

By the Commission.

Magalie R. Salas,
Secretary.

■ In consideration of the foregoing, the Commission amends part 35, Chapter I, Title 18, Code of Federal Regulations, as follows.

PART 35—FILING OF RATE SCHEDULES AND TARIFFS

■ 1. The authority citation for part 35 continues to read as follows:

Authority: 16 U.S.C. 791a–825r, 2601–2645; 31 U.S.C. 9701; 42 U.S.C. 7101–7352.

■ 2. Subpart H is added to read as follows:

Subpart H—Wholesale Sales of Electric Energy at Market-Based Rates

Sec.

35.36 Generally.

35.37 Market behavior rules.

§ 35.36 Generally.

(a) For purposes of this subpart, seller means any person that has authorization to engage in sales for resale of electric energy at market-based rates under section 205 of the Federal Power Act.

(b) The provisions of this subpart apply to all sellers authorized to make sales for resale of electric energy at market-based rates, unless otherwise ordered by the Commission.

§ 35.37 Market behavior rules.

(a) *Unit operation.* Where a seller participates in a Commission-approved organized market, seller will operate and schedule generating facilities, undertake maintenance, declare outages, and commit or otherwise bid supply in a manner that complies with the Commission-approved rules and regulations of the applicable power market. Seller is not required to bid or supply electric energy or other electricity products unless such requirement is a part of a separate Commission-approved tariff or is a requirement applicable to seller through seller's participation in a Commission-approved organized market.

(b) *Communications.* Seller will provide accurate and factual information and not submit false or misleading information, or omit material information, in any communication with the Commission, Commission-approved market monitors, Commission-approved regional transmission organizations, Commission-approved independent system operators, or jurisdictional transmission providers, unless seller exercises due diligence to prevent such occurrences.

(c) *Price reporting.* To the extent seller engages in reporting of transactions to publishers of electricity or natural gas price indices, seller shall provide accurate and factual information, and not knowingly submit false or misleading information or omit material information to any such publisher, by reporting its transactions in a manner consistent with the procedures set forth in the Policy Statement issued by the Commission in Docket No. PL03–3–000 and any clarifications thereto. Unless seller has previously provided the Commission with a notification of its price reporting status, seller shall notify the Commission within 15 days of the effective date of this regulation whether it engages in such reporting of its transactions. Seller must update the notification within 15 days of any subsequent change in its transaction reporting status. In addition, Seller must adhere to such other standards and requirements for price reporting as the Commission may order.

(d) *Record retention.* Seller must retain, for a period of three years, all data and information upon which it billed the prices it charged for the electric energy or electric energy products it sold pursuant to seller's market-based rate tariff, and the prices it reported for use in price indices.

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DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Parts 41, 158, 286 and 349

[Docket No. RM06–2–000; Order No. 675]

Procedures for Disposition of Contested Audit Matters

Issued February 17, 2006.

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Final rule.

SUMMARY: In this Final Rule, the Federal Energy Regulatory Commission (Commission) is amending its regulations to expand due process for certain audited persons who dispute findings or proposed remedies contained in draft audit reports.

DATES: *Effective Date:* This Final Rule will become effective March 29, 2006.

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SUPPLEMENTARY INFORMATION:

Before Commissioners: Joseph T. Kelliher, Chairman; Nora Mead Brownell, and Suedeen G. Kelly

I. Introduction

1. The Final Rule expands the procedural rights of persons subject to audits conducted by Commission staff under the Federal Power Act (FPA),¹ the Natural Gas Act (NGA),² the Natural Gas Policy Act of 1978 (NGPA)³ and the Interstate Commerce Act (ICA).⁴ Under current practice, audited persons who disagree with non-financial audit matters approved by the Commission must seek rehearing of that order. Under the Final Rule, such audited persons may elect to file briefs with the Commission, or, in appropriate circumstances, participate in a trial-type hearing to challenge audit matters before the Commission makes its decision on the merits. This revised procedure affords enhanced due process to audited persons who disagree with the findings or proposed remedies suggested by audit staff.⁵

2. Under the Final Rule, following completion of the audit process, the Commission will issue an order on the merits with respect to non-disputed audit matters contained in a notice of deficiency, audit report, or similar document, and will notice, without making any findings on the merits, any disputed audit matters. The audited person may then elect a shortened procedure⁶ or a trial-type procedure to challenge the disputed audit matters. The Commission would honor this election unless the Commission determines that there are no material facts in dispute which require a trial-type proceeding.

3. As set forth in further detail below, twelve companies filed initial comments⁷ and four companies filed

¹ 16 U.S.C. 791a *et seq.* (2000).

² 15 U.S.C. 717 *et seq.* (2000).

³ 15 U.S.C. 3301 *et seq.* (2000).

⁴ 49 U.S.C. App. 1 *et seq.* (2000).

⁵ As explained below, the Final Rule does not apply to audits pertaining to reliability that the Commission authorized in Order No. 672, *Rules Concerning Certification of the Electric Reliability Organization; and Procedures for the Establishment, Approval, and Enforcement of Electric Reliability Standards*, Docket No. RM05–30–000, 114 FERC ¶ 61,104 (February 2, 2006) (ERO Audits).

⁶ The term “shortened procedure” as used in the Final Rule and the accompanying regulatory text refers to a “paper hearing” or briefing of matters only, and it does not include a trial-type hearing.

⁷ The entities filing initial comments in this proceeding (initial comments) were Ameren Services Company (Ameren); American Public Gas

reply comments⁸ to the Notice of Proposed Rulemaking (NOPR) which the Commission issued in this docket.⁹ In response to the comments, and as discussed more fully below, the Commission, among other things: Clarifies the scope of application of the Final Rule; addresses the role of interested persons in the proposed procedures; discusses informal procedures for resolving disputed audit matters between audited persons and the Commission's audit staff; and addresses comments that pertain to implementation issues and audit practices and other matters that underlie the procedures in the Final Rule.

4. In response to the filed comments, the Commission finds that a change to the proposed regulatory text is warranted to permit an audited person who has elected the shortened procedure to file a motion with the Commission for a trial-type proceeding in circumstances where a party has raised one or more new issues in the shortened procedure. In addition, three minor changes to the wording of the proposed regulatory text are warranted: (1) Clarifying that an audited person¹⁰ may challenge, using the procedures set forth in the Final Rule, either one or more audit findings, or one or more proposed remedies, or both, in any combination; (2) specifying the number of days an audited person has to notify the Commission of its election of shortened procedures or a trial-type hearing and the number of days to file memoranda under the shortened procedure; and (3) deleting reference to Standards of Conduct or Codes of

Association (APGA); American Public Power Association (APPA); American Transmission Company LLC (ATC); Association of Oil Pipe Lines (AOPL); Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc., LIPA, New York Power Authority, New York State Electric & Gas Corporation, Orange and Rockland Utilities, Inc. and Rochester Gas and Electric Corporation (Indicated New York Transmission Owners); Edison Electric Institute (EEI); Interstate Natural Gas Association of America (INGAA); LG&E Energy LLC (LG&E); Midwest ISO Transmission Owners; Public Service Company of New Mexico and Texas-New Mexico Power Company (PNM-TNMP); and Williston Basin Interstate Pipeline Company (Williston Basin).

⁸ The entities filing reply comments in this proceeding (reply comments) were APGA; EEI; INGAA; and Williston Basin.

⁹ *Procedures for Disposition of Contested Audit Matters*, 70 FR 65866 (Nov. 1, 2005); IV FERC Stats. & Regs., Proposed Regulations ¶ 32,592 (2005).

¹⁰ The term "person" as used in the NOPR and in the Final Rule and the accompanying regulatory text is the same as the definition of person found in parts 101 (Definition 24) and 201 (Definition 27) of the Commission's regulations, which define "person" as follows: "An individual, a corporation, a partnership, an association, a joint stock company, a business trust, or any other organized group of persons, whether incorporated or not, or any receiver or trust."

Conduct in section 349.1, which pertains to oil pipeline companies.

II. Background

5. On October 20, 2005, the Commission issued an NOPR to apply existing procedures for challenging the Commission staff's financial audit findings and proposed remedies to all Commission staff audits, including operational audit findings and proposed remedies. Pursuant to section 309 of the FPA,¹¹ section 16 of the NGA,¹² sections 20 and 204(a)(6) of the ICA¹³ and section 501 of the NGPA,¹⁴ the Commission proposed to amend part 41 under Subchapter B, part 158 under Subchapter E and part 286 under Subchapter I, and to add a part 349 under Subchapter P, to Title 18 of the Code of Federal Regulations. Under the proposed regulations, an audited person would be able to challenge staff audit findings and proposed remedies (collectively, audit matters) before the issuance of a Commission order on the merits of those audit matters.

6. As explained in the NOPR, relevant portions of the existing language of parts 41 and 158 of the Commission's regulations that relate to procedures for challenging audit matters date at least to 1937.¹⁵ Those regulations address audits of financial matters. In more recent years, the Commission has expanded the scope of its audits to determine compliance with the Commission's Standards of Conduct,¹⁶ Open Access Transmission Tariff requirements, and Codes of Conduct, among other requirements. The Final Rule will provide the enhanced procedures long applicable to financial audits to all audits, other than ERO Audits, conducted by the Commission or its staff.

III. Discussion

7. The 12 initial comments and four reply comments were overwhelmingly supportive of the Commission's efforts to provide a more complete and expansive procedure for persons subject to non-financial audits. We first address comments that identified issues pertaining to the primary scope of the proposed rule: (1) The role of interested persons; (2) appropriate informal procedures; and (3) the application of the proposed regulations to reliability audits. Next, we address comments

¹¹ 16 U.S.C. 825h (2000).

¹² 15 U.S.C. 717o (2000).

¹³ 49 U.S.C. App. 20 and 204(a)(6) (2000).

¹⁴ 15 U.S.C. 3411 (2000).

¹⁵ See Federal Power Commission, Rules of Practice and Regulations 301(a) (Revised Jan. 1, 1937).

¹⁶ See 18 CFR part 358 (2005).

suggesting changes to the proposed regulatory text. Finally, we address comments regarding the conduct of audits and related matters. Although these comments are beyond the scope of the issues set forth in the NOPR, the Commission believes that a discussion of these comments will add clarity to the agency's enforcement program.

A. The Role of Interested Entities

8. The proposed rule states that "any other interested entities" may submit memoranda in the shortened procedure. Similarly, the existing rule makes provision for filing by "any other parties interested."

1. Comments

9. Several commenters address whether anyone other than the audited person and the Commission staff should be able to file memoranda in the shortened procedure. For example, EEI comments that neither the proposed rule nor the Commission's regulations define the term "any other interested entities." EEI asserts that historically only utility customers have intervened in contested proceedings concerning financial audits. EEI states that operational audits, in most cases, do not present rate implications, and that therefore there is no reason to permit other interested entities to file memoranda in the shortened procedure in matters involving operational audits. EEI also expresses the concern that an entity other than the audited person or Commission staff that files a memorandum in the shortened procedure could arguably be entitled to obtain in discovery non-public information pertaining to the underlying audit. EEI further seeks clarification regarding whether an interested entity may appeal the findings of an operational audit.¹⁷

10. The Indicated New York Transmission Owners likewise comment that the Commission should clarify the role of "other interested persons" in the contested audit proceeding.¹⁸ Ameren comments that allowing interventions would jeopardize the controlled and confidential process that has traditionally allowed audited persons and the Commission staff to address compliance issues.¹⁹ INGAA expresses the concern that, because any interested person could intervene in the shortened procedure and raise new facts or allegations or proposals for new remedies, an audited person should be

¹⁷ EEI initial comments at 16–17.

¹⁸ Indicated New York Transmission Owners initial comments at 3–4.

¹⁹ Ameren initial comments at 3–4.

able to change its election from shortened procedure to trial-type proceeding for good cause shown in light of any new issues raised.²⁰ Finally, APGA comments that an interested entity should be able to participate in the decision of whether a shortened procedure or a trial-type hearing will be used to determine contested audit matters, and that the rights of interested entities should be strengthened.²¹

2. Commission Determination

11. In this Final Rule, as is now the case in financial audits, the Commission will permit other interested entities to file memoranda in the shortened procedure. An entity other than the audited person may have an interest in the outcome of the contested audit proceeding and may have information about the audited person's operations or proposed remedy that would inform the Commission's determination regarding the contested issue. The Commission will use the same standard for permitting interested entities to file memoranda in the shortened procedure as it uses to permit interventions in other proceedings.²² In addition, an interested entity may include in its initial memorandum filed pursuant to the shortened procedure a motion to intervene in the proceeding.²³

12. The Final Rule defines the shortened procedure as consisting of the filing of two rounds of memoranda, and thus there will be no opportunity in this procedure for any interested entity to use the discovery process to obtain information from the audited person.²⁴ By permitting interested entities to file memoranda in the shortened procedure, the Commission is not affecting the non-public conduct of the audit that includes communications between the audited person and the Commission staff regarding compliance issues. The interested entity that files memoranda in the shortened procedure will have access only to publicly available filings and not to any non-public communications.

13. The Commission adopts in part INGAA's suggestion that an audited person be permitted to change its election of the shortened procedure in

favor of a trial-type procedure for good cause shown after an interested entity files a memorandum in the shortened procedure that raises a new matter. Within 20 days after the last date that reply memoranda under the shortened procedure may be timely filed, the audited person who elected the shortened procedure may file a motion with the Commission requesting a trial-type hearing if new issues are raised by a party. To prevail in such a motion, the audited person must show that a party to the shortened procedure raised one or more new issues of material fact relevant to resolution of a matter in the shortened procedure such that fundamental fairness requires a trial-type hearing to resolve the new issue or issues so raised. Parties to the shortened procedure and the Commission staff may file responses to the motion. In ruling upon the motion, the Commission may determine that some or all of the issues be litigated in a trial-type hearing. Further, the Commission can also set a matter for hearing *sua sponte*, if warranted.

14. The Commission declines to adopt APGA's suggestion that the Commission permit an interested entity to participate in the initial election of the shortened procedure or the trial-type hearing. The election belongs to the audited person. The election provides the audited person a voice in how it may contest audit findings with which it disagrees. We conclude that the best approach is to permit the audited person to make the election for the shortened procedure or the trial-type election alone, subject to the requirement, as stated in the proposed rule, that the Commission will honor that election except when there are no material facts in dispute requiring a trial-type hearing.

B. Informal Procedures

15. In the NPR, the Commission invited public comments on whether the Commission should also provide informal procedures before proceeding with the formal procedures contained in the NPR.²⁵

1. Comments

16. A number of commenters express support for the continuation of informal contacts between the audit staff and the audited person during the course of the audit and up to the point where the audited person informs audit staff in writing that the audited person contests one or more audit findings or proposed remedies.²⁶ Commenters also provide

suggestions for additional informal procedures. EEI urges the Commission to provide for a mechanism by which the audited company may raise a concern with the management of the audit staff. EEI further states that it would support an additional informal procedure to resolve disputes after an audit concludes but before the shortened procedure or the trial-type hearing begins.²⁷ Ameren comments in favor of an additional informal procedure that would provide the audited person an opportunity to review draft audit findings and discuss those findings with audit staff.²⁸ Williston Basin comments that an informal audit conference would allow the audited person to resolve issues without incurring the expense of more formal procedures.²⁹ APGA notes the "long-standing practice" of the audit staff engaging in informal contacts and discussions with audited persons, but requests that the Commission explicitly state that only formal contacts may occur between the audit staff and the audited person with respect to the substance of any audit.³⁰

2. Commission Determination

17. The Commission agrees with the commenters that asserted that informal discussions between the audited person and audit staff are useful and should continue where they are appropriate. Nothing in the Final Rule is intended to discourage these informal contacts. While it is not clear precisely what APGA means by "formal contacts," requiring such contacts, as APGA suggests, would unduly impede the flow of communication between audit staff and an audited person that is essential to understand company records and the Commission therefore rejects this suggestion.

18. The Commission also does not see a compelling need to establish a specific informal procedure. An audited person may request to speak with management of the audit staff at any time during an audit up to the time that it indicates in writing that it contests specified findings or proposed remedies.³¹ An audited person may contact management of the audit staff directly or through the audit staff. Informal resolution of issues that arise in audits is in the public interest. Furthermore, a specific informal procedure is not necessary to provide an audited person

²⁰ INGAA initial comments at 2-3.

²¹ APGA initial comments at 4.

²² See 18 CFR 385.214(b) (2005).

²³ If an interested entity is granted intervention, that entity will obtain party status with all the ensuing rights and responsibilities of a party.

²⁴ With respect to discovery in a trial-type proceeding conducted pursuant to the Final Rule, the applicable standards under part 385 of the Commission's regulations will apply. The presiding administrative law judge will rule on discovery procedures and motions as in other contested hearings.

²⁵ NPR at P 11.

²⁶ See EEI initial comments at 20-21; LG&E initial comments at 3.

²⁷ EEI initial comments at 21.

²⁸ Ameren initial comments at 7.

²⁹ Williston Basin initial comments at 3-4.

³⁰ APGA initial comments at 3.

³¹ For an explanation of how staff conducts an audit, see <http://www.ferc.gov/legal/maj-ord-reg/land-docs/order2004/resources.asp>.

an opportunity to comment on a draft audit report. Under the audit staff's current practice, at the end of the audit process the audit staff provides an audited person a draft audit report for review and comment. Audit staff considers these comments and discusses them with the audited person. Finally, an audited person is routinely provided an audit conference at the end of the audit process to try to resolve disputed issues or clarify points that the audited person believes are not clear. At this "wrap-up" conference, the audited person may discuss with the audit staff and its management proposed audit findings and proposed remedies, as well as information provided to staff in the audit and the application of that information to applicable law.³² The wrap-up conference is similar to the meeting that EEI described in its comments. The availability of a wrap-up conference ensures that the questions and concerns of audited persons are meaningfully addressed and obviates the need for the Commission to promulgate a specific informal procedure.

C. Reliability Audits

1. Comments

19. Two commenters ask whether the proposed rule would apply to reliability audits.³³

2. Commission Determination

20. The Final Rule will apply to all audits conducted by Commission staff except for ERO Audits. A little background regarding ERO Audits will provide useful context. Order No. 672 was promulgated under the authority of the Energy Policy Act of 2005 (EPA 2005).³⁴ Section 1211 of the EPA 2005 amended the FPA by adding a new section 215 on electric reliability. FPA section 215(e) establishes an Electric Reliability Organization (ERO) with authority to impose a penalty under certain circumstances on a user, owner or operator of the bulk-power system for violation of a reliability standard approved by the Commission. FPA section 215(e) also authorizes the Commission, on its own motion or upon complaint, to order compliance with a reliability standard and to impose a

penalty against a user or owner or operator of the bulk-power system.

21. Any audit or review of compliance with reliability standards conducted by an ERO will, by definition, not be an audit conducted by the Commission. Accordingly, the procedures set forth in the Final Rule will not apply to audits or compliance reviews conducted by an ERO. In addition, audits that are expressly conducted by the Commission staff pursuant to the provisions of Order No. 672 will not be subject to the procedures contained in the Final Rule. The Commission is excluding ERO Audits from the scope of the Final Rule because aspects of the Commission's program with respect to such audits remain to be determined. The Commission may reconsider this decision after an ERO is certified.

D. Right To Challenge Audit Findings or Proposed Remedies

1. Comments

22. Ameren and EEI point out that in the NOPR the Commission referred to audit findings and proposed remedies collectively as audit matters and seeks assurance that an audited person may use the procedures set forth in the proposed regulations to challenge either an audit finding, or a proposed remedy, or both.³⁵

2. Commission Determination

23. A situation may occur in which an audited person does not challenge a finding that it violated a Commission requirement, but the audited person does not agree with the remedial measure associated with the finding. In this situation, the audited person may wish to challenge the audit report, deficiency report, or other document with respect to the proposed remedy alone. The NOPR did not clearly specify that an audited person may challenge just the proposed remedy. The Commission clarifies that an audited person may do so, and the regulatory text is modified accordingly to clearly state that an audited person may challenge one or more audit findings, or one or more proposed remedies, or both, in any combination.

E. Time Frames

1. Comments

24. EEI notes that under the proposed section 41.1, the Commission shall provide the audited person a specified number of days to respond with respect to disputed audit matters. EEI also notes that the Commission did not specify the

number of days in section 41.3 that an audited person will have to file memoranda pursuant to the shortened procedure. EEI urges that the Commission specify in sections 41.1 and 41.2 that an audited person shall have 30 days to respond to a Commission order that notes, but does not address on the merits, one or more disputed findings or proposed remedies. EEI also urges that the Commission specify in section 41.3 that initial memoranda be filed within 45 days and that reply memoranda be filed 20 days later.³⁶

2. Commission Determination

25. The Commission accepts EEI's recommended changes with respect to the noted time limits for filings. The existing section 41.1 does not specify a time period for an audited person to respond to the Commission with respect to a noticed finding or proposed remedy with which he or she may disagree. Specifying the number of days for the noted filings will promote certainty. Therefore, the Commission will change the regulatory text to indicate the number of days for making the noted filings.³⁷ Specifically, section 41.1 will indicate that an audited person will have 30 days to respond with respect to a disputed audit matter. Section 41.3 will indicate that initial memoranda must be filed within 45 days and reply memoranda must be filed 20 days later.³⁸

F. Excision of Certain References in Part 349

1. Comments

26. AOPL notes that the proposed section 349.1, which would apply to oil pipelines, provides that an audit may result in findings that an audited person has not complied with the Commission's requirements under the Standards of Conduct or the Code of Conduct, and that these requirements do not apply to oil pipelines.³⁹

2. Commission Determination

27. The referenced requirements do not apply to oil pipelines. Accordingly, to avoid confusion, the Commission shall excise the phrase "matters under the Standards of Conduct or the Code of Conduct" from the regulatory text of section 349.1 in the Final Rule.

³² Audit staff will provide the audit report, notice of deficiency or similar document before it is made public. The wrap-up conference is also described on the Commission's Web site at <http://www.ferc.gov/legal/maj-ord-reg/land-docs/order2004/resources.asp>.

³³ See EEI initial comments at 19–20; and Indicated New York Transmission Owners initial comments at 4.

³⁴ Public Law 109–58, 119 Stat. 594 (2005).

³⁵ Ameren initial comments at 7–8; EEI initial comments at 17–18.

³⁶ EEI initial comments at 18. AOPL also advocated that specific filing time periods be provided. AOPL initial comments at 2–3.

³⁷ Under the Commission's existing authority, it retains the right to modify the time limits in appropriate circumstances.

³⁸ Conforming changes are made in 18 CFR 158.1, 158.3, 286.103, 286.105, 349.1 and 349.3.

³⁹ AOPL initial comments at 3.

G. The Commission May Take "Other Action"

1. Comments

28. Williston Basin requests that the Commission remove the phrase "or taking other action" from proposed sections 41.2, 158.2, 286.104 and 349.2 because it appears to give the Commission the opportunity to change the findings or proposed remedies or possibly to take other action inconsistent with the original findings and proposed remedies. The relevant language reads as follows: "Upon issuance of a Commission order that notes a finding or findings, with or without proposed remedies, with which the audited person has disagreed, the audited person may: Acquiesce in the findings and proposed remedies by not timely responding to the Commission order, in which case the Commission may issue an order approving them or taking other action * * *."

2. Commission Determination

29. The Commission declines to remove the words "or taking other action" as Williston Basin requests. These words are needed to permit the Commission flexibility to decline to adopt the finding or findings or proposed remedy or remedies to which the audited person acquiesced by not timely filing the required document. The Commission may revise an audit report even where there is no party challenging the contents of that report because the Commission must always discharge its obligation to act consistent with the public interest according to its statutory authority.⁴⁰ An audited person who believes it is aggrieved by a Commission order that changes an audit report in the circumstances Williston Basin describes may seek rehearing of the Commission order.

H. Other Issues

30. A number of commenters assert that a lack of clear rules causes them to be surprised by new and changing regulatory requirements. Despite good faith attempts at compliance, these commenters state, they are subject to a

⁴⁰ For this reason, the Commission may revise or reject an uncontested settlement. See *Panhandle Eastern Pipe Line Company*, 95 F.3d 62, 64 (D.C. Cir. 1996) ("[W]e have held that the Commission should approve an uncontested settlement 'only upon a finding that the settlement appears to be fair and reasonable and in the public interest.'" (Citation omitted.); *Alternative Dispute Resolution*, Order No. 578, 60 FR 19494 (Apr. 19, 1995), *FERC Stats. & Regs.* ¶ 31,018 at 31,331 (1995) ("[T]he Commission may refashion an uncontested settlement to comport with the public interest * * *"); *Carolina Power & Light Company*, 51 FERC ¶ 61,403 (1990) (The Commission rejected a provision of an uncontested settlement).

"gotcha" approach to auditing that forces them to meet "moving target" requirements. As noted above, while these and similar comments regarding the audit process are outside the scope of the proposed rule, the Commission believes that addressing them will provide greater clarity to the agency's enforcement program.

1. Precedential Value of Audit Findings

a. Comments

31. Several commenters ask the Commission to clarify whether audit reports, settlements and orders on contested audit matters constitute binding precedent for non-parties. EEI states that the Commission must provide an opportunity for comment with respect to any requirement set forth in an audit report, settlement or order on a contested audit matter that the Commission proposes to make generally applicable.⁴¹ APGA asks the Commission to explain the precedential value of an audit finding.⁴² Ameren urges that if the Commission seeks to impose requirements or remedies imposed in an individual audit proceeding on the regulated community in general, the Commission should proceed by a separate generic proceeding that provides notice to the public and the opportunity to comment.⁴³ PNM-TNMP comments that the settlement of an audit or investigation should not have precedential effect except as to the settling entity.⁴⁴

b. Commission Determination

32. Unless the Commission expressly states it is making findings that apply to other parties, an audit report and a Commission order approving an uncontested audit report are not binding on entities other than the audited person or persons who agreed not to contest the audit report that the Commission approved. To this extent, such an order, like an order approving an uncontested settlement, does not have precedential value.⁴⁵ The Commission routinely makes this point

⁴¹ EEI initial comments at 6-7.

⁴² APGA initial comments at 3.

⁴³ Ameren initial comments at 3.

⁴⁴ PNM-TNMP initial comments at 3.

⁴⁵ See, e.g., *United Municipal Distributors Group v. FERC*, 732 F.2d 202, 207 n. 8 (D.C. Cir. 1984) ("The Commission's regulations thus permit it to approve uncontested offers of settlement without a determination on the merits that the rates approved are 'just and reasonable.' The Commission's approval of an uncontested settlement has no precedential value as settled practice."); *New York Power Authority*, 105 FERC ¶ 61,102 at P 87 (2003) ("It is well established that settlements have no precedential value."); See also *Kelley v. FERC*, 96 F.3d 1482, 1490 (D.C. Cir. 1996) (collecting cases).

in orders it issues approving stipulation and consent agreements in part 1b investigations.⁴⁶ An uncontested audit report is similar to a stipulation and consent agreement to the extent that the audited person consents to the contents of the audit report. By contrast, a Commission order to resolve a contested matter does have precedential effect.⁴⁷ An audited person that selects the shortened procedure or the trial-type hearing to resolve a dispute regarding an audit staff finding or remedy is participating in a contested, on-the-record proceeding, and, like any other such proceeding before the Commission, the legal reasoning and conclusions of the resulting order apply to non-parties. The Commission has substantial discretion to establish rules of general application by adjudication and need not necessarily employ a separate generic proceeding.⁴⁸

2. Cooperation With Audit Staff

a. Comments

33. Some commenters ask the Commission to clarify a number of issues regarding cooperation of audited persons. EEI asserted that it should not be considered a lack of cooperation for a company being audited to seek to narrow the scope of information requests. EEI requests that the Commission clarify whether the discussions with staff of this nature

⁴⁶ See, e.g., *The Williams Companies*, 111 FERC ¶ 61,392 at 62,651 (2005) ("The Commission's approval of the Agreement does not constitute precedent regarding any principle or issue in any proceeding.")

⁴⁷ See, e.g., *Enbridge Pipelines (KPC)*, 102 FERC ¶ 61,310 at n. 74 (2003) (a Commission order approving a contested settlement is a legal precedent of the Commission).

⁴⁸ *NLRB v. Bell Aerospace Corp.*, 416 U.S. 267, 294 (1974) ("[A]djudicative cases may and do serve as vehicles for the formulation of agency policies."); *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947) ("[T]he choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency."); *Michigan-Wisconsin Pipeline Co. v. FPC*, 520 F.2d 84, 89 (D.C. Cir. 1975) ("[T]here is no question that the Commission may attach precedential and even controlling weight to principles developed in one proceeding and then apply them under appropriate circumstances in a stare decisis manner."); *Pacific Gas and Electric Co. v. FPC*, 506 F.2d 33, 38 (D.C. Cir. 1974) ("[A]gency may establish binding policy through rulemaking procedures * * * or through adjudications which constitute binding precedents."); *AEP Power Marketing, Inc.*, 108 FERC ¶ 61,026 at P 187 (2004) ("Our decision to establish new policy in the context of case-specific proceedings is clearly within our authority."); *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 103 FERC ¶ 61,349 at P 51 (2003) ("The Commission, moreover, is not limited to notice and comment rulemaking to develop policy. Agencies generally are permitted considerable discretion to choose whether to proceed by rulemaking or by adjudication.")

would indicate a lack of cooperation.⁴⁹ EEI and Ameren also ask the Commission to clarify that it does not demonstrate a lack of cooperation to assert the attorney-client privilege in good faith.⁵⁰

b. Commission Determination

34. On October 20, 2005, the Commission issued a policy statement to provide guidance and regulatory certainty regarding the agency's enforcement of the statutes, orders, rules and regulations it administers.⁵¹ The Policy Statement addressed the factors the Commission will take into account in determining remedies for violations, including applying the enhanced civil penalty authority provided by EAct 2005. The Commission stressed that one of these factors would be cooperation, which was discussed in a general sense⁵² and described with respect to specific factors.⁵³ The Commission also addressed qualitative factors, such as wholehearted cooperation and cooperation with respect to certain aspects yet not with others.⁵⁴ In addition, the Commission listed conduct that would indicate a lack of cooperation.⁵⁵

35. In sum, the Policy Statement set forth that the Commission expects cooperation, that the Commission will give consideration to exemplary cooperation, *i.e.*, "cooperation which quickly ends wrongful conduct, determines the facts, and corrects a problem,"⁵⁶ and that a lack of cooperation would be weighed in deciding appropriate remedies for non-compliance.⁵⁷ The Commission did not suggest that efforts by an audited person taken in good faith to resolve issues that arise in the course of an audit would be construed as evidence of non-cooperation. Where an audited person believes that data requests create a substantial burden that could be relieved by limiting the scope of the request, by the audited person providing other information that would achieve the same purpose, or by some other resolution that would satisfy audit staff, an audited person is not failing to cooperate if it suggests changes to, or narrowing of, the data requests. Similarly, an audited person who

appropriately interposes the attorney-client privilege will not be considered non-cooperative. However, the interposition of the privilege where it does not apply and that is designed to frustrate audit staff's efforts to obtain information could be evidence of non-cooperation.

3. Public Treatment of Contested Audit Matters

a. Comments

36. Two commenters ask the Commission to keep information regarding contested audit matters confidential. Ameren asserts that the Commission should ensure that all contested audit proceedings remain completely confidential until a final Commission determination has been made. Ameren also asks the Commission to clarify that, if an audited company challenges any of the audit staff's proposed findings under the contested audit procedures, the Commission not issue a notice or other statement releasing any proposed staff findings or remedies to the public. Instead, Ameren urges that any additional paper or formal hearing procedures on the contested audit findings should be kept confidential until a final determination is made by the Commission. Ameren notes that the public release of proposed remedies could have an immediate and harmful impact on the audited person's stock price or credit rating.⁵⁸ Williston Basin asks the Commission to clarify that the notice setting a schedule for the filing of memoranda be non-public.⁵⁹

b. Commission Determination

37. All Commission issuances regarding the resolution of contested audit matters under the Final Rule will be public. A brief statement of the relevant processes under the Final Rule at this juncture will help inform this discussion. In instances in which the audited person and the audit staff are unable to agree upon the findings and proposed remedies contained in a draft audit report, the following steps occur:

- The audited person may provide in writing to the audit staff a response to the draft audit report indicating any and all findings or proposed remedies, or both, in any combination, with which the audited person disagrees.
- The audit staff communicates this response to the Commission along with the proposed final audit report. At this point, the Commission may direct the audit staff to undertake further analysis, obtain further information from the

audited person, or take other action. The audited person's response indicating disputed findings or proposed remedies becomes public when the audit report becomes public, *i.e.*, at the time the Commission issues an order on the merits of the final audit report.

- The Commission may make determinations on the merits in a public order with respect to the findings and proposed remedies contained in the audit report that are not in dispute and will publicly notice the disputed items. The order will not constitute final agency action with respect to the disputed items and will provide the audited person the opportunity to elect in writing the shortened procedure (submission of briefs) or the trial-type hearing by a date certain.

- If the audited person does not respond within 30 days to the notice, the Commission may issue an order on the merits regarding the noticed items. Alternatively, the audited person may timely respond to the notice in a public filing by electing in writing the shortened procedure or the trial-type hearing.

- If the audited person makes a timely election, the Commission will honor the election (unless a trial-type proceeding is chosen and there are in the Commission's judgment no disputed issues of material fact requiring a trial-type hearing) and issue a public notice setting the schedule for submission of memoranda, in the case of the shortened procedure, or referring the matter to the Chief Administrative Law Judge, in the case of the trial-type hearing.

38. The Commission is aware that noticed findings or proposed remedies may have financial consequences for an audited person. The public has an appropriate interest, however, in seeing the Commission's resolution of disputed, jurisdictional matters before it. Regulated companies may need to be aware of Commission determinations regarding disputed audit matters to comply with Commission requirements. Further, the Commission must publicly notice the disputed audit findings or proposed remedies to provide potential interested parties an opportunity to determine whether to participate in the contested audit procedures. The audited person's response and the Commission's notice establishing a briefing schedule or beginning a trial-type hearing must also be public to enable potential interested parties to participate in the proceeding. Nevertheless, audited persons may seek to file proprietary materials with a request for confidential treatment under section 388.112 of the

⁴⁹ EEI initial comments at 12–14.

⁵⁰ EEI initial comments at 14; Ameren initial comments at 5.

⁵¹ *Enforcement of Statutes, Orders, Rules, and Regulations*, 113 FERC ¶ 61,068 (2005).

⁵² 113 FERC ¶ 61,068 at n.2.

⁵³ *Id.* at P 26.

⁵⁴ *Id.* at P 27.

⁵⁵ *Id.*

⁵⁶ *Id.* at P 26.

⁵⁷ *Id.* at P 26–27.

⁵⁸ Ameren initial comments at 5–6.

⁵⁹ Williston Basin initial comments at 6.

Commission's regulations.⁶⁰ Parties appearing before the Commission and its administrative law judges may also seek protective orders to protect the confidentiality of information. These methods of keeping information non-public are adequate for the purposes of the Final Rule.

4. Applicability of part 1b of the Commission's Regulations to Audits

a. Comments

39. Three commenters request clarification regarding the role that part 1b of the Commission's regulations plays in audits.⁶¹ These commenters ask the Commission to clarify that any new rule will not modify existing protections regarding investigations that are provided in part 1b of the Commission's regulations.⁶²

40. In addition, EEI states that audited persons are uncertain as to whether the operational audits constitute part 1b investigations or whether part 1b investigations are separate and apart from the operational audits and the proposed procedures. EEI asserts that if audits are not conducted pursuant to part 1b, the Commission must establish procedures that define the rights of an audited person. In particular, EEI claims that new procedures are needed to both ensure the confidentiality of the audited person's proprietary or otherwise sensitive information during an audit and when the audited person contests the findings or remedies proposed by the audit staff. EEI calls on the Commission to issue a policy statement, with an opportunity for public comment, to establish the appropriate relationship between the audit staff and the enforcement staff during an audit, consistent with separations of functions requirements.⁶³ EEI also seeks clarification regarding when audit staff may communicate with an audited person's employees without an attorney present and how the right to have an attorney present changes during the audit process, shortened and trial-type procedures, and part 1b investigations.⁶⁴

41. INGAA also asks the Commission to clarify whether audits are conducted under part 1b of its regulations.⁶⁵ In addition, Ameren asks the Commission to confirm that any new rule resulting from the NOPR will not modify existing

confidentiality protections that are provided in part 1b.⁶⁶

b. Commission Determination

42. Although not directly related to this rulemaking proceeding, we address the concerns about the role of investigations with respect to audits as part of the Commission's recent efforts to clarify its enforcement program. Investigations and audits are distinct methods the Commission uses to determine and address compliance with its requirements. Part 1b applies to investigations and not to audits.⁶⁷ Audits are conducted pursuant to the authority conferred in FPA section 301,⁶⁸ NGA section 8,⁶⁹ NGPA section 504⁷⁰ and ICA sections 20 and 204(a)(6).⁷¹ The Commission's audit staff routinely informs the subject of an audit in an initial letter that an audit has commenced pursuant to specific statutory authority. Similarly, the Commission's enforcement staff routinely informs the subject of an investigation in an initial letter that an investigation has commenced pursuant to part 1b of the Commission's regulations. The Commission's practice is that audits begin with issuance of a public commencement letter and end with issuance of a public audit report. By contrast, investigations undertaken pursuant to part 1b begin and end without notice to the public, unless the Commission orders otherwise. The Final Rule will not affect investigations conducted under part 1b.

43. It is not necessary, as EEI asserts, for the Commission to establish new procedures that define the rights of audited persons to ensure the confidentiality of the audited person's sensitive information. Audited persons provide information to the audit staff on a non-public basis. In that regard, the FPA specifies that "[n]o member, officer, or employee of the Commission shall divulge any fact or information which may come to his knowledge during the course of examination of books or other accounts, as hereinbefore provided, except insofar as he may be directed by the Commission or by a court."⁷²

44. No new procedures are required to establish the relationship between audit staff and enforcement staff. Information

obtained in an audit may be shared with Commission staff conducting a related investigation.⁷³ This sharing is appropriate to effectively enforce compliance with the Commission's rules and regulations. This sharing of information promotes efficiency; it would be pointless to require an audited person to produce the same information twice. Further, the knowledge that an audit may lead to an investigation should encourage entities subject to the Commission's jurisdiction to volunteer the existence of violations and to cooperate to the maximum extent practicable to expose and remedy misconduct promptly.⁷⁴

45. The Commission has explained that the same person on its staff may perform more than one function "provided (1) such combination enhances the Commission's understanding of energy markets and related issues; and (2) parties in individual proceedings appear to and actually receive a fair and impartial adjudication of their claims."⁷⁵ The Commission has further specified that "[u]nless an investigator is assigned to serve as a litigator, she may freely speak to persons inside the Commission about an investigation * * *."⁷⁶ The same observation holds true for an auditor, or, indeed, for a person on Commission staff who works on audits and investigations. Prior to a matter becoming an on-the-record proceeding, *i.e.*, while it is still an audit or investigation, the separations of functions rule set forth in section 2202 of the Commission's Rules of Practice and Procedure⁷⁷ does not apply.⁷⁸ Of course, if the Commission permits an interested entity to intervene in the shortened procedure with respect to a disputed issue, the Commission's *ex parte* rule would apply.⁷⁹

46. Finally, with respect to EEI's request for clarification regarding when an attorney may be present during employee interviews, the Commission

⁷³ *Trans Alaska Pipeline System*, 9 FERC ¶ 61,205 (1979). See also The House Committee Report on the Government in the Sunshine Act, Pub. L. 94-409 (1976), which amended the Administrative Procedure Act, 5 U.S.C. 500 *et seq.* (2000), discussing the scope of *ex parte* prohibitions, states in part that "[t]he rule forbids *ex parte* communications between interested persons outside the agency and agency decisionmakers * * *. Communications solely between agency employees are excluded from the section's prohibitions." 1976 U.S.C.C.A.N. 2183, 2202.

⁷⁴ *Enforcement of Statutes, Orders, Rules, and Regulations*, 113 FERC ¶ 61,068 at P 26-27 (2005).

⁷⁵ *Separation of Functions*, 101 FERC ¶ 61,340 at P 1 (2002).

⁷⁶ *Id.* at P 26.

⁷⁷ 18 CFR 385.2202 (2005).

⁷⁸ 101 FERC ¶ 61,340 at P 26.

⁷⁹ 18 CFR 385.2201 (2005).

⁶⁰ 18 CFR 388.112 (2005).

⁶¹ 18 CFR part 1b (2005).

⁶² See Ameren initial comments at 7; EEI initial comments at 15; INGAA reply comments at 3-4, 7.

⁶³ EEI initial comments at 8-11.

⁶⁴ EEI initial comments at 11.

⁶⁵ INGAA reply comments at 3-4, 7.

⁶⁶ Ameren initial comments at 7.

⁶⁷ 18 CFR 1b.2 (2005).

⁶⁸ 16 U.S.C. 825 (2000).

⁶⁹ 15 U.S.C. 717g (2000).

⁷⁰ 15 U.S.C. 3415 (2000).

⁷¹ 49 U.S.C. App. 20 and 204(a)(6) (2000).

⁷² See FPA section 301(b), 16 U.S.C. 825(b) (2000). See also NGA section 8(b), 15 U.S.C. 717g(b) (2000). The Commission's regulations reiterate that requirement. 18 CFR 3c.2(a) (2005).

agrees that an audited person's employees may have counsel present at any time, during any part of an audit.

5. Best Practices

a. Comments

47. Several commenters express concern about the role of "best practices" in the audit process. EEI states that the audit staff has developed and utilized a non-public list of best practices in its audits for Standards of Conduct and Code of Conduct compliance. EEI further states that best practices are not necessarily regulatory requirements and that on a cost-benefits basis, best practices may not be warranted.⁸⁰ Ameren states that audit reports have recommended certain best practices for Standards of Conduct compliance even though the actual rules do not require that companies use these practices to comply with the Standards of Conduct.⁸¹ PNM-TNMP states that the audit staff comments and previously issued audit reports should not be a basis for a best practices requirement.⁸²

b. Commission Determination

48. The Commission acknowledges that because a practice was successfully implemented by one audited person does not necessarily mean that practice will be a good fit elsewhere. Practices that companies implement to improve compliance may serve as useful references, but they are not binding on others. For example, experience has shown that the taking of minutes at meetings in which transmission function and energy affiliate employees are present may be useful to address and prevent Standards of Conduct violations. However, taking minutes at such meetings is not a requirement. For some audited persons, the presence of a compliance officer may be sufficient, or other measures may be adopted that are equally effective. There is often not a one-size-fits-all response to help ensure compliance. The Commission does not intend to bind all companies to adhere to a remedy that one company may have adopted. A person need only comply with Commission requirements.

49. The staff does not have a non-public list of best practices as EEI suggests. The audit staff, however, has observed a broad array of company practices that address and prevent violations of Commission requirements with varying degrees of effectiveness. Some of these company practices are reflected in Frequently Answered Questions (FAQs) on the Commission's

Web site.⁸³ There, the Commission staff has provided detailed responses to many FAQs about the process and substance of financial and operational audits. These responses include company practices that may be appropriate in some circumstances. They are not, however, intended to be new legal requirements.

6. Audit Cycles

a. Comments

50. LG&E encourages the Commission to consider promulgating audit cycles for most of what LG&E refers to as the Commission's "standard" audits. For example, LG&E suggests that compliance with wholesale fuel adjustment clauses might occur on a three-year cycle.⁸⁴

b. Commission Determination

51. The Commission declines to adopt LG&E's suggestion. The audit staff does not necessarily commence audits based on a schedule. The audit staff selects companies and subjects to audit based on a variety of factors.

7. Auditing Standards

a. Comments

52. LG&E encourages the Commission to develop or adopt auditing standards for all audits.

b. Commission Determination

53. The audit staff adheres to auditing standards.⁸⁵ The audit staff follows Generally Accepted Government Auditing Standards as prescribed by the Comptroller General of the United States.⁸⁶

IV. Information Collection Statement

54. Office of Management and Budget (OMB) regulations require OMB to approve certain information collection requirements imposed by agency rule.⁸⁷ The Final Rule does not contain any information collection requirements and compliance with the OMB regulations is thus not required.

V. Environmental Analysis

55. The Commission is required to prepare an Environmental Assessment or an Environmental Impact Statement for any action that may have a significant adverse effect on the human

environment.⁸⁸ The Commission has categorically excluded certain actions from this requirement as not having a significant effect on the human environment. Included in the exclusion are rules that are clarifying, corrective, or procedural or that do not substantially change the effect of the regulations being amended.⁸⁹ The Final Rule is procedural in nature and therefore falls under this exception; consequently, no environmental consideration is necessary.

VI. Regulatory Flexibility Act Certification

56. The Regulatory Flexibility Act of 1980⁹⁰ generally requires a description and analysis of final rules that will have significant economic impact on a substantial number of small entities. The Commission is not required to make such analyses if a rule would not have such an effect. The Commission certifies that the Final Rule will not have such an impact on small entities. The Final Rule is procedural only, expands due process rights of certain audited persons and does not involve additional filing or recordkeeping requirements or any similar burden. By providing an additional due process opportunity, the Commission has enhanced benefits to small entities.

VII. Document Availability

57. 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 FERC's home page <http://www.ferc.gov> and the FERC's Public Reference Room during normal business hours (8:30 a.m. to 5 p.m. eastern time) at 888 First Street, NE., Room 2A, Washington, DC 20426.

58. From FERC's home page on the Internet, this information is available in the Commission's document management system, 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.

59. User assistance is available for eLibrary and the FERC's Web site during normal business hours. For assistance, please contact FERC Online Support at 1-866-208-3676 (toll free) or

⁸³ <http://www.ferc.gov/legal/maj-ord-reg/land-docs/stand-cond/stand-cond-faqs.pdf>.

⁸⁴ LG&E initial comments at 3-4.

⁸⁵ Government Auditing Standards, 2003 Version issued by the Comptroller General of the United States, June 2003.

⁸⁶ <http://www.gao.gov/govaud/yb2003.pdf>.

⁸⁷ 5 CFR 11320.12 (2005).

⁸⁸ Order No. 486, 52 FR 47897 (Dec. 17, 1987), FERC Stats. & Regs. ¶ 30,783 (1987) (Codified at 18 CFR part 380 (2005)).

⁸⁹ 18 CFR 380.4(a)(2)(ii) (2005).

⁹⁰ 5 U.S.C. 601-612 (2000).

⁸⁰ EEI initial comments at 4-6.

⁸¹ Ameren initial comments at 3.

⁸² PNM-TNMP initial comments at 3.

202-502-6652 (e-mail at FERCOnlineSupport@ferc.gov), or the Public Reference Room at 202-502-8371, TTY 202-502-8659 (e-mail at public.reference@ferc.gov).

VIII. Effective Date

60. These regulations are effective March 29, 2006.

61. The provisions of 5 U.S.C. 801 regarding Congressional review of Final Rules does not apply to the Final Rule because the rule concerns agency procedure and practice and will not substantively affect the rights of non-agency parties.

List of Subjects

18 CFR Part 41

Administrative practice and procedure, Electric utilities, Reporting and recordkeeping, Uniform System of Accounts.

18 CFR Part 158

Administrative practice and procedure, Natural gas, Reporting and recordkeeping requirements, Uniform System of Accounts.

18 CFR Part 286

Administrative practice and procedure, Natural gas, Price controls.

18 CFR Part 349

Administrative practice and procedure, Pipelines.

By the Commission.

Magalie R. Salas,
Secretary.

■ In consideration of the foregoing, the Commission amends parts 41, 158 and 286, and adds part 349, Chapter I, Title 18, of the *Code of Federal Regulations*, as follows:

PART 41—ACCOUNTS, RECORDS, MEMORANDA AND DISPOSITION OF CONTESTED AUDIT FINDINGS AND PROPOSED REMEDIES

■ 1. The authority citation for part 41 continues to read as follows:

Authority: 16 U.S.C. 791a-825r, 2601-2645; 42 U.S.C. 7101-7352.

■ 2. The heading of part 41 is revised to read as set forth above.

■ 3. Sections 41.1, 41.2 and 41.3 and the undesignated center heading preceding them are revised to read as follows:

Disposition of Contested Audit Findings and Proposed Remedies

§ 41.1 Notice to audited person.

(a) *Applicability.* This part applies to all audits conducted by the Commission or its staff under authority of the Federal

Power Act except for Electric Reliability Organization audits conducted pursuant to the authority of part 39 of this chapter.

(b) *Notice.* An audit conducted by the Commission's staff under authority of the Federal Power Act may result in a notice of deficiency or audit report or similar document containing a finding or findings that the audited person has not complied with a requirement of the Commission with respect to, but not limited to, the following: A filed tariff or tariffs, contracts, data, records, accounts, books, communications or papers relevant to the audit of the audited person; matters under the Standards of Conduct or the Code of Conduct; and the activities or operations of the audited person. The notice of deficiency, audit report or similar document may also contain one or more proposed remedies that address findings of noncompliance. Where such findings, with or without proposed remedies, appear in a notice of deficiency, audit report or similar document, such document shall be provided to the audited person, and the finding or findings, and any proposed remedies, shall be noted and explained. The audited person shall timely indicate in a written response any and all findings or proposed remedies, or both, in any combination, with which the audited person disagrees. Any initial order that the Commission subsequently may issue with respect to the notice of deficiency, audit report or similar document shall note, but not address on the merits, the finding or findings, or the proposed remedy or remedies, or both, in any combination, with which the audited person disagreed. The Commission shall provide the audited person 30 days to respond with respect to the finding or findings or any proposed remedy or remedies, or both, in any combination, with which it disagreed.

§ 41.2 Response to notification.

Upon issuance of a Commission order that notes a finding or findings, or proposed remedy or remedies, or both, in any combination, with which the audited person has disagreed, the audited person may: Acquiesce in the findings and/or proposed remedies by not timely responding to the Commission order, in which case the Commission may issue an order approving them or taking other action; or challenge the finding or findings and/or any proposed remedies, with which it disagreed by timely notifying the Commission in writing that it requests Commission review by means of a shortened procedure or, if there are

material facts in dispute which require cross-examination, a trial-type hearing.

§ 41.3 Shortened procedure.

If the audited person subject to a Commission order described in § 41.1 notifies the Commission that it seeks to challenge one or more audit findings, or proposed remedies, or both, in any combination, by the shortened procedure, the Commission shall thereupon issue a notice setting a schedule for the filing of memoranda. The person electing the use of the shortened procedure, and any other interested entities, including the Commission staff, shall file, within 45 days of the notice, an initial memorandum that addresses the relevant facts and applicable law that support the position or positions taken regarding the matters at issue. Reply memoranda shall be filed within 20 days of the date by which the initial memoranda are due to be filed. Only participants who filed initial memoranda may file reply memoranda. Subpart T of part 385 of this chapter shall apply to all filings. Within 20 days after the last date that reply memoranda under the shortened procedure may be timely filed, the audited person who elected the shortened procedure may file a motion with the Commission requesting a trial-type hearing if new issues are raised by a party. To prevail in such a motion, the audited person must show that a party to the shortened procedure raised one or more new issues of material fact relevant to resolution of a matter in the shortened procedure such that fundamental fairness requires a trial-type hearing to resolve the new issue or issues so raised. Parties to the shortened procedure and the Commission staff may file responses to the motion. In ruling upon the motion, the Commission may determine that some or all of the issues be litigated in a trial-type hearing.

PART 158—ACCOUNTS, RECORDS, MEMORANDA AND DISPOSITION OF CONTESTED AUDIT FINDINGS AND PROPOSED REMEDIES

■ 4. The authority citation for part 158 continues to read as follows:

Authority: 15 U.S.C. 717-717w, 3301-3432; 42 U.S.C. 7102-7352.

■ 5. The heading of part 158 is revised to read as set forth above.

■ 6. Sections 158.1, 158.2 and 158.3 and the undesignated center heading preceding them are revised to read as follows:

Disposition of Contested Audit Findings and Proposed Remedies**§ 158.1 Notice to audited person.**

An audit conducted by the Commission's staff under authority of the Natural Gas Act may result in a notice of deficiency or audit report or similar document containing a finding or findings that the audited person has not complied with a requirement of the Commission with respect to, but not limited to, the following: A filed tariff or tariffs, contracts, data, records, accounts, books, communications or papers relevant to the audit of the audited person; matters under the Standards of Conduct or the Code of Conduct; and the activities or operations of the audited person. The notice of deficiency, audit report or similar document may also contain one or more proposed remedies that address findings of noncompliance. Where such findings, with or without proposed remedies, appear in a notice of deficiency, audit report or similar document, such document shall be provided to the audited person, and the finding or findings, and any proposed remedies, shall be noted and explained. The audited person shall timely indicate in a written response any and all findings or proposed remedies, or both, in any combination, with which the audited person disagrees. Any initial order that the Commission subsequently may issue with respect to the notice of deficiency, audit report or similar document shall note, but not address on the merits, the finding or findings, or the proposed remedy or remedies, or both, in any combination, with which the audited person disagreed. The Commission shall provide the audited person 30 days to respond with respect to the finding or findings or any proposed remedy or remedies, or both, in any combination, with which it disagreed.

§ 158.2 Response to notification.

Upon issuance of a Commission order that notes a finding or findings, or proposed remedy or remedies, or both, in any combination, with which the audited person has disagreed, the audited person may: Acquiesce in the findings and/or proposed remedies by not timely responding to the Commission order, in which case the Commission may issue an order approving them or taking other action; or challenge the finding or findings and/or any proposed remedies, with which it disagreed by timely notifying the Commission in writing that it requests Commission review by means of a shortened procedure or, if there are

material facts in dispute which require cross-examination, a trial-type hearing.

§ 158.3 Shortened procedure.

If the audited person subject to a Commission order described in § 158.1 notifies the Commission that it seeks to challenge one or more audit findings, or proposed remedies, or both, in any combination, by the shortened procedure, the Commission shall thereupon issue a notice setting a schedule for the filing of memoranda. The person electing the use of the shortened procedure, and any other interested entities, including the Commission staff, shall file, within 45 days of the notice, an initial memorandum that addresses the relevant facts and applicable law that support the position or positions taken regarding the matters at issue. Reply memoranda shall be filed within 20 days of the date by which the initial memoranda are due to be filed. Only participants who filed initial memoranda may file reply memoranda. Subpart T of part 385 of this chapter shall apply to all filings. Within 20 days after the last date that reply memoranda under the shortened procedure may be timely filed, the audited person who elected the shortened procedure may file a motion with the Commission requesting a trial-type hearing if new issues are raised by a party. To prevail in such a motion, the audited person must show that a party to the shortened procedure raised one or more new issues of material fact relevant to resolution of a matter in the shortened procedure such that fundamental fairness requires a trial-type hearing to resolve the new issue or issues so raised. Parties to the shortened procedure and the Commission staff may file responses to the motion. In ruling upon the motion, the Commission may determine that some or all of the issues be litigated in a trial-type hearing.

PART 286—ACCOUNTS, RECORDS, MEMORANDA AND DISPOSITION OF CONTESTED AUDIT FINDINGS AND PROPOSED REMEDIES

- 7. The authority citation for part 286 is revised to read as follows:

Authority: 5 U.S.C. 551 *et seq.*; 15 U.S.C. 717–717w, 3301–3432; 42 U.S.C. 7102–7352.

- 8. The heading of part 286 is revised to read as set forth above.
- 9. Sections 286.103 through 286.109 and a new undesignated center heading preceding them are added to read as follows:

Disposition of Contested Audit Findings and Proposed Remedies**§ 286.103 Notice to audited person.**

An audit conducted by the Commission's staff under authority of the Natural Gas Policy Act may result in a notice of deficiency or audit report or similar document containing a finding or findings that the audited person has not complied with a requirement of the Commission with respect to, but not limited to, the following: A filed tariff or tariffs, contracts, data, records, accounts, books, communications or papers relevant to the audit of the audited person; matters under the Standards of Conduct or the Code of Conduct; and the activities or operations of the audited person. The notice of deficiency, audit report or similar document may also contain one or more proposed remedies that address findings of noncompliance. Where such findings, with or without proposed remedies, appear in a notice of deficiency, audit report or similar document, such document shall be provided to the audited person, and the finding or findings, and any proposed remedies, shall be noted and explained. The audited person shall timely indicate in a written response any and all findings or proposed remedies, or both, in any combination, with which the audited person disagrees. Any initial order that the Commission subsequently may issue with respect to the notice of deficiency, audit report or similar document shall note, but not address on the merits, the finding or findings, or the proposed remedy or remedies, or both, in any combination, with which the audited person disagreed. The Commission shall provide the audited person 30 days to respond with respect to the finding or findings or any proposed remedy or remedies, or both, in any combination, with which it disagreed.

§ 286.104 Response to notification.

Upon issuance of a Commission order that notes a finding or findings, with or without proposed remedies, with which the audited person has disagreed, the audited person may: Acquiesce in the findings and proposed remedies by not timely responding to the Commission order, in which case the Commission may issue an order approving them or taking other action; or challenge the finding or findings and any proposed remedies with which it disagreed by timely notifying the Commission in writing that it requests Commission review by means of a shortened procedure, or, if there are material facts in dispute which require cross-examination, a trial-type hearing.

§ 286.105 Shortened procedure.

If the audited person subject to a Commission order described in § 286.103 notifies the Commission that it seeks to challenge one or more audit findings, or proposed remedies, or both, in any combination, by the shortened procedure, the Commission shall thereupon issue a notice setting a schedule for the filing of memoranda. The person electing the use of the shortened procedure, and any other interested entities, including the Commission staff, shall file, within 45 days of the notice, an initial memorandum that addresses the relevant facts and applicable law that support the position or positions taken regarding the matters at issue. Reply memoranda shall be filed within 20 days of the date by which the initial memoranda are due to be filed. Only participants who filed initial memoranda may file reply memoranda. Subpart T of part 385 of this chapter shall apply to all filings. Within 20 days after the last date that reply memoranda under the shortened procedure may be timely filed, the audited person who elected the shortened procedure may file a motion with the Commission requesting a trial-type hearing if new issues are raised by a party. To prevail in such a motion, the audited person must show that a party to the shortened procedure raised one or more new issues of material fact relevant to resolution of a matter in the shortened procedure such that fundamental fairness requires a trial-type hearing to resolve the new issue or issues so raised. Parties to the shortened procedure and the Commission staff may file responses to the motion. In ruling upon the motion, the Commission may determine that some or all of the issues be litigated in a trial-type hearing.

§ 286.106 Form and style.

Each copy of such memorandum must be complete in itself. All pertinent data should be set forth fully, and each memorandum should set out the facts and argument as prescribed for briefs in § 385.706 of this chapter.

§ 286.107 Verification.

The facts stated in the memorandum must be sworn to by persons having knowledge thereof, which latter fact must affirmatively appear in the affidavit. Except under unusual circumstances, such persons should be those who would appear as witnesses if hearing were had to testify as to the facts stated in the memorandum.

§ 286.108 Determination.

If no formal hearing is had the matter in issue will be determined by the Commission on the basis of the facts and arguments submitted.

§ 286.109 Assignment for oral hearing.

Except when there are no material facts in dispute, when a person does not consent to the shortened procedure, the Commission will assign the proceeding for hearing as provided by subpart E of part 385 of this chapter. Notwithstanding a person's not giving consent to the shortened procedure, and instead seeking assignment for hearing as provided for by subpart E of part 385 of this chapter, the Commission will not assign the proceeding for a hearing when no material facts are in dispute. The Commission may also, in its discretion, at any stage in the proceeding, set the proceeding for hearing.

■ 10. Part 349 is added to Subchapter P to read as follows:

PART 349—DISPOSITION OF CONTESTED AUDIT FINDINGS AND PROPOSED REMEDIES**Sec.**

- 349.1 Notice to audited person.
- 349.2 Response to notification.
- 349.3 Shortened procedure.
- 349.4 Form and style.
- 349.5 Verification.
- 349.6 Determination.
- 349.7 Assignment for oral hearing.

Authority: 42 U.S.C. 7101–7352; 49 U.S.C. 1, *et seq.*

§ 349.1 Notice to audited person.

An audit conducted by the Commission or its staff under authority of the Interstate Commerce Act may result in a notice of deficiency or audit report or similar document containing a finding or findings that the audited person has not complied with a requirement of the Commission with respect to, but not limited to, the following: A filed tariff or tariffs, contracts, data, records, accounts, books, communications or papers relevant to the audit of the audited person; and the activities or operations of the audited person. The notice of deficiency, audit report or similar document may also contain one or more proposed remedies that address findings of noncompliance. Where such findings, with or without proposed remedies, appear in a notice of deficiency, audit report or similar document, such document shall be provided to the audited person, and the finding or findings, and any proposed remedies, shall be noted and explained. The audited person shall timely indicate in

a written response any and all findings or proposed remedies, or both, in any combination, with which the audited person disagrees. Any initial order that the Commission subsequently may issue with respect to the notice of deficiency, audit report or similar document shall note, but not address on the merits, the finding or findings, or the proposed remedy or remedies, or both, in any combination, with which the audited person disagreed. The Commission shall provide the audited person 30 days to respond with respect to the finding or findings or any proposed remedy or remedies, or both, in any combination, with which it disagreed.

§ 349.2 Response to notification.

Upon issuance of a Commission order that notes a finding or findings, or proposed remedy or remedies, or both, in any combination, with which the audited person has disagreed, the audited person may: Acquiesce in the findings and/or proposed remedies by not timely responding to the Commission order, in which case the Commission may issue an order approving them or taking other action; or challenge the finding or findings and/or any proposed remedies with which it disagreed by timely notifying the Commission in writing that it requests Commission review by means of a shortened procedure, or, if there are material facts in dispute which require cross-examination, a trial-type hearing.

§ 349.3 Shortened procedure.

If the audited person subject to a Commission order described in § 349.1 notifies the Commission that it seeks to challenge one or more audit findings, or proposed remedy or remedies, or both, in any combination, by the shortened procedure, the Commission shall thereupon issue a notice setting a schedule for the filing of memoranda. The person electing the use of the shortened procedure, and any other interested entities, including the Commission staff, shall file, within 45 days of the notice, an initial memorandum that addresses the relevant facts and applicable law that support the position or positions taken regarding the matters at issue. Reply memoranda shall be filed within 20 days of the date by which the initial memoranda are due to be filed. Only participants who filed initial memoranda may file reply memoranda. Subpart T of part 385 of this chapter shall apply to all filings. Within 20 days after the last date that reply memoranda under the shortened procedure may be timely filed, the audited person who elected the shortened procedure may

file a motion with the Commission requesting a trial-type hearing if new issues are raised by a party. To prevail in such a motion, the audited person must show that a party to the shortened procedure raised one or more new issues of material fact relevant to resolution of a matter in the shortened procedure such that fundamental fairness requires a trial-type hearing to resolve the new issue or issues so raised. Parties to the shortened procedure and the Commission staff may file responses to the motion. In ruling upon the motion, the Commission may determine that some or all of the issues be litigated in a trial-type hearing.

§ 349.4 Form and style.

Each copy of such memorandum must be complete in itself. All pertinent data should be set forth fully, and each memorandum should set out the facts and argument as prescribed for briefs in § 385.706 of this chapter.

§ 349.5 Verification.

The facts stated in the memorandum must be sworn to by persons having knowledge thereof, which latter fact must affirmatively appear in the affidavit. Except under unusual circumstances, such persons should be those who would appear as witnesses if hearing were had to testify as to the facts stated in the memorandum.

§ 349.6 Determination.

If no formal hearing is had the matter in issue will be determined by the Commission on the basis of the facts and arguments submitted.

§ 349.7 Assignment for oral hearing.

Except when there are no material facts in dispute, when a person does not consent to the shortened procedure, the Commission will assign the proceeding for hearing as provided by subpart E of part 385 of this chapter. Notwithstanding a person's not giving consent to the shortened procedure, and instead seeking assignment for hearing as provided for by subpart E of part 385 of this chapter, the Commission will not assign the proceeding for a hearing when no material facts are in dispute. The Commission may also, in its discretion, at any stage in the proceeding, set the proceeding for hearing.

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DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 284

[Docket No. RM06-5-000; Order No. 673]

Amendments to Codes of Conduct for Unbundled Sales Service and for Persons Holding Blanket Marketing Certificates

Issued February 16, 2006.

AGENCY: Federal Energy Regulatory Commission.

ACTION: Final rule.

SUMMARY: In this final rule, the Federal Energy Regulatory Commission (Commission) is amending its regulations regarding the blanket certificates for unbundled natural gas sales services held by interstate natural gas pipelines and the blanket marketing certificates held by persons making sales for resale of natural gas at negotiated rates in interstate commerce. Specifically, the Commission is rescinding sections of its regulations pertaining to codes of conduct with respect to certain sales of natural gas.

DATES: This final rule will become effective March 29, 2006.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

Before Commissioners: Joseph T. Kelliher, Chairman; Nora Mead Brownell, and Suede G. Kelly

1. The Commission has decided to rescind §§ 284.288(a), (d) and (e) and 284.403(a), (d) and (e) of its codes of conduct regulations,¹ as promulgated pursuant to Order No. 644.² The central purpose of Order No. 644 was to prohibit market manipulation by pipelines that provide unbundled natural gas sales service and by sellers

¹ 18 CFR 284.288(a), (d) and (e) and 284.403(a), (d) and (e) (2005).

² *Amendments to Blanket Sales Certificates*, 105 FERC ¶ 61,217 (2003), reh'g denied 107 FERC ¶ 61,174; 68 FR 66323 (Nov. 26, 2003); 18 CFR 284.288 and 284.403 (2003) (Order No. 644). Order No. 644 is currently on appeal. See *Cinergy Marketing & Trading, L.P. v. FERC*, No. 04-1168 et al. (D.C. Cir. filed April 28, 2004).

of natural gas for resale at negotiated rates. This prohibition is set out in §§ 284.288(a) and 284.403(a) of the Commission's regulations. Sections 284.288(d)-(e) and 284.403(d)-(e) of the Commission's regulations are largely procedural in nature, dealing with remedies for violations of the codes of conduct requirements and time limits on complaints and Commission enforcement of the codes of conduct requirements. Subsequent to the issuance of Order No. 644, Congress provided the Commission with specific anti-manipulation authority in the Energy Policy Act of 2005 (EPA 2005).³ To implement this new authority, the Commission recently issued Order No. 670, adopting a final rule making it unlawful for any entity, including pipelines that provide unbundled natural gas sales service and all sellers of natural gas for resale, to engage in fraudulent or deceptive conduct in connection with the purchase or sale of electric energy, natural gas, or transmission or transportation services subject to the jurisdiction of the Commission.⁴ In order to avoid regulatory uncertainty and confusion, to assure that all market participants are held to the same standard, and to provide clarity to entities subject to our rules and regulations, we rescind §§ 284.288(a), (d) and (e) and 284.403(a), (d) and (e) of the Commission's regulations effective 30 days after publication hereof in the **Federal Register**.⁵

2. Although Order No. 670 makes it unnecessary to retain §§ 284.288(a), (d) and (e) and 284.403(a), (d) and (e) of the Commission's regulations, there is benefit to retaining §§ 284.288(b)-(c) and 284.403(b)-(c) of the Commission's regulations. Sections 284.288(b) and 284.403(b) of the Commission's regulations deal with requirements for price index reporting that are not entirely provided for by the new anti-manipulation regulations under Order

³ Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005). Congress prohibited the use or employment of "any manipulative or deceptive device or contrivance" in connection with the purchase or sale of natural gas or transportation services subject to the jurisdiction of the Commission. Congress directed the Commission to give these terms the same meaning as under the Securities Exchange Act of 1934, 15 U.S.C. 78j(b) (2000).

⁴ *Prohibition of Energy Market Manipulation*, Order No. 670, 71 FR 4244 (Jan. 26, 2006), FERC Stats. & Regs. ¶ 31,202, 114 FERC ¶ 61,047 (Jan. 19, 2006) (Order No. 670).

⁵ The Commission will redesignate existing sections 284.288(b)-(c) and 284.403(b)-(c) of the Commission's regulations as new sections 284.288(a)-(b) and 284.403(a)-(b), respectively. Unless otherwise specified, this NOPR will refer to these sections under their existing designation before the effectiveness of this Final Rule.