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FEDERAL ENERGY REGULATORY COMMISSION

Docket No. AD20-10-000

Standard Applied to Complaints Against Oil Pipeline Index Rate Changes

AGENCY: Federal Energy Regulatory Commission.

ACTION: Notice of inquiry.

SUMMARY: Following the issuance of *HollyFrontier Refining & Marketing LLC v. SFPP, L.P.*, 170 FERC ¶ 61,133 (2020), the Federal Energy Regulatory Commission (Commission) seeks comment on the Commission's recent proposal to eliminate the Substantially Exacerbate Test as the preliminary screen applied to complaints against oil pipeline index rate changes under 18 CFR 343.2(c)(1) and to apply the Percentage Comparison Test as the preliminary screen for complaints. The Commission also seeks comment on the use of the 10% threshold when applying the Percentage Comparison Test to complaints.

DATES: Initial Comments are due [**Insert date 60 days after publication in the Federal Register**], and Reply Comments are due [**Insert date 90 days after publication in the Federal Register**]

ADDRESSES: Comments, identified by docket number, may be filed electronically at <http://www.ferc.gov> in acceptable native applications and print-to-PDF, but not in scanned or picture format. For those unable to file electronically, comments may be filed by mail or hand-delivery to: Federal Energy Regulatory Commission, Secretary of the

Commission, at Health and Human Services, 12225 Wilkins Avenue, Rockville,  
Maryland, 20852.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

1. In *HollyFrontier Refining & Marketing LLC v. SFPP, L.P.*,<sup>1</sup> the Commission proposed to eliminate the Substantially Exacerbate Test as the preliminary screen applied to complaints against index rate increases and to evaluate such complaints by applying the Percentage Comparison Test. The Commission further stated that it planned to initiate a separate, generic proceeding to request briefing from industry participants.<sup>2</sup> As contemplated in *HollyFrontier*, we invite public comment on the merits of this proposal as well as the use of the 10% threshold when applying the Percentage Comparison Test to complaints.

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<sup>1</sup> 170 FERC ¶ 61,133 (2020) (*HollyFrontier*).

<sup>2</sup> *Id.* P 46 n.82.

## I. Background

2. The Commission regulates oil pipeline rates pursuant to the Interstate Commerce Act's just and reasonable standard.<sup>3</sup> In accordance with the Energy Policy Act of 1992,<sup>4</sup> the Commission adopted the indexing regime to provide a simplified and generally applicable ratemaking methodology for oil pipelines and created streamlined procedures related to oil pipeline rates.<sup>5</sup> Indexing allows oil pipelines to change their tariff rates so long as those rates remain at or below applicable ceiling levels. When the Commission created indexing, it also added page 700 to Form No. 6 to provide cost, revenue, and throughput information so that the Commission and the industry can monitor these indexed rates.<sup>6</sup>

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<sup>3</sup> 49 U.S.C. app. 1(5) (1988).

<sup>4</sup> Energy Policy Act of 1992, Pub. L. No. 102-486 1801(b), 106 Stat. 3010 (Oct. 24, 1992).

<sup>5</sup> *See Revisions to Oil Pipeline Regulations Pursuant to Energy Policy Act of 1992*, Order No. 561, FERC Stats. & Regs. ¶ 30,985 (1993), (cross-referenced at 65 FERC ¶ 61,109), *order on reh'g and clarification*, Order No. 561-A, 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).

<sup>6</sup> *Cost-of-Service Reporting and Filing Requirements for Oil Pipelines*, Order No. 571, FERC Stats. & Regs. ¶ 31,006 (1994), (cross-referenced at 69 FERC ¶ 61,102), *order on reh'g and clarification*, Order No. 571-A, FERC Stats. & Regs. ¶ 31,012 (1994), (cross-referenced at 69 FERC ¶ 61,411) *aff'd sub nom. Ass'n of Oil Pipe Lines v. FERC*, 83 F.3d 1424 (D.C. Cir. 1996); *see also Revisions to and Electronic Filing of the FERC Form No. 6 and Related Uniform Systems of Accounts*, Order No. 620, 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, 144 FERC ¶ 61,049, at PP 29-40 (2013), *reh'g denied*, Order No. 783-A, 148 FERC ¶ 61,235 (2014). All jurisdictional pipelines are required

3. In adopting the indexing regime, the Commission established a procedure to allow shippers to challenge index rate increases that, while in compliance with the applicable ceiling, are substantially in excess of the actual cost changes that the pipeline incurred.<sup>7</sup> 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.”<sup>8</sup> The Commission reviews protests and complaints against index rate increases by: (1) applying a preliminary screen based on cost and revenue data from the pipeline’s page 700; and (2) if the preliminary screen is satisfied, investigating the rate or rate increase at a hearing.

4. Under the Commission’s current policy, the preliminary screen differs for protests and complaints. When a proposed index rate increase is protested, the Commission applies the Percentage Comparison Test and will investigate the protested increase if the pipeline’s page 700 revenues exceed its costs and there is more than a 10 percentage-point differential between: (a) the index rate increase; and (b) the change in the prior two years’ total cost-of-service data reported on page 700, line 9.<sup>9</sup> By contrast, when a

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to file page 700, including pipelines exempt from filing the full Form No. 6.  
18 CFR 357.2(a)(2)-(3).

<sup>7</sup> Order No. 561, FERC Stats. & Regs. ¶ 30,985 at 30,951.

<sup>8</sup> 18 CFR 343.2(c)(1).

<sup>9</sup> *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)).

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.<sup>10</sup> Pursuant to the Substantially Exacerbate Test, the Commission will investigate a complaint against an index rate increase if the complaint shows that: (1) the pipeline is substantially over-recovering its cost of service (first prong); and (2) the index rate increase so exceeds the actual increase in the pipeline’s cost that the resulting rate increase would substantially exacerbate the pipeline’s over-recovery (second prong).<sup>11</sup>

## **II. HollyFrontier Proceedings**

5. In 2014, two complaints were filed in Docket Nos. OR14-35-000 and OR14-36-000 challenging SFPP, L.P.’s (SFPP) index rate increases for the 2012 and 2013 index years under § 343.2(c)(1) (2014 Complaints). The Commission dismissed the complaints for failing the second prong of the Substantially Exacerbate Test, finding that the complaints failed to show that the challenged rate increases exacerbated any over-recovery because, notwithstanding the rate increases, page 700 data that became available after SFPP implemented the increases and before the 2014 Complaints were filed (post-increase data) showed that the difference between SFPP’s costs and revenues declined between 2011 and 2013.<sup>12</sup>

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<sup>10</sup> E.g., *Calnev Pipe Line L.L.C.*, 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 (2007); *BP W. Coast Prods., LLC v. SFPP, L.P.*, 121 FERC ¶ 61,141, at P 7 (2007)).

<sup>11</sup> E.g., *BP W. Coast Prods., LLC v. SFPP, L.P.*, 121 FERC ¶ 61,141 at P 10.

<sup>12</sup> *HollyFrontier Ref. & Mktg. LLC v. SFPP, L.P.*, 157 FERC ¶ 61,186, at P 9 (2016).

6. Following an appeal by the complainants, the United States Court of Appeals for the District of Columbia Circuit held in *Southwest Airlines Co. v. FERC*<sup>13</sup> that the Commission’s consideration of post-increase data in evaluating the 2014 Complaints marked an unjustified departure from the Commission’s prior practice of considering only pre-increase data in evaluating challenges to index rate increases.<sup>14</sup> The court vacated and remanded the Commission’s orders dismissing the 2014 Complaints so that the Commission, if it chose to consider post-increase data in evaluating the complaints, could persuasively distinguish or knowingly abandon its prior inconsistent practice.<sup>15</sup> The court directed the Commission on remand to “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.”<sup>16</sup>

7. In 2019, three additional complaints were filed in Docket Nos. OR19-21-000, OR19-33-000, and OR19-37-000 challenging certain SFPP index rate increases for the 2018 index year (2019 Complaints).

### **III. Discussion**

8. In response to the remand in *Southwest Airlines* and the 2019 Complaints, the Commission issued the *HollyFrontier* order proposing to revise the Commission’s policy

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<sup>13</sup> 926 F.3d 851 (D.C. Cir. 2019).

<sup>14</sup> *Id.* at 856-59.

<sup>15</sup> *Id.* at 859.

<sup>16</sup> *Id.*

for reviewing complaints against index rate increases by eliminating the Substantially Exacerbate Test as the preliminary screen applied to such complaints and applying the Percentage Comparison Test to both protests and complaints under § 343.2(c)(1).<sup>17</sup>

9. In *HollyFrontier*, the Commission explained that several considerations support this proposed change in policy. First, the Substantially Exacerbate Test has not been defined and lacks clear standards.<sup>18</sup> Second, the Substantially Exacerbate Test suffers from an inherent mechanical flaw that makes developing analytically sound thresholds unworkable and causes the test to yield irrational results.<sup>19</sup> Third, the Substantially Exacerbate Test is arguably inconsistent with the purposes of indexing because rather than measure the challenged index rate increase relative to the pipeline's already incurred annual cost increases, it considers whether the increase will substantially worsen the gap between the pipeline's revenues and costs going forward.<sup>20</sup> Fourth, the Substantially Exacerbate Test appears to be inconsistent with Commission regulations because it does not consider whether the challenged index rate increase is "so substantially in excess of the actual cost increases incurred by the carrier that the rate is unjust and unreasonable,"

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<sup>17</sup> *HollyFrontier*, 170 FERC ¶ 61,133 at P 21. The Commission further explained that under this proposed approach, it would continue to strictly confine its evaluation of protests to the Percentage Comparison Test while retaining the discretion to consider additional factors in evaluating complaints. *Id.* P 37.

<sup>18</sup> *Id.* PP 22-23.

<sup>19</sup> *Id.* PP 24-26.

<sup>20</sup> *Id.* P 27.

as required by § 343.2(c)(1).<sup>21</sup> Finally, eliminating the Substantially Exacerbate Test would not deprive shippers of the ability to challenge a pipeline's rates where the pipeline is substantially over-recovering its cost of service because regardless of the standard applied to complaints against individual index rate increases, shippers can file a cost-of-service complaint challenging the pipeline's rates that have historically been indexed.<sup>22</sup>

10. In light of these concerns regarding use of the Substantially Exacerbate Test to evaluate complaints under § 343.2(c)(1), the Commission in *HollyFrontier* proposed to eliminate the Substantially Exacerbate Test and apply the Percentage Comparison Test to both protests and complaints. Under this proposed approach, the Commission would apply the Percentage Comparison Test to complaints against index rate increases and establish a hearing to investigate the increase when the complaint shows that the pipeline's page 700 shows that revenues exceed its costs and that there is a 10% or more differential between: (a) the proposed index rate increase; and (b) the annual percentage change in cost of service reported on line 9, page 700, over the two years preceding the index rate increase.<sup>23</sup>

11. The Commission explained how this proposed change in policy appears to resolve the concerns regarding the current policy of applying the Substantially Exacerbate Test. The Commission explained that the Percentage Comparison Test is free of the apparent

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<sup>21</sup> *Id.* PP 28-30.

<sup>22</sup> *Id.* PP 31, 38.

<sup>23</sup> *Id.* P 32.

methodological defect that causes the Substantially Exacerbate Test to yield irrational results<sup>24</sup> and more closely conforms to indexing's purpose and the language of § 343.2(c)(1).<sup>25</sup> In addition, the Commission stated that the proposed change in policy would respond to the court's concerns in *Southwest Airlines* by adopting a single test applicable to all challenges to index rate changes that relies solely upon pre-increase data.<sup>26</sup>

12. The Commission also proposed in *HollyFrontier* to maintain the Percentage Comparison Test's existing 10% threshold in applying the test to complaints, consistent with the Commission's historical practice involving protests against index rate changes.<sup>27</sup> The Commission noted that the 10% threshold could apply to complaints as well as protests because it preserves indexing's cost efficiency incentives and encourages pipelines to control costs.<sup>28</sup> Moreover, the Commission stated that high annual volatility in oil pipeline cost and volume data militates against adopting a threshold below 10%, because lower thresholds could result in distorted outcomes.<sup>29</sup> The Commission invited the parties to comment on the use of the 10% threshold for complaints against index rate

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<sup>24</sup> *Id.* P 33.

<sup>25</sup> *Id.* P 34.

<sup>26</sup> *Id.* P 35.

<sup>27</sup> *Id.* P 39.

<sup>28</sup> *Id.* PP 42-43.

<sup>29</sup> *Id.* P 44.

increases and to present and justify any alternative threshold they believe would be superior.<sup>30</sup>

13. The Commission directed the parties in the *HollyFrontier* proceedings to submit briefs addressing the merits of the Commission's proposal.<sup>31</sup> The Commission further stated that it planned to initiate a separate, generic proceeding to request briefing from industry participants.<sup>32</sup>

14. As contemplated in *HollyFrontier*, we therefore now invite public comment on the Commission's proposal to eliminate the Substantially Exacerbate Test as the preliminary screen applied to complaints against index rate increases and to apply the Percentage Comparison Test as the preliminary screen for both protests and complaints under § 343.2(c)(1). The comments should address the merits of the Commission's proposal; whether the Commission should apply the Percentage Comparison Test's existing 10% threshold to complaints; and whether and how the Commission should consider additional factors beyond the Percentage Comparison Test in evaluating complaints against index rate increases. The comments may also propose alternative methods or standards for the Commission to apply in determining whether a complaint against an index rate increase satisfies the requirements of § 343.2(c)(1). The comments should fully justify any such alternatives and explain why the alternative is superior to the

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<sup>30</sup> *Id.* P 45.

<sup>31</sup> *Id.* P 46.

<sup>32</sup> *Id.* P 46 n.82.

Percentage Comparison Test. In addition, the comments may propose alternative Percentage Comparison Test thresholds, but must fully explain why any such alternative thresholds are superior to the 10% threshold.

15. After publication of this Notice of Inquiry in the Federal Register, the Commission will extend the comment deadlines in the *HollyFrontier* proceedings so that the period for comments in *HollyFrontier* aligns with the period for comments in the instant docket.

#### **IV. Comment Procedures**

16. The Commission invites public comment on the proposals discussed in *HollyFrontier*. Initial Comments are due by **[Insert date 60 days after publication in the Federal Register]**, and Reply Comments are due by **[Insert date 90 days after publication in the Federal Register]**.

17. The Commission encourages comments to be filed electronically via the eFiling link on the Commission's web site at <http://www.ferc.gov>. The Commission accepts most standard word processing formats. Documents created electronically using word processing software should be filed in native applications or print-to-PDF format and not in a scanned format. Commenters filing electronically do not need to make a paper filing.

18. Commenters that are not able to file comments electronically must send an original of their comments to: Federal Energy Regulatory Commission, Secretary of the Commission, at Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland, 20852.

19. All comments will be placed in the Commission's public files and may be viewed, printed, or downloaded remotely as described in the Document Availability section below. Commenters on this proposal are not required to serve copies of their comments on other commenters.

**V. Document Availability**

20. 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>). At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID-19), issued by the President on March 13, 2020.

21. 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.

22. 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) or email at [ferconlinesupport@ferc.gov](mailto:ferconlinesupport@ferc.gov), or the Public Reference Room at (202) 502-8371, TTY (202) 502-8659. E-mail the Public Reference Room at [public.referenceroom@ferc.gov](mailto:public.referenceroom@ferc.gov).

By direction of the Commission.

Issued: March 25, 2020.

Kimberly D. Bose,  
Secretary.

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