* Opinion No. 571, 172 FERC ¶ 61,207 at PP 166-167 (excluding an entity from an oil pipeline proxy group because the entities gas pipeline income and assets significantly exceeded its oil pipeline income and assets).

[294] Initial Decision, 179 FERC ¶ 63,008 at P 1033. Citgo's witness Mr. Ashton shares this conclusion, Ex. CIT-0045 (Ashton) at 12:8-9, and reports that commodity sales comprised 36.4% Kinder Morgan's revenue in 2019, *id.* at 14 tbl.1.

[295] ROE Policy Statement, 171 FERC ¶ 61,155 at P 61 ("The Commission has emphasized . . . that it will only include firms not satisfying the 50% standard until five proxy group members are obtained.").

[296] Initial Decision, 179 FERC ¶ 63,008 at PP 1077, 1090 tbl.4.

[297] *Id.* PP 1002, 1078.

analysis: (1) an inflation rate of 2.33%,[298] (2) DCF short-term growth rates from IBES,[299] and (3) a long-term gross domestic product (GDP) growth rate of 4.21%.[300] The Initial Decision rejected Trial Staff's proposal to use an updated long-term GDP figure of 4.26%.[301]

ii. Brief on Exceptions

109. Trial Staff argues that the Initial Decision's DCF analysis is flawed because it used an outdated long-term GDP growth rate of 4.21% rather than 4.26% based on the most recent GDP information in the record.[302]

110. Trial Staff and Colonial argue that the Initial Decision erred by using the averages of the proxy group results, rather than the median.[303] They state that Commission precedent requires reference to the median in establishing the ROE, absent a showing that the pipeline faces anomalously high or low risks, and that all ROE witnesses in this proceeding use the median results.[304]

iii. Brief Opposing Exceptions

111. Joint Shippers support and Colonial states that it does not oppose Trial Staff's proposed update regarding updated GDP figures.[305]

iv. Commission Determination

112. We modify the Initial Decision's DCF return calculation and apply an updated long-term GDP growth rate of 4.26% based upon the more recent record evidence

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[298] *Id.* P 1038.

[299] *Id.* PP 1039, 1090 tbl.4.

[300] *Id.* P 1079.

[301] *Id*.

[302] Trial Staff Br. on Exceptions at 67-68 (citing Initial Decision, 179 FERC ¶ 63,008 at P 1079; Ex. S-00229 (Feb. 2020 DCF results) at 1, 9).

[303] Trial Staff Br. on Exceptions at 58-59; Colonial Br. on Exceptions at 107-108.

[304] Trial Staff Br. on Exceptions at 58-59; Colonial Br. on Exceptions at 107-108.

[305] *See* Joint Shippers Br. Incorporating Exceptions at 2; Colonial Br. Opposing Exceptions at 41 n.22.

provided by Trial Staff.[306] The Commission prefers to use updated information when available and no participant disputes the updated figure.[307]

113. We modify the Initial Decision's DCF to use the median, not the average. Absent unusual circumstances showing that the pipeline faces anomalously high or low risks, the Commission sets a pipeline's nominal ROE at the median of the zone of reasonableness.[308] Moreover, no participant at hearing advocated using the average instead of the median and the Initial Decision did not support its departure from Commission policy. Accordingly, the median is the appropriate measure of central tendency here.

114. As result, we adopt the DCF return below:

Table 1: Discounted Cash Flow Model

Company	6-mo. Avg. Dividend Yield	IBES Short-Term Growth	GDP Long-Term Growth	Weighted Avg. Growth (a)	Adjusted Dividend Yield (b)	DCF Results [(a)+(b)]
Enbridge	6.02%	7.23%	4.26%	6.24%	6.24%	12.48%
Enterprise	6.62%	7.96%	2.13%	6.02%	6.88%	12.90%
Magellan	6.57%	0.09%	2.13%	0.77%	6.57%	7.34%
Phillips 66	6.03%	8.21%	2.13%	6.18%	6.28%	12.46%

[306] Trial Staff Br. on Exceptions at 67-68 (explaining that Trial Staff witness Mr. Keyton calculated an updated long-term GDP growth rate of 4.26% based on IHS Markit and Energy Information Agency data from February and January 2020).

[307] Trial Staff Br. on Exceptions at 67-68; *see* Joint Shippers Br. Incorporating Exceptions at 2; Colonial Br. Opposing Exceptions at 41 n.22 ("Colonial does not oppose that modification, if the Commission chooses to make it.").

[308] ROE Policy Statement, 171 FERC ¶ 61,155 at P 88; Opinion No. 571, 172 FERC ¶ 61,207 at P 120 ("The range of the proxy group's returns produces the zone of reasonableness. The Commission generally uses the median of the zone of reasonableness to establish the regulated pipeline's cost-of-service nominal ROE."). In contrast to the median, the average can be skewed by the inclusion of data from the top or bottom of the proxy group reflecting entities with unrepresentatively high or low risk.

Plains	7.91%	6.22%	2.13%	4.86%	8.16%	13.01%
					Median ROE	12.48%
					Inflation Rate	2.33%
					Real Return	**10.15%**

e. CAPM Return

i. Initial Decision

115. The Initial Decision's CAPM analysis yielded an ROE of 13.43% (nominal) and 11.1% (real) using the six-month data period ending February 29, 2020.[309] The Initial Decision relied on the following inputs for its CAPM analysis: (1) the 30-year U.S. Treasury yield for the risk-free rate, (2) size adjustment factors from Duff & Phelps, (3) betas from Value Line, and (4) short-term growth rates from both IBES and Value Line to determine the market risk premium.[310] The Initial Decision cited the Commission's preference for sourcing betas from Value Line and rejected Trial Staff's proposal to use Bloomberg instead.[311] The Initial Decision determined the growth rate using CAPM analysis from both Value Line and IBES.[312]

116. The Initial Decision adopted Colonial witness Dr. Fairchild's market risk premium calculation[313] based on IBES and Value Line data, finding that they produce more

[309] Initial Decision, 179 FERC ¶ 63,008 at PP 1080, 1090 tbls.5-6.

[310] *Id.* P 1090 tbls.5-6 (citing, *inter alia*, Ex. CPC-00280 (Fairchild revised CAPM analysis)).

[311] *Id.* PP 1088-89 (citing ROE Policy Statement, 171 FERC ¶ 61,155 at P 8; Opinion No. 569-A, 171 FERC ¶ 61,154 at P 76).

[312] *Id.* PP 1081-85 (citing ROE Policy Statement, 171 FERC ¶ 61,155 at P 56).

[313] The market risk premium calculation consists of the "$(r_m - r_f)$" in the CAPM formula described above where "r_m" is the expected DCF analysis of dividend paying companies in the S&P 500 and "r_f" is the risk-free rate based on 30-year U.S. Treasury

accurate results than the alternative proposals.[314] The Initial Decision then averaged the different CAPM ROEs from the IBES and Value Line short-term growth rate models to yield composite CAPM ROE.[315]

ii. Brief on Exceptions

117. Participants challenged three aspects of the Initial Decision's CAPM calculation: (1) the use of an average rather than the median of the proxy group, (2) the use of betas from Value Line rather than Bloomberg and (3) the use of a short-term growth rate based upon the average of IBES and Value Line data.

118. First, as with the DCF, Trial Staff and Colonial argue that the Initial Decision erred by using the average of the proxy group results, rather than the median.[316] They state this is contrary to Commission precedent.

119. Second, Trial Staff asserts that the Initial Decision erred by sourcing CAPM betas from Value Line rather than Bloomberg.[317] Trial Staff argues that the Commission prefers Bloomberg betas over Value Line betas.[318] Trial Staff also asserts that Value Line betas are unreliable here because using them in the CAPM analysis would substantially increase the nominal ROE.[319] In contrast, Colonial supports the Initial Decision and argues that Commission policy favors using Value Line betas for oil and gas pipeline ROE determinations.[320]

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bonds. *See supra* P 77. The growth rate is relevant for determining the DCF used to determine the "r_m" in the CAPM analysis.

[314] Initial Decision, 179 FERC ¶ 63,008 at PP 1085-1086.

[315] *Id.* P 1090 tbl.6.

[316] Trial Staff Br. on Exceptions at 58-59; Colonial Br. on Exceptions at 107-108.

[317] Trial Staff Br. on Exceptions at 73-75; Joint Shippers Br. Incorporating Exceptions at 2.

[318] Trial Staff Br. on Exceptions at 73-74 (citing *Pac. Gas & Elec. Co.*, 178 FERC ¶ 61,175, at P 178 n.406 (2022)).

[319] *Id.* at 74 (citing Ex. S-00273 at 1).

[320] Colonial Br. Opposing Exceptions at 37-39 (citing ROE Policy Statement, 171 FERC ¶ 61,155 at P 46).

120. Third, regarding short-term growth rate, Trial Staff states that the Commission should instead adopt Mr. Keyton's analysis based exclusively on IBES growth rates[321] and argues that the Value Line growth rate data should be dismissed as unreliable.[322]

iii. Brief Opposing Exceptions

121. Complainants advocate for using its witness Mr. Ashton's calculated growth rate estimates and rejecting both published Value Line growth rates and IBES data. Complainants argue that Value Line data is superior to IBES because it incorporates the opinions of more analysts and is updated predictably.[323] However, rather than using published Value Line growth rates, Complainants argue that the Initial Decision should have adopted Mr. Ashton's growth rate estimates that he calculated using data from Value Line.[324] Complainants argue that the ROE Policy Statement requires determining a market risk premium on a forward-looking basis within the CAPM calculation and that, as such, the Initial Decision erred by using published Value Line growth rates which are based on historical earnings data.[325]

122. Colonial supports the Initial Decision's holding related to short-term growth rates. Colonial states that the Commission has endorsed using Value Line growth rates in a CAPM analysis. Colonial argues that using both Value Line and IBES growth rates is appropriate here because they have relative advantages and disadvantages.[326]

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[321] Trial Staff Br. on Exceptions at 72 (citing Opinion No. 569-A, 171 FERC ¶ 61,154 at P 83; *Pac. Gas & Elec. Co.*, 178 FERC ¶ 61,175 at P 197).

[322] *Id.* at 69-72.

[323] Citgo Br. on Exceptions at 65-66; *see also* Joint Shippers Br. Incorporating Exceptions at 3 (incorporating Citgo Exception No. 13 by reference); Joint Complainants Supp. Br. on Exceptions at 1 (same). Joint Shippers and Joint Complainants adopted Citgo witness Mr. Ashton's positions for purposes of determining the appropriate test period ROE. Initial Decision, 179 FERC ¶ 63,008 at P 1037.

[324] Citgo Br. on Exceptions at 58-65. Mr. Ashton used figures from the Value Line dataset that he states represent current earnings to compute his own growth rate estimates for the market risk premium calculation. Ex. CIT-0050 (Ashton) at 3-5.

[325] Citgo Br. on Exceptions at 58-65. Mr. Ashton used two estimates for current earnings found in the Value Line dataset to compute his own growth rates for the market risk premium calculation. Ex. CIT-0050 (Ashton) at 3-5.

[326] Colonial Br. Opposing Exceptions at 35 (citing ROE Policy Statement, 171

iv. Commission Determination

123. We modify the Initial Decision's holdings regarding the CAPM return but affirm the Initial Decision's use of short-term growth rates based upon both Value Line and IBES data.

124. First, consistent with our holding above involving the DCF analysis, we will adopt the median of the proxy group in our CAPM analysis and we overturn the Initial Decision's use of the average.

125. Second, we adopt Bloomberg-based betas and reverse the Initial Decision's reliance on Value Line betas.[327] We acknowledge that in the ROE Policy Statement, the Commission stated "Value Line adjusted betas are reasonable for use in the CAPM analysis as applied to natural gas and oil pipelines" as there is "substantial evidence that investors rely on Value Line betas" in making their investment decisions.[328] However, the Commission subsequently recognized the imperfect correspondence of applying Value Line betas derived from the whole New York Stock Exchange (NYSE) to risk premiums used by the Commission that are developed using the S&P 500.[329] The Commission explained that it would apply Bloomberg-based data where it was available because Bloomberg-based alternative betas are derived from the S&P 500 instead of the NYSE.[330] In this proceeding the risk premium was derived using S&P 500 data and Bloomberg-based data have been included in the record.[331] Accordingly, we modify the Initial Decision and will determine the CAPM using Bloomberg-based betas.

126. Finally, we affirm the Initial Decision in using both IBES and Value Line short-term growth estimates for purposes of determining the risk premium in the CAPM analysis.[332] In the ROE Policy Statement, the Commission stated that it would consider

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FERC ¶ 61,155 at P 56).

[327] Initial Decision, 179 FERC ¶ 63,008 at PP 1088-1089.

[328] ROE Policy Statement, 171 FERC ¶ 61,155 at P 43.

[329] *Pac. Gas & Elec. Co.*, 178 FERC ¶ 61,175 at P 178.

[330] *Id.* P 178 & n.406.

[331] Although the Commission adopted this preference for Bloomberg-based data in an electric rate proceeding subject to the Federal Power Act, the same reasoning applies to the record in this oil pipeline rate proceeding.

[332] Initial Decision, 179 FERC ¶ 63,008 at P 1081.

using Value Line growth projections in the CAPM analysis if proposed.[333] The Commission also found that it is "beneficial to diversify the data sources used in our revised natural gas and oil pipeline ROE methodology because doing so may better reflect the data sources that investors consider and mitigate the effect of any unusual data in either source."[334] We agree with the Initial Decision that using both IBES and Value Line data in the CAPM analysis here may mitigate the effect of any limitations in an individual source's data.[335]

127. We also reject Complainants' argument that the risk premium should be determined using Mr. Ashton's estimates as opposed to the Initial Decision's use of market risk premium calculation based on published Value Line short-term growth rates.[336] The Commission has endorsed using published Value Line short-term growth rates based, in part, on evidence that investors rely on these.[337] We are not convinced to depart from that approach here because the record does not indicate that any investor uses Mr. Ashton's different method for independently calculating projected short-term growth rates.[338]

128. In addition, Mr. Ashton's reasoning for his short-term growth rate calculation is internally inconsistent. Mr. Ashton's own use of that historical data contradicts Mr.

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[333] ROE Policy Statement, 171 FERC ¶ 61,155 at P 55.

[334] *Id.* P 56.

[335] Initial Decision, 179 FERC ¶ 63,008 at P 1083.

[336] Citgo Br. on Exceptions at 58-65; Initial Decision, 179 FERC ¶ 63,008 at P 1086 (comparing Ex. CPC-00280 with Ex. CIT-0052); *see also* Tr. 1684 (Ashton) (confirming that he calculated his own growth rates using information from Value Line, whereas Dr. Fairchild used specific growth rates that were published by Value Line); *id.* 1451-58.

[337] ROE Policy Statement, 171 FERC ¶ 61,155 at P 56 (explaining that using both IBES and Value Line growth estimates "may better reflect the data sources that investors consider").

[338] Although Citgo claims that investors make their own growth rate calculations using the Value Line data that Mr. Ashton used (Citgo Br. on Exceptions at 62), Citgo provides insufficient evidence for finding that investors determine estimated growth rates by performing calculations similar to Mr. Ashton's approach. *See* Tr. at 1486-87 (Ashton) (testifying that "different investors use growth numbers for different purposes," but he is unaware of any investors or investment firms that perform the calculations he did using Value Line data to project future earnings).

Ashton's position that is inappropriate to use the Value Line short-term growth estimates because those growth estimates incorporate historical data.[339] On balance, we find the Initial Decision's use of Value Line short-term growth rates more appropriate here.

129. As we result, we adopt the CAPM calculations in Tables 2 and 3 below:

Table 2: Capital Asset Pricing Model (IBES Market Risk Premium)

Company	Cost of Equity[1]	Risk-free Rate[2]	Market Risk Premium	Beta (β)	Unadjusted Cost of Equity	Size Premium[3]	Nominal ROE
Enbridge	11.43%	2.19%	9.24%	1.032	11.73%	-0.28%	11.45%
Enterprise	11.43%	2.19%	9.24%	0.894	10.45%	-0.28%	10.17%
Magellan	11.43%	2.19%	9.24%	0.768	9.29%	0.50%	9.79%
Phillips 66	11.43%	2.19%	9.24%	0.864	10.17%	0.50%	10.67%
Plains	11.43%	2.19%	9.24%	1.029	11.70%	0.73%	12.43%
						Median ROE	10.67%
						Inflation Rate	2.33%
						Real Return	**8.34%**

Note: [1] Ex. S-00270 at 2; [2] Ex. S-00270 at 18; and [3] Ex. S-00270 at 17.

Table 3: Capital Asset Pricing Model (Value Line Market Risk Premium)

Company	Cost of Equity[4]	Risk-free Rate	Market Risk Premium	Beta (β)	Unadjusted Cost of Equity	Size Premium	Nominal ROE
Enbridge	12.28%	2.19%	10.09%	1.032	12.60%	-0.28%	12.32%

[339] Citgo Br. on Exceptions at 60.

Enterprise	12.28%	2.19%	10.09%	0.894	11.21%	-0.28%	10.93%
Magellan	12.28%	2.19%	10.09%	0.768	9.94%	0.50%	10.44%
Phillips 66	12.28%	2.19%	10.09%	0.864	10.91%	0.50%	11.41%
Plains	12.28%	2.19%	10.09%	1.029	12.57%	0.73%	13.30%
						Median ROE	11.41%
						Inflation Rate	2.33%
						Real Return	**9.08%**

Note: Ex. CPC-00280.

Table 4: CAPM ROE Results		
	Nominal	Real
CAPM IBES	10.67%	8.34%
CAPM Value Line	11.41%	9.08%
CAPM ROE	**11.04%**	**8.71%**

f. Combined DCF and CAPM ROE

130. The Initial Decision calculated a nominal ROE of 12.53% and the real ROE of 10.20% by averaging the results of the DCF and CAPM analyses.[340]

131. As a result of the modifications discussed above, we adopt a nominal ROE of 11.76% and a real ROE of 9.43% for Colonial's test-period cost of service as shown in Table 5 below.[341]

[340] Initial Decision, 179 FERC ¶ 63,008 at PP 1076, 1092.

[341] We adopt the base period return of 9.02%, as proposed by Citgo witness Mr.

Table 5: Test Period ROE Results		
	Nominal	Real
CAPM ROE	11.04%	8.71%
DCF ROE	12.48%	10.15%
ROE	**11.76%**	**9.43%**

2. Test Period Capital Structure

132. We modify the Initial Decision's recommendation by adding Enbridge and Phillips 66 to the recommended four-member test period capital structure proxy group of Buckeye, Enterprise, Magellan, and Plains. This six-member capital structure proxy group produces a test period capital structure of 53.45% debt and 46.55% equity for Colonial in this proceeding.

a. Initial Decision

133. For the test period, the Initial Decision found the record supports a 54.94% debt and 45.06% equity capital structure for Colonial based on a four-member proxy group composed of Buckeye, Enterprise, Magellan, and Plains as proposed by Trial Staff witness Mr. Keyton.[342] The Initial Decision also found that, if the Commission prefers a five-member proxy group, an appropriate test period capital structure for Colonial is 54.46% debt and 45.54% equity based on Mr. Keyton's addition of Phillips 66.[343]

Ashton for the six-month period ending December 31, 2017. Ex. No. CIT-0010. While Trial Staff proposes a base period return of 9.01%, the difference between the two returns is *de minimis* and will not materially impact the cost of service. Ex. S-00060 at 3; Trial Staff Br. Opposing Exceptions at 72 (acknowledging the *de minimis* difference). Moreover, Colonial and Complainants agree on using Mr. Ashton's return on equity calculation for the six-month period ending December 31, 2017. Citgo Br. on Exceptions at 46.

[342] Initial Decision, 179 FERC ¶ 63,008 at PP 1125, 1130, 1145; *see also* Ex. S-00282 (Keyton) at 7:12-15; Ex. S-00059 at 33.

[343] Initial Decision, 179 FERC ¶ 63,008 at P 1144 (citing Ex. S-00196 (Keyton) at

134. The Initial Decision rejected Citgo witness Mr. Ashton's proposal to add Enbridge rather than Phillips 66 as the fifth proxy group member.[344] The Initial Decision rejected Colonial witness Dr. Fairchild's proposed 19-member proxy group composed of natural gas pipeline companies, which it found the Commission has not endorsed for oil pipelines.[345]

b. Brief on Exceptions

135. Colonial asserts that the Initial Decision erred in rejecting Colonial's proposed capital structure of 40.71% debt and 59.29% equity for the test period.[346] Colonial claims that the 19 natural gas companies that Dr. Fairchild chose for his capital structure proxy group more closely resemble Colonial than the oil pipelines used in the other proposed proxy groups.[347] Colonial also argues that, contrary to the Initial Decision, being publicly traded is not necessary for capital structure proxy groups, since those ratios are based on the firms' books and not market values. Colonial also argues that the average equity ratio of all the 19 natural gas pipeline companies is not anomalous even if some are individually anomalous;[348] that the Commission does not require the capital structure and ROE proxy groups to match;[349] and that the Commission has not foreclosed using natural gas pipelines in a capital structure proxy group for oil pipelines.[350]

136. In the alternative, Colonial argues that the Initial Decision should have adopted Mr. Ashton's results rather than Mr. Keyton's adjustments to those calculations.[351] Colonial argues that it was an error to remove Enbridge from the test period capital

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36-37).

[344] *Id.* PP 1105, 1141.

[345] *Id.* P 1137.

[346] Colonial Br. on Exceptions at 109 (citing Ex. CPC-00040 (Fairchild) at 26-27).

[347] *Id.* at 109-111 (citing Ex. CPC-00040 (Fairchild) at 25-26; Ex. CPC-00048).

[348] *Id.* at 111-12.

[349] *Id.* at 113 (citing Opinion No. 414-B, 85 FERC at 62,265).

[350] *Id.* at 114 (citing Opinion No. 502, 123 FERC ¶ 61,287 at PP 166 & n.277, 179).

[351] *Id.* at 112-14.

structure proxy group based on an announced merger given that Enbridge's 52.44% debt to 47.56% equity ratio at the end of the test period was not anomalous.[352]

c. Briefs Opposing Exceptions

137. Trial Staff and Complainants support the Initial Decision's rejection of Colonial's natural gas company proxy group as consistent with Commission precedent.[353] They state that Colonial's proposal to use a proxy group with oil pipelines for ROE and natural gas pipelines for capital structure is internally inconsistent and goes against the Commission's preference to use consistent groups for both purposes.[354] Trial Staff and Complainants further assert that, contrary to Colonial's claim, the Commission does not endorse using natural gas pipelines in oil pipeline proxy groups.[355]

138. Trial Staff and Complainants also argue that Colonial is not comparable to the natural gas pipelines on the relevant metrics, like risk profile.[356] Likewise, they state that the Initial Decision correctly applied Commission precedent by rejecting the natural gas companies for not being publicly traded and for having anomalous capital structures.[357]

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[352] *Id.* at 114 (citing Ex. CIT-0009 at 1).

[353] Trial Staff Br. on Exceptions at 61; Citgo Br. Opposing Exceptions at 53; Joint Complainants Br. Opposing Exceptions at 110 (adopting Citgo's arguments regarding test period capital structure); Joint Shippers Br. Opposing Exceptions at 57-61.

[354] Trial Staff Br. Opposing Exceptions at 62, 65-67 (citing Opinion No. 502, 123 FERC ¶ 61,287 at PP 174-178; *Transcon. Gas Pipe Line Corp.*, 71 FERC ¶ 61,305, at 62,195 (1995)); Citgo Br. Opposing Exceptions at 60; Joint Shippers Br. Opposing Exceptions at 57.

[355] Trial Staff Br. Opposing Exceptions at 63; Citgo Br. on Exceptions at 59 (citing Opinion No. 502, 123 FERC ¶ 61,287 at PP 176, 179; *Kuparuk Transp. Co.*, 55 FERC at 61,376-77); Joint Shippers Br. on Exceptions at 57.

[356] Trial Staff Br. Opposing Exceptions at 62-63 (citing Colonial's high credit ratings, that petroleum pipelines are generally less risky than natural gas pipelines, and that Colonial has been found less risky than 100 midstream energy companies transporting either oil or gas); Joint Shippers Br. Opposing Exceptions at 58-60 (same); Citgo Br. Opposing Exceptions at 54-58.

[357] Trial Staff Br. Opposing Exceptions at 64; Joint Shippers Br. Opposing Exceptions at 60-61; *see also* Citgo Br. Opposing Exceptions at 58-59 (arguing that the 58% equity ratio that Dr. Fairchild derived from the natural gas proxy group is outside

139. In addition, Trial Staff supports the Initial Decision's proxy group selections and opposes Colonial's objections. Trial Staff argues that Mr. Keyton's capital structure proxy groups align with the ROE proxy groups that the Initial Decision approved, consistent with Commission precedent.[358] Trial Staff also states that Colonial does not provide a legitimate basis for its request to include five companies instead of four.[359]

d. Commission Determination

140. We modify the Initial Decision to adopt a six-member test period capital structure proxy group composed of the four entities included by the Initial Decision (Buckeye, Enterprise, Magellan, Plains) and two additional entities (Enbridge and Phillips 66). [360] This results in an imputed capital structure of 53.45% debt and 46.55% equity for the test period as shown in Table 6 below.

141. We add Phillips 66 in the capital structure proxy group because it had a significant oil pipeline business[361] and a reasonable capital structure of 54.46% debt and 45.54% equity as of September 30, 2018,[362] which is within the 45% to 55% equity ratio range the Commission has typically found just and reasonable for oil pipelines.[363] No participant opposes including Phillips 66 in the capital structure proxy group.

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the range typically found just and reasonable by the Commission for oil pipelines).

[358] Trial Staff Br. Opposing Exceptions at 65-67.

[359] *Id.* at 68-69.

[360] The Commission uses the pipeline's actual capital structure if the pipeline has its own credit rating, issues its own non-guaranteed debt, and has a reasonable capital structure in relation to other pipeline capital structures and to other capital structures approved by the Commission. Opinion No. 546, 154 FERC ¶ 61,070 at P 148. If these criteria are not met, the Commission will use an imputed capital structure based on the pipeline's corporate parent company or the average capital structure of a group of comparable firms (proxy group). *Id.* P 149. Because all participants agree that Colonial's capital structure and that of its parent company are anomalous for the test period, we will use a hypothetical capital structure based on a proxy group here. Initial Decision, 179 FERC ¶ 63,008 at P 1134.

[361] Oil pipelines were 71.48% of total assets. Ex. S-00066 at 1.

[362] Ex. S-00201 at 2.

[363] *See* Opinion No. 502, 123 FERC ¶ 61,287 at P 176. The Commission considers capital structures which are outside the 45% to 55% equity ratio range (*see*

142. We also add Enbridge to the capital structure proxy group. Enbridge is a representative proxy group member because it had a substantial oil pipeline business[364] and a capital structure of 49.78% debt and 50.22% equity as of September 30, 2018, which is within the appropriate range.[365] We do not find Enbridge's merger during the test period to be disqualifying given that its capital structure was not anomalous as of the end of the test period.[366]

143. We find that these additions are appropriate and make the proxy group more robust. The Commission prefers proxy groups of at least five members if representative entities can be found.[367] The Commission has observed that additional representative members "results in greater statistical accuracy."[368] Additionally, including both Enbridge and Phillips 66 in the capital structure proxy group brings it more in line with the ROE proxy group.[369]

144. Accordingly, we adopt a test period capital structure of 53.45% debt and 46.55% equity for Colonial in this proceeding based on a proxy group composed of Buckeye, Enterprise, Magellan, Plains, Enbridge, and Phillips 66 as shown in Table 6 below.[370]

Table 6; *see also infra* P 175) but, when an entity is within this range, that supports a finding that the entity is suitable for inclusion in the proxy group.

[364] Ex. CIT-0009; *see also* Ex. S-00066 at 1 (indicating that oil pipelines contributed to 42.16% of Enbridge's net operating income during the year ending March 31, 2019).

[365] *See* Opinion No. 502, 123 FERC ¶ 61,287 at P 176.

[366] *See* Initial Decision, 179 FERC ¶ 63,008 at PP 1141-1142.

[367] Opinion No. 486-B, 126 FERC ¶ 61,034 at P 104; Opinion No. 511, 134 FERC ¶ 61,121 at P 203.

[368] Opinion No. 486-B, 126 FERC ¶ 61,034 at P 104.

[369] Opinion No. 502, 123 FERC ¶ 61,287 at P 179 ("This matching of proxy groups makes sense because it ensures that the risks of the proxy groups are consistent for both capital structure and return on equity purposes."); *see supra* P 91 (adopting a test-period ROE proxy group of Enterprise, Magellan, Plains, Enbridge, and Phillips 66).

[370] We calculate Colonial's capital structure using the median of the proxy group results, as Mr. Ashton and Mr. Keyton propose. Ex. CIT-0009 at 1; Ex. S-00201 at 2. Because no participant has shown that Colonial lies towards the upper or lower end of the zone of reasonableness within the proxy group, we find that the median of the proxy

Table 6: Test Period Capital Structure		
	Debt	Equity
Buckeye	56.36%	43.64%
Enterprise	52.44%	47.56%
Magellan	62.64%	37.36%
Plains	44.61%	55.39%
Enbridge	49.78%	50.22%
Phillips 66	54.46%	45.54%
Median	**53.45%**	**46.55%**

Note: Ex. CIT-0009 at 1; Ex. S-00201 at 2.

145. Like the Initial Decision, we are not persuaded to adopt Colonial's proposed capital structure proxy group composed of 19 natural gas pipeline companies.[371] As an initial matter, a capital structure proxy group must include "comparable firms."[372] The Initial Decision correctly notes that the Commission has not endorsed using a capital structure proxy group for an oil pipeline comprised primarily of natural gas pipelines.[373] Given that the record in this proceeding includes a six-member oil pipeline proxy group, we are not persuaded to consider natural gas pipelines.

group is an appropriate measure of central tendency for determining capital structure, as we have for the ROE determinations discussed above. *See* ROE Policy Statement, 171 FERC ¶ 61,155 at P 88.

[371] Initial Decision, 179 FERC ¶ 63,008 at PP 1137-1140.

[372] Opinion No. 502, 123 FERC ¶ 61,287 at P 174.

[373] Initial Decision, 179 FERC ¶ 63,008 at P 1138. While not dispositive here, or in all cases, the Commission has found that oil and gas pipelines are not comparable for ROE purposes because they operate under a different regulatory regime and face different business risks. *Kern River Gas Transmission Co.*, Opinion No. 486, 117 FERC ¶ 61,077, at P 152 n.248 (2006).

146. Moreover, we have some concerns that Dr. Fairchild's capital structure proxy group may be skewed.[374] The Commission has found that a 45% to 55% equity range is typically reasonable for oil pipelines.[375] In contrast, of the 19 companies in Dr. Fairchild's proxy group, 16 have debt or equity ratios above 55%, 10 have ratios above 60%, and two have ratios above 70%.[376] Dr. Fairchild's proxy group has a median capital structure of 38.80% debt and 61.20% equity,[377] which is also outside the range that the Commission has typically approved for oil pipelines.[378] While the Commission will consider equity ratios outside the 45 to 55% range (particularly when supported by the company or its parent's own capital structure),[379] we find no reason to consider this potentially anomalous proxy group of gas pipelines when we have a full proxy group of oil pipelines as described above.

147. We reject Colonial's argument that the 58% equity ratio approved by the Commission in *Kuparuk* supports its position here.[380] *Kuparuk* was based upon the unique and specific evidence in that proceeding (particularly the parent's capital structure). Moreover, there were risks present in *Kuparuk* that do not apply to Colonial, including uncertainty over whether the drop in oil prices in the mid-1980s and early-1990s might shut in Kuparuk's wells and whether demand for Kuparuk's transportation

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[374] *See, e.g.*, Opinion No. 546, 154 FERC ¶ 61,070 at PP 169-172 (approving a capital structure proxy group "comprised of MLPs similar to Seaway" but removing one member due to its anomalous capital structure).

[375] Opinion No. 502, 123 FERC ¶ 61,287 at P 176.

[376] Ex. CPC-00048.

[377] *Id*.

[378] Opinion No. 502, 123 FERC ¶ 61,287 at P 176. *See also* Opinion No. 546, 154 FERC ¶ 61,070 at PP 169-172. Dr. Fairchild proposes a test period capital structure of 40.71% debt and 59.29% equity based on his proxy group's average capital structure. Colonial Br. on Exceptions at 109; Ex. CPC-00048. As discussed above, we find that it is appropriate to use the median of the proxy group here. Regardless, the average capital structure that Dr. Fairchild calculates is also anomalous.

[379] *See infra* P 175.

[380] Colonial Br. on Exceptions at 112 (citing *Kuparuk Transp. Co.*, 55 FERC at 61,376-77).

services would continue in the market it was serving.[381] We find that *Kuparuk* does not justify Colonial's approach here.

C. Carrier Property

148. The components of an oil pipeline's rate base are governed by the TOC methodology adopted by the Commission in Opinion No. 154-B.[382] Under this methodology, a pipeline's rate base consists of (1) the original cost rate base, (2) any unamortized amounts from the oil pipeline's starting rate base write-up (SRB write-up),[383] and (3) net deferred earnings.[384]

1. Trended Original Cost Elements

a. Amount and Amortization of Deferred Earnings

i. Initial Decision

149. The Initial Decision found that Colonial is entitled to recover deferred earnings in its cost of service, consistent with Opinion No. 154-B.[385]

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[381] *See Kuparuk Transp. Co.*, 55 FERC at 61,376-77.

[382] *See* Opinion No. 154-B, 31 FERC ¶ 61,377.

[383] The SRB write-up is a transitional rate base element employed to bridge the transition from a valuation ratemaking methodology to the TOC methodology as adopted in Opinion 154-B. The SRB write-up was to be amortized over the estimated life of the pipeline at the time the SRB write-up was established. *Revisions to Page 700 of FERC Form No. 6*, 140 FERC ¶ 61,217, at P 7 n.11 (2012); Opinion No. 435, 86 FERC at 61,090 (holding that "the proper way to amortize the SRB is over the composite remaining useful life of the pipeline's assets as of December 31, 1983"); *see also* Opinion No. 351-A, 53 FERC at 62,836 (explaining that the SRB write-up "is a transitional measure which should be decreased over time").

[384] The TOC methodology divides the nominal return on equity component of the cost of service into real return and an inflationary return. The real return is collected in the current year. The net deferred earnings consists of the inflation component, which is deferred to be recovered in annual installments over the remaining life of the pipeline. *See* Opinion No. 154-B, 31 FERC ¶ 61,377*; see also, e.g.*, *BP West Coast*, 374 F.3d at 1282-83.

[385] Initial Decision, 179 FERC ¶ 63,008 at PP 697-699.

150. As for the appropriate methodology to use to amortize Colonial's deferred earnings, the Initial Decision adopted Trial Staff's remaining life method, which divides annual depreciation expense by net plant in service.[386] The Initial Decision rejected Colonial's proposed composite depreciation method, which divides annual depreciation expense by gross plant in service.[387]

ii. Briefs on Exceptions

151. Joint Shippers argue that Colonial should not be entitled to recover any deferred earnings in the rates established in this proceeding. Joint Shippers contend that no earnings have been deferred in Colonial's existing rates and that Colonial has substantially over-recovered its costs for many years such that any deferred earnings have already been recovered.[388] Further, Joint Shippers argue that the rule against retroactive ratemaking is inapplicable here given that the Commission has never approved Colonial's rates with deferred earnings.[389]

152. Colonial argues that adopting the remaining life method contradicts Commission precedent, unreasonably accelerates the amortization of deferred earnings, and does not amortize plant in service and deferred earnings at the same time.[390] Further, Colonial states that adopting the remaining life method for amortizing deferred earnings would be a change in policy and would have industry-wide implications.[391] Instead, Colonial proposes to calculate the annual amortization rate using the composite depreciation method, which divides annual depreciation expense by average gross plant in service.[392]

iii. Briefs Opposing Exceptions

153. Colonial and Trial Staff take exception to Joint Shippers' argument that Colonial is not entitled to recover deferred earnings. Colonial and Trial Staff explain that

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[386] *Id.* PP 700-702. Net plant in service is gross plant in service less accrued depreciation. *See* Ex. CPC-00019 (Wetmore) at 26.

[387] Initial Decision, 179 FERC ¶ 63,008 at PP 688, 701-702.

[388] Joint Shippers Br. on Exceptions at 16-17.

[389] *Id.* at 18-20.

[390] Colonial Br. on Exceptions at 91-94.

[391] *Id.* at 95.

[392] *Id.* at 91.

Commission precedent permits pipelines to recover deferred earnings and that eliminating properly accrued deferred earnings would be retroactive ratemaking.[393]

154. Complainants and Trial Staff reject Colonial's composite depreciation method for amortizing deferred earnings because they claim the methodology is inconsistent with Commission precedent. Further, Complainants and Trial Staff contend that under Colonial's method, plant in service and deferred earnings will not fully amortize at the same time.[394]

iv. Commission Determination

155. We affirm the Initial Decision's determination that Colonial is entitled to recover deferred earnings in its cost of service. However, we reverse the Initial Decision's holding regarding the appropriate methodology for calculating the amortization rate, and instead find that Colonial should use the composite depreciation method, which divides depreciation expense by gross plant in service.

(a) Colonial can include deferred earnings in its rates

156. We are unpersuaded by Joint Shippers' argument that Colonial should not be entitled to recover any deferred earnings in the rates established in this proceeding. Since Opinion No. 154-B, the Commission has applied the TOC ratemaking methodology which includes deferred earnings.[395] Following this well-established precedent, the Initial Decision appropriately found that Colonial may reflect recovery of deferred earnings in its rates.[396]

157. We reject Joint Shippers' argument that Colonial should not be able to recover deferred earnings because Colonial has never received Commission approval for rates that included deferred earnings. The Commission previously rejected a similar argument in *Lakehead*, concluding that a pipeline "did not have to file for new rates under TOC to activate the new methodology."[397] Colonial's rates have been subject to the TOC

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[393] Colonial Br. Opposing Exceptions at 71-73; Trial Staff Br. Opposing Exceptions at 45-46.

[394] Trial Staff Br. Opposing Exceptions at 46-52; Joint Shippers Br. Opposing Exceptions at 40-44; Joint Complainants Br. Opposing Exceptions at 76-82.

[395] Opinion No. 154-B, 31 FERC at 61,834.

[396] Initial Decision, 179 FERC ¶ 63,008 at PP 697-698.

[397] *Lakehead Pipe Line Co.*, 75 FERC ¶ 61,181, at 61,591 (1996).

methodology since Opinion No. 154-B.[398] Consistent with *Lakehead*, and contrary to Joint Shippers' assertions, Colonial is entitled to recover deferred earnings in the rates established in this proceeding.

158. For similar reasons, we reject Joint Shippers' argument that allowing Colonial to recover deferred earnings would constitute retroactive ratemaking.[399] As discussed above, the TOC methodology and the accompanying deferred earnings were established when the Commission issued Opinion No. 154-B.[400] The Commission explained that the inflation-related component of the pipeline's equity return was placed in deferred earnings, which is capitalized into rate base and amortized over the life of the pipeline.[401] Elsewhere in this proceeding, all participants agree that the Opinion No. 154-B methodology was the ratemaking method in effect beginning in 1985. Like every other oil pipeline regulated by the Commission, Colonial has long reported deferred earnings on page 700 of its FERC Form No. 6. Moreover, the Commission has permitted recovery of deferred earnings in oil pipeline cost-of-service proceedings since Opinion No. 154-B.[402] In short, shippers were on notice that Colonial could recover its deferred earnings. Accordingly, Joint Shippers' argument that Colonial never received approval for including deferred earnings in rates is misplaced. Rather, given the Commission's policy to allow recovery of deferred earnings described above, adopting Joint Shippers'

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[398] *See id.* ("The appropriate starting point for trending an oil pipeline's rate base under TOC was when the new methodology became effective for oil pipelines.").

[399] The rule against retroactive ratemaking is a corollary to the filed-rate doctrine. *SFPP, LP v. FERC*, 967 F.3d 788, at 801-02 (D.C. Cir. 2020). The rule "forbids a regulated entity from charging rates for its service other than those properly filed with the appropriate federal regulatory authority [*i.e.,* the Commission]." *Amerada Hess Pipeline Corp.*, 79 FERC ¶ 61,300, at 62,358-59 (1997).

[400] Opinion No. 154-B, 31 FERC at 61,834.

[401] *Id.* Because oil pipeline rates were based upon a TOC methodology, depriving Colonial of the ability to recover these deferred earnings would deny Colonial the ability to recover that component of its annual ROE attributable to inflation.

[402] The Commission's indexing regime was always intended to recover the Opinion No. 154-B trended original cost of service. *Ass'n of Oil Pipe Lines v. FERC*, 876 F.3d 336, 345-346 (D.C. Cir. 2017) (citing Order No. 561, FERC Stats. & Regs. ¶ 30,985 at 30,949, *order on reh'g*, Order No. 561-A, FERC Stats. & Regs. ¶ 31,000 at 31,092; *Five-Year Rev. of the Oil Pipeline Pricing Index*, 153 FERC ¶ 61,312, at P 13 (2015)).

approach to exclude deferred earnings from Colonial's rates would raise retroactive ratemaking concerns.

159. We also reject Joint Shippers' claims that Colonial should not be permitted to recover deferred earnings because they allege Colonial over-recovered its costs in the past. As discussed above, Colonial is entitled to recover deferred earnings. Eliminating deferred earnings from Colonial's rates in light of Colonial's past over-recoveries would violate the Commission's rule against retroactive ratemaking, which "prohibits the Commission from adjusting current rates to make up for a utility's over- or under-collection in prior periods."[403]

(b) Colonial should derive the amortization rate by dividing the depreciation expense by gross plant in service

160. We reverse the Initial Decision's holding that Colonial should derive the amortization rate for deferred earnings based upon the remaining useful life method as advocated by Trial Staff. Instead, we find that Colonial should use the composite depreciation method, as advocated by Colonial.

161. In Opinion No. 435, the Commission ruled that:

> The amortization of the deferred equity return is to be done annually as follows. Amortization of the deferred component of the equity return begins in the year in which that inflation component is deferred. Consistent with the previous determination on how the deferred equity return is calculated in subsequent years, the composite depreciation rate for the year in which the return is first deferred will be used to amortize that deferred return in all subsequent years until the amortization is completed. This will assure that the deferred return is amortized in a reasonable period of time and prevent its indefinite extension.[404]

Since the Commission has issued its guidance, pipeline companies have used the composite depreciation method in deriving the amortization rate for deferred earnings. For example, following Opinion No. 435, SFPP derived the amortization rate for deferred earnings using the composite depreciation method in its compliance filing, which was not

[403] *Towns of Concord v. FERC*, 955 F.2d 67, 71 n.2 (D.C. Cir. 1992).

[404] Opinion No. 435, 86 FERC at 61,092.

challenged by any party.[405] In other proceedings, pipelines have similarly used the composite depreciation method for deriving an amortization rate for deferred earnings.[406] A shift to the remaining life method therefore would depart from industry practice.[407] Accordingly, we find that it is reasonable for Colonial to use the composite depreciation method here in deriving its amortization rate for deferred earnings.

162. Moreover, deriving an amortization rate for deferred earnings using the composite depreciation method is consistent with the treatment of depreciation expense. The Commission's regulations require depreciation expense to be calculated by multiplying the gross depreciable property[408] in service by the composite depreciation rate.[409] Depreciation expense is part of the calculation for deriving the amortization rate for deferred earnings. Therefore, given that depreciation expense must be calculated using composite depreciation rates, Colonial should similarly use the composite depreciation method for deriving an amortization rate for deferred earnings.

163. We are unpersuaded by arguments that the composite depreciation method will cause deferred earnings to remain unamortized after the assets are fully depreciated.

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[405] Tr. 2766-67 (Dr. Arthur affirming that SFPP used the composite depreciation rate method); Tr. 1328 (Palazzari) (testifying that the only protests were regarding starting rate base, not deferred return).

[406] *SFPP, L.P.*, 166 FERC ¶ 61,142, Opinion No. 511-D, at ordering para. (A) (2019) (affirming the use of the composite depreciation rate method for amortizing return); *Seaway Pipeline Co.*, Docket No. IS12-226-000 (delegated order) (Aug. 17, 2016); *see also* Ex. S-00173 (Ruckert) at 30-31.

[407] Tr. 5382 (Ruckert) ("I was not familiar with the possibility of using the method proposed by Ms. Palazzari in this proceeding until it was raised by Ms. Palazzari in this proceeding."). We note that the effect of the remaining life method is to increase the amount of deferred return amortized during the earlier years, while decreasing the balance of deferred earnings in the current period relative to the composite depreciation method. For pipelines who may have amortized their deferred returns with the impression that the composite depreciation method is consistent with Opinion No. 154-B, those pipelines would have forgone the opportunity to collect the additional amortization of deferred return in the earlier years. *See* Tr. 5386-90 (Ruckert).

[408] Gross property is also referred to as book cost.

[409] 18 C.F.R. § 352, 1-8 Depreciation accounting – Carrier property (2022). Additionally, Ms. Palazzari acknowledged that the composite depreciation rate is to be multiplied by gross property in service to properly calculate depreciation expense for oil pipeline companies. Ex. TMG-0076 (Palazzari) at 9.

Regardless of whether the composite or remaining life method is used in deriving an amortization rate, deferred earnings and plant in service will not fully amortize at the same time.[410] As discussed above, the practical application of Commission precedent is that pipelines use the composite depreciation method in deriving an amortization rate for deferred earnings. Based on the record in this proceeding, we find that Colonial should compute the amortization rate for deferred earnings using the composite depreciation method.

164. We are also unpersuaded by some parties' claim that certain statements in Opinion No. 154-B and Opinion No. 435-A support using the remaining life method. Although we acknowledge that these statements when viewed in isolation could be construed as supporting the remaining life method,[411] we find that the composite depreciation method is more consistent with longstanding industry practice that has been accepted by the Commission.

2. Historical Cost of Capital

a. 1984 - 2016

165. Below, we address the arguments on exceptions regarding historical capital structure (debt and equity ratio). We note that the parties stipulated to the historical cost of debt[412] and no briefs on exceptions were filed to the Initial Decision's findings regarding historical return on equity.[413]

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[410] Trial Staff Br. Opposing Exceptions at 50 n.228 ("It is worth noting that amortizing deferred earnings at a constant rates, as Mr. Ruckert proposed, will cause the total plant amortized and the total deferral amortization to not match over time. This is a natural consequence of the amortization rate for deferred earnings remaining the same even as Colonial adds carrier property over time.").

[411] The Commission has explained in Opinion No. 154-B that deferred earnings should be amortized "over the life of the property under the rate base (assuming no salvage value) hit[s] zero." Opinion No. 154-B, 31 FERC at 61,834. The Commission clarified in Opinion No. 435-A, that "once the deferred equity component is determined for a given year, the amount of the deferred equity remains fixed thereafter and is then amortized over the remaining useful life of the pipeline's assets." *SFPP, L.P.*, Opinion No. 435-A, 91 FERC ¶ 61,135, at 61,508 (2000).

[412] Regarding the historical cost of debt, "for the purposes of ratemaking," the participants stipulate the historical cost of debt for each year from 1984 through 2016. Initial Decision, 179 FERC ¶ 63,008 at P 705, tbl. 2.

[413] Regarding historical return on equity, the Initial Decision found that the record

i. Initial Decision

166. The Initial Decision adopted Citgo witness Mr. Ashton's calculations for the capital structure for the historical period 1984 through 2016, which used Colonial's parent company capital structure for the period 1984 through 2000 and a proxy group for the period 2001 through 2016. For the period 1984 through 2000, the Initial Decision explained that Mr. Ashton used Colonial's parent company capital structure because (i) Colonial's return on equity numbers were anomalous; and (ii) its debt obligations were essentially guaranteed by its parent companies under the terms of a Through-put Agreement.[414] For the period 2001 through 2016, the Initial Decision explained that Mr. Ashton developed an appropriate proxy group for establishing a reasonable capital structure to impute to Colonial.[415]

167. The Initial Decision rejected Joint Shippers' imputed 50/50 debt-to-equity capital structure for the period 1984 through 2016.[416] The Initial Decision explained that using the averaging of parent equity ratios serves to level-out anomalous equity ratios of individual parent companies and that these averages more closely approximate an appropriate capital structure for Colonial than the 50/50 imputed ratio.[417]

ii. Briefs on Exceptions

168. Joint Shippers and Trial Staff argue that the Initial Decision should have adopted a 50/50 debt-to-equity capital structure for the period 1984 through 2000, instead of Colonial's parent company average capital structure. Joint Shippers and Trial Staff contend that the parent company average capital structure is based on one document that

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supported adopting Citgo witness Mr. Ashton's calculations for the period 1984 through 2016. *Id.* P 704 (citing Revised Joint Statement of Issues (Aug. 31, 2020) at 36-37).

[414] In 1962, Colonial and nine of its owners entered into a "Through-put Agreement." Ex. CPC-00049 (Through-put Agreement). Colonial witness Dr. Fairchild explains that under the terms of the Through-put Agreement, Colonial's owners agreed that they would provide payments for transportation services (current or future) which would enable Colonial to pay all expenses, liabilities, and obligations. Ex. CPC-00040 (Fairchild) at 29. The Through-put Agreement, with extensions, had a term of June 1962 to June 15, 2002. *Id.*

[415] Initial Decision, 179 FERC ¶ 63,008 at P 736.

[416] *Id.*

[417] *Id.*

is not adequately supported.[418] Moreover, Joint Shippers and Trial Staff state that the capital structures listed in the document are anomalous.[419]

169. Colonial challenges the Initial Decision's adoption of Mr. Ashton's proxy group capital structure for 2001 through 2016. For 2001, Colonial states that Mr. Ashton improperly switched to using the capital structure of his proposed proxy group, even though Colonial's parent capital structure was still applicable based on the Through-put Agreement.[420] For 2002 through 2016, Colonial challenges the Initial Decision's rejection of a natural gas pipeline proxy group as proposed by Colonial's witness Dr. Fairchild.

iii. Briefs Opposing Exceptions

170. Colonial supports the Initial Decision's use of Colonial's parent company average data rather than a 50/50 capital structure. Colonial argues that a hypothetical 50/50 capital structure is arbitrary, unsupported, and contrary to Commission precedent.[421]

171. Trial Staff and Joint Shippers dispute Colonial's reliance on the Through-put Agreement for using Colonial's parent company capital structure in 2001. Trial Staff supports using Mr. Ashton's proxy group capital structure for 2001 because Colonial's parent company capital structure was anomalous that year.[422]

iv. Commission Determination

172. As discussed below, we affirm the Initial Decision's adoption of Citgo witness Mr. Ashton's calculations for capital structure for the historical period 1984 through 2016. We find that it is appropriate to use Colonial's parent company capital structure for the period 1984 through 2000. For the period 2001 through 2016, Mr. Ashton developed an appropriate proxy group for establishing a reasonable capital structure to impute to Colonial for this historical period.

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[418] Joint Shippers Br. on Exceptions at 21-22, 26-27; Trial Staff Br. on Exceptions at 80.

[419] Joint Shippers Br. on Exceptions at 23; Trial Staff Br. on Exceptions at 77-80.

[420] Colonial Br. on Exceptions at 115-116.

[421] Colonial Br. Opposing Exceptions at 42-46.

[422] Trial Staff Br. Opposing Exceptions at 69-70; Joint Shippers Br. Opposing Exceptions at 8, 62.

(a) Colonial should use its parent company capital structure for the period 1984 through 2000

173. We affirm the Initial Decision and adopt Colonial's parent company capital structure for the period 1984 through 2000.

174. In Opinion No. 502, the Commission explained that if the entity does not provide its own financing, the Commission will generally use the capital structure of the parent company that does the financing.[423] However, if the parent company's capital structure is anomalous relative to the capital structures of the publicly-traded proxy companies used in the DCF analysis and capital structure approved for other regulated pipelines, the Commission will use a hypothetical capital structure based on the average capital structure of a selected group of comparable firms.[424]

175. Here, we will use Colonial's parent company capital structure. Colonial's debt obligations during the period 1984 through 2000 were essentially guaranteed by its parent companies under the terms of the Through-put Agreement.[425] We are not persuaded by Trial Staff and Joint Shippers' objections to the use of Colonial's parent company capital structure. Trial Staff and Joint Shippers emphasize that the equity component of Colonial's parent company capital structure for the period 1984 through 2000 was generally in the range of 55-65%,[426] and the Commission has typically adopted capital

[423] Opinion No. 502, 123 FERC ¶ 61,287 at P 174.

[424] *Id.*

[425] Ex. CPC-00049 (Through-put Agreement). Joint Shippers contend that the Through-put Agreement expired in 1997, when the debt secured under the agreement was fully paid. Joint Shippers Br. on Exceptions at 24. However, Colonial witness Dr. Fairchild explains that the obligation of the parent company signatories to the Through-put Agreement remained in effect through 2001, which included backstopping all of Colonial's obligations, expenses and liabilities, including any unsecured debts issued by Colonial in addition to those debts that were in the original secured debt category. Ex. CPC-00040 (Fairchild) at 29; Ex. CPC-00049 (Through-put Agreement) at 15-19.

[426] Ex. CPC-00052 (Colonial Historical Rates of Return); Ex. CIT-0001 (Ashton) at 51 (explaining that he made no adjustments for Colonial's capital structure for periods prior to 2001 as the equity ratio was generally in the range of 55-65%). Only five of the 17 years were above 65%. Ex. CPC-00052. The highest equity ratio was 69.96% in 1984. *Id.*

structures with a lower equity component in "the 45 percent to 55 percent" range.[427] We are not convinced by this objection. Trial Staff and Joint Shippers cite no case where the Commission has rejected a proposed capital structure that is below 71% equity.[428] While the equity ratio of Colonial's parent company capital structure is higher than the typical range, we agree with the Initial Decision that "using the actual capital structures of Colonial's parent companies more closely approximates an appropriate capital structure for Colonial, especially during the period of the Through-put Agreement."[429] This approach is also consistent with the Commission's preference to use the capital structure of the pipeline's parent company.[430]

176. We reject Joint Shippers and Trial Staff's assertions that an imputed 50/50 debt-to-equity capital structure for the time period 1984 through 2000 is more appropriate. Joint Shippers and Trial Staff argue that the parent company capital structures are unsupported and that record evidence shows the median capital structures of Mr. Ashton's proposed proxy group from 2001 through 2019 were between 45-55%.[431] However, the 50/50 capital structure is an arbitrary figure that is not derived from any specific companies.[432] In contrast, the equity ratios for the period 1984 through 2000 were based on the weighted average of Colonial's parent companies, as recorded in FERC Form 6, page 700.[433]

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[427] Opinion No. 502, 123 FERC ¶ 61,287 at P 176.

[428] *See id.* P 175 (rejecting a capital structure that resulted in a 71% equity ratio).

[429] Initial Decision, 179 FERC ¶ 63,008 at P 735.

[430] Opinion No. 502, 123 FERC ¶ 61,287 at P 174.

[431] Joint Shippers Br. on Exceptions at 21-24; Trial Staff Br. on Exceptions at 75-80. Note that despite raising concerns before the ALJ regarding the parent company capital structures, Trial Staff's expert Mr. Keyton adopted Citgo witness Mr. Ashton's proposed structure for 1984 through 2016. Ex. S-00282 (Keyton) at 54 ("For the capital structures proposed for Colonial from 1984 to 2000, I accepted the figures reported by Colonial in its FERC Form No. 6 and adopted by Mr. Ashton.").

[432] Further, while Trial Staff and Joint Shippers cite to Commission precedent supporting an equity range between 45-55%, they do not provide any Commission precedent supporting the use of a hypothetical 50/50 capital structure. Trial Staff Br. on Exceptions at 77, 80; Joint Shippers Br. on Exceptions at 26-27.

[433] Ex. CPC-00040 (Fairchild) at 32.

(b) Colonial should use the proxy group proposed by Citgo witness Mr. Ashton for the period 2001 through 2016

177. We affirm the Initial Decision's use of Mr. Ashton's proxy group capital structures for the period 2001 through 2016. Mr. Ashton determined the historical capital structure for this time period based on the proxy group used (i) in the return on equity calculations accepted by the Commission between 2001 and 2008; and (ii) Mr. Ashton's return on equity calculations for 2009 through 2016.[434] We find that Mr. Ashton's proxy group is the most appropriate proxy group in the record for approximating Colonial's historical capital structure for the period 2001 through 2016.

178. Colonial was the only party to seek exceptions to the Initial Decision's holdings regarding historical capital structure for the 2001 through 2016 period. We are not persuaded to adopt Colonial's alternative proposals for determining historical capital structure. As discussed in section III.B.2, we reject as not risk appropriate Colonial's proposal to use a proxy group of natural gas companies when a proxy group of oil companies is available. We also reject Colonial's argument that the parent company capital structure should be used for the year 2001 because the Through-put Agreement was still in place. The equity ratio of Colonial's capital structure in 2001 was 71.51%, which is considered anomalous.[435] Given that Colonial's 2001 capital structure was anomalous, Colonial cannot use the capital structure ratios of its parent.[436] As discussed above, for the historical period 2001 through 2016, we find that Citgo witness Mr. Ashton's proxy group is reasonable.

b. 2017

179. We modify the Initial Decision and adopt a 2017 calendar year capital structure of 51.18% debt and 48.82% equity in this proceeding based on a proxy group of Buckeye, Enterprise, Magellan, and Enbridge[437] as proposed by Citgo witness Mr. Ashton.

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[434] Ex. CIT-0001 (Ashton) at 50-51.

[435] Ex. CPC-00052 (Colonial Historical Rates of Return); Opinion No. 502, 123 FERC ¶ 61,287 at PP 175-176 (rejecting a capital structure that resulted in a 71% equity ratio).

[436] Opinion No. 502, 123 FERC ¶ 61,287 at PP 174-177 (finding that parent company capital structure should not be used and instead a proxy group should be used to determine hypothetical capital structure).

[437] Enbridge Energy Partners, LP merged with Enbridge Partners Inc. in 2018. Ex. CIT-0008 at 1. Like the Initial Decision, we refer to both entities as "Enbridge." *See*

i. Initial Decision

180. The Initial Decision found that the record supports a base period capital structure for Colonial of 56.03% debt and 43.97% equity based on a four-member proxy group consisting of Buckeye, Enterprise, Magellan, and ONEOK as proposed by Trial Staff witness Mr. Keyton.[438] The Initial Decision also found that, should the Commission prefer a five-member proxy group, the record supports a base period capital structure of 51.90% debt and 48.10% equity based on Mr. Keyton's alternative proxy group that adds Enbridge.[439]

ii. Positions of the Participants

181. Colonial asserts that the Initial Decision erred in rejecting Colonial's proposed capital structure period based upon Dr. Fairchild's proposed proxy group of 19 natural-gas companies.[440] In the alternative, Colonial supports Mr. Ashton's base period proxy group with Buckeye, Enterprise, Magellan, and Enbridge.[441] Colonial argues that the Initial Decision erred in adopting Mr. Keyton's base period proxy group, which includes a company (ONEOK) that the Initial Decision expressly found inappropriate for the test period ROE proxy group.[442] Colonial argues that the Initial Decision also erred in

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Initial Decision, 179 FERC ¶ 63,008 at PP 1105, 1122.

[438] Initial Decision, 179 FERC ¶ 63,008 at P 1145; *see also* Ex. S-00282 (Keyton) at 7:6-9, 52:7-9; Ex. S-00060 at 2.

[439] Initial Decision, 179 FERC ¶ 63,008 at P 1143 (citing Ex. S-00196 (Keyton) at 39; Ex. S-00202 (Alternative Base Period After-Tax Weighted Average Cost of Capital Recommendation) at 2). Note that the Initial Decision correctly states Mr. Keyton's recommended base period capital structure in Paragraph 1143 but inverts Mr. Keyton's base and test period recommendations in Paragraph 1145. *Compare* Initial Decision, 179 FERC ¶ 63,008 at PP 1143, 1145 *with* Ex. S-00196 (Keyton) at 36-39.

[440] Colonial Br. on Exceptions at 109-114.

[441] Joint Complainants also supported Mr. Ashton's testimony regarding base period capital structure at hearing. Initial Decision, 179 FERC ¶ 63,008 at P 1098.

[442] Colonial Br. on Exceptions at 113 (citing Initial Decision, 179 FERC ¶ 63,008 at PP 1028-1030).

omitting Enbridge from the capital structure proxy group based on its ROE when its capital structure is not anomalous.[443]

182. Additionally, Colonial claims that the Initial Decision erred by failing to clarify that the base period capital structure should be calculated using the average of the beginning and end of the base period (December 31, 2016, and December 31, 2017), rather than just the base period end value.[444] Colonial argues that this averaging approach is more accurate.

183. Trial Staff and Complainants support the Initial Decision's rejection of Colonial's natural-gas company proxy group as consistent with Commission precedent.[445] Trial Staff and Complainants also oppose Colonial's proposal to average the capital structure values from the beginning and end of the base period as contrary to Commission precedent,[446] and inconsistent with the methodology used by Colonial in other years.[447] In addition, Trial Staff supports the Initial Decision's proxy group selections and opposes Colonial's objections. Trial Staff argues that Mr. Keyton's capital structure proxy groups align with the ROE proxy groups that the Initial Decision approved, consistent with Commission precedent.[448] Complainants do not except to the Initial Decision's adoption of Mr. Keyton's capital structure proxy group.

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[443] *Id.* (citing Ex. CIT-0009 at 1).

[444] *Id.* at 115 (citing Ex. CPC-00040 (Fairchild) at 26-27).

[445] Trial Staff Br. on Exceptions at 61; Citgo Br. Opposing Exceptions at 53; Joint Complainants Br. Opposing Exceptions at 110 (adopting Citgo's arguments regarding capital structure); Joint Shippers Br. Opposing Exceptions at 57-61.

[446] Trial Staff Br. Opposing Exceptions at 69; Citgo Br. Opposing Exceptions at 60-61; Joint Shippers Br. Opposing Exceptions at 62-63.

[447] Citgo Br. Opposing Exceptions at 60-61.

[448] Trial Staff Br. Opposing Exceptions at 65-67.

iii. Commission Determination

184. As discussed above, we agree with the Initial Decision that it is appropriate to impute a debt-to-equity ratio from a proxy group analysis.[449] We also affirm the Initial Decision's rejection of Colonial's proposed capital structure proxy group as discussed.[450]

185. However, we modify the Initial Decision and adopt Mr. Ashton's proposed base period capital structure proxy group composed of Buckeye, Enterprise, Magellan, and Enbridge.[451] On that basis, we find that an appropriate base period capital structure for Colonial in this proceeding is 51.18% debt and 48.82% equity.[452]

186. All participants agree that it is appropriate to include Buckeye, Enterprise, and Magellan in the base period capital structure proxy group.[453] The only questions are whether to include one or both of ONEOK and Enbridge.

187. Consistent with our reasoning with the test period proxy group, we affirm the inclusion of Enbridge in the base period capital structure proxy group. Enbridge had a capital structure of 49.23% debt and 50.77% equity for calendar year 2017,[454] which is within the typical range for oil pipelines.[455] The record also demonstrates that Enbridge is representative of Colonial based on characteristics like Enbridge having more than

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[449] Initial Decision, 179 FERC ¶ 63,008 at PP 1134-1135; *see supra* section III.B.2.

[450] Initial Decision, 179 FERC ¶ 63,008 at PP 1137-1140; *see supra* section III.B.2

[451] Ex. CIT-0001 (Ashton) at 44:7-17.

[452] *Id.* at 48:8-13; Ex. CIT-0009 at 1 (capital structure analysis). As with the test-period capital structure, we find it is appropriate to use Mr. Ashton's calculation of the proxy group's median capital structure because no participant has shown that Colonial lies towards the upper or lower end of the zone of reasonableness within the proxy group. *See* ROE Policy Statement, 171 FERC ¶ 61,155 at P 88.

[453] *See* Initial Decision, 179 FERC ¶ 63,008 at P 1143 (noting this overlap in Mr. Keyton and Mr. Ashton's proposals); Colonial Br. on Exceptions at 112 (supporting Mr. Ashton's base period proxy group should Dr. Fairchild's proposal be rejected).

[454] Ex. S-00196 (Keyton) at 39:15-17; Ex. S-00202 (Alternative Base Period After-Tax Weighted Average Cost of Capital Recommendation) at 2.

[455] Opinion No. 502, 123 FERC ¶ 61,287 at P 176.

50% of its business dedicated to oil transportation.[456] We disagree with excluding Enbridge from the capital structure proxy group based solely on its 21.63% nominal base period ROE because ROE is not dispositive in a capital structure inquiry.[457]

188. We do not find it appropriate to include ONEOK in the base period capital structure proxy group. As discussed previously, we find that ONEOK is not representative of Colonial because the vast majority of ONEOK's revenue is from commodity sales rather than pipeline transportation services.[458] Additionally, the natural gas pipeline component of ONEOK's business outweighs the oil pipeline component.[459] In 2018, which is the most analogous data year in the record, oil pipelines contributed to only 15.54% of ONEOK's net assets and 11.94% of ONEOK's net operating income.[460] The participants do not present evidence showing that ONEOK's operations were significantly different in 2017. As with the test period ROE proxy group,[461] this imbalance raises concerns regarding whether ONEOK is sufficiently comparable to Colonial to merit inclusion in its capital structure proxy group.

[456] Ex. CIT-0008 (Accepted Proxy Group Companies) at 1 ("In 2017, 100% of EEP's consolidated revenues were derived from the company's liquids segments, which included owning and operating crude oil and liquid petroleum products pipeline transportation and storage assets." (citing 2017 EEP SEC Form 10-k)).

[457] *See* Initial Decision, 179 FERC ¶ 63,008 at P 1141.

[458] *See supra* P 101; Ex. CIT-0048 at 22 (ONEOK's 2019 Form 10-K reports 2019 revenues of $8,916.10 for "Commodity sales" and $1,248.30 for "Services," or approximately 88% and 12% of revenues, respectively).

[459] *See* Ex. CPC-00281 (Fairchild) at 5:4-5 ("ONEOK is predominantly engaged in the NGL business."); Ex. CIT-0045 (Ashton) at 15 ("ONEOK does not have a refined products or crude oil transportation reporting segment."); Ex. CIT-0048 (ONEOK 2019 Form 10-K) at 20 (describing the company's "core capabilities" as "gathering, processing, fractionating, transporting, storing and marketing natural gas and NGLs through vertical integration across the midstream value chain").

[460] Ex. S-00198 (Corrected Potential Proxy Group: Property, Plant and Equipment, and Operating Income Data) at 1.

[461] Initial Decision, 179 FERC ¶ 63,008 at P 1030.

189. Because the participants identified only four representative proxy group members for the base period, we find it appropriate to limit the base period capital structure proxy group to Buckeye, Enterprise, Magellan, and Enbridge.[462]

190. Finally, we reject Colonial's unsupported claim that its base period capital structure should be calculated by averaging the values from December 31, 2016, and December 31, 2017.[463] To determine the capital structure for a specific year, we are only concerned with the entity's debt-to-equity ratio for that year. This is computed using the year-end debt-to-equity ratio because it represents the company's cumulative experience during the year. Averaging the debt-to-equity ratio values from the end of different years would not yield an accurate representation of capital structure for the year at issue, as Colonial contends.[464] It would instead provide an average capital structure over a longer period, which is not relevant for developing the weighted average cost of capital in a particular year.[465] Moreover, Colonial's proposal is inconsistent with the methodology Colonial applied to other time periods in this proceeding.

[462] *See* Opinion No. 486-B, 126 FERC ¶ 61,034 at P 104; *SFPP*, 134 FERC ¶ 61,121 at P 203.

[463] Colonial Br. on Exceptions at 115 (citing Ex. CPC-00040 (Fairchild) at 10, 26-27).

[464] *Id.*

[465] We also reject Colonial's claim that an averaging approach is necessary for capital structure simply because other cost-of-service rate components may be normalized. *See id.* (arguing that averaging is appropriate for capital structure since Colonial witnesses do the same with ROE and plant values).

3. Accumulated Deferred Income Tax Balance and Amortization; Excess Deferred Income Tax

a. Initial Decision

191. The Initial Decision recommended adopting Joint Shippers' proposed accumulated deferred income tax (ADIT)[466] and excess ADIT (EDIT)[467] balances, which rely on Colonial's FERC Form No. 6, page 700 information as modified to reflect: (1) actual repairs; (2) correct tax-depreciation rates; (3) the correct Commission-approved book depreciation rates; and (4) Colonial's schedule M-1 adjustments for 2017 and 2018, modified to reflect non-jurisdictional ADIT balance.[468]

192. The Initial Decision rejected Colonial's proposed ADIT and EDIT balances, which were based on a model prepared by Colonial witness Mr. Ganz. Mr. Ganz calculated ADIT by using Colonial's ratemaking and tax depreciation rates and historical composite income tax rates to develop ADIT related to six separate groups of carrier property.[469] The Initial Decision stated that Colonial failed to explain discrepancies

[466] ADIT balances arise from tax timing differences between the straight-line depreciation used for ratemaking purposes and the accelerated depreciation used for federal income tax purposes. Generally, in the early years of an asset's life, ADIT balances increase because a pipeline's cost of service reflects a higher tax allowance than the pipeline's IRS obligations which are lower due to the effects of accelerated depreciation for income tax purposes. In a pipeline's later years, the situation reverses and the ADIT balance declines. *See Inquiry Regarding the Comm'n's Pol'y for Recovery of Income Tax Costs*, 164 FERC ¶ 61,030, at P 11 (2018). ADIT primarily impacts ratemaking by decreasing the rate base. In a cost-of-service proceeding, the Commission requires the pipeline to deduct the sums in the ADIT liability accounts from rate base so the pipeline does not improperly earn a return on amounts funded by cost-free capital. *Id.* P 12.

[467] EDIT and deficient (or unfunded) ADIT balances can result from a change in tax rates or the change from flow-through to income tax normalization. EDIT is recorded as a regulatory liability and amortized back to ratepayers; deficient ADIT is recorded as a regulatory asset and collected from ratepayers.

[468] Initial Decision, 179 FERC ¶ 63,008 at P 802. Although the Initial Decision also addressed issues related to how system integrity program management (SIPM) costs should be treated for purposes of determining ADIT, we need not address those issues here because we have concluded that SIPM costs should be expensed. *See infra* PP 286-289.

[469] Ex. CPC-00080 (Ganz) at 17. The six groups relate to: (1) the majority of Colonial's carrier property in service by property account and vintage year; (2) the 2001

between the amounts used by the Mr. Ganz's model and Colonial's reported amounts on the page 700.[470]

193. Regarding Colonial's pre-1974 unfunded ADIT balance,[471] the Initial Decision found that amortization should have commenced in October 1992 and that the balance was fully amortized before the base or test period commenced. The Initial Decision deemed deferred tax liability to be embedded in Colonial's rates when Congress determined Colonial's grandfathered rates just and reasonable under EPAct 1992.[472] The Initial Decision reasoned that following 1992, if the pre-1974 unfunded ADIT balance was not recovered by Colonial's rate, then Colonial may have sought a rate change from the Commission.[473] Accordingly, the Initial Decision rejected Colonial's proposal to begin amortization of the pre-1974 unfunded ADIT in the 2018 test period. The Initial Decision also rejected Complainants' and Trial Staff's assertions that Colonial's pre-1974 unfunded ADIT should have started amortizing before 1992.[474] The Initial Decision stated that the record provides insufficient evidence as to whether amortization was included in Colonial's rates prior to 1992.[475]

b. Briefs on Exceptions

194. Colonial asserts that the Initial Decision erred when rejecting Mr. Ganz's ADIT model based upon vintage years and different groups of carrier property. Colonial avers

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acquisition of the Collins Tank Farm; (3) the 2015 acquisition of the Port Arthur Products System; (4) capitalized leases; (5) capitalized integrity management costs; and (6) the debt portion of Colonial's Allowance for Funds Used During Construction (AFUDC). *Id.* at 23-25 (stating five groups but identifying six).

[470] Initial Decision, 179 FERC ¶ 63,008 at P 786.

[471] The unfunded ADIT balance arose when Colonial switched from flow-through to tax normalization in 1974. Ex. CPC-00080 at 19-20.

[472] Initial Decision, 179 FERC ¶ 63,008 at P 796.

[473] *Id.* P 798.

[474] *Id.* PP 790-795.

[475] *Id.* P 795.

that Mr. Ganz's model more precisely determines the federal tax liability used to determine ADIT.[476]

195. Colonial, Joint Complainants and Trial Staff take exception with the Initial Decision's determination to amortize the pre-1974 unfunded ADIT beginning in 1992, albeit for different reasons. Joint Complainants and Trial Staff claim that amortization should be deemed to have begun in 1974. Trial Staff states that Colonial's page 700 workpapers reflect amortization of pre-1974 unfunded ADIT beginning in 1974.[477] Joint Complainants contend that beginning amortization in 1974 is consistent with Commission precedent and Colonial had recourse to an affirmative rate filing if its existing rates were not sufficiently high to amortize the pre-1974 ADIT cost.[478] On the other hand, Colonial contends that it is appropriate for Colonial to include the amortization of its pre-1974 unfunded ADIT in the test period cost-of-service calculation as Colonial has not previously established, or been required to establish, rates on a cost-of-service basis.[479]

196. Joint Shippers assert that Colonial should be required to add the tax-book difference that would have resulted had Colonial availed itself of bonus depreciation in 2012 and 2013.[480]

c. Briefs Opposing Exceptions

197. Trial Staff and Complainants support the Initial Decision's finding that Colonial's ADIT and EDIT balance should be determined according to Joint Shippers' calculations.[481] Trial Staff and Joint Shippers state that Mr. Ganz's study does not incorporate the modifications to Colonial's page 700 ADIT balance identified by the Joint Shippers and adopted by the Initial Decision.[482]

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[476] Colonial Br. on Exceptions at 103-104.

[477] Trial Staff Br. on Exceptions at 92-94.

[478] Joint Complainants Br. on Exceptions at 37-42.

[479] Colonial Br. on Exceptions at 104-107.

[480] Joint Shippers Br. on Exceptions at 40-41.

[481] Trial Staff Br. Opposing Exceptions at 52-56; Joint Complainants Br. Opposing Exceptions at 83-84; Joint Shippers Br. Opposing Exceptions at 33.

[482] Trial Staff Br. Opposing Exceptions at 55; Joint Shippers Br. Opposing

198. Colonial takes exception with Trial Staff and Joint Complainants' assertion that amortization should have begun in 1974. Colonial explains that the Commission provided guidance in recent electric proceedings involving a public utility's request for recovery of unfunded deferred taxes arising prior to 1976.[483] In that guidance, the Commission established a limited compliance period in which to file for recovery of past ADIT, and Colonial claims that the test period in this proceeding falls within this limited compliance period.[484] Regarding Colonial's page 700 workpapers showing amortization of the pre-1974 unfunded ADIT balance, Colonial states that it does not set its rates based on page 700 cost of service and therefore the underlying workpapers cannot establish that Colonial's pre-1974 unfunded ADIT was recovered in rates.[485] Further, Colonial states that the Commission should reject the clarifications sought by Joint Shippers.[486]

199. Trial Staff and Complainants state that the Initial Decision correctly rejected Colonial's proposal to begin amortizing its pre-1974 unfunded ADIT in 2018.[487] Trial Staff states that a ruling allowing Colonial in this proceeding to re-amortize pre-1974 unfunded ADIT in rates would unfairly penalize current shippers for costs incurred and known to Colonial for decades.[488] Trial Staff and Complainants state that Colonial misapplies Commission precedent, as such precedent would instead reaffirm the conclusion that Colonial's proposal to include pre-1974 unfunded ADIT in rates starting in 2018 is untimely.[489]

Exceptions at 34-37.

[483] Colonial Br. Opposing Exceptions at 62-66 (citing *Commonwealth Edison Co.*, 164 FERC ¶ 61,172, at P 132 (2018), *order on reh'g & clarification*, 171 FERC ¶ 61,217 (2020)).

[484] *Id.* at 66 (citing *Commonwealth Edison Co.*, 164 FERC ¶ 61,172 at P 132).

[485] *Id.* at 67.

[486] *Id.* at 67-70.

[487] Trial Staff Br. Opposing Exceptions at 56-60; Joint Shippers Br. Opposing Exceptions at 38-40; Joint Complainants Br. Opposing Exceptions at 84-88.

[488] Trial Staff Br. Opposing Exceptions at 56-58.

[489] Trial Staff Br. Opposing Exceptions at 58-60; Joint Shippers Br. Opposing Exceptions at 38-40; Joint Complainants Br. Opposing Exceptions at 84-88.

d. Commission Determination

200. No participant, including Colonial, challenges on exceptions the Initial Decision's holdings that the ADIT and EDIT balances should be modified to reflect (1) actual repairs, (2) correct tax-depreciation rates, (3) correct Commission-approved book depreciation rates, and (4) Colonial's schedule M-1 adjustments for 2017 and 2018, modified to reflect non-jurisdictional ADIT balance.[490] Accordingly, Colonial's ADIT and EDIT calculations should reflect these modifications.[491]

201. As discussed below, we modify the Initial Decision and find that (1) the ADIT and EDIT balances should be calculated based on Colonial's approach using vintages and carrier property groups, subject to certain modifications; and (2) Colonial should have begun amortization of the pre-1974 unfunded ADIT balance in 1974. We reject Joint Shippers' clarification regarding bonus depreciation.

i. ADIT and EDIT balances should be calculated based upon vintages and carrier property groups

202. We modify the Initial Decision and adopt Colonial's methodology based upon specific carrier property groups and vintages for determining ADIT and EDIT balances. Each year's deferred taxes are calculated using the difference between the Commission's ratemaking depreciation and tax depreciation multiplied by the composite income tax rate. Ratemaking depreciation is based on the same depreciation rate, no matter the vintage of the plant, multiplied by the total plant in service. In contrast, federal tax depreciation is based upon each vintage of plant times a unique stream of steadily declining depreciation rates. By determining tax depreciation based upon carrier property group and vintage, Colonial's methodology more accurately computes each year's deferred taxes, which is then summed across time to determine ADIT.[492] Although

[490] Initial Decision, 179 FERC ¶ 63,008 at P 786.

[491] We note that Joint Shippers express concern that the Initial Decision contained an ambiguous statement that EDIT should be "netted" against ADIT balance. Joint Shippers Br. on Exceptions at 42-43. While the Initial Decision may have inadvertently mischaracterized how ADIT and EDIT should be treated, there is no dispute in this proceeding that unamortized balance of ADIT and EDIT, as adjusted for the modifications described above, should be deducted from Colonial's rate base.

[492] *See* Ex. CPC-00080 (Ganz) at 23-26 (explaining carrier property data development for ADIT calculations); *SFPP, L.P.*, 80 FERC ¶ 63,014, at 65,136-37 (1997) (finding it appropriate to develop the ADIT balance by the difference in tax and book depreciation for each category of property by vintage year); *see also* 18 C.F.R. § 367.1900 (2022).

Colonial's proposed ADIT methodology departed from its prior practice on page 700, we adopt Colonial's use of vintages because it is more precise.[493] In contrast, the Initial Decision's methodology does not calculate tax depreciation based upon carrier property group and vintage year.[494]

203. We are also not persuaded to reject Colonial's proposal based on the various adjustments recommended by the Initial Decision that are not contested on exceptions. Rather than abandon the more precise carrier property group and vintage data, we hold that Colonial should make these adjustments on compliance to Mr. Ganz's model.[495]

ii. Colonial should amortize the pre-1974 unfunded ADIT starting in 1974

204. We modify the Initial Decision and find that Colonial should have begun amortization of the pre-1974 unfunded ADIT balance in 1974. We also reject Colonial's proposal to begin amortizing the pre-1974 unfunded ADIT amount in 2018.

205. Colonial's pre-1974 unfunded ADIT arose when Colonial switched from flow-through accounting to tax normalization in 1974.[496] Colonial's switch was a result of the ICC directing oil pipelines to begin measuring their income tax costs on a normalized

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[493] We emphasize that Colonial should follow accurate accounting and ratemaking practices on page 700.

[494] Ex. TMG-0093.

[495] Ex. CPC-00080 (Ganz) at 17-19. As explained above, the Initial Decision found that the ADIT and EDIT balances should be modified to reflect (1) actual repairs, (2) correct tax-depreciation rates, (3) the correct Commission-approved book depreciation rates, and (4) Colonial's schedule M-1 adjustments for 2017 and 2018, modified to reflect non-jurisdictional ADIT balance. Initial Decision, 179 FERC ¶ 63,008 at P 786. We direct Colonial to revise Mr. Ganz's ADIT calculations to reflect these adjustments on compliance. However, as noted above, we do not adopt the Initial Decision's findings regarding the treatment of SIPM costs for purposes of determining ADIT. *See infra* PP 286-289 (finding that SIPM costs should be expensed).

[496] Prior to 1974, oil pipelines were required to measure their income tax costs on a flow-through basis so that, for ratemaking purposes, the income tax allowance reflected income taxes payable after making all appropriate deductions from income, including accelerated depreciation expense. Ex. CPC-00080 (Ganz) at 19; *see also Inquiry Regarding the Comm'n's Pol'y for Recovery of Income Tax Costs*, 164 FERC ¶ 61,030 at P 11 n.22 (explaining the flow-through method).

basis.[497] From that point forward, the income tax allowance for ratemaking purposes reflected income taxes after deducting straight-line depreciation expense. As discussed below, the record and Commission policy demonstrate that it is appropriate for Colonial to have begun amortizing the pre-1974 unfunded ADIT in 1974.

206. The record in this proceeding demonstrates that Colonial itself has long treated the pre-1974 unfunded ADIT as though it began amortizing in 1974 and as fully amortized by 2011. Colonial's witness Mr. Ganz admitted at hearing that Colonial amortized the pre-1974 unfunded ADIT for Form No. 6, page 700 purposes.[498] Moreover, Colonial's own workpapers supporting its page 700, FERC Form No. 6, for 2017 show the pre-1974 unfunded ADIT liability to be amortized commencing in 1974.[499] That calculation demonstrates that the pre-1974 unfunded ADIT was fully amortized in 2011.[500] Colonial's own longstanding practices support the amortization of the pre-1974 unfunded ADIT beginning in 1974 and fully amortizing in 2011.[501]

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[497] Accounting for Income Taxes; Interperiod Tax Allocation, Deferred Taxes, 39 Fed. Reg. 33315, 33343 (1974). To implement the change in policy, the ICC revised the Uniform System of Accounts (USofA) for oil pipelines and the annual Form P.

[498] Tr. 5023 (Ganz) (explaining that the proposal to begin amortizing pre-1974 unfunded ADIT in the test period is considered a revision with respect to Colonial's page 700 as the starting point).

[499] Ex. JC-0173 (Colonial Form No. 6 page 700 workpapers for 2015-2018) at 15-19 (providing Colonial's page 700 Workpapers "Pre-1984 Tax Depreciation" calculations, which show amortization beginning in 1974).

[500] *Id.* (showing amortization complete by 2011). The results of this calculation are incorporated in Colonial's 2017 page 700 Workpapers at "Workpaper 1." *See* Ex. JC-0003 at 23-25 (line 48).

[501] In seeking to dismiss the relevance of its prior practices on page 700, Colonial emphasizes that page 700 is a preliminary screen that does not necessarily establish what a just and reasonable rate would be. *See* Order No. 783, 144 FERC ¶ 61,049 at P 4 (citations omitted). However, in order to ensure that page 700 functions as an appropriate preliminary screen and consistent with the instructions on page 700, pipelines when completing page 700 should properly apply the Commission's Opinion No. 154-B ratemaking methodology, including the treatment of ADIT. Form No. 6, page 700 at Instruction 2. While the pipeline may be able to justify some departures from its page 700 practices in a fully litigated cost-of-service rate case as we have permitted elsewhere in this order, the pipeline's longstanding and consistent treatment of particular items in developing page 700 (such as Colonial's treatment of pre-1974 underfunded ADIT)

207. Furthermore, the Commission's policy for entities with stated rates is to begin amortizing excess or deficient ADIT balances immediately and not delay until a rate case. The Commission's policy provides that the income tax component in cost of service must be computed by making provision for any excess or deficient ADIT.[502] These policies provide that "[i]f no Commission-approved ratemaking method has been made specifically applicable to the interstate pipeline, then the interstate pipeline must use some ratemaking method for making such provision, and the appropriateness of such method will be subject to case-by-case determination."[503] As the Commission explained, for entities with stated rates that lack a Commission-approved ratemaking method, the Commission's policies "require that such [entity] use some ratemaking method to make provision for excess and deficient ADIT, and the appropriateness of this method will be subject to case-by-case determination in a later rate proceeding."[504] The Commission further explained its policy that entities with stated rates (which include oil and natural gas pipelines) that lack a Commission-approved ratemaking method should "begin reducing excess ADIT immediately upon a tax rate change and not at a later date, such as at the time of a future rate case."[505] The Commission's policy that entities with stated rates that have not had a rate case resulting in a previous Commission-approved

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remains an important consideration.

[502] 18 C.F.R. § 154.305(d)(2) (2022) ("The interstate pipeline must compute the income tax component in its cost-of-service by making provision for any excess or deficiency in deferred taxes."). Although Order No. 144 and the resulting regulations applied specifically to electric utilities and natural gas pipelines, the Commission has followed the ratemaking treatment of under- and over-funded ADIT established in Order No. 144 for oil pipeline ratemaking, starting with the issuance of Opinion No. 154-B in 1985. Opinion No. 154-B, 31 FERC ¶ 61,377 (1985); *see also* Opinion No. 511-D, 166 FERC ¶ 61,142, at P 91 (explaining that although the Commission's rules in 18 C.F.R. § 154.305 are not specifically applicable to oil pipelines, the same principles apply).

[503] 18 C.F.R. § 154.305(d)(3).

[504] *Pub. Util. Transmission Rate Changes to Address Accumulated Deferred Income Taxes*, Order No. 864-A, 171 FERC ¶ 61,033, at P 19 (2020).

[505] *Pub. Util. Transmission Rate Changes to Address Accumulated Deferred Income Taxes*, Order No. 864, 169 FERC ¶ 61,139, at P 93 (2019), *clarified*, Order No. 864-A, 171 FERC ¶ 61,033 at PP 18-19, 21. We find the Commission's guidance as to how excess and deficient ADIT should be treated for electric utilities with stated rates instructive for oil pipelines that also have stated rates and are applying the same normalization principles to address excess and deficient ADIT balances.

ratemaking method amortize excess and deficient ADIT balances immediately (rather than delaying until a rate case as Colonial proposes to do here) is grounded in fundamental stated rates principles.[506] As the Commission explained, a "stated rate is presumed to recover all its costs during the time the rate is in effect, even if some of those costs change between rate cases."[507] Therefore, even in the absence of a rate case

[506] The filed rate is the sole mechanism for recovering a pipeline's costs. However, the filed rate does not guarantee that a pipeline will recover its exact cost of service. Rather, between rate cases, an entity's "operating costs, billing determinants, and cost of capital may increase or decrease." Order No. 864-A, 171 FERC ¶ 61,033 at P 18 n.42. Amortizable costs are no different from any other cost. For instance, if a pipeline acquires a new asset, the regulated entity need not file a new rate case for that asset (1) to be added to plant accounts, (2) to begin depreciating, and (3) to begin contributing to the accumulation of ADIT via that asset's depreciation on the pipeline's books. Likewise, regular ADIT grows (and then starts reducing) between rate cases. When the pipeline has a rate case, those amounts are measured by their depreciated or amortized balance during the test period. This is reflected in the treatment of other depreciable and amortizable cost items in Colonial's rates in this proceeding. *See, e.g.*, *infra* PP 219-222 (describing treatment of AFUDC). There is no reason to treat unfunded ADIT different than other depreciable or amortizable costs. *SFPP, L.P.*, Opinion No. 511-B, 150 FERC ¶ 61,096, at P 19 (2015) ("[T]he pipeline is assumed to recover its costs (including its tax costs) via the rate in effect at the time the cost is incurred" and "[t]here is no subsequent adjustment for under- or over-recoveries."); *see also Interstate & Intrastate Nat. Gas Pipelines; Rate Changes Relating to Fed. Income Tax Rate*, Order No. 849, 164 FERC ¶ 61,031 at P 144 ("[T]he Commission expects the flow-back of the excess regulatory liability or deficiency regulatory asset to occur over the remaining book life of the associated plant assets, because depreciation of plant assets is the primary driver of timing differences in taxes as they relate to natural gas companies.").

[507] Order No. 864-A, 171 FERC ¶ 61,033 at P 18 (citing Opinion No. 511-B, 150 FERC ¶ 61,096 at P 19) ("[T]he pipeline is assumed to recover its costs (including its tax costs) via the rate in effect at the time the cost is incurred" and "[t]here is no subsequent adjustment for under- or over recoveries."); *id.* P 19 ("[A] . . . stated rate is presumed to recover all [of the entity's] costs during the time the rate is in effect, even if some of those costs change between rate cases."). Similarly, consistent with the Commission's policy that excess and deficient ADIT balances begin amortizing immediately for entities with stated rates, following the Tax Cuts and Jobs Act, the Commission required tax-paying natural gas pipelines with cost-based stated rates to file a cost of revenue study that assumed the reduction of excess ADIT commenced on January 1, 2018 (i.e., immediately as of the date the Tax Cuts and Jobs Act was enacted). Order No. 849, 164 FERC ¶ 61,031 at P 119 (requiring pipelines to "reduce their income tax allowance by an amount reflecting the first year's amortization of excess ADIT resulting [from] the reduced income tax rates under the Tax Cuts and Jobs Act"); *id.* P 145 ("FERC Form

resulting in a previous Commission-approved ratemaking method, the Commission's polices require pipelines to amortize excess and deficient ADIT balances and not delay until a rate case, the timing of which is uncertain.[508] Applying this precedent to the facts in this proceeding we find that Colonial's pre-1974 unfunded ADIT appropriately began amortizing immediately in 1974, consistent with Colonial's treatment of the unfunded ADIT in its page 700 reporting. Commission policy refutes Colonial's argument that the amortization of pre-1974 unfunded ADIT should begin in 2018 because Colonial did not have a cost-of-service rate case over the intervening years.

208. This interpretation is also consistent with other Commission precedent that specifically addressed the treatment of pre-1974 unfunded ADIT in the context of indexed rates and found that amortization began in 1974. In *SFPP*, one of the issues litigated as part of a complaint involving SFPP's rates was the amortization period related to SFPP's unfunded deferred income tax liability that existed before 1974.[509] The Commission concluded that SFPP should begin amortizing its unfunded ADIT beginning in 1974 because SFPP failed to show that it had not already recovered the portion of the unfunded ADIT that should have been amortized since 1974.[510] The Commission found it reasonable to assume that SFPP would not have adopted normalization for accounting purposes absent corresponding rate recovery of a normalized tax allowance.[511] Likewise here, Colonial adopted normalization for accounting purposes, consistent with Order No. 144.[512] As discussed above, Colonial's record demonstrates that Colonial has calculated

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No. 501-G appropriately considers the amortization of excess ADIT balances as part of calculating the tax allowance included in cost of service.").

[508] This is particularly true where the most commonly accepted ratemaking methodologies – ARAM and Reverse South Georgia – allow amortization of excess and deficient ADIT balances to begin immediately and such methods are not tethered to the timing of a rate case. Order No. 849, 164 FERC ¶ 61,031 at PP 144-145. In addition, both ARAM and Reverse South Georgia match the amortization of excess and deficient ADIT with the useful life of the depreciable asset that created the excess or deficient ADIT.

[509] *SFPP, L.P.*, 80 FERC ¶ 63,013, at 65,136-37 (1997). Similar to Colonial, SFPP changed its method of accounting for income taxes from flow-through to normalization in 1974 resulting in an unfunded deferred tax liability. *Id.*

[510] Opinion No. 435, 86 FERC at 61,093.

[511] *Id.*

[512] *Reguls. Implementing Tax Normalization for Certain Items Reflecting Timing Differences in the Recognition of Expenses or Revenues for Ratemaking & Income Tax Purposes*, Order No. 144, FERC Stats. & Regs. ¶ 30,254 (1981), *reh'g denied*, Order No.

an income tax allowance for FERC Form No. 6, page 700 purposes that includes an amortization of pre-1974 unfunded ADIT beginning in 1974. Accordingly, we find that Colonial has failed to show that it has not already recovered the unfunded ADIT that should have been amortized since 1974.

209. Order No. 144 does not support Colonial's position that amortization of the pre-1974 unfunded ADIT should be delayed to begin in the 2018 test period. In Order No. 144, the Commission adopted full income tax normalization and specified the ratemaking treatment of the tax effects of timing difference transactions that had previously been flowed through and the effects of tax rate changes.[513] The Commission found that it was appropriate to require all companies to make some provision in their deferred taxes for the tax effects of timing differences that had been previously flowed through and that those adjustments must be included in their next rate case.[514] Order No. 144 also required companies to begin the process of making up deficiencies in or eliminating excesses of their deferred tax reserves so that, within a reasonable period of time to be determined on a case-by-case basis, they will be operating under a full normalization policy.[515] In applying this case-by-case determination, the Commission has found it reasonable for entities with stated rates to begin amortization immediately.[516] Colonial switched to

144-A, FERC Stats. & Regs. ¶ 30,340 (1982), *aff'd sub nom. Pub. Sys. v. FERC*, 709 F.2d 73 (D.C. Cir. 1983); *see also* 18 C.F.R. § 154.305.

[513] Although Order No. 144 applied specifically to electric utilities and natural gas pipelines, the Commission has followed the ratemaking treatment of under- and over-funded ADIT established in Order No. 144 for oil pipeline ratemaking, starting with the issuance of Opinion No. 154-B in 1985. *Williams Pipe Line Co.*, Opinion No. 154-B, 31 FERC ¶ 61,377, *order on reh'g*, Opinion No. 154-C, 33 FERC ¶ 61,327 (1985); *see also* Opinion No. 511-D, 166 FERC ¶ 61,142 at P 91 (explaining that although the Commission's rules in 18 C.F.R. § 154.305 are not specifically applicable to oil pipelines, the same principles apply).

[514] Order No. 144, FERC Stats. & Regs. ¶ 30,254 at 31,559-60. As discussed above, in 1982, Colonial established an "across-the-board" rate increase. Ex. JC-0028 at 29-34 (Colonial's Statement of Economic Justification supporting 1982 rate increase with system-wide throughput and cost-of-service data); Ex. JC-0169 (Arthur) at 138:7-21, 140:18-141:1.

[515] Order No. 144, FERC Stats. & Regs. ¶ 30,254 at 31,559-60.

[516] Opinion No. 435, 86 FERC at 61,093; *see also* Order No. 864, 169 FERC ¶ 61,139 at P 93, *clarified*, Order No. 864-A, 171 FERC ¶ 61,033 at PP 18-19, 21.

normalization in 1974[517] and the requirements of Order No. 144 were effective in 1981.[518] Therefore, under the Commission's long-standing policy explained above, we find the pre-1974 unfunded ADIT appropriately began amortizing in 1974 for purposes of determining Colonial's rates (consistent with Colonial's approach in its page 700 calculations). Further, Colonial established an "across-the-board" rate increase in 1982 and it is unclear how Colonial's position that it may wait more than 40 years to begin amortization of the pre-1974 unfunded amount could constitute "a reasonable period of time."[519]

210. We are not persuaded by Colonial's arguments to distinguish the facts of this proceeding from *SFPP*. Colonial claims that there are factual differences between SFPP and this case, including that when income tax normalization was implemented in 1974, SFPP made the election to record ADIT retrospectively, whereas Colonial elected to do so only prospectively.[520] However, the Commission's determination that amortization of the unfunded ADIT began in 1974 in *SFPP* does not rely on the fact that SFPP elected to record ADIT "retrospectively," nor is that fact stated anywhere in the order. Further, Colonial does not elaborate on the relevance of the difference between applying normalization "retrospectively" or "prospectively," or explain how that distinction would support a determination that it is appropriate for the Commission to treat the amortization of the pre-1974 ADIT balance as starting in 2018 for purposes of the Commission's cost-of-service ratemaking.[521]

211. Similarly, we find Colonial is distinguishable from electric utility cases involving treatment of excess ADIT balances for formula rates. Colonial claims that the Commission's guidance in the electric proceedings provided for a limited compliance period (one year from publication of the orders in the Federal Register) in which to file

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[517] *See* Ex. CPC-00080 (Ganz) at 19-20.

[518] Which is prior to Colonial's 1982 "across-the-board rate increase." Initial Decision, 179 FERC ¶ 63,008 at P 795.

[519] Order No. 144, FERC Stats. & Regs. ¶ 30,254 at 31,560.

[520] Colonial Br. Opposing Exceptions at 64.

[521] Colonial did not provide any order of the Commission or its predecessor, the ICC, that discusses the election to record the unfunded ADIT prospectively. Colonial also did not provide any documents to verify that Colonial made this prospective election in the mid-1970s. As noted above, notwithstanding the election to implement normalization prospectively, Colonial has treated the pre-1974 unfunded ADIT as amortizing beginning in 1974 for purposes of its FERC Form No. 6, page 700 reporting to the Commission.

for recovery of past ADIT.[522] In *Commonwealth Edison Co.*, the Commission announced a limited, one-year compliance period in which public utilities could file to recover past ADIT if the public utility did not file a rate case subsequent to the Commission's issuance of Order No. 144 or if the public utility properly preserved its right to recover past ADIT through settlement terms.[523] According to Colonial, the test period in this proceeding falls within this limited compliance period, making Colonial's request to begin recovery of its pre-1974 unfunded ADIT timely. However, this only applied to entities that, unlike Colonial, had not had a rate case.[524] More fundamentally, that limited compliance period in *Commonwealth Edison Co.*, addressed formula rates, not stated rates.[525] As discussed above, the Commission has provided guidance that companies

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[522] Colonial Br. on Exceptions at 106 (citing *Commonwealth Edison Co.*, 164 FERC ¶ 61,172 at P 132; *PJM Interconnection, L.L.C.*, 164 FERC ¶ 61,173, at P 38 (2018)).

[523] *Commonwealth Edison Co.,* 164 FERC ¶ 61,172 at P 132. In *Commonwealth Edison Co.*, the Commission found that the electric companies had not shown the proposed tariff revisions allowing for the recovery of the full amount of past deficient ADIT to be just and reasonable because, among other things, the electric companies had filed a rate case and failed to meet the directives in Order No. 144 to begin the process of adjusting deferred tax deficiencies in a reasonable period of time. "Exelon Companies still do not explain why they waited an additional nine and a half years to make their February 23, 2018 filings [after the end of the rate moratorium in the settlement agreement]. And Exelon Companies' apparent conclusion that they could hold these amounts in reserve indefinitely conflicts with the language of Order No. 144." *Id.* P 113; *see also PJM Interconnection, L.L.C.*, 161 FERC ¶ 61,163 (2017); *order on reh'g and clarification*, 164 FERC ¶ 61,173 (2018), *pet. for review denied sub nom. Balt. Gas & Elec. Co. v. FERC*, 954 F.3d 279 (D.C. Cir. 2020) (finding that the Commission acted reasonably in determining that an electric company's 12-year delay was not a reasonable period of time and that the utilities failed to preserve their right to recover their deferred taxes).

[524] Although we find that amortization of the pre-1974 unfunded ADIT began immediately in 1974, we note that Colonial at minimum submitted a 1982 rate filing and Colonial's numerous indexed rate increases filed since 1993. Ex. S-00190 (Miller) at 27-31; Ex. S-00191 (Cost-Based Rate Exhibit) at 19-20; Ex. JC-0028 (Colonial's Response to Joint Complainants) at 29-34. All of these refute any claim by Colonial that amortization of the full amount of the pre-1974 unfunded ADIT should begin over forty years later in 2018. *See Balt. Gas & Elec. Co. v. FERC*, 954 F.3d 279 (affirming the Commission's decision that the utility did not preserve its right to recover past ADIT amounts).

[525] *Commonwealth Edison Co.*, 164 FERC ¶ 61,172 at P 132 ("If . . . conditions

with stated rates should begin amortizing excess or deficient ADIT immediately upon a tax rate change and not a later date, such as at the time of a future rate case.[526] Unlike formula rates that may lack a provision for amortization of excess or deficient ADIT balances, those amounts are presumed to amortize "immediately" for stated rates.[527] This is consistent with fundamental stated rate principles where costs may change in the years (in Colonial's case decades) between rate cases, but "the pipeline is assumed to recover its costs (including its tax costs) via the rate in effect at the time the cost is incurred" and "[t]here is no subsequent adjustment for under- or over-recoveries."[528]

212. We further find unavailing Colonial's assertions that the Initial Decision "depriv[es] Colonial of the opportunity to recover all of its income tax costs over the life of its assets."[529] On the contrary, allowing Colonial in this proceeding to re-amortize pre-1974 unfunded ADIT in rates would unfairly penalize current shippers for costs incurred and known to Colonial since 1974.[530] As explained above, a pipeline's rate is presumed

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are met, we will permit a public utility to make a FPA section 205 filing to revise its formula rate provisions to allow for the refund or recovery of all previously incurred income tax amounts as a result of full tax normalization within one year.").

[526] Order No. 864, 169 FERC ¶ 61,139; Order No. 864-A, 171 FERC ¶ 61,033 at PP 18-19.

[527] Order No. 864, 169 FERC ¶ 61,139 at P 93.

[528] Opinion No. 511-B, 150 FERC ¶ 61,096 at P 19; *see also* Order No. 864-A, 171 FERC ¶ 61,033 at P 18 ("A . . . stated rate is presumed to recover all [of the entity's] costs during the time the rate is in effect, even if some of those costs change between rate cases.").

[529] Colonial Br. on Exceptions at 106.

[530] Colonial also does not explain how its proposal to delay amortization of the unfunded ADIT for decades is consistent with the matching principle, which is the primary aim of normalization to match "the recognition in rates of the tax effects of expenses and revenues with the expenses and revenues themselves." Order No. 144, FERC Stats. & Regs. ¶ 30,254 at 31,522; Opinion No. 511-D, 166 FERC ¶ 61,142 at P 91 ("The purpose of normalization is matching the pipeline's cost-of-service expenses in rates with the tax effects of those same cost-of-service expenses."); *Pub. Sys. v. FERC*, 709 F.2d 73, 76 (D.C. Cir. 1983) (explaining that the Commission's primary justification for its decision to adopt tax normalization was "the matching principle"); *see also PJM Interconnection*, 161 FERC ¶ 61,163 at PP 20-21 (explaining that a utility's delay in addressing deficient tax balances within a reasonable time violated the matching principle), *order on reh'g*, 164 FERC ¶ 61,173 at P 25, *aff'd*, *Balt. Gas & Elec. Co. v. FERC*, 954 F.3d at 283 ("[A]s the Commission requires normalization in order to fulfill

to recover all of its costs between rate cases.[531] If the pipeline is not able to recover all of its costs through its stated rate, the pipeline may file a cost-of-service rate increase.[532]

iii. Bonus Depreciation

213. We reject Joint Shippers' requested clarification that bonus depreciation for the years 2012 and 2013 should be imputed into Colonial's ADIT balance. Joint Shippers claim that Colonial provided conflicting information as to why it did not avail itself of this tax benefit, which resulted in Colonial paying a greater amount of taxes and not deferring the tax-book differences in its ADIT balance to the detriment of shippers.[533] Joint Shippers state that such an imputation is required by Commission precedent.[534] In *ITC Midwest* and *Midcontinent Independent System Operator,* the Commission found that a utility's failure to take bonus depreciation was imprudent because it increased the revenue requirement unnecessarily (by increasing both the tax expense and rate base).[535] The Commission has found that it is neither reasonable nor prudent for management to opt out of bonus depreciation and has required that the impacts of bonus depreciation be reflected in future rate cases.[536] However, the Commission has declined to impute bonus

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the matching principle, it would seem to contradict itself if it allowed the 2006 settlement's language to allow indefinite postponement of a utility's recovery of [the] amounts.").

[531] *See supra* note 559.

[532] 18 C.F.R. § 342.4(a); Initial Decision, 179 FERC ¶ 63,008 at P 797 ("Instead of pursuing a cost-of-service change in rates, Colonial has chosen to avail itself voluntarily and regularly of the index increases offered by the Commission under Orders No. 561 and 561-A."). Because we find that amortization of the pre-1974 unfunded ADIT began immediately in 1974 under our ratemaking policies explained above, we need not address the Initial Decision's conclusion that the passage of EPAct 1992 that grandfathered Colonial's rates started the amortization of Colonial's pre-1974 unfunded ADIT. Initial Decision, 179 FERC ¶ 63,008 at PP 796-798 (finding EPAct 1992 appropriate for establishing Colonial's rates as just and reasonable); Ex. S-00190 at 27-31; Ex. S-00191 at 19-20.

[533] Joint Shippers Br. on Exceptions at 40-41.

[534] *Id.* at 41 (citing *ITC Midwest LLC*, 154 FERC ¶ 61,188, at PP 45-62 (2016); *Midcontinent Indep. Sys. Operator Inc.*, 154 FERC ¶ 61,187 (2016)).

[535] *ITC Midwest*, 154 FERC ¶ 61,188 at PP 45-62; *Midcontinent Indep. Sys. Operator*, 154 FERC ¶ 61,187.

[536] *Midcontinent Indep. Sys. Operator*, 154 FERC ¶ 61,187 at P 43; *ITC Midwest*,

depreciation for historical periods, citing the risk of causing a normalization violation.[537] Here, Colonial did not take bonus depreciation for years 2012 and 2013.[538] Requiring Colonial to impute bonus depreciation for historical periods could cause a normalization violation. Accordingly, we decline Joint Shippers' requested clarification.

4. Accumulated AFUDC and AFUDC Amortization

214. The Commission permits oil pipelines to add an Allowance for Funds Used During Construction (AFUDC) for the cost of plant additions. In essence, the allowance compensates the pipeline for the return that would otherwise be earned on funds that have been committed for utility purposes but have not yet been included in rate base.[539]

a. Initial Decision

215. The Initial Decision found that AFUDC should be amortized on the basis of the remaining life method, as suggested by Joint Shippers' witness Ms. Palazzari.

216. The Initial Decision stated that while the Commission normally looks to the composite depreciation rate for the amortization of AFUDC, the record in this proceeding indicates that amortizing AFUDC using the composite depreciation method will result in an unamortized balance of AFUDC when Colonial's rate base is fully depreciated. The Initial Decision explained that the reasons for this conclusion are highly fact dependent: (1) while AFUDC is normally recorded to the property accounts to which AFUDC is associated, and then transferred to rate base at the same time, Colonial did not record AFUDC contemporaneously; and (2) at the time the AFUDC was commenced, in 1984, Colonial already had depreciated 25% of its plant in service because it began recording depreciation in 1963.[540]

b. Briefs on Exceptions

217. Colonial and Trial Staff argue that AFUDC should be amortized using the composite depreciation method, which divides annual depreciation expense by gross plant in service. They state that AFUDC is a cumulative asset like its plant in service,

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154 FERC ¶ 61,188 at P 61.

[537] *ITC Midwest*, 154 FERC ¶ 61,188 at PP 58-60; *Midcontinent Indep. Sys. Operator*, 154 FERC ¶ 61,187 at PP 44-46.

[538] Ex. TMG-0094 (Data Responses).

[539] Opinion No. 435, 86 FERC at 61,095.

[540] Initial Decision, 179 FERC ¶ 63,008 at P 822.

and it thus makes sense to synchronize their depreciation by using the same method, based on gross plant.[541] Colonial explains that it is still in service; as such, the divergence will only get worse over time since AFUDC would depreciate twice as fast as plant in service when using the remaining life method. To the extent the Initial Decision sought to synchronize depreciation of AFUDC and the associated plant in service by exactly the same percentages, Colonial states that its witness Mr. Wetmore demonstrated that using the composite depreciation method does so.[542] Moreover, Trial Staff states that while the Initial Decision claims that using Joint Shippers' proposed AFUDC amortization rate would allow AFUDC amortization to "catch up" to the depreciation of plant in service, Trial Staff states that no catching up is necessary because the AFUDC amount began to amortize when it was accumulated in 1984.[543]

c. Briefs Opposing Exceptions

218. Joint Shippers state that because Colonial began recording plant depreciation on its books in 1963, but did not record AFUDC until 1984 when it transferred AFUDC to rate base, use of the same composite depreciation rates to amortize both plant in service and AFUDC would not synchronize the amortization of these two assets. Joint Shippers explain that if AFUDC and plant in service are amortized at the same composite depreciation rate, at the end of the test period Colonial's plant will be depreciated by 50%, but AFUDC will be depreciated by only 30%.[544]

d. Commission Determination

219. We reverse the Initial Decision and find that Colonial should amortize AFUDC using the composite depreciation method.

220. The Commission's general practice is to amortize AFUDC using the composite depreciation method.[545] As Trial Staff explained, because AFUDC and plant in service

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[541] Colonial Br. on Exceptions at 96-98.

[542] *Id.*

[543] Trial Staff Br. on Exceptions at 94-97.

[544] Joint Shippers Br. Opposing Exceptions at 44.

[545] Initial Decision, 179 FERC ¶ 63,008 at P 821 ("Normally, the Commission looks to the composite depreciation rate for the amortization of AFUDC, just as the Joint Complainants, CITGO, Colonial and Trial Staff point out.").

are both cumulative assets, it is appropriate to use the same depreciation rate based on the composite depreciation method.[546]

221. We are unpersuaded by Joint Shippers' argument that AFUDC should be depreciated at a higher rate than plant in service so AFUDC will catch up to plant in service.[547] AFUDC was first included in rate base in 1984, and as demonstrated by Trial Staff and Colonial, AFUDC did not begin to be amortized until 1984.[548] This is demonstrated by participants' AFUDC calculations, including Joint Shippers', which do not amortize any pre-1984 AFUDC and thus no "catching up" to plant in service depreciation is necessary.[549]

222. We also disagree with the Initial Decision that the remaining life method will result in no AFUDC remaining at the end of the life of plant in service. We agree with Colonial and Trial Staff that the divergence will only get worse over time since AFUDC would be depreciated at twice the pace of plant in service under the remaining life method. Contrary to the concerns raised by the Initial Decision and Joint Shippers, Trial Staff's modeling shows that using an AFUDC amortization rate based on gross plant would fully amortize AFUDC at the end of the pipeline's service life, while Joint Shippers' method would fully amortize AFUDC before plant in service is fully amortized at the end of the pipeline's service life.[550]

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[546] Ex. S-00173 (Ruckert) at 36-37; *see also* Ex. CPC-00171 (Wetmore) at 8-15.

[547] We note no participant argued that for ratemaking purposes amortization of AFUDC began in the 1960s when Colonial entered into service. Instead, Joint Shippers propose amortizing AFUDC starting in 1984 but using a remaining life method.

[548] Ex. S-00173 (Ruckert) at 36-37; Ex. CPC-00171 (Wetmore) at 8-15.

[549] *See, e.g.*, Ex. TMG-0033 at 1 (indicating the beginning of the year (BOY) equity AFUDC in 1984 was $0, and the equity AFUDC additions figure for 1984 was derived from monthly data from that year); Ex. S-00352 at 16 (same); Ex. JC-0026 at 43 (same); Ex. CIT-0015 at 16 (same); Ex. CPC-00034 at 11 (same).

[550] Ex. S-00184 (AFUDC Amortization Example); Ex. S-00173 (Ruckert) at 36-37 (Ruckert).

5. Accrued Depreciation and Colonial's Reclassification Adjustment (FERC Account No. 166 (Other Property))

a. Initial Decision

223. The Initial Decision found that Trial Staff's derivation of the accumulated depreciation balance of $1.57 billion is reasonable and recommended it be adopted after adjustment for the corrections required to conform with the Initial Decision's findings related to ADIT.

224. The Initial Decision rejected Joint Shippers' arguments that Colonial's accumulated depreciation balance should be adjusted to account for Colonial's 2014 reclassification of $108 million from Account No. 166 to other property accounts. The Initial Decision explained that a Commission Audit Report[551] indicated that Colonial had erroneously accounted for $108 million of plant in service in FERC Account No. 166, Other Property, instead of different plant in service accounts.[552] The Initial Decision stated that the reclassification conducted by Colonial in response to the Audit Report resulted in a composite depreciation rate that had little impact on Colonial's cumulative total plant in service balance.[553]

b. Brief on Exceptions

225. Joint Shippers state that the fact that the amount is not as significant a portion of Colonial's total cost of service as some other elements of its cost of service is not a reason to fail to correct an undisputed error.[554]

c. Brief Opposing Exceptions

226. Trial Staff states that it is unnecessary for ratemaking purposes to modify Colonial's pre-2014 carrier property and depreciation balances in response to Colonial's reclassification. Trial Staff explains that the Audit Report did not recommend modifying

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[551] *Colonial Pipeline Co*., Docket No. FA14-4-000, Audit Report (June 17, 2015) (delegated order) (Audit Report).

[552] Initial Decision, 179 FERC ¶ 63,008 at P 844 (citing Audit Report).

[553] *Id.* PP 860-861.

[554] Joint Shippers Br. on Exceptions at 27-29.

Colonial's pre-2014 carrier property in service and accumulated depreciation balances; the Audit Report only recommended a one-time, prospective adjustment.[555]

d. Commission Determination

227. We affirm the Initial Decision and find that Trial Staff's derivation of the accumulated depreciation balance of $1.57 billion is reasonable after adjustment for the corrections required to conform with our findings related to ADIT.

228. We find it unnecessary for ratemaking purposes to modify Colonial's pre-2014 carrier depreciation balances in response to Colonial's 2014 reclassification of approximately $108.7 million from Account No. 166 to other property accounts. Colonial's reclassification was made in response to the Audit Report, which found that Colonial "incorrectly accounted for interest during construction in Account No. 166, Other Property, instead of recording the interest in the carrier property Accounts 153-161, which are the accounts used to record the related property costs."[556] While this accounting affected the accuracy of the balances in these specific accounts, the Audit Report found that the total carrier property was not affected since Account No. 166 and Account Nos. 153-161 were used to derive the balance in Account 30, Carrier Property. The Audit Report recommended that Colonial "record, *prospectively*, capitalized interest in the accounts charged with the cost of the property to which they are related."[557] Given that the Audit Report found that Colonial's pre-2014 accounting had minimal effect on the cumulative total carrier property balance and recommended a one-time prospective adjustment, we find that Colonial need not modify its accumulated depreciation balances to account for Colonial's 2014 reclassification from Account No. 166.

6. Depreciation of Carrier Property

a. Initial Decision

229. The Initial Decision determined that Colonial's existing depreciation rates using a 30-year economic life are just and reasonable.[558]

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[555] Trial Staff Br. Opposing Exceptions at 77.

[556] Audit Report at 3, 20-22.

[557] *Id.* at 22 (emphasis added).

[558] Initial Decision, 179 FERC ¶ 63,008 at PP 945-946. Parties do not dispute the survivor curves or other elements of Colonial's depreciation computation.

b. Briefs on Exceptions

230. Trial Staff and Joint Shippers take exception with the Initial Decision's finding that Colonial's depreciation rates should continue to use a 30-year economic life based on Colonial's Commission-approved 2009 depreciation study.[559] Trial Staff states that a 50-year economic life should be used in calculating Colonial's depreciation rates.[560] In support of adjusting the depreciation rates, Trial Staff claims that evidence in the record demonstrates that the demand for Colonial's transportation services has not declined even in the face of an overall decline in the demand for refined products.[561] Moreover, Trial Staff states that there is ample supply and the Commission has traditionally considered supply as the most important limiting factor on a pipeline's economic life and depreciation rate.[562]

231. Joint Shippers claim that the economic life of Colonial's assets should be at least 35 years based on Colonial's 2015 GAAP depreciation study.[563] Alternatively, Joint Shippers request that the Commission clarify that Colonial recompute its depreciation rates based on a 30-year life as of the end of the test period.[564]

c. Briefs Opposing Exceptions

232. Colonial states that Trial Staff and Joint Shippers have not demonstrated that circumstances have changed sufficiently to warrant revising Colonial's Commission-approved depreciation rates using a 30-year economic life.[565] Colonial claims that Trial Staff ignored the substantial demand risks facing Colonial, including substantial policy

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[559] *Colonial Pipeline Co.*, Docket No. DO09-2-000 (Dec. 2, 2009) (delegated order).

[560] Trial Staff Br. on Exceptions at 90-92.

[561] *Id.* at 87-89.

[562] *Id.* at 86-87.

[563] Joint Shippers Br. on Exceptions at 37-39. Joint Complainants incorporate by reference Joint Shippers' exception to the Initial Decision adopting less than a 35-year economic life for Colonial's depreciation rates. Joint Complainants Br. Incorporating Exceptions at 2.

[564] Joint Shippers Br. on Exceptions at 39.

[565] Colonial Br. Opposing Exceptions at 20-23.

and technological initiatives as well as deteriorating demand.[566] Colonial also states that Commission precedent recognizes both supply and demand factors in limiting the economic life of pipelines.[567] Additionally, Colonial challenges parties' reliance on the 2015 GAAP study, stating that there is no credible evidence that the 2015 GAAP study is applicable for ratemaking.[568] Finally, Colonial states that Joint Shippers' clarification regarding the test period is unnecessary.[569]

d. Commission Determination

233. We affirm the Initial Decision's determination that Colonial's existing depreciation rates using a 30-year remaining economic life are just and reasonable.

234. Colonial's existing depreciation rates are supported by the record. When evaluating the appropriate economic life for depreciation rates, the Commission considers both supply and demand.[570] The record includes EIA estimates of global petroleum reserves including the EIA's 2020 Annual Energy Outlooks and BP Statistical Review of World Energy.[571] Based on the record, the estimated global production, proved reserves, and estimates of undiscovered resources is between 45 and 71 years.[572] However, the record does not contain sufficient evidence to support a finding of adequate demand for petroleum products for 50 years.[573] Further, evidence in the record casts doubt on the

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[566] *Id.* at 23-27.

[567] *Id.* at 28.

[568] *Id.* at 30-32.

[569] *Id.* at 32-33.

[570] *See Panhandle E. Pipe Line Co*., Opinion No. 885, 181 FERC ¶ 61,211, at P 190 n.414 (2022) ("[A] finding that the economic life should exceed 35 years requires both supply and demand to exceed 35 years.").

[571] Ex. S-00366 (EIA's Annual Energy Outlook 2020); Ex. S-00283 (Skorski) at 12. The Commission has relied on the EIA in the past to determine remaining economic life. *Trunkline Gas Co.*, 90 FERC ¶ 61,017, at 61,050, 61,052, 61,060 (2000).

[572] Ex. S-00283 at 12-15.

[573] The EIA's current projections only extend to 2050. *See, e.g.*, Ex. S-00283 at 16 (describing 2019 EIA projections of petroleum and other liquids consumption in the United States through 2050).

ability to project demand beyond 30 years.[574] The record demonstrates that multiple states in Colonial's market have established goals to increase electric vehicles or zero emission vehicles, and that some of the jurisdictions have carbon reduction goals well before 2068.[575] Further, at the federal level, additional public and technological pronouncements may also affect demand in Colonial's markets.[576] Energy transition-related policy and technological risks can affect the consumption of refined products in Colonial's markets in the coming years such that forecasting demand decades in the future involves considerable uncertainty. Therefore, the record demonstrates that using an economic life beyond 30 years in calculating depreciation rates is speculative.

235. Moreover, the Commission has approved a 30-year economic life for several pipelines other than Colonial.[577] Although these cases do not dictate a uniform 30-year

[574] As discussed below, the EIA's projections for consumption have declined since 2009. *See infra* note 611.

[575] *See* Ex. BE-0011 (Multi-state matrix of state carbon reduction goals); Tr. 6260-6268, 6301-6315 (Skorski); Ex. CPC-00456 (Duke Energy seeks to expand electric vehicles in the North and South Carolina); Ex. CPC-00457 (Transportation electrification in the Southeast); Ex. CPC-00458 (New Jersey calls for 100% electric vehicles by 2035); Ex. CPC-00459 (Electric vehicles rise in popularity in some of the states served by Colonial); Ex. CPC-00461 (North Carolina zero emission vehicle plan); Ex. CPC-00473 (describing a memorandum of understanding among 14 states (some of which are in Colonial's market) to ramp up electrification of buses and trucks – 30% by 2030 and 100% by 2050).

[576] Colonial explains that these developments include: (1) President Biden's January 20, 2021 Executive Order cancelling the Keystone XL presidential permit; (2) President Biden's January 20, 2021 Acceptance of "every article and clause" of the climate Paris Agreement, "done at Paris on December 12, 2015;" (3) General Motors' announcement that it plans to be carbon neutral by 2040—which means it will stop producing internal combustion engine cars by 2035; (4) Chevron CEO Mike Wirth's announcement that the company "is beginning [a] shift away from fossil fuel use"; (5) Senate consideration of a reconciliation bill including billions of dollars in tax credits for purchase of electric vehicles and tax incentives for construction of alternative energy infrastructure; and (6) the potential for a presidential declaration of climate change as a national emergency. Colonial Br. Opposing Exceptions at 25 n.14.

[577] *See, e.g.*, *Plantation Pipe Line Co.*, Docket No. DO17-14-000 (July 18, 2017) (delegated order); *Buckeye Pipe Line Co.*, Docket No. DO16-17-000 (Sept. 9, 2016) (delegated order).

remaining economic life for every pipeline, a 30-year economic life is consistent with numerous Commission orders applying a similar economic life to other pipelines.[578]

236. Trial Staff and Joint Shippers have not met the burden to demonstrate that Colonial's existing depreciation rates based on a 30-year economic life are unjust and unreasonable. Trial Staff claims that present conditions on the Colonial pipeline show that the actual barrels of oil delivered on the Colonial pipeline system between 2008 and 2018 increased, despite the existence of emissions reductions targets.[579] While Colonial's demand has increased in the past, the record demonstrates considerable uncertainty as to Colonial's demand in the future. The record shows the EIA's own projections for petroleum consumption declined significantly from 2009 to 2020.[580] Moreover, as discussed by the Initial Decision, the "escalating requirements for the state and federal government to limit emissions and promote the energy transition policies directly affect[] the demand side."[581] This conclusion is strengthened by the fact that 15 of the 18 Petroleum Administration for Defense Districts (PADD) 1 states have adopted emissions reductions goals.[582] The PADD 1 states adopted these emissions goals between 2005 and 2020,[583] which coincides with the declines in the EIA's projected demand discussed above. The emissions reductions goals also have long term deadlines, so the

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[578] *See* Ex. CPC-00451 (Depreciation Study Survey) (showing that the Commission-approved mean economic life since 2000 is 36).

[579] Trial Staff Br. on Exceptions at 88-89.

[580] As stated by the Initial Decision, the EIA's own projections for consumption in 2030 for PADD 1, which represents the East Coast region where most of Colonial's deliveries occur, declined 24.8% between 2009 and 2020. Initial Decision, 179 FERC ¶ 63,008 at P 939 (citing Ex. CPC-00195 at 38-39). The Initial Decision also stated that the EIA's 2020 report projected that total U.S. petroleum consumption would be 5.3% less in 2030 than the EIA's own 2009 report projected. *Id.* (citing Ex. CPC-00195 at 38). Moreover, there is no evidence in the record forecasting projected demand beyond 2050.

[581] *Id.* P 942.

[582] Ex. BE-0011 (Overview of State Carbon Reduction Goals) (demonstrating that Connecticut, the District of Columbia, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, Vermont, and Virginia have adopted carbon reduction goals).

[583] *See* Ex. BE-0011 (Overview of State Carbon Reduction Goals). PADD 1 states adopted carbon emissions goals between 2005 (Vermont) and 2020 (Virginia). The average years that PADD 1A, 1B, and 1C states adopted their respective goals were 2010, 2014, and 2015. *Id.*

requirements to limit emissions will become more stringent in the coming years.[584] Accordingly, the record demonstrates that there are too many uncertain factors to sufficiently support a departure from the 30-year economic life.

237. We are also not persuaded by Trial Staff's argument that supply is the predominant factor in establishing a depreciation rate. Trial Staff states that Commission guidance provides that "supply is the single most important factor in determining a pipeline's useful life."[585] We acknowledge that supply has been and continues to be an important factor in determining a pipeline's useful life. However, in more recent cases, the Commission has focused on both supply *and* demand.[586] As discussed above, we find that the record demonstrates that supply is not a limiting factor in this case. Rather, the record fails to sufficiently justify an economic life for Colonial beyond 30 years based on the evidence of demand.

238. We reject Joint Shippers' contentions that, if the 50-year economic life is rejected, then the Commission should require Colonial to recalculate its depreciation rates based on the 35-year economic life used in Colonial's 2015 GAAP depreciation study.[587] The record contains a 2015 GAAP depreciation study that Colonial commissioned for GAAP purposes, and that study does include a 35-year economic life.[588] However, Joint Shippers do not sufficiently explain why the 2015 GAAP depreciation study, which is sanctioned for bookkeeping purposes, would be appropriate for determining Colonial's depreciation rates for ratemaking purposes. Moreover, the 2015 GAAP depreciation

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[584] *See, e.g.*, Ex. CPC-00458 (New Jersey calls for 100% electric vehicles by 2035); Ex. CPC-00473 (describing a memorandum of understanding among 14 states (some of which are in Colonial's market) to ramp up electrification of buses and trucks – 30% by 2030 and 100% by 2050).

[585] Trial Staff Br. on Exceptions at 87 (citing *Iroquois Gas Transmission Sys., L.P.*, 84 FERC ¶ 61,086, at 61,437-39 (1998)).

[586] *See* Opinion No. 885, 181 FERC ¶ 61,211 at P 192 ("While evidence exists in the record of adequate supply for the pipeline for 50 years, the record fails to show sufficient demand for Panhandle for 50 years."); Opinion No. 528, 145 FERC ¶ 61,040 at PP 114-116, *aff'd*, Opinion No. 528-A, 154 FERC ¶ 61,120 (finding that Trial Staff's remaining economic life study demonstrated sufficient supply and demand for a 40 year economic life).

[587] Joint Shippers Br. on Exceptions at 37-39.

[588] Ex. CPC-00032 (Colonial 2015 GAAP Depreciation Study) at 16-19.

study includes non-carrier property, which reduces the applicability and validity for the purposes of establishing Colonial's cost of service.[589]

239. We also reject Joint Shippers' requested clarification that Colonial must recompute its depreciation rates based on a 30-year life as of the end of the test period, as opposed to using the depreciation rates approved in the 2009 study.[590] Joint Shippers have not explained why recalculating Colonial's depreciation rates using a 30-year economic life as of the end of the test period is necessary or how it will impact depreciation rates.[591] Given that Colonial's existing depreciation rates already are based on a 30-year economic life, we reject Joint Shippers' requested clarification.

7. Dismantling, Removal and Restoration

a. Initial Decision

240. The Initial Decision found that the weight of the evidence is insufficient to include an annual dismantling, removal and restoration (DR&R) allowance in Colonial's test period cost of service.

241. The Initial Decision explained that the actual costs associated with DR&R may include, but not be limited to: (1) deconstruction of the pipeline (unless abandoned in place); (2) removal of pipeline assets; and (3) restoration of the previously burdened

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[589] Initial Decision, 179 FERC ¶ 63,008 at P 944.

[590] Joint Shippers Br. on Exceptions at 39.

[591] Joint Shippers state that the Initial Decision rejected Colonial's proposed 25-year life as of the end of 2017, which would be the remaining life as of the end of the base period if the 2009 depreciation rates continued in effect as proposed by Colonial. Joint Shippers Br. on Exceptions at 39. However, Joint Shippers confuse average remaining life (ARL) with economic life. ARL is used to calculate depreciation rates for each class and is generated by combining information about the expected physical life, and particularly expected interim retirements, with the assumed economic life. Ex. CPC-00195 (Webb) at 22. As explained by Colonial witness Webb, Colonial's ARL of 25 years as of the end of 2017 means that if Colonial never invested another dollar in carrier assets, it will be fully depreciated sometime in 2032 at its current depreciation rates. *Id.* at 24. To the extent Colonial continues to make additional investments in carrier property, the ARL will be extended relative to the current Commission-approved depreciation rates. *Id.* at 25. As long as additions to carrier property roughly equal depreciation expense, and such additions extend the life of the property, depreciation expense will appropriately match costs with causation. *Id.*

property.[592] Here, Colonial sought to include for the first time an annual DR&R allowance of $78 million.[593] However, the Initial Decision stated that there is no evidence in this record of even one contract entered into by Colonial to undertake DR&R service, or one post-service cost that is not already covered by asset retirement obligations (ARO) and net salvage contained in depreciation rates.[594] Further, the Initial Decision explained that there is no evidence that any of the high-level estimates Colonial provided on this record for a DR&R allowance make any distinction between carrier and non-carrier activities or property, as required by the Commission's regulations.[595]

b. Briefs on Exceptions

242. Colonial takes exception with the Initial Decision's findings, stating that the Initial Decision misinterprets the ICA and Commission precedent and conflates DR&R with AROs and net salvage.[596] Moreover, Colonial states that its witness Mr. Wilder provided a detailed decommissioning cost study of both pipeline and facilities.[597] To support Mr. Wilder's testimony, Colonial explains that its witness Mr. Bryant performed a systematic review of removal requirements for each Colonial segment, which is more than sufficient to support its DR&R estimate.[598] Further, Colonial contends that the Initial Decision reversed the burden of proof by finding that it was up to Colonial to prove its entitlement to a DR&R allowance.[599]

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[592] Initial Decision, 179 FERC ¶ 63,008 at P 947.

[593] Ex. CPC-00034 at 1, Statement A, Line 7 (Base Period and Test Period Cost of Service).

[594] Initial Decision, 179 FERC ¶ 63,008 at P 948.

[595] *Id.* P 988 (citing 18 C.F.R. pt. 352.34 (noncarrier property); *Acct*., *Financial Reporting & Rate Filing Requirements for Asset Retirement Obligations*, Order No. 631, 103 FERC ¶ 61,021, at P 11 (2003)).

[596] Colonial Br. on Exceptions at 78-82.

[597] *Id.* at 82-84.

[598] *Id.* at 84-86.

[599] *Id.* at 86-90.

c. Briefs Opposing Exceptions

243. Trial Staff and Complainants support the Initial Decision's finding that Colonial's proposed DR&R costs were not adequately supported.[600] They generally oppose Colonial's attempt to introduce a new cost liability in response to a complaint with information from outside the test period.[601] Trial Staff and Joint Shippers argue that the Initial Decision correctly recognized the difference between AROs and DR&R costs.[602]

d. Commission Determination

244. We affirm the Initial Decision's finding that Colonial failed to adequately support its proposed DR&R costs.

245. Because Colonial does not currently have a DR&R allowance and first proposed a DR&R allowance in this case, Colonial bears the burden of proof that its proposed DR&R cost and methodology is just and reasonable.

246. Here, Colonial has not sufficiently supported its proposed DR&R costs. Colonial does not provide evidence of any commitments to undertake the activity for which it estimates DR&R costs. Although Colonial claims its witness Mr. Wilder performed a detailed study,[603] as explained by the Initial Decision, Colonial did not provide any contract or identify any other obligation to any entity (*e.g.*, a state, a landowner, a shipper) requiring or causing the incurrence of these costs.[604] Moreover, the study is

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[600] Trial Staff Br. Opposing Exceptions at 40-41; Joint Complainants Br. Opposing Exceptions at 103-110; Joint Shippers Br. Opposing Exceptions at 51-54.

[601] *E.g.*, Joint Complainants Br. Opposing Exceptions at 103-110.

[602] Trial Staff Br. Opposing Exceptions at 42-43; Joint Shippers Br. Opposing Exceptions at 50-51, 56.

[603] Colonial Initial Br. on Exceptions at 82-84.

[604] Initial Decision, 179 FERC ¶ 63,008 at P 994 (noting that no evidence was presented of an agreement with "a third-party landowner of the right of way; a State; a state Department of Environmental Protection or other state agency; its owners; a resolution from its shareholders; a city or town or county or other municipal form that it passes through; its shippers; or, some other bona fide counterparty, that mandates [DR&R activities]."); *cf*, Opinion No. 502, 123 FERC ¶ 61,287 at PP 21, 138-142 (finding that the transportation service agreement provided for the recovery of DR&R through transportation rates); *Kuparuk Transp. Co.*, 55 FERC ¶ 61,122, at 61,382 (1991) (permitting the recovery of DR&R costs based on an agreement with the State of Alaska

based on unsupported assumptions. For example, as explained by Trial Staff, the underlying data has never been verified,[605] and the methodology is based on extrapolations that have not been demonstrated to be representative.[606]

247. Contrary to Colonial's assertions, the Initial Decision did not conflate DR&R costs with AROs and net salvage.[607] Rather, the Initial Decision questioned why certain asset retirement obligations were "being duplicated in the dismantling, removal and restoration proposal . . . and included as part of Colonial witness Wilder's estimate."[608] Moreover, the Initial Decision stated that Colonial witness Mr. Wetmore did not assign any portion of the proposed DR&R allowance to non-carrier activities, although the record demonstrates there are non-carrier activities that rely on shared assets, expenses, and personnel.[609]

248. Further, we are not persuaded by Colonial's reliance on *New England Power Co.* to argue that it has provided a reasonable estimate of its removal and restoration obligations.[610] In *New England Power Co.,* the Commission stated that it accepts long-

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for the restoring of the right-of-way to its natural condition upon expiration of the lease).

[605] Ex. S-00283 (Skorski) at 33-37.

[606] Initial Decision, 179 FERC ¶ 63,008 at P 996 (explaining that just "445.17 miles of the 5,500-mile Colonial System" was reviewed by Colonial's experts and just "46.74 miles worth of pipeline right of way" had clear removal upon termination language); *id*. P 995 (quoting Colonial's witness conceding that he simply "*assumed* the owner of a right of way being crossed or regulatory authority over the waterway being crossed, would dictate the removal") (emphasis in original). During cross-examination, Colonial witness Mr. Wilder conceded the following flaws in his analysis: that the study was based on ferrous metal quotes and did not account for recycling of copper or other non-ferrous metals; (Tr. 4585:23-4586:20 (Wilder)) the study did not include an estimate of tonnage or value of recyclable material; (Tr. 4587:14-18 (Wilder)) the study did not consider any offsetting revenues Colonial might receive for repurposing the land; (Tr. 4597:2-14 (Wilder)) and the study did not reflect the value of Colonial's existing rights-of-way or alternate uses of the land. Tr. 4626:24-4631:5 (Wilder).

[607] Colonial Br. on Exceptions at 79.

[608] Initial Decision, 179 FERC ¶ 63,008 at P 988.

[609] *Id.* P 988 n.2027.

[610] We also find unavailing Colonial's arguments that the Commission has never rejected a DR&R allowance when an oil pipeline has sought one. Colonial Br. on Exceptions at 79. As discussed above, while the Commission has permitted a DR&R

range forecasts as cost support and only requires that the projections were made in good faith to be considered reasonable.[611] Colonial's reliance on that case is misplaced because the cost-of-service element at issue in that case was post-retirement benefits other than pensions (PBOPs). Moreover, the projections for such PBOPs are based on annual studies.[612] Colonial's cost-of-service element issue in this proceeding is a DR&R allowance, and as acknowledged by Colonial, it has not previously conducted a DR&R cost study.[613] Further, as explained above, we find Colonial did not sufficiently support its proposed DR&R costs.[614]

D. Operating Expenses

1. Incident Response Costs

249. Incident response costs are short-term expenses to respond to product releases from the pipeline (e.g., spills), such as emergency response contractors, product containment and recovery, pipeline replacement/repair, and certain remediation costs.[615]

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allowance in certain circumstances, Colonial has not sufficiently demonstrated in this proceeding that it meets those circumstances.

[611] Colonial Br. on Exceptions at 85 n.40 (citing *New England Power Co.*, 61 FERC ¶ 61,331, at 62,217 (1992)).

[612] *New England Power Co.*, 61 FERC at 62,217.

[613] Colonial Br. on Exceptions at 82 ("[P]rior to this rate case, Colonial had no occasion to perform a detailed analysis of the extent of its DR&R obligations because it had no obligation to record its DR&R costs.").

[614] We find unpersuasive Colonial's remaining challenges to the Initial Decision's findings. Colonial claims that the Initial Decision found that DR&R costs cannot be included in transportation service because they occur after oil transportation and the conclusion of Commission's oversight. Colonial Br. on Exceptions at 79. While the Initial Decision expressed some skepticism regarding the propriety of including these costs in Colonial's cost of service, the Initial Decision nevertheless accepted that DR&R costs may be recovered in a cost of service. Initial Decision, 179 FERC ¶ 63,008 at P 999 ("[T]he Commission – under its precedent – can enforce [a DR&R] agreement after service ends and allow the costs associated with that obligation in the oil pipeline cost-of-service."). The Initial Decision rejected Colonial's DR&R allowance for reasons other than finding that they are not "actual costs" to include in transportation service.

[615] Initial Decision, 179 FERC ¶ 63,008 at PP 1176-1177; Ex. CPC-00088 (Piazza)

250. The Initial Decision recommended the Commission exclude all of Colonial's incident response costs as non-jurisdictional, reasoning that spilled oil is no longer physically in the pipeline for transportation in interstate commerce.[616] Joint Complainants, Trial Staff, and Colonial challenge this recommendation on exceptions, and no participant filed briefs supporting the Initial Decision's recommendation. Participants are correct that incident response costs are costs to provide interstate transportation service on the pipeline and are jurisdictional and properly recoverable in rates.[617] Accordingly, we decline to adopt the Initial Decision's recommendation.

251. As discussed below, we address the Initial Decision's alternative recommendation regarding the appropriate level of incident response costs and arguments raised on exceptions related to the appropriate level of incident response costs to include in rates.

a. Initial Decision

252. Absent the exclusion of all incident costs as non-jurisdictional, the Initial Decision alternatively recommended excluding incident response costs associated with incidents that exceeded $1 million in costs based on Joint Complainants' witness Mr. Levine's analysis.[618]

b. Positions of the Participants

253. Complainants support the Initial Decision's alternate recommendation to exclude incident response costs for incidents that each cost over $1 million as extraordinary and non-recurring.[619] They argue that the evidence in the record shows that the incidents in excess of $1 million are high magnitude spills that are properly characterized as extraordinary and nonrecurring under Commission precedent.[620] They assert that Mr.

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at 3; Ex. JC-0130 (Levine) at 23.

[616] Initial Decision, 179 FERC ¶ 63,008 at PP 1212-1224.

[617] *See* Opinion No. 544, 153 FERC ¶ 61,233 at P 142 (the costs of oil spills can be included in rates, unless extraordinary and non-recurring).

[618] Initial Decision, 179 FERC ¶ 63,008 at PP 1211, 1225.

[619] Joint Complainants Br. on Exceptions at 51-52, 56 (citing Ex. JC-0130 (Levine)); Joint Complainants Br. Opposing Exceptions at 110-117; Joint Shippers Br. Opposing Exceptions at 68-69. Mr. Levine normalized the remaining incident response costs by averaging them for the period 2015 to 2018. Ex. JC-0130 (Levine) at 35.

[620] Joint Shippers Br. Opposing Exceptions at 69-70 (citing Opinion No. 544, 153 FERC ¶ 61,233 at P 142); Joint Complainants Br. Opposing Exceptions at 111 (citing

Levine's conclusions are based on his evaluation of Colonial's historical incidents and industrywide data.[621] They also assert that the incidents Mr. Levine excluded were designated as "significant" by PHMSA and thus not normal incidents.[622] They argue that these incidents are less likely to recur because Colonial significantly increased its system integrity spending between 2013 and 2018.[623]

254. Trial Staff and Colonial oppose the recommendation to exclude incident response costs over $1 million. Trial Staff and Colonial argue this one-size-fits all threshold is arbitrary and does not account for the pipeline's circumstances.[624]

255. Trial Staff witness Mr. Ruckert proposes to exclude incident response costs for Colonial's CR-91 and CR-251 oil spills that occurred in Helena, Alabama, in September and October of 2016, respectively.[625] Trial Staff argues that these incidents were extraordinary and non-recurring in comparison with Colonial's other oil spills between 2002 and 2018. Trial Staff asserts that these two incidents were larger in magnitude, created longer shutdowns, and were more expensive to resolve. Excluding the costs for these two incidents, Trial Staff argues that Colonial's remaining incidents were not extraordinary or nonrecurring and should be recovered in rates by normalizing costs over a three-year period.[626]

Opinion No. 544, 153 FERC ¶ 61,233 at P 142).

[621] Joint Complainants Br. Opposing Exceptions at 113-115.

[622] *Id.* at 114.

[623] *Id.* at 116.

[624] Trial Staff Br. on Exceptions at 101-104; Colonial Br. on Exceptions at 70-77; Colonial Br. Opposing Exceptions at 52.

[625] The CR-91 incident occurred from a crack that formed within a wrinkle on the pipeline, following a recoating project. Ex. S-00001 (Ruckert) at 108; Ex. CPC-00088 (Piazza) at 8. The CR-251 incident occurred while repairing the damage from the CR-91 incident, when a contractor excavation work crew accidentally struck the line with an excavator, causing a release of product that ignited. The fire resulted in two fatalities and lasted several days. Ex. S-00001 (Ruckert) at 108; Ex. CPC-00088 (Piazza) at 8.

[626] Trial Staff Br. on Exceptions 101-105. After excluding the costs for CR-91 and CR-251, Mr. Ruckert normalizes the incident response costs for the period 2015 to 2017. Ex. S-00001 (Ruckert) at 107-108.

256. Colonial opposes Trial Staff's proposal to exclude the CR-91 and CR-251 incidents. Colonial claims that it provided substantial evidence showing that these incidents are not extraordinary, non-recurring items, but instead common, related to ordinary pipeline activities, and likely to recur.[627] Colonial also claims that if these incidents are extraordinary, the Commission permits cost normalization over a period of years rather than total exclusion.[628]

257. Although Complainants agree with Trial Staff that the costs for the CR-91 and CR-251 incidents should be excluded,[629] they challenge Trial Staff's analysis. Joint Complainants argue Mr. Ruckert considers irrelevant factors such as the type of incident and cause, whereas Mr. Levine's approach is appropriately focused on costs.[630] Joint Shippers argue that the $1 million threshold is not arbitrary and is based on a number of factors.[631] In particular, Complainants argue that Trial Staff should have excluded Colonial's September 2015 spill in Centreville, Virginia (Centreville incident) and January 2016 Felix spill in Louisiana (Felix incident) as extraordinary and non-recurring incidents.[632]

c. Commission Determination

258. As the Commission explained in Opinion No. 544, while the cost of routine oil spills may be included in rates, "the cost of high magnitude oil spills should be excluded from the cost of service calculations insofar as these are properly characterized as extraordinary, non-recurring items."[633] Based on the record, we adopt Trial Staff's proposal to exclude the costs for the CR-91 and CR-251 incidents and normalize the

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[627] Colonial Br. on Exceptions at 70.

[628] *Id.* at 70, 74 (citing 18 C.F.R. § 346.2(a)(i); *BP Pipelines (Alaska) Inc.*, 146 FERC ¶ 63,019, at P 1617 (2014)).

[629] *See* Ex. JC-0130 (Levine) at 31 (agreeing that CR-91 and CR-251 are extraordinary and non-recurring).

[630] Joint Complainants Br. Opposing Exceptions at 115-116; *see also* Joint Shippers Br. Opposing Exceptions at 72 (arguing that Opinion No. 544 focused on the cost of the spill rather than the barrels spilled).

[631] Joint Shippers Br. Opposing Exceptions at 71-72.

[632] Joint Complainants Br. Opposing Exceptions at 116; Joint Shippers Br. Opposing Exceptions at 72.

[633] Opinion No. 544, 153 FERC ¶ 61,233 at P 142 (citing 18 C.F.R. § 346.2(a)(i)).

remaining costs over the three-year period 2015 to 2017.[634] As discussed below, (1) we find the CR-91 and CR-251 incidents were extraordinary and non-recurring, and (2) we decline to adopt the Initial Decision's alternate proposal to exclude all incident response costs associated with incidents that exceeded $1 million in costs.

i. The CR-91 and CR-251 Incidents were Extraordinary and Non-recurring

259. We find that Trial Staff witness Mr. Ruckert's analysis appropriately compared the magnitude and costs of Colonial's incidents over a historical period as well as analyzing other factors bearing on whether the incidents were extraordinary and non-recurring. Consistent with Commission precedent, Mr. Ruckert provided evidence showing the CR-91 and CR-251 incidents were high magnitude in relation to Colonial's other more common spills.[635] Mr. Ruckert demonstrated that the volumes spilled for CR-91 and CR-251 were appreciably higher than the barrels released from 252 other spills on Colonial's system during the 17-year period he examined from February 2002 to September 2018.[636] Colonial also incurred significantly high costs for these incidents in comparison with other incidents.[637] In addition, evidence in the record indicates that CR-91 and CR-251

[634] Ex. S-00001 (Ruckert) at 107-108.

[635] *See* Opinion No. 544, 153 FERC ¶ 61,233 at P 142 (stating that "high magnitude" oil spills that are extraordinary and non-recurring should be excluded and finding the pipeline provided "no evidence as to the magnitude of more common oil spills in relation to the 2010's spill and whether this level of spill was extraordinary or likely to recur").

[636] CR-91 resulted in 7,370 barrels spilled and CR-251 resulted in 4,445 barrels spilled. These were the two highest volume spills over the 17-year period examined. The next highest volume spill was 2,854 barrels. For comparison, the average product lost per incident was approximately 85 barrels, and only five out of the 252 incidents (two of which were CR-91 and CR-251) involved product losses of more than 500 barrels. Ex. S-00001 (Ruckert) at 108-111; Ex. S-00014 at 1-8; Ex. S-00008 at 18; Ex. JC-0142 at 1 (Colonial Pipeline Incidents reported to PHMSA).

[637] Ex. S-0001 at 109, 111 (Colonial incurred approximately $57.4 million in expenses associated with these two incidents between 2016 and 2018, whereas the expenses for Colonial's other incidents were $10.2 million for 2015, $16.8 million for 2016, $1.6 million for 2017 and $9.2 million for 2018); Ex. S-00002 at 134-135 (Trial Staff Cost of Service Analysis); Ex. S-00261 at 134-135 (showing expenses associated with CR-91 and CR-251 compared to Colonial's remaining incident response costs); Ex. S-00014 (Colonial incident reports to PHMSA); Ex. S-00326 (comparing costs for 21 incidents on Colonial from 2015 to 2017); Ex. JC-0135 (showing estimated costs Colonial reported to PHMSA for product release incidents from 2015 to 2018); *see also*

were caused by the actions of Colonial or its contractors, rather than ordinary causes,[638] and Colonial has taken actions to prevent such incidents from recurring.[639] The record also indicates that Colonial received reimbursement from its contractors and insurance proceeds associated with these incidents.[640]

260. Although Colonial's witnesses make general assertions that spill incidents are a normal part of oil pipeline business and not uncommon, they neither refute the facts discussed above regarding CR-91 and CR-251 (including the unusually high costs and magnitude of those two spills) nor provide evidence demonstrating that these incidents are normal and routine in relation to Colonial's other spills.[641] Regarding CR-91, Colonial provides insufficient evidence to support its assertion that the causes of such

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Ex. JC-0252 at 20-21 (showing estimated incident costs reported to PHMSA by hazardous liquids pipelines from 2015 to 2018).

[638] Colonial's witness testified that CR-91 was caused by "inappropriate backfilling and compaction" and CR-251 was caused by "contractors not following procedures." Tr. 4087-4090 (Piazza); *see also* Ex. S-00014 at 23 (PHMSA incident report for CR-91 stating the cause was "inadequate soil consolidation under Line 01 following maintenance/recoat activities in 2015"); Ex. S-00001 (Ruckert) at 108-109 (noting the National Transportation Safety Board (NTSB) found that CR-251 was likely caused by "the excavation crew's inadequate planning, coordination, and communication during the excavation and failure to adhere to company policy").

[639] Tr. 4087-4090 (Piazza) (describing actions Colonial has taken to prevent similar incidents from occurring, such as modifying its backfill and compaction procedure and improving contractor training and field oversight).

[640] Ex. S-00001 (Ruckert) at 109; Ex. CPC-00019 (Wetmore) at 62-63; *see also*, Ex. BE-0013 at 1.

[641] *See, e.g.*, Ex. CPC-00088 (Piazza) at 8-9 (claiming that "incidents occur during the normal course of business" but providing no data or analysis to compare CR-91 and CR-251 to other incidents); Ex. CPC-00019 (Wetmore) at 59-60 (claiming that "incidents are an expected and recurring part of pipeline operations" and providing only general data about the number of oil pipeline incidents reported to PHMSA per year); Ex. CPC-00171 (Wetmore) at 43 (asserting generally that "[i]ncidents are recurring events that are not extraordinary" and again citing general data about the number of oil pipeline incidents reported to PHMSA); *see also* Ex. S-00173 (Ruckert) at 58-59 (noting that although Colonial's expert asserts that Colonial often experiences oil spill incidents, he does not challenge the data showing that the product released from CR-91 and CR-251 was appreciably higher than any other spills on Colonial's system in the 2002 to 2018 period) (citing Ex. CPC-00171 (Wetmore) at 42-44).

incident present "a standard risk in the oil business."[642] Although Colonial claims that TransCanada reported a comparable incident to CR-91,[643] the evidence Colonial relies on states the TransCanada incident was comparable to the Centreville incident and does not address CR-91.[644] Colonial also asserts it "experienced another such incident of significant magnitude,"[645] but the record is devoid of information regarding the circumstances of that incident, including critically its cost.[646] Moreover, the other incident appears to have occurred almost two years after the end of the test period.[647]

261. Similarly regarding CR-251, Colonial does not provide adequate evidence to support its claims that accidental line strikes and related spills are not uncommon.[648]

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[642] Colonial Br. on Exceptions at 71. For example, Colonial's witness, Mr. Piazza merely asserts that "[p]ipeline recoating is a standard maintenance procedure" but does not provide information for discerning whether the cause of CR-91 (a leak occurring in a crack that formed within a wrinkle following pipeline recoating) is common. Ex. CPC-00088 (Piazza) at 8. Similarly, Colonial asserts that the CR-91 incident resulted in approximately 7,000 lost barrels compared to 960 million barrels delivered by Colonial in 2018 (Colonial Br. on Exceptions at 74) but does not contradict the evidence presented by Mr. Ruckert directly comparing the lost volume from CR-91 to the volumes of Colonial's other spills from 2002 to 2018.

[643] Colonial Br. on Exceptions at 71 (citing Ex. CPC-00088 at 7).

[644] Ex. CPC-00088 (Piazza) at 7 (addressing the Centreville incident and stating, "TransCanada reported a similar pipeline failure," citing the NTSB Centreville Report); *see also* Ex. JC-0139 at 11 (NTSB Centreville Report) ("TransCanada reported a similar liquid pipeline failure"). Similarly, in discussing CR-91, Colonial claims that "PHMSA has acknowledged the challenges of detecting such small leaks" but references only Mr. Piazza's testimony regarding PHMSA's investigation of the Centreville incident. Colonial Br. on Exceptions at 71 (citing Ex. CPC-00088 (Piazza) at n.11); Ex. CPC-00088 (Piazza) at 7 n.11 (discussing PHMSA's investigation of the Centreville incident and citing the NTSB Centreville Report). Colonial does not explain why the findings it references for the Centreville incident would apply to CR-91.

[645] Colonial Br. on Exceptions at 71.

[646] *See* Tr. 4075 (Piazza) (stating that there was "a recent release in Huntersville, North Carolina" and the "initial volumes reported . . . were 6490 barrels" but the volumes spilled were "still under investigation").

[647] Tr. 4081 (Piazza) (stating the incident occurred in August 2020).

[648] Colonial Br. on Exceptions at 71 (citing Ex. CPC-00088 (Piazza) at 6-9).

Again, Colonial refers to the same general testimony of Mr. Piazza that incidents occur during the normal course of oil pipeline business.[649] Mr. Piazza does not provide any further data or information regarding the frequency of accidental line strikes or similar incidents to CR-251 in terms of costs or magnitude related to Colonial or the industry.

262. Finally, Colonial is incorrect in claiming that it is entitled to normalize the cost for extraordinary and non-recurring incidents.[650] The regulation Colonial references merely provides that a pipeline filing a rate "*may* include appropriate normalizing adjustments in lieu of nonrecurring items."[651] This regulation does not require the Commission to include the costs for extraordinary and non-recurring spills in rates. To the contrary, the Commission's policy is to exclude the cost of high magnitude oil spills that are properly characterized as extraordinary, non-recurring items and thus not representative of the pipeline's future costs.[652]

263. Based on the evidence discussed above, we find that CR-91 and CR-251 were extraordinary and non-recurring incidents and the incident response costs for these incidents should be excluded from Colonial's rates.

ii. A $1 Million Threshold for Excluding Incident Costs is Not Supported by this Record

264. We decline to adopt the Initial Decision's alternative recommendation to exclude all incident response costs over a threshold of $1 million. We agree with Trial Staff that a $1 million threshold is arbitrary and does not take into account Colonial's circumstances in evaluating whether the incidents are extraordinary and nonrecurring.[653]

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[649] Ex. CPC-00088 (Piazza) at 6-9.

[650] Colonial Br. on Exceptions at 70, 74.

[651] 18 C.F.R. § 346.2(a)(1)(i); *see also* Colonial Br. on Exceptions at 74.

[652] Opinion No. 544, 153 FERC ¶ 61,233 at P 142. Colonial also cites the initial decision in the Opinion No. 544 proceeding (Colonial Br. on Exceptions at 74), but that decision excluded expenses for an oil spill as an extraordinary and nonrecurring item notwithstanding the carriers raising the same argument that the Commission "should permit the costs to be normalized and recovered over a reasonable period rather than excluding them entirely." *BP Pipelines (Alaska) Inc.*, 146 FERC ¶ 63,019 at PP 1616-1618, *aff'd in relevant part*, Opinion No. 544, 153 FERC ¶ 61,233 at P 142 (affirming the exclusion of the oil spill costs from rates).

[653] Trial Staff Br. on Exceptions at 103; *see also* Tr. 5504-5505, 5510-5512 (Ruckert).

Further, evidence in the record regarding the costs of Colonial's incidents undermines a finding that all incidents incurring costs above $1 million are extraordinary and nonrecurring.[654]

265. We are also not persuaded by Mr. Levine's analysis that the Initial Decision relied on. Contrary to Complainants' claim that Mr. Levine examined numerous factors, Mr. Levine simply excluded all incidents in the top 10% for costs and barrels spilled.[655] We find that Mr. Levine did not adequately explain the use of his 10% threshold.[656] Further, Mr. Levine relied on adjusted cost estimates[657] instead of Colonial's actual costs, and Mr. Levine's figures may vary significantly from Colonial's actual costs incurred for certain incidents.[658]

266. We are also unpersuaded by Complainants' challenges to Trial Staff's inclusion of the Centreville incident and Felix incident. On balance, rather than completely exclude the costs associated with the Centreville and Felix incidents, we find that Trial Staff's proposal to retain these incident costs normalized over a three-year period is reasonable based on the record before us. Mr. Ruckert testified that, recognizing that the costs of Colonial's incidents can vary, the three-year normalization adjustment would smooth out the effects of high and low-cost incidents.[659] Further, although we recognize that the Centreville incident incurred high costs when compared with Colonial's other

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[654] *See* Trial Staff Br. on Exceptions at 103-104 (citing Ex. S-00326 (column [d]); Ex. JC-0130 at 35 (Figure 8, column [9])).

[655] Mr. Levine excludes all incidents with costs greater than $500,000 and more than 55 barrels spilled. Ex. JC-0130 (Levine) at 33-35; Tr. 2197 (Levine).

[656] *See* Tr. 2059-61 (Levine) (explaining that he "used . . . a 10 percent threshold" and conceding that it was an arbitrary choice and a different threshold could have been applied).

[657] Mr. Levine based his analysis on Colonial's estimated incident costs submitted to PHMSA that he adjusted for inflation. *See* Ex. JC-0130 (Levine) at 34; *compare id.* at 32 (Figure 6), *with id.* at 34 (Figure 7); *see also* Tr. 2194-97.

[658] *Compare* Ex. JC-0130 (Levine) at 32 (Figure 6) (Colonial's actual costs) *with id.* at 34 (Figure 7) (Mr. Levine's adjusted cost estimates); *see also* Tr. 2194-95; Colonial Br. on Exceptions at 73-74 ("Mr. Levine used PHMSA report numbers that do not reliably comport with Colonial's actual expenses").

[659] Tr. 5504-05, 5575-5577 (Ruckert); *see also* Ex. S-00001 (Ruckert) at 108; Ex. S-00173 (Ruckert) at 55.

incidents,[660] the costs are likely in part due to the incident occurring in a high-population area.[661] In addition, other evidence indicates this incident was similar in several respects to Colonial's other incidents and thus could be expected to recur.[662] The volumes released were small, only approximately 95 barrels.[663] The cause of this incident was a small crack[664] that formed in a dent[665] due to corrosion fatigue,[666] and the small leak that resulted was difficult to detect.[667] The NTSB Report for the incident states that in April 2016, TransCanada reported a "similar liquid pipeline failure involving a small leak . . . that went undetected on its . . . system."[668] As Colonial is a large pipeline system that

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[660] As Complainants assert, the Centreville incident was the second costliest spill on Colonial during the 2002 to 2018 period. Ex. JC-0130 (Levine) at 33; Joint Complainants Br. Opposing Exceptions at 116; Joint Shippers Br. Opposing Exceptions at 72.

[661] Ex. JC-0143 at 17-18; Ex. JC-0139 at 6 (NTSB Centreville Report); Initial Decision, 179 FERC ¶ 63,008 at PP 1165-1166.

[662] Tr. 5576 (Ruckert) (explaining "[t]here are similar attributes that are associated with the Centreville incident" that "are more typical of other incidents, the vast majority of incidents, during this time period"); *see also* Ex. S-00326.

[663] Ex. JC-0142 at 1; Ex. JC-0130 (Levine) at 33. This volume is much closer to the average product lost per incident of approximately 85 barrels than the CR-91 and CR-251 incidents. Ex. S-00001 (Ruckert) at 109-110.

[664] The crack was 5.97 inches long at the outside diameter and 4.52 inches long on the inside diameter. Ex. JC-0139 (NTSB Centreville Report) at 13.

[665] The dent was below the PHMSA threshold for requiring repair. *Id.* at 9, 16.

[666] *Id.* at 7, 13-15, 18-19. Colonial's witness testified that Colonial's system is particularly susceptible to fatigue cracks within dents due to its large diameter and thin wall nature of the pipe steel and the relatively large number of pressure cycles from standard operations on the system. Ex. CPC-00088 (Piazza) at 6-8.

[667] The NTSB Centreville Report found that the estimated leak rate for the incident was well below the leak detection Supervisory Control and Data Acquisition (SCADA) system performance limit, making it difficult to accurately detect. *Id.* at 11-12, 19. The report also states that detecting small leaks has been a challenge for the industry and "PHMSA is not aware of widely used industry technologies to detect small leaks similar to the one that occurred on Colonial's line 4 in Centreville." *Id.* at 11.

[668] *Id.* at 11.

traverses several high consequence or high population areas,[669] Colonial's cost of service may reflect that leaks like the Centreville incident may occur in those areas and result in similar costs.

267. Regarding the Felix incident, although Complainants claim the costs of this incident were extraordinary,[670] they rely on a PHMSA cost estimate as adjusted for inflation that deviates significantly from Colonial's actual costs for the incident.[671] Mr. Ruckert testified that aside from volume,[672] other factors suggest the Felix incident was similar to Colonial's other incidents and likely recurring.[673] In particular, the record indicates the Felix incident was caused by "Material Failure of Pipe or Weld," which is consistent with the cause of numerous other incidents on Colonial's system.[674]

268. We are also not persuaded by Complainants' argument that because incidents were designated as "significant" by PHMSA, they are necessarily extraordinary and non-recurring for Commission ratemaking purposes.[675] Neither Complainants nor Mr. Levine

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[669] *See* Ex. CPC-00086 (Pearson) at 7 ("Colonial traverses and/or could affect high consequence areas for about 80% of its system."); *see also* Ex. JC-0143; Tr. 5501-03 (Ruckert); Initial Decision, 179 FERC ¶ 63,008 at PP 1165-1166; Ex. CPC-00040 (Fairchild) at 3 (explaining that Colonial's pipeline system connects Gulf Coast refineries to market terminals located near major population centers).

[670] Joint Complainants Br. Opposing Exceptions at 116; Joint Shippers Br. Opposing Exceptions at 72.

[671] *Compare* Ex. JC-0252 at 24 (showing the approximately $9.5 million cost estimate Complainants assert) *with* Ex. JC-0130 (Levine) at 32 (showing Colonial's actual cash expenditures for the Felix incident); *see also* Tr. 2194-97 (Levine); Tr. 4082-83 (Piazza) (explaining that the cost data reported to PHMSA is "the best estimate that an operator can provide at the time that the information is available," which may be different than Colonial's actual costs); Colonial Br. on Exceptions at 73-74 ("Mr. Levine used PHMSA report numbers that do not reliably comport with Colonial's actual expenses").

[672] The Felix incident resulted in 2,854 barrels spilled, the third largest spill on Colonial, after CR-91 and CR-251, for the 2002 to 2018 period. Ex. JC-0130 (Levine) at 31; Ex. S-00008 at 18.

[673] Tr. 5504-5505, 5511 (Ruckert); Ex. S-00326; Ex. JC-0301 (PHMSA report for the Felix incident) at 2-14.

[674] Ex. S-00326; Ex. JC-0135.

[675] *See* Ex. JC-0130 (Levine) at 31 ("PHMSA declares as 'significant' those spills including any of the following conditions: 1) Fatality or injury requiring in-patient

explain why the criteria for reporting incidents to PHMSA, and how PHMSA derives its cost estimates for such incidents, would be appropriate for determining whether incident costs are representative costs for setting Colonial's cost-of-service rates.[676]

269. Finally, we are not persuaded by Complainants' claim that high magnitude oil spill incidents are less likely to recur due to Colonial's increased spending on system integrity.[677] Although the increased spending may be intended to reduce product releases, Complainants do not provide any data or evidence to support their expert's prediction that that the increased spending will completely eliminate major product incidents on Colonial's system.[678] Instead, we find Trial Staff's proposal is supported by evidence in the record as discussed above.

2. Litigation Surcharge & Legal Expenses

a. Litigation Surcharge for Expenses for this Proceeding

i. Initial Decision

270. The Initial Decision found that the litigation expenses incurred by Colonial in this proceeding should be recovered through a three-year surcharge after being offset by unpaid reparations to non-complaining shippers.[679]

ii. Briefs on Exceptions

271. Colonial argues that its litigation expenses in this proceeding should not be offset by unpaid reparations to non-complaining shippers. Colonial states that in *Texaco*, the Commission permitted a litigation surcharge without offset.[680] Colonial further argues

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hospitalization, 2) $50,000 or more in total costs, measured in 1984 dollars, 3) Highly volatile liquid releases of 5 barrels or more or other liquid releases of 50 barrels or more, and 4) Liquid releases resulting in an unintentional fire or explosion").

[676] *See* Ex. JC-0130 (Levine) at 31-32; Tr. 2052-58 (Levine).

[677] Joint Complainants Br. Opposing Exceptions at 116.

[678] Ex. JC-00130 (Levine) at 23 (asserting "Colonial has adopted an aggressive system integrity program that should eliminate major product spill incidents on its system"); *id.* at 28, 38; *see also* Ex. JC-0034 (Levine) at 27; Tr. 2209-12 (Levine).

[679] Initial Decision, 179 FERC ¶ 63,008 at P 1239.

[680] Colonial Br. on Exceptions at 120, 122 (citing *Texaco Ref. & Mktg., Inc. v. SFPP, L.P.*, 117 FERC ¶ 61,285, at P 73 (2006)).

that the concept of unpaid reparations to non-complaining shippers is meaningless because the ICA only permits reparations for past over-recoveries to complaining shippers.[681] Colonial asserts that non-complaining shippers improperly subsidize complaining shippers under the offset,[682] and that the offset violates the filed-rate doctrine.[683]

iii. Briefs Opposing Exceptions

272. Trial Staff and Complainants oppose Colonial's arguments on exceptions. They argue that offsetting Colonial's legal expenses in this proceeding with unpaid reparations to non-complaining shippers is consistent with Commission and D.C. Circuit precedent.[684]

iv. Commission Determination

273. We affirm the Initial Decision's finding that Colonial's surcharge for litigation expenses in this proceeding should be offset by unpaid reparations to non-complaining shippers, consistent with Commission policy that has been affirmed by the D.C. Circuit.[685] Although Colonial acknowledges that prior Commission and D.C. Circuit precedents approved "the same approach" adopted here,[686] Colonial nonetheless reasserts arguments challenging the offset mechanism that were raised and rejected in prior cases.

274. The D.C. Circuit and Commission have previously rejected Colonial's argument that the offset mechanism is inappropriate because the ICA only permits reparations to complaining shippers.[687] The Commission's policy in offsetting litigation costs does not

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[681] *Id.* at 121-122.

[682] *Id.* at 122-123.

[683] *Id.* at 121.

[684] Trial Staff Br. Opposing Exceptions at 75-76; Joint Shippers Br. Opposing Exceptions at 74-76; Joint Complainants Br. Opposing Exceptions at 117-121.

[685] *SFPP, L.P.*, Opinion No. 435-B, 96 FERC ¶ 61,281, at 62,074-75 (2001), *order on reh'g*, 100 FERC ¶ 61,353, at PP 9-14 (2002), *aff'd in relevant part sub nom. BP West Coast*, 374 F.3d at 1294; Opinion No. 571, 172 FERC ¶ 61,207 at PP 70-71.

[686] Colonial Br. on Exceptions at 120 (citing Opinion No. 571, 172 FERC ¶ 61,207 at PP 59-66, 70-71; Opinion No. 435-B, 96 FERC at 62,074-75, *aff'd sub nom. BP West Coast*, 374 F.3d at 1294).

[687] *See BP West Coast*, 374 F.3d at 1294 ("While [the pipeline] contends that this

award reparations to non-complaining shippers. Instead, offsetting litigation costs addresses those litigation costs the pipeline already recovered in its existing rates during the pendency of this proceeding.[688] In other words, when developing the litigation surcharge, the Commission determines the just and reasonable amount of litigation costs related to this proceeding. The Commission allows these costs to be recovered through a separate, prospective surcharge in recognition that it is "very difficult to determine a representative level for [a pipeline's] future regulatory litigation expenses" while the proceeding is ongoing.[689] In determining the representative level of recoverable costs for the prospective surcharge, the Commission and D.C. Circuit have found it appropriate to credit the amount of unpaid reparations to noncomplaining shippers against the total litigation expenses for the proceeding. This reflects the recovery of the litigation expenses under the pipeline's rates in effect during the proceeding to the extent they may have exceeded just and reasonable levels.[690] Under Commission policy, this calculation is done by crediting the amount of unpaid reparations to noncomplaining shippers against

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unfairly benefits shippers that sat on their rights by not filing complaints against [the pipeline's] rates, and that Section 16 of the ICA only authorizes reparations for shippers who have filed such challenges . . . , it presents no justification for being entitled to keep this windfall. The court therefore affirms the Commission's surcharge mechanism and its corresponding offset . . . .") (internal citations removed); *see also* Opinion No. 571, 172 FERC ¶ 61,207 at PP 65-66, 71 (relying on the D.C. Circuit's reasoning in *BP West Coast* to reject pipeline's argument that litigation costs should not be offset because the ICA only permits reparations for complaining shippers) (citing *BP West Coast*, 374 F.3d at 1294).

[688] In a complaint proceeding, Colonial's rates are adjusted on a prospective basis following the Commission's order setting new rates. Although a shipper that filed a complaint can obtain reparations for excessive rates that specific shipper paid during the pendency of its complaint, Colonial retains the over-recoveries from shippers that did not file complaints.

[689] Opinion No. 522, 140 FERC ¶ 61,220 at P 81; Opinion No. 511, 134 FERC ¶ 61,121 at P 35, *order on reh'g*, Opinion No. 511-A, 137 FERC ¶ 61,220 at P 39.

[690] In other words, recognizing the ongoing nature of the litigation, to the extent the Commission permits Colonial recovery of litigation expenses related to this proceeding through a separate, going-forward surcharge, the Commission must determine the representative cost level by taking into account expenses already incurred and recovered through Colonial's rates in effect during the litigation. *See* Opinion No. 435-B, 96 FERC at 62,073-75, *order on reh'g*, 100 FERC at PP 10-11, *aff'd*, *BP West Coast*, 374 F.3d at 1294.

the litigation expenses.[691] Contrary to Colonial's claim, this calculation does not improperly subsidize complaining shippers, but instead ensures that shippers entitled to reparations do not have their reparations reduced by sums that the pipeline has already recovered in its existing rates.[692]

275. The Commission has likewise rejected Colonial's argument that offsetting litigation expenses violates the filed-rate doctrine.[693] The offset mechanism does not reduce Colonial's rates below the just and reasonable level based on perceived past over-recoveries, but instead credits unpaid reparations in setting the representative cost level Colonial may recover for its litigation expenses in this proceeding through a going-forward surcharge as explained above.[694] To the extent that Colonial recovered litigation expenses through its existing rates in effect during this proceeding, it is not retroactive ratemaking to reflect its recovery of those costs in determining the surcharge. In affirming the precise "surcharge mechanism and its corresponding offset" adopted here, the D.C. Circuit recognized that this is a reasonable method for "setting prospective rates."[695]

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[691] Here, Colonial has been incurring litigation expenses since the first complaint was filed on November 22, 2017. If the Commission determines that Colonial's challenged rates are unjust and unreasonable, the Commission will establish lower just and reasonable rates. Only those shippers that filed complaints will receive reparations relating to the difference between Colonial's existing rates in effect during and up to two-years before the proceeding began and the lower just and reasonable rate. *E.g.*, *SFPP, L.P.*, 121 FERC ¶ 61,163, at P 5 (2007). To the extent Colonial's rates in effect during the proceeding that recovered litigation expenses incurred during that timeframe exceeded just and reasonable levels, the offset mechanism will appropriately reduce or eliminate the amount of the prospective litigation surcharge. *See BP West Coast*, 374 F.3d at 1294. Otherwise, Colonial would "recover [these] costs in part through revenues that were generated by rates that were in excess of the just and reasonable rate determined for the reparations period" and also recover the same costs for the same period through the going-forward surcharge. *SFPP*, 100 FERC ¶ 61,353 at P 11.

[692] *SFPP*, 100 FERC ¶ 61,353 at P 12; Opinion No. 435-B, 96 FERC at 62,073-75.

[693] Opinion No. 571, 172 FERC ¶ 61,207 at PP 59, 65-66, 70-71 (applying the offset mechanism and rejecting pipeline's argument that it violates the filed-rate doctrine); *see also SFPP*, 100 FERC ¶ 61,353 at P 12.

[694] *See supra* P 274.

[695] *BP West Coast*, 374 F.3d at 1294 (finding the Commission could reasonably credit litigation expenses already recovered "above those [the pipeline] would

276. Finally, in Opinion No. 571, the Commission rejected the same argument Colonial raises here that the Commission did not offset litigation expenses in *Texaco*.[696] The Commission explained that *Texaco* is "distinguishable" because "it did not address whether the litigation surcharge should be offset against unpaid reparations to non-complainant shippers."[697] The Commission further stated that "the issue was not raised by any parties" in that proceeding, and "the Commission's decision not to reject a particular uncontested cost *sua sponte* does not establish a precedent permitting recovery of that cost."[698] Consistent with Opinion No. 571, we are unpersuaded by Colonial's reliance on *Texaco* to claim that the litigation expenses should not be offset.

b. Legal Expenses

i. Initial Decision

277. The Initial Decision adopted Trial Staff's proposal to normalize Colonial's legal expenses[699] by taking the four-year average from 2015 to 2018 for inclusion in the cost of service.[700] As relevant here, Trial Staff annualized 2018 legal expenses for the first nine months of 2018 because the test period ended on September 30, 2018.[701]

ii. Briefs on Exceptions

278. Joint Shippers challenge Trial Staff's use of annualized 2018 legal expenses for the first nine months of 2018. They argue that this approach includes two cost entries that Colonial subsequently reversed at the end of the year that should be removed.[702]

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prospectively incur as part of its cost of service" in "setting prospective rates").

[696] Opinion No. 571, 172 FERC ¶ 61,207 at P 71 (discussing *Texaco*, 117 FERC ¶ 61,285).

[697] *Id.*

[698] *Id.*

[699] This excludes litigation expenses incurred by Colonial in this proceeding that will be recovered through a three-year surcharge and the legal expenses associated with incident response costs discussed above.

[700] Initial Decision, 179 FERC ¶ 63,008 at P 1240; Ex. S-00001 (Ruckert) at 132-133.

[701] Ex. S-00001 (Ruckert) at 133.

[702] Joint Shippers Br. on Exceptions at 32-35.

Joint Shippers support either (1) using a full four-year average from January 1, 2015 to December 31, 2018, or (2) annualizing the nine-month test period for 2018, but removing the costs that were subsequently reversed by Colonial.[703]

iii. Briefs Opposing Exceptions

279. Trial Staff argues that annualizing 2018 legal expenses from the first nine months of 2018 is appropriate because the test period ended in September 2018.[704]

iv. Commission Determination

280. We affirm the Initial Decision's use of annualized 2018 legal expenses from the first nine months of 2018. However, we agree with Joint Shippers that certain costs should be removed. The record shows that in December 2018 Colonial reversed two substantial entries from earlier in the year.[705] Although the test period ended in September 2018, excluding the cost entries that were reversed merely corrects the data to more accurately reflect Colonial's legal expenses during the nine-month test period. Therefore, we adopt Trial Staff's annualized legal expenses for the nine-month test period for 2018 as adjusted to remove the two cost entries that Colonial reversed.

3. System Integrity Program Management Costs

281. System integrity program management (SIPM) costs are the expenses incurred by a pipeline company to maintain, inspect, and prevent corrosion on its pipelines.[706]

282. For the reason below, we find that the Initial Decision erred in finding that mitigation and remediation SIPM costs (including casings, coatings, cathodic protection, and sleeves) must be capitalized, and instead we find that these costs should be expensed so long as they are for less than a full retirement unit. However, we affirm the Initial Decision's adoption of the normalization of SIPM costs.[707]

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[703] *Id.*

[704] Trial Staff Br. Opposing Exceptions at 76-77.

[705] Ex. TMG-0076 (Palazzari) at 147 (citing Ex. S-00007, File CPC 028164, lines 450800 and 450808); *see also*, Ex. TMG-0187; Tr. 5652-56 (Ruckert).

[706] Initial Decision, 179 FERC ¶ 63,008 at P 865.

[707] *Id.* PP 882, 895.

a. Expensing versus Capitalizing

i. Initial Decision

283. The Initial Decision adopted Trial Staff's approach for capitalization of mitigation and remediation SIPM costs.[708] The Initial Decision determined that these costs should be capitalized under Commission policy because they increase the pipeline's useful life.[709] The Initial Decision emphasized that Colonial capitalized these costs under its GAAP accounting.

ii. Brief on Exceptions

284. Colonial argues that the Initial Decision erred by capitalizing, rather than expensing, all costs of the mitigation and remediation SIPM costs.[710] Colonial asserts that its mitigation and remediation SIPM costs applied to less than a retirement unit and thus Colonial claims they should be expensed under Commission policy.[711] Moreover, Colonial emphasizes that the mitigation and remediation of SIPM costs at issue in this proceeding were not part of a major rehabilitation project, but rather were associated with an ongoing maintenance program that should be expensed.[712] Although Colonial capitalizes these expenses for GAAP accounting purposes, Colonial claims that the Commission's regulation has different rules.[713]

iii. Briefs Opposing Exceptions

285. Trial Staff and Complainants assert that the Initial Decision correctly capitalized the remediation and mitigation SIPM costs.[714] They argue that mitigation and remediation SIPM costs should be capitalized under Commission policy because they

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[708] *Id.* PP 883, 891-892.

[709] *Id.* P 891.

[710] Colonial Br. on Exceptions at 39-40.

[711] *Id.* at 41 (citing Acct. for Pipeline Assessment Costs, Notice of Proposed Accounting Release, 69 Fed. Reg. 67,727, 67,729, app. A, ex.1 (2004)).

[712] *Id.* at 42.

[713] *Id.* at 47.

[714] Trial Staff Br. Opposing Exceptions at 24-25; Joint Complainants Br. Opposing Exceptions at 88-89; Joint Shippers Br. Opposing Exceptions at 63.

enhance and increase the useful life of a pipeline system.[715] Trial Staff also claims this is consistent with the Financial Accounting Standards Board guidance and Colonial's existing practices under its GAAP accounting.[716] Trial Staff and Complainants claim that Colonial's arguments for a contrary position incorrectly rely upon precedent that only applies to inspection and assessment activities, not mitigation and remediation measures.[717]

iv. Commission Determination

286. We find that the Initial Decision erred in finding that mitigation and remediation SIPM costs should be capitalized. Instead, we find that these costs should be expensed.

287. Expensing the mitigation and remediation SIPM costs is consistent with Commission policy. As a general matter, the Commission's accounting regulations provide that mitigation and remediation SIPM costs shall be charged to maintenance expense.[718] Moreover, post-construction remedial costs are not generally capitalized unless a full *retirement unit* is replaced.[719] Accordingly, the Commission has explained that mitigation and remediation SIPM costs (coating and sleeving) should be capitalized

[715] Trial Staff Br. Opposing Exceptions at 26; Joint Complainants Br. Opposing Exceptions at 90-91; Joint Shippers Br. Opposing Exceptions at 64-65.

[716] Trial Staff Br. Opposing Exceptions at 31.

[717] Trial Staff Br. Opposing Exceptions at 27; Joint Complainants Br. Opposing Exceptions at 94-95; Joint Shippers Br. Opposing Exceptions at 64-65.

[718] 18 C.F.R. § 352 Account 155. Trial Staff concedes that expensing SIPM costs conforms to the Account No. 155 (pipeline construction) instruction contained in Part 352 of the Commission's regulations. Ex. S-00238 (Ruckert) at 6; *id.* at 38 (showing that if one minor unit of property is replaced with another then such costs must be expensed).

[719] *Jurisdictional Pu. Util. & Licensees, Nat. Gas Cos., Oil Pipeline Cos.*, Order on Accounting for Pipeline Assessment Costs, 111 FERC ¶ 61,501, at P 28 (2005); *Accounting for Pipeline Assessment Costs, Notice of Proposed Accounting Release*, 69 Fed. Reg. 67,727, 67,728, app. A (2004) (2004 NOPAR).

only if they apply to a full retirement unit,[720] and Colonial's mitigation and remediation SIPM costs do not apply to a full retirement unit.[721]

288. We disagree with Complainants' and Trial Staff's claim that these mitigation and remediation SIPM costs should be expensed because they enhanced and increased the useful life of the oil pipeline system. Merely extending the useful life is insufficient for capitalization. To be capitalized, the mitigation and remediation SIPM costs must extend the useful life of the asset beyond its *originally estimated* useful life.[722] Such a finding must be substantiated by technical studies, including a depreciation study,[723] and no such studies are present in this record.

289. We also disagree with arguments that the Commission should require capitalization of the mitigation and remediation SIPM costs due to GAAP accounting rules.[724] GAAP accounting does not govern ratemaking,[725] and the Commission's accounting regulations provide for different treatment of the mitigation and remediation SIPM costs.[726]

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[720] *Nat. Gas Pipeline Co. of Am.*, 115 FERC ¶ 61,294, at PP 9-10 (2006); *Jurisdictional Public Utilities and Licensees, Natural Gas Companies, Oil Pipeline Companies*, Order on Accounting for Pipeline Assessment Costs, 111 FERC ¶ 61,501, at P 28.

[721] Colonial defines a retirement unit as a 100-feet or more length of pipeline and Colonial's mitigation and remediation SIPM costs at issue in this proceeding apply to less than 100-foot length of pipeline. Colonial Br. on Exceptions at 42 n.21 (citing Ex. JC-0147). Colonial's definition of a retirement unit as 100-feet of pipe is consistent with the example of retirement unit previously used by the Commission. 2004 NOPAR, 69 Fed. Reg. at 67,728, at app. A (examples 1 and 3 using 100 feet as the size of a retirement unit and that only mitigation and remediation SIPM costs should be capitalized).

[722] *Pac. Gas & Elec. Co.*, 178 FERC ¶ 61,123, at P 17 (2022).

[723] *See id.*; *SFPP, L.P.,* Docket No. AC22-58-000 (May 12, 2022) (delegated order); *Waverly Light & Power*, Docket No. AC11-2-000 (Feb. 17, 2011) (delegated order).

[724] Initial Decision, 179 FERC ¶ 63,008 at P 892; Trial Staff Br. Opposing Exceptions at 31; Joint Complainants Br. Opposing Exceptions at 89, 95; Joint Shippers Br. Opposing Exceptions at 63-64.

[725] Opinion No. 522-A, 150 FERC ¶ 61,097 at P 37.

[726] Moreover, we are similarly unpersuaded by arguments relying upon Colonial's

b. Normalization

i. Initial Decision

290. All parties agree that the SIPM expenses should be normalized. The Initial Decision adopted Trial Staff's proposed normalization period of January 1, 2015, through September 30, 2018 (the end of the Test Period).[727] The Initial Decision rejected the use of post-test period data as contrary to Commission policy and stated that there is no evidence that reliance on data from the chosen test period for SIPM expenses would result in substantial error.[728]

ii. Briefs on Exceptions

291. Colonial states that the Initial Decision's normalization period would yield a SIPM expense that is too low.[729] Colonial argues that 2015 is not representative of the average anticipated level of future SIPM costs.[730] Thus, Colonial argues that 2015 should be excluded and that the normalization period should be January 1, 2016 – September 30, 2018. Colonial supports its argument with the following facts: (1) a 2015 product release prompted an accelerated integrity fatigue crack management program that continues; and (2) Colonial acquired Port Arthur Product Station (PAPS) in 2015, which added associated integrity costs beginning in 2016 that were not present in 2015.[731] Additionally, Colonial states that a normalization period of 2016 through the end of the Test Period is more representative of the SIPM costs anticipated for an aging pipeline

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accounting practices prior to 2015 when Colonial capitalized mitigation and remediation SIPM costs, including during the 2011-2014 period in which Colonial was audited by the Commission. *E.g.*, Joint Complainants Br. Opposing Exceptions at 92. As discussed above, we have reviewed the Commission's policies and, consistent with those policies, we find that mitigation and remediation SIPM costs that apply to less than a full retirement unit should be expensed.

[727] Initial Decision, 179 FERC ¶ 63,008 at PP 882, 895.

[728] *Id.* P 890.

[729] Colonial Br. on Exceptions at 48.

[730] *Id.*

[731] *Id.*

constructed nearly 60 years ago, which faces consistently accelerating demands on the system and its integrity.[732]

292. Conversely, Joint Complainants argue that the Trial Staff's normalization period would yield a SIPM expense that is too high.[733] They also argue that the Trial Staff's normalization period arbitrarily ignores Colonial's relatively lower SIPM expense levels in 2014, 2018, and 2019, and that it does not correspond to a five-year SIPM expense cycle.[734] Additionally, Joint Complainants criticize Trial Staff for not considering Colonial's 2019 SIPM expense level, which they argue demonstrates a pattern of declining SIPM expenses.[735]

iii. Briefs Opposing Exceptions

293. Joint Shippers and Trial Staff argue that the Initial Decision correctly adopted the normalization period.[736] Regarding the 2015 SIPM expenses, Trial Staff argues that Colonial has not quantified the incremental effect of the 2015 product release and PAPS acquisition on its SIPM expenses and, thus, has not demonstrated that Colonial's 2015 SIPM expenses are unrepresentative.[737] In response to Joint Complainants' assertion that Trial Staff arbitrarily ignored Colonial's SIPM expense levels in 2014, 2018, and 2019, Trial Staff states that Colonial's 2014 SIPM expense level does not reflect the increased integrity costs resulting from Colonial's initiation of a more robust integrity program, and that expense level was much lower than its annual SIPM expenses through the end of the Test Period. Regarding the 2019 SIPM expense level, Trial Staff argues that Commission policy precludes reliance on post-test period data absent a showing that reliance on information within the test period leads to substantial error.[738]

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[732] *Id.*

[733] *Id.*

[734] Joint Complainants Br. on Exceptions at 45-46.

[735] *Id.* at 45-50.

[736] Joint Shippers Br. Opposing Exceptions at 67-68; Trial Staff Br. Opposing Exceptions at 33.

[737] Trial Staff Br. Opposing Exceptions at 34.

[738] *Id.* at 35-36.

iv. Commission Determination

294. We affirm the Initial Decision's holding that normalizes the SIPM costs from January 1, 2015, through September 30, 2018 (the end of the Test Period).[739] Joint Shippers and Trial Staff have presented persuasive arguments in support of this decision. We find that Colonial has failed to demonstrate that its spending in 2015 is not representative of the average anticipated level of future SIPM costs. The 2015 product release and PAPS acquisition did not have a significant impact on Colonial's SIPM costs, and Colonial has not quantified the incremental effect of these events on Colonial's SIPM costs.[740] Regarding Joint Complainants' argument about ignoring costs in 2014, 2018, and 2019, we find that the 2014 SIPM expense level does not reflect the increased integrity costs resulting from Colonial's initiation of a more robust integrity program. Regarding the last three months of 2018 and the calendar-year 2019 SIPM costs, the Initial Decision correctly excluded post-test period data from its analysis, as Commission policy precludes reliance on such data absent a showing that reliance on information within the test period leads to substantial error.[741] No such showing was made here.[742]

295. We are not persuaded by Joint Complainants' assertion that Colonial's SIPM expense level should be modified to correspond to a five-year pipeline integrity inspection cycle. As discussed above, the five-year average proposed by Joint Complaints includes 2014 data that is not representative and 2019 data that is after the

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[739] Initial Decision, 179 FERC ¶ 63,008 at PP 882, 895. Although the Initial Decision adopts the January 1, 2015, through September 30, 2018 data period, we also note that the Initial Decision states that it is following the approach advocated by Trial Staff witness Mr. Ruckert as presented in Ex. S-00001. However, we observe that Ex. S-00001 proposed to use data ending in base period (December 31, 2017) and specifically declined to include data through the end of the test period (September 30, 2018). Thus, it is not clear whether the Initial Decision intended to use data ending September 30, 2018, or December 31, 2017. For the reason stated herein, we find that we should consider the data through September 30, 2018.

[740] *See* Ex. S-00173 (Ruckert) at 54-55.

[741] Trial Staff proposed to exclude 2018 data on the basis that SIPM expense was lower than normal because of a slowdown in crack-in-dent excavation work. However, the Commission typically uses data through the end of test period. Moreover, we are not persuaded that the first nine months of 2018 are so anomalous that they should be excluded from the normalized January 1, 2015, through September 30, 2018 expenses. Finally, all the other participants (Colonial and Complainants) support the consideration of the expenses from first nine months of 2018.

[742] Trial Staff Br. Opposing Exceptions at 36.

test period. Although less than the full five-year cycle, the January 1, 2015, through September 30, 2018 normalization period provides a reasonable estimate of Colonial's future SIPM costs compared to the other alternatives in the record.

4. Line 25 Retirement

296. Line 25 is a spur line in western Virginia.[743] Colonial announced that it would retire Line 25 effective September 2018[744] and entered Line 25's retirement into property accounting records in December 2018.[745] The participants stipulated to remove $19.4 million from Colonial's carrier property and accrued depreciation balances for the test period to reflect the retirement of Line 25, and they expressly did not resolve whether to reduce test period operating expenses related to Line 25.[746] As discussed below, we find that operating expenses associated with Line 25 should be removed for ratemaking purposes.

a. Initial Decision

297. The Initial Decision accepted the stipulated removal of Line 25 from carrier property and accrued depreciation for the test period,[747] but recommended that Line 25's test period operating expenses and volumes be included since Line 25 was in service until December 2018—after the test period.[748]

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[743] Initial Decision, 179 FERC ¶ 63,008 at P 247.

[744] Ex. S-00010 at 4 (Colonial press release regarding its "announced shut down of Line 25 in September 2018"); Ex. JC-0047 (volume data provided by Colonial indicating a sharp reduction in transportation on Line 25 after September 2018).

[745] Ex. CPC-00019 (Wetmore) at 84:6-7.

[746] Ex. BE-0003 (Joint Stipulations) ¶ 7.

[747] Initial Decision, 179 FERC ¶ 63,008 at PP 248, 255; *see also* Ex. BE-0003 ¶¶ 7, 13.

[748] Initial Decision, 179 FERC ¶ 63,008 at P 256 (citing Ex. CPC-0019 (Wetmore) at 84).

b. Brief on Exceptions

298. Trial Staff states that including Line 25 operating expenses would be inconsistent with the participants' stipulation to remove Line 25 from test period carrier property and accrued depreciation to reflect its retirement.[749]

299. Additionally, Trial Staff asserts that the test period volumes associated with Line 25 are not a live issue given the participants' stipulation as to Colonial's total test period throughput.[750] Trial Staff claims this is also implied by the participants' Line 25 property stipulation, which only expressly reserved the issue of Line 25 operating expenses.[751]

c. Commission Determination

300. Because the participants agreed to remove Line 25 from carrier property and accrued depreciation during the test period, we find that the operating expenses associated with Line 25 should also be removed from the test period cost of service.[752] This is consistent with Commission policy to align all cost-of-service elements to assure consistent results.[753]

301. We find that the test period volumes associated with Line 25 are appropriately resolved by stipulation.[754]

302. Accordingly, Colonial must remove operating expenses, property, and accrued depreciation related to Line 25 for purposes of calculating the test period cost of service.

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[749] Trial Staff Br. on Exceptions at 97; Joint Shippers Br. Incorporating Exceptions at 2.

[750] Trial Staff Br. on Exceptions at 98.

[751] *Id.*

[752] Ex. BE-0003 ¶ 7 (Joint Stipulations).

[753] *SFPP, L.P.*, 113 FERC ¶ 61,277, at P 53 (2005) ("It is important to use all cost-of-service factors from the same year to assure internally consistent results. For example, since volumes determine how the costs are distributed on a unit basis, the test years for costs and volumes should be the same to assure that volume sensitive costs are correctly matched to the volumes of the same year. Thus, if the cost of service utilizes 1999 costs, then 1999 volumes should be used . . . .").

[754] *See* Ex. BE-0003 ¶ 9.

5. FERC Account No. 580 Property Tax Abatements and Refunds

303. The participants stipulated to the amount of base and test period property tax expense in FERC Account No. 580.[755] However, they did not resolve "whether any amounts of property tax relating to the base or test period that are recovered by Colonial as a result of pending appeals should be subject to refund."[756]

a. Initial Decision

304. The Initial Decision found that it is reasonable to impute any property tax refunds from the pending appeals to Colonial's FERC Account No. 580 test year balance in the cost of service.[757]

b. Positions of the Participants

305. Colonial, Trial Staff, Joint Shippers, and Joint Complainants disagree with the Initial Decision and assert that no cost-of-service adjustment should be made at this time with respect to any potential refunds related to the property tax disputes because the result of Colonial's appeals was unknown and unmeasurable during the test period.[758] However, they disagree as to how refunds should be addressed once the disputed property tax amounts are finalized.[759]

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[755] *Id.* ¶ 13(e).

[756] *Id.* ¶ 14.

[757] Initial Decision, 179 FERC ¶ 63,008 at P 1248.

[758] Colonial Br. on Exceptions at 119; Trial Staff Br. on Exceptions at 106 (citing Ex. S-00001 (Ruckert) at 144). While Joint Shippers and Joint Complainants did not except to the Initial Decision, they agree with Colonial and Trial Staff's position on this point. Joint Shippers Br. Opposing Exceptions at 76; Joint Complainants Br. Opposing Exceptions at 121 (adopting Joint Shippers' arguments on this topic).

[759] Colonial argues that any property tax refunds received after the test period may not be addressed in this case (Colonial Br. on Exceptions at 119), whereas Complainants and Trial Staff argue that shippers should be able to obtain refunds if the disputed amounts are finalized given that there is sufficient notice. Trial Staff Br. on Exceptions at 106-107; Joint Shippers Br. Opposing Exceptions at 76-77. To that point, Joint Shippers and Joint Complainants argue that the Commission should require Colonial to state in its compliance filing whether it has received any refunds from these appeals and, if so, to credit them to the cost of service in its filing. Joint Shippers Br. Opposing

c. Commission Determination

306. We reverse the Initial Decision and find that it is not appropriate to impute potential property tax refunds to Colonial's FERC Account No. 580 test year balance in the cost of service.[760] The purpose of a rate case is to set rates based on representative cost levels. The Commission uses a test-period methodology to determine representative costs.[761] The record shows that the outcome of Colonial's property tax appeals was not known and measurable during the test period.[762] Thus, we find that the property tax expenses that Colonial actually paid during the test period leads to a reasonable representation of the property tax component of Colonial's cost of service.[763]

E. Cost Allocation

307. The Initial Decision adopted Complainants' revenue crediting methodology for Colonial's merchant storage, blending, and product transfer order (PTO) services,[764] and rejected cost allocation analyses proposed by Colonial and Trial Staff. Regarding the costs associated with Colonial's lease of its Alliance Line 7 lateral to a third party

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Exceptions at 76-77.

[760] Initial Decision, 179 FERC ¶ 63,008 at P 1248.

[761] *See* 18 C.F.R. § 346.2(a)(1)(ii) ("A test period must consist of a base period adjusted for changes in revenues and costs which are known and are measurable with reasonable accuracy at the time of filing and which will become effective within nine months after the last month of available actual experience utilized in the filing").

[762] *See* Ex. S-00001 (Ruckert) at 144:10-17.

[763] Opinion No. 571, 172 FERC ¶ 61,207 at PP 50-51 (determining that SFPP may recover right-of-way expenses that were "actually paid . . . during the test period" and rejecting SFPP's "proposed test period adjustment based on its projection of the outcome of the litigation"). We note that one of Colonial's two property tax disputes has concluded with no change to the tax amount. Colonial Br. on Exceptions at 118. Regarding the one remaining dispute over Colonial's South Carolina property taxes, we do not address whether or how shippers may recoup any amounts that may be refunded to Colonial in the future. The only issue before us now is what test period costs should be used to determine Colonial's prospective rates and any reparations. We note, however, that the Commission has previously declined to revise test period costs based on the post-test period resolution of litigation. Opinion No. 571, 172 FERC ¶ 61,207 at PP 53-56.

[764] A revenue crediting method retains the costs for the service in rates but credits the cost of service with revenues from that service.

(Alliance lease), the Initial Decision adopted Complainants' barrel-mile approach, and rejected Colonial and Trial Staff's cost allocation analyses. The Initial Decision did not make a test period adjustment for Colonial's lease to a third party of a delivery line near Nashville, Tennessee (Nashville lease). As discussed below, we reverse the Initial Decision and adopt Trial Staff's method for allocating costs related to merchant storage, blending, PTO, and the Alliance lease, but we affirm the Initial Decision's determination regarding the Nashville lease. Finally, we address certain miscellaneous issues related to cost allocations for activities under FERC Account Nos. 250 and 260.

1. Merchant Storage

308. Colonial has both operational storage that is part of its transportation service,[765] as well as elective short- and long-term merchant storage.[766] The participants presented options for addressing Colonial's merchant storage expenses for purposes of determining Colonial's cost-of-service transportation rates. Colonial witness Mr. Brock conducted an analysis to identify and allocate costs to Colonial's merchant storage for removal from Colonial's cost of service, which Trial Staff modified as described below. In contrast, Complainants proposed a revenue crediting approach, which retains the costs for the merchant storage service in rates but credits the cost of service with revenues from that service.

309. Colonial witness Mr. Brock identified capital costs and operational expenses for merchant storage.[767] He applied Colonial's general and administrative overhead factor of 8.38% (overhead gross-up factor) to gross-up these costs.[768] Where storage-related costs could not be directly assigned to either merchant storage or operational storage, Mr. Brock applied a Storage Ratio (a ratio of leased merchant storage capacity to total storage capacity) to estimate the portion of costs associated with the merchant storage service.

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[765] Approximately 90% of movements on Colonial flow through operational break out storage. This storage is necessary for Colonial's jurisdictional transportation to customers and is included as part of the tariff transportation rate. Ex. S-00022 (McComb) at 37; Ex. CPC-00111 (Brock) at 39, 41-42.

[766] Colonial's merchant storage service is optional for customers with various types of service depending on the length of the desired storage contract. Ex. S-00022 (McComb) at 37; Initial Decision, 179 FERC ¶ 63,008 at P 116 (citing *TransMontaigne Partners L.P. v. Colonial Pipeline Co*., 172 FERC ¶ 61,015 (2020)); Ex. CPC-00111 (Brock) at 38-42; Ex. CPC-00110 (Gardner) at 10-11.

[767] Ex. CPC-00111 (Brock) at 38-50; *see also* Ex. CPC-00117.

[768] Ex. CPC-00111 (Brock) at 37-38, 48.

310. Mr. Brock identified seven sub-categories of operational expenses:

(a) Support Expenses - Mr. Brock surveyed relevant personnel in different departments to determine how many hours per month are spent on either general tank activities or merchant storage specific activities.[769] He directly assigned support expenses that were merchant storage specific,[770] and he applied the Storage Ratio to shared costs.[771]

(b) SIPM - Mr. Brock ran a report from Colonial's accounting systems that showed SIPM costs related to tanks and then applied the Storage Ratio.[772]

(c) Port Arthur Products Station noncarrier[773] - Mr. Brock directly assigned all the costs of Port Arthur Products Station noncarrier tanks to merchant storage.[774]

(d) Other maintenance[775] - Mr. Brock identified storage expenses for other maintenance by extracting data from Colonial's accounting system using subcodes that referenced tanks. He then applied the Storage Ratio.[776]

(e) Insurance - Mr. Brock developed a ratio of the insured values of the tanks to the

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[769] He used the number of hours and the market reference point for the employee's position to determine the monthly salary amount attributable to either tanks generally or merchant storage. *Id.* at 43-45.

[770] He determined that "the time identified by merchant storage accounting, legal, customer relations and scheduling, and commercial affairs" related to functions directly related to storage leases. *Id.*

[771] *Id.*

[772] Mr. Brock also applied a benefits percentage that Colonial uses when estimating total labor costs. *Id.* at 45.

[773] The Port Arthur Products Station is a terminal in Port Arthur, Texas that Colonial owns. Ex. S-00001 (Ruckert) at 11.

[774] Ex. CPC-00111 (Brock) at 46.

[775] This category of expenses includes materials and supplies and outside services related to tanks. *Id.* at 46.

[776] *Id.*

total value of the property insured, then applied the Storage Ratio.[777]

(f) Ad valorem taxes - Mr. Brock developed a ratio of the assessed value of tanks to the assessed value of all property and applied the Storage Ratio.[778]

(g) Rentals[779] - Mr. Brock identified the costs by reviewing all invoices in FERC Account No. 350 associated with third parties and directly assigned all of these costs to merchant storage.[780]

311. Trial Staff proposed two primary adjustments to Mr. Brock's analysis. First, Trial Staff modified the Storage Ratio.[781] Second, regarding the "other maintenance" category, Trial Staff identified additional operating expenses at location codes Colonial identified as associated with leased storage service in discovery responses.[782] In contrast, Complainants argued that Mr. Brock's analysis should be rejected entirely and that the Commission should apply a revenue credit.

a. Initial Decision

312. The Initial Decision adopted Complainants' revenue crediting approach, and rejected Colonial and Trial Staff's cost allocation methodology.[783] The Initial Decision reasoned that Colonial did not follow parameters specified by the Commission in Opinion No. 511-A to have internal tracking, record-keeping, and reporting protocols in place to allow a reasonable cost allocation to be made, such as time-keeping for direct charges by employees.[784] The Initial Decision found that Colonial's allocation survey was replete

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[777] *Id.* at 47.

[778] *Id.*

[779] Colonial rents capacity from third parties purely for the purpose of providing merchant storage. *Id.* at 49.

[780] *Id.* at 47-48.

[781] Ex. S-00001 (Ruckert) at 155.

[782] *Id.* at 157-158.

[783] Initial Decision, 179 FERC ¶ 63,008 at P 178.

[784] *Id.* PP 156-159, 162, 165, 167, 172-173 (citing *SFPP, L.P.*, Opinion No. 511-A, 137 FERC ¶ 61,220 (2011)).

with errors such as the use of a uniform overhead gross-up factor of 8.38%.[785] The Initial Decision found that Trial Staff's analysis did not cure the deficiencies in Colonial's record-keeping, reporting and data management practices.[786] The Initial Decision also criticized Colonial's Form No. 6, page 700 reporting related to the merchant storage revenues and assets.[787]

b. Briefs on Exceptions

313. Trial Staff and Colonial argue that the Initial Decision erroneously adopted the revenue crediting approach, instead of a cost allocation methodology.[788] Trial Staff and Colonial argue that their analyses using a cost-allocation methodology are reasonable and consistent with the Commission's preference to allocate costs to services as opposed to crediting revenues. They argue that the Commission has permitted reasonable methods to allocate costs when it is not able to directly assign costs. However, Trial Staff supports its modified cost allocation analysis and opposes Colonial's analysis, whereas Colonial argues that both Trial Staff's and its own analyses are reasonable.[789] Colonial also argues that its record-keeping and reporting practices are not deficient.

c. Briefs Opposing Exceptions

314. Complainants support the Initial Decision's revenue crediting approach,[790] whereas Colonial continues to support a cost allocation approach but argues its analysis is superior to Trial Staff's analysis.[791]

315. Complainants argue that crediting revenue is appropriate where, as here, a reasonable allocation cannot be made.[792] Complainants argue that Colonial's books and

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[785] *Id.* P 167 & n.353.

[786] *Id.* P 169.

[787] *Id.* PP 160-161.

[788] Trial Staff Br. on Exceptions at 15-36; Colonial Br. on Exceptions at 55-69.

[789] Trial Staff Br. Opposing Exceptions at 37; Colonial Br. on Exceptions at 57, 59.

[790] Joint Complainants Br. Opposing Exceptions at 7-18; Joint Shippers Br. Opposing Exceptions at 19-27.

[791] Colonial Br. Opposing Exceptions at 53-57.

[792] *E.g.*, Joint Shippers Br. Opposing Exceptions at 19-20; Joint Complainants Br.

records are incapable of providing a credible and reasonable allocation of merchant storage costs.[793] Complainants argue that Colonial's accounting systems, time recording processes, and storage inventory processes do not track expenses in a manner that permits identification of the costs associated with merchant storage services.[794]

316. Complainants allege various flaws regarding Mr. Brock's analysis,[795] and argue that Trial Staff's modified analysis reflects the same flaws.[796] In particular, Complainants argue that Mr. Brock's 8.38% gross-up factor for general and administrative overhead is unsupported.[797]

317. Complainants also argue that Mr. Brock's Storage Ratio is not transparent or verifiable.[798] They assert that Colonial did not track the volumes of barrels held in storage for merchant storage service or track storage barrels by location.[799] Complainants argue that allocating costs based on the ratio of reserved merchant storage capacity to total storage capacity over-allocates costs associated with unutilized capacity to the transportation cost of service.[800] They argue that evidence suggests some of Colonial's

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Opposing Exceptions at 16, 37, 44.

[793] Joint Complainants Br. Opposing Exceptions at 21; Joint Shippers Br. Opposing Exceptions at 20-24.

[794] Joint Complainants Br. Opposing Exceptions at 21 (citing JC-0001 (Arthur) at 20-25; Ex. JC-0169 (Arthur) at 73; CPC-00111 (Brock) at 35-65; Tr. 4006-08 (Pearson); Ex. JC-0004); *id.* at 34, 36-37; Joint Shippers Br. Opposing Exceptions at 24.

[795] Joint Complainants Br. Opposing Exceptions at 7-18, 21-22, 27-29, 37-39; Joint Shippers Br. Opposing Exceptions at 25-26.

[796] Joint Complainants Br. Opposing Exceptions at 29-32, 38-39; Joint Shippers Br. Opposing Exceptions at 27.

[797] Joint Complainants Br. Opposing Exceptions at 28-29; Joint Shippers Br. Opposing Exceptions at 25.

[798] Joint Shippers Br. Opposing Exceptions at 26.

[799] *Id.* at 24; Joint Complainants Br. Opposing Exceptions at 32-35.

[800] Joint Complainants Br. Opposing Exceptions at 33-35; Joint Shippers Br. Opposing Exceptions at 26.

storage capacity was built to provide merchant storage and should be directly assigned to merchant storage.[801]

318. Complainants also assert that Mr. Brock's limited survey process for support expenses was conducted for the litigation and is not verifiable.[802] Specifically, they argue that Mr. Brock did not provide any supporting documents underlying the study.[803] Further, they claim Mr. Brock failed to survey all employees involved in merchant storage activities and only inquired how much time personnel spent on operation of storage tanks, which failed to capture other storage-related operations.[804]

319. Complainants further argue that a comparison of the costs allocated by Colonial to non-jurisdictional services with revenues reported shows that Colonial's analysis is biased and allocates an insufficient level of costs to merchant storage.[805] In addition, Complainants argue that the cost allocation analysis was not conducted within the test period and the costs were not known and measurable within nine months of the end of the base period.[806]

320. Complainants also argue that Colonial's allocation of costs on page 700, although inflated, is not relevant to the Initial Decision's rejection of Colonial's cost allocation analysis prepared in this proceeding.[807]

321. Colonial argues Trial Staff (1) overstated the allocation factor by adjusting only short-term storage capacity for the actual length of existing contracts, and (2) added operating expenses from tank farm and leased storage locations that included some expenses associated with jurisdictional activities.[808]

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[801] Joint Shippers Br. Opposing Exceptions at 26 (Ex. TMG-0076 (Palazzari) at 98; Ex. TMG-0104).

[802] Joint Complainants Br. Opposing Exceptions at 9, 21-26, 37-39, 41-42; Joint Shippers Br. Opposing Exceptions at 25.

[803] Joint Complainants Br. Opposing Exceptions at 22-23.

[804] *Id.* at 26-27; Joint Shippers Br. Opposing Exceptions at 26.

[805] Joint Complainants Br. Opposing Exceptions at 23-27.

[806] *Id.* at 9, 21-22.

[807] *Id.* at 10-14; Joint Shippers Br. Opposing Exceptions at 22-24.

[808] Colonial Br. Opposing Exceptions at 53-57.

d. Commission Determination

322. We reverse the Initial Decision and adopt Trial Staff's cost allocation analysis. There is no disagreement that direct assignment is preferable where possible and that Colonial's internal tracking and record-keeping processes did not permit 100% of costs to be directly assigned to merchant storage.[809] However, the Initial Decision misconstrues Opinion No. 511-A to require records directly assigning costs in all instances as a prerequisite for any reasonable cost allocation.[810] In Opinion No. 511-A, the Commission rejected arguments that the pipeline's internal systems used to directly assign overhead expenses were unreliable. The Commission explained that the pipeline had a uniform time keeping system and other protocols for tracking overhead in place.[811] However, the Commission did not find these particular tracking systems and protocols to be required in all instances for allocating costs in ratemaking. Instead, the Commission has recognized that some costs are "not susceptible to direct allocation"[812] and has accepted other reasonable methods to allocate costs where direct assignment is not possible based on the data available.[813]

323. As discussed below, we find Trial Staff's analysis is an appropriate method for allocating costs to merchant storage here.[814] Trial Staff reasonably relied upon Mr. Brock's general approach for identifying and allocating merchant storage costs. Mr. Brock identified and directly assigned some costs as 100% related to merchant storage.[815] For other costs that could not be directly assigned, Mr. Brock applied the Storage Ratio of leased capacity to total storage capacity. Trial Staff modified the Storage Ratio based

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[809] Initial Decision, 179 FERC ¶ 63,008 at P 156; Opinion No. 522, 140 FERC ¶ 61,220 at P 101.

[810] Initial Decision, 179 FERC ¶ 63,008 at PP 156-159, 162, 165, 167, 172-173 (citing Opinion No. 511-A, 137 FERC ¶ 61,220).

[811] Opinion No. 511-A, 137 FERC ¶ 61,220 at P 112.

[812] *Id.* P 83 n.102 ("It is unnecessary to engage in an administratively burdensome and expensive process of attempting to allocate directly costs that are not susceptible to direct allocation.") (citing *Williams Nat. Gas Co.*, 85 FERC ¶ 61,285 (1998)).

[813] *See, e.g.*, Opinion No. 486, 117 FERC ¶ 61,077 at PP 288-294; *Williams Nat. Gas Co.*, 85 FERC at 62,138.

[814] Ex. S-00001 (Ruckert) at 155-158; Ex. S-00022 (McComb) at 41-44; Ex. S-00173 (Ruckert) at 7-13; Ex. S-00174 at 152-154; Ex. S-00192 (McComb) at 3-7.

[815] *See, e.g.*, Ex. CPC-00111 (Brock) at 43-44, 46.

on a ratio of annual short- and long-term merchant storage capacity to total capacity using detailed capacity figures obtained from Colonial.[816] Trial Staff also identified additional operating expenses related to merchant storage using location codes Colonial identified as associated with leased storage service in discovery responses.[817] Trial Staff's review and analysis significantly increased the costs attributed to merchant storage.[818] On balance, we find Trial Staff's cost allocation analysis reasonable in the absence of more precise data that would permit direct assignment of costs.[819]

324. In contrast, we find Complainants' revenue crediting approach is an inferior method for addressing merchant storage costs in this proceeding. Rather than allocating costs, Complainants' approach retains the costs for the merchant storage service in rates but credits the cost of service with revenues from that service. Revenue crediting is not appropriate where there is a way to reasonably identify the costs associated with the service and allocate any shared costs.[820] As the Commission has explained, in choosing which proposal in the record is more reasonable, "the Commission considers which methodology most closely conforms to the Commission's long standing practice of trying to align cost allocation with cost causation."[821] A revenue crediting approach is not consistent with the Commission's goal of aligning cost allocation with cost causation to comport with the Commission's determination of cost-of-service rates based on projected volumes and costs.[822] Further, a revenue crediting approach would "disregard the more

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[816] Ex. S-00001 (Ruckert) at 155; Ex. S-00173 (Ruckert) at 7-13; Ex. S-00022 (McComb) at 42-43; Ex. S-00192 (McComb) at 3-7; *see also* Ex. S-00033; Ex. S-00036; Ex. S-00037; Ex. S-00193.

[817] Ex. S-00001 (Ruckert) at 157-158; Ex. S-00173 (Ruckert) at 7.

[818] Trial Staff Br. on Exceptions at 24; Ex. S-00001 (Ruckert) at 158; Ex. S-00173 (Ruckert) at 7; Ex. S-00352 at 154.

[819] Opinion No. 522, 140 FERC ¶ 61,220 at P 100 ("In deciding which cost allocation methodology to apply, the Commission must choose from the cost allocation alternatives available on the record.").

[820] *See, e.g.*, *Cheyenne Plains Gas Pipeline Co.*, 108 FERC ¶ 61,052, at 61,318 (2004) ("The Commission generally prefers pipelines to allocate costs to services . . . rather than credit the revenues to their shippers."); Ex. S-00022 (McComb) at 41.

[821] Opinion No. 522, 140 FERC ¶ 61,220 at P 100 (citing *Transcontinental Gas Pipe Line Corp*., 106 FERC ¶ 61,299, at P 190 (2004)).

[822] 18 C.F.R. § 346.2; Ex. S-00001 (Ruckert) at 167-68.

precise cost allocation information contained within the record,"[823] including the direct assignment of some costs to merchant storage based on Colonial's records.[824] Moreover, here it is reasonable to presume that Colonial earns a profit above its costs from offering its unregulated merchant storage service.[825] Consequently, revenue crediting would artificially reduce Colonial's cost-of-service rates based in part on profits generated from its ancillary merchant storage service.

325. We are not persuaded to abandon a cost allocation approach in favor of revenue crediting based on the Initial Decision and Complainants' arguments that Trial Staff's analysis incorporates various deficiencies from Mr. Brock's study. Trial Staff made several adjustments that addressed deficiencies in Mr. Brock's study.[826] Regarding the Initial Decision and Complainants' other criticisms of Trial Staff's analysis, we do not find them persuasive as discussed below. Further, neither the Initial Decision nor Complainants evaluated the extent or significance of the alleged deficiencies or demonstrated that they significantly affect Colonial's rates.[827] Any potential impact of these criticisms on rates is also more attenuated under Trial Staff's analysis which identifies merchant storage costs approximately three times greater than Mr. Brock's analysis.[828] Thus, we decline to leap from these alleged instances of imprecision to justify "a 'broad brush' rejection" of Trial Staff's cost allocation approach and adoption of revenue crediting, which is far less precise and fails to align cost allocation with cost causation.[829]

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[823] Opinion No. 522, 140 FERC ¶ 61,220 at P 102.

[824] Ex. S-00001 (Ruckert) at 154; Ex. CPC-00111 (Brock) at 43, 46, 48.

[825] A comparison between Trial Staff's proposed merchant storage costs to the Complainants' proposed revenue credit supports the notion that Colonial profits from its merchant storage service. *See* Ex. S-00352 at 154; Ex. JC-0169 (Arthur) at 87; Ex. CIT-0001 (Ashton) at 102; Ex. TMG-0001 (Palazzari) at 91.

[826] *Supra* P 311.

[827] *See* Opinion No. 522, 140 FERC ¶ 61,220 at P 133 (rejecting challenges to a direct assignment of costs where challengers failed to quantify the effect of the errors or show that the imprecision significantly impacted the pipeline's rates).

[828] Trial Staff Br. on Exceptions at 24; Ex. S-00352 at 154; Ex. CPC-00117 at 1.

[829] Opinion No. 522, 140 FERC ¶ 61,220 at P 133; *see also* Tr. 5519 (Ruckert) (observing that although it would be ideal if 100% of costs were tracked, Trial Staff's

326. Although the Initial Decision claims that "the record is replete with material examples of error in the Colonial allocation survey,"[830] the Initial Decision only specifically identifies a single alleged "error," the use of a uniform overhead gross-up factor of 8.38%.[831] The Initial Decision criticizes the use of a uniform overhead gross-up factor "without regard to location, size of facility, age, capacity, interconnected refineries, or the like, which were previously adjudged by this Commission to be unreliable," citing Opinion No. 435.[832] This reasoning based on Opinion No. 435 is not applicable. Opinion No. 435 addressed the allocation of overhead costs between jurisdictional and non-jurisdictional services,[833] whereas the 8.38% overhead gross-up factor here was used for a completely different purpose, namely, to gross up costs associated with merchant storage to account for general and administrative overhead.[834] Given that the purpose to gross-up merchant storage costs are grossed up only for general and administrative overhead, the use of the uniform overhead gross-up factor is reasonable.

327. We also disagree with Complainants' arguments that the 8.38% overhead gross-up factor is unsupported. Colonial and Trial Staff provided a reasonable basis for applying the 8.38% overhead gross-up factor. Mr. Brock testified that Colonial applies the 8.38% overhead gross-up factor to all projects that Colonial undertakes for outside parties to account for general and administrative costs that Colonial incurs for the project.[835] The overhead gross-up factor is the result of two detailed studies performed by Colonial in 2015 and 2018, and Colonial does not employ any other methodology for attributing general and administrative overhead costs to projects or services it undertakes for other parties.[836] Trial Staff witness Mr. Ruckert also reviewed Colonial invoices and found that Colonial applies the 8.38% overhead gross-up factor to the total cost billed by Colonial to

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method of identifying and allocating costs to merchant service was reasonable given the information available in this proceeding).

[830] Initial Decision, 179 FERC ¶ 63,008 at P 167.

[831] *Id.* P 167 n.353.

[832] *Id.* (citing Opinion No. 435, 86 FERC ¶ 61,022).

[833] Opinion No. 435, 86 FERC at 61,082-83.

[834] Ex. CPC-00111 (Brock) at 36-38 (citing Ex. CPC-00115 and Ex. CPC-00116); Ex. S-00001 (Ruckert) at 72; Ex. S-00173 at 21.

[835] Ex. CPC-00111 (Brock) at 36-37.

[836] *Id.* at 37.

the entity receiving the project services.[837] Further, Complainants do not propose any reasonable alternative for estimating general and administrative overhead.[838] Therefore, we find that Trial Staff and Colonial's use of the 8.38% overhead gross-up factor that Colonial employs for all outside projects was reasonable.

328. We are also not persuaded by Complainants' other criticisms of the cost allocation analyses provided by Colonial and Trial Staff. Although Complainants critique certain aspects of the analyses,[839] on balance we find Trial Staff's analysis reasonable based on the record before us.[840] For example, Complainants challenge the Storage Ratio, arguing that a capacity-based ratio is inappropriate because Colonial does not track storage volumes by location. However, we find Colonial and Trial Staff reasonably relied on a capacity-based Storage Ratio that measured capacity reserved for merchant storage (via short- and long-term leases) compared to total storage capacity based on the data available. Trial Staff explained that data regarding storage usage at particular tank locations is not relevant to determining the capacity ratio.[841] Trial Staff refined the

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[837] Ex. S-00001 (Ruckert) at 74.

[838] *See, e.g.*, Joint Complainants Br. Opposing Exceptions at 28.

[839] *See supra* PP 310-311 (describing the different components of Colonial and Trial Staff's analyses).

[840] *See Transcontinental Gas Pipe Line Corp*., 106 FERC ¶ 61,299 at P 190 ("Cost allocation is not an exact science"); Opinion No. 522, 140 FERC ¶ 61,220 at P 100 ("In deciding which cost allocation methodology to apply, the Commission must choose from the cost allocation alternatives available on the record."). As explained above, Complainants did not provide sufficient evidence quantifying the impact of the alleged flaws and any such impact would be more attenuated under Trial Staff's analysis that triples the costs attributed to merchant storage. Trial Staff Br. on Exceptions at 24; Ex. S-00352 at 154; Ex. CPC-00117 at 1.

[841] Ex. S-00192 (McComb) at 4-7. Complainants also argue that Mr. Brock contradicts himself by claiming that (1) Colonial's records do not identify the location of tankage used for merchant storage and (2) excluding capacity associated with non-carrier tankage for the Port Arthur Products Station and third-party leased storage capacity at Cedar Bayou and Baton Rouge from the Storage Ratio. Joint Complainants Br. Opposing Exceptions at 33. The fact that Colonial may be able to identify the location of some tankage capacity used for merchant storage does not necessarily mean that Colonial can identify the tank location of all merchant storage volumes. Colonial operates a fungible system where its tanks are generally not used exclusively for the purpose of merchant or operational storage. Ex. CPC-00111 (Brock) at 38-42; Ex. CPC-00110 (Gardner) at 10-11. As the record indicates not all storage assets can be traced to particular storage services, we find the use of a capacity-based ratio that does not rely on storage usage at

Storage Ratio based on detailed short-term and long-term capacity lease figures obtained from Colonial.[842]

329. We are also not convinced by Complainants' argument that the Storage Ratio improperly allocated unutilized storage capacity to the transportation service, given the operational facts regarding Colonial's system. Although Colonial leases storage capacity to shippers through short- and long-term contracts, the balance of the storage capacity is used as operational storage to provide the transportation service.[843] Colonial states that it uses nearly all of its storage capacity at peak times to operate the pipeline system.[844] Moreover, the record indicates that Colonial operates a fungible system where schedulers routinely move product among tanks used for both operational and merchant storage, and no particular tank is used for either purpose.[845] Colonial did not construct any storage tanks solely for the purpose of providing merchant storage.[846] We also find the

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particular tank locations a reasonable method for allocating costs between merchant and operational storage service. Moreover, where Colonial could attribute specific tankage capacity to merchant storage, Mr. Brock directly assigned 100% of those costs to merchant storage, and accordingly excluded those capacity amounts from the Storage Ratio. *See* Ex. CPC-00111 (Brock) at 46-47 (noting 100% of the costs associated with non-carrier tankage for the Port Arthur Products Station and third-party leased storage capacity at Cedar Bayou and Baton Rouge were directly assigned to merchant storage); Ex. JC-0186 (Arthur) at 1 (explaining that the tankage facilities at Cedar Bayou and Baton Rouge are used solely for merchant storage); *id.* at 6-8 (itemizing the capacity excluded from the capacity calculation).

[842] Ex. S-00001 (Ruckert) at 155; Ex. S-00022 (McComb) at 42-43; Ex. S-00192 (McComb) at 4-7; *see also* Ex. S-00033; Ex. S-00036; Ex. S-00037; Ex. CPC-00170; Ex. S-00193.

[843] All merchant storage leases give Colonial the ability to use the merchant storage for transportation purposes if required. Approximately 90% of movements on Colonial flow through operational break out storage. Ex. CPC-00111 (Brock) at 41-42; *see also* Ex. TMG-0104 at 1 (Under a majority of volumetric contracts, Colonial has the right to determine the tanks and facilities where the barrels are stored); Ex. CPC-00110 (Gardner) at 11 ("Colonial has storage contracts that are non-location specific" where "Colonial reserves the right to physically store the shipper's product at any point on Colonial's system and further reserves the right to relocate the stored barrels at any time").

[844] Ex. CPC-00076 (Webb) at 34-35 (citing Ex. CPC-00079).

[845] Ex. CPC-00111 (Brock) at 38-42; Ex. CPC-00110 (Gardner) at 10-11.

[846] Although Colonial leases capacity for the sole purpose of providing merchant

Complainants did not present sufficient evidence supporting their claim that Colonial over-built storage capacity for providing its merchant storage service.[847]

330. Likewise, we are not persuaded to adopt Complainants' revenue crediting approach based on their criticisms of Mr. Brock's survey process used to identify personnel support expenses associated with merchant storage. Complainants direct their criticisms primarily to this one aspect Mr. Brock's cost allocation analysis,[848] yet they do not demonstrate that it significantly impacts the storage costs allocated to Colonial's cost of service, particularly in light of the Commission's adoption of Mr. Ruckert's other adjustments.[849] Further, Trial Staff witness Mr. Ruckert ultimately concluded that Trial Staff's analysis was reasonable and "the best possible allocation that could be performed" for this proceeding given the available information and that cost allocation is inherently imperfect.[850] Mr. Ruckert also explained that Mr. Brock was conservative in his allocations for certain other items.[851] Although Complainants also claim Mr. Brock failed to provide supporting documents underlying his surveys, the participants in this

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storage, it did not build this storage capacity. None of this capacity is included in Colonial's pipeline transportation rates. Ex. CPC-00111 (Brock) at 47-48.

[847] For example, Joint Shippers cite exhibits to claim that Colonial constructed additional storage capacity in a year when there was no additional mainline capacity added, but do not provide any evidence indicating the additional storage was constructed to provide merchant storage service. Joint Shippers Br. Opposing Exceptions at 26 (citing Ex. TMG-0076 (Palazzari) at 98; Ex. TMG-0104).

[848] *See, e.g.*, Joint Complainants Br. Opposing at 8-10, 21-29. Complainants exaggerate the effect of any deficiencies in the survey. The survey was only used for determining personnel expenses related to merchant storage activities. As noted above, personnel expenses are only one out of seven categories of storage costs that Mr. Brock analyzed.

[849] Tr. 5519 (Ruckert). Complainants have not demonstrated that these expenses would have more than a *de minimus* effect on the cost-of-service rate. *See* Ex. S-00352 at 153-154. As noted above, any potential impact on rates is more attenuated under Trial Staff's analysis which identifies merchant storage costs approximately three times greater than Mr. Brock's analysis. Trial Staff Br. on Exceptions at 24; Ex. S-00352 at 154; Ex. CPC-00117 at 1.

[850] Tr. 5517-5519 (Ruckert).

[851] Tr. 5517 (Ruckert).

case conducted extensive discovery, including discovery related to Mr. Brock's survey,[852] and it is unclear why Complainants could not obtain the additional data or information they claim Colonial failed to provide during discovery.[853] We find the record here does not support allocating more support expenses to merchant storage and away from jurisdictional service.

331. We also disagree with Complainants' argument that a comparison of costs allocated to merchant storage with revenues shows the cost allocation analysis is biased. We note that Trial Staff excluded significantly more costs for merchant storage than Colonial.[854] Further, as explained above, it is reasonable to presume that Colonial would profit from its ancillary, unregulated merchant storage service above its costs.

332. We reject Complainants' argument that the cost allocation analyses were not conducted within the test period. Trial Staff and Mr. Brock's cost-allocation analyses did not alter the fact that the underlying costs were incurred during the test period, and they simply allocate test period costs between the merchant storage service and Colonial's operational storage.

333. The Initial Decision and Complainants also assert that Colonial failed to accurately report its merchant storage activities in its FERC Form No. 6.[855] However, as Complainants acknowledge, Colonial conducted a separate cost allocation study in this proceeding, which Trial Staff relies on.[856] Although we emphasize that Colonial should

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[852] *See, e.g.*, Ex. TMG-0109; Ex. JC-0184.

[853] If Complainants believed that the information Colonial provided in response to their discovery requests was inadequate, they could have filed a motion to compel. *Williams Nat. Gas Co.*, 77 FERC ¶ 61,277, at 62,188-89 (1996). Further, as Trial Staff notes, Colonial disclosed the individuals who conducted the survey process (Ex. TMG-0109) and the individual sources for the survey data (Ex. CPC-00117 at 5-16), and it does not appear that Complainants sought to depose Mr. Brock or any of his sources. Trial Staff Br. on Exceptions at 24; *see, also*, Tr. 2931-2932 (Arthur).

[854] Trial Staff Br. on Exceptions at 24; Ex. S-00352 at 154; Ex. CPC-00117 at 28. Further, in terms of the overall effect on cost of service, Trial Staff's methodology is closer to Complainants' proposal than Colonial's original proposal. *Compare* Ex. S-00352 at 154 *with* Ex. JC-0169 (Arthur) at 87 *and* Ex. TMG-0001 (Palazzari) at 91.

[855] *E.g.*, Initial Decision, 179 FERC ¶ 63,008 at PP 160-161; Joint Complainants Br. Opposing Exceptions at 10-12.

[856] Joint Complainants Br. Opposing Exceptions at 10-14; Joint Shippers Br. Opposing Exceptions at 22-24.

accurately assign costs in its regulatory reporting, any inaccuracies in Colonial's Form No. 6 do not necessarily render Colonial's and Trial Staff's separate cost allocation studies unreasonable for purposes of this rate case. Our task here is to determine which methodology to adopt for addressing merchant storage costs for purposes of setting Colonial's cost-of-service rate in this proceeding based on the record before us.[857]

334. Finally, we are unpersuaded by Colonial's challenges to Trial Staff's modifications to Mr. Brock's analysis. We reject Colonial's critique of Trial Staff's modified Storage Ratio.[858] Colonial does not offer any explanation in its brief for why Trial Staff's recalculated Storage Ratio is unreasonable, but instead merely observes that it is slightly higher than Mr. Brock's Storage Ratio.[859] Further, the difference between these figures is trivial and would have a negligible effect on the cost of service.[860]

335. We also reject Colonial's claims that Trial Staff over-excluded costs associated with its transportation activities from the cost of service, such as expenses associated with drag reducing agent and right of way inspection and repair.[861] First, Colonial fails to acknowledge that Trial Staff updated its calculations to remove costs related to drag reducing agent from merchant storage.[862] Second, Colonial does not provide any analysis to support a finding that the expenses for numerous sub-account codes associated with tank farm and lease storage locations that Trial Staff identified only relate to transportation activities. Colonial merely argues that these expenses include some amount of costs associated with transportation activities but fails to specifically identify such costs. Third, Colonial does not explain why Mr. Brock's approach of excluding all

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[857] *See* Opinion No. 522, 140 FERC ¶ 61,220 at P 100 ("In deciding which cost allocation methodology to apply, the Commission must choose from the cost allocation alternatives available on the record.").

[858] In determining the Storage Ratio, Mr. Brock employed a simplifying assumption to short- and long-term merchant storage, where he assumed that each short-term lease was for one cycle and that each long-term lease's initial month was a full month. Ex. CPC-00166 (Brock) at 3. Both Colonial and Trial Staff later recalculated the Storage Ratio using actual short- and long-term contracts. Ex. CPC-00166 (Brock) at 3; Ex. CPC-00170; Ex. S-00192 (McComb) at 4-7; Ex. S-00193.

[859] Colonial Br. Opposing Exceptions at 54.

[860] *See* Ex. CPC-00117; Ex. CPC-00170; Ex. S-00193.

[861] Colonial Br. Opposing Exceptions at 54.

[862] Ex. S-00173 (Ruckert) at 12-13; Ex. S-00174 at 55.

expenses associated with these sub-account codes from merchant storage is reasonable.[863] Fourth, Trial Staff provided evidence undermining Mr. Brock's approach of excluding all costs at numerous sub-account codes associated with tank farm and lease storage locations.[864] Finally, although Colonial criticizes Trial Staff for failing to perform a more "granular" examination of the additional sub-account codes,[865] we do not find Trial Staff's inability to perform an in-depth review of each of the approximately 482,000 accounting entries provided by Colonial renders Trial Staff's analysis unreasonable,[866] as Colonial elsewhere appears to acknowledge.[867] As explained above, we "must choose from the cost allocation alternatives available on the record."[868] On balance, we find that Trial Staff's approach of allocating a portion of these expenses to merchant storage is more reasonable than excluding them entirely.

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[863] Mr. Brock only removes a portion of the costs associated with seven sub-account codes that included "tank" in the name out of numerous sub-account codes for tank farm locations. Ex. CPC-00168 at 19-21. Mr. Brock does not provide sufficient evidence to demonstrate that expenses booked to these sub-account codes that do not include "tank" in the name exclusively relate to transportation activities. *See* Ex. CPC-00166 (Brock) at 6-7; *see also* Ex. S-00173 (Ruckert) at 10-11.

[864] For example, although Colonial claims pipeline right of way inspection and repair is only associated with its transportation activities (Colonial Br. Opposing Exceptions at 54), Mr. Ruckert reviewed detailed descriptions of expenses booked to the sub-account code for "pipeline and [right of way] inspection and repair" in accounting entries provided by Colonial and identified descriptions that contradict Colonial's position. Ex. S-00173 (Ruckert) at 11-12; Ex. S-00181 at 1.

[865] Colonial Br. Opposing Exceptions at 55.

[866] Ex. S-00173 (Ruckert) at 11. Further, Colonial inconsistently (1) claims it was not required to account for costs with more "granularity" in supporting its cost allocation approach, yet (2) criticizes Trial Staff for failing to perform a more "granular" examination of the additional sub-account codes. *Compare* Colonial Br. on Exceptions at 59, *with* Colonial Br. Opposing Exceptions at 55.

[867] *See, e.g.*, Colonial Br. on Exceptions at 57-58 ("While not an 'exact science,' [Colonial and Trial Staff] proposed a reasonable method for fulfilling the Commission's cost causation goals.").

[868] Opinion No. 522, 140 FERC ¶ 61,220 at P 100.

2. Product Transfer Order (PTO) Service

a. Initial Decision

336. At a shipper's request and for a fee, Colonial will issue a PTO that records a transfer of title of the product from one shipper to another while the product is in-transit and under Colonial's custody.[869] The Initial Decision accepted Complainants' revenue crediting approach, and rejected Colonial and Trial Staff's cost allocation method. Similar to the merchant storage issue discussed above, the Initial Decision found that Colonial had failed to establish protocols for assigning costs and had not maintained its books and records in a manner that would permit a reasonable cost allocation to be made.[870]

b. Briefs on Exceptions

337. Trial Staff and Colonial argue that the Initial Decision erroneously adopted revenue crediting, instead of a cost-allocation methodology for Colonial's PTO services, raising the same arguments discussed above for merchant storage.[871]

c. Briefs Opposing Exceptions

338. Complainants assert that the Initial Decision correctly adopted revenue crediting and rejected a cost allocation approach for PTO costs, raising the same arguments discussed above regarding merchant storage.[872]

d. Commission Determination

339. We adopt Trial Staff and Colonial's cost allocation method for allocating costs to the PTO service and reject Complainants' revenue crediting approach. Similar to merchant storage, Mr. Brock identified both capital expenses and operating expenses attributable to the PTO service. For operating expenses, he identified (1) support expenses based upon a survey of Colonial's scheduling and inventory departments, (2) expenses from the T4 system, and (3) expenses paid to Bengal storage facility. He also

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[869] Initial Decision, 179 FERC ¶ 63,008 at P 259; *see also* Ex. CPC-00111 (Brock) at 51.

[870] Initial Decision, 179 FERC ¶ 63,008 at PP 284-285 (citing Opinion No. 511-A, 137 FERC ¶ 61,220 at P 134).

[871] Trial Staff Br. on Exceptions at 15-36; Colonial Br. on Exceptions at 55-69.

[872] Joint Complainants Br. Opposing Exceptions at 7-18, 39-42; Joint Shippers Br. Opposing Exceptions at 28-29.

applied the general and administrative overhead percentage to the total operating expenses.[873] Trial Staff did not have any adjustments to Mr. Brock's analysis.[874] We find that this approach provides a reasonable method for allocating costs and is superior to Complainants' revenue credit approach for the same reasons discussed above regarding merchant storage.

3. Blending Operations

a. Initial Decision

340. There are two blending operations, Powder Springs Logistics and Texon L.P., that generate earnings for Colonial.[875] The Initial Decision accepted Complainants' revenue crediting approach, and rejected Colonial and Trial Staff's cost allocation method. Similar to the merchant storage and PTO service issues discussed above, the Initial Decision found that Colonial had failed to establish protocols for assigning costs and had not maintained its books and records in a manner that would permit a reasonable cost allocation to be made.[876]

b. Briefs on Exceptions

341. Trial Staff and Colonial argue that the Initial Decision erroneously adopted revenue crediting, instead of a cost-allocation methodology for Colonial's blending services, raising the same arguments as discussed above regarding the merchant storage service.[877]

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[873] Ex. CPC-00111 (Brock) at 52.

[874] Ex. S-00001 (Ruckert) at 160.

[875] Powder Springs Logistics uses an in-line blending process that blends butane into gasoline products through a facility that is connected to Colonial at Atlanta Junction, Georgia. Powder Springs Logistics is a joint venture between Magellan Midstream Partners, L.P. and Trinidad Products, Inc., a Colonial subsidiary. Texon L.P. blends a 5% biodiesel concentration into ultra-low sulfur diesel that moves through Colonial's system at Greensboro, North Carolina for delivery into Colonial's Line 22 to Selma, North Carolina, and Line 24 to Fayetteville, North Carolina. Initial Decision, 179 FERC ¶ 63,008 at PP 338-341; Ex. CPC-00111 (Brock) at 59.

[876] Initial Decision, 179 FERC ¶ 63,008 at PP 361-364 (citing Opinion No. 511-A, 137 FERC ¶ 61,220 at P 101).

[877] Trial Staff Br. on Exceptions at 15-36; Colonial Br. on Exceptions at 55-69.

c. Briefs Opposing Exceptions

342. Complainants argue that the Initial Decision correctly adopted revenue crediting and rejected a cost allocation approach for the same reasons discussed above regarding the merchant storage service.[878]

d. Commission Determination

343. We adopt Trial Staff's analysis for allocating costs to the blending service and reject Complainants' revenue crediting approach. Similar to merchant storage, Trial Staff modified the analysis provided by Colonial witness Mr. Brock, which identified both capital and operating costs related to blending.[879] Trial Staff identified additional operational costs associated with Colonial's blending operations, using project codes used for cost tracking that Colonial provided in discovery.[880] We find that Trial Staff's analysis provides a reasonable method for allocating costs, and is superior to Complainants' revenue credit approach for the same reasons discussed above regarding merchant storage.

4. Alliance Lease

a. Initial Decision

344. Colonial leased its Alliance Line 7 lateral[881] to Phillips 66.[882]

345. Unlike the merchant storage, PTO, and blending costs discussed above, the Initial Decision found Colonial's records permitted the Alliance lease plant and capital costs to be identified and directly assigned.[883] However, regarding the operating expenses associated with the lateral, the Initial Decision again found that Colonial's record-keeping

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[878] Joint Complainants Br. Opposing Exceptions at 7-18, 42-45; Joint Shippers Br. Opposing Exceptions at 28-29.

[879] Ex. CPC-00111 (Brock) at 60-61.

[880] Ex. S-00001 (Ruckert) at 162-163. Mr. Brock subsequently accepted Trial Staff's modified blending costs. Ex. CPC-00166 (Brock) at 8.

[881] Line 7 runs from Phillips 66's Alliance refinery at Belle Chasse, Louisiana to a tank farm at Collins, Mississippi. Ex. CPC-00111 (Brock) at 61-62.

[882] Initial Decision, 179 FERC ¶ 63,008 at PP 181-182; Ex. CPC-00111 (Brock) at 61-62.

[883] Initial Decision, 179 FERC ¶ 63,008 at PP 220, 226.

and reporting practices were insufficient to support a reasonable allocation of costs, and accordingly rejected Colonial and Trial Staff's cost allocation analyses.[884] Instead, the Initial Decision adopted Joint Complainants' proposed approach of allocating the remaining operating costs based on a volumetric barrel-mile methodology.[885]

b. Briefs on Exceptions

346. Trial Staff and Colonial argue the Initial Decision should have adopted a cost-allocation methodology, as opposed to a barrel-mile method.[886] Trial Staff argues that a barrel-mile method is less exact than attempting to identify the specific costs associated with the Alliance lease.[887]

c. Briefs Opposing Exceptions

347. Joint Complainants argue that the Initial Decision correctly rejected Colonial and Trial Staff's cost allocation analyses and appropriately relied on a barrel-mile method.[888] Joint Complainants assert that using a barrel-mile method provides a consistent basis to

[884] *Id.* PP 221-225 (citing Opinion No. 511-A, 137 FERC ¶ 61,220 at PP 96, 112).

[885] *Id.* PP 225, 227 (citing Ex. JC-0001 (Arthur) at 10-12; Ex. JC-0169 (Arthur) at 120). Joint Complainants proposed allocating non-pipeline integrity operating expenses for the Alliance Line 7 lateral based on the sum of non-distance (barrel) and distance (barrel-mile) ratios multiplied by total system distance and non-distance operating expenses, respectively. Specifically, Dr. Arthur allocated general and administrative costs (i.e., non-distance costs) to the Alliance 7 lateral using the ratio of Alliance Line 7 barrels to total system barrels, while treating the remaining operating expenses as distance-related costs that are allocated to the Alliance Line 7 lateral based on the ratio of Alliance Line 7 barrel-miles to total system barrel-miles. Ex. JC-0169 (Arthur) at 120:18-24; Ex. JC-0026 at 9-10. Dr. Arthur then multiplied the total system non-distance-related operating expenses by the barrel ratio and the total system distance-related operating expenses by the barrel-mile ratio and summed the results. Ex. JC-0026 at 11.

[886] Trial Staff Br. on Exceptions at 27-29; Colonial Br. on Exceptions at 64-65.

[887] Trial Staff Br. on Exceptions at 27-29.

[888] Joint Complainants Br. Opposing Exceptions at 39.

allocate such costs as all parties have implemented such a methodology for intrastate transportation allocations and fully allocated cost methodology for deriving rates.[889]

348. Similar to merchant storage, Colonial argues that its method is superior to Trial Staff's method, alleging that Trial Staff attributed some additional costs associated with its jurisdictional transportation service to the Alliance lease.[890]

d. Commission Determination

349. We reverse the Initial Decision's use of the barrel-mile method and instead adopt Trial Staff's analysis for allocating costs to the Alliance lease. Once again Trial Staff modified the analysis provided by Colonial witness Mr. Brock, which identified both capital and operating costs related to the Alliance lease.[891] Trial Staff identified additional operating expenses using location codes associated with the Alliance lease that Colonial provided in discovery.[892] We find that Trial Staff's analysis provides a reasonable method for allocating costs, and is superior to Complainants' barrel-mile approach.

350. We find that Joint Complainants' barrel-mile approach is an inferior method for addressing costs related to the Alliance lease in this proceeding because it is less precise. Rather than identify specific costs attributable to the Alliance lease like Trial Staff, Dr. Arthur developed a formula using ratios to estimate those costs.[893] Thus, Trial Staff's cost allocation analysis is more consistent with the Commission's goal of aligning cost allocation with cost causation.[894]

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[889] Joint Complainants Br. Opposing Exceptions at 39.

[890] Colonial Br. Opposing Exceptions at 57-58.

[891] Mr. Brock identified five categories of operating expenses associated with the Alliance lease: (1) support expenses, (2) SIPM expenses, (3) operating expenses, (4) insurance expenses, and (5) ad valorem taxes. He used a similar methodology to that of merchant storage. Ex. CPC-00111 (Brock) at 63-66; Ex. CPC-00126.

[892] Ex. S-00001 (Ruckert) at 151-152.

[893] Ex. JC-0169 (Arthur) at 120:18-24; Ex. JC-0026 at 9-11.

[894] As described above, the Commission prefers to directly assign and allocate costs where possible. Opinion No. 522, 140 FERC ¶ 61,220 at P 100. Moreover, Dr. Arthur's application of the barrel-miles approach resulted in a lower cost allocation to the Alliance lease such that any impact of adopting Trial Staff's methodology is to lower the cost of service. *Compare* Ex. JC-0169 (Arthur) at 122 *with* Ex. S-00352 at 151; *see also*

351. We are also unpersuaded by Colonial's challenges to Trial Staff's methodology. Similar to merchant storage, Trial Staff excluded additional operating expenses associated with location codes Colonial identified as associated with the Alliance lease.[895] Colonial again argues that Trial Staff over-excluded costs associated with its transportation activities from the cost of service. However, Colonial only provides a single example: costs recorded to Colonial's Collins Tank Farm (Location 327). Although Colonial claims "a significant portion" of these costs relate to jurisdictional transportation,[896] Colonial once again does not specify the portion of these costs it claims relate to jurisdictional transportation. Further, Trial Staff responded to this criticism and provided evidence indicating that the assets associated with the Collins Tank Farm appear to be leased to Phillips 66.[897] Colonial does not address this evidence in its brief, which appears to undermine Colonial's claim that the Collins Tank Farm is part of jurisdictional transportation operations and the costs should not be removed from cost of service.[898] As explained above in the merchant storage section, we "must choose from the cost allocation alternatives available on the record."[899] On balance, we find that Trial Staff's approach of allocating these additional operating expenses to the Alliance lease reasonable based on the information available in the record.

Tr. 5518 (Ruckert) (noting that Trial Staff removed more costs associated with the Line 7 than Dr. Arthur, which mitigated any impact of adopting Dr. Arthur's approach on cost of service).

[895] Mr. Brock followed a similar approach to identify and allocate operating expenses to Line 7 as his merchant storage analysis. He identified five sub-categories of operating expenses: support expenses, SIPM expenses, operating expenses, insurance expenses, and ad valorem taxes. For the "operating expenses" sub-category, he reviewed all expenses coded in a location indicating they were incurred in the area in which Line 7 is located to determine whether they related to Line 7 operations. Ex. CPC-00111 (Brock) at 64-65; Ex. CPC-00126 at 20. Mr. Ruckert identifies additional operating expenses by applying a similar process as his merchant storage analysis of querying all operating expenses at location codes Colonial identified as associated with the Line 7 lease. Ex. S-00001 (Ruckert) at 151.

[896] Colonial Br. Opposing Exceptions at 58 (citing Ex. CPC-00166 (Brock) at 9).

[897] Ex. S-00173 (Ruckert) at 14-15; Ex. S-00179 at 40.

[898] *See* Colonial Br. Opposing Exceptions at 58.

[899] Opinion No. 522, 140 FERC ¶ 61,220 at P 100.

5. Nashville Lease

a. Initial Decision

352. The Initial Decision found that it is not appropriate to make a test-period adjustment to account for Colonial's lease to a third party of a delivery line near Nashville, Tennessee. The Initial Decision explained that the Nashville lease was executed after the test period and would not have a substantial impact on the test period cost of service.[900]

b. Briefs on Exceptions

353. Joint Shippers argue that the Initial Decision should have required Colonial to credit revenues from the Nashville lease to the cost of service, similar to the approach the Initial Decision adopted for merchant storage discussed above.[901] Joint Shippers assert that this error creates an unreasonable result of including the costs of the leased delivery line in the cost of service while excluding the associated revenues generated by the lease. Joint Shippers argue that the revenues can be credited even though the lease was executed after the end of the test period because the evidence shows the lease was known and measurable during the test period. Alternatively, if the lease is considered a post-test period event, Joint Shippers argue that the lease should be considered because excluding it will yield unreasonable results.[902]

c. Briefs Opposing Exceptions

354. Trial Staff and Colonial argue that the Initial Decision correctly declined to credit revenues associated with the Nashville lease.[903] They assert that the Nashville lease is not relevant to the cost of service because the lease was entered into outside the test period.[904] They argue the lease was not known and measurable by the end of the test period because earlier unexecuted drafts may not come to fruition or may change prior to

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[900] Initial Decision, 179 FERC ¶ 63,008 at P 244.

[901] Joint Shippers Br. on Exceptions at 35-37.

[902] *Id.* at 36-37.

[903] Trial Staff Br. Opposing Exceptions at 37-38; Colonial Br. Opposing Exceptions at 61.

[904] Trial Staff Br. Opposing Exceptions at 37; Colonial Br. Opposing Exceptions at 61.

the executed version.[905] Trial Staff also argues that Joint Shippers' proposed revenue credit is not a substantial error that justifies consideration of post-test period data.

d. Commission Determination

355. We affirm the Initial Decision's finding that it is not appropriate to make a test period adjustment related to the Nashville lease, because the lease was executed after the test period[906] and would not have a substantial impact on the test period cost of service.[907]

6. Miscellaneous Account 250 and 260 Issues

356. Below we discuss four miscellaneous issues regarding Colonial's Account 250 and 260 costs, namely (1) the jurisdictional nature of certain ancillary services, (2) the stipulation regarding miscellaneous services, (3) the stipulation regarding Colonial's lease of pipeline capacity to Enterprise TE Products Pipeline Company LLC (TEPPCO) (the TEPPCO lease), and (4) the Initial Decision's recommendation that Colonial make a limited filing to revise its cost of service with updated cost allocations.

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[905] Trial Staff Br. Opposing Exceptions at 37-38; Colonial Br. Opposing Exceptions at 61.

[906] Initial Decision, 179 FERC ¶ 63,008 at P 244; Ex. CPC-00019 (Wetmore) at 109; Ex. CPC-00111 (Brock) at 62.

[907] Initial Decision, 179 FERC ¶ 63,008 at P 244. *See* Ex. TMG-0001 (Palazzari) at 78:13-18 (stating that Colonial recorded revenues of $356,660 from the Nashville lease in 2018); Ex. CPC-00310. This comports with the Commission's general policy of using actual test period experience even if additional costs or revenues are incurred soon after the test period. *Papago Tribal Util. Auth. v. FERC*, 773 F.2d 1056, 1060 (9th Cir. 1985) (finding that test period estimates that included pipeline capacity that would be sold after the test period were "reasonable when made because [the utility] did not plan to receive, nor did it receive, revenues from these sales during the test year" and "[t]he fact that [the utility] will receive these revenues in the future is not sufficient to establish that the estimates were 'substantially in error' and would 'yield unreasonable results'"). *See, e.g.*, *Exxon Corp. v. FERC*, 114 F.3d 1252, 1263-64 (D.C. Cir. 1997) (affirming use of test period billing determinants despite evidence of higher billing determinants after the test period due to short-term contracts); *Nw. Pipeline Corp.*, 71 FERC ¶ 61,253, at 62,000 (1995), *reh'g order*, 76 FERC ¶ 61,068 (1996), *rev'd on other grounds*, 79 FERC ¶ 61,309 (1997) (affirming decision not to reflect in the test period terms of contract executed seven days after the test period); *Panhandle E. Pipeline Co.*, Opinion No. 404, 74 FERC ¶ 61,109, at 61,354 (1996) (allowing the pipeline to retain in its rate base certain facilities sold one and five months after the test period, respectively).

357. First, the Initial Decision declined to address the jurisdictional nature of certain ancillary services, including Colonial's merchant storage, PTO, and blending services. The Initial Decision found that the jurisdictional issues were not set by the Commission for hearing and are not relevant to assessing the cost of service for determining Colonial's jurisdictional transportation rates in this proceeding.[908] We agree with the Initial Decision, and therefore we do not address the participants' arguments on exceptions regarding the jurisdictional nature of these ancillary services.[909]

358. Second, the Initial Decision departed from the participants' stipulation that certain operating expense and miscellaneous revenue items would be resolved via lump sum amounts to be included in the base period and test period cost of service.[910] Instead, the Initial Decision found that test period revenues associated with these miscellaneous services should be imputed to Colonial's cost of service.[911] We agree with all participants that the stipulation resolved the costs and revenues associated with the miscellaneous services on a black-box basis without addressing the cost allocation methodology and that the Initial Decision's findings on this issue are unnecessary.[912]

359. Third, the participants also stipulated to a level of costs to be removed from Colonial's cost of service related to the TEPPCO lease, which they stipulated "fully

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[908] Initial Decision, 179 FERC ¶ 63,008 at PP 116 n.186, 151, 155, 170, 282.

[909] *See, e.g.*, Colonial Br. on Exceptions at 56 (arguing the merchant storage service is not jurisdictional); Joint Complainants Br. Opposing Exceptions at 19 (arguing the merchant storage services are jurisdictional); Joint Shippers Br. Opposing Exceptions at 27-28 (same); Colonial Br. on Exceptions at 56, 66-67 (arguing the PTO service is not jurisdictional); Trial Staff Br. on Exceptions at 33-34 (arguing the PTO service is jurisdictional); Joint Complainants Br. Opposing Exceptions at 40 (same); Colonial Br. on Exceptions at 68 (arguing the blending operations are not jurisdictional); Joint Complainants Br. Opposing Exceptions at 43-44 (arguing the blending operations are jurisdictional).

[910] These items included Colonial's ExxonMobil Valve Operations, Handling Fees, Shipper Requested Regrade Fees, Fuel System Icing Inhibitor, and Parkway Transmix Handling Operations. Ex. BE-0003 ¶ 13.

[911] Initial Decision, 179 FERC ¶ 63,008 at PP 299 (ExxonMobil valve operations), 308 (handling fee operations), 317 (shipper-requested regrade services), 326 (fuel system icing inhibitor operations), 337 (Parkway Transmix handling operations).

[912] Colonial Br. on Exceptions at 67-68; Trial Staff Br. on Exceptions at 40-44; Joint Complainants Br. on Exceptions at 13-16; Joint Shippers Br. Opposing Exceptions at 29.

resolves the TEPPCO lease issue."[913] Accordingly, we decline to address the Initial Decision's suggestion that the TEPPCO lease may conflict with a Commission order,[914] or the participants' arguments responding to this suggestion.[915]

360. Fourth, we decline to adopt the Initial Decision's recommendation that Colonial make a limited one-time filing with updated costs, revenues, and going-forward cost allocations for all activities under Accounts 250 and 260 no sooner than 36 months from the Commission's final order.[916] We agree with all participants that the Initial Decision's recommendation is contrary to the Commission's ratemaking procedures for oil pipelines and would extend this litigation unnecessarily.[917] The participants have developed an extensive record in this proceeding over several years and the Commission will resolve all issues in this proceeding on that basis.[918]

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[913] Ex. BE-0003 ¶ 8.

[914] Initial Decision, 179 FERC ¶ 63,008 at PP 231, 234, 236 (citing *Colonial Pipeline Co.*, 146 FERC ¶ 61,206 (2014)).

[915] Colonial Br. on Exceptions at 65-66; Joint Complainants Br. Opposing Exceptions at 46-47; Joint Shippers Br. Opposing Exceptions at 29-30.

[916] Initial Decision, 179 FERC ¶ 63,008 at PP 175-176; *see also id.* PP 299 (ExxonMobil valve operations), 308 (handling fee operations), 317 (shipper-requested regrades), 326 (fuel system icing inhibitor operations), 337 (Parkway Transmix handling operations), 364 (blending operations), 375, 1152 (FERC Account No. 330 fuel and power expenses), 1246 n.2591 (FERC Account No. 580 property tax abatements and refunds).

[917] The Commission generally disfavors limited cost-of-service filings because they only examine a portion of the cost of service and would not consider whether the pipeline's other costs have decreased in the same period such that an overall rate increase would not be warranted. *See ANR Pipeline Co.*, 110 FERC ¶ 61,069, at P 18 (2005). All participants opposed the Initial Decision's recommendation. *See* Colonial Br. on Exceptions at 60; Trial Staff Br. on Exceptions at 36-38; Joint Complainants Br. on Exceptions at 9-12; Joint Shippers Br. on Exceptions at 14-16; Colonial Br. Opposing Exceptions at 76.

[918] Moreover, Colonial may seek to adjust its rates at any time pursuant to the Commission's regulations. 18 C.F.R. § 342.4.

IV. Grandfathering

A. Background

1. Grandfathering under EPAct 1992

361. EPAct 1992 deems any oil pipeline rate in effect and not subject to protest, investigation, or complaint for one year before October 24, 1992, to be just and reasonable under the ICA.[919] This "grandfathering" protection extends only to the rate level in effect at the enactment of EPAct 1992 and does not extend to subsequent rate increases above the grandfathered level.[920] Thus, where a pipeline has increased a grandfathered rate through indexing, the portion of the rate above the grandfathered level is not protected by grandfathering.[921]

362. EPAct 1992 enumerates three circumstances where the Commission may reduce a rate below the grandfathered level (or "de-grandfather" the rate).[922] As relevant here, EPAct 1992 allows the Commission to de-grandfather rates where:

> (1) evidence is presented to the Commission which establishes that a substantial change has occurred after the date of the enactment of [EPAct 1992]—
>
> > (A) in the economic circumstances of the oil pipeline which were a basis for the rate.[923]

363. The Commission determines whether a substantial change in economic circumstances has occurred based upon changes in the pipeline's profitability, as

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[919] EPAct 1992 § 1803(a).

[920] *See Revisions to Oil Pipeline Reguls. Pursuant to Energy Pol'y Act of 1992*, Order No. 561, FERC Stats. & Regs. ¶ 30,985, at 30,956 (1993) (cross-referenced at 65 FERC ¶ 61,109), *order on reh'g*, Order No. 561-A, FERC Stats. & Regs. ¶ 31,000 (1994) (cross-referenced at 68 FERC¶ 61,138), *aff'd sub nom. Ass'n of Oil Pipe Lines v. FERC*, 83 F.3d 1424 (D.C. Cir. 1996) (*AOPL v. FERC*) (explaining that "increases from [grandfathered] rates resulting in application of the index are only *prima facie* lawful, and may be challenged through the complaint or protest procedure").

[921] *Tesoro*, 134 FERC ¶ 61,214 at P 47(affirming that "index-based increases are not grandfathered even if the increase is applied onto a grandfathered rate").

[922] EPAct 1992 § 1803(b).

[923] *Id.* § 1803(b)(1)(A).

reflected by the change in actual rate of return on equity (actual ROE), expressed as a percentage, from that embedded in the grandfathered rate.[924] To this end, the Commission considers the pipeline's actual ROE during three periods: when the grandfathered rates were established (A Period); when EPAct 1992 was enacted (B Period); and when the complaint against the grandfathered rates was filed (C Period).[925] The pipeline's actual ROE is calculated based upon the pipeline's costs and revenues in dollars using the ratemaking methodology applicable during the period at issue.[926] Where the actual ROE is higher in the B Period than in the A Period, the Commission compares the change from the B to the C Periods relative to the A Period, using the formula (C-B)/A.[927]

364. The Commission has adopted 25% as the minimum percentage change in actual ROE necessary to show substantially changed circumstances that would support removing grandfathered protection from a rate and dropping the rate below the grandfathered level.[928]

2. The Commission's Oil Pipeline Ratemaking Methodology

365. As discussed above, in determining the pipeline's actual ROE in the A, B, and C Periods examined in the Commission's grandfathering methodology, the Commission considers the ratemaking methodology in effect in each period. Thus, we briefly discuss the historical background of oil pipeline ratemaking.

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[924] *Tesoro*, 134 FERC ¶ 61,214 at PP 2, 59, 63.

[925] *Id.* P 17.

[926] *Id.* PP 2, 40, 68.

[927] *Tesoro*, 134 FERC ¶ 61,214 at P 18; *ARCO Prods. Co. v. SFPP, L.P.*, 106 FERC ¶ 61,300, at P 22 (2004) (*ARCO*). The Commission has established two alternative tests for evaluating the change in the pipeline's actual ROE. First, where the actual ROE is lower in the B Period than in the A Period, the Commission compares the change from the A to the C Periods relative to the A Period, using the formula (C-A)/A. *ARCO*, 106 FERC ¶ 61,300 at P 24. Second, where information about the A Period is unavailable, the Commission compares the change in ROE from the B to the C Periods relative to the B Period, using the formula (C-B)/B. Hearing Order, 164 FERC ¶ 61,202 at PP 13, 50, 53; *Sw. Airlines Co. v. Colonial Pipeline Co.*, 147 FERC ¶ 61,024, at PP 11, 31 (2014) (*Southwest Airlines*); *ARCO*, 106 FERC ¶ 61,300 at P 23.

[928] *Tesoro*, 134 FERC ¶ 61,214 at PP 2, 60. As discussed below, the 25% threshold is not a bright-line standard. *Id.* P 61.

366. Between 1906 and 1977, oil pipelines were regulated under the ICA by the ICC. The ICC determined oil pipelines' rate of return on equity using a methodology based upon the value of the pipeline's property under the Valuation Act[929] (Valuation Method). This approach relied upon a weighted average of original cost and cost of reproduction new to determine a pipeline's Valuation Rate Base.[930] The ICC determined allowed return by multiplying Valuation Rate Base by a fixed rate of return of 10% for refined products pipelines and 8% for crude oil pipelines.[931]

367. In 1985, the Commission issued Opinion No. 154-B adopting a TOC methodology.[932] The Opinion No. 154-B methodology divides an oil pipeline's nominal return on equity into (i) an inflation-related component and (ii) a real return on equity.[933] The real rate of return multiplied by the equity share of the TOC rate base (equity rate base) yields the pipeline's yearly allowed equity return in dollars. The inflation-related component multiplied by the equity rate base yields the equity rate base write-up (deferred earnings), which is capitalized into rate base and amortized over the remaining life of the pipeline.[934] Thus, each year, the inflation-related component of the pipeline's equity return (Current-Year Deferred Earnings) is added to the unamortized deferred earnings in the pipeline's rate base (Accumulated Deferred Earnings), and an amortized

[929] 49 U.S.C. app. § 19a.

[930] *Farmers Union II*, 734 F.2d at 1495; *see also id.* at 1495 n.28 (describing the ICC's formula for computing Valuation Rate Base). The Valuation Rate Base consisted of three primary elements: (1) cost of reproduction new; (2) cost of reproduction new less depreciation; and (3) original cost to date. Cost of reproduction new and original cost to date were weighted together based on each one's percentage to the sum of the two. The weighted figure was depreciated by applying the ratio of (1) cost of reproduction new less depreciation to (2) cost of reproduction new. Next, the resulting depreciated value was increased by 6% to reflect an amount for going concern. Finally, amounts for working capital and the present values of land and rights-of-way were added to determine the Valuation Rate Base. *E.g.*, *Portland Pipe Line Corp.*, 14 FERC ¶ 62,141, at 63,221-22 (1981).

[931] *Farmers Union Cent. Exch. v. FERC*, 584 F.2d 408, 420 n.31 (D.C. Cir. 1978) (*Farmers Union I*).

[932] Opinion No. 154-B, 31 FERC ¶ 61,377.

[933] *Id.* at 61,834; *see also, e.g.*, Opinion No. 571, 172 FERC ¶ 61,207 at P 121.

[934] Opinion No. 154-B, 31 FERC at 61,834-35.

portion of Accumulated Deferred Earnings is included in the pipeline's cost of service for that year.

368. In Opinion No. 154-B, the Commission adopted a starting rate base in dollars for existing plant to "bridge the transition" from the Valuation Method to TOC ratemaking.[935] The starting rate base represents the sum of (i) the pipeline's debt ratio times net depreciated original cost (DOC) rate base and (ii) the pipeline's equity ratio times the reproduction portion of its 1983 Valuation Rate Base depreciated by the same percentage as the book original cost rate base.[936] The difference between the starting rate base and the net depreciated original cost of the pipeline's assets is the starting rate base write-up (SRB write-up).[937] The SRB write-up is included in the TOC rate base at declining balance amortized on a straight-line basis over the remaining life of the pipeline's assets as of December 31, 1983.[938]

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[935] *Id.* at 61,833-34, 61,836; *see also ARCO Pipe Line Co.*, Opinion No. 351, 52 FERC ¶ 61,055, at 61,232-33, *reh'g denied*, Opinion No. 351-A, 53 FERC ¶ 61,398, at 62,383 (1990). As discussed above, the ICC regulated oil pipelines between 1906 and 1977, when the Department of Energy Organization Act transferred the ICC's oil pipeline ratemaking authority to the Commission. Department of Energy Organization Act, Pub. L. No. 95-91, § 402(b), 91 Stat. 565 (1977); *see also* 49 U.S.C. § 60502.

[936] Opinion No. 154-B, 31 FERC at 61,836. For example, if the original cost of a pipeline's assets had depreciated by 40% by 1983, the reproduction portion of Valuation Rate Base was to be depreciated by 40% in determining the starting rate base. *Id.* n.40. The Commission uses the 1983 Valuation Rate Base because 1983 is the last year for which valuations were performed. Opinion No. 351, 52 FERC at 61,234 n.19.

[937] Opinion No. 351-A, 53 FERC at 62,383-84. To the extent that an oil pipeline was not subject to the Valuation Method, it is not entitled to an SRB write-up. *See* Opinion No. 502, 123 FERC ¶ 61,287 at P 114.

[938] *SFPP, L.P.*, 121 FERC ¶ 61,240, at P 121 (2007) (citing Opinion No. 435-B, 96 FERC at 62,076); Opinion No. 435, 86 FERC at 61,090; *see also* Opinion No. 351-A, 53 FERC at 62,386 ("The [SRB] write-up is a traditional measure which should be decreased over time."). Colonial's SRB write-up was fully amortized as of 2011. Ex. CPC-00035 at 28. Unlike deferred earnings, the amortization of the SRB write-up is not a cost includable in the pipeline's cost of service: its effect is only to reduce the related component of rate base. Opinion No. 351, 52 FERC at 61,237, *aff'd*, Opinion No. 351-A, 53 FERC at 62,385-86; *see also* Opinion No. 351-A, 53 FERC at 62,385 (explaining that "[t]he starting rate base was adopted for the purpose of determining return on and not return of capital").

3. Colonial's Grandfathered Rates

369. Colonial's rates in effect for the 365-day period preceding EPAct 1992 are the rates set forth in FERC Tariff No. 38 and supplemental filings, which became effective in 1986 and 1987 (collectively, Tariff No. 38).[939] With limited exception, the rates established in Tariff No. 38 were carried over unchanged from FERC Tariff No. 37, which became effective July 21, 1982, and implemented a 10% "across-the-board" increase to Colonial's existing rates.[940] Accordingly, the significant majority of Colonial's grandfathered rates were established when Tariff No. 37 became effective on July 21, 1982.

B. Recommendation to Initiate Investigation Pursuant to Section 15(1) of the ICA

1. Initial Decision

370. The Initial Decision argues that the Commission's Hearing Order erred by setting Colonial's grandfathered rates for investigation. The Initial Decision interprets section 1803(b) of EPAct 1992 as requiring complainants to present a conclusive showing of substantially changed economic circumstances in their complaints.[941] Contrary to the Commission's determination in the Hearing Order, the Initial Decision argues that the Complaints did not make a sufficient showing of changed circumstances as required by EPAct 1992.[942]

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[939] Ex. JC-0028 at 1.

[940] *Id.* at 1, 3. The grandfathered rates for movements to the following destinations were established for the first time in Tariff No. 38, as opposed to Tariff No. 37: Norfolk, Virginia, at Craney Island; Raleigh-Durham Airport (Wake County); and Yorktown Defense Fuel Supply Point (DFSP) (York County). Ex. CPC-00216 (Van Hoecke) at 12 n.25.

[941] Initial Decision, 179 FERC ¶ 63,008 at PP 405-410 (citing EPAct 1992 § 1803(b); *BP West Coast*, 374 F.3d at 1275).

[942] *Id.* PP 415-416 (citing 49 U.S.C. app. § 16(6)).

2. Briefs on Exceptions

371. Complainants and Trial Staff filed exceptions. Complainants and Trial Staff argue that the Hearing Order correctly found that the Complaints presented sufficient evidence of substantial change under EPAct 1992 to proceed to hearing.[943]

372. Complainants disagree with the Initial Decision's claim that EPAct 1992 requires complaints against grandfathered rates to provide conclusive showings of substantial change. They argue that the Commission has reasonably interpreted section 1803(b) to merely require complaints to provide *prima facie* evidence of substantial change, not a conclusive showing.[944] Trial Staff also argues that the record developed at hearing validates that a substantial change has occurred.[945]

3. Briefs Opposing Exceptions

373. Colonial supports the Initial Decision's interpretation of section 1803(b), whereby complainants must conclusively demonstrate substantial change at the complaint stage.[946] Colonial observes that section 1803(b) provides that "[n]o person may file a complaint" against a grandfathered rate unless "evidence is presented to the Commission which *establishes* that a substantial change has occurred . . . ."[947]

4. Commission Determination

374. We disagree with the Initial Decision. As an initial matter, because no party sought rehearing of the Hearing Order, any argument challenging the Commission's decision that the Complaints presented sufficient evidence to warrant a hearing has been waived. Nonetheless, we continue to find that the Hearing Order properly determined that the Complaints satisfied the standard necessary to set the challenges to Colonial's grandfathered rates for hearing.

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[943] Joint Complainants Br. on Exceptions 21; Joint Shippers Br. on Exceptions 10; Trial Staff Br. on Exceptions 83-84.

[944] Joint Complainants Br. on Exceptions at 22-23; Joint Shippers Br. on Exceptions at 10-11 (citing Hearing Order, 164 FERC ¶ 61,202 at P 53; *Southwest Airlines*, 147 FERC ¶ 61,024, at P 31).

[945] Trial Staff Br. on Exceptions at 83-84.

[946] Colonial Br. Opposing Exceptions at 18-19 (citing Initial Decision, 179 FERC ¶ 63,008 at PP 405-413).

[947] *Id.* at 18 (quoting EPAct § 1803(b)(1)) (emphasis by Colonial).

a. Arguments Challenging the Hearing Order are Waived

375. The Hearing Order determined that the Complaints presented sufficient evidence that a substantial change has occurred in the economic circumstances that formed a basis of Colonial's grandfathered rates under section 1803(b)(1)(A) to warrant an investigation.[948] No participant requested rehearing of the Commission's determination.[949] Thus, any argument that the Commission erred in setting the Complaints for hearing because the Complaints failed to provide adequate evidence of substantial change is waived and would represent an impermissible collateral attack on the Hearing Order.[950]

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[948] Hearing Order, 164 FERC ¶ 61,202 at PP 50, 53; *see also, e.g.*, *Iran Air v. Kugelman*, 996 F.2d 1253, 1260 (D.C. Cir. 1993) ("[O]nce the agency has ruled on a given matter . . . it is not open to reargument by the administrative law judge." (quoting Joseph Zwerdling, *Reflections on the Role of an Administrative Law Judge*, 25 Admin. L. Rev. 9, 12-13 (1973))); *Cent. La. Elec. Co.*, 64 FERC ¶ 63,020, at 65,065 (1993) (explaining that "the Presiding Judge is not free to embark on matters that clearly usurp the Commission's obligatory duty of making an initial determination as to whether a complainant has submitted the requisite filing under" Rule 206 of the Commission's Rules of Practice and Procedure "and set forth sufficient cause for instituting an investigative hearing under" the Federal Power Act).

[949] The Commission's regulations allow participants to request rehearing of a "final Commission decision" or "other final order." 18 C.F.R. § 385.713(a)(1). A "final order" is "one that imposes an obligation, denies a right, or fixes some legal relationship as a consummation of the administrative process." *E.g.*, *BridgeTex Pipeline Co.*, 164 FERC ¶ 61,111, at P 11 (2018) (citing *Reliable Automatic Sprinkler Co. v. Consumer Prod. Safety Comm'n*, 324 F.3d 726, 731 (D.C. Cir. 2003)). Although orders establishing hearing procedures are typically not final orders because they will be succeeded by further Commission action, *id.* P 5, the Commission's determination that the Complaints presented sufficient evidence to satisfy the pleading requirements of section 1803(b) represented a final determination on this issue. *See Cove Mountain Solar, LLC*, 179 FERC ¶ 61,179 at P 6 (setting aside limited aspect of hearing order that could have been construed as a final determination on an issue).

[950] *E.g.*, *ISO N. England, Inc.*, 138 FERC ¶ 61,238, at P 17 (2012) ("[A] collateral attack is '[a]n attack on a judgment in a proceeding other than a direct appeal,' and is 'generally prohibited.'" (quoting *N. England Conf. of Pub. Utils. Comm'rs v. Bangor Hydro-Elec. Co.*, 135 FERC ¶ 61,140, at P 27 (2011))).

b. Affirming the Hearing Order

376. We also continue to conclude that the Complaints presented adequate evidence of substantial change under section 1803(b). At the complaint stage, shippers challenging grandfathered rates must provide evidence establishing a *prima facie* case for concluding that a substantial change has occurred.[951] However, the Commission can set the matter for hearing and evaluate whether the complaint satisfies the standard for challenging grandfathered rates.

377. In this case, the Commission adhered to its long-standing practice and found that the Complaints established a *prima facie* case that a substantial change occurred using Colonial's publicly available Form No. 6 data for the B and C Periods.[952] The Commission has previously held that where evidence addressing the pipeline's economic circumstances for the A Period is unavailable, it is appropriate to measure substantial change by comparing changes from the B Period to the C Period relative to the B Period, using the formula (C-B)/B.[953] Complainants provided affidavits from expert witnesses applying the Commission's substantial-change test using Colonial's publicly reported Form No. 6 data and attesting that Colonial's actual ROE had increased by more than 25% since EPAct 1992.[954] To the extent that Colonial's page 700 data did not fully

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[951] *ConocoPhillips Co. v. SFPP, L.P.*, 137 FERC ¶ 61,005, at P 3 (2011) (*ConocoPhillips*); *Tesoro*, 134 FERC ¶ 61,214 at P 3; *Am. W. Airlines, Inc. v. Calnev Pipe Line, L.L.C.*, 121 FERC ¶ 61,241, at P 6 (2007) (*America West*); *see also* Opinion No. 435, 86 FERC at 61,072. Complaints that fail to present persuasive evidence of substantial change are subject to summary dismissal. *See Santee Distrib. Co. v. Dixie Pipeline Co.*, 71 FERC ¶ 61,205, at 61,754-55 (1995) (*Santee I*), *reh'g denied*, 75 FERC ¶ 61,254 (1996) (dismissing complaint against grandfathered rates where complainant's evidence applied to pre-EPAct 1992 periods and did not address whether substantial change had occurred since EPAct 1992).

[952] Hearing Order, 164 FERC ¶ 61,202 at P 50.

[953] *ARCO*, 106 FERC ¶ 61,300 at P 23; *see also id.* P 67 & app. D (assessing substantial change on SFPP, L.P.'s Oregon Line using only B and C-Period data).

[954] *E.g.*, Epsilon Trading, LLC, Complaint, Docket No. OR18-7-000, at 36, Ex. 3 at P 38 (filed Nov. 22, 2017) (affidavit of Dr. Daniel S. Arthur attesting that Colonial's return on equity had increased by 44.1% between 1991 and 2016); BP Products North America, Inc., Complaint, Docket No. OR18-12-000, at 37, Ex. 3 at P 38 (filed Feb. 2, 2018) (same); Citgo, Complaint, Docket No. OR18-21-000, at 16, Ex. A at PP 31-37 (filed Apr. 20, 2018) (sworn declaration of Peter K. Ashton attesting that Colonial's return on equity had increased by 87% between 1991 and 2016).

conform to the Commission's ratemaking policies,[955] a hearing allows the Commission to address those concerns and shippers should not be precluded from an opportunity to challenge that Form No. 6 data for purposes of applying the substantial-change test.[956] Moreover, although the Complaints did not include information about Colonial's actual ROE in the A Period, the lack of publicly available or easily accessible A-Period data[957] did not preclude Complainants from adequately pleading substantial change and instead raised issues of fact appropriately resolved at hearing. Thus, the Commission found that Complainants established a *prima facie* showing of substantial change and the Commission appropriately set the Complaints for hearing to test that showing using additional evidence adduced through discovery and witness testimony.[958]

378. We disagree with Colonial's claim that EPAct 1992 precluded the Commission from setting the Complaints for hearing to further evaluate the evidence of substantial change. As discussed above, section 1803(b) of EPAct 1992 provides that "[n]o person may file a complaint" against a grandfathered rate unless "evidence is presented to the Commission which establishes that a substantial change has occurred after the date of the enactment of [EPAct 1992]."[959] Contrary to Colonial's assertions, this provision does not preclude the Commission's use of hearing procedures to determine whether a complaint was properly filed by examining the evidence of substantial change. In particular, section 1803(b) does not limit the information that may be presented to the Commission or specify how the Commission should determine whether there has been a substantial

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[955] *See* Initial Decision, 179 FERC ¶ 63,008 at P 408 (expressing concern that the page 700 data on which Complainants relied to establish substantial change was unreliable because Colonial did not adhere to applicable reporting and recordkeeping requirements).

[956] *See Southwest Airlines*, 147 FERC ¶ 61,024 at P 31 (quoting *ARCO*, 106 FERC ¶ 61,300 at P 64) ("[I]f a pipeline is unable to produce anything during discovery that bears on the economic basis of the rate at issue, it will not be permitted to defeat the purpose of the statute on the absence of evidence."). For instance, as discussed below, Colonial itself proposes in this proceeding to depart from data that it reported on Form No. 6.

[957] We note that in answering the Complaints, Colonial did not provide the A-Period data or seek to defend its rates based upon an analysis of A-Period data. To the extent that only the B and C Periods are being considered, Complainants satisfied the Commission's criteria for establishing substantial change as discussed above.

[958] Hearing Order, 164 FERC ¶ 61,202 at P 53 (citing *ARCO*, 106 FERC ¶ 61,300 at P 64).

[959] EPAct 1992 § 1803(b)(1)(A).

change in economic circumstances. Accordingly, the Commission's decision to set this matter for hearing was consistent with EPAct 1992.

379. Setting the Complaints for hearing is a reasonable application of EPAct 1992. Challenges to grandfathered rates, while difficult, are "not designed to be impossible or insurmountable."[960] The Commission has recognized that challenging grandfathered rates is a complex undertaking because complainants must determine the pipeline's actual ROE at three different points in time.[961] Deriving the pipeline's actual ROE at the time its grandfathered rates were established (A Period) can be particularly difficult because those rates are now several decades old and information regarding the pipeline's cost of service during that period may not be readily available.[962] Thus, if a complaint establishes *prima facie* evidence of a substantial change, the Commission sets the complaint for hearing to develop a complete factual record to validate whether a substantial change has in fact occurred.[963] This approach recognizes the showing that

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[960] Hearing Order, 164 FERC ¶ 61,202 at P 53; *Southwest Airlines*, 147 FERC ¶ 61,024 at P 31.

[961] Hearing Order, 164 FERC ¶ 61,202 at P 53; *Southwest Airlines*, 147 FERC ¶ 61,024 at P 31; *America West*, 121 FERC ¶ 61,241 at P 6.

[962] Hearing Order, 164 FERC ¶ 61,202 at P 53; *Southwest Airlines*, 147 FERC ¶ 61,024 at P 31. The Commission has explained that the lack of reliable, publicly available data regarding the economic basis of the pipeline's grandfathered rates should not be permitted to defeat the purpose of the statute. Hearing Order, 164 FERC ¶ 61,202 at P 53; *Southwest Airlines*, 147 FERC ¶ 61,024 at P 31; *ARCO*, 106 FERC ¶ 61,300 at P 64; *see also ConocoPhillips*, 137 FERC ¶ 61,005 at PP 30-33 (directing pipeline to file refined page 700 data where publicly available data did not provide adequate basis for evaluating substantial change and providing complainants opportunity to file amended complaints based upon refined data).

[963] *ConocoPhillips*, 137 FERC ¶ 61,005 at P 28; *Tesoro*, 134 FERC ¶ 61,214 at P 3; *America West*, 121 FERC ¶ 61,241 at P 6; Opinion No. 435, 86 FERC at 61,072. Although the Commission stated in *Santee I* that "it is not enough . . . to merely raise a factual issue with regard to changed circumstances," 71 FERC at 61,755, the Commission has since clarified this statement. In Opinion No. 435, the Commission explained that *Santee I* summarily denied a complaint where the evidence of substantial change only addressed periods before EPAct 1992, and thus could not establish that a substantial change had taken place following the statute's enactment. Opinion No. 435, 86 FERC at 61,072. Given the limited information available to shippers at the pleading stage, the Commission recognized that where the concerns in *Santee I* do not apply, it is appropriate to set complaints against grandfathered rates for hearing so long as the complaint raises a "colorable argument" that a substantial change has occurred. *Id.* As

must be made under section 1803(b) while also acknowledging that the information needed to establish conclusively that a substantial change has occurred by examining pipeline's actual ROE for the A, B, and C Periods may require discovery, expert testimony, cross examination, and the other processes afforded by a hearing.[964] In contrast, requiring complainants to provide all evidence regarding substantial change at the initial pleading stage, without the benefit of a hearing or discovery, would establish an insurmountable threshold for challenging grandfathered rates.[965]

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discussed above, the Commission has consistently adhered to this practice in subsequent cases, including in this proceeding. Hearing Order, 164 FERC ¶ 61,202 at P 53; *Southwest Airlines*, 147 FERC ¶ 61,024 at P 31; *ConocoPhillips*, 137 FERC ¶ 61,005 at P 28; *Tesoro*, 134 FERC ¶ 61,214 at P 3; *America West*, 121 FERC ¶ 61,241 at P 6.

[964] *See* Hearing Order, 164 FERC ¶ 61,202 at P 53; *Southwest Airlines*, 147 FERC ¶ 61,024 at P 31; *America West*, 121 FERC ¶ 61,241 at P 6 ("[I]t is difficult to establish substantially changed circumstances during the pleading phase of a proceeding since much of the detailed information is in the control of the pipeline."). Even where a complainant can access information needed to perform the substantial-change test, there may be disagreements regarding how the Commission should incorporate that information in its analysis that are appropriately resolved via hearing. For example, in this proceeding, Colonial itself has presented extensive testimony, exhibits, and briefing relating to whether the standard for de-grandfathering its rates was satisfied. *E.g.*, Colonial Br. on Exceptions at 12-27; Colonial Br. Opposing Exceptions at 12-16; Colonial Initial Br. at 3-17; Colonial Reply Br. at 5-13; Ex. CPC-00216 (Van Hoecke) at 3:4-81:19; Ex. CPC-00217; Ex. CPC-00218; Ex. CPC-00219; Ex. CPC-00220; Ex. CPC-00221; CPC-00222; Ex. CPC-00223; Ex. CPC-00224; Ex. CPC-00225; Ex. CPC-00226; Ex. CPC-00227; Ex. CPC-00228; Ex. CPC-00229; Ex. CPC-00230 (Van Hoecke) at 3:1-41:3. Moreover, a hearing may be necessary to evaluate whether there are discrepancies or inaccuracies in the publicly available information. For instance, we observe that Colonial's own proposals in this proceeding differ from the information that it reported on its Form No. 6 filings, and Complainants would have had no means of evaluating non-public information that supported modifications to the pipeline's Form No. 6 filings absent the hearing proceeding. Therefore, hearing procedures are appropriate for confirming whether a complainant has satisfied the standard for challenging grandfathered rates.

[965] Because information needed to apply the substantial-change test may not be publicly available, requiring a complainant to provide conclusive evidence at the complaint stage, without the possibility of discovery and further evaluation by the Commission, would appear to create an impossible threshold for challenging grandfathered rates. *See* Hearing Order, 164 FERC ¶ 61,202 at P 53 ("[A] challenge to grandfathered rates, while difficult, is not designed to be impossible or insurmountable,

380. Accordingly, we affirm that the Complaints provided sufficient evidence of substantial change to proceed to hearing, consistent with EPAct 1992 and established Commission policy.[966] We therefore decline to initiate a separate investigation as recommended in the Initial Decision.[967]

381. Finally, contrary to the arguments in the dissent, even if the Commission erred in concluding that the Complaints presented sufficient evidence of substantial change at the pleading stage, this would not have provided a basis for dismissing the Complaints against Colonial's indexed rates in their entirety. Rather, the Commission would have retained authority to set the Complaints for hearing to evaluate whether Colonial's indexed rates are just and reasonable on a cost-of-service basis.[968] In those

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and a lack of publicly available data does not prevent a challenge at hearing, but may in fact require further investigation before a trier of fact and law."); *Southwest Airlines*, 147 FERC ¶ 61,024 at P 31 (same).

[966] Although the dissent challenges the Commission's interpretation of section 1803, we continue to find our interpretation consistent with the text of the statute and the Commission's longstanding application of the statute as described above. Moreover, as explained above, the dissent's interpretation would establish an insurmountable threshold for challenging grandfathered rates.

[967] The Initial Decision finds that the Commission has authority under ICA section 15(1) to alter grandfathered rates through a Commission-initiated investigation, without regard to EPAct 1992, if it determines after hearing that the grandfathered rate is unjust and unreasonable. Initial Decision, 179 FERC ¶ 63,008 at PP 400-402. Colonial disputes this finding, arguing that rates may only be de-grandfathered where a complainant establishes substantial change under section 1803(b) of EPAct 1992. Colonial Br. on Exceptions at 14-15. Because we affirm that the Complaints presented sufficient evidence of substantial change under section 1803(b), we need not address whether the Commission may modify grandfathered rates through a Commission-initiated investigation under ICA section 15(1).

[968] The text of EPAct 1992 in any event supports our conclusion that even where complainants do not present sufficient evidence of substantial change, the Commission retains jurisdiction to evaluate the pipeline's indexed rates to the extent they exceed the grandfathered level. Section 1803(a) makes clear that grandfathering protections apply to "rate[s] in effect" at EPAct 1992's enactment, and nothing in the statutory language suggests that this protection (or the substantial-change standard) applies to subsequent rate increases. EPAct 1992 § 1803(a). Moreover, since EPAct 1992's enactment, the Commission has consistently interpreted section 1803 as grandfathering only those rate levels in effect in 1992, not subsequent increases to those rates. *E.g.*, *Tesoro*, 134 FERC ¶ 61,214 at P 47; *ARCO v. Calnev*, 97 FERC at 61,311; Order No. 561, FERC Stats. &

circumstances, the only difference is that upon finding Colonial's existing rates to be unjust and unreasonable, the Commission would lack authority to establish new rates below the rate levels grandfathered by EPAct 1992.[969] Accordingly, because section 1803(b) only applies to challenges against the grandfathered portions of Colonial's indexed rates, and not the portions above the grandfathered levels, we disagree with the dissent's position that the Commission lacks jurisdiction to address the Complaints. We therefore do not adopt the dissent's suggestions to dismiss the Complaints or remand them to the ALJ.

C. Evaluating Substantial Change on a System-Wide or Rate-by-Rate Basis

1. Background and Initial Decision

382. The participants dispute whether the Commission should assess changes in Colonial's actual ROE at the system-wide or individual-rate level. Complainants support using a system-wide approach, while Colonial and Trial Staff argue that the Commission should use a rate-by-rate analysis.[970]

Regs. ¶ 30,985 at 30,956; *see also* 138 Cong. Rec. S17614 (daily ed. Oct. 8, 1992) (statement of Sen. Malcolm Wallop), *reproduced in* Ex. BE-0010 at 581-82 (describing section 1803 and explaining that "[i]f a pipeline with grandfathered rates seeks a rate increase, only the increase can be addressed by the Commission, not the underlying grandfathered rate, in the absence of [section 1803's] limited exceptions"). Thus, we conclude that grandfathering only applies to rate levels in effect at EPAct 1992's enactment and that Congress did not intend to limit the Commission's jurisdiction to investigate rates increased above the grandfathered level.

[969] The only issue addressed in section IV of this order is whether, having determined that Colonial's existing rates are unjust and unreasonable, the Commission may establish new just and reasonable rates below the grandfathered level.

[970] Specifically, Colonial and Trial Staff propose to evaluate substantial change by (1) computing actual ROEs for individual grandfathered rates in the A, B, and C Periods by allocating costs and revenues to each rate using the fully allocated cost (FAC) methodology and (2) using these actual ROEs to apply the substantial-change test to each individual rate. Ex. CPC-00216 (Van Hoecke) at 30:4-31:4; Ex. S-00001 (Ruckert) at 52:3-13). In contrast, Complainants propose to evaluate substantial change using Colonial's system-wide actual ROE in the A, B, and C Periods. Ex. JC-0169 (Arthur) at 142:4-15; Ex. CIT-0028 (Ashton) at 218:2-222:13.

383. The Initial Decision concluded that it was unnecessary to resolve this issue because the record establishes substantial change under either a system-wide or rate-by-rate approach.[971]

2. Briefs on Exceptions

384. Complainants and Colonial filed exceptions urging the Commission to clarify whether the substantial-change analysis should be performed on a system-wide or rate-by-rate basis.[972]

385. Complainants contend that EPAct 1992 supports a system-wide approach. They argue that because section 1803(b) requires examining "the economic circumstances *of the oil pipeline* that were a basis for the rate," EPAct 1992 is best construed as addressing the economic circumstances of the pipeline's entire system, rather than the circumstances of individual rates.[973]

386. Complainants argue that a system-wide analysis conforms to Commission precedent.[974] They state that in *ARCO*, the Commission held that the substantial-change analysis is appropriately performed on a system-wide basis where the grandfathered rates were based upon aggregated costs.[975] Complainants state that a system-wide analysis is

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[971] Initial Decision, 179 FERC ¶ 63,008 at PP 497-498.

[972] *See* Joint Complainants Br. on Exceptions at 24-25; Joint Shippers Br. on Exceptions at 12; Colonial Br. on Exceptions at 18.

[973] Joint Complainants Br. on Exceptions at 25 (quoting EPAct 1992 § 1803(b)(1)(A)) (emphasis by Joint Complainants).

[974] Joint Complainants Br. on Exceptions at 26-28 (citing *ARCO*, 106 FERC ¶ 61,300 at P 77); Joint Shippers Br. on Exceptions at 12 (citing *ARCO*, 106 FERC ¶ 61,300 at PP 76-77).

[975] Joint Complainants Br. on Exceptions at 27 (citing *ARCO*, 106 FERC ¶ 61,300 at P 77). Although *ARCO* examined changes in volumes at specific delivery points, Complainants claim that the Commission has departed from this approach and now evaluates substantial change based on changes in actual ROE, which it determines using system-wide costs and revenues. *Id.* at 29-30 (citing *Tesoro*, 134 FERC ¶ 61,214 at PP 42-43, 45-47, 52, 55, 59-63; Ex. JC-0169 at 137-38 (Arthur)); *see also* Joint Shippers Br. on Exceptions at 12. Joint Shippers observe that Colonial and Trial Staff derived their proposed actual ROEs for the A, B, and C Periods in this proceeding using system-wide data. *Id.* (citing Ex. S-00001 (Ruckert) at 37 (Table 1), 45 (Table 3), 50 (Table 4), 51; Ex. CPC-00216 (Van Hoecke) at 61, 71 (Table 8), 77 (Table 10)).

proper here because Colonial established its grandfathered rates through an across-the-board rate increase based upon system-wide costs and revenues.[976]

387. Complainants argue that a rate-by-rate analysis would produce illogical and arbitrary results. They state that pipelines make equity investments on a system-wide basis and that it would be illogical to perform separate analyses for individual rates when pipelines themselves do not assess their economic circumstances on a rate-by-rate level.[977] They argue that a rate-by-rate analysis creates a mismatch between (i) the FAC methodology used to determine actual ROEs for individual rates and (ii) the unknown rate-design methodology actually used to design to Colonial's grandfathered rates.[978]

388. In contrast, Colonial contends that both EPAct 1992 and Commission precedent support evaluating substantial change on a rate-by-rate basis.[979] Colonial states that section 1803(b) of EPAct 1992 focuses on changes in economic circumstances that form a basis "for the rate" at issue. Colonial maintains that the Commission previously used a rate-by-rate approach in *ARCO*, where it considered volume changes at specific points on the pipeline's system.[980] Colonial argues that a system-wide approach could produce irrational results by removing protections from grandfathered rates based on changes in economic circumstances that relate only to non-grandfathered rates.[981] In response to arguments that a rate-by-rate approach is impractical because Colonial's grandfathered rates were not designed using a discernible rate-design methodology, Colonial argues that this supports evaluating each rate individually because Colonial's grandfathered rates do not have a uniform economic basis.[982]

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[976] Joint Complainants Br. on Exceptions at 27-28 (citing Ex. JC-0028 (Arthur) at 32).

[977] *Id.* (citing Ex. JC-0169 (Arthur) at 135-42).

[978] *Id.* at 26, 30; Joint Shippers Br. on Exceptions at 12-13 (citing Ex. JC-0169 (Arthur) at 104-05; Ex. S-00173 (Ruckert) at 94; Ex. S-00177 at 10-17). According to Complainants, this mismatch produces arbitrary results by producing individual-rate returns that exceed the system-wide average return in some instances and fall below the system-wide average in other instances. Joint Complainants Br. on Exceptions at 28-29; Ex. JC-0169 (Arthur) at 139:1-141:19.

[979] Colonial Br. on Exceptions at 17-18.

[980] *Id.* at 17 & n.6 (citing *ARCO*, 106 FERC ¶ 61,300 at PP 36, 53, 76-77).

[981] *Id.* at 18.

[982] *Id.* at 18 n.7 (citing Ex. CIT-0028 (Ashton) at 222; Ex. JC-0169 (Arthur) at

3. Briefs Opposing Exceptions

389. Complainants state that contrary to Colonial's contention, both EPAct 1992 and relevant precedent support evaluating substantial change using a system-wide approach.[983] Complainants reiterate that a system-wide analysis is appropriate because Colonial established its grandfathered rates through across-the-board rate increases based on aggregated costs and revenues.[984] Moreover, Complainants disagree with Colonial's argument that uncertainty regarding the methodology used to design the grandfathered rates supports a rate-by-rate analysis. Rather, Complainants argue that this uncertainty favors a system-wide approach because it is unclear whether any costs were specifically allocated to individual rates in the manner proposed by Colonial and Trial Staff.[985]

390. Colonial contends that Complainants misinterpret EPAct 1992.[986] Colonial argues that by requiring complainants to show a substantial change in the economic circumstances that were a basis "for the rate," Congress intended to require complainants to show a substantial change for each individual grandfathered rate.[987]

391. Colonial and Trial Staff argue that Commission precedent supports a rate-by-rate approach. Colonial states that in *ARCO*, the Commission applied a rate-by-rate approach and found that changes in economic circumstances must be measured against the assumptions "*embodied in the grandfathered rate.*"[988] Colonial states that the Commission affirmed the rate-by-rate approach in *Tesoro*, where it explained that it

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[983] Joint Complainants Br. Opposing Exceptions at 54-55 (citing *Tesoro*, 134 FERC ¶ 61,214 at PP 52, 55, 56 n.107, 59-63; *ARCO*, 106 FERC ¶ 61,300 at P 77); *see also* Joint Shippers Br. Opposing Exceptions at 77.

[984] Joint Complainants Br. Opposing Exceptions at 54-55 & n.89 (citing *ARCO*, 106 FERC ¶ 61,300 at P 77; Ex. JC-0001 (Arthur) at 60:1-72:8; Ex. JC-0169 (Arthur) at 139:1-141:20).

[985] *Id.* at 54.

[986] Colonial Br. Opposing Exceptions at 12-13.

[987] *Id.* at 12 (quoting EPAct 1992 § 1803(a)).

[988] *Id.* at 13-14 (quoting *ARCO*, 106 FERC ¶ 61,300 at P 16 (emphasis by Colonial)) (citing *ARCO*, 106 FERC ¶ 61,300 at PP 55, 77); *see also* Trial Staff Br. Opposing Exceptions at 8-9 (arguing that the Commission expressed a preference for a rate-by-rate approach in *ARCO*) (citing *ARCO*, 106 FERC ¶ 61,300 at P 55).

evaluates substantial change by measuring the change in the ROE "*embedded in the grandfathered rate*" using "the return generated by *the [grandfathered] rate*" when EPAct 1992 was enacted.[989] Colonial contends that neither the D.C. Circuit nor the Commission have overruled a rate-by-rate approach.[990]

392. Colonial disputes Joint Complainants' claim that a rate-by-rate analysis produces a mismatch in rate-design methodologies. Colonial states that because it did not design its grandfathered rates using an FAC rate design, those rates have experienced varying degrees of change in profitability since EPAct 1992. Colonial states that taking these differences into account does not create a mismatch. Rather, Colonial argues that because its grandfathered rates had different starting levels of profitability, a greater mismatch would result from using a system-wide approach.[991]

4. Commission Determination

393. We conclude that the substantial-change analysis is appropriately performed based upon the change in Colonial's system-wide actual ROE, rather than at the individual-rate level.[992]

394. The language of EPAct 1992 supports analyzing substantial change in this proceeding on a system-wide basis. As discussed above, section 1803(b)(1)(A) provides for de-grandfathering upon a showing of "a substantial change . . . in the economic circumstances of the oil pipeline which were a basis for the rate."[993] The Commission relies upon actual ROE as the summary metric of the economic circumstances of the oil

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[989] Colonial Br. Opposing Exceptions at 15 (quoting *Tesoro*, 134 FERC ¶ 61,214 at PP 2, 17, 53) (emphasis by Colonial).

[990] For instance, Colonial argues that examples in *Tesoro* describing how to perform the substantial-change analysis did not address whether that analysis should be undertaken at a system-wide or rate-by-rate level. *Id.* at 15 n.8.

[991] *Id.* at 16.

[992] Contrary to the Initial Decision's conclusion, the resolution of this issue may affect the outcome of the grandfathering analysis. According to Trial Staff, whereas the system-wide analyses in the record would de-grandfather all 142 of Colonial's grandfathered rates, Trial Staff's rate-by-rate analysis would de-grandfather only 135 of those rates while retaining grandfathering protections for 7 rates. Trial Staff Br. Opposing Exceptions at 7 n.21 (citing Ex. S-00355 at 15-18).

[993] EPAct 1992 § 1803(b)(1)(A).

pipeline.[994] Where the pipeline established its grandfathered rates upon system-level information, it is the actual ROE determined using system-wide costs and revenues that represents the "economic circumstances of the oil pipeline" forming the relevant "basis for the rate" under section 1803(b)(1)(A). In these circumstances, only changes in the pipeline's system-wide costs and revenues, as opposed to changes in costs or revenues attributed to particular delivery points, will result in changes to the basis of individual rates.[995] Colonial justified its 1982 and 1987 rate adjustments upon system-wide costs and revenues.[996] Thus, under section 1803(b)(1)(A), the economic circumstances of Colonial's pipeline system were the relevant basis for each of Colonial's rates established in 1982 and 1987, and those economic circumstances are best summarized in Colonial's system-wide actual ROE.[997] It is therefore appropriate to apply the substantial-change test using Colonial's system-wide actual ROE. Accordingly, we reject Colonial's argument that EPAct 1992's reference to the "basis of *the rate*" compels the use of a rate-

[994] *Tesoro*, 134 FERC ¶ 61,214 at PP 53, 58, 63.

[995] *See ARCO*, 106 FERC ¶ 61,300 at PP 53, 77. For example, consider a pipeline that transports product to multiple delivery points, with movements to each point governed by separate individual rates. Furthermore, assume that the pipeline designed each individual rate by dividing fully allocated cost by throughput using the pipeline's system-wide costs. Holding costs constant at the system and route levels, if route-specific throughput to a given point decreased while system-wide throughput increased, the rate for that route would decrease in response to the increase in system-wide throughput. By contrast, if the pipeline designed its rates using route-specific costs (i.e., directly assignable costs or costs allocated based on throughput in barrels or barrel-miles), the rate would increase in response to the decrease in route-specific throughput.

[996] Ex. JC-0028 at 29-34 (Colonial's Statement of Economic Justification supporting 1982 rate increase with system-wide throughput and cost-of-service data); Ex. JC-0169 (Arthur) at 138:7-21, 140:18-141:1. As discussed above, Colonial applied the 1982 and 1987 across-the-board rate increases to rates established during prior periods. Although the record does not address the methods used to design those prior-period rates, Colonial does not dispute that those rates were established based upon system-wide costs and throughput. Joint Complainants Br. Opposing Exceptions at 54.

[997] In contrast to pipelines that operate multiple discrete, non-contiguous pipeline systems, Colonial operates a single, unified pipeline system. *Compare* Colonial Initial Br. at 24 (explaining that "Colonial . . . operates a single linear system from Texas to New Jersey"), *with SFPP, L.P.*, 139 FERC ¶ 61,266, at P 2 n.4 (2012) ("SFPP comprises four non-contiguous pipeline segments named the West, East, North and Oregon Lines.")

by-rate approach.[998] Here, where all of Colonial's grandfathered rates have the same economic "basis," it is consistent with EPAct 1992 to evaluate "the economic circumstances of the oil pipeline which were a basis for" those rates using a system-wide analysis.

395. Contrary to Colonial's and Trial Staff's contention, *ARCO* and *Tesoro* do not require examining substantial change on a rate-by-rate basis. In *ARCO*, the Commission evaluated whether a substantial change had occurred on SFPP's West, North, and Oregon Lines by examining changes in volumes, rate base, allowed return, and total cost of service.[999] The Commission found that SFPP had justified its grandfathered rates based upon system-wide cost information. Although SFPP argued that EPAct 1992 required a rate-by-rate analysis, the Commission rejected this position and held that it was "appropriate to examine cost-of-service factors for all points on [each line] in the aggregate."[1000] Thus, *ARCO* correctly recognized that where a pipeline established its grandfathered rates based upon system-wide costs, changes in the economic circumstances underlying those rates are appropriately examined at the system-wide level. We acknowledge that *ARCO* also considered changes in volumes at specific points on the West and North Lines to assess whether a substantial change had occurred at those locations.[1001] As discussed above, however, where a grandfathered rate is established using system-wide cost information, volumes at the individual points served by that rate do not form the relevant basis of that rate.[1002] To the extent that the Commission's consideration of volume changes at particular locations suggested that substantial change must be established at the individual-rate level,[1003] we reject that approach for the reasons

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[998] EPAct 1992 § 1803(b)(1)(A) (emphasis added).

[999] *ARCO*, 106 FERC ¶ 61,300 at PP 56-58, 61, 67, apps. B-D; *see also SFPP, L.P.*, 111 FERC ¶ 61,334 at PP 38-40.

[1000] *ARCO*, 106 FERC ¶ 61,300 at P 53; *see also id.* P 77; *id.* app. B at tbls. 3-6 (charts showing aggregate changes in rate base, allowed total return, income tax allowance, and total cost of service for West Line); *id.* app. C at tbls. 3-6 (charts showing aggregate changes in rate base, allowed total return, income tax allowance, and total cost of service for North Line); *id.* app. D at tbls. 3-6 (charts showing aggregate changes in rate base, allowed total return, income tax allowance, and total cost of service for Oregon Line).

[1001] *ARCO*, 106 FERC ¶ 61,300 at PP 55-58, 61, app. B at tbls. 1-2, app. C at tbls. 1-2, app. D at tbls. 1-2.

[1002] *See supra* P 394 & note 1030.

[1003] As discussed above, the Commission explained in *Tesoro* that it would no longer evaluate substantial change based upon changes in volumes. *Tesoro*, 134 FERC

discussed herein.[1004] With this clarification, *ARCO* is consistent with our conclusion that where a grandfathered rate was established using system-level information, the pipeline's system-wide actual ROE reflects the "economic circumstances of the pipeline" that formed the "basis of the rate."

396. Colonial's reliance upon *Tesoro* is likewise misplaced. In *Tesoro*, the Commission described a two-step framework whereby complainants challenging grandfathered rates must (1) "posit a *rate* that, when multiplied by the pipeline's current volumes, equals the *total cost-of-service on page 700* of the pipeline's FERC Form No. 6, and determine whether that rate exceeds the grandfathered rate" and (2) "if the posited *rate* exceeds the grandfathered level, explain what adjustments to the pipeline's existing cost of service would warrant a lower rate."[1005] Colonial contends that because this passage uses "rate" in the singular, the substantial-change analysis should be performed based on cost information attributed to each rate.[1006] However, Colonial overlooks that the rate discussed in the first step of the inquiry is a hypothetical rate and that the "total cost-of-service on page 700 of the pipeline's FERC Form No. 6" is a system-wide metric, not a rate-by-rate metric. Thus, the test set forth in *Tesoro* does not support a rate-by-rate analysis of substantial change as Colonial argues.

397. Colonial's remaining arguments are similarly unavailing. First, we disagree with Colonial's contention that a system-wide approach is improper because it would incorporate changes in economic circumstances related to non-grandfathered rates.[1007] The Commission clarified in *Tesoro* that the substantial-change analysis should reflect the pipeline's total jurisdictional revenues from all rates, not just revenues derived from grandfathered rates.[1008] Moreover, to the extent that including revenues from non-

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¶ 61,214 at P 40 (explaining that "volumes should not be used as a proxy for revenues in evaluating whether there are substantially changed circumstances").

[1004] Contrary to the Commission's finding in *ARCO*, location-specific volume changes at individual delivery points do not necessarily alter the "basis" of a rate established based upon the costs and volumes of the entire system. Rather, where the pipeline established its grandfathered rates based upon system-wide costs, "the economic circumstances of the pipeline" as a whole represent the "basis of the rate." *See* EPAct 1992 § 1803(b)(1)(A); *supra* P 394 & note 1030.

[1005] *Tesoro*, 134 FERC ¶ 61,214 at P 46 (emphasis added).

[1006] Colonial Br. on Exceptions at 17; Colonial Br. Opposing Exceptions at 18.

[1007] Colonial Br. on Exceptions at 18.

[1008] *Tesoro*, 134 FERC ¶ 61,214 at P 2.

grandfathered rates distorts the substantial-change analysis, Colonial has not quantified this effect. Second, we reject Colonial's argument that a rate-by-rate analysis is necessary because its grandfathered rates do not have a uniform economic basis. As discussed above, we conclude that because Colonial established its grandfathered rates based upon system-wide data, Colonial's system-wide actual ROE at the A Period represents the "basis" of each of its grandfathered rates. Thus, it is appropriate to measure changes in economic circumstances using changes in system-wide actual ROE.

398. Accordingly, we modify the Initial Decision and conclude that the substantial-change analysis in this proceeding is appropriately performed based upon changes in Colonial's system-wide actual ROE.

D. Applying the Substantial-Change Test

399. In applying the substantial-change test, the Initial Decision addressed arguments by Colonial, Joint Complainants, and Trial Staff. The participants' proposals are set forth in the table below:

Table 7: Proposed Actual ROEs and Results of (C-B)/A Test

	Colonial	Joint Complainants	Trial Staff
A Period	26.66%	14.41%	13.44%
B Period	27.18%	21.05%	21.05%
C Period	21.96%	38.81%	41.73%
(C-B)/A	-19.60%	123.20%	153.93%

Sources: Ex. CPC-00225 at 1; Ex. JC-0195 at 1; Ex. S-00355 at 9

Colonial argues that its rates remain protected and cannot be reduced below the grandfathered level because the (C-B)/A test yields -19.6%, which is less than the Commission's 25% threshold. In contrast, Joint Complainants and Trial Staff assert that Colonial's rates should be de-grandfathered and may be reduced below the grandfathered level because the results of the (C-B)/A test significantly exceed 25%.

1. A Period

400. The participants agree that the A Period in this proceeding is 1982, when Colonial filed Tariff No. 37 establishing the rate levels in effect when EPAct 1992 was enacted.[1009] All participants calculate Colonial's actual ROE for the A Period by dividing Colonial's net income by its equity rate base, which they determine by multiplying an equity ratio of 62.23% times Colonial's 1982 rate base.[1010] However, the participants disagree regarding the appropriate methodology for determining the 1982 rate base. Complainants and Trial Staff support using Colonial's Valuation Rate Base,[1011] whereas Colonial proposes to derive a rate base using DOC ratemaking.[1012]

a. Initial Decision

401. The Initial Decision adopted Complainants' and Trial Staff's proposal to use Colonial's Valuation Rate Base.[1013] The Initial Decision held that the Valuation Method was the governing oil pipeline ratemaking methodology when Colonial established its grandfathered rates in 1982.[1014] In support of this conclusion, the Initial Decision found

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[1009] As discussed above, the grandfathered rates for movements to Craney Island, Raleigh-Durham Airport, and Yorktown DFSP were established when Tariff No. 38 became effective in 1987 (1987 A Period). Joint Complainants and Trial Staff present separate A-Period analyses for the rates established in Tariff No. 38. Ex. JC-0169 (Arthur) at 158:7 n.432; Ex. JC-0195 at 8-11; Ex. S-00001 (Ruckert) at 27:5-20; Ex. S-00355 at 3, 6.

[1010] Ex. JC-0001 (Arthur) at 67:14-68:1; Ex. JC-0195 at 5; Ex. CIT-0001 (Ashton) at 129:12-15; Ex. CIT-0041 at 1; Ex. CPC-00216 (Van Hoecke) at 35:20-36:1; Ex. CPC-00217 at 1; Ex. S-00001 (Ruckert) at 37:2-7; Ex. S-00355 at 2. The 62.23% figure reflects the equity ratio that Colonial used to compute its SRB write-up as of 1983. Ex. JC-0031 at 3; Ex. CPC-00035 at 26.

[1011] Joint Complainants Br. Opposing Exceptions at 58-61; Joint Shippers Br. Opposing Exceptions at 80; Trial Staff Br. Opposing Exceptions at 10-15. For Colonial's 1982 Valuation Rate Base, Joint Complainants and Trial Staff use the average of Colonial's actual Valuation Rate Base in 1981 ($1,405,173) and its forecasted Valuation Rate Base for 1982 ($1,469,377), which results in a Valuation Rate Base of $1,437,275. Ex. JC-0029 at 9; Ex. S-00355 at 2; *see also* Ex. JC-0028 at 32.

[1012] Colonial Br. on Exceptions at 23.

[1013] Initial Decision, 179 FERC ¶ 63,008 at PP 501-505.

[1014] *Id.* P 501.

that Colonial justified its grandfathered rates in 1982 by filing a Statement of Economic Justification that included calculations under the Valuation Method. Although Colonial contended that the Valuation Method no longer applied in 1982, the Initial Decision found that argument was undercut by evidence that its witness, Mr. Van Hoecke, testified in another Commission proceeding that the Valuation Method remained in effect until 1985.[1015]

b. Briefs on Exceptions

402. Colonial argues that the Initial Decision erred by using the Valuation Rate Base. First, Colonial contends that the Valuation Method did not apply when Colonial established its grandfathered rates in 1982. Colonial emphasizes that in 1978, the D.C. Circuit criticized the Valuation Method and remanded an oil pipeline rate proceeding for the Commission to develop a new methodology "free of the problems" in the Valuation Method.[1016] Colonial states that in 1979, the Commission directed the pipeline in the remanded proceeding to support its proposed rates with information to compute an original-cost rate base.[1017] Colonial observes, moreover, that a 1980 initial decision criticized the Valuation Method and recommended that the Commission adopt a DOC methodology.[1018] Colonial states that although the Commission overturned the TAPS ID in November 1982 and retained the Valuation Rate Base,[1019] the Commission never applied the Valuation Method in a rate proceeding and the D.C. Circuit ultimately vacated the Commission's decision.[1020] Accordingly, Colonial argues that it is unclear whether any oil pipeline ratemaking methodology was in effect between the issuance of *Farmers Union I* in 1978 and Opinion No. 154-B in 1985. Colonial claims that the Statement of Economic Justification it filed to support its grandfathered rates does not

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[1015] *Id.* (citing Ex. S-00187 at 45 (Van Hoecke testimony in Docket No. OR03-5-001)).

[1016] Colonial Br. on Exceptions at 21 (quoting *Farmers Union I*, 584 F.2d at 421).

[1017] *Id.* (citing *Williams Pipe Line Co.*, 6 FERC ¶ 61,187, at 61,264 (1979)).

[1018] *Id.* (citing *Trans Alaska Pipeline Sys.*, 10 FERC ¶ 63,026 (1980) (TAPS ID)). Colonial states that although the Commission never ruled on the TAPS ID, it represents the only Commission ruling addressing the appropriate oil pipeline ratemaking methodology when Colonial filed its grandfathered rates in 1982. *Id.*

[1019] *Williams Pipe Line Co.*, Opinion No. 154, 21 FERC ¶ 61,260 (1982), *vacated and remanded sub nom. Farmers Union II*, 734 F.2d 1486 (D.C. Cir. 1984).

[1020] Colonial Br. on Exceptions at 22 (citing *Farmers Union II*, 734 F.2d 1486).

demonstrate that the Valuation Method applied in 1982 and instead simply illustrates the prevailing regulatory uncertainty.[1021]

403. Second, Colonial argues that the Initial Decision's approach creates a mismatch between the Valuation Method used for the A Period and the Opinion No. 154-B methodology used for the B and C Periods. According to Colonial, comparing the results of the Valuation Method and the Opinion No. 154-B methodology does not produce a meaningful measure of changes in economic circumstances.[1022] Colonial states that the Valuation Method differs from the Opinion No. 154-B methodology in multiple respects. For example, Colonial states that the Valuation Rate Base is not divided into debt and equity components and is driven by elements unrelated to equity investment.[1023] As a result, Colonial argues that applying its equity ratio to its Valuation Rate Base would fail to quantify return on equity in actual dollar amounts as required by *Tesoro*.[1024] To measure equity investment in the A, B, and C Periods on the same scale, Colonial proposes to calculate an original-cost rate base for the A Period by applying the 62.23% equity ratio to the net depreciated investment in Colonial in 1982.[1025]

404. Third, Colonial argues that EPAct 1992 only addresses changes in economic circumstances that occurred after the statute's enactment. Because it is uncontested that the Commission discarded the Valuation Method before 1992, Colonial argues that the substantial-change analysis should exclude any changes in its actual ROE that resulted from the transition between Valuation and TOC ratemaking.[1026]

405. Finally, Colonial claims that the actual ROEs calculated by Joint Complainants (14.41%)[1027] and Trial Staff (13.44%)[1028] do not represent credible achieved returns for an oil pipeline in 1982. Colonial states that during the first months of 1982, ten-year government bonds produced average yields above 14%. As a result, Colonial argues that

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[1021] *Id.*

[1022] *Id.* at 23.

[1023] *Id.*

[1024] *Id.* (citing *Tesoro*, 134 FERC ¶ 61,314 at P 2).

[1025] *Id.* (citing Ex. CPC-00216 (Van Hoecke) at 68).

[1026] *Id.* at 24 (citing EPAct 1992 § 1803(b)).

[1027] Ex. JC-0169 (Arthur) at 158:5-7; Ex. JC-0195 at 1.

[1028] Ex. S-00001 (Ruckert) at 38:1-8; Ex. S-00177 at 4.

an oil pipeline's ROE in 1982 should have been substantially higher than 14%. Moreover, Colonial states the Valuation Method faced criticism for permitting excessive rates of return and that the actual ROEs calculated by Complainants and Trial Staff do not reflect this reality.[1029]

c. Briefs Opposing Exceptions

406. Complainants and Trial Staff state that the Initial Decision correctly determined the A Period actual ROE using Colonial's Valuation Rate Base.[1030] They contend that the Valuation Method remained the governing ratemaking methodology for oil pipelines until the Commission issued Opinion No. 154-B in 1985.[1031] They further argue that the record demonstrates that Colonial believed the Valuation Method applied when it filed its Tariff No. 37 rate increase, as its Statement of Economic Justification did not reference DOC and instead included a rate of return calculated under the Valuation Method.[1032] They further state that Colonial's position is undermined by Mr. Van Hoecke's prior testimony and by a discovery response in this proceeding, in which Colonial recognized that "[a]t the time FERC Tariff No. 37 was filed, oil pipelines were still subject to rate regulation under the approach established by the [ICC]."[1033]

407. Joint Complainants and Trial Staff contend that Colonial has not supported its proposal to determine the A Period actual ROE using a DOC rate base. They argue that in evaluating substantial change, the Commission applies the ratemaking methodology applicable to the year under analysis even if that methodology is later changed.[1034]

[1029] Colonial Br. on Exceptions at 23 & n.12.

[1030] Joint Complainants Br. Opposing Exceptions at 58-60; Joint Shippers Br. Opposing Exceptions at 80; Trial Staff Br. Opposing Exceptions at 11-15.

[1031] Joint Complainants Br. Opposing Exceptions at 60; Trial Staff Br. Opposing Exceptions at 12 (citing Opinion No. 154, 21 FERC at 61,632).

[1032] Joint Complainants Br. Opposing Exceptions at 60 (citing Ex. JC-0028 at 33; Ex. JC-0169 (Arthur) at 152:12-154:7; Tr. 1631:12-1632:6 (Ashton)).

[1033] Joint Complainants Br. Opposing Exceptions at 60 (citing Ex. S-00006 at 1; Ex. S-00173 (Ruckert) at 77:7-78:21; Ex. S-00187 at 42, 45, 61); Trial Staff Br. Opposing Exceptions at 12-13 (quoting Ex. S-00006 at 1) (citing Ex. S-00001 (Ruckert) at 32; Ex. S-00187 at 45).

[1034] Joint Complainants Br. Opposing Exceptions at 60-61 (citing Ex. JC-0169 (Arthur) at 145:25-28); Trial Staff Br. Opposing Exceptions at 14-15 (citing *Tesoro*, 134 FERC ¶ 61,214 at P 68). Trial Staff states that the Commission's policy recognizes that economic regulation is an integral part of a pipeline's commercial environment that can

Additionally, Joint Complainants claim that contrary to Colonial's argument, the Valuation Rate Base includes both debt and equity financing.[1035] Although Colonial argues that the Valuation Rate Base includes elements unrelated to equity investment, Trial Staff states that using the Valuation Rate Base to determine the A Period actual ROE is consistent with the Commission's treatment of the SRB write-up.[1036]

408. Trial Staff disputes Colonial's argument that it is improper to compare the results of the Valuation and Opinion No. 154-B methodologies. As an initial matter, Trial Staff contends that using the Valuation Method does not produce an impermissible mismatch. Furthermore, Trial Staff refutes Colonial's contention that the Commission should disregard changes to Colonial's actual ROE resulting from the Commission's shift from Valuation to TOC ratemaking, arguing that this approach would eliminate the A Period from the substantial-change analysis and that the Commission has previously rejected similar arguments.[1037] Finally, Trial Staff rejects Colonial's claim that the Valuation Method results in an unrepresentative actual ROE for 1982. Trial Staff contends that Colonial's position is internally inconsistent, as Colonial argues both that (i) the Valuation Method was criticized for allowing excessive returns and (ii) Colonial's actual ROE computed using that methodology is too low.[1038]

d. Commission Determination

409. We affirm the Initial Decision. For purposes of the A Period in this proceeding, we conclude that the Valuation Method remained in effect when Colonial established its grandfathered rates in 1982.[1039] As a result, Colonial's actual ROE under the Valuation

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vary from year to year and present different risks and opportunities and different times. *Id.* at 14 (citing *Tesoro*, 134 FERC ¶ 61,214 at P 68).

[1035] Joint Complainants Br. Opposing Exceptions at 61 (citing Opinion No. 351-A, 53 FERC at 62,389 n.32; Ex. JC-0169 (Arthur) at 154:8-157:5).

[1036] In particular, Trial Staff states that even though the SRB Write-Up is "not related to equity capital," the Commission nevertheless allocates a portion of the SRB write-up to the equity portion of a pipeline's TOC rate base for purposes of determining ROE under the Opinion No. 154-B methodology. Trial Staff Br. Opposing Exceptions at 13-14 (citing *Revisions to Page 700 of FERC Form No. 6*, Order No. 783, 144 FERC ¶ 61,049 (2013), *reh'g denied*, Order No. 783-A, 148 FERC ¶ 61,235 (2014); Ex. S-00001 (Ruckert) at 33-35; Ex. S-00173 (Ruckert) at 80-82).

[1037] *Id.* at 15 (citing *ARCO*, 106 FERC ¶ 61,300 at PP 19, 22, 26).

[1038] *Id.* at 14.

[1039] In contrast, no participant disputes that the Opinion No. 154-B methodology

Method formed the "basis" of its grandfathered rates.[1040] Accordingly, Colonial's actual ROE for the A Period is appropriately determined using its Valuation Rate Base as of 1982.

410. First, Colonial itself used the Valuation Method to support its grandfathered rates. When it filed Tariff No. 37 in June 1982, Colonial submitted a Statement of Economic Justification to justify its proposed across-the-board rate increase.[1041] The Statement of Economic Justification included actual and forecasted "FERC Valuation" rate bases and returns on "FERC Valuation" rate bases,[1042] and Colonial relied upon these figures to show that its rates were just and reasonable.[1043] Based upon this evidence, we conclude that the Valuation Method formed the "basis" of Colonial's grandfathered rates. It is therefore appropriate to calculate Colonial's actual ROE for the A Period using the Valuation Rate Base.

411. Second, as Colonial's own rate filing reflects, the Valuation Method was the prevailing oil pipeline ratemaking methodology when Colonial established its grandfathered rates in 1982. The ICC adhered to the Valuation Method until the transfer of its oil pipeline regulatory responsibilities to the Commission in 1977,[1044] and the ICC's oil pipeline decisions are treated as Commission precedent.[1045] Thus, the Valuation

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applied in 1987 when Colonial established the 1987 A Period rates. Because the Opinion No. 154-B methodology governed oil pipeline ratemaking in both the 1987 A Period and the B Period, our determinations regarding the B Period govern the calculation of Colonial's actual ROE for the 1987 A Period.

[1040] *See* EPAct 1992 § 1803(b)(1)(A) (providing that grandfathering protections do not apply where evidence "establishes that a substantial change has occurred after the date of the enactment of [EPAct 1992] in the economic circumstances of the oil pipeline which were a basis for the rate").

[1041] Ex. JC-0028 at 1, 28-34.

[1042] *Id.* at 33. In particular, Colonial included a "FERC Rate of Return," which it derived by dividing "FERC Earnings from Operations" by "FERC Valuation." *Id.* at 32-33; *see also id.* at 1 (Colonial's response to data request JC-CPC 1.65) (explaining that "FERC Valuation" refers to "FERC's determination of the valuation of Colonial under the ICC approach"); Ex. JC-0169 (Arthur) at 153:9-154:7; Ex. CIT-0028 (Ashton) at 223:17-224:2; Ex. S-00001 (Ruckert) at 32:10-16 (citing Ex. S-00006 at 32-34).

[1043] Ex. JC-0028 at 29-30.

[1044] *Petroleum Products*, 355 I.C.C. 479 (1976).

[1045] *Frontier Pipeline Co. v. FERC*, 452 F.3d 774, 776 (D.C. Cir. 2006) ("The

Method represented the Commission's policy as of 1977 and remained in effect until the Commission expressly departed from it.[1046]

412. A review of D.C. Circuit and Commission decisions between 1978-1985 demonstrates that the Commission did not depart from the Valuation Rate Base until it issued Opinion No. 154-B in 1985. In *Farmers Union I*, the D.C. Circuit expressed "unease" with the Valuation Method and identified flaws in the ICC's reasoning for applying that methodology in the underlying proceeding. However, the court did not direct the Commission to discard the Valuation Method and instead remanded for the Commission to consider whether to maintain the methodology going forward.[1047] Following the remand, the Commission explained that it would address the remanded issues in the *Williams* or *TAPS* proceedings.[1048] Although the Commission directed Williams to file data to compute an original-cost rate base, the Commission clarified that it would decide whether to adopt an original-cost approach at a later time and "may agree" that "original cost is inappropriate."[1049] In November 1982, five months after

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parties agree that decisions of the ICC applying the ICA prior to . . . 1977 . . . are treated as if they were FERC decisions; i.e., if FERC deviates from such a decision, it must at least justify the deviation as it would a deviation from a decision of its own . . . ." (citing *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970))).

[1046] *E.g.*, *FCC v. Fox Television Studios, Inc.*, 556 U.S. 502, 515 (2009) (citing *United States v. Nixon*, 418 U.S. 683, 696 (1974)) ("An agency may not . . . depart from a prior policy *sub silentio* or simply disregard rules that are still on the books."); *Am. Wild Horse Pres. Campaign v. Perdue*, 873 F.3d 914, 923 (D.C. Cir. 2017) (citing *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016)) ("A central principle of administrative law is that, when an agency decides to depart from decades-long past practices and official policies, the agency must at a minimum acknowledge the change and offer a reasoned explanation for it.").

[1047] *Farmers Union I*, 584 F.2d at 421.

[1048] *Ass'n of Oil Pipe Lines*, 10 FERC ¶ 61,023, at 61,034-35 (1980); *see also id.* at 61,034 (issuing stay of other pending oil pipeline rate proceedings); *id.* at 61,036 (terminating rulemaking proceeding initiated by ICC for purposes of considering changes to oil pipeline ratemaking methodology).

[1049] *Williams Pipe Line Co.*, 6 FERC ¶ 61,187, at 61,365 (1979) ("We do not hold that the legality of the rates here involved must necessarily be tested by reference to the sort of original cost rate base that we use when we work with electric utilities and natural gas pipelines."); *see also id.* (emphasizing that the Commission had not "prejudged the rate base issue" and would "leave that question open for resolution at a later date when we have an adequate evidentiary record before us").

Colonial established its grandfathered rates, the Commission issued Opinion No. 154 retaining the Valuation Rate Base.[1050] While the D.C. Circuit vacated and remanded Opinion No. 154 in 1984,[1051] the Commission did not formally depart from the Valuation Rate Base until June 1985 when it issued Opinion No. 154-B.[1052] Based upon this precedent, we find that notwithstanding the uncertainty surrounding oil pipeline ratemaking following the transfer of the ICC's authority to the Commission in 1977,[1053] the Valuation Rate Base remained part of the Commission's ratemaking methodology until the issuance of Opinion No. 154-B in June 1985.[1054] Thus, we conclude that

[1050] Opinion No. 154, 21 FERC at 61,631-32 ("For the present . . . we shall adhere to the [rate base] formula we inherited from the [ICC].").

[1051] *Farmers Union II*, 734 F.2d at 1490.

[1052] Opinion No. 154-B, 31 FERC at 61,833-34 (explaining that Opinion No. 154-B marked a "transition from valuation to TOC"); *id.* at 61,835 ("[T]he Commission is switching oil pipelines from a valuation rate base to a TOC rate base . . . ."); *see also* Opinion No. 351-A, 53 FERC at 62,833 (stating that the TOC rate base adopted in Opinion No. 154-B "replaced the valuation rate base used by the [ICC] to regulate oil pipelines"); Opinion No. 351, 51 FERC at 61,232 ("Prior to the issuance of Opinion Nos. 154-B and 154-C, oil pipelines were entitled to earn a return on capital determined by multiplying the allowed rate of return times a valuation rate base.").

[1053] We acknowledge that the Commission stated in July 1982 that there was "no applicable law" and "no generally accepted principles of oil pipeline ratemaking." *Trans Alaska Pipeline Sys.*, 20 FERC ¶ 61,044, at 61,095 (1982); *see also id.* at 61,096 (referencing "the total fog in which oil pipeline regulation is now shrouded" and stating that "[a]t the moment there are no general rules in this field"). These statements reflect the significant uncertainty following *Farmers Union I* regarding the oil pipeline ratemaking methodology the Commission would ultimately adopt. Notwithstanding these statements, however, the ICC's decisions applying the Valuation Method remained valid Commission precedent until the Commission consciously departed from that precedent. In the absence of a judicial decision or Commission order formally rejecting the Valuation Methodology, and in light of the Commission's subsequent November 1982 decision retaining the Valuation Rate Base in Opinion No. 154, we find that the Valuation Method is the appropriate methodology for evaluating Colonial's actual ROE in 1982.

[1054] *See Lakehead Pipe Line Co.*, Opinion No. 397-A, 75 FERC ¶ 61,181, at 61,591 (1996) (explaining that when the Commission issued Opinion No. 154-B, "the valuation method was inoperative and the new methodology was operative"); *see also id.* ("If a shipper had filed a complaint from that point on, [the pipeline's] rates would have

Colonial's actual ROE based upon a Valuation Rate Base reflects the economic circumstances that formed a basis of its grandfathered rates.

413. Third, as the Initial Decision concluded, the record shows that both Colonial and its expert witness have recognized that the Valuation Method continued to apply in 1982.[1055] Specifically, in response to a data request in this proceeding, Colonial stated that "[a]t the time FERC Tariff No. 37 was filed, oil pipelines were still subject to rate regulation under the valuation approach established by the [ICC], since the FERC's adoption of the Opinion No. 154-B methodology did not occur until June 28, 1985."[1056] Colonial's witness Mr. Van Hoecke has likewise acknowledged that the Valuation Method remained effective until Opinion No. 154-B. In testimony filed in Docket No. OR03-5-001, Mr. Van Hoecke attested that because the pipeline's "grandfathered rates were initially established in 1985 prior to the issuance of Opinion No. 154-B . . . the Commission's previous methodology, known as Valuation, would have represented the cost of service methodology in effect when the rates were set."[1057]

414. In contrast, Colonial's arguments for using a DOC rate base are unpersuasive. Using a DOC rate base as Colonial proposes would fail to reflect the economic circumstances that formed a "basis" of Colonial's grandfathered rates. The Commission has never used a DOC rate base for purposes of oil pipeline ratemaking.[1058] As discussed above, the Commission did not depart from the Valuation Rate Base until Opinion No. 154-B, where it adopted a TOC (rather than a DOC) methodology.[1059] Moreover, the record contains no evidence that the DOC methodology provided a basis for Colonial's grandfathered rates. To the contrary, as discussed above, the Statement of Economic

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been analyzed under TOC and not under the previous valuation methodology.").

[1055] Initial Decision, 179 FERC ¶ 63,008 at PP 501-502.

[1056] Ex. JC-0028 at 1.

[1057] Ex. S-00187 at 45; *see also id.* at 61 (testifying that because the grandfathered rates "were established prior to the Commission's issuance of Opinion No. 154-B . . . Valuation was the cost of service methodology that existed at that point in time"); *id.* at 42 (testifying that Mr. Van Hoecke asked another witness "to apply the Valuation methodology since the 1985 [grandfathered] rates were established prior to the Commission issuing Opinion No. 154-B").

[1058] *See* Opinion No. 397-A, 75 FERC at 61,591 (finding that "DOC was and is irrelevant" for determining when the TOC methodology became effective "because it was never used as the rate base").

[1059] Opinion No. 154-B, 31 FERC at 61,833-34.

Justification used to support the rates included forecasted rates of return using a Valuation Rate Base, not a DOC rate base.[1060] An actual ROE determined using a DOC rate base therefore would not reflect the economic circumstances underlying Colonial's grandfathered rates.

415. Colonial's claim based upon the TAPS ID that the Valuation Method no longer applied when it established its grandfathered rates in 1982 is unpersuasive. First, contrary to Colonial's contention, the June 1980 TAPS ID did not displace the Valuation Rate Base from the prevailing oil pipeline ratemaking methodology. When Colonial filed its grandfathered rates in June 1982, the TAPS ID was pending before the Commission on exceptions. As a result, it was not a final Commission decision and did not represent binding precedent.[1061] Moreover, concurrently with Opinion No. 154, the Commission remanded the TAPS ID for reconsideration in light of the Commission's decision to retain the Valuation Rate Base.[1062] The TAPS ID therefore did not alter the Commission's policy, which continued to rely upon the Valuation Rate Base until June 1985. Second, as discussed above, Colonial itself relied upon the return on its Valuation Rate Base, rather than the depreciated original cost methodology recommended in the TAPS ID, to support its grandfathered rates, and both Colonial and its expert witness have recognized that the Valuation Method continued to apply in 1982.[1063]

416. Colonial's remaining arguments opposing use of the Valuation Rate Base are similarly unavailing. First, comparing the results of the Valuation and Opinion No. 154-B methodologies for purposes of the substantial-change test does not produce unreliable results. Since EPAct 1992, the Commission has consistently recognized that changes in the Commission's regulatory policies can significantly affect the economic circumstances that formed a basis of the pipeline's grandfathered rates.[1064] This principle recognizes

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[1060] *See supra* P 410.

[1061] *E.g.*, *Tex. N.M. Power Co. v. El Paso Elec. Co.*, 110 FERC ¶ 61,258, at P 10 (2005) (citing *KeySpan Energy Dev. Co. v. N.Y. Indep. Sys. Operator, Inc.*, 108 FERC ¶ 61,201, at P 4 (2004); *Ill. Power Co.*, 62 FERC ¶ 61,147, at 62,062 n.17 (1993); *S. Co. Servs., Inc.*, 61 FERC ¶ 61,339, at 62,336 n.63 (1992)) ("[A]n initial decision pending before the Commission on exceptions is not a final Commission decision, and as such does not create binding precedent.").

[1062] *Trans Alaska Pipeline Sys.*, 21 FERC ¶ 61,092, at 61,285 (1982).

[1063] *See supra* PP 410-413.

[1064] *Tesoro*, 134 FERC ¶ 61,214 at P 68 ("Economic regulation is as much a part of a pipeline's commercial environment as demand, operating costs, the cost of capital, and taxes. All of these can vary from year-to-year and present different opportunities and risk at different times."); Opinion No. 435, 86 FERC at 61,070 ("What is clear is that

that the "economic circumstances" underlying grandfathered rates include the regulatory methodology used to determine the pipeline's ROE. To the extent that the Commission's methodology for determining actual ROE changes between the A, B, or C Periods, this change affected the pipeline's economic circumstances and is appropriately reflected in the Commission's evaluation of substantial change.[1065] In contrast, Colonial's proposal to impose a DOC methodology upon the A Period would erase the change in Colonial's economic circumstances that occurred when the Commission replaced the longstanding Valuation Method with the Opinion No. 154-B methodology. In this regard, Colonial seeks to construct a regulatory environment that would depart from historical realities and distort the substantial-change analysis by inflating Colonial's actual ROE in the A Period.[1066]

417. Second, we disagree with Colonial's contention that comparing the results of the Valuation and Opinion No. 154-B methodologies is inappropriate because the Valuation Rate Base is unrelated to equity investment. The Commission has long recognized that the return on Valuation Rate Base "covered both debt and equity."[1067] Because the return on Valuation Rate Base was designed to provide pipelines with a return on their equity capital, we find that applying Colonial's reported equity ratio of 62.33% to its Valuation Rate Base is a reasonable method of determining the equity rate base used to compute its actual ROE under the Valuation Method.

418. Third, we reject Colonial's assertion that using a Valuation Rate Base is improper because the change between Valuation and TOC ratemaking occurred before EPAct

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regulatory change is a well recognized risk of doing business and may significantly affect the economic basis of a pipeline's rate structure as much as its own commercial policies or the extrinsic economic environment." (citing *Texaco Inc. v. FERC*, 148 F.3d 1091, 1098 (D.C. Cir. 1998))).

[1065] *See Farmers Union I*, 584 F.2d at 419 ("Even more so than the choice of a reasonable rate base methodology, a 'reasonable rate of return' determination must be the product of the economic moment.").

[1066] The DOC rate base that Colonial proposes for the A Period ($536,522,000) is less than half of the Valuation Rate Base figures on which Complainants and Trial Staff rely ($1,469,377,000 or $1,437,275,000). *Compare* Ex. CPC-00216 (Van Hoecke) at 71, Table 6, *and* Ex. CPC-00218 at 1, *with* Ex. JC-0195 at 5, Ex. CIT-0041 at 1, *and* Ex. S-00355 at 2. As a result, replacing the Valuation Rate Base with Colonial's proposed DOC rate base would reduce the denominator in the formula for calculating actual ROE, resulting in an inflated A Period result that would distort the application of the substantial-change test.

[1067] Opinion No. 351-A, 53 FERC at 62,389 n.32.

1992. This argument rests upon a misreading of EPAct 1992 and misapprehends the substantial-change analysis. Section 1803(b) provides that a rate may be de-grandfathered upon a showing that "a substantial change has occurred after the date of the enactment of [EPAct 1992] . . . in the economic circumstances of the oil pipeline *which were a basis for the rate*."[1068] Because Colonial used a Valuation Rate Base to support its rates in 1982, the Valuation Rate Base served as the "basis for the rate[s]." Contrary to Colonial's position, the substantial-change test does not incorporate changes in actual ROE between the A and B Periods. Instead, it measures the change in actual ROE between the B and C Periods (i.e., C-B) and weighs the result against the actual ROE in the A Period (i.e., C-B/A) to determine whether there has been a substantial change in the economic circumstances that formed a basis for the rates.[1069] Because the Valuation Rate Base remained part of the Commission's ratemaking methodology in 1982,[1070] Colonial's actual ROE under that methodology is the correct baseline against which to evaluate changes between the B and C Periods. For this reason, the Commission has rejected proposals to exclude the A Period from the substantial-change analysis,[1071] and Colonial's arguments do not persuade us to depart from this precedent.

419. Finally, we are not persuaded by Colonial's argument that the returns calculated by Complainants and Trial Staff under the Valuation Method are too low. Although Colonial suggests that its actual ROE under the Valuation Method in 1982 exceeded the amounts calculated by Complainants and Trial Staff, it does not substantiate this claim with any calculations or analysis.[1072] To the contrary, rather than diverge from the actual ROEs that pipelines recovered under the Valuation Method in the early 1980s, Complainants' and Trial Staff's calculations are consistent with the earnings on Valuation that another oil pipeline recovered in 1983 and 1984.[1073] Thus, Colonial has

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[1068] EPAct 1992 § 1803(b)(1)(A) (emphasis added).

[1069] *ARCO*, 106 FERC ¶ 61,300 at P 22.

[1070] Moreover, as discussed above, the Statement of Economic Justification that Colonial filed to support its rates in 1982 included returns on Valuation Rate Base. *See supra* P 410.

[1071] *ARCO*, 106 FERC ¶ 61,300 at PP 22-23.

[1072] For example, Colonial did not provide an alternative calculation using the Valuation Method to support its claim that Complainants' and Trial Staff's calculations are too low.

[1073] In Opinion No. 397, the Commission found that Lakehead Pipe Line Company's earnings on Valuation were 9.3% in 1983 and 9.8% in 1984. *Lakehead Pipe Line Co.*, Opinion No. 397, 71 FERC ¶ 61,338, at 62,312 (1995), *reh'g denied*, Opinion No. 397-A, 75 FERC at 61,592. Thus, the A Period returns calculated by Complainants

not demonstrated that Complainants' and Trial Staff's calculations for the A Period lack credibility.

420. For these reasons, we affirm that Colonial's actual ROE for the A Period should be computed using its Valuation Rate Base. Although Complainants and Trial Staff each present analyses using the Valuation Rate Base,[1074] their calculations vary in several respects.[1075] The primary difference relates to the interest expense they use to derive net income (the numerator of the actual ROE formula). Joint Complainants compute interest expense by (i) multiplying Colonial's Valuation Rate Base by the debt ratio of its 1983 capital structure and (ii) multiplying the result by Colonial's 10.25% cost of debt in 1984.[1076] In contrast, Trial Staff uses forecasted interest expenses included in Colonial's 1982 Statement of Economic Justification.[1077] On balance, because Joint Complainants compute interest expense based upon Colonial's historical capital structure and cost of debt, as opposed to relying upon forecasted amounts, we adopt Joint Complainants' calculated actual ROE of 14.41% for the A Period.

2. B Period

421. All participants agree that the B Period in this proceeding is 1992.[1078] The participants propose to determine Colonial's actual ROE for the B Period by applying the Opinion No. 154-B methodology using data for 1992 from the workpapers underlying Colonial's 1994 Form No. 6, page 700, the first year in which pipeline companies were

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and Trial Staff for 1982 (ranging from 12.62% to 14.41%) exceed the earnings on Valuation obtained by another pipeline in the same period. Ex. JC-0195 at 5; Ex. CIT-0041 at 1; S-00395 at 5.

[1074] The Initial Decision did not specifically adopt any participant's proposed actual return on equity for the A Period. *See* Initial Decision, 179 FERC ¶ 63,008 at PP 501-505.

[1075] *Compare* Ex. JC-0195 at 5, *with* Ex. CIT-0041 at 1, *and* Ex. S-00355 at 2, 5.

[1076] Ex. JC-0169 (Arthur) at 157:18-23; Ex. JC-0195 at 7.

[1077] Ex. S-00355 at 5 (citing Ex. JC-0028 at 28-34).

[1078] Colonial Br. on Exceptions at 24; Joint Complainants Br. Opposing Exceptions at 61; Trial Staff Br. Opposing Exceptions at 16; Ex. JC-0001 (Arthur) at 64:10; Ex. CIT-0001 (Ashton) at 128:13-15; Ex. S-00001 (Ruckert) at 39:2-5; Ex. CPC-00216 (Van Hoecke) at 74:2-3; *see also Tesoro*, 134 FERC ¶ 61,214 at P 17 (explaining that the B Period is "the time EPAct became effective, or a reasonably approximate time frame, which, generally, is . . . the calendar year 1992").

required to file cost-of-service information in the FERC annual reports.[1079] To determine actual ROE, the participants divide Colonial's actual equity return in 1992 by the equity portion of its 1992 TOC rate base.[1080] The participants compute the actual equity return by subtracting Colonial's revenues from total cost of service and adjusting the difference for taxes. The participants derive Colonial's equity rate base by multiplying its 1992 TOC rate base by the equity ratio in its reported capital structure for 1992.[1081]

422. Colonial's calculation differs from Complainants' and Trial Staff's proposals with regard to the treatment of SRB write-up and deferred earnings. First, Colonial excludes the SRB write-up from equity rate base (denominator).[1082] Second, in computing the revenues used to derive actual equity return (numerator), Colonial includes the portions of Accumulated Deferred Earnings and equity allowance for funds used during construction (equity AFUDC) amortized and recovered in its cost of service in 1992.[1083] In contrast, Complainants and Trial Staff include unamortized SRB write-up in equity rate base and calculate actual equity return[1084] by (i) including Current-Year Deferred Earnings in revenues and (ii) deducting the portions of Accumulated Deferred Earnings and equity AFUDC recovered in 1992 via amortization.[1085] As a result of these

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[1079] Joint Complainants Br. Opposing Exceptions at 61; Trial Staff Br. Opposing Exceptions at 16; Ex. JC-0195 at 12; Ex. CIT-0041 at 2; Ex. S-00355 at 6; Ex. CPC-00217 at 2; Ex. CPC-00223.

[1080] Ex. JC-0195 at 12, 14; Ex. CIT-0041 at 2; Ex. S-00355 at 3, 6; Ex, CPC-00217 at 2; Ex. CPC-00223.

[1081] Ex. JC-0031 at 6 (Colonial's 1994 page 700 cost-of-service workpapers); Ex. JC-0195 at 12; Ex. CIT-0041 at 2; Ex. S-00355 at 6; Ex. CPC-00223.

[1082] Ex. CPC-00216 (Van Hoecke) at 37:18-38:4.

[1083] *Id.* at 38:17-39:3, 41:15-18.

[1084] Whereas Trial Staff witness Mr. Ruckert refers to the numerator of his calculation as "actual return on equity," Ex. S-00355 at 6, Joint Complainants witness Dr. Arthur and Citgo witness Mr. Ashton refer to their numerators as "net income" and "equity earnings," respectively. Ex. JC-0195 at 12; Ex. CIT-0041 at 2. However, despite minor differences, their approaches to determining the numerator of the actual-return formula are mathematically consistent. Ex. JC-0169 (Arthur) at 159:4-13.

[1085] Ex. JC-0195 at 12, 14; Ex. CIT-0041 at 2; Ex. S-00355 at 3, 6. As discussed above, "Current-Year Deferred Earnings" refers to the inflationary component of Colonial's return in the current year, which is added to accumulated deferred earnings and deferred for collection in subsequent years.

differences, Colonial's calculated actual ROE for the B Period (27.18%) exceeds the calculations of Joint Complainants (21.05%) and Trial Staff (21.05%).[1086]

a. Initial Decision

423. The Initial Decision adopted Trial Staff's proposed 21.05% actual ROE for the B Period.[1087] The Initial Decision found that Trial Staff appropriately included SRB write-up in equity rate base. The Initial Decision found that under Opinion No. 154-B, unamortized SRB write-up is included in the TOC rate base.[1088] Because equity rate base is determined by multiplying the TOC rate base by the equity ratio, the Initial Decision concluded that the Opinion No. 154-B methodology allocates a portion of unamortized SRB write-up to equity rate base.[1089] Although the Commission has previously explained that the SRB write-up "is not related to equity capital,"[1090] the Initial Decision found that when this statement is viewed in context, the Commission in fact concluded that the SRB write-up is not solely attributable to equity and instead relates to both equity and debt.[1091]

424. The Initial Decision found that Trial Staff correctly computed the actual equity return (numerator) by including Current-Year Deferred Earnings and excluding the amortization of deferred earnings and equity AFUDC. The Initial Decision concluded that Trial Staff's approach conforms to the formula established in Order No. 783 for calculating actual ROE under Opinion No. 154-B (Order No. 783 formula).[1092]

b. Briefs on Exceptions

425. Colonial contends that the Initial Decision erred by including SRB write-up in equity rate base. Colonial contends that the Initial Decision's reliance on the Order No. 783 formula is misplaced because the Commission has explained that this formula "does not have precedential effect for ratemaking purposes" and "do[es] not change the

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[1086] *See* Ex. JC-0195 at 12; Ex. CIT-0041 at 2; Ex. S-00355 at 6; Ex. CPC-00223.

[1087] Initial Decision, 179 FERC ¶ 63,008 at P 508.

[1088] *Id.* (citing Ex. S-00001 (Ruckert) at 34).

[1089] *Id.* (citing Ex. S-00001 (Ruckert) at 34-35).

[1090] Opinion No. 351, 52 FERC at 61,235.

[1091] Initial Decision, 179 FERC ¶ 63,008 at PP 506-507.

[1092] *Id.* P 510 (citing Order No. 783-A, 148 FERC ¶ 61,235 at P 15; Order No. 783, 144 FERC ¶ 61,049 at P 29). Although the Initial Decision made these findings with regard to the C Period, they apply equally to the B Period.

Commission's ratemaking policies."[1093] Colonial further argues that Order No. 783 does not reflect the applicable ratemaking methodology in 1992 because it was not issued until 2013.[1094]

426. According to Colonial, SRB write-up is not a form of equity or equity investment.[1095] Colonial states that the Commission explained in Opinion No. 351-A that SRB write-up "is not related to equity capital" and that the starting rate base was "not meant to be used as a vehicle to reconstruct original cost."[1096] Colonial further states that the Commission's policy prohibits pipelines from recovering the amortization of SRB write-up in rates. Colonial argues that if the SRB write-up constituted equity investment, prohibiting pipelines from recovering amortization of SRB write-up would represent an unconstitutional taking.[1097]

427. Colonial argues that the Initial Decision erred by adopting Trial Staff's approach to deferred earnings. Colonial states that under Opinion No. 154-B, the portion of Accumulated Deferred Earnings recovered in a particular year through amortization represents actual revenues collected in that year.[1098] By contrast, Colonial states that Current-Year Deferred Earnings represent amounts that the pipeline could potentially recover through rates in future periods.[1099] Colonial argues that by excluding amortization of deferred earnings from revenues, Trial Staff's approach fails to measure actual equity return and instead produces a hypothetical amount that Colonial would have recovered under a different formulation of the Opinion No. 154-B methodology. In addition, Colonial claims that this approach does not conform to the Commission's policy of using actual data in the substantial-change calculation.[1100]

[1093] Colonial Br. on Exceptions at 25-26 (quoting Order No. 783, 144 FERC ¶ 61,049 at PP 37-38).

[1094] *Id.* at 26 (citing Ex. CPC-00230 (Van Hoecke) at 19-20, 29-30).

[1095] *Id.* at 25.

[1096] *Id.* at 24 (quoting Opinion No. 351-A, 53 FERC at 62,389; Opinion No. 351, 52 FERC at 61,235).

[1097] *Id.* at 24-25 (citing Tr. 1543:2-7 (Ashton)).

[1098] *Id.* at 25 (citing Ex. CPC-00216 (Van Hoecke) at 38-41, 72-74).

[1099] *Id.* (citing Tr. 5267-70 (Ruckert)).

[1100] *Id.* at 25-26.

c. Briefs Opposing Exceptions

428. Complainants and Trial Staff state that the Initial Decision correctly found that the equity rate base includes a portion of unamortized SRB write-up. They contend that the Commission precedent makes clear that SRB write-up is attributable to both debt and equity financing.[1101] They further argue that because the Opinion No. 154-B methodology includes SRB write-up in the TOC rate base, a portion of SRB write-up is allocated to equity rate base when the TOC rate base is multiplied by the pipeline's equity ratio.[1102] Trial Staff states that because SRB write-up is included in the TOC rate base, pipelines receive an equity return on the SRB write-up. According to Trial Staff, the fact that pipelines do not recover a return of the SRB write-up does not support excluding SRB write-up from equity rate base.[1103] Rather, Trial Staff states that the TOC rate base includes a number of items, such as deferred income taxes, that are not subject to amortization but are nonetheless financed by the pipeline's capital structure.[1104]

429. Trial Staff contends that the Initial Decision's treatment of deferred earnings conforms to Commission precedent. Trial Staff states that under Order No. 783, actual ROE is determined using Current-Year Deferred Earnings, rather than deferred earnings accrued in prior years and amortized in the current year.[1105] Trial Staff states that although Order No. 783 did not address ratemaking, its reasoning nonetheless applies to the calculation of Colonial's actual ROE.[1106] Moreover, Complainants and Trial Staff state that Colonial's treatment of deferred earnings lacks merit and conflicts with the Commission's findings in Order No. 783-A.[1107] For instance, Joint Complainants state that contrary to its current position, Colonial deducted current-period amortization of

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[1101] Joint Complainants Br. Opposing Exceptions at 62 (citing Opinion No. 351, 52 FERC at 61,242; Ex. JC-0169 (Arthur) at 161:1-21).

[1102] Trial Staff Br. Opposing Exceptions at 16.

[1103] Trial Staff Br. Opposing Exceptions at 16 (citing *SFPP, L.P.*, 134 FERC ¶ 63,013, at P 38 (2011), *aff'd in relevant part*, Opinion No. 522, 140 FERC ¶ 61,220 at P 265; Ex. S-00173 (Ruckert) at 81).

[1104] *Id.* at 17 (citing Ex. S-00173 (Ruckert) at 81).

[1105] Trial Staff Br. Opposing Exceptions at 17-18 (citing Order No. 783-A, 148 FERC ¶ 61,235 at PP 10-11; Order No. 783, 144 FERC ¶ 61,049 at PP 29, 36).

[1106] Trial Staff Br. Opposing Exceptions at 18 (citing Tr. 5280:22-24 (Ruckert)).

[1107] Joint Complainants Br. Opposing Exceptions at 62-63; Trial Staff Br. Opposing Exceptions at 18-19 n.72.

deferred earnings and equity AFUDC when it calculated its actual ROE in its 1994 page 700 workpapers. Joint Complainants further state that incorporating the amortization of deferred earnings and equity AFUDC in the calculation of Colonial's actual equity return would produce illogical results.[1108]

d. Commission Determination

430. We affirm the Initial Decision. As discussed below, we conclude that the Order No. 783 formula presents a reasonable method for determining actual ROE under the Opinion No. 154-B methodology. Moreover, we find that Trial Staff correctly accounted for SRB write-up and deferred earnings in accordance with that methodology. For these reasons, we adopt 21.05% as Colonial's actual ROE for the B Period.

431. Here, as the Initial Decision concluded, Trial Staff appropriately calculated Colonial's actual ROE in 1992 under the Opinion No. 154-B methodology. Trial Staff correctly computed Colonial's actual equity return (numerator) by adding its Current-Year Deferred Earnings to its embedded ROE and tax-adjusted difference between revenues and cost of service.[1109] In addition, Mr. Ruckert correctly derived Colonial's equity rate base (denominator) by applying the applicable adjusted equity ratios to the TOC rate base, which includes the unamortized portions of Colonial's SRB write-up.[1110]

432. We find that the Order No. 783 formula provides a reasonable method for determining Colonial's actual ROE. As discussed above, all participants agree that the Opinion No. 154-B methodology was the ratemaking method in effect beginning in 1985. The Commission adopted the Order No. 783 formula "to more easily enable the calculation of a pipeline's actual rate of return on equity consistent with the ratemaking principles embodied in Opinion [No.] 154.B."[1111] This formula calculates the pipeline's actual ROE in accordance with Opinion No. 154-B by dividing the actual equity return by equity rate base. The actual equity return is the sum of (i) the ROE embedded in the pipeline's page 700 cost of service, (ii) the tax-adjusted difference between total

[1108] Joint Complainants Br. Opposing Exceptions at 62-63 (citing Ex. JC-0169 (Arthur) at 146:1-150:1 & Fig. 14, 162:17-163:2).

[1109] Ex. S-00355 at 6; *see also* Ex. S-00001 (Ruckert) at 44:14-45:4.

[1110] Ex. S-00355 at 3; *see also* Ex. S-00001 (Ruckert) at 44:4-11.

[1111] *Revisions to Page 700 of FERC Form No. 6*, 140 FERC ¶ 61,217 at P 5.

operating revenues and total cost of service, and (iii) Current-Year Deferred Earnings. The equity rate base is the TOC rate base multiplied by the pipeline's equity ratio.[1112]

433. Colonial's arguments opposing use of the Order No. 783 formula to measure actual ROE for the B Period in this proceeding are unconvincing. We acknowledge that page 700 and the actual ROE formula were developed for preliminary screening purposes, and the Commission stated that the Order No. 783 formula "does not have precedential effect for ratemaking purposes" or demonstrate "whether a pipeline's rates are just and reasonable."[1113] However, Order No. 783 provides a reasonable method for determining oil pipeline actual ROE for purposes of the substantial-change test using the principles established in Opinion No. 154-B. Moreover, as discussed below, we have fully considered Colonial's arguments in this proceeding, and conclude that Colonial's proposed departures from the Order No. 783 formula are unsupported.[1114]

434. First, we reject Colonial's argument that the treatment of SRB write-up under the Order No. 783 formula conflicts with Opinion No. 154-B. Under the Opinion No. 154-B methodology, the SRB write-up is included in the TOC rate base and the pipeline is permitted to earn an equity return on the TOC rate base (which includes the SRB write-up). More specifically, the Opinion No. 154-B methodology allocates portions of the TOC rate base to both debt and equity in proportion to the pipeline's weighted cost of capital. The SRB write-up is treated no differently than other parts of the TOC rate base.[1115] Therefore, just like a portion of the TOC rate base is attributed to the equity rate

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[1112] Order No. 783, 144 FERC ¶ 61,049 at PP 29-30.

[1113] *Id.* P 37; *see also id.* (stating that the Order No. 783 formula "is for preliminary screening purposes only" and "does not establish a formula for setting oil pipeline rates in a particular rate case"); *id.* P 38 (reiterating that the Order No. 783 formula "is for preliminary screening purposes only"). We observe, moreover, that the substantial-change test for de-grandfathering rates does not involve setting rates. Rather, it measures change in the pipeline's actual ROE for the limited purpose of determining whether a substantial change in economic circumstances has occurred under EPAct 1992.

[1114] Furthermore, while the Commission did not issue Order No. 783 until 2013, the Order No. 783 formula merely illustrates how to compute actual ROE using the principles established in Opinion No. 154-B. Colonial cites no evidence that the Commission revised the Opinion No. 154-B methodology between 1985 and 2013 in a manner that changed the calculation of actual ROE.

[1115] In other words, the same percentage of the SRB write-up is attributed to equity as the percentage of the pipeline's depreciated plant and other aspects of TOC rate base (excluding deferred earnings as discussed below).

base in the grandfathering analysis, portions of the SRB write-up should be attributed to equity rate base.[1116]

435. Second, Colonial's reliance upon Opinion No. 351-A is misplaced. There, the pipeline proposed to establish two separate rate bases, one for debt and one for equity, and to include the SRB write-up in the equity-only rate base.[1117] The Commission rejected this proposal, explaining that "the write-up is not related to equity capital" and "does not represent capitalized deferred earnings on equity capital."[1118] Contrary to Colonial's argument, the Commission did not hold that the SRB write-up must be entirely excluded from equity rate base. Rather, the Commission merely rejected a proposal to include the SRB write-up in an equity-only rate base and affirmed its use of the weighted cost-of-capital approach, which multiplies the TOC rate base by the weighted cost of capital to allocate the SRB write-up between debt and equity.[1119]

436. Colonial's contentions regarding deferred earnings are likewise unavailing. Colonial argues that the actual equity return (numerator) should include the portion of Accumulated Deferred Earnings recovered in the current year's cost of service, rather than the Current-Year Deferred Earnings accrued that year and deferred for recovery in future periods. However, the Commission rejected this exact argument in Order No. 783-A. As the Commission explained, under the TOC methodology, the current year's

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[1116] We observe that the Opinion No. 154-B methodology includes SRB write-up in the equity rate base used to compute deferred earnings. The Commission has held that under Opinion No. 154-B, deferred earnings are computed using only the equity portion of the SRB write-up, rather than the full write up. Opinion No. 522, 140 FERC ¶ 61,220 at PP 265-266; Opinion No. 511-A, 137 FERC ¶ 61,220 at PP 262-265. In this regard, the Commission has explained that "the entire SRB write-up . . . must be divided between debt and equity so that only the equity portion of the SRB write-up is used to calculate the deferred return." Opinion No. 511-A, 137 FERC ¶ 61,220 at P 264. Because the Opinion No. 154-B methodology includes SRB write-up in the equity rate base used to calculate deferred earnings, it is likewise appropriate to include SRB write-up in equity rate base for purposes of computing actual ROE.

[1117] Opinion No. 351-A, 53 FERC at 62,388-89.

[1118] *Id.*

[1119] *Id.* Because the SRB write-up does not represent equity investment, Colonial's claim that an unconstitutional taking results from the Commission's policy prohibiting pipelines from collecting amortization of SRB write-up in rates is misplaced. Opinion No. 351, 52 FERC at 61,237 (rejecting argument that precluding pipelines from recovering SRB write-up as a cost-of-service expense via amortization resulted in an unconstitutional confiscation of deferred earnings).

inflationary component of the pipeline's equity return (i.e., Current-Year Deferred Earnings) is recovered via amortization in the pipeline's cost of service over subsequent years.[1120] Because this right to future recoveries is obtained in the current year, the Commission recognizes Current-Year Deferred Earnings as part of the pipeline's actual equity return in the current year.[1121] Moreover, the unamortized portion of Current-Year Deferred Earnings are added to Accumulated Deferred Earnings included in the equity component of the pipeline's capital structure. While Current-Year Deferred Earnings are being amortized in subsequent years, the pipeline earns a return upon the unamortized portion which remains in Accumulated Deferred Earnings. Thus, if the entirety of Current-Year Deferred Earnings is not viewed as equity earnings in the current period, there would be no basis for (i) using Current-Year Deferred Earnings to increase the equity component of capital structure or (ii) permitting a return on the unamortized portion of Current-Year Deferred Earnings.[1122]

437. Similarly unavailing is Colonial's contention that relying upon Current-Year Deferred Returns would depart from the Commission's policy of evaluating substantial change based upon actual data.[1123] This argument misconstrues the Commission's guidance in *Tesoro*. In *Tesoro*, the Commission determined changes in actual ROE using revenues and costs in "actual dollar amounts,"[1124] in accordance with the ratemaking methodology in effect in the relevant period.[1125] Current-Year Deferred Earnings are a defined dollar amount reflecting the inflationary component of the pipeline's equity

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[1120] Order No. 783-A, 148 FERC ¶ 61,235 at P 11.

[1121] *Id.*

[1122] *Id.* n.16.

[1123] Colonial Br. on Exceptions at 26.

[1124] *Tesoro*, 134 FERC ¶ 61,214 at PP 2; *see also id.* P 40; *America West*, 121 FERC ¶ 61,241 at P 8 (rejecting analysis that compared percentage changes in costs and revenues and explained that a "more appropriate" analysis would "compare the change in actual revenues and expenses to determine the change in profit margins"). This approach marked a departure from the Commission's practice in *ARCO*, where it determined whether a substantial change had occurred by considering changes in the pipeline's volumes, rate base, and allowed return, with volumes serving as a proxy for revenues and rate base and allowed return serving as proxies for costs. *ARCO*, 106 FERC ¶ 61,300 at PP 29-30, 53-58, 61-62, 67; *see also SFPP, L.P.*, 111 FERC ¶ 61,334 at P 38 (explaining that *ARCO* "used volume as a proxy for revenue" and "changes to rate base and allowed return as major indicia of changes in total expense").

[1125] *Tesoro*, 134 FERC ¶ 61,214 at PP 2, 68.

return,[1126] which the Opinion No. 154-B methodology recognizes as revenue during the current year. Thus, incorporating Current-Year Deferred Earnings in the revenues used to compute Colonial's actual ROE for the B Period is fully consistent with the Commission's policy.

438. For these reasons, we conclude that the Order No. 783 formula is a reasonable method for determining Colonial's actual ROE under the Opinion No. 154-B methodology. Because Trial Staff calculated Colonial's actual ROE for 1992 in accordance with the Opinion No. 154-B methodology, we affirm the Initial Decision and adopt 21.05% as Colonial's actual ROE for the B Period.

3. C Period

439. All participants agree that the C Period in this proceeding is calendar year 2017.[1127] The participants calculate actual ROE for the C Period using the same formulas they applied for the B Period, which divide Colonial's net income or actual equity return by its equity rate base. The participants determine equity rate base using the TOC rate base and equity ratios developed in their respective base-period cost-of-service analyses.[1128] In calculating net income or actual equity return, all participants use the revenues that Colonial reported for 2017 in its page 700 submitted in April 2018.[1129] For the costs used to derive the numerator, Complainants and Trial Staff used data from their respective base-period cost-of-service analyses,[1130] whereas Colonial states that it relies upon unadjusted 2017 cost-of-service data.[1131]

[1126] *See* Ex. CPC-00035 at 8 (calculating Colonial's Current-Year Deferred Earnings in 1992 to be $23,004,000).

[1127] Ex. CPC-00216 (Van Hoecke) at 74:6; Ex. JC-0001 (Arthur) at 65:2-3; Ex. CIT-0028 (Ashton) at 237:1-4; Ex. S-00001 (Ruckert) at 47:16-19.

[1128] Ex. CPC-00217 at 3 (citing Ex. CPC-00035); Ex. JC-0195 at 16; Ex. JC-0327 at 34; Ex. CIT-0037 at 4; Ex. CIT-0041 at 3; Ex. S-00352 at 4, 6; Ex. S-00355 at 4.

[1129] Ex. CPC-00224 at 1; Ex. JC-0195 at 16; Ex. CIT-0041 at 3; Ex. S-00355 at 7; *see also* Ex. TMG-0149 at 127 (Colonial's 2017 page 700).

[1130] Ex. JC-0169 (Arthur) at 165:20-168:4; Ex. JC-0195 at 16; Ex. CIT-0041 at 3; Ex. S-00352 at 2, 4, 14-15, 23; Ex. S-00355 at 7-8.

[1131] Ex. CPC-00216 (Van Hoecke) at 75:1-9.

a. Initial Decision

440. The Initial Decision adopted Trial Staff's calculated actual ROE of 41.73% for the C Period.[1132] The Initial Decision found that Trial Staff accounted for deferred earnings and derived equity rate base in a manner consistent with Order No. 783 and Opinion No. 154-B.[1133] Although Colonial argued that Complainants and Trial Staff improperly used adjusted data in calculating the actual ROE, the Initial Decision concluded that this argument lacked credibility in light of deficiencies in Colonial's recordkeeping practices and Form No. 6 reporting.[1134] In any event, the Initial Decision found that it was unnecessary to resolve this issue because the record established a substantial change in economic circumstances using either Complainants' analyses, which calculated the C Period actual ROE using adjusted data, or Trial Staff's analysis, which relied upon unadjusted data.[1135]

b. Briefs on Exceptions

441. Colonial contends that the Initial Decision erred in adopting an actual ROE of 41.73% for the C Period. Colonial states that this figure is inflated due to errors in Trial Staff's calculation of Colonial's base-period cost of service. In particular, Colonial argues that the Initial Decision's determinations on capital structure, the capitalization of maintenance costs, and the amortization of deferred earnings and AFUDC result in an overstated actual ROE and impact the C Period disproportionately to the A and B Periods.[1136] Moreover, Colonial argues that in *Tesoro*, the Commission explained that the substantial-change analysis must be performed using actual costs and revenues.[1137] Colonial contends that Complainants and Trial Staff violate this requirement by using data that reflects "normalizing and other adjustments" that do not reflect actual circumstances in the C Period.[1138]

[1132] Initial Decision, 179 FERC ¶ 63,008 at PP 509-513.

[1133] *Id.* PP 510-511.

[1134] *Id.* P 512.

[1135] *Id.* P 513.

[1136] Colonial Br. on Exceptions at 26 (citing Tr. 1564-65 (Ashton)).

[1137] *Id.* at 19 (citing *Tesoro*, 134 FERC ¶ 61,214 at P 2).

[1138] *Id.*

c. Briefs Opposing Exceptions

442. Complainants and Trial Staff support the Initial Decision's conclusions regarding the C Period. Joint Complainants state that Commission policy does not preclude use of adjusted data to determine the C Period actual ROE. Rather, Joint Complainants submit that it would be illogical to rely solely on the pipeline's reported cost and revenue data when there is no assurance that this data is accurate or complies with Commission policies.[1139] Joint Complainants state that consistent with *Tesoro*, their analysis does not incorporate test-period adjustments and instead only modifies Colonial's reported data to reflect just and reasonable cost levels, apply appropriate ratemaking methods, and avoid the double recovery of costs associated with storage and incidental services.[1140] Joint Complainants contend that the Commission's determinations regarding Colonial's just and reasonable cost of service in 2017 are properly reflected in the calculation of the C Period actual ROE.[1141] Joint Complainants argue that to the extent these determinations affect the C Period disproportionately to the A and B Periods, this is an "intended feature of the Commission's regulatory regime."[1142]

443. Trial Staff refutes Colonial's contention that Trial Staff's actual ROE for the C Period is overstated due to the Trial Staff's treatment of Deferred Return, capitalization of maintenance costs, and capital structure.[1143] Trial Staff further states that contrary to Colonial's claim, Trial Staff's calculation for the C Period relies upon actual data and excludes its proposed normalization adjustments to certain expenses.[1144]

[1139] Joint Complainants Br. Opposing Exceptions at 63-64 (citing *Tesoro*, 134 FERC ¶ 61,213 at P 46; Ex. JC-0169 (Arthur) at 166:19-168:4).

[1140] Joint Complainants Br. Opposing Exceptions at 64 (citing Ex. JC-0169 (Arthur) at 165:2-168:15).

[1141] *Id.*

[1142] *Id.*

[1143] Trial Staff Br. Opposing Exceptions at 19. Trial Staff states that contrary to Colonial's claim, Trial Staff's actual ROE for the C Period reflects Colonial's position regarding the amortization of AFUDC. *Id.* n.76.

[1144] *Id.* at 19-20.

d. Commission Determination

444. We affirm the Initial Decision's finding that Trial Staff used an appropriate approach in calculating Colonial's actual ROE for the C Period. As discussed above, the Order No. 783 formula represents an appropriate method for computing actual ROE under the Opinion No. 154-B methodology, which all participants agree applied during the C Period. Furthermore, Trial Staff properly relied upon adjusted data for the base period in computing actual ROE for the C Period. However, Trial Staff's proposed actual ROE of 41.73% incorporates Trial Staff's positions regarding every issue. Because we do not adopt Trial Staff's or Complainants' positions on every issue, the existing record does not provide an adequate basis for adopting a specific actual ROE for the C Period. We therefore direct Colonial to submit a compliance filing calculating its actual ROE for the C Period in accordance with our determinations in this order, as discussed below.

445. We disagree with Colonial's contention that Trial Staff's calculation improperly relies upon adjusted data. As an initial matter, the data underlying Trial Staff's analysis does not incorporate test-period adjustments. Moreover, Colonial does not rebut Trial Staff's assertion that its calculation excludes the normalizing adjustments it proposes for Colonial's base-period cost of service.[1145] In any event, neither EPAct 1992 nor the Commission's precedent preclude participants from calculating the C Period actual ROE using data that reflects reasonable base-period adjustments.[1146] EPAct 1992 requires complainants challenging grandfathered rates to demonstrate that a substantial change "has occurred."[1147] The Commission has interpreted this language to preclude participants from using data related to events that occurred after the complaint was filed to show substantial change.[1148] Here, however, neither Complainants nor Trial Staff

[1145] Ex. S-00001 (Ruckert) at 48:7-12.

[1146] To the contrary, the Commission has previously evaluated substantial change using cost-of-service data that was updated after the filing of the complaints. *See ARCO*, 106 FERC ¶ 61,300 at P 37 (finding that ALJ correctly relied on "updated cost-of-service information provided by [the pipeline] at [the ALJ's] direction" and relying upon this updated information to perform substantial-change analysis); *see also Texaco Refin. & Mktg., Inc. v. SFPP, L.P.*, 103 FERC ¶ 63,055, at P 116 (2003) (Initial Decision addressed in *ARCO*) (explaining that the participants in that proceeding "use[d] the particular [pipeline] cost-of-service analysis, *as updated or otherwise adjusted*, for the calendar year preceding the complaint") (emphasis added).

[1147] EPAct 1992 § 1803(b)(1).

[1148] Opinion No. 435, 86 FERC at 61,069 (rejecting proposal to use volume increases that occurred after filing of complaints to establish substantial change), *aff'd*, *BP West Coast*, 374 F.3d at 1279-80 (explaining that for purposes of the substantial-change analysis, "[t]he closing date for evidence is the day the complaint is filed"); *see*

propose to use data from after the filing of the Complaints. Rather, they rely on pre-complaint data that reflect adjustments based upon the Commission's applicable ratemaking policies.

446. To the extent Colonial argues that the Commission must determine Colonial's actual ROE for the C Period based strictly upon data reported on page 700, we reject this contention. As Joint Complainants observe,[1149] the record indicates that the data Colonial reported on page 700 for 2017 may not be accurate or consistent with the Opinion No. 154-B methodology.[1150] More broadly, Colonial's just and reasonable rates for the C Period, including the costs used to derive its actual ROE, are being established in this proceeding. To the extent that the cost of service adopted in this proceeding differs from the summary cost of service Colonial reported on page 700, the calculation of actual ROE for the C Period should reflect these differences.[1151]

447. Moreover, contrary to Colonial's argument, reliance upon adjusted pre-complaint data does not conflict with the Commission's policy requiring use of "actual revenues and expenses."[1152] As discussed above, the reference in *Tesoro* to "actual revenues and expenses" reflects the Commission's policy for computing actual ROE in the substantial-change analysis using costs and revenues expressed in dollar terms, as opposed to

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also ConocoPhillips, 137 FERC ¶ 61,005 at P 30 (citing *Texaco Refin. & Mktg., Inc. v. SFPP, L.P.*, 86 FERC ¶ 61,035, at 61,141 (1999)) ("Simply put, the substantially changed circumstances standard requires all proof *relate to the period* up to the date before the complaint was filed." (emphasis added)).

[1149] Joint Complainants Br. Opposing Exceptions at 63-64.

[1150] In fact, in its evidence in this proceeding, Colonial itself departs from the data and allocation practices reflected in its page 700. *See supra* PP 202 (departing from Colonial's page 700 data in calculating ADIT), 333 (explaining that Colonial presented a cost-allocation study in this proceeding that departs from the cost allocations reported on its Form No. 6).

[1151] In this regard, the C Period is distinct from the A and B Periods, as Colonial's rates for the A and B Periods are not subject to revision. Given that the C Period also represents the base period in this proceeding, the Commission's determinations regarding Colonial's just and reasonable cost of service will affect the C Period more significantly than the A or B Periods. Contrary to Colonial's claim, however, this fact does not justify excluding the Commission's determinations from the C Period analysis by relying strictly upon reported data.

[1152] *Tesoro*, 134 FERC ¶ 61,214 at P 40 (quoting *America West*, 121 FERC ¶ 61,241 at P 8).

comparing percentage changes or relying upon volumes as a proxy for revenues.[1153] Trial Staff's analysis complies with this requirement by computing Colonial's actual ROE using costs and revenues in dollar terms.

448. For these reasons, we disagree with Colonial's argument that Trial Staff's calculation for the C Period improperly relied upon adjusted data.[1154] However, because Trial Staff's proposed actual ROE rests upon inputs that we do not adopt, we direct Colonial to submit a compliance filing calculating its actual ROE for the C Period in a manner consistent with this order.

4. Consistent and Sustainable Change

449. As discussed above, the Commission has adopted 25% as the minimum percentage change in actual ROE necessary to show substantially changed circumstances.[1155] However, the 25% threshold for the substantial-change test is not a bright-line standard. Rather, where the change in actual ROE is greater than 25%, the Commission will only find that a substantial change has occurred where the record shows a consistent and

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[1153] *See id.* (explaining that by directing complainants to "compare the change in actual revenues and expenses to determine the change in profit margins" in *America West*, the Commission "thereby intended that volumes should not be used as a proxy for revenues in evaluating whether there are substantially changed circumstances").

[1154] Even if we agreed with Colonial's criticisms of Trial Staff's analysis, discrepancies in the record would preclude accepting Colonial's calculation. In calculating the C Period actual ROE, Colonial witness Van Hoecke relies upon "unadjusted" operating expenses sourced from Exhibit No. CPC-00035. Ex. CPC-00224 at 2. Exhibit No. CPC-00035, in turn, cites Exhibit No. CPC-00026 as the source for these figures. Ex. CPC-00035 at 2. However, the operating expense amounts shown in Exhibit No. CPC-00035 do not appear anywhere in Exhibit No. CPC-00026. For certain expense items, the amounts listed in Exhibit No. CPC-00026 differ from the amounts used in Mr. Van Hoecke's calculation. *Compare* Ex. CPC-00026 at 1, "2017 Actual" column, lines 2-3, 6-7, 11-14, *with* Ex. CPC-00035 at 2, "2017" column, lines 2-3, 6-7, 11-14. For other expense items, Exhibit No. CPC-00026 indicates zero expense rather than the positive amount listed in Exhibit No. CPC-00035. *Compare* Ex. CPC-00026 at 1, "2017 Actual" column, lines 1, 4-5, 9, 16 (listing "na" as opposed to a positive amount), *with* Ex. CPC-00035 at 2, "2017" column, lines 1, 4-5, 9, 16 (listing positive amounts for the same items). Colonial does not acknowledge or explain these discrepancies, which could cause material errors in Mr. Van Hoecke's C Period calculation.

[1155] *Tesoro*, 134 FERC ¶ 61,214 at PP 2, 60.

sustainable change in economic circumstances.[1156] In this regard, the record must demonstrate that the C Period does not reflect "an unrepresentative short term or anomalous change in return."[1157] The Commission has explained that an unrepresentative change in actual ROE may result from "minor changes in the balance sheet or capital structure, a spike in expenses or revenues, non-recurring revenue from payments for an accidental loss, or a one-time sale or other gain or loss."[1158]

a. Initial Decision

450. The Initial Decision found that the change in Colonial's actual ROE was sustained and consistent. The Initial Decision accepted the analysis of Trial Staff's witness Mr. Ruckert, who calculated Colonial's average actual ROE for 2014-2016 and compared the three-year average to the actual ROE in the C Period.[1159] This analysis indicated that Colonial's actual ROE for the C Period (41.7%) was comparable to actual ROE in the years 2014-2016 (42.0%, 49.2%, and 40.7%, respectively).[1160] In addition, the Initial Decision found that Colonial had not experienced any of the non-recurring events that the Commission has found may cause an unrepresentative change in actual ROE.[1161]

b. Briefs on Exceptions

451. Colonial contends that the record does not establish a sustained and consistent change in economic circumstances. Colonial asserts that Trial Staff's analysis suffers from three flaws. First, it does not reflect actual costs and revenues and instead relies upon Trial Staff's normalized costs for 2017 and revenues inflated by Trial Staff's improper treatment of Deferred Earnings. Second, its use of an average actual ROE for 2014-2016 masks periods, such as 2016, when the actual results of Colonial's operations resulted in a lower change in actual ROE. Third, it relies upon Colonial's system-wide actual ROE, rather than the actual ROEs associated with individual rates. Colonial

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[1156] *Id.* P 61.

[1157] *Id.*

[1158] *Id.*

[1159] Initial Decision, 179 FERC ¶ 63,008 at P 498; Ex. S-00001 (Ruckert) at 48:12-19.

[1160] Ex. S-00355 at 7.

[1161] Initial Decision, 179 FERC ¶ 63,008 at P 499 (citing *Tesoro*, 134 FERC ¶ 61,214 at P 61).

argues that in light of these issues, the Initial Decision erred in adopting Trial Staff's sustained-and-consistent analysis.[1162]

c. Briefs Opposing Exceptions

452. Complainants and Trial Staff argue that the Initial Decision correctly determined that the substantial change in Colonial's economic circumstances was sustained, consistent, and not unrepresentative.[1163] They argue that the record demonstrates that Colonial's actual ROE for the C Period is consistent with its actual ROE between 2014-2016.[1164] Complainants argue that the increase in Colonial's actual ROE is not unrepresentative given that Colonial reported significant over-recoveries during the period preceding the Complaints.[1165] Joint Shippers state that the Initial Decision correctly found that Colonial has not experienced any of the events discussed in *Tesoro* that could produce an anomalous or unrepresentative change in actual ROE.[1166]

453. Complainants and Trial Staff further contend that Colonial's criticisms of Trial Staff's sustained-and-consistent analysis lack merit.[1167] First, Trial Staff argues that although Mr. Ruckert performed his analysis using normalized operating costs, these normalized costs diverged from the operating costs Colonial reported on page 700 by less than 5%.[1168] Furthermore, Trial Staff submits that using Colonial's page 700 costs would

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[1162] Colonial Br. on Exceptions at 19.

[1163] Joint Complainants Br. Opposing Exceptions at 65; Trial Staff Br. Opposing Exceptions at 20-22.

[1164] Joint Complainants Br. Opposing Exceptions at 65 n.228 (citing Ex. S-00001 (Ruckert) at 50; Ex. S-00005 at 6); Joint Shippers Br. Opposing Exceptions at 78; Trial Staff Br. Opposing Exceptions at 20-21 (citing Ex. S-00001 (Ruckert) at 48; Ex. S-00173 (Ruckert) at 91-93; Ex. S-00355 at 7, line 29).

[1165] Joint Complainants Br. Opposing Exceptions at 65 & n.228 (citing Ex. CIT-0041 at 4; Ex. S-00009; Ex. JC-0033; Ex. JC-0037; Ex. JC-0074; Ex. JC-0111; Ex. JC-0169 (Arthur) at 170, figure 18; Ex. JC-0260; Ex. JC-0261; Ex. JC-0287; Ex. TMG-0149; Ex. TMG-0151; Ex. TMG-0154); *see also* Joint Shippers Br. Opposing Exceptions at 79.

[1166] Joint Shippers Br. Opposing Exceptions at 79 (citing Initial Decision, 179 FERC ¶ 63,008 at P 499).

[1167] *Id.*; Trial Staff Br. Opposing Exceptions at 21-22.

[1168] Trial Staff Br. Opposing Exceptions at 21 (citing Ex. S-00173 (Ruckert) at 91).

not produce a materially different result. Second, Trial Staff states that using a three-year average does not conceal the change in Colonial's actual ROE in 2016. Trial Staff states that the actual ROE for 2016 (40.7%) is consistent with the average actual ROE between 2014-2016 (43.96%).[1169] Finally, Trial Staff disagrees with Colonial's assertion that sustained and consistent change may be established using the pipeline's system-wide actual ROE, rather than on a rate-by-rate basis.[1170]

d. Commission Determination

454. As discussed above, we direct Colonial to submit a compliance filing calculating its actual ROE for the C Period in a manner consistent with our determinations in this order. The Commission will evaluate that data upon its submission.

455. However, to the extent the Initial Decision suggests that the consistent-and-sustainable analysis turns upon whether the pipeline's actual ROE in the C Period deviated from its actual ROE during the prior three years,[1171] we clarify that the standard articulated in *Tesoro* is satisfied where the finding of a substantial change in economic circumstances does not result from anomalous factors unique to the complaint year.[1172] In other words, so long as the fact that the substantial-change test's output exceeds 25% did not result from anomalous factors unique to the complaint year, then the pipeline's rates are de-grandfathered. On the record here, Colonial has not advanced any argument that would support a finding that an anomalous factor inflated the C Period substantial-change test's output above 25%. Furthermore, although not essential to a finding of consistent-and-sustainable change, a factor that could further support such a finding is that the actual ROEs for 2014-2016 adopted by the Initial Decision (and undisputed by Colonial) would each produce results above 25% under the (C-B)/A test.[1173]

[1169] *Id.* at 22; *see also* Ex. S-00355 at 7.

[1170] Trial Staff Br. Opposing Exceptions at 22 (citing *Tesoro*, 134 FERC ¶ 61,214 at P 61).

[1171] Initial Decision, 179 FERC ¶ 63,008 at PP 498-499.

[1172] For instance, if a pipeline's actual ROE was 100% in Years 1-3 and 50% in Year 4 (i.e., the complaint year), this would not undercut a finding of substantial change if the formula had an output above 25% in Year 4. This is because notwithstanding the decrease in actual ROE, the pipeline has experienced a substantial change in economic circumstances relative to the B Period.

[1173] *See* Ex. S-00355 at 7. Using the actual ROE for 2014 (42.04%) as the C Period together with the actual ROEs adopted herein for the B Period (21.05%) and A Period (14.41%), the result of the (C-B)/A formula is approximately 146% ((42.04-

5. Compliance Filing Applying the Substantial-Change Test

456. For purposes of this proceeding, we find that Colonial's actual ROEs are 14.41% for the A Period and 21.05% for the B Period. Because the result for the B Period is greater than the result for the A Period, the substantial-change analysis is appropriately performed using the formula (C-B)/A.[1174] Using Trial Staff's proposed actual ROE of 41.73% for the C Period, the result of this test would be approximately 143%,[1175] which exceeds the Commission's established 25% threshold.[1176] As discussed above, however, although we affirm Trial Staff's method for calculating the actual ROE for the C Period, we modify the Initial Decision's holdings regarding several cost-of-service inputs into Trial Staff's calculation. As a result, we do not adopt an actual ROE for the C Period in this order. Instead, we direct Colonial to submit a compliance filing calculating its actual ROE for the C Period and applying the (C-B)/A test in accordance with our determinations in this order. After reviewing the compliance filing and any comments thereon, we will make a final determination regarding whether Colonial's indexed rates are de-grandfathered and may be reduced below the grandfathered level.

V. Whether to Discontinue the Opinion No. 154-B Methodology

A. Initial Decision

457. The Initial Decision discussed Joint Shippers' argument that TOC ratemaking is no longer necessary or appropriate and that the Commission should discontinue the TOC methodology on a prospective basis.[1177] The Initial Decision found that TOC ratemaking

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21.05)/14.41 = 1.46). Using the actual ROE for 2015 (49.15%), the result of the (C-B)/A formula is approximately 195% ((49.15-21.05)/14.41 = 1.95). Using the actual ROE for 2016 (40.70%), the result of the (C-B)/A formula is approximately 136% ((40.7-21.05)/14.41 = 1.36).

[1174] *Tesoro*, 134 FERC ¶ 61,214 at P 18; *ARCO*, 106 FERC ¶ 61,300 at P 23.

[1175] (41.73-21.05)/14.41 = 1.435.

[1176] *Tesoro*, 134 FERC ¶ 61,214 at PP 2, 60.

[1177] Initial Decision, 179 FERC ¶ 63,008 at P 568. As discussed above, under the TOC methodology, a pipeline's nominal ROE is divided into (i) an inflationary component and (ii) a real ROE (calculated by subtracting the inflationary component from the nominal ROE). The real ROE times the equity portion of rate base yields the pipeline's yearly allowed return on equity in dollars. The inflationary component times the equity rate base yields the equity rate base write-up, which is placed in deferred earnings and amortized over the life of the pipeline. *E.g.*, *SFPP, L.P.*, Opinion No. 511-C, 162 FERC ¶ 61,228, at P 33 (2018); Opinion No. 154-B, 31 FERC at 61,834; *see also*

is consistent with the ICA and that Joint Shippers did not provide a sufficient basis for disturbing its continued application.[1178] However, the Initial Decision concluded that the question of whether to retain the TOC methodology going forward exceeded the scope of the Hearing Order and should be decided by the Commission. Thus, the Initial Decision declined to address this issue.[1179]

B. Brief on Exceptions

458. Joint Shippers argue that the Initial Decision conflated Joint Shippers' argument that the Commission should depart from the TOC methodology on a prospective basis with their argument that Colonial is not entitled to recover deferred earnings.[1180] With regard to their contention that the Commission should depart from the TOC methodology, Joint Shippers state that they agree with the Initial Decision that this issue should be decided by the Commission.[1181] Joint Shippers state that, at the hearing, they argued that the TOC methodology is no longer needed to help new pipelines compete with older pipelines because the Commission now permits pipelines to enter committed-service contracts for up to 90% of new or expansion capacity.[1182] As a result, Joint Shippers contended that the TOC methodology should be changed on a prospective basis.[1183]

BP West Coast, 374 F.3d at 1283 (explaining that TOC "smooths out depreciation and equity recovery over the life of the pipeline, thereby avoiding the front-loading problems associated with a [DOC] methodology").

[1178] Initial Decision, 179 FERC ¶ 63,008 at PP 579-580.

[1179] *Id.* PP 568 n.1137, 699.

[1180] Joint Shippers Br. on Exceptions at 17.

[1181] *Id.* at 18.

[1182] *Id.* at 17 (citing *Targa NGL Pipeline Co.*, 166 FERC ¶ 61,179, at P 20 (2019); *Sunoco Pipeline L.P.*, 167 FERC ¶ 61,159, at P 13 (2019); *Oryx S. Del. Gath. & Transp. LLC*, 154 FERC ¶ 61,065, at P 16 (2016); Ex. TMG-0001 (Palazzari) at 32-33); *see also* Opinion No. 154-B, 31 FERC at 61,834-35 (explaining that the TOC methodology would assist newer pipelines in competing with older pipelines by addressing the "front-end load problem").

[1183] *Id.* Joint Shippers state that if the Commission declined to discontinue the TOC methodology, they propose that the Commission should require Colonial to record its deferred earnings in the appropriate FERC accounts and explain its accounting in a

C. Briefs Opposing Exceptions

459. Colonial and Trial Staff contend that the record here provides no basis for departing from TOC ratemaking.[1184] Colonial argues that this issue exceeds the scope of this proceeding and would be more appropriately addressed via rulemaking, rather than adjudication.[1185]

D. Commission Determination

460. We conclude that the record does not support departing from the TOC methodology. As an initial matter, we find that Joint Shippers did not properly renew this argument before the Commission. As discussed above, the Initial Decision held that the TOC methodology accords with the ICA and that the issue of whether to retain that methodology going forward exceeds the scope of this proceeding.[1186] Joint Shippers do not clearly object to these determinations. Moreover, although Joint Shippers state that they agree that the Commission should decide this issue, they do not clearly request that the Commission do so in this proceeding.[1187] Because Joint Shippers do not object to the Initial Decision's determinations or renew their arguments in their brief on exceptions, they have not properly raised the issue of whether the Commission should continue to apply the TOC methodology.[1188]

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transparent manner on page 700 of Form No. 6. *Id.* at 18 n.16 (citing Ex. TMG-0001 (Palazzari) at 34).

[1184] Colonial Br. Opposing Exceptions at 71; Trial Staff Br. Opposing Exceptions at 44.

[1185] Colonial Br. Opposing Exceptions at 71.

[1186] Initial Decision, 179 FERC ¶ 63,008 at PP 568 n.1137, 580, 699.

[1187] Joint Shippers Br. on Exceptions at 18. Whereas Joint Shippers do not oppose the Initial Decision's determination declining to address whether the TOC methodology should apply going forward, they argue that the separate issue of whether Colonial is entitled to recover deferred earnings "should have been resolved in the [Initial Decision]" and that "[t]he Commission must, therefore, do so on exceptions." *Id.*

[1188] 18 C.F.R. § 385.711(d)(2) ("If a participant does not object to a part of an initial decision in a brief on exceptions, any objections by the participant to that part of the initial decision are waived."); *see also, e.g.*, *Midcontinent Indep. Sys. Operator, Inc.*, 161 FERC ¶ 61,059, at P 26 (2017); *SFPP, L.P.*, 150 FERC ¶ 61,097, at P 30 (2015); *Enbridge Pipelines (KPC)*, 102 FERC ¶ 61,310 at P 141.

461. In any case, the record here does not support departing from TOC ratemaking.[1189] As the Commission has explained, TOC and DOC ratemaking differ primarily with regard to their treatment of inflation and are "essentially the same over time."[1190] Although Joint Shippers argued at hearing that TOC is unnecessary because committed-service contracts enable new pipelines to compete with older pipelines, they provide no evidence or analysis to support this claim. Moreover, this argument overlooks that the Commission did not adopt the TOC methodology solely to assist new pipelines.[1191] Rather, the Commission explained that TOC presents additional advantages over DOC, including promoting "greater intergenerational equity by providing relatively constant cost of equity capital charges in real terms (adjusted for inflation) to ratepayers over the life of the regulated property."[1192] Joint Shippers did not address this finding or explain how an alternative ratemaking methodology would provide similar benefits. Finally, discontinuing TOC ratemaking would cause significant disruption and upset settled expectations. The Commission has applied the TOC methodology for nearly 40 years

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[1189] Although no participant addressed this issue on exceptions or at hearing, in response to concerns raised by the Initial Decision, we clarify that no double recovery results from permitting Colonial to recover deferred earnings given its prior-period index rate changes. The index provides an annual increase to update pipeline rates for annual cost changes. *E.g.*, *Five-Year Rev. of the Oil Pipeline Index*, 153 FERC ¶ 61,312, at PP 13, 17 (2015), *aff'd sub nom. Ass'n of Oil Pipe Lines v. FERC*, 876 F.3d at 345-46 (finding that "the Commission has consistently treated the index as a measure of normal industry-wide [Opinion No. 154-B] cost-of-service changes"); *Five-Year Rev. of Oil Pricing Index*, 133 FERC ¶ 61,228, at P 101 (2010), *reh'g denied*, 135 FERC ¶ 61,172 (2011); Order No. 561, FERC Stats. & Regs. ¶ 30,985 at 30,951-52. In contrast, unlike indexing, deferred earnings are not an annual rate increase. Instead, deferred earnings are simply extracted from the nominal ROE in the pipeline's existing rate. Thus, no double recovery results because deferred earnings reflect the ROE recoverable in the pipeline's existing rate, whereas index rate changes update the pipeline's rate so that the pipeline can recover future costs. Moreover, neither the Initial Decision nor the record include any specific details to support the Initial Decision's double-recovery concern.

[1190] Opinion No. 397-A, 75 FERC at 61,591; *see also* Opinion No. 154-B, 31 FERC at 61,834 (explaining that although TOC "results in a different timing of the recovery of the cost of equity capital," over the life of the pipeline, "TOC results in the same discounted value of the earnings stream for the investor as" DOC).

[1191] *See* Opinion No. 397-A, 75 FERC at 61,591 (rejecting argument that TOC methodology should apply only when necessary to further goal of helping newer pipelines compete with older pipelines).

[1192] Opinion No. 154-B, 31 FERC at 61,835.

and departing from this approach would undermine the reliance interests of both pipelines and shippers.

462. For these reasons, we conclude that the record here does not support departing from the TOC methodology.[1193]

VI. Reparations

463. The ICA generally allows reparations for up to two years prior to the date of the filing of a complaint if the pipeline's rates exceed the just and reasonable rate established in the complaint proceeding.[1194] We direct Colonial on compliance to calculate potential reparations based on the amount the indexed rates that each complainant paid during their respective reparations period exceeds the cost of service established by the Commission's findings herein.[1195] However, we defer our decision on whether reparations must be

[1193] As discussed above, Joint Shippers request in the alternative that the Commission direct Colonial to record its deferred earnings in the appropriate FERC accounts and to report deferred earnings on page 700 in a transparent manner. Joint Shippers Br. on Exceptions at 18 n.16 (citing Ex. TMG-0001 (Palazzari) at 34). However, the instructions on page 700 already require pipelines to report Amortization of Deferred Earnings and Accumulated Net Deferred Earnings on page 700 in a manner consistent with the Opinion No. 154-B methodology. *See* Form No. 6, page 700, at Instruction 2. The instructions further require pipelines to report any major changes in their application of the Opinion No. 154-B methodology in a footnote to page 700. *Id.* at Instruction 6. We affirm that Colonial, like all other oil pipelines required to file page 700, must fully comply with the instructions on Form No. 6 and page 700. 18 C.F.R. § 357.2(c)(1) (2022) (requiring that Form No. 6, including page 700, "must be properly completed and verified").

[1194] *BP West Coast*, 374 F.3d at 1306 (citing 49 U.S.C. app. § 16(1)). The Initial Decision did not make any findings regarding reparations related to Colonial's cost of service, finding that the Commission did not set the issue for hearing. Initial Decision, 179 FERC ¶ 63,008 at PP 648 n.1305, 1264. Contrary to the Initial Decision, the issue of reparations was within the scope of the hearing proceeding. *See* Hearing Order, 164 FERC ¶ 61,202 at P 50, ordering para. (B). However, as the compliance filing should provide an adequate record on this issue, we need not remand the reparations issues to the ALJ as the Initial Decision suggested. Initial Decision, 179 FERC ¶ 63,008 at PP 1262 n.2601, 1263.

[1195] For purposes of calculating potential reparations on compliance, we note that we have reserved determination of whether Colonial's indexed rates are de-grandfathered prospective from the date of filing the complaint to the compliance phase of the proceeding. EPAct 1992 § 1803(b)(2). Therefore, for each complainant potentially owed reparations, in calculating potential reparations for the period after the filing of the

made pending review of the compliance filing, consistent with procedures in past oil pipeline rate proceedings.[1196]

464. As discussed below, we also find that (1) test period data should be used to calculate pre-2018 reparations; and (2) Colonial has not shown that a specified complainant is partially barred from receiving reparations related to the indexed rates.

A. Pre-2018 Reparations

1. Initial Decision

465. The Initial Decision did not address this issue.[1197]

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complaint, Colonial should separately identify (A) the amount of reparations that would result from rate reductions that are above the grandfathered level, and (B) any additional reparations that would result if the Commission de-grandfathers Colonial's rates based upon the results of the (C-B)/A formula submitted on compliance. However, for any reparations for damages during the two years prior to the filing of the complaint, those reparations merely apply to the difference between the just and reasonable rate and the grandfathered level. *Id. See also BP West Coast*, 374 F.3d at 1306.

[1196] *E.g.*, Opinion No. 435, 86 FERC at 61,084-111 ("SFPP is directed to recalculate and refile its East Line rates to comply with this order. . . . SFPP is directed to calculate the potential reparations, but the Commission will defer its decision on whether reparations must be made pending review of the compliance filing."). We decline to adopt the Initial Decision's recommendations for an iterative process involving additional briefing to determine whether and to what extent reparations are warranted. Initial Decision, 179 FERC ¶ 63,008 at PP 1256-1261, P 9 & n.12. The amount of potential reparations owed to each complainant, if any, can be calculated on compliance based on the Commission's determinations in this order as the parties appear to recognize. Joint Shippers Br. on Exceptions at 6-7; Joint Complainants Br. on Exceptions at 59; Colonial Br. Opposing Exceptions at 83. To the extent that Colonial seeks to argue that no reparations are owed, Colonial should address those arguments to the cost of service determined by this order consistent with the Opinion No. 154-B methodology.

[1197] Initial Decision, 179 FERC ¶ 63,008 at P 1264.

2. Positions of the Participants

466. Colonial states that, to the extent reparations are required, pre-2018 reparations should be calculated using base period data rather than test period data.[1198] Colonial argues that using test period data to calculate pre-2018 reparations would not account for higher test period volumes and the federal income tax rate reduction that became effective in 2018.[1199] Colonial claims that using test period data would thus reflect volumes that were not moved and ignore costs that were incurred, giving complainants a windfall.[1200] Colonial states that while reparations are often based on the test period cost of service, a different approach is warranted when the test period is not representative of a past historical period.[1201] Colonial argues that Complainants failed to prove that Colonial's test period rates are representative of Colonial's operations for the pre-2018 period.[1202] Colonial states that its proposal is consistent with Commission precedent where reparations were calculated using same-year data, rather than test-period data, for one year due to abnormally low throughput.[1203]

467. By contrast, Complainants argue that reparations should be ordered based on test period data.[1204] They argue that Commission and D.C. Circuit precedent provides that it is appropriate to use test period rates to calculate reparations because test period data is a reasonable proxy for actual costs even if it does not match the cost of service in the entire reparations period.[1205] Joint Complainants argue that Colonial has not shown that the test period cost of service is unrepresentative for purposes of calculating pre-2018

[1198] Colonial Br. on Exceptions at 123.

[1199] *Id.* at 124 (citing Tr. 1138:1-5 (Palazzari); Ex. CPC-00019 (Wetmore) at 11).

[1200] *Id*.

[1201] *Id.* (citing *SFPP, L.P.*, 80 FERC ¶ 63,014, at 65,203 (1997); Opinion No. 435, 86 FERC at 61,111 & n.218, 61,113; *BP West Coast*, 374 F.3d at 1307).

[1202] Colonial Br. Opposing Exceptions at 83-84.

[1203] Colonial Br. on Exceptions at 124 (citing *SFPP, L.P.*, 80 FERC at 65,203).

[1204] Joint Shippers Br. on Exceptions at 7-8.

[1205] *Id.*; Joint Shippers Br. Opposing Exceptions at 80-81; Joint Complainants Br. Opposing Exceptions at 121-122 (citing *BP West Coast*, 374 F.3d 1263 at 1307; Opinion No. 571, 172 FERC ¶ 61,207 at P 105).

reparations.[1206] They also assert that Colonial did not quantify the impact on reparations from using base period volume data.[1207]

468. Additionally, Joint Shippers state that while some test period rate elements may lower rates, as Colonial argues, other rate elements in this proceeding produce higher rates in the test period, such as return on equity.[1208] Joint Complainants note that Colonial argued in this case that the lower base period volumes it experienced did not warrant an adjustment to its cost of service.[1209]

3. Commission Determination

469. We find that any pre-2018 reparations in this proceeding regarding Colonial's indexed rates should be calculated using the test period cost of service.

470. The Commission's policy is to use test-period rates to calculate reparations.[1210] The D.C. Circuit has recognized that the test period is a reasonable proxy for the pipeline's costs and it is therefore reasonable to use test-period rates to determine reparations for the entire reparations period.[1211] The Commission has found this policy reasonable because it avoids having "separate cost-of-service investigations for different periods within a single complaint case, which would greatly exacerbate the time and burden of litigating pipeline rate proceedings."[1212]

[1206] Joint Complainants Br. Opposing Exceptions at 121.

[1207] *Id.* at 122.

[1208] Joint Shippers Br. Opposing Exceptions at 81.

[1209] Joint Complainants Br. Opposing Exceptions at 122 (citing Initial Decision, 179 FERC ¶ 63,008 at PP 630-634, 637-649, 656).

[1210] Opinion No. 571, 172 FERC ¶ 61,207 at P 105.

[1211] *BP West Coast*, 374 F.3d at 1307 (finding that "[t]he use of test periods to set the cost of service for rates intended to span a number of years is well established" and "[t]here is no basis to conclude that test period rates that are just and reasonable for all future years do not provide a just and reasonable basis for determining reparations in the two years prior to the complaints").

[1212] Opinion No. 571, 172 FERC ¶ 61,207 at P 106.

471. We are not persuaded to depart from the Commission's policy here. Although Colonial cites one initial decision that found it appropriate to use non-test-period data for reparations in a single year based on "abnormally low" volumes, without further explanation or citation,[1213] the Commission did not address that approach in its order on that initial decision and that initial decision preceded the precedent discussed above.[1214] Moreover, the record shows that Colonial's volumes differed in each of 2016, 2017, and 2018 and Colonial does not explain why it is more representative to determine reparations in 2016 based on volumes from 2017 (the base period) rather than the 12 months ending September 30, 2018 (the test period).[1215] We also note that the base and test periods in this case overlap in the last three months of 2017, which may limit any impact on the reparations calculation from the different federal income tax rates before and after 2018. In addition, Colonial has not quantified the potential impact from using base-period versus test-period costs and volumes to calculate pre-2018 reparations.[1216]

472. Thus, we reject Colonial's proposal because it invites litigating the cost of service for each year in which reparations may be owed without demonstrating that the test period is an unreasonable proxy for costs.

B. Availability of Reparations for a Specified Complainant

473. The Initial Decision did not address this issue.[1217] However, Colonial asserts that one complainant cannot receive reparations for the full two-year period before its

[1213] Colonial Br. on Exceptions at 124 (citing *SFPP, L.P.*, 80 FERC at 65,203).

[1214] *See* Opinion 435, 86 FERC at 61,111-13; *BP West Coast*, 374 F.3d at 1307; Opinion No. 571, 172 FERC ¶ 61,207 at P 105.

[1215] Colonial Br. on Exceptions at 124; Colonial Br. Opposing Exceptions at 79; Ex. CPC-00019 (Wetmore) at 11, Figure 2.

[1216] *See* Colonial Br. on Exceptions at 124; Colonial Br. Opposing Exceptions at 84.

[1217] Initial Decision, 179 FERC ¶ 63,008 at P 1264.

complaint was filed.[1218] Joint Complainants oppose Colonial's exception as unsupported because it is based on evidence that is not in the record.[1219]

474. We reject Colonial's exception. Colonial's exception turns on information that Colonial failed to submit into evidence.[1220] Based on the information in the record, Colonial has not shown that any complainant is precluded from obtaining reparations.

VII. Compliance and Next Steps

475. Within 45 days of the issuance of this order Colonial shall submit a compliance filing calculating its actual ROE for the C Period and applying the (C-B)/A test in accordance with our determinations regarding the grandfathered rates issues discussed above. In addition, as part of the compliance filing, we direct Colonial to file explanatory statements and workpapers recalculating its indexed rates to reflect the determinations made above. Colonial should separately identify (A) the rates that would result from rate reductions that are above the grandfathered level and (B) any additional rate reductions that would result if the Commission de-grandfathers Colonial's rates based upon the results of the (C-B)/A formula submitted on compliance. Colonial should also calculate potential reparations owed to each complainant as discussed above.[1221]

The Commission orders:

(A) The exceptions to the Initial Decision are resolved as stated in the body of this order. Any exception not specifically discussed should be considered denied.

(B) Colonial's rates may not be just and reasonable for the reasons stated in this order. Within 45 days after this order issues, Colonial shall file statements and workpapers reflecting the changes to the calculation of its rates discussed in this order for the 12 months ending September 30, 2018, as indexed to a current level pursuant to the Commission's indexing regulations published at 18 C.F.R. § 342.3. Colonial shall calculate its actual ROE for the C Period and apply the (C-B)/A test in accordance with

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[1218] Colonial Br. on Exceptions at 123, 125. Because Colonial designated the entirety of its argument on this issue as "CUI/PRIV/HC/15(13)," including the identity of the complainant at issue, we summarize its positions in a generalized manner here.

[1219] Joint Complainants Br. Opposing Exceptions at 123.

[1220] Colonial Br. on Exceptions at 125.

[1221] We decline to adopt the Initial Decision's recommendation to require the participants to engage in mandatory mediation or settlement discussions at this stage. Initial Decision, 179 FERC ¶ 63,008 at P 1259.

our determinations regarding the grandfathering issues as discussed in the body of this order. Colonial shall estimate any reparations that may be due as required in the body of this order. Colonial must include with this compliance filing supporting workpapers, explanatory statements, and any other supporting documentation.

(C) Comments on the compliance filing directed in Ordering Paragraph (B) are due 75 days after this order issues and reply comments are due 90 days after this order issues.

By the Commission. Commissioner Danly is dissenting with a separate statement attached.

(S E A L)

Debbie-Anne A. Reese,
Deputy Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Epsilon Trading, LLC, Chevron Products Company, and Valero Marketing and Supply Company v. Colonial Pipeline Company	Docket Nos.	OR18-7-003
BP Products North America, Inc., Trafigura Trading LLC, and TCPU, Inc. v. Colonial Pipeline Company		OR18-12-003
TransMontaigne Product Services LLC v. Colonial Pipeline Company		OR18-17-003
Southwest Airlines Co. and United Aviation Fuels Corporation v. Colonial Pipeline Company		OR19-1-002
Phillips 66 Company v. Colonial Pipeline Company		OR19-4-002
American Airlines, Inc. v. Colonial Pipeline Company		OR19-16-002
Metroplex Energy, Inc. v. Colonial Pipeline Company		OR19-20-001
Gunvor USA LLC v. Colonial Pipeline Company		OR19-27-001
Pilot Travel Centers, LLC v. Colonial Pipeline Company		OR19-36-001
Sheetz, Inc. v. Colonial Pipeline Company		OR20-7-001
Apex Oil Company, Inc. and FutureFuel Chemical Company v. Colonial Pipeline Company		OR20-9-001 (consolidated)

(Issued November 16, 2023)

DANLY, Commissioner, *dissenting*:

1. I dissent in full from this order. While there are a number of findings in this order that I would have handled differently, instead of an exhaustive list, I will focus on a single, fundamental issue: jurisdiction.

2. It could very well be that Colonial Pipeline Company's (Colonial) is overcharging when it comes to its cost-based transportation rates. But these complaints, to the extent to which they concern Colonial's grandfathered rates should never have gone as far as they have and the fact that they have gotten this far, demonstrates that the Commission has failed to take Congress at its word when it enacted the Energy Policy Act of 1992 (EPAct 1992).[1] The intent of Congress when enacting that legislation was to establish a more predictable and routine method by which oil pipelines could seek rate adjustments

[1] *Energy Policy Act of 1992*, Pub. L. 102–486, 106 Stat 2776 (Oct. 24, 1992) (EPAct 1992).

and, in doing so, it also protected pre-existing rates by establishing an extraordinarily strong presumption against *challenging*[2] those rates.

3. Now, I did not vote for the Hearing Order setting these complaints for hearing.[3] I was not yet a Commissioner. In my view, the decision to set the complaints, and specifically the issues regarding grandfathered rates, for hearing was misguided. I therefore disagree with the Commission's determinations in today's order regarding "Grandfathering."[4]

4. As today's order recognizes, "[t]he Initial Decision argues that the Commission's Hearing Order erred by setting Colonial's grandfathered rates for investigation," "[t]he Initial Decision interprets section 1803(b) of EPAct 1992 as requiring complainants to present a conclusive showing of substantially changed economic circumstances in their complaints," and "the Initial Decision argues that the Complaints did not make a sufficient showing of changed circumstances as required by EPAct 1992."[5] I agree.

5. The complaints indeed failed to make a sufficient showing to challenge the grandfathered rates. I therefore disagree with my colleagues' assertion that "because no party sought rehearing of the Hearing Order, any argument challenging the Commission's decision that the Complaints presented sufficient evidence to warrant a hearing has been waived."[6] Jurisdictional arguments are *always* relevant and cannot be waived. If there is no jurisdiction, then the Commission has no authority to act.

6. Specifically, I dissent from my colleagues' "find[ing] that the Hearing Order properly determined that the Complaints satisfied the standard necessary to set the challenges to Colonial's grandfathered rates for hearing" and all aspects of today's decision regarding the grandfathered rates. It is really simple: we do not have jurisdiction.[7]

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[2] Note I said *challenging*, which is to say, challenging them in the first instance.

[3] *See Epsilon Trading, LLC v. Colonial Pipeline Co.*, 164 FERC ¶ 61,202 (2018) (Hearing Order).

[4] See *Epsilon Trading, LLC v. Colonial Pipeline Co.*, 185 FERC ¶ 61,126, at PP 361-456 (2023) (Order on Initial Decision).

[5] *Id.* P 370 (citing *Epsilon Trading, LLC v. Colonial Pipeline Co.*, 179 FERC ¶ 63,008, at PP 405-410 (2022) (Partial Initial Decision); *id.* PP 415-416).

[6] *Id*. P 374.

[7] *Id.* To be clear, when I refer to this as a jurisdictional issue, the point that I am

7. My colleagues state that they

> continue to conclude that the Complaints presented adequate evidence of substantial change under section 1803(b). At the complaint stage, shippers challenging grandfathered rates must provide evidence establishing a *prima facie* case for concluding that a substantial change has occurred. However, the Commission can set the matter for hearing and evaluate whether the complaint satisfies the standard for challenging grandfathered rates.[8]

My colleagues' interpretation of the standard for filing a complaint regarding grandfathered rates appears in direct tension with the language in the statute. EPAct 1992 established that:

> (a) RATES DEEMED JUST AND REASONABLE.—Except as provided in subsection (b)—
>
> (1) any rate in effect for the 365–day period ending on the date of the enactment of this Act shall be deemed to be just and reasonable (within the meaning of section 1(5) of the Interstate Commerce Act); and
>
> (2) any rate in effect on the 365th day preceding the date of such enactment shall be deemed to be just and reasonable (within the meaning of such section 1(5)) regardless of whether or not, with respect to such rate, a new rate has been filed with the Commission during such 365–day period;
>
> if the rate in effect, as described in paragraph (1) or (2), has not been subject to protest, investigation, or complaint during such 365–day period.
>
> (b) CHANGED CIRCUMSTANCES.—No person may file a complaint under section 13 of the Interstate Commerce Act against a rate deemed to be just and reasonable under subsection (a) unless—

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making is that the Commission lacks jurisdiction to hear a complaint that no person can file.

[8] Order on Initial Decision, 185 FERC ¶ 61,126 at P 376.

> (1) evidence is presented to the Commission which establishes that a substantial change has occurred after the date of the enactment of this Act—
>
> (A) in the economic circumstances of the oil pipeline which were a basis for the rate; or
>
> (B) in the nature of the services provided which were a basis for the rate; or
>
> (2) the person filing the complaint was under a contractual prohibition against the filing of a complaint which was in effect on the date of enactment of this Act and had been in effect prior to January 1, 1991, provided that a complaint by a party bound by such prohibition is brought within 30 days after the expiration of such prohibition.
>
> If the Commission determines pursuant to a proceeding instituted as a result of a complaint under section 13 of the Interstate Commerce Act that the rate is not just and reasonable, the rate shall not be deemed to be just and reasonable. Any tariff reduction or refunds that may result as an outcome of such a complaint shall be prospective from the date of the filing of the complaint.
>
> (c) LIMITATION REGARDING UNDULY DISCRIMINATORY OR PREFERENTIAL TARIFFS.— Nothing in this section shall prohibit any aggrieved person from filing a complaint under section 13 or section 15(l) of the Interstate Commerce Act challenging any tariff provision as unduly discriminatory or unduly preferential.[9]

8. The operative words, which are applicable to complaints against Colonial's grandfathered rates (i.e., rates that have been deemed by EPAct 1992 to be just and reasonable),[10] is that "[n]o person may file a complaint under section 13 of the [ICA] . . . *unless . . . evidence is presented to the Commission which establishes that a substantial change has occurred* after the date of the enactment of this Act."[11] This

[9] EPAct 1992 at § 1803.

[10] *See id*. § 1803(a).

[11] *Id*. § 1803(b).

language does not suggest, as my colleagues do, that the standard is *prima facie* evidence. No, the standard established, in order to achieve the clear intent of Congress to protect pre-existing rates, is that a complainant must overcome an extraordinary burden merely to open the Commission's doors to entertain their challenge: they must *establish* that a substantial change has occurred. Without such a showing, we do not have jurisdiction over the complaint. So restricted are we in hearing such challenges that "no person may file" absent that showing in the first instance. My colleagues, however, continue on the path to "make a . . . determination whether Colonial's indexed rates are de-grandfathered and may be reduced below the grandfathered level."[12]

9. Here is what *should* have occurred. Because the requisite showing has not been made, the Commission should have dismissed the complaints without prejudice.[13] But given where we are, in today's order—at a *minimum*—we should have remanded the proceeding back to the Administrative Law Judge with instructions to dismiss the complaints to the extent to which grandfathered rates are challenged absent the requisite showing, and further instructions to issue a superseding initial decision. I say "at a minimum" because it would have been cleaner and would have sent a better signal to enforce the intent of EPAct 1992 had the Commission dismissed the complaints that intertwined arguments regarding grandfathered rates without prejudice instead of having issued the Hearing Order.[14]

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[12] Order on Initial Decision, 185 FERC ¶ 61,126 at P 456.

[13] In fact, since the statute specifies that "no *person*" may file a complaint, were we to read the statute for all it is worth, we might well require complainants to file an ICA petition which includes all of the evidence "establish[ing] that a substantial change has occurred" to which they can attach a motion to file a complaint to which they might further attach a complaint. Perhaps a trifle procedurally cumbersome, but certainly more in keeping with the spirit of EPAct 1992.

[14] Hearing Order, 164 FERC ¶ 61,202. I do not dispute that "section 1803(b) only applies to challenges against the grandfathered portions of Colonial's indexed rates." Order on Initial Decision, 185 FERC ¶ 61,126 at P 381. Nor do I dispute that "the Commission retains jurisdiction to evaluate the pipeline's indexed rates to the extent they exceed the grandfathered level." *Id*. P 381 n.968. Therefore, I agree that "grandfathering only applies to rate levels in effect at the time of EPAct 1992's enactment and that Congress did not intend to limit the Commission's jurisdiction to investigate rates increased above the grandfathered level." *Id*. My dissent, however, focuses on the Commission's decision to continue on its chosen procedural path to "make a . . . determination whether Colonial's indexed rates are de-grandfathered and may be reduced below the grandfathered level" when, under EPAct 1992, the prerequisites for filing a complaint on grandfathered rates have not been satisfied. *Id*. P 456.

10. *Finally*, I want to point out that today's order states that "[t]he discussion in [the] order includes citations to nonpublic information, only to the extent necessary to identify where relevant nonpublic information may be found in the record."[15] This order is long; the record is longer. And while it is my typical practice to check every citation in the orders to which my name is affixed in order to confirm whether privileged information has been disclosed, it was simply not possible given the amount of time available before it was brought forth for the Commission's consideration. To the extent to which this order may have inadvertently disclosed privileged information, I disagree with its inclusion in today's order and, indeed, any order. This concern of mine is not new. While I did not avail myself of the opportunity to address this issue in a separate statement, my uncertainty as to whether privileged information was disclosed in a recent proceeding was one of the reasons that I concurred in the result in *West Texas Gulf Pipe Line Co. LLC*, 184 FERC ¶ 61,182 (2023)—I will take the opportunity now. I do not support any reasoning in the Commission's order that amounts to a disclosure of privileged information.

For these reasons, I respectfully dissent.

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James P. Danly
Commissioner

[15] *Id.* P 9 n.11.