workdays following disease confirmation. Subsequent disposition of the ruminants must occur under the direct oversight of APHIS representatives.

(vi) *Recordkeeping.*

(A) The operator must maintain a current daily log, to record the entry and exit of all persons entering and leaving the facility.

(B) The operator must retain the daily log, along with any logs kept by APHIS and deposited with the operator, for at least 2 years following the date of release of the ruminants from quarantine and must make such logs available to APHIS representatives upon request.

(5) *Environmental quality.* If APHIS determines that a privately owned medium or minimum security quarantine facility does not meet applicable local, State, or Federal environmental regulations, APHIS may deny or suspend approval of the facility until appropriate remedial measures have been applied.

(6) *Other laws.* A privately owned medium or minimum security quarantine facility must comply with other applicable Federal laws and regulations, as well as with all applicable State and local codes and regulations.

(7) *Variances.* The Administrator may grant variances to existing requirements relating to location, construction, and other design features of a privately owned medium security quarantine facility or minimum security quarantine facility as well as to sanitation, security, operating procedures, recordkeeping, and other provisions in paragraph (d) of this section, but only if the Administrator determines that the variance causes no detrimental impact to the health of the ruminants or to the overall biological security of the quarantine operations. The operator must submit a request for a variance to the Administrator in writing at least 30 days in advance of the arrival of the ruminants to the facility. Any variance also must be expressly provided for in the compliance agreement.

(Approved by the Office of Management and Budget under control number 0579–0232)

■ 7. Section 93.413 is revised to read as follows:

§ 93.413 Quarantine stations, visiting restricted; sales prohibited.

Visitors are not permitted in the quarantine enclosures during any time that ruminants are in quarantine unless the APHIS representative or inspector in charge specifically grants access under such conditions and restrictions as may be imposed by the APHIS representative or inspector in charge. An importer (or his or her accredited agent or veterinarian) may be admitted to the yards and buildings containing his or her quarantined ruminants at such intervals as may be deemed necessary, and under such conditions and restrictions as may be imposed, by the APHIS representative or the inspector in charge of the quarantine facility or station. On the last day of the quarantine period, owners, officers, or registry societies, and others having official business or whose services may be necessary in the removal of the ruminants may be admitted upon written permission from the APHIS representative or inspector in charge. No exhibition or sale shall be allowed within the quarantine grounds.

§ 93.414 [Amended]

■ 8. In § 93.414, the first sentence is amended by adding the words ''APHIS representative or'' immediately before the words ''inspector in charge''.

■ 9. In the undesignated center heading ''Mexico'' before § 93.424, redesignate footnote 9 as footnote 10.

■ 10. In the undesignated center heading ''Central America and West Indies'' before § 93.422, redesignate footnote 8 as footnote 9.

■ 11. In the undesignated center heading ''Canada'' before § 93.417, redesignate footnote 7 as footnote 8.

§ 93.434 [Removed and Reserved]

■ 12. Section 93.434 is removed and reserved.

Done in Washington, DC, this 19th day of May 2006.

W. Ron DeHaven,

Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 06–4811 Filed 5–23–06; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Parts 41, 158, 286 and 349

[Docket No. RM06–2–001; Order No. 675–A]

Procedures for Disposition of Contested Audit Matters

Issued May 18, 2006.

AGENCY: Federal Energy Regulatory Commission; DOE.

ACTION: Final rule, order on rehearing and clarification.

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 June 23, 2006.

FOR FURTHER INFORMATION CONTACT: John R. Kroeger, Office of Enforcement, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. (202) 502–8177. *John.Kroeger@ferc.gov.*

SUPPLEMENTARY INFORMATION:

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

Order No. 675–A

Order on Rehearing and Clarification

I. Introduction

1. On February 17, 2006, the Commission issued a Final Rule, Order No. 675,[1] that expands the procedural rights of persons subject to all audits conducted by the Commission staff under the Federal Power Act (FPA),[2] the Natural Gas Act (NGA),[3] the Natural Gas Policy Act (NGPA),[4] and the Interstate Commerce Act (ICA),[5] except for audits pertaining to reliability that the Commission authorized in Order No. 672.[6] Prior to the effective date of Order No. 675, audited persons who disagreed with non-financial audit matters approved by the Commission were required to seek rehearing of that order to obtain further Commission review.

2. Pursuant to Order No. 675, audited persons may seek Commission review of disputed matters contained in an audit report or similar document in a procedure that provides additional due process to audited persons subject to non-financial audits. Under this procedure, audited persons may provide in writing to the audit staff a response to a draft notice of deficiency, draft audit report or similar document

[1] *Procedures for Disposition of Contested Audit Matters,* Order No. 675, 71 FR 9698 (Feb. 27, 2006), III FERC Stats. & Regs. ¶ 31,209 (Feb. 17, 2006).

[2] 16 U.S.C. 791a, *et seq.* (2000).

[3] 15 U.S.C. 717, *et seq.* (2000).

[4] 15 U.S.C. 3301, *et seq.* (2000).

[5] 49 U.S.C. App. 1, *et seq.* (2000).

[6] *Rules Concerning Certification of the Electric Reliability Organization; and Procedures for the Establishment, Approval, and Enforcement of Electric Reliability Standards,* 71 FR 8662 (Feb. 17, 2006), III FERC Stats. & Regs. ¶ 31,204 (Feb. 2, 2006); *reh'g granted in part and denied in part,* Order No. 672–A, 71 FR 19814 (Apr. 18, 2006), 114 FERC ¶ 61,328 (Mar. 30, 2006).

(collectively, 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 draft 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 draft audit report that are not in dispute. The Commission will publicly notice the disputed items and provide the audited person the opportunity to elect in writing a shortened procedure, which consists of a submission of memoranda, or a trial-type hearing, by a date certain. 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.

3. The Commission will honor the audited person's timely election (unless a trial-type hearing 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.

4. On March 20, 2006, Edison Electric Institute (EEI) timely filed the only request for rehearing and clarification of Order No. 675.[7] The Commission grants the request for rehearing and clarification filed by EEI in four respects. First, the Commission grants EEI's request for clarification regarding the scope of contested audit matters. Second, the Commission grants EEI's request for clarification that contested audit procedures will not be used to amend Final Rules. Third, the Commission grants EEI's request for clarification by specifying that an audited person shall have at least 15 days to provide in writing to the audit staff a response to the draft audit report indicating findings or proposed remedies with which it disagrees. Fourth, the Commission grants the substance of EEI's proposal to change the regulatory text regarding the time within which an audited person must elect either the shortened procedure or a trial-type hearing. In all other respects, as explained below, the Commission denies EEI's request for rehearing and clarification.

[7] *See* 16 U.S.C. 825l(a) (2000).

II. Discussion

A. Scope of Contested Audit Matters

5. In Order No. 675, the Commission stated that entities other than the audited person and the audit staff may participate in the shortened procedure or the trial-type hearing.[8] The Commission explained that 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.[9]

1. Request for Rehearing or Clarification

6. EEI requests clarification, or in the alternative, rehearing, that the Final Rule is not intended to allow intervenors to raise new issues in response to a public notice of a contested audit report.[10] EEI expresses concern that intervenors may seek to intervene in a contested audit proceeding and raise issues that are beyond the scope of contested issues raised by the audited person. EEI asserts that allowing intervenors to expand the scope of audit proceedings in such a manner would tend to dilute the due process rights afforded by Order No. 675.[11] To address this concern, EEI urges that the Final Rule should be clarified to permit intervenors only to raise arguments or facts that directly relate to a finding or remedy already at issue in the contested audit proceeding. EEI contends that, under the FPA and consistent with due process norms, new issues must be raised in a section 206 complaint[12] filed by the interested entity.[13]

[8] Order No. 675 at P 11, 38.

[9] Order No. 675 at P 11.

[10] EEI Request for Rehearing and Clarification at p. 6.

[11] EEI Request for Rehearing and Clarification at pp. 5–7.

[12] *See* 16 U.S.C. 824e (2000).

[13] In support of its argument, EEI cites *Public Service Commission of N.Y.* v. *FERC,* 642 F.2d 1335, 1345 (DC Cir. 1980), for the proposition that section 4(e) of the NGA ''cannot be used by the Commission to institute any change in a ratemaking component * * * that does not represent at least partial approval of the change for which the enterprise had petitioned in its filing. If the Commission seeks to make such changes, it has no alternative save compliance with the strictures of section 5(a).'' EEI also cites *Public Service Commission of Kentucky* v. *FERC,* 397 F.3d 1004, 1012 (DC Cir. 2005), for the proposition that ''[t]he Due Process Clause and the [Administrative Procedure Act] require that an agency setting a matter for hearing provide parties 'with adequate notice of the issues that would be considered, and ultimately resolved, at that hearing.'''

2. Commission Determination

7. The Commission grants EEI's request for clarification. An interested entity that has successfully intervened in a proceeding will be limited to arguments or facts that directly relate to a finding or proposed remedy already at issue in the contested audit proceeding that the audited person has appropriately designated and that is noted in the Commission's initial order concerning the audit report or similar document.[14] Permitting an intervenor to raise extraneous issues could deflect the focus of the contested proceeding from the designated issue or issues, could cause unnecessary expense, litigation and delay, and could require an audited person to litigate issues of which it had no notice at the time it made its election to challenge a finding or proposed remedy in the audit report.

B. Orders in Contested Audit Proceedings

1. Request for Rehearing or Clarification

8. EEI requests that the Commission clarify that it does not intend the Final Rule's language regarding the precedential effect of contested audit orders to create or support the ability to amend, by individual adjudication, rules adopted through rulemaking proceedings.[15] EEI contends that such a result would be contrary to law. EEI asserts that courts have struck down agencies' attempts to use clarification and interpretations as a way of imposing more stringent requirements and setting higher standards on the regulated community.[16] EEI also asserts that courts have rejected agencies' efforts to enforce new policies by gradually imposing more restrictive standards and higher burdens without allowing the regulated community to participate or object.[17]

2. Commission Determination

9. The Commission grants EEI's request for clarification. Orders that the

[14] This limitation is consistent with Commission practice. For example, the Commission has rejected the timely-filed or otherwise accepted pleadings of intervenors where they addressed issues that were not relevant to the Commission's disposition of a seller's market-based rates application and where they related to issues that were otherwise outside the scope of the proceeding. *See H.Q. Energy Services (U.S.) Inc.,* 81 FERC ¶ 61,184 at 61,809 n.5 (1997).

[15] EEI Request for Rehearing and Clarification at p. 9.

[16] To support this position, EEI cites *Alaska Professional Hunters Ass'n* v. *FAA,* 177 F.3d 1030, 1034 (DC Cir. 1999) (*Alaska Professional Hunters Ass'n*).

[17] To support this position, EEI cites *Appalachian Power Co.* v. *EPA,* 208 F.3d 1015, 1024 (DC Cir. 2000) (*Appalachian Power*).

Commission issues in contested audit proceedings will not amend rules adopted through rulemaking proceedings.

C. Clarification of Time Frames for Audited Person To Respond

1. Request for Rehearing and Clarification

10. EEI states that if the Commission intended to require a 30-day time frame in which the audited person must provide in writing to the audit staff a response to the draft audit report noting the items with which it disagrees, then EEI seeks rehearing of that determination. EEI states that the time frame in which the audited person must provide in writing to the audit staff a response to the draft audit report indicating items with which it disagrees should be flexible and that it should be determined by the Commission audit staff and the audited person based on the facts of the audit. EEI also asks the Commission to clarify the regulatory text to make it clear that after the public issuance of the Commission's initial order concerning an audit report, the audited person will have 30 days to respond to the Commission with the selection of a shortened procedure or a trial-type proceeding.[18]

2. Commission Determination

11. The Commission grants EEI's request for clarification in part. In Order No. 675, the Commission did not specify a time frame in which the audited person must provide in writing to the audit staff a response to the draft audit report noting the items with which it disagrees. Instead, the pertinent regulation stated that the audited person's written response must be ''timely.'' The Commission intended that the audit staff would determine the length of time an audited person would have to file a written response indicating the findings or proposed remedies with which it disagrees. The relevant regulatory text at §§ 41.1, 158.1, 286.103 and 349.1 reads as follows:

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 remedies, or both, in any combination, with which it disagreed.

12. The Commission declines to adopt EEI's suggestion that both the audited person and the audit staff determine the time period in which the audited person shall provide a written response to the audit staff indicating findings or proposed remedies with which the audited person disagrees. If the time period for the audited person's submission of this response were subject to agreement between the audited person and the audit staff, there might be instances in which the audited person and the audit staff would fail to agree, resulting in inappropriate delay. The Commission recognizes, however, that a certain time period for the audited person to provide a written response indicating findings and proposed remedies with which it disagrees, with the possibility for additional time if deemed necessary by the Commission, would provide a measure of assurance to the audited person that it will have sufficient time to make this written response to audit staff. The Commission determines that 15 days to make this written response will be sufficient time in the large majority of cases in which the audited person and audit staff do not disagree regarding the contents of the draft audit report. Even in the remaining instances in which the audited person and the audit staff disagree regarding the contents of the draft audit report, the discussion between them regarding the contents of the draft audit report preceding the commencement of the 15-day period should render the allotted time sufficient for the audited person to indicate the areas of disagreement. In instances in which the audited person may require more than 15 days to provide a written statement of findings or proposed remedies with which it disagrees to audit staff, the audit staff may provide in writing to the audited person additional time at the time the draft audit report is sent. The audited person may also move the Commission for additional time. Consequently, the Commission will add two sentences to follow the second sentence of §§ 41.1, 158.1, 286.103, and 349.1 quoted above to read as follows: ''*The audited person shall have 15 days from the date it is sent the notice of deficiency, audit report or similar document to provide a written response to the audit staff indicating any and all findings or proposed remedies, or both, in any combination, with which the audited person disagrees, and such further time as the audit staff may provide in writing to the audited person at the time the document is sent to the audited person. The audited person may move the Commission for additional time to provide a written response to the audit staff and such motion shall be granted for good cause shown.*''

13. In Order No. 675, the Commission intended to indicate that an audited person shall have 30 days to respond to a Commission order with a selection of a shortened procedure or a trial-type proceeding.[19] The 30-day provision in the last sentence quoted in paragraph 11 above is meant to convey this intention. To remove any possible ambiguity, the Commission will amend the last sentence of §§ 41.1, 158.1, 286.103, and 349.1 quoted above, to read as follows: ''The Commission shall provide the audited person 30 days to respond *to the initial Commission order concerning a notice of deficiency, audit report or similar document* with respect to the finding or findings or any proposed remedy or remedies, or both, in any combination, with which it disagreed.''

D. Precedential Effect of Decisions in Contested Audit Matters

14. In Order No. 675, the Commission stated that a Commission order that resolves a contested audit matter would be precedent for non-parties. The Commission explained that an audited person who challenges a finding or proposed remedy in an audit report using the procedure in the Final Rule 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 would apply to non-parties.[20]

1. Request for Clarification

15. EEI requests clarification that the Commission will not apply any ruling on a contested audit matter to an entity that was not a party to the adjudication unless and until the non-party entity has been afforded an opportunity to challenge the basis of the ruling as it applies to that entity. EEI states that the language in the Final Rule regarding the precedential value of the Commission's rulings on a contested audit may not be clear. According to EEI, judicial precedent clearly supports its position. EEI relies principally upon *Florida Gas Transmission Co.* v. *FERC,* 876 F.2d 42, 44 (5th Cir. 1989) (*FGT*). In that case, the

[18] EEI Request for Rehearing and Clarification at pp. 10–11.

[19] Order No. 675 at P 24–25.

[20] Order No. 675 at P 32.

United States Court of Appeals for the Fifth Circuit held that the Commission did not sufficiently substantiate its decision to grant individual NGA section 7(c) certificates for interruptible service for a one-year term instead of the multi-year terms requested by FGT. The Commission had relied on a policy of granting one-year terms for such certificates. The court stated that due process

> guarantees that parties who will be affected by the general rule be given an opportunity to challenge the agency's action. When the rule is established through formal rulemaking, public notice and hearing provide the necessary protection. But where, as here, the rule is established in individual adjudications, due process requires that affected parties be allowed to challenge the basis of the rule. FERC must be able to substantiate the general rule.[21]

2. Commission Determination

16. The Commission denies EEI's request for clarification. The Commission plainly stated in the Final Rule that a Commission order that resolves a contested matter has precedential effect.[22] As the Commission noted in Order No. 675, ''the 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.'' [23] The long-settled principle of Federal administrative law is that ''[a]bsent express congressional direction to the contrary, agencies are free to choose their procedural mode of administration.'' [24]

17. *FGT* does not require a different conclusion. The issue in that case was whether the Commission could rely upon its one-year policy for denying requests for longer term individual certificates or whether the Commission needed to provide an explanation specific to FGT's circumstances and failed to do so. On remand, the Commission gave an explanation [25] that the court subsequently concluded was sufficient.[26] To the extent that the Commission makes a determination in a contested audit matter and subsequently applies that determination to an audited person who had not been a party in the prior proceeding, the Commission will provide a reasoned explanation to comply with applicable legal standards.

18. In sum, just like other Commission contested, on-the-record proceedings that provide third parties an opportunity to intervene and participate, we find that Commission determinations in contested audit proceedings are precedent for non-parties in subsequent proceedings. And, as in such proceedings, the Commission will explain the application of that precedent on the basis of the record developed in subsequent proceedings.

E. Codifying the Determination in the Preamble of the Final Rule

1. EEI's Request for Rehearing and Clarification

19. EEI asks that the Commission include a number of its determinations contained in the Final Rule in the regulatory text. EEI states that the types of matters addressed in the Final Rule that were not included in the regulatory text have been included in the Commission's regulations on other occasions. As an example, EEI cites § 1b.16 of the Commission's regulations,[27] which pertains, in part, to the right of a person who is compelled to appear, or who appears in person at the request or permission of the Investigating Officer, to be accompanied, represented and advised by counsel, subject to certain additional provisions. EEI notes in this regard that in the Final Rule, the Commission stated that an attorney may be present during interviews of an audited person's employees. EEI contends that a person should not have to refer to the language of the Final Rule, but instead should be able to consult the Commission's regulations, to learn this information.[28]

20. EEI identifies seven matters that it states are discussed in the Final Rule but not reflected in the regulatory text. These matters are (1) The right to have counsel present during an audit; (2) use by the Commission of the standard set forth in § 385.214(b) of its regulations [29] to govern interventions in contested audit proceedings and the disallowances of interested persons to intervene until after the Commission issues the notice described in Part 41 of the Commission's regulations; (3) confidential treatment of information provided in an audit; (4) the absence of discovery in the shortened procedure and the applicability of Part 385 of the Commission's regulations [30] with respect to discovery in a trial-type proceeding; (5) the precedential value of an audit report and an order approving an uncontested audit report; (6) the 30-day time frame for an audited person's response; [31] and (7) protection of confidential treatment in trial-type proceedings.

2. Commission Determination

21. EEI has not provided a compelling reason for the Commission to include the noted portions of the Final Rule in the regulatory text. In particular, four of the issues EEI raises are not germane to the procedural matters addressed in the regulatory text. The right to counsel, confidential treatment, precedential value of an audit report and a Commission order approving an uncontested audit report, and protection of confidential treatment issues do not pertain to the procedure an audited person may use to challenge findings or proposed remedies in an audit report. Accordingly, it would not be appropriate to include them in the regulatory text of the parts of Title 18 involved in this rulemaking. The Commission has exercised its discretion in past proceedings to clarify matters in final rules and in orders on rehearing of final rules without inserting those clarifications in the underlying regulations.[32]

22. The Commission's statements in the Final Rule regarding interventions likewise do not warrant inclusion in the regulatory text. The Commission stated that it will use the standard stated in § 385.214(b),[33] which is in subpart B of Part 385 of the Commission's regulations, for permitting interested

[21] *FGT*, 876 F.2d at 44 (citations omitted). EEI also cites *PPL Wallingford Energy LLC* v. *FERC*, 419 F.3d 1194 (DC Cir. 2005). In that case, the court vacated orders of the Commission on the grounds that the Commission did not directly respond to or address arguments the petitioner in that proceeding had made before the Commission.

[22] Order No. 675 at P 32.

[23] *SEC* v. *Chenery Corp.,* 332 U.S. 194, 203 (1947).

[24] *Davis* v. *EPA,* 336 F.3d 965 (9th Cir. 2003).

[25] *Florida Gas Transmission Co.,* 49 FERC ¶ 61,375 (1989).

[26] *Monsanto Co.* v. *FERC,* 963 F.2d 827 (5th Cir. 1992).

[27] 18 CFR 1b.16 (2005).

[28] EEI Request for Rehearing and Clarification at pp. 11–14.

[29] 18 CFR 85.214(b) (2005).

[30] 18 CFR part 385 (2005).

[31] EEI's request with respect to the 30-day time frame for an audit person's response is addressed supra P 11–13.

[32] *See, e.g., Regulations Implementing Energy Policy Act of 2005; Pre-filing Procedures for Review of LNG Terminals and Other Natural Gas Facilities,* Order No. 665, 70 FR 60426 (Oct. 18, 2005), FERC Stats. & Regs., Regulations Preambles 2001–2005 ¶ 31,195 (Oct. 7, 2005) (''In view of the clarification and regulatory text revisions discussed above, the Commission does not believe that it is necessary to include in the final regulations additional criteria or definitions for the Director's use in reaching a determination whether prospective modifications to an existing or approved LNG terminal should be subject to a mandatory pre-filing process.''); *Standards of Conduct for Transmission Providers,* Order No. 2004–A, 69 FR 23562 (Apr. 29, 2004), FERC Stats. & Regs., Regulations Preambles 2001–2005 ¶ 31,161 (Apr. 16, 2004) (''The Commission denies National Fuel-Supply's request to revise the regulatory text, but clarifies that by using the term 'relate' in the phrase 'if it relates solely to a Marketing or Energy Affiliate's specific request for transmission service,' the Commission intended to include the corresponding transportation service agreements that result from a 'request.' '').

[33] 18 CFR 385.214(b) (2005).

entities to file memoranda in the shortened procedure as it uses to permit interventions in other proceedings. Subpart B of Part 385 ''applies to any pleading'' [34] and thus no addition to the regulatory text is needed to provide certainty.

23. The Commission's statements in the Final Rule regarding discovery also do not warrant inclusion in the regulatory text. The regulatory text accompanying the Final Rule does not authorize discovery in the shortened procedure. The Final Rule clarified that discovery is not available in the shortened procedure at EEI's request.[35] Again, adding language in the regulatory text will not provide certainty. As is true for adding regulatory text regarding interventions, adding regulatory text regarding discovery in trial-type proceedings would also be redundant, in this case to the rules in Part 385 of the Commission's regulations.

24. The Commission does not agree with EEI's contention that a provision in Part 1b of the Commission's regulations, which pertains to a person's right to have counsel present under certain circumstances in an investigation, suggests that the revised Part 41 should also address issues relating to counsel, in addition to other issues. Part 1b contains provisions describing the Commission's policy and procedures for investigations conducted under the statutes it administers. [36] Part 41 does not describe the audit process. Instead, Part 41 sets forth the procedure an audited person can use to challenge audit findings or proposed remedies with which it disagrees. In sum, by declining to include in the regulatory text the topics EEI references the Commission is not acting in a manner inconsistent with its promulgation of Part 1b.

F. Separation of Functions Issues

1. Request for Rehearing and Clarification

25. In its request for rehearing and clarification, EEI asks the Commission to issue a policy statement, with an opportunity for public comment, to consider and determine the appropriate relationship between the Commission's audit and enforcement staffs during audits, shortened or trial-type procedures for contested audit matters, and formal and informal investigations under Part 1b of the Commission's regulations. EEI asserts that the time is ripe for such a policy statement because of developments and changes in the roles and functions of the audit and enforcement staffs since the Commission's issuance of its Policy Statement on Separation of Functions [37] in 2002 and the Commission's new and substantial enforcement and remedial authority under the Energy Policy Act of 2005 (EPAct 2005).[38] EEI states that the purpose of the policy statement it proposes would be for the Commission to examine the relationship of the audit and enforcement staffs to ensure that their work is fair and consistent with due process rights and separations of functions during every possible stage of the audit process and any subsequent investigatory or enforcement action. EEI states that a policy statement, with opportunity for public comment, would help build an appropriate Commission record and basis for balancing separation of functions and due process requirements.[39] Finally, EEI asserts that a case the Commission cited in the Final Rule, *Trans Alaska Pipeline System*, 9 FERC ¶ 61,205 (1979), which states that the Commission's audit and investigatory staffs may freely share information, is no longer fully relevant.[40]

2. Commission Determination

26. The Commission declines EEI's proposal that the Commission issue a policy statement concerning the relationship of its audit and investigations staffs. As an initial matter, EEI's proposal is not related to the Commission's promulgation of a new procedure for audited persons seeking to challenge audit findings or proposed remedies, which is the subject of Order No. 675. Moreover, the Commission already has a policy statement on Separations of Functions,[41] which is as applicable today as it was when it was issued in 2002. Nothing in EPAct 2005 affects the operation of Rule 2202,[42] which was the focus of that policy statement.

27. For its part, EEI's request is not supported by facts. EEI does not identify any specific practice or activity that warrants examination. EEI refers to developments and changes since 2002, but does not state what material developments and changes have occurred that compel the public examination of separation of functions issues that EEI requests. EPAct 2005 provided the Commission with enhanced authority to assess civil penalties for violations of the FPA, NGA and NGPA, but EEI does not suggest why this authority should trigger the policy statement it seeks.[43]

28. *Trans Alaska Pipeline System* remains relevant to the issue of whether the audit staff and investigative staff may share information. In that proceeding, the Trans Alaska Pipeline System owners asked that the Commission forbid communications between the valuation and audit staff on the one hand and the rate staff on the other. The Commission determined, among other things, that communications between these two staffs would not constitute impermissible, *ex parte* communications and that the staffs need not be separated to ensure the integrity of the valuation.[44] The Commission approvingly quoted from a prior proceeding in which it endorsed the sharing of information among different staffs:

> Administrative agencies were brought into being to supply expertise and to minimize formalism. Walls of separation between those who litigate and those who investigate do not serve those ends. Nor does due process require them. All that due process mandates in situations of this kind is that adjudicative proceedings be decided solely on the basis of the records developed in them.[45]

29. Efficiency and sound administrative practice favors the sharing of information between the audit staff and investigative staff, and no entity suffers a cognizable due process harm as a result. We see no need at this

[34] 18 CFR 385.201 (2005).

[35] Order No. 675 at P 9, 12. The Final Rule also clarified that the applicable standards under Part 385 of the Commission's regulations will govern if the trial-type procedure is used. Order No. 675 n.25.

[36] *Rules Relating to Investigations,* Order No. 8, 43 FR 27174 (Jun. 23, 1978), FERC Stats. & Regs., Regulations Preambles 1977–1981 ¶ 30,012 (1978).

[37] 101 FERC ¶ 61,340 (2002).

[38] P.L. No. 109–58, 119 Stat. 594 (2005).

[39] EEI Request for Rehearing and Clarification at pp. 14–15. According to EEI, the Commission has not established a sufficient basis and record with respect to this issue to satisfy the reasoned decision making standard under the Administrative Procedure Act, 5 U.S.C. 706 (2000).

[40] EEI Request for Rehearing and Clarification at pp. 15–16.

[41] 101 FERC ¶ 61,340 (2002).

[42] 18 CFR 385.2202 (2005).

[43] Since the enactment of EPAct 2005, the Commission has issued a number of statements and orders to provide guidance to the regulated community. For example, in October 2005, the Commission issued a Policy Statement on Enforcement to provide guidance and regulatory certainty regarding the Commission's enforcement of the statutes, orders, rules and regulations it administers. *Enforcement of Statutes, Orders, Rules, and Regulations,* 113 FERC ¶ 61,068 (2005). In November 2005, the Commission issued an Interpretive Order Regarding No-Action Letter Process to clarify that members of the public may request and obtain no-action letters with respect to whether staff will recommend that the Commission take no enforcement action with respect to specific proposed transactions, practices or situations that may raise issues under certain Commission regulations. *Informal Staff Advice on Regulatory Requirements,* 113 FERC ¶ 61,174 (2005).

[44] *Trans Alaska Pipeline System,* 9 FERC at 61,371–372.

[45] *Id.* at 61,372, quoting *Tenneco, Inc.,* 7 FERC ¶ 61,258 at 61,541–542 (1979) (footnotes omitted).

time to reevaluate the interaction between these staffs.

The Commission orders: EEI's petition for rehearing and clarification is granted in part and denied in part as discussed in the body of this order.

By the Commission.

Magalie R. Salas,

Secretary.

List of Subjects

18 CFR Part 41

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

18 CFR Part 158

Administrative practice and procedure, Natural gas, Reporting and recordkeeping requirements.

18 CFR Parts 286 and 349

Administrative practice and procedure, Natural gas, Price Controls.

■ In consideration of the foregoing, the Commission amends parts 41, 158, 286 and 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. Section 41.1 is revised to read as follows:

§ 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 the Commission's regulations.

(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. The audited person shall have 15 days from the date it is sent the notice of deficiency, audit report or similar document to provide a written response to the audit staff indicating any and all findings or proposed remedies, or both, in any combination, with which the audited person disagrees, and such further time as the audit staff may provide in writing to the audited person at the time the document is sent to the audited person. The audited person may move the Commission for additional time to provide a written response to the audit staff and such motion shall be granted for good cause shown. 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 to the initial Commission order concerning a notice of deficiency, audit report or similar document with respect to the finding or findings or any proposed remedy or remedies, or both, in any combination, with which it disagreed.

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

■ 3. 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.

■ 4. Section 158.1 is revised to read as follows:

§ 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. The audited person shall have 15 days from the date it is sent the notice of deficiency, audit report or similar document to provide a written response to the audit staff indicating any and all findings or proposed remedies, or both, in any combination, with which the audited person disagrees, and such further time as the audit staff may provide in writing to the audited person at the time the document is sent to the audited person. The audited person may move the Commission for additional time to provide a written response to the audit staff and such motion shall be granted for good cause shown. 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 to the initial Commission order concerning a notice of deficiency, audit report or similar document with respect to the finding or findings or any proposed remedy or remedies, or both, in any combination, with which it disagreed.

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

■ 5. 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.

■ 6. Section 286.103 is revised to read as follows:

§ 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. The audited person shall have 15 days from the date it is sent the notice of deficiency, audit report or similar document to provide a written response to the audit staff indicating any and all findings or proposed remedies, or both, in any combination, with which the audited person disagrees, and such further time as the audit staff may provide in writing to the audited person at the time the document is sent to the audited person. The audited person may move the Commission for additional time to provide a written response to the audit staff and such motion shall be granted for good cause shown. 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 to the initial Commission order concerning a notice of deficiency, audit report or similar document with respect to the finding or findings or any proposed remedy or remedies, or both, in any combination, with which it disagreed.

PART 349—DISPOSITION OF CONTESTED AUDIT FINDINGS AND PROPOSED REMEDIES

■ 7. The authority citation for part 349 is revised to read as follows:

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

■ 8. Section 349.1 is revised to read as follows:

§ 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. The audited person shall have 15 days from the date it is sent the notice of deficiency, audit report or similar document to provide a written response to the audit staff indicating any and all findings or proposed remedies, or both, in any combination, with which the audited person disagrees, and such further time as the audit staff may provide in writing to the audited person at the time the document is sent to the audited person. The audited person may move the Commission for additional time to provide a written response to the audit staff and such motion shall be granted for good cause shown. 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 to the initial Commission order concerning a notice of deficiency, audit report or similar document with respect to the finding or findings or any proposed remedy or remedies, or both, in any combination, with which it disagreed.

[FR Doc. 06–4814 Filed 5–23–06; 8:45 am]

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DEPARTMENT OF LABOR

Mine Safety and Health Administration

30 CFR Parts 48, 50, and 75

RIN 1219–AB46

Emergency Mine Evacuation

AGENCY: Mine Safety and Health Administration, Labor.

ACTION: Extension of comment period.

SUMMARY: The Mine Safety and Health Administration is extending the comment period for the Emergency Temporary Standard on Emergency Mine Evacuation published on March 9, 2006 (71 FR 12252). This action is in response to a request from the public.

DATES: The comment period will close on June 29, 2006.

FOR FURTHER INFORMATION CONTACT: Patricia W. Silvey, Acting Director; Office of Standards, Regulations, and Variances, MSHA; phone: (202) 693–9440; facsimile: (202) 693–9441; E-mail: *Silvey.Patricia@dol.gov.*

SUPPLEMENTARY INFORMATION: The Mine Safety and Health Administration (MSHA) received a request to extend the public comment period for 60 days so that interested parties could adequately address issues contained in MSHA's opening statement. MSHA is conducting this rulemaking under the statutory requirement that the Agency must publish the Final Rule no later than December 9, 2006, that is, 9 months following the publication of the ETS. MSHA is granting a 30-day extension of the comment period (from May 30, 2006, to June 29, 2006) to allow all interested parties additional time to provide input into this important rulemaking. The comment period will close on June 29, 2006; MSHA welcomes comment from all interested parties.

Dated: May 18, 2006.

David G. Dye,

Acting Assistant Secretary for Mine Safety and Health.

[FR Doc. 06–4825 Filed 5–22–06; 9:53 am]

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