188 FERC ¶ 61,077
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Willie L. Phillips, Chairman;
Mark C. Christie, and David Rosner.

TransCanada Keystone Pipeline, LP	Docket Nos.	IS20-108-001
		IS21-133-000
Husky US Marketing LLC and Phillips 66 Company v. TransCanada Keystone Pipeline, LP		OR21-1-000
		(consolidated)

ORDER ON INITIAL DECISION

OPINION NO. 590

(Issued July 25, 2024)

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1. On February 16, 2023, the Presiding Administrative Law Judge (ALJ) issued an Initial Decision addressing protests and a complaint related to TransCanada Keystone Pipeline, LP's (Keystone) Variable Rate pursuant to the Transportation Service Agreements (TSA) between Keystone and certain committed shippers for crude oil transportation.[1]

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

I. Background

3. Keystone owns the U.S. portion of a crude oil pipeline system that originates in Hardisty, Alberta, Canada, and ends in the Gulf Coast (the Keystone System).[2] The U.S.

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[1] *TransCanada Keystone Pipeline, LP*, 182 FERC ¶ 63,013 (2023) (Initial Decision). Specifically, the Initial Decision addressed the (a) 2018, 2019, and 2020 Final Variable Rate, (b) 2021 Estimated Variable Rate, (c) 2018, 2019, and 2020 Final Variable Rate Notices, and (d) 2020 and 2021 Estimated Variable Rate Notices.

[2] Keystone is an indirect, wholly owned subsidiary of TC Energy Corporation (TC Energy). *Id.* PP 95, 527; Ex. KEY-0024 at 4:10-11 (Kuharski Direct). TC Energy has six overarching business units. One such business unit, Liquids Pipelines, includes the

portion of the Keystone System (Keystone U.S.) extends from the Canada-U.S. border near Haskett, Manitoba, to Steele City, Nebraska, where it diverges into two legs, one extending eastward to Wood River and Patoka, Illinois, and the other southward to Cushing, Oklahoma (the Base U.S. Segment). From Cushing, the pipeline continues southward to points in the Gulf Coast (Gulf Coast Segment). Keystone leases capacity on the Gulf Coast Segment to Marketlink, LLC (Marketlink), an affiliate.[3]

4. Keystone provides uncommitted and committed transportation service. Keystone provides committed transportation service pursuant to the Commission's committed rate policy for oil pipelines. Under that policy, oil pipelines may provide contractual committed service pursuant to the Interstate Commerce Act's (ICA) common-carriage and nondiscrimination requirements when the rates and terms are offered in a public open season where all interested shippers have an equal opportunity to obtain the committed service.[4] Carriers may generally offer up to 90% of overall pipeline capacity to

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U.S. and Canadian portions of the Keystone System as separate lines of business. Initial Decision, 182 FERC ¶ 63,013 at P 95; Ex. KEY-0024 at 3:18-4:6 (Kuharski Direct). That is to say, the U.S. and Canadian portions of the Keystone System "are held in distinct legal entities that are owned in whole or in part by TC Energy." Ex. KEY-0024 at 4:6-8 (Kuharski Direct). TransCanada Keystone Pipeline GP Ltd., a Keystone affiliate and general partner, owns and operates the Canadian portion of the Keystone System (Keystone Canada). Initial Decision, 182 FERC ¶ 63,013 at P 94; *see also* Ex. KEY-0024 at 2:22-3:3 (Kuharski Direct).

[3] Initial Decision, 182 FERC ¶ 63,013 at PP 94, 96; Ex. KEY-0001 at 8:8-14, 5:17-6:2 (Trout Direct) (explaining that Marketlink is "a wholly owned separately operated subsidiary of TransCanada Oil Pipelines Inc."). *See also Marketlink, LLC*, 144 FERC ¶ 61,086, at PP 12, 15 (2013) (granting petition for declaratory order finding that the Commission may approve the requested rate structure for Marketlink's proposed oil transportation service using pipeline capacity leased from Keystone as well as Marketlink-owned facilities); *Marketlink, LLC*, 169 FERC ¶ 61,194, at P 1 (2019) (granting application to charge market-based rates for crude oil transportation on its pipeline system from Cushing, Oklahoma to Houston, Texas and Port Arthur, Texas).

[4] *Sea-Land Serv., Inc v. ICC*, 738 F.2d 1311, 1317 (D.C. Cir. 1984) ("[C]ontract rates can . . . be accommodated to the principle of nondiscrimination by requiring a carrier offering such rates to make them available to any shipper willing and able to meet the contract's terms."); *Express Pipeline P'ship*, 77 FERC ¶ 61,188, at 61,756 (1996) ("The proposed term rate structure of Express does not violate the antidiscrimination or undue preference provisions of the [ICA] because such term rates were made available to all interested shippers."); *Enter. Crude Pipeline LLC*, 166 FERC ¶ 61,224, at P 11 (2019)

committed shippers who sign a TSA.[5] When the open season results in an arm's-length agreement, the Commission presumes the contractual committed service is just and reasonable and non-discriminatory.[6] Oil pipelines may choose to file a petition for declaratory order to obtain Commission approval for the committed rate structure.[7]

5. On October 8, 2008, the Commission granted a petition for declaratory order regarding Keystone's committed rate structure for the TSAs at issue in this proceeding.[8] The TSAs incorporate a two-part rate consisting of a Fixed Rate and a Variable Rate.[9] The Fixed Rate is the same over the life of the contract and allows Keystone to recover the "development, construction, and acquisition costs of the Pipeline System."[10] The

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("The vital element of the contracting arrangements . . . has been an open season that provided all shippers equal opportunity to avail themselves of the offered capacity.").

[5] *Enter. Crude*, 166 FERC ¶ 61,224 at P 11.

[6] *Tesoro High Plains Pipeline Co.*, 148 FERC ¶ 61,129, at P 23 (2014) ("The Commission honors the contract terms entered into by sophisticated parties that engage in an arms-length negotiation."); *Seaway Crude Pipeline Co.*, 146 FERC ¶ 61,151, at P 25 (2014) ("Absent a compelling reason, it would be improper to second guess the business and economic decisions made between sophisticated businesses when entering negotiated rate contracts."); *see also Oil Pipeline Affiliate Committed Serv.*, 181 FERC ¶ 61,206, at P 4 (2022) ("the presence of one or more nonaffiliated contracting shippers supports a presumption of reasonableness and nondiscrimination").

[7] *Express Pipeline P'ship*, 76 FERC ¶ 61,245, at 62,253 (1996) (affirming that "in order to provide definitive guidance for all interested parties, it would be appropriate to address the oil pipeline ratemaking issues raised by the petition . . . in a declaratory order proceeding"); *see also, e.g.*, *Enter. Crude*, 166 FERC ¶ 61,224 at P 8; *Kinder Morgan Pony Express Pipeline LLC*, 141 FERC ¶ 61,180, at P 21 (2012).

[8] *See TransCanada Keystone Pipeline, LP*, 125 FERC ¶ 61,025, at PP 18-22 (2008) (2008 Declaratory Order) (approving proposed rate principles for Keystone's committed shippers); Ex. JC-0003 (Keystone Petition for Declaratory Order, Docket No. OR08-9-000 (Mar. 28, 2008)) (2008 PDO).

[9] Initial Decision, 182 FERC ¶ 63,013 at P 100 (citing Ex. JC-0010 at 17-21; Ex. JC-0011 at 17-21; Ex. JC-0001 at 6:15-7:12 (Arthur Direct)).

[10] Ex. JC-0010 at 17-18; Ex. JC-0011 at 17-18; *see also* Ex. KEY-0040 at 9:17-10:9 (Jones Answering) (explaining that the Fixed Rate "was intended to provide both a return of capital and a return on capital for the initial development and construction of the pipeline"); Initial Decision, 182 FERC ¶ 63,013 at P 100. Despite its fixed nature, the TSAs provide that, within two years after service under the TSAs

Variable Rate is revised annually and allows recovery of Operating, Maintenance and Administration (OM&A) costs, which the TSAs define as "all operating, maintenance and administration costs and expenses incurred by or on behalf of Carrier in respect of the Pipeline System," including a non-exhaustive list of cost categories.[11] Keystone uses a true-up mechanism to balance any over- or under-payment resulting from a difference between the Estimated Variable Rate effective January 1 of each year and its actual costs and volumes for that calendar year.[12]

II. Procedural History

6. This consolidated proceeding arises from complaints and protested tariff filings regarding Keystone's Variable Rate under the TSAs. The protestors and complainants in this proceeding—Husky US Marketing LLC (Husky) and Phillips 66 Company (Phillips 66) (together, Joint Customers)[13]—are committed shippers that contracted to take service on the Keystone System. Joint Customers entered long-term agreements for firm transportation service on Keystone U.S. in one or more open seasons offered by Keystone for service beginning in 2005.[14] The current TSAs between Husky and Keystone and Phillips 66 and Keystone were entered into on July 24, 2009, and are identical in all material respects.[15]

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begins, the Fixed Rate will be adjusted to reflect any difference between estimated and actual project costs (the Capital Variance). Ex. JC-0010 at 9, 17-18; Ex. JC-0011 at 9, 17-18.

[11] Ex. JC-0010 at 19-20; Ex. JC-0011 at 19-20. The Variable Rate differs for light and heavy crude oil transportation as well as by destination. Ex. JC-0196 at 165 (Keystone FERC Tariff No. 6.59.0, effective Jan. 1, 2021); *see also* Ex. JC-0010 at 19 (providing that the Variable Rate for light crude oil is the Variable Rate for heavy crude oil "multiplied by 0.70"); Ex. JC-0011 at 19 (same).

[12] Ex. JC-0010 at 19-21; Ex. JC-0011 at 19-21; Ex. JC-0196 at 166; *see also* Initial Decision, 182 FERC ¶ 63,013 at P 102 (citing, *inter alia*, Ex. JC-0001 at 23:22-24 (Arthur Direct)).

[13] Although Husky and Phillips 66 use the term "Joint Complainants" in their briefs on exceptions and in their complaint, this order uses the term "Joint Customers" for consistency with the Initial Decision and to reflect that Husky and Phillips 66 are alternatively complainants and protestors in this consolidated proceeding.

[14] Initial Decision, 182 FERC ¶ 63,013 at P 98.

[15] *Id.*

7. Specifically, Joint Customers protested Keystone's annual changes to its Variable Rate to be effective for the calendar years 2020 (Docket No. IS20-108) and 2021 (Docket No. IS21-133). The Commission accepted and suspended the tariff filings for a nominal period subject to refund and hearing procedures.[16] Joint Customers also filed a complaint on October 9, 2020, against Keystone in Docket No. OR21-1-000 (the Complaint), challenging Keystone's increases to the Variable Rate and seeking reparations. The Commission consolidated these proceedings.[17]

8. From June 15 to July 22, 2022, the ALJ presided over a hearing that featured 19 witnesses and produced over 700 exhibits and thousands of pages of testimony.[18] Participants filed initial post-hearing briefs on September 12, 2022, and reply briefs on October 28, 2022.

9. On February 16, 2023, the ALJ rendered an Initial Decision. Joint Customers and Keystone filed briefs on exceptions on March 20, 2023, and Joint Customers, Keystone, and Trial Staff filed briefs opposing exceptions on April 10, 2023.[19]

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[16] *TransCanada Keystone, LP*, 169 FERC ¶ 61,254, at P 13 (2019) (2020 Tariff Hearing Order); *TransCanada Keystone Pipeline, LP*, 173 FERC ¶ 61,285, at P 20 (2020) (2020 Consolidation Order).

[17] 2020 Consolidation Order, 173 FERC ¶ 61,285 at P 20. On June 3, 2022, Coffeyville Resources Refining & Marketing, LLC (Coffeyville) withdrew its complaint and protests in this consolidated proceeding pursuant to an uncontested settlement with Keystone, approved by the Commission on August 10, 2022. These actions terminated Docket No. OR21-2-000 and resolved all issues between Coffeyville and Keystone in Docket No. IS20-108-001. *TransCanada Keystone Pipeline*, *LP*, 180 FERC ¶ 61,086, at PP 3-4 (2022).

[18] *See* Joint Index of Exhibits, *TransCanada Keystone Pipeline*, *LP*, Docket No. IS20-108-001. (filed Aug. 12, 2022); Revised Joint Witness List, *TransCanada Keystone Pipeline, LP*, Docket No. IS20-108-001, et al. (filed June 6, 2022).

[19] The Initial Decision granted Joint Customers' January 10, 2023 motion to lodge the December 14, 2022 Canadian Energy Regulator's (CER) Reasons for Decision in Docket No. RH-005-2020 regarding the parties' TSAs for service on Keystone Canada, noting that the CER's findings "carry little if any persuasive weight" in this proceeding. Initial Decision, 182 FERC ¶ 63,013 at P 112. We will take official notice of the CER's July 26, 2023 Letter Order on the Review and Variance Application of TransCanada Keystone Pipeline GP Ltd. in Docket No. RH-005-2020, which affirms its prior decision. 18 C.F.R. § 385.508(d) (2023); *Nev. Power Co. & Sierra Pac. Power Co.*, 99 FERC

III. Discussion

10. We affirm the Initial Decision in part and reverse the Initial Decision in part. As discussed below, we address the participants' exceptions regarding: (a) choice of law, (b) General Plant and Maintenance Costs (GPMC) and Non-Routine Adjustments (NRA), (c) drag reducing agent (DRA), (d) crude oil release incidents, (e) cost allocation with respect to corporate overhead costs and between Keystone and its affiliate lessee, Marketlink, and (f) appropriate remedies.[20]

A. Choice of Law

1. Initial Decision

11. Although the Initial Decision acknowledged that the TSAs' choice-of-law provision states that the TSAs shall be "construed and applied and be subject to" the laws of Canada,[21] the Initial Decision declined to apply Canadian law.[22] The Initial Decision also found that while "Commission precedent generally supports adhering to contract choice-of-law provisions," the litigants cited no precedent in which the Commission applied the laws of a foreign jurisdiction.[23]

¶ 61,047, at 61,193 (2002). Thus, Joint Customers' August 10, 2023 motion to lodge this Letter Order and Keystone's August 25, 2023 answer are moot.

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

[21] Initial Decision, 182 FERC ¶ 63,013 at P 167 (citing Ex. JC-0010 at 14 ("This Contract shall be construed and applied and be subject to the laws of the Province of Alberta, Canada, and the laws of Canada applicable therein, and shall be subject to the rules, regulations and orders of any regulatory or legislative authority having jurisdiction, including the FERC."); Ex. JC-0011 at 14 (same)).

[22] *Id.* P 172.

[23] *Id.* P 169.

2. Briefs on Exceptions

12. Joint Customers assert that the Initial Decision erred by failing to apply Canadian contract law as required by the TSAs' choice-of-law provision.[24] Additionally, Joint Customers state that the Initial Decision "has not identified any specific conflict between the ICA and Canadian law with respect to the contract interpretation principles at issue."[25]

3. Briefs Opposing Exceptions

13. Keystone states that it does not take a position on the enforcement of the TSAs' choice-of-law provision because the Initial Decision correctly found that the result is the same under U.S. and Canadian law.[26] Similarly, Trial Staff states that the Initial Decision's holdings did not result in reversible error because the Initial Decision held that its findings were in accordance with Canadian law and both standards of contract interpretation yield the same result.[27]

4. Commission Determination

14. As discussed below, we reverse the Initial Decision and find that Canadian law shall apply to construe the TSAs in this proceeding.

15. Each TSA provides that it "shall be construed and applied and be subject to the laws of the Province of Alberta, Canada, and the laws of Canada applicable therein, and shall be subject to the rules, regulations and orders of any regulatory or legislative authority having jurisdiction, including the FERC."[28] The Commission generally gives choice-of-law provisions effect, and the Commission interprets contract provisions from different jurisdictions depending upon the choice-of-law provision in a given contract.[29]

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[24] Joint Customers Br. on Exceptions at 41.

[25] *Id.* at 43.

[26] Keystone Br. Opposing Exceptions at 41-42.

[27] Trial Staff Br. Opposing Exceptions at 42-43, 54.

[28] Ex. JC-0010 at 14; Ex. JC-0011 at 14 (same).

[29] *See, e.g., Midwest Indep. Transmission Sys. Operator, Inc.*, 138 FERC ¶ 61,055, at P 21 n.38 (2012) ("In construing an agreement, the Commission must apply the choice of law selected by the parties"); *S. Cal. Edison Co. v. FERC*, 502 F.3d 176, 181 (D.C. Cir. 2007) (finding the Commission erred by not applying a contractual choice-of-law provision "without identifying any difference between federal and

Here, the record does not provide a persuasive basis for departing from the choice-of-law provision in the TSAs.

B. General Plant and Maintenance Costs and Non-Routine Adjustment Costs

16. GPMCs are costs for maintaining the Keystone System.[30] If a maintenance cost is non-routine and above $2,000,000 in total, it is no longer classified as a GPMC.[31] Instead, it is classified as an NRA cost and amortized over several years.[32] GPMCs and NRA costs may be capitalized or expensed.[33] Historically, Keystone has recovered in the Variable Rate both GPMCs and NRA costs and Keystone has also included in the Variable Rate a return on those sums.[34] In this proceeding, Joint Customers assert that

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California law to justify such selection under the first clause of the choice of law provision").

[30] Ex. KEY-0024 at 10:8-10 (Kuharski Direct) (stating that examples of GPMCs include "upgrades to the measurement ticketing system and cybersecurity improvements"); *see also* Ex. JC-0032 at 1 (stating that GPMC projects are listed in a document produced as KEY000017); Ex. JC-0039 at Tab "KEY000017 (GPMC 2018)" (listing, for example, vehicle purchases and materials for pump replacement).

[31] Ex. KEY-0060 at 18:13-19:3 (Wetmore Answering) (quoting Ex. KEY-0031 at 18-19 (Gough Direct)).

[32] Ex. JC-0010 at 20 (defining NRAs as "maintenance costs and expenses associated with any single expenditure or expenditures in respect of the same or a common matter or project exceed[ing] U.S. $2,000,000"); Ex. JC-0011 at 20 (same); *see also* Ex. KEY-0024 at 10:14-16 (Kuharski Direct).

[33] Although GPMCs and NRA costs may be capitalized or expensed by Keystone for accounting purposes, the record shows that GPMCs are recovered in the Variable Rate during the period in which the costs are incurred. *See* Ex. KEY-0030 (Capitalization Guidelines); Ex. KEY-0024 at 12:16-13:2 (Kuharski Direct) (explaining that "minor" GPMCs are expensed); Ex. KEY-0011 at 5-6 (listing "maintenance capital," "maintenance expense," and "NRAs" as separate categories), and 9-10 (discussing NRA costs that are capitalized or expensed); Ex. JC-0032 at 1 (providing a "list of non-amortized GPMC projects"); Ex. S-0139 at 3, 6; Ex. JC-0293 at 1; Ex. JC-0365 at 3.

[34] Ex. KEY-0024 at 10:7-18 (Kuharski Direct); Ex. KEY-0031 at 6:17-18, 15:12-17 (Gough Direct); *see also* Ex. KEY-0011 at 5-6 (including "maintenance capital," "maintenance expense," and "NRAs" in the OM&A total for Keystone U.S.); Ex. KEY-0034 at Tab "GPMC" and Tab "NRAs."

Keystone cannot recover capitalized GPMCs and NRA costs in the Variable Rate, that the TSAs preclude Keystone from earning a return on GPMCs and NRA costs, and that Keystone inappropriately amortizes capitalized NRA costs.[35]

17. As discussed below, we affirm the Initial Decision in part and hold that: (1) Keystone properly included capitalized GPMCs and NRA costs in the Variable Rate; (2) Keystone properly assessed a return on capitalized NRA costs but may not earn a return on non-capitalized NRA costs or any GPMCs; and (3) Keystone's amortization practices concerning capitalized NRA costs are inconsistent with the TSAs.

1. Capitalized GPMCs and NRA Costs Are Recoverable in the Variable Rate

a. Initial Decision

18. The Initial Decision held that capitalized GPMCs and NRA costs are properly included in the Variable Rate under the plain language of the applicable TSAs.[36] The Initial Decision rejected Joint Customers' argument that Keystone may recover only non-capitalized GPMCs and NRA costs through the Variable Rate.[37]

19. The Initial Decision reasoned that the TSAs allow for recoveries in the Variable Rate of OM&A costs, which include "*all* operating, maintenance and administration costs

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[35] *See* Joint Customers Br. on Exceptions at 29 & n.96, 48-50. The crux of Joint Customers' position is that GPMCs and NRA costs are "capital costs" recoverable via the Fixed Rate rather than "non-capital" costs recoverable via the Variable Rate. *Id.* at 38; Initial Decision, 182 FERC ¶ 63,013 at PP 318, 381.

[36] Initial Decision, 182 FERC ¶ 63,013 at P 340; *see also id.* P 356 (concluding that "the reasonable interpretation of the plain language of the TSAs is that the capital costs associated with ongoing operations and maintenance of the pipeline are recoverable in the" Variable Rate); Errata to Initial Decision, *TransCanada Keystone Pipeline, LP*, Docket No. IS20-108-001, at 2 (issued Mar. 8, 2023) (Errata to Initial Decision) (clarifying that the last sentence in Paragraph 356 should state "Variable Rate" instead of "Fixed Rate"). *See also* Initial Decision, 182 FERC ¶ 63,013 at P 391 ("The costs and expenses related to NRAs were properly included in the Variable Rate under the applicable TSAs. The analysis regarding the inclusion of GPMCs and expenses discussed above in several respects equally applies to NRAs.").

[37] Initial Decision, 182 FERC ¶ 63,013 at P 340; *see also id.* P 394 (rejecting Joint Customers' claim that the costs and expenses related to all but one NRA from 2018 to 2021 were capitalized costs ineligible for recovery in the Variable Rate).

and expenses incurred by or on behalf of [Keystone] for the Keystone System . . . ."[38] The Initial Decision explained that because capitalized GPMCs are maintenance costs, they are included within the OM&A costs recoverable in the Variable Rate.[39] The Initial Decision found that, because the TSAs refer to NRA costs as "maintenance costs and expenses," capitalized NRA costs must also be included in the definition of OM&A costs.[40] With regard to GPMCs and NRA costs, the Initial Decision emphasized that "the TSAs do not distinguish between capital and noncapital costs."[41] Further, the Initial Decision noted that costs recoverable via the Variable Rate include "expenditures that are 'reasonably expected to include capital investment,' such as 'repairs' or 'costs attributable to changes in laws or regulations.'"[42] The Initial Decision also found it persuasive that "capital costs associated with maintaining and operating the pipeline after construction was completed could not have been forecasted or estimated at the time of contracting."[43]

20. The Initial Decision found that Joint Customers' arguments based on ratemaking principles "cannot override the express terms of the applicable TSAs regarding the unambiguous definition of OM&A."[44] Similarly, the Initial Decision concluded that the express language of the TSAs overrode Joint Customers' reliance upon Keystone's 2008 PDO and the Commission's ensuing 2008 Declaratory Order.[45] The Initial Decision also found that the open season documents related to the TSAs undermined Joint Customers'

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[38] *Id.* P 352 (emphasis in original).

[39] *Id.* PP 352, 356; *see also* Errata to Initial Decision at 2 (clarifying that the last sentence in Paragraph 356 should state "Variable Rate" instead of "Fixed Rate").

[40] *Id.* P 395.

[41] *Id.* P 353 (GPMC); *see also id.* P 394 (noting "there is no exclusion for capital NRAs" and that all participants acknowledge that section D(3) of Appendix B of the TSAs describes NRA costs and does not distinguish between capitalized and non-capitalized costs).

[42] *Id.* P 353 (quoting Trial Staff Initial Br. 37 nn.140-141); *see also id.* P 395 (making the same point regarding NRA costs).

[43] *Id.* P 355; *see also id.* P 396 (making the same point regarding NRA costs).

[44] *Id.* P 354; *see also id.* P 398 (noting that, although NRAs are "designed to prevent rate shock, this does not exclude NRAs from the provisions of the TSAs which defines OM&A costs and expenses").

[45] *Id.* P 351.

assertions because they included language regarding flowing capitalized maintenance costs through the Variable Rate.[46]

b. Briefs on Exceptions

21. Joint Customers claim that the Initial Decision erred by permitting Keystone to recover capitalized costs classified as GPMCs and NRA costs through the Variable Rate.[47] First, they argue that this interpretation of the TSAs contradicts Keystone's and the Commission's statements related to the 2008 Declaratory Order that the Variable Rate recovers only "non-capital" costs.[48]

22. In addition, Joint Customers assert that the Initial Decision's finding ignored longstanding Commission precedent. Specifically, they argue that Commission precedent provides that capitalized costs are separate from Operating and Maintenance (O&M) costs, which Joint Customers analogize to the OM&A costs in the TSAs.[49] Joint Customers also argue that the term "pipeline repairs" in the list of eligible OM&A costs in the TSAs includes only repairs that are expensed, and does not mean that capitalized pipeline repair costs are within the definition of OM&A costs.[50] They assert that this distinction is in both Keystone's Capitalization Guidelines and the Uniform System of Accounts.[51]

23. Finally, Joint Customers assert that, if Keystone is permitted to collect capitalized GPMCs and NRA costs, "it should be required to make a compliance filing identifying

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[46] *Id.* PP 346-349.

[47] Joint Customers Br. on Exceptions at 29 & n.96, 30.

[48] *Id.* at 30-34; *see also id.* at 36 (citing 2008 Declaratory Order, 125 FERC ¶ 61,025), 37 (claiming that even though they did not participate in the 2007 open season, "each iteration of the TSA . . . has 'the same variable rate provisions or substantially similar'" (quoting Tr. 634:25-635:5 (Trout))).

[49] *Id.* at 38-39 (citing *Five-Year Rev. of Oil Pipeline Pricing Index*, 133 FERC ¶ 61,228, at P 94 (2010); *Revisions to Oil Pipeline Regulations Pursuant to the Energy Pol'y Act of 1992*, Order No. 561 ¶ 30,985, at 30,952 (1993) (cross-referenced at 65 FERC ¶ 61,109)).

[50] *Id.* at 45-46.

[51] *Id.* at 45.

those specific costs so the Commission can consider whether they qualify for inclusion in the Variable Rate."[52]

24. Keystone states that the Initial Decision erred only in its finding that Joint Customers' course of performance, in failing to object to the inclusion of certain categories of costs in the Variable Rate such as GPMCs and NRA costs, does not suggest they are includable.[53]

c. **Briefs Opposing Exceptions**

25. Opposing Joint Customers' exceptions, Keystone and Trial Staff support the Initial Decision's determination that the Variable Rate includes capitalized costs that are required for the maintenance of the Keystone System per the TSAs' plain language.[54] Keystone and Trial Staff agree with the Initial Decision that the category of "pipeline repairs" in the definition of OM&A supports including capitalized costs in the Variable Rate.[55] Likewise, Keystone argues that the TSAs expressly include NRA costs in the Variable Rate, and there is no term in the contracts that excludes capitalized NRA costs.[56]

26. Moreover, Keystone and Trial Staff assert that including certain capitalized costs in the Variable Rate is consistent with the broad definition of OM&A costs in the TSAs and, therefore, does not contradict Commission precedent finding that capitalized costs are separate from O&M costs.[57] Trial Staff asserts that the Initial Decision addressed and properly rejected Joint Customers' arguments regarding Keystone's capitalization policies for pipeline repairs and the Commission's accounting rules in favor of an interpretation based on the TSAs' plain language.[58] Furthermore, Keystone states that the Initial Decision correctly found that the Fixed Rate was not intended to recover ongoing

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[52] *Id.* at 37 n.128.

[53] Keystone Br. on Exceptions at 32, 34 (listing "DRA, NRAs, and GPMC").

[54] Trial Staff Br. Opposing Exceptions at 27-30; Keystone Br. Opposing Exceptions at 27.

[55] Trial Staff Br. Opposing Exceptions at 54; Keystone Br. Opposing Exceptions at 27-28 (quoting Ex. KEY-0004 at 19; Ex. KEY-0005 at 19).

[56] Keystone Br. Opposing Exceptions at 29.

[57] *Id.* at 31; Trial Staff Br. Opposing Exceptions at 40-42.

[58] Trial Staff Br. Opposing Exceptions at 54-56.

or future capitalized costs based on the TSAs' text and surrounding circumstances,[59] including course of performance.[60]

27. Further responding to Joint Customers, Keystone asserts that Joint Customers' argument for excluding capitalized NRA costs is illogical as Keystone consults annually with shippers, including Joint Customers, to discuss which NRA costs will be included in the Variable Rate.[61] Trial Staff states that Dr. Arthur admitted that pipeline repairs are generally capitalized, and, as a practical matter, the OM&A categories include costs that are typically capitalized per Keystone's accounting guidelines.[62] Trial Staff also argues that Joint Customers undermine their position as they have knowingly paid a Variable Rate that includes capitalized costs since at least 2016.[63]

28. In addition, Keystone and Trial Staff challenge Joint Customers' reliance upon the 2008 PDO and the Commission's statements in the 2008 Declaratory Order.[64] Keystone argues that Joint Customers knew before the 2008 PDO that capitalized costs would be included in the Variable Rate,[65] that Keystone's open seasons were transparent, and that the Initial Decision fully enforces the Commission's contract rate policy.[66] Trial Staff notes that the Commission "has rejected attempts to interpret contracts or tariffs in a way that is inconsistent with their plain language based on descriptions contained in filings or affidavits."[67]

29. Finally, Keystone argues that the Commission should reject Joint Customers' request that Keystone make a compliance filing identifying the specific capitalized

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[59] Keystone Br. Opposing Exceptions at 36-40.

[60] *Id.* at 39.

[61] *Id.* at 29-30, 40 (citing Ex. KEY-0040 at 11:13-18 (Jones Answering)).

[62] Trial Staff Br. Opposing Exceptions at 42.

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

[64] Keystone Br. Opposing Exceptions at 32; *see also id.* at 14.

[65] *Id.* at 34 (citing Ex. S-0030 at 9).

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

[67] Trial Staff Br. Opposing Exceptions at 36 (citing cases); *see also id.* at 34 ("The Commission's reliance on these statements and documents to interpret the TSAs may bring about an interpretation that is inconsistent with the TSAs' plain language.").

maintenance costs that it intends to collect through the Variable Rate, as this request is untimely raised, not based in the ICA, and duplicative of shippers' rights to audit Keystone's books and to protest annual rate updates.[68]

30. Joint Customers oppose Keystone's exception and assert that the Initial Decision correctly found that course of performance is irrelevant to determining which cost categories are includable in the Variable Rate.[69] Joint Customers argue that the non-waiver provision in the TSAs forecloses such an argument.[70] Joint Customers further argue that course of performance cannot resolve ambiguity in the TSAs because Commission precedent provides that shippers may challenge rates at any time.[71] In addition, Joint Customers assert that they did not understand the details of Keystone's Variable Rate calculation methodology before initiating this proceeding.[72]

d. <u>Commission Determination</u>

31. We affirm the Initial Decision's holding that pursuant to the TSAs, capitalized GPMCs and NRA costs are recoverable in the Variable Rate.[73] GPMCs are

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[68] Keystone Br. Opposing Exceptions at 37-38.

[69] Joint Customers Br. Opposing Exceptions at 20.

[70] *Id.* at 21-22 (citing Ex. JC-0010 at 14; Ex. JC-0011 at 14 (TSA section 11.7, providing that "[t]he failure by any Party to insist on the strict performance of any of the provisions of this Contract or to take advantage of any of the rights hereunder, shall not be construed as a waiver of any such provisions or relinquishment of any such rights")).

[71] *Id.* at 22-23 (citing *S. Mont. Elec. Generation & Transmission Coop., Inc.*, 133 FERC ¶ 61,163, at P 66 (2010) ("business practice cannot override tariff requirements")), and 25-27.

[72] *Id.* at 23-25; *see also id.* at 24 (explaining that before Joint Customers' protest on the 2020 tariff filing, "Keystone did not inform shippers of major details concerning how it was administering the Variable Rate," including regarding "the cost categories at issue").

[73] Joint Customers argue that GPMCs and NRA costs are "capital costs" recoverable via the Fixed Rate rather than "non-capital" costs recoverable via the Variable Rate. Initial Decision, 182 FERC ¶ 63,013 at PP 318, 381. Despite using this terminology, we understand Joint Customers to argue that "capitalized" costs are not recoverable in the Variable Rate. To the extent their position can be construed more broadly to be that both capitalized and non-capitalized GPMCs and NRA costs are excluded from the Variable Rate, that is contrary to the TSAs. The TSAs expressly provide that NRA "costs and expenses" are recoverable in the Variable Rate, and NRA

"maintenance costs," and thus encompassed within the OM&A costs recovered by the Variable Rate.[74] The TSAs do not distinguish between capitalized and non-capitalized GPMCs. Rather, the TSAs allow recovery of "all" maintenance costs. Likewise, the TSAs expressly provide that NRA costs are recovered in the Variable Rate.[75] The TSAs do not include any language differentiating between capitalized and non-capitalized NRA costs or excluding capitalized NRA costs from the Variable Rate.

32. Other provisions in the TSAs support finding that the Variable Rate may recover capitalized GPMCs and NRA costs. For example, the definition of OM&A costs recoverable by the Variable Rate is followed by a list of costs and expenses that are likely to require capitalization, such as "pipeline inspection and pipeline repairs," and includes "all other costs and expenses similar in nature to any of the foregoing."[76] The recovery by the Variable Rate of specific capitalized costs supports allowing recovery via the Variable Rate of other capitalized costs classified as GPMCs and NRA costs.

33. Moreover, the Variable Rate provides the only means in the TSAs for recovering the capitalized GPMCs and NRA costs. The TSAs do not include capitalized pipeline maintenance costs in the Fixed Rate. The TSAs provide that the Fixed Rate includes "Final Project Costs," defined as related to "the actual development, construction and acquisition costs of the Pipeline System,"[77] and must be finalized no later than two years

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costs are merely GPMCs that exceed a cost threshold. Ex. JC-0010 at 20; Ex. JC-0011 at 20; Ex. KEY-0060 at 18:13-19:3 (Wetmore Answering). Indeed, Joint Customers concede that the Variable Rate may recover an NRA cost that Keystone records as expense, which Joint Customers call a "non-capital" NRA. Joint Customers Initial Post-hearing Br. at 57 & n.264; Ex. JC-0179 at 86, Fig. 3 n.6 (Arthur Rebuttal); Ex. JC-0099 at Tab "OPEX;" *see also* Initial Decision, 182 FERC ¶ 63,013 at P 413; Joint Customers Br. on Exceptions at 50-51.

[74] The TSAs state that OM&A costs "shall include *all* operating, maintenance and administration costs and expenses incurred by or on behalf of Carrier in respect of the Pipeline System." Ex. JC-0010 at 19 (emphasis added); Ex. JC-0011 at 19.

[75] In fact, the TSAs categorically require Keystone to notify shippers "of *any* NRA" and consult with shippers "as to a reasonable allocation of such NRA" into the Variable Rate. Ex. JC-0010 at 20 (emphasis added); Ex. JC0011 at 20.

[76] Ex. JC-0010 at 19-20; Ex. JC-0011 at 19-20.

[77] Ex. JC-0010 at 11, 17-18; Ex. JC-0011 at 11, 17-18. We understand this language to mean that the Fixed Rate does not include capitalized investments made after the pipeline became operational.

following the commencement of transportation service.[78] Maintenance costs are different and are incurred after "development, construction and acquisition" of the pipeline system and continue to be incurred more than two years following the commencement of transportation service.[79] It is reasonable to expect that Keystone would make capital investments in its pipeline system after it becomes operational, and the Variable Rate provides the only vehicle in the TSAs for Keystone to recover such costs.

34. Contrary to Joint Customers' arguments, ratemaking principles do not support construing the TSAs to exclude capitalized GPMCs and NRA costs.[80] Keystone and Joint Customers agreed to a negotiated rate in the TSAs that departs from the default cost-of-service rate structure. As explained above, GPMCs and NRA costs are part of "OM&A" as specifically defined in the TSAs. The term OM&A as defined by the TSAs does not equate to the term "O&M" used in the Commission's cost-of-service ratemaking regulations.[81] In addition, the fact that Keystone expenses certain pipeline repair costs and capitalizes others does not justify excluding capitalized pipeline repair costs from OM&A costs.[82] Rather, as discussed above, the TSAs do not distinguish between

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[78] The TSAs provide that, within two years after service under the TSAs begins, the Fixed Rate will be adjusted to reflect any difference between estimated and actual project costs. *Supra* note 10. *See also* Ex. JC-0010 at 9, 18 (defining, in Section 5.3, "Commencement Date" as "the date on which transportation service under this Contract is to commence" and requiring, in Part B of Appendix B, that Keystone determine Final Project Costs within two years of the Commencement Date); Ex. JC-0011 at 9, 18 (same). The first phase of the Keystone System entered service in 2010. Ex. KEY-0001 at 5:1-8 (Trout Direct).

[79] Initial Decision, 182 FERC ¶ 63,013 at P 355; *see also id.* P 396.

[80] Joint Customers Br. on Exceptions at 38-39, 45-46.

[81] *Cf.* 18 C.F.R. § 346.2(c)(2) (2023). Similarly, Joint Customers place undue reliance on the Commission's methodology for determining the index level. *See* Joint Customers Br. on Exceptions at 38-39. The TSAs include their own methodology for recovering costs that departs from the Commission's accounting and ratemaking policies used to determine the index level.

[82] *See* Joint Customers Br. on Exceptions at 45-46; Ex. KEY-0030 at 1 (2019 Keystone Capitalization Guidelines providing that "Pipe Replacement" and "Pipe recoating" replacements and upgrades are capitalized if greater than 12 meters in length); 18 C.F.R. Part 352 § 3-6 (2023) ("Replacements").

capitalized or expensed pipeline repair costs, but simply provide that "all" are included in the definition of OM&A.[83]

35. Moreover, even if the Commission were to find the TSAs ambiguous and consider additional extrinsic evidence, the record would still support recovery in the Variable Rate of capitalized GPMCs and NRA costs. Course of performance supports permitting the recovery of capitalized GPMCs and NRA costs via the Variable Rate. Joint Customers previously paid the Variable Rate without objecting to the inclusion of capitalized costs.[84] Furthermore, the open season documents related to the TSAs state that the Variable Rate "is a flow through of actual operating costs" and that "[f]lowing through operating, administration and maintenance *capital* and expense costs will also provide cost transparency."[85] Finally, we are not persuaded by Joint Customers witness Dr. Arthur's testimony providing a contrary interpretation of the parties' intentions.[86] Whereas Dr. Arthur did not speak with anyone involved in the negotiations, Keystone witness

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[83] Ex. JC-0010 at 19; Ex. JC-0011 at 19.

[84] Initial Decision, 182 FERC ¶ 63,013 at P 397 ("To the extent that Joint Customers contend that they were unaware that NRA capital costs were being recovered in the Variable Rate, this argument rings hollow. . . . TransCanada Keystone consults with shippers annually to discuss NRAs included in the Variable Rate going forward including the amortization period. . . . [T]here are numerous instances when 'certain NRAs included in Variable Rates prior to 2018 were *specifically presented to committed shippers* as capital expenditures.'" (emphasis added)). Moreover, although the ICA permits Joint Customers to file a complaint seeking damages for two years prior to the complaint, Joint Customers' ongoing course of performance would be relevant to interpreting the TSAs to the extent they are found to be ambiguous. *See Shewchuk v. Blackmont Capital Inc.*, 2016 ONCA 912, para. 56 (explaining that parole "evidence of the parties' subsequent conduct is admissible to assist in contractual interpretation only if a court concludes . . . that the contract is ambiguous").

[85] Ex. JC-0008 at 13, 25 (2009 Notice of Open Season) (emphasis added). *See also* Ex. KEY-0042 at 9, 22 (2007 Notice of Open Season); Ex. JC-0004 at 8, 20 (2005 Notice of Open Season).

[86] *See, e.g.*, Ex. JC-0001 at 13:1-17:19 (Arthur Direct) (interpreting statements in items like the open season documents and the 2008 PDO to mean that the Fixed Rate recovers "all ongoing capital expenditures . . . for the operation of [the] system" and the Variable Rate recovers "non-capital related costs" that "include expenses to operate a system").

Mr. Jones participated in negotiating the relevant TSAs and supports an interpretation that is consistent with the TSAs' plain meaning.[87]

36. We are not persuaded by Joint Customers' heavy reliance on Keystone's representations in the 2008 PDO and the Commission's resulting statements in the 2008 Declaratory Order.[88] Although the 2008 Declaratory Order applies to the committed service applicable to the Joint Customers' TSAs,[89] we find Joint Customers' arguments unpersuasive. The 2008 Declaratory Order is not part of the TSAs themselves, nor was the 2008 Declaratory Order required for Keystone to offer committed service.[90] Fundamentally, the 2008 Declaratory Order does not override the

[87] Ex. KEY-0040 at 11:13-18 (Jones Answering) ("Costs and expenses related to ongoing and future operation, maintenance, and administration of the pipeline were not intended to be recovered under the fixed rate component . . . because they could not have been forecasted or estimated at the time of contracting (when the fixed rate was calculated)."); *see also id.* at 2:5-12 (explaining that he "led the development of the Keystone System from inception" and his responsibilities included to "negotiate [TSAs] with potential shippers"). There is also record evidence that NRA costs included in Variable Rate before 2018 were presented to committed shippers as "capital" expenditures. *See, e.g.*, Ex. KEY-0099 (Nov. 27, 2015 email discussing "the implementation of an NRA covering $65 million of capital").

[88] Joint Customers Br. on Exceptions at 29-34 (citing Ex. JC-0003 at 7-8, 19, 48 (2008 PDO); 2008 Declaratory Order, 125 FERC ¶ 61,025 at PP 9-11, 28, 30). Similar statements by Keystone in a 2011 PDO are also unpersuasive for the reasons discussed herein. Joint Customers Br. on Exceptions at 32 (citing *TransCanada Keystone Pipeline, LP*, 135 FERC ¶ 61,259, at P 3 (2011)).

[89] We reverse the Initial Decision's finding that the 2008 PDO is irrelevant and unrelated to the 2009 TSAs. Initial Decision, 182 FERC ¶ 63,013 at P 185.

[90] *See supra* P 4. Further, the pipeline and the shippers can agree in an open season to a committed service that differs from the service described in a PDO. Although departures from those representations negate the assurances provided in the Commission's Declaratory Order based upon the PDO, the PDO does not dictate the service the pipeline must provide. Thus, contrary to Joint Customers' arguments, the interpretations offered in this proceeding are not a "collateral attack" on the 2008 Declaratory Order. *See* Joint Customers Br. on Exceptions at 34-38 (discussing collateral attack).

TSAs' express terms, which provide for recovery of capitalized GPMCs and NRA costs in the Variable Rate as discussed above.[91]

2. Return on GPMCs and NRA Costs

a. Initial Decision

37. The Initial Decision found that the TSAs permit Keystone to earn a return on costs and expenses related to both GMPCs and NRA costs.[92] The Initial Decision reasoned that, to the extent GPMCs are included in the Variable Rate, a return on such costs and expenses is also permitted "based on the inclusive definition of OM&A set forth in the TSA."[93] The Initial Decision stated that such return on GPMCs "is consistent with ratemaking principles and industry standards."[94]

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[91] We note that Canadian law provides that surrounding circumstances existing at the time of the contract's formation may be used as an interpretive aid even when a contract is unambiguous. *Creston Moly Corp. v. Sattva Capital Corp.*, 2014 SCC 53, paras. 46, 50, 60 (Can.); *IFP Techs. (Canada) Inc. v. EnCana Midstream & Mktg.*, 2017 ABCA 157, para. 82 (Can.). These surrounding circumstances (also referred to as the factual matrix) "cannot speak to the subjective intentions of the contracting parties, but can include: (i) the genesis, aim or purpose of the contract; (ii) the nature of the relationship created by the contract; and (iii) the nature or custom of the market or industry in which the contract was formed." *NEP Canada ULC v. MEC OP LLC*, 2021 ABQB 180 at para. 635 (Can.) (citing *Sattva*, 2014 SCC 53 at paras. 47-48). However, these surrounding circumstances do not allow for consideration of parole evidence regarding the subjective intentions of one party. *Sattva*, 2014 SCC 53 at paras. 59-61. The Commission's statements in the 2008 Declaratory Order simply reiterated the representations of one party (Keystone) in the 2008 PDO, and thus fall within the parole evidence exclusion. With that said, if we were to consider the representations in the 2008 PDO and 2008 Declaratory Order in assessing whether the contract is ambiguous, we would reach the same result. As discussed above, the language in the TSAs supports allowing recovery of the capitalized GPMCs and NRA costs, and the language Keystone included in its 2008 PDO does not overcome the express terms of the TSAs. *Id.* at para. 57 ("While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement . . . .").

[92] Initial Decision, 182 FERC ¶ 63,013 at PP 368-369, 410-411.

[93] *Id.* P 374; *see also id.* P 414 (regarding NRA costs).

[94] *Id.* P 373.

38. The Initial Decision also found that it is appropriate for Keystone to earn a return on capital with respect to capitalized NRA costs, as a cost of doing business, and "to earn a return similar to cash working capital in the ratemaking context" with respect to non-capitalized NRA costs.[95] The Initial Decision found this to be reasonable because capitalized and non-capitalized NRA costs are amortized over a multi-year period and there is a delay between Keystone's incurrence and receipt of revenues for both capitalized and non-capitalized NRA costs.[96]

b. Briefs on Exceptions

39. Joint Customers assert that the Initial Decision erred by permitting Keystone to recover a return on capitalized GPMCs and NRA costs and non-capitalized NRA costs because there is no basis to add a return to any costs recovered under the TSAs.[97] Joint Customers argue that, if capitalized costs are recoverable through the Variable Rate as part of all OM&A costs, as the Initial Decision found, then "the Commission should apply established ratemaking practice, which precludes collecting a return on OM&A costs that are expensed (and recovered in rates) in the period they are incurred."[98]

40. In addition, Joint Customers claim that although the TSAs discuss the recovery of NRA costs, they do not mention a return, which indicates that the parties did not understand that Keystone could earn a return on capitalized or non-capitalized costs categorized as NRA costs.[99] Joint Customers also assert that the Initial Decision improperly discounted evidence that Keystone personnel stated that the pipeline "does not make a return" on NRA costs.[100]

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[95] *Id.* P 413.

[96] *Id.*

[97] Joint Customers Br. on Exceptions at 49.

[98] *Id.* at 50 (citing *San Diego Gas & Elec. Co. v. Sellers of Mkt. Energy & Ancillary Servs.*, 121 FERC ¶ 61,184, at P 112 (2007)). Joint Customers further argue that the Initial Decision erred in adopting arguments based on ratemaking policy when made by Keystone and Trial Staff but rejecting such arguments when made by Joint Customers. *Id.* at 50 n.192.

[99] *Id.* at 50.

[100] *Id.* at 51 (citing Ex. JC-0185 at 17; Initial Decision, 182 FERC ¶ 63,013 at P 414).

c. Briefs Opposing Exceptions

41. Keystone and Trial Staff support the Initial Decision's finding that a return on GPMCs and NRA costs is a component of OM&A costs under the TSAs.[101] Keystone states that the TSAs allow Keystone to assign a return on capitalized costs based on the TSAs' provision that OM&A costs include "all . . . costs and expenses."[102] Keystone argues that, even without this language, "costs," in the ratemaking context, "include operating and maintenance expenses, depreciation expense, taxes *and a reasonable return on the pipeline's investment.*"[103] Keystone further argues that costs in the ratemaking context include "those for providing service or doing business, including the cost of capital, also known as a return on capital."[104] Finally, Keystone asserts that the Initial Decision properly weighed the evidence, finding it unpersuasive on the whole, and did not err by not addressing one specific document.[105]

d. Commission Determination

42. We affirm the Initial Decision in part and find that Keystone may include in the Variable Rate a return on all capitalized NRA costs.[106] However, we find that Keystone may not earn a return on non-capitalized NRA costs or any GPMCs.

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[101] Keystone Br. Opposing Exceptions at 50. Trial Staff does not address Joint Customers' exceptions on this issue but notes in its Brief Opposing Exceptions that "[t]he Initial Decision correctly interprets the TSAs," including regarding return on GPMCs and NRA costs. Trial Staff Br. Opposing Exceptions at 2-3 (citing Initial Decision, 182 FERC ¶ 63,013 at P 119); *see also* Trial Staff Post-hearing Reply Br. at 51 (stating, with respect to return, that "Trial Staff does not address this issue").

[102] Keystone Br. Opposing Exceptions at 50 (citing Ex. KEY-0004 at 19; Ex. KEY-0005 at 19).

[103] *Id.* at 50-51 (quoting Ex. KEY-0066 at 12 (June 1999 FERC Cost-Service Rates Manual) (emphasis added by Keystone)).

[104] *Id.* at 51 (quoting Ex. KEY-0060 at 13:3-6 (Wetmore Answering)). Keystone stresses that these ratemaking principles merely support the Initial Decision's findings, and that the Initial Decision appropriately found that the ratemaking principles that Keystone and Trial Staff presented align with the TSAs' terms while Joint Customers' ratemaking-related arguments do not. *Id.*

[105] *Id.* at 51-52 (referencing Ex. JC-0185).

[106] Because no participant challenged the 8% rate of return Keystone applies to OM&A costs, we do not address whether this figure is just and reasonable. We note that

43. We find that the TSAs permit Keystone to earn a return on capitalized NRA costs.[107] The TSAs allow Keystone to include all NRA costs in the Variable Rate, as discussed above.[108] Although the TSAs do not explicitly state that Keystone may recover in the Variable Rate a return on capitalized NRA costs, the definition of OM&A costs includes "*all* operating, maintenance and administration costs and expenses" without limitation.[109] The cost of financing for capitalized NRA projects is a part of the overall cost for capitalized projects. Because the Variable Rate recovers "all" maintenance costs (including capitalized NRA costs), the TSAs can reasonably be construed to include a return as a part of those costs. The inclusion of a return on capitalized NRA costs is also consistent with widely accepted ratemaking principles.[110] Thus, it is reasonable to interpret the TSAs as permitting a return on capitalized NRA costs.[111]

Keystone stated that this rate "is a representative historical proxy of [Keystone's] weighted average cost of capital." Keystone Pre-hearing Br. at 18-19.

[107] We understand that "capitalized" NRA costs extend the useful life of an existing asset and are therefore depreciated over that asset's useful life. *See* Ex. KEY-0024 at 12:19-20 (Kuharski Direct) ("expenditures that do not, by themselves, increase the useful life or improve the efficiency of the pipeline cannot be capitalized").

[108] *See supra* Part III.B.1.

[109] Ex. JC-0010 at 19-20 (emphasis added); Ex. JC-0011 at 19-20.

[110] *Cost Recovery Mechanisms for Modernization of Nat. Gas Facilities*, 151 FERC ¶ 61,047, at P 100 (2015) (Modernization Policy), *clarification denied*, 152 FERC ¶ 61,046 (2015). The term "costs" in the cost-of-service context includes costs for providing service or doing business, which includes a return on capital. FED. ENERGY REGULATORY COMM'N, ENERGY PRIMER: A HANDBOOK FOR ENERGY MARKET BASICS 55 (2023), https://www.ferc.gov/news-events/news/ferc-staff-issues-2024-energy-primer-handbook-energy-market-basics (explaining that cost-based rates generally include a "fair return on capital, known as the cost of capital," which involves "determining . . . forms of short-term borrowing, such as lines of credit used to finance projects and provide cash for day-to-day operations"). By contrast, expenses that are recovered in the period they are incurred generally do not include a return in the ratemaking context.

[111] One statement in the speaker's notes to a 2006 presentation does not dictate a contrary result. Initial Decision, 182 FERC ¶ 63,013 at P 414; Joint Customers Br. on Exceptions at 51 (citing Ex. JC-0185 at 17). Those notes state that "because the variable cost[s] are a flow through" Keystone does not earn a return. Ex. JC-0185 at 17. However, this presentation was given in 2006, well before the 2009 open season that is applicable to these TSAs. Furthermore, unlike the costs apparently described by the

44. By contrast, we find that it is inappropriate for Keystone to earn a return on any non-capitalized NRA costs. Non-capitalized NRA costs are expenses that Keystone would ordinarily recover in the year they were incurred but for their magnitude.[112] The parties' agreement that such expenses would be amortized does not indicate that a return is warranted.[113] Indeed, the expectation in ratemaking is that a pipeline would not earn a return on amortized costs that are not capitalized.[114] Accordingly, neither the TSAs nor

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notes, the capitalized NRA costs are amortized and not fully flowed through every year. Thus, it is not clear how this statement in the speaker's notes was intended to apply to capitalized NRA costs. Even if this statement was part of the surrounding circumstances, we find other evidence in the record to be more compelling. Additionally, Joint Customers did not present a witness who can speak to the parties' objective intent when executing the TSAs and this is a contested issue. *See supra* P 35; Keystone Br. Opposing Exceptions at 50-52. The weight of the evidence in this record supports permitting Keystone to recover a return on capitalized NRA costs.

[112] We understand the term "non-capital" NRA to mean NRA costs that are expensed rather than capitalized. *See* Ex. KEY-0040 at 16:21-23 (Jones Answering) (stating that NRA costs "can be either capitalized or expensed" and that "standard accounting practice is to capitalize costs that extend the life of the asset"); Ex. KEY-0024 at 12:19-20 (Kuharski Direct) ("expenditures that do not, by themselves, increase the useful life or improve the efficiency of the pipeline cannot be capitalized"); Ex. JC-0033 at 2-4 (explaining that an NRA recorded as "expense" was not capitalized because it "includes maintenance costs associated with . . . activities that do not qualify" for capitalization based on Keystone's internal guidelines, and that Keystone amortized these costs over three years "to reduce 2020 variable toll impacts" in consultation with shippers).

[113] Ex. JC-0010 at 20; Ex. JC-0011 at 20.

[114] Modernization Policy, 151 FERC ¶ 61,047 at P 100 (stating that costs may "be treated as: (1) a rate base item to be depreciated over the life of the pipeline with the pipeline recovering a return on equity on the portion of those costs financed by equity together with associated income taxes *or* (2) a non-rate base item to be amortized over a shorter period with the pipeline recovering the interest necessary to compensate it for the time value of money *but no return on equity or associated income taxes*" (emphases added)); *High Island Offshore Sys., L.L.C.*, 145 FERC ¶ 61,155, at P 22 (2013) (explaining that to the extent costs are recovered "through base rates" they "would have included a return on equity on the undepreciated portion," whereas treating such costs as "a one-time extraordinary expense to be amortized over a three-year period" only entitles the pipeline to "recover carrying charges on the outstanding balance in order to compensate it for the time value of money"). Although Keystone could have potentially claimed that instead of a return, it was entitled to the time-value of money for

ratemaking principles support Keystone earning a return on non-capitalized NRA costs. On compliance, Keystone is directed to remove any claimed return on non-capitalized NRA costs.

45. For similar reasons, we find that Keystone may not earn a return on any GPMCs. Although the record reflects that GPMCs may be recorded as "capitalized" or "expensed" for internal accounting purposes,[115] the record also shows that the Variable Rate recovers all GPMCs in the same period they are incurred.[116] Accordingly, a return is not part of the overall cost of such projects.[117] Because neither the TSAs nor precedent justify Keystone earning a return on costs that are incurred and recovered in the same period, we direct Keystone on compliance to remove a return on GPMCs from the Variable Rate.

3. <u>Keystone Must Amortize Capitalized NRA Costs Using Good Accounting Practice</u>

a. <u>Initial Decision</u>

46. The Initial Decision rejected Joint Customers' request that, if Keystone is permitted to include capitalized NRA costs in the Variable Rate, Keystone should be required to amortize those costs over a period that reflects the remaining life of the

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non-capitalized NRA costs, Keystone did not support such recovery in the record nor does the mere application of amortization mean that Keystone must recover the time-value of money. *See, e.g.*, Opinion No. 511-A, 137 FERC ¶ 61,220 at PP 39, 49 (approving a multi-year litigation cost surcharge that does not increase over time to account for forces like inflation). Moreover, Keystone conflates these concepts with its assertion that any right to recover the time value of money supports earning a return. *See* Ex. KEY-0097 at 21:2-6 (Wetmore Rebuttal) ("Given the time value of money, I believe it is reasonable for costs associated with NRA expenses to include a return component that recognizes the delay between when expenses are incurred and revenues are received.").

[115] *See* Ex. KEY-0024 at 12:9-13:2 (Kuharski Direct) (describing capitalization policy); Ex. KEY-0033; Ex. JC-0365 at 3; *but see* Ex. JC-0293 at 1.

[116] *Cf.* Ex. JC-0010 at 20 (providing that all NRA costs are amortized while containing no similar provision for GPMCs); JC-0011 at 20 (same); *see also* Ex. JC-0293 at 1; Ex. S-0139 at 3, 6; Ex. JC-0294 at 6; Ex. JC-0365 at 3.

[117] *See High Island*, 145 FERC ¶ 61,155 at P 22 (explaining that a return is not appropriate when a cost is not capitalized, even if that cost could have been capitalized and depreciated).

underlying assets, consistent with good accounting practice.[118] The Initial Decision stated that Joint Customers' proposal would create an inconsistency, as Joint Customers do not challenge the amortization period and accounting practices for non-capitalized NRA costs.[119] Moreover, the Initial Decision stated that it would generally be inappropriate to require Keystone "to amortize capital-related costs of NRAs over a period that reflects the remaining life of the underlying asset on a going-forward basis."[120]

47. Nonetheless, the Initial Decision "encouraged" Keystone to develop a uniform method for determining the amortization period for NRA costs, "consistent with the [Uniform System of Accounts], 18 C.F.R. [Part 352] Oil Pipeline, General Instructions 1.8 regarding depreciation accounting to the extent practical."[121] The Initial Decision noted that Keystone would retain discretion to develop the amortization period for NRA costs and that Joint Customers could raise any concerns in their annual meetings with Keystone to discuss what NRA costs will be included in the Variable Rate going forward.[122]

b. Briefs on Exceptions

48. Joint Customers assert that the Initial Decision erred by approving Keystone's amortization of NRA costs. Instead, Joint Customers argue that, "[t]o the extent Keystone is permitted to include any capitalized NRAs in the Variable Rate, Keystone should be required to amortize those costs over a period that reflects the remaining life of the underlying assets."[123] They further assert that the Initial Decision's finding is contrary to the TSAs' requirement that "[a]ll NRAs will be amortized in accordance with

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[118] Initial Decision, 182 FERC ¶ 63,013 at P 399. The TSAs provide that Keystone "will consult with [shippers] as to a reasonable allocation of such NRA" into the Variable Rate and that "[a]ll NRAs will be amortized in accordance with good accounting practice." Ex. JC-0010 at 20; Ex. JC-0011 at 20; *see also* Initial Decision, 182 FERC ¶ 63,013 at PP 392-393.

[119] Initial Decision, 182 FERC ¶ 63,013 at PP 399-400.

[120] *Id.*

[121] *Id.* P 402.

[122] *Id.*

[123] Joint Customers Br. on Exceptions at 48.

good accounting practice."[124] Joint Customers state that Keystone gives its commercial personnel, as opposed to accounting personnel, authority to select the amortization periods for NRA costs and that that selection is guided by their desire to increase revenue and reduce Keystone's recovery risk, which results in unreasonably short NRA amortization periods.[125] In addition, Joint Customers argue that, while meetings with the pipeline can be productive, the Commission should not defer to Keystone's method of recovering NRA costs over truncated periods without regard to good accounting practice.[126]

49. Keystone states that the Initial Decision erred by making an unnecessary suggestion that Keystone "develop a method for determining the appropriate amortization period for NRAs" that is consistent with rules regarding depreciation accounting, based on an observation that Keystone "does not appear to have a uniform method" for such determination.[127] Keystone asserts that it has a uniform method for determining NRA amortization periods that entails annual discussions with shippers, and that a different method is unnecessary.[128]

c. Briefs Opposing Exceptions

50. Opposing Joint Customers' exceptions, Keystone states that the Initial Decision correctly rejected Joint Customers' assertion that capitalized NRA costs be amortized over the remaining life of the underlying asset, not some other time period.[129] Keystone asserts that the TSAs state that all NRA costs will be amortized based on consultation with shippers in addition to good accounting practice.[130] According to Keystone, shipper consultation would be unnecessary if the TSAs required determining NRA amortization periods based on precise application of accounting rules.[131] In addition, Keystone

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[124] *Id.* (citing Ex. JC-0010 at 20; Ex. JC-0011 at 20).

[125] *Id.*

[126] *Id.* at 49.

[127] Keystone Br. on Exceptions at 43 (quoting Initial Decision, 182 FERC ¶ 63,013 at P 402).

[128] *Id.* at 43-44.

[129] Keystone Br. Opposing Exceptions at 48-49.

[130] *Id.* at 48 (citing Ex. KEY-0004 at 20).

[131] *Id.*

reiterates that the TSAs include a uniform method for determining the amortization period for each NRA and that the Commission need not determine a different method.[132]

51. Joint Customers oppose Keystone's exception and assert that the Commission should require Keystone to implement a uniform method of amortizing NRA costs, consistent with good accounting practice.[133]

d. <u>Commission Determination</u>

52. We reverse the Initial Decision and hold that Keystone must determine the amortization period for each capitalized NRA based on the applicable accounting rules, as the TSAs require.[134]

53. The TSAs state that "[a]ll NRAs *will* be amortized *in accordance with good accounting practice*."[135] Good accounting practice generally provides for the recovery of capitalized costs over time through amortization via depreciation. For assets that are depreciated under accounting rules,[136] like general plant, the Commission uses the remaining life method. Under the remaining life method, "[t]he useful physical life of [the asset] is presumed to be the appropriate depreciation period unless the pipeline demonstrates that" its economic life will be shorter.[137] The appropriate remaining life over which an asset is depreciated depends upon the particular asset.

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[132] *Id.* at 49. Trial Staff does not address the exceptions on this issue but notes that "[t]he Initial Decision correctly interprets the TSAs," including as to including capitalized GPMCs and NRA costs in the Variable Rate. Trial Staff Br. Opposing Exceptions at 2-3 (citing Initial Decision, 182 FERC ¶ 63,013 at P 119).

[133] Joint Customers Br. Opposing Exceptions at 34-35.

[134] Typically, capitalizing is a method in which a cost is included in the value of an existing asset and amortized over the useful life of that asset. In the ratemaking context, capitalized costs are included in rate base and earn a return.

[135] Ex. JC-0010 at 20 (emphases added); Ex. JC-0011 at 20.

[136] *See* 18 C.F.R. Part 352, Instruction 1-8 ("Depreciation accounting – Carrier property"), Instruction 1-9 ("Depreciation accounting – Noncarrier property"), Instruction 1-10 (discussing "account 540, Depreciation and Amortization").

[137] *Portland Nat. Gas Transmission Sys.*, Opinion No. 524, 142 FERC ¶ 61,197, at P 143 (2013), *order on reh'g*, Opinion No. 524-A, 150 FERC ¶ 61,107 (2015); *see also Panhandle E. Pipe Line Co.*, Opinion No. 885-A, 184 FERC ¶ 61,181, at P 211 (2023); 18 C.F.R. Part 352, Instruction 1-8(e) ("When circumstances indicate that . . . the

54. Keystone's current method for amortizing capitalized NRA costs for recovery in the Variable Rate is inconsistent with "good accounting practice" and, thus, inconsistent with the TSAs. The record reflects that Keystone does not determine the amortization period for each capitalized NRA based on "good accounting practice," but rather on commercial considerations.[138] These departures from good accounting practice include deviation from the remaining life for assets subject to depreciation.[139]

55. Although Keystone emphasizes its discretion to select an amortization period for capitalized NRA costs,[140] the TSAs require that "[a]ll NRAs *will* be amortized in

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prescribed depreciation rates based on the service lives of certain property are no longer applicable, because the source of traffic will be exhausted before the end of the physical service life, the carrier shall submit to the Commission for approval amortization or depreciation rates based on the estimated remaining service life of the property accompanied by full information justifying the request."). Keystone's accounting personnel have acknowledged this principle. *See* Tr. 1604:15-23 (Kuharski); Ex. KEY-0024 at 2:1-8 (Kuharski Direct) (describing job responsibilities); Tr. 1604:17-23 (Gough); Ex. KEY-0031 at 1:6-2:5 (Gough Direct) (describing job responsibilities); *see also* Ex. JC-0365 at 3-4.

[138] *See* Tr. 1613:13-18 (Kuharski) ("My team provides the numbers to the commercial team. . . . [T]he commercial team in consultation with the shippers will decide the final amortization for the variable toll."); Keystone Br. Opposing Exceptions at 48; Ex. JC-0033 at 3 ("The amortization period for all NRAs were based on the lesser of the applicable asset class depreciation rate and the remaining term of the contracts."); Ex. KEY-0001 at 18:24-19:1 (Trout Direct) ("Keystone evaluates how to amortize a particular NRA based upon financial considerations and in accordance with standard accounting practices"); *but see* Ex. JC-0294 at 1-6 (discussing approach to NRA amortization for recovery in the Variable Rate); Ex. S-0139 at 5-6 (discussing potential internal guidelines for NRA treatment); Tr. 1594:10-14, 1598:2-24 (Gough) (discussing how decisions are made regarding amortizing NRAs). The record contains little information about how Keystone determined the amortization periods for specific NRA costs. *See, e.g.*, Ex. KEY-0011 at 9-10 (describing NRA costs included in the 2021 Estimated Variable Rate); Ex. KEY-0038 at Tab "NRAs;" Ex. S-0139 at 7, 10, 16-25 (GPMC and NRA presentation).

[139] *See* Ex. JC-0294 at 1-6; *see also* Ex. JC-0365 at 3-4.

[140] Keystone Br. Opposing Exceptions at 49 ("the Commission should confirm . . . that TransCanada Keystone retains the discretion to develop NRA's amortization periods under the TSAs").

accordance with good accounting practice."[141] And the requirement that Keystone must inform shippers of how it amortizes capitalized NRA costs does not alter that requirement.[142]

56. Accordingly, to the extent that the amortization periods for capitalized NRA costs deviate from the accounting principles outlined above,[143] we direct Keystone in its compliance filing to adjust these amortization periods to comport with good accounting practice.[144]

C. Drag Reducing Agent

57. Oil pipelines rely upon internal pressure to move oil through their systems. As oil travels through the pipeline, pressure declines between pump stations due to friction with the pipeline walls and temperature changes that increase the oil's viscosity. Decreases in pressure reduce the pipeline's maximum flow rate, which, in turn, lowers the pipeline's system-wide capacity. To mitigate pressure losses, pipelines may use a drag reducing agent (DRA), a long-chain chemical polymer, to reduce the friction that occurs during

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[141] Ex. JC-0010 at 20; Ex. JC-0011 at 20.

[142] *See id.* at 48 (asserting that "shippers are aware of the amortization period for each NRA"). Moreover, we are not persuaded by Keystone's suggestion that its prior consultation with Joint Customers about the NRA costs at issue ends the discussion. *Id.* The TSAs do not include a procedure for resolving shipper disagreements with Keystone's proposed NRA amortization period following consultation, and Joint Customers contest the amortization periods for capitalized NRA costs in this proceeding. Joint Customers Br. on Exceptions at 48-49.

[143] Ex. JC-0010 at 20; Ex. JC-0011 at 20. We only specifically address Joint Customers' challenge to Keystone's amortization of capitalized NRA costs. Joint Customers Br. on Exceptions at 48-49. However, we emphasize that the amortization of *all* NRA costs must be in accordance with good accounting practice under the TSAs.

[144] For example, Keystone states that some NRA costs at issue are categorized as "General Plant" for accounting purposes. Ex. JC-0033 at 3. Thus, we expect that such NRA costs will be depreciated over the remaining life of the underlying asset. *See* Opinion No. 524, 142 FERC ¶ 61,197 at P 143.

transportation. DRA is injected into a pipeline through DRA skids,[145] which are installed at pump stations or valve sites along the pipeline's routes.[146]

58. Keystone developed the Base U.S. Segment in two phases: the first phase originating in Hardisty, Alberta, passing through Steele City, Nebraska, and terminating in Patoka, Illinois (Phase 1); the second phase originating in Steele City and terminating in Cushing, Oklahoma (Phase 2).[147] Keystone conducted open seasons in 2005, 2007, and 2009, soliciting bids for committed transportation service to support the development of Phases 1 and 2.[148] Upon completion of the 2009 open season, Keystone had entered contracts requiring it to provide committed service on 530,000 barrels per day (bpd) of capacity.[149] However, after Phase 2 entered service in February 2011, the Keystone System proved unable to achieve its intended nominal capacity of 591,000 bpd.[150] Between 2011-2014, the Keystone System's nominal capacity generally ranged from 520,000-540,000 bpd,[151] with a maximum available capacity of 549,500 bpd.[152]

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[145] *See* Tr. 1215:29-24 (Ali) (describing DRA skids).

[146] Ex. KEY-0019 at 3:6-7 (Ali Direct); *see also* Tr. 1215:25-1216:3 (Ali).

[147] *E.g.*, Ex. KEY-0040 at 3:16-4:2, 6:5-8 (Jones Answering); Ex. KEY-0045 at 4:1-7 (Kothari Answering).

[148] Ex. KEY-0001 at 9:6-12, 9:22-10:4, 10:7-14 (Trout Direct); *see also* Ex. JC-0004 (2005 open season materials); Ex. KEY-0042 (2007 open season materials); Ex. JC-0008 (2009 open season materials); Ex. JC-0001 at 4:5-11 (Arthur Direct).

[149] *See* Ex. KEY-0001 at 10:15-17 (Trout Direct); Ex. JC-0001 at 21:8-9 (Arthur Direct); Ex. JC-0333 at 1; *see also* Ex. JC-0009 at 2-3, 6. Joint Customers executed TSAs with Keystone following the 2005 and 2009 open seasons. Ex. JC-0001 at 19:14-15 (Arthur Direct); *see also* Ex. JC-0010 at 1, 16; Ex. JC-0011 at 1, 16; Ex. KEY-0112 at 6:5-6 (Jones Rebuttal); Ex. KEY-0001 at 10:15-17 (Trout Direct).

[150] *E.g.*, Ex. JC-0139 at 38:17-18 (Arthur Cross-Answering); Ex. KEY-0045 at 11:17-19 (Kothari Answering); Ex. KEY-0070 at 5:19-20, 11:9-20 (Miesner Answering); Ex. KEY-0078 at 14:21-24, 17:1-3 (Bednorz Answering); Ex. KEY-0075 at 4:6-7 (Elliott Answering); Ex. S-0001 at 42:6-15 (Norman Direct).

[151] *E.g.*, Ex. KEY-0078 at 17:1-3 (Bednorz Answering); Ex. JC-0026 at 78; *see also* Ex. JC-0252 at 4.

[152] Ex. JC-0025 at Tab "Table 1," row 259; Ex. JC-0091 at 14:7-12, 17:17-21 (Arthur Answering); Ex. JC-0001 at 23:18-22 (Arthur Direct).

59. Keystone began using DRA on the Keystone System in 2014 and has included the commodity costs associated with DRA, as well as the costs of certain DRA skids, in the Variable Rate.[153] Joint Customers oppose the inclusion of DRA costs in the Variable Rate and contend that Keystone has used DRA to expand the system's nominal capacity, rather than for OM&A purposes.[154] Keystone and Trial Staff, by contrast, contend that DRA costs are OM&A costs recoverable through the Variable Rate.[155]

1. **Initial Decision**

60. The Initial Decision determined that Keystone's DRA commodity costs are OM&A costs recoverable in the Variable Rate.[156] The Initial Decision found that the TSAs define OM&A costs broadly and that Keystone has used DRA for multiple operational purposes, including mitigating the effects of pressure restrictions and addressing the effects of pipeline maintenance.[157]

61. The Initial Decision concluded that capitalized costs related to DRA skids are recoverable in the Variable Rate to the extent the DRA skids were used for operational purposes rather than to expand the Keystone System.[158] The Initial Decision found that Keystone installed certain DRA skids for operational reasons (such as mitigating pressure restrictions following incidents on the Keystone System) and appropriately included the costs of these DRA skids in the Variable Rate.[159] By contrast, the Initial Decision found

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[153] *E.g.*, Ex. KEY-0019 at 8:3-5 (Ali Direct); Ex. KEY-0053 at 2:18-21 (Ali Answering). Keystone tested the use of DRA on the Keystone System in 2012-2013 and began using DRA on a large-scale basis in 2014. *E.g.*, Ex. KEY-0019 at 8:3-5 (Ali Direct); Ex. KEY-0070 at 8:24-25 (Miesner Answering); Ex. JC-0132 at 2.

[154] Joint Customers Br. on Exceptions at 51-80.

[155] Keystone Br. Opposing Exceptions at 52-78; Trial Staff Br. Opposing Exceptions at 56-81.

[156] Initial Decision, 182 FERC ¶ 63,013 at PP 299-301.

[157] *Id.* P 300 (citing Ex. KEY-0001 at 35:11-17 (Trout Direct); Ex. KEY-0019 at 4:16-19 (Ali Direct); Ex. KEY-0053 at 3:8-4:3 (Ali Answering); Ex. KEY-0114 at 13:6-10 (Trout Rebuttal); Ex. S-0001 at 6:17-20, 49:1-10 (Norman Direct); Ex. S-0073 at 44:4-14 (Norman Rebuttal); Ex. JC-0057 at 27:2-6, 30:11-12 (Vanderpool Direct); Tr. 665:11-17 (Trout)).

[158] *Id.* PP 308-311.

[159] *Id.* P 311.

that Keystone installed other DRA skids primarily to expand the Keystone System by creating incremental capacity to accommodate new committed shippers.[160] However, the Initial Decision found that Keystone has absorbed the costs of these expansion-related DRA skids rather than include them in the Variable Rate.[161] Thus, the Initial Decision found that Keystone appropriately recovered the costs of DRA skids installed for operational purposes in the Variable Rate and excluded the costs of DRA skids installed for expansion purposes from the Variable Rate.[162]

62. The Initial Decision rejected Joint Customers' argument that Keystone used DRA primarily to expand the Keystone System's capacity rather than for operational reasons. The Initial Decision found that Joint Customers unreasonably define "expansion" to include any use of DRA that increases the pipeline's hydraulic maximum flow rate, even where increasing the flow rate is necessary to respond to operational conditions and does not create incremental capacity.[163]

63. The Initial Decision also disagreed with Joint Customers' contention that the DRA costs brought the Keystone System's nominal capacity to 591,000 bpd and are recovered in the Fixed Rate. First, the Initial Decision rejected Joint Customers' claim that the TSAs required Keystone to construct a pipeline system with a nominal capacity of 591,000 bpd. The Initial Decision found that the TSAs do not obligate Keystone to construct a system with a specific capacity.[164] Although a Permanent Diversion Agreement between Keystone and ConocoPhillips Company discusses "Expansion/Extension Facilities" with a nominal capacity of 590,000 bpd,[165] the Initial Decision held that this agreement merely states that Keystone "is *proposing*" to construct

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[160] *See id.* P 309.

[161] *Id.* (citing Ex. S-0033 at 1; Tr. 651:21-25, 674:6-11, 703:1-8 (Trout)).

[162] *See id.* PP 309, 311.

[163] For example, the Initial Decision found that Keystone used DRA following a December 2018 equipment outage at its Roswell Pump Station to counteract pressure losses and maintain its throughput at pre-outage levels. *Id.* PP 296-297 (citing Ex. KEY-0145 at 2; Keystone Initial Br. 68-69).

[164] *Id.* P 247 (citing Ex JC-0010 at 5-6; Ex. JC-0011 at 5-6; Ex. S-0001 at 27:15-20 (Norman Direct)). The Initial Decision found, moreover, that the TSAs do not impose any consequences on Keystone for constructing a pipeline system with a nominal capacity less than 590,000 bpd. *Id.* P 246 (citing Tr. 4274:23-4275:3 (Norman)).

[165] *Id.* P 243 (citing Ex. JC-0005 at 27, 92; Ex. JC-0011 at 92).

these facilities.[166] In addition, the Initial Decision found that nothing in the TSAs precludes Keystone from using DRA to operate and maintain its system.[167] The Initial Decision concluded that Keystone's descriptions of the Keystone System in open season documents and regulatory filings do not alter the language of the TSAs or otherwise obligate Keystone to provide 591,000 bpd of nominal capacity.[168]

64. Second, the Initial Decision held that even if the TSAs required Keystone to provide 591,000 bpd of capacity, Keystone satisfied this obligation.[169] The Initial Decision found that the Keystone System transported 601,000 bpd in 2021 using a reduced level of DRA.[170] In addition, the Initial Decision rejected Joint Customers' argument that the Keystone System was improperly designed.[171]

65. Third, the Initial Decision concluded that the Keystone System's inability to transport 591,000 bpd without DRA resulted from five operational factors: (1) the Pipeline and Hazardous Materials Safety Administration (PHMSA) suspended a waiver that Keystone obtained to operate the system at a design factor of 0.80, rather than the standard factor of 0.72 (PHMSA Suspension); (2) the PHMSA Suspension caused pump stations along the system to emit lower discharge pressures; (3) soil temperatures along portions of the system were lower than assumed during design; (4) shippers transported higher volumes to Cushing than Keystone anticipated, reducing capacity on the pipeline segment terminating in Patoka; and (5) operational incidents resulted in pressure restrictions.[172] The Initial Decision held that these factors were not reasonably foreseeable and that it would be infeasible for the design process to anticipate all issues that could arise after the Keystone System entered service.[173]

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[166] *Id.* P 244 (quoting Ex. JC-0011 at 92) (emphasis in Initial Decision).

[167] *Id.* PP 252-253.

[168] *Id.* P 245.

[169] *Id.* P 254.

[170] *Id.* PP 255-256 (citing Ex. KEY-0140 at 1; Tr. 799:10-15 (Trout)).

[171] *Id.* PP 254-266.

[172] *Id.* PP 268-280.

[173] *Id.* PP 257, 267 (citing Ex. KEY-0118 at 18:1-9 (Bednorz)).

2. Briefs on Exceptions

66. Joint Customers argue the Initial Decision erred in allowing Keystone to recover any DRA costs in the Variable Rate. Joint Customers contend that costs incurred to expand the Keystone System by increasing its hydraulic maximum flow rate are not OM&A costs under the TSAs. Joint Customers state that although the Initial Decision correctly recognizes that Keystone must exclude DRA skid capitalized costs incurred for expansion purposes from the Variable Rate, it improperly allows Keystone to include DRA commodity costs incurred for the same expansion purposes.[174]

67. Joint Customers argue that the Initial Decision ignored substantial evidence showing that Keystone used DRA to expand the Keystone System's nominal capacity from 535,000 to 591,000 bpd.[175]

68. Joint Customers argue that the Initial Decision is internally inconsistent because it concludes that Keystone installed certain DRA skids for expansion purposes while also finding that none of Keystone's DRA commodity costs related to expansion.[176] They argue that this conclusion conflicts with determinations made by the Canada Energy Regulator (CER), relies upon testimony of non-engineer witnesses, and ignores evidence in the record.[177] Contrary to the Initial Decision, Joint Customers contend that it is the

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[174] Joint Customers Br. on Exceptions at 51-53.

[175] *Id.* at 54-60, 62-63 (citing Ex. JC-0026 at 19, 28; Ex. JC-0130 at 1; Ex. JC-0209 at 1; Ex. JC-0251 at 1-2; Ex. JC-0263 at 3; Ex. JC-0300 at 9; Ex. JC-0301 at 3; Ex. JC-0351 at 1; Ex. KEY-0045 at 6:10-17, 11:17-19 (Kothari Answering); Ex. KEY-0070 at 5:19-20 (Miesner Answering); Ex. KEY-0078 at 17:1-3 (Bednorz Answering); Ex. S-0082 at 1; Tr. 1148:20-21, 1149:4-6, 1170:20-21, 1184:12-13 (Ali); Tr. 1254:9-12 (Kothari)). According to Joint Customers, Keystone concedes that the Keystone System's capacity without DRA is approximately 535,000 bpd and that even if operated at maximum pressure, the system could only transport 581,500 bpd without DRA. *Id.* at 56-57 (citing Ex. KEY-0078 at 17:1-3 (Bednorz Answering); Ex. JC-0130 at 1; Ex. JC-0205 at 27:26-28:3 (Vanderpool Rebuttal); Ex. JC-0351 at 1). Joint Customers state the Initial Decision overlooks exhibits that demonstrate Keystone used DRA to expand system capacity. *Id.* at 60-62 (citing Initial Decision, 182 FERC ¶ 63,013 at PP 290-291; Ex. JC-0263 at 1, 3; Ex. JC-0273 at 8).

[176] *Id.* at 63-65 (citing Initial Decision, 182 FERC ¶ 63,013 at P 292).

[177] *Id.* (citing *TransCanada Keystone Pipeline GP Ltd.*, 2022 CarswellNat 5352, para. 101 (Can. Energy Regul. 2022) (WL) (CER Reasons for Decision); Ex. S-0001 at 47:8-12 (Norman Direct); Ex. S-0073 at 16:14-17:8, 416-14 (Norman Rebuttal);

DRA commodity that increases a pipeline's flow rate and that DRA skids merely provide the means for injecting DRA into the pipeline. They state that if Keystone installed DRA skids to expand the system's capacity, then it likewise used DRA for expansion purposes.[178]

69. Joint Customers further argue that the Initial Decision incorrectly required Joint Customers to establish that all DRA costs recovered in those rates relate to expansion, rather than merely a portion of those costs.[179] Moreover, Joint Customers state that Keystone must demonstrate that all costs included in the Estimated Variable Rate for 2020 and 2021 constitute OM&A costs. They argue that despite significant evidence that Keystone used DRA for expansion, the Initial Decision did not require Keystone to show that any of its DRA costs were incurred for non-expansion purposes.[180] Joint Customers state that if the Commission concludes that Keystone used DRA for reasons unrelated to expansion, it should direct Keystone to make an accounting of its DRA use that differentiates between the various uses.[181]

70. Joint Customers state that the issues of whether the TSAs required Keystone to construct a pipeline with a nominal capacity of 591,000 bpd or whether the Keystone System was improperly designed are not central to resolving whether DRA costs are recoverable in the Variable Rate.[182] In any case, however, Joint Customers argue that the Initial Decision's conclusions on these issues do not withstand scrutiny.

Ex. JC-0057 at 26:7-27:17 (Vanderpool Direct); Ex. JC-0153 at 35:7-9 (Vanderpool Cross-Answering); Tr. 4215:24-4216:5 (Norman); Tr. 1174:12-13 (Jakubiak)).

[178] *Id.* at 64-65.

[179] *Id.* at 54-55, 67.

[180] *Id.* at 53-55.

[181] *Id.* at 67-69. Joint Customers state that the CER Reasons for Decision provides an example of this approach. *Id.* at 68-69 (citing CER Reasons for Decision, 2022 CarswellNat 5352, paras. 182, 204-205).

[182] *Id.* at 69 (stating that the outcome of these issues "does not determine whether DRA commodity is an OM&A Cost" and that the Initial Decision's "discussion of the merits of Keystone pipeline's design process—which addresses whether expenses incurred to remedy those flaws are recovered only through the Fixed Rate—is irrelevant to the question of whether DRA costs are OM&A Costs"); *id.* at 75 (stating that the Initial Decision's findings on pipeline design issues are "not central to the question of whether DRA costs can be included in the Variable Rate").

71. First, Joint Customers argue that the TSAs require Keystone to construct a pipeline capable of transporting 591,000 bpd. They state that Keystone proposed to construct "Expansion Facilities" to increase the Keystone System's capacity to 591,000 bpd in exchange for shippers' agreement to the rate structure in the TSAs, whereby Keystone would recover the costs of these facilities through the Fixed Rate.[183] Moreover, Joint Customers state that even if the TSAs only required Keystone to provide sufficient capacity to meet its cumulative obligations to committed and uncommitted shippers, they would still require Keystone to construct a system with a nominal capacity of 591,000 bpd.[184] Joint Customers further state that Keystone represented in open season documents and regulatory filings that the system would transport 591,000 bpd and that both the Commission and Canada's National Energy Board (NEB) relied upon these statements.[185]

72. Second, Joint Customers maintain that Keystone did not properly design the Keystone System to achieve its intended capacity. They argue that Keystone concedes that the system was unable to transport 591,000 bpd without DRA between entering service in 2011 through at least 2021.[186] They further state that Keystone has acknowledged that even without pressure restrictions, the Keystone System can only achieve a nominal capacity of 535,000 bpd absent DRA.[187] Furthermore, Joint Customers claim that the Initial Decision erred by declining to rely upon testimony showing that the system was improperly designed.[188] Joint Customers contend,

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[183] *Id.* at 71-72 (citing Ex. JC-0005 at 3-4). Joint Customers contend that the Initial Decision's interpretation of the TSAs is illogical because it would allow Keystone to build a pipeline with a nominal capacity of only 50,000 bpd, use DRA to increase the capacity to 591,000 bpd, and recover the costs of that DRA in the Variable Rate. *Id.* at 74-75.

[184] *Id.* at 57-58, 72-74 (citing Ex. JC-0001 at 5:9-11, 6:1-7 (Arthur Direct); Ex. JC-0009; Ex. JC-0333 at 1).

[185] *Id.* at 73-74 (citing Ex. JC-0001 at 4:2-5:14, 5:9-11, 20:6-11 (Arthur Direct); Ex. JC-0003 at 2-3, 5-6 & n.5, 46-47; Ex. JC-0004 at 1-2, 9, 13; Ex. JC-0005 at 1-2, 28; Ex. JC-0006 at 24-28; Ex. JC-0008 at 18; Ex. JC-0024; 2008 Declaratory Order, 125 FERC ¶ 61,025 at PP 3, 52; Ex. JC-0006 at 24-28). The NEB is the predecessor agency to the CER. *Id.* at 74.

[186] *Id.* at 76-78 (citing Ex. JC-0205 at 5:8-6:5 (Vanderpool Rebuttal)).

[187] *Id.* at 76 (citing Ex. JC-0209 at 1).

[188] *Id.* at 79 (citing Tr. 1258:22-1259:7, 1355:3-5 (Kothari); Tr. 1792:6-1794:14 (Jones)).

moreover, that the five operational factors discussed in the Initial Decision do not explain the capacity shortfall and that Keystone should have addressed these factors in the design phase.[189]

3. Briefs Opposing Exceptions

73. Keystone and Trial Staff contend that Keystone's DRA commodity costs are OM&A costs recoverable in the Variable Rate.[190] They state that Keystone used DRA for purposes related to OM&A, including mitigating the operational factors that prevented the Keystone System from transporting 591,000 bpd, maintaining throughput following incidents or pressure restrictions, and addressing the effects of pipeline maintenance.[191] Keystone and Trial Staff state that because Keystone used DRA solely for OM&A purposes, it is unnecessary for Keystone to prepare an accounting of its DRA costs that differentiates its DRA costs between different uses.[192]

74. Keystone and Trial Staff argue that the Initial Decision correctly rejected Joint Customers' argument that DRA costs constitute expansion costs as opposed to OM&A costs.[193] Keystone and Trial Staff argue that whether DRA costs are recoverable in the Variable Rate turns upon whether Keystone uses DRA for OM&A purposes, not whether

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[189] *Id.* at 79-80 (citing Ex. JC-0205 at 12:16-41:19 (Vanderpool Rebuttal)). In particular, Joint Customers argue that the PHMSA Suspension and resulting pressure restrictions were resolved by mid-2017 and do not explain capacity shortfalls on the Keystone System in subsequent years. *Id.* at 80 (citing Initial Decision, 182 FERC ¶ 63,013 at PP 270, 272, 274; Ex. JC-0187 at 2; Tr. 1278:8-20, 1288:1-7, 1291:9-12, 1291:14-20 (Kothari); Tr. 2641:1-2646:15 (Elliott); Tr. 2820:17-2822:21, 2824:4-12 (Bednorz); Tr. 4257:19-23 (Norman)).

[190] Keystone Br. Opposing Exceptions at 54-56; Trial Staff Br. Opposing Exceptions at 57-61.

[191] Keystone Br. Opposing Exceptions at 54-56, 59-61, 64-65; Trial Staff Br. Opposing Exceptions at 57-58, 60-65.

[192] Keystone Br. Opposing Exceptions at 58, 68-69; Trial Staff Br. Opposing Exceptions at 68. Furthermore, Keystone argues that it is infeasible to identify the specific purpose served by individual batches of DRA. Keystone Br. Opposing Exceptions at 69 (citing Tr. 782:18-20 (Trout)).

[193] Keystone Br. Opposing Exceptions at 52-56, 65-66; Trial Staff Br. Opposing Exceptions at 58-61.

DRA increases the pipeline's maximum flow rate.[194] They further contend that Joint Customers unreasonably treat any use of DRA as an expansion, regardless of whether Keystone used the DRA for operational or maintenance needs.[195] Keystone and Trial Staff state that this position would preclude Keystone from recovering the costs of DRA used for OM&A purposes, such as restoring capacity to preexisting levels following an incident or maintaining capacity during planned maintenance activities.[196]

75. Moreover, Keystone and Trial Staff contend that injecting DRA does not expand pipeline capacity.[197] They argue that only physical changes, such as installing DRA skids or building new pump stations, can increase a pipeline's capacity.[198] Trial Staff states that although Keystone used certain DRA skids to create incremental capacity for new committed shippers, it does not follow that it used DRA commodity for the same purpose.[199]

76. Keystone and Trial Staff dispute Joint Customers' claim that the Initial Decision failed to address evidence regarding Keystone's use of DRA.[200] To the extent that the Initial Decision did not discuss specific exhibits, Trial Staff states that these exhibits show that Keystone used DRA to respond to bottlenecks, outages, and regulatory changes, which fit within the meaning of OM&A.[201]

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[194] Keystone Br. Opposing Exceptions at 55 (quoting Initial Decision, 182 FERC ¶ 63,013 at P 310).

[195] Keystone Br. Opposing Exceptions at 54, 56; Trial Staff Br. Opposing Exceptions at 59-60.

[196] Keystone Br. Opposing Exceptions at 65; Trial Staff Br. Opposing Exceptions at 60.

[197] Keystone Br. Opposing Exceptions at 63-67; Trial Staff Br. Opposing Exceptions at 65-66.

[198] Keystone Br. Opposing Exceptions at 66; Trial Staff Br. Opposing Exceptions at 66.

[199] Trial Staff Br. Opposing Exceptions at 65-66 (citing Initial Decision, 182 FERC ¶ 63,013 at P 300).

[200] Keystone Br. Opposing Exceptions at 58, 61-63.

[201] Trial Staff Br. Opposing Exceptions at 62-65 (citing Ex. JC-0026 at 11, 19, 28-30, 39-40; Ex. JC-0213 at 4; Ex. JC-0248 at 16; Ex. JC-0249 at 3; Ex. JC-0251 at 1; Ex. JC-0257 at 2). Trial Staff further states that these exhibits indicate that Keystone

77. Keystone and Trial Staff state that the Initial Decision concluded that Keystone demonstrated that its DRA costs are recoverable in the Variable Rate because all identified uses of DRA related to OM&A activities under the TSAs.[202]

78. Keystone and Trial Staff argue that nothing in the TSAs requires Keystone to build a pipeline capable of transporting 591,000 bpd in exchange for the Fixed Rate.[203] They argue that Joint Customers' reliance upon the term "Expansion Facilities" is misplaced because the TSAs merely provide that Keystone "is proposing" to construct these facilities.[204] They contend that Keystone's statements in open season documents and regulatory filings do not alter the language of the TSAs and likewise indicate that Keystone was proposing, rather than committing, to build a pipeline with a capacity of 591,000 bpd.[205] They also dispute Joint Customers' claim that Keystone's obligation to satisfy committed-shipper contracts while reserving capacity for uncommitted shippers required it to construct a system with a nominal capacity of 591,000 bpd.[206]

79. Keystone and Trial Staff agree with Joint Customers that the issue of whether the Keystone System was designed to transport 591,000 bpd is irrelevant to resolving whether DRA costs are recoverable in the Variable Rate.[207] In any event, they argue that the system was properly designed. Keystone argues that although the system did not

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needed to use DRA to achieve a nominal capacity of 591,000 bpd, a fact that the Initial Decision recognizes and no participant contests. *Id.* at 62-63 (citing Initial Decision, 182 FERC ¶ 63,013 at PP 249-250, 254, 267; Ex. KEY-0078 at 17:1-3, 17:5-7 (Bednorz Answering)).

[202] Keystone Br. Opposing Exceptions at 55-56; Trial Staff Br. Opposing Exceptions at 58.

[203] Keystone Br. Opposing Exceptions at 71-72; Trial Staff Br. Opposing Exceptions at 73.

[204] Keystone Br. Opposing Exceptions at 72 (citing Ex. KEY-0004 at 51-52); Trial Staff Br. Opposing Exceptions at 70, 72, 74-75 (quoting Ex. JC-0011 at 92-93) (citing *MCI Telecomms. Corp. v. FCC*, 842 F.2d 1296, 1306 (D.C. Cir. 1988)).

[205] Trial Staff Br. Opposing Exceptions at 70, 73-75 (citing Ex. JC-0004 at 7; Ex. JC-0008 at 18).

[206] *Id.* at 75 (citing Initial Decision, 182 FERC ¶ 63,013 at PP 255-256; Tr. 4408:25-4409:9 (Norman)); Keystone Br. Opposing Exceptions at 71.

[207] Keystone Br. Opposing Exceptions at 69, 74 (citing Joint Customers Br. on Exceptions at 69, 75); Trial Staff Br. Opposing Exceptions at 62, 79-81 (same).

attain its intended capacity when it entered service, it is infeasible for the design process to anticipate all issues that can occur in real-world operations.[208]

80. Additionally, Keystone and Trial Staff argue that Joint Customers' reliance upon the CER's 2022 Reasons for Decision is misplaced. Keystone states that the CER's decision should receive minimal weight because it reflects a less extensive evidentiary record and applies Canadian law rather than the ICA.[209] Trial Staff likewise states that the CER's decision is not binding upon the Commission.[210]

4. Commission Determination

81. We affirm the Initial Decision. Although the TSAs do not reference DRA costs, they broadly define OM&A costs to include "all operating, maintenance and administration costs and expenses," including costs related to "pipeline inspection and pipeline repairs" and "all other costs and expenses similar in nature to any of the foregoing."[211] As discussed below, upon review of the evidence describing how Keystone has used DRA on the Keystone System, we conclude that Keystone appropriately recovered DRA commodity and DRA skid costs in the Variable Rate.

a. DRA Commodity Costs Are Recoverable in the Variable Rate

82. We find that Keystone's DRA commodity costs are "operating, maintenance and administrative and general costs and expenses (including pipeline inspection and pipeline repairs)" that are recoverable in the Variable Rate.[212]

83. DRA is properly classified as an operating and maintenance cost because Keystone uses DRA to mitigate capacity constraints in operating the Keystone System.[213]

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[208] Keystone Br. Opposing Exceptions at 73-74; Trial Staff Br. Opposing Exceptions at 76-77 (quoting Ex. JC-0011 at 99 (emphasis by Trial Staff)) (citing Ex. JC-0005 at 28, 115).

[209] Keystone Br. Opposing Exceptions at 77-78.

[210] Trial Staff Br. Opposing Exceptions at 68 (citing *Great Lakes Transmission Ltd. P'ship*, Opinion No. 367-A, 62 FERC ¶ 61,101, at 61,727 (1993)).

[211] Ex. JC-0010 at 19-20; Ex. JC-0011 at 19-20.

[212] Ex. JC-0010 at 19; Ex. JC-0011 at 19.

[213] Tr. 1187:12-19 (Ali).

All participants agree that when Phase 2 of the Keystone System began operations in February 2011, the Keystone System was unable to attain its designed nominal capacity of 591,000 bpd and instead could only transport between 520,000-540,000 bpd. This capacity disparity resulted from multiple operational factors, including the PHMSA Suspension,[214] equipment issues that reduced the discharge pressures from fixed-speed pump stations,[215] increased crude oil viscosity resulting from lower-than-expected soil temperatures,[216] and higher volumes flowing to Cushing rather than Patoka.[217] The record shows that Keystone used DRA to address these constraints and ensure that the Keystone System could provide sufficient capacity to satisfy its obligations to committed and uncommitted shippers.[218] In particular, Keystone used DRA on a targeted basis and

[214] *E.g.*, Ex. KEY-0051 at 1-2; Ex. KEY-0045 at 9:1-23, 10:3-5, 13:24-14:2 (Kothari Answering); Ex. KEY-0075 at 21:19-22 (Elliott Answering).

[215] Ex. KEY-0045 at 12:21-13:6 (Kothari Answering) (attesting that the PHMSA Suspension caused vibration issues at certain fixed-speed pump stations, which reduced the discharge pressure emitted from those stations and further constrained the Keystone System's nominal capacity).

[216] Ex. KEY-0045 at 12:12-20 (Kothari Answering). Lower soil temperatures reduce the temperature of crude oil flowing through the pipeline, which results in higher viscosity. *Id.* As the viscosity of crude oil increases, additional pressure is required to flow the oil through the pipeline and the pipeline's nominal capacity is reduced. *E.g.*, Ex. KEY-0045 at 15:18-19 (Kothari Answering); Ex. KEY-0070 at 7:9-10 (Miesner Answering); Ex. KEY-0075 at 6:19-20 (Elliott Answering); Ex. KEY-0123 at 19:21-22 (Miesner Rebuttal); Ex. JC-0057 at 8:22-9:3 (Vanderpool Direct).

[217] The record indicates that the Keystone System was designed based upon the assumption that approximately one-third of crude oil volumes would flow to Cushing and the remaining two-thirds would flow to Wood River and Patoka. Ex. KEY-0070 at 9:10-17 (Miesner Answering) (citing Ex. KEY-0073 at 1); Tr. 1793:16-1794:1, 1794:12-14, 1799:19-25 (Jones). In practice, however, shippers transported higher volumes to Cushing than anticipated. *See* Ex. KEY-0073 at 1; Ex. JC-0026 at 29, 78. Because the pipeline segment between Steele City and Patoka shuts down when crude oil is flowing to Cushing, increased flows to Cushing result in higher crude oil viscosity on the Steele City-Patoka segment, which reduces the Keystone System's nominal capacity. Ex. KEY-0070 at 10:10-18 (Miesner Answering); Ex. KEY-0045 at 13:7-12 (Kothari Answering).

[218] *E.g.*, Ex. JC-0026 at 29 (July 2014 Keystone Decision Summary); *id.* at 78 (May 2014 Keystone Decision Summary) (proposing to use DRA at fix-speed pump stations "to reduce the frictional losses thus compensating for not being able to achieve

its DRA use fluctuated in response to specific operational conditions on the system.[219] For example, as discussed above, Keystone generally used higher levels of DRA when operating under a reduced design factor or other pressure restrictions and lower levels of DRA when operating without these constraints.[220] Moreover, after the removal of pressure restrictions resulting from the PHMSA Suspension and operational incidents, Keystone's DRA costs declined by 75-80% in 2021 relative to prior years.[221] This evidence supports the conclusion that Keystone used DRA as an operational and maintenance tool to provide transportation service.[222]

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the required discharge pressures"); *id.* (indicating that all DRA skids operating in May 2014 served to eliminate operability bottlenecks).

[219] Ex. KEY-0019 at 8:8-10:9, 12:21-13:3 (Ali Direct) (describing how Keystone decides whether to use DRA in particular situations); Tr. 1217:9-12 (Ali); Ex. JC-0298 at 7; Ex. S-0033 at 2; *see also* Ex. JC-0026 at 29 (explaining that Keystone expected DRA usage to decrease after installation of new pressure control valves to increase pump stations' maximum discharge pressure); Ex. KEY-0019 at 13:4-14:2 (Ali Direct) (explaining instances when Keystone considered but declined to use DRA). In addition, Keystone witness Mr. Ali testified that Keystone decides whether to use DRA by evaluating current and forecasted operating conditions and determining whether DRA is necessary to satisfy its obligations to shippers. Ex. KEY-0019 at 4:20-5:2, 8:8-10:9, 11:14-21 (Ali Direct).

[220] Ex. KEY-0019 at 12:4-9, 14:14-15 (Ali Direct); Ex. KEY-0053 at 4:21-5:7 (Ali Answering); Tr. 1217:13-21 (Ali).

[221] Keystone Br. Opposing Exceptions at 61 & n.366 (citing Ex. KEY-0140 at 1) (stating that the DRA costs included in the Variable Rate declined by nearly 80% in 2021 relative to 2020). To the extent that Joint Customers challenge the Initial Decision's reliance on data regarding Keystone's throughput and DRA usage in 2021, their arguments are unpersuasive. This data was admitted into the evidentiary record and Joint Customers did not object to its admission. Tr. 4011:7-15; *see also* Tr. 4003:7-4011:11 (indicating that Joint Customers objected to the admission of other exhibits introduced together with Exhibit No. KEY-0140 but did not object to Exhibit No. KEY-0140 itself). Moreover, although Keystone presented this data for the first time at hearing, the record indicates that Keystone provided the data to Joint Customers before the hearing began. *See* Ex. KEY-0140 at 2-3, 15-16; Tr. 3821:12-22, 3822:24-3823:15 (Arthur).

[222] Furthermore, nothing in the TSAs prohibits Keystone from using DRA in operating the Keystone System to provide the services described in the TSAs. *See* Ex. JC-0010 at 1-21; Ex. JC-0011 at 1-21.

84. Further supporting treatment of DRA as an operating and maintenance cost, Keystone uses DRA to maintain capacity and avoid curtailments of service during pressure restrictions, equipment outages, and pipeline maintenance, inspection, and repair activities. For instance, the record shows that Keystone used higher amounts of DRA in 2016, 2018, 2019, and 2020 after it had imposed pressure restrictions in response to incidents on the Keystone System.[223] In addition to counteracting pressure restrictions, Keystone also uses DRA in operating the Keystone System during unplanned outages and equipment failures. For example, after an inlet valve seal failure in October 2020, Keystone used DRA to restore throughput to pre-failure levels.[224] Similarly, Keystone used DRA to mitigate throughput losses in September 2020 after the failure of a variable frequency drive at its Carpenter pump station and in December 2018 after an electrical issue rendered a pump unit unavailable at its Roswell pump station.[225] Keystone likewise used DRA to support pipeline maintenance, inspections, and repairs.[226] Specifically, Keystone institutes pressure restrictions while it performs in-line inspections and pipeline repairs and uses DRA to counteract the capacity reductions resulting from those restrictions.[227] Based upon this evidence, we conclude that DRA commodity costs incurred for these purposes are "operating" and "maintenance . . . costs and expenses (including pipeline inspection and pipeline repairs)" under the TSAs.[228]

b. <u>DRA Skid Costs Are Recoverable in the Variable Rate</u>

85. We also affirm the Initial Decision's conclusion that the costs of DRA skids installed for OM&A purposes are recoverable in the Variable Rate. First, Keystone injects DRA into the Keystone System using DRA skids.[229] Thus, because Keystone uses

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[223] Ex. KEY-0019 at 12:4-9 (Ali Direct); Ex. KEY-0053 at 4:21-5:7 (Ali Answering). Due to pressure restrictions imposed after these incidents, the Keystone System operated at reduced pressure between: (i) April 8, 2016, and October 4, 2016, (ii) November 27, 2017, and May 4, 2018, (iii) February 14, 2019, and September 30, 2019, and (iv) November 11, 2017, and early 2021. Ex. KEY-0045 at 10:18-21 (Kothari Answering).

[224] Ex. KEY-0019 at 9:18-23 (Ali Direct).

[225] Ex. KEY-0019 at 12:15-18 (Ali Direct); Ex. KEY-0145 at 1-2.

[226] Ex. KEY-0019 at 4:16-20, 8:11-14 (Ali Direct); Ex. KEY-0145 at 2.

[227] Ex. KEY-0145 at 2.

[228] Ex. JC-0010 at 19; Ex. JC-0011 at 19.

[229] *See* Ex. KEY-0019 at 3:6-11 (Ali Direct).

DRA for purposes that satisfy the TSAs' definition of OM&A, we find that the costs of DRA skids installed for these purposes are likewise recoverable in the Variable Rate. Second, as discussed above, the TSAs allow Keystone to recover capitalized costs in the Variable Rate.[230] Accordingly, the fact that the costs of DRA skids are capitalized costs does not provide a basis for excluding them from the Variable Rate. Third, although Keystone installed certain DRA skids to increase the Keystone System's nominal capacity,[231] as opposed to mitigating capacity constraints,[232] it states that it has excluded the costs of these skids from the Variable Rate.[233] For these reasons, we find that Keystone has demonstrated that the DRA skid costs included in the Variable Rate constitute OM&A costs under the TSAs.

c. <u>Joint Customers' Arguments for Excluding DRA Costs from the Variable Rate Are Unavailing</u>

86. Joint Customers' arguments for excluding Keystone's remaining DRA skid costs and all DRA commodity costs from the Variable Rate are unpersuasive. Regarding DRA commodity costs, we disagree with Joint Customers' argument that these costs are not OM&A costs because DRA commodity expands the Keystone System by increasing its hydraulic maximum flow rate. Although DRA increases the pipeline's hydraulic maximum flow rate,[234] as discussed above, Keystone used DRA on a targeted basis to counteract capacity constraints preventing the Keystone System from operating at its intended capacity and to sustain throughput during outages, maintenance, and repairs.[235]

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[230] *Supra* at P 31.

[231] *See* Ex. JC-0132 at 6 (indicating that Keystone installed DRA skids between 2013-2016 to increase the Keystone System's nominal capacity); Tr. 949:21-950:5, 952:14-18 (Trout).

[232] *See* Tr. 951:1-7, 952:18-21 (Trout) (attesting that Keystone installed DRA skids in 2019 to mitigate incidents on the Keystone System and included the costs of these skids in the Variable Rate).

[233] Ex. S-0033 at 1; Ex. S-0143 at 2; Tr. 651:21-25, 666:9-10, 667:24-668:7, 689:2-9, 940:16-19, 952:18-23 (Trout); Tr. 1899:8-18, 1899:22-25 (Jones).

[234] *E.g.*, Ex. JC-0213 at 4.

[235] In contrast, Joint Customers' position would deem any use of DRA that increases the pipeline's flow rate to be a non-OM&A expansion, even when the flow-rate increase merely offsets a flow-rate decline and restores the pipeline's capacity to its preexisting levels. *E.g.*, Tr. 3918:11-3919:2 (Arthur) (attesting that using DRA to avoid a curtailment of service constitutes a non-OM&A expansion because it creates additional

We therefore conclude that Keystone used DRA for specific operational and maintenance purposes, rather than to expand the Keystone System's capacity.[236]

87. We likewise disagree with Joint Customers' argument that the Initial Decision is not based upon substantial evidence because it did not specifically address exhibits describing how Keystone used DRA. The exhibits that Joint Customers cite do not undermine our conclusion that Keystone used DRA for operational and maintenance purposes. To the contrary, these exhibits indicate that although DRA increased the Keystone System's flow rate,[237] Keystone used DRA to maintain or restore capacity in the face of operational constraints,[238] not to expand the Keystone System's capacity from

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capacity "compared to what otherwise would have been the capacity of the system after the event occurred that reduced capacity").

[236] Joint Customers' argument overlooks the distinction between the DRA skids that expanded Keystone's nominal capacity (which Keystone absorbed and excluded from the Variable Rate), and the DRA commodity used to operate the system, the costs of which can be allocated on a per-barrel basis between all applicable committed shippers paying the Variable Rate (including both expansion and non-expansion shippers like Joint Customers). *E.g.*, Ex. KEY-0019 at 3:4-5, 4:11-19, 5:3-7 (Ali Direct); Ex. JC-0057 at 27:2-6 (Vanderpool Direct); Ex. JC-0213 at 4. Although DRA increases a pipeline's operational throughput by reducing friction that occurs during transportation, it is the installation of DRA skids, not the use of DRA commodity, that expands the Keystone System's capacity. Ex. S-0073 at 5:5-8 (Norman Rebuttal); Tr. 4231:1-8, 4231:19-4232:9, 4233:7-4234:3, 4238:15-19, 4297:9-14 (Norman); Tr. 1217:1-4 (Ali).

[237] *See* Ex. JC-0026 at 19-20, 28-29, 78; Ex. JC-0132 at 6; Ex. JC-0213 at 4; Ex. JC-0257 at 1, 3; Ex. JC-0263 at 1, 3; Ex. JC-0273 at 8; Ex. JC-0296 at 4:16-22 (Vanderpool Surrebuttal); Ex. KEY-0045 at 11:17-19 (Kothari Answering); Ex. S-0014 at 15; Ex. S-0082 at 1; Tr. 1148:20-21, 1149:4-6 (Ali).

[238] Although the Initial Decision did not address the specific exhibits that Joint Customers cite on exceptions, we nonetheless conclude that the Initial Decision sufficiently addressed the record evidence regarding Keystone's use of DRA. Moreover, there is no requirement for initial decisions to address every argument or individual exhibit advanced at some point during the proceeding. *E.g., Sw. Power Pool, Inc.*, Opinion No. 562, 163 FERC ¶ 61,109, at P 147 (2018) ("[T]he fact that the Initial Decision does not address every piece of evidence or every argument advanced throughout the proceeding does not necessarily mean the Initial Decision is unreasoned or unsupported."); *Cajun Elec. Power Coop., Inc. v. Gulf States Utils. Co.*, Opinion No. 388, 66 FERC ¶ 61,325, at 62,050 n.92 (1994) (citing *Borek Motor Sales, Inc. v. NLRB*, 425 F.2d 677, 681 (7th Cir. 1970); *Nat. Gas Pipeline Co. of Am.*, 28 FERC ¶ 61,174,

520,000-540,000 bpd to 591,000 bpd.[239] To the extent that Keystone estimated in discovery that the Keystone System could not transport 591,000 bpd without DRA, even when operating at its maximum hydraulic flow rate without pressure restrictions,[240] Keystone explained that these estimates reflect several hypothetical assumptions that do not reflect actual operating conditions or system parameters.[241] Moreover, the fact that the Keystone System transported over 602,000 bpd in 2021 while its DRA costs declined by 75-80% compared to prior years further supports our conclusion that Keystone used DRA primarily for operational and maintenance purposes to address the effects of pressure restrictions.[242]

88. In addition, we reject Joint Customers' argument that the Initial Decision is internally inconsistent because it determined that the costs of DRA skids installed to create incremental capacity are not recoverable in the Variable Rate, while allowing Keystone to recover the costs of DRA commodity injected through those skids. This argument overlooks that the TSAs include operating costs associated with pipeline expansions within the definition of OM&A costs. Specifically, the TSAs define OM&A costs to include "all" operating costs incurred regarding the "Pipeline System,"[243] which consists of pipeline facilities owned by Keystone "as such facilities may be modified, expanded or extended from time to time."[244] Thus, even though Keystone installed

at 61,330-31 (1984)) ("There is no requirement that the presiding judge address every piece of evidence, one by one, in a voluminous record such as this one.").

[239] *E.g.*, Ex. JC-0026 at 19, 29, 78; Ex. JC-0248 at 16; Ex. JC-0273 at 24. For example, internal Keystone documents from 2014 state that Keystone planned to use DRA to mitigate "operability bottlenecks" at specific points on the Keystone System, including constraints related to pump stations emitting lower-than-expected discharge pressures due to vibration issues resulting from the PHMSA Suspension. Ex. JC-0026 at 29, 78.

[240] Ex. JC-0130 at 1; Ex. JC-0209 at 1; Ex. JC-0351 at 1; Ex. S-0082 at 1; *see also* Ex. S-0074 at 2; Ex. JC-0263 at 3; Tr. 1170:20-21, 1184:12-13 (Ali); Tr. 1254:9-12 (Kothari).

[241] Ex. JC-0130 at 1; Ex. JC-0209 at 1.

[242] Keystone Br. Opposing Exceptions at 61 & n.366 (citing Ex. KEY-0140 at 1).

[243] Ex. JC-0010 at 19; Ex. JC-0011 at 19.

[244] Ex. JC-0010 at 26 (Keystone Rules and Regulations tariff); Ex. JC-0011 at 26 (same); *see also* Ex. JC-0010 at 1-2 (explaining that capitalized terms not defined in the

certain DRA skids to expand the Keystone System by creating incremental capacity,[245] the TSAs allow Keystone to recover the costs of operating those skids[246] through the Variable Rate, which is paid by all committed shippers (expansion and non-expansion). For example, if Keystone had created incremental capacity by constructing new pump stations instead of installing DRA skids, the TSAs would permit Keystone to recover the costs of operating those new pump stations in the Variable Rate.[247] Just as the costs of operating new pump stations would be recoverable in the Variable Rate, the DRA commodity costs incurred to operate DRA skids are likewise recoverable in the Variable Rate.[248]

89. Furthermore, we disagree with Joint Customers' claim that the TSAs require Keystone to construct a pipeline system capable of transporting 591,000 bpd in exchange for the Fixed Rate. The TSAs between Keystone and Joint Customers reflect agreements to transport specific volumes of crude oil on behalf of the shipper that is a party to the TSA. Joint Customers' TSAs do not contain language requiring Keystone to construct a

TSAs shall have the meaning set forth in Keystone's Rules and Regulations tariff); Ex. JC-0011 at 1-2 (same).

[245] Ex. JC-0132 at 6; Tr. 949:21-950:5, 952:14-18 (Trout). As discussed above, Keystone has not included the costs of these DRA skids installed to create incremental capacity in the Variable Rate. *E.g.*, Ex. S-0033 at 1; Ex. S-0143 at 2; Tr. 651:21-25, 940:16-19, 945:13-19 (Trout).

[246] As discussed above, we find that Keystone created incremental capacity used to accommodate new contract shippers on the Keystone System by installing DRA skids and operated those skids by injecting DRA commodity into the system. *Supra* P 85 n.233. Accordingly, the costs of that DRA commodity represent costs of operating the Keystone System, as expanded by the addition of DRA skids.

[247] *See* Ex. JC-0010 at 19-20 (including power costs within the definition of OM&A costs recoverable in the Variable Rate); Ex. JC-0011 at 19-20 (same).

[248] Because we find that Keystone uses DRA commodity for operational and maintenance purposes, not for expansion, we decline to require Keystone to allocate its DRA commodity costs between expansion and non-expansion purposes. *See* Joint Customers Br. on Exceptions at 67-68. To the extent that Keystone expanded the Keystone System by installing DRA skids to create incremental capacity, we find that the TSAs allow Keystone to recover the costs of operating the expanded system, including DRA commodity costs, through the Variable Rate. Moreover, we observe that all committed shippers, including those that entered TSAs for incremental capacity following the 2015 and 2017 open seasons, pay the costs of DRA commodity and DRA skids included in the Variable Rate.

pipeline system with any particular capacity.[249] Contrary to Joint Customers' contention, the TSAs do not establish an explicit connection between the Fixed Rate and the construction of a pipeline with a nominal capacity of 591,000 bpd. In any case, this argument relies on language in a TSA dated March 14, 2007, referencing "Expansion Facilities" required to "expand the Pipeline System to a nominal transportation capacity of approximately 590,000 [bpd]."[250] However, Joint Customers are not parties to this 2007 TSA and their own TSAs with Keystone contain no reference to "Expansion Facilities."[251] Given the absence of any similar language in Joint Customers' TSAs, we find that Joint Customers' TSAs do not obligate Keystone to build a pipeline with a nominal capacity of 591,000 bpd.[252]

90. Similarly unavailing is Joint Customers' contention that a supplemental rate principles agreement between Keystone and Phillips 66 establishes an explicit tie between the Fixed Rate and the construction of a pipeline system capable of transporting 591,000 bpd.[253] This agreement provides for the Fixed Rate to be "adjusted for capital

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[249] *See* Ex. JC-0010 at 9, 16; Ex. JC-0011 at 9, 16.

[250] Joint Customers Br. on Exceptions at 72 (quoting Ex. JC-0005 at 4); *see also* Ex. JC-0005 at 28, 115 (discussing "Expansion/Extension Facilities").

[251] Ex. JC-0005 at 3 (listing TransCanada Keystone Pipeline GP Ltd. and National Cooperative Refinery Association as parties to the March 14, 2007 TSA); *see generally* Ex. JC-0010 at 1-15 (July 24, 2009 TSA between Keystone and Husky); Ex. JC-0011 at 1-15 (July 24, 2009 TSA between Keystone and ConocoPhillips). In any case, like Joint Customers' TSAs, the 2007 TSA reflects an agreement to transport specific quantities of crude oil for specific shippers and provides that Keystone "is proposing," rather than committing, to construct an expansion of the Keystone System. Ex. JC-0005 at 3, 11, 19.

[252] Regarding Joint Customers' argument that the Initial Decision's interpretation of the TSAs would allow Keystone to construct a pipeline with a nominal capacity of 50,000 bpd, use DRA to increase the capacity to 591,000 bpd, and recover the costs of that DRA through the Variable Rate, we note that Joint Customers raised this argument for the first time on exceptions. In any case, as discussed above, the parties did not include language in the TSAs requiring Keystone to build a pipeline system with a specific capacity. Moreover, even if it were possible to increase a pipeline's capacity from 50,000 bpd to 591,000 bpd solely using DRA, in these circumstances, the Fixed Rate under the TSAs would be significantly lower than existing levels, which would tend to offset increases to the Variable Rate resulting from higher DRA costs.

[253] Ex. JC-0139 at 40:6-43:17 (Arthur Cross-Answering) (citing Ex. JC-0011 at 1-119).

variance" consistent with "the applicable Governing Agreement."[254] It then defines "Governing Agreement" as either: (a) Phillips 66's 2009 TSA with Keystone (P66 TSA) or (b) the "US Cushing Expansion/Extension Contract" included as Schedule A to the Permanent Diversion Agreement.[255] Joint Customers' argument turns upon which of these contracts represents "the applicable Governing Agreement": the US Cushing Expansion/Extension Contract references "Expansion/Extension Facilities" in the provision governing the calculation of the Capital Variance, whereas the P66 TSA does not.[256] Contrary to Joint Customers' contention,[257] we conclude that the P66 TSA constitutes the "applicable Governing Agreement" because unlike the US Cushing Expansion/Extension Contract, which is an unexecuted *pro forma* agreement, the P66 TSA is a binding, executed agreement that governs the rates and terms of the transportation service that Phillips 66 receives from Keystone.[258] Thus, we find that the Permanent Diversion Agreement does not establish a connection between the Fixed Rate and the construction of pipeline facilities capable of transporting 591,000 bpd.

91. We acknowledge that Keystone indicated in open season documents and regulatory filings that Phase 2 would increase the Keystone System's nominal capacity to

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[254] Ex. JC-0011 at 42.

[255] *Id.*

[256] *Compare* Ex. JC-0011 at 65, 116 (US Cushing Expansion/Extension Contract), *with id.* at 18 (P66 TSA).

[257] Ex. JC-0139 at 42:11-15 (Arthur Cross-Answering) (citing Ex. JC-0011 at 100, 115).

[258] *Compare* Ex. JC-0011 at 15 (showing that representatives of Keystone and ConocoPhillips Company, Phillips 66's predecessor, executed the P66 TSA effective July 24, 2009), *with id.* at 62, 113 (showing unexecuted signature blocks in the US Cushing Expansion/Extension Contract). In particular, the US Cushing Expansion/Extension Contract relates to the 2007 open season, in which Joint Customers did not participate. *See* Ex. JC-0005 at 2-160 (including TSAs executed in connection with the 2007 open season, none of which involve Husky or Phillips 66). Thus, the US Cushing Expansion/Extension Contract does not apply to the service provided under Joint Customers' TSAs. By contrast, the P66 TSA was executed on the same day as the supplemental rate principles agreement in connection with the 2009 open season. *Compare* Ex. JC-0011 at 1, 15 (showing that Keystone and Phillips 66 executed the P66 TSA on July 24, 2009), *with id.* at 41, 45 (showing that Keystone and Phillips 66 executed the supplemental rate principles agreement on July 24, 2009).

approximately 591,000 bpd.[259] However, other statements in the open season documents indicate that Keystone was merely proposing to provide that capacity, rather than committing to do so.[260] Moreover, notwithstanding Keystone's descriptions of the Keystone System in its regulatory filings, neither the Commission nor the NEB directed Keystone to construct a pipeline capable of transporting 591,000 bpd.[261] On balance, we are unpersuaded that the TSAs require Keystone to construct a pipeline with a nominal capacity of 591,000 bpd.

92. In addition, to the extent that Keystone was required to construct a pipeline system with sufficient capacity to satisfy its contractual obligations to committed shippers while reserving capacity for uncommitted shippers,[262] this does not undermine our conclusion

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[259] *See* Ex. JC-0008 at 10, 122 (2009 Notice of Open Season) ("Keystone Canada received approval from the NEB for the Cushing Expansion which will increase the capacity on the Keystone pipeline to 590,000 bpd."); Ex. JC-0003 at 3-4 (2008 PDO) (stating that "[c]onstruction of the extension to Cushing . . . will . . . involve additional facilities to increase Keystone's capacity to 591,000 bpd."); *id.* at 45 (Becker Affidavit) (stating that "[c]onstruction of the extension to Cushing . . . will also involve additional facilities to increase Keystone's capacity to 591,000 bpd to Wood River, Patoka, and Cushing").

[260] *See* Ex. JC-0008 at 18, 130 ("*It is proposed* that both segments (Cushing and Wood River/Patoka) of the Keystone Pipeline would be operated at full line rates of approximately 590,000 bpd." (emphasis added)); Ex. KEY-0042 at 13 (January 2007 Notice of Open Season) (same); *id.* (stating that "Keystone is *proposing* an expansion of the Keystone Pipeline from the current design of 435,000 [bpd] . . . by way of construction of the . . . Cushing Extension" (emphasis added)).

[261] *See TransCanada Keystone*, 135 FERC ¶ 61,259 at P 8 (granting Keystone's request for a temporary waiver of the requirement in 18 C.F.R. § 342.4(c) (2023) to file a verified statement in support of future changes to its committed rates); 2008 Declaratory Order, 125 FERC ¶ 61,025 at PP 18, 21-22, 25, 30-33, 38 (granting 2008 PDO in part and approving Keystone's committed-rate structure and proposals related to calculation of uncommitted rates); Ex. JC-0006 at 13-44.

[262] We reject Joint Customers' argument that Keystone's cumulative obligations to committed and uncommitted shippers required it to construct a pipeline capable of transporting 591,000 bpd when Phase 2 entered service. Joint Customers Br. on Exceptions at 72-73. When Phase 2 entered service in 2011, Keystone had entered contracts for 530,000 bpd of capacity and the NEB had required Keystone to reserve 35,000 bpd of capacity for uncommitted shippers. Ex. JC-0333 at 1; Ex. JC-0006 at 28. Thus, at that time, Keystone was required to provide 565,000 bpd of capacity to satisfy its contractual and regulatory obligations. Although Keystone later entered contracts for an

that DRA costs are recoverable in the Variable Rate. As discussed above, although the Keystone System could only transport between 520,000-540,000 bpd upon entering service due to multiple capacity constraints,[263] nothing in the TSAs prohibits Keystone from using DRA in operating the Keystone System to provide capacity sufficient to satisfy its obligations to shippers.

93. Joint Customers' argument that the Keystone System was improperly designed does not compel a different result. All participants, including Joint Customers, agree that this issue is not relevant to determining whether DRA costs are recoverable in the Variable Rate.[264] For this reason, Joint Customers' evidence regarding alleged flaws in the Keystone System's design does not alter our conclusion that Keystone's DRA commodity costs constitute OM&A costs under the TSAs.

94. Furthermore, contrary to Joint Customers' contention, the Initial Decision did not require Joint Customers to establish that all of Keystone's DRA costs related to expansion purposes. Rather, the Initial Decision concluded that the record contains sufficient evidence that no DRA costs associated with expansion were included in the Variable Rate.[265] We also reject Joint Customers' argument that Keystone must separately account for DRA commodity used for expansion and non-expansion purposes. Because we find that all of Keystone's DRA commodity costs were recoverable in the Variable Rate, Joint Customers' requested accounting is not necessary.[266]

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additional 25,000 bpd of capacity through open seasons conducted in 2015 and 2017, Ex. JC-0333 at 1, it was not obligated to provide this additional capacity when the Phase 2 expansion entered service.

[263] As discussed above, after the PHMSA Suspension and incident-related pressure restrictions were removed, the Keystone System transported over 600,000 bpd in 2021 using a significantly reduced amount of DRA. Ex. KEY-0140 at 1.

[264] Joint Customers Br. on Exceptions at 69; Keystone Br. Opposing Exceptions at 69-70; Trial Staff Br. Opposing Exceptions at 78-79.

[265] Although the Initial Decision stated that exhibits cited by Joint Customers "do not establish that the DRA costs and expenses were only incurred by . . . Keystone to expand the capacity of the Keystone System to 591 kbpd," Initial Decision, 182 FERC ¶ 63,013 at P 289, this statement does not reflect the burden of proof that the Initial Decision applied to Joint Customers. Rather, Joint Customers contended that Keystone has used DRA exclusively for expansion purposes, and the Initial Decision concluded that the exhibits at issue did not support this contention. *See id*.

[266] *See* Initial Decision, 182 FERC ¶ 63,013 at PP 300-301.

95. Finally, we are unpersuaded by Joint Customers' references to the CER's determinations regarding DRA costs.[267] The CER's decisions are based on a different evidentiary record developed through procedures that differ from the Commission's hearing processes.[268] For instance, the CER proceeding only allowed for written submissions and oral argument, did not include witness testimony or cross-examination, and did not apply the ICA.[269] Furthermore, the CER proceeding addressed only the Canadian portion of the Keystone System, not the U.S. portion of the system at issue here.[270] Accordingly, we decline to defer to the findings of the CER regarding the appropriate treatment of DRA costs under the TSAs.

D. Incident Costs and Expenses

96. Incident costs and expenses are incurred to address crude oil releases (i.e., spills) from the Keystone System.[271] Joint Customers challenge Keystone's recovery of costs and expenses related to three release incidents through the Variable Rate (the Incidents).[272] During the 2018 through 2021 period at issue in this proceeding, Keystone

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[267] Joint Customers state that the CER's decisions are "not binding" on the Commission in interpretating the TSAs that govern the U.S. portion of the Keystone System. Joint Customers January 10, 2023 Motion at 7. However, Joint Customers state that the CER's decisions are persuasive authority relevant to this proceeding. *Id.*

[268] *See id.* at 16 (acknowledging that "[t]he CER's findings were made without the benefit of the more fulsome evidentiary record before the Commission").

[269] Initial Decision, 182 FERC ¶ 63,013 at P 113; Keystone January 20, 2023 Answer at 11; *see also* Ex. JC-0010 at 14 (providing that TSAs "shall be subject to the rules, regulations and orders of . . . the FERC"); Ex. JC-0011 at 14 (same); Joint Customers January 10, 2023 Motion at 12 n.51 (stating that "CER policy is not governed by U.S. precedent or FERC policy").

[270] CER Reasons for Decision, 2022 CarswellNat 5352, para. 1 (defining the "Keystone System" addressed in that decision to mean the Canadian portion of the Keystone System).

[271] Ex. KEY-0060 at 20:4-5 (Wetmore Answering); *see also* Ex. KEY-0001 at 26:9-10 (Trout Direct) (describing costs "associated with remediation and reclamation activities stemming from an incident"); Ex. KEY-0017 at 9:14-16 (Kirstine Direct) (stating that a release incident required "engineering assessments, in-line inspections, excavations, and repairs").

[272] Initial Decision, 182 FERC ¶ 63,013 at P 431. Specifically, these are: (1) the November 16, 2017 release of approximately 6,592 barrels of oil after a rupture at Keystone System milepost 34.3 in Amherst, South Dakota, between the Ludden and

incurred approximately $107.5 million in costs and expenses due to the Incidents (the Incident Costs), of which Keystone recovered approximately $79 million from insurance proceeds.[273] The Incident Costs were thus offset by insurance adjustments in the Variable Rates for 2018 through 2021 for a net recovery of approximately $28.5 million for the Incidents.[274] At hearing, Joint Customers argued that Keystone should not be permitted to recover the Incident Costs through the Variable Rate because they stem from defects during the original construction, and they emphasized that the Fixed Rate (not the Variable Rate) recovers original construction costs. Moreover, they asserted that even if the Incident Costs would generally be recoverable through the Variable Rate, Keystone should not be allowed to recover costs related to the Incidents because it should have prevented them.[275]

Freeman pump stations (the Ludden Incident), Ex. KEY-0017 at 3:11-14 (Kirstine Direct); (2) the February 6, 2019 release of 17 barrels of oil in St. Charles County, Missouri (the St. Charles Incident), *id.* at 4:22-26; and (3) the October 29, 2019 release of approximately 4,500 barrels of oil after a rupture at Keystone System milepost 34.3 in Walsh County, North Dakota, between the Edinburg and Niagara pump stations (the Edinburg Incident), *id.* at 5:2-7. We note that Joint Customers do not challenge the inclusion in the Variable Rate of costs and expenses related to two other incidents that occurred in 2019 and 2020, respectively. *See id.* at 3:3-10, 10:8-15 (Kirstine Direct) (describing costs and expenses associated with five incidents from 2017 through 2021); Ex. JC-0091 at 30:16-17 (Arthur Answering) (proposing to exclude from the Variable Rate costs related to the Ludden, Edinburg, and St. Charles incidents only). Thus, we do not address either incident.

[273] Specifically, Keystone states that it incurred costs of: (1) $57.0 million due to the Ludden Incident, of which $45.7 million was reimbursed; (2) $9.6 million due to the St. Charles Incident, of which $1.2 million was reimbursed; and (3) $40.9 million due to the Edinburg Incident, of which $32.3 million was reimbursed. Ex. KEY-0017 at 10:8-14 (Kirstine Direct).

[274] *See* Ex. JC-0022 at 3-4, 8 (estimated Variable Rate notices for 2017-2020); Ex. JC-0015 at 1-2, 4-5 (2019 Final Variable Rate Notice); Ex. KEY-0140 at 6 (2021 Final Variable Rate Notice); Ex. JC-0001 at 36:1-9 (Arthur Direct) (describing Incident Costs included in the 2018 and 2019 Variable Rate); Ex. KEY-0001 at 35:8-10 (Trout Direct) (explaining that insurance proceeds "are credited back to shippers at the time they are received").

[275] Initial Decision, 182 FERC ¶ 63,013 at PP 436-440; *see also* Joint Stipulation of Issues at 15.

97. As discussed below, we affirm the Initial Decision in part and find that: (1) Keystone may recover the Incident Costs through the Variable Rate under the TSAs and (2) Keystone properly included the Incident Costs in the Variable Rate.

1. The Incident Costs Are Recoverable in the Variable Rate

a. Initial Decision

98. The Initial Decision determined that the Incident Costs are properly recovered through the Variable Rate and not the Fixed Rate.[276] The Initial Decision emphasized that under the TSAs, the Variable Rate recovers OM&A costs and expenses required after the pipeline begins operations.[277] In contrast, the Initial Decision found that the Fixed Rate recovers the original costs to construct the pipeline as finalized in the Capital Variance.[278] Since the Incidents occurred after the in-service date,[279] the Initial Decision determined that the Incident Costs fall within the category of "pipeline repair" in the definition of OM&A costs and the TSAs contain no exception for the recovery of all pipeline repair costs and expenses in the Variable Rate.[280]

b. Briefs on Exceptions

99. Joint Customers claim that the Initial Decision erred in finding that the Incident Costs are recoverable under the TSAs as OM&A costs through the Variable Rate.[281] Joint Customers assert that the Incident Costs result from errors during the construction and installation of the pipeline, and thus these costs should be recovered through the Fixed Rate. They argue that Keystone bears the risk of any such costs beyond those

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[276] Initial Decision, 182 FERC ¶ 63,013 at P 466; Errata to Initial Decision at 2 (clarifying that the first sentence in Paragraph 466 should state that the Incident Costs are "not associated with the Fixed Rate")

[277] Initial Decision, 182 FERC ¶ 63,013 at PP 459-461; *id.* P 460 ("Based on the USofA and Commission practice, the in-service date of a facility . . . is typically the demarcation between the incurrence of construction related and OM&A Costs.").

[278] *Id.* P 462.

[279] *Id.* P 461.

[280] *Id.* PP 461, 463-464.

[281] Joint Customers Br. on Exceptions at 82.

included in the Fixed Rate as modified by the Capital Variance.[282] Joint Customers argue that the Initial Decision inappropriately focuses on when the Incidents were discovered rather than when the damage resulting in the Incidents occurred.[283]

c. Briefs Opposing Exceptions

100. Keystone and Trial Staff support the Initial Decision's determination that the Incident Costs should be included as OM&A costs in the Variable Rate, like other costs and expenses related to pipeline repairs, based on the TSAs' plain text.[284] Keystone and Trial Staff agree with the Initial Decision that it is important to this finding that the Incidents occurred after the pipeline was operational and the Fixed Rate had been established.[285]

d. Commission Determination

101. We affirm the Initial Decision and find that the Incident Costs are recoverable through the Variable Rate based on the TSAs' plain language. As discussed, the TSAs define OM&A costs broadly to include "all" costs and expenses related to the operation, maintenance, and administration of the U.S. portion of the Keystone System.[286] OM&A costs expressly include "pipeline inspection and pipeline repairs" and "all other costs and expenses similar in nature."[287] Costs and expenses associated with pipeline ruptures, like the Incidents, qualify under this definition.[288] Because the Incident Costs are within the definition of OM&A, they are includable in the Variable Rate.

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

[283] *Id.*

[284] Trial Staff Br. Opposing Exceptions at 81-83; Keystone Br. Opposing Exceptions at 81.

[285] Trial Staff Br. Opposing Exceptions at 83; Keystone Br. Opposing Exceptions at 81.

[286] Ex. JC-0010 at 19; Ex. JC-0011 at 19.

[287] Ex. JC-0010 at 19-20; Ex. JC-0011 at 19-20.

[288] *See, e.g.*, Ex. KEY-0017 at 9:14-16 (Kirstine Direct) (explaining that, following the Edinburg Incident, Keystone conducted "engineering assessments, in-line inspections, and repairs"); Ex. JC-0060 at 13 (reporting the "replacement of failed section" after the Ludden Incident).

102. We reject Joint Customers' interpretation of the Fixed Rate as encompassing costs and expenses related to the Incidents even though they occurred during pipeline operations.[289] The TSAs demarcate costs incurred before and after the pipeline becomes operational. Under the TSAs, Keystone recovers pre-operational costs through the Fixed Rate and Keystone recovers post-operational costs through the Variable Rate. This follows from the definition of "Final Project Costs" included in the Capital Variance to the Fixed Rate as the "actual development, construction and acquisition costs of the Pipeline System."[290] Keystone had to determine Final Project Costs within two years after the in-service date, and these costs were simply used to adjust the Fixed Rate through the Capital Variance mechanism, based on any difference between the estimated and final project costs.[291] By contrast, the TSAs provide that the Variable Rate includes "all operating, maintenance and administration costs and expenses incurred by or on behalf of [Keystone] in respect of the Pipeline System."[292] These provisions establish that any costs or expenses related to the operational pipeline would be recovered through the Variable Rate.

103. This temporal distinction is consistent with the parties' risk-sharing arrangement. To limit the impact of project cost changes, the parties agreed that Keystone would assume half of any increase to estimated project costs as determined in the Capital Variance to the Fixed Rate within two years after the in-service date.[293] The parties did not agree to a risk-sharing mechanism for any OM&A costs incurred after the pipeline became operational. Instead, the TSAs provide that shippers will bear "all" OM&A costs in the Variable Rate.[294] As discussed above, the definition of OM&A costs includes "pipeline inspection and pipeline repairs" and it is reasonable to expect that Keystone would incur pipeline repair costs after the initial construction of the pipeline.[295] It is also reasonable to expect that spill incidents that require remediation and repairs would occur

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[289] *See* Joint Customers Br. on Exceptions at 82-84.

[290] Ex. JC-0010 at 18; Ex. JC-0011 at 18.

[291] Ex. JC-0010 at 18; Ex. JC-0011 at 18.

[292] Ex. JC-0010 at 19; Ex. JC-0011 at 19.

[293] Ex. JC-0010 at 18; Ex. JC-0011 at 18; Ex. KEY-0001 at 14:26-15:3 (Trout Direct).

[294] Ex. JC-0010 at 19; Ex. JC-0011 at 19.

[295] *See supra* P 101.

on an operational pipeline.[296] Thus, contrary to Joint Customers' argument, for cost recovery purposes under the TSAs it is significant when the Incidents were discovered and not when the damage that led to the Incidents occurred.[297]

2. Prudence and Other Principles Do Not Limit Keystone's Recovery of the Incident Costs

a. Initial Decision

104. The Initial Decision held that there is no limitation on Keystone's recovery of the Incident Costs under the TSAs.[298] Thus, the Initial Decision concluded that ratemaking principles regarding prudence, negligence, and the exclusion of extraordinary, non-recurring incident costs do not apply to limit Keystone's recovery of the Incident Costs.[299] In addition, the Initial Decision found no evidence that the TSAs require Keystone to recover costs from its suppliers or contractors for any errors attributable to them.[300] Therefore, the Initial Decision concluded that recovery of the Incident Costs through the Variable Rate is just and reasonable under the ICA.

105. Based on the record evidence, the Initial Decision found that Keystone and its agents and contractors used commercially reasonable and customary precautions and best practices to construct, maintain, and operate the pipeline to avoid the Ludden, St. Charles, and Edinburg Incidents.[301] Specifically, as to the Ludden Incident, the Initial Decision

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[296] *See BP Pipelines (Alaska) Inc.*, Opinion No. 544, 153 FERC ¶ 61,233, at P 142 (2015) ("minor oil spills may be included in rates as routine"). Note that Joint Customers do not argue that any incident costs and expenses should be excluded from the Variable Rate based on whether they are routine or extraordinary, non-recurring costs.

[297] *See* Joint Customers Br. on Exceptions at 82-83.

[298] Initial Decision, 182 FERC ¶ 63,013 at PP 455 (holding that the Incident Costs are "properly included in the Variable Rates under the TSAs"), 473 (holding that "allowing recovery of the Incident costs and expenses through the Variable Rate is just and reasonable and not unduly discriminatory" under the ICA), and 478-479, 484 (discussing potential limitations on Keystone's recovery of OM&A costs in the Variable Rate).

[299] *Id.* P 478.

[300] *Id.* P 471.

[301] *Id.* P 484; *see also id.* PP 485-497 (discussing Ludden Incident), 498-504 (discussing St. Charles Incident), 505-510 (discussing Edinburg Incident).

found that Keystone took reasonable measures before commissioning to detect the fatigue crack that likely caused the incident.[302] The Initial Decision found unpersuasive Joint Customers' claim that the Ludden Incident was entirely attributable to mechanical damage without regard to the impact of the intervening nine years of operations on the damaged segment.[303] Regarding the St. Charles Incident, the Initial Decision found that Keystone and its contractors used "reasonable diligence to prevent" the incident following an earlier repair on that segment.[304] Regarding the Edinburg Incident, the Initial Decision found that Keystone took all reasonable precautions to prevent the incident because Keystone's inspections were consistent with industry standards at the time.[305]

b. <u>Briefs on Exceptions</u>

106. Joint Customers state that the Initial Decision erred by not applying Commission precedent that they claim generally bars recovery of costs related to construction errors due to the pipeline's mismanagement.[306] They argue that these principles are not limited to cost-of-service proceedings and should apply here.[307] Additionally, Joint Customers claim that the Initial Decision erred by not finding that Keystone's recovery of the Incident Costs is contrary to sound ratemaking policy because it would reward poor construction practices.[308]

107. Joint Customers claim that the Incidents are directly attributable to Keystone's mismanagement, which supports excluding the related costs from the Variable Rate, and

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[302] *Id.* PP 487, 488.

[303] *Id.* P 495 (citing Ex. KEY-0121 at 3:21-24 (Godfrey Rebuttal)).

[304] *Id.* P 503; *but see id.* PP 501-502 (stating that Keystone and its contractors contributed to the incident due to making an unsuccessful repair years before); Ex. JC-0122 at 29.

[305] *Id.* P 509.

[306] Joint Customers Br. on Exceptions at 84.

[307] *Id.* at 84-86 (citing *Anaheim v. FERC*, 669 F.2d 799, 809 (D.C. Cir. 1981); *BP Pipelines (Alaska)*, 146 FERC ¶ 63,019, at P 93 (2014); *Midwestern Gas Transmission Co.*, 36 F.P.C. 61, 70 (1966)).

[308] *Id.* at 86-87; *see also id.* at 5 (asserting that this policy consideration implicates "Keystone's legal duty to mitigate damages prior to attempting to recover incident costs from shippers").

that the Initial Decision failed to properly evaluate the evidence in reaching the opposite conclusion.[309] Specifically, Joint Customers argue that the Initial Decision's findings with respect to each incident contradict those in the analyses conducted by third-party engineering firms. Joint Customers state that the Initial Decision inappropriately relied more on after-the-fact statements from Keystone witnesses.[310] Joint Customers further argue that the Initial Decision's conclusion about the Edinburg Incident is flawed because, despite acknowledging that a third-party analysis faulted Keystone and its contractor for actions leading to the incident, the Initial Decision found that Keystone acted reasonably given the analysis's conclusion that Keystone nonetheless conformed to industry standards.[311] Joint Customers also assert that an oil spill in 2022 reinforces the record evidence of Keystone's lack of care in constructing the Keystone Pipeline.[312]

c. <u>Briefs Opposing Exceptions</u>

108. Keystone counters that Joint Customers cite inapplicable precedent regarding prudence and exclusion of incident costs and expenses from rates.[313] Keystone also asserts that the Commission need not address whether Keystone has a legal duty to adequately mitigate damages.[314] Keystone notes that, separate from any legal duty, its practice is to pursue suppliers and contractors for damages due to their negligence where a viable claim exists.[315] Similarly, Trial Staff supports the Initial Decision's conclusion that the TSAs "do not contain an exception for the recovery of all pipeline repair costs and expenses in the Variable Rate."[316]

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[309] *Id.* at 86-89.

[310] *Id.* at 88-89.

[311] *Id.* at 89.

[312] *Id.* at 90. On July 19, 2023, Joint Customers moved to lodge evidence of the December 7, 2022 release of crude oil from a rupture at Cushing Extension, Mile Point 14 in Kansas (the Milepost 14 Incident), which Keystone opposed in an answer filed on August 3, 2023.

[313] Keystone Br. Opposing Exceptions at 84.

[314] *Id.* at 9.

[315] *Id.*

[316] Trial Staff Br. Opposing Exceptions at 82 (quoting Initial Decision, 182 FERC ¶ 63,013 at P 464).

109. In addition, Keystone asserts that the Initial Decision fully evaluated the evidence regarding the Incidents and correctly concluded that the Incident Costs are properly included in the Variable Rate.[317] Keystone states that the Initial Decision correctly found no mismanagement or negligence by Keystone or its agents or contractors, and that no participant claims or submitted evidence showing negligence or mismanagement.[318] Specifically, Keystone argues that the Initial Decision lists numerous actions and inspection processes that Keystone undertook to prevent the Incidents and properly concludes that Joint Customers misconstrued the third-party analyses for each incident.[319] Keystone asks the Commission to disregard Joint Customers' new evidence of a 2022 incident as it is beyond the scope of this proceeding.[320]

d. <u>Commission Determination</u>

110. We affirm the Initial Decision and hold that the Incident Costs are properly recovered in the Variable Rate under the TSAs.[321]

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[317] Keystone Br. Opposing Exceptions at 88-90.

[318] *Id.* at 85.

[319] *Id.* at 88-90.

[320] *Id.* at 90. Trial Staff does not address this issue on exceptions. Previously, Trial Staff stated that it "does not opine on the causes of the Incidents or whether Keystone acted consistently with legal and industry standards when managing, operating, constructing, or inspecting the pipeline." Trial Staff Initial Post-hearing Br. at 49.

[321] Initial Decision, 182 FERC ¶ 63,013 at P 454. We deny Joint Customers' July 19, 2023 motion to lodge the root cause failure analysis and PHMSA amended corrective order related to the Milepost 14 Incident, which Keystone timely opposed. The Milepost 14 Incident occurred in 2022 and is, therefore, outside of the scope of this proceeding, which concerns Keystone's Variable Rate through 2021. *Pub. Serv. Co. of Colo.*, 185 FERC ¶ 61,106, at P 15 (2023). Further, this information is not necessary to understand or resolve any issue in this proceeding. *Maritimes & Ne. Pipeline, L.L.C.*, 93 FERC ¶ 61,117, at 61,339-40 (2000) (denying motion to lodge engineering affidavit where the Commission understood the issues based on the existing record). Indeed, Joint Customers acknowledge that the lodged information is "directly relevant" to issues that have been set for hearing in Docket No. IS22-76-000, et al., where the participants will be able to develop a record and make arguments regarding the Milepost 14 Incident. July 19, 2023 Motion at 3; *see also San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs.*, 148 FERC ¶ 61,006, at PP 6, 11, 14 (2014) (denying rehearing of denial

111. However, as an initial matter, we reverse the Initial Decision to the extent that it interpreted the TSAs as permitting Keystone to recover imprudently incurred costs without any limitations. We recognize that the TSAs allow for the recovery of "all operating, maintenance and administrative costs," "regulatory costs," and "all other costs and expenses similar in nature to any of the foregoing."[322] We also acknowledge that the TSAs do not contain an express prohibition on Keystone's recovery of imprudently incurred incident costs and expenses. However, for purposes of construing what the parties meant by "all" and "costs" in these provisions of the TSAs, we observe that the parties negotiated a cost-based rate mechanism[323] and cost-based rates typically only permit recovery by the pipeline of prudently incurred costs. In that context, allowing a pipeline to recover "all" of its costs simply refers to allowing a pipeline to recover its prudently incurred costs.[324] Thus, without compelling evidence to the contrary, it seems unlikely that the parties intended to permit Keystone to assess its shippers for imprudent

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of motion to lodge evidence that will not affect the proceeding's outcome and goes to questions in another proceeding).

[322] Ex. JC-0010 at 19-20; Ex. JC-0011 at 19-20.

[323] Although as stated above the TSAs do not strictly follow the Commission's cost-of-service policies, the parties nonetheless negotiated a mechanism that flows through Keystone's OM&A costs to the committed shippers through the Variable Rate, as opposed to a fixed rate (e.g., $5 per barrel) or a fixed OM&A cost (e.g., $250,000,000).

[324] The TSAs provide that they are subject to the ICA and Commission precedent. *See* Ex. JC-0010 at 14; Ex. JC-0011 at 14. Under the ICA and Commission precedent, public utilities may recover only their prudently incurred costs. Opinion No. 544, 153 FERC ¶ 61,233 at P 12 ("The prudence standard ensures that ratepayers are not required to pay for unnecessary costs." (cleaned up)); *Midwestern Gas*, 36 FPC 61 at 70, *reh'g denied*, 36 FPC 599 (1966), *aff'd, Midwestern Gas Transmission Co. v. FPC*, 388 F.2d 444 (7th Cir. 1968), *cert. denied*, 392 U.S. 928 (1968) ("An elementary proposition of utility law and utility regulation, universally recognized, is that public utilities, in the interest of their customers as well as in their own interest, should be permitted to charge rates which are compensatory of the full cost incurred by alert, efficient, and responsible management. It is equally elementary that customers should not be required to pay more than this cost." (citing *Acker v. U.S.*, 298 U.S. 426, 430-431 (1935)); *see also, e.g., New England Power Co.*, Opinion No. 231, 31 FERC ¶ 61,047, at 61,085-86 (1985), *reh'g denied*, 32 FERC ¶ 61,112 (1985), *aff'd sub nom. Violet v. FERC*, 800 F.2d 280 (1st Cir. 1986) (assessing prudence of costs incurred pursuant to a contract for the construction and operation of a nuclear power plant).

or reckless expenditures.[325] Accordingly, in the absence of any provision in the TSAs specifically permitting Keystone to recover imprudent costs, it is reasonable to interpret the TSAs as only permitting the recovery of prudent costs.[326] Furthermore, this interpretation is consistent with the contractual doctrine of good faith and fair dealing, which applies to the TSAs as with other contracts.[327] Thus, we find that Keystone's right to recover the Incident Costs through the Variable Rate is limited to those prudently incurred.

112. Nonetheless, we find that the Incident Costs recovered by Keystone under the Variable Rate satisfy the prudence limitation. A presumption of prudence applies until the challenging party creates a "serious doubt" as to the prudence of an expenditure.[328] Once a serious doubt has been raised, the pipeline has the burden to dispel such doubt and prove that the expenditure at issue was prudent.[329] The relevant inquiry "is not just whether the utility made a mistake in deciding whether or not to engage in an action, but whether it acted imprudently in failing to consider the costs and benefits of that action

[325] *2249778 Ontario Inc. v. Smith*, 2014 ONCA 788, para. 19 (Can.) ("a commercial contract is to be interpreted . . . in a fashion that . . . avoids a commercial absurdity").

[326] To the extent the TSAs could be construed to allow the recovery of imprudently incurred costs, the Commission has authority under the ICA to modify contractual terms that it finds to be unjust and unreasonable. *Seaway*, 146 FERC ¶ 61,151, at P 19.

[327] *Wastech Servs. Ltd. v. Greater Vancouver Sewerage & Drainage Dist.*, 2021 SCC 7, para. 62 ("[A] discretionary power, even if unfettered, is constrained by good faith. To exercise it, for example, capriciously or arbitrarily, is wrongful and constitutes breach of contract."). This and other contractual duties stem from the "requirement of corrective justice." *Id.* at para. 4; *see, e.g.*, *Bhasin v. Hrynew*, 2014 SCC 71, paras. 73-74 (explaining that a duty of "honest contractual performance" flows from the duty of good faith and is "analogous to equitable doctrines which impose limits on the freedom of contract, such as unconscionability"). The participants did not present a limiting principle for recovery of the Incident Costs under Canadian contract law on exceptions, other than Joint Customers' arguments concerning mitigation of damages, discussed *infra* note 355. *See* Joint Customers Br. Opposing Exceptions at 37.

[328] Opinion No. 544, 153 FERC ¶ 61,233 at P 13.

[329] *Id*.

before undertaking it."[330] "Flawed or even wrong decision-making does not equate to imprudence."[331]

113. The Incident Costs, as described in this record, satisfy the prudence standard. Although the record indicates that Keystone or a third-party contractor or manufacturer had some role in causing the Incidents, the record evidence does not raise a serious doubt as to the prudence of Keystone's management decisions or suggest that a breach of a contractual duty, like the duty of good faith, limits Keystone's right to recover the Incident Costs.[332] In fact, the record indicates that Keystone used reasonable precautions and practices at the time to construct, maintain and, operate the pipeline to avoid the Ludden, St. Charles, and Edinburg incidents.[333]

114. Regarding the Ludden Incident,[334] post-incident reports state that the probable cause was a crack resulting from mechanical damage during installation that grew while

[330] *Entergy Servs., Inc.*, Opinion No. 505, 130 FERC ¶ 61,023, at P 52 (2010).

[331] *Id.* P 54 n.69. For example, the Commission has found imprudence based on evidence that an oil pipeline should have known that project cost estimates were unrealistic and evidence of "conspicuous misconceptions" regarding project design. Opinion No. 544, 153 FERC ¶ 61,233 at P 16.

[332] *See supra* P 111. For instance, a Canadian court refused to enforce a liability limiting clause in a sales contract for a product that a company knew to be defective when doing so endangered the public. *See Plas-Tex Can. Ltd. v. Dow Chemical of Can. Ltd.*, 2004 ABCA 309 at paras. 54-55; *id.* para. 1 (explaining that the defective product made a natural-gas pipe crack such that it leaked often, caused an explosion, and was eventually shut down).

[333] Initial Decision, 182 FERC ¶ 63,013 at P 484. We reviewed and reference several incident reports, including from the National Transportation Safety Board (NTSB) (Ex. JC-0082), the U.S. Government Accountability Office (GAO) (Ex. JC-0122), PHMSA (Ex. JC-0060; Ex. JC-0061; Ex. JC-0083; Ex. JC-0087), and third-party engineering firms hired by Keystone, as required by PHMSA, Ex. JC-0122 at 2. Those engineering firms completed root cause failure analyses (RCFAs) for each incident. *See* Ex. JC-0120 (Ludden RCFA); Ex. JC-0124 (St. Charles RCFA); Ex. KEY-0087 (Edinburg RCFA).

[334] The Ludden Incident is the November 16, 2017 release of approximately 6,592 barrels of oil. Ex. JC-0060 at 1 (Ludden PHMSA Accident Report); Ex. KEY-0017 at 3:12-14 (Kirstine Direct).

in service.[335] Joint Customers fault Keystone for inadequately inspecting the pipeline during and after installation.[336] However, post-incident analyses found that the pipe was visually inspected during installation and surveyed after construction to identify any physical damage.[337] The record also shows that Keystone conducted several tests before the segment entered service and then retested at regular intervals while in service.[338] A post-incident investigation found that Keystone initiated an emergency shutdown of the pipeline three minutes after the "first indication of the pipeline rupture."[339] This evidence does not raise a serious doubt about Keystone's prudent management in incurring costs related to the Ludden Incident, or suggest that recovery of these costs should be disallowed due to overriding public policy concerns.

115. Regarding the St. Charles Incident,[340] a post-incident report stated it was caused by the failure of a flawed repair made in 2012 to address previous corrosion issues.[341]

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[335] Ex. JC-0082 at 5 (Ludden NTSB Report) (describing "the probable cause of the failure" as "a fatigue crack, likely originating from mechanical damage to the pipe exterior by a metal-tracked vehicle during pipeline installation, that grew and extended in-service to a critical size").

[336] Joint Customers Br. on Exceptions at 88; Ex. JC-0057 at 32:19-20 (Vanderpool Direct).

[337] Ex. JC-0120 at 52; Initial Decision, 182 FERC ¶ 63,013 at P 492.

[338] *See* Ex. JC-0120 at 22-30 (timeline of events), 85-86 (stating that Keystone conducted an annual fatigue analysis during the first five years of operation). *See also* Ex. JC-0398 (inspection reports); Ex. KEY-0017 at 3:18-4:4, 4:20-21 (Kirstine Direct) (testifying that inspections in 2012 and 2016 indicated that metal loss at the incident's location "was within specifications and so no action was taken," and that the inspection devices "were considered top-of-the-line technology during that time"); Ex. JC-0060 at 11 (Ludden PHMSA Accident Report) (indicating data inspection tools used at the point of the accident, including magnetic flux leakage in 2016, geometry in 2016, caliper in 2016, and acoustic leak detection in 2017).

[339] Ex. JC-0082 at 2; *see also* Ex. JC-0120 at 28; Ex. KEY-0017 at 4:7-12 (Kirstine Direct).

[340] The St. Charles Incident is the February 6, 2019 release of 17 barrels of oil. Ex. JC-0122 at 29 (GAO Report); Ex. KEY-0017 at 4:24-26 (Kirstine Direct).

[341] Ex. JC-0122 at 29 (GAO Report); *see also id.* at 29 n.31 ("The cause for this incident according to PHMSA data was 'incorrect operation-wrong equipment specified or installed.'").

Joint Customers contend that there was a defect in the original design of the cathodic protection system and that Keystone failed to properly assess the ensuing corrosion defect and made repairs in 2012 that did not meet industry standards.[342] However, post-incident reports identified the flawed repair as the root cause rather than original design defects.[343] A post-incident analysis further found that a root cause of the flawed repair was the lack of clear industry guidance at the time.[344] Moreover, Ms. Kirstine testifies that when the repair was made in 2012, the technique used was consistent with industry practice and the vendor's recommendation.[345] The record reflects that Keystone inspected the repaired segment several times before the incident[346] and responded promptly to the eventual rupture.[347] The evidence does not raise a serious doubt about the prudence of Keystone's management decisions that led to the St. Charles Incident even though, in hindsight, some of those decisions were flawed.[348] Further, we do not find an overriding public policy reason to limit Keystone's recovery of costs related to the St. Charles Incident.

116. Regarding the Edinburg Incident,[349] post-incident analyses found the cause was a manufacturing defect in the pipe segment that aided the development of a significant

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[342] Ex. JC-0119 at 6:16-18, 7-10 (Vanderpool Answering).

[343] Ex. JC-0124 at 29; *see also id.* at 30-31 (stating that TC Energy completed "corrective measures to address . . . deficiencies" related to the original cathodic protection design in 2013).

[344] Ex. JC-0124 at 13 (Edinburg RCFA).

[345] Ex. KEY-0017 at 5:2-3, 10-12 (Kirstine Direct).

[346] Ex. KEY-0017 at 5:13-19 (Kirstine Direct); *see also* Ex. JC-0124 at 9, 12 (St. Charles RCFA).

[347] Ex. JC-0124 at 27 (St. Charles RCFA); *see also* Ex. KEY-0017 at 5:20-6:2 (Kirstine Direct) (describing precautionary measures such as voluntary pressure reductions and inspections).

[348] Opinion No. 505, 130 FERC ¶ 61,023 at P 51 (explaining that the task of a prudence inquiry is to determine whether a management decision was prudent at the time it occurred even though "in hindsight it may be clear that a management decision was wrong" (citing Opinion No. 231, 31 FERC at 61,084)). *See also id.* P 54 n.69 ("Flawed or even wrong decision-making does not equate to imprudence.").

[349] The Edinburg Incident is the October 29, 2019 release of 4,515 barrels of oil. Ex. JC-0061 at 1 (Edinburg PHMSA Accident Report).

crack while in service.[350] Joint Customers argue that the pipe was defective at installation and if Keystone had discovered and corrected the damage during or prior to construction the failure would not have occurred.[351] A post-incident analysis found that the root cause of the defect going undetected before installation was insufficiently strict industry standards concerning the frequency and scope of inspection at the time.[352] This analysis also found that Keystone used a common technology and reputable vendor to conduct integrity assessments and that these may not have detected the crack due to the unusual geometry of the defective segment.[353] Accordingly, as with the St. Charles Incident, the record does not raise a serious doubt that Keystone's management decisions were imprudent at the time or raise a public policy concern that overrides Keystone's contractual right to recover costs related to the Edinburg Incident.

117. Finally, we reject Joint Customers' claim that Keystone failed to mitigate the Incident Costs.[354] The record reflects that Keystone recovered nearly 75% of the Incident Costs from insurance proceeds and passed this reimbursement through to its shippers.[355]

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[350] *Id.* at 11 (Edinburg PHMSA Accident Report) (stating "[a]bnormal seam geometry facilitated crack initiation and accelerated growth" and that the failure was "[f]atigue or [v]ibration-related"); Ex. JC-0122 at 28 (GAO Report).

[351] Ex. JC-0057 at 33:11-18 (Vanderpool Direct); *see also* Ex. JC-0119 at 9:1-5 (Vanderpool Answering); Joint Customers Br. on Exceptions at 89.

[352] Ex. KEY-0087 at 12; *see also* Initial Decision, 182 FERC ¶ 63,013 at P 508; KEY-0117 at 7:21-25 (Kirstine Direct) (testifying that the inspection at the pipe mill was consistent with common industry practice at the time).

[353] Ex. KEY-0087 at 12; *see also* KEY-0117 at 7:11-14 (Kirstine Direct) (explaining that Keystone used an in-line inspection tool in 2017 to inspect for cracking along the ruptured segment that purportedly could, but did not, discover the defect).

[354] Initial Decision, 182 FERC ¶ 63,013 at P 471.

[355] Ex. KEY-0017 at 10:5-15 (Kirstine Direct) (indicating that insurance proceeds reimbursed $79.2 million of the $107.5 million in costs that Keystone incurred for the Ludden, St. Charles, and Edinburg incidents); *see also* Ex. KEY-0001 at 35:8-10 (Trout Direct) ("Insurance proceeds that reimburse costs included in determining the variable rates are credited back to shippers at the time they are received by flowing them through as a negative cost."); Ex. KEY-0031 at 18:12-14 (Gough Direct) (explaining subtraction of incident insurance proceeds from OM&A total); Ex. KEY-0038 at Tab "OM&A." The record also indicates that the costs and insurance proceeds for the Incidents were incurred and reimbursed over several years, thereby limiting rate shock. *See* Ex. JC-0019 at 3 (indicating that Ludden Incident costs and insurance proceeds were spread over multiple years); Ex. KEY-0011 at 9-10 (noting that costs for "regulatory obligations related to the

The record also shows that Keystone decided not to seek recovery from third parties only after determining that such action was unlikely to succeed.[356] The authority cited by Joint Customers on exceptions does not suggest that more is required.[357]

E. Variable Rate Cost Allocation

118. In this section, we address: (1) TC Energy's allocation of corporate overhead costs and expenses to Keystone U.S. and (2) Keystone's methodology for allocating costs between Keystone U.S. and Marketlink, which is a separate TC Energy entity that leases capacity on Keystone U.S.

Edinburg release" were part of a pipeline integrity initiative accounted for as a non-routine adjustment amortized over a three-year period); Ex. KEY-0001 at 34:19-35:4 (Trout Direct) (describing years in which costs and insurance reimbursements for the St. Charles and Edinburg incidents were included in the Variable Rate).

[356] Ex. JC-0125 at 1. Joint Customers argue for the first time in their brief opposing exceptions that Canadian precedent concerning "cost-plus contracts" applies here and suggests a duty to mitigate costs passed to a counterparty. Joint Customers Br. Opposing Exceptions at 37. We decline to consider this argument as it is untimely. *Midwest Indep. Transmission Sys. Operator, Inc.*, Opinion No. 534, 148 FERC ¶ 61,206, at P 300 (2014). Joint Customers' earlier one-sentence claims of a duty to mitigate were general and unsupported. *See* Joint Customers Initial Post-hearing Br. at 69 n.318; Joint Customers Br. on Exceptions at 5. Even if Joint Customers' new argument were timely raised, it would not change the outcome here because the cases they cited relate to general principles of due diligence in avoiding cost overruns. Joint Customers Br. Opposing Exceptions at 37 (citing, *inter alia*, *Ashlar Dev. Inc. v. Marakat Industries Ltd.*, 2018 ABQB 67, para. 15). As discussed *infra*, the record does not raise a serious doubt as to the prudence of Keystone's management decisions regarding the Incident Costs.

[357] *See* Joint Customers Br. Opposing Exceptions at 36 (citing *CHS*, 145 FERC ¶ 61,056 at P 43 & n.41 (requiring complainants to "set forth what efforts have been undertaken to mitigate any damages that have incurred" due to the pipeline's breach of a settlement agreement); Restatement (Second) of Contracts § 350 (stating that "damages are not recoverable for loss that the injured party could have avoided without undue risk, burden or humiliation" unless that party "has made reasonable but unsuccessful efforts to avoid loss")).

1. Corporate Overhead Cost Allocation

119. Keystone allocates some of TC Energy's corporate overhead costs and expenses to the Variable Rate.[358] Of three categories of corporate overhead costs included in the Variable Rate—Direct Charges, Governance Costs, and Enterprise Services Costs—Joint Customers challenge only the Enterprise Services Costs.[359] Enterprise Services Costs are primarily associated with supporting personnel who work in "corporate services (including information services, facilities services, and human resources," "the technical center (handling supply chain, safety, and engineering standards)," "the chief financial office," and "stakeholder relations and general counsel."[360] Because Enterprise Services Costs "support the TC Energy organization as a whole," they are allocated to business units (here, Liquids Pipelines) or lines of business within those business units (like Keystone U.S.) based on TC Energy's internal cost allocation policy.[361]

120. Specifically, Enterprise Services Costs are pooled and allocated monthly to cost centers within each business unit "by multiplying the fully burdened labor cost by a set overhead rate."[362] Each business unit then uses TC Energy's Time Activity Analysis (TAA) methodology to allocate Enterprise Services Costs among its lines of business based on the percentage of time spent on activities related to each line of business for each cost center as determined by cost center managers.[363] Enterprise Services Costs

[358] Initial Decision, 182 FERC ¶ 63,013 at PP 528, 537; *see also id.* P 527 (explaining that "overhead costs are allocated to Keystone U.S. in accordance with a cost allocation policy developed by TC Energy" because Keystone owns Keystone U.S. and is "an indirect, wholly owned subsidiary of TC Energy").

[359] *Id.* PP 528, 537.

[360] Ex. KEY-0056 at 4:1-9 (Kuharski Answering).

[361] Ex. KEY-0024 at 7:7-11 (Kuharski Direct); *see also id.* at 3:18-4:8 (explaining that Keystone U.S. is a line of business within the Liquids Pipelines business unit); Ex. JC-0044 at 5 (TC Energy Cost Allocation Policy and Framework).

[362] Ex. KEY-0024 at 7:12-13 (Kuharski Direct); *see also id.* at 4:18-5:3 (explaining that cost centers are used to track different operating expenses within TC Energy's software accounting system); Ex. JC-0044 at 7 (providing that the corporate support overhead rate is calculated based on the net allocable cost of the enterprise services cost pool divided by the total internal business unit and capitalized labor cost).

[363] Ex. KEY-0024 at 7:12-15 (Kuharski Direct); Ex. JC-0044 at 5; Ex. S-0052 at 3. TC Energy's Cost Allocation Principles and Framework defines "Time Activity Analysis" as "[a]n estimate (%) of employee and contractor labour hours in support of the various [lines of business] within a Business Unit." Ex. JC-0044 at 8; *see also*

from cost centers that are not within a specific business unit, like U.S. pension costs, are allocated to relevant lines of business without flowing through a business unit first.[364] TC Energy uses the TAA methodology for these costs as well.[365] At hearing, Joint Customers proposed the Massachusetts Formula as a replacement methodology.[366]

a. **Initial Decision**

121. The Initial Decision found that Keystone's allocation of TC Energy's corporate overhead costs and expenses under the TSAs was just and reasonable.[367]

122. The Initial Decision rejected Joint Customers' claim that, under the TSAs, the Variable Rate may include only costs that can be directly assigned to Keystone U.S.[368] Joint Customers' argument rested upon language in the TSA that the Variable Rate may recover only "directly allocable" costs. The Initial Decision reasoned that Joint

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Ex. KEY-0096 at 3:20-23 (Kuharski Cross-Answering) (explaining that the TAA methodology "requires each cost center owner to apply an appropriate allocation rate for each [line of business] it supports based on the scope of work required by the team in that cost center").

[364] Ex. KEY-0096 at 4:1-23 (Kuharski Cross-Answering).

[365] However, Keystone explains that "as of November 2019, some cost centers that provide operational support to all line[s] of business[] have chosen to align TAA rates with pipeline length as a reasonable proxy for where operational support is being provided." Ex. S-0052 at 3; *see also* Ex. KEY-0056 at 5:16-18 (Kuharski Answering); Ex. S-0112 at 2 (explaining that "cost centers that use the miles of pipe TAA factors are primarily supporting the operating assets").

[366] Initial Decision, 182 FERC ¶ 63,013 at P 519 (citing Joint Customers Initial Post-hearing Br. at 73). The Massachusetts Formula "relies on ratios of gross revenue, gross property, and direct labor between a given subsidiary and its corporate parent with all ownership interests reflected," which "ratios are then equally weighted and summed together to derive a Massachusetts Formula percentage." *Id.* P 539 n.848 (citing, *inter alia*, *Williams Nat. Gas Co.*, 85 FERC ¶ 61,285, at 62,133 (1998); *SFFP, L.P.*, Opinion No. 522, 140 FERC ¶ 61,220, at P 93 n.144 (2012); Ex. S-0035 at 1 (illustrative example)).

[367] *Id.* P 526.

[368] *Id.* P 534. *See also* Ex. JC-0010 at 19 (defining OM&A costs as "including . . . overhead costs or expenses directly allocable to the Pipeline System"); Ex. JC-0011 at 19 (same).

Customers' argument would render meaningless the word "allocable" in the TSAs since direct costs "are, by definition, not allocated."[369] Instead, the Initial Decision interpreted the term "directly allocable" in the TSAs to prohibit "the inclusion of corporate overhead costs attributable to other entities in the TC Energy corporate family" based on language in the TSAs specifying that OM&A costs shall include only those "costs and expenses incurred by or on behalf of [Keystone] *in respect of the Pipeline System*,"[370] defined in the TSAs as the U.S. portion of the Keystone System.[371]

123. The Initial Decision also found that Keystone adequately supported, and Joint Customers failed in their challenge of, the TAA methodology used by TC Energy to allocate Enterprise Services Costs to its lines of business.[372] First, the Initial Decision found that the TAA methodology has not been shown to be unreasonable as there is no indication that it leads to cross-subsidization, and unrefuted record evidence comparing the TAA and Massachusetts Formula methodologies indicates that the TAA methodology produces reasonable allocations of overhead costs.[373] Second, the Initial Decision found that Joint Customers did not show the TAA methodology to be untransparent, unverifiable, or inherently subjective, as Commission precedent supports this approach and TAA is standard in the industry.[374] The Initial Decision noted that Joint Customers use the TAA methodology as well.[375]

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[369] Initial Decision, 182 FERC ¶ 63,013 at P 534.

[370] *Id.* (citing Ex. S-0034 at 21:20-22:1 (Ruckert Direct and Answering) (citing Ex. KEY-0004 at 19) (emphasis added in testimony)).

[371] Ex. JC-0010 at 26 (defining "Pipeline System" as "facilities owned by Carrier which are connected to the Keystone Canada Pipeline System commencing at the international boundary at or near Haskett, Manitoba, and terminating at or near Patoka, Illinois, as such facilities may be modified, expanded or extended"); Ex. JC-0011 at 26 (same).

[372] Initial Decision, 182 FERC ¶ 63,013 at PP 535, 540.

[373] *Id.* P 542 (citing Ex. S-0034 at 24:15-19, 35:8-36:1 (Ruckert Direct and Answering)).

[374] *Id.* PP 544-545 (citing Opinion No. 522, 140 FERC ¶ 61,220 at P 109 n.168; Ex. KEY-0056 at 5:5-12 (Kuharski Answering)). The Initial Decision also reiterates that the TAA methodology is reasonable because the costs allocated under that methodology are less than they would be under the Massachusetts formula. *Id.* P 545.

[375] *Id.* P 545.

124. Nonetheless, the Initial Decision suggested that the Commission "consider requiring [Keystone] to maintain and readily supply workpapers detailing TC Energy's TAA calculations to any of [Keystone's] committed shippers exercising their audit rights pursuant to their TSAs."[376] The Initial Decision stated that this would give Keystone's committed shippers information to compare amounts allocated under the TAA methodology with the amounts that would otherwise be allocated under the Massachusetts Formula Methodology or other methodologies.[377]

b. Briefs on Exceptions

125. Joint Customers claim that the Initial Decision erred by approving Keystone's allocation of Enterprise Services Costs to the Variable Rate. First, Joint Customers assert that the TSAs only allow including costs in the Variable Rate that are "directly allocable to the Pipeline System," and thus Keystone must exclude from the Variable Rate any OM&A costs that are not directly allocable.[378]

126. Second, Joint Customers assert that Keystone's implementation of the TAA methodology to allocate Enterprise Services Costs is unverifiable and subjective and should be rejected.[379] Joint Customers argue that not only does TC Energy not require cost center owners to justify or document their allocation decisions, but that Keystone also failed to allocate certain costs in a manner that reflects TC Energy's allocation policy.[380] Moreover, Joint Customers assert that the Initial Decision found that no outside party is able to evaluate the reasonableness of Keystone's allocation of Enterprise Services Costs, as shown by the Initial Decision's suggestion that Keystone be required to maintain and supply workpapers to shippers, and, therefore, the Commission should either "disallow the costs or impose an objective, verifiable method."[381]

127. Keystone asserts that the Initial Decision erred in suggesting that the Commission require Keystone to maintain and supply workpapers detailing TC Energy's TAA

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[376] *Id.* P 547.

[377] *Id.*

[378] Joint Customers Br. on Exceptions at 90-91 (citing Ex. JC-0010 at 19; Ex. JC-0011 at 19).

[379] *Id.* at 91-92.

[380] *Id.* at 92.

[381] *Id.* at 93.

calculations to committed shippers exercising their audit rights.[382] Keystone argues that such a ruling would grant shippers new audit rights that are not present in the TSAs, and that such rights are unnecessary as shippers have never exercised their existing right to audit Keystone's relevant books and records.[383]

c. Briefs Opposing Exceptions

128. In opposing Keystone's exception, Joint Customers assert their support for requiring Keystone to provide TAA workpapers to committed shippers exercising their audit rights and argue that the TSAs allow for such a requirement.[384]

129. Keystone opposes Joint Customers' exceptions, arguing that the record adequately supports its TAA methodology, and that this methodology is not only standard in the industry but also used by Joint Customers.[385] Keystone also reiterates that a policy determination to grant expanded audit rights to Joint Customers is unnecessary.[386]

130. Trial Staff opposes the parties' exceptions and supports the Initial Decision. Trial Staff agrees with the Initial Decision's rejection of Joint Customers' arguments against Keystone using the TAA methodology to allocate corporate overhead costs.[387] Trial Staff also argues that the Initial Decision is not creating new obligations with its suggestion that Keystone maintain and supply workpapers with the TAA calculation to committed shippers exercising audit rights. Rather, Trial Staff asserts that the Initial Decision is affirming that committed shippers have audit rights under the TSAs and ensuring that Keystone maintains documents to satisfy a shipper audit.[388]

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[382] Keystone Br. on Exceptions at 49.

[383] *Id.* at 49-50.

[384] Joint Customers Br. Opposing Exceptions at 43-44.

[385] Keystone Br. Opposing Exceptions at 94-95.

[386] *Id.* at 95-96.

[387] Trial Staff Br. Opposing Exceptions at 88-89.

[388] *Id.* at 90-91.

d. Commission Determination

131. We affirm the Initial Decision's findings approving Keystone's allocation of Enterprise Services Costs to the Variable Rate.[389]

132. First, we find that Keystone may recover Enterprise Services Costs through the Variable Rate under the TSAs. The TSAs define OM&A costs recovered through the Variable Rate as "*all* operating, maintenance and administration costs and expenses incurred *by or on behalf of* [Keystone] in respect of the Pipeline System," including "overhead costs and expenses directly allocable to the Pipeline System" and "all other costs and expenses similar in nature to any of the foregoing."[390] Because Enterprise Services Costs are a type of corporate overhead cost that is incurred with respect to Keystone U.S.,[391] we find they are included in the definition of OM&A costs.

133. We reject Joint Customers' argument that the phrase "directly allocable" limits recovery of corporate overhead costs to those directly assigned.[392] This artificially narrows the definition of OM&A costs and would render the word "allocable" meaningless.[393] TC Energy only uses an allocation methodology for corporate overhead costs that cannot be directly assigned.[394] Further, the phrase "directly allocable *to the Pipeline System*" indicates that OM&A costs only include those costs attributable to Keystone U.S. because, in the TSAs, "Pipeline System" means the U.S. portion of the Keystone System.[395] Thus, we agree with the Initial Decision that the phrase "directly

[389] Initial Decision, 182 FERC ¶ 63,013 at P 526.

[390] Ex. JC-0010 at 19-20 (emphases added); Ex. JC-0011 at 19-20.

[391] Initial Decision, 182 FERC ¶ 63,013 at P 537; Ex. KEY-0024 at 6:23-25 (Kuharski Direct).

[392] *See* Joint Customers Br. on Exceptions at 90-91.

[393] *Agrium, Inc. v. Worley Canada Servs. Ltd.*, 2023 ABCA 80, paras. 22-23 (explaining that "[c]ourts should . . . avoid interpretations that render any portion of a contract meaningless or redundant" and rejecting an interpretation that stripped "operative language of any reasonable commercial meaning").

[394] Ex. KEY-0024 at 7:5-11 (Kuharski Direct); *see also* Ex. JC-0044 at 4.

[395] Ex. JC-0010 at 26 (defining "Pipeline System" as "facilities owned by Carrier which are connected to the Keystone Canada Pipeline System commencing at the international boundary at or near Haskett, Manitoba, and terminating at or near Patoka,

allocable" means overhead costs that are attributable to Keystone U.S. rather than other TC Energy lines of business.[396]

134. Second, in the absence of a specific allocation methodology in the TSAs, we find TC Energy's use of the TAA methodology for allocating Enterprise Services Costs to Keystone U.S. to include in the Variable Rate reasonable based on this record.[397] TC Energy's method is consistent with the Commission's "long standing practice of trying to align cost allocation with cost causation" when costs cannot be directly assigned.[398] Under TC Energy's methodology, Enterprise Services Costs that cannot be directly assigned to a line of business are pooled and allocated to cost centers within each business unit.[399] Each business unit (here, Liquids Pipelines) then uses the TAA methodology to allocate these costs among its lines of business (like Keystone U.S.) based on the percentage of time spent on activities related to each line of business for each cost center as determined by cost center managers.[400] Enterprise Services Costs from cost centers that are not within a specific business unit are allocated to lines of

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Illinois, as such facilities may be modified, expanded or extended"); Ex. JC-0011 at 26 (same).

[396] Initial Decision, 182 FERC ¶ 63,013 at P 534.

[397] *See* Opinion No. 522, 140 FERC ¶ 61,220 at P 100 ("In deciding which cost allocation methodology to apply, the Commission must choose from the cost allocation alternatives available on the record.").

[398] *Id.*; *see also Epsilon Trading, LLC*, Opinion No. 586, 185 FERC ¶ 61,126, at P 324 (2023). TC Energy's cost allocation policy is informed by three guiding principles: (1) "Increase the proportion of direct costs controlled by the B[usiness]U[nit]s, thereby decreasing the total costs allocated by centralized support groups," (2) "Where corporate support activities can be specifically attributed to a particular [line of business], internal labor should be charged to cost objects (projects, internal orders, etc.) in that B[usiness]U[nit] using timesheets," and (3) "Allocate the remainder of the corporate support costs based on a simple and predictable Methodology." Ex. JC-0044 at 4; *see also* Ex. KEY-0056 at 3:4-11 (Kuharski Answering).

[399] Ex. KEY-0024 at 7:7-13 (Kuharski Direct). Specifically, Keystone witness Ms. Kuharski states that "[c]osts in the Enterprise Services pool are allocated monthly to cost centers within each business unit by multiplying the fully burdened labor cost by a set overhead rate." *Id.* at 7:12-13; *see also* Ex. KEY-0028 (showing calculations for 2016 through 2020); Ex. JC-0044 at 6-7 (explaining the formula for the "Corporate Support (Overhead) rate").

[400] Ex. KEY-0024 at 7:12-15 (Kuharski Direct); Ex. JC-0044 at 5; Ex. S-0052 at 3.

business without flowing through business units first.[401] TC Energy uses the TAA methodology for these costs as well.[402]

135. The Commission has approved methods that similarly allocated corporate overhead costs from responsibility centers to each entity based on the percentages of time spent on different tasks.[403] In upholding this methodology, the Commission stated it "was confident that supervisors may identify the most significant responsibilities of their subordinates" and that "instances of imprecision" did not justify rejecting the methodology.[404] That reasoning applies equally here. Although the record lacks detail about how cost center managers estimate workload for their subordinates,[405] no party has provided evidence that this practice is resulting in unreasonable allocations.[406] The Commission has recognized that "[c]ost allocation is not an exact science."[407] Moreover, the TAA methodology is commonly used to allocate overhead costs in the oil pipeline industry.[408]

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[401] Ex. KEY-0096 at 4:1-23 (Kuharski Cross-Answering).

[402] However, Keystone explains that "as of November 2019, some cost centers that provide operational support to all line[s] of business[] have chosen to align TAA rates with pipeline length as a reasonable proxy for where operational support is being provided." Ex. S-0052 at 3; *see also* Ex. KEY-0056 at 5:16-18 (Kuharski Answering); Ex. S-0112 at 2 (explaining that "cost centers that use the miles of pipe TAA factors are primarily supporting the operating assets").

[403] Opinion No. 522, 140 FERC ¶ 61,220 at P 109.

[404] *Id.* P 134.

[405] Ex. S-0052 at 3 (explaining that while "TAA rates are inputs into the allocation system and there are no workpapers to support most of the cost center TAA rates," Keystone produced supporting calculations for TAA rates based on pipeline length).

[406] *See* Opinion No. 586, 185 FERC ¶ 61,126 at P 325 (declining to reject allocation methodology based on "alleged instances of imprecision" where the complainants had not "evaluated the extent or significance of the alleged deficiencies" or shown that they significantly affected the rate (citing Opinion No. 522, 140 FERC ¶ 61,220 at P 133)).

[407] *Transcon. Gas Pipe Line Corp.*, 106 FERC ¶ 61,299, at P 190 (2004); Opinion No. 586, 185 FERC ¶ 61,126 at P 328.

[408] Initial Decision, 182 FERC ¶ 63,013 at P 545. Joint Customers admit that Husky and Phillips 66 use the TAA methodology for "cost allocation purposes where

136. Further, Trial Staff demonstrated that the TAA methodology does not cause Keystone U.S. to improperly subsidize other TC Energy lines of business. Trial Staff witness Mr. Ruckert showed that Keystone's methodology generally results in lower cost allocation to Keystone U.S. than another common allocation method, the Massachusetts Formula, thereby supporting a finding that Keystone's methodology is a reasonable method for allocating costs to the Variable rate.[409] Although Keystone did not provide workpapers demonstrating all of these allocations in this proceeding,[410] this comparison supports a finding that the one allocation requirement in the TSAs (no cross subsidization) was met. Thus, we reject Joint Customers' claim that the record lacks detail about the allocation of Enterprise Services Costs such that the Commission should "disallow the costs or impose an objective, verifiable method."[411]

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certain employees' job responsibilities are split between business teams or units." Ex. KEY-0058; Ex. KEY-0059. While this is not dispositive as to the application of TAA here, it demonstrates the ubiquity of this methodology.

[409] Ex. S-0085 at 21:6-16 (Ruckert Rebuttal) ("TC Energy's methodology results in an *under*-allocation of costs to Keystone U.S. by approximately 16.4%, 8.5%, and 6.3% in 2018, 2019, and 2020, respectively, when compared to calculations" using the Massachusetts Formula (emphasis in original)); *see also* Ex. S-0087 at 3. Although the Initial Decision stated that it declined to use the Massachusetts Formula as a check, the Initial Decision proceeded to use the Massachusetts Formula to check the results of the TAA methodology for the periods at issue in this proceeding. Initial Decision, 182 FERC ¶ 63,013 at PP 541-542. We find that using the Massachusetts Formula for this limited purpose was appropriate.

[410] *See* Ex. S-0052 at 3. *But see* Ex. KEY-0028 (showing Keystone U.S. corporate support overhead costs for 2016-2020, calculated as the corporate support overhead rate times actual labor costs); Ex. JC-0044 at 6-7 (explaining the formula for the "Corporate Support (Overhead) rate"); Ex. S-0052 at 2 (providing 2018 and 2019 inputs to the "Corporate Support (Overhead) rate"); Ex. S-0085 at 22:4-24:3 (Ruckert Rebuttal) (explaining how pipeline length ratios are calculated for use in TAA rates for allocating corporate overhead costs from certain cost centers).

[411] Joint Customers Br. on Exceptions at 93. The only replacement methodology that Joint Customers proposed at hearing is the Massachusetts Formula. Joint Customers Initial Post-hearing Br. at 71; Ex. JC-0001 at 52 (Arthur Direct). However, the Massachusetts Formula is not an appropriate replacement because it is less exact than the existing methodology, as it "results in the same allocation percentages for every cost center, regardless of the scope of work required by the team for that cost center or the nature of the costs involved." Ex. KEY-0096 at 3:17-23 (Kuharski Cross-Answering); *see also* Opinion No. 522, 140 ¶ 61,220 at P 134 (declining to replace an allocation

137. In addition, we reject Joint Customers' claim that costs from several Enterprise Services cost centers that do not exist within a business unit, because they serve TC Energy as a whole, should be excluded from the Variable Rate because TC Energy's cost allocation framework does not allow applying the TAA methodology to allocate such costs to lines of business.[412] Joint Customers cite no authority for excluding corporate overhead costs from the Variable Rate on this basis. Critically, the TSAs do not require Keystone to use a particular cost allocation methodology for overhead costs. In any case, Keystone clarified that TC Energy's cost allocation framework is high level and does not include the "few exceptions" to the general policy that costs must flow through a business unit before they are allocated using the TAA methodology as "this is not necessary for most people that reference this document."[413] Keystone explained that the cost centers at issue benefit the entire corporate family (including Keystone U.S.) and cannot be attributed to a particular business unit.[414] The record evidence suggests that it is reasonable to apply the TAA methodology at the corporate level, rather than the business-unit level, to allocate such costs.[415]

138. Finally, we do not find it necessary to require Keystone "to maintain and readily supply workpapers detailing TC Energy's TAA calculations to any of [Keystone's]

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methodology based on time sheets with a "less exact" methodology); Opinion No. 586, 185 FERC ¶ 61,126 at P 328 (declining to replace cost allocation approach with a "less precise" method).

[412] Joint Customers Br. on Exceptions at 92 (arguing that TC Energy's cost allocation framework provides that "'[o]nly intra-business unit allocations are allowable via TAA'" and this means that costs in cost centers that are not located within a business unit cannot be allocated via the TAA methodology (quoting Ex. KEY-0027 at 5)).

[413] Ex. S-0101 at 1.

[414] Ex. KEY-0096 at 4:1-22 (Kuharski Cross-Answering) (describing the five corporate cost centers in which costs are not exclusively incurred on behalf of the Liquids Pipelines business unit); Ex. JC-0198 at 4 (explaining that the "average allocation rates for" five cost centers "relate to allocable cost pools at the TC Energy Corporate level" whereas the "average allocation rates for the remaining cost centers" relevant to this proceeding "relate to allocable cost pools at the Liquids Pipelines [business unit] level").

[415] *See, e.g.*, Ex. S-0101 at 2 (explaining that a corporate-level TAA methodology is relied on to properly allocate costs from, for example, "executive leaders that oversee more than one operating business unit").

committed shippers exercising their audit rights pursuant to their TSAs."[416] The record contains no indication that Keystone is unable to fulfill its audit duties under the TSAs. As discussed above, Joint Customers have never exercised their right to audit Keystone's relevant books and records annually.[417] Moreover, the record demonstrates that Keystone maintains information regarding its corporate overhead cost allocations.[418]

2. Cost Allocation Between Keystone U.S. and Marketlink

139. As discussed below, we affirm the Initial Decision and adopt Trial Staff's proposed modifications to Keystone's existing methodology for allocating costs between Keystone U.S. and Marketlink. Keystone is directed to allocate costs between Keystone U.S. and Marketlink in accordance with our findings for purposes of calculating the Variable Rate under the TSAs.

a. Background

140. As discussed above, Keystone leases capacity on the Gulf Coast Segment of Keystone U.S. to an affiliate common carrier, Marketlink.[419] Marketlink offers transportation service on the Gulf Coast Segment under its own tariffs and commercial agreements separate from Keystone's tariffs and TSAs.[420] All Marketlink volumes originate in Cushing, Oklahoma and ship to the Texas Gulf Coast whereas all Keystone System volumes originate in Hardisty, Alberta and may be shipped on Keystone U.S. to any point on the Base U.S. Segment or the Gulf Coast Segment.[421] The Marketlink lease began in 2014 and was effective during the period relevant to this proceeding.[422] Because

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[416] Initial Decision, 182 FERC ¶ 63,013 at P 547.

[417] Ex. JC-0010 at 18, 21; Ex. JC-0011 at 18, 21; Initial Decision, 182 FERC ¶ 63,013 at P 639 ("to the extent Joint [Complainants] had questions about included charges, they could have exercised their audit rights; they did not"); Tr. 4400:5-15 (Norman).

[418] *See supra* note 410.

[419] *See supra* P 3. *See also* Ex. KEY-0033 (Marketlink Lease).

[420] Ex. KEY-0001 at 8:9-11 (Trout Direct); Ex. KEY-0097 at 40:7-10, 60:18-19 (Wetmore Rebuttal); *Marketlink*, 144 FERC ¶ 61,086 at PP 2, 4.

[421] Ex. KEY-0097 at 35:9-12, 60:18-19:1 (Wetmore Rebuttal); *see also* Keystone Br. on Exceptions at 13 (Keystone System map).

[422] Ex. KEY-0001 at 8:13-14 (Trout Direct).

Marketlink and Keystone U.S. operate on the same physical pipeline segment, certain shared costs and expenses that cannot be directly assigned must be allocated between the entities.

141. Keystone uses a four-step methodology to allocate costs. First, Keystone identifies all costs and expenses, both direct and indirect, for the entirety of Keystone U.S. Second, Keystone identifies all direct costs and expenses attributable to the Gulf Coast Segment.[423] Third, Keystone calculates the Gulf Coast Segment's share of Keystone U.S. indirect costs in relation to the Base U.S. Segment based on the average of two ratios: (i) the Gulf Coast Segment's pipe length divided by total Keystone U.S. pipe length and (ii) the number of pump stations on the Gulf Coast Segment divided by the total number of pump stations on Keystone U.S. (the Blended Allocator).[424] Fourth, Keystone determines the percentage of direct and indirect costs attributable to the Gulf Coast Segment that should be allocated to Marketlink as provided in the Marketlink lease agreement.[425] Ultimately, Keystone uses the amount attributable to Marketlink to find the total OM&A costs attributable to Keystone U.S. and, thus, calculate the Variable Rate.[426]

142. At hearing, Joint Customers opposed Keystone's methodology and proposed an alternate methodology; separately, Trial Staff disagreed with Keystone's third step

[423] Ex. KEY-0031 at 8:10-12, 9:4-5 (Gough Direct).

[424] *Id.* at 9:9-20; *see also* Keystone Br. on Exceptions at 37 ("the amount of indirect costs and expenses allocated to the Gulf Coast Segment [is] based on: (i) pipe length and (ii) the number of pump stations of the Gulf Coast Segment as compared to the entirety of Keystone U.S."); Ex. KEY-0094 at 3:1-3 (Daljevic Cross-Answering) ("Keystone applies two cost drivers to determine this allocation to the Gulf Coast Segment—distance and the number of pump stations"); Ex. KEY-0031 at 8:10-12 (Gough Direct) (describing the Blended Allocator as "the percentage that [the] Gulf Coast Segment represents of Keystone U.S.'s overall facilities"); Joint Customers Br. Opposing Exceptions at 32 ("Keystone's Blended Allocator is a simple average of a mileage allocator and an allocator based on the number of pump stations." (citing Initial Decision, 182 FERC ¶ 63,013 at P 596)).

[425] Ex. KEY-0031 at 8:13-16 (Gough Direct); *see also id.* at 11:2-5 (describing the cost allocation methodology in the Marketlink lease agreement in detail). Marketlink's lease payments to Keystone are generally based on its proportional share of the capacity of the Gulf Coast Segment. *Marketlink*, 144 FERC ¶ 61,086 at P 7.

[426] Ex. KEY-0031 at 3:17-18 (Gough Direct).

(Step Three) and proposed an alternative.[427] Specifically, Joint Customers proposed that OM&A costs for the entire Keystone U.S. System (including the Base U.S. Segment and Gulf Coast Segment) should be allocated between Keystone U.S. and Marketlink based on their proportionate share of total distance-weighted throughput on all U.S. portions of the Keystone System.[428] Trial Staff proposed to replace the Blended Allocator in Step Three of Keystone's existing methodology with a two-step process whereby: (i) a barrel allocator is applied to non-distance-based costs and (ii) a barrel-mile allocator is applied to distance-based costs.[429] Keystone stated that Trial Staff's "proposed methodology may be a reasonable choice."[430]

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[427] Initial Decision, 182 FERC ¶ 63,013 at P 582; *see also* Ex. S-0055 at 24:18-19 (McComb Direct and Answering) ("I disagree with the allocator Keystone develops to allocate costs to the Gulf Coast Segment").

[428] Initial Decision, 182 FERC ¶ 63,013 at PP 584-586 (citing, *inter alia*, Ex. JC-0001 at 40:5-10 (Arthur Direct)).

[429] *Id.* P 605; Ex. S-0055 at 30:9-16 (McComb Direct and Answering); Ex. S-0115 at 6:1-13:5 (McComb Rebuttal) (accepting some of Keystone's proposed adjustments to Trial Staff's allocation calculations); Ex. S-0116 (Ms. McComb's revised Marketlink cost allocation calculations).

[430] Initial Decision, 182 FERC ¶ 63,013 at P 607 n.1008 (quoting Keystone Initial Br. at 97); *see also* Keystone Br. on Exceptions at 38. Keystone witness Mr. Wetmore proposed three modifications to Trial Staff's methodology: (1) correcting the mileage used in Ms. McComb's calculation of barrel-miles for the Gulf Coast Segment; (2) correcting Ms. McComb's calculation of the barrel allocation factor to attribute barrels to the applicable segments used in the transportation movement; and (3) using Keystone witness Mr. Daljevic's distance-based categories to adjust Ms. McComb's classification of certain costs. Ms. McComb accepted adjustments (1) and (2) and mostly rejected (3). Initial Decision, 182 FERC ¶ 63,013 at P 606 (citing Ex. S-0115 at 6:20-21, 11:5-7, 13:1-5 (McComb Rebuttal)); Ex. S-0115 at 21:14-24:2 (McComb Rebuttal) (agreeing to change three cost categories from non-distance based to distance based).

b. Joint Customers' Proposed Allocation Methodology

i. Initial Decision

143. The Initial Decision rejected Joint Customers' proposed replacement methodology to allocate OM&A costs for Keystone U.S. evenly between Keystone U.S. and Marketlink.[431]

144. First, the Initial Decision found that the TSAs allow Keystone's allocation methodology and that nothing in the TSAs specifies the methodology for allocating costs to lessees.[432] The Initial Decision found that this silence undercuts Joint Customers' position that all barrels on Keystone U.S. should bear an equal share of OM&A costs and makes it appropriate to consider cost-of-service ratemaking principles in evaluating the disputed cost-allocation methodology.[433] The Initial Decision further found that the terms of the TSAs "do not apply to a separate, legitimate lessee common carrier that has its own Commission-approved tariffs on the same pipeline system."[434] The Initial Decision noted that neither the construction of the Gulf Coast Segment nor the execution of the Marketlink lease changed the way Keystone charges the Variable Rate to its customers because Marketlink costs and expenses are allocated and excluded before the Variable Rate is calculated.[435]

145. Second, the Initial Decision found that Marketlink and Keystone should be treated as distinct common carriers on the Keystone System given that Marketlink has its own facilities, open seasons, committed shippers, and Commission-approved tariffs.[436] The Initial Decision also found it relevant that Marketlink is a wholly owned and separately operated subsidiary of TransCanada Oil Pipelines, Inc. and provides different services than Keystone.[437]

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[431] Initial Decision, 182 FERC ¶ 63,013 at PP 583, 587.

[432] *Id.* P 588.

[433] *Id.*

[434] *Id.* P 589.

[435] *Id.* P 590 (citing Ex. KEY-0031 at 3:17-18 (Gough Direct); Tr. 3641:11–3642:14 (Wetmore)).

[436] *Id.* P 591.

[437] *Id.*

146. Third, the Initial Decision found that it is just and reasonable for Keystone to first isolate costs and volumes between the Base U.S. Segment and Gulf Coast Segment and then allocate some of the Gulf Coast Segment costs to Marketlink to avoid Marketlink shippers bearing costs and expenses associated with the Base U.S. Segment, which they cannot access under the Marketlink lease.[438] The Initial Decision found that cross-subsidization would result from Joint Customers' proposal, contrary to their assertion, even though Marketlink has negotiated and market based-rates, not cost-of-service rates.[439]

ii. Briefs on Exceptions

147. Joint Customers state that the Initial Decision erred by allowing Keystone to use a lease with its affiliate, Marketlink, to allocate more OM&A costs to Keystone's committed volumes than to volumes transported under Marketlink's tariff. Joint Customers assert that the TSAs require uniform allocation of OM&A costs to all volumes on the Keystone System and do not provide an exception for leased capacity.[440] Joint Customers argue that the Initial Decision created an exception to this categorical requirement by treating contractual silence on the allocation of costs to leased volumes as permissive,[441] and that this approach makes the TSAs susceptible to various readings to which the parties did not agree.[442] Further, Joint Customers claim that an agreement

[438] *Id.* PP 592-593.

[439] *Id.* P 594 (explaining that Marketlink's committed shippers pay negotiated rates and its uncommitted shippers pay market-based rates).

[440] Joint Customers Br. on Exceptions at 9. Joint Customers state that "[t]he Variable Rate formula applies to the 'Pipeline System,' which refers to the entirety of Keystone's pipeline system in the United States 'owned by Carrier . . . as such facilities may be modified, expanded or extended for time to time.'" *Id.* at 10 (quoting Ex. JC-0011 at 26). Joint Customers further assert that the Variable Rate is based on a "rolled-in system average unit cost calculation" even though no shipment travels along the entire Keystone System. *Id.* at 13-14 (quoting Ex. JC-0007 at 2).

[441] *Id.* at 15-16.

[442] *Id.* at 20-21. Joint Customers also state that the Initial Decision addressed this issue inconsistently by allowing exceptions to the uniform allocation of OM&A costs based on silence in the TSAs but finding no exceptions to the words "all OM&A Costs" because none are expressly identified in the TSAs. *Id.* at 20 (citing Initial Decision, 182 FERC ¶ 63,013 at PP 352-353).

between two affiliates does not change the bargain struck by Keystone and its shippers.[443] Joint Customers also claim that the Variable Rate is calculated by allocating the same unit cost to all shipments on the Pipeline System that Keystone owns and operates, which includes the portion leased to Marketlink because, contrary to the Initial Decision's finding, there is no separate Keystone U.S. Pipeline System and Marketlink Pipeline System.[444] Joint Customers argue that the Commission should treat Keystone and Marketlink as one entity if necessary to enforce the TSAs' requirement that all shipments be allocated the same unit cost.[445]

148. Finally, Joint Customers dispute the Initial Decision's finding that enforcing the uniform cost allocation required by the TSAs would cause Marketlink shippers to subsidize Keystone's committed shippers.[446] Joint Customers argue that there is no connection between allocation of OM&A costs and the Marketlink rates because Marketlink's rates are not tied to Marketlink's cost of service.[447]

iii. <u>Briefs Opposing Exceptions</u>

149. Keystone and Trial Staff oppose Joint Customers' exceptions. Keystone and Trial Staff assert that the Initial Decision correctly found that the TSAs do not specify how to allocate costs between Marketlink and Keystone.[448] Keystone further argues that the Initial Decision correctly found that leased capacity does not meet the definitional requirement for inclusion in the Variable Rate.[449] Trial Staff also argues that Marketlink shippers are legally distinct from Keystone shippers who signed a TSA and the execution

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[443] *Id.* at 17.

[444] *Id.*

[445] *Id.* at 21 (citing *Town of Highlands, N.C. v. Nantahala Power & Light Co.*, 37 FERC ¶ 61,149, at 61,356 (1986)); *see also id.* at 22-25.

[446] *Id.* at 25.

[447] *Id.* at 12-13, 27.

[448] Trial Staff Br. Opposing Exceptions at 14-15; Keystone Br. Opposing Exceptions at 20-21.

[449] Keystone Br. Opposing Exceptions at 17-20.

of the Marketlink lease does not change the Variable Rate calculation because Marketlink costs and expenses are excluded before the Variable Rate is calculated.[450]

150. In addition, Keystone and Trial Staff argue that the Commission should not treat Keystone and Marketlink as the same entity as they are separately operated and provide different services under different tariffs.[451] Keystone and Trial Staff argue that enforcing a uniform cost allocation would result in a subsidy of Keystone's committed shippers by Marketlink shippers who cannot physically access the Base U.S. Segment, and that Marketlink's rate methodology is irrelevant to this question.[452]

iv. Commission Determination

151. We affirm the Initial Decision and reject Joint Customers' proposal to allocate OM&A costs for Keystone U.S. evenly between Keystone U.S. and Marketlink.

152. As the Initial Decision found, the TSAs do not address the allocation of leased volumes.[453] Thus, we consider the Commission's typical treatment of leased capacity. The Commission views lease arrangements differently from transportation services under rate contracts.[454] Generally, the Commission "views a lease of interstate pipeline capacity as an acquisition of a property interest that the lessee acquires in the capacity of the lessor's pipeline."[455] The Commission has held that, in such situations, the lessor may not "reflect in its system rates any of the costs . . . associated with the leased

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[450] Trial Staff Br. Opposing Exceptions at 16-17.

[451] *Id.* at 17-19; Keystone Br. Opposing Exceptions at 26. Trial Staff and Keystone also argue that Joint Customers cite inapposite precedent. *See* Trial Staff Br. Opposing Exceptions at 19-21; Keystone Br. Opposing Exceptions at 25-26.

[452] Trial Staff Br. Opposing Exceptions at 21-23; Keystone Br. Opposing Exceptions 21-24.

[453] Initial Decision, 182 FERC ¶ 63,013 at P 588.

[454] *Gulf S. Pipeline Co.*, 120 FERC ¶ 61,291, at P 35 (2007), *reh'g granted in part*, 122 FERC ¶ 61,162 (2008); *see also W. Ref. Sw., Inc. v. FERC*, 636 F.3d 719, 726 (5th Cir. 2011) (observing a substantive difference between the common carrier-shipper and a carrier-lessee relationships).

[455] *Gulf S.*, 120 FERC ¶ 61,291 at P 35.

capacity."[456] The Commission has also held that lease terms "reflect the economic value the parties placed on [the] discrete segment of capacity" that is leased.[457]

153. When choosing among different cost allocation methodologies, "the Commission considers which methodology most closely conforms to the Commission's long-standing practice of trying to align cost allocation with cost causation."[458] Consistent with these principles, Keystone allocates costs to Marketlink that are associated with the leased capacity on the Gulf Coast Segment rather than costs associated with all capacity on Keystone U.S. The record reflects that Marketlink only leases capacity on Keystone U.S.'s Gulf Coast Segment.[459] Thus, in allocating costs to Marketlink, it is reasonable for Keystone to first allocate costs between the Base U.S. Segment and the Gulf Coast Segment, and second to allocate a portion of the Gulf Coast Segment costs to Marketlink.[460]

154. By contrast, we find that Joint Customers' proposal to allocate OM&A costs for Keystone U.S. evenly between Keystone U.S. and Marketlink violates both these principles and the TSAs.[461] Marketlink only has a property interest in the capacity and facilities on Keystone U.S. that it leases,[462] and the record shows that it only leases

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[456] *Id.* P 42.

[457] *Arena Energy, LP v. High Point Gas Transmission, LLC*, 166 FERC ¶ 61,196, at P 36 (2019).

[458] Opinion No. 522, 140 FERC ¶ 61,220 at P 100; *see also*, Opinion No. 586, 185 FERC ¶ 61,126 at P 324.

[459] Ex. KEY-0060 at 31:4-6 (Wetmore Answering); *see also* KEY-0033 at 1, 3 (Marketlink Lease).

[460] *See* Ex. KEY-0031 at 8:1-16 (Gough Direct).

[461] Joint Customers Br. on Exceptions at 19-20 (arguing that OM&A costs for all of Keystone U.S., which includes both the Base U.S. Segment and Gulf Coast Segment, should be allocated uniformly among all volumes transported on any part of Keystone U.S., including volumes transported by Marketlink); Ex. JC-0001 at 46:4-5 (Arthur Direct) ("Costs should be allocated to Marketlink based on its proportionate share of all heavy-crude equivalent distance-weighted throughput on the Keystone US system.").

[462] *Gulf S.*, 120 FERC ¶ 61,291 at PP 35, 42.

capacity on the Gulf Coast Segment.[463] Moreover, Marketlink does not contribute to the OM&A costs necessary to provide service to Joint Customers and other Keystone shippers.[464] Joint Customers' proposal would over-allocate costs to Marketlink and result in a subsidy of Keystone's shippers.[465] Thus, allocating OM&A costs for the Base U.S. Segment to Marketlink would violate cost-causation principles and be contrary to the TSAs.

155. We reject Joint Customers' exceptions on this issue. First, the Marketlink lease does not change the bargain struck between Keystone and its shippers because, as the Initial Decision explains, any costs attributable to Marketlink are excluded before OM&A costs, as defined in the TSAs, are finalized for use in the Variable Rate calculation.[466] Thus, regardless of any leased capacity, Keystone's shippers are only responsible for their proportionate share of OM&A costs under the TSAs. Second, the Initial Decision did not create an exception to the TSAs' cost allocation requirements by finding that Marketlink should only be responsible for the costs associated with its leased capacity. Marketlink is not a shipper on Keystone U.S. but a lessee. The TSAs are silent as to leases and the Initial Decision's conclusion is consistent with longstanding Commission and court precedent concerning cost responsibility for leased capacity.[467]

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[463] Ex. KEY-0060 at 31:4-6 (Wetmore Answering); *see also* KEY-0033 at 1, 3 (Marketlink Lease).

[464] The TSAs provide that "all" OM&A costs "incurred by or on behalf of Carrier," defined as Keystone, shall be recoverable in the Variable Rate. Spreading these costs over volumes shipped on both Keystone and Marketlink would improperly shift some of these costs to Marketlink. Ex. JC-0010 at 19 (emphasis added), 24 (defining "Carrier" as "TransCanada Keystone Pipeline, LP"); Ex. JC-0011 at 19, 24 (same).

[465] *See* Ex. KEY-0060 at 38:4-39:3 (Wetmore Answering); Ex. S-0055 at 19:19-23:20 (McComb Direct and Answering); Ex. S-0055 at 20:8-11 (explaining that, for example, Dr. Arthur's allocation method would assign NRA costs to Marketlink that are associated with Hartford, Illinois, which is north of Cushing, Oklahoma, the origin point for Marketlink's leased capacity (citing Ex. JC-0043 at Tab "OPEX 2018 1 Inter")); Ex. S-0115 at 33:3-6 (McComb Rebuttal).

[466] Initial Decision, 182 FERC ¶ 63,013 at P 590; Ex. KEY-0031 at 3:15-4:5 (Gough Direct) (explaining that the total OM&A costs attributable to Keystone U.S. are "adjusted by allocations between Keystone U.S. and Marketlink" before the Variable Rate is calculated).

[467] *See supra* P 152.

156. Third, the record does not support treating Keystone and Marketlink as one entity for cost allocation purposes. Each of those entities has its own Commission tariff under which it provides different transportation service to shippers under different TSAs entered pursuant to different open seasons.[468] Treating Keystone and Marketlink as one entity leads to a less accurate allocation of costs. Moreover, for the reasons discussed, treating the companies as one entity is not necessary to enforce the TSAs or to ensure they are implemented in a just and reasonable manner as Joint Customers contend.[469]

157. Finally, we reject Joint Customers' assertion that any over-allocation to Marketlink is a non-issue because Marketlink charges either negotiated or market-based rates that are not based on a cost of service.[470] Under the TSAs, the Variable Rate recovers "all operating, maintenance and administration costs and expenses incurred by or on behalf of Carrier in respect of the [Keystone] System."[471] Shifting those costs allocable from Keystone to Marketlink would violate the TSAs. Moreover, there is no legal basis for making Marketlink subsize Keystone simply because Marketlink has negotiated and market-based rates. This runs counter to the fundamental principle of cost-causation.

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[468] Ex. KEY-0001 at 8:8-14, 5:17-6:2 (Trout Direct) (explaining that Marketlink is "a wholly owned separately operated subsidiary of TransCanada Oil Pipelines Inc."); *Marketlink, LLC*, 144 FERC ¶ 61,086, at PP 12, 15 (2013) (granting petition for declaratory order finding that the Commission may approve the requested rate structure for Marketlink's proposed oil transportation service using pipeline capacity leased from Keystone as well as Marketlink-owned facilities); *Marketlink*, 169 FERC ¶ 61,194 at P 1 (granting application to charge market-based rates for crude oil transportation on its pipeline system from Cushing, Oklahoma to Houston, Texas and Port Arthur, Texas); Ex. JC-0193 (Marketlink FERC Tariff No. 2.41.0, effective July 1, 2021, stating market-based rates for non-term shippers and term shippers for volumes that exceed contract volumes and committed rates for term shippers).

[469] *See* Joint Customers Br. on Exceptions at 21-25; *Town of Highlands, N.C. v. Nantahala Power & Light Co.*, 37 FERC ¶ at 61,356 (explaining that the Commission generally "defer[s] to the corporate form," and it "may disregard the corporate form in the interest of public convenience, fairness, or equity" or to "achieve the agency's statutory mandate and to assure that statutory purposes are not frustrated").

[470] Joint Customers Br. on Exceptions at 13, 27-28.

[471] Ex. JC-0010 at 19; Ex. JC-0011 at 19.

c. Trial Staff's Proposed Alternative to Step Three of Keystone's Allocation Methodology

i. Initial Decision

158. The Initial Decision found that Trial Staff met its burden to show that the Blended Allocator in Step Three of Keystone's Marketlink cost allocation methodology is not just and reasonable and that Trial Staff's proposed replacement is just and reasonable.[472]

159. Specifically, the Initial Decision found that the Blended Allocator is unjust and unreasonable because it fails to conform to Commission precedent regarding cost causation.[473] First, the Initial Decision found that the Blended Allocator is unreasonably imprecise because the final percentage would distort the allocation of indirect costs on the Gulf Coast Segment that are primarily associated with pump stations and those that are primarily associated with pipeline mileage, as pump stations and mileage on the Gulf Coast Segment represent different percentages of total pump stations and mileage on the Keystone U.S. System, respectively.[474] Moreover, the Initial Decision agreed with Trial Staff that the Blended Allocator is unreasonably imprecise because the same percentage would be used even if five times the barrels were shipped on the Gulf Coast Segment as the Base U.S. Segment in a given year.[475]

160. Second, the Initial Decision found that Keystone's categorization of cost items as being related to pipeline distance or the number of pump stations to determine the Blended Allocator fails to account for non-distance-related factors.[476] The Initial Decision found that Keystone primarily categorized many cost items as distance-based when they are better categorized as non-distance-based, and rejected all cost categories

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[472] Initial Decision, 182 FERC ¶ 63,013 at PP 595, 604, 607. The Initial Decision states that while Dr. Arthur opposes Trial Staff's proposal, Joint Customers "did not brief their position on Trial Staff's replacement methodology." *Id.* P 607 n.1008.

[473] *Id.* PP 595, 597.

[474] *Id.* P 598; *see also* Ex. KEY-0094 at 3:1-3 (Daljevic Cross-Answering); Ex. KEY-0031 at 8:10-12 (Gough Direct); Keystone Br. on Exceptions at 41.

[475] Initial Decision, 182 FERC ¶ 63,013 at P 599; *see also* Ex. KEY-0094 at 3:1-3 (Daljevic Cross-Answering); Ex. KEY-0031 at 8:10-12 (Gough Direct).

[476] Initial Decision, 182 FERC ¶ 63,013 at P 600 (citing Ex. S-0117 (McComb Distance and Non-Distance Workpapers); Ex. KEY-0094 at 5:1-6:1 (Daljevic Cross-Answering)); *see also* Ex. KEY-0094 at 3:1-3 (Daljevic Cross-Answering).

described as being related to pump stations as inadequately supported.[477] The Initial Decision concluded that, contrary to Keystone's method, a proper allocation methodology will find the primary cost driver and match an appropriate allocator for those costs rather than select an allocator based on some relationship to the primary cost driver.[478]

161. Third, the Initial Decision found that the Blended Allocator has redundancy that likely overemphasizes distance in allocating costs.[479] The Initial Decision stated that the use of pump stations and pipeline distance to determine the final Blended Allocator is redundant because a longer pipeline will generally require more pump stations.[480] Fourth, the Initial Decision found that Trial Staff's methodology, which is based on allocators typically used in oil pipeline ratemaking, yields Gulf Coast allocation percentages that are more than twice as large as those from the Blended Allocator.[481] The Initial Decision stated that this difference suggests that the Blended Allocator may not be just and reasonable.[482]

162. In addition, the Initial Decision found that Trial Staff's proposed two-step replacement for the Blended Allocator using barrels and barrel-miles, with adjustments made in Trial Staff witness Ms. McComb's rebuttal testimony, is just, reasonable, and

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[477] Initial Decision, 182 FERC ¶ 63,013 at PP 600 n.989, 601; *see also* Ex. KEY-0094 at 3:1-3 (Daljevic Cross-Answering).

[478] Initial Decision, 182 FERC ¶ 63,013 at P 601 (*comparing* Ex. S-0115 at 19:3-9 (McComb Rebuttal), *with* Ex. KEY-0094 at 7:9-12 (Daljevic Cross-Answering)); *see also* Keystone Br. on Exceptions at 41 (explaining that pump stations are a relevant cost driver because the probability that costs on a given segment relate to pump stations is greater when there are more pump stations on that segment).

[479] Initial Decision, 182 FERC ¶ 63,013 at P 602.

[480] *Id.*; *see also* Ex. KEY-0094 at 3:1-3 (Daljevic Cross-Answering).

[481] Initial Decision, 182 FERC ¶ 63,013 at P 603; *see also* Keystone Br. on Exceptions at 42. The Initial Decision also noted that Ms. McComb interpreted this difference to mean that Keystone's methodology under-allocated costs to Marketlink. Initial Decision, 182 FERC ¶ 63,013 at P 603 (citing Ex. S-0055 at 27:21-28:2 (McComb Direct and Answering)).

[482] Initial Decision, 182 FERC ¶ 63,013 at P 603.

non-discriminatory.[483] The Initial Decision found that this approach is consistent with the Commission's established distance-based and volumetric indirect cost allocations for oil pipelines.[484] The Initial Decision also found that Trial Staff categorized costs as either distance- or non-distance-based to match cost incurrence with cost responsibility.[485] Accordingly, the Initial Decision found that Trial Staff's recommended weighted Gulf Coast volumetric allocators shown in Exhibit No. S-0116 should be used to allocate the Keystone U.S. shared costs to the Gulf Coast Segment.[486]

ii. <u>Briefs on Exceptions</u>

163. Keystone excepts to the Initial Decision's finding that Step Three of Keystone's Marketlink cost allocation methodology is not just and reasonable.[487] Keystone states that the TSAs do not specify a particular methodology for allocating costs and expenses between Keystone U.S. and Marketlink and may permit a variety of methodologies, including Trial Staff's proposal.[488] Nonetheless, Keystone argues that its allocation methodology is just and reasonable and superior to Trial Staff's proposal because it follows cost-causation principles more closely and considers the pipeline's actual operational characteristics.[489]

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[483] *Id.* PP 604, 607 (citing Ex. S-0115 at 6:20-21, 11:5-7, 13:1-5, 21:14-24:2 (McComb Rebuttal)); *see also id.* PP 609, 611.

[484] *Id.* P 608.

[485] *Id.* P 609. The Initial Decision further noted that no party disputes that Ms. McComb's distance-based classifications for certain cost categories are correct. *Id.*

[486] *Id.* P 611.

[487] Keystone Br. on Exceptions at 36. Specifically, Keystone states that the Initial Decision erred in finding that, as to Step Three, Keystone "failed to meet its burden of proving the justness and reasonableness of the allocations of costs and expenses between Keystone U.S. and Marketlink for the 2021 Estimated Variable Rates, and that Trial Staff has met its burden of demonstrating the unjustness and unreasonableness of the allocations of cost and expenses between Keystone U.S. and Marketlink for the 2018, 2019, and 2020 Final Variable Rates." *Id.* at 25 (citing Initial Decision, 182 FERC ¶ 63,013 at P 578).

[488] *Id.* at 38.

[489] *Id.* Even so, Keystone cited the Initial Decision's finding that "[m]ere 'failure to conform to established Commission precedent governing cost causation' cannot be

164. Specifically, Keystone disputes the Initial Decision's finding that the Blended Allocator is "unreasonably imprecise" because it uses pipeline distance and number of pump stations to allocate all indirect costs, including those "primarily associated" with either pipeline mileage or pump stations. Keystone claims the Initial Decision failed to identify which, if any, costs are primarily associated with either pipeline mileage or pump stations.[490] Keystone states that the Blended Allocator properly recognizes that costs may not be strictly distance- or non-distance-sensitive.[491] Keystone asserts that Trial Staff's approach of categorizing indirect costs as either distance- or non-distance-based is not empirically supported and increases subjectivity.[492] Keystone asserts that the indirect costs cannot be allocated to specific incurrences and can only be approximated to certain cost drivers.[493] Keystone also criticizes Trial Staff's approach for not considering the number of pump stations on the Gulf Coast Segment compared to the entire pipeline and thus omitting a key cost driver between segments.[494]

165. Additionally, Keystone asserts that the Initial Decision erred in finding that the Blended Allocator is redundant in considering both pipe length and the number of pump stations, as Keystone argues they are not necessarily proportional.[495] Finally, Keystone claims that the Initial Decision overemphasizes the fact that an alternative methodology produced a different percentage for the allocator, particularly given the Initial Decision's finding that "the TSAs . . . do not contradict [Keystone's] allocation methodology."[496]

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enough to reject [Keystone's] approach." *Id.* at 42 (citing Initial Decision, 182 FERC ¶ 63,013 at P 595).

[490] *Id.* at 39 (citing Initial Decision, 182 FERC ¶ 63,013 at P 598).

[491] *Id.* at 39-40 (citing Ex. KEY-0094 at 4:19–20 (Daljevic Cross-Answering)).

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

[493] *Id.* at 41.

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

[495] *Id.* at 41.

[496] *Id.* at 42 (quoting Initial Decision, 182 FERC ¶ 63,013 at P 588 and citing *id.* P 603). Keystone also asserts that the Initial Decision's comparison is based on data presented in Exhibit No. S-0055, which Trial Staff revised in Exhibit No. S-0116, and the revised data reflects a smaller difference in the results of the allocation methodologies. *Id.*

iii. Briefs Opposing Exceptions

166. Trial Staff supports the Initial Decision's rejection of Step Three of Keystone's Marketlink cost allocation methodology and adoption of Trial Staff's proposal.[497] Trial Staff opposes Keystone's exception regarding the Blended Allocator. Trial Staff states that the Initial Decision correctly concluded that a per-barrel allocator applied to non-distance-based costs and a barrel-mile allocator applied to distance-based costs is consistent with the Commission's established volumetric allocations and that the Blended Allocator fails to account for this.[498] Trial Staff further states that Keystone does not support the primary cost driver for all indirect costs as being related to distance and argues that using both pump stations and pipeline distance to calculate the Blended Allocator is redundant as these are both distance-related factors.[499] In addition, Trial Staff agrees with the Initial Decision that it is informative that Keystone's methodology under-allocates costs to Marketlink compared to Trial Staff's alternative methodology.[500] Trial Staff notes that Keystone does not contest the Initial Decision's finding that Trial Staff demonstrated that its alternative methodology is just and reasonable.[501]

167. Joint Customers state that, if the Commission does not adopt their proposal to allocate OM&A costs for Keystone U.S. uniformly between Keystone U.S. and Marketlink, then the Commission should affirm the Initial Decision's adoption of Trial Staff's proposal as it correctly applies cost-of-service ratemaking principles and somewhat mitigates Keystone's excessive committed rates.[502]

[497] Trial Staff Br. Opposing Exceptions at 11.

[498] *Id.* at 24 (citing Initial Decision, 182 FERC ¶ 63,013 at P 608); *see also* Ex. KEY-0094 at 3:1-3 (Daljevic Cross-Answering).

[499] Trial Staff Br. Opposing Exceptions at 25-26; *see also* Ex. KEY-0094 at 3:1-3 (Daljevic Cross-Answering).

[500] Trial Staff Br. Opposing Exceptions at 26-27.

[501] *Id.* at 27 & n.133.

[502] Joint Customers Br. Opposing Exceptions at 28; *id.* 28-33.

iv. Commission Determination

168. The TSAs do not specify a method for allocating costs to pipeline lessees, such as Marketlink.[503] The Commission recognizes that there can be a range of reasonable ways to allocate costs and design rates.[504] When choosing among different cost allocation methodologies, "the Commission considers which methodology most closely conforms to the Commission's long-standing practice of trying to align cost allocation with cost causation" and avoiding cross-subsidization between shippers.[505]

169. Based on these principles, as discussed below, we affirm the Initial Decision and find that: (a) the Blended Allocator in Step Three of Keystone's Marketlink cost allocation methodology is not just and reasonable and (b) Trial Staff's proposed replacement for the Blended Allocator is just and reasonable.[506]

(a) The Blended Allocator Is Unjust and Unreasonable

170. We find that Step Three of Keystone's methodology for allocating costs between Keystone U.S. and Marketlink, in which the Blended Allocator is applied, is unjust and unreasonable. As discussed below, we find that the Blended Allocator: (1) is unreasonably imprecise; (2) includes pump stations as an allocation factor without adequate justification; (3) fails to account for non-distance-related factors; and (4) may under-allocate costs to Marketlink.

171. First, we agree with the Initial Decision that Keystone's Blended Allocator is unreasonably imprecise.[507] We acknowledge that some imprecision is inherent when direct assignment is not possible and a cost allocation methodology is used to estimate

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[503] Initial Decision, 182 FERC ¶ 63,013 at P 597; Keystone Br. on Exceptions at 38; Trial Staff Br. Opposing Exceptions at 15.

[504] *Transcon. Gas Pipe Line Corp.*, 106 FERC ¶ 61,299 at P 190.

[505] Opinion No. 522, 140 FERC ¶ 61,220 at P 100. Although this is not a cost-of-service case, Keystone acknowledges that cost-causation principles apply here. *See* Keystone Br. on Exceptions at 37-38; Ex. KEY-0094 at 6:6-7:2 (Daljevic Cross-Answering). Joint Customers state if the Commission finds that the TSAs do not require Keystone to uniformly allocate costs then it should apply cost-of-service ratemaking precedent. Joint Customers Br. Opposing Exceptions at 27-28 n.73.

[506] Initial Decision, 182 FERC ¶ 63,013 at PP 595, 604, 607.

[507] *Id.* P 598.

cost responsibility.[508] However, to achieve a reasonable estimate, an allocation method should match the primary driver of indirect costs with an allocator that relates to that cost driver.[509] Keystone's method is unreasonably imprecise because it uses an average of two allocation factors (pipe length and pump stations) to allocate *all* indirect costs, regardless of type, when one or both of those allocation factors may not relate to the primary driver for a particular cost.[510] If any indirect costs are primarily associated with either pipe length or pump stations, but not both, then using a blended allocator will distort the allocation of those costs. If neither factor (pipe length and pump stations) is the primary driver for any or all indirect costs, then using a combination of those factors to allocate costs may be inconsistent with cost-causation principles. Because Keystone did not demonstrate that pipe length and pump stations are co-equal factors in driving all categories of indirect costs, treating them as such necessarily leads to distortion and does not align with cost-causation principles.[511]

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[508] Opinion No. 511-A, 137 FERC ¶ 61,220 at P 83; *Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1369 (D.C. Cir. 2004) ("we have never required a ratemaking agency to allocate costs with exacting precision").

[509] *See ISO New England, Inc.*, 113 FERC ¶ 61,220, at P 34 (2005) (finding that "because real-time load is both the primary driver (cause) of posturing and the primary beneficiary from posturing, it is appropriate to allocate the costs of posturing to real-time load"); Ex. S-00115 at 16:18-20 (McComb Rebuttal) ("Generally, when trying to assign costs to those activities that incur the costs, the goal of the allocation method is to find the primary driver of those costs and thus match an appropriate allocator to the costs it relates to.") (emphasis in original); *see also*, Opinion No. 522, 140 FERC ¶ 61,220 at P 100 ("the Commission considers which methodology most closely conforms to the Commission's longstanding practice of trying to align cost allocation with cost causation"); Opinion No. 586, 185 FERC ¶ 61,126 at P 324.

[510] Ex. KEY-0094 at 3:1-3 (Daljevic Cross-Answering); Ex. KEY-0031 at 8:10-12 (Gough Direct); Initial Decision, 182 FERC ¶ 63,013 at P 580; *see also* Keystone Br. on Exceptions at 37; Joint Customers Br. Opposing Exceptions at 32. For example, if 50% of Keystone U.S. pump stations were on the Gulf Coast Segment and the Gulf Coast Segment comprised 20% of Keystone U.S.'s pipe length, this yields a Blended Allocator of 35%. In this hypothetical, 35% of all Keystone U.S. indirect costs would be allocated to the Gulf Coast Segment and 65% would be allocated to the Base U.S. Segment.

[511] Ex. S-0145 at 1 (explaining that Keystone's "approach to cost allocation does not require [Keystone] to . . . quantify the specific impact of either cost driver to each cost category"); *see also* Ex. KEY-0094 at 3:1-3 (Daljevic Cross-Answering).

172. Second, we find that the Blended Allocator is unjust and unreasonable because Keystone did not justify using pump stations as an allocation factor.[512] Keystone admits that pump stations may not be the primary cost driver for any cost category and that some indirect costs are not related to pump stations at all.[513] Although Keystone witness Mr. Daljevic provides a chart identifying the cost categories associated with pump stations, he fails to explain why the number of pump stations on a segment directly and primarily leads to an increase in a particular category of shared costs.[514] Indeed, Mr. Daljevic admitted that he "cannot determine if pump stations are the most important driver of costs for the cost categories listed in" the chart in his testimony.[515] Accordingly, Mr. Daljevic's explanations do not provide a reasonable basis for relying on pump stations as an allocator.

173. Third, we find that the Blended Allocator is unjust and unreasonable because it fails to account for non-distance-related factors and thus overstates the role of distance in allocating costs.[516] Both pipe length and pump stations are functions of distance. Even if Keystone had justified using the number of pump stations as an allocation factor, it is redundant of pipe length as more pump stations are generally required as the pipeline's

[512] Initial Decision, 182 FERC ¶ 63,013 at P 601; *see also* Ex. KEY-0094 at 3:1-3 (Daljevic Cross-Answering).

[513] Ex. S-0121 at 1; *see also* Tr. 3004:9-12 (Daljevic) ("Q So you're aware that there are other indirect costs allocated between Keystone and Marketlink that are not related to pump station maintenance; correct? A Yes, I am aware of that.").

[514] Ex. KEY-0094 at 8-9 (Daljavic Cross-Answering); *see also* Ex. S-0115 at 19:12-14 (McComb Rebuttal); *id.* at 19:17-20:4.

[515] Ex. S-0121 at 1 (citing Ex. KEY-0094 at 8-9 (Daljevic Cross-Answering)); *see also id.* (explaining that the chart's purpose is to identify cost categories that "are believed to have some relationship with pump stations"); Tr. 3001:19‑22, 3002:24‑25 (Daljevic) (explaining that when "there are more pump stations on a given segment, the probability that costs incurred related to pump stations is greater for that segment," making the "number of pump stations . . . a relevant cost driver to be applied"); Keystone Br. on Exceptions at 41 (quoting Tr. 3001:19‑22, 3002:24‑25 (Daljevic)).

[516] Initial Decision, 182 FERC ¶ 63,013 at P 600; *see also* Ex. KEY-0094 at 7:4-8 (Daljevic Cross-Answering) (stating that Keystone's methodology "incorporates the effect of the difference in facility set distance and facility density . . . as it relates to cost incurrence").

length increases.[517] Because the Blended Allocator is a simple average of these two factors,[518] we agree with the Initial Decision that this redundancy likely overstates the role distance plays in cost incurrence on each segment.[519]

174. Moreover, although there is no non-distance-related allocation factor in Keystone's methodology, some of the indirect costs that Keystone categorizes as distance-based appear to be primarily non-distance related.[520] For example, Keystone witness Mr. Daljevic categorizes actuarial and pension costs as distance sensitive because they relate to labor, and one of the factors that Keystone uses internally to determine labor demand includes distance.[521] However, Keystone's explanation does not indicate that these costs vary with distance. We agree with Trial Staff witness Ms. McComb that these costs are better categorized as Administrative and General (A&G) costs that do not vary with distance.[522] The Commission's longstanding policy is to allocate A&G costs

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[517] Tr. 2756:4-8 (Elliott); *see also* Ex. KEY-0094 at 3:1-3 (Daljevic Cross-Answering).

[518] Initial Decision, 182 FERC ¶ 63,013 at P 580; *see also* Joint Customers Br. Opposing Exceptions at 32.

[519] Initial Decision, 182 FERC ¶ 63,013 at P 602. Keystone appears to argue on exceptions that, to be redundant, the proportion of pipe length and pump stations on the two segments must be equal. Keystone Br. on Exceptions at 41. However, whether pipe length and pump stations are fully proportional does not disprove that both are distance-related factors. As the Initial Decision notes, Keystone labels many cost categories as both being related to distance and to pump stations. Initial Decision, 182 FERC ¶ 63,013 at P 602 (citing Ex. KEY-0094 at 5:2-6:1 (Daljevic Cross-Answering); *id.* at 8:7- 9:1); *see also, e.g.*, Ex. S-0117 at 6.

[520] For instance, the Blended Allocator does not account for the non-distance-related factor of volume to allocate costs between the Base U.S. and Gulf Coast segments.

[521] Ex. KEY-0094 at 5 (Daljevic Cross-Answering) (stating that "Actuarial Gain/Loss Amortization" and "Pension" costs are "distance sensitive" because they are allocated "based on [full time employees (FTEs)]" and because "[p]ipeline complexity, which includes distance, is one of the components in the demand function for FTEs"); Ex. S-0115 at 23:7-13 (McComb Rebuttal); Ex. S-0117; Trial Staff Initial Post-hearing Br. at 61.

[522] Ex. S-0117 at 2; *see also id.* (explaining that "[p]ension related costs are usually included in FERC Account No. 550 which the Commission typically treats as non-distance related").

on a volumetric basis rather than a mileage basis because such costs do not vary sufficiently with mileage to justify a mileage-based allocation.[523] Keystone does not justify deviating from that policy here.[524] Thus, rather than being "mindful of . . . grey areas," as Keystone claims, the Blended Allocator ignores key facets of cost incurrence altogether.[525]

175. Finally, we find Trial Staff's methodology informative to show that Keystone's methodology under-allocates costs to Marketlink. Trial Staff uses a barrel and barrel-mile cost allocation methodology for non-distance and distance-based costs, respectively,[526] which is an established allocation methodology under Commission precedent.[527] As discussed regarding corporate overhead cost allocation, the result of such a methodology is a useful check on the reasonableness of Keystone's allocation

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[523] *Great Lakes Gas Transmission Ltd. P'ship*, 74 FERC ¶ 61,257, at 61,857-58 (1996), *reh'g denied* 76 FERC ¶ 61,179 (1996); *see also SFPP, L.P.*, Opinion No. 511, 134 FERC ¶ 61,121, at P 62 (2011), *vacated in part on other grounds sub nom. United Airlines, Inc. v. FERC*, 827 F.3d 122 (D.C. Cir. 2016) ("The Commission's regulations define Account 590 expenses as 'general and administrative costs.' Although SFPP has identified DOT and California State Fire Marshall regulations indicating that a component of some of the fees may be related to mileage, . . . such 'general and administrative costs' are not considered by the Commission to be distance related.").

[524] Ex. S-0124 at 1 (explaining that "Keystone's cost allocation methodology does not attempt to quantify the specific impact of distance to each cost category" and that "accurately quantifying the specific degree to [which] distance [has] relevance is beyond the scope of Mr. Daljevic's testimony and capabilities"); Ex. S-0145 at 1 (stating that Keystone did not "quantify the specific impact of either cost driver to each cost category"); *see also* Ex. KEY-0094 at 5:1-6:1 (Daljevic Cross-Answering).

[525] Keystone Br. on Exceptions at 40. We reject Keystone's argument that the Blended Allocator's lack of line drawing between distance- and non-distance-related categories is a feature rather than a flaw because it limits subjectivity. *See id.* at 39-41. Some subjectivity is inherent in cost allocation. By contrast, by not attempting to determine the specific impact of its chosen cost drivers on cost incurrence or confirm that they are the primary cost drivers, Keystone's methodology appears arbitrary and divorced from cost-causation principles. *See* Ex. S-0124 at 1; Ex. S-0145 at 1.

[526] *See* Ex. S-0116 at 1.

[527] *Revisions to Indexing Policies & Page 700 of FERC Form No. 6*, 157 FERC ¶ 61,047, at P 39 n.59 (2016).

methodology.[528] Trial Staff's volumetric allocator, as revised in Ms. McComb's rebuttal testimony, resulted in a higher percentage of indirect costs being allocated to the Gulf Coast Segment than Keystone's Blended Allocator.[529] This supports a finding that Keystone's Blended Allocator is unjust and unreasonable and unduly discriminatory.

176. Based on the foregoing, we find that the Blended Allocator in Step Three of the Marketlink cost allocation methodology is not just and reasonable.

(b) <u>Trial Staff's Replacement Methodology Is Just and Reasonable</u>

177. We next find that Trial Staff's proposed cost allocation methodology, as adjusted in Ms. McComb's rebuttal testimony, is a just and reasonable replacement for the Blended Allocator.[530] Trial Staff proposes to allocate costs to the Gulf Coast Segment based on barrels and barrel-miles for non-distance and distance-related costs, respectively.[531] This is consistent with Commission precedent regarding distance-based and volumetric cost allocation of indirect costs for oil pipelines.[532]

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[528] *See supra* P 136.

[529] *Compare* Ex. KEY-0031 at 9:9-20 (Gough Direct) (explaining the results of the Blended Allocator), *with* Ex. S-0116 at 1 *and* Ex. S-0095 at 1 (line 9) (calculating the weighted Gulf Coast allocation factor as 35.2% for 2018, 39.4% for 2019, and 37.5% for 2020); *see also* Ex. S-0115 at 6:1-12:11 (McComb Rebuttal) (discussing revisions to Trial Staff's calculation of barrels and barrel-miles used to derive the Gulf Coast allocation factor); *see also* Ex. KEY-0031 at 8:10-12 (Gough Direct). Keystone is correct that the Initial Decision cited Trial Staff's initial calculations when noting that Trial Staff's Gulf Coast allocators were "more than twice as large" as Keystone's Blended Allocator. Keystone Br. on Exceptions at 42 (citing Initial Decision, 182 FERC ¶ 63,013 at P 603). Although Trial Staff's revised calculations are closer to the results of the Blended Allocator, they still differ significantly.

[530] Ex. S-0115 at 6:1-12:11 (McComb Rebuttal) (describing revisions to Gulf Coast allocation factor); Ex. S-0116 (revised calculations).

[531] Ex. S-0055 at 30:9-11 (McComb Direct and Answering).

[532] *Revisions to Indexing Policies & Page 700 of FERC Form No. 6*, 157 FERC ¶ 61,047 at P 39 n.59; *SFPP, LP.*, 129 FERC ¶ 63,020, at P 863 (2009), *aff'd*, Opinion No. 511, 134 FERC ¶ 61,121, at P 62 (2011); *SFPP, L.P.*, 80 FERC ¶ 63,014, at 65,191 (1997), *aff'd*, Opinion No. 435, 86 FERC ¶ 61,022 (1999).

178. We also find, like the Initial Decision, that Trial Staff properly categorized certain costs as either distance-related or non-distance-related in a manner that more closely aligns cost incurrence with cost causation.[533] For instance, Trial Staff witness Ms. McComb categorizes "Executive Administration" as a non-distance-related cost because, in the ratemaking context, it is an A&G cost that is includable in FERC accounts that are typically treated by the Commission as non-distance related.[534] Similarly, Ms. McComb justifies categorizing "Insurance" costs as distance-related based on record evidence that "the majority" of these costs are related to property insurance.[535] Additionally, no party asserts that Trial Staff's method is unjust and unreasonable.[536]

179. We reject Keystone's critiques of Trial Staff's replacement methodology. First, Keystone's contention that Trial Staff's categorization of indirect costs as either distance- or non-distance-based is not empirically supported overstates the subjectivity used in Trial Staff's approach.[537] As discussed above, Trial Staff supports its

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[533] Initial Decision, 182 FERC ¶ 63,013 at P 609; Ex. S-0117 (workpapers with justification for distance and non-distance-based cost categories).

[534] Ex. S-0117 at 1; *see also SFPP, LP.*, 129 FERC ¶ 63,020 at P 863 ("Non-mileage costs include items that are not distance sensitive, such as administrative and general expenses. Non-mileage costs are allocated on a per barrel basis to derive their cost per barrel. Mileage sensitive costs are allocated on a barrel-mile basis[.]"). Trial Staff classifies several cost categories as non-distance-related that Keystone had classified as distance related using similar reasoning. *See, e.g.*, Ex. S-0117 at 5 (explaining that corporate memberships "are typically classified as FERC Account No. 590"); *see* 18 C.F.R. Part 352 (providing that Account No. 590, "Other expenses," includes costs for A&G services).

[535] Ex. S-0117 at 5 (citing Ex. JC-0104). Although Trial Staff agrees with Keystone's classification, Trial Staff provided specific information to justify this classification while Keystone did not. *Id.*

[536] Keystone Br. on Exceptions at 38 ("Keystone acknowledges that the TSAs may permit a spectrum of potential methodologies, and does not dispute that Trial Staff witness Meagan K. McComb's proposed methodology may be a reasonable choice"); Joint Customers Br. Opposing Exceptions at 28 ("If the Commission does not grant Joint [Customers]' exception and finds instead a non-uniform allocation method is appropriate notwithstanding the TSAs, then the next best option would be to affirm the [Initial Decision]'s adoption of Trial Staff's method.").

[537] Keystone Br. on Exceptions at 40-41. We note that Keystone did not object to Trial Staff's distance-based classifications for any specific costs. Initial Decision, 182 FERC ¶ 63,013 at P 609 ("no party disputes, that McComb's distance-based

distance- and non-distance-based cost classifications based on record evidence and Commission precedent.[538] Keystone asserts that that some cost categories classified by Trial Staff as non-distance based have a degree of cost incurrence due to distance factors.[539] However, classifying costs as non-distance based for allocation purposes does not mean there is no relationship to distance, but rather, that the costs are primarily related to non-distance factors.[540] Cost allocation is not an exact science, and we find that Trial Staff adequately supported its cost categorizations here.[541]

180. Second, contrary to Keystone's assertion, it is reasonable for Trial Staff's allocation methodology to exclude the number of pump stations as a cost driver.[542] As discussed above, Keystone did not show that the number of pump stations is the primary

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classification for certain cost categories are correct"); Ex. KEY-0092 at 22:3-11 (Wetmore Cross-Answering) (asserting that, if the Commission accepts Ms. McComb's allocation methodology, adjustments are needed to "Ms. McComb's classification of certain non-distance-related costs" but asserting no adjustments to costs classified as distance related).

[538] *Supra* P 178; *see also* Ex. S-0115 at 16:18-17:6 (McComb Rebuttal); Ex. S-0117.

[539] Keystone Br. on Exceptions at 40; *see also* Ex. S-0124 at 1 (stating that Mr. Daljevic interprets Trial Staff's non-distance characterizations as "absolute").

[540] Ms. McComb acknowledged this in her testimony. Ex. S-0115 at 17:9-13 (McComb Rebuttal) ("Labeling a cost as non-distance related does not mean that the length of pipeline has zero relevance to incurrence and magnitude of the specific cost category. Instead, it can be reasonably concluded that distance is not the primary driver of costs for that specific cost category." (emphasis in original)).

[541] *Midwest ISO Transmission Owners v. FERC*, 373 F.3d at 1369; *Transcon. Gas Pipe Line Corp.*, 106 FERC ¶ 61,299 at P 190. Keystone recognizes and relies on this principle to support its own methodology. *See* Keystone Br. on Exceptions at 39-41; *id.* at 41 (quoting Mr. Daljevic's statements, Tr. 3001:19‑22, 3002:24‑25 (Daljevic), that when "there are more pump stations on a given segment, the probability that costs incurred related to pump stations is greater for that segment")).

[542] Keystone Br. on Exceptions at 41.

driver of any indirect costs at issue in this proceeding.[543] Thus, using pump stations as an allocator is not necessary for a cost allocation methodology to be reasonable here.

181. Based on the foregoing, we direct Keystone to use Trial Staff's volumetric cost allocation methodology to determine the Gulf Coast Segment's share of indirect costs on Keystone U.S. going forward and for purposes of calculating any reparations and refunds in this proceeding.[544]

F. Remedies

182. As discussed below, we affirm the Initial Decision's findings that: (1) Joint Customers' claims are not fully time barred; and (2) the reparations period begins on October 9, 2018. Accordingly, we direct Keystone on compliance to calculate potential reparations from October 9, 2018, through December 31, 2021, based on the amount that each complainant paid during the reparations period that exceeds the just and reasonable Variable Rate for those periods as calculated in accordance with the findings herein.[545] Keystone is also directed to calculate any refunds owed to non-complainant shippers for the Variable Rate established in the 2020 and 2021 tariff proceedings to the extent any non-complainant shippers are eligible for refunds under the ICA.[546]

1. Joint Customers' Claims Are Not Fully Time Barred

a. Initial Decision

183. The Initial Decision rejected Keystone's argument that Joint Customers' claims and any reparations are time barred because the cause of action accrued when Joint Customers first knew the facts underlying the Complaint, which Keystone argued was

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[543] *Supra* P 172; Ex. S-0121 at 1 ("Mr. Daljevic cannot determine if pump stations are the most important driver of costs for the cost categories listed in Exhibit KEY-0094 at 8-9.").

[544] With respect to reparations and refunds for 2018, 2019, and 2020, we direct Keystone to use the weighted Gulf Coast volumetric allocators in Exhibit No. S-0116.

[545] Reparations for damages during the two years prior to the filing of the Complaint should be calculated as the difference between the just and reasonable rate and the existing level. *BP W. Coast Prod., LLC v. FERC*, 374 F.3d 1263, 1306 (D.C. Cir. 2004) (citing 49 U.S.C. app. § 16(3)(b)).

[546] 49 U.S.C. app. §§ 8, 15(7); *see also* 2020 Tariff Hearing Order, 169 FERC ¶ 61,254 at ordering para. (A) (setting tariff filing for hearing, subject to refund); 2020 Consolidation Order, 173 FERC ¶ 61,285 at ordering para. (A) (same).

more than two years before the Complaint was filed.[547] The Initial Decision reasoned that, under the ICA, a cause of action is based on the challenged rates, and the Complaint clearly challenges the rates charged by Keystone.[548]

b. Briefs on Exceptions

184. Keystone claims that Joint Customers' claims are fully time barred under the ICA and asks the Commission to dismiss the Complaint as untimely.[549] Keystone states that Joint Customers' cause of action accrued under the ICA when they learned Keystone was including the disputed cost categories in the Variable Rate.[550] Keystone argues that the Variable Rate is a "perennially known rate" because Keystone gives Joint Customers notice of the costs and expenses included in rates as they are charged.[551] Keystone further asserts that the cost categories and methodology for calculating the Variable Rate have not changed since 2015 and Joint Customers' claims are barred by their failure to bring an action within two years of that time.[552] Keystone also argues that, because the rate methodology is constant but the rates change annually, failing to find that Joint Customers' claims are time barred will result in perennial challenges to essentially the same cost categories.[553]

185. Keystone states that the Commission has rejected Joint Customers' argument that a claim accrues each time a rate based on a set calculation is charged.[554] Keystone argues that because the Variable Rate was paid based on a calculation with numerous inputs, the

[547] Initial Decision, 182 FERC ¶ 63,013 at PP 625-628 (citing 49 U.S.C. app. § 16(3)(b)).

[548] *Id.* P 628 (citing *BP W. Coast Prod., LLC v. FERC*, 374 F.3d at 1306; *SFPP, L.P.*, 121 FERC ¶ 61,163, at P 5 (2007); *Epsilon Trading, LLC*, 177 FERC ¶ 63,017, at P 530 (2021)).

[549] Keystone Br. on Exceptions at 29, 32.

[550] *Id.* at 30.

[551] *Id.* at 31 (quoting Initial Decision, 182 FERC ¶ 63,013 at P 635).

[552] *Id.* at 29-30, 99.

[553] *Id.* at 32.

[554] Keystone Br. Opposing Exceptions at 98-99 (citing *Flint Hills Res. Alaska v. BP Pipelines (Alaska) Inc.*, 145 FERC ¶ 61,117 (2013), *reh'g denied sub nom. BP Pipelines (Alaska) Inc.*, 149 FERC ¶ 61,149 (2014)).

cause of action accrued not upon each new payment but when "'a reasonable person in Joint Customers' position would have determined the [Variable Rate] was no longer just and reasonable.'"[555]

c. **Briefs Opposing Exceptions**

186. Joint Customers and Trial Staff support the Initial Decision and oppose Keystone's exception. Trial Staff states that a cause of action under the ICA is based on the rates challenged and that the Complaint clearly challenged the rates that Keystone charged.[556] Joint Customers assert that claims for damages under the ICA generally accrue when the transportation service is provided.[557]

187. Further, Joint Customers assert that they did not waive their right to seek relief from the Commission based on Keystone's contention that they understood the Variable Rate methodology years ago. Joint Customers state that they could not understand Keystone's Variable Rate methodology from Keystone's annual rate notices as they provided insufficient information.[558] Joint Customers also note that they were not required to seek an audit under the TSAs before filing a complaint or protest, and that the TSAs establish that Joint Customers may file a complaint to enforce the TSAs' terms even if they paid rates that included improper costs in the past.[559]

188. In addition, Joint Customers argue their timely protests of the 2020 and 2021 tariff filings provide a separate statutory ground for relief that is not subject to the statute of limitations governing complaints.[560] Moreover, Trial Staff argues that the Commission addressed Keystone's concern about Joint Customers re-litigating the cost categories at

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[555] *Id.* at 99 (quoting *Flint Hills*, 145 FERC ¶ 61,117 at P 46).

[556] Trial Staff Br. Opposing Exceptions at 91.

[557] Joint Customers Br. Opposing Exceptions at 15 (citing 49 U.S.C. app. § 16(3)(e)). Joint Customers state that the Commission should reject Keystone's citation to *Flint Hills*, 145 FERC ¶ 61,117, regarding when a claim accrues because the relevant statute of limitations in that case came from section 4412(c)(1) of the Motor Carrier Safety Reauthorization Act of 2005 (Motor Carrier Act) and is, therefore, inapposite. Joint Customers Br. Opposing Exceptions at 14 n.22.

[558] Joint Customers Br. Opposing Exceptions at 18-19.

[559] *Id.* at 18 (citing Ex. JC-0011 at 14 (Sec. 11.7)); *id.* at 20.

[560] *Id.* at 17.

issue here by holding in abeyance challenges to Keystone's more recent tariff filings pending the outcome of this proceeding to ensure an efficient resolution.[561]

d. Commission Determination

189. We affirm the Initial Decision and find that the claims in Joint Customers' Complaint are not entirely time barred under the ICA.[562] The ICA generally allows reparations for up to two years prior to the date of the filing of a complaint if the pipeline's rates exceed the just and reasonable rate established in the complaint proceeding.[563] The ICA also provides that "[t]he cause of action in respect of a shipment of property shall . . . be deemed to accrue upon delivery or tender of delivery thereof by the carrier, and not after."[564] Accordingly, Joint Customers' claims accrued based on the date of delivery of each shipment on which a challenged rate was charged even though the TSAs' Variable Rate methodology was effective earlier.

190. We reject Keystone's contention that Joint Customers' claims arose when the categories and methodology for calculating the challenged Variable Rate charges were known, which Keystone claims was no later than 2015.[565] As noted above, the plain language in ICA section 16(3)(e) provides that a cause of action accrues upon delivery or

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[561] *Id.* at 93 (quoting *TransCanada Keystone Pipeline, LP*, 177 FERC ¶ 61,225, at P 13 (2021) (2022 Tariff Hearing Order); *TransCanada Keystone Pipeline, LP*, 181 FERC ¶ 61,281, at P 14 (2022) (2023 Tariff Hearing Order)).

[562] We note that finding the Complaint to be fully time barred would not moot this proceeding. Because Joint Customers protested Keystone's proposed rate increases in the 2020 and 2021 tariff filings, which went into effect subject to refund following hearing procedures, Joint Customers and non-complainant shippers may be entitled to refunds with respect to those rates even if Joint Customers had not filed a complaint. 2020 Consolidation Order, 173 FERC ¶ 61,285 at P 20; 49 U.S.C. app. §§ 15(7) (refunds), 16 (reparations); *SFPP*, 121 FERC ¶ 61,163 at P 6 (explaining that "[t]he carrier's obligation to provide refunds inures to all shippers regardless of whether a particular shipper filed a complaint," and "attaches only to rates in those proceedings in which the Commission is investigating an underlying rate that was part of a pipeline rate filing," while "[f]or the complainant shippers, the remedy occurs through their reparations to the extent they are eligible").

[563] *BP W. Coast Prod., LLC v. FERC*, 374 F.3d at 1306 (citing 49 U.S.C. app. § 16(3)(b)); Opinion No. 586, 185 FERC ¶ 61,126, at P 463 (2023).

[564] 49 U.S.C. app. § 16(3)(e).

[565] Keystone Br. Opposing Exceptions at 98-99.

tender of delivery of the shipment by the pipeline.[566] Keystone cites no support under the ICA for a distinction between a challenge to the rates charged and a challenge to the categories or methodology for calculating those rates for purposes of determining when a cause of action accrues.[567] Keystone merely cites Commission precedent interpreting the limitations period in a statute that does not apply here.[568]

191. Finally, we do not share Keystone's concern about Joint Customers relitigating the Variable Rate methodology through successive protests on Keystone's annual rate filings. This proceeding is the first time that Joint Customers have litigated these issues. Moreover, the Commission has consolidated and held several proceedings in abeyance pending the outcome of this proceeding to ensure an efficient and consistent resolution.[569]

2. The Reparations Period Begins October 9, 2018

a. Initial Decision

192. The Initial Decision found that the proper reparations period under the ICA in this case is October 9, 2018—two years before the Complaint was filed—through

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566 49 U.S.C. app. § 16(3)(e).

567 *See* Keystone Br. on Exceptions at 29-32.

568 Keystone Br. Opposing Exceptions at 98-99 (citing *Flint Hills*, 145 FERC ¶ 61,117). In *Flint Hills*, the Commission interpreted a provision of the Motor Carrier Act that is "unique" to the Trans Alaska Pipeline System and which Congress adopted "to limit the extent of retroactive refunds in cases that have dragged on interminably." 145 FERC ¶ 61,117 at P 41; *see also id.* PP 44-46 (interpreting the claim accrual date to effectuate Congress's intent in section 4412(c)(1) of the Motor Carrier Act); Motor Carrier Act § 4412, Pub. L. 109-59, 19 Stat. 1144, at 1178-79 ("Quality Bank Adjustments"). The provision of the Motor Carrier Act at issue in *Flint Hills* provided: "A claim relating to a quality bank under this section shall be filed with the Federal Energy Regulatory Commission not later than two years after the date on which the claim arose." *Flint Hills*, 145 FERC ¶ 61,117 at P 29. However, the ICA does not contain a similar provision.

569 2022 Tariff Hearing Order, 177 FERC ¶ 61,225 at P 13; 2023 Tariff Hearing Order, 181 FERC ¶ 61,281 at P 14; *TransCanada Keystone Pipeline, LP*, 185 FERC ¶ 61,230, at PP 14-15 (2023) (2024 Tariff Hearing Order). Moreover, the principles of claim or issue preclusion could apply to bar future claims regarding the Variable Rate in whole or in part depending on the circumstances.

December 31, 2021.[570] The Initial Decision found that its determination of the reparations period comports with section 16 of the ICA, which limits an award of reparations to the rates paid during the two years before filing a complaint and provides that a claim accrues upon delivery.[571]

193. The Initial Decision rejected Joint Customers' argument that they are entitled to reparations dating back to January 1, 2018 because the 2018 Estimated Variable Rate was subject to revision until the 2018 Final Variable Rate was issued by notice on March 22, 2019.[572] The Initial Decision found that Joint Customers cited inapposite cases that addressed claims that arose due to a rate change or a formula that made the rate unknowable until after the service was provided.[573] By contrast, the Initial Decision noted that Joint Customers challenged the inclusion and allocation of certain costs and expenses in one known rate that is charged as each barrel is delivered.[574] The Initial Decision further noted that Keystone's estimate-based charges were merely trued-up in March 2019 and Joint Customers do not challenge that true-up.[575]

b. Briefs on Exceptions

194. Joint Customers claim that the Initial Decision erred by finding that the reparations period begins on October 9, 2018, instead of January 1, 2018.[576] Joint Customers assert that the limitations period for claiming reparations related to the 2018 rates did not begin to run until Keystone provided the 2018 Final Variable Rate in March 2019.[577] Joint

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[570] Initial Decision, 182 FERC ¶ 63,013 at PP 629, 643.

[571] *Id.* P 641 (citing 49 U.S.C. app. §§ 16(3)(b), (e)).

[572] *Id.* PP 631-632 (summarizing Joint Customers' argument as based on precedent and, in the alternative, the doctrine of equitable tolling).

[573] *Id.* PP 634-636 (distinguishing *Ark. Oak Flooring Co. v. La. & Ark. R.R. Co.*, 166 F.2d 98, 101 (5th Cir. 1948), *cert. denied*, 334 U.S. 828 (1948); *Chi. & N.W.R. Co. v. Connor Lumber & Land Co.*, 212 F.2d 712, 718-19 (7th Cir. 1954); *J.C. Penney Co. v. Terminal R.R. Ass'n of St. Louis*, 296 I.C.C. 96 (1955); *United States v. Atchison, Topeka & Santa Fe Ry. Co.*, 315 I.C.C. 259 (1961)).

[574] *Id.* PP 635, 637.

[575] *Id.* P 637.

[576] Joint Customers Br. on Exceptions at 94.

[577] *Id.* at 93-94.

Customers argue that appellate courts and the Interstate Commerce Commission have held that a cause of action for damages under the ICA accrues only when the final rate is known and not when an estimated rate is charged.[578]

195. Joint Customers also argue that their challenge to Keystone's Variable Rate for service since January 1, 2018 necessarily includes the difference between the 2018 Estimated and Final Variable Rates and thus a claim as to any difference is timely.[579] Accordingly, Joint Customers ask the Commission to, at a minimum, find that the Complaint is timely as to the difference between the 2018 Final Variable Rate and 2018 Estimated Variable Rate for charges from January 1, 2018 to October 10, 2018.[580]

c. **Briefs Opposing Exceptions**

196. Keystone and Trial Staff support the Initial Decision's conclusion that the proper reparations period here is October 9, 2018 through the year 2021.[581] Keystone and Trial Staff agree with the Initial Decision that the precedent Joint Customers cite in support of extending the reparations period to January 1, 2018 is inapplicable.[582] Trial Staff also asserts that Joint Customers' proposition that a cause of action for damages under the ICA accrues only when the final rate is known contradicts the ICA's plain language.[583]

197. In addition, Keystone and Trial Staff dispute Joint Customers' claim that the Initial Decision's determination creates burdensome filing requirements.[584] Trial Staff states that applying the ICA's plain language regarding the reparations period would not

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[578] *Id.* at 94-97 (citing, *inter alia*, *Ark. Oak Flooring*, 166 F.2d 98; *Chi. & N.W.R. Co.*, 212 F.2d 712; *Atchison*, 315 ICC 259; *J.C. Penney*, 296 I.C.C. 96).

[579] *Id.* at 98-99.

[580] *Id.* at 99 (citing Initial Decision, 182 FERC ¶ 63,013 at P 635).

[581] Keystone Br. Opposing Exceptions at 96; Trial Staff Br. Opposing Exceptions at 95.

[582] Keystone Br. Opposing Exceptions at 96-97 (arguing that "the rates at issue in the cases Joint Customers cited had *actually* changed, whereas the Variable Rate methodology here has not changed since at least 2015" (emphasis in original)); Trial Staff Br. Opposing Exceptions at 95-97.

[583] Trial Staff Br. Opposing Exceptions at 97-98 (citing 49 U.S.C. app. § 16(3)(e)).

[584] Keystone Br. Opposing Exceptions at 98; Trial Staff Br. Opposing Exceptions at 98.

require Joint Customers to file multiple complaints against the non-final and final rates to seek complete relief for the alleged injuries.[585] Trial Staff notes that Joint Customers could have filed a complaint as late as January 1, 2020 to recover costs back to January 1, 2018, long after the Final Variable Rate issued in March 2019, and that the Commission addressed concerns about re-litigation in its orders on Joint Customers' protests of Keystone's more recent rate filings.[586]

d. <u>Commission Determination</u>

198. We affirm the Initial Decision and hold that the reparations period runs from October 9, 2018 through December 31, 2021.[587] Section 16(3)(b) of the ICA provides that "[a]ll complaints against carriers subject to this chapter for the recovery of damages not based on overcharges shall be filed with the Commission within two years from the time the cause of action accrues, and not after."[588] Section 16(3)(e) provides that a cause of action regarding a shipment "shall . . . be deemed to accrue upon delivery or tender of

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[585] Trial Staff Br. Opposing Exceptions at 98.

[586] *Id.* at 98-99.

[587] The participants do not challenge December 31, 2021 as the end of the reparations period in this proceeding. *See, e.g.*, Joint Customers Br. on Exceptions at 98. Any issues concerning reparations or refunds with respect to post-2021 Variable Rate assessments are reserved for future proceedings, including those held in abeyance. 2022 Tariff Hearing Order, 177 FERC ¶ 61,225 at P 13; 2023 Tariff Hearing Order, 181 FERC ¶ 61,281 at P 14; 2024 Tariff Hearing Order, 185 FERC ¶ 61,230 at PP 14-15. We note, however, that Joint Customers did not need to file a subsequent complaint to obtain prospective relief for any overpayments of the Variable Rate, contrary to their assertion. Joint Customers Br. on Exceptions at 99. In the past, the Commission has determined any reparations owed for periods after the hearing record closed on compliance. *See, e.g.*, Opinion No. 586, 185 FERC ¶ 61,126 at P 463 & n.1196 ("The amount of potential reparations owed to each complainant, if any, can be calculated on compliance based on the Commission's determinations in this order."). Nonetheless, we do not find it efficient to address any reparations or other relief owed for post-2021 periods here given Joint Customers' pending protests and complaint with respect to Keystone's Variable Rate, in which Joint Customers allege additional issues. 2024 Tariff Hearing Order, 185 FERC ¶ 61,230 at PP 14-15.

[588] 49 U.S.C. app. § 16(3)(b); *see also BP W. Coast Prod., LLC v. FERC*, 374 F.3d at 1306 (citing 49 U.S.C. app. § 16(3)(b)); Opinion No. 586, 185 FERC ¶ 61,126 at P 463.

delivery thereof by the carrier, and not after."[589] Therefore, for limitations purposes under the ICA, a claim accrued as to each shipment under the TSAs on the date each shipment was delivered. Because the Complaint was filed on October 9, 2020, Joint Customers are only eligible for reparations as to shipments that were delivered on or after October 9, 2018.

199. We are not persuaded that the cases cited by Joint Customers support a different result.[590] In the cases cited by Joint Customers, the courts found that the two-year limitations period did not begin running at delivery as provided by ICA section 16(3). The courts explained that the rate that the railroad sought to collect did not yet apply at that time,[591] and, thus, the railroad could not initiate a claim to collect that rate at the time of delivery.[592] Thus, the courts reasoned that no cause of action had accrued until a later time when the rate the railroad sought to collect became applicable.[593] Only then could a

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[589] 49 U.S.C. app. § 16(3)(b).

[590] *See* Joint Customers Br. on Exceptions at 94-96 (citing *Ark. Oak Flooring*, 166 F.2d at 100-01; *Chi. & N.W.R. Co.*, 212 F.2d at 718-19).

[591] *Ark. Oak Flooring*, 166 F.2d at 100-01 ("the local rate was not the applicable rate when the . . . delivery was made"); *Chi. & N.W.R. Co.*, 212 F.2d at 718-19 (finding "[t]he cause of action . . . in Sec. 16(3)(e) . . . does not apply to a case arising under a transit tariff," and determining that the claim accrued when information necessary to ascertain that the shipper was obligated to pay the local rate was provided). Likewise, Joint Customers rely on a decision of the Interstate Commerce Commission that followed the Fifth Circuit's holding in *Arkansas Oak Flooring* to find a cause of action did not accrue at the time of delivery because "the applicable rate . . . cannot be determined" at that time. *Atchison*, 315 I.C.C. 259 at 262.

[592] *Ark. Oak Flooring*, 166 F.2d at 101 (finding the "plaintiff could not have sued" for collection of the rate at the time of delivery until the shipper actually owed that rate); *Chi. & N.W.R. Co.*, 212 F.2d at 718-19 ("Certainly the plaintiff could not have sued the defendant before the adjustment was made by the bureau showing whether or not there was a deficit imposing upon defendant an obligation to pay non-transit rates, and if so, the amount thereof.").

[593] Joint Customers also cite the Interstate Commerce Commission's decision in *J.C. Penney*. *See* Joint Customers Br. on Exceptions at 96. In *J.C. Penney*, the Interstate Commerce Commission found that the ICA's two-year statute of limitation did not apply to a claim for payment of a demurrage charge that was calculated based on the total credits and debits for rail cars released or detained at a terminal by the end of each calendar month. Unlike the facts here, the demurrage charges under the tariff "were not determinable" until the end of the month when the total credits and debits for all cars

cause of action commence.[594] Relying upon the "purpose" of the statute, the courts concluded that the two-year period only began once the cause of action accrued (not at the time of delivery).[595]

200. Here, Joint Customers had a cause of action against the Estimated Variable Rate that was charged at the time of delivery.[596] For those issues apparent from the Estimated Variable Rate, there is no basis to depart from the statute of limitations section 16(3) of the ICA that limits claims to two years from delivery. Similarly, we are not persuaded by Joint Customers' argument that the true-up supports departing from ICA section 16(3)'s

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detained and released during the month were computed, and therefore, the railroad could not have brought its claim for the charges at the time the cars were released. *J.C. Penney*, 296 I.C.C. 96 at 96-97.

[594] For example, in *Arkansas Oak Flooring*, a lower in-transit rate applied to the shipment initially, which was based upon the condition that the shipper would re-ship the product for a subsequent movement on the railroad within a particular time period. However, the higher local rate only applied if the shipper did not make the subsequent movement by the tariff deadline. *See Ark. Oak Flooring*, 166 F.2d at 100.

[595] As the court explained in *Arkansas Oak Flooring*:

> The majority thinks it quite plain: that the main, the paramount purpose of Sec. 16(3) as a whole is . . . to fix, as the time for suing, two years from the accrual of the cause of action; that a cause of action accrues only when the right to sue has fully matured; and that subdivision (e) of the section was not intended to, nor does it, have any different effect.

Accordingly, the Court emphasized that the "plaintiff could not have sued" for collection of the rate at the time of delivery until the shipper actually owed that rate. *Ark. Oak Flooring*, 166 F.2d at 101.

[596] The Variable Rate is charged on a volumetric basis that can be determined as each barrel is delivered. Initial Decision, 182 FERC ¶ 63,013 at P 637; Ex. JC-0196 (Keystone FERC Tariffs); Ex. KEY-0001 at 15:8-20 (Trout Direct) (noting that "while the term 'barrel-miles' is used in the TSAs, the actual calculation set forth in the TSAs is cubic-meters (m^3) per 100 kilometers"). Moreover, in this proceeding, Joint Customers raised similar claims regarding the Estimated Variable Rate in protests before a barrel was even shipped. No party argues on exceptions that Joint Customers were precluded from such claim against the Estimated Variable Rate either in a protest or a complaint. In contrast, in the cases cited by Joint Customers, there was no way to bring any claim. *Ark. Oak Flooring*, 166 F.2d at 100-101; *Chi. & N.W.R. Co.*, 212 F.2d at 718-19.

limit upon claims to two years from delivery.[597] Joint Customers have not identified any new claims related to the deliveries at issue in this proceeding that only became apparent from the filing of the true-up.[598] Thus, we see no basis to depart from ICA section 16(3)'s application of the two year statute of limitations upon delivery.

201. We further observe that Joint Customers had ample time to preserve a right to reparations for all 2018 shipments with knowledge of the Final Variable Rate by filing a complaint after the Final 2018 Variable Rate Notice issued on March 22, 2019[599] and before the two-year reparations period for such shipments lapsed on January 1, 2020. Indeed, Joint Customers filed the Complaint more than a year after the Final 2018 Variable Rate Notice issued in March 2019.[600] In these circumstances, Joint Customers have not shown that an exception to the ICA's two-year limitations period for reparations applies.

G. <u>Compliance and Next Steps</u>

202. Within 45 days of the issuance of this order Keystone shall submit a compliance filing with potential refunds and reparations for the periods at issue in this proceeding pursuant to the rulings herein.[601] Keystone shall include with that compliance filing

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[597] Under the TSAs, a shipper pays the Estimated Variable Rate for movements during the calendar year. After the calendar year, Keystone identifies its actual costs and either rebills or refunds each shipper for its individual shipments based upon the true-up. Ex. JC-0010 at 20-21; Ex. JC-0011 at 20-21; Ex. JC-0196 at 15; *see also, e.g.*, Ex. JC-0015 at 1 (2019 Final Variable Rate Notice); Ex. JC-0116 at 1 (2020 Final Variable Rate Notice).

[598] Joint Customers Br. on Exceptions at 93-99. Because we find Joint Customers' claims do not relate to the application or calculation of the true-up, we also reject Joint Customers' argument that the Complaint is timely as to the difference between the 2018 Final Variable Rate and 2018 Estimated Variable Rate for charges from January 1, 2018, to October 10, 2018. *Id.* at 99. Unlike the cases cited by Joint Customers where the railroads had no claim against the shippers at the time of delivery, Joint Customers' Complaint relates to aspects of the Variable Rate that were subject to challenge at the time of delivery.

[599] Ex. JC-0014 (Notice of 2018 Final Variable Rate and True-up).

[600] *See id.*

[601] We clarify that this order does not lift the abeyance in the consolidated proceeding in Docket No. IS22-76-000, et al., 2024 Tariff Hearing Order, 185 FERC ¶ 61,230 at PP 14-15.

explanatory statements and workpapers supporting its calculations of potential reparations and refunds and recalculating the Variable Rates for the aforementioned periods to reflect the determinations made above.[602]

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) Within 45 days after this order issues, Keystone shall file estimated reparations and refunds consistent with this order. Keystone must include with this compliance filing supporting workpapers, explanatory statements, and any other supporting documentation.

(C) Comments on the compliance filing directed in Ordering Paragraph (B) are due 75 days after this order issues and reply comments are due 90 days after this order issues.

By the Commission. Commissioner See is not participating.
Commissioner Chang is not participating.

(S E A L)

Debbie-Anne A. Reese,
Acting Secretary.

[602] 2020 Tariff Hearing Order, 169 FERC ¶ 61,254 at ordering para. (A) (setting tariff filing for hearing, subject to refund); 2020 Consolidation Order, 173 FERC ¶ 61,285 at ordering para. (A) (same).