6. A carrier holding an Operating Authorization may request the Administrator's approval to move any arrival or departure scheduled from 6:00 a.m. through 10:59 p.m. to another half hour within that period. Except as provided in paragraph 7, the carrier must receive the written approval of the Administrator, or his delegate, prior to conducting any adjusted arrival or departure. All requests to move an allocated Operating Authorization must be submitted to the FAA Slot Administration Office, facsimile (202) 267–7277 or email *7-AWA-Slotadmin@faa.gov,* and must come from a designated representative of the carrier. If the FAA cannot approve a carrier's request to move a scheduled arrival or departure, the carrier may then apply for a trade in accordance with paragraph 7.

7. For the duration of this Order, a carrier may enter into a lease or trade of an Operating Authorization to another carrier for any consideration. Notice of a trade or lease under this paragraph must be submitted in writing to the FAA Slot Administration Office, facsimile (202) 267–7277 or email *7-AWA-Slotadmin@faa.gov,* and must come from a designated representative of each carrier. The FAA must confirm and approve these transactions in writing prior to the effective date of the transaction. The FAA will approve transfers between carriers under the same marketing control up to five business days after the actual operation, but only to accommodate operational disruptions that occur on the same day of the scheduled operation. The FAA's approval of a trade or lease does not constitute a commitment by the FAA to grant the associated historical rights to any operator in the event that slot controls continue at JFK after this Order expires.

8. A carrier may not buy, sell, trade, or transfer an Operating Authorization, except as described in paragraph 7.

9. Historical rights to Operating Authorizations and withdrawal of those rights due to insufficient usage will be determined on a seasonal basis and in accordance with the schedule approved by the FAA prior to the commencement of the applicable season.

a. For each day of the week that the FAA has approved an operating schedule, any Operating Authorization not used at least 80% of the time over the time-frame authorized by the FAA under this paragraph will be withdrawn by the FAA for the next applicable season except:

i. The FAA will treat as used any Operating Authorization held by a carrier on Thanksgiving Day, the Friday following Thanksgiving Day, and the period from December 24 through the first Saturday in January.

ii. The Administrator of the FAA may waive the 80% usage requirement in the event of a highly unusual and unpredictable condition which is beyond the control of the carrier and which affects carrier operations for a period of five consecutive days or more.

b. Each carrier holding an Operating Authorization must forward in writing to the FAA Slot Administration Office a list of all Operating Authorizations held by the carrier along with a listing of the Operating Authorizations and:

i. The dates within each applicable season it intends to commence and complete operations.

A. For each winter scheduling season, the report must be received by the FAA no later than August 15 during the preceding summer.

B. For each summer scheduling season, the report must be received by the FAA no later than January 15 during the preceding winter.

ii. The completed operations for each day of the applicable scheduling season:

A. No later than September 1 for the summer scheduling season.

B. No later than January 15 for the winter scheduling season.

iii. The completed operations for each day of the scheduling season within 30 days after the last day of the applicable scheduling season.

10. In the event that a carrier surrenders to the FAA any Operating Authorization assigned to it under this Order or if there are unallocated Operating Authorizations, the FAA will determine whether the Operating Authorizations should be reallocated. The FAA may temporarily allocate an Operating Authorization at its discretion. Such temporary allocations will not be entitled to historical status for the next applicable scheduling season under paragraph 9.

11. The FAA considers the following factors and priorities in allocating Operating Authorizations, which the FAA has determined are available for reallocation—

a. Historical requests for allocation of an Operating Authorization in the same time;

b. New entrant status;

c. Retiming of historic Operating Authorizations;

d. Extension of a seasonal Operating Authorization to year-round service;

e. The effective period of operation;

f. The extent and regularity of intended use with priority given to year-round services;

g. The operational impacts of scheduled demand, including the hourly and half-hour demand and the mix of arrival and departure flights; and,

h. Airport facility constraints.

Any carrier that is not approved for allocation of an Operating Authorization by the FAA may request it be placed on a waiting list for consideration should an Operating Authorization in the requested time become available during that scheduling season.

12. If the FAA determines that an involuntary reduction in the number of allocated Operating Authorizations is required to meet operational needs, such as reduced airport capacity, the FAA will conduct a weighted lottery to withdraw Operating Authorizations to meet a reduced hourly or half-hourly limit for scheduled operations. The FAA will provide at least 45 days' notice unless otherwise required by operational needs. Any Operating Authorization that is withdrawn or temporarily suspended will, if reallocated, be reallocated to the carrier from which it was taken, provided that the carrier continues to operate scheduled service at JFK.

13. The FAA may enforce this Order through an enforcement action seeking a civil penalty under 49 U.S.C. 46301(a). The FAA or Department of Justice also could file a civil action in U.S. District Court, under 49 U.S.C. 46106 or 46107, respectively, seeking to enjoin any carrier from violating the terms of this Order.

14. The FAA may modify or withdraw any provision in this Order on its own or on application by any carrier for good cause shown.

Issued in Washington, DC, on October 26, 2022.

Alyce Hood-Fleming,

Acting Vice President, System Operations Services.

[FR Doc. 2022–23616 Filed 10–26–22; 4:15 pm]

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DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 343

[Docket No. AD20–10–000]

Standard Applied to Complaints Against Oil Pipeline Index Rate Changes

AGENCY: Federal Energy Regulatory Commission.

ACTION: Policy statement.

SUMMARY: In this Policy Statement, the Federal Energy Regulatory Commission

(Commission) provides guidance regarding how it will evaluate complaints against oil pipeline index rate increases. Specifically, the Commission replaces the Substantially Exacerbate Test with the Percentage Comparison Test as the preliminary screen for determining whether to investigate complaints against index rate increases.

DATES: October 28, 2022.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

1. On March 25, 2020, the Commission issued a Notice of Inquiry [1] seeking comments regarding its proposal to replace the Substantially Exacerbate Test as the preliminary screen for determining whether to investigate complaints against index rate increases for oil pipelines and to instead evaluate such complaints using the Percentage Comparison Test, which historically has applied to protests of index rate increases. The Commission also sought comment on whether it should apply the Percentage Comparison Test's existing 10% threshold to complaints.[2]

2. As discussed below, we provide guidance regarding how the Commission will evaluate complaints against index rate increases.[3] Specifically, we adopt the proposal to apply the Percentage Comparison Test with its existing 10% threshold as the preliminary screen in both protest and complaint challenges to index rate increases.

I. Background

A. The Indexing Methodology

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 indexing to provide a simplified and generally applicable ratemaking methodology for oil pipelines and create 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 adopted indexing, it also added page 700 to FERC Form No. 6 to provide cost, revenue, and throughput information so that the Commission and the industry can monitor pipelines' indexed rates.[7]

4. In adopting indexing, 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 annual index rate increases by (1) applying a preliminary screen based on data from the pipeline's page 700 and (2) if the preliminary screen is satisfied, investigating the rate increase at a hearing.[9]

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 there is a more than 10 percentage-point differential between (1) the index rate increase and (2) the change in the prior two years' total cost-of-service data reported on page 700, line 9.[10] 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.[11] Under 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 costs that the resulting rate increase would substantially exacerbate the pipeline's over-recovery (second prong).[12]

B. Procedural History

6. In *Southwest Airlines Co.* v. *FERC,* the U.S. Court of Appeals for the District of Columbia Circuit vacated and remanded Commission orders applying the Substantially Exacerbate Test to complaints against index rate increases by SFPP, L.P. (SFPP).[13] The court held

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[1] *Standard Applied to Complaints Against Oil Pipeline Index Rate Changes,* 85 FR 21420 (Apr. 17, 2020), 170 FERC ¶ 61,252 (2020) (NOI).

[2] *Id.* P 14.

[3] This policy statement does not establish a binding rule or precedent but instead provides guidance by notifying entities of the course of action the Commission intends to follow in future adjudications. *See Pac. Gas & Elec. Co.* v. *FPC,* 506 F.2d 33, 38 (D.C. Cir. 1974).

[4] 49 U.S.C. app. 1(5).

[5] Public Law 102–486 1801(b), 106 Stat. 3010 (Oct. 24, 1992).

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

[7] *Cost-of-Service Reporting & Filing Requirements for Oil Pipelines,* Order No. 571, 59 FR 59137 (Nov. 16, 1994), FERC Stats. & Regs. ¶ 31,006 (cross-referenced at 69 FERC ¶ 61,102), *order on reh'g and clarification,* Order No. 571–A, 60 FR 356 (Jan. 4, 1995), FERC Stats. & Regs. ¶ 31,012 (1994) (cross-referenced at 69 FERC ¶ 61,411), *aff'd sub nom. AOPL* v. *FERC,* 83 F.3d 1424 (D.C. Cir. 1996); *see also Revisions to & Elec. Filing of the FERC Form No. 6 & Related Unif. Sys. of Accts.,* Order No. 620, 65 FR 81335 (Dec. 26, 2000), FERC Stats. & Regs. ¶ 31,115 (2000) (cross-referenced at 93 FERC ¶ 61,262), *reh'g denied,* Order No. 620–A, 94 FERC ¶ 61,130 (2001); *Revisions to Page 700 of FERC Form No. 6,* Order No. 783, 78 FR 44424 (July 24, 2013), 144 FERC ¶ 61,049, at PP 29–40 (2013), *reh'g denied,* Order No. 783–A, 148 FERC ¶ 61,235 (2014). All jurisdictional oil pipelines are required to file page 700, including pipelines exempt from filing the full Form No. 6. 18 CFR 357.2(a)(2)–(3) (2021).

[8] 18 CFR 343.2(c)(1).

[9] Such challenges to annual index rate increases are distinct from complaints on a cost-of-service basis against a pipeline's total rate. *See BP W. Coast Prods. LLC* v. *SFPP, L.P.,* 121 FERC ¶ 61,243, at PP 8–10 (2007) (distinguishing complaints against annual index rate increases from complaints against the pipeline's base rate).

[10] *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)); *see also* Appendix (depicting Percentage Comparison Test formula). The Commission has explained that there is an exception to the Percentage Comparison Test whereby the Commission will not investigate a protest if the pipeline's costs exceed its revenues. *SFPP, L.P.,* Opinion No. 527–A, 162 FERC ¶ 61,230, at P 20 (2018) (citing *Shell Pipe Line Co.,* 102 FERC ¶ 61,350, *order on reh'g,* 104 FERC ¶ 61,021 (2003)) (''[W]hen a pipeline is under-recovering its costs, the Commission permits a pipeline to receive the index increase. In these circumstances, the index increase (even if it exceeds the pipeline's cost changes) is not likely to lead to a rate that is 'unjust and unreasonable.' '').

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

[12] *BP West Coast II,* 121 FERC ¶ 61,141 at P 10; *see also* Appendix (depicting Substantially Exacerbate Test formulas).

[13] *Sw. Airlines Co.* v. *FERC,* 926 F.3d 851, 856 (D.C. Cir. 2019) (*Southwest Airlines*). In the vacated

that the Commission had departed from its prior policy by considering post-rate-increase data in evaluating the complaints.[14] The court vacated and remanded the Commission's orders dismissing the complaints. The court emphasized the general principle that the Commission must ''explain its action in a way that coheres with the rest of its indexing scheme'' and ''provide a reasoned explanation that treats like cases alike.'' [15] These complaint proceedings subsequently settled.[16]

7. Following the remand in *Southwest Airlines,* the Commission issued the NOI and sought comment upon its proposal to eliminate the Substantially Exacerbate Test as the preliminary screen applied to complaints against index rate increases and to instead evaluate such complaints by applying the Percentage Comparison Test.[17] The NOI outlined the Commission's concerns regarding the Substantially Exacerbate Test: that the test lacks clear standards, suffers from an inherent mechanical flaw that yields irrational results, and is inconsistent with the purpose of indexing and the Commission's regulations.[18] The Commission sought comment addressing the merits of the proposal, including 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 complaints against index rate increases.[19]

C. Comments

8. Initial and reply comments on the NOI were submitted by Joint Complainants,[20] the Liquids Shippers Group (Liquids Shippers),[21] SFPP, the Canadian Association of Petroleum Producers (CAPP), and the Liquid Energy Pipeline Association (LEPA).[22]

9. SFPP and LEPA generally support the proposal in the NOI, arguing that the Percentage Comparison Test is well-founded in precedent and aligns with the Commission's goals of streamlined and simplified index-based ratemaking.[23] Liquids Shippers, CAPP, and Joint Complainants oppose the proposal and also propose alternatives to the Percentage Comparison Test.

II. Discussion

10. In this policy statement, we adopt the proposal set forth in the NOI to use the Percentage Comparison Test as the preliminary screen for both protests and complaints against annual index rate increases and to eliminate the Substantially Exacerbate Test. As explained below, we conclude that: (1) the Substantially Exacerbate Test should be eliminated; (2) the Percentage Comparison Test provides a preferable alternative for evaluating complaints against index rate changes; (3) the Percentage Comparison Test's 10% threshold is supported; (4) commenters' alternative proposals are incompatible with the indexing scheme; (5) the Commission intends to generally limit its consideration to the Percentage Comparison Test in evaluating complaints against index rate changes but will address other arguments as they arise in specific cases; and (6) proposals to adopt broader changes to the Commission's oil pipeline ratemaking methodologies are beyond the scope of this proceeding.

A. The Substantially Exacerbate Test Should Be Eliminated

11. As discussed below, we are ending our use of the Substantially Exacerbate Test because it (1) lacks clear standards, (2) suffers from an inherent mechanical flaw, and (3) does not effectively implement the Commission's regulations.

1. The Substantially Exacerbate Test Lacks Clear Standards

12. The Substantially Exacerbate Test lacks clear standards for evaluating complaints. Consistent with EPAct 1992's mandate for a simplified and streamlined ratemaking methodology, we conclude that the preliminary screen used to determine whether to investigate a complaint against an annual index rate increase would benefit from clear percentage thresholds to avoid complex case-specific analysis. Also, clear percentage thresholds facilitate ''treat[ing] like cases alike,'' as the D.C. Circuit emphasized in *Southwest Airlines.*[24]

13. However, in establishing the Substantially Exacerbate Test, the Commission did not set clear percentage thresholds of over-recovery and exacerbation for using the test to determine whether to set a complaint for hearing.[25] Since 2007, only a small number of shipper complaints have invoked the Substantially Exacerbate Test. Among the six sets of proceedings in which complainants sought relief pursuant to the Substantially Exacerbate Test,[26] the Commission applied the Substantially Exacerbate Test to establish a hearing on only one occasion. However, in that case, the Commission did not establish a minimum percentage threshold that could be applied going forward in other cases.[27] The five other complaint

orders, the Commission addressed complaints filed in 2014 against SFPP's index rate increases for the 2012 and 2013 index years. The Commission dismissed the complaints for failing the second prong of the Substantially Exacerbate Test. *HollyFrontier Ref. & Mktg. LLC* v. *SFPP, L.P.,* 157 FERC ¶ 61,186, at P 8 (2016) (December 2016 Order), *reh'g denied,* 162 FERC ¶ 61,232, at P 14 (2018). The Commission explained that notwithstanding the challenged rate increases, page 700 data that became available after SFPP implemented the rate increases and before the complaints were filed (post-rate-increase data) showed that the difference between SFPP's costs and revenues declined between 2011 and 2013. December 2016 Order, 157 FERC ¶ 61,186 at P 9.

[14] *Southwest Airlines,* 926 F.3d at 858.

[15] *Id.* at 859.

[16] *SFPP, L.P.,* 178 FERC ¶ 61,019 (2022); *SFPP, L.P.,* 173 FERC ¶ 61,295 (2020).

[17] NOI, 170 FERC ¶ 61,252 at P 14. The Commission first described this proposal in an order on remand following *Southwest Airlines. HollyFrontier,* 170 FERC ¶ 61,133 at P 21; *see also* NOI; 170 FERC ¶ 61,252 at P 14 (soliciting public comment on the Commission's proposal).

[18] NOI, 170 FERC ¶ 61,252 at P 9.

[19] *Id.* P 14.

[20] Joint Complainants are the complainants from the *HollyFrontier* proceedings: American Airlines, Inc.; Chevron Products Company; HollyFrontier Refining & Marketing LLC; Southwest Airlines Co.; and Valero Marketing and Supply Company.

[21] Liquids Shippers are Apache Corporation, Cenovus Energy Marketing Services Ltd., ConocoPhillips Company, Devon Gas Services, L.P., Equinor Marketing & Trading US Inc., Fieldwood Energy LLC, Marathon Oil Company, Ovinitiv Marketing Inc., and Pioneer Natural Resources USA, Inc.

[22] At the time its comments were filed, LEPA was known as the Association of Oil Pipe Lines.

[23] *E.g.,* LEPA Initial Comments at 4–5; SFPP Initial Comments at 13–19.

[24] *Southwest Airlines,* 926 F.3d at 859. Although the court made this statement while specifically addressing the Commission's use of post-rate-increase data in evaluating the complaints in *HollyFrontier,* we find the general principle instructive that like cases must be treated similarly and that the Commission's indexing policies must be internally coherent. *See id.*

[25] *HollyFrontier,* 170 FERC ¶ 61,133 at PP 22–23; *see also supra* P 5 (explaining that the Substantially Exacerbate Test considers whether (1) the pipeline is substantially over-recovering its cost of service and (2) the index rate increase so exceeds the actual increase in the pipeline's costs that the resulting rate increase would substantially exacerbate the pipeline's over-recovery).

[26] These six 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, (5) Docket Nos. OR14–35 and OR14–36, and (6) Docket Nos. OR19–21, OR19–33, and OR19–37. Moreover, although the Commission has received index filings from over 200 pipelines annually in recent years, these complaints were all against either SFPP or its affiliate Calnev Pipe Line, L.L.C.

[27] In Docket Nos. OR07–08 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 return of some 25%.'' *BP West Coast II,* 121 FERC ¶ 61,141 at P 8.

Continued

proceedings likewise did not specify the thresholds for establishing a substantial over-recovery or substantial exacerbation.[28] As a result, the Substantially Exacerbate Test lacks clear 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. Comments in response to the NOI, addressed below, do not persuade us to reach a different conclusion. Rather, as discussed in the following section, clear standards are difficult to develop due to the Substantially Exacerbate Test's mechanical flaws, and we are unpersuaded by Joint Complainants' argument that such thresholds are unnecessary.[29]

2. The Substantially Exacerbate Test Is Mechanically Flawed

14. The Substantially Exacerbate Test suffers from an inherent mechanical flaw that makes developing analytically sound percentage thresholds unworkable. For example, as a pipeline's over-recovery increases, an index rate increase will exacerbate the over-recovery by a lower percentage; thus, if a pipeline has a relatively high over-recovery, even a relatively large index increase will lead to a minimal exacerbation.[30] Conversely, applying the same index rate increase to a lower level of over-recovery will result in a higher degree of exacerbation.[31] This relationship between the Substantially Exacerbate Test's two prongs causes the Substantially Exacerbate Test to yield results whereby complaints against pipelines with higher over-recoveries are less likely to be investigated because a large index increase will lead to minimal exacerbation.[32]

15. Moreover, there appears to be no combination of threshold levels for these two prongs of the test that would consistently yield reasonable results, such that the test fails to provide a workable standard for evaluating complaints against index rate increases.[33] 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.[34] The table shows that the Substantially Exacerbate Test is driven 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

Revenues Exceeding Costs (%)	Index Level								
	1%	2%	3%	4%	5%	6%	7%	8%	9%
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

16. 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, the second line of the table indicates that applying a 4% 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 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. Due to this mechanical flaw, there is no combination of threshold levels that would consistently yield reasonable results. Accordingly, the Substantially Exacerbate Test fails to provide a workable standard for the Commission to evaluate complaints under § 343.2(c)(1).

17. We disagree with Joint Complainants' argument that the

The complaints resulted in settlement. *See ExxonMobil Oil Corp.* v. *SFPP, L.P.,* 122 FERC ¶ 61,129, at P 1 (2008) (setting complaints for hearing); *BP W. Coast Prods., LLC* v. *SFPP, L.P.,* 125 FERC ¶ 61,138, at P 2 (2008) (approving uncontested settlement resolving complaints).

[28] The Commission found in three of these proceedings that the complaint 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 W. Coast Prods. LLC* v. *SFPP, L.P.,* 121 FERC ¶ 61,243 at P 4 (OR07–20); *SFPP, L.P.,* 129 FERC ¶ 61,228, at P 41 (2009) (OR09–18). The fourth set of proceedings involved the complaints at issue in *Southwest Airlines.* As discussed above, the Commission held that these complaints failed the Substantially Exacerbate Test's second prong because post-rate-increase page 700 data showed that SFPP's cost-revenue divergence decreased after SFPP implemented the challenged increases. *Supra* note 13. Finally, the fifth set of proceedings involved complaints addressed in the Commission's order on remand following *Southwest Airlines, HollyFrontier,* 170 FERC ¶ 61,133 (OR19–21, OR19–33, OR19–37), and these complaints ultimately settled. *SFPP,* 178 FERC ¶ 61,019; *SFPP,* 173 FERC ¶ 61,295.

[29] *See infra* PP 14–19.

[30] *HollyFrontier,* 170 FERC ¶ 61,133 at P 24.

[31] *Id.* This flaw was illustrated in *HollyFrontier* with a table presenting results of the Substantially Exacerbate Test over a range of over-recovery and index levels. *Id.* P 25. For example, if a pipeline's revenues exceed its costs by 50%, a 3% index increase leads to an exacerbation of 9%. *Id.* In contrast, if a pipeline's revenues exceed its costs by only 5%, that same 3% index increase leads to an exacerbation of 63%. *Id.*

[32] *Id.* P 24; *see also supra* P 5 (explaining that the Substantially Exacerbate Test considers whether (1) the pipeline is substantially over-recovering its cost of service and (2) the index rate increase so exceeds the actual increase in the pipeline's costs that the resulting rate increase would substantially exacerbate the pipeline's over-recovery).

[33] *Id.* PP 24, 26.

[34] Since its inception in 1995, the oil pipeline index has ranged from approximately −2.0% to 8.7%. 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 only the positive historical levels of the oil pipeline index.

Substantially Exacerbate Test does not produce irrational results because it is not meant to provide an absolute mathematical threshold, but rather provides information to help the Commission determine, in its judgment, whether a substantial over-recovery would be substantially exacerbated.[35] As discussed above, we find that, to further the goals of streamlining and simplifying the ratemaking process, the preliminary screen used to determine whether to investigate a complaint against an index rate increase benefits from clear thresholds. Furthermore, a clearly established threshold also facilitates ''treat[ing] like cases alike'' consistent with *Southwest Airlines*.[36]

18. Similarly, we disagree with Joint Complainants' argument that the Commission could apply the Substantially Exacerbate Test on a case-by-case basis using a ''pragmatic quantitative and qualitative analysis'' similar to the analysis used in full cost-of-service rate cases.[37] The purpose of indexing is to avoid the complexity of cost-of-service litigation,[38] and therefore we view clear thresholds as a means to effectuate the streamlining and simplification required by EPAct 1992.[39] Finally, Joint Complainants do not explain how their ''pragmatic quantitative and qualitative analysis'' would function as a workable standard for evaluating complaints in the indexing regime.

19. We are also not persuaded by Joint Complainants' reliance upon the Commission's prior statement in Order No. 561–A that precise thresholds are not feasible for reviewing challenges to index rate changes.[40] Our experience since Order No. 561–A, including applying the Percentage Comparison Test's 10% threshold,[41] has demonstrated that precise thresholds are feasible, and in fact preferable, in this setting.

3. The Substantially Exacerbate Test Does Not Effectively Implement the Commission's Regulations

20. The Substantially Exacerbate Test does not effectively implement § 343.2(c)(1)'s ''substantially in excess'' requirement. Section 343.2(c)(1) provides 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.''[42] When the Commission first established the Substantially Exacerbate Test, it concluded that complaints applying that test did not need to satisfy the regulation's ''substantially in excess'' requirement.[43] On rehearing, recognizing the Commission could not wholly disregard this part of its regulation, the Commission sought to rectify the error by explaining that the complainant applying the Substantially Exacerbate Test needed to show that the rate change substantially exceeded the cost change (''in dollar amounts'' or percentages) as part of its demonstration that the rate change substantially exacerbated the prior over-recovery.[44]

21. Upon further consideration, we now conclude that the Substantially Exacerbate Test does not effectively implement the regulation. As discussed above, this is because the Substantially Exacerbate Test primarily considers pre-existing over-recoveries and the exacerbation of those over-recoveries. As discussed below, the Substantially Exacerbate Test provides inadequate consideration to whether the annual rate increase is ''substantially in excess'' to the annual cost increase, which is the standard provided in the regulation.

22. First, in applying the Substantially Exacerbate Test, the Commission stated that ''dollar amounts'' could be used to satisfy the regulation's ''substantially in excess'' requirement. However, we find that defining ''substantially in excess'' in dollar terms hinders the development of consistent and transparent standards for implementing a simplified and streamlined ratemaking regime. This is because the relative significance of a certain dollar value varies greatly between large and small pipelines. For example, an over-recovery of $1 million would likely be insignificant for a large pipeline with substantial costs and revenues, but it could be significant for a smaller pipeline with lower costs and revenues. Thus, this approach is in tension with the goals of the Commission's indexing regime.[45]

23. Second, conversely, using percentages instead of dollar amounts would be redundant of the Percentage Comparison Test. To the extent the Substantially Exacerbate Test simply compares the pipeline's percentage cost change with the percentage index rate change, this duplicates the calculation already used in the Percentage Comparison Test.[46] Thus, the Substantially Exacerbate Test's application of the regulation's ''substantially in excess'' requirement either (a) undercuts the goals of simplified and streamlined ratemaking (relying upon dollar terms) or (b) is redundant (relying upon percentages, which uses the same standard as the Percentage Comparison Test). We disagree with Joint Complainants' arguments that the Substantially Exacerbate Test is consistent with the Commission's indexing regulations because (1) § 343.2(c)(1) requires that index rate changes must produce rates that are just and reasonable under the ICA and (2) the Commission can only determine whether an index rate change will produce an unjust and unreasonable rate by considering whether the pipeline's revenues exceed its costs.[47] Joint Complainants'

[35] *E.g.,* Joint Complainants Reply Comments at 13.

[36] 926 F.3d at 859; *see also supra* note 24.

[37] Joint Complainants Initial Comments at 26 (arguing that clear thresholds are unnecessary and that the Commission could use a ''pragmatic quantitative and qualitative analysis'' similar to the analysis used in full cost-of-service rate cases).

[38] *See, e.g.,* Order No. 561, FERC Stats. & Regs. ¶ 30,985 at 30,948 (explaining that indexing avoids ''the need of strict regulatory review of the pipeline's individual cost of service, thus saving regulatory manpower, time and expense'').

[39] We also find that using, as a screen for complaints against index rate increases, the same analytical approach that the Commission uses in base-rate proceedings could exacerbate the protracted length of complaint proceedings, about which Joint Complainants also express concern. Joint Complainants Initial Comments at 19–20.

[40] *Id.* at 22 (citing Order No. 561–A, FERC Stats. & Regs. ¶ 31,000 at 31,103).

[41] *E.g., SFPP, L.P.,* 168 FERC ¶ 61,043, at P 21 (2019) (declining to investigate protested index rate increase where differential under Percentage Comparison Test was less than 10%); *N.D. Pipeline Co.,* 163 FERC ¶ 61,235, at P 11 (2018) (setting protested index rate increase for hearing where Percentage Comparison Test differential exceeded 10%).

[42] 18 CFR 343.2(c)(1) (emphasis added).

[43] *BP West Coast I,* 119 FERC ¶ 61,241 at PP 10–11.

[44] *BP West Coast II,* 121 FERC ¶ 61,141 at P 9. However, the Commission has provided limited guidance regarding how this would be applied. First, in establishing the Substantially Exacerbate Test, the Commission concluded that a $4 million additional return resulting from the index rate increase satisfied the ''substantially in excess'' standard. Second, in other cases, the Commission stated that it would reject index rate increases where the dollar increase in costs exceeded the projected dollar increase in revenues. *SFPP, L.P.,* 129 FERC ¶ 61,228 at P 41 & n.74. Moreover, along the same lines, the Commission also rejected complaints where the pipeline's percentage cost change exceeded the percentage index rate increase. *See BP W. Coast Prods. LLC* v. *SFPP, L.P.,* 121 FERC ¶ 61,243 at P 4; *Tesoro Ref. & Mktg. Co.* v. *Calnev Pipe Line, L.L.C.,* 121 FERC ¶ 61,142 at PP 4, 7.

[45] 926 F.3d at 859.

[46] As discussed above, under the Percentage Comparison Test, a rate change is ''substantially in excess'' of the cost change when the cost change exceeds the percentage index rate by 10 percentage points. *See supra* P 5. No commenter has advanced a viable proposal for differentiating this aspect of the Substantially Exacerbate Test from the Percentage Comparison Test. Thus, the Substantially Exacerbate Test is redundant of the Percentage Comparison Test and, to the extent it differs, simply imposes a burden on shippers to show a *preexisting* over-recovery, a requirement that is not supported by the regulation.

[47] Joint Complainants Initial Comments at 28–29, 32–33, 35; *see also* 18 CFR 343.2(c)(1) (requiring that protests or complaints against index rate

Continued

arguments do not explain how the Substantially Exacerbate Test effectively implements § 343.2(c)(1), which requires comparing the proposed rate increase to the amount of cost increases the pipeline has incurred.

24. For the same reason, Joint Complainants' reliance on the Commission's statement in Opinion No. 527–A that ''a comparison between revenues and costs can be relevant'' under § 343.2(c)(1) is inapposite.[48] The fact that consideration of revenues can be relevant under the regulation does not demonstrate that the Substantially Exacerbate Test effectively implements the regulation requiring a comparison between the ''rate increase'' and the ''cost increases.'' [49]

25. We find unpersuasive Joint Complainants' contention that the Substantially Exacerbate Test should be retained because indexing is designed to allow recovery of historical costs and not prospective costs. In particular, they argue that indexing is designed to allow recovery of historical costs and not prospective costs based on (1) the Commission's statement in Order No. 561 that indexing ''merely preserves the value of just and reasonable rates in real economic terms'' and (2) the Commission's practice of solely considering data preceding the index increase in cases challenging index rate changes.[50] The quoted language in Order No. 561 does not support Joint Complainants' contention. Rather, annual index rate increases preserve the economic value of pipeline rates by allowing them to keep pace with industry-wide cost changes so that rates will be sufficient to recover future years' costs.[51] Although the Commission considers page 700 data from the preceding two years in evaluating a challenged index rate increase, index rate changes simply adjust a pipeline's existing rate so that it does not lose ground relative to industry-wide cost changes going forward.[52] Indexing is not a true-up to account for prior-period over- or under-recoveries; rather, it is a permanent change in the pipeline's rate to recover future costs.

26. Therefore, the concerns outlined above support eliminating the Substantially Exacerbate Test as the preliminary screen applied to index increase complaints.

B. The Percentage Comparison Test Offers a Preferable Alternative for Evaluating Complaints Against Index Rate Increases

27. We find that the Percentage Comparison Test provides a more consistent way to evaluate complaints against index rate changes than the Substantially Exacerbate Test.[53] As discussed below, (1) the Percentage Comparison Test lacks the same analytical flaws as the Substantially Exacerbate Test, (2) the Percentage Comparison Test conforms to the Commission's regulations, and (3) it is preferable to evaluate challenges to index rate changes, whether via protest or a complaint, using a single test. As discussed below, the comments do not dissuade us from adopting this alternative approach.

1. The Percentage Comparison Test Lacks the Analytical Flaws of the Substantially Exacerbate Test

28. We find that the Percentage Comparison Test is preferable to the Substantially Exacerbate Test.

29. We disagree with the Joint Complainants' and Liquids Shippers' objections that the Percentage Comparison Test must be rejected because it is also mechanically flawed. They argue that the Percentage Comparison Test improperly compares percentages with different bases.[54] We recognize that in other situations the Commission may seek to avoid comparisons of percentages with two different bases, but that concern is not persuasive here. Joint Complainants and Liquids Shippers neither cite evidence that the difference in bases leads to a distortion nor have they provided a workable alternative for comparing the pipeline's cost change to the index rate change that does not involve different bases. In fact, the Percentage Comparison Test has been workably applied to protests of index rate increases.[55] Applying this simplified and streamlined formula is appropriate within the simplified and streamlined indexing regime, and Joint Complainants and Liquids Shippers do not propose any adjustment to the Percentage Comparison Test or viable alternative method for performing the rate-change to cost-change comparison that § 343.2(c)(1) requires.

30. We also reject Joint Complainants' and Liquids Shippers' argument that the Percentage Comparison Test does not ensure just and reasonable rates because it permits pipelines with over-recoveries and declining costs to implement index rate increases.[56] As an initial matter, we emphasize that index rate increases are limited to the industry-wide index level and do not recover a pipeline's cost changes in excess of that amount. At the same time, the Commission implemented the indexing methodology with the understanding that some individual pipelines' revenues could potentially exceed their costs under the scheme and that some individual pipelines' annual rate changes could also exceed their annual cost changes.[57] By permitting revenues to exceed costs to some degree, indexing encourages pipelines to operate efficiently by allowing them to benefit from their cost

changes ''allege reasonable grounds for asserting that the rate is so substantially in excess of the actual cost increase incurred by the carrier *that the rate is unjust and unreasonable*'') (emphasis added). Joint Complainants further argue that the Commission's proposal ignores the fact that § 343.2(c)(1) resulted from Order Nos. 561 and 561–A, which expressly envisioned an evaluation of over-recovery of costs and the proposed rate increase's impact on that over-recovery. Joint Complainants Initial Comments at 33 (citing Order No. 561–A, FERC Stats. & Regs. ¶ 31,000 at 31,103; *BP West Coast,* 121 FERC ¶ 61,141 at P 10).

[48] Joint Complainants Initial Comments at 35 (quoting *SFPP, L.P.,* Opinion No. 527–A, 162 FERC ¶ 61,230, at P 20 (2018)).

[49] 18 CFR 343.2(c)(1). Further, in Opinion No. 527–A, the Commission allowed for the consideration of revenue as ''tied to the language of the regulation'' in the context of the Percentage Comparison Test at the hearing stage. Opinion No. 527–A, 162 FERC ¶ 61,230 at P 20. Thus, the Percentage Comparison Test responds to both parts of the regulation by comparing the index rate change with the pipeline's cost changes and considering whether the divergence renders the pipeline's rate ''unjust and unreasonable.'' 18 CFR 343.2(c)(1).

[50] Joint Complainants Initial Comments at 29–31, 33–34 (quoting Order No. 561, FERC Stats. & Regs. ¶ 30,985 at 30,950).

[51] *HollyFrontier,* 170 FERC ¶ 61,133 at P 27. Each prior year's inflation sets a new industry-wide cost level and inflationary changes compound in future years. Thus, if inflation is 10% each year and the cost level is $100 in Year 1, then in Year 2 the cost level will be $110 and in Year 3 will be $121. Indexing allows pipeline rates to increase accordingly.

[52] Order No. 561, FERC Stats. & Regs. ¶ 30,985 at 30,950; *Ass'n of Oil Pipe Lines* v. *FERC,* 83 F.3d at 1430.

[53] NOI, 170 FERC ¶ 61,252 at PP 10–12 (citing *HollyFrontier,* 170 FERC ¶ 61,133 at PP 32–35, 39, 42–45).

[54] Joint Complainants Initial Comments at 20, 40–41 (citing *Am. W. Airlines, Inc.* v. *Calnev Pipe Line, L.L.C.,* 121 FERC ¶ 61,241, at P 8 (2007) (''[I]t is incorrect to use the sum of the changes in two percentages as a measure of absolute change when the percentages have different bases.'')); Liquids Shippers Initial Comments at 34–35. For example, when considering an index increase filed on July 1, 2022, the Percentage Comparison Test compares the rate change (new rate/prior rate) to the cost change ((2021 costs—2020 costs)/(2020 costs)). Because one denominator is the ''prior rate'' and the other denominator is the ''2020 costs,'' Joint Complainants and Liquids Shippers assert that the Percentage Comparison Test compares percentages with ''different bases.''

[55] *See, e.g., SFPP,* 163 FERC ¶ 61,232 at PP 13, 20; *SFPP, L.P.,* 135 FERC ¶ 61,274, at P 11 (2011); *Calnev Pipe Line,* 130 FERC ¶ 61,082 at P 10; *Calnev Pipe Line L.L.C.,* 115 FERC ¶ 61,387, at PP 10–11 (2006).

[56] Joint Complainants Initial Comments at 46; Liquids Shippers Initial Comments at 34–35; *see also* CAPP Initial Comments at 14.

[57] *See* Order No. 561, FERC Stats. & Regs. ¶ 30,985 at 30,949.

savings.[58] Likewise, denying index rate increases whenever a pipeline's costs decline could discourage pipelines from operating efficiently.[59] Thus, while indexing allows some pipelines to increase their rates above their individual cost changes, indexed rate changes are below other pipelines' cost changes. Accordingly, denying an index rate increase whenever a pipeline's revenues exceed its costs, even slightly, and/or the pipeline's costs decline would make indexing a lopsided methodology in which pipelines are presented with a significant risk of under-recovery without commensurate potential for benefits for operating efficiently.

31. We are unpersuaded by Liquids Shippers' argument that the Commission should expand the scope of indexing proceedings to include a review of the pipeline's underlying base rate.[60] Shippers can challenge a pipeline's base rate at any time. The choice of whether to challenge a pipeline's index rate increase or its base rate belongs to the complaining shipper.[61] Since indexing's inception, the Commission has limited its review of index rate increase challenges to the proposed incremental rate change and rejected arguments to expand these proceedings to encompass challenges to the pipeline's base rate.[62] Although Liquids Shippers contend that the rationale for this policy no longer applies,[63] they do not explain how enlarging indexing proceedings to include a full cost-of-service review of the pipeline's base rate would cohere with streamlined and simplified ratemaking or conform to the limited scope of § 343.2(c)(1).

2. The Percentage Comparison Test Conforms to Commission Regulations

32. We find that the Percentage Comparison Test effectively implements the Commission's regulations. As discussed above, § 343.2(c)(1) requires protests and complaints against index rate increases to show that the rate increase is ''substantially in excess'' of the pipeline's actual cost changes.[64] Unlike the Substantially Exacerbate Test, the Percentage Comparison Test more closely conforms to this language by comparing the challenged index rate change to the pipeline's already incurred cost changes and relying upon this comparison to determine whether the rate increase was, in fact, ''substantially in excess'' of the cost changes.

33. Joint Complainants and Liquids Shippers contend that the Percentage Comparison Test is inconsistent with the Commission's regulations because § 343.2(c)(1) inquires whether a challenged index rate increase substantially exceeds the pipeline's ''*actual cost increases,*'' thereby limiting index rate increases to pipelines that experienced cost increases and excluding pipelines that experienced cost decreases.[65] We disagree with these arguments. First, the regulatory language that Joint Complainants and Liquids Shippers cite describes when shippers can *challenge* an index rate change, not whether a pipeline can *implement* such a change. To the extent that this language could be construed as only allowing challenges to rate increases where a pipeline's costs have increased, this would not prohibit a pipeline from implementing a rate increase when its costs have decreased.

34. Second, Joint Complainants' and Liquids Shippers' interpretation of the regulation is inconsistent with the Commission's indexing precedent. Although the regulation discusses comparing rate increases to ''actual cost increases'' and rate decreases to ''actual cost decreases,'' [66] the Commission has consistently interpreted this regulation as requiring a comparison of the challenged rate change to the pipeline's cost change, whether positive or negative.[67]

35. Third, as discussed above, interpreting the regulation as Joint Complainants and Liquids Shippers propose would undermine indexing's cost-efficiency incentives. Indexing aims to provide pipelines ''with the incentive to cut costs aggressively,'' [68] but denying index rate increases to pipelines that succeed in reducing costs would undermine that goal.[69] In contrast, adopting the Percentage Comparison Test appropriately triggers investigations where an index rate change diverges markedly from the pipeline's recent reported cost changes.

3. It Is Preferable To Evaluate Challenges to Index Rate Changes Using a Single Test

36. Based on the record in this proceeding, we conclude that it is preferable to evaluate protests and complaints against index rate changes using the same preliminary screen.[70] The court in *Southwest Airlines* instructed the Commission to evaluate complaints against index rate increases in a manner that coheres with the rest of its indexing scheme and ''treats like cases alike.'' [71] Section 343.2(c)(1) requires protests and complaints to make the same showing: that the challenged rate increase ''is so substantially in excess of the actual cost increases incurred by the carrier that the rate is unjust and unreasonable.'' [72] Given that the same standard applies to all challenges to index rate changes regardless of form, we conclude that evaluating protests and complaints using a single test conforms to the structure of the regulation and will better ensure that similar cases are not treated differently.

37. We acknowledge that the Commission has previously found in *BP*

[58] *See HollyFrontier,* 170 FERC ¶ 61,133 at P 42. Moreover, tying indexed rates to pipeline-specific costs would reduce the efficacy of the indexing scheme as a streamlined, simplified ratemaking methodology, counter to the Commission's goals in Order No. 561. *See* Order No. 561, FERC Stats. & Regs. ¶ 30,985 at 30,949.

[59] This also leads to irrational results. For instance, if the index increase in any given year is 3%, it would be illogical to deny a pipeline whose costs declined by 0.01% (or less) an index rate increase whereas a pipeline whose costs increased by 0.01% would receive the full 3% index increase.

[60] Liquids Shippers argue that the Percentage Comparison Test improperly focuses on the incremental change (both in costs and separately in rates) rather than the entirety of the pipeline's underlying base rate. Liquids Shippers Initial Comments at 2–3, 27–33; Liquids Shippers Reply Comments at 15–16.

[61] If a shipper is concerned that an index rate increase substantially exceeds the pipeline's cost changes, it can file a complaint against the index rate increase. If successful, such a complaint would eliminate or reduce the index rate increase. On the other hand, if a shipper is concerned that a pipeline's base rates may be substantially over-recovering the pipeline's costs, it can file a cost-of-service complaint against the base rates. If successful, such a complaint against the base rates would eliminate the pipeline's over-recovery.

[62] *E.g., SFPP, L.P.,* 107 FERC ¶ 61,334, at P 10 (2004); *Calnev Pipe Line, L.L.C.,* 96 FERC ¶ 61,350, at 62,304 (2001) (explaining that the Commission ''is not subject to a statutory duty to examine the whole rate when an indexed change is proposed''); Order No. 561–A, FERC Stats. & Regs. ¶ 31,000 at 31,104; *see also SFPP, L.P.,* 140 FERC ¶ 61,016, at P 34 (2012) (''Indexing cases are intended to be streamlined proceedings that do not delve into cost-of-service issues.''); Order No. 561, FERC Stats. & Regs. ¶ 30,985, at 30,952–53 (finding that requiring protests under § 343.2(c)(1) to compare the proposed incremental rate change to the pipeline's cost changes, while permitting complaints against the pipeline's base rates, achieves an adequate balance between competing interests).

[63] Liquids Shippers Initial Comments at 28–29.

[64] 18 CFR 343.2(c)(1); *see also supra* P 20.

[65] Joint Complainants Initial Comments at 47–48 (quoting 18 CFR 343.2(c)(1) (emphasis in original)); Liquids Shippers Initial Comments at 34 (same); Liquids Shippers Reply Comments at 15.

[66] 18 CFR 343.2(c)(1).

[67] *See, e.g., SFPP, L.P.,* 139 FERC ¶ 61,267, at PP 9–10 (2012), *reh'g denied,* 143 FERC ¶ 61,140 (2013).

[68] Order No. 561, FERC Stats. & Regs. ¶ 30,985 at 30,949 n.37.

[69] For example, if reducing costs by 1% precludes a pipeline from implementing a 5% index rate increase it could obtain if its costs instead increased by 1%, the pipeline's incentives to reduce costs would diminish.

[70] *HollyFrontier,* 170 FERC ¶ 61,133 at P 37.

[71] *Southwest Airlines,* 926 F.3d at 859.

[72] 18 CFR 343.2(c)(1).

West Coast II that it is not arbitrary to interpret § 343.2(c)(1) differently depending upon whether the challenge to the index rate change takes the form of a protest or a complaint.[73] In making this finding, the Commission reasoned that the different procedural frameworks for protest and complaint proceedings warranted applying different interpretations of § 343.2(c)(1) to these pleadings and that applying the same standard in both types of proceedings ''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.'' [74]

38. Upon review of the record in this proceeding, we now conclude that it is preferable to evaluate protests and complaints under § 343.2(c)(1) using a single test. The considerations identified in *BP West Coast II* do not compel evaluating complaints against index rate increases differently than protests. While different procedural frameworks may justify different kinds of evidence that the Commission would consider in evaluating complaints as compared to accelerated protest proceedings, the different procedural frameworks here—where our regulations set forth the requirement for filing protests and complaints against index rate adjustments in the same sentence under a single standard—do not warrant applying different tests. Here, as discussed above, we find the Percentage Comparison Test to be superior to the Substantially Exacerbate Test and, given the flaws in the Substantially Exacerbate Test, we conclude that it is preferable to apply the Percentage Comparison Test to both protests and complaints.

39. In addition, shippers will be able to challenge index rate increases by demonstrating that such increases are disallowed under the Percentage Comparison Test. Thus, contrary to commenters' arguments,[75] we disagree that shippers are effectively precluded from challenging proposed index rate increases. The Percentage Comparison Test provides an effective preliminary screen that enables shippers to challenge index rate increases that substantially diverge from the pipeline's cost changes.[76]

40. Furthermore, although the Percentage Comparison Test does not permit shippers to raise existing over-recoveries to challenge index rate increases,[77] this is consistent with the plain language of the Commission's regulations and with the purpose of annual index rate increases. As discussed above, § 343.2(c)(1) requires a complainant to show that the pipeline's cost change substantially exceeds its rate change, not to evaluate pre-existing over-recoveries.[78] In addition, indexing allows annual pipeline rate increases to reflect industry-wide cost changes during the prior year to ensure that the pipeline's rate is sufficient to recover future years' costs. Consistent with this 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.[79] Applying the Percentage Comparison Test to both protests and complaints would bring the standard applied to complaints in line with this precedent by limiting the inquiry in index increase complaint proceedings to the relationship between the rate increase and the pipeline's prior changes in cost.

41. Moreover, even a successful complaint challenging an index rate increase based upon the Substantially Exacerbate Test would merely prevent the index increase at issue; it would not address any pre-existing over-recoveries. 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. If successful, such a complaint would eliminate the pipeline's over-recovery.

C. The Percentage Comparison Test's 10% Threshold Is Reasonable

42. We reaffirm our continued use of a 10% threshold in the application of the Percentage Comparison Test.[80] This record does not support a different threshold, and we find the 10% threshold continues to be reasonable. As an initial matter, the 10% threshold fulfills the Commission's regulations by denying index rate increases where the rate increase significantly exceeds the pipeline's cost changes.[81] In contrast, imposing a lower threshold (such as a 5% threshold) could prevent a majority or near-majority of the industry from taking full index rate increases.[82] This would undercut the purpose of indexing by precluding large portions of the industry from adjusting their rates to reflect industry-wide cost changes.

43. Moreover, the 10% threshold preserves indexing's cost-efficiency incentives and encourages pipelines to control costs. Indexing allows for some gap between an individual pipeline's rates and its costs, and allowing rates to exceed costs by a modest degree encourages pipelines to operate efficiently by permitting them to retain a portion of their cost savings while also placing downward pressure on the industry-wide index level through the five-year review process.[83] Setting the threshold at 10% provides a reasonable 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.

44. Conversely, setting the threshold below 10% could undermine these efficiency incentives. Industry-wide cost data illustrate this point. The average of the annual index levels from 2004 to 2019 is approximately 4.10%. In 10 of those 16 years, the index level exceeded

[73] *BP West Coast II,* 121 FERC ¶ 61,141 at P 7.

[74] *Id.; see also supra* P 22 (discussing why the use of the dollar yield is not appropriate).

[75] Joint Complainants Initial Comments at 19, 39; Liquids Shippers Initial Comments at 20–23; *see also* CAPP Initial Comments at 14; CAPP Reply Comments at 2–3.

[76] Dr. Webb's analysis demonstrates that for each year between 2001–2018, a significant segment of oil pipelines filing cost-of-service information would have failed the Percentage Comparison Test's 10% threshold had they attempted to take a full index rate increase. SFPP Reply Comments, Ex. B at 7–8 (Affidavit of Michael J. Webb). In most years, the 10% threshold would have screened all pipelines in the upper quartile of all pipelines from implementing a full index rate increase. *Id.*

[77] Liquids Shippers Initial Comments at 20–23; *see also* CAPP Initial Comments at 14; CAPP Reply Comments at 2–3.

[78] 18 CFR 343.2(c)(1).

[79] *E.g., SFPP, L.P.,* 140 FERC ¶ 61,016 at P 34 (finding 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 index rate increase).

[80] The Percentage Comparison Test's 10% threshold developed gradually through the adjudication of protests to index rate increases. *HollyFrontier,* 170 FERC ¶ 61,133 at P 41. The Commission made this threshold explicit a decade ago in 2012. *SFPP, L.P.,* 139 FERC ¶ 61,267 at P 10.

[81] An analysis of page 700 data indicates that the 10% threshold generally excludes pipelines in the top 30% of industry-wide cost changes from implementing index rate increases. Moreover, between 2017–2020, an average of 32 pipelines per year (or approximately 12% of pipelines filing page 700) experienced a divergence of 10% or more between their annual percentage change in cost of service and the full index rate increase. *See also* SFPP Reply Comments, Ex. B at 8, Figure 2 (Affidavit of Dr. Michael J. Webb) (illustrating that in most years between 2001–2018, the 10% threshold would have excluded pipelines in the top 30% of industry-wide cost changes reported on page 700 from implementing full index rate increases).

[82] *Id.* at 8–9.

[83] *HollyFrontier,* 170 FERC ¶ 61,133 at P 42 (citing Order No. 561, FERC Stats. & Regs. ¶ 30,985 at 30,949). The Commission recalculates the index based upon industry-wide cost changes over the prior five-year period; therefore, any cost savings over that prior period will tend to reduce the index level.

4.10%. Moreover, in five of those years, the index level exceeded 5%, reaching as high as 8.6%. 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.[84] Moreover, a threshold equal to [85] or lower than [86] the index level for a given year would create incentives for 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.[87] Accordingly, we find that the existing 10% threshold balances indexing's efficiency incentives without shielding unreasonable rate increases from scrutiny.

45. Further, 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.[88] 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% 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 their costs over time.[89] 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.[90]

46. Joint Complainants have not persuaded us to lower the 10% threshold.[91] Joint Complainants observe that the Commission previously stated that the index should not be set so ''sufficiently high and generous to encompass even the most extraordinary costs.'' [92] As discussed above, however, the 10% threshold would not encompass extraordinary costs and imposing a 5% threshold could prevent a majority or near-majority of the industry from taking full index rate increases.[93] This result would fail to account for pipeline cost- and throughput-volatility and risk, creating a lopsided ratemaking methodology that deprives pipelines an appropriate opportunity for sufficient cost recovery.[94]

47. We find misplaced Joint Complainants' argument that pipelines have cost-efficiency incentives even without the possibility of an index rate increase. If a pipeline risks losing a future index increase because it reduces costs, then the pipeline's incentive to reduce those costs will erode.[95] As noted above, we remain concerned setting the threshold for the Percentage Comparison Test too low would undermine pipelines' incentives to control costs. The 10% threshold reasonably balances that concern with the need to constrain index rate increases that are substantially in excess of pipelines' cost changes.[96]

48. We are similarly unpersuaded by Joint Complainants' argument regarding how a threshold slightly above or below the index level in a given year could impact pipelines' incentives to reduce costs. Specifically, Joint Complainants claim that even if pipelines could forecast the next year's index level, it is highly unlikely that they could precisely calibrate their cost changes to take the index level into account.[97] Although Joint Complainants are correct that pipelines likely cannot precisely calibrate their costs to account for an index level to be published the following year, this misses the point. Even if pipelines cannot calibrate their costs with such exactitude or anticipate future index levels, losing all or part of an index rate increase due to an overly stringent Percentage Comparison Test threshold could erode pipelines' incentives to control costs going forward. This erosion can become pronounced at thresholds less than 10%. For example, if the threshold is set at 5% and the index level is 4.1%, a pipeline whose costs declined by more than 1% could lose at least a portion of any index rate increase for that year.[98] Because this slight cost reduction caused the pipeline to lose an index rate increase in a year with an average index level, a 5% threshold could weaken the pipeline's incentive to reduce costs going forward.

49. Joint Complainants' remaining contentions are also without merit. Their argument that the 10% threshold can produce large disparities between pipeline revenues and costs lacks support because the examples that Joint Complainants provide assume without basis that pipelines' revenues will increase in future periods while their costs and throughput will remain unchanged.[99] Joint Complainants also provide no evidence that the application of the Percentage Comparison Test and the 10% threshold to protested index

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

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

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

[87] *HollyFrontier,* 170 FERC ¶ 61,133 at P 43.

[88] Because oil pipelines are common carriers, throughput can change significantly from year to year. For example, using page 700 data, the median annual change in throughput was 14% from 2017–2018. Significant changes in throughput can produce significant changes in pipeline costs and revenues.

[89] This potential distortion would be magnified by the sheer number of pipelines that would lose index increases under a threshold lower than 10% as discussed above.

[90] *HollyFrontier,* 170 FERC ¶ 61,133 at P 44. For example, if the threshold is set at 8%, Pipeline A with 3% cost decreases in year one and year two would be permitted to implement index rate increases at the 4.10% average for both years. However, Pipeline B with no cost changes in year one and a 5% cost decrease in year two would be unable to implement a full 4.10% 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 5% instead of 6%).

[91] Joint Complainants Initial Comments at 42–44.

[92] *Id.* at 49–50 (quoting Order No. 561–A, FERC Stats. & Regs. ¶ 31,000 at 31,097).

[93] *Id.* at 8–9.

[94] *HollyFrontier,* 170 FERC ¶ 61,133 at P 44.

[95] For example, if a pipeline is considering steps that could reduce its costs by 5% but this would cause the pipeline to lose a 5% index increase in the next year, then the pipeline will not have an incentive to implement the cost reduction.

[96] *HollyFrontier,* 170 FERC ¶ 61,133 at P 43. Furthermore, reducing costs often requires pipelines to invest in cost-saving measures, such as more efficient pumps. A stringent Percentage Comparison Test threshold that places pipelines at risk of losing all or part of an index rate increase when the pipeline modestly controls its costs could discourage pipelines from making such investments.

[97] Joint Complainants Initial Comments at 51 (citing *HollyFrontier,* 170 FERC ¶ 61,133 at P 43, nn.77, 78, & 79; Brattle Report at PP 21–24).

[98] *HollyFrontier,* 170 FERC ¶ 61,133 at P 43 n.77.

[99] Joint Complainants Initial Comments at 52.

rate increases has in fact lead to significant over-recoveries.

50. Similarly, we disagree with Joint Complainants' claim that indexing only weakly reflects industry-wide cost changes because it lacks a recurring requirement to reset industry-wide oil pipeline rates on a cost-of-service basis (''rebasing'' mechanism).[100] As an initial matter, it is not clear whether a rebasing mechanism would increase pipeline incentives to operate efficiently.[101] Moreover, this proposal is beyond the scope of this proceeding. As discussed above, the Commission established indexing as a simplified, streamlined ratemaking methodology in response to EPAct 1992's mandate to develop an alternative to complex, costly, and lengthy cost-of-service rate proceedings. Periodically resetting oil pipeline rates to cost-of-service levels as Joint Complainants propose could be contrary to that mandate,[102] requiring the Commission to resolve a large number of cost-of-service rate cases on a recurring basis and imposing substantial burdens on shipper, pipeline, and Commission resources.[103] Joint Complainants do not explain how a recurring rebasing mechanism would be consistent with simplified and streamlined ratemaking.

51. Liquids Shippers likewise fail to adequately challenge the Percentage Comparison Test's 10% threshold. While Liquids Shippers claim that the threshold is arbitrary and unsupported,[104] it has in fact been developed over time through several proceedings.[105] Although Liquids Shippers argue that the Commission has not justified setting the threshold at 10% as opposed to a slightly lower level,[106] we find, based on our experience with its application and the record before us, that the 10% threshold strikes an appropriate balance between upholding the indexing methodology's cost-efficiency incentives and ensuring just and reasonable rates.[107] Moreover, the Commission has considerable discretion in setting numerical thresholds,[108] and Liquids Shippers have not demonstrated that the 10% threshold is so objectionable as to be ''patently unreasonable.'' [109]

52. Accordingly, we will apply the 10% threshold when using the Percentage Comparison Test to evaluate complaints. Although Joint Complainants and Liquids Shippers criticize the 10% threshold, they do not persuade us that an alternative Percentage Comparison Test threshold better satisfies our statutory obligations. As discussed above, the Commission possesses significant discretion in setting numerical thresholds. We find no reason based upon the record here to depart from our proposal in the NOI and our prior precedent.[110]

D. The Alternative Proposals Presented Are Inconsistent With the Indexing Scheme

53. Several commenters suggest alternatives to the Percentage Comparison Test they assert would provide superior means for evaluating complaints against index rate increases. As discussed below, these proposals are the ''cost-decrease test'' and the ''revenues test.'' We disagree that these alternatives are superior to the Percentage Comparison Test. Moreover, both proposals are inconsistent with the Commission's regulations requiring that a challenge to an index increase be assessed based on whether the increase is substantially in excess of the pipeline's cost increases.[111] Accordingly, we decline to adopt these proposals here.

1. Cost-Decrease Test

a. Proposal

54. Joint Complainants propose that the Commission deny index rate increases where (i) the pipeline's revenues exceed its costs and (ii) the pipeline's costs have decreased for the relevant index period (cost-decrease test).[112] Joint Complainants argue that granting an index rate increase in such circumstances would negate the cost basis of the index rate increase by allowing the pipeline to double-recover the industry-wide cost changes that the rate increase seeks to address. Joint Complainants further assert that Opinion No. 511–A supports this proposal.[113]

b. Commission Determination

55. We decline to adopt Joint Complainants' proposed cost-decrease test. The proposal is fundamentally flawed. First, the cost-decrease test is inconsistent with the Commission's regulations because it may permit challenges to index rate increases even though the rate change is not substantially in excess of the pipeline's costs changes as required by § 343.2(c)(1). For instance, if a pipeline's total costs decrease by 0.01% and the index increase is only 0.1%, it is not the case that the rate increase is substantially in excess of the cost change.

56. Second, the cost-decrease test is also conceptually flawed. As discussed above, some gap between revenues and costs must be permitted to preserve indexing's efficiency incentives.[114]

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[100] *Id.* at 52–53.

[101] Regularly reducing the pipeline's rates to the cost-of-service level would reduce pipeline incentives to operate efficiently. Moreover, even pipelines that are already earning revenues above their costs have an incentive to control costs in order to further increase the return to investors.

[102] *See Ass'n of Oil Pipe Lines* v. *FERC,* 281 F.3d 239, 244 (D.C. Cir. 2002) (*AOPL II*) (quoting EPAct 1992, Pub. L. 102–486 1801(a)) (finding that ''a regime based in large part on [cost-of-service proceedings] would be inconsistent with Congress's mandate under the EPAct for FERC to establish 'a simplified and generally applicable ratemaking methodology' '').

[103] In establishing indexing, the Commission explicitly declined to undertake a periodic review of individual pipeline costs and the D.C. Circuit affirmed this decision. Order No. 561–A, FERC Stats. & Regs. ¶ 31,000 at 31,104–05, *aff'd, AOPL* v. *FERC,* 83 F.3d at 1437.

[104] Liquids Shippers Initial Comments at 35.

[105] The 10% threshold evolved through orders in which the Commission initiated investigations when the divergence between a pipeline's cost increases and the proposed rate increase was more than 10% and declined to initiate investigations where such divergence was less than 10%. *Compare SFPP,* 139 FERC ¶ 61,267 at P 10 (rejecting protests where divergence was 9.88%), *with Calnev Pipeline L.L.C.,* 115 FERC ¶ 61,387 at PP 10–11 (setting protest for hearing based upon 10.95% divergence), *and SFPP, L.P.,* 139 FERC ¶ 61,266, at P 7 (2012) (setting protest for hearing where divergence was 13.1%).

[106] Liquids Shippers Reply Comments at 18 (arguing that the Commission has not justified setting the threshold at 10% rather than 9.88%).

[107] *See HollyFrontier,* 170 FERC ¶ 61,133 at PP 41–44. In addition, Liquids Shippers' argument that the 10% threshold allows for improper gamesmanship is unconvincing. Liquids Shippers support this claim by citing an example where a pipeline, faced with a shipper protest, withdrew a proposed index rate increase that exceeded the 10% threshold and refiled a lower rate increase that fell below the threshold. Liquids Shippers Initial Comments at 36 (citing Buckeye Pipe Line Transportation LLC, Tariff Filing, Docket No. IS15–352–000 (filed May 28, 2015)). However, rather than undermine the Percentage Comparison Test, this example illustrates how the 10% threshold can constrain pipelines from implementing rate increases that diverge considerably from their cost changes.

[108] *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). 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 of unbridled whim.' '' *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)).

[109] *Vonage Holdings Corp.* v. *FCC,* 489 F.3d at 1242.

[110] *See, e.g., SFPP, L.P.,* 140 FERC ¶ 61,106 (2012), *order on reh'g,* 143 FERC ¶ 61,141 (2013); *SFPP, L.P.,* 143 FERC ¶ 61,297, at P 11 (2013), *order on reh'g,* 147 FERC ¶ 61,012 (2014); *SFPP,* 163 FERC ¶ 61,232 at PP 13, 20.

[111] 18 CFR 343.2(c).

[112] Joint Complainants Initial Comments at 56.

[113] *Id.* at 57 (citing *SFPP, L.P.,* Opinion No. 511–A, 137 FERC ¶ 61,220, at P 407 (2011)).

[114] *See supra* P 43.

Likewise, Joint Complainants' proposal would make indexing a lopsided methodology in which pipelines face significant risk of under-recovery without commensurate potential for benefits for operating efficiently.[115] Finally, Joint Complainants' proposal includes no flexibility for the annual fluctuations in a pipeline's costs and revenues.[116]

57. Third, we are not persuaded by Joint Complaints' arguments in support of the cost-decrease test. In seeking to justify this proposal, Joint Complainants mischaracterize the purpose of indexing. Joint Complainants argue that index rate increases are designed to recover a pipeline's past costs, and therefore to avoid a double-recovery index rate increases should not be extended to pipelines whose rates already recover these costs.[117] Contrary to Joint Complainants' assertions, and as noted above, an index rate change is not a true-up to account for prior period over- or under-recoveries. Rather, indexing allows pipeline rates to increase (or decrease) to keep pace with annual industry-wide cost changes so that the pipeline can recover its costs in *future* years.[118] Likewise, indexing does not address a pipeline's base costs as in a cost-of-service rate case.[119] Thus, to the extent that a pipeline's rates generate revenues sufficient to recover the pipeline's base costs as reported on its page 700, this does not necessarily indicate that those rates also recovered the annual industry-wide cost changes that indexing is designed to recover. As a result, adjusting a pipeline's rate to account for industry-wide cost changes, even where the pipeline's cost of service has declined, does not negate the cost basis for the rate increase.[120]

58. Moreover, we disagree with Joint Complainants' assertion that Opinion No. 511–A supports the cost-decrease test. Opinion No. 511–A involved different circumstances than those under consideration here. As explained in Opinion No. 511–A, the Commission has rejected index rate increases following a new cost-of-service rate filing where the increase addressed prior-period inflationary cost changes that were already incorporated into the test period data used to determine the pipeline's cost-of-service rate.129F [121] Opinion No. 511–A involved situations where the test period for setting cost-of-service rates and the time period for measuring industry-wide cost changes reflected in the index rate increase overlapped, in total or in part. In that cost-of-service rate case, the Commission correctly found that the pipeline's new cost-of-service rates already reflected the prior-period cost changes (*i.e.,* the costs in the test period) that would have been reflected in the proposed index rate increase. Because that proceeding involved new base rates set at the pipeline's cost-of-service level, there was no need to adjust those rates to account for inflationary industry-wide costs that took place during the cost-of-service test period. By contrast, under the indexing regime, it is appropriate as a general matter for pipelines to adjust their rates to account for industry-wide cost changes where the Commission did not set the rate using cost data from the period covered by the index rate change.[122]

2. Revenues Test

a. Proposal

59. Joint Complainants, Liquids Shippers, and CAPP propose versions of a revenues test, wherein the Commission would grant challenges to an index rate increase where the pipeline's page 700 revenues exceeded its page 700 cost of service by a certain percentage for two consecutive years. Joint Complainants propose a 7.5% threshold,[123] Liquids Shippers propose a 5% threshold,[124] and CAPP proposes a 10% threshold.[125] Joint Complainants explain that over-recovering by 7.5% would contribute a 25% impact on the pipeline's return on equity (ROE), which Joint Complainants argue is a reasonable threshold and is consistent with the Commission's existing framework for rate evaluation, including the evaluation of grandfathered rates.[126] Liquids Shippers submit that a 5% threshold is appropriate because it translates to a real ROE of 12.3%, which they claim approximates the top of the zone of reasonableness as determined by the discounted cash flow (DCF) analysis in recent pipeline cost-of-service rate cases.[127] CAPP argues that there are numerous reporting pipelines whose revenues exceed its proposed 10% threshold, which in turn represents an unwarranted over-recovery that cannot be reconciled with the just and reasonable rate standard.[128]

b. Commission Determination

60. We are not persuaded to adopt the proposed revenues tests. As an initial matter, a revenues test is inconsistent with the regulations because it evaluates existing over-recovery, while the regulations require a comparison of cost changes to rate changes.[129] While commenters are correct that the Commission proposed a similar revenues test in the 2016 ANOPR, the Commission ultimately declined to adopt such a test.[130]

61. Moreover, this record does not provide support for a workable application of a revenues test. For example, we conclude that the proposed revenues test thresholds lack support. Joint Complainants criticize the 2016 ANOPR's 15% threshold as arbitrary

[115] *See supra* P 30.

[116] Because oil pipelines are common carriers, throughput can change significantly from year to year and this significantly affects oil pipeline revenues.

[117] Joint Complainants Initial Comments at 57.

[118] *See* discussion *supra* P 25.

[119] *SFPP, L.P.,* Opinion No. 522–B, 162 FERC ¶ 61,229, at P 16 n.25 (2018).

[120] Applying the Percentage Comparison Test as the preliminary screen for both protests and complaints under § 343.2(c)(1) provides an additional safeguard by triggering investigations where an index rate change diverges markedly from the pipeline's recent reported cost changes.

[121] Opinion No. 511–A, 137 FERC ¶ 61,220 at P 407 (citing *SFPP, L.P.,* 117 FERC ¶ 61,271 (2006), *reh'g denied,* 120 FERC ¶ 61,245 (2007). For instance, in Opinion No. 511–A, the Commission allowed SFPP to implement one-quarter of an index rate increase for 2008 where cost data from the first nine months were reflected in a Commission order approving new cost-of-service rates for SFPP. Opinion No. 511–A, 137 FERC ¶ 61,220 at PP 405, 409–411.

[122] In these circumstances, the industry-wide cost changes that the index rate change is designed to recover are not already incorporated into the pipeline's underlying rate. Thus, the mere fact that the pipeline's revenues exceed its cost of service does not establish that its rates have already recovered the cost changes that indexing seeks to recover.

[123] Joint Complainants Initial Comments at 59.

[124] Liquids Shippers Initial Comments at 36–37.

[125] CAPP Initial Comments at 14–16.

[126] Joint Complainants Initial Comments at 61 (citing Order No. 783, 144 FERC ¶ 61,049 at P 5). EPAct 1992 ''grandfathered,'' or deemed just and reasonable, rates that were in effect for the 365-day period ending on the date of enactment of EPAct 1992, or that were in effect on the 365th day preceding enactment, and which were not subject to a protest, complaint, or an investigation during this 365-day period. These grandfathered rates can be challenged under certain limited conditions, including where the complainant establishes that ''a substantial change has occurred after the date of the enactment of'' EPAct 1992 in ''the economic circumstances . . . which were the basis for the rate.'' EPAct 1992 1803(b)(1). The Commission has interpreted that test to require a complainant to demonstrate that the ROE earned on the rate at issue has increased by at least 25% over the ROE embedded in the grandfathered rate and that the increase has occurred since the passage of EPAct in 1992. *See, e.g., Tesoro Ref. & Mktg. Co.* v. *Calnev Pipe Line LLC,* 134 FERC ¶ 61,214, at PP 17–18, 60 (2011).

[127] Liquids Shippers Initial Comments at 38 (citing *Revisions to Indexing Policies & Page 700 of FERC Form No. 6,* 157 FERC ¶ 61,047, at n.25 (2016) (2016 ANOPR), *withdrawn,* 170 FERC ¶ 61,134 (2020); *El Paso Nat. Gas Co.,* Opinion No. 528–A, 154 FERC ¶ 61,120, at P 215 (2016); *Seaway Crude Pipeline Co.,* Opinion No. 546, 154 FERC ¶ 61,070, at P 194 (2016)).

[128] CAPP Initial Comments at 14.

[129] *See* 18 CFR 343.2(c)(1).

[130] *See Revisions to Indexing Policies & Page 700 of FERC Form No. 6,* 170 FERC ¶ 61,134 at P 11.

and capricious,[131] but they fail to provide substantive support for their proposed 7.5% threshold.[132] Liquids Shippers similarly fail to justify their proposed 5% threshold.[133] In addition, we are concerned that the proposed 5% and 7.5% thresholds are inconsistent with a streamlined, generally applicable ratemaking methodology, because they could necessitate the use of cost-of-service rate filings for many pipelines where the pipeline's revenues slightly exceed costs over a short period but not necessarily in the long term.[134] Moreover, such narrow thresholds risk making indexing a one-sided methodology in which pipelines face significant risk of under-recovery without commensurate potential for benefits for operating efficiently.[135]

E. Consideration of Additional Factors in Complaint Proceedings

1. Comments

62. The NOI invited comment on how and whether the Commission should consider additional factors in evaluating complaints against index rate increases.[136] SFPP objects to the Commission's proposal, arguing that introducing undefined ''additional factors'' would create ambiguity and regulatory uncertainty, which would impede the gains achieved by eliminating the Substantially Exacerbate Test as well as undermine the goal of creating streamlined procedures that reduce litigation.[137] Therefore, SFPP requests that the Commission clarify that it will not consider additional factors beyond the Percentage Comparison Test.

2. Commission Determination

63. We decline to clarify that the Commission will not consider additional factors beyond the Percentage Comparison Test when evaluating complaints to an index rate increase. While our intention, based upon this record in this proceeding, is to generally limit our consideration of challenges to index rate increases to the Percentage Comparison Test, we recognize that the Commission must address specific arguments as they arise in specific cases.

F. Whether To Adopt Broader Changes to the Commission's Oil Pipeline Ratemaking Methodologies

1. Comments

64. Liquids Shippers claim that the indexing methodology allows for significant over-recovery and should be reexamined, referring to arguments they made in support of the 2016 ANOPR.[138]

65. CAPP contends that the Commission should perform a comprehensive review of the indexing regime to ensure that shipper and pipeline interests are appropriately balanced and to determine whether the regime can be improved.[139] CAPP further argues that because the current cost-of-service ratemaking process is cumbersome, costly, and time-consuming, the Commission should consider overhauling the cost-of-service ratemaking process rather than using its flaws as justification for increased reliance on the indexing system.[140]

2. Commission Determination

66. We reject Liquids Shippers' and CAPP's arguments that the Commission should reexamine the indexing methodology and cost-of-service ratemaking process as outside the scope of this proceeding. The NOI requested comment on the Commission's proposal for evaluating complaints against index rate increases under § 343.2(c)(1).[141] Because Liquids Shippers' and CAPP's arguments exceed the scope of this inquiry, we decline to address their proposals.

III. Document Availability

67. In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://www.ferc.gov*).

68. From the Commission's Home Page on the internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

69. User assistance is available for eLibrary and the Commission's website during normal business hours from the Commission's Online Support at (202) 502–6652 (toll free at 1–866–208–3676), via email at *ferconlinesupport@ferc.gov,* or from the Public Reference Room at (202) 502–8371, TTY (202) 502–8659. Email the Public Reference Room at *public.referenceroom@ferc.gov*.

By the Commission. Commissioner Danly is not participating.

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[131] Joint Complainants Initial Comments at 60.

[132] Joint Complainants justify this threshold on the basis that a 1992 oil pipeline rate is ''de-grandfathered'' if the pipeline's ROE has increased by 25% over the grandfathered level. Joint Complainants Initial Comments at 60–61 (citing *Tesoro,* 134 FERC ¶ 61,214 at PP 53, 60–62). Joint Complainants assert that a gap between revenues and costs of 7.5% equates to a 25% increase in ROE over the industry-wide average reported on page 700. Joint Complainants Initial Comments at 61–62 (citing Brattle Report at PP 41–47 & Figures 7–9). However, the threshold for de-grandfathering rates serves the different purpose of measuring a ''substantial change in economic circumstances'' since a specific point in time. *E.g.,* Order No. 561, FERC Stats. & Regs. ¶ 30,985 at 30,944. The issue when evaluating an index rate increase is not a change in economic circumstances, but, rather, whether the annual index increase ''is so substantially in excess of the actual cost increases'' that the resulting rate is unjust and unreasonable. 18 CFR 343.2(c)(1).

[133] We are not persuaded by Liquids Shippers' claim that the Commission should investigate index increases when revenues are 105% of costs, arguing that this approximates the top of the zone of reasonableness (an ROE of 12.3%) as determined by the discounted cash flow (DCF) analysis in recent oil pipeline cost-of-service cases. This argument fails because the just and reasonable return permitted by a rate case is not equivalent to the return permitted by indexing. Indexing permits efficient pipelines to recover more (earn a higher return) than they would under a cost-of-service model. Likewise, inefficient pipelines recover less than they would under a cost-of-service model (earning a lower return). By capping the return at a cost-of-service level, Liquids Shippers' proposal would deny the benefit that indexing is meant to provide to efficient pipelines while continuing to subject less efficient pipelines to the downsides of indexing.

[134] *See AOPL II,* 281 F.3d at 244 (quoting EPAct 1992, Pub. L. 102–486 1801(a)) (''[A] regime based in large part on [cost-of-service proceedings] would be inconsistent with Congress's mandate under the EPAct for FERC to establish 'a simplified and generally applicable ratemaking methodology.' ''). Such narrow thresholds fail to account for variability of costs and revenues from year to year. Over- and under-recovery can vary widely from year to year. For example, in 2020 and considering the data set of all pipelines, the median variation from the prior year's recoveries was by 37.03 percentage points. Although a pipeline's revenues resulting from indexed rates may track its costs, this is not necessarily true over the short term. If such a pipeline's recoveries fluctuate around zero but with significant annual variations, denying the pipeline index rate increases in those years when revenues modestly exceed costs would, over time, cause the pipeline to under-recover its costs in the long term. To avoid such under-recoveries, the pipeline would need to file a cost-of-service rate increase.

[135] *See supra* P 30. For instance, if a pipeline's revenues exceed its costs by 5%, the pipeline would be denied an index rate increase under Liquids Shippers' 5% revenues-test threshold. On the other hand, if a pipeline's costs exceeded its revenues by 5%, then the pipeline would only receive that year's index rate increase, which may be insufficient for the pipeline to eliminate the under-recovery.

[136] NOI, 170 FERC ¶ 61,252 at P 14.

[137] SFPP Initial Comments at 21.

[138] *See* Liquids Shippers Initial Comments at 21–22.

[139] CAPP Initial Comments at 9–13.

[140] *Id.* at 9, 17–18; CAPP Reply Comments at 1–3.

[141] NOI, 170 FERC ¶ 61,252 at P 14.

Issued: October 20, 2022.

Kimberly D. Bose,

Secretary.

Appendix: Percentage Comparison Test and Substantially Exacerbate Test Formulas

BILLING CODE 6717–01–P

Percentage Comparison Test

$$[Index\ Adjustment]_t - \left(\frac{[Costs]_{t-1} - [Costs]_{t-2}}{[Costs]_{t-2}}\right)$$

Where [Index Adjustment] is expressed in percentage terms and t = index adjustment year

Substantially Exacerbate Test

Exacerbation = $$\frac{[Post\text{-}Index\ Over\text{-}Recovery] - [Existing\ Over\text{-}Recovery]}{[Existing\ Over\text{-}Recovery]}$$

Post-Index Over-Recovery = $$\frac{[Index\ Adjustment]_t * [Revenues]_{t-1} - [Costs]_{t-1}}{[Costs]_{t-1}}$$

Existing Over-Recovery = $$\frac{[Revenues]_{t-1} - [Costs]_{t-1}}{[Costs]_{t-1}}$$

Where [Index Adjustment] is expressed in percentage terms and t = index adjustment year

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BILLING CODE 6717–01–C

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 220216–0049]

RTID 0648–XC499

Fisheries of the Exclusive Economic Zone Off Alaska; Shortraker Rockfish in the Central Regulatory Areas of the Gulf of Alaska

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Temporary rule; closure.

SUMMARY: NMFS is prohibiting retention of shortraker rockfish in the Central Regulatory Areas of the Gulf of Alaska (GOA). This action is necessary to prevent exceeding the 2022 total allowable catch of shortraker rockfish in the Central Regulatory Areas of the GOA.

DATES: Effective 12 p.m., Alaska local time (A.l.t.), October 25, 2022, through 12 a.m., A.l.t., December 31, 2022.

FOR FURTHER INFORMATION CONTACT: Obren Davis, 907–586–7228.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the GOA exclusive economic zone according to the Fishery Management Plan for Groundfish of the Gulf of Alaska (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR parts 600 and 679.

The 2022 total allowable catch (TAC) of shortraker rockfish in the Central Regulatory Areas of the GOA is 280 metric tons (mt) as established by the final 2022 and 2023 harvest specifications for groundfish of the GOA (87 FR 11599, March 2, 2022).

In accordance with § 679.20(d)(2), the Administrator, Alaska Region, NMFS (Regional Administrator), has determined that the 2022 shortraker rockfish TAC in the Central Regulatory