



DEPARTMENT OF ENERGY

FEDERAL ENERGY REGULATORY COMMISSION

18 CFR Part 342

[Docket No. RM25-2-000]

Supplemental Review of the Oil Pipeline Index Level

AGENCY: Federal Energy Regulatory Commission.

ACTION: Withdrawal of supplemental notice of proposed rulemaking and termination of rulemaking proceeding.

SUMMARY: The Federal Energy Regulatory Commission (Commission) is withdrawing the supplemental notice of proposed rulemaking (Supplemental NOPR) that proposed to amend the index level used to determine annual changes to oil pipeline rate ceilings for the remainder of the five-year period that began July 1, 2021, and concludes June 30, 2026.

DATES: The Supplemental NOPR published on October 23, 2024, at 89 FR 84475 is withdrawn as of **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**

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SUPPLEMENTARY INFORMATION:

1. On October 17, 2024, the Commission issued a supplemental notice of proposed rulemaking proposing to amend the index level used to determine annual changes to oil pipeline rate ceilings.¹ The Supplemental NOPR requested comment regarding (a) changing the current index level of Producer Price Index for Finished Goods plus 0.78% (PPI-FG+0.78% (Initial Index)) to PPI-FG-0.21% (Rehearing Index) and (b) other issues related to the appropriate index level following the decision of the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) in *Liquid Energy Pipeline Association v. FERC*.²
2. For the reasons discussed below, we exercise our discretion to withdraw the Supplemental NOPR and terminate this rulemaking proceeding.

I. Background

A. Indexing and the Kahn Methodology

3. The Energy Policy Act of 1992 (EPAAct 1992) required the Commission to establish a “simplified and generally applicable” ratemaking methodology³ that was consistent with the just and reasonable standard of the Interstate Commerce Act (ICA).⁴ To implement this mandate, the Commission issued Order No. 561,⁵ establishing an

¹ *Supplemental Rev. of the Oil Pipeline Index Level*, 89 FR 84475 (Oct. 23, 2024), 189 FERC ¶ 61,030 (2024) (Supplemental NOPR).

² 109 F.4th 543 (D.C. Cir. 2024) (*LEPA v. FERC*).

³ Pub. L. No. 102-486, 1801(a), 106 Stat. 3010 (Oct. 24, 1992).

⁴ 49 U.S.C. app. 1 *et seq.*

⁵ *Revisions to Oil Pipeline Reguls. Pursuant to Energy Policy Act of 1992*, Order No. 561, 58 FR 58753 (Nov. 4, 1993), FERC Stats. & Regs. ¶ 30,985 (1993) (cross-referenced at 65 FERC ¶ 61,109), *order on reh'g*, Order No. 561-A, 59 FR 40243 (Aug. 8, 1994), FERC Stats. & Regs. ¶ 31,000 (1994) (cross-referenced at 68 FERC ¶ 61,138), *aff'd sub nom. Ass'n of Oil Pipe Lines v. FERC*, 83 F.3d 1424 (D.C. Cir. 1996)

indexing methodology that allows oil pipelines to change their rates subject to certain ceiling levels as opposed to making cost-of-service filings.⁶ In Order No. 561, the Commission committed to review the index level every five years to ensure that it adequately reflects changes to industry costs.⁷ The Commission conducted five-year index reviews in 2000,⁸ 2005,⁹ 2010,¹⁰ and 2015.¹¹

4. In Order No. 561 and each successive five-year review, the Commission has calculated the index level based upon a methodology developed by Dr. Alfred E. Kahn.¹² The Kahn Methodology uses pipeline data from FERC Form No. 6, page 700 from the prior five-year period to determine an appropriate adjustment to be applied to PPI-FG.

(*AOPL I*).

⁶ Pursuant to the Commission's indexing methodology, oil pipelines change their rate ceiling levels effective every July 1 by "multiplying the previous index year's ceiling level by the most recent index published by the Commission." 18 CFR 342.3(d)(1). Oil pipelines may adjust their rates to the ceiling levels pursuant to Commission's regulations so long as no protest or complaint demonstrates that the index rate change substantially diverges from the pipeline's cost changes. *Id.* 343.2(c)(1).

⁷ Order No. 561, FERC Stats. & Regs. ¶ 30,985 at 30,941.

⁸ *Five-Year Review of Oil Pipeline Pricing Index*, 93 FERC ¶ 61,266 (2000), *aff'd in part and remanded in part sub nom. Ass'n of Oil Pipe Lines v. FERC*, 281 F.3d 239 (D.C. Cir. 2002) (*AOPL II*), *order on remand*, 102 FERC ¶ 61,195 (2003), *aff'd sub nom. Flying J Inc. v. FERC*, 363 F.3d 495 (D.C. Cir. 2004).

⁹ *Five-Year Review of Oil Pipeline Pricing Index*, 114 FERC ¶ 61,293 (2006) (2005 Index Review).

¹⁰ *Five-Year Review of Oil Pipeline Pricing Index*, 133 FERC ¶ 61,228 (2010) (2010 Index Review), *reh'g denied*, 135 FERC ¶ 61,172 (2011).

¹¹ *Five-Year Review of the Oil Pipeline Index*, 153 FERC ¶ 61,312 (2015) (2015 Index Review), *aff'd sub nom. Ass'n of Oil Pipe Lines v. FERC*, 876 F.3d 336 (D.C. Cir. 2017) (*AOPL III*).

¹² The D.C. Circuit has affirmed the Commission's use of the Kahn Methodology. *AOPL I*, 83 F.3d at 1433-37; *Flying J Inc. v. FERC*, 363 F.3d at 497-500.

The calculation is as follows. Each pipeline's cost change on a per-barrel mile basis over the prior five-year period (e.g., the years 2014-2019) is calculated. In order to capture normal industry cost experience, the resulting data set is trimmed by removing an equal number of pipelines from the top and bottom of the data set. The Kahn Methodology then calculates three measures of the trimmed data sample's central tendency: the median, the mean, and a weighted mean.¹³ The Kahn Methodology calculates a composite by averaging these measures of central tendency and measures the difference between the composite and the PPI-FG over the prior five-year period. The Commission then sets the index level at PPI-FG plus (or minus) this differential.

B. The 2020 Five-Year Review

5. The 2020 five-year review addressed the index level for the July 1, 2021, to June 30, 2026 period.¹⁴ In December of 2020, the Commission's Initial Order¹⁵ adopted the Initial Index level of PPI-FG+0.78%. As relevant here, the Commission determined the Initial Index, in part, by: (1) adjusting the data for Master Limited Partnership (MLP) pipelines to remove the effects of a 2018 policy change (Income Tax Policy Change), and (2) trimming the data set to the middle 80% of cost changes.

6. First, the Commission considered whether to adjust the data to remove the effects of the Income Tax Policy Change. As noted above, the Commission measures industry-

¹³ The weighted mean assigns a different weight to each pipeline's cost change based upon the pipeline's total barrel-miles.

¹⁴ The Commission initiated the 2020 five-year review by issuing a Notice of Inquiry in June of 2020. *Five-Year Rev. of the Oil Pipeline Index*, 171 FERC ¶ 61,239 (2020).

¹⁵ *Five-Year Rev. of the Oil Pipeline Index*, 173 FERC ¶ 61,245 (2020) (Initial Order), *order on reh'g*, 178 FERC ¶ 61,023 (2022) (Rehearing Order), *vacated sub nom. LEPA v. FERC*, 109 F.4th 543.

wide cost changes using data from pipelines' Form No. 6, page 700 for the five years prior to the start of the five-year review, here, 2014 to 2019. In 2018, the Commission changed its policy regarding the recovery of income tax costs and required MLP pipelines to eliminate their income tax allowance and Accumulated Deferred Income Taxes (ADIT) balances from their page 700s.¹⁶ As a result, the 2014 page 700 data for MLP pipelines reflected the Commission's old policy while the 2019 page 700 data reflected the new policy. In the Initial Order, the Commission adjusted for this by removing the effects of the Income Tax Policy Change.¹⁷

7. Second, the Initial Order trimmed the data set to the middle 80% of cost changes. As noted above, the Kahn Methodology statistically trims the page 700 data by removing an equal number of pipelines from the top and bottom of the data set to remove outlying and anomalous data that can distort the measure of central tendency. Participants in the 2020 five-year review proceeding disputed whether to trim the data to the middle 80% or the middle 50% of cost changes. The Commission determined that using the middle 80% was appropriate for this index review.¹⁸

8. In January 2021, shippers filed requests for rehearing of the Initial Order. While those rehearing requests were pending, the Commission published a new annual index on

¹⁶ See *Inquiry Regarding the Comm'n Pol'y for Recovery of Income Tax Costs*, 162 FERC ¶ 61,227 (2018 Income Tax Policy Statement), *reh'g denied*, 164 FERC ¶ 61,030 (2018), *requests for clarification dismissed*, 168 FERC ¶ 61,136 (2019), *petitions for review dismissed sub nom. Enable Miss. River Transmission, LLC v. FERC*, 820 F. App'x 8 (D.C. Cir. 2020).

¹⁷ For any pipelines that were MLPs in 2014, the Commission set the 2014 page 700 income tax allowance to zero and revised the 2014 return on rate base to reflect the removal of ADIT. Initial Order, 173 FERC ¶ 61,245 at P 16.

¹⁸ *Id.* P 25.

May 14, 2021, consistent with the Initial Order.¹⁹ Pipelines proceeded to make rate filings, which became effective July 1, 2021, reflecting the Initial Order.

9. In January 2022, the Commission issued the Rehearing Order²⁰ adopting the lower Rehearing Index level of PPI-FG-0.21%.²¹ In the Rehearing Order, the Commission reversed course on the two issues described above: the Commission calculated the Rehearing Index (1) using unadjusted page 700 data that reflected the Income Tax Policy Change, and (2) trimming the data set to the middle 50% of cost changes.²² In addition, the Commission addressed certain relatively minor computational issues identified by pipelines related to the appropriate source for the 2014 data from page 700.²³

10. The Commission directed pipelines to recompute their ceiling levels and reduce their rates to reflect the lower Rehearing Index, effective March 1, 2022.²⁴ Certain parties appealed the Rehearing Order.

C. *LEPA v. FERC* and Reinstatement Order

11. In *LEPA v. FERC*, the D.C. Circuit vacated the Rehearing Order.²⁵ The court held that the Commission's Rehearing Order violated the Administrative Procedure Act (APA) by amending the Initial Index without providing notice and an opportunity for

¹⁹ *Notice of Ann. Change in the Producer Price Index for Finished Goods*, 175 FERC ¶ 61,117 (2021).

²⁰ Rehearing Order, 178 FERC ¶ 61,023, *reh'g denied*, 179 FERC ¶ 61,100 (2022) (Second Rehearing Order).

²¹ Rehearing Order, 178 FERC ¶ 61,023 at P 2.

²² *Id.* PP 17-36, 43-58.

²³ *Id.* PP 99-102.

²⁴ *Id.* P 106.

²⁵ *LEPA v. FERC*, 109 F.4th 543.

comment. The court explained that once an agency’s rule “carrie[s] legal consequences,” the APA requires the agency to follow notice-and-comment procedures before amending the rule.²⁶ The court found that the Initial Index became “sufficiently final” by July 1, 2021, when pipelines’ rates for the first year of the five-year period became effective, “to require that any amendment undergo notice-and-comment procedures.”²⁷ Because the Commission changed the index to the Rehearing Index level and required pipelines to lower their rates without providing notice-and-comment procedures, the court vacated the Rehearing Order and ordered the Commission to reinstate the Initial Order.

12. On September 17, 2024, the Commission issued an order reinstating the Initial Order in compliance with the court’s decision.²⁸ The Commission directed oil pipelines to recompute their ceiling levels for a second time to reflect the Initial Index and explained that pipelines could file to prospectively increase their indexed rates up to their recomputed ceiling levels.²⁹ The Commission also stated that it would address other issues following *LEPA v. FERC* in a subsequent order.

13. Parties continued to file comments in Docket No. RM20-14 disputing the appropriate index level following *LEPA v. FERC*.³⁰ Among other things, shippers argued

²⁶ *Id.* at 548 (quoting *Humane Soc’y v. USDA*, 41 F.4th 564, 570 (D.C. Cir. 2022)) (internal quotation marks omitted).

²⁷ *Id.* at 549.

²⁸ *Revisions to Oil Pipeline Reguls. Pursuant to the Energy Pol’y Act of 1992*, 188 FERC ¶ 61,173 (2024) (Reinstatement Order).

²⁹ *Id.* PP 1-2.

³⁰ In addition, certain shippers filed a Petition for Action requesting the Commission readopt the Rehearing Index in notice-and-comment proceedings. *Five-Year Review of the Oil Pipeline Index*, Joint Shippers Petition for Action Following Vacatur and Remand of Five-Year Index Review Decision, Docket No. RM20-14-003, (filed

that the Commission should reinstitute the Rehearing Order vacated by *LEPA v. FERC* and consider their rehearing requests.³¹

II. Supplemental NOPR

A. Supplemental NOPR

14. In order to resolve the ongoing disputes over whether the index should be modified following *LEPA v. FERC* and to comply with the court's holding that any change must be accomplished through APA notice-and-comment procedures, the Commission issued the Supplemental NOPR. The Commission proposed to amend the index level to PPI-FG-0.21% (the same level as the Rehearing Index) and sought comments on its proposal. The Commission proposed to amend the index level on a prospective basis for the remainder of the five-year period. More specifically, the Commission proposed the following:

- Calculating Prospective Ceiling Levels: The Commission proposed that pipelines recalculate their ceiling levels as though the amended index level of PPI-FG-0.21% was effective throughout the five-year period beginning in 2021.³² However, the Commission noted that commenters could address, in the alternative, if ceiling levels should only reflect a revised index level as of July 1, 2025, rather than the full five-year period.³³

Sep. 23, 2024) (Joint Shippers Petition for Action).

³¹ The Commission is issuing an order resolving the remaining issues in that proceeding concurrent with this order. *Revisions to Oil Pipeline Reguls. Pursuant to the Energy Pol'y Act of 1992*, 193 FERC ¶ 61,137 (2025).

³² Under this approach, pipelines would recalculate their July 1, 2025 ceiling levels using the revised index level for 2021, 2022, 2023, and 2024.

³³ Supplemental NOPR, 189 FERC ¶ 61,030 at P 37.

- Income Tax Policy Change: The Commission proposed to use unadjusted page 700 data that reflects the Income Tax Policy Change, consistent with the Rehearing Order, rather than the adjusted data used in the Initial Order.³⁴
- Statistical Data Trimming: The Commission proposed to trim the data set to the middle 50% of cost changes, as the Commission did in the Rehearing Order, rather than the middle 80% adopted by the Initial Order.³⁵
- Appropriate Source of 2014 Page 700 Data: The Commission proposed to use page 700 data for 2014 from more recent filings made in April 2016 rather than the outdated 2014 data filed in April 2015. The Commission explained that the Initial Order inadvertently used outdated page 700 data for 2014.³⁶

15. The Commission acknowledged that it had never previously undertaken a rulemaking to consider revisions to the index level outside of the five-year review process. However, the Commission found it appropriate to initiate new notice-and-comment procedures given the D.C. Circuit's holdings in *LEPA v. FERC* and ongoing concerns with the Initial Index.³⁷ The Commission emphasized that commenters could address any issues or concerns associated with the proposal to revise the index level during the five-year period.³⁸

³⁴ *Id.* PP 24-34.

³⁵ *Id.* PP 13-23.

³⁶ *Id.* PP 35-36.

³⁷ *Id.* P 40; *see also* Joint Shippers Petition for Action.

³⁸ Supplemental NOPR, 189 FERC ¶ 61,030 at P 40.

B. Comments

16. Initial comments on the Supplemental NOPR were filed on November 26, 2024, and reply comments were filed on December 20, 2024. In general, pipeline commenters (Pipelines)³⁹ oppose the Commission's proposal to revise the index level. Pipelines assert that amending the index level at this time would disrupt settled expectations, cause regulatory uncertainty, and incentivize litigation over pipeline rates.⁴⁰ By contrast, shipper commenters (Shippers)⁴¹ support the Commission's proposal.

17. Regarding the Commission's proposal to calculate ceiling levels as if any revised index was effective for the entire five-year period, Pipelines argue that the Commission's proposal is inconsistent with the vacatur of the Rehearing Order and the D.C. Circuit's directive in *LEPA v. FERC* to reinstate the Initial Order.⁴² Additionally, Pipelines argue

³⁹ Pipelines include: Liquid Energy Pipeline Association (LEPA); Designated Carriers (Buckeye Partners, L.P., Colonial Pipeline Company, Energy Transfer LP, Enterprise Products Partners, L.P., and Plains All American Pipeline, L.P.); Bridger Pipeline LLC (Bridger); Kinder Morgan, Inc. (Kinder Morgan); Marathon Pipe Line LLC (Marathon); Williams Companies, Inc. (Williams); South Bow (USA) LP (South Bow); and Tallgrass Energy Partners LP. In addition, the Energy Infrastructure Council filed comments opposing the Commission's proposal to adopt a revised index level.

⁴⁰ Designated Carriers Initial Comments at 23-34; LEPA Initial Comments at 21; Bridger Comments at 6; Williams Comments at 8; Kinder Morgan Initial Comments at 5; Marathon Initial Comments at 5.

⁴¹ Shippers include: Joint Commenters (Air Transport Association of America d/b/a Airlines for America, Chevron Products Company, National Propane Gas Association, and Valero Marketing and Supply Company); Appalachian Basin Shippers (PennEnergy Resources, LLC, and Range Resources – Appalachia, LLC); American Exploration & Production Council; Canadian Association of Petroleum Producers (CAPP); Pilot Travel Centers, LLC, George E. Warren LLC, and Murphy Oil USA, Inc. (PG&M Shippers); Liquids Shippers Group (Apache Corporation, Cenovus Energy Marketing Services Ltd., ConocoPhillips Company, Husky Marketing and Supply Company, and Orintiv Marketing Inc.); River City Petroleum; Expand Energy Marketing LLC (formerly known as SWN Energy Services Company, LLC), and Shell Trading (US) Company (Shell).

⁴² LEPA Initial Comments at 47; South Bow Initial Comments at 8; LEPA Reply

that the Commission's proposal is inconsistent with Commission regulations,⁴³ and constitutes impermissible retroactive rulemaking⁴⁴ and retroactive ratemaking.⁴⁵

Shippers dispute Pipelines' claims that the Commission's proposal constitutes retroactive rulemaking or ratemaking.⁴⁶ Shippers argue that the Commission's proposal ensures that going-forward rates reflect any revised index level adopted in this proceeding,⁴⁷ and conforms to the Commission's practice in the 2000 index review.⁴⁸

18. Pipelines oppose the Commission's proposal to calculate a revised index level using page 700 data that incorporates the Income Tax Policy Change. Pipelines argue that because previous index reviews did not incorporate the Commission's policy allowing MLP pipelines to recover a full income tax allowance, it would be improper to reflect the 2018 policy change removing the MLP income tax allowance in this review.⁴⁹ Additionally, Pipelines contend that most pipelines in the data set are not MLPs and the double recovery is not widely reflected in MLP pipelines' rates.⁵⁰ In contrast, Shippers

Comments at 28.

⁴³ Designated Carriers Initial Comments at 30.

⁴⁴ LEPA Initial Comments at 48-49; Designated Carriers Initial Comments at 31-32; Kinder Morgan Initial Comments at 9-12; South Bow Initial Comments at 8.

⁴⁵ LEPA Initial Comments at 49.

⁴⁶ Joint Commenters Reply Comments at 38; Appalachian Basin Shippers Reply Comments at 8-9; Liquids Shippers Group Reply Comments at 16; Shell Reply Comments at 12.

⁴⁷ *See* Joint Commenters Initial Comments at 36; Liquids Shippers Group Initial Comments at 12.

⁴⁸ Joint Commenters Initial Comments at 36; Shell Initial Comments at 13-14.

⁴⁹ LEPA Initial Comments at 40-41; Designated Carriers Initial Comments at 48-51, 64; Designated Carriers Reply Comments at 31, 33-35.

⁵⁰ LEPA Initial Comments at 37, 44; Designated Carriers Initial Comments at

argue that the Commission's proposal to reflect the Income Tax Policy Change in the index calculation conforms with indexing's purpose of tracking changes in recoverable costs,⁵¹ regardless of whether individual MLP pipelines' rates incorporate the income tax double recovery.⁵² Shippers contend that implementing the Income Tax Policy Change as proposed fulfills EPCRA 1992's mandates for simplified and streamlined ratemaking while ensuring just and reasonable rates.⁵³ Pipelines also oppose the Commission's proposal to trim the data set to the middle 50%, arguing that the record in this proceeding supports using the middle 80%.⁵⁴ Shippers, on the other hand, support the Commission's proposal and argue that the middle 50% conforms to past Commission practice and is a better measure of normal cost changes.⁵⁵

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⁵¹ *E.g.*, Joint Commenters Initial Comments at 32-33; CAPP Initial Comments at 3; Shell Initial Comments at 13; Appalachian Basin Shippers Reply Comments at 12-13 & n.42; PG&M Shippers Reply Comments at 9-10.

⁵² Joint Commenters Initial Comments at 65, 68-69; PG&M Shippers Reply Comments at 11-12. Relatedly, Shippers explain that even though the policy change did not affect pipelines owned by corporations, its effects on costs recoverable by MLPs are appropriately reflected in the industry-wide index. Liquids Shippers Group Reply Comments, Affidavit of Elizabeth H. Crowe, at 6:21-7:17.

⁵³ Joint Commenters Initial Comments at 35-36; Appalachian Basin Shippers Initial Comments at 8.

⁵⁴ LEPA Initial Comments at 27-28; Designated Carriers Initial Comments at 72-74; LEPA Reply Comments at 33-34; Designated Carriers Reply Comments at 40-42.

⁵⁵ Joint Commenters Initial Comments at 24-32; CAPP Initial Comments at 3; Appalachian Basin Shippers Initial Comments at 4-7; Shell Initial Comments at 9-11; PG&M Shippers Initial Comments at 10-11; River City Petroleum Initial Comments at 1; Joint Commenters Reply Comments at 43-45, 51, 53 (citing 2015 Index Review, 153 FERC ¶ 61,312 at PP 9, 42-44; 2010 Index Review, 133 FERC ¶ 61,228 at P 63; Order No. 561-A, FERC Stats. & Regs. ¶ 31,000 at 31,097, *aff'd*, *AOPL I*, 83 F.3d at 1434).

III. Discussion

19. Upon consideration of the record in this proceeding and given the late stage of the five-year review period that began July 1, 2021, and concludes June 30, 2026, we are not persuaded to proceed with the proposal considered in the Supplemental NOPR. The Commission initiated the Supplemental NOPR to allow industry-wide comment on “all issues related to the appropriate index level following *LEPA v. FERC*,”⁵⁶ including whether to modify the index level outside the five-year review process based on the issues discussed in the Rehearing Order.⁵⁷

20. We conclude that the best course of action is to allow the current index level to remain effective for the remainder of this five-year period. The question before the Commission in the instant proceeding is not what action the Commission should have taken in 2020 at the beginning of this five-year review. Rather, the question presented here is whether in 2025 the Commission should now change the index level prospectively in the last year of this five year period as proposed in the Supplemental NOPR.⁵⁸ Changing the index level for a fourth time in the fifth year of the five-year period⁵⁹ would

⁵⁶ Supplemental NOPR, 189 FERC ¶ 61,030 at P 2.

⁵⁷ *Id.* PP 13-34.

⁵⁸ As with any rulemaking, any action the Commission might take to amend the index level through notice-and-comment procedures may be prospective only. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988); *see also LEPA v. FERC*, 109 F.4th at 547.

⁵⁹ After establishing the Initial Index for this five-year period in 2020 and after 201 pipelines filed rates pursuant to that index effective July 1, 2021, the Commission changed the index level twice. First, the Commission issued the Rehearing Order on January 20, 2022 and pipelines filed rates to comply with the Rehearing Order’s lower index made effective March 1, 2022. Then, following *LEPA v. FERC*, the Commission issued the Reinstatement Order on September 17, 2024, which restored the Initial Index and pipelines once again refiled rates and ceiling levels.

prolong ongoing regulatory uncertainty regarding the index level.⁶⁰ As discussed below, we do not find that the record supports taking such a step. Moreover, at this stage, the benefits of any index change are limited, as pipelines made the last annual indexed rate filing of the five-year period in June 2025.

21. We therefore exercise our discretion to withdraw the Supplemental NOPR and terminate this rulemaking proceeding. We address below the Supplemental NOPR's proposals regarding (1) recalculation of prospective ceiling levels, (2) the Income Tax Policy Change, (3) statistical data trimming, and (4) the appropriate source of 2014 Page 700 data.⁶¹

A. Calculating Prospective Ceiling Levels

22. We are not persuaded to adopt the Supplemental NOPR's proposal to require pipelines to recalculate ceiling levels effective prospectively from the issuance of this rule as though a revised index resulting from this rulemaking was effective starting July 1, 2021.⁶²

⁶⁰ As noted above, indexing is intended to provide a "simplified and generally applicable ratemaking methodology for oil pipelines" under EPCRA 1992. EPCRA 1992 1801(a). Consistent with that goal, the Commission established a framework under which the Commission would review the index once every five years. Order No. 561, FERC Stats. & Regs. ¶ 30,985 at 30,946-47.

⁶¹ The Supplemental NOPR also requested comment on any additional remedial steps the Commission should take following *LEPA v. FERC*. Because we decline to adjust the index level, we reject Shippers' arguments that they are entitled to remedies for any part of the five-year period based on the application of a lower index level than the Initial Index. We decline to address here whether Pipelines are entitled to remedies for the period between March 1, 2022 and September 17, 2024 when the Rehearing Index was in effect. Instead, we address this issue in a concurrent order in Docket No. RM20-14. *See Revisions to Oil Pipeline Regs. Pursuant to the Energy Pol'y Act of 1992*, Order Denying Rehearing, Denying Petition and Granting Remedies, 193 FERC ¶ 61,137 (2025).

⁶² Supplemental NOPR, 189 FERC ¶ 61,030 at P 37. As explained above, the indexing methodology allows oil pipelines to change their rates, effective every July 1,

23. As explained further below, commenters raised extensive questions and concerns regarding this proposal, including assertions that this proposal departs from the Commission's indexing framework and regulations, and runs afoul of the rules against retroactive rulemaking and retroactive ratemaking. On balance, we are not convinced that the Commission should recalculate pipeline ceiling levels for the preceding four years of the five-year period.

24. First, commenters argue that the proposal to recalculate prior ceiling levels departs from the Commission's indexing framework and regulations.⁶³ Although the Commission can amend its rules through notice-and-comment rulemakings, we recognize that the proposal to recalculate the ceiling levels for multiple past years would be an unprecedented departure from the Commission's existing indexing policies and regulations, in which the index is "cumulative from year to year,"⁶⁴ and each annual index is applied to a pipeline's ceiling level from the preceding year.⁶⁵ Moreover, each year's index is based upon the prior years' cost changes, not some other adjustment as proposed in the Supplemental NOPR.⁶⁶ Pipeline rates are bound by those annual ceiling rate changes.⁶⁷

subject to specific ceiling levels, which pipelines recalculate annually by multiplying their previous year's ceiling level by the annual index published by the Commission.

⁶³ Designated Carriers Initial Comments at 30.

⁶⁴ Order No. 561, FERC Stats. & Regs. ¶ 30,985 at 30,954.

⁶⁵ 18 CFR 342.3(d)(1).

⁶⁶ In particular, section 342.3(d)(1) of the Commission's regulations requires pipelines to compute the ceiling level for each index year by multiplying *the previous index year's ceiling level* by the most recent index. 18 CFR 342.3(d)(1).

⁶⁷ Carriers are permitted to raise their rates to unused ceiling levels at any time after those ceiling levels are established and while they remain in effect. *Id.*; *id.*

25. Second, the Commission designed the cumulative ceiling level approach to achieve EAct 1992's "criteria of simplicity and general applicability"⁶⁸ and "reduce[] the necessity and likelihood of prolonged litigation."⁶⁹ Yet another change to the ceiling levels that were in place over the prior four years would directly contravene such mission, adding even more complexity and is thus in tension with the index's simplified design.

26. Third, we acknowledge significant debate in the record regarding whether the remedy proposed in the Supplemental NOPR constitutes impermissible retroactive rulemaking and retroactive ratemaking.⁷⁰ While we decline to address the scope of the Commission's remedial authority in this rulemaking context, we are not persuaded that perpetuating and exacerbating uncertainty for the final year of this index cycle is warranted.

27. We are not persuaded by other arguments advanced by Shippers. Although the Shippers argue that the proposal is necessary to ensure that the "flaws" of the Initial

342.3(a). Conversely, the Commission prohibited pipelines from filing rates exceeding their ceiling levels except in very specific circumstances. Order No. 561, FERC Stats. & Regs. ¶ 30,985 at 30,947; 18 CFR 342.4(a)-(b).

⁶⁸ Order No. 561, FERC Stats. & Regs. ¶ 30,985 at 30,946; *id.* at 30,940 (indexing provides "a simplified and generally applicable methodology for regulating oil pipeline rates").

⁶⁹ *Id.* at 30,946.

⁷⁰ Compare LEPA Initial Comments at 48-50; Designated Carriers Initial Comments at 31-32; Kinder Morgan Initial Comments at 9-12; South Bow Initial Comments at 8 *with* Joint Commenters Reply Comments at 38; Appalachian Basin Shippers Reply Comments at 8-9; Liquids Shippers Group Reply Comments at 16; Shell Reply Comments at 12.

Index do not result in inflated ceiling levels going forward,⁷¹ as discussed below, we find those flaws to be overstated.

28. We recognize that Shippers cite to the 2000 five-year review as one prior instance in which the Commission directed pipelines to recalculate index increases over multiple years for prospective effect in rates.⁷² However, we believe this case is distinguishable. The Commission's decision to recalculate ceiling levels in the 2000 five-year review was made in addressing the legal error identified by the D.C. Circuit on remand,⁷³ whereas any recalculation of ceiling levels as proposed in the Supplemental NOPR would occur in response to a rulemaking. Thus, we are not persuaded that the Commission's decision in the 2000 five-year review would support adoption of the Supplemental NOPR's proposal on ceiling levels.

29. In sum, we conclude that the benefit of rate certainty at this late stage of the current five-year index cycle generally counsels against the Supplemental NOPR's proposal to revise the index going back more than four years. It would be an unprecedented step for the Commission to take such action, and we are concerned about establishing a practice here that could justify additional disruption of subsequent index periods. On balance, we are not persuaded to adopt the Supplemental NOPR's proposal to recalculate pipeline ceiling levels for the full five-year period.

⁷¹ Joint Commenters Initial Comments at 36; Shell Initial Comments at 13-14.

⁷² *Five-Year Review of Oil Pipeline Pricing Index*, 102 FERC ¶ 61,195, at PP 1, 31 (2000).

⁷³ *Id.* The D.C. Circuit remanded the Commission's December 2000 order establishing the index level on the grounds that the Commission had not adequately addressed the concerns raised by certain pipelines. *See AOPL II*, 281 F.3d at 245-46.

B. Income Tax Policy Change

30. We are not persuaded to modify the index level to incorporate the Income Tax Policy Change as proposed in the Supplemental NOPR in order to address an income tax double recovery in pipeline rates. As discussed below, there are valid arguments against taking such action, particularly in the fifth year of the five-year index.

31. As an initial matter, it is not clear the extent to which an income tax double recovery exists in oil pipeline rates. The income tax double recovery concern applies only to MLP pipelines, less than half of the pipelines subject to the index.⁷⁴ Moreover, as the Initial Order explained, it is not clear that the income tax double recovery is widely incorporated in those MLP pipelines' rates. The Commission only permitted MLP pipelines to include a full income tax allowance in their costs of service between 2005 and 2018. During that period, the Commission's index reviews did not actually incorporate the Commission's policies allowing MLP pipelines to recover an income tax allowance.⁷⁵ Although the Commission's prior income tax policy influenced MLP pipelines' rates in other ways,⁷⁶ MLP pipelines are only a subset of all pipelines and

⁷⁴ Seventy of the 160 pipelines in the data set (or approximately 44%) were organized as MLPs when the Commission adopted the Income Tax Policy Change. *See* Designated Carriers Initial Comments, Aff. of Dr. Michael J. Webb, at P 48 & n.60 (Webb Aff.).

⁷⁵ Before the Commission updated its calculation of the index in the 2015 Index Review to use page 700 data, the Kahn Methodology used net carrier property as a proxy for capital costs and income taxes. 2015 Index Review, 153 FERC ¶ 61,312 at P 14 (citing Order No. 561-A, FERC Stats. & Regs. ¶ 31,000 at 31,096, 31,098). This proxy did not reflect changes in the Commission's Opinion No. 154-B cost-of-service methodology, including changes to the Commission's income tax policy. As a result, the Commission's prior policies permitting MLP pipelines to recover a full or partial income tax allowance were never directly incorporated into the index.

⁷⁶ *See* Supplemental NOPR, 189 FERC ¶ 61,030 at P 33. For example, as the Supplemental NOPR observed, 164 of the 277 total oil pipelines in the Commission's data set, or 59%, have been added since the 2005 five-year review. Supplemental NOPR,

the Supplemental NOPR acknowledged that MLP pipelines' rates only "imperfectly captured the 2005 income tax policy change" that allowed MLPs to recover a full income tax allowance.⁷⁷

32. Second, to the extent the income tax double recovery was incorporated into MLP pipelines' rates, the index provides an incomplete mechanism for remedying this issue because it would not fully remove any double recoveries from MLP pipeline rates. The index reflects an average of all pipelines' cost changes on an industry-wide basis,⁷⁸ including the cost changes of non-MLP pipelines that were not affected by the Income Tax Policy Change. Accordingly, the reduction to the index level that results from reflecting the Income Tax Policy Change provides an imprecise mechanism for addressing any MLP pipeline double recoveries.

33. Third, the late-stage of this proceeding (the fifth year of the five-year review) significantly reduces the effectiveness of the index as a mechanism for addressing the income tax double recovery. To meaningfully address the income tax double recovery, as proposed in the Supplemental NOPR, the Commission would need to direct pipelines to recompute their ceiling levels and rates as though the revised index level was effective

189 FERC ¶ 61,030 at n.68. Those pipelines either filed cost-of-service rates directly incorporating the income tax allowance or negotiated rates under the circumstances of the Commission's income tax policies for MLP pipelines.

⁷⁷ Supplemental NOPR, 189 FERC ¶ 61,030 at P 33; *see also Inquiry Regarding Income Tax Allowances*, 111 FERC ¶ 61,139, at P 32 (2005).

⁷⁸ *E.g.*, Order No. 561-A, FERC Stats. & Regs. ¶ 31,000 at 31,103 (explaining that indexing "relies upon industry-wide average costs . . . to establish rates").

for the full five-year period beginning July 1, 2021. As discussed above, however, this presents considerable concerns, and thus we decline to take such a step.⁷⁹

34. Finally, attempting to address the double recovery via the index reduces the index for pipelines that have no double recovery. For example, it is not clear that index reductions to address the double recovery are necessary for MLP pipelines whose revenues under-recover costs.⁸⁰ Whereas shippers may file cost-of-service complaints in those circumstances where pipelines' rates are excessive in light of the Income Tax Policy Change, making an industry-wide adjustment of the index level for the only remaining year of the five-year period would be both overbroad (in capturing pipelines who do not have a double-recovery embedded in rates) and have limited effectiveness (in only capturing a fraction of any double-recovery).

35. In 2020, at the beginning of this five-year review period, the income tax allowance double recovery issue was an issue of first impression that the Commission in 2020 addressed by removing the effects of that change from the calculation of the index.⁸¹ It is now 2025, the fifth year of the five-year index process, and the benefit of rate certainty

⁷⁹ *Supra* PP 22-29.

⁸⁰ Even where an MLP pipeline filed a cost-of-service rate that included a full income tax allowance or negotiated a settlement rate based on the Commission's prior income tax policy, it is not clear that the pipeline is presently over-recovering its cost of service. For instance, when the Commission evaluated whether natural gas pipelines were over-recovering their costs of service as a result of the Income Tax Policy Change, the resulting proceedings did not result in rate reductions for most pipelines. *Interstate & Intrastate Nat. Gas Pipelines*, Order No. 849-A, 84 FR 17739 (April 26, 2019), 167 FERC ¶ 61,051, at P 4 (2019) (stating that of 120 natural gas pipelines that filed FERC Form No. 501-G in response to Order No. 849, 84 pipelines explained why no change to their cost-of-service rates was necessary following the Income Tax Policy Change).

⁸¹ Initial Order, 173 FERC ¶ 61,245 at PP 16-20.

support leaving the index undisturbed.⁸² None of the comments⁸³ undermine the factual findings above and, as explained above, we decline to modify the index level for a policy change that was only partially incorporated into pipeline rates and where, to the extent any double recovery exists, any modifications we could make at this stage would provide an imprecise and limited resolution to the double-recovery issue.⁸⁴

36. We acknowledge that the Commission stated in the 2018 Income Tax Policy Statement that it would “incorporate the effects of the post-*United Airlines* policy changes . . . on industry-wide oil pipeline costs in the 2020 five-year review.”⁸⁵

However, these statements were not binding,⁸⁶ and the Commission later reconsidered

⁸² See *Rail Splitter Wind Farm, LLC v. Ameren Servs. Co.*, 142 FERC ¶ 61,047, at P 31 (2013) (emphasizing the importance of stability and certainty in the Commission’s decision-making process).

⁸³ Supplemental NOPR, 189 FERC ¶ 61,030 at PP 24-34; Joint Commenters Initial Comments at 32-36; Appalachian Basin Shippers Initial Comments at 8-9; CAPP Initial Comments at 3; PG&M Shippers Initial Comments at 10; Shell Initial Comments at 11-13; River City Petroleum Initial Comments at 1; Joint Commenters Reply Comments at 61-69; Liquids Shippers Group Reply Comments at 12-13; Appalachian Basin Shippers Reply Comments at 12-13; PG&M Shippers Reply Comments at 9-13.

⁸⁴ We decline to resolve the differing positions in the Initial Order and the Supplemental NOPR, regarding whether the index should generally reflect policy changes embedded in the Opinion No. 154-B cost of service. See Supplemental NOPR, 189 FERC ¶ 61,030 at P 30 (citing Initial Order, 173 FERC ¶ 61,245 at P 17). Similarly, we do not resolve whether reflecting the Income Tax Policy Change would effectuate a true-up for prior-period over-recoveries. *Id.* P 31 (citing Initial Order, 173 FERC ¶ 61,245 at P 18). As necessary, those issues can be addressed in subsequent five-year review proceedings.

⁸⁵ 2018 Income Tax Policy Statement, 162 FERC ¶ 61,227 at P 46; see also *id.* P 8 (“[T]he Commission will incorporate the effects of this Revised Policy on industry-wide oil pipeline costs in the 2020 five-year review of the oil pipeline index level.”).

⁸⁶ *E.g., Ass’n of Flight Attendants v. Huerta*, 785 F.3d 710, 716 (D.C. Cir. 2015) (“Policy statements ‘are binding on neither the public nor the agency, and the agency retains the discretion and the authority to change its position . . . in any specific case.’”) (quoting *Syncor Int’l Corp. v. Shalala*, 127 F.3d 90 (D.C. Cir. 1997)).

those statements in the Initial Order and decided a different course of action was more appropriate.⁸⁷ We find that at this late stage any potential benefits of addressing the Income Tax Policy Change through the index calculation are significantly attenuated, and do not outweigh the disruption and regulatory uncertainty that revising the index level again would entail.

C. Statistical Data Trimming

37. We likewise decline to adopt the Supplemental NOPR's proposal to modify the index level by using the middle 50% instead of the middle 80% of cost changes.

38. We find that any benefits that may result from using the middle 50% do not justify revising the index level at this late stage in the five-year review period. The record demonstrates that using the middle 50% would reduce the index level by 33 basis points, from PPI-FG+0.78% to PPI-FG+0.45%.⁸⁸ Moreover, this change would be only for one year and affect pipeline rates by 1/3 of one percent or 0.33%.⁸⁹ It would represent an

⁸⁷ Initial Order, 173 FERC ¶ 61,245 at P 18 (considering the Commission's statement in the 2018 Income Tax Policy Statement but concluding that the index is not an appropriate mechanism for incorporating the Income Tax Policy Change).

⁸⁸ LEPA Initial Comments, Declaration of Dr. Ramsey D. Shehadeh, at Ex. A4 (Shehadeh Decl.).

⁸⁹ For example, assume that Pipeline A's ceiling level was \$10 on June 30, 2021. Thus, Pipeline A's ceiling level would be \$12.748 following the reinstatement of the index level of PPI-FG+0.78% pursuant to *LEPA v. FERC* ($10 * 0.994188 * 1.097007 * 1.143094 * 1.022547 = 12.748$). See Order Reinstating Index, 189 FERC ¶ 61,173 at P 1 (listing index multipliers reflecting PPI-FG+0.78% index level for July 1, 2021-June 30, 2025). In addition, assume that the annual change in PPI-FG from 2023-2024 is 1.22%, which reflects the most recent data published by the Bureau of Labor Statistics, available at <https://data.bls.gov/toppicks?survey=bls> (accessible by selecting "PPI Finished Goods 1982+100 (Unadjusted) – WPUFD49207" and clicking "Retrieve data"). Using the index of PPI-FG+0.78%, Pipeline A's ceiling level would increase from \$12.748 to \$13.004 effective July 1, 2025 ($12.748 * (1 + 0.0122 + 0.0078) = 13.0036$). By contrast, using a revised index of PPI-FG+0.45% that reflects the middle 50% for July 1, 2025-June 30, 2026, Pipeline A's ceiling level would increase from \$12.748 to \$12.961 ($12.748 * (1 + 0.0122 + 0.0045) = 12.9609$). As a result, revising the index level using the middle

extremely small percentage of the total pipeline indexed rate changes over the five-year review period, and, when considered over the five-year period, this 0.33% effect is *de minimis*. Indexing necessarily involves some degree of imprecision.⁹⁰ Even in a more traditional ratemaking framework, a change of 0.33% above or below a pipeline's cost of service is within expected imprecision in rates over any period of time.⁹¹ Neither ratemaking generally nor the index in particular are so exact.⁹²

39. The question before the Commission is not the index that should be in place for the full five-year index period, but whether there is sufficient basis to change the Commission-established index in the fifth year of the five-year review period. As discussed above, this record does not justify such an unprecedented step.

50% at this stage would only reduce Pipeline A's ceiling level by \$0.043 (or 0.33%).

⁹⁰ *E.g.*, Order No. 561, FERC Stats. & Regs. ¶ 30,985 at 30,949 (explaining that under the indexing system “some divergence between actual cost changes experienced by individual pipelines and the rate changes permitted by the index is inevitable”); 2005 Index Review, 114 FERC ¶ 61,293 at P 57 (explaining that in adopting indexing, the Commission “recognized in adopting a uniform index for all pipelines that inevitably some pipelines would over-earn while others will under-earn”); *see also* Joint Commenters Reply Comments at 69 (stating that “indexing is necessarily inexact to some degree”).

⁹¹ For example, between 2018 and 2019, 156 of the 160 pipelines in the data set had a change in billing determinants (throughput) exceeding plus or minus 0.33%. Likewise, between 2018 and 2019, 94% of pipelines had page 700 costs of service per barrel-mile changes exceeding plus or minus 0.33%.

⁹² *See, e.g., Consol. Edison Co. of N.Y., Inc. v. FERC*, 45 F.4th 265, 286 (D.C. Cir. 2022) (stating that “courts have long recognized that ratemaking is ‘much less a science than an art’”) (quoting *Ala. Elec. Coop., Inc. v. FERC*, 684 F.2d 20, 27 (D.C. Cir. 1982)); *Farmers Union Cent. Exch., Inc. v. FERC*, 734 F.2d 1486, 1502 (D.C. Cir. 1984) (explaining that there is a “zone of reasonableness” for just and reasonable rates).

D. Appropriate Source of 2014 Page 700 Data

40. As explained in the Supplemental NOPR,⁹³ page 700 includes columns for reporting summary cost-of-service data for both the current year and the previous year. The more recently filed data reported in the previous-year column often updates the data that was filed in the prior year. As a result, for the first year of the index review period in the five-year review, the Commission uses updated page 700 data filed in the following year's Form No. 6, where available.⁹⁴ However, in the Initial Order, the Commission inadvertently departed from its prior practice by using outdated page 700 data for 2014.⁹⁵ Thus, the Supplemental NOPR proposed to calculate a revised index level using updated page 700 data for 2014, where available, as reported in the previous-year column in the Form No. 6 filings submitted in April 2016.⁹⁶

41. After further consideration, we decline to adopt the proposal in the Supplemental NOPR. Consistent with our determination above, we conclude that any benefit of adopting this proposal would not justify the additional disruption that would result from modifying the index level for a fourth time at this late stage of the five-year period.

IV. Conclusion

42. As discussed above, upon review of the record in this proceeding and given the late stage of the five-year review period that began July 1, 2021, we are not persuaded to

⁹³ 189 FERC ¶ 61,030 at P 35.

⁹⁴ 2005 Index Review, 114 FERC ¶ 61,293 at P 50 (finding that a witness was “correct to use the data contained in [a] resubmitted FERC Form No. 6”).

⁹⁵ Specifically, although 38 pipelines filed updated 2014 data in April 2016, the Initial Order erroneously relied on those pipelines' originally filed 2014 data as reported in April 2015.

⁹⁶ Supplemental NOPR, 189 FERC ¶ 61,030 at P 36.

proceed with the proposals considered in the Supplemental NOPR. Thus, we withdraw the Supplemental NOPR and terminate this rulemaking proceeding.

The Commission orders:

The Supplemental NOPR is hereby withdrawn and Docket No. RM25-2-000 is hereby terminated.

By the Commission.

Issued: November 20, 2025

Debbie-Anne A. Reese,

Secretary.

[FR Doc. 2025-20900 Filed: 11/24/2025 8:45 am; Publication Date: 11/25/2025]