172 FERC ¶ 61,207
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

OPINION NO. 571

Chevron Products Company, HollyFrontier Refining & Marketing LLC, US Airways, Inc., Valero Marketing and Supply Company, and Western Refining Company, L.P.

v.

SFPP, L.P.

Docket No. OR16-6-000

OPINION AND ORDER ON INITIAL DECISION AND ESTABLISHING PAPER HEARING PROCEDURES

(Issued September 4, 2020)

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Before Commissioners: Neil Chatterjee, Chairman;
Richard Glick, Bernard L. McNamee,
and James P. Danly.

Chevron Products Company, HollyFrontier Refining & Marketing LLC, US Airways, Inc., Valero Marketing and Supply Company, and Western Refining Company, L.P.

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OPINION AND ORDER ON INITIAL DECISION AND
ESTABLISHING PAPER HEARING PROCEDURES

(Issued September 4, 2020)

1. This order addresses briefs on and opposing exceptions to an Initial Decision issued on July 21, 2017, by the Presiding Administrative Law Judge related to a 2015 complaint against SFPP, L.P.'s (SFPP) East Line rates.[1] As discussed herein, this order generally affirms the Initial Decision's holdings regarding capital structure, throughput, right-of-way expenses, regulatory litigation expenses, environmental remediation costs and other issues. This order modifies the Initial Decision's conclusions regarding return on equity (ROE). Finally, this order grants SFPP's December 12, 2018 motion to reopen the record and establishes a paper hearing to allow the participants to apply the Commission's recently revised oil pipeline ROE methodology to the record in this proceeding.

I. General Background

2. SFPP owns and operates the East Line, a common carrier pipeline that transports refined petroleum products – including gasoline, diesel, and jet fuel – in interstate

[1] *Chevron Prods. Co. v. SFPP, L.P.*, 160 FERC ¶ 63,006 (2017) (Initial Decision).

commerce. The East Line originates in El Paso, Texas, and Diamond Junction, Texas, and delivers to Lordsburg, New Mexico; Tucson, Arizona; Phoenix, Arizona; and various military destinations.

3. On December 4, 2015, Complainants[2] filed a complaint against SFPP's East Line rates in Tariff No. 197.8.0. On March 23, 2016, the Commission issued an order finding that Complainants sufficiently established a prima facie case warranting further investigation and setting the complaint for hearing proceedings.[3] The hearing was held in early 2017, and the Presiding Judge issued the Initial Decision on July 21, 2017. The cost of service developed at hearing was based upon a base period from January 1, 2014, through December 31, 2014. The nine-month adjustment period for test period changes is from January 1, 2015, through September 30, 2015.[4]

4. Complainants, SFPP and Trial Staff filed briefs on exceptions on September 20, 2017, and briefs opposing exceptions on October 17, 2017. On exceptions, the participants challenge the Initial Decision's findings as discussed below. On September 20, 2017, SFPP filed a motion to reopen the record, or, in the alternative, for the Commission to take administrative notice of evidence showing the actual amount of rental expenses it incurred during the test period (Right-of-Way Motion to Reopen). On December 12, 2018, SFPP filed a motion to reopen the record and establish a paper hearing to address proposed revisions to the Commission's ROE policy (ROE Motion to Reopen). Complainants and Trial Staff filed answers to SFPP's motions, as further discussed below.

5. As discussed below, we affirm the Initial Decision's holdings involving capital structure, cost of debt, throughput, right of way, litigation expenses, environmental remediation, reparations, and bonus depreciation in future rates. We also affirm in part and reverse in part the Initial Decision's holdings regarding ROE. In light of the

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[2] Complainants are Chevron Products Company, HollyFrontier Refining and Marketing LLC, American Airlines, Inc., Valero Marketing and Supply Company, and Western Refining Company, L.P.

[3] *Chevron Prods. Co. v. SFPP, L.P.*, 154 FERC ¶ 61,231 (2016).

[4] 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 which will become effective within nine months after the last month" of the base period. 18 C.F.R. § 346.2(a) (2019).

Commission's determinations in the ROE Policy Statement issued May 21, 2020,[5] we reopen the record and establish a paper hearing.

II. Capital Structure and the Cost of Debt

6. This part of the order addresses issues related to capital structure and the cost of capital. The issues raised include the treatment of debt in the capital structure, whether the cost of certain types of debt should be included in SFPP's debt cost, and matters related to the equity cost of capital. We find that the cost of capital must be calculated as of the September 30, 2015 conclusion of the test period. To be consistent with this determination, we determine that the same date is also appropriate for determining capital structure.

A. Appropriate Debt to be Included in Capital Structure

1. Initial Decision

7. The Initial Decision found that the short-term debt of SFPP's parent, Kinder Morgan Inc. (KMI), should be included in capital structure because it was being used as long-term debt.[6] The Initial Decision followed the Commission's treatment of short-term debt in prior decisions involving SFPP in Opinion Nos. 511, 522 and 522-A.[7]

2. Briefs on Exceptions

8. On exceptions, SFPP states that the Initial Decision erroneously concluded that the evidence in this proceeding demonstrates that KMI's Current Portion of Debt should be used to calculate capital structure and cost of debt. SFPP asserts that both the commercial paper and the long-term debt set to expire within one year should be excluded from capital structure. SFPP states that KMI does not use the Current Portion of Debt as long-term debt, does not have a practice of refinancing its Current Portion of Debt, and does not maintain substantial and sustained levels of the Current Portion of Debt. According to SFPP, the Commission identified multiple factors related to Kinder Morgan Energy Partners, L.P (KMEP) (prior parent of SFPP) in Opinion No. 511 that caused it to depart from its typical exclusion of short-term debt from capital structure,

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

[6] Initial Decision, 160 FERC ¶ 63,006 at PP 200-236.

[7] Opinion No. 511, 134 FERC ¶ 61,121; *SFPP, L.P.*, Opinion No. 522, 140 FERC ¶ 61,220 (2012); *order on reh'g*, Opinion No. 522-A, 150 FERC ¶ 61,097 (2015).

including that (1) KMEP had maintained significant levels of commercial paper for many years, such that it was a continual presence in KMEP's financial portfolio; (2) expiring long-term debt appeared to be a permanent aspect of KMEP's ongoing financing; (3) given KMEP's continual issuances of new debt and equity, it was not clear that the expiration of certain debt would represent a change in KMEP's capital structure; (4) the large amounts of short-term debt would materially impact the capital structure; and (5) KMEP's maturing debt was of significant scale.[8]

9. SFPP states that the facts in this proceeding show that KMI's financing practices with respect to short-term debt are different from the financing practices of KMEP: (1) KMI has not maintained commercial paper as a continual presence in its capital structure; (2) KMI's level of commercial paper and credit facility borrowings fluctuated significantly over a multi-year time period; (3) KMI had no such borrowings in certain periods; (4) KMI's minor commercial paper and credit facility borrowings that existed in September 2015 were paid down to $0 by three months later (as of December 31, 2015); (5) KMI's expiring long-term debt is not a permanent feature of KMI's capital structure; (6) KMI announced that it did not plan to issue any debt in the capital markets in 2016 and instead planned to fund its capital expenditures with retained earnings; (7) as of November 30, 2016, KMI had not sought additional debt financing from the capital markets in 2016; (8) as of September 5, 2016, KMI had no credit facility borrowings or borrowings under its commercial paper program; and (9) short-term financing does not constitute a material element of KMI's capital structure.[9] SFPP also argues that the Initial Decision only reviewed KMI's use and level of short-term debt over a period of less than two years, rather than over a longer period.[10]

3. Briefs Opposing Exceptions

10. Complainants assert that the Initial Decision correctly held that the short-term debt of SFPP's parent company must be included in the cost of debt used for calculating SFPP's weighted-average cost of capital. Complainants contend that the Initial Decision reviewed KMI's use of short-term debt and correctly found that it followed the same pattern as KMEP's debt in the periods at issue in Opinion Nos. 511 and 522. Further, Complainants argue that KMI's "current portion of long-term debt tends to increase and decrease in opposition to the movement of the long-term debt outstanding. This indicates

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[8] SFPP Brief on Exceptions at 40.

[9] *Id.* at 40-45; Ex. SPP-0039 at 33-35; Ex. SPP-0047; Ex. SPP-0048; Ex. S-0044 at 2.

[10] *Id.* at 43.

that as short-term debt expires, KMI refinances by taking on new long-term debt."[11] Complainants also argue that the Initial Decision correctly analyzed only the post-acquisition filings of KMI, before it merged with and subsumed KMEP.[12] Complainants state that the Initial Decision examined the relevant data and found that KMI uses short-term debt as an "ongoing, and material part" of its overall debt financing.[13]

11. Trial Staff asserts that a review of the credit facility and commercial paper outstanding for KMI for the entirety of the relevant period reveals a significant and ongoing amount of such short-term debt. According to Trial Staff, expiring long-term debt is consistently refinanced into new long-term debt, and commercial paper and credit facilities remain a substantial part of KMI's ongoing debt structure to fund long-term investments.[14]

4. Commission Determination

12. We affirm the Initial Decision's finding that short-term debt should be incorporated as debt into KMI's capital structure for the years in which that debt existed. The Commission "generally does not use short term debt to determine capital structure because short term debt typically does not support the pipeline's rate base."[15] However, the Commission included the short-term debt of SFPP's then-parent, KMEP,[16] in capital structure in Opinion Nos. 511, 522, and 522-A. In those decisions the Commission found that "[t]he sustained level of short-term debt that KMEP maintained on its books demonstrated that this short-term debt was an ongoing, material part of KMEP's overall financing, and thus a factor in KMEP's overall debt financing and capital structure."[17]

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[11] Complainants Brief Opposing Exceptions at 25-26.

[12] *Id.* at 24.

[13] *Id.* at 25.

[14] Trial Staff Brief Opposing Exceptions at 45-46.

[15] Opinion No. 511, 134 FERC ¶ 61,121 at P 183 (citing *Cent. Tel. & Utils. Corp.*, 18 FERC ¶ 61,132, at 61,266 (1982)).

[16] SFPP became a nearly wholly owned subsidiary of KMI in 2014. Initial Decision, 160 FERC ¶ 63,006 at P 207.

[17] Opinion No. 522-A, 150 FERC ¶ 61,097 at P 41; *see also* Opinion No. 511, 134 FERC ¶ 61,121 at P 183 ("KMEP has maintained significant levels of commercial paper for several years, such that the commercial paper became a continual presence in KMEP's financial portfolio."); *id.* P 184 ("Although due to mature during the test period,

The Initial Decision correctly determined based on the record that KMI's use of short-term debt is a continuation of KMEP's use of short-term debt, and thus there was no reason to depart from the Commission's treatment of short-term debt in Opinion Nos. 511 and 522.[18]

13. Consistent with Opinion Nos. 511 and 522, the Initial Decision found that, given the fungible character of KMI's capital, the Commission's aversion to including short-term debt to determine capital structure because short-term debt typically does not support the pipeline's rate base, is not applicable to the facts.[19] The Initial Decision found that KMI has maintained significant levels of commercial paper for several years, such that the commercial paper became a continual presence in KMI's financial portfolio.[20] Thus, given that it was a basic component of KMI's financing, KMI's commercial paper must be reflected as debt in capital structure.[21] We affirm the Initial Decision's finding that KMI still "rolls over" short-term and expiring long-term debt into new debt.[22] Accordingly, all such debt should be considered a permanent feature of its debt financing.

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this expiring long-term debt has been used as a permanent aspect of KMEP's ongoing funding of capital structure, not as temporary financing.").

[18] Initial Decision, 160 FERC ¶ 63,006 at PP 218, 221, & 225.

[19] *Id.* P 223.

[20] *Id.* P 220.

[21] KMI's outstanding commercial paper and credit facilities debt amounted to approximately $1.2 million, $896 million, $619 million, and $468 million, respectively, for the quarters ending December 2014, March 2015, June 2015, and September 2015. Ex. HVW-0073 at 1, 9; Ex. HVW-0048 at 58. Although this is a relatively small percentage of KMI's overall debt (ranging from one to three percent), it is a fairly continuous presence in KMI's financing structure.

[22] Initial Decision, 160 FERC ¶ 63,006 at P 229; *see also id.* PP 213, 219, 227.

B. The Cost of Debt

14. SFPP does not separately address cost of debt, but argues that KMI's Current Portion of Debt should be excluded from the cost of long-term debt for the same reasons that SFPP argued it should be excluded from capital structure.[23]

15. As the Initial Decision states, all participants agree that the appropriate cost of debt should be determined as of the same date as capital structure and should be calculated using the same debt included as capital structure. We affirm that 5.60% for a cost of debt should be calculated as of September 30, 2015, using the same debt as included in capital structure.[24]

III. Throughput

A. Background and Initial Decision

16. All parties agree that throughput should be based upon the 12-month period ending September 30, 2015 (referred to as the test period throughput for the purposes of this throughput discussion).[25] All parties also agree that the actual East Line throughput volume observed during the test period was 62.4 million barrels, including 44.4 million barrels to Phoenix.[26]

17. The only dispute is whether any adjustments should be made to the actual test period data to account for what SFPP claims are non-recurring volumes. At hearing, SFPP advocated adjusting downward the test period East Line throughput from Texas to Phoenix to account for the explosion on February 2015 at the Torrance Refinery in California and the ensuing temporary shutdown. SFPP asserted that the Torrance Refinery shutdown temporarily diverted throughput from SFPP's West Line (which is supplied by the Torrance Refinery[27] and transports product from California to Phoenix)

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[23] SFPP Brief on Exceptions at 37 n.47.

[24] Initial Decision, 160 FERC ¶ 63,006 at P 250.

[25] This consists of the last three months of the base period and the nine-month adjustment period.

[26] Initial Decision, 160 FERC ¶ 63,006 at PP 26-27 (citing Complainants Initial Brief at 2; Ex. HVW-0017 at 4).

[27] SFPP has two systems, the East Line and the West Line, that service Phoenix. Whereas the East Line moves product from Texas into Phoenix, the West Line moves

and inflated SFPP's East Line throughput to Phoenix.[28] Accordingly, SFPP claimed that the East Line test period throughput to Phoenix should be adjusted downward from 44.4 million barrels to 42.1 million barrels, which reduces the total East Line throughput downward from 62.4 million barrels to 60.04 million barrels.[29] SFPP determined these adjusted volumes (a) for the months October 2014 – February 2015 (before the Torrance Refinery shutdown), using actual monthly East Line throughput data and (b) for the months March 2015 – September 2015 (after the Torrance Refinery shutdown), assigning to the East and West Lines a percentage of their actual combined throughput into Phoenix based upon each line's average historical share between 2010-2015.[30] Both Complainants and Trial Staff opposed this adjustment.

18. The Initial Decision set SFPP's East Line throughput volume based upon the actual test period 62.4 million barrels, including 44.4 million barrels to Phoenix, and rejected SFPP's proposed throughput adjustment. In addressing SFPP's arguments, the Initial Decision determined that "although the Torrance Refinery outage may have had an impact on East Line volumes, there is insufficient credible and persuasive evidence in the record to quantify the impact of the outage."[31] Accordingly, the Initial Decision determined that SFPP failed to justify departing from actual test period throughput volumes to calculate its cost-of-service rates.

B. Briefs on Exceptions

19. SFPP argues that the Initial Decision erred when rejecting SFPP's proposed adjustment and using the actual test period volumes to set SFPP's cost-of-service rates.

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product from California into Phoenix.

[28] SFPP Initial Brief at 9.

[29] Initial Decision, 160 FERC ¶ 63,006 at P 26. SFPP did not propose to adjust the throughput for its other East Line destinations outside of Phoenix.

[30] Ex. SPP-0001 at 11-13; Ex. SPP-0009 at 2. In other words, in March 2015, the East and West Lines moved a combined 6,435,908 barrels into Phoenix. Rather than using the actual East Line (3,906,264 barrels) and West Line (2,529,544 barrels), SFPP allocated to the East Line 56.37 percent of the combined 6,435,908 barrels because over the 2010-2015 period, the East Line accounted for 56.37 percent of all barrels moving into Phoenix relative to the West Line. Ex. SPP-0009 at 2.

[31] Initial Decision, 160 FERC ¶ 63,006 at P 113; *see also id.* P 123 (acknowledging "that some of SFPP's evidence suggests that the Torrance Refinery may have had an impact on East Line throughput to Phoenix.").

SFPP claims that all of the parties agree that the Torrance Refinery outage affected the throughput on the East Line during the test period.[32] Although SFPP acknowledges that the Commission has a preference for setting rates using actual test period throughput volumes, SFPP states that throughput levels may be adjusted for known and measurable changes and non-recurring events.[33] SFPP emphasizes that in Opinion No. 554 the Commission found that a shutdown of Trans Alaska Pipeline System (TAPS) during the test period required an adjustment of the throughput data to account for this non-recurring event.[34] Therefore, SFPP argues that the actual throughput volumes on the East Line for Phoenix delivery should be similarly adjusted for the Torrance Refinery shutdown. Furthermore, SFPP asserts that it presented extensive evidence regarding the effect of the Torrance Refinery outage on the East Line's throughput during the test period. However, according to SFPP, the Initial Decision ignored all the evidence of the Torrance Refinery's seven-month outage during the test period and therefore failed to follow Commission policy and make an adjustment.[35]

C. Briefs Opposing Exceptions

20. Complainants and Trial Staff agree that the Initial Decision is consistent with Commission precedent by using actual throughput volumes from the test period. They state that SFPP has failed to support its argument that there was a known and measurable change to throughput levels. Distinguishing Opinion No. 544, they argue that the decrease in throughput resulting from an 80-hour shutdown on TAPS led to an easily quantifiable reduction to volumes on the TAPS system. Complainants argue that this was not the case with the Torrance Refinery shutdown, as the incident is not easily quantifiable nor attributable to the increase in throughput on the East Line. Thus, Complainants and Trial Staff assert that, unlike the TAPS outage, the effects of the Torrance Refinery outage were neither known nor measurable.[36]

21. Complainants and Trial Staff also disagree with SFPP's claim that the Initial Decision is not supported by the evidence. Complainants contend that the Initial Decision is correct in finding that SFPP failed to submit evidence that credibly quantifies

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[32] SFPP Brief on Exceptions at 49; *see* Footnote 207 of Trial Staff Brief Opposing Exceptions where Trial Staff disagrees with SFPP's claim that all parties agreed.

[33] *Id.* at 51.

[34] *Id.* at 52.

[35] *Id.* at 50.

[36] Complainants Brief Opposing Exceptions at 27-28.

the effects of the Torrance Refinery outage from other on-going effects contributing to an increase in throughput during the test period. Trial Staff argues that evidence shows the opposite of SFPP's claim, as the throughput was increasing during the test period before the Torrance Refinery outage.[37]

D. Commission Determination

22. We affirm the Initial Decision's finding that the actual throughput volumes observed on SFPP's East Line during the test period should be used in calculating rates. We also find that the Initial Decision appropriately rejected SFPP's proposed adjustment to the test period throughput volumes.

23. The Initial Decision's use of test period throughput data (i.e., the last three months of the base period combined with the nine-month adjustment period) when setting rates is consistent with prior Commission application of this regulation.[38] The actual test period data provides quantifiable evidence of SFPP's throughput levels.[39] In contrast, the record fails to show non-recurring volumes in East Line throughput based upon the Torrance Refinery shutdown.[40] To the extent SFPP seeks to depart from the actual throughput levels, SFPP has the burden to produce the data that supports such a departure. First, as discussed below, SFPP's exceptions fail to quantify the effect of the Torrance Refinery shutdown. Second, SFPP failed to quantify the effect of the Torrance Refinery shutdown and to identify any non-recurring volumes in the actual throughput levels. Accordingly, we affirm the Initial Decision's adoption of the actual data.

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[37] Trial Staff Brief Opposing Exceptions at 50.

[38] *See* 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; Opinion No. 522, 140 FERC ¶ 61,220 at P 41; *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)).

[39] Initial Decision, 160 FERC ¶ 63,006 at P 114.

[40] In its factual findings, the Initial Decision acknowledged that East Line volumes increased following the Torrance Refinery outage. Initial Decision, 160 FERC ¶ 63,006 at P 123. However, the Initial Decision determined that the evidence in the record demonstrated that other factors also contributed to the increase in East Line volumes. Indeed, SFPP concedes that increased demand in Phoenix contributed to the increase in East Line volumes. SFPP Brief on Exceptions at 66-67.

24. The Initial Decision fully considered and addressed the arguments raised by SFPP on exceptions, including SFPP's claims that adjustments to the actual test period data are supported by (a) differences between SFPP's forecasted 2015 volumes and actual volumes,[41] (b) analysis of gas prices in Phoenix and Los Angeles,[42] (c) SFPP expert's Dr. Webb's analyses,[43] (d) SFPP's volumes prior to and during the Torrance Refinery outage,[44] (e) SFPP's volumes when the refinery allegedly resumed service,[45] and (f) a 2016 Energy Analysts International (EAI) report.[46] In addressing these arguments, the Initial Decision determined that "although the Torrance Refinery outage may have had an impact on East Line volumes, there is insufficient credible and persuasive evidence in the record to quantify the impact of the outage."[47] On the contrary, the Initial Decision identified credible evidence that East Line throughput increases started well before the shutdown of the Torrance refinery,[48] and, as SFPP itself concedes, increasing throughput during the test period on the East Line resulted from increases in demand in addition to

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[41] Initial Decision, 160 FERC ¶ 63,006 at P 122 (finding this evidence unpersuasive and noting that "[b]ecause it is not clear what forms the basis for the projections in the 2015 Plan, it is not clear why it establishes that the Torrance Refinery had an impact and, if it did have an impact, why the 2015 Plan is useful in quantifying that impact"); *id.* P 126. Although SFPP accuses the Initial Decision of "ignoring" the comparison between the 2015 projections and actual movements, SFPP did not refute the Initial Decision's finding that SFPP had failed to demonstrate that the 2015 plan should provide a relevant basis for comparison. *Id.* P 122.

[42] *Id.* P 123.

[43] *Id.* P 130.

[44] *Id.* PP 123-125, 128-129.

[45] *Id.* PP 114-121.

[46] *Id.* P 122 (finding this evidence unpersuasive because while the report shows that "the Torrance Refinery outage may have had an impact on volumes," it also demonstrated "that there are other causes of growth on the East Line").

[47] Initial Decision, 160 FERC ¶ 63,006 at P 113; *see also id.* P 123 (acknowledging "that some of SFPP's evidence suggests that the Torrance Refinery may have had an impact on East Line throughput to Phoenix.").

[48] Ex. HVW-0048 at 10; Initial Decision, 160 FERC ¶ 63,006 at P 128.

the effects of the Torrance refinery shutdown. Accordingly, we adopt the comprehensive reasoning and findings of the Initial Decision subject to the additional discussion below.

25. We are not persuaded by SFPP's argument that the Initial Decision failed to address evidence presented by Dr. Webb that the percentage of West Line demand relative to East Line demand into Phoenix was one standard deviation above the 2010-2015 historical average.[49] Although the Initial Decision did not specifically discuss SFPP's statistical analysis, the Initial Decision explained that it rejected the 2010-2015 period data as a relevant comparison for the future throughput levels, stating that SFPP failed to explain why the prior five years provided a representative sample for evaluating throughput in 2015.[50] As the Initial Decision determined elsewhere, East Line throughput was increasing (both absolutely and relative to the West Line) independent of the Torrance Refinery shutdown.[51]

26. We also reject SFPP's claims that the Initial Decision improperly disregarded SFPP's post-test-period data showing the impact on East Line volumes once the Torrance Refinery resumed operations.[52] The Commission has a general policy against the use of post-test-period data.[53] SFPP's claim that East Line volumes reverted back to their historical patterns starting in August 2016 relies on data from nearly a year after the test period in this proceeding (ending on September 30, 2015). The Commission has in some circumstances considered data outside of the test period where "the post-test-period data show that the projections based on the test-period data will be seriously in error."[54] The

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[49] SFPP Brief on Exceptions at 58.

[50] Initial Decision, 160 FERC ¶ 63,006 at P 124.

[51] *Id.*

[52] SFPP Brief on Exceptions at 53-54, 61.

[53] *Williston Basin Interstate Pipeline Co.*, 87 FERC ¶ 61,265, at 62,022 n.33 (1999).

[54] *El Paso Nat. Gas Co.*, 112 FERC ¶ 61,150, at P 73 (2005) (citing *Distrigas of Mass. Corp. v. FERC*, 737 F.2d 1208, 1220-21 (1st Cir. 1984); *Williston Basin*, 87 FERC at 62,022; *Nat'l Fuel Gas Supply Corp.*, 51 FERC ¶ 61,122, at 61,334 (1990)); *Enbridge Pipelines (KPC)*, 102 FERC ¶ 61,310, at P 84 (2003).

Initial Decision correctly followed the Commission's policy and found that SFPP's post-test-period data did not show that the test period data was substantially in error.[55] Although SFPP claims that in Opinion No. 511 the Commission used post-test-period volume data to verify the accuracy of the test period data,[56] this claim is false. Opinion No. 511 (as demonstrated by the paragraphs cited by SFPP) relied upon no such comparison with post-test-period throughput data.[57] Further, the Initial Decision found that even if SFPP's post-test-period data was considered, it would not establish the impact of the Torrance Refinery outage.[58] In particular, the Initial Decision found that the record evidence was unclear as to when the Torrance Refinery actually resumed normal operations.[59]

27. We also dismiss SFPP's objections to the Initial Decision's finding that increased gasoline prices in Los Angeles prompted shippers to divert Phoenix shipments to the Los Angeles market. Regarding this evidence, the Initial Decision correctly concluded that this was "interesting but not proven with reliable record evidence."[60] Although SFPP challenges the Initial Decision's conclusion that it failed to prove price changes in Los Angeles or that these changes were (at least in part) related to the Torrance Refinery, this misses the point. The exhibits cited by SFPP (while they refer to increased imports of

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[55] Initial Decision, 160 FERC ¶ 63,006 at P 117 (noting that "the actual test period data produces a total throughput of 62.4 million barrels, whereas the proposed adjusted throughput produces a total throughput of 60.04 million barrels").

[56] SFPP Brief on Exceptions at 61 n.81 (citing Opinion No. 511, 134 FERC ¶ 61,121 at PP 27-29).

[57] Although the summary of SFPP's arguments in Opinion No. 511 acknowledged SFPP's post-test-period arguments, the Commission's actual analysis did not cite to any post-test-period data. *Compare* Opinion No. 511, 134 FERC ¶ 61,121 at 12 (summarizing SFPP's brief and acknowledging arguments based upon Longhorn's 2009 bankruptcy) *with* PP 27-29 (referring solely to the calendar-year 2007 base period and the January 1, 2008 – September 30, 2008 adjustment period).

[58] Initial Decision, 160 FERC ¶ 63,006 at PP 115, 121.

[59] *Id.* PP 116-121.

[60] *Id.* P 123.

motor gasoline) do not provide any suggestion that this led to a quantifiable shift in the fuel movements on the East Line to Phoenix.[61]

28. We also reject SFPP's claim that the Initial Decision failed to adequately address the differences between SFPP's actual 2015 throughput levels and its 2015 projections after the February 2015 explosion at the Torrance refinery. The Initial Decision determined that it was "not clear what forms the basis" for the 2015 projections, and, given that the legitimacy of the 2015 projects had not been established, the comparison between the projects and the actuals was not useful.[62] SFPP's exceptions ignore the Initial Decision's concern.[63]

29. The most persuasive evidence presented by SFPP to support its volume adjustment is the EAI report. However, even here, SFPP's brief on exceptions does not undercut the Initial Decision's findings. As the Initial Decision concluded, the EAI report identified the Torrance Refinery outage as potentially affecting volumes on SFPP's East Line, but also provided evidence that there are other causes of the 2015 East Line volume growth. The EAI report did not quantify how the Torrance Refinery shutdown affected SFPP East Line volumes or estimate the effect of the change.

30. Accordingly, although the Torrance Refinery shutdown may have affected SFPP's East Line volumes, SFPP has not supported an adjustment to the throughput on the East Line to account for the Torrance Refinery shutdown. The Initial Decision also correctly distinguishes the Torrance Refinery shutdown from the shutdown of the TAPS pipeline addressed in Opinion No. 544. The TAPS shutdown addressed in Opinion No. 544 had a known quantifiable effect on pipeline volumes as "the oil spill on the TAPS pipeline caused the pipeline itself to shut down, resulting in a cessation of operations for 80 hours and an impact of 2.2 million barrels."[64] In contrast, the impact of the Torrance Refinery shutdown on East Line throughput is at most speculative.[65] According to SFPP, the impact from the shutdown is 2.3 million barrels over seven months because the actual volumes over that period exceeded the 2010-2015 average throughput by that sum. As the Initial Decision states, there is no reason to assume the volumes from the previous

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[61] Ex. SPP-0004 at 1.

[62] Initial Decision, 160 FERC ¶ 63,006 at PP 123, 126.

[63] Any argument not raised on exceptions is waived.

[64] Initial Decision, 160 FERC ¶ 63,006 at P 135 (citing Opinion No. 544, 153 FERC ¶ 61,233).

[65] *Id*. P 136.

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five years are representative of SFPP's volumes in 2015. As the Initial Decision determined, East Line throughput was increasing (both absolutely and relative to the West Line) independent of the Torrance Refinery shutdown over the prior five years.[66] Thus, SFPP has not persuasively established that the Torrance Refinery outage caused the 2.3 million barrel differential it seeks to use as an adjustment.[67] Because the evidence in the record shows that the impact of the Torrance Refinery outage is not known or measurable,[68] the Initial Decision clearly and reasonably distinguished the TAPS outage addressed in Opinion No. 544, which required adjustments to the test period throughput data, from the Torrance Refinery outage when it found that the Torrance Refinery outage does not necessitate an adjustment to the actual test period throughput volumes.

IV. Right of Way

A. Background and Initial Decision

31. SFPP pays rent to multiple landowners for the right of way for the East Line. SFPP and Union Pacific Railroad Company (UPRR) have a contract that grants SFPP easements on UPRR's railroad right of way for several of SFPP's pipeline systems, including the East Line. SFPP has been involved in a lengthy legal dispute with UPRR regarding the fair value rent payable to UPRR for SFPP's use of these pipeline easements.[69]

32. SFPP paid UPRR $6.685 million for the use of its right of way for 2014. SFPP's expert, Mr. Wetmore, asserted that the portion of this amount attributable to the East Line that SFPP actually paid is $327,000. Mr. Wetmore also represented that SFPP reported an additional $898,000 in rental expenses for the East Line in 2014 that were not owed to UPPR, for a total East Line right-of-way expense of $1.205 million. By notice dated October 25, 2013, UPRR demanded an annual payment of $22.3 million for use of the UPRR right of way for the year beginning January 1, 2014. SFPP rejected the demand. The issue had not been resolved at the time of the Initial Decision.[70]

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[66] *Id.* P 128.

[67] *Id.* P 136 (citing SFPP Initial Brief at 14-15).

[68] *Id.* P 138.

[69] Ex. SPP-0011 at 8-9.

[70] Initial Decision, 160 FERC ¶ 63,006 at P 558; Ex. SPP-0011 at 9-11, 15.

33. The Initial Decision determined that SFPP could recover the proportion of the right-of-way expense SFPP actually paid to UPRR during the test period that was attributable to the East Line, and rejected SFPP's proposed additional right-of-way expense. As noted above, at the time, SFPP and UPRR were engaged in litigation involving the right-of-way expense. The Initial Decision found that the amount SFPP actually paid UPRR was known and measurable within the test period, whereas the additional amount SFPP sought to include based on the amount demanded by UPRR was purely speculative.[71] The Initial Decision found unpersuasive SFPP's argument that its adjustment was the best projection of what it would ultimately pay.[72]

34. In addition, the Initial Decision stated that "this proceeding constitutes sufficient notice to SFPP's ratepayers of SFPP's intention to recover additional right-of-way costs through rates, depending on the outcome of its litigation with UPRR,"[73] so that SFPP could later request approval to recover any additional amounts once they are known and measurable without violating the retroactive ratemaking or filed rate doctrines.[74]

B. Briefs on Exceptions and Right-of-Way Motion to Reopen

35. SFPP argues that the Initial Decision erred in ruling that only the right-of-way expenses SFPP actually paid to UPRR during the test period should be included in SFPP's cost of service. SFPP claims that the Initial Decision erred in finding that any additional amounts were purely speculative and not known and measurable.[75] SFPP claims that Opinion No. 544[76] indicates that potential future increases of costs subject to litigation must be recovered in current rates based on reasonable estimates, not in rates for a future period once the dispute is resolved. SFPP claims that it followed this approach by proposing a test period adjustment for the projected additional right-of-way costs based on the best information available at the time.[77]

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[71] *Id.* PP 583-584.

[72] *Id.* PP 585, 591.

[73] *Id.* P 586.

[74] *Id.* PP 586-591.

[75] SFPP Brief on Exceptions at 74-75.

[76] Opinion No. 544, 153 FERC ¶ 61,233.

[77] SFPP Brief on Exceptions at 75-76.

36. Concurrently with its brief on exceptions, SFPP filed the Right-of-Way Motion to Reopen.[78] In both its brief on exceptions and motion, SFPP requests that, if the ruling in the Initial Decision regarding SFPP's right-of-way expenses is affirmed, the Commission should reopen the record to admit evidence showing the actual amount of rental expenses that SFPP incurred to use UPRR's right of way during the test period. SFPP argues that the amount was in dispute when the record closed in this proceeding, but SFPP and UPRR resolved the dispute on July 19, 2017 and the amount has become known and measurable.[79] SFPP submits an affidavit of its expert, Erik Wetmore, which calculates the portion of the right-of-way cost that should be allocated to SFPP's East Line during the test period.[80]

37. According to SFPP, the Initial Decision acknowledged that the right-of-way expenses could increase as a result of the litigation with UPRR, and correctly determined that SFPP must have an opportunity to recover any additional costs. SFPP states that the Initial Decision found that SFPP could recover any additional right-of-way costs after the litigation was resolved without violating the retroactive ratemaking or filed rate doctrines.[81]

38. SFPP argues that the determination of the right-of-way expense constitutes an extraordinary change in circumstance that goes to the heart of this proceeding and thus, good cause exists to reopen the record. SFPP asserts that the right-of-way expense is a key component of its cost of service and the proposed evidence would have changed the Initial Decision's findings on that issue. SFPP argues that admitting the evidence will not augment an already complete record because the Initial Decision found the record deficient on the issue of the right-of-way expense. SFPP further argues that admitting the evidence would lend finality to the record and would not expose the proceeding to endless re-openings. Finally, SFPP argues that admitting the evidence would avoid potential litigation. SFPP states that the Initial Decision indicated that SFPP can recover

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[78] SFPP Right-of-Way Motion to Reopen (September 20, 2017).

[79] SFPP represents that on August 17, 2017, the Superior Court of California, County of Los Angeles, issued the Notice dismissing the dispute between UPRR and SFPP with prejudice. *Id.* at 3 (citing Ex. 1).

[80] SFPP Right-of-Way Motion to Reopen Ex. 3.

[81] SFPP Brief on Exceptions 74, 76.

the additional costs. SFPP claims that settling the issue in the current proceeding would avoid the potential need for further proceedings to recover such costs.[82]

39. Alternatively, SFPP moves for the Commission to take administrative notice of a Los Angeles County Court document showing the dismissal, with prejudice, of the case between SFPP and UPRR.[83] SFPP claims that the document shows that the right-of-way costs are no longer in dispute and are instead known and measurable.[84]

40. Complainants in their brief on exceptions assert that the Initial Decision properly found that only the amounts SFPP actually paid for the UPRR right of way during the base/test period could be included in rates. However, Complainants oppose the finding that the instant proceeding would serve as sufficient notice for SFPP to seek recovery of additional right-of-way expenses in the future.[85] Complainants argue that SFPP's claim of contingent right-of-way costs in responsive testimony in this complaint proceeding involving only a small subset of shippers does not constitute sufficient notice. Complainants assert that SFPP did not make a public tariff filing identifying that its rates could be revised to include the contingent costs.[86] Complainants further argue that the Initial Decision did not identify the specific period for which SFPP would be able to recoup its contingent right-of-way costs. Complainants claim that the Initial Decision was without authority to authorize recovery of contingent costs associated with time periods prior to the Presiding Judge's notice because the notice must be provided at the time the potential liability is incurred. Complainants assert that the Initial Decision also could not authorize the recovery of contingent right-of-way costs associated with time periods subsequent to the notice (and consequently the base/test period) because this would prejudge a particular cost item outside of a full rate review.[87]

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[82] SFPP Right-of-Way Motion to Reopen at 5-8.

[83] *Id.* at Ex. 1.

[84] *Id.* at 8-10.

[85] Complainants Brief on Exceptions at 6-7, 31-35.

[86] *Id.* at 33-35.

[87] *Id.* at 36-38.

C. Briefs Opposing Exceptions and Answers

41. Complainants and Trial Staff oppose SFPP's proposals to adjust the right-of-way costs based on SFPP's prior estimate of the outcome of the UPRR litigation. Complainants argue that Opinion No. 544 does not modify the requirement that test period adjustments to base period actual cost levels be known and measurable within the test period. Complainants allege that SFPP is attempting to embed speculative and contingent costs in rates that reflect the maximum potential exposure for the cost item, contrary to test period ratemaking principles.[88] Complainants claim that SFPP's projected amount is not a cost it incurred during the base/test period, and the only known expense amount is the amount SFPP actually paid UPRR in 2014. Complainants argue that SFPP projected the litigation would result in a complete loss (based on UPRR's best case litigation position, which SFPP rejected), and thus SFPP was either underselling its chances to reduce its costs or engaging in frivolous litigation at ratepayers' expense. Complainants assert that SFPP's expert reviewed no information on how the projected amount was derived.[89] Complainants argue that SFPP could have made a tariff filing to put all shippers on notice of the contingent right-of-way costs and preserve the issue for future consideration.[90]

42. Similarly, Trial Staff argues that only costs that are known and measurable are recoverable in rate proceedings and it is not appropriate for ratepayers to shoulder the burden of speculative, potential future increases that SFPP could be required to pay at some later date. Trial Staff alleges that SFPP's own witness agreed that these expenses were not fully and finally established as of the end of the test period.[91]

43. Complainants also oppose SFPP's request to reopen the record to update the right-of-way amount.[92] Complainants assert that SFPP's request relies on the Initial Decision's erroneous determination that this proceeding constitutes sufficient notice of SFPP's intent

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[88] Complainants Brief Opposing Exceptions at 58-61.

[89] *Id.* at 63-64 (citing Tr. 793-95).

[90] *Id.* at 62-63.

[91] Trial Staff Brief Opposing Exceptions at 71-73 (citing Initial Decision, 160 FERC ¶ 63,006 at P 584 (citing Tr. 784)).

[92] Complainants Brief Opposing Exceptions at 65-66; Complainants Answer to SFPP's Motion to Reopen the Record (Oct. 5, 2017) (Complainants Answer).

to recover additional right-of-way costs.[93] Complainants argue that guaranteeing future recovery of a discrete cost item outside the base/test period without analyzing changes in other cost and revenue factors violates the Commission's test period ratemaking scheme.[94]

44. Complainants argue that SFPP does not meet the standards for reopening the record. Complainants claim that updating a single, relatively small cost item is not an extraordinary circumstance that goes to the heart of the case. Complainants allege that the proposed incremental cost increase associated with SFPP's East Line right-of-way costs will have a negligible impact on the East Line rates and does not compel an overall result contrary to that reached in the Initial Decision. Complainants argue that SFPP ignores other offsetting cost decreases or revenue increases that occurred following the end of the base/test period. Complainants assert that SFPP has provided no extraordinary facts or circumstances to justify upending the finality of this proceeding, and instead, the Commission has a complete record containing evidence that has been subject to discovery and cross-examination as well as the Presiding Judge's evaluation.[95]

45. Complainants argue that SFPP's proposed costs are unsupported. Complainants state that SFPP did not produce underlying documentation showing the time period and costs encompassed in the amount resolving the dispute, and there is no evidentiary support for the portion of that amount attributable to the East Line during the test period. Complainants allege that it is not clear that SFPP made any payment to UPRR. Complainants further allege that additional factors raise questions as to the credibility of SFPP's proposed amount.[96] Complainants argue that there is no way to determine from SFPP's evidence if the proposed costs are reasonable.[97]

46. Trial Staff also argues that SFPP failed to adequately support its motion, although Trial Staff does not oppose reopening the record. Trial Staff asserts that if the additional right-of-way amount is now known and measurable, that represents a material change in circumstance. However, Trial Staff argues that SFPP has failed to conclusively establish

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[93] Complainants Answer at 3-6.

[94] *Id.* at 6-8.

[95] *Id.* at 8-11.

[96] For example, Complainants assert that SFPP does not provide any evidence as to how the amount was allocated and/or valued on a carrier and non-carrier basis or from an intrastate/interstate perspective.

[97] *Id.* at 11-18.

the facts to support the appropriate right-of-way expense to include in the test period East Line rates. Trial Staff argues that if permitted to reopen the record, (1) SFPP must supplement the record with the best evidence beyond SFPP's proffered affidavit by an interested witness, and (2) Trial Staff and Complainants should be given a meaningful opportunity to investigate the appropriate amount of the right-of-way expenses to include in East Line rates through limited discovery, testimony and briefing.[98]

47. Trial Staff argues that the Initial Decision correctly determined that this proceeding provides adequate notice of SFPP's intention to recover additional right-of-way costs depending on the outcome of the UPRR litigation.[99] Trial Staff disagrees with Complainants' argument that SFPP could not recover additional right-of-way expenses for the period prior to August 12, 2016 (the date SFPP's witness submitted prepared answering testimony).[100] However, Trial Staff also claims that Complainants' objections are moot because the need for notice regarding possible future adjustments to current rates has been obviated. Trial Staff argues that either the Commission will accept SFPP's updated costs for inclusion in rates in this proceeding, or those costs will be excluded because they were not known and measurable during the test period.[101]

48. Finally, Complainants and Trial Staff oppose SFPP's alternative request to take administrative notice of the court record showing that the litigation between SFPP and UPRR was terminated. They argue that although the court record provides evidence that the action has been dismissed, it does not provide any evidence showing that the right-of-way costs should be increased by any particular amount. Therefore, they argue that the information at the core of SFPP's request is not public information and cannot be accurately or readily verified.[102]

49. SFPP argues that limiting recovery to only the actual right-of-way expenses that SFPP paid UPRR during the test period would deprive SFPP of a reasonable opportunity to charge rates based on costs that are representative of its actual test period costs or its estimate of test period costs. SFPP continues to argue that the Initial Decision contradicts the determination in Opinion No. 544 that when a pipeline is in litigation regarding costs

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[98] Trial Staff Brief Opposing Exceptions at 74-75; Trial Staff Answer to SFPP's Motion to Reopen the Record (Oct. 5, 2017).

[99] Trial Staff Brief Opposing Exceptions at 64-67.

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

[101] *Id.* at 70-71.

[102] Complainants Answer at 18-19; Trial Staff Answer at 2-5.

that the pipeline is entitled to include in its cost of service, the pipeline must include in its current rates the higher costs that it could be required to pay in the future or risk forgoing recovery altogether. SFPP argues that, contrary to Complainants' assertions, when, as here, test period data is not representative of going-forward costs, the Commission permits parties to update or reasonably estimate the test period data so long as the data used to do so is known and measurable. SFPP claims that adjustment of the right-of-way expense is appropriate because the test period costs were not representative of going-forward costs, whereas SFPP's projection of the right-of-way costs was shown to be reasonable and representative.[103] SFPP also filed a motion to answer and answer to Complainants' and Trial Staff's answers to SFPP's Right-of-Way Motion to Reopen.[104] SFPP represents that if the Commission grants its motion, SFPP is willing to enter the settlement agreement between SFPP and UPRR into the record under seal, and to engage in the limited additional process proposed by Trial Staff.

D. Commission Determination

50. We affirm the Initial Decision's finding that SFPP may recover the East Line portion of the right-of-way expenses SFPP actually paid to UPRR during the test period, and find that the Initial Decision appropriately rejected SFPP's proposed adjustment to the right-of-way costs based on the amount demanded by UPRR. We therefore deny SFPP's Right-of-Way Motion to Reopen.

51. Under the Commission's test period principles for cost-of-service rate proceedings, the costs must be known and measurable with reasonable accuracy at the time of the proceeding.[105] The Initial Decision correctly found that the right-of-way expenses SFPP actually paid UPRR during the test period were known and measurable, but SFPP's proposed test period adjustment based on its projection of the outcome of the litigation was speculative.[106] SFPP's witness, Mr. Wetmore, conceded that the only amounts definitely incurred were the UPRR right-of-way costs that SFPP actually paid for 2014 usage.[107] In addition, we reject SFPP's argument that its proposed adjustment based on UPRR's demand was the best projection of what it would ultimately pay. It is

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[103] SFPP Brief Opposing Exceptions at 7, 38-43.

[104] SFPP Motion for Leave to File an Answer and Answer (Oct. 19, 2017).

[105] 18 C.F.R. § 346.2(a)(ii) (2019).

[106] Initial Decision, 160 FERC ¶ 63,006 at PP 583-585, 591.

[107] Tr. 801.

undisputed that SFPP rejected UPRR's demand for this amount.[108] Mr. Wetmore was unable to explain how UPRR derived the demand amount and why SFPP rejected UPRR's demand.[109] However, Mr. Wetmore agreed that it was fair to assume that SFPP did not agree with the amount demanded and was seeking a lower amount in the ongoing litigation.[110] The Initial Decision aptly reasoned based on the evidence presented that in projecting a total loss as the outcome of the litigation and seeking to recover the entire UPRR demand amount, "SFPP is either engaging in frivolous litigation with UPRR or is seriously underselling its chances for success."[111] We agree that SFPP's proposed adjustment was not a reasonable projection of the outcome of the litigation. The Initial Decision reasonably allowed SFPP to recover only its actual UPPR right-of-way costs based on the most up-to-date information at the time.

52. In addition, we agree with the Initial Decision's finding that "[s]hippers on SFPP's East Line are responsible for right of way costs that are known and measurable during the test period, not for whatever amount SFPP considers might be its maximum right of way exposure."[112] We are unpersuaded by SFPP's argument that, under Opinion No. 544, it must include its maximum litigation exposure. In Opinion No. 544, the Commission held that a pipeline's supplemental ad valorem tax payment made in December 2010 for a reassessment of 2006 property tax could not be included in cost of service for determining the pipeline's 2010 rates.[113] The Commission held that "the payment of back-taxes from 2006 is a one-time expense that is non-recurring, and does not reflect the pipeline's future ad valorem tax levels."[114] The Commission further stated that recovery of the 2006 tax liability in going-forward 2010 rates would violate the retroactive ratemaking doctrine, which prohibits the Commission from adjusting current rates to

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[108] Initial Decision, 160 FERC ¶ 63,006 at P 558; Ex. SPP-0011 at 10; Ex. HVW-0041 at 7; Tr. 795.

[109] Initial Decision, 160 FERC ¶ 63,006 at P 585; Tr. 793, 795-797, 802-805.

[110] Tr. 795-797, 802.

[111] Initial Decision, 160 FERC ¶ 63,006 at P 585.

[112] *Id.* P 584.

[113] Opinion No. 544, 153 FERC ¶ 61,233 at P 117; *see also BP Pipelines (Alaska) Inc.*, 146 FERC ¶ 63,019, at P 1619 (2014).

[114] Opinion No. 544, 153 FERC ¶ 61,233 at P 127.

compensate for previous over- or under- recovery of costs in prior periods.[115] Opinion No. 544 does not require a pipeline to include the highest potential amount that could be incurred for every disputed cost item in a cost-of-service proceeding. Indeed, there is uncertainty associated with every element included in a cost-of-service calculation. Allowing SFPP to recover disputed cost items based on its maximum potential exposure would be one-sided, as SFPP would be unlikely to seek to incorporate projections of potential unfavorable cost decreases.[116] Notably, SFPP did not propose to refund any potential right-of-way costs recovered from shippers in the event that the resolution of the dispute resulted in an amount less than UPRR's demand.[117] Opinion No. 544 found that "[t]he failure to accurately estimate taxes is not an extraordinary event."[118] The same can be said here regarding the right-of-way costs. At bottom, SFPP failed to demonstrate that its proposed adjustment was a reasonable projection of what it would ultimately pay.

53. We also deny SFPP's Right-of-Way Motion to Reopen. The Commission has discretion in deciding whether to reopen the record,[119] and "the general rule is that the record once closed will not be reopened."[120] The Commission's long-standing policy is that:

> To persuade the Commission to exercise its discretion to reopen the record, the requesting party must demonstrate the existence of "extraordinary circumstances." The party must demonstrate a change in circumstances that is more than just material – it must be a change that goes to the very heart of

[115] *Id.* P 128.

[116] *See Williston Basin Interstate Pipeline Co.*, 87 FERC ¶ 61,265, at 62,022 (1999) ("The Commission cannot allow pipelines to make adjustments that will favor the pipeline, if they eventually come to pass after the test period, since the pipelines would be unlikely to project changes unfavorable to them such as increases in throughput and decreases in costs.").

[117] Tr. 805.

[118] Opinion No. 544, 153 FERC ¶ 61,233 at P 129.

[119] 18 C.F.R. § 385.716 (2019); *Nw. Pipeline Corp.*, 76 FERC ¶ 61,068, at 61,240 (1996) (*Northwest Pipeline*); *E. Tex. Elec. Coop., Inc. v. Cent. & S. W. Servs., Inc.*, 94 FERC ¶ 61,218, at 61,801 (2001) (*E. Tex*) .

[120] *E. Tex.*, 94 FERC at 61,801.

> the case. The policy against reopening the record except in extraordinary circumstances is based on the need for finality in the administrative process.[121]

54. On balance, we find that the facts here do not warrant reopening the record. The purpose of a rate case is to set rates based on representative cost levels. The Initial Decision's use of the right-of-way expenses SFPP actually paid UPRR during the test period for East Line service leads to a reasonable representation of the right-of-way component of SFPP's cost of service. SFPP's proposed update to the UPRR portion of the right-of-way expenses is not an extraordinary change in circumstance that goes to the very heart of the case. SFPP's proposed update to the portion of the UPRR right-of-way expense attributable to the East Line based on the outcome of the litigation is a relatively small portion of the right-of-way component, and an even smaller portion of SFPP's total cost of service, such that making the proposed adjustment would not have a significant impact on the East Line rates.[122] Cost components will inevitably change after the close of the record. Although the Commission "recognize[s] of course that changes have occurred since the close of the record,"[123] "such changes always occur" and "[y]et litigation must come to an end at some point."[124]

55. Additionally, SFPP's proposed exhibits cannot be accepted at face value. SFPP did not produce the underlying documentation regarding the resolution of the dispute between SFPP and UPRR, but instead seeks to admit only the court document showing

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[121] *Id.* at 61,800 (citing *CMS Midland, Inc.*, 56 FERC ¶ 61,177, at 61,624 (1991), *reh'g denied*, 56 FERC ¶ 61,361 (1991); *S. Co. Servs., Inc.*, Opinion No. 300, 43 FERC ¶ 61,003, at 61,024 (1988), *reh'g denied*, Opinion No. 300-A, 43 FERC ¶ 61,394 (1988), *aff'd sub nom. Gulf States Utils. Co. v. FERC*, 886 F.2d 442 (D.C. Cir. 1989); *NE Hub Partners, L.P.*, 90 FERC ¶ 61,142, at 61,456 (2000); *Transwestern Pipeline Co.*, Opinion No. 238, 32 FERC ¶ 61,009 (1985), *reh'g denied*, Opinion No. 238-A, 36 FERC ¶ 61,175, at 61,453 (1986)); *Northwest Pipeline*, 76 FERC at 61,240 ("The Commission is only required to reopen the record when the interest in finality of the proceedings is overcome by 'extraordinary circumstances' that amount to a change in core circumstance that goes to the heart of the case."); *Sw. Power Pool, Inc.*, 163 FERC ¶ 61,109, at P 220 (2018); *The Detroit Edison Co.*, 105 FERC ¶ 61,209, at P 29 (2003).

[122] *Compare* Ex. SPP-0011 at 11, 15 and Ex. SPP-0014 *with* SFPP Right-of-Way Motion to Reopen at Ex. 3.

[123] *Sw. Power Pool, Inc.*, 163 FERC ¶ 61,109 at P 222 (quoting *Transwestern Pipeline Co.*, Opinion No. 238, 32 FERC ¶ 61,009 at 61,037 (1985)).

[124] *Id.* (quoting Opinion No. 238, 32 FERC at 61,037).

that the action was dismissed and affidavits by two interested witnesses.[125] SFPP and UPRR disputed the expenses for the 10-year period preceding the test period from January 2004 to December 2013 and the next 10-year period beginning January 2014.[126] There is no way to verify from SFPP's proposed evidence the total amount that SFPP claims it owes UPRR as a result of the resolution of the litigation, nor the portion of the total amount that is properly attributable to East Line right-of-way expenses during the test period. SFPP's proposed recalculation of the right-of-way expense to include in the test period East Line rates is based solely on the affidavit of Mr. Wetmore.

56. We also reject SFPP's alternative request that the Commission take official notice of a court document that merely demonstrates that the action between SFPP and UPRR has been dismissed with prejudice.[127] If admitted, the document would not establish the facts that SFPP seeks to prove, namely the updated amount of the right-of-way expenses attributable to the East Line during the test period.[128]

57. The issue of whether SFPP could recover additional right-of-way costs if the litigation was not resolved during the course of this proceeding is moot. The litigation has been resolved and we have rejected SFPP's proposal to reopen the record to include SFPP's proposed updated costs, as discussed above.

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[125] SFPP offered to submit the settlement agreement if the Commission accepts the Right-of-Way Motion to Reopen. *See* SFPP Motion for Leave to File an Answer and Answer (Oct. 19, 2017).

[126] Initial Decision, 160 FERC ¶ 63,006 at P 558; Ex. HVW-0041 at 4; Ex. SPP-0011 at 9-11, 15.

[127] *See* SFPP Right-of-Way Motion to Reopen, Ex. 1. Rule 508(d)(1) of the Commission's Rules of Practice and Procedure states that "[a] presiding officer may take official notice of any matter that may be judicially noticed by the courts of the United States, or any matter about which the Commission, by reason of its functions, is expert." 18 C.F.R. § 385.508(d)(1) (2019).

[128] *See Mont. Power Co.*, 74 FERC ¶ 61,315, at 61,998 (1996) (declining to take official notice of certain state approved rates as "it would be of little use without a showing that the rates contained in those sheets conform to the requirements that the rates are fair and equitable"); *La. Pub. Serv. Comm'n v. Entergy Servs., Inc.*, 111 FERC ¶ 61,311, at P 190 (2005) (declining to take official notice where the existing record provided sufficient evidence); Opinion No. 510, 134 FERC ¶ 61,129 at P 271 (declining to take official notice of data that was irrelevant to the determination of the entity's rates in the proceeding).

V. Regulatory Litigation Expenses

A. Initial Decision

58. The Initial Decision determined that SFPP should be permitted to recover its prudently incurred regulatory litigation expenses through a three-year surcharge established as part of the compliance filing stage of this proceeding.[129] Relying on the Commission's decision in Opinion No. 435-B and the D.C. Circuit decision affirming it, the Initial Decision found that SFPP's litigation expenses should first be offset by unpaid reparations to non-complainant shippers before being recovered through the surcharge.[130]

B. Briefs on Exceptions

59. SFPP asserts that the Initial Decision erred in concluding that SFPP must first offset its regulatory litigation costs related to this proceeding against unpaid reparations. SFPP asserts that the Initial Decision's conclusion is inconsistent with recent Commission precedent, contravenes just and reasonable rate setting principles, and violates the filed rate doctrine and the prohibition against retroactive ratemaking.[131]

60. SFPP states that the Initial Decision found that, similar to the reasoning in Opinion No. 435-B[132] and the appellate opinion finding the Commission's conclusion to be reasonable, SFPP has "reaped a windfall" by collecting excess revenues under unjust and unreasonable rates and that recovery of its regulatory litigation costs should be offset by unpaid reparations resulting from such windfall.

61. SFPP asserts that in a case more recent than the precedent relied upon in the Initial Decision, the Commission concluded that it would be unjust to allow complainants to receive large reparations without having litigation expense included within the revised rates used to calculate reparations.[133] Specifically, in *Sepulveda*, SFPP states the Commission found that complainant shippers should bear their share of regulatory

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[129] Initial Decision, 160 FERC ¶ 63,006 at PP 667-674.

[130] *SFPP, L.P.*, Opinion No. 435-B, 96 FERC ¶ 61,281, at 62,074-75 (2001); *BP W. Coast Prods., LLC v. FERC*, 374 F.3d 1263, 1294 (D.C. Cir. 2004) (*BP West Coast Products*).

[131] SFPP Brief on Exceptions at 82-87.

[132] 96 FERC ¶ 61,281.

[133] *Texaco Ref. & Mktg., Inc. v. SFPP, L.P.*, 117 FERC ¶ 61,285 (2006) (*Sepulveda*).

litigation costs and thus, the Commission did not require that such costs be offset against unpaid reparations. SFPP submits that the Commission determined that a just and reasonable rate must include the full litigation costs, and to do otherwise would result in a rate that was below the just and reasonable level.

62. SFPP states that the Initial Decision sought to distinguish *Sepulveda* by noting that it appeared that no party in *Sepulveda* raised the specific offset mechanism at issue in this proceeding; therefore, the Initial Decision found that *Sepulveda* does not control its ruling in this case. However, SFPP states that the position adopted in the Initial Decision is that SFFP's unjust and unreasonable rates have resulted in a windfall that must be offset for equitable reasons. SFPP asserts that those equitable reasons existed in *Sepulveda* because Sepulveda's rates were found to be unjust and unreasonable, but the Commission in *Sepulveda* did not find it necessary to offset regulatory litigation expenses against unpaid reparations in that proceeding.

63. SFPP argues that *Sepulveda* demonstrates that the Opinion No. 435, *et al.* orders that the Initial Decision relied upon are not the only just and reasonable outcome supported by the Commission with respect to regulatory litigation expenses vis-à-vis reparations. SFPP states that, when reviewing the Commission's decision in Opinion No. 435-B, the D.C. Circuit noted that the Commission's finding was not based on any precedent and only found the Commission's novel approach to be "reasonable,"[134] but that it was by no means required. SFPP contends that *Sepulveda* indicates that the Commission does not necessarily find that all reparations demonstrate a "windfall" against which litigation expenses must be offset. Therefore, SFPP asserts that in *Sepulveda*, the Commission's most recent decision addressing this issue, not only did the Commission not endorse the offsetting mechanism adopted by the Initial Decision, but the Commission also provided reasoning as to why the full litigation expenses should be included in the revised rates so that the resulting rate would be just and reasonable.

64. SFPP states that, as noted above, in order for the *Sepulveda* pipeline rates to be considered just and reasonable, the Commission found that the complainants' revised rates in that case must be calculated by including a proportionate share of all costs, including regulatory litigation costs. SFPP submits that the Initial Decision erred in requiring SFPP to offset regulatory litigation expenses against unpaid reparations because such offsetting will result in a rate that is less than just and reasonable. SFPP contends that the Initial Decision is incorrect in concluding that the offset mechanism will not cause the revised rates used to calculate reparations for Complainants to drop below the just and reasonable level.

[134] *BP West Coast Products*, 374 F.3d at 1294.

65. SFPP states that the Initial Decision's ruling to offset regulatory litigation expenses against unpaid reparations should also be rejected because it violates the filed rate doctrine and the rule against retroactive ratemaking. SFPP asserts that if SFPP was found to have been under-recovering its cost of service, it could not retroactively receive compensation for the under-recovered amounts. With respect to a scenario where a pipeline has been found to receive more than just and reasonable compensation for service, section 13(1) of the Interstate Commerce Act (ICA)[135] permits the Commission to order reparations for past periods, but only for those who have filed a complaint. Accordingly, SFPP contends there is no remedy for under-recovery by SFPP and no remedy in the event of over-recovery for shippers who have not filed a complaint; those two scenarios are constrained by the correlated principles of the filed rate doctrine and the prohibition against retroactive ratemaking, with no exceptions under section 13(1).

66. SFPP argues that the Initial Decision erred by blurring the lines between complainants who should receive reparations and those shippers who are not entitled to receive reparations. Specifically, SFPP submits that non-complaining shippers are not entitled to reparations under section 13(1), and non-complaining shippers have no statutory redress for past amounts paid that are later found to be unjust and unreasonable, just as pipelines have no statutory redress to be compensated for any past under-recovered costs of service. SFPP asserts that reducing the regulatory litigation expenses incurred in this proceeding by amounts received under the prior filed rates, amounts that non-complaining shippers are not entitled to recover as reparations by statute, effectively reduces the compensation collected by SFPP for the period prior to the Complaint under the rates in effect at that time. SFPP submits that this is a violation of the filed rate doctrine and the rule against retroactive ratemaking.

C. Briefs Opposing Exceptions

67. Trial Staff asserts that SFPP's regulatory litigation costs should be offset against unpaid reparations when setting SFPP's litigation surcharge related to this proceeding. Trial Staff argues that, contrary to SFPP's claim, the Initial Decision is consistent with Commission precedent, with the principle that the Commission must establish just and reasonable rates, and with the filed rate doctrine and the rule against retroactive ratemaking.[136]

68. Complainants submit that the method adopted by the Initial Decision was applied by the Commission in a prior SFPP complaint case and affirmed by the D.C. Circuit. Complainants state that the judicially approved mechanism that the Initial Decision applied here is designed to allow SFPP to recover extraordinary, non-recurring litigation

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[135] 49 U.S.C. app. § 13(1) (1988).

[136] Trial Staff Brief Opposing Exceptions at 80-87.

costs to the extent it has not already collected and retained those costs from non-complainant shippers. Complainants assert that if SFPP is permitted to charge and retain unjust and unreasonable rates in the past, then collect extraordinary costs as if it had not already recovered them through over-recoveries, it will receive an improper windfall, which is precisely the reason the Court affirmed this offset mechanism. Complainants argue that use of this mechanism is entirely consistent with the ICA and does not violate the filed rate doctrine or the bar against retroactive ratemaking.[137]

69. Complainants state that as to the *Sepulveda* order that SFPP wishes to apply here, not only did the Commission fail to reference its judicially approved litigation offset policy, that case involved unique circumstances in which there were only three shippers on the line at issue and the two complainants among them had largely ceased using the line by the time prospective rates would be put into effect. Complainants assert that absent any discussion associated with the Commission's established litigation cost offset policy in the *Sepulveda* order, only two potential rationales are likely: (i) the Commission inappropriately ignored its established precedent and policy or (ii) the Commission was focused on concerns associated with inter-generational inequity between classes of shippers. Complainants argue that no inter-generational inequities or other unique factors exist which could justify any exception to the Commission's established litigation cost offset policy. Complainants submit that there is no basis to diverge from the Commission's well-settled policy of offsetting litigation costs with excess revenues retained by the carrier from non-complainant shippers. In short, Complainants contend that the Initial Decision was correct not to follow the case cited by SFPP and to instead apply the general rule established by the Commission and affirmed by the D.C. Circuit.

D. Commission Decision

70. We affirm the Initial Decision's finding that regulatory litigation expenses associated with this proceeding should be recovered through a three-year surcharge, after being offset by unpaid reparations to non-complaining shippers. We also adopt the reasoning set forth by the Initial Decision. As the Initial Decision recognized, all participants agreed that the regulatory litigation expenses should be recovered through a three-year surcharge. The only dispute was whether those expenses should first be offset against unpaid reparations to non-complainant shippers. We find that the Initial Decision is consistent with Commission precedent in a prior SFPP case as affirmed by the D.C. Circuit in *BP West Coast* where the issue was the equitable allocation of regulatory litigation expenses.

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[137] Complainants Brief Opposing Exceptions at 75-81.

71. The heart of the Initial Decision's reasoning can be found in the following quote summarizing the court opinion in *BP West Coast*:

> The D.C. Circuit explained that "the Commission could reasonably conclude that because SFPP had reaped a windfall by charging rates in excess of those ultimately deemed just and reasonable . . . it should be required to first fund its litigation expenses out of that pool before it could begin charging those costs to its customers anew." The D.C. Circuit noted that SFPP presented "no justification for being entitled to keep this windfall."[138]

The same reasoning equally applies in this proceeding.[139] Further, on exceptions, SFPP has not raised anything new to show that the Initial Decision erred or that the Initial Decision was incorrect in determining that SFPP overstated the significance of the holding in *Sepulveda.* As the Initial Decision found,[140] *Sepulveda* was distinguishable because it did not address whether the litigation surcharge should be offset against unpaid reparations to non-complainant shippers. Furthermore, the issue was not raised by parties, and the Commission's decision not to reject a particular uncontested cost *sua sponte* does not establish a precedent permitting recovery of that cost.[141]

VI. Environmental Remediation Expenses

A. Initial Decision

72. The Initial Decision determined that SFPP's expenses related to the Silvercroft environmental remediation project (Silvercroft Project) should be based on SFPP's actual expenses at the end of the test period, as reduced by a five-year amortization of the settlement proceeds received by SFPP for forgoing future insurance claims.[142] The Initial

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[138] Initial Decision, 160 FERC ¶ 63,006 at P 668 (footnotes omitted).

[139] SFPP's argument that the Initial Decision erred by offsetting the litigation surcharge by amounts SFPP collected from non-complaining shippers is unavailing. In *BP West Coast*, the D.C. Circuit expressly affirmed the Commission's decision to "offset the [litigation] surcharge for later years by the amount SFPP had collected, in excess of rates ultimately set by the Commission, from shippers that did not challenge the rates and were therefore not entitled to reparations." *BP West Coast*, 374 F.3d at 1293-94.

[140] *See* Initial Decision, 160 FERC ¶ 63,006 at PP 670-671.

[141] *Id.*

[142] *Id.* P 644.

Decision ruled that SFPP's Silvercroft Project remediation expenses were known and measurable and must be considered in SFPP's cost of service and that the costs associated with the Silvercroft Project are recurring and ordinary expenses in the context of operating a pipeline. In determining the appropriate remedy, the Initial Decision acknowledged that these costs are to be recovered over a long period of time and explicitly relied on an exhibit proffered by SFPP which contains yearly projections of SFPP's future expenses to remediate the Silvercroft Project.

B. Briefs on Exceptions

73. SFPP asserts that the record evidence presented by SFPP in this proceeding demonstrates that SFPP should be permitted to recover $609,744 of its costs for the Silvercroft Project.[143] SFPP states that the reason that SFPP only proposed to recover a percentage of its costs related to the Silvercroft Project is because the Silvercroft Project was previously covered by an insurance policy administered by AEGIS. SFPP states that in 2013, approximately 10 years into SFPP's remediation efforts for this project, SFPP's parent company, KMI, entered into a settlement with AEGIS that resolved AEGIS' liability with respect to projects covered by the policy, including the Silvercroft Project. SFPP states that one of the terms of the settlement was that KMI was no longer permitted to submit any further claims to AEGIS for reimbursement for past and future remediation expenses for any of the covered projects. Accordingly, SFPP states that when SFPP was calculating its cost of service for this proceeding (which was based on calendar year 2014 data), SFPP took into account the amount of the settlement proceeds allocated to the Silvercroft Project over its remaining life. SFPP determined that the Silvercroft Project settlement proceeds are expected to cover some of the costs that SFPP has incurred or is expected to incur over the remaining life of the project. Therefore, SFPP states it included only some of SFPP's total 2014 costs for the Silvercroft Project in its cost of service in this proceeding.

74. SFPP states that the Initial Decision ruled that rather than allocating the value of the one-time settlement over the remaining life of the Silvercroft Project, the settlement value attributable to the Silvercroft Project should be amortized over a five-year period. SFPP asserts that this proposed calculation is arbitrary and capricious and is inconsistent with Commission precedent. SFPP contends that it is well-established, and not a disputed fact in this proceeding, that environmental remediation projects are long-term projects that almost always last significantly longer than a five-year period. SFPP submits that this is true with respect to the Silvercroft Project. SFPP states that it began incurring costs for the Silvercroft Project in 2003 and presented evidence that it will continue incurring costs for the Silvercroft Project for at least an additional 40 years. SFPP states that it presented a third-party report that estimated the costs of the Silvercroft Project over the remainder of its estimated 40-year life (Remediation Lifecycle Cost

[143] SFPP Brief on Exceptions at 78.

Cycle Report). SFPP asserts that its Director of Environmental, Health and Safety also confirmed in his testimony that SFPP anticipates it will be incurring costs associated with the Silvercroft Project for at least 40 more years. The Initial Decision concluded, however, that relying on a cost estimate for the next 40 years "does not comport with the test period ratemaking concept of expenses being known and measurable and effective by the end of the test period" and that the report is nothing more than "speculation."[144] Based on this finding, SFPP states that the Initial Decision concluded that the Silvercroft Project settlement payment should only be allocated over a five-year period.

75. SFPP argues that the Initial Decision's ruling on this point should be rejected because it contradicts the D.C. Circuit's and Commission's findings on this issue. SFPP states that in *New England Power Company*,[145] the Commission rejected a party's challenge that cost forecasts, like the Remediation Lifecycle Cost Cycle Report, "are too speculative and difficult to ascertain" to be relied upon.[146] SFPP states that the Commission concluded that future costs can be calculated with "sufficient accuracy to be considered known and measurable."[147] SFPP states that the D.C. Circuit affirmed this determination, finding that "[l]ong-range estimates are an integral feature of ratemaking," as the Commission has "regularly relied on admittedly imperfect future cost estimates."[148] Thus, SFPP submits that contrary to the Initial Decision's finding, the Remediation Lifecycle Cost Cycle Report was a reasonable way to estimate the remaining costs for the Silvercroft Project and reliance on it is consistent with the Commission's ratemaking principles.

76. SFPP asserts that the one case the Initial Decision cited to support its decision does not do so. In *Williston Basin Interstate Pipeline Co.*,[149] the Commission determined that a non-recurring *cost* should be recovered over a five-year amortization period. SFPP states that the Initial Decision failed to explain, however, why a proposed method for

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[144] *Id.* at 79-80 (quoting Initial Decision, 160 FERC ¶ 63,006 at P 637).

[145] 61 FERC ¶ 61,331 (1992).

[146] *Town of Norwood v. FERC*, 53 F.3d 377, 380 (D.C. Cir. 1995).

[147] *Id*. (citing *New England Power Co.*, 61 FERC ¶ 61,331).

[148] *Town of Norwood v. FERC*, 53 F.3d at 380.

[149] 79 FERC ¶ 63,010 (1997) (*Williston Basin*).

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recovering a certain non-recurring *cost* is also applicable to a non-recurring settlement payment, as is the case here.

77. SFPP asserts that the Initial Decision offered no support for why five years is the appropriate period of time to amortize the settlement payment. SFPP submits that the Commission has, on numerous occasions, allocated expenses over a longer period of time than a five-year period. SFPP states that the Commission order that the Initial Decision relied upon for its proposed method also stated that the Commission has "provided for amortization periods of up to 20 years and the Commission's use of a 20-year amortization period has been upheld by the Courts."[150] SFPP asserts that in a more recent order, the Commission ruled that certain costs should be amortized over the remaining life of the pipeline, just as SFPP proposed in this proceeding with respect to the settlement payment and the remaining life of the Silvercroft Project.[151] SFPP states that there is no dispute that KMI's settlement with AEGIS was designed to cover all future and ongoing costs related to the Silvercroft Project, and KMI is prohibited from submitting future claims for the Silvercroft Project. SFPP states there is also no dispute that the Silvercroft Project is expected to continue for at least the next 40 years. Therefore, SFPP contends that the decision to allocate the portion of the settlement attributable to the Silvercroft Project over only a five-year period, rather than the remaining life of the project, is arbitrary and should be rejected.

78. Finally, SFPP argues that the Initial Decision should be rejected because it produces a cost level for the Silvercroft Project that is not representative of SFPP's ongoing costs for this project. The Initial Decision asserted that its recommendation is reasonable because it matches SFPP's cost estimates for 2022 and 2024. However, SFPP submits that the fact that the Initial Decision's adopted cost level for the Silvercroft Project will not align with SFPP's projected cost level for this project until at least 2022 demonstrates precisely why the Initial Decision's method is not representative of SFPP's costs and should be rejected. In contrast, SFPP states that the actual cost of the Silvercroft Project, from the end of the 2014 test period through August 2016, is consistent with SFPP's proposed recommendation, demonstrating why SFPP's proposed cost level is reasonable and the Initial Decision erred in rejecting it.

C. Briefs Opposing Exceptions

79. Trial Staff asserts that the Initial Decision reasonably determined that insurance settlement proceeds related to the Silvercroft Project should be amortized over a five-year period when setting the level of SFPP's environmental remediation expenses. Trial Staff states that SFPP's own witness estimates the total cost to remediate the Silvercroft

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[150] *Id.* at 65,137 (citing *Town of Norwood v. FERC*, 53 F.3d 377).

[151] *See* Opinion No. 544, 153 FERC ¶ 61,233 at PP 89, 98-99.

Project over 40 years is approximately $6.97 million. Trial Staff states that SFPP argues that its annual cost of service should contain a Silvercroft Project remediation expense of $609,744,345 which, if SFPP were allowed to collect that amount uninterrupted, would result in a 40-year recovery of $24,389,760. In contrast, Trial Staff submits that by allocating more of the settlement proceeds to the earliest years (which is also when Silvercroft Project remediation expenses are significantly higher than the final three decades), the Initial Decision is able to arrive at an annual expense that more closely resembles SFPP's projected 40-year expense.[152]

80. Complainants state that the sole dispute involving SFPP's East Line environmental remediation costs centers on the appropriate treatment of the Silvercroft-related expenses in relation to a settlement payment designed, in part, to apply to both past and future remediation costs for this project. Complainants state that after noting concerns with Complainants' recommendation and rejecting SFPP's proposal as inconsistent with base/test period known and measurable requirements, the Presiding Administrative Law Judge developed his own alternative proposal for deriving a reasonable Silvercroft-related remediation cost level for developing just and reasonable East Line rates. Unlike SFPP, neither Complainants nor Trial Staff take exception to the Initial Decision on this point. Complainants assert that SFPP's criticisms of the Initial Decision's approach are misplaced as each of SFPP's arguments in favor of its proposal are premised on data which fail to comply with the Commission's known and measurable requirement associated with base/test period ratemaking and rely on speculative post-test-period data that is not permitted absent unique circumstances that do not exist in this case. Accordingly, Complainants submit that there is no basis upon which to modify the Initial Decision's determination on this issue.[153]

D. Commission Decision

81. We affirm the Initial Decision on environmental remediation costs and adopt the Initial Decision's reasoning. The Initial Decision correctly determined that SFPP rates should only reflect the environmental remediation costs for the Silvercroft Project that were incurred during the test period of this rate case and that there were no unique circumstances that would compel a departure from that ratemaking principle. We find that the Initial Decision also correctly determined that SFPP's environmental remediation costs should be reduced by a five-year amortization of the settlement proceeds received by SFPP for forgoing future insurance claims.[154] We agree with the Initial Decision that

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[152] Trial Staff Brief Opposing Exceptions at 76-80.

[153] Complainants Brief Opposing Exceptions at 66-75.

[154] All participants agree that some amortization of SFPP's settlement proceeds is appropriate and the only dispute pertains to the appropriate amortization time period.

it is appropriate to account for the insurance proceeds when setting the environmental remediation costs because to do otherwise would allow SFPP to reap a windfall of the insurance proceeds. We further agree with the Initial Decision that as an equitable matter it is appropriate to amortize the insurance proceeds that SFPP received.

VII. Over-Depreciated Account Nos. 164 and 165

A. Initial Decision

82. At the hearing Trial Staff asserted that its analysis of Account Nos. 164 (Office Furniture and Equipment) and 165 (Vehicles and Other Work Equipment) demonstrated that the depreciation expenses reflected in those two SFPP accounts should be reduced to zero. Trial Staff contended that corrective action was necessary because the accrued depreciation balances exceed the gross plant balances for these accounts. Trial Staff submitted that Account Nos. 164 and 165 are over-accrued by $3.1 million and $1.7 million, respectively. Trial Staff argued that the over-accrued amounts in Account Nos. 164 and 165 demonstrate that SFPP continued to accrue depreciation expense for those accounts after such accounts became fully depreciated, and, in doing so, failed to comply with the requirements of a 1991 Depreciation Order.[155]

83. The Initial Decision found that SFPP could continue collecting depreciation expense for these accounts in its East Line rates. The Initial Decision determined that Trial Staff had not shown that the accounts are over-depreciated on a *composite* basis (i.e., taking into account the property for all of SFPP's pipeline segments, collectively) and that Trial Staff's requested relief was inconsistent with prior Commission orders and Commission regulations. The Initial Decision rejected Trial Staff's proposed depreciation rates for Account Nos. 164 and 165 on the same grounds.[156]

84. The Initial Decision found that SFPP's interpretation of the 1991 Depreciation Order is most persuasive. The Depreciation Order refers only to SFPP, L.P. and does not reference the component segments of the system, let alone the East Line. The Initial

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Contrary to SFPP's claim that the Presiding Judge improperly applied *Williston Basin* to adopt a five-year amortization period, the Presiding Judge's rationale appropriately relied upon specific facts in this proceeding to justify the selected five-year period. Initial Decision, 160 FERC ¶ 63,006 at PP 641-642.

[155] SFPP's currently effective depreciation rates were established in an order issued by the Commission's former Oil Pipeline Board on December 19, 1991 in *SFPP, L.P.*, 57 FERC ¶ 62,216 (1991) (1991 Depreciation Order).

[156] Initial Decision, 160 FERC ¶ 63,006 at PP 475-499, 516.

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Decision found that the fact that the Commission did not order a departure from its policy of examining the depreciation accounts on a composite basis, in contradiction to the 1991 Depreciation Order, further supports the conclusion that Account Nos. 164 and 165 should not be examined on a component basis, but rather should be examined by including them on a system-wide SFPP basis.[157]

85. The Initial Decision held that Trial Staff provided no evidence that SFPP has over-depreciated Account Nos. 164 and 165 when analyzed on a composite basis. The Initial Decision found that, in proposing that depreciation rates for Account Nos. 164 and 165 be set at zero for the East Line, Trial Staff is recommending the adoption of component depreciation rates. The Initial Decision concluded that SFPP has not requested the use of component depreciation rates, so Trial Staff's proposed adjustments are inconsistent with the Commission's regulations.[158]

B. Briefs on Exceptions

86. Trial Staff asserts that the Initial Decision erred in finding that SFPP should be permitted to recover depreciation expense for Account Nos. 164 and 165, which are over-accrued by $3.1 million and $1.7 million, respectively, and in rejecting Trial Staff's recommendation that SFPP be ordered to cease collecting depreciation expense for these accounts until they are no longer over-accrued.

87. Trial Staff argues that the over-depreciation of East Line Account Nos. 164 and 165 is unjust and unreasonable regardless of the net book balances for those accounts on SFPP's West, North, or Oregon lines. Trial Staff asserts that Commission precedent provides that a pipeline should discontinue recovering depreciation expense in rates once it has fully recovered its investment in that property. Otherwise, an entity would collect costs that it did not incur to procure or build a plant or pipeline.[159] Therefore, a pipeline must track the amount of depreciation recovered from ratepayers to ensure that only the

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[157] *Id.* P 482.

[158] Initial Decision, 160 FERC ¶ 63,006 at P 496.

[159] "The purpose of depreciation is to allocate the cost of plant over its useful life." *Tenn. Gas Pipeline Co.*, 25 FERC ¶ 61,020, at 61,107 (1983). Depreciation expense is included in a pipeline's cost of service and is the mechanism through which a pipeline recovers its invested capital in such plant. *See Kern River Gas Transmission Co.*, Opinion No. 486-A, 123 FERC ¶ 61,056, at P 43 (2008).

amount of its investment in capital is recovered, and no more, to avoid over-collection.[160] Trial Staff contends that SFPP has over-collected depreciation expense in clear contravention of these principles.

88. Trial Staff asserts that a simple comparison of the East Line's accrued depreciation account balances to the East Line's carrier property balances shows that Account Nos. 164 and 165 are over-depreciated. Trial Staff submits that a comparison of the gross plant balances to the accrued depreciation balances for both accounts precisely demonstrates the amount of excess depreciation expense SFPP had over-accrued as of year-end 2014, namely $3.1 million and $1.7 million in Account Nos. 164 and 165, respectively. Trial Staff contends that its comparison is consistent with SFPP's own cost of service, which similarly exposes the fact that Account Nos. 164 and 165 are over-depreciated.

89. Trial Staff submits that the impact of SFPP's continued over-collection of depreciation expense is not insignificant and the Commission should require SFPP to discontinue collecting depreciation expense for Account Nos. 164 and 165 until those accounts have a net positive book balance. Trial Staff asserts that the Initial Decision's ruling that depreciation expense must be viewed on a composite basis in this case is at odds with fundamental principles of cost causation. Trial Staff submits that not only would SFPP unabatedly continue over-recovering depreciation expense from its East Line customers, but the Commission would force the East Line customers to subsidize customers on SFPP's other distinct operating pipeline segments (assuming Account Nos. 164 and 165 are not over-depreciated to a greater extent on SFPP's other segments).[161]

C. Briefs Opposing Exceptions

90. SFPP asserts that the Initial Decision correctly concluded that Trial Staff failed to provide any evidence that SFPP had over-depreciated Account Nos. 164 and 165 when analyzed on a composite basis.[162] SFPP states that consistent with the group plan of

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[160] *See Kern River Gas Transmission Co.*, Opinion No. 486, 117 FERC ¶ 61,077, at P 47 (2006) (noting the Commission's agreement with the Presiding Judge's findings that Kern River keeps track of its recovered depreciation from ratepayers in a separate account, thereby preventing Kern River from over-collecting), *reh'g granted in part*, Opinion No. 486-A, 123 FERC ¶ 61,056; Ex. HVW-0040 at 22-23 ("it is not reasonable to recover more capital through depreciation expense than is associated with the carrier property providing the regulated transportation service at issue").

[161] Trial Staff Brief on Exceptions at 5-12.

[162] SFPP Brief Opposing Exceptions at 33-38.

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accounting, SFPP depreciates property for all of its pipelines using the composite depreciation rates that were prescribed by the Commission. SFPP records all property for the East Line, the West Line, the North Line, and the Oregon Line in the same property accounts and depreciates that property using the same composite depreciation rates. SFPP submits that because property for different pipelines was placed into service at different times, property for an account can become over-depreciated if analyzed on an individual asset or pipeline basis, even though the account is not over-depreciated when viewed on a composite basis under the group plan of accounting.

91. SFPP asserts that the Initial Decision correctly found that Trial Staff did not establish that Account Nos. 164 and 165 are over-depreciated on a composite basis (i.e., system-wide). SFPP states that this conclusion is undisputed by Trial Staff. Although Trial Staff concluded that SFPP had over-depreciated Account Nos. 164 and 165, SFPP states that Trial Staff reached that conclusion by analyzing those accounts only for the East Line, not for all of SFPP's pipeline segments. SFPP states that it showed that Trial Staff provided no evidence that SFPP had over-depreciated Account Nos 164 and 165 when analyzed on a composite basis (i.e., system-wide).

92. SFPP contends that the Initial Decision correctly rejected Trial Staff's attempt to require SFPP to adopt component depreciation rates, finding this request to be inconsistent with the Commission's regulations. SFPP asserts that the Commission's regulations provide that the use of component depreciation rates is only authorized at the specific request of a carrier and that, absent such a request, the carrier must use composite depreciation rates.[163] In light of these regulations, SFPP submits that the Initial Decision correctly noted that SFPP has not requested the use of component depreciation rates for its system, and that Trial Staff's proposed adjustments would result in the adoption of component depreciation rates for SFPP, in contravention of the Commission's regulations.

93. SFPP states that if the Commission were to adopt component East Line depreciation rates for Account Nos. 164 and 165, the Commission would also need to determine depreciation costs and rates for Account Nos. 164 and 165 for SFPP's remaining pipelines as well, because the composite depreciation rates prescribed by the Commission apply to all property in Account Nos. 164 and 165. SFPP submits that if a new component depreciation rate is applied only to East Line property, then different component depreciation rates must necessarily be developed and applied to other pipeline property. SFPP contends that the composite depreciation rates previously prescribed by the Commission could no longer be applied to the other pipelines, as a composite rate by

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[163] 18 C.F.R. pt. 352, Instruction 1-8(b)(1) (2019) ("Separate composite annual percentage rates will be prescribed for each depreciable account except that the Commission may authorize the use of component rates upon specific request from a carrier.").

definition needs to be applied to all property in the group. SFPP submits that such a determination simply cannot be done in this proceeding, as there is no evidence in the record upon which the Commission can base such a determination.

94. Finally, SFPP argues that the Initial Decision's rulings on this issue are supported by the fact that Trial Staff failed to show that the overall average remaining life for the East Line is unreasonable. SFPP states that one approach the Commission has taken in evaluating whether an oil pipeline's depreciation rates are reasonable is by evaluating the oil pipeline's overall average remaining life.[164] SFPP asserts that its overall average remaining life falls within the zone of reasonableness determined by the Commission in other oil pipeline rate proceedings. SFPP states that its overall average remaining life, without Trial Staff's adjustment, is 27.4 years. SFPP contends that the Commission upheld a 23-year remaining life for SFPP's West Line in Docket No. IS08-390 (a proceeding in which Trial Staff supported a 25.4 overall average remaining life)[165] and a 28.5-year remaining life for Seaway pipeline.[166] In contrast, SFPP states that Trial Staff's proposal would increase the East Line's overall average remaining life by three years, from 27.4 years to 30.4 years. SFPP asserts that Trial Staff does not reference any instance in which the Commission has adopted a remaining life for an existing oil pipeline that is as long as the 30.4-year remaining life that would result from adopting this recommended adjustment to Account Nos. 164 and 165.

D. Commission Determination

95. As set forth in the Commission's accounting regulations,[167] the group plan of accounting does not provide any rule for attributing group-level depreciation charges to individual assets. In the normal course of accounting for carrier property in reporting for a regulated entity, such asset-level attribution of depreciation charges is not required, except when assets are transferred to or from an affiliate. This is because the group plan of accounting requires that asset retirements be recorded as though the retired asset had been fully depreciated. Other than for transfers, the need to attribute group-level depreciation to individual assets arises only in a ratemaking context.

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[164] *E.g.*, Opinion No. 511, 134 FERC ¶ 61,121 at PP 48-49.

[165] *Id.* P 48.

[166] Opinion No. 546, 154 FERC ¶ 61,070 at P 128.

[167] 18 C.F.R. pt. 352 (2019).

96. Individual assets can be represented as over-depreciated in a carrier's accounting records even when the associated asset group is less than fully depreciated. This is the result of implementing the group plan of accounting, which establishes that depreciation is to be determined and recorded at the group level, not the asset level.

97. Further, under the group plan method of depreciation, a number of similar or related assets are included in a group to which a single composite depreciation rate is applied. The assets within the group typically have various useful lives and therefore the single composite rate reflects an average useful life for all the assets within the group. The development and use of composite depreciation rates recognizes that some assets within the group will outlive the average useful life of the group while other assets within the group will be retired from service earlier than the average life. Composite depreciation rates are developed and subsequently modified based on a depreciation study that determines the remaining useful life of individual assets and computes the resulting composite rate.[168]

98. We affirm the Initial Decision's finding that Account Nos. 164 and 165 should not be examined on a component basis, but rather should be examined by including them on a system-wide SFPP basis. We agree with SFPP that property for an account can become over-depreciated if analyzed on an individual asset or pipeline basis, even though the account is not over-depreciated when viewed on a composite basis under the group plan of accounting, because some assets might outlive the average useful life of the group or be retired earlier than the average group life.

99. Additionally, we find SFPP's overall average remaining life of 27.4 years lies within the zone of reasonableness.

VIII. Treatment of Income Tax Allowance During the Reparations Period

A. Background and Initial Decision

100. The Initial Decision found, and no party contested, that SFPP should recover an income tax allowance in its going-forward rates.[169] However, the parties disputed whether the test period rates should be used to calculate reparations for the prior period from December 4, 2013 to November 26, 2014. During that time SFPP was owned by KMEP, a master limited partnership (MLP), instead of its current owner, KMI, which is a corporation. Complainants argued that following the D.C. Circuit's decision in *United*

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[168] *See Colo. Interstate Gas Co.*, 137 FERC ¶ 61,049 at n.12.

[169] Initial Decision, 160 FERC ¶ 63,006 at PP 703-704.

Airlines, Inc. v. FERC,[170] SFPP's cost of service should not include an income tax allowance for the portion of the reparations period when SFPP was owned by an MLP.

101. In *United Airlines*, the D.C. Circuit remanded orders involving SFPP's 2008 West Line rates. The D.C. Circuit held that the Commission failed to demonstrate that a double recovery does not result from granting SFPP, at the time a wholly owned subsidiary of an MLP, both an income tax allowance and an ROE determined by the DCF methodology. At the time of the Initial Decision, the Commission had not yet issued a decision on remand in that proceeding and had issued a notice of inquiry to consider its income tax allowance policy.[171] The Initial Decision found that the Commission had not announced any change in policy as a result of *United Airlines* that would prevent SFPP from recovering an income tax allowance.[172]

B. Briefs on Exceptions

102. Complainants argue that SFPP should not be permitted an income tax allowance for the reparations period, during which SFPP was owned by an MLP.[173] Complainants assert that if the Commission rules in SFPP's prior East Line rate case in Docket No. IS09-437 that SFPP is not entitled to collect an income tax allowance, that ruling should govern the reparations period.[174] Complainants request that the Commission remove the income tax allowance from the cost of service for the period December 4,

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[170] 827 F.3d 122 (D.C. Cir. 2016) (*United Airlines*).

[171] *Inquiry Regarding the Commission's Policy for Recovery of Income Tax Costs*, 157 FERC ¶ 61,210 (2016). Subsequently, the Commission responded to *United Airlines* in two issuances, an order on remand in the 2008 West Line proceeding and a Revised Policy Statement. Both found that permitting an MLP pipeline to recover both an income tax allowance and a DCF ROE results in a double recovery of investors' tax costs. *See* Opinion No. 511-C, 162 FERC ¶ 61,228; *Inquiry Regarding the Commission's Policy for Recovery of Income Tax Costs*, Revised Policy Statement on Treatment of Income Taxes, 162 FERC ¶ 61,227, *order on reh'g*, 164 FERC ¶ 61,030 (2018).

[172] Initial Decision, 160 FERC ¶ 63,006 at PP 705-720.

[173] Complainants Brief on Exceptions at 38-39.

[174] *Id.* at 39-41, 43. On March 15, 2018, the Commission issued an order in that proceeding directing SFPP to remove its income tax allowance consistent with *United Airlines*. *SFPP, L.P.*, Opinion No. 522-B, 162 FERC ¶ 61,229, at P 8 (2018).

2013 through November 26, 2014 and determine reparations based on the difference between the rates without an income tax allowance and the rates charged at that time.[175]

103. Complainants argue that following the Commission's policy of basing reparations on test period rates would deny Complainants just and reasonable rates for the reparations period. Complainants argue that this approach contradicts *United Airlines*, in which the D.C. Circuit held it would be unjust and unreasonable to include an income tax allowance in rates for an MLP-owned pipeline.[176] Further, Complainants assert that using test period rates would fail to achieve the purpose of reparations, to put Complainants in the position they would have been in had the proper rates been charged.[177]

C. Briefs Opposing Exceptions

104. SFPP and Trial Staff argue that the Initial Decision properly followed the Commission's policy of using test period rates to determine reparations.[178] Both SFPP and Trial Staff assert that it would be unreasonable to remove one cost element, the income tax allowance, without considering adjustments to other cost-of-service components during the reparations period.[179] SFPP argues that Complainants' proposal would require a separate cost-of-service calculation for the reparations period, but the record only contains the test period cost-of-service study.[180] Similarly, Trial Staff argues that adopting Complainants' proposal would result in the need to determine individual yearly cost-of-service calculations creating more extensive discovery and longer and more complex hearing proceedings.[181]

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[175] Complainants Brief on Exceptions at 42.

[176] *Id.* at 40-41.

[177] *Id.* at 41, 43.

[178] SFPP Brief Opposing Exceptions at 28-31; Trial Staff Brief Opposing Exceptions at 87-91. SFPP also argues that even if the Commission departed from its policy of using test period rates, SFPP is nonetheless entitled to an income tax allowance for the entire reparations period. SFPP Brief Opposing Exceptions at 31-33.

[179] SFPP Brief Opposing Exceptions at 30-31; Trial Staff Brief Opposing Exceptions at 90.

[180] SFPP Brief Opposing Exceptions at 30-31.

[181] Trial Staff Brief Opposing Exceptions at 89-91.

D. Commission Determination

105. We affirm the Initial Decision's use of the test period rates to determine reparations. Complainants concede that the Commission has previously awarded reparations based on test period rates.[182] In Opinion No. 435-A, the Commission explained that reparations are awarded based on the difference between the new just and reasonable rate based on the test year and the older rate pursuant to which the pipeline has already collected the revenues.[183] The D.C. Circuit affirmed the Commission's use of this approach in *BP West Coast Products*.[184] The D.C. Circuit stated:

> The use of test periods to set the cost of service for rates intended to span a number of years is well established. As we have noted, it is ordinarily impossible for a pipeline to know at the time of filing what its actual costs will be during the effective period of the filed rates, and so the use of a "test period" for calculating the cost of service is appropriate. While use of a test period is not perfect, it is a reasonable proxy for actual costs. It was therefore reasonable for the Commission to base reparations calculations on the same test period methodology it uses to calculate prospective rates. . . .
>
> The Commission also properly determined that rates based on the test period could be used to calculate reparations for the two years prior to the filing of the complaints. There 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.[185]

We see no reason to depart from the Commission's policy of using test period rates to calculate reparations here, and there is no dispute that SFPP is entitled to an income tax allowance in the test period cost of service.

106. We deny Complainants' request to selectively adjust one component of the cost of service used for determining reparations by using data from outside of the test period. Furthermore, if the cost of service was adjusted to remove the income tax allowance for the reparations period, other components of the cost of service would necessarily need to be adjusted as well to reflect other cost differences between that period and the test

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[182] Complainants Brief on Exceptions at 40.

[183] *SFPP, L.P.*, Opinion No. 435-A, 91 FERC ¶ 61,135, at 61,515-16 (2000).

[184] 374 F.3d at 1307.

[185] *Id.* (internal citations omitted).

period. Such a policy would result in various 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. Notably, although they propose to adjust one cost component for purposes of calculating reparations using data from before the test period, Complainants oppose adjusting SFPP's going-forward rates to reflect changes in other cost components that occurred after the test period. For example, Complainants oppose SFPP's motion to reopen the record to update the right-of-way expenses, arguing that the Commission may not update a single cost item "without a full review of whether other adjustments to cost and revenue factors are also appropriate."[186] Complainants further claim that "[i]f the Commission were to allow SFPP to reopen the record in order to update discrete cost items in self-serving fashion, it would effectively destroy the equitable balance established by the Commission's base/test period requirements. . . ."[187] We find that this same reasoning likewise weighs against selectively adjusting one component of the cost of service used to determine reparations based upon data from outside of the test period. As the D.C. Circuit found, "[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."[188]

IX. Index Adjustments for the Reparations Period and Going-Forward Rates

A. Initial Decision

107. The Initial Decision did not make a decision regarding the extent to which SFPP was entitled to apply the July 1, 2015 Index or July 1, 2016 Index for purposes of calculating reparations. Complainants argued it would not be appropriate for SFPP to include the full July 2016 Index amount that reflects industry-wide cost changes between calendar year 2013 and calendar year 2014, because SFPP's rates are based on base and test period cost-of-service data that include calendar year 2014 through September 30, 2015. Instead, Complainants proposed to apply only 25% of the July 2016 Index amount.

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[186] Complainants Answer to SFPP's Right-of-Way Motion to Reopen at 7.

[187] *Id.* at 8.

[188] *BP West Coast Products*, 374 F.3d at 1307.

108. The Initial Decision noted that the Commission had addressed similar facts in Opinion No. 511-A.[189] However, the determination of whether to permit the index increase in that proceeding was not made until after the compliance filing, when the Commission had a more complete record. Accordingly, the Initial Decision found it would be premature to address this issue prior to the compliance phase of the proceeding.[190]

B. Briefs on Exceptions

109. Complainants assert that the Initial Decision erred by deferring the decision of the extent to which index adjustments should be incorporated for determining reparations and going-forward rates. Complainants claim that the record and directly applicable Commission precedent establish that SFPP is not entitled to an adjustment for the July 1, 2015 Index and is entitled to only a partial, 25% adjustment for the July 1, 2016 Index.[191] Complainants state that the determination of SFPP's rates relies on data for the calendar year 2014 and the first nine months of 2015 (ending September 30, 2015). Therefore, Complainants argue, incorporating an adjustment for the July 2015 Index would cause SFPP to inappropriately double-recover the same costs, once through the instant cost-based rate proceeding (as such rates already incorporate 2014 base year costs) and again through the July 2015 indexing adjustment, which is designed to recover industry-wide costs incurred over 2014. Regarding the July 2016 Index, Complainants assert that allowing a 25% adjustment corresponds to the three months of 2015 cost changes that are outside the January 1, 2015 to September 30, 2015 data period used for determining SFPP's cost-based rates.

C. Briefs Opposing Exceptions

110. SFPP argues that the Initial Decision correctly concluded that the Commission should make a final determination regarding the incorporation of the index adjustments at the compliance phase of the proceeding when the Commission can undertake a more comprehensive review and have a more complete record. SFPP argues that until the Commission sets a just and reasonable rate, the Commission will not be able to determine

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[189] Opinion No. 511-A, 137 FERC ¶ 61,220.

[190] Initial Decision, 160 FERC ¶ 63,006 at PP 794-795, 835-841.

[191] Complainants Brief on Exceptions at 44-48 (citing *SFPP, L.P.*, 117 FERC ¶ 61,271, at PP 5-6 (2006); *SFPP, L.P.*, 120 FERC ¶ 61,245, at PP 6-12 (2007); *Chevron Prods. Co. v. SFPP, L.P.*, 127 FERC ¶ 63,024, at P 524 n.1593 (2009); Opinion No. 511-A, 137 FERC ¶ 61,220 at PP 397-411, *order on reh'g*, Opinion No. 511-B, 150 FERC ¶ 61,096, at PP 22-33 (2015); *United Airlines*, 827 F.3d at 133-34).

whether application of the challenged index adjustments would result in a "rate increase [that] is so substantially in excess of the actual cost increases incurred by the carrier that the rate is unjust and unreasonable."[192]

D. Commission Determination

111. We affirm the Initial Decision's finding that the extent to which SFPP may apply adjustments for the July 1, 2015 or July 1, 2016 Index should be addressed at the compliance phase of the proceeding, at which point the Commission will have a more complete record. In a prior cost-of-service proceeding involving SFPP's West Line Rates, the Commission addressed a similar issue of whether SFPP was entitled to apply index adjustments after the compliance phase of the proceeding. At that point, the Commission had issued its rulings on the just and reasonable cost-of-service rate level based on the base and test period data.[193] The Initial Decision reasonably found that it was premature to address this issue prior to the compliance phase of the proceeding.

X. Bonus Depreciation in Future Rate Cases

A. Initial Decision

112. Bonus depreciation accelerates the depreciation of certain assets for tax purposes, thus reducing the federal income tax that would otherwise be payable in that year. The Initial Decision found that Complainants took no position on this issue and both Trial Staff and SFPP agree that this issue has no bearing on this proceeding. Nonetheless, the Initial Decision stated that it appeared that Trial Staff wanted it to be clear that, even though SFPP will not be penalized for foregoing bonus depreciation in this proceeding, the precedent set in *Midcontinent Independent System Operator, Inc.* and *ITC Midwest*

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[192] SFPP Brief Opposing Exceptions at 45-47 (quoting *United Airlines*, 827 F.3d at 132-33) (citing 18 C.F.R. § 343.2(c)(1)).

[193] Opinion No. 511-A, 137 FERC ¶ 61,220 at PP 405-411, *order on reh'g*, Opinion No. 511-B, 150 FERC ¶ 61,096 at PP 27-33; *United Airlines*, 827 F.3d at 131-134 (affirming the Commission's holdings regarding the indexed increases); *see also* Opinion No. 522-B, 162 FERC ¶ 61,229 at P 22 n.40 (noting that "[b]ecause the degree to which adjustment period data would be used was not determined until the conclusion of the cost-of-service rate case, the Commission adjusted the level of the index increase in the compliance filing once the use of the adjustment period data had been determined").

LLC may apply to future rate cases.[194] The Initial Decision concluded that it is not necessary to make any findings regarding this issue as it has no bearing on this proceeding.[195]

B. Briefs on Exceptions

113. Trial Staff asserts that the Initial Decision erred in not recommending that SFPP be required to reflect the impacts of bonus depreciation in future rate cases. Trial Staff states that the Initial Decision did not rule on the bonus depreciation issues raised by Trial Staff on the ground that the impacts of bonus depreciation will not have any bearing on this proceeding. Trial Staff submits that 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, in order for customers to receive the benefit of lower rates that may result from taking bonus depreciation.[196] Trial Staff contends that although a prospective requirement to reflect bonus depreciation will not impact the rates in this proceeding, the Commission should, as it has in other proceedings, direct SFPP to reflect the impacts of bonus depreciation in future rate cases.[197] Trial Staff submits that such action is needed to ensure that SFPP discontinues this imprudent practice; otherwise, ratepayers will continue to be harmed by an increased rate base and revenue requirement due to SFPP's failure to reflect the impacts of bonus depreciation.

C. Briefs Opposing Exceptions

114. SFPP states that the issue that Trial Staff is requesting the Commission rule upon, how bonus depreciation should be handled in future rate cases, is outside the scope of this hearing. Because of that fact, SFPP states that the Initial Decision correctly rejected Trial Staff's proposal. SFPP states that Trial Staff challenged this finding in its brief, arguing not that SFPP has violated a Commission regulation by opting out of recognizing bonus depreciation, but rather that SFPP's election to do so was "imprudent." SFPP asserts that Trial Staff's attack on the prudency of SFPP's actions should be rejected for multiple reasons. SFPP submits that the Commission's oil pipeline regulations do not require the

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[194] *Midcontinent Indep. Sys. Operator, Inc.*, 154 FERC ¶ 61,187, at P 43 (2016); *ITC Midwest LLC*, 154 FERC ¶ 61,188, at P 61 (2016).

[195] Initial Decision, 160 FERC ¶ 63,006 at PP 784-785.

[196] Trial Staff Brief on Exceptions at 12 (citing *Midcontinent Indep. Sys. Operator, Inc.*, 154 FERC ¶ 61,187 at P 43; *ITC Midwest LLC*, 154 FERC ¶ 61,188 at P 61).

[197] *Id.* (citing *ITC Midwest LLC*, 154 FERC ¶ 61,188 at P 58).

use of accelerated (i.e., "bonus") depreciation for income tax reporting purposes, nor do they require the use of any particular accelerated depreciation method. SFPP contends that there is an insufficient record in this proceeding for the Commission to determine the prudence of SFPP's business decision to forgo recognition of bonus depreciation. SFPP states that in both of the cases upon which Trial Staff relies to support its argument on this point, the issue was addressed at length by the participants and there was an extensive record upon which the Commission could analyze the issue.[198]

115. SFPP states that Trial Staff has made no attempt to explain why the same considerations and circumstances that informed the cases upon which it relies (i.e., two public utility cases under the Federal Power Act) are applicable here, or why, if the rationale of those cases is universally applicable (which SFPP does not believe is the case), such a sweeping ruling should be issued by an order in this proceeding with applicability to only a single asset rather than through a Commission rulemaking proceeding with industry-wide applicability that comports with administrative due process. SFPP asserts that despite these basic flaws in its position, Trial Staff requests that the Commission issue an order in the current proceeding that SFPP must recognize the impacts of bonus depreciation going forward in potential, unfiled rate proceedings that may never occur. SFPP submits that such a ruling lacks any type of justification, in law or in the record, and is procedurally improper. Accordingly, SFPP asserts that the Initial Decision's ruling on this point should be affirmed.[199]

D. Commission Decision

116. We affirm the Initial Decision and adopt the reasoning of the Initial Decision concerning the issue of bonus depreciation. The Initial Decision correctly determined that Complainants did not raise the issue of bonus depreciation in this proceeding and therefore that it is not necessary to make any findings on this issue as it has no bearing on the current proceeding. There is no reason to require in this proceeding that SFPP recognize the impacts of bonus depreciation going forward in potential, unfiled rate proceedings. Such issues can be raised in the future when SFPP submits a rate filing to the Commission. We find that Trial Staff's position that a decision concerning bonus depreciation made in the two Federal Power Act cases discussed above should have general applicability is beyond the scope of this proceeding.

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[198] *See ITC Midwest LLC*, 154 FERC ¶ 61,188 (referencing extensive briefing and affidavits submitted by the parties on bonus depreciation); *Midcontinent Indep. Sys. Operator, Inc.*, 154 FERC ¶ 61,187 (same).

[199] SFPP Brief Opposing Exceptions at 44-45.

XI. Return on Equity

117. The Initial Decision adopted Trial Staff's proposed nominal discounted cash flow (DCF) ROE of 10.56% and a real DCF ROE of 9.56% based upon an inflation factor of 1.01%. Both SFPP and Complainants challenge the Initial Decision's determination. As discussed below, we modify the Initial Decision and hold that SFPP may recover a nominal DCF ROE of 10.54% and a real DCF ROE of 9.08%, based upon an inflation factor of 1.46%. These changes result from modifying the data period from June 2016 to September 2016 and from modifications to the proxy group used in the Initial Decision.

118. In addition, we grant SFPP's ROE Motion to Reopen and establish a paper hearing to allow the parties to consider the new methodology adopted in the ROE Policy Statement issued May 21, 2020 after the record closed in this proceeding.

A. Issues Addressed by the Initial Decision

1. The Commission's Return on Equity Methodology

119. 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."[200] In order to attract capital, "a utility must offer a risk-adjusted expected rate of return sufficient to attract investors."[201]

120. Although the Commission in the May 21, 2020 ROE Policy Statement subsequently modified its policy to include consideration of a Capital Asset Pricing Model (CAPM) analysis as discussed below,[202] at the time of the Initial Decision and the briefs on exceptions the Commission estimated the return necessary for the pipeline to attract capital by performing a DCF analysis.[203] The DCF analysis is based upon the range of returns that the market provides investors in a proxy group of publicly-traded

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

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

[202] *See infra* PP 199-201.

[203] *Policy Statement on the Composition of Proxy Groups for Determining Gas and Oil Pipeline Return on Equity*, 123 FERC ¶ 61,048, *reh'g dismissed*, 123 FERC ¶ 61,259 (2008) (Proxy Group Policy Statement).

entities with similar risk profiles.[204] For each member of the proxy group, the required rate of return is estimated to equal the entities' current dividend yield – dividends (or, in the case of MLPs, distributions) divided by stock (or, in the case of MLPs, unit) price – plus the projected future growth rate of dividends (or distributions), such that k = D/P + g, where P is the six-month average price of the stock (or units) over the relevant test period, D is the current dividend (or distribution), k is the investors' required rate of return, and g is the expected growth rate in dividends (or distributions) based upon the weighted averaging of short-term and long-term growth estimates.[205] The range of the proxy group's returns produces the zone of reasonableness.[206] The Commission generally uses the median of the zone of reasonableness to establish the regulated pipeline's cost-of-service nominal ROE.

121. Once the nominal ROE has been produced by the DCF analysis,[207] the Commission applies the trended original cost methodology, which divides the nominal ROE into (a) an inflationary component and (b) a real ROE (calculated by subtracting the inflationary component from the nominal ROE).[208] The real ROE times the equity share

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[204] *See, e.g., CAPP v. FERC*, 254 F.3d at 293-94. The proxy group is generally necessary because most oil pipelines (including SFPP) are wholly owned subsidiaries and not publicly traded.

[205] The Commission uses a two-step procedure for determining the constant growth of dividends, averaging short-term and long-term growth estimates. *E.g.*, *Portland Nat. Gas Transmission Sys.*, Opinion No. 510, 134 FERC ¶ 61,129, at P 159 (2011), *order on reh'g*, Opinion No. 510-A, 142 FERC ¶ 61,198 (2013), *order on reh'g*, Opinion No. 510-B, 150 FERC ¶ 61,106 (2015). The Commission determines the short-term growth rate based upon security analysts' five-year forecasts for each company in the proxy group as published by the Institutional Brokers Estimates System (IBES); the long-term growth rate is based on forecasts of long-term growth of the economy as a whole as reflected in the gross domestic product (GDP). For calculating the combined growth rate used in the DCF, the short-term forecast receives a two-thirds weighting and the long-term forecast receives a one-third weighting. The DCF methodology produces a zone of reasonableness in which the pipeline's rates may be set based on specific risks.

[206] *Trunkline Gas Co.*, 90 FERC at 61,113, 61,118.

[207] In accordance with the May 21, 2020 ROE Policy Statement, the Commission will derive the nominal ROE based upon both the DCF and the CAPM. ROE Policy Statement, 171 FERC ¶ 61,155 at P 18.

[208] *Williams Pipe Line Co.*, Opinion No. 154-B, 31 FERC ¶ 61,377, at 61,834 (1985).

of the rate base yields the pipeline's yearly allowed equity return in dollars. The inflation factor times the equity rate base yields the equity rate base write-up (i.e., deferred earnings), which is amortized over the life of the property.

122. For determining the nominal ROE, inflation, and real ROE in the trended original cost and DCF methodologies, the Commission typically applies the most recent data in the record "because the market is always changing and later figures more accurately reflect current investor needs."[209] To reflect these changing market conditions, the Commission uses the most recent data in the record even if such data is outside the test period.[210]

2. Initial Decision and Briefs on Exceptions on DCF Model

123. Applying the DCF model and trended original cost policies, the Initial Decision adopted a nominal DCF ROE of 10.56% and a real DCF ROE of 9.56% based upon an inflation factor of 1.01%. The Initial Decision used a data period consisting of the six-months ending June 2016 (the June 2016 Period).[211] The Initial Decision adopted a proxy group consisting of (1) Buckeye Partners, L.P. (Buckeye); (2) Magellan Midstream Partners, L.P. (Magellan); (3) Enterprise Products Partners (Enterprise); and (4) Plains All American Pipeline, L.P. (Plains).

124. Both SFPP and Complainants filed briefs on exceptions challenging the Initial Decision's holdings regarding (a) the data period used for determining the DCF ROE and (b) the composition of the proxy group used to calculate the DCF ROE. Consistent with the Commission's policy of using the most recent data in the record, Complainants assert the DCF ROE should be based upon September 2016 period[212] data whereas SFPP argues the Commission should calculate the DCF ROE based upon September 2015 period data,

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[209] Opinion No. 510, 134 FERC ¶ 61,129 at P 242 (quoting *Trunkline*, 90 FERC at 61,117 (citing *Panhandle E. Pipe Line Co.*, 74 FERC ¶ 61,109, at 61,363 (1996) (citing *Boston Edison Co. v. FERC*, 885 F.2d 962, 966 (1st Cir. 1989)).

[210] Commission policy also provides that "updates are not permitted once the record has been closed and the hearing has concluded." *Id.*

[211] The inflation period is based upon the prior year (June 2015-June 2016), not the previous six months.

[212] The September 2016 period refers to the DCF returns in April 2016 - September 2016 and inflation data for September 2015 – September 2016.

which coincides with the close of the test period.[213] Regarding the proxy group, SFPP advocates the removal of Plains and Enterprise and the inclusion as additional proxy group members of Enbridge Energy Partners, L.P. (Enbridge) and Sunoco Logistics Partners, LP. (Sunoco). Based upon their proposal to determine the ROE using the September 2016 period data, Complainants advocate including Kinder Morgan, Inc. (KMI) and excluding Plains based upon its dividend cut in July 2016.[214]

125. The chart below summarizes the Initial Decision's holdings and the parties' positions regarding the data period, proxy group membership, and the resulting ROE data:

Entity	**Data Period**	**Proxy Group**	**Nominal DCF ROE**	**Inflation**	**Real DCF ROE**
Initial Decision & Trial Staff	June 2016	Buckeye Magellan Enterprise Plains	10.56	1.01	9.56
Complainants	September 2016	Buckeye Magellan Enterprise KMI	10.20	1.46	8.73
SFPP	September 2015	Buckeye Magellan Plains Enbridge Sunoco	12.76	-0.04	12.80

126. As discussed below, we modify the Initial Decision's DCF ROE holdings. These modifications result in a nominal DCF ROE of 10.54% and a real DCF ROE of 9.08%

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[213] The September 2015 period refers to the DCF returns in April 2015 - September 2015 and inflation data for September 2014 – September 2015.

[214] On exceptions, the following entities remain under consideration for inclusion in SFPP's proxy group: (1) Buckeye; (2) Magellan; (3) Enterprise; (4) KMI; (5) Plains; (6) Enbridge; and (7) Sunoco.

based upon (a) September 2016 period data and (b) a proxy group consisting of Buckeye, Magellan, Enterprise, and Enbridge.

3. Data Period

a. Initial Decision

127. Adopting the proposal advanced by Trial Staff at hearing, the Initial Decision determined SFPP's DCF ROE based upon data from the June 2016 period.[215] The Initial Decision rejected Complainants' proposed September 2016 period data as a full-year removed from the September 30, 2015 conclusion of the test period.[216] The Initial Decision also reasoned that older June 2016 period data could be used because this cost-of-service complaint proceeding both sets SFPP's prospective rates and provides shippers backward looking reparations.[217] Moreover, the Initial Decision stated that the parties had more fully "vetted" the data from the June 2016 period.[218] The Initial Decision rejected SFPP's proposal to use the September 2015 period data because it included negative inflation. The Commission has historically considered negative inflation as anomalous and unlikely to be representative of longer-term economic conditions.[219] The Initial Decision also explained that SFPP's proposal was inconsistent with the Commission's policy of using more recent, post-test-period ROE data.

b. Briefs on Exceptions

128. Both SFPP and Complainants challenge the Initial Decision's selection of the June 2016 period for calculating the ROE. Complainants advocate the September 2016 period and SFPP advocates the September 2015 period.

129. Complainants assert that the ROE should be calculated based upon the September 2016 period, which is the most recent data in the record. Complainants explain that the

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[215] Initial Decision, 160 FERC ¶ 63,006 at PP 389-400.

[216] *Id.* PP 399-400.

[217] *Id.* P 400. Complainants may receive reparations for damages resulting from excessive rates paid any time after December 4, 2013, two years prior to the December 4, 2015 filing of the complaints. 49 U.S.C. app. § 16 (1988).

[218] *Id.* P 399.

[219] *Id.* PP 391-392 (citing *United Airlines*, 827 F.3d at 130; Opinion No. 511, 134 FERC ¶ 61,121 at P 209).

Commission typically uses the most recent data to determine the ROE "because the market is always changing,"[220] and the most recent data "more accurately reflects investor needs"[221] during the time the rates will be effective. Complainants acknowledge that if the most recent record data is distorted by anomalous economic conditions (such as a financial crisis) the Commission may consider alternatives to the most recent data. However, Complainants emphasize that no such circumstances exist in this proceeding.

130. Complainants object to the Initial Decision's reasons for rejecting the September 2016 period. Complainants assert that, contrary to the Initial Decision's holdings, the Commission has previously used ROE data periods that concluded a full year after the test year.[222] Likewise Complainants object that the existence of "backward looking" reparations (in a complaint case such as this one) or refunds (when the Commission reduces or rejects a rate increase proposed by the pipeline) has never served as a basis for rejecting the most recent data in the record. In response to the Initial Decision's holding that the June 2016 data was more fully "vetted" by the parties, Complainants assert that parties had an adequate opportunity to challenge the September 2016 period data.[223]

131. In contrast, SFPP argues that the ROE should be calculated based upon September 2015 period data. SFPP claims that the Initial Decision disregarded the directives of the D.C. Circuit's *United Airlines* decision, which SFPP contends requires the Commission to show that the real ROE adopted is both representative for SFPP and consistent with historical trends.[224] SFPP also claims that the September 2015 period data is more

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[220] Complainants Brief on Exceptions at 10 (quoting *Trunkline*, 90 FERC at 61,117).

[221] *Id.* (quoting *Trunkline,* 90 FERC at 61,117).

[222] *Id.* at 14 (citing Initial Decision, 160 FERC ¶ 63,006 at P 399).

[223] *Id.* at 20 (citing *Seaway Crude Pipeline, Co.,* Opinion No. 546, 154 FERC ¶ 61,070, at PP 194-196 (2016); *Seaway Crude Pipeline, Co.,* 147 FERC ¶ 63,009, at PP 11, 219 (2014)).

[224] SFPP Brief on Exceptions at 29 (citing *United Airlines, Inc. v. FERC*, 827 F.3d 122 (2016)).

representative than the June 2016 period data.[225] SFPP argues that the negative inflation embedded within the September 2015 period data reflects long-term trends.[226]

132. SFPP also argues that the Commission should adopt the September 2015 period data because it coincides with the conclusion of the test period. Citing a December 2005 Order, SFPP asserts that the Commission has previously relied upon test period data to calculate ROE when adjudicating oil pipeline cost-of-service complaints.[227] SFPP adds that in contrast to the June 2016 period data, the September 2015 period data balances the forward-looking effect (setting future rates) and backward-looking effect (reparations) of the cost-of-service rates established by this complaint proceeding.

c. Briefs Opposing Exceptions

133. SFPP and Trial Staff object to Complainants' preferred September 2016 period for determining the ROE. They claim that they had an insufficient opportunity to review and to challenge the September 2016 period data. SFPP further asserts that the September 2016 period is too attenuated from the December 4, 2013 beginning of the reparations period (two years prior to the December 4, 2015 filing of the complaint).

134. Opposing SFPP's proposed September 2015 period, Trial Staff and Complainants object that the September 2015 period incorporates unrepresentative negative inflation. They also assert that, consistent with longstanding precedent, the Commission is not bound to use the test period data when determining ROE.

d. Discussion

135. We modify the Initial Decision and will determine the ROE based upon September 2016 period data. To identify an ROE likely to be representative of future conditions, 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.[228] The Commission

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[225] *Id.* at 30 (citing Ex. SPP-0039 at 23-28; Ex. SPP-0088 at 40-47; Tr. 931-935).

[226] *Id.* at 34 (citing Ex. SPP-0088 at 44-47; Ex. SPP-0099).

[227] *Id.* at 36 (citing *SFPP, L.P.*, 113 FERC ¶ 61,277, at P 79 (2005) (December 2005 Order)).

[228] Opinion No. 510, 134 FERC ¶ 61,129, at P 242 (2011) (quoting *Trunkline*, 90 FERC at 61,117 (citing *Panhandle*, 74 FERC at 61,363 (citing *Boston*, 885 F.2d 962, 966 (1st Cir. 1989)))); *Williston Basin Interstate Pipeline Co.*, 104 FERC ¶ 61,036, at P 20 (2003) (permitting updated cost of equity figures over Trial Staff's objections); *Williston Basin Interstate Pipeline Co.*, 84 FERC ¶ 61,081, at 61,382 (1998) (stating "It

typically relies upon the most recent data because "the market is always changing and later figures more accurately reflect current investor needs."[229] By incorporating these market changes, the most recent data is generally the most "representative of the conditions likely to happen while the rate is in effect"[230] indefinitely into the future. 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.[231]

136. In this record, the September 2016 period data provides the most recent data and, consistent with the Commission's general policy, we will use the September 2016 period data for determining SFPP's ROE. As discussed below, we reject the various arguments for departing from the most recent ROE data in the record, including that (a) September 2016 period data is more than one year removed from the end of the test period; (b) potential reparations in a complaint proceeding warrant consideration of earlier period data; (c) parties lacked an opportunity to adequately litigate the September 2016 period data; (d) the September 2016 period data is contrary to the D.C. Circuit's *United Airlines* decision; and (e) the September 2016 period data is not representative. We also reject SFPP's arguments that the September 2015 period should be used to determine the DCF ROE in this proceeding.

i. The September 2016 Period Data Should Not Be Rejected as Too Distant from the Test Period

137. We are unpersuaded by arguments urging rejection of the September 2016 period as too attenuated from the September 30, 2015 close of the test period. The determination of the ROE provides an exception to the Commission's test period rules. As noted above, because the most recent data in the record is likely to be representative of the pipeline's future costs, the Commission uses the most recent data "even if such

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is true that the Commission prefers to use dividend yield data from the most recent six-month period available"); *SFPP, L.P.*, Opinion No. 511, 134 FERC ¶ 61,121, at P 208 (2011) (stating that the Commission generally determines the ROE based upon the most recent data in the record), *order on reh'g*, Opinion No. 511-A, 137 FERC ¶ 61,220, at P 258 (2011) (same), *aff'd in part and rev'd in part*, *United Airlines*, 827 F.3d 122.

[229] Opinion No. 510, 134 FERC ¶ 61,129 at P 242 (citations omitted).

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

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

data is from outside the test period."[232] Pursuant to this policy, we have considered DCF return data that became available one year after the end of the test period.[233] We will not reject the September 2016 period data merely because it includes data from a year after the close of the September 2015 test period.[234]

ii. The Availability of Reparations Does Not Justify Departing from the Commission's Policy to Use the Most Recent Data in the Record

138. We also deny arguments that the presence of potential reparations in this complaint proceeding supports departing from the Commission's longstanding policy to use the most recent ROE data in the record.[235] This cost-of-service complaint proceeding will set a future rate that may remain effective indefinitely. Absent compelling evidence to the contrary, the Commission presumes the most recent data is likely the most reflective of those future periods. The Commission recognizes that cost-of-service complaint proceedings (via reparations) may return the pipeline's previously collected over-recoveries to shippers. However, this is also true of protested cost-of-service rate proceedings (via refunds) and the primary purpose of both rate proceedings is to set future rates.[236] The mere fact that this particular proceeding arises from a shipper

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[232] Opinion No. 510, 134 FERC ¶ 61,129 at P 242; Opinion No. 511, 134 FERC ¶ 61,121 at P 208.

[233] *See, e.g.*, *Panhandle*, 74 FERC at 61,353, 61,363 (adopting ROE data for the six months ending November 30, 1993 when the test period concluded November 30, 1992).

[234] Although the Initial Decision and Trial Staff emphasize that the September 2016 period data is a full year removed from the test period, the September 2016 period DCF return data is based upon averages from the prior six months. Thus, it includes data that is between 6-12 months after the September 2015 close of the end of the test period.

[235] Under section 16 of the Interstate Commerce Act, shippers may receive reparations for damages resulting from the pipeline's over-recoveries for two years prior to the complaint. 49 U.S.C. app. § 16 (1988).

[236] Although reparations provide payments to shippers for over-recoveries for up to two years prior to the complaint whereas protested proceedings are from the date of the pipeline's filing, this distinction does not merit a different policy. For example, in this case, the shippers will receive reparations to December 2014 (two years prior to the December 2016 complaint). The September 2016 ROE data is closer to the December 2014 data than it is to the present, and SFPP's preferred September 2015 period data

complaint (as opposed to a protest of a pipeline initiated rate filing) does not justify deviating from the Commission's longstanding policy of using the most recent ROE data to set future rates.

139. Similarly, we reject SFPP's claim that the December 2005 Order establishes a broad exception in oil pipeline complaint proceedings to the Commission's general policy determining the ROE based upon the most recent data in the record. The December 2005 Order addressed a prior SFPP cost-of-service complaint proceeding and rejected in one sentence and without further explanation 2001 ROE data as "far outside the [calendar-year 1999] test period."[237] In rejecting the 2001 ROE data, the December 2005 Order neither acknowledged the Commission's longstanding policy using the most recent data in the record nor explained why a different standard should apply in an oil pipeline complaint proceeding.[238] Unlike the arguments SFPP advances here, there is no evidence the December 2005 Order sought to distinguish the ROE policies for an oil pipeline complaint proceeding on the basis that reparations were potentially available.[239]

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represents a time in the middle of the reparations period before the shippers even filed their complaint.

[237] December 2005 Order, 113 FERC ¶ 61,277 at P 79. The December 2005 Order also rejected ROE data for the year 2000 (which had been adopted by the Initial Decision) in favor of the 1999 data, but the December 2005 Order's discussion of the ROE issues did not explain why it was overturning the Initial Decision's use of the 2000 ROE data. Rather, the December 2005 Order only stated that the 2001 ROE data was too far from the test period. *Id.* Trial Staff notes that in another section of the order, the December 2005 Order expressed broad, generalized concern about post-1999 test period data and, as a result, expressed a preference for using the 1999 test period data. Trial Staff Brief Opposing Exceptions at 26 (citing December 2005 Order, 113 FERC ¶ 61,277 at P 53). Although such concerns may have informed the December 2005 Order's rejection of both the 2001 and 2000 DCF ROE data, the December 2005 Order is not clear.

[238] SFPP emphasizes that, at the time of the December 2005 Order, established precedent already existed for using the most recent data in the record. SFPP Brief Opposing Exceptions at 11 (citing *Trunkline*, 90 FERC at 61,117; *Panhandle*, 74 FERC at 61,363). However, as discussed above, the December 2005 Order did not acknowledge this precedent or explain why a different standard should apply.

[239] Casting further doubt upon SFPP's attempt to read its reparations rationale into the December 2005 Order, the December 2005 Order expressed uncertainty whether any reparations would be owed based upon the 1999 test year. December 2005 Order, 113 FERC ¶ 61,277 at P 114.

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To the extent the December 2005 Order departed without discussion from the Commission's general policy using the most recent ROE data in the record, we decline to adopt that approach here.

iii. Objections that the September 2016 Period Data Was Not Fully Vetted Are Without Merit

140. We find similarly unavailing claims that the litigants lacked a full opportunity to challenge the September 2016 period data. Complainants provided the September 2016 period data in pre-filed rebuttal testimony.[240] As SFPP acknowledges, parties frequently update the ROE in cost-of-service proceedings during later stages of testimony, including rebuttal testimony.[241] Although SFPP claims that disputes involving proxy group composition differentiate this proceeding, SFPP fails to support such claims. Rather, all parties had the full opportunity to challenge via cross examination Complainants' September 2016 period data at hearing. After hearing, the parties filed briefs and reply briefs addressing the September 2016 period data and, upon the Presiding Administrative Law Judge's Initial Decision, continue to litigate this issue in briefs on exceptions before the Commission. Claims that the parties lacked the opportunity to challenge the September 2016 period data are unsubstantiated.

iv. SFPP's 2008 West Line Rate Orders Did Not Overturn the Commission's General Policy to Use the Most Recent Data in the Record

141. SFPP misconstrues Opinion Nos. 511, 511-A, and the D.C. Circuit's order on remand in *United Airlines* as overturning the Commission's general policy determining the DCF ROE data using the most recent data in the record.[242] On the contrary, in

[240] Ex. HVW-0048 at 80-81.

[241] SFPP Brief on Exceptions at 27. SFPP further adds that witnesses sometimes update ROE data after the conclusion of pre-filed testimony and upon taking the stand at hearing. *Id.*

[242] Opinion No. 511, 134 FERC ¶ 61,121, *order on reh'g*, Opinion No. 511-A, 137 FERC ¶ 61,220, *aff'd in part and rev'd in part*, *United Airlines*, 827 F.3d 122. These proceedings addressed SFPP's June 30, 2008 rate increase on its West Line system which provides transportation service between Watson Station, Los Angeles County, California, and Phoenix, Arizona. That proceeding involved a test period consisting of a base period of the calendar year 2007 (January 1, 2007 to December 31, 2007) and an adjustment period of the first nine months of 2008 (January 1, 2008 through September 30, 2008). The most recent ROE data in the record was for April 2014.

addressing SFPP's 2008 West Line rate proceeding, those decisions reaffirmed that the Commission generally determines the ROE based upon the most recent data in the record.[243] However, SFPP's 2008 West Line rate case presented "unique circumstances" in which the most recent ROE data (April 2009) in the record was skewed by the historic 2008-2009 financial crisis.[244] All parties acknowledged that the 2008 and 2009 ROE data reflected a "volatile economic period"[245] including the "collapse of the stock prices" and "negative inflation."[246] This economic turmoil caused inflation and real ROEs to change abruptly and dramatically during the time period addressed by the record.[247] Under those circumstances, the Commission explained that while the West Line rates could remain effective indefinitely into the future, "[n]either the collapse of the stock prices (which increased the dividend yield used in the DCF calculation) nor the minimal or negative inflation rate (which establishes the real rather than the nominal cost of capital)" were likely to continue.[248] Consequently, recognizing the 2008-2009 financial crisis rendered the most recent DCF ROE data non-representative "of the conditions likely to happen while the rate is in effect," the Commission departed from its general policy of using the most recent data in the record (April 2009) and used other data from the record to determine the ROE.[249]

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[243] Opinion No. 511, 134 FERC ¶ 61,121 at P 208; Opinion No. 511-A, 137 FERC ¶ 61,220 at PP 257-258; *United Airlines*, 827 F.3d at 129.

[244] *SFPP, L.P.*, Opinion No. 511-C, 162 FERC ¶ 61,228, at n.116 (2018). As explained by the Administrative Law Judge's Initial Decision in SFPP's 2008 West Line rate proceeding, such economic conditions had not existed since the Great Depression. *SFPP, L.P.*, 129 FERC ¶ 63,020, at P 650 (2009).

[245] Opinion No. 511-A, 137 FERC ¶ 61,220 at P 256.

[246] Opinion No. 511, 134 FERC ¶ 61,121 at P 209.

[247] Between September 2008 and January 2009 alone, the real DCF ROE nearly doubled from 7.64% to 14.30% and remained at 14.83% in April 2009. *Id.*; Opinion No. 511-C, 162 FERC ¶ 61,228 at P 36. Likewise, between January 2007 and April 2009, 12-month inflation averages fluctuated between a high of 5.6% and a low of negative 0.74%. *Id.* n.115.

[248] Opinion No. 511, 134 FERC ¶ 61,121 at P 209.

[249] Once the Commission departed from the most recent data in the record, the Commission adopted September 2008 period data for determining the nominal ROE and the real ROE. The D.C. Circuit affirmed the Commission's adoption of the September 2008 nominal ROE, but concluded that the Commission had not justified its selection of

142. In contrast, this record provides no reason to depart from the Commission's general presumption that the most recent data (i.e., the September 2016 period data) provides the best estimate of the equity returns SFPP will need to attract capital in the future. No historic financial crisis affects the September 2016 period data.[250] Although we recognize that markets and inflation levels shifted throughout this proceeding, these normal economic changes are the very market shifts that the Commission intends to capture by using the most recent data.[251] Absent the extreme economic conditions that existed in SFPP's 2008 West Line rate case, it is reasonable to assume that the most recent data (i.e., September 2016 period data) is more reflective of future market conditions (when the rates will be in effect) than older data (i.e., September 2015 period data) that is further removed from those future time periods.

v. SFPP's Numerical Comparisons Do Not Provide a Basis for Departing from the Most Recent Data in the Record

143. We reject SFPP's arguments that the September 2016 period data should be rejected merely because it results in a lower nominal ROE, inflation, or real ROE than earlier time periods in the record. When using the most recent data in the record, comparisons to earlier periods lack relevance. The Commission uses the most recent data due to its relative proximity to the future time period in which the rates will be effective, not its similarity to earlier time periods. The Commission expects that estimates of future returns based upon more current data will differ from earlier, outdated DCF returns in the record. Because the most recent returns reflect new market changes, they are likely representative of the pipeline's future costs even if they are among the highest or lowest in the record. If the Commission rejected more recent data whenever it deviated from prior period data, this would undermine the purpose and the application of the Commission's policy to rely upon the more recent data.

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the September 2008 period ROE. *United Airlines, Inc.*, 827 F.3d at 128-131. On remand, the Commission continued to use the September 2008 nominal ROE approved by the court, but adopted an inflation factor based upon the annualized average for January 1, 2007–April 2009. Opinion No. 511-C, 162 FERC ¶ 61,228 at P 49.

[250] Opinion No. 511-A, 137 FERC ¶ 61,220 at P 256.

[251] Opinion No. 510, 134 FERC ¶ 61,129 at P 242 (citations omitted) (explaining "the Commission uses the most recent data in the record, even if such data is from outside the test period, because the market is always changing and later figures more accurately reflect current investor needs.")

144. Furthermore, any decision to depart from the most recent data policy is not based upon mere numerical changes to nominal ROEs, real ROEs, or inflation levels. As discussed above, the 2008 SFPP West Line Proceeding's holdings were based upon compelling evidence that extremely anomalous economic conditions distorted the most recent data in the record so that it was not a "reasonable forecast" of the pipeline's future costs.[252] Accordingly, in the 2008 SFPP West Line Proceeding the Commission departed from the policy by comparing multiple data periods only as a result of compelling evidence of these extremely anomalous conditions that raised serious concerns regarding the most recent data in the record.

145. Thus, as a general matter, the Commission assigns little relevance to comparisons between the most recent DCF return data and DCF return data from prior periods. Furthermore, regarding SFPP's numerical comparisons in this proceeding, these arguments fail to support a finding that the September 2016 period data is so anomalous that it must be rejected in favor of earlier data. The September 2016 inflation rate of 1.46% is generally consistent with the average annualized inflation rate of 1.30% from January 2014 (the start of the base period) through September 2016 (the most recent data in the record).[253] Likewise, although the real DCF ROE in September 2016 period data may be lower than prior periods,[254] the timing differences in this proceeding do not reflect the extreme instability that, in SFPP's 2008 West Line rate case, prompted a

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[252] Opinion No. 511, 134 FERC ¶ 61,121 at P 208.

[253] The Commission measured the change in the consumer price index (CPI) between January 1, 2014 (233.9) (which is the CPI for the end of December 2013) and September 30, 2016 (241.4). Ex. S-0025 at 14; Ex. SPP-0099. The Commission calculated the mean for the monthly changes by taking the 33rd root, and then annualized it by taking this mean to the 12th power. Expressed as a formula, the average monthly inflation over the 33-month period = $\sqrt[33]{\frac{241.4}{233}} = 1.001074$. The annualized average monthly inflation = $1.001074^{12} = 1.01296$. *See* Opinion No. 511-C, 162 FERC ¶ 61,228 at n.113.

[254] Differences in proxy groups, not time period, account for much of the disparity between the Commission and SFPP in this case. Using September 2015 period data and a proxy group fairly similar to the one adopted by the Commission in this proceeding leads to a nominal DCF ROE of 11.15%. Ex. SPP-0044 at 12 (calculating the September 2015 period ROE using the same four-member proxy group as the Commission, but substituting Plains for KMI). If the Commission determined the real ROE using the average 1.30% inflation rate in the record (as opposed to anomalous negative inflation), the resulting real DCF ROE is 9.85%. This is well below the 12.80% real DCF ROE advocated by SFPP.

700 basis point change to the real DCF ROE in four months.[255] Rather, the September 2016 period data embodies the normal market changes that the Commission's policy using the most recent data is designed to incorporate into cost-of-service rates.

vi. **SFPP Fails to Support Its Proposed September 2015 Period Data**

146. We reject SFPP's proposal to determine the ROE upon the September 2015 period data. The September 2015 period data is a full year prior to the most recent data favored by Commission policy, and, accordingly, the September 2015 period data is less likely to be representative of future market conditions.

147. SFPP also fails to demonstrate that the September 2015 period data provides a representative estimate of future market conditions. SFPP's proposed September 2015 period data and the resulting 12.80% real DCF ROE incorporate negative inflation of 0.04%. The Commission has historically considered negative inflation as anomalous and unlikely to be representative of longer-term economic conditions.[256] The record in this proceeding does not support a different conclusion. On a calendar year basis (January 1 – December 31), there had not been negative inflation since 2009 at the time the record closed in September 2016.[257] The average annualized inflation rate during the period from January 2014 through September 2016 was 1.30% – 134 basis points higher than the negative 0.04% inflation rate for SFPP's proposed September 2015 period. Although SFPP argues that the median inflation was 0.18%, this methodology assigns more weight to certain months with low inflation.[258] Moreover, as a result of this anomalously

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[255] In the 2008 West Line rate case, the real ROE shifted from 7.69% using a September 2008 data period to 14.30% in the January 2009 data period a mere four months later.

[256] Opinion No. 511, 134 FERC ¶ 61,121 at P 209.

[257] Ex. S-0025 at 13.

[258] Ex. SPP-0099. Dr. Webb considered "12-month" inflation periods for each month between January 2015 and June 2016. For example, in Dr. Webb's analysis, the January 2015 inflation period reflected inflation between January 2014 and January 2015, the February 2015 inflation period reflected inflation between February 2014 and February 2015, and so forth. As a result, one of the months with the most negative inflation (December 2014, -5.93 percent) was incorporated into 12 of Dr. Webb's 18 inflation periods, skewing the results downward whereas inflation from June 2016 was only incorporated into 1 of the 18 data periods. Furthermore, the final 8 of 18 inflation periods in Dr. Webb's sample all exceeded his proposed median, and inflation exceeded 1.00% in 5 of the last 6 of Dr. Webb's inflation periods. Dr. Webb's argument

negative inflation and the particular market conditions in the September 2015 period, SFPP's proposed September 2015 period data likely results in a real DCF ROE among the highest of the different data periods presented in the record.[259]

4. Proxy Group Composition

a. Proxy Group Policies

148. As the court explained in *Petal Gas Storage, LLC v. FERC*,[260] 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.'"[261] The firms in the proxy group should be comparable to the regulated firm whose cost-of-service rate is being determined. In

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for a -0.04% inflation (which is less than even his median) disregards the most recent data. Moreover, even using Dr. Webb's methodology, Trial Staff witness Keyton demonstrates that inflation was also considerably higher than Dr. Webb's 0.18% median in prior 12-month periods using 2013 and 2014 data and over the more extended January 2014 through June 2016 period. Ex. S-0025 at 13 (showing that the median 12-month inflation average was 1.02%).

[259] Ex. SPP-0044 at 12, 14, 16, 18, 20, 22, 24, 26, 28, 30 (using a four-member proxy group, showing that the real DCF ROE in the September 2015 data period exceeded the real DCF ROE for every potential data period through the June 2016 data period); Ex. SPP-0039 at 24 (data and chart showing that for a six-member proxy group, the real DCF ROE in the September 2015 data period exceeded the real DCF ROE for every potential data period but the April 2016 data period between the October 2015 and June 2016 data periods). Although somewhat different results emerge using a five-member proxy group of Sunoco, Plains, Magellan, Enbridge, and Buckeye, that proxy group is contrary to the holdings in this case removing Sunoco and including Enterprise. Furthermore, in most months, Plains was the median in this proxy group used to set the nominal ROE, and SFPP's own brief on exceptions argues that Plains' ROE data by June 2016 was distorted by the pending dividend cut. SFPP Brief on Exceptions at 22-25.

[260] 496 F.3d 695 (D.C. Cir. 2007).

[261] *Id.* at 697 (quoting *CAPP v. FERC*, 254 F.3d at 293).

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other words, as the court emphasized in *Petal v. FERC*, the proxy group must be "risk-appropriate."[262]

149. Historically, the Commission 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) pipeline operations must constitute a high proportion (historically 50%) of the company's business.[263] In the 2008 Proxy Group Policy Statement, the Commission extended potential proxy group membership to include MLPs. The Commission provided similar general 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 operations.[264] 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.[265]

150. Under Commission policy, a proxy group should consist of at least four, and preferably five members, if representative members can be found.[266] At the same time, the Commission has also 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."[267]

b. <u>Proxy Group in this Proceeding</u>

151. In this proceeding, the Initial Decision adopted a proxy group of Magellan, Buckeye, Enterprise, and Plains. On exceptions, SFPP argues the Initial Decision's proxy group should be modified to exclude Enterprise and Plains and to include Enbridge

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[262] *Id.*

[263] Proxy Group Policy Statement, 123 FERC ¶ 61,048 at P 8.

[264] *Id*. P 79.

[265] *Id.*

[266] *Id.* P 16; Opinion No. 511, 134 FERC ¶ 61,121 at P 203.

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

and Sunoco. Complainants assert that in the September 2016 period data, the proxy group should exclude Plains but include KMI. Trial Staff supports the Initial Decision.

152. As discussed below, we adopt a proxy group of Magellan, Buckeye, Enterprise and Enbridge. No party challenges the inclusion of Magellan or Buckeye. Furthermore, because we adopt the September 2016 period data, Plains must be excluded as a result of the distribution cut and reorganization announced in July 2016.[268] Whether or not to include Enterprise, KMI, Enbridge, and Sunoco in the proxy group is discussed below.

Entities Included in Commission Adopted Proxy Group

Company	I/B/E/S	GDP Growth	Weighted Avg Growth	Adjusted Dividend Yield	Yield Plus Growth
Buckeye Partners LP	3.60%	2.18%	3.13%	6.97%	10.09%
Magellan Midstream Partners LP	8.01%	2.18%	6.07%	4.72%	10.79%
Enterprise Products Partners, LP	5.41%	2.18%	4.33%	5.97%	10.30%
Enbridge Energy Partners, LP	14.20%	2.18%	10.19%	10.45%	21.17%
				Median	10.54%
				Inflation (CPI-U)	1.46%
					9.08%

[268] Initial Decision, 160 FERC ¶ 63,006 at PP 324-325. The Initial Decision included Plains in its proxy group based upon June 2016 period data. The Initial Decision asserted that Plains' inclusion was appropriate because the distribution cut and reorganization only became public July 11, 2016, which was after the conclusion of the June 2016 period. *Id.* P 417. Although SFPP challenges this finding on exceptions regarding the June 2016 period data (*see* SFPP Brief on Exceptions at 22-25), we need not address whether Plains should be included in the June 2016 data period due to our adoption of the September 2016 period data. Following the July 2011 distribution cut and reorganization, no entity argues that Plains should be included in the September 2016 period proxy group.

Entities Excluded From Commission Proxy Group					
Company	I/B/E/S	GDP Growth	Weighted Avg Growth	Adjusted Dividend Yield	Yield Plus Growth
Kinder Morgan Inc.	8.37%	4.36%	7.03%	2.67%	9.70%
Sunoco Logistic Partners, LP	62.90%	2.18%	42.66%	8.48%	51.14%
Plains All American Pipeline, LP	N/A	N/A	N/A	N/A	N/A

i. Enterprise

(a) Initial Decision

153. The Initial Decision included Enterprise in the proxy group. The Initial Decision acknowledged that in Opinion No. 511 addressing SFPP's 2008 West Line rate case, the Commission removed Enterprise from the proxy group due to commodity risk associated with Enterprise's natural gas liquids (NGLs) transportation.[269] The Initial Decision explained that since that case, the proportion of Enterprise's revenues from NGLs transportation declined from 77% to "somewhere between 45 and 36 percent" in 2015.[270] The Initial Decision also emphasized that in Opinion No. 546, issued on February 1, 2016, the Commission held that Enterprise was "appropriate" for inclusion in the proxy group for Seaway Crude Pipeline LLC.[271]

(b) Brief on Exceptions

154. On exceptions, SFPP argues that the Initial Decision erred by including Enterprise in the proxy group. SFPP argues that the statements regarding commodity price risk in Enterprise's 2007 Form No. 10-K, upon which the Commission relied in SFPP's 2008 West Line rate case, Docket No. IS08-390, are substantially similar to those in Enterprise's 2015 Form No. 10-K.[272] SFPP also claims that NGLs were 52% of

[269] *Id.* P 435 (citing Opinion No. 511, 134 FERC ¶ 61,121 at P 199).

[270] *Id.* (citing Ex. HVW-0048 at 81-85).

[271] *Id.* P 434 (citing Opinion No. 546, 154 FERC ¶ 61,070 at P 196).

[272] SFPP Brief on Exceptions at 20 (*comparing* Ex. SPP-0582 at 9 *with* Ex. HVW-0032 at 7).

Enterprise's gross operating margin in 2015, which is a small reduction from 2007 when NGLs provided 54% of Enterprise's gross operating margin.[273] SFPP also alleges that the Initial Decision underestimated Enterprise's commodity price risk by focusing exclusively upon Enterprise's NGL business. SFPP claims that commodity price risk also affects Enterprise's natural gas pipeline and services business.[274] SFPP claims that 67% of Enterprise's gross operating margin involves commodity price risks.[275] Accordingly, SFPP argues there has been no material change in Enterprise's exposure to commodity price risk since Opinion No. 511 when the Commission rejected Enterprise's inclusion in the proxy group.

(c) <u>Briefs Opposing Exceptions</u>

155. In response to SFPP, Trial Staff and Complainants reiterate the arguments advanced by the Initial Decision. Trial Staff and Complainants state that although the Commission excluded Enterprise on the basis of commodity risk from the proxy group in SFPP's 2008 West Line rate case, the percentage of Enterprise's revenues from NGLs declined from 77% to 45%.[276] Accordingly, Complainants claim that Enterprise's NGLs and non-NGLs businesses by 2015 were "roughly similar magnitude" and that the concern that caused the Commission to exclude Enterprise from the proxy group in Opinion No. 511 no longer applies.[277] Trial Staff further claims that crude oil pipeline services presently exceed NGLs as a share of Enterprise's overall business.[278] Trial Staff further disputes SFPP's reliance on exceptions to "gross operating margin," arguing that the Commission's analysis has previously relied upon revenues instead.[279] Both Complainants and Trial Staff emphasize that subsequent Commission rate litigation has reflected the changes after Opinion No. 511. They explain that the Commission included Enterprise in an oil pipeline proxy group in the more recent Opinion No. 546 proceeding

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[273] *Id.* (citing Ex. HVW-0032 at 85).

[274] *Id.*

[275] *Id.* (citing Ex. HVW-0032 at 85; Tr. 1208-1212).

[276] Complainants Brief Opposing Exceptions at 14; Trial Staff Brief Opposing Exceptions at 16-17.

[277] Complainants Brief Opposing Exceptions at 15.

[278] Trial Staff Brief Opposing Exceptions at 17 (citing Ex. S-0042 at 42; Ex. S-0044 at 17; Ex. HVW-0048 at 84-85; Ex. HVW-0032 at 85).

[279] *Id.*

involving Seaway.[280] They further add that SFPP's ROE expert witness proposed to include Enterprise in the proxy group in two other rate cases occurring after Opinion No. 511.[281]

(d) Discussion

156. We affirm the Initial Decision's inclusion of Enterprise in the proxy group. Enterprise is an appropriate proxy group entity to determine the DCF ROE of an oil pipeline such as SFPP. There is no dispute that a substantial portion of Enterprise's business involves oil pipeline operations.[282] Furthermore, Enterprise has been included in prior DCF proxy groups for oil pipelines. SFPP itself included Enterprise in its 2014 Form No. 6, page 700 cost-of-service analysis.[283] Likewise, SFPP's witness Dr. Webb also proposed to include Enterprise in the proxy group in two other oil pipeline rate proceedings,[284] and the Commission included Enterprise in the proxy group to determine the DCF ROE for Seaway in Opinion No. 546.[285] Both the composition of Enterprise's business and recent practice support including Enterprise in SFPP's DCF proxy group.

157. The counter arguments for excluding Enterprise are not persuasive. Although Opinion No. 511 excluded Enterprise from the proxy group in the 2008 SFPP West Line rate proceeding, this record does not support a similar result. At the time of the 2008 SFPP West Line rate case, 77% of Enterprise's revenues derived from NGLs, and Opinion No. 511 excluded Enterprise from the proxy group because "Enterprise's natural gas liquids transmission business is particularly vulnerable to commodity risk due to the pricing mechanism it utilizes to transport natural gas liquids and related interest risks."[286]

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[280] Complainants Brief Opposing Exceptions at 15 (citing Opinion No. 546, 154 FERC ¶ 61,070 at P 196); Trial Staff Brief Opposing Exceptions at 16 (same).

[281] Complainants Brief Opposing Exceptions at 15 (citing Ex. HVW-0048 at 81-82; HVW-0082; HVW-0083); Trial Staff Brief Opposing Exceptions at 16.

[282] Ex. HVW-0048 at 83; Ex. HVW-0077 at 7.

[283] Ex. HVW-0048 at 81 (citing Ex. HVW-0081 at 3).

[284] *Id.* at 81-82 (citing Ex. HVW-0082; Ex. HVW-0083).

[285] Opinion No. 546, 154 FERC ¶ 61,070 at P 196. Although, as SFPP observes, no party challenged the inclusion of Enterprise in the proxy group in the Seaway proceeding, the absence of such a challenge is itself informative.

[286] Opinion No. 511, 134 FERC ¶ 61,121 at P 199.

However, since SFPP's 2008 West Line rate case, Enterprise's revenues from its NGLs business have declined from 77% to "somewhere between 45 and 36 percent" in 2015.[287] Crude oil pipeline services are now a higher proportion of Enterprise's revenues than NGL transportation.[288] Although SFPP argues that "gross operating margin" may more accurately reflect the proportion of Enterprise's business devoted to NGLs,[289] this is not the criteria relied upon by Opinion No. 511. Many factors may provide insight into the evolution of Enterprise's business, but reduced revenues present one indicium that the relative significance of Enterprise's NGLs business has declined.

158. In any case, to the extent that NGLs remain a significant portion of Enterprise's business, we are also no longer persuaded this serves as a basis for removing Enterprise from the proxy group for SFPP. When using Enterprise's pipeline transportation, the shipper (not Enterprise) retains title and the associated commodity price risk.[290] Although Opinion No. 511 stated that Enterprise's "pricing mechanism" for NGLs transportation elevates Enterprise's risk, this record does not support such a concern. Similar to SFPP, Enterprise's rates are subject to the Commission's oil pipeline rate regulatory methodologies and common carriage requirements pursuant to the ICA.[291]

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[287] Initial Decision, 160 FERC ¶ 63,006 at P 435 (citing Ex. HVW-0048 at 81-85).

[288] Ex. HVW-0032 at 86.

[289] Gross operating margin "represents operating income exclusive of (1) depreciation, amortization and accretion expenses, (2) impairment charges, (3) gains and losses attributable to asset sales and insurance recoveries and (4) general and administrative costs. Gross operating margin includes equity in income of unconsolidated affiliates and non-refundable deferred transportation revenues relating to the make-up rights of committed shippers associated with certain pipelines." Ex. HVW-0032 at 83.

[290] Ex. HVW-0032 at 7. Although other portions of Enterprise's Form No. 10-K refer to commodity price risk, for the reasons stated above, we conclude that it is not necessary to exclude Enterprise from the proxy group. For example, we note that in its 2015 Form No. 10-K, Buckeye included language referring to commodity price risk. Ex. SPP-0087 at 20. KMI, which SFPP argues should be excluded on the basis that it is less risky than SFPP, also included commodity risk language in its 2015 Form No. 10-K. Ex. SPP-0069 at 27.

[291] When concluding that Enterprise faced heightened risk due to the "pricing mechanism used to transport natural gas liquids," Opinion No. 511 relied upon the Commission's holdings in Opinion No. 486 addressing the rates on a natural gas pipeline, Kern River Gas Transmission Company. Opinion No. 511, 134 FERC ¶ 61,121 at P 199 (citing *Kern River Gas Transmission Co.,* Opinion No. 486-B, 126 FERC ¶ 61,034, at PP

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There is also no evidence that price commodity risk inflates Enterprise's DCF returns compared to other proxy group members.[292] Accordingly, as noted above, SFPP and its own experts have included Enterprise in other oil pipeline proxy groups.[293]

159. In this case, there are a limited number of proxy entities available to meet the Commission's minimum four proxy group members.[294] In these circumstances, an insufficient basis exists for excluding Enterprise from the proxy group. Moreover, although SFPP (not shippers) challenges Enterprise's placement in the proxy group, including Enterprise in SFPP's proxy group will tend to *increase* the DCF returns by incorporating any higher risk levels (to the extent they exist).[295] SFPP is not aggrieved by such a result.

78-81 (2009)). The evidence Opinion No. 486-B cited for this "variable pricing mechanism" involving the transportation rate was an exhibit explaining that Enterprise's NGLs transportation is subject to the ICA's common carriage regulation in which shippers generally have no contractual commitment for firm capacity and shipper volumes can change on a monthly basis due to commodity demand shifts. Opinion No. 486-B, 126 FERC ¶ 61,034 at P 78, n.125 (citing Ex. BP-143 at 9-12, 14). Although Kern River is a natural gas pipeline subject to the Natural Gas Act's (NGA) contract carriage regulation, SFPP is subject to the ICA's common carriage regulation. Thus, such a distinction provides no basis for excluding Enterprise from SFPP's proxy group.

[292] Enterprise's DCF ROE (10.30%) is consistent with the DCF ROE of Buckeye (10.09%) and Magellan (10.79%). Moreover, Staff witness Keyton's analysis indicated that Enterprise's share prices were not disproportionately affected by low commodity prices compared to other potential members of the proxy group. Ex. S-0042 at 30, 42-43.

[293] Given its arguments in this proceeding, SFPP has not explained why Opinion No. 511, in which Enterprise was included in the proxy group, should preclude Enterprise's inclusion in the proxy group used in SFPP's 2014 Form No. 6, page 700 cost-of-service analysis.

[294] This contrasts with the 2008 West Line proceeding in which the proxy group included seven remaining entities after Enterprise was excluded. *See* Docket No. IS08-390, Ex. SPP-0005 at 9.

[295] In other words, any elevated risk merely increases the return that Enterprise must provide investors to attract capital.

ii. KMI

(a) Initial Decision

160. Because the Initial Decision adopted Trial Staff's proposed June 2016 period data and no party argued that KMI should be included in the June 2016 data period, the Initial Decision did not address whether KMI should be included in the proxy group.[296]

(b) Briefs on Exceptions

161. Complainants state that KMI should be included in the proxy group for the September 2016 period data. Complainants assert that because KMI's December 2015 dividend cut occurred more than six months before September 30, 2016, the rationale for excluding KMI from the proxy group does not apply to the September 2016 period data.

162. Complainants emphasize that KMI reflects SFPP's investment risks. Complainants assert that KMI is SFPP's own parent and that KMI's cost of debt and capital structure were used to calculate SFPP's cost of debt and capital structure in this case.[297] Complainants acknowledge that KMI derives less than 50% of its revenues from product pipelines such as SFPP.[298] However, Complainants state that KMI's revenues arise from both oil and gas pipeline assets[299] and that these interstate pipeline operations constitute the vast majority of KMI's business activity.[300] Complainants further explain that SFPP's own exhibits show that Standards and Poor's financial analysis considers KMI to be comparable to other members of the proxy group.[301] Complainants argue that KMEP, KMI's predecessor, was included in the proxy group used to determine SFPP's DCF ROE in prior rate cases (such as SFPP's West Line rate case in Docket No. IS08-

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[296] KMI cut its dividend in December 2015. Ex. S-0024 at 38; Ex. HVW-0017 at 16.

[297] Complainants Brief on Exceptions at 29 (citing Ex. HVW-0048 at 86; Ex. HVW-0068 at 27).

[298] *Id*. Complainants state that KMI derives 14.4% of its revenues from product pipelines. *Id.* at 29 (citing Ex. HVW-0048 at 86; Ex. HVW-0068 at 27).

[299] *Id.* at 37.

[300] *Id.* at 30 (citing Ex. HVW-0048 at 86-87; Ex. HVW-0069 at 133-136).

[301] *Id.* at 27 (citing Ex. SPP-0094)

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390) notwithstanding that KMEP also derived less than 50% of its earnings from petroleum product pipelines.[302]

163. Complainants also assert that KMI's DCF return is within 38 basis points of Buckeye's return and 108 basis points of Magellan's return, the two entities that all parties agree should be included in the proxy group. Complainants assert that KMI's return more closely approximates Magellan's and Buckeye's returns than other entities that the Initial Decision or SFPP propose to include in the proxy group.[303]

(c) Briefs Opposing Exceptions

164. SFPP opposes the inclusion of KMI in the proxy group. SFPP contends that KMI is not risk comparable to SFPP. Citing the Commission's holding in Opinion No. 435, SFPP argues that only companies that derive 50% of revenue or income from oil pipeline companies should be included in SFPP's DCF proxy group.[304] SFPP emphasizes that only 21% of KMI's total assets and 14.4% of KMI's revenues are derived from oil pipelines.[305] In contrast, over 63% of KMI's assets and 61% of KMI's revenues are derived from natural gas pipelines.[306]

165. SFPP also asserts that prior to considering entities that earn less than 50% of operating income or revenues from oil pipeline assets, the Commission should first consider entities that have operated for less than five years. SFPP also argues that if KMI is included in the proxy group, the Commission should consider including other pipelines that report less than 50% operating income or revenues from oil pipeline operations.

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[302] *Id.* at 30 (citing Ex. HVW-0105 at 4; *SFPP, L.P.*, 129 FERC ¶ 63,020 at P 268 (IS08-390 Initial Decision listing SFPP witness's proxy group, including KMEP)).

[303] *Id.* at 24.

[304] SFPP Brief Opposing Exceptions 20 (citing *SFPP, L.P.*, Opinion No. 435, 86 FERC ¶ 61,022, at 61,099 (1999)).

[305] *Id.* at 21 (citing Ex. HVW-0089 at 3; Ex. HVW-0068 at 27; Tr. 196-197). SFPP acknowledges that its natural gas segment includes a small fraction of petroleum product pipelines. *Id.* at 22.

[306] *Id.*

(d) **Discussion**

166. We conclude that KMI should be excluded from the DCF proxy group for determining SFPP's ROE. In forming a proxy group, the Commission may include a diversified entity with both natural gas and oil pipeline components that does not satisfy the Commission's 50% threshold "if the weight of the gas and oil pipelines is similar and the combined transmission function exceeds 50 percent."[307] Here, by contrast, the natural gas pipeline component of KMI's business outweighs the oil pipeline component, as it devotes over 63% of its assets and derives 61% of its revenues from natural gas pipelines and only 21% of its assets and 14.4% of its revenues from oil pipelines. This imbalance raises concerns regarding whether KMI is sufficiently comparable in risk to SFPP to merit inclusion in the proxy group.

167. Accordingly, we conclude based on the record here that KMI is appropriately excluded from the proxy group.[308] In our view, the fact that KMI predominately transports natural gas, together with the availability of four predominately oil pipeline companies for the proxy group, outweighs the arguments for including KMI in the proxy group.[309]

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[307] *Kern River Gas Transmission Co.*, Opinion No. 486-B, 126 FERC ¶ 61,034, at P 74 (2009) (citing *Kern River Gas Transmission Co.*, Opinion No. 486, 117 FERC ¶ 61,077, at P 154 & n.248 (2006)), *reh'g denied*, Opinion No. 486-C, 129 FERC ¶ 61,240 (2009), *order on reh'g and compliance*, Opinion No. 486-D, 133 FERC ¶ 61,162 (2010).

[308] As set forth in the ROE Policy Statement, the Commission continues to consider companies with both natural gas and oil pipeline components and evaluates whether such companies should be included in the proxy group based on the relevant record and the totality of the circumstances. *See* ROE Policy Statement, 171 FERC ¶ 61,155 at P 64 (explaining that the Commission "will maintain a flexible approach to forming natural gas and oil pipeline proxy groups and continue to relax the 50% standard when necessary to obtain a proxy group of five members"); *El Paso Nat. Gas Co.*, Opinion No. 528, 145 FERC ¶ 61,040, at P 635 (2013), *order on reh'g*, Opinion No. 528-A, 154 FERC ¶ 61,120 (2016) ("The Commission will evaluate the totality of the circumstances to determine whether a particular company should be included in the proxy group.").

[309] In any event, we note that including KMI in the proxy group would have a limited effect on the DCF result in this proceeding. Adding KMI to the proxy group adopted herein would reduce the DCF result by only 24 basis points (from 10.54% to

iii. Sunoco and Enbridge

168. We next address whether Sunoco and Enbridge should be included in the proxy group. Because the arguments for including or excluding these entities overlap significantly, we address them together in the instant order. However, there are material differences and, for the reasons discussed below, we find that the record supports excluding Sunoco from the proxy group and including Enbridge.

(a) Initial Decision

169. The Initial Decision excludes Enbridge and Sunoco from the proxy group. The Initial Decision explains that, consistent with the guidance in the Proxy Group Policy Statement, the Commission excludes an MLP from a proxy group if the MLP's "growth projection is illogical or anomalous."[310] Applying this policy, the Initial Decision determined that Enbridge's (14.2%) and Sunoco's (62.9%) short-term growth rates are "illogical" and "anomalous," and substantially exceed the short-term growth rates of the other members of the proxy group: Buckeye (3.60%), Magellan (8.01%), Enterprise (5.41%), and KMI (8.37%).[311] The Initial Decision further concluded that the Compound Annual Growth Rate (CAGR) analysis provided by SFPP did not need to be considered because it is beyond the parameters of the Commission's prior precedent and case law.[312]

(b) Brief on Exceptions

170. On exceptions, SFPP asserts that the Initial Decision erroneously excluded Enbridge and Sunoco from the proxy group. SFPP argues that no entity should be excluded from the proxy group solely on the basis that the entity's growth rate is merely "illogical and anomalous" or that the growth rate cannot be plausibly maintained in perpetuity. Relying upon an excerpt from the book *New Regulatory Finance* in exhibit SPP-0577,[313] SFPP asserts that an entity's growth rate only justifies removal from the

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10.30%). The impact is only slightly larger if Enbridge is excluded, reducing the DCF result by 34 basis points (from 10.54% to 10.20%).

[310] Initial Decision, 160 FERC ¶ 63,006 at P 424.

[311] *Id.* P 427. The numbers above are updated to reflect the shift to the September 2016 period data from the June 2016 period data adopted by the Initial Decision.

[312] *Id.* P 428.

[313] Roger A. Morin, New Regulatory Finance (Public Utilities Reports, Inc. 2006).

proxy group if the growth rate fails to "represent variation 'around some average expected value.'"[314]

171. SFPP also argues that Dr. Webb's analysis of five-year CAGR[315] demonstrates that Sunoco's and Enbridge's growth rates are merely variations around such expected values. In his CAGR analysis, Dr. Webb examined a sample of eight MLPs with oil pipeline assets and, beginning with each entity's first year of operations, identified the periods with the highest five-year growth rates:[316]

Dr. Webb's CAGR analysis				
Entity	Years of Operation	Lifetime Annualized Unit Price Growth Rate	Best Five Years of Unit Price Growth	Annualized Growth Percentage During Best Five Years
Buckeye	1987-2015	6.81	1996-2001	12.30
Enbridge	1992-2015	4.48	1992-1997	11.31
Enterprise	1999-2015	12.51	2009-2014	23.25
Magellan	2002-2015	17.73	2009-2014	34.16
Sunoco	2003-2015	18.02	2009-2014	36.86
Plains	1999-2015	10.06	2009-2014	20.17
NuStar[317]	2002-2015	3.02	2002-2007	10.78
Holly[318]	2005-2015	4.71	2009-2014	15.79

[314] SFPP Brief on Exceptions at 16 (citing Ex. SPP-0577 at 4).

[315] *Id.* at 16.

[316] Ex. SPP-0039 at 42-43.

[317] NuStar Energy L.P.

[318] Energy Partners L.P.

172. Based upon this analysis, SFPP argues that the growth rates in the DCF formula for Sunoco's 62.90% five-year growth rate and Enbridge's 42.66% five-year growth rate can be construed as representing movement "around some expected average value" and, thus, these entities should not be excluded from the proxy group.[319]

(c) Briefs Opposing Exceptions

173. Opposing SFPP's brief on exceptions, Complainants and Trial Staff emphasize that the Proxy Group Policy Statement provides that the Commission will "continue to exclude an MLP from the proxy groups if its growth projection is illogical or anomalous."[320] Complainants and Trial Staff argue that SFPP's arguments are inconsistent with this policy.[321]

174. Complainants and Trial Staff assert that SFPP mischaracterizes the excerpt from the book *New Regulatory Finance* in Exhibit SPP-0577. They state that this excerpt did not address anomalous growth rates such as those included in Sunoco's and Enbridge's DCF analyses. Rather, Complainants and Trial Staff assert that the excerpt merely discussed the DCF's assumption of a constant growth rate in determining the ROE[322] and explained that, although actual growth rates fluctuate, the assumption of a constant growth rate is not problematic so long as the growth rate used in the DCF reflects a reasonable variation around a "mean expected growth" or "average expected value."[323]

175. Complainants and Trial Staff also argue that Dr. Webb's CAGR analysis provides insufficient support for including Sunoco and Enbridge in the proxy group. Trial Staff emphasizes that Dr. Webb's CAGR depicts growth in unit prices. In contrast, the five-year growth projections used in the DCF project growth in earnings or distributions.

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[319] SFPP Brief on Exceptions at 17.

[320] Proxy Group Policy Statement, 123 FERC ¶ 61,048 at P 79.

[321] Complainants Brief Opposing Exceptions at 12.

[322] In the formula D/P + g, g (the growth rate) is treated as though it is constant. Ex. SPP-0577 at 4.

[323] Complainants Brief Opposing Exceptions at 11 (citing Ex. SPP-0577 at 4); Trial Staff Brief Opposing Exceptions at 9-11 (citing Ex. SPP-0577 at 4).

They conclude that unit prices measured by Dr. Webb's CAGR methodology are not the same as the growth rate component of the DCF calculation.[324]

(d) Discussion

176. We affirm the Initial Decision's exclusion of Sunoco from the proxy group but reverse its exclusion of Enbridge.

177. Regarding Sunoco, we reject its inclusion in the proxy group. As explained above, because most oil pipelines (including SFPP) are not publicly traded, proxy groups provide a mechanism to estimate in cost of service just and reasonable returns "sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital."[325] In order to ensure the proxy group fulfills this goal, the Commission has recognized that "anomalous" or "illogical" data should be excluded from the proxy group.[326] Once the Commission has identified a proxy group, the proxy group defines the zone of reasonableness and the Commission determines where the pipeline's just and reasonable ROE should be placed within this zone of reasonableness.

178. Sunoco's anomalous DCF results do not provide meaningful indicia of the returns that SFPP needs to attract capital from the market. Sunoco's 51.14% DCF return is approximately five times greater than the DCF return for three of the four members of the Commission's proxy group (Enterprise, Magellan and Buckeye), all of which report DCF returns under 10.79%,[327] and it is more than double the return of the fourth member, Enbridge. Moreover, whereas three members of the Commission's proxy group produce DCF returns within 70 basis points of each other (indicating a general market consensus),

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[324] Trial Staff Brief on Exceptions at 9.

[325] *Hope*, 320 U.S. at 603.

[326] *See, e.g.,* Proxy Group Policy Statement, 123 FERC ¶ 61,048 at P 79 (stating the Commission will exclude MLPs that report anomalous or illogical growth rates); *ISO New England*, *Inc*., 109 FERC ¶ 61,147, at P 205 (2004) (removing an entity from the proxy group because its "cost of equity is an extreme outlier and the inclusion of this number in the calculation in an unreliable ROE that will skew the results" and explaining "it is often necessary to eliminate illogical results from cost of equity estimates that fail to meet threshold tests of economic logic."); *So. Cal. Edison Co.*, 131 FERC ¶ 61,020, at PP 54-59 (2004) (explaining that the Commission removes both high-end and low-end outliers).

[327] The other proxy group entities report DCF ROEs of 10.79% (Magellan), 10.30% (Enterprise), and 10.09% (Buckeye).

Sunoco's DCF returns exceed the DCF return of those proxy group members by more than 4000 basis points.[328] Likewise, Sunoco's IBES five-year growth rate is more than four times higher than any other proxy group member's growth rate. The Commission concludes that these returns and growth rates are "anomalous" and "illogical" and should be excluded consistent with the Proxy Group Policy Statement.[329] SFPP cites to no precedent in which the Commission approved a 51.16% ROE or included in the proxy group an entity with a 51.16% DCF return.[330] Sunoco's anomalous DCF returns do not contribute meaningfully to measuring the returns needed by SFPP to attract capital.

179. We also are not persuaded by SFPP's argument that Dr. Webb's CAGR analysis supports including Sunoco in the proxy group. First, Dr. Webb's CAGR analysis examined growth in unit prices (i.e., stock or MLP shares), not the growth rate in the earnings or distributions used in the DCF methodology. This inapposite comparison distorts Dr. Webb's analysis.[331] Second, when identifying the top five-year growth rates for the eight pipeline entities, Dr. Webb does not address why those high growth rates occurred, and whether, during those periods of high growth, those pipelines were risk comparable to SFPP's present business conditions. Third, on its own terms, Dr. Webb's analysis does not support a finding that Sunoco's 62.90% short-term growth rate (i.e., IBES five-year growth rate) is consistent with industry norms. Rather, Sunoco's five-year 62.90% growth rate exceeds by 26 percentage points (2600 basis points) the highest

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[328] This includes Enterprise, which SFPP argues should be excluded because Enterprise incurs commodity price risks that make it a *more risky* investment than SFPP.

[329] Proxy Group Policy Statement, 123 FERC ¶ 61,048 at P 79. Because the DCF uses GDP to determine the long-term growth rate, the Commission will not reject a pipeline from the two-stage DCF analysis purely on the basis that the short-term growth rate is unsustainable. However, as is the case here, where the short-term growth rate is "illogical" and "anomalous," inclusion of the entity in the proxy group would distort the Commission's analysis of the reasonable returns.

[330] On the contrary, in an electric power proceeding, the Commission excluded as a high-end outlier an entity with a 17.7% DCF return. *ISO New England*, 109 FERC ¶ 61,147 at P 205. While we make no finding as to whether that same threshold applies here (or even in another electric power proceeding) and circumstances can vary from case-to-case, it is nonetheless noteworthy that Sunoco's DCF return is nearly three times the DCF return the Commission previously excluded.

[331] The short-term growth rates used in the DCF model are analysts' projections of five-year earnings growth, and the purpose of the DCF model is to project growth in distributions (or for corporations, dividends) and not in unit prices.

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five-year growth rates for all eight pipelines in Dr. Webb's study.[332] Moreover, Sunoco's 42.66% combined short- and long-term growth rate[333] also exceeds the *peak* five years of growth (i.e., the five-year period in which the pipeline grew the most) for all eight pipelines in Dr. Webb's sample.[334] Sunoco's 42.66% combined growth rate is also more than double the life-time CAGR for all eight pipelines in Dr. Webb's sample.[335] Dr. Webb's CAGR study fails to demonstrate that Sunoco's growth rate (and any resulting DCF ROE) is representative and should be used in the development of SFPP's DCF ROE.

180. Finally, we reject SFPP's argument that the Commission addressed potentially anomalous growth rates by halving the long-term growth rate based upon GDP. This modification addressed the Commission's concern that MLPs have lower long-term growth rates compared to corporations. However, in this proceeding, the adjustment to the long-term growth rate had a minimal effect on Sunoco's combined growth rate used in the DCF study,[336] and it did not address the separate concern that Sunoco's DCF return was anomalous and illogical when compared to other entities (including other MLPs).

181. In contrast, we reverse the Initial Decision's exclusion of Enbridge from the proxy group. We recognize that Enbridge's 21.17% DCF return and its 14.2% short-term growth rate are nearly double the returns of the other entities in the proxy group and will

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[332] Depending upon the pipeline, Dr. Webb analyzed between 10 and 28 years of historical data for eight pipelines. The highest five-year CAGR reported by those entities throughout that period were (a) Sunoco (36.96%) and (b) Magellan (34.36%). Ex. HVW-0048 at 75. The remaining pipelines in Dr. Webb's sample produced five-year growth rates that were one-half to one-sixth the 62.90% short-term growth rate used in Sunoco's DCF analysis.

[333] As noted previously, this consists of (a) a short-term growth rate defined by the 62.90% IBES projected five-year growth rate (weighted two-thirds) and (b) the 2.18% long-term growth rate, which is one-half of GDP's projected growth. Ex. HVW-0048 at 75.

[334] Ex. HVW-0048 at 75; Ex. SPP-0039 at 42-43.

[335] Ex. HVW-0048 at 75.

[336] In calculating the growth rate, the short-term growth rate is given two-thirds weight and the long-term growth rate is given one-third weight. Following this methodology, halving the 4.36% GDP growth rate to 2.18% reduced Sunoco's DCF return from 53.32% to 51.14%. Ex. HVW-0048.

have an impact on the resulting ROE for SFPP.[337] Proxy groups are supposed to help establish the appropriate risk and authorized ROE for a company; proxies are not picked because they will result in some predetermined ROE that the Commission finds "reasonable." We conclude that under the specific facts of this proceeding, including Enbridge is necessary to form a proxy group of minimally sufficient size.[338] In light of the limited number of potential proxy group companies in the record, we conclude that on balance, Enbridge presents the most viable fourth proxy group member. Unlike KMI, whose natural gas pipeline business outweighs its oil pipeline business, Enbridge is primarily an oil pipeline company, with 72% of its total assets consisting of oil pipelines.[339] As a result, Enbridge is more likely to be representative of SFPP's investment risks.

182. Furthermore, the data demonstrates that including Enbridge in the proxy group has a limited effect upon SFPP's DCF return in this proceeding[340] and its inclusion in the proxy group does not distort SFPP's DCF ROE.

183. In sum, given the limited number of viable proxy group members in the record, and applying the Commission's case-by-case approach to excluding outliers in pipeline proceedings,[341] we conclude that it is appropriate under the specific facts of this proceeding to include Enbridge in order to form a proxy group of at least four members.

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[337] Ex. HVW-0048 at 75.

[338] As discussed above, Commission policy requires using a proxy group of at least four members. Proxy Group Policy Statement, 123 FERC ¶ 61,048 at P 16; Opinion No. 511, 134 FERC ¶ 61,121 at P 203.

[339] Ex. HVW-0089 at 3.

[340] For instance, using Complainants' proposed proxy group of KMI, Enterprise, Buckeye, and Magellan yields a median DCF return of 10.20% based upon September 2016 period data. Adding Enbridge to this proxy group and removing KMI increases the median DCF return by only 34 basis points, to 10.54%.

[341] ROE Policy Statement, 171 FERC ¶ 61,155 at P 87.

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c. Broader Argument of Proxy Group Bias

184. SFPP argues that the proxy groups adopted by the Initial Decision and advocated by Complainants and Trial Staff create a significant downward bias.[342] To support this position, SFPP cites an exhibit comparing entities included in Trial Staff's proposed proxy group (which was adopted by the Initial Decision) to a more expansive group of 18 pipelines. SFPP also compares its proposed proxy group to the same 18 pipelines.[343] SFPP claims that the downward bias in the Initial Decision's proxy group results from the exclusion of outliers such as Enbridge and Sunoco.[344] First, SFPP claims that as Trial Staff or Complainants eliminated entities from the proxy group the overall ROE tended to decline.[345] Second, SFPP ranked all entities in its larger group of 18 pipelines from one (the highest return) to 18 (the lowest return). SFPP states that, depending upon the time period used, the members of its proxy group have an average rank roughly between 9 and 12.8 in this larger group of 18 pipelines whereas Trial Staff's proxy group members (which were adopted by the Initial Decision) produced an average rank between 13.25 and 16 among the 18 pipelines.[346] Thus, SFPP argues that its proposed proxy group is closer to the median whereas Trial Staff's proxy group is weighted toward those pipelines with lower returns. Opposing Complainants' brief on exceptions, SFPP reiterates similar arguments regarding Complainants' preferred proxy group.[347]

185. Our analysis of the proxy group does not change as a result of these comparisons. This order has addressed two issues involving SFPP's proxy group: (1) the data period for determining the proxy group and (2) the entities to be included in the proxy group. Regarding the former, we follow longstanding Commission policy and adopt the most recent evidence in the record for determining the ROE. As explained above, the most recent data in the record is closest in time to the future periods in which these cost-of-service rates will be effective. The most recent data in the record is likely most representative of those future returns unless there is evidence of highly anomalous economic circumstances (such as the 2008-2009 financial crisis). This holds whether or

[342] SFPP Brief on Exceptions at 18, 31-34; SFPP Brief Opposing Exceptions at 15, 24-25.

[343] *Id.* at 31 (citing Ex. SPP-0092).

[344] *Id.* at 18.

[345] *Id.* at 31 (citing Ex. SPP-0089).

[346] *Id.* at 32 (citing Ex. SPP-0092).

[347] SFPP Brief Opposing Exceptions 24-25.

not the most recent data in the record results in a higher or lower DCF ROE than other data periods. The principle purpose of using the most recent data in the record is to incorporate the most recent market changes into the cost-of-service rates.

186. Likewise, SFPP's criticisms of the proxy group composition based upon Dr. Webb's comparisons are not persuasive. The above discussion addresses SFPP's claims regarding specific entities that SFPP believes should be included or excluded from the proxy group.[348] To the extent SFPP did not identify any other specific entities for inclusion in the proxy group on exceptions, SFPP has waived any argument that those additional entities should be considered.[349] Furthermore, we assign little weight to Dr. Webb's comparisons involving the 18 pipelines. Of the 18 pipelines SFPP identifies in its study, SFPP effectively concedes (by not arguing otherwise on exceptions) that 12 of 18 entities should be *excluded* from the proxy group used to determine SFPP's DCF ROE. Thus, SFPP has not demonstrated that these pipelines are relevant for evaluating whether SFPP's DCF ROE is too high or too low.

187. The nominal DCF ROE of 10.54% and real DCF ROE of 9.08% we adopt herein are based upon a proxy group that excludes anomalous data and includes balanced risk. Although the Commission prefers a five-member proxy group, the four-member proxy group adopted by this order satisfies the minimum standard.

B. SFPP's ROE Motion to Reopen

188. Following the Initial Decision, SFPP filed the ROE Motion to Reopen on December 12, 2018. In that Motion, SFPP requests that the Commission reopen the record and establish a limited paper hearing to consider, in addition to the DCF model addressed in the hearing, CAPM, an expected earnings analysis (Expected Earnings), and a risk premium model (Risk Premium) for purposes of determining the nominal ROE, as proposed in the Commission's October 16, 2018 briefing order in *Coakley v. Bangor Hydro-Electric Company*.[350]

189. As discussed below, we grant SFPP's ROE Motion to Reopen and establish a paper hearing to allow the parties to consider the new methodology that the Commission

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[348] To the extent SFPP's criticisms relate to reasoning included in Trial Staff's or Complainant's testimony but not adopted by this order, SFPP's arguments are irrelevant.

[349] 18 C.F.R. § 385.711 (2019).

[350] 165 FERC ¶ 61,030 (2018) (*Coakley* Briefing Order).

adopted in the ROE Policy Statement issued on May 21, 2020 after the record closed in this proceeding.

1. **ROE Motion to Reopen**

190. SFPP maintains that the Commission's proposal in the *Coakley* Briefing Order to depart from its longstanding practice of relying exclusively upon the DCF model to calculate ROE represents extraordinary circumstances. According to SFPP, the Commission's proposal of the *Coakley* Briefing Order methodology reflected the Commission's belief that the DCF model alone will not produce just and reasonable results.[351] SFPP argues that applying the CAPM, Risk Premium, and Expected Earnings models in this case would alter the Initial Decision's findings regarding SFPP's ROE and therefore "go to the very heart of the case."[352] SFPP further claims that the procedural posture of this case is at a similar stage as other proceedings with initial decisions pending before the Commission in which the Commission reopened the record to conduct a paper hearing to address the *Coakley* Briefing Order methodology.[353]

191. SFPP submits an analysis by Dr. Michael J. Webb applying the *Coakley* Briefing Order methodology to the proxy group and test period adopted in the Initial Decision.[354] As shown below, Dr. Webb calculates that the *Coakley* Briefing Order methodology would yield a 13.0% ROE for SFPP.[355]

Cost of Equity Results Additional Cost of Equity Models Market Data Through June 30, 2016				
Line	Model	Average	Median	Cost of Equity

[351] SFPP ROE Motion to Reopen at 9.

[352] *Id.* at 8 (quoting *San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs.*, 127 FERC ¶ 61,269, at P 26 (2009)) (citing *Millennium Pipeline Co. L.L.C.*, 141 FERC ¶ 61,198, at P 13 (2012); *Nev. Power Co.*, 103 FERC ¶ 61,353, at P 132 (2003)).

[353] *Id.* at 7-8 (citing *Ass'n of Bus. Advocating Tariff Equity v. Midcontinent Indep. Sys. Operator, Inc.*, 165 FERC ¶ 61,118, at PP 7, 20 (2018) (MISO Briefing Order); *ENE (Environment Ne.) v. Bangor Hydro-Elec. Co.*, 154 FERC ¶ 63,024 (2016)).

[354] *Id.* at 15 (citing Ex. A at P 15 (Affidavit of Dr. Michael J. Webb) (Webb Affidavit)).

[355] *Id.* at 16.

1	FERC Model DCF Oil Pipeline Proxy Group (Exhibit S-0025, OR16-06)	11.5%	10.6%	10.6%
2	CAPM	12.7%	12.6%	12.6%
3	Expected Earnings	19.9%	15.4%	15.4%
4	Risk Premium			13.6%
5	Average	14.7%	12.9%	13.0%

2. **Answers and Subsequent Pleadings**

192. On December 27, 2018, Complainants and Trial Staff filed answers to the ROE Motion to Reopen. On January 10, 2019, SFPP filed an answer to Complainants' and Trial Staff's answers. On January 18, 2019, Complainants filed a Motion to Supplement Answer and Supplement to their December 27, 2018 answer (Motion to Supplement). On January 25, 2019, Trial Staff filed an answer to the Motion to Supplement. On February 12, 2019, SFPP filed an answer to the Motion to Supplement and Trial Staff's January 25, 2019 answer.

193. Rule 213 of the Commission's Rules of Practice and Procedure[356] prohibits answers to answers unless otherwise ordered by the decisional authority. We are not persuaded to accept the answers to answers related to the ROE Motion to Reopen, and will, therefore, reject them.[357]

194. Complainants state that the ROE Motion to Reopen is unjustified. First, Complainants assert that all of the participants in this case used the DCF model to calculate SFPP's ROE, and SFPP should not be allowed to change its litigation strategy

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[356] 18 C.F.R. § 385.213(a)(2) (2019).

[357] On January 18, 2019, Complainants filed a motion to supplement their December 27, 2018 answer with a discussion of the Order on Motion for Disclosure, which the Commission issued in the *Coakley* proceeding on January 7, 2019. *Coakley v. Bangor Hydro-Elec. Co.*, 166 FERC ¶ 61,013 (2019). Complainants argue that the Order on Motion for Disclosure clarified that the Commission was only considering whether to adopt the *Coakley* Briefing Order methodology and thus refutes SFPP's claim that the Commission had rejected the use of the DCF alone for calculating ROE. Motion to Supplement at 4-6. Trial Staff and SFPP filed answers supporting and opposing the Motion to Supplement, respectively. In light of the Commission's determinations in Opinion Nos. 569 and 569-A and the ROE Policy Statement, we find that Complainants' Motion to Supplement is now moot.

at this stage in the proceeding.[358] Complainants state that, in contrast to this proceeding, in *Coakley*, experts had testified that it would be more appropriate in that case to consider multiple ROE methodologies rather than rely exclusively on the DCF model. Complainants state that no such testimony was submitted in the instant proceeding.[359]

195. Second, Complainants argue that the Commission's ruling in this case has been pending for too long to justify reopening the record and subjecting all participants to further delay.[360]

196. Third, Complainants claim that the ROE methodology applied by Dr. Webb differs substantially from the *Coakley* Briefing Order methodology.[361] For example, Complainants argue that in calculating the CAPM market risk premium, Dr. Webb inappropriately combines a five-year historical annualized S&P 500 return with a 2016 forecast of 30-year Treasury bond yields in 2020. According to Complainants, the *Coakley* Briefing Order did not endorse combining a short and recent sample of realized market returns with a forecasted risk-free rate.[362]

197. Trial Staff states that reopening the record would transgress norms of administrative finality.[363] However, Trial Staff states that it recognizes that reopening the record under these circumstances is at the Commission's discretion.[364] If the Commission grants the ROE Motion to Reopen, Trial Staff requests that the Commission define the scope of the reopened proceeding to include the same time period for determining ROE as exists in the certified record.[365]

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[358] Complainants December 27, 2018 Answer at 3.

[359] *Id.* at 4.

[360] *Id.*

[361] *Id.* at 7.

[362] *Id.* at 8.

[363] Trial Staff December 27, 2018 Answer at 4-5.

[364] *Id.* at 1, 5.

[365] *Id.* at 5.

3. ROE Policy Statement

198. After SFPP filed its ROE Motion to Reopen, the Commission issued the ROE Policy Statement on May 21, 2020 adopting a revised methodology for determining interstate natural gas and oil pipeline ROEs.[366] This revised methodology determines ROE by averaging the results of DCF and CAPM analyses, according equal weight to both models.[367]

199. Investors use CAPM analysis as a measure of the cost of equity relative to risk.[368] 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."[369] In the ROE Policy Statement, the Commission adopted, as the risk-free rate, the 30-year U.S. Treasury average historical bond yield over a six-month period corresponding as closely as possible to the six-month financial study period used to produce the DCF study in the applicable proceeding. The Commission further explained that it would 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, excluding S&P 500 companies with growth rates that are negative or in excess of 20%.[370]

200. The Commission excluded from its revised methodology the Expected Earnings and Risk Premium models discussed in the *Coakley* Briefing Order and in Opinion Nos. 569 and 569-A. The Commission found that relying on the Expected Earnings model to determine pipeline ROEs would not satisfy the Commission's obligations under *Hope* because it measures the pipeline's return on book value, rather than the estimated return that investors would require to purchase stock in the pipeline at the pipeline's current

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[366] ROE Policy Statement, 171 FERC ¶ 61,155.

[367] *Id.* P 2.

[368] *Id.* P 8 (citing *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 (2020)).

[369] Betas measure the volatility of a particular stock relative to the market and are published by several commercial sources. *Id.* (citing *Inquiry Regarding the Commission's Policy for Determining Return on Equity*, 166 FERC ¶ 61,207, at P 14 (2019)).

[370] ROE Policy Statement, 171 FERC ¶ 61,155 at P 39.

market price.[371] Moreover, the Commission concluded that there was insufficient data to apply the Risk Premium model to natural gas and oil pipelines.[372] The Commission explained that the Risk Premium model relies upon stated ROEs approved in past Commission orders, such as orders on settlements, but natural gas and oil pipeline cost-of-service rate proceedings frequently result in "black box" settlements that typically do not enumerate a stated ROE.[373]

4. Commission Determination

201. We find that good cause exists to reopen the record in this proceeding to apply the revised ROE methodology established in the ROE Policy Statement and therefore grant SFPP's ROE Motion to Reopen. In light of the Commission's determinations in the ROE Policy Statement, we will establish a limited paper hearing to allow the participants to consider the Commission's revised ROE methodology and address how it should be applied to the record in this proceeding.

a. Good Cause Exists to Reopen the Record

202. As discussed above, under Rule 716 of the Commission's Rules of Practice and Procedure, the Commission may reopen the evidentiary record for good cause if "the Commission . . . has reason to believe that reopening of a proceeding is warranted by any changes in conditions of fact or of law or by the public interest."[374] The Commission views good cause as consisting of an extraordinary change in circumstances that is not merely material but rises to the level of a change in core circumstances that go to the very heart of the case.[375] Reopening the record is a matter of agency discretion[376] and the Commission's decisions whether to reopen the record are reviewed for abuse of

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[371] *Id.* PP 76-78.

[372] *Id.* PP 70-71.

[373] *Id.* P 70.

[374] 18 C.F.R. § 385.716(a), (c) (2019).

[375] *E.g.*, *Midcontinent Indep. Sys. Operator, Inc.*, 161 FERC ¶ 61,137, at P 51 (2017) (citing *Cal. Indep. Sys. Operator Corp.*, 121 FERC ¶ 61,193, at P 14 (2007)); *Interstate Power & Light Co. v. ITC Midwest, LLC*, 135 FERC ¶ 61,162, at P 23 (2011).

[376] *Cities of Campbell v. FERC*, 770 F.2d 1180, 1191 (D.C. Cir. 1985) (citing *City of Wausau v. United States*, 703 F.2d 1042, 1044 (7th Cir. 1983)).

discretion.[377] When the Commission changes its policy, the Commission may apply the new policy in an ongoing adjudication so long as it gives the parties notice and an opportunity to offer evidence bearing on the new standard.[378]

203. We find that good cause exists under Rule 716 to reopen the record to allow the participants to consider the Commission's revised ROE methodology. Specifically, we conclude that the adoption of this revised methodology represents extraordinary circumstances bearing upon a core issue in the instant proceeding.[379] The issue of SFPP's ROE lies at the heart of this cost-of-service rate proceeding and was strenuously litigated at hearing and was the subject of considerable analysis in the Initial Decision.[380]

204. Furthermore, the ROE Policy Statement marks a significant evolution in the Commission's policy and departs from the Commission's traditional practice of relying exclusively upon the DCF model to determine ROE. The participants and the Presiding Judge, relying upon the Commission's prior longstanding practice, applied only the DCF model in determining SFPP's ROE in this proceeding. Since the close of the record, however, the Commission has expressed concerns that "relying on the DCF methodology

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[377] *Cooley v. FERC*, 843 F.2d 1464, 1473 (D.C. Cir. 1988) (quoting *E. Carolinas Broad. Co. v. FCC*, 762 F.2d 95, 103 (D.C. Cir. 1985)).

[378] *Consol. Edison Co. of N.Y., Inc. v. FERC*, 315 F.3d 316, 323 (D.C. Cir. 2003) ("A new rule may be applied retroactively to the parties in an ongoing adjudication, so long as the parties before the agency are given notice and an opportunity to offer evidence bearing on the new standard." (citing *Hatch v. FERC*, 654 F.2d 825, 835 (D.C. Cir. 1981)); *see also Town of Norwood, Mass. v. FERC*, 80 F.3d 526, 535 (D.C. Cir. 1996) (citing *Union Elec. Co. v. FERC*, 890 F.2d 1193, 1201-04 (D.C. Cir. 1989) (holding that when "the Commission takes account of changes that occur between the ALJ's decision and the Commission's review of that decision . . . the Commission may not depart from the zone of reasonableness on the basis of the change without giving parties an opportunity to reopen the record.").

[379] In light of the determinations in Opinion Nos. 569 and 569-A and the ROE Policy Statement, we reject as moot Complainants' and Trial Staff's contentions that the ROE Motion to Reopen should be denied because the Commission has not reached a final determination on whether using the DCF alone was sufficient to produce a just and reasonable ROE. *See* Motion to Supplement at 4-6; Trial Staff January 25, 2019 Answer at 3-4.

[380] Initial Decision, 160 FERC ¶ 63,006 at PP 252-443 (discussing participants' arguments and Presiding Judge's conclusions regarding SFPP's ROE).

alone will not produce a just and reasonable ROE"[381] because "the DCF methodology alone no longer captures how investors view utility returns because investors do not rely on the DCF alone and the other methods used by investors do not necessarily produce the same results as the DCF."[382] The Commission subsequently determined in the ROE Policy Statement that "expanding the methodology we use to determine ROE for . . . oil pipelines to include the CAPM in addition to the DCF model will better reflect how investors in those industries measure cost of equity while tending to reduce the model risk associated with relying on the DCF model alone."[383] The Commission explained that this "should result in our ROE analyses producing cost-of-equity estimates for . . . oil pipelines that more accurately reflect what ROE a pipeline must offer in order to attract capital."[384]

205. Accordingly, in light of the significant evolution of the Commission's ROE policy since the close of the record and the centrality of base ROE issues to this proceeding, we find that good cause exists under Rule 716 to reopen the record to allow the participants to consider the Commission's revised ROE policy.[385]

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[381] *Coakley* Briefing Order, 165 FERC ¶ 61,030 at P 40; MISO Briefing Order, 165 FERC ¶ 61,118 at P 42; *see also* Opinion No. 531 147 FERC ¶ 61,234 at P 145 (explaining that because of unusual capital market conditions, the Commission had "less confidence" that the midpoint of the zone of reasonableness determined by the DCF analysis satisfied the *Hope* and *Bluefield* capital attraction standards); Opinion No. 551, 156 FERC ¶ 61,234 at P 119 (same).

[382] *Coakley* Briefing Order, 165 FERC ¶ 61,030 at PP 34-36.

[383] ROE Policy Statement, 171 FERC ¶ 61,155 at P 28.

[384] *Id.*

[385] Consistent with the discussion above, the circumstances underlying SFPP's ROE Motion to Reopen are distinguishable from those of the Right-of-Way Motion to Reopen, which we deny. Whereas the use of right-of-way expenses that SFPP actually paid UPRR during the test period leads to a reasonable representation of the right-of-way component of SFPP's cost of service, this is not the case for ROE. In light of the Commission's determination that relying upon the DCF alone will not produce a just and reasonable result, we find that the DCF ROEs adopted in this order are not a reasonable representation of SFPP's just and reasonable ROE. Along similar lines, unlike cost changes that inevitably occur after the close of the record, major changes to the Commission's longstanding ROE policy represent an extraordinary circumstance that warrants reopening of the record. Finally, whereas updating the portion of the UPRR right-of-way expenses attributable to the East Line represents a small portion of SFPP's

b. Paper Hearing

206. Consistent with the discussion above, we establish a limited paper hearing and direct the participants to submit briefs applying the revised ROE methodology described in the ROE Policy Statement to the facts of this proceeding. Because the instant order resolves (a) SFPP's just and reasonable nominal and real DCF ROEs, (b) the proper composition of the proxy group,[386] and (c) the proper data period for determining SFPP's ROE, these issues should not be relitigated in the paper hearing. Thus, the participants' briefs should present analyses of the CAPM model as adopted in the ROE Policy Statement based upon data from the September 2016 time period and using the proxy group of Buckeye, Magellan, Enterprise, and Enbridge. In accordance with the ROE Policy Statement, the participants should average the results of their CAPM analyses with the DCF ROEs adopted in this order, according equal weight to both models.

207. We acknowledge that the ROE Policy Statement set forth the policy the Commission intends to apply in future adjudications similar to the instant proceeding, but it did not establish a binding rule.[387] However, to the extent that a participant proposes to use the Expected Earnings or Risk Premium models, it must fully address the

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total cost of service, applying the Commission's revised ROE methodology to determine SFPP's ROE could have a significant impact on SFPP's rates.

[386] The Commission explained in the ROE Policy Statement that in light of continuing difficulties in forming pipeline proxy groups of sufficient size, the Commission would consider proposals to include Canadian entities that otherwise satisfy the Commission's proxy group eligibility criteria. ROE Policy Statement, 171 FERC ¶ 61,155 at P 66. However, the participants in the instant proceeding already litigated the potential inclusion of Canadian companies at hearing. In this order, we have considered and accepted a proposal by SFPP in this proceeding to include Enbridge, a Canadian entity, in the proxy group. Thus, it is unnecessary to reopen the record to allow additional litigation on the proper composition of the proxy group in light of the ROE Policy Statement.

[387] *Pac. Gas & Elec. Co. v. Fed. Power Comm'n*, 506 F.2d 33, 38 (D.C. Cir. 1974) ("A general statement of policy . . . announces the course which the agency intends to follow in future adjudications" but "does not establish a binding norm" and "is not finally determinative of the issues or rights to which it is addressed" (internal quotation marks and citation omitted)).

Commission's concerns with those models as discussed in the ROE Policy Statement[388] and other proceedings.[389]

208. Initial briefs shall be due 45 days from the date of this order. Responses to those initial briefs shall be due 21 days thereafter.[390]

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) SFPP's motion to reopen the record filed on December 12, 2018 is granted, as discussed in the body of this order.

(C) A paper hearing shall be held addressing the application of the Commission's revised ROE methodology to the record in this proceeding, as discussed in the body of this order. Briefs on this issue are due 45 days from the date of this order. Reply briefs are due 21 days thereafter.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

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[388] ROE Policy Statement, 171 FERC ¶ 61,155 at PP 71, 78.

[389] *See* Opinion No. 569-A, 171 FERC ¶ 61,154 at PP 126-131 (discussing concerns with the Expected Earnings model); Opinion No. 569, 169 FERC ¶ 61,129 at PP 201-227 (same).

[390] Once the Commission has addressed the issues raised in the paper hearing, we will address any revisions to SFPP's East Line Rate and any reparations, and will require SFPP to file a supporting cost of service, workpapers, explanatory statements, and any other necessary documentation consistent with the Commission's orders in this proceeding.

Document Content(s)

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