

170 FERC ¶ 61,133
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

HollyFrontier Refining & Marketing LLC, Southwest Airlines Co., Tesoro Refining and Marketing Company, US Airways, Inc., Valero Marketing and Supply Company, and Western Refining Company, L.P. v. SFPP, L.P.	Docket Nos. OR14-35-003
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Chevron Products Company v. SFPP, L.P.	OR14-36-003
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American Airlines, Inc., Chevron Products Company, HollyFrontier Refining & Marketing LLC, Southwest Airlines Co., and Valero Marketing and Supply Company v. SFPP, L.P.	OR19-21-000
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Tesoro Refining & Marketing Company LLC and Western Refining Company, L.P. v. SFPP, L.P.	OR19-33-000
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Phillips 66 Company v. SFPP, L.P.	OR19-37-000
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ORDER ON REMAND AND COMPLAINTS, AND DIRECTING BRIEFS

(Issued February 21, 2020)

1. This order addresses the United States Court of Appeals for the District of Columbia Circuit's remand in *Southwest Airlines*¹ which vacated and remanded Commission orders rejecting complaints in Docket Nos. OR14-35 and OR14-36 challenging index rate increases that SFPP, L.P. (SFPP) implemented for the 2012 and 2013 index years (2014 Complaints).² This order also addresses complaints filed in Docket Nos. OR19-21, OR19-33, and OR19-37 challenging SFPP's index rate increases implemented for the 2018 index year (2019 Complaints). The 2014 Complaints and 2019 Complaints allege that the challenged index rate increases fail the Commission's Substantially Exacerbate Test and are therefore unjust and unreasonable.

2. As discussed below, upon review of the Commission's policy for reviewing challenges to index rate increases under section 343.2(c)(1) of our regulations,³ we propose to eliminate the Substantially Exacerbate Test and evaluate the complaints against index rate increases by applying the Percentage Comparison Test. We direct the parties in the above-captioned proceedings to file briefs addressing their views on this proposal within 60 days of the date this order issues. Parties may submit reply briefs within 30 days thereafter.

I. Background

3. The Commission regulates oil pipeline rates pursuant to the Interstate Commerce Act's (ICA) just and reasonable standard.⁴ In accordance with the Energy Policy Act of 1992 (EPAct 1992),⁵ the Commission adopted the indexing regime to provide a simplified and generally applicable ratemaking methodology for oil pipelines and create

¹ *Sw. Airlines Co. v. FERC*, 926 F.3d 851 (D.C. Cir. 2019) (*Southwest Airlines*).

² *HollyFrontier Ref. & Mktg. LLC v. SFPP, L.P.*, 149 FERC ¶ 61,097 (2014) (October 2014 Order) (holding 2014 Complaints in abeyance); *HollyFrontier Ref. & Mktg. LLC v. SFPP, L.P.*, 157 FERC ¶ 61,186 (2016) (December 2016 Order) (granting rehearing and dismissing 2014 Complaints); *HollyFrontier Ref. & Mktg. LLC v. SFPP, L.P.*, 162 FERC ¶ 61,232 (2018) (March 2018 Order) (denying rehearing).

³ 18 C.F.R. § 343.2(c)(1) (2019).

⁴ 49 U.S.C. app. § 1(5) *et seq.* (1988).

⁵ Energy Policy Act of 1992, Pub. L. No. 102-486 § 1801(b), 106 Stat. 3010 (Oct. 24, 1992).

streamlined procedures related to oil pipeline rates.⁶ Indexing allows oil pipelines to change their tariff rates so long as those rates remain at or below applicable ceiling levels, which change every July 1 based upon an index that tracks industry-wide cost changes. When the Commission created indexing, it also added Page 700 to Form No. 6 to provide cost, revenue, and throughput information so that the Commission and the industry can monitor these indexed rates.⁷

4. In adopting the indexing regime, the Commission established a procedure to allow shippers to challenge rate increases that, while in compliance with the applicable ceiling, are substantially in excess of the actual cost changes that the pipeline incurred. Section 343.2(c)(1) of the Commission's regulations provides that a protest or complaint against an index rate increase must allege "reasonable grounds" that the index rate increase is "so substantially in excess of the actual cost increases incurred by the carrier that the rate is unjust and unreasonable."⁸ The Commission reviews protests and complaints against index rate increases by: (1) applying a preliminary screen based on cost and revenue data from the pipeline's Page 700 and (2) if the preliminary screen is satisfied, investigating the rate or rate increase at a hearing.

⁶ See *Revisions to Oil Pipeline Regulations Pursuant to Energy Policy Act of 1992*, Order No. 561, FERC Stats. & Regs. ¶ 30,985 (cross reference 65 FERC ¶ 61,109) (1993), *order on reh'g and clarification*, Order No. 561-A, FERC Stats. & Regs. ¶ 31,000 (cross reference 68 FERC ¶ 61,138) (1994), *aff'd sub nom. Ass'n of Oil Pipe Lines v. FERC*, 83 F.3d 1424 (D.C. Cir. 1996).

⁷ *Cost-of-Service Reporting and Filing Requirements for Oil Pipelines*, Order No. 571, FERC Stats. & Regs. ¶ 31,006 (cross reference 69 FERC ¶ 61,102) (1994), *order on reh'g and clarification*, Order No. 571-A, FERC Stats. & Regs. ¶ 31,012 (69 FERC ¶ 61,411) (1994), *aff'd sub nom. Ass'n of Oil Pipe Lines v. FERC*, 83 F.3d 1424 (D.C. Cir. 1996); see also *Revisions to and Electronic Filing of the FERC Form No. 6 and Related Uniform Systems of Account*, Order No. 620, FERC Stats. & Regs. ¶ 31,115 (93 FERC ¶ 61,262) (2000), *reh'g denied*, Order No. 620-A, 94 FERC ¶ 61,130 (2001); *Revisions to Page 700 of FERC Form No. 6*, 144 FERC ¶ 61,049, at PP 29-40 (2013), *reh'g denied*, 148 FERC ¶ 61,235 (2014). All jurisdictional pipelines are required to file Page 700, including pipelines exempt from filing the full Form No. 6. 18 C.F.R. § 357.2(a)(2)-(3).

⁸ 18 C.F.R. § 343.2(c)(1) (2019). See also Order No. 561, FERC Stats. & Regs. ¶ 30,985 at 30,951. Protests and complaints can also allege that the indexed rate exceeds the ceiling level. 18 C.F.R. § 343.2(c)(1) (2019). If this is true, then the indexed rate is rejected.

5. Under the Commission's current policy, the preliminary screen differs for protests and complaints. When a proposed index rate increase is protested, the Commission applies the Percentage Comparison Test and will investigate the protested increase if the pipeline's Page 700 revenues exceed its costs and there is more than a 10 percentage-point differential between (a) the index rate increase and (b) the change in the prior two years' total cost-of-service data reported on Page 700, line 9.⁹ By contrast, when a complaint against an index rate increase is filed, the Commission considers "a wider range of factors beyond the Percentage Comparison Test," including the Substantially Exacerbate Test.¹⁰ Pursuant to the Substantially Exacerbate Test, the Commission will investigate a complaint against an index rate increase if the complaint shows that: (1) the pipeline is substantially over-recovering its cost of service (first prong) and (2) the index rate increase so exceeds the actual increase in the pipeline's cost that the resulting rate increase would substantially exacerbate the pipeline's over-recovery (second prong).¹¹

II. Remand in Docket Nos. OR14-35-003 and OR14-36-003

A. 2014 Complaints

6. In the 2014 Complaints, Joint Shippers¹² allege that the Commission should reject SFPP's index rate increases for 2012 and 2013 under the Substantially Exacerbate Test because: (1) SFPP was substantially over-recovering its cost of service at the time of its 2012 and 2013 index filings and (2) the index rate increases substantially exacerbated SFPP's over-recovery. Regarding the 2012 index rate increase, Joint Shippers argue that SFPP's 2011 Page 700 reported a cost-of-service over-recovery of 13.11 percent and that

⁹ E.g., *SFPP, L.P.*, 168 FERC ¶ 61,043, at P 4 (2019) (citing *Calnev Pipe Line, L.L.C.*, 130 FERC ¶ 61,082, at PP 10-11 (2010)).

¹⁰ E.g., *Calnev*, 130 FERC ¶ 61,082, at P 11 (citing *BP West Coast Prods. LLC v. SFPP, L.P.*, 121 FERC ¶ 61,243, at PP 8-9 (2007); *BP West Coast Prods., LLC v. SFPP, L.P.*, 121 FERC ¶ 61,141, at P 7 (2007) (*BP West Coast II*)).

¹¹ *BP West Coast II*, 121 FERC ¶ 61,141 at P 10.

¹² The complainants in Docket No. OR14-35 include: HollyFrontier Refining & Marketing LLC, Southwest Airlines Co., Tesoro Refining and Marketing Company, US Airways, Inc., Valero Marketing and Supply Company, and Western Refining Company, L.P. Chevron Products Company filed a separate complaint in Docket No. OR14-36. The complainants in Docket Nos. OR14-35 and OR14-36 are collectively referred to herein as Joint Shippers.

the index rate increase would increase this over-recovery by approximately 38%.¹³ Regarding the 2013 index rate increase, Joint Shippers contend that SFPP's 2012 Page 700 reported a cost-of-service over-recovery of 10.13 percent and that the index rate increase would increase the over-recovery by approximately 50%.¹⁴

7. In the December 2016 and March 2018 Orders, the Commission dismissed the 2014 Complaints and declined to further investigate SFPP's 2012 and 2013 index rate increases.¹⁵ The Commission found that the 2014 Complaints failed the second prong of the Substantially Exacerbate Test because, notwithstanding the challenged rate increases, data from SFPP's FERC Form No. 6, Page 700 that became available after SFPP implemented the challenged rate increases and before the 2014 Complaints were filed (post-increase data) showed that the difference between SFPP's costs and revenues declined from 13.11 percent in 2011, to 10.13 percent in 2012, to 9.22 percent in 2013.¹⁶ The Commission reasoned that this continuing decline in SFPP's cost-revenue differential was inconsistent with the claim that the 2012 and 2013 index rate increases substantially exacerbated SFPP's pre-existing over-recoveries.¹⁷ The Commission concluded that it would be inefficient and inequitable to ignore additional Page 700 data where that data was available at the time Joint Shippers filed the 2014 Complaints and undermined the basis of Joint Shippers' claims.¹⁸ Moreover, the Commission found Joint Shippers' reliance on earlier Commission orders holding that later-developed data is irrelevant in indexing proceedings to be misplaced.¹⁹

B. Southwest Airlines

8. Following an appeal by Joint Shippers, in *Southwest Airlines*, the court found that the Commission had departed from its prior policy by considering post-increase data in evaluating the 2014 Complaints.²⁰ The court cited two reasons for this conclusion. First,

¹³ OR14-35 Complaint at 13; OR14-36 Complaint at 12-13.

¹⁴ OR14-35 Complaint at 14-15; OR14-36 Complaint at 14-15.

¹⁵ December 2016 Order, 157 FERC ¶ 61,186 at P 8.

¹⁶ *Id.* P 9.

¹⁷ *Id.*

¹⁸ March 2018 Order 162 FERC ¶ 61,232 at P 14.

¹⁹ *Id.* P 15.

²⁰ *Southwest Airlines*, 926 F.3d at 856.

the Commission had previously found that only pre-increase data is relevant in indexing cases and that such data reflects “precisely what indexing is supposed to measure: cost changes in the previous year.”²¹ Second, in three earlier complaint cases, the Commission considered only pre-increase data despite presumably having post-increase data available.²² The court concluded that the Commission’s orders on the 2014 Complaints did not adequately explain its change in policy and that by considering post-increase data in applying the Substantially Exacerbate Test, the Commission had reinterpreted the section 343.2(c)(1) phrase “actual cost increases incurred by the carrier” to include both costs incurred before the rate increase’s filing and costs incurred before the complaint’s filing.²³ The court stated that this reinterpretation “calls into question the purpose of indexing itself. Are index-based rate increases designed to compensate pipelines for cost increases actually incurred in the previous calendar year, costs likely incurred in the current calendar year, or, depending on the type of proceeding, both?”²⁴

9. The court stated that it was not convinced that the Commission could allow this question to go unanswered and remanded the orders so that the Commission, if it chose to use post-increase data in evaluating the 2014 Complaints, could offer a reasoned explanation that persuasively distinguishes or knowingly abandons its prior practice of considering only pre-increase data.²⁵ The court concluded as follows:

Though expressing no opinion on how the Commission should apply the substantially exacerbate test going forward, we emphasize that however the Commission chooses to proceed, it must explain its actions in a way that coheres with the rest of its indexing scheme—namely the manner in which it establishes yearly indexes and the methods it uses to evaluate challenges to index-based rates.

²¹ *Id.* at 856-57 (citing *Tesoro Ref. & Mktg. Co. v. SFPP, L.P.*, 129 FERC ¶ 61,114, at PP 17-18 (2009); *SFPP, L.P.*, 140 FERC ¶ 61,016, at PP 34, 42 (2012)).

²² *Id.* at 857-58 (discussing *BP West Coast Prods. LLC v. SFPP, L.P.*, 118 FERC ¶ 61,261 (2007); *BP West Coast Prods. LLC v. SFPP, L.P.*, 119 FERC ¶ 61,241 (2007) (*BP West Coast I*); *Tesoro Ref. & Mktg. Co. v. Calnev Pipe Line, LLC*, 121 FERC ¶ 61,142 (2007)).

²³ *Id.* at 858.

²⁴ *Id.*

²⁵ *Id.* at 859.

In short, the Commission must provide *a reasoned explanation that treats like cases alike*.²⁶

III. 2019 Complaints

10. On May 24, 2018, SFPP filed in Docket Nos. IS18-380-000 and IS18-380-001 to implement index rate increases for the 2018 index year for its East, West, North, and Oregon Lines. SFPP proposed increases of 8.25 percent for its East and North Lines and 4.41 percent for its West and Oregon Lines. Several shippers filed protests challenging the increases to SFPP's East Line and West Line rates. The Commission applied the Percentage Comparison Test and determined that the differential between the challenged rate increases and the 1.75 percent cost decrease reported on SFPP's 2016 and 2017 Page 700s were within the Commission's 10% threshold for accepting an index filing without further investigation.²⁷ The Commission exercised its discretion not to investigate SFPP's 2018 index rate increases.²⁸

11. On April 4, 2019, American Airlines, Inc., Chevron Products Company, HollyFrontier Refining & Marketing LLC, Southwest Airlines Co., and Valero Marketing and Supply Company (collectively, Joint Complainants) filed a complaint in Docket No. OR19-21-000 challenging SFPP's 2018 index rate increases for its East, West, North, and Oregon Lines under the Substantially Exacerbate Test (OR19-21 Complaint). On August 20, 2019, Tesoro Refining & Marketing Company LLC (Tesoro) and Western Refining Company, L.P. (Western, and together with Tesoro, TW Shippers) filed a complaint in Docket No. OR19-33-000 raising largely identical issues and moved for consolidation with Docket No. OR19-21-000 (OR19-33 Complaint). On September 27, 2019, Phillips 66 Company (Phillips 66) filed a complaint in Docket No. OR19-37-000 challenging the same index rate increases (OR19-37 Complaint).

12. The 2019 Complaints allege that SFPP's 2018 index rate increases are unjust and unreasonable, claiming that SFPP was substantially over-recovering its cost of service at the time of the increases and the increases will substantially exacerbate that over-recovery.²⁹ According to the 2019 Complaints: (1) SFPP's 2017 Page 700 shows interstate revenues of \$174,838,939 and an interstate cost of service of \$164,190,607, reflecting an over-recovery of 6.49 percent, and (2) the 2018 index rate increases are

²⁶ *Id.* (emphasis added).

²⁷ *SFPP, L.P.*, 163 FERC ¶ 61,232, at PP 13, 20 (2018).

²⁸ *Id.* PP 11-12, 19-25.

²⁹ OR19-21 Complaint at 6, 8-10; OR19-33 Complaint at 5, 7-9; OR19-37 Complaint at 8-10.

expected to exacerbate SFPP's over-recovery by least \$7.7 million, or 72%.³⁰ The 2019 Complaints request that the Commission summarily rescind or set the index rate increases for hearing and award reparations for amounts paid to SFPP in excess of the rates determined to be just and reasonable.³¹

IV. Public Notice and Answers

13. Notice of the OR19-21 Complaint was issued on April 5, 2019, providing for answers, protests, and interventions to be filed on or before May 3, 2019. On May 3, 2019, SFPP filed an answer to the OR19-21 Complaint. On May 20, 2019, Joint Complainants filed an answer to SFPP's answer. On June 4, 2019, SFPP filed an answer to Joint Complainants' answer.

14. Notice of the OR19-33 Complaint was issued on August 21, 2019, providing for answers, protests, and interventions to be filed on or before September 19, 2019. On September 18, 2019, SFPP filed an answer to the OR19-33 Complaint. On September 19, 2019, Phillips 66 filed a motion to intervene in Docket No. OR19-33-000. On October 3, 2019, TW Shippers filed an answer to SFPP's answer. On October 16, 2019, SFPP filed an answer to TW Shippers' answer.

15. Notice of the OR19-37 Complaint was issued on October 9, 2019, providing for answers, protests, and interventions to be filed on or before October 17, 2019. SFPP filed an answer to the OR19-37 Complaint on October 17, 2019. On November 1, 2019, Phillips 66 filed an answer to SFPP's answer. On November 7, 2019, SFPP filed an answer to Phillips 66's answer.

16. In its answers to the 2019 Complaints, SFPP argues that the 2019 Complaints fail the Substantially Exacerbate Test because a 6.49 percent over-recovery is not substantial under the first prong of the test.³² SFPP contends that deeming a 6.49 percent over-recovery to be substantial would undermine indexing's cost efficiency incentives.³³ SFPP also argues that the Substantially Exacerbate Test can produce irrational results

³⁰ OR19-21 Complaint at 8-9; OR19-33 Complaint at 7-8; OR19-37 Complaint at 9 & n.9.

³¹ OR19-21 Complaint at 6, 11-12, 16; OR19-33 Complaint at 5-6, 10-12, 17; OR19-37 Complaint at 2, 10, 14.

³² SFPP Answer to OR19-21 Complaint at 5-12; SFPP Answer to OR19-33 Complaint at 5-11; SFPP Answer to OR19-37 Complaint at 5-11.

³³ SFPP Answer to OR19-21 Complaint at 8-9; SFPP Answer to OR19-33 Complaint at 8-9; SFPP Answer to OR19-37 Complaint at 8-10.

because as a pipeline's over-recovery declines, the degree by which an index rate increase exacerbates that over-recovery increases.³⁴ SFPP asserts that because of this mechanical flaw, "the Commission should adopt a relatively high threshold for what constitutes a 'substantial over-recovery' under the first prong of the test."³⁵

17. SFPP further contends that the *Arizona Grocery* doctrine may foreclose the 2019 Complaints.³⁶ SFPP states that under *Arizona Grocery*, Commission-mandated just and reasonable rates may only be changed prospectively.³⁷ SFPP states that Commission decisions in several pending proceedings will establish just and reasonable rates for SFPP's East, West, North, and Oregon Lines.³⁸ SFPP claims that such rates, once established, will then be indexed forward to establish just and reasonable rates for subsequent years including the indexing periods covered by the 2019 Complaints.³⁹ SFPP argues that because these rates could only be adjusted prospectively under *Arizona Grocery*, the requests for reparations are moot.⁴⁰

³⁴ SFPP Answer to OR19-21 Complaint at 12-15; SFPP Answer to OR19-33 Complaint at 11-14; SFPP Answer to OR19-37 Complaint at 12-14.

³⁵ SFPP Answer to OR19-21 Complaint at 15; SFPP Answer to OR19-33 Complaint at 14; SFPP Answer to OR19-37 Complaint at 14.

³⁶ *Ariz. Grocery Co. v. Atchison, Topeka & Santa Fe Ry. Co.*, 284 U.S. 379 (1932) (*Arizona Grocery*).

³⁷ SFPP Answer to OR19-21 Complaint at 18 (citing *SFPP, L.P.*, 111 FERC ¶ 61,334, at PP 56-57 (2005)); SFPP Answer to OR19-33 Complaint at 15; SFPP Answer to OR19-37 Complaint at 15.

³⁸ SFPP states that the Commission is in the process of establishing just and reasonable rates for SFPP's West Line in Docket No. IS08-390 and SFPP's East Line in Docket No. IS09-437. In addition, SFPP states that the resolution of complaints in Docket Nos. OR11-13, OR11-16, and OR11-18 may lead to determinations regarding the just and reasonable rates for SFPP's West, North, and Oregon Lines. SFPP Answer to OR19-21 Complaint at 17-18; SFPP Answer to OR19-33 Complaint at 14-15; SFPP Answer to OR19-37 Complaint at 15.

³⁹ SFPP Answer to OR19-21 Complaint at 17-18; SFPP Answer to OR19-33 Complaint at 14-15; SFPP Answer to OR19-37 Complaint at 15.

⁴⁰ SFPP Answer to OR19-21 Complaint at 18; SFPP Answer to OR19-33 Complaint at 15; SFPP Answer to OR19-37 Complaint at 15-16.

18. SFPP also claims that the OR19-21 Complaint fails to make a good faith effort to quantify the financial action or burden as required by Rule 206(b)(4) of the Commission's Rules of Practice and Procedure.⁴¹ In addition, SFPP argues that TW Shippers lack standing to bring a complaint against certain of SFPP's pipelines.⁴² Finally, SFPP submits that if the Commission does not reject the 2019 Complaints, it should hold them in abeyance pending final resolution of complaints against SFPP's base rates in Docket Nos. OR11-13, OR11-16, OR11-18, and OR16-6.⁴³

V. Discussion

A. Procedural Matters

19. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,⁴⁴ all unopposed and timely filed motions to intervene and any unopposed motions to intervene out of time in Docket Nos. OR19-21, OR19-33, and OR19-37 filed before the issuance date of this order are granted. Rule 213 of the Commission's Rules of Practice and Procedure⁴⁵ prohibits answers to answers unless otherwise ordered by the decisional authority. We are not persuaded to accept the answers to answers in Docket Nos. OR19-21, OR19-33, and OR19-37 and will, therefore, reject them.

B. Substantive Matters

20. In *Southwest Airlines*, the court remanded the Commission's orders dismissing the 2014 Complaints for the Commission to evaluate those complaints solely based on pre-increase data or, if the Commission uses post-increase data, to persuasively distinguish or knowingly abandon its prior practice of considering only pre-increase data in evaluating complaints against index rate increases. The court directed the Commission, in making this determination, to address whether index rate increases are designed to compensate pipelines for actual cost increases incurred during the previous calendar year, costs likely

⁴¹ SFPP Answer to OR19-21 Complaint at 15-17 (citing 18 C.F.R. § 385.206(b)(4) (2019)).

⁴² SFPP Answer to OR19-33 Complaint at 16.

⁴³ SFPP Answer to OR19-21 Complaint at 19-20; SFPP Answer to OR19-33 Complaint at 16-17; SFPP Answer to OR19-37 Complaint at 16-17.

⁴⁴ 18 C.F.R. § 385.214.

⁴⁵ *Id.* § 385.213(a)(2).

incurred in the current calendar year, or both.⁴⁶ The court emphasized that the Commission must explain its decision in a manner that “coheres with the rest of its indexing scheme” and “treats like cases alike.”⁴⁷

21. Upon review of the policies governing evaluation of challenges to index rate increases, we propose to modify the Commission’s existing policy by eliminating the Substantially Exacerbate Test and applying the Percentage Comparison Test to both protests and complaints under section 343.2(c)(1) of the Commission’s regulations. In our view, several considerations support this proposed change in policy. First, we are concerned that the Substantially Exacerbate Test has not been defined, suffers from mechanical flaws, and appears to be inconsistent with the purposes of indexing and the language of section 343.2(c)(1). Second, applying the Percentage Comparison Test, which relies upon pre-increase Page 700 data, to both protests and complaints would better adhere to the purposes of indexing and respond to the *Southwest Airlines* remand by adopting a single standard for governing challenges to index rate changes based upon pre-increase data that would treat like cases alike. Third, this approach would provide the foregoing benefits without depriving shippers of the ability to challenge a pipeline’s rates where the pipeline is substantially over-recovering its cost of service.

1. Concerns with the Substantially Exacerbate Test

a. The Substantially Exacerbate Test Has Not Been Defined

22. Because only a relatively small number of complaints have invoked the Substantially Exacerbate Test since its adoption in 2007, the showings needed to satisfy its two prongs are largely undefined and the Commission has not established numerical thresholds for either prong. Among the five proceedings in which the complainants sought relief pursuant to the Substantially Exacerbate Test,⁴⁸ the Commission has established a hearing to investigate an index-related complaint on only one occasion. In Docket Nos. OR07-8 and OR07-11, the Commission established a hearing to investigate complaints alleging that SFPP was over-recovering its cost of service by \$16 million and that the challenged index rate increase would have “represented an increase in SFPP’s

⁴⁶ *Southwest Airlines*, 926 F.3d at 859.

⁴⁷ *Id.*

⁴⁸ These five proceedings include: (1) Docket Nos. OR07-08 and OR07-11, (2) Docket No. OR07-16, (3) Docket No. OR07-20, (4) Docket No. OR09-18, and (5) Docket Nos. OR14-35 and OR14-36, which addressed the 2014 Complaints. Notably, all of these proceedings involved either SFPP or its affiliate Calnev Pipe Line, L.L.C.

return of some 25%.”⁴⁹ Adopting the Substantially Exacerbate Test for the first time, the Commission found that these showings “might normally be sufficient” to satisfy the new standard⁵⁰ and set the complaints for hearing.⁵¹ The Commission did not, however, define generally applicable minimum thresholds that complaints invoking the Substantially Exacerbate Test would be required to satisfy going forward.⁵² The four subsequent complaint proceedings likewise did not clarify the threshold showings required to satisfy the Substantially Exacerbate Test.⁵³

23. The Commission therefore has not opined upon the minimum levels of over-recovery and exacerbation required to justify setting a complaint for hearing under the Substantially Exacerbate Test. As a result, the standards on which parties may rely in bringing or defending against index increase complaints or which the Commission may apply in deciding whether to investigate such complaints at a hearing are not clear.

⁴⁹ *BP West Coast II*, 121 FERC ¶ 61,141 at P 8.

⁵⁰ *BP West Coast I*, 119 FERC ¶ 61,241 at P 11.

⁵¹ The Commission initially held the complaints in abeyance pending the resolution of ongoing proceedings involving generic oil pipeline cost-of-service issues and set the complaints for hearing and settlement judge procedures after those proceedings concluded. *BP West Coast II*, 121 FERC ¶ 61,141 at P 8 (holding complaints in abeyance); *ExxonMobil Oil Corp. v. SFPP, L.P.*, 122 FERC ¶ 61,129, at P 1 (2008) (setting complaints for hearing).

⁵² The hearing established to address the complaints resulted in settlement. *See BP West Coast Prods., LLC v. SFPP, L.P.*, 125 FERC ¶ 61,138, at P 2 (2008) (letter order approving uncontested settlement).

⁵³ The Commission found in three of these proceedings that the complaints failed the Substantially Exacerbate Test because the challenged index rate increases were smaller than the actual changes in the pipelines’ costs. *See Tesoro Ref. & Mktg. Co. v. Calnev Pipe Line, L.L.C.*, 121 FERC ¶ 61,142, at P 7 (2007) (OR07-16); *BP West Coast Prods. LLC v. SFPP, L.P.*, 121 FERC ¶ 61,243, at P 4 (2007) (OR07-20); *SFPP, L.P.*, 129 FERC ¶ 61,228, at P 41 (2009) (OR09-18). As discussed above, the fourth proceeding involved the 2014 Complaints, which the Commission held failed the Substantially Exacerbate Test’s exacerbation prong because post-increase Page 700 data showed that SFPP’s cost-revenue divergence decreased after SFPP implemented the challenged increases. December 2016 Order, 157 FERC ¶ 61,186 at P 9.

b. The Substantially Exacerbate Test May be Mechanically Flawed

24. We are concerned that the Substantially Exacerbate Test may suffer from an inherent mechanical flaw that makes developing analytically sound thresholds unworkable: as a pipeline's over-recovery increases, an index rate increase will exacerbate the over-recovery by a lower percentage; conversely, applying the same index rate increase to a lower level of over-recovery will exacerbate the over-recovery by a higher percentage. This relationship between the Substantially Exacerbate Test's two prongs, where higher levels of over-recovery lead to lower degrees of exacerbation, causes the Substantially Exacerbate Test to yield irrational results whereby complaints against pipelines with higher over-recoveries would be less likely to be investigated.

25. This phenomenon is demonstrated in the table below, which presents results of the Substantially Exacerbate Test over a relevant range of over-recovery and index levels.⁵⁴ The table shows that the Substantially Exacerbate Test is driven entirely by (1) the extent of the pipeline's over-recovery and (2) the level of the index rate increase.

Table – Exacerbation Percentages at Various Over-Recovery-Index Combinations

		Index Level								
		1%	2%	3%	4%	5%	6%	7%	8%	9%
Revenues Exceeding Costs	5%	21	42	63	84	105	126	147	168	189
	10%	11	22	33	44	55	66	77	88	99
	15%	8	15	23	31	38	46	54	61	69
	20%	6	12	18	24	30	36	42	48	54
	25%	5	10	15	20	25	30	35	40	45
	30%	4	9	13	17	22	26	30	35	39
	35%	4	8	12	15	19	23	27	31	35
	40%	3	7	11	14	18	21	25	28	32
	45%	3	6	10	13	16	19	23	26	29
	50%	3	6	9	12	15	18	21	24	27

⁵⁴ Since its inception in 1995, the oil pipeline index has ranged from -2.0 percent to 8.6 percent. Because the Substantially Exacerbate Test would not apply to an index that is less than zero (a negative index), the range of index levels presented in the columns of the table encompasses the historical levels of the oil pipeline index.

26. The table shows that at low levels of over-recovery, a modest index rate increase exacerbates the over-recovery by a large percentage. For example,⁵⁵ the second line of the table indicates that applying a 4 percent index rate increase to an over-recovery of 10% will exacerbate the over-recovery by 44%. In comparison, the same increase would only exacerbate a 50% over-recovery by 12%. This leads to a perverse result whereby a complaint against the pipeline with the 50% over-recovery is less likely to be set for hearing under the Substantially Exacerbate Test than a complaint against the pipeline with the 10% over-recovery due to the lower degree of exacerbation. There appears to be no combination of threshold levels for the first and second prongs of the test that would yield reasonable results in all circumstances. This mechanical flaw raises concerns regarding whether the Substantially Exacerbate Test provides a workable standard for the Commission to evaluate complaints under section 343.2(c)(1).

c. The Substantially Exacerbate Test is Arguably Inconsistent with Indexing's Purpose

27. In addition to its apparent mechanical flaw, we are concerned that the Substantially Exacerbate Test is inconsistent with the purposes of indexing. Indexing allows annual pipeline rate increases to reflect industry-wide cost changes during the prior year so that the pipeline's rates will be sufficient to recover future years' costs. Under the indexing regime, protests and complaints against index rate increases are intended to provide a "fail safe" ensuring that a particular pipeline's proposed increase does not "substantially exceed" its cost changes.⁵⁶ The Substantially Exacerbate Test, however, arguably does not closely adhere to indexing's purpose. Rather than measure the pipeline's proposed index rate increase relative to its already incurred annual cost increases, the Substantially Exacerbate Test considers the pipeline's revenues and whether the index rate increase will substantially worsen the gap between revenues and costs going forward.

⁵⁵ The Substantially Exacerbate Test measures over-recovery using the equation $\frac{(Revenues - Costs)}{(Costs)}$ and measures exacerbation using the equation $\frac{((Revenues - Costs) * Index Adjustment) - (Revenues - Costs)}{(Revenues - Costs)}$.

⁵⁶ Order No. 561, FERC Stats. & Regs. ¶ 30,985 at 30,951; *Revisions to Oil Pipeline Regulations Pursuant to Energy Policy Act of 1992*, Order No. 561-A, FERC Stats. & Regs. ¶ 31,000, at 31,092, *aff'd sub nom. Ass'n of Oil Pipe Lines v. FERC*, 83 F.3d 1424 (D.C. Cir. 1996); *Five-Year Review of Oil Pipeline Pricing Index*, 93 FERC ¶ 61,266, at 61,855 (2000); *see also Chevron Prods. Co. v. SFPP, L.P.*, 138 FERC ¶ 61,115, at P 20 (2012).

d. The Substantially Exacerbate Test Appears to be Inconsistent with Commission Regulations

28. We are also concerned that the Substantially Exacerbate Test appears to be inconsistent with the plain language of section 343.2(c)(1), which sets forth the standard that protests and complaints against index rate increases must satisfy. Section 343.2(c)(1) provides that protests and complaints “must allege reasonable grounds for asserting . . . that the rate increase is *so substantially in excess of the actual cost increases* incurred by the carrier that the rate is unjust and unreasonable.”⁵⁷ This standard makes no reference to over-recovery, and instead requires comparing the challenged index rate increase to actual cost increases that the pipeline has incurred. The Substantially Exacerbate Test considers different information, requiring an analysis of the magnitude of the difference between the pipeline’s revenues and costs and the degree to which the index rate increase will worsen that differential.

29. This inconsistency is further reflected in the rationale the Commission found persuasive in adopting the Substantially Exacerbate Test in *BP West Coast I* and *II*. The Commission stated in *BP West Coast I*:

The instant complaint essentially argues that . . . if a pipeline is substantially over recovering its cost of service, the Commission should not allow the carrier a further increase under indexing *even though the rate increase for the year is not substantially in excess of the cost increase for the year*. Upon further review here, the Commission agrees⁵⁸

The italicized language contradicts section 343.2(c)(1)’s requirement that complaints must “allege reasonable grounds for asserting that . . . the *rate increase is so substantially in excess of the actual cost increases* incurred by the carrier that the rate is unjust and unreasonable.”⁵⁹

30. The Substantially Exacerbate Test therefore appears to be inconsistent with both indexing’s purpose and the Commission’s regulation governing challenges to index rate increases. In our view, this tension between purpose and effect supports eliminating the Substantially Exacerbate Test as the preliminary screen applied to index increase

⁵⁷ 18 C.F.R. § 343.2(c)(1).

⁵⁸ *BP West Coast I*, 119 FERC ¶ 61,241 at PP 10-11 (emphasis added).

⁵⁹ 18 C.F.R. § 343.2(c)(1) (emphasis added).

complaints, in favor of a screen that more closely adheres to the purpose of the indexing regime and the language of section 343.2(c)(1).

e. **Eliminating the Substantially Exacerbate Test Would Not Deprive Shippers of the Ability to Challenge Rates Where the Pipeline is Substantially Over-Recovering its Cost of Service**

31. Upon further review of the Substantially Exacerbate Test we find that, contrary to the Commission's concern expressed in *BP West Coast II*,⁶⁰ eliminating the Substantially Exacerbate Test would not deprive shippers of the ability to challenge a pipeline's rates where the pipeline is substantially over-recovering its cost of service. Regardless of the standard applied to complaints against individual index rate increases, shippers concerned that a pipeline may be substantially over-recovering may file a cost-of-service complaint challenging the pipeline's rates that have historically been indexed. Such a complaint, if successful, would eliminate the pipeline's over-recovery. In contrast, a complaint against an individual index rate increase will only address that particular rate increase.

2. **Proposed New Policy to Apply the Percentage Comparison Test to Complaints Against Index Increases**

32. In light of the foregoing concerns regarding the existing policy of applying the Substantially Exacerbate Test to evaluate complaints under section 343.2(c)(1), we propose to eliminate the Substantially Exacerbate Test and apply the Percentage Comparison Test to both protests and complaints. Under this proposed approach, the Commission would apply the Percentage Comparison Test to complaints against index rate increases and establish a hearing to investigate the increase when the complaint shows that the pipeline's Page 700 revenues exceed its costs and that there is a 10% or more differential between (a) the proposed index rate increase and (b) the annual percentage change in cost of service reported on line 9, Page 700, over the two years preceding the index rate increase. We direct the parties to submit briefs addressing this proposed policy change, as discussed below.

a. **The Percentage Comparison Test May Be a Better Approach Than the Substantially Exacerbate Test**

33. We believe that applying the Percentage Comparison Test to both protests and complaints under section 343.2(c)(1) would resolve the aforementioned concerns with the existing policy for evaluating complaints against index rate increases. The Percentage Comparison Test lacks the apparent mechanical defect discussed above that causes the Substantially Exacerbate Test to yield irrational results, and thus provides parties and the

⁶⁰ *BP West Coast II*, 121 FERC ¶ 61,141 at P 7; see also *infra* PP 36-37.

Commission with a more workable standard for assessing whether a challenge to an index rate increase satisfies the standard of section 343.2(c)(1).

34. Furthermore, the Percentage Comparison Test more closely conforms to indexing's purpose and to the language of section 343.2(c)(1). As discussed above, indexing allows for oil pipelines to increase their rates to reflect industry-wide cost changes during the prior year so that the pipeline's rates will be sufficient to recover future costs. The Percentage Comparison Test accords with this purpose: by examining the pipeline's annual rate changes relative to its annual cost changes and permitting an investigation when the two significantly diverge, the Percentage Comparison Test ensures that each annual index rate increase fulfills its intended role. In this way, the Percentage Comparison Test is also more consistent with the language of section 343.2(c)(1), as it compares the challenged index rate increase to the pipeline's already incurred cost changes and relies upon this comparison to determine whether the rate increase was, in fact, "substantially in excess" of the cost changes.

35. Replacing the Substantially Exacerbate Test with the Percentage Comparison Test would also respond to the concerns that the court expressed in *Southwest Airlines*. The court found that the Commission's consideration of post-increase Page 700 data in dismissing the 2014 Complaints marked an unjustified departure from the Commission's prior practice of relying exclusively upon pre-increase data in evaluating such complaints. Applying the Percentage Comparison Test to complaints against index increases would make Commission policy consistent by adopting a single standard that relies solely upon pre-increase data for the two-year period preceding the index rate increase.⁶¹ This approach would be consistent with the Commission's prior practice of considering only Page 700 data for the prior two years in evaluating index rate increase complaints⁶² and conform to the Commission's prior recognition that "[t]he only relevant evidence in indexing cases is the change in the pipeline's cost-of-service in the two years preceding the proposed index rate increase."⁶³ Moreover, adopting a single test

⁶¹ *E.g.*, *SFPP, L.P.*, 143 FERC ¶ 61,140, at P 5 (2013) (quoting *Calnev Pipe Line L.L.C.*, 130 FERC ¶ 61,082, at P 10) ("The percentage comparison test . . . 'compare[s] the Page 700 cost data contained in the company's annual FERC Form No. 6 to the data that is reflected in the index filing for a given year with the data for [the] prior year'").

⁶² *See BP West Coast Prods. LLC v. SFPP, L.P.*, 118 FERC ¶ 61,261, at PP 8-9 (2007); *BP West Coast I*, 119 FERC ¶ 61,241 at P 9; *Tesoro Ref. & Mktg. Co. v. Calnev Pipe Line, L.L.C.*, 121 FERC ¶ 61,142, at P 7 (2007).

⁶³ *SFPP, L.P.*, Opinion No. 527, 143 FERC ¶ 61,213, at P 87 (2013) (emphasis in original), *order on reh'g*, Opinion No. 527-A, 162 FERC ¶ 61,230 (2018); *see also SFPP, L.P.*, 140 FERC ¶ 61,016, at P 34 (2012) (same).

applicable to all challenges to index rate changes would establish a more coherent policy that treats like cases alike⁶⁴ and eliminate any tensions that result from interpreting section 343.2(c)(1) differently depending upon whether a challenge takes the form of a protest or a complaint.

36. We acknowledge that the Commission has previously found that it is not arbitrary to interpret section 343.2(c)(1) differently depending upon whether the challenge to the index rate change takes the form of a protest or a complaint.⁶⁵ In making this finding, the Commission reasoned that the different procedural frameworks for protest and complaint proceedings warranted applying different interpretations of section 343.2(c)(1) to these pleadings and that applying the same standards in both types of proceeding “would effectively deprive shippers of any opportunity to question the rate levels and the returns resulting from the pipeline’s annual index-based rate filings based on changes in the dollar yield from the rate index.”⁶⁶

37. We now believe, however, that applying a single interpretation of section 343.2(c)(1) in both protest and complaint proceedings is preferable. First, the court in *Southwest Airlines* instructed the Commission to evaluate index increase complaints in a manner that coheres with the rest of its indexing scheme and “treats like cases alike.”⁶⁷ Commission regulations require protests and complaints against index rate increases to make the same showing: that the challenged increase “is so substantially in excess of the actual cost increases incurred by the carrier that the rate is unjust and unreasonable.”⁶⁸ While differing procedural frameworks may justify curtailing the amount of information the Commission will consider in the more accelerated protest proceedings, they do not, in our view, warrant applying different interpretations—which rely upon separate information—of the common regulatory standard such that like challenges to an index rate increase are not treated alike based upon the form of pleading. Consistent with existing practice, under the proposed approach the Commission would continue to strictly confine its evaluation of protests to the Percentage Comparison Test, while retaining the discretion to consider additional factors (i.e., in addition to the Percentage Comparison Test) in evaluating complaints. Such additional factors, however, would be required to cohere with complainant’s burden to demonstrate that the index rate increase so

⁶⁴ *Southwest Airlines*, 926 F.3d at 859 (“[T]he Commission must provide a reasoned explanation that treats like cases alike.”).

⁶⁵ *BP West Coast II*, 121 FERC ¶ 61,141 at P 7.

⁶⁶ *Id.*

⁶⁷ *Southwest Airlines*, 926 F.3d at 859.

⁶⁸ 18 C.F.R. § 343.2(c)(1).

substantially exceeds the actual cost increases reported on the pipeline's Page 700 over the two years preceding the index rate increase that the resulting rate is unjust and unreasonable.

38. In addition, although applying the Percentage Comparison Test to index increase complaints would not allow shippers to challenge the rate increase based upon the increase's impact upon the pipeline's alleged over-recoveries, this result would not be inconsistent with the Commission's indexing scheme. As discussed above, indexing allows annual pipeline rate increases to reflect industry-wide cost changes during the prior year. Consistent with indexing's purpose, the Commission has previously held that the only relevant information in reviewing index rate increases is the change in the pipeline's costs over the two years preceding the increase,⁶⁹ and our proposed policy change would bring the standard applied to index increase complaints in line with that precedent by limiting the inquiry in index increase complaint proceedings to the relationship between the rate increase and the pipeline's prior change in cost. Shippers concerned about the level of over-recovery resulting from an index rate increase and its effect upon the pipeline's overall rate may file complaints challenging the justness and reasonableness of the pipeline's base rate.⁷⁰

b. 10 Percent Threshold in the Percentage Comparison Test

39. Furthermore, we propose to maintain the Percentage Comparison Test's existing 10% threshold in applying the test to complaints against index rate increases. Under our proposed approach, to establish reasonable grounds to conclude that an index rate increase is so substantially in excess of the pipeline's actual cost increases under section 343.2(c)(1), a complainant would be required to show that the challenged rate increase and the pipeline's cost change over the prior two years diverged by at least 10%. Although we propose to maintain the 10% threshold consistent with the Commission's historical practice involving protests against annual index rate changes, we seek further comment as discussed below.

40. The Commission possesses significant discretion in setting numerical thresholds,⁷¹ and courts will generally uphold an agency's threshold if "the figure selected by the agency reflects its informed discretion, and is neither patently unreasonable nor 'a dictate

⁶⁹ *SFPP, L.P.*, 140 FERC ¶ 61,016, at P 34 (2012).

⁷⁰ *See supra* P 31.

⁷¹ *E.g.*, *ExxonMobil Gas Mktg. Co. v. FERC*, 297 F.3d 1017, 1085 (D.C. Cir. 2002) (quoting *AT&T Corp. v. FCC*, 220 F.3d 607, 627 (D.C. Cir. 2000)) ("FERC 'has wide discretion to determine where to draw administrative lines.'"); *Mo. Pub. Serv. Comm'n v. FERC*, 215 F.3d 1, 4 (D.C. Cir. 2000).

of unbridled whim.’’⁷² In our view, adopting a numerical threshold in this context is necessary to ensure that indexing proceedings continue to be conducted in a simplified and streamlined manner. Defining a numerical threshold for index increase complaints would further the goals of simplified and efficient ratemaking by, in most instances, obviating the need for case-by-case determinations of whether an alleged gap between the challenged rate increase and the pipeline’s change in costs is so great as to raise issues of rate reasonableness that warrant further investigation.

41. The Percentage Comparison Test’s 10% threshold developed gradually through the adjudication of protests to index rate increases,⁷³ and there are reasons why the 10% threshold could apply to complaints as well.

42. First, this threshold preserves indexing’s cost efficiency incentives and encourages pipelines to control costs. The index measures industry-wide cost changes and allows for some gap between an individual pipeline’s rates and its costs.⁷⁴ Allowing rates to exceed costs to a modest degree encourages pipelines to operate efficiently by permitting them to retain a portion of their cost savings⁷⁵ while also placing downward pressure on the industry-wide index level.⁷⁶ It is therefore important to set the threshold for a tolerable gap between rate increases and cost changes above a *de minimis* level so that pipelines have the incentive to control costs and reap the benefits of efficiency gains.

⁷² *Vonage Holdings Corp. v. FCC*, 489 F.3d 1232, 1242 (D.C. Cir. 2007) (quoting *WJG Tel. Co. v. FCC*, 675 F.2d 386, 388-89 (D.C. Cir. 1982)).

⁷³ The 10% threshold developed through Commission orders in which the Commission initiated investigations where the divergence under the Percentage Comparison Test was slightly over 10 percent and declined to investigate where the divergence was slightly less than 10 percent. *Compare SFPP, L.P.*, 139 FERC ¶ 61,267, at P 10 (2012) (rejecting protests to an index rate increase where the increase exceeded the cost change by 9.88 percent), *with Calnev Pipeline L.L.C.*, 115 FERC ¶ 61,387, at PP 10-11 (2006) (setting index rate increase for hearing based upon 10.95 percent differential), *and SFPP, L.P.*, 139 FERC ¶ 61,266, at P 7 (2012) (setting index rate increase for hearing based upon 13.1 percent differential).

⁷⁴ Order No. 561, FERC Stats. & Regs. ¶ 30,985 at 30,949.

⁷⁵ *Id.*

⁷⁶ Because the Commission recalculates the index based upon industry-wide cost changes over the prior five-year period, any efficiencies that pipelines obtain over that prior period will tend to reduce the index level.

43. Industry-wide cost data illustrate this point. The level of the annual index has averaged approximately 4.10 percent over the last 15 years. In 10 of those years, the index level has exceeded 4.10 percent. Moreover, in five of the last 15 years, the index level has exceeded 5 percent, reaching as high as 8.6 percent. Accordingly, setting the threshold below 10% could undermine indexing's efficiency incentives. If the threshold is only slightly higher than the index level for a given year, pipelines would have little incentive to reduce costs because a slight cost reduction could render the pipeline unable to implement a full index rate increase.⁷⁷ Moreover, a threshold equal to⁷⁸ or lower than⁷⁹ the index level for a given year would encourage pipelines to maintain or increase costs in order to implement an index rate increase. As a result, a threshold at or slightly above the index level could weaken pipelines' incentive to reduce costs which, in turn, could inflate the index adder for future years. Accordingly, maintaining the existing 10% threshold may best preserve indexing's efficiency incentives while affording a balance that would not shield unreasonable rate increases from scrutiny.

44. Second, the potential that a threshold below 10% could yield distorted outcomes is amplified by the high annual volatility in oil pipeline cost and volume data. Because a pipeline's cost changes may vary significantly from year to year, the pipeline's ability to implement an annual index rate increase in a given year may likewise vary. Depending upon the magnitude of the pipeline's cost increases or decreases, the level of divergence between cost changes and index rate increases permitted under the Percentage Comparison Test can impact pipelines' ability to recover costs over time. For example, a 5-percent cost decline in one year, which could lead to the denial of an index rate increase, may be followed by a 15% cost increase in the next year, which would likely significantly exceed the permitted index rate increase. In this way, a low threshold that does not account for annual shifts in pipeline costs could cause pipelines to under-recover

⁷⁷ For example, if the threshold is set at 5 percent, pipelines that reduce costs by 1 percent over the prior two years may be unable to implement an index rate increase at the 4.10 percent average. An index level exceeding 4.10 percent would further diminish a pipeline's incentive to reduce costs.

⁷⁸ If, for instance, the index level for a given year is 6 percent, and the Percentage Comparison Test threshold is set at 6 percent, pipelines would have little incentive to reduce their costs because even a 1 percent cost reduction would result in the pipeline's cost change diverging from the 6 percent index level by more than the 6 percent threshold.

⁷⁹ If the index level is 7 percent and the Percentage Comparison Test threshold is 6 percent, pipelines could be incentivized to increase their costs to bring the gap between their cost change and the index level within 7 percent, thereby undermining indexing's cost efficiency incentives.

their costs over time. Along similar lines, a low threshold could also unfairly differentiate between a pipeline with sizable one-year cost declines and a pipeline whose costs decline at a more consistent pace: the former may be barred from implementing an index rate increase while the latter is not, even where the former's cost changes deviate less from the index level than the latter's.⁸⁰

45. For the reasons stated above and consistent with the Commission's historical practice involving protests against index rate increases, we propose to maintain the 10% threshold for the Percentage Comparison Test in applying the test to complaints under section 343.2(c)(1). However, in the briefing requested below, we invite the parties to comment on our proposed threshold and present and justify any alternative threshold that they believe would be superior.

3. Briefing

46. We direct the parties to these proceedings⁸¹ to submit briefs addressing the Commission's proposal to eliminate the Substantially Exacerbate Test as the screen applied to index increase complaints and apply the Percentage Comparison Test in evaluating both protests and complaints under section 343.2(c)(1). The briefs should address the merits of the Commission's proposal, whether the Commission should apply the Percentage Comparison Test's existing 10% threshold to complaints, and whether and how the Commission should consider additional factors beyond the Percentage Comparison Test in evaluating index increase complaints. In addition, the parties may propose alternative methods or standards for the Commission to apply in determining whether an index increase complaint satisfies the requirements of section 343.2(c)(1). The parties should fully justify any such alternatives and explain why the alternative is superior to the Percentage Comparison Test. The parties may also

⁸⁰ For example, if the threshold is set at 8 percent, Pipeline A with 3 percent cost decreases in year one and year two would be permitted to implement index rate increases at the 4.10 percent average for both years. However, Pipeline B with no cost changes in year one and a 4 percent cost decrease in year two would be unable to implement a full 4.10 percent index rate increase for year two, despite the fact that Pipeline B's costs deviated less from the index level over two years than the costs of Pipeline A (by instead of 6 percent).

⁸¹ SFPP argues that TW Shippers do not ship on all four of SFPP's pipelines at issue in these proceedings and therefore lack standing to challenge the index rate increases for the pipelines on which they do not ship. SFPP Answer to OR19-33 Complaint at 16. At this stage, however, these proceedings involve challenges to the index rate increases on all four of the pipelines, and it is undisputed that TW Shippers have shipped on some these pipelines. We will therefore defer ruling on questions of standing with regard to particular pipelines at this time.

propose alternative Percentage Comparison Test thresholds, but must fully explain why any alternative thresholds are superior to the existing 10% threshold. Initial briefs shall be due 60 days from the date of this order. Responses to those initial briefs shall be due 30 days later.⁸²

4. Arizona Grocery

47. Lastly, we reject as without merit SFPP's claim that ongoing complaint and cost-of-service rate proceedings addressing its East, West, North, and Oregon Line rates will render the challenges to its 2018 index rate increases moot under *Arizona Grocery*. The *Arizona Grocery* doctrine provides that when the Commission has prescribed a final just and reasonable rate on which the carrier has relied, the Commission may only modify that rate prospectively and may not thereafter order the carrier to pay reparations measured by a lower rate later determined to be just and reasonable.⁸³ Here, because the cited proceedings addressing SFPP's base rates are ongoing and the Commission has not established final rates on which SFPP could have relied, any assertion of *Arizona Grocery* protection is premature.⁸⁴

48. In any event, the ongoing base rate proceedings will not confer *Arizona Grocery* protection upon SFPP's 2018 index rate increases because they will not result in the approval of index rate increases filed while those proceedings are pending. Proceedings on an oil pipeline's base rates focus specifically upon the challenged base rates and do not address the justness and reasonableness of subsequently filed index rate increases, which involve separate filings and center upon different time periods. Consequently, when a pipeline indexes forward the Commission-determined just and reasonable rate at the conclusion of a base rate proceeding for purposes of calculating refunds and establishing going forward rates, the Commission does not examine whether index rate increases that the pipeline implemented while the base rate proceeding was pending were

⁸² We also plan to initiate a separate, generic proceeding in which we will be requesting briefing from industry participants on (a) the proposal to process complaints against index rate increases using the Percentage Comparison Test and to eliminate the Substantially Exacerbate Test and (b) the use of the 10 percent threshold level when applying the Percentage Comparison Test to complaints.

⁸³ *Ariz. Grocery*, 284 U.S. at 390; see also, e.g., *ExxonMobil Oil Corp. v. FERC*, 487 F.3d 945, 967-68 (D.C. Cir. 2007).

⁸⁴ *SFPP, L.P.*, 121 FERC ¶ 61,240, at P 70 (2007) ("Since reliance by the carrier is the basis for *Arizona Grocery*, the protection it provides against retroactive ratemaking does not apply until a final order.").

just and reasonable.⁸⁵ Rather, the Commission's longstanding practice has been to act upon individual index rate increases without awaiting final resolution of ongoing litigation on the pipeline's base rates.⁸⁶ This is reasonable because acting upon previously filed index rate increases at the conclusion of years-long litigation on the pipeline's base rates would frustrate the simplified and streamlined oil pipeline ratemaking procedures mandated by EPCA 1992 and embodied in the indexing methodology.⁸⁷ Consistent with this practice, the ongoing SFPP base rate proceedings will not address the lawfulness of SFPP's 2018 index rate increases and thus will not afford the 2018 index rate increases *Arizona Grocery* protection.

The Commission orders:

The parties are directed to submit briefs addressing the Commission's proposed policy change, as discussed in the body of this order, within 60 days of the date this order issues; parties may submit reply briefs within 30 days thereafter.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

⁸⁵ See *SFPP, L.P.*, Opinion No. 522-B, 162 FERC ¶ 61,229, at P 16 (2018).

⁸⁶ See, e.g., Opinion No. 527-A, 162 FERC ¶ 61,230 at PP 17-23 (establishing hearing and settlement judge procedures to address SFPP's 2011 West Line index rate increase in Docket No. IS11-444 notwithstanding ongoing cost-of-service litigation on West Line rates in Docket No. IS08-390); December 2016 Order, 157 FERC ¶ 61,186 (addressing SFPP's 2012 and 2013 East and West Line index rate increases in Docket Nos. OR14-35 and OR14-36 notwithstanding ongoing cost-of-service litigation on East Line rates in Docket No. IS09-437 and West Line rates in Docket No. IS08-390).

⁸⁷ Opinion No. 522-B, 162 FERC ¶ 61,229 at P 18.