

129 FERC ¶ 61,228
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Sudeen G. Kelly, Marc Spitzer,
and Philip D. Moeller.

SFPP, L.P. Docket No. IS08-302-003

ExxonMobil Oil Corporation and BP West Coast
Products LLC Docket No. OR08-15-001

v.
SFPP, L.P.

Chevron Products Company Docket No. OR09-8-000

v.
SFPP, L.P.

Tesoro Refining and Marketing Company Docket No. OR09-18-000

v.
SFPP, L.P.

ORDER CONSOLIDATING CERTAIN COMPLAINT ISSUES FOR HEARING AND
SETTLEMENT JUDGE PROCEDURES, DISMISSING OTHERS, AND DENYING
REHEARING

(Issued December 17, 2009)

1. This order addresses all of the outstanding challenges to SFPP, L.P.'s (SFPP) index-based rate increases to SFPP's interstate rates on its West Line, North Line, Oregon Line, and Sepulveda Line (FERC Tariff Nos. 165-169) which became effective July 1, 2008. Specifically, we are acting on BP West Coast Products LLC's (BP) and ExxonMobil Oil Corp.'s (ExxonMobil) joint request for rehearing of the Commission's Order accepting SFPP's 2008 indexed rates¹ and three separate complaints filed by BP

¹ *SFPP, L.P.*, 123 FERC ¶ 61,317 (2008) (2008 Index Order).

and ExxonMobil, Chevron Products Co. (Chevron), and Tesoro Refining and Marketing Company (Tesoro). In this order, the Commission (i) denies BP's and ExxonMobil's request for rehearing; (ii) dismisses Tesoro's complaint filed in Docket No. OR09-18-000 (the Tesoro Complaint); and, (iii) consolidates the complaint filed by Chevron in Docket No. OR09-8-000 (the Chevron Complaint) together with the complaint filed jointly by BP and ExxonMobil in Docket No. OR08-15-001 (the BP/Exxon Complaint), sets for hearing two discrete issues raised by the Chevron Complaint and the BP/Exxon Complaint, and dismisses the Chevron Complaint and BP/Exxon Complaint as to the remaining issues. The Commission's determinations in this order reflect an application of the pleading standards for challenges to a pipeline's index-based rate increase.

I. Background

2. On June 30, 2008, the Commission accepted, effective July 1, 2008, SFPP's proposal in Docket No. IS08-302-000 to increase its rates for four of its five pipelines, SFPP's West Line, North Line, Sepulveda Line, and Oregon Line pursuant to the Commission's oil pipeline indexing regulations.² SFPP asserted in its 2008 index filing that its costs increased from 2006 to 2007 by approximately 15.87 percent as reflected on page 700 of its 2007 FERC Form No. 6 Report.³ SFPP's percentage cost increase thus exceeded the Commission's 5.1653 percent industry-wide inflation-based ceiling level for 2008.

3. SFPP's 2008 index filing was protested by Chevron and jointly by BP and ExxonMobil.⁴ In the 2008 Index Order, the Commission specifically addressed Chevron's protest, finding that Chevron's arguments were without merit:

As the Commission has stated on numerous occasions, a protest to an index-based filing must establish that the rate increase resulting from such a filing is so substantially in excess of the pipeline's actual cost increases that the rate is unjust and unreasonable. In the instant case, SFPP proposes a 5.2 percent increase in all of its rates. Based on its 2007 FERC Form No. 6, Page 700 cost of service, this would result

² See 2008 Index Order. SFPP did not file an index-based rate increase for its East Line in 2008.

³ *Id.* P 4.

⁴ Interventions and requests for clarification also were jointly filed by U.S. Airways, Inc., Southwest Airlines Co., Continental Airlines, Inc., and Northwest Airlines, Inc., and by Valero Marketing and Supply Company. BP and ExxonMobil were the only parties to file a rehearing request.

in a revenue increase of some \$7.446 million compared to cost increases between 2006 and 2007 of \$19.6 million.⁵

The Commission permitted SFPP's proposed 2008 index-based rate increases to become effective with the rates on the West, North, and Sepulveda Lines subject to refund.

II. BP's and ExxonMobil's Request for Rehearing

4. On July 30, 2008, BP and ExxonMobil filed a request for rehearing asserting that the Commission (1) erred by failing to address the arguments set forth in BP's and ExxonMobil's protest; (2) violated BP's and ExxonMobil's due process rights by failing to address the merits of their protest; (3) erred by permitting SFPP to increase its rates under the indexing methodology because, if the capital costs related to the East Line expansion are removed, SFPP's cost of service for its other lines actually decreased from 2006 to 2007, or in the alternative, erred by permitting SFPP to recover the costs associated with the East Line expansion twice, through the indexing methodology and through the East Line's general rate case filings; and, (4) improperly permitted SFPP to recover the costs associated with new investment on the East Line through rates on the separate West, North, and Oregon Lines.⁶ BP and ExxonMobil maintain the Commission violated two related principals of law (i) that shippers on a pipeline system cannot be forced to subsidize costs on another, separate pipeline system, and (ii) that the increase in capacity on the East Line is not "used and useful" to SFPP's shippers on other, separate lines. In summary, BP and ExxonMobil seek rehearing arguing that the Commission failed to address the substantive arguments raised in their protest.

5. Protests challenging an index-based rate increase are governed by section 343.2(c)(1) of the Commission's regulations, which provides in part:

A protest or complaint filed against a rate proposed or established pursuant to § 342.3 [indexing] of this chapter 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 unreasonable⁷

6. To maintain the relative simplicity of the oil indexing process, the Commission intended the data reported on FERC Form No. 6, Annual Report for Oil Pipelines, to be integral to index filings and challenges: "Cost data included in Form No. 6 can be used

⁵ 2008 Index Order at P 6.

⁶ BP's and ExxonMobil's request for rehearing does not name the Sepulveda Line.

⁷ 18 C.F.R. § 343.2(c)(1) (2009).

by an interested person to form the basis of a complaint or protest that the increase sought under any of the methodologies is not justified It will thus serve as a ‘reality check’ on increases under the indexing methodology.”⁸ The Commission uses the FERC Form No. 6, page 700 data in a “percentage comparison test.” The percentage comparison test is a very narrow test that “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 [sic] prior year. . . .”⁹ This test is the “preliminary screening tool for pipeline [index-based] rate filings,”¹⁰ and is the means by which the Commission determines whether a protest meets the section 343.2(c)(1) standard.

7. As the Commission has explained, when evaluating a protest to an index-based rate increase, the Commission will not look beyond the percentage comparison test.

[T]he Commission uses a percentage comparison test in the context of a *protest* to an index-based filing to assure that the indexing procedure remains a simple and efficient procedure for the recovery of annual cost increases. [Footnote omitted.] This screening approach at the suspension phase is a snap shot approach that avoids extensive arguments over issues of accounting accuracy and rate reasonableness within the time limits available for Commission review, and highlights the simplicity of the filing procedure. It also precludes the use of the protest procedure to complicate what should in most cases be merely a price adjustment that is capped at the industry’s average annual cost increases. . . . [T]his approach . . . serves to discourage unnecessary litigation because of the high standard involved and the fact that the

⁸ *Revisions to Oil Pipeline Regulations Pursuant to the Energy Policy Act of 1992*, Order No. 561, 58 FR 58753 (Nov. 4, 1993), FERC Stats. & Regs., Regs. Preambles January 1991-June 1996 ¶ 30,985, at 30,948 (1993), *order on reh’g*, Order 561-A, 59 FR 40242 (Aug. 8, 1994), FERC Stats. & Regs., Regs. Preambles, January 1991-June 1996 ¶ 31,000 (1994); *aff’d*, *Association of Oil Pipe Lines v. FERC*, 83 F.3d 1424 (D.C. Cir. 1996).

⁹ *BP West Coast Products, LLC v. SFPP, L.P.*, 118 FERC ¶ 61,261, at P 8 (2007). The percentage comparison test compares proposed changes in rates against the change in the level of a pipeline’s cost of service.

¹⁰ *Cost-of-Service Reporting and Filing Requirements for Oil Pipelines*, Order No. 571, 59 FR 59137 (November 16, 1994), FERC Stats. & Regs. ¶ 31,006, at 31,168, *order on reh’g*, Order No. 571-A, FERC Stats & Regs ¶ 31,012 (1994).

Commission's decision not to investigate is not subject to judicial review.¹¹

8. The Commission will not consider protests that raise arguments beyond the scope of the percentage comparison test. The Commission may apply a wider range of factors beyond the percentage comparison test in reviewing a complaint against an index-based rate increase.¹² This bright line is what distinguishes protests from complaints challenging an index filing. This distinction between complaints and protests furthers the goal of administrative simplicity that is the core rationale of the indexing methodology.¹³

9. The issues raised in BP's and ExxonMobil's protest go beyond the percentage comparison test the Commission strictly applies to determine whether to investigate a protested annual index filing.¹⁴ Because BP and ExxonMobil failed to meet the requirements for a protest under 343.2(c)(1), their protest was dismissed pursuant to section 343.2(c)(4). Accordingly, the Commission denies rehearing on the other substantive issues raised in BP's and ExxonMobil's request for rehearing.

10. BP and ExxonMobil also raise on rehearing that the 2008 Index Order failed to recognize their protest. While for procedural clarity the 2008 Index Order could have acknowledged BP's and ExxonMobil's protest, because the protest patently failed the Commission's standard for a protest of an index-based rate increase as discussed above, there was no reason for the Commission to act on or discuss the merits of the protest. Thus, the order's lack of a discussion of the merits of a protest that clearly fell outside the regulatory requirements, did not impact BP's and ExxonMobil's due process rights. Accordingly, the Commission denies rehearing.

¹¹ *BP West Coast Products, LLC v. SFPP, L.P.*, 121 FERC ¶ 61,141, at P 6 (2007) (emphasis added). Notably, a complaint involves a different procedural framework. *Id.* P 7.

¹² *Id.* P 9.

¹³ *Calnev Pipe Line, L.L.C.*, 119 FERC ¶ 61,332, at P 7 (2007).

¹⁴ BP and ExxonMobil raise identical substantive issues in its complaint challenging SFPP's 2008 index-based increase and, as discussed *infra*, the Commission has set certain of the issues raised by BP and ExxonMobil for hearing.

III. The Complaints

A. BP's and ExxonMobil's Complaint

i. Complainants' Arguments

11. On August 20, 2008, BP and ExxonMobil filed a complaint challenging SFPP's 2008 index-based rate increase as unjust and unreasonable.¹⁵ BP's and ExxonMobil's core charge is that SFPP's 15.87 percent cost of service increase between 2006 and 2007, which served as the basis for SFPP's index-based rate increases on its West, North, and Oregon Lines,¹⁶ was driven by a large increase in rate base resulting from SFPP's capital investment on its East Line.

12. The BP/Exxon Complaint questions whether SFPP can recover the costs associated with a capacity expansion on one line of its system, which costs will be recovered through a general rate case for SFPP's East Line, can include these same costs in the overall cost of service used to increase rates on SFPP's other lines pursuant to the Commission's index methodology.¹⁷ BP and ExxonMobil allege the East Line capacity expansion resulted in system-wide rate base increase of approximately 70 percent, which they say accounts for the 15.87 percent increase in SFPP's total cost of service.¹⁸ According to BP and ExxonMobil, it follows that if one excludes the increase in rate base attributable to the East Line expansion, then SFPP's cost of service actually decreased between 2006 and 2007.

13. BP and ExxonMobil argue that it is arbitrary and capricious to allow SFPP to base an inflation-based indexed rate increase upon its "massive increase in investment."¹⁹ In short, BP and ExxonMobil argue the Commission cannot take capital investment into consideration when calculating inflation-based pressures on a cost of service. In the alternative, BP and ExxonMobil contend that SFPP booked the increase in rate base attributable to the East Line to the wrong year. They argue, SFPP should have booked the rate base increase in 2006, the year the expansion went into service.²⁰ BP and

¹⁵ BP and ExxonMobil, August 20, 2008 Complaint at 12.

¹⁶ The BP/Exxon Complaint does not address the Sepulveda Line.

¹⁷ BP/Exxon Complaint at 15.

¹⁸ *Id.* at 16.

¹⁹ *Id.* at 17.

²⁰ *Id.* at 18-19.

ExxonMobil believe that if SFPP had correctly booked the expansion-related costs to 2006 instead of 2007, then SFPP's actual costs would have decreased between 2006 and 2007.

14. Next, BP and ExxonMobil argue that SFPP's 2008 index-based rate increases are unlawful. BP and ExxonMobil state it is unlawful for SFPP to recover the same costs it is collecting through its East Line cost-of-service rate case a second time through index-based rate increases on its other four lines.²¹ BP and ExxonMobil note that SFPP filed two rate cases to recover the capital costs associated with the East Line expansion in Docket Nos. IS06-283 (East Line Phase I) and IS08-28 (East Line Phase II).²² According to BP and ExxonMobil, if SFPP increases its rates due to an increase in rate base through both the index methodology and the filing of rate cases to recover the increased costs, SFPP will be "double dipping." BP and ExxonMobil also argue it is unlawful for SFPP to increase the rates on the West, North, and Oregon lines based on increased costs associated solely with the East Line because such costs provide no benefit to the shippers on the other lines.²³ BP and ExxonMobil state the Commission cannot compel shippers on separate and distinct lines to pay any costs associated with another separate and distinct line. Further, BP and ExxonMobil state that based on SFPP's FERC Form No. 6 for 2007, it is clear that all capital expenditures for expansions were related to the East Line.²⁴

ii. Responsive Pleadings

15. Public notice of the BP/Exxon Complaint was issued on August 9, 2008, with interventions, comments, and SFPP's answer due on or before September 9, 2008. ConocoPhillips Company, Chevron Products Company, Tesoro, and jointly Continental Airlines, Inc., Northwest Airlines, Inc., Southwest Airlines Co., and US Airways, Inc. filed unopposed motions to intervene in this proceeding.

16. On September 8, 2008, SFPP filed an answer denying the allegations in the BP/Exxon Complaint. SFPP argues that the Commission should dismiss the BP/Exxon Complaint for failure to make the *prima facie* showing required under section 343.2 of

²¹ *Id.* at 20.

²² *Id.*

²³ *Id.* at 21-22.

²⁴ *Id.* at 22. The BP/Exxon Complaint points to page 109.1 of SFPP's 2007 FERC Form No. 6 to show that the large investments in the years 2006 and 2007 were for the East Line: \$210,000,000 in 2006 and \$154,000,000 in 2007.

the Commission's regulations, 18 C.F.R. § 343.2(c). SFPP states that the Commission's standard for evaluating whether a complainant has met its burden of production under section 343.2(c)(1) requires the complainant to satisfy the "substantially exacerbate" standard; i.e., based on data from the pipeline's FERC Form No. 6, the complainant must show that "(1) the pipeline is substantially over-recovering its cost of service and (2) that the indexed based increase so exceeds the actual increase in the pipeline's cost that the resulting rate increase would substantially exacerbate that over-recovery."²⁵ SFPP asserts BP and ExxonMobil offer no valid argument that SFPP is substantially over-recovering its cost of service, stating that "instead of basing their complaint on the information presented in SFPP's 2007 FERC Form No. 6, as is required under section 343.2(c)(1) and the November 2007 Order, Complainants put forth an invalid and flawed argument attempting to remove from SFPP's rate base costs related to the expansion of SFPP's East Line."²⁶

17. SFPP further argues that BP and ExxonMobil failed to satisfy the "second prong" of the Commission's substantially exacerbate standard because they have not shown that SFPP's index-based increase so exceeds the actual increase in its cost that the resulting rate increase would substantially exacerbate that over-recovery.²⁷ SFPP points to the fact that "on the face" of its FERC Form No. 6, there has been no substantial exacerbation of SFPP's over-recovery because the increase in revenues based on the indexed rates does not exceed the increase in SFPP's costs of service.

18. SFPP categorizes the BP/Exxon Complaint as a request to strip its East Line capital investments from SFPP's 2007 cost of service on the grounds that capital expenditures "have nothing to do with inflation."²⁸ SFPP states that the issue of whether the oil pipeline index should be applied to all of a pipeline's costs, including its capital costs, has been fully vetted by the Commission and affirmed by the U.S. Court of Appeals for the District of Columbia Circuit. SFPP states it correctly recorded the 2006 and 2007 East Line expansion capital costs as reflected in its 2007 FERC Form No. 6,

²⁵ SFPP, September 8, 2008 Answer at 4.

²⁶ *Id.* at 5. The "November 2007 Order" is SFPP's short reference for *BP West Coast Products LLC v. SFPP, L.P.*, 121 FERC ¶ 61,141 (2007).

²⁷ SFPP, September 8, 2008 Answer at 6.

²⁸ *Id.* at 7.

Page 700.²⁹ Thus, SFPP asks the Commission to reject BP's and ExxonMobil's underlying attack on the Commission's indexing methodology.³⁰

19. SFPP also argues that the Commission should not permit BP and ExxonMobil to challenge its East Line rates in a complaint proceeding against SFPP's 2008 index-based rate increase on its other lines.³¹ SFPP states that it has not filed a 2008 index-based rate increase for its East Line consistent with Commission policy. SFPP asserts the BP/Exxon Complaint essentially challenges a filing that SFPP has not made, thus the Commission should dismiss the portion of the complaint regarding SFPP's East Line.

20. SFPP's answer raises some additional procedural issues. First, SFPP maintains that BP and ExxonMobil erroneously attempt to shift the burden of persuasion to SFPP. SFPP notes that complainants bear the burden of production prior to a case being set for hearing and bear the burden of persuasion if a complaint is set for hearing.³² SFPP further asserts BP and ExxonMobil erroneously claim the Commission has no discretion to decline to investigate a complaint.³³

B. Chevron's Complaint

i. Chevron's Arguments

21. On May 29, 2009, Chevron filed a complaint against SFPP challenging the justness and reasonableness of SFPP's filed index-based rate increases that became effective on July 1, 2008.³⁴ Chevron states its complaint raises the same legal and factual issues raised in the BP/Exxon Complaint and incorporates BP's and ExxonMobil's arguments into its complaint by reference. Chevron requests the Commission to consolidate its complaint with the BP/Exxon Complaint because it raises the same substantive arguments.³⁵

²⁹ *Id.* at 9-10.

³⁰ *Id.* at 14.

³¹ *Id.* at 10-11.

³² *Id.* at 12.

³³ *Id.*

³⁴ Chevron Products Co., May 29, 2009 Complaint (the Chevron Complaint).

³⁵ *Id.* at 4.

22. Like BP and ExxonMobil, Chevron asserts that SFPP's increase in its cost of service reported in its FERC Form No. 6 for year 2007, was driven exclusively by an increase in rate base caused by new capital expenditures on the East Line. They urge the Commission to exclude these capital expenditures when determining SFPP's actual costs.³⁶ Chevron points to Page 700 of SFPP's Form No. 6 which states SFPP's rate base increased by \$210,329,175, or approximately 71 percent.³⁷ Chevron states that data in FERC Form No. 6 supports the assertion that the increase in rate base is due primarily or exclusively to the East Line expansions.³⁸ Chevron further argues that:

[A]pplying SFPP's claimed rate-of-return to the rate base increase yields \$14,996,470. Add to that the increased depreciation claimed of \$5,341,113 and the total attributable to the "increase" caused by the East Line Expansion on the face of Page 700 is \$20,337,583. Since the total increase in the cost-of-service claimed by SFPP is \$19,611,250 as shown on SFPP's 2007 FERC Form 6, Page 700, line 9, the \$20,337,583 directly related to the East Line rate base increase and related depreciation indicates that SFPP's other pipelines actually experienced a decrease in its cost of service in 2007.³⁹

Chevron argues the Commission should not consider a pipeline's capital investment of this magnitude when calculating inflation-based pressures on a cost of service.⁴⁰

23. Chevron asserts three legal arguments to support excluding the costs associated with the East Line expansion from the cost of service calculation used to determine whether SFPP may take the index increase for its other four lines. First, Chevron argues that it would be arbitrary and capricious to allow a pipeline to base an inflation-based indexed rate increase upon a massive increase in investment, a non-inflationary cost.⁴¹ Next, Chevron states it is unlawful for SFPP to use the increased rate base associated with the East Line expansion to justify an index increase to the rate on its other lines because SFPP seeks to recover the increase in rate base associated with the East Line

³⁶ *Id.* at 7.

³⁷ *Id.* at 10 (citing SFPP's 2006 FERC Form No. 6, Page 700, line 5).

³⁸ Chevron also points out that shippers do not have access to the work papers that underlie Page 700 of a pipeline's FERC Form No. 6.

³⁹ Chevron Complaint at 11.

⁴⁰ *Id.* at 8.

⁴¹ *Id.* at 10.

expansion from East Line shippers through two cost-of-service rate cases; i.e., SFPP is double dipping.⁴² Last, Chevron alleges that where SFPP's large increase in rate base is associated exclusively with SFPP's East Line expansions, SFPP cannot recover the costs derived from such a large increase in rate base from shippers on separate systems because the East Line expansion facilities are not used and useful to them.⁴³ Chevron notes that in Order No. 561-A, the Commission stated that the role of the index methodology is to allow pipelines to recover normal costs through operation of the index, and that extraordinary costs can be recovered through either of the alternate rate change means – cost of service or settlement rates.⁴⁴

ii. Responsive Pleadings

24. Public notice of the Chevron Complaint was issued on June 3, 2008, with interventions, comments, and SFPP's answer due on or before June 18, 2008. ConocoPhillips Company, Tesoro Refining and Marketing Company, and jointly BP and ExxonMobil filed unopposed motions to intervene in this proceeding. BP and ExxonMobil were the only parties to file comments. Their comments were limited to supporting Chevron's request that the Commission consolidate its complaint with the BP/Exxon Complaint.

25. SFPP filed an answer to the Chevron Complaint that parallels its earlier answer to the BP/Exxon Complaint. SFPP asserts Chevron failed to make a *prima facie* showing required under section 343.2 of the Commission's regulations which govern challenges to a pipeline's indexing adjustment. SFPP characterizes the Commission's standard for evaluating whether a complainant has met its burden under section 343.2(c)(1) as requiring the complaint to challenge the index adjustment based exclusively on data from the pipeline's FERC Form No. 6 to make the showing required by the substantially exacerbate standard.⁴⁵ SFPP relies on the fact that based on its 2007 FERC Form No. 6,

⁴² *Id.* at 9 and 11. In the alternative, Chevron argues that if the Commission decides that the increase in SFPP's rate base caused by the East Line expansion should not be excluded, then the Commission should find that SFPP booked the increase in rate base to the wrong year, and the expansion costs should have been booked in 2006, which change would result in a decrease in SFPP's cost of service between 2006 and 2007.

⁴³ *Id.* at 15.

⁴⁴ *Id.* at 9 (quoting Order No. 561-A at 31,097).

⁴⁵ SFPP states the substantially exacerbate standard requires the complainant to show that (1) the pipeline is substantially over-recovering its cost of service; and, (2) the index-based increase so exceeds the actual increase in the pipeline's costs that the resulting rate increase would substantially exacerbate that over-recovery. SFPP, June 18, (continued...)

SFPP is experiencing an over-recovery of only 3.98 percent.⁴⁶ Further, SFPP states Chevron can never meet its burden under the second prong because, based on SFPP's FERC Form No. 6, Page 700, the index increase of 5.2 percent to SFPP's rate does not exceed the 15.9 percent increase in cost of service experienced by SFPP.⁴⁷

26. SFPP rebuts Chevron's argument that the East Line capital expenditures should be removed from its cost of service, stating that the Commission, when implementing the index methodology, concluded that the oil pipeline index should apply to all of a pipeline's costs, not just those costs driven by inflation.⁴⁸ Second, SFPP rebuts Chevron's assertion that the Commission should separate its cost of service by line noting that allowing a complainant to cherry-pick certain costs and attribute such costs to specific transportation movements is inconsistent with the purpose of indexing and contrary to Commission policy and precedent.⁴⁹ SFPP also asserts the Chevron Complaint is an attempt to expand its 2008 index-based filing into a full rate case in which a full examination of SFPP's base rates and costs of service would occur in detail.⁵⁰ SFPP replies to Chevron's claim that SFPP is double-recovering its East Line capital investment by noting that if a pipeline increases its base rates based on an increase in its cost-of-service for a given year, then the Commission's regulations prohibit the indexing of that rate during that same year. Therefore, companies making capital investments and filing for a base rate increase only recover their capital costs by filing and obtaining a base rate increase for that given year. For that reason, SFPP did not take the 2008 index increase for its East Line. Therefore, SFPP argues it only sought recovery of its capital expenditure on the East Line once through its cost-of-service rate filing for the East Line.⁵¹

2009 Answer at 4 (quoting *BP West Coast Products LLC v. SFPP, L.P.*, 121 FERC ¶ 61,141 at P 10).

⁴⁶ SFPP, June 18, 2009 Answer at 5.

⁴⁷ *Id.* at 7.

⁴⁸ *Id.* at 10.

⁴⁹ *Id.* at 13.

⁵⁰ *Id.*

⁵¹ *Id.* at 16.

C. Discussion Regarding the BP/Exxon and Chevron Complaints

i. Procedural Matters

27. The Commission will address the Chevron Complaint and the BP/Exxon Complaint together because they are substantively identical. Further, pursuant to the complainants' requests, the Commission hereby consolidates the two complaints. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2009), the timely, unopposed motions to intervene filed in both Docket Nos. OR08-15-001 and OR09-8-000 serve to make the entities that filed them parties to the consolidated proceedings.

ii. Commission Determination

28. As discussed *supra* at paragraph 8, the Commission may apply a wider range of factors in reviewing a complaint challenging an index-based rate increase, as we do with respect to the BP/Exxon Complaint and the Chevron Complaint. The Commission's standard for a complainant to establish a *prima facie* case challenging a pipeline's index-based rate increase requires that:

[T]o be heard on the merits, a complaint against an existing rate that has been indexed will be required to allege reasonable grounds for believing that the discrepancy between the actual cost experienced by the pipeline and the existing rate is so substantial that the existing rate level is not just and reasonable.⁵²

29. The regulatory goal of allowing challenges to index-based rate increases is to protect against increases that are substantially above the pipeline's actual costs.⁵³ The Commission interprets section 343.2(c)(1) as requiring any challenge to an index increase as "normally limited to matters that appear on the face of the Page 700."⁵⁴ Thus, in the usual case, a shipper must make the *prima facie* showing that there is a substantial disparity between the rate increase and the actual cost increase (or decrease) based on data reported in FERC Form No. 6.⁵⁵ This is a narrow test with very few exceptions.⁵⁶

⁵² Order No. 561 at 30,956.

⁵³ *Id.* at 30,955.

⁵⁴ *BP West Coast Products LLC v. SFPP, L.P.*, 119 FERC ¶ 61,241, at P 9 (2007).

⁵⁵ *See, e.g., Calnev Pipeline L.L.C.*, 115 FERC ¶ 61,387, at PP 10-11 (2006) (finding ExxonMobil satisfied the initial showing requirement based on 11 percent spread between an index increase of 6.15 percent and an actual cost decrease of 4.8 percent).

However, “section 343.2(c)(1) does not state how any quantitative analysis should be performed or that such an analysis must be the same for all circumstances.”⁵⁷ The Commission may address a range of concerns in reviewing a complaint against an index-based rate increase, where a “unique factual situation” warrants such review.⁵⁸

30. In this case, BP, ExxonMobil, and Chevron identify a unique factual situation regarding SFPP’s 2008 index rate increase. Specifically, the complainants make a credible argument that, but for the large cost increase caused by the capital expansion on SFPP’s East Line, SFPP’s cost of service may have decreased between 2006 and 2007. Under these circumstances, but for the extraordinary capital costs experienced by one segment of SFPP’s system, the other segments may not qualify to take the annual index increase.

31. Given the unique factual situation presented in this case, complainants have provided reasonable grounds for asserting that the index-based rate increases may be substantially in excess of the actual cost increase (or decrease) incurred on the West, North, Oregon, and Sepulveda Lines. Using the cost information available to them from SFPP’s FERC Form No. 6 for 2007,⁵⁹ complainants have sufficiently shown that if the

⁵⁶ *BP West Coast Products LLC v. SFPP, L.P.*, 121 FERC ¶ 61,243, at P 8 (2007). One such exception is the substantially exacerbate standard. In the proceeding against SFPP’s 2005 index increase, the Commission rejected shippers’ protest of the 2005 index increase based solely on the percentage comparison test, using the FERC Form No. 6 data. However, on BP’s complaint against the same increase, the Commission found grounds for an investigation into the index rate increase where the usual percentage comparison test would not. On rehearing, the Commission clarified this revised interpretation stating that for a complaint alleging that the pipeline was substantially over-recovering its costs, the complainant must show (1) the pipeline is substantially over-recovering its cost of service and (2) that the indexed based increase so exceeds the actual increase in the pipeline’s cost that the resulting rate increase would substantially exacerbate that over-recovery. *See BP West Coast Products LLC v. SFPP, L.P.*, 121 FERC ¶ 61,141, at P 10 (2007).

⁵⁷ *Id.* P 5.

⁵⁸ *See BP West Coast Products LLC v. SFPP, L.P.*, 121 FERC ¶ 61,141 at P 6 (citing *SFPP, L.P.*, 117 FERC ¶ 61,271 (2006), *reh’g denied*, 120 FERC ¶ 61,245 (2007)).

⁵⁹ The Commission recognizes that it is difficult for a shipper to establish the exact percentages or dollars with certainty during the pleading phase because much of the detailed cost information is in the control of the pipeline and it is not available to shippers or the Commission.

East Line expansion costs were excluded from the company-wide cost of service that the actual costs for the North, West, Oregon and Sepulveda Lines might have decreased between 2006 and 2007. This, in turn, could lead to a substantial divergence between the pipeline's actual costs and the index increase that warrants a Commission investigation. Accordingly, the complainants have met the threshold set forth in 18 C.F.R.

§ 343.2(c)(1), by demonstrating reasonable grounds to conclude that, if it is determined that SFPP must exclude the East Line expansion costs from the cost of service used to evaluate an index-based rate increase, then SFPP's index-based rate increases on its other lines may so exceed its actual costs such that the resulting index-based rate increases on those lines are unjust and unreasonable.

32. Therefore, the Commission sets for hearing the issues of (i) whether the East Line expansion costs should be excluded from SFPP's cost of service for purposes of determining whether SFPP's other pipelines, the West, North, Oregon, and Sepulveda Lines may take the index-based rate increase in 2008 and (ii) if the East Line expansion costs are excluded, whether SFPP's 5.2 percent index-based rate increase is so substantially in excess of SFPP's actual cost increases or decreases on those lines in 2007 that the resulting index-based rates are unjust and unreasonable.⁶⁰ As we have previously stated, section 343.2(c)(1) of the Commission's regulations do not automatically preclude an index adjustment if a pipeline has not experienced a cost increase.⁶¹ However, in this case, neither the complainants nor the Commission can establish, with certainty, the exact percentage or dollar cost-of-service change that would result if SFPP's East Line expansion costs were excluded from the 2008 indexing calculations because much of the detailed cost information is in SFPP's control. Thus, we direct SFPP to make the work papers underlying its 2008 index-based rate increase available to the complainants within fifteen (15) days after this order issues.

33. The Commission has, however, consistently encouraged parties to resolve disputes of this nature through settlement, and is of the view that formal settlement procedures may lead to a resolution of this case. The issues in this case may be resolvable by settlement. Therefore, the Commission will hold the hearing in abeyance pending the outcome of formal settlement procedures in this matter. To aid the parties in their settlement efforts, a settlement judge shall be appointed pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.⁶² If the parties desire, they may, by mutual agreement, request a specific settlement judge; otherwise, the Chief Judge will

⁶⁰ The parties' debate regarding who bears the burden of proof should be addressed through the hearing.

⁶¹ See *Calnev Pipeline L.L.C.*, 115 FERC ¶ 61,387, at P 9 (2006).

⁶² 18 C.F.R. § 385.603 (2009).

select a judge for this purpose.⁶³ If a settlement cannot be reached, the instant docket will be set for hearing.

34. Notwithstanding the foregoing, to the extent the Chevron Complaint and the BP/Exxon Complaint attack either the Commission's indexing methodology or SFPP's base rates, the Commission dismisses those aspects of the complaints. For example, BP, Exxon and Chevron argue, as a general proposition, that SFPP should not be allowed to take an inflation-based indexed rate increase based upon a non-inflation driven cost – the East Line capital investment. SFPP correctly points out that the Commission addressed this issue in Order No. 561.⁶⁴ In Order No. 561 the Commission noted that it gave due consideration to commentors' arguments that it should adopt a broader-based index to only that part of the rate that is arguably subject to inflation, but we determined that applying an index to specific inflation-related components of a rate could have perverse and unintended consequences.

Applying the index only to operating and maintenance costs may give pipelines an incentive to direct a disproportionate amount of their spending to such costs, to the neglect of other necessary or advisable expenditures, *such as investment in plant.*⁶⁵

The Commission dismisses the Chevron Complaint and the BP/Exxon Complaint as to this argument. Rather, the issue here is the allocation of the cost increases over the different lines of SFPP's system.

35. The BP/Exxon and Chevron Complaints also make the alternative argument that SFPP booked the increase in rate base associated with the East Line expansion to the wrong year. Specifically, the complainants assert that the East Line expansion costs should have been booked in 2006 not 2007. They allege that if such costs were booked in 2006, SFPP's costs of service would decrease between 2006 and 2007. We find this

⁶³ If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at 202-502-8500 within five days of this order. The Commission's website contains a list of Commission judges and a summary of their background and experience (www.ferc.gov – click on Office of Administrative Law Judges).

⁶⁴ See SFPP, September 8, 2008 Answer to BP/Exxon Complaint at 7-8.

⁶⁵ Order No. 561 at 30,952 (emphasis added). The Commission decision to not select an indexing scheme in which only inflation-driven costs would be indexed was affirmed by the United States Court of Appeals for the District of Columbia Circuit. *Association of Oil Pipe Lines v. FERC*, 83 F.3d 1424, 1436 (D.C. Cir. 1996).

alternative argument to be unrelated to a challenge to the reasonableness of SFPP's index-based increase. It is a challenge to the accuracy of the regulatory accounts underlying that increase. An argument that SFPP booked costs in the wrong year, challenges the cost figures that underpin SFPP's Page 700 of its FERC Form No. 6. The Commission has consistently ruled that Form No. 6 implementation matters are generic cost issues that address how a pipeline's cost of service is constructed and are not properly raised by a complaint against an index-based rate increase.⁶⁶ Instead these are accounting matters that may be raised in a separate complaint that asserts credible grounds to believe that there is a significant problem. The Commission will not allow the complainants to expand this argument into a general attack on SFPP's FERC Form No. 6 accounting practices. Accordingly, the Commission dismisses the Chevron Complaint and the BP/Exxon Complaint as to this argument.

D. Tesoro's Complaint

i. Tesoro's Arguments

36. On July 1, 2009, Tesoro filed a complaint against SFPP challenging the justness and reasonableness of the index-based rate increases taken by SFPP on July 1, 2008 and July 1, 2009 pursuant to section 342.3 of the Commission's regulations (the "Tesoro Complaint").⁶⁷

37. With respect to the 2008 index-based rate increase, Tesoro alleges that despite SFPP's under recovery of its cost of service as reported on its 2008 FERC Form No. 6:

Tesoro has demonstrated in other complaint and protest proceedings that SFPP has vastly overstated its cost of service and thus is substantially over-recovering its costs. SFPP's rate increases in 2008 and 2009 therefore exacerbate its ongoing over-recovery.

Tesoro's complaint does not provide any information to support this bare allegation, not even citing references.

⁶⁶ See *BP West Coast Products, LLC v. SFPP, L.P.*, 121 FERC ¶ 61,243, at P 9 (2007) and *Calnev Pipe Line, L.L.C.*, 119 FERC ¶ 61,332, at P 7 (2007).

⁶⁷ This order does not address the allegations in Tesoro's complaint regarding SFPP's 2009 index rate increase. Those claims have been addressed by separate order issued on November 9, 2009. *Tesoro Refining and Marketing Company v. SFPP, L.P., et al.*, 129 FERC ¶ 61,114 (2009) (order dismissing Tesoro's complaint against SFPP's July 1, 2009 index-based rate increase and severing Tesoro's complaint against SFPP's July 1, 2009 index-based rate increase).

ii. Responsive Pleadings

38. Public notice of the Tesoro Complaint was issued on July 2, 2009, with interventions, comments, and SFPP's answer due on or before July 21, 2009. BP, Chevron, and jointly Continental Airlines, Inc., Northwest Airlines, Inc., Southwest Airlines Co., and US Airways, Inc. filed unopposed motions to intervene in this proceeding.

39. SFPP filed an answer to the Tesoro Complaint on July 21, 2009. SFPP's answer asserts that Tesoro fails to make the *prima facie* showing required under section 343.2(c)(1) of the Commission's regulations for an index complaint. According to SFPP, in 2007, it experienced an over-recovery of 3.98 percent which is "below the standard the Commission applies as a threshold in determining whether there are reasonable grounds to conclude that an oil pipeline's rates are unjust and unreasonable."⁶⁸ SFPP states that its 2008 index-based rate adjustment of 5.2 percent would result in a revenue increase of approximately \$7.446 million. However, its FERC Form No. 6 shows that its costs increased by \$19.6 million. Thus, according to SFPP, it follows that its 2008 index-based rate adjustment does not substantially exacerbate its existing over-recovery.⁶⁹ SFPP asserts that Tesoro fails to show that SFPP's index-based increase so exceeds the actual increase in its costs that the resulting rate increase would substantially exacerbate the over-recovery. Last, SFPP states that Tesoro's complaint fails to include a level of detail sufficient to show a violation of statutory or regulatory standards and, therefore, should be dismissed.⁷⁰

iii. Commission Determination

40. The Commission concludes that Tesoro's complaint against SFPP's 2007 index-based rate increase is inadequate under section 343.2(c)(1) of the Commission's regulations. As noted above, the Commission *only* applies the percentage comparison test when reviewing a protest and typically applies that test to evaluate complaints with very few exceptions.⁷¹ Tesoro's complaint is merely a perfunctory challenge to SFPP's index-based rate increase, and is properly evaluated using the percentage comparison test. In the instant case, applying the percentage comparison test using the data SFPP reported

⁶⁸ SFPP, July 21, 2009 Answer at 6.

⁶⁹ *Id.* at 7.

⁷⁰ *Id.* at 8.

⁷¹ *See, supra*, P 28, 29. *See also, BP West Coast Products LLC v. SFPP, L.P.*, 123 FERC ¶ 61,121, at P 6 (2008).

in its FERC Form No. 6, SFPP's actual cost increase in dollar and percentage terms exceeded the 5.2 percent index-based rate increase authorized for the year 2007.⁷² Thus, the Tesoro Complaint fails.

41. Moreover, while Tesoro asserts that the increase at issue here would substantially exacerbate SFPP's over-recovery, it is not necessary to reach that point. The "substantially exacerbate" standard, as discussed in *BP West Coast Products LLC v. SFPP L.P.*, is satisfied if (1) the pipeline is substantially over-recovering its cost of service, and (2) an index-based increase so exceeds the actual increase in the pipeline's cost that the resulting rate increase would substantially exacerbate that over-recovery.⁷³ Tesoro's bare, unsupported allegations that SFPP is substantially over-recovering its costs and is experiencing an on-going over-recovery, do not give the Commission any basis to look any further than SFPP's FERC Form No. 6 data in deciding whether to further investigate Tesoro's complaint. In this case, the substantially exacerbate standard is not satisfied because the revenues generated by the index-based increase are less than the increase in SFPP's cost reflected on its FERC Form No. 6, Page 700.⁷⁴ Thus, the Commission finds that Tesoro has failed "to 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" as required under 18 C.F.R. § 343.2(c), and has failed to satisfy the substantially exacerbate standard.

42. In short, the Tesoro Complaint does not meet the minimum standards for filing a complaint against an index-based rate increase. The Commission's filing standards for oil pipeline complaints require complaints to be precisely drafted and to conform to the regulatory policies embodied in the Commission's prior oil pipeline orders.⁷⁵ The Commission will summarily dismiss any complaint that does not meet the minimum standards as it would be unfair to allow one shipper to avoid the minimum pleading standards that the Commission applies to other shippers and to which most have

⁷² See 18 C.F.R. § 342.3 for the indexing methodology.

⁷³ *BP West Coast Products, LLC v. SFPP, L.P.*, 121 FERC ¶ 61,141 at P 10.

⁷⁴ The index-based increase will result in a revenue increase of approximately \$7.446 million, however, based on Page 700 of SFPP's 2007 FERC Form No. 6, SFPP's costs increased by \$19.6 million.

⁷⁵ *America West Airlines, Inc. v. Calnev Pipe Line, L.L.C.*, 121 FERC ¶ 61,241, at P 6 (2007).

consistently conformed.⁷⁶ Accordingly, the Commission dismisses the Tesoro Complaint.

The Commission orders:

(A) BP's and ExxonMobil's request for rehearing in Docket No. IS08-302-003 is denied for the reasons stated in the body of this order.

(B) The BP/Exxon Complaint filed in Docket No. OR08-15-001 and the Chevron Complaint filed in Docket No. OR09-8-000 are consolidated and, pursuant to the authority of the Interstate Commerce Act, particularly sections 13(1) and 15(1) thereof, and the Commission's regulations, a hearing is established in the consolidated proceedings to address (i) whether SFPP's East Line expansion costs should be excluded from SFPP's cost of service for purposes of determining whether SFPP's West, North, Oregon and Sepulveda Lines may take the index-based rate increase in 2008 and (ii) if the East Line expansion costs are so excluded, whether SFPP's 2008 index-based rate increase is so substantially in excess of SFPP's actual cost increase or decrease in 2007 that the resulting index-based rate is unjust and unreasonable. SFPP shall make the work papers underlying its 2008 index-based rate increase available to the complainants within fifteen (15) days of the date this order issues. The remaining issues in the BP/Exxon and Chevron Complaints are dismissed.

(C) Pursuant to section 375.304 of the Commission's regulations, 18 C.F.R. § 375.304 (2009), the Chief Administrative Law Judge shall designate a presiding administrative law judge for the purpose of conducting a hearing. The ALJ is authorized to conduct further proceedings pursuant to this order and to the Commission's Rules of Practice and Procedure.

(D) The hearing established in Ordering Paragraph (B) is hereby held in abeyance to provide time for settlement judge procedures, as discussed in Ordering Paragraphs (E) and (F) below.

(E) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2009), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within ten (10) days of the date this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates

⁷⁶ *BP West Coast Products LLC v. SFPP, L.P.*, 121 FERC ¶ 61,243, at P 2-3 (2007) (order dismissing BP's complaint for failing to meet the minimum filing standards).

the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge within five (5) days of the date of this order.

(F) Within thirty (30) days of the appointment of the settlement judge, the settlement judge shall file a report with the Commission and Chief Judge on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every thirty (30) days thereafter, informing the Commission and Chief Judge of the parties' progress toward settlement.

(G) Tesoro's complaint against SFPP's 2008 index-based rate increase filed in Docket No. OR09-18-000 is dismissed for the reasons stated in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.