UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Supplemental Review of the Oil Pipeline Index Level	))	Docket No. RM 25-2-000

INITIAL COMMENTS OF THE ENERGY INFRASTRUCTURE COUNCIL TO SUPPLEMENTAL REVIEW OF THE OIL PIPELINE INDEX LEVEL

The Energy Infrastructure Council ("EIC") hereby respectfully submits these comments in response to the October 17, 2024 Notice of Proposed Rulemaking ("Supplemental Notice") issued by the Federal Energy Regulatory Commission ("FERC" or the "Commission") in the above-captioned proceeding.[1] The Notice seeks comments on the Commission's proposal to update the index level used to set the rate ceiling for pipelines regulated under the Interstate Commerce Act ("ICA").[2] The Commission's established practice is to review the index, which is based on the Producer Price Index for Finished Goods ("PPI-FG"), every five years (the "Five-Year Index").[3] Except that, in this instance, the Commission proposes to deviate from its over 30-years-old policy to revise the Five-Year Index in its fourth year of applicability and to set a new rate that would expire on July 1, 2026, which is when the next Five-Year Index is to take effect. This change, if approved by FERC, will become the fourth index rate placed into effect since the current five-year rate period commenced on July 1, 2021. EIC files these comments out of concern that the

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[1] *Supplemental Review of the Oil Pipeline Index Level*, 189 FERC ¶ 61,030 (2024).

[2] 49 U.S.C. app. §§ 1 *set seq.*

[3] *Revisions to Oil Pipeline Reguls. Pursuant to the Energy Pol'y Act of 1992*, Order No. 561, 58 Fed. Reg. 58,753 (Nov. 4, 1993), FERC Stats. & Regs. ¶ 30,985, at 30,941, 30,947, 30,951 (1993) (cross-referenced at 65 FERC ¶ 61,109), *order on reh'g*, Order No. 561-A, 59 Fed. Reg. 40,243 (Aug. 8, 1994), FERC Stats. & Regs. ¶ 31,000, at 31,093, 31,099 (1994) (cross-referenced at 68 FERC ¶ 61,138), *aff'd sub nom. Ass'n of Oil Pipe Lines v. FERC*, 83 F.3d 1424 (D.C. Cir. 1996) (*AOPL I*).

Commission's actions here will have a destabilizing effect on its regulated pipeline members and the energy infrastructure investment community that it represents.[4]

By proposing to initiate new rates at this time, the Supplemental Notice is not just at odds with the Commission's own practices, but with its Congressional mandate of ratemaking simplification in avoidance of protracted litigation, the very basis and purpose for the Five-Year Index. To avoid an arbitrary and capricious result, the Commission should close this rulemaking proceeding and allow the current Five-Year Index rates of PPI-FG +0.78% to continue until a new Five-Year Index is set in the ordinary course. To the extent the Commission deems a mid-cycle change to the Five-Year Index necessary, EIC urges the Commission to consider the proposal submitted by the Liquid Energy Pipeline Association ("LEPA") demonstrating that the Five-Year Index should actually be *higher* and set at PPI-FG +0.82%.

In support hereof, EIC states as follows:

I. COMMUNICATIONS

EIC requests that the following persons be placed on the Commission's service list for this proceeding:

[4] EIC is a non-profit trade association dedicated to advancing the interests of companies that develop and operate energy infrastructure. EIC addresses core public policy issues critical to investment in U.S. energy infrastructure that directly impact its member companies, such as this oil pipeline index rate proceeding. Approximately 29 of EIC's member companies have business operations that include gathering or transportation of natural gas liquids ("NGLs"), crude oil, and refined products in interstate commerce. EIC also has 12 Associate Members representing a large segment of the pipeline investor community, who collectively invest billions of dollars in U.S. energy infrastructure.

Lori Ziebart
President and Chief Executive Officer
Energy Infrastructure Council
300 New Jersey Avenue, N.W.
Suite 300
Washington, D.C. 20001
(202) 747-6570
Lori@eic.energy

Emily P. Mallen*
Akin Gump Strauss Hauer & Feld LLP
2001 K Street, N.W.
Washington, DC 20006
Phone: (202) 887-4019
emallen@akingump.com

II. BACKGROUND

The Commission set the current Five-Year Index at PPI-FG +0.78% on December 17, 2020,[5] following standard notice and comment rulemaking procedures that conformed to Order No. 561 and the Administrative Procedure Act ("APA").[6] The index methodology uses recent historic data to set rates prospectively. For the current Five-Year Index period of July 1, 2021 through June 30, 2026, the Commission relies on Form No. 6 page 700 data from the five-year period of 2014-2019, as this was the most recent full five-year period available to FERC when it initiated the prior rulemaking proceeding in Docket No. RM20-14 and issued the Initial Order. Accordingly, the next Five-Year Index period, which EIC anticipates will be initiated by FERC in June 2025 for rates to take effect July 1, 2026, will rely on data from 2019-2024.

EIC provided comments in the Docket No. RM20-14 proceeding.[7] The EIC Comments explained why EIC supported the index rates proposed by LEPA's predecessor, the Association of Oil Pipe Lines, calculated based on application of the Kahn Methodology: (1) using a data set

[5] *Order Establishing Index Level, Five-Year Review of the Oil Pipeline Index*, 173 FERC ¶ 61,245 (Dec. 17, 2020) ("Initial Order"), *order on reh'g*, 178 FERC ¶ 61,023 (2022) ("Rehearing Order"), *aff'd on reh'g*, 179 FERC ¶ 61,100 (2022), *vacated sub nom.*, *Liquid Energy Pipeline Assoc. v. FERC*, 109 F. 4th 543 (D.C. Cir. 2024) ("*LEPA*").

[6] *See Notice of Inquiry, Five-Year Review of the Oil Pipeline Index*, 171 FERC ¶ 61,239 (June 18, 2020); *see also LEPA*, 109 F. 4th at 547.

[7] *Five-Year Review of Oil Pipeline Index*, Docket No. RM20-14-000, Comments of the Energy Infrastructure Council (filed Aug. 17, 2020) ("EIC Comments").

consisting of the middle 80 percent of FERC-regulated pipelines that file the FERC Form No. 6; and, (2) adjusting reported FERC Form No. 6 Page 700 data to eliminate the effects of the income tax policy changes from the index calculation.[8]

The thesis of the EIC Comments was the negative impact to market confidence and resulting harm to infrastructure investment that would result from FERC adopting too low of an index adder, which at the time was proposed to be PPI-FG +0.09%. EIC raised concerns that the proposal was results driven, as opposed to data driven. In support of the higher adder, EIC provided comprehensive data to demonstrate how the market priced regulatory risks resulting from Commission decision-making.[9] In 2020, the market was undergoing deep disruption due to the COVID-19 pandemic along with other demand and supply shocks. The data provided by EIC demonstrated how FERC-initiated regulatory changes had reduced access to capital for FERC-regulated pipelines, detrimentally impacting infrastructure investment in an already challenging environment.[10] EIC also emphasized that the oil pipeline index is the most important rulemaking to the pipeline operator and investor community given that, with limited exceptions, every ICA-regulated pipeline must use the index to set their rates.[11] In light of its importance, EIC encouraged the Commission to promote predictability and stability, which would "create the backdrop upon which a pipeline can recover just and reasonable rates," while avoiding the need to engage in

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[8] *Id.* at 12-18. The income tax policy changes referenced arose from *Inquiry Regarding the Commission's Policy for Recovery of Income Tax Costs*, 162 FERC ¶ 61,227, at P 8 (2018) ("Revised Policy Statement"), *reh'g denied*, 164 FERC ¶ 61,030 (2018) ("Income Tax Policy Statement Rehearing Order").

[9] EIC Comments at 8-12. The EIC Comments also provided background on the origins of the index methodology, which are incorporated herein by reference, but do not require restatement for administrative efficiency purposes. *See id.* at 2-6.

[10] *Id.* at 12 (explaining how valuation premiums ascribed to FERC-regulated assets had reduced since the issuance of the Revised Policy Statement).

[11] *See id.* at 6-7 (explaining that approximately 75 percent of oil pipeline rates are set using the index methodology).

alternative forms of ratemaking that can result in time consuming and expensive litigation.[12] This was to remind the Commission of the importance of promoting regulatory certainty.

Consistent with EIC's Comments, the Initial Order adopted an adder of PPI-FG +0.78%. The Initial Order was published in the Federal Register and took effect on February 16, 2021, with the Five-Year Index going into effect on July 1, 2021.[13] Little more than six months after pipelines began charging and collecting the rates approved in the Initial Order, in January 2022, FERC took the unprecedented step of revising the Five-Year Index downward to PPI-FG -0.21%.[14] The Rehearing Order, which issued following a change in leadership at the Commission, placed lower rates into effect on March 1, 2022. While the Commission did not require the issuance of refunds, it directed oil pipelines to retroactively recompute their ceiling levels for July 1, 2021 through June 30, 2022 based on the revised PPI-FG -0.21% ceiling level.[15] LEPA filed an appeal that was reviewed by the U.S. Court of Appeals for the District of Columbia Circuit ("D.C. Circuit").

On July 26, 2024, the D.C. Circuit vacated the Rehearing Order. The court did not discuss the merits of the Rehearing Order, nor did it condone the rationale provided by the Commission in reversing course by reducing the Five-Year Index by nearly a percentage point. The court instead held that the Initial Order "carried legal consequences" beginning on July 1, 2021, and thus adherence to the APA's notice and comment procedures were necessary should the Commission seek to modify the Five-Year Index, and that it had not done so prior to issuing the Rehearing

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[12] *Id.* at 7.
[13] *Five-Year Review of the Oil Pipeline Index*, 86 Fed. Reg. 9448 (issued Feb. 16, 2021).
[14] Rehearing Order at P 1.
[15] *Id.* at P 3.

Order.[16] Because the Commission's issuance of the Rehearing Order had violated the APA, the court vacated it and ordered FERC to reinstate the Initial Order.[17] The Commission did so on September 17, 2024.[18] The Reinstatement Order directed pipelines to revise their index multipliers for each annual period from July 1 through June 30, beginning on July 1, 2021 back to the PPI-FG +0.78% adder.[19] The Commission advised that it would address other issues related to the court's opinion in *LEPA* in a subsequent order.[20]

EIC assumes the "subsequent order" referenced in the Reinstatement Order is the Supplemental Notice. However, while the Reinstatement Order was issued pursuant to the court's directives in *LEPA*, the Supplemental Notice was not. Importantly, the D.C. Circuit did *not* remand to FERC the Rehearing Order in its vacatur order, nor direct the Commission to rehabilitate the Rehearing Order's substantive findings through adherence to the APA's notice and comment rulemaking procedures.[21] Yet, in the Supplemental Notice, this is what the Commission states that it intends to do, requesting comments that would relitigate the Initial Order, and inviting the creation of a record that FERC could use to reissue the Rehearing Order with the benefit of proper APA notice and comment.[22] The Commission also suggests that it is open to considering new unspecified remedies.[23] EIC urges the Commission to take no action in this docket, as the only

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[16] *LEPA*, 109 F. 4th at 549 (citing *Human Soc'y v. USDA*, 41 F. 4th 564, 570 (D.C. Cir. 2022); 5 U.S.C. §§ 551(5), 553(b)-(c); and *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 101 2015)).

[17] *Id.*

[18] *Revisions to Oil Pipeline Reguls. Pursuant to the Energy Pol'y Act of 1992*, 188 FERC ¶ 61,173 (2024) ("Reinstatement Order").

[19] *Id.* at P 2.

[20] *Id.* at P 3.

[21] *See LEPA*, 109 F. 4th at 547-49.

[22] Supplemental Notice at P 38 (inviting commenters to "renew any arguments raised in requests for rehearing or clarification of the Initial Order that they would like for the Commission to consider in determining the index level for this five-year review period.").

[23] *Id.* at P 39.

appropriate remedy is the correction of FERC's error in changing the Five-Year Index adjustment in the Rehearing Order, which it has already corrected by reinstating the +0.78% adjustment, or adopt the relief proposed by LEPA.

III. COMMENTS

EIC stands by its prior comments that changes to the FERC index methodology influence investment decisions in pipeline infrastructure, and actions taken by the Commission reverberate across the industry and impact regulated pipelines' access to capital. The Commission, therefore, must be mindful of its statutory obligation to ensure that oil pipeline operators have the opportunity to earn a just and reasonable rate of return if it intends to meddle with the Five-Year Index at this juncture.[24] The Commission acknowledges that it has never undertaken a supplemental rulemaking to consider revisions to the Five-Year Index mid-cycle. The Commission's rationale for doing so now, in light of the court's *LEPA* decision, is unsupported. The D.C. Circuit did not require this inquiry and EIC cautions the Commission against assuming otherwise.[25] The Rehearing Order, which issued six months after the Five-Year Index took on legal effect, harmed the market by unsettling expectations at a time of rising costs for pipeline operators. To now revise the index *four years* after it took effect, as the Supplemental Notice would purport to do, would compound these harms and undercut any regulatory certainty that index rates were intended to create, contravening the methodology adopted by the Commission in Order No. 561.

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[24] *See* ICA § 1(5); *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591 (1944) ("*Hope*"); *Bluefield Waterworks & Improvement Co. v. Pub. Service Comm'n*, 262 U.S. 679 ("*Bluefield*").

[25] Supplemental Notice at P 40 (suggesting that the "present circumstances" created by the court's vacatur make a new rulemaking "appropriate" at this juncture).

EIC is concerned that FERC trades regulatory certainty for political expediency by proposing a reduced Five-Year Index adder of PPI-FG -0.21% based on its disagreements with the reasoning adopted by a prior Commission under different political leadership. This method of ratemaking leads the Commission's actions to appear whimsical, as opposed to principled. Whether or not the whimsy is real or merely perceived, the result is regulatory instability that the market is forced to price. Moreover, the Commission's proposal to revise the Five-Year Index for the fourth time in four years treats interstate pipelines more like a ping pong ball than critical infrastructure necessary to safeguard the country's energy and national security.

If the Commission insists on revisiting the Five-Year Index mid-cycle, it must ensure that the ultimate outcome of this proceeding results in just and reasonable rates that provides regulated carriers with the opportunity to earn a reasonable return on investment. Accordingly, EIC provides these comments explaining why it continues to support the use of a data set based upon the middle 80% of FERC Form No. 6 reporting pipelines, and the adjustments to the Page 700 data set to remove the effects of the income tax policy change. EIC also echoes and adopts the rationale for maintaining the current Five-Year Index of PPI-FG +0.78%, or adopting a higher rate of PPI-FG + 0.82%, in the comments being filed contemporaneously by LEPA.[26] EIC again files separately from LEPA to provide the perspective of the investment community. It explains why this inquiry undermines the industry's need for regulatory certainty, and the impacts this has on infrastructure investment, how undermining investments harms shippers, and how the Commission deviates from its own ratemaking principles.

[26] EIC also acknowledges and supports the comments being filed by the Designated Carriers, which include some of its member companies.

A. This Inquiry Undermines the Industry's Need for Regulatory Certainty and Finality.

Investments are priced to account for regulatory certainty and finality. Without either, the cost of capital increases.[27] The Commission fundamentally understands the concerns lenders have regarding regulatory risk, which is when "a regulatory commission adopts a policy upon which it surely expects investors to rely, nevertheless those investors are exposed to the risk that either that or a subsequent Commission may change its collective mind, and thus the policy."[28] In the context of the Five-Year Index, the market has been on notice for over thirty years that the Commission will revise oil pipeline rates every five years, and is aware that nearly all oil, liquid, and refined product pipelines are subject to the index regulations.[29] The stability created by this form of ratemaking is unmatched in any other industry regulated by FERC. Certainly, investment decisions are driven in part by known revenues earned by regulated pipelines.

Rate stability created by the Five-Year Index is one of the most important metrics used by investors to assess risk. This stands in contrast to natural gas pipelines, for which an investor would look at long-term contracts to assess risk. While certain new or expanded oil, liquid, and refined product pipeline projects may be underwritten by negotiated shipper contracts that immunize the impact of FERC decisions during the contract period, investors are aware that asset life is several times longer than durations of these foundational contracts. The inability to contract beyond set periods of time, result in higher terminal value assumptions and higher hurdle rates. Hence, ICA

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[27] *See e.g.*, Lorenz Wieshammer and Phillip Hieman, *Regulatory Risk as a Cost Driver of the Energy Transition*, NERA Report (May 31, 2024), available at: https://www.nera.com/content/dam/nera/publications/2024/PUB_2024_Regulatory_Risk.pdf.

[28] *Trailblazer Pipeline Co.*, 18 FERC ¶ 61,244 at n. 16 (1982) (adding that "reason and policy argue that prejudicial reliance warrants invoking the doctrine of estoppel against the government" when investors rely upon the Commission's findings).

[29] Order No. 561 at p. 30,951. The market also prices in the opportunity for annual rate increases or decreases should the rate ceiling rise or fall with inflation.

common carrier pipelines are beholden to risk assessments through adherence to the Five-Year Index. In the past, this has not been seen as a negative given that pipelines with index rates may have more consistent revenue streams than pipelines collecting cost-of-service or market-based rates.

Because of the Congressional mandate underlying the Five-Year Index—that oil pipeline ratemaking follow "streamline[d] procedures…to avoid unnecessary regulatory costs and delays"[30]—until now, the investment community has had little cause to question the stability of index rates. The Commission has never deviated from its practice and engaged in a mid-cycle Five-Year Index review.[31] The reasons provided in the Supplemental Notice for doing so now are at odds with the Commission's commitments in Order No. 561 to limit the index review to every five years.[32] This decision, which balanced the need of protecting both shippers and pipelines, was upheld by the D.C. Circuit as a proper mechanism to guard against excessive rates.[33] The court also upheld the Commission's decision to limit mid-cycle rate challenges to protests and complaints filed by shippers, as opposed to industry-wide review.[34] The Commission's reversal from this prior practice, without a reasoned explanation, adds to the atmosphere of uncertainty around FERC procedures.

EIC does not raise concerns with the Commission's actions as an academic exercise. There are real world implications of the Commission's choice to undermine the settled expectations of

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[30] *See* Pub. L. No. 102-486 § 1802(a), 106 Stat. 3011 (Oct. 24, 1992) ("EPAct").

[31] The Commission is incorrect to compare this proceeding to prior decisions making rate changes in response to a court order. *See Supplemental Notice* at P 37. The Reinstatement Order is the proper parallel.

[32] Order No. 561 at p. 30,952.

[33] *AOPL I* at 1437.

[34] *Id.*

infrastructure developers, operators, and investors. By removing certainty—both within a given five-year period, but also with longer-term implications—the discount rate for oil, liquids and refined product pipelines increases. While midstream asset owners can account for those risks that are reasonably identifiable, regulatory uncertainty materially increases hurdle rates for new projects. By signaling to the market that the Five-Year Index can be changed whenever there is a change in the composition of the sitting Commissioners, the Commission undermines the industry's ability to develop projects, which often take several years to plan and execute. Project developers must access the capital markets to fund upgrades and build-out their systems years before they are able to offer transportation services and collect revenues from tariff rates. And it is not just regulated pipelines that are impacted. Many intrastate pipelines and adjacent infrastructure providers, such as terminals and storage facilities, embed the FERC PPI-FG index adder into their commercial contracts when setting rate escalations over long-term projects. The FERC index has become a reliable proxy for industry participants to use when negotiating agreements. If developers are unable to accurately price their projects due to a lack of regulatory certainty, for both regulated and unregulated facilities, their resulting base rates will be higher and the costs to shippers and downstream consumers will increase. It is axiomatic that regulatory certainty reduces costs to consumers by reducing the external transactional costs to provide service.

B. Pipelines and Shippers Will Be Harmed by a Rate Reduction that Diminishes Infrastructure Investment.

Interstate pipelines provide an essential service, creating an efficient, reliable, and safe transportation path for oil, natural gas liquids, and refined petroleum products to reach markets around the country. The addition of new pipeline miles helps to foster competition for new markets and new sources of oil, natural gas liquids and refined petroleum products. As a result, shippers have increased leverage for discounts and rate relief. Moreover, by reducing supply bottlenecks, new infrastructure will flatten basis differentials and reduce transportation costs, leading to lower consumer energy costs. However, infrastructure development is not just about creating new capacity to serve new markets. It also is about maintaining existing facilities to conform with updated regulatory standards and account for wear and tear. Infrastructure investment is crucial to allow this development to occur. Enacting a lower, mid-cycle Five-Year Index may negatively impact pipeline industry investment, to the detriment of shippers needing access to vital transportation infrastructure and public benefits to the overall economy.

U.S. consumers undeniably have benefitted from lower energy prices enabled by pipeline investment as new sources of supply reach new downstream markets. Two important and complimentary factors have enabled the investments necessary to construct and operate pipeline facilities: (a) ready access to the capital markets; and (b) a predictable regulatory environment that reduces investment risks. Companies that own and build-out infrastructure require investment to continue the care and stewardship of their assets and ensure ongoing compliance with pipeline integrity regulations and obligations. However, companies cannot engage in these development activities without assurances for their own financial health. The Five-Year Index promotes revenue stability, which in turn allows pipeline developers to attract capital. In the case of refined product pipelines—instrumental to supplying gasoline, jet and diesel—access to capital is crucial to expand systems to reach markets otherwise stranded due to refinery closures and account for areas with new population growth post-Covid. The refined products pipelines, often through investment in laterals, looping or more pumping, allow cost-effective product to be imported to those regions. As these laterals and expansion projects often represent just a small portion of the product movement, reasonable and visible economics on the incumbent system (subject to FERC tolls) are important components of the underwriting process. Yet, the owners of these systems must balance returns for liquids pipelines (higher cost of capital due to uncertainty, lower terminal value due to potentially declining earnings in real terms as cost inflation outpaces revenue growth over time) with other infrastructure with more certain economics over time, such as gas pipelines or bilateral agreements with customers entered outside of the common carrier marketplace.

Moreover, a sufficient index adder is needed to allow pipeline rates to keep pace with changes in industry costs.[35] Anything less than this would be confiscatory,[36] and impair the pipelines' ability to attract the investments necessary to ensure the maintenance and growth of the pipeline network. After a three-plus year period of steep inflation that increased costs across the globe, it is nonsensical for the Commission to propose that pipelines reduce their rates, and also reduce their index ceiling levels in prior periods.

The Commission's purported rationale for this change, that it is no longer "persuaded" by its prior reasoning, is belied by the record. For example, the Commission states that income tax policy changes from derived from the Revised Policy Statement should have been reflected in the Five-Year Index and that use of the middle 80% departed from established practice that was unsupported by the Initial Order's record.[37] The Commission is mistaken. EIC was one of several participants in the prior docket to provide data in support of the Initial Order's findings. It explained why real cost increases would be distorted if the Commission failed to properly account for income tax treatment in the Page 700 data, and how a bigger dataset would result in a more inclusive index. It cited cost increases experienced by pipelines as an industry, as opposed to

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[35] *See* Initial Order at P 17 (explaining that "the purpose of indexing is to allow the indexed rate to keep pace with industry-wide cost changes, not to reflect alterations to the Commission's Opinion No. 154-B cost-of-service methodology.").

[36] *See Bluefield*, 262 U.S. at 694-95.

[37] Supplemental Notice at P 30.

extraordinary cost changes that were atypical or idiosyncratic.[38] Even before the most recent inflationary period, the pipeline industry was experiencing steep cost increases related to regulations enacted by the U.S. Pipeline and Hazardous Materials Safety Administration ("PHMSA"), environmental enforcement actions, and cybersecurity risks.

EIC's predictions about industry-wide cost increases and the need for pipelines rates to reflect increased costs were prescient. With the benefit of hindsight, it is clear that industry costs have not abated since 2020. They have been amplified. The past four years have borne witness to some of the highest inflation in nearly forty years,[39] in an environment of increased regulations on the liquid pipeline industry. While PPI-FG has increased rapidly as well since 2020, it does not account for the pace of change in environmental and other regulations. Compliance with new pipeline safety regulations that were only recently effective in 2020 has increased costs, along with most stringent environmental cyber security regulations.[40] Indeed, the entire cybersecurity regulatory regime was modified in the wake of the May 7, 2021 ransomware attack on Colonial Pipeline.[41] For most operators, the Five-Year Index is the only viable mechanism for responding to these increased costs, especially given the high burden placed on accessing other Commission-approved rate changing methodologies.

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[38] *Cf. id.* at P 14.

[39] *See e.g.*, https://www.bls.gov/charts/producer-price-index/final-demand-1-month-percent-change.htm#.

[40] *See e.g.*, *Federal "Good Neighbor Plan" for the 2015 Ozone National Ambient Air Quality Standards*, 88 Fed. Reg. 36,654 (June 5, 2023); EPA, *Waste Emissions Charge for Petroleum and Natural Gas Systems*, 89 Fed. Reg. 5,318 (Jan. 26, 2024); EPA, *Standards of Performance for New, Reconstructed, and Modified Sources and Emissions Guidelines for Existing Sources: Oil and Natural Gas Sector Climate Review*, 89 Fed. Reg. 16,820 (Mar. 8, 2024); EPA, *Greenhouse Gas Reporting Rule: Revisions and Confidentiality Determinations for Petroleum and Natural Gas Systems*, 88 Fed. Reg. 50,282 (Aug. 1, 2023).

[41] *See e.g.*, Transportation Security Directive Pipeline-2021-02 series: *Pipeline Cybersecurity Mitigation Actions, Contingency Planning, and Testing* (issued Jul. 23, 2024) For example, earlier this month, DHS published a lengthy new rulemaking proposal that would further codify cybersecurity preparedness regulations. *Enhancing Surface Cyber Risk Management*, 89 Fed. Reg. 88488 – 88592 (issued Nov. 7, 2024).

A decision by the Commission to reduce the Five-Year Index now, in light of the real cost increases experienced by industry over the past four years sends a very clear message that it places a low value on supporting the operation and maintenance of critical infrastructure. As EIC previously has explained, pipeline developers and operators compete for capital across sectors, including technology and healthcare. Pipelines need to entice the market to invest in their infrastructure through, among other things, higher expected returns. The mid-cycle rate cut proposed by the Commission undermines investor confidence, which in turn makes the operation of critical infrastructure more costly.

C. The Commission's Proposal to Reduce the Five-Year Index Ignores Key Rulemaking and Ratemaking Principles.

In addition to unsettling market expectations, the Commission's proposal to reduce the Five-Year Index from PPI-FG +0.78% to PPI-FG -0.21% violates several important ratemaking and administrative law principles that caution against its adoption. These include violation of the Rule Against Retroactive Ratemaking and misapplication of cost-of-service rate principles to index rates. With respect to the first issue, if the Five-Year Index is changed, pipelines' ceiling levels should only reflect a revised index level as of July 1, 2025, rather than for the full five-year period.[42] The ICA requires changes to oil and liquid pipeline rates to be made prospectively.[43] Hence, with respect to the ICA, the Commission is subject to the filed rate doctrine and the rule against retroactive ratemaking. Any "do over" of past payments is clearly prohibited as the

[42] *See* Supplemental Notice at P 38.

[43] 49 USC app. 15(1) (FERC has authority to establish the rate "to be thereafter observed"); *see also Sea Robin Pipeline Co. v. FERC*, 795 F.2d 182, 187 (D.C. Cir. 1986) (confirming that "to be thereafter observed" means prospective); *See also*, *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994) (a statute does not operate retroactively "absent clear congressional intent favoring such a result.").

Commission "may not retroactively alter a filed rate to compensate for prior over- or underpayments" and is limited to "prospective remedies."[44]

Here, the Commission incorrectly asserts that its proposal will only adjust rates prospectively, presumably taking effect on July 1, 2025.[45] While this may appear facially correct, it is an inaccurate surface-level assertion. The proposal would have pipelines recalculate their ceiling levels "as though the revised index level was effective throughout the five-year period."[46] Hence, the rate ceiling that would govern the rates that pipelines would be able to charge effective July 1, 2025 is lower than it would otherwise have been had the ceiling levels from prior periods not been recalculated. Under the Commission's proposal, the rates that pipelines would be able to recover, beginning on July 1, 2025, would be set as though the ceiling level beginning on July 1, 2021 was set at PPI-FG -0.21%, as opposed to PPI-FG +0.78%. The Commission unquestionably would "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed," giving the proposal unlawful retroactive effect.[47] In contrast, *LEPA* required the ceiling level to be set at PPI-FG +0.78% for this entire period on grounds that the Rehearing Order was unlawfully issued.[48] Moreover, the Commission's regulations provide that each year's ceiling level is determined "by multiplying the previous index year's ceiling level by the most recent index published by the Commission."[49] Ordering

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[44] *Exxon Mobil Corp. v. FERC*, 571 F.3d 1208, 1211 (D.C. Cir. 2009); *Old Dominion Elec. Coop. v. FERC*, 892 F.3d 1223, 1227 (D.C. Cir. 2018) ("*Old Dominion*"); *see also SFPP, L.P. v. FERC*, 967 F.3d 788, 803 (D.C. Cir. 2020) (cleaned up) ("*SFPP v. FERC*") ("Ratemaking decisions violate the rule against retroactive ratemaking if they rest on a Commission view that the prior rates were in retrospect too high" and if they "effectively force[] [a pipeline] to return a portion of rates approved by FERC.").

[45] Supplemental Notice at P 24.

[46] *Id.* at P 37 and n. 73.

[47] *See Landgraf*, 511 U.S. at 280.

[48] 109 F.4th at 549.

[49] 18 C.F.R. § 342.3(d)(1).

pipelines to set new rates as though the ceiling level for this entire period was something lower would be an attempt by the Commission to "adjust[] current rates to make up for a utility's over- or under-collection in prior periods."[50] Hence, in addition to being a form of unlawful retroactive ratemaking, the proposal would be inventing a new ratemaking methodology that contravenes Order No. 561's directive that index ceilings be cumulative and build upon the prior year.[51]

The Commission also misapplies cost-of-service rate principles to index rates. Specifically, in the Revised Policy Statement, the Commission determined that pipelines organized as Master Limited Partnerships should be disallowed from recovering an income tax allowance in their cost-of-service rates.[52] The Commission enacted this policy following a cost-of-service rate proceeding reviewed by the D.C. Circuit, which found that equity owners of a pipeline organized as a master limited partnership were double recovering income tax costs through rates that collected an income tax allowance and a return on equity calculated using the discounted cash flow methodology.[53] It is undisputed that the change "directly affected the costs that MLP pipelines can recover under the [cost-of-service] methodology."[54] It is further undisputed that the Commission enacted the "simplified and generally applicable" index rate methodology as an alternative to cost-of-service ratemaking.[55] And, in the Initial Order, the Commission concluded that the index should not reflect

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[50] *Old Dominion Elec. Coop. v. FERC*, 892 F.3d 1223, 1227 (D.C. Cir. 2018) ("*Old Dominion*"); *see also SFPP, L.P. v. FERC*, 967 F.3d 788, 803 (D.C. Cir. 2020) (cleaned up) ("*SFPP v. FERC*") ("Ratemaking decisions violate the rule against retroactive ratemaking if they rest on a Commission view that the prior rates were in retrospect too high" and if they "effectively force[] [a pipeline] to return a portion of rates approved by FERC.").

[51] Order No. 561 at p. 30,954. *See also* Supplemental Notice at n. 74 ("The index is cumulative from year to year, whereby each annual index is applied to the pipeline's ceiling level from the preceding year.") (citing 18 CFR § 342.3(d)(1) and Order No. 561, FERC Stats. & Regs. ¶ 30,985 at p. 30,954).

[52] *See* Revised Policy Statement at P 11. Indeed, the Revised Policy Statement was borne out of a D.C. Circuit decision reviewing a highly litigated cost-of-service rate case, the very type of case the Index Rate methodology is intended to avoid.

[53] *United Airlines, Inc. v. FERC*, 827 F.3d 122, 136-37 (D.C. Cir. 2016).

[54] Supplemental Notice at n. 62.

[55] *See* Order No. 561 at p. 30,946.

the effects of cost-of-service policy changes, to include that of the Revised Policy Statement.[56] This finding was consistent with the Commission's prior holding in Order No. 561 that indexed rates may diverge from cost-of-service rates.[57]

In an about-face, the Supplemental Notice states otherwise, claiming no "meaningful distinction" between changes to the cost-of-service methodology applicable to oil pipelines and "changes to the costs that pipelines input into that methodology and end up reported on page 700."[58] EIC defers to LEPA and Designated Carrier's Initial Comments in this proceeding, which demonstrate why this assertion is inaccurate and without merit. Moreover, the Commission denies the obvious, which is that index rates are intended to capture actual cost changes.[59] Application of the Revised Income Tax's cost-of-service policy change creates phantom cost changes that lead to an artificial reduction in the index rate ceiling.

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[56] Initial Order at PP 16-20.

[57] *See* EPAct § 1801(a); Order No. 561 at p. 30,949; Order No. 561-A at p. 40,247 n.25.

[58] Supplemental Notice at P 30.

[59] *Compare* Supplemental Notice at n. 62 *with* Order No. 561 at p. 30,941 (explaining that the methodology examines the prior index rate with "actual cost changes experienced by the oil pipeline industry every five years.").

IV. CONCLUSION

WHEREFORE, for the foregoing reasons, EIC respectfully requests that the Commission maintain the Five-Year Index set in the Initial Order or raise it to PPI-FG +0.82% in accordance with the data provided by LEPA and Designated Carriers to promote continued investment in the energy sector, and permit pipeline operators to operate efficiently, reliably, and safely.

Respectfully submitted,

/s/ *Emily Mallen*

Emily Mallen
AKIN GUMP STRAUSS HAUER & FELD LLP
2001 K Street, N.W.
Washington, D.C. 20006
Tel: (202) 887-4019
Emallen@akingump.com

On behalf of Energy Infrastructure Council

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing document to be served upon the individuals designated on the Commission's official service list for this proceeding.

Dated at Washington, D.C., this 26th day of November 2024.

/s/ *Emily Mallen*

Emily Mallen
AKIN GUMP STRAUSS HAUER & FELD LLP
2001 K Street, N.W.
Washington, D.C. 20006
(202) 887-4019