

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

18 CFR Parts 41, 158, 286 and 349

(Docket No. RM06-2-000)

Procedures for Disposition of Contested Audit Matters

(October 20, 2005)

AGENCY: Federal Energy Regulatory Commission.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: Pursuant to section 309 of the Federal Power Act, 16 U.S.C. § 825h (2000); section 16 of the Natural Gas Act, 15 U.S.C. § 717o (2000); sections 20 and 204(a)(6) of the Interstate Commerce Act, 49 App. U.S.C. §§ 20 and 204(a)(6)(2000); and section 501 of the Natural Gas Policy Act of 1978, 15 U.S.C. § 3411 (2000), the Federal Energy Regulatory Commission proposes to issue Rules permitting audited persons to challenge audit findings before the issuance of a Commission order on the merits of those findings. The Commission seeks public comment on the Rules proposed herein.

DATES: Comments are due **[insert date 21 days after publication in the FEDERAL REGISTER]**. Reply comments are due **[insert date seven days after comment date]**.

ADDRESSES: Comments may be filed electronically via the eFiling link on the Commission's web site at <http://www.ferc.gov>. Commenters unable to file comments electronically must send an original and 14 copies of their comments to: Federal Energy Regulatory Commission, Office of the Secretary, 888 First Street N.E., Washington, D.C.

20426. Refer to the Comment Procedures section of the preamble for additional information on how to file comments.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Procedures for Disposition of Contested Audit Matters

Docket No. RM06-2-000

NOTICE OF PROPOSED RULEMAKING

(October 20, 2005)

I. **Summary**

1. In this Notice of Proposed Rulemaking (NOPR), the Federal Energy Regulatory Commission (Commission) proposes to amend Parts 41 and 158, add new language to Part 286 and to add a new Part 349 to its regulations.¹ The main purpose of the proposed rule is to apply existing procedures for challenging the Commission staff's financial audit findings and proposed remedies to the Commission staff's operational audit findings and proposed remedies as well.

2. The Commission is proposing to amend its regulations to permit any audited person² 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.

¹ 18 CFR Parts 41, 158 and 286 (2005). Part 41 applies to public utilities and licensees under the Federal Power Act (FPA), Part 158 applies to natural gas companies under the Natural Gas Act (NGA), Part 286 applies to entities subject to the Commission's jurisdiction under the Natural Gas Policy Act of 1978 (NGPA) and the new Part 349 would apply to common carriers subject to the Commission's jurisdiction under the Interstate Commerce Act (ICA).

² The term "person" as used in this notice 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 reads 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."

Under the proposed rule, the Commission would 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 would notice, without making any findings on the merits, any disputed audit matters. The Commission would provide the audited person an opportunity to challenge any such disputed audit matters. The audited person could then elect a shortened procedure³ or a trial-type hearing to challenge the disputed audit matters. The Commission would honor this election unless in the Commission's judgment there were no material facts in dispute which require cross-examination.

II. Background

3. Relevant portions of the existing language of Parts 41 and 158 that relate to procedures for challenging audit matters date at least to 1937.⁴ At that time and for many years afterward, Commission staff audited primarily the financial accounts and records of jurisdictional persons and the language of these sections was adequate. Financial audits have been conducted mainly to determine compliance with Parts 101 (Uniform System of Accounts Prescribed for Public Utilities and Licensees), 201 (Uniform System of Accounts Prescribed for Natural Gas Companies) and 352 (Uniform Systems of Accounts Prescribed for Oil Pipeline Companies). However, in more recent years the Commission staff has conducted operational audits. Operational audits have been conducted to

³ The term "shortened procedure" as used in this notice and the accompanying regulatory text refers to a "paper hearing," or briefing of matters only, not including a trial-type proceeding, in a contested proceeding before the Commission.

⁴ See Federal Power Commission, Rules of Practice and Regulations § 301(a) (Revised January 1, 1937).

determine compliance with the Commission's Standards of Conduct,⁵ Behavior Rules,⁶ Codes of Conduct, tariff matters and other Commission requirements. Thus, operational audits address matters that are not explicitly covered by the existing provisions of Parts 41 and 158. Accordingly, the proposed rule is needed to provide the audited persons who are subject to operational audits, and indeed, to all audits the Commission staff conducts, the same procedural benefits provided to audited persons who are subject to financial audits. The proposed rule would advance the due process rights of all audited persons by providing an effective procedure for them to challenge staff audit findings.

4. The Commission's regulations do not now contain procedures for challenging audit findings and proposed remedies of audits conducted under the NGPA and the ICA. The proposed rule includes audits under these statutes for the sake of completeness. While the Commission's staff conducts audits under the authority of these statutes less frequently than it does under the NGA and FPA, the proposed rule would permit persons audited under the NGPA and the ICA to challenge audit matters in the same way that persons audited under the NGA or FPA could challenge audit matters.

III. Discussion

5. The Commission staff conducts audits of persons subject to the Commission's jurisdiction to determine compliance with the Uniform Systems of Accounts and other requirements of the Commission. The Commission's audit staff conducts audits that

⁵ See 18 CFR Part 358 (2005).

⁶ See Authorization of Terms and Conditions of Public Utility Market-Based Rate Authorizations, 105 FERC ¶ 61,218 (2003); Amendments to Blanket Sales Certificates, III FERC Statutes & Regulations, Regulations Preambles ¶ 31,153 (2003).

pertain to orders, rules and regulations covering, among other things, financial accounting and reporting, annual charges, Standards of Conduct and Codes of Conduct, interlocking directorates, and other requirements affecting persons under the Commission's jurisdiction.

6. The Commission's rules now permit persons subject to financial audits to challenge staff audit findings before the issuance of a Commission order on the merits of those findings. Parts 41 and 158, at sections 41.1 through 41.7 and at sections 158.1 through 158.7, respectively, currently provide for Commission or Commission staff to inform a person subject to the Commission's FPA jurisdiction (in the case of Part 41) or the Commission's NGA jurisdiction (in the case of Part 158) of a deficiency with respect to the following limited classification of items: (1) the maintenance of accounts, or any books and records pertaining to or in support of those accounts; or (2) any statement or report submitted by such person. In the event of a disagreement between such person and the Commission or its staff with respect to any finding, Parts 41 and 158 permit such person to challenge one or more findings of audit staff before issuance of an order by the Commission on the merits of the audit findings. An audited person can challenge the findings by either choosing a paper hearing, referred to as a "shortened procedure" in Parts 41 and 158, or a trial type-hearing under subpart E of Part 385 of the Commission's regulations.⁷ The shortened procedure consists of an opportunity to submit briefs to the Commission with respect to the disagreement. If the audited person does not choose the

⁷ See 18 CFR §§ 41.1 and 158.1 (2005).

shortened procedure, the Commission will assign the proceeding for a trial-type hearing except when there are no material facts in dispute requiring cross-examination.

7. The proposed rule would expand the existing procedural rights of persons subject to audits conducted by the Commission staff. Accordingly, under the proposed rule, the Commission would not limit the ability to challenge staff audit findings before the issuance of a Commission order on the merits of those findings to persons subject to financial audits only, i.e., audits of accounts or books and records in support of those accounts, or audits of statements or reports submitted to the Commission. Instead, the Commission would amend its regulations to permit all audited persons who disagree with staff audit findings to so challenge them.

8. The Commission's audit staff communicates its audit findings and proposed remedies with the audited person. The audited person has an opportunity to provide written comments signifying agreement or disagreement with the audit findings and proposed remedial measures. Under the proposed rule, in cases where the audited person communicated its disagreement with any finding or proposed remedy, the Commission would notice any such disputed findings and proposed remedies, without ruling on the merits with respect to them, in any initial order regarding the notice of deficiency, audit report or similar document. For all audits, the Commission would provide the audited person the opportunity to timely challenge the noticed finding or findings and proposed remedial measures through the shortened procedure or a trial-type hearing. The Commission would honor the audited person's election unless in the Commission's judgment there were no material facts in dispute which require cross-examination. By

opting for the shortened procedure, the person has waived any right to subsequently request a hearing before an administrative law judge under section 41.7 or 158.7.⁸

9. The Commission is also proposing to permit persons audited under the NGPA or the ICA the same opportunity to challenge staff audit findings before the Commission issues an order on the merits of those findings.⁹ The Commission's regulations applicable to these statutes do not contain provisions analogous to the procedures in Parts 41 and 158. Accordingly, the proposed rule would add sections 286.103 through 286.109 to Part 286 to provide the indicated provisions for persons audited under authority of the NGPA. The proposed rule would further add a new Part 349 to provide the indicated provisions for persons audited under authority of the ICA.

10. The Commission has legal authority to make the proposed changes under the FPA, NGA, ICA and NGPA.¹⁰ In this respect, the FPA and NGA empower the Commission, with respect to public utilities and interstate natural gas pipeline companies to "perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules and

⁸ See sections 41.3 and 158.3 of the Commission's regulations; 18 CFR §§ 41.3 and 158.7 (2005).

⁹ The Commission staff may conduct an audit pursuant to its enforcement authority found in section 501(a) of the NGPA, 15 U.S.C. § 3411(a) (2000). Such audits are infrequent and the Commission suggests no change in the frequency of such audits by the promulgation of this proposed rule. The Commission staff may conduct an audit to assure compliance with the Uniform Systems of Accounts Prescribed for Oil Pipeline Companies, 18 CFR Part 352 (2005).

¹⁰ See section 309 of the FPA, 16 U.S.C. § 825h (2000); section 16 of the NGA, 15 U.S.C. § 717o (2000); sections 20 and 204(a)(6) of the ICA; 49 App. U.S.C. §§ 20 and 204(a)(6) (2000); and section 501 of the NGPA, 15 U.S.C. § 3411 (2000).

regulations as it may find necessary or appropriate to carry out the provisions of [the] Act.”¹¹

11. The Commission invites public comments on whether the Commission should also provide informal procedures before proceeding with the formal procedures contained in the proposed rule. Commenters should address the relative merits of such processes and how they could function in concert with the proposed rule.

IV. Information Collection Statement

12. This proposed rule clarifies and amends the existing requirements to apply to all audits and does not include new information collections under the provisions of the Paperwork Reduction Act of 1995.¹²

V. Environmental Analysis

13. 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. The Commission has categorically excluded certain actions from this requirement as not have a significant effect on the human environment. Included in the exclusions are rules that are clarifying, corrective, or procedural or that do not substantively change the effect of the regulations being amended. This proposed rule, if finalized, is procedural in nature and therefore falls under this exception; consequently, no environmental consideration would be necessary.

¹¹ Section 309 of the FPA, 16 U.S.C. § 825h (2000); and section 16 of the NGA, 15 U.S.C. § 717o (2000).

¹² 44 U.S.C. § 3501 et seq. (2000).

VI. Regulatory Flexibility Act Statement

14. The Regulatory Flexibility Act of 1980 (RFA)¹³ 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 concludes that this rule would not have such an impact on small entities. Most filing companies regulated by the Commission do not fall within the Commission's definition of a small entity. The proposed rule would not impose new filing requirements.

VII. Comment Procedures

15. The Commission invites interested persons to submit written comments on the matters and issues proposed in this notice to be adopted, including any related matters or alternative proposals that commenters may wish to discuss. Comments are due 21 days from publication in the Federal Register. Comments must refer to Docket No. RM06-2-000, and may be filed either in electronic or paper format. Those filing electronically do not need to make a paper filing.

16. Documents filed electronically via the Internet can be prepared in a variety of formats, including WordPerfect, MS Word, Portable Document Format, Real Text Format, or ASCII format, as listed on the Commission's web site at <http://ferc.gov> under the e-Filing link. The e-Filing link provides instructions for how to Login and complete an electronic filing. First time users will have to establish a user name and password. The Commission will send an automatic acknowledgment to the sender's e-mail address

¹³ 5 U.S.C. §§ 601-612.

upon receipt of comments. User assistance for electronic filing is available at 202-208-0258 or by e-mail to efiling@ferc.gov. Comments should not be submitted to the e-mail address.

17. For paper filings, the original and 14 copies of such comments should be submitted to the Office of the Secretary, Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426.

18. All comments will be placed in the Commission's public files and will be available for inspection in the Commission's Public Reference Room at 888 First Street, N.E., Washington, D.C. 20426, during regular business hours. Additionally, all comments may be viewed, printed, or downloaded remotely via the Internet through FERC's home page.

VIII. Document Availability

19. 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 and in FERC's Public Reference Room during normal business hours.

20. From FERC's home page on the Internet, this information is available in e-library. The full text of this document is available in e-library in PDF and MS Word format for viewing, printing or downloading. To access this document in e-library, type the docket number excluding the last three digits of this document in the docket number field.

21. User assistance is available for e-library and the FERC's website during normal business hours from our Help line at (202) 208-2222 or the Public Reference Room at

(202) 208-1371. E-mail the Public Reference Room at public.reference@ferc.gov.

List of Subjects

18 CFR Part 41

Electric power, accounts, records, memoranda, conduct, shortened procedure.

18 CFR Part 158

Natural gas, accounts, records, memoranda, conduct, shortened procedure.

18 CFR Part 286

Natural gas, accounts, records, memoranda, conduct, shortened procedure.

18 CFR Part 349.

Oil pipelines, accounts, records, memoranda, conduct, shortened procedure.

By direction of the Commission.

Magalie R. Salas,
Secretary.

In consideration of the foregoing, the Commission proposes to amend Chapter 1, 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.

2. Sections 41.1, 41.2 and 41.3, are revised to read as follows:

DISPOSITION OF CONTESTED AUDIT FINDINGS AND PROPOSED REMEDIES

§ 41.1 Notice to audited person.

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) a filed tariff or tariffs, contracts, data, records, accounts, books, communications or papers relevant to the audit of the audited person; (b) matters under the Standards of Conduct or the Code of Conduct; and (c) 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, including any and all

proposed remedies, 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 and any proposed remedies with which the audited person disagreed. The Commission shall provide the audited person a specified number of days to respond with respect to the finding or findings and any proposed remedies with which it disagreed.

§ 41.2 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: (a) 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 (b) 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.

§ 41.3 Shortened procedure.

If the audited person subject to a Commission order described in section 41.1 above notifies the Commission that it seeks to challenge one or more audit findings, with or without proposed remedies, 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, by the date specified by the Commission in 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. In the notice, the Commission shall also set a date for the filing of reply memoranda, which may be filed only by participants that filed initial memoranda. Subpart T of Part 385 of the Commission's regulations shall apply to all filings. A person that consents to the matter being handled pursuant to the shortened procedure has waived any right to subsequently request a hearing pursuant to section 41.7 and may not later request such a hearing.

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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.

4. Sections 158.1, 158.2 and 158.3, 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 or its 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) a filed tariff or tariffs, contracts, data, records, accounts, books, communications or papers relevant to the audit of the audited person; (b) matters under the Standards of Conduct or the Code of Conduct; and (c) 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, including any and all proposed remedies, 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 and any proposed remedies with which the audited person disagreed. The Commission shall provide the audited person a specified number of days to respond with respect to the finding or findings and any proposed remedies with which it disagreed.

§ 158.2 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: (a) 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 (b) 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.

§ 158.3 Shortened procedure.

If the audited person subject to a Commission order described in section 158.1 above notifies the Commission that it seeks to challenge one or more audit findings, with or without proposed remedies, 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, by the date specified by the Commission in 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. In the notice, the Commission shall also set a date for the filing of reply memoranda, which may be filed only by participants that filed initial memoranda. Subpart T of Part 385 of the Commission's regulations shall apply to all filings. A person that consents to the matter being handled pursuant to the shortened procedure has waived any right to subsequently request a hearing pursuant to section 158.7 and may not later request such a hearing.

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PART 286 – ADMINISTRATIVE PROCEDURES AND DISPOSITION OF CONTESTED AUDIT FINDINGS AND PROPOSED REMEDIES.

5. The authority citation for Part 286 continues to read as follows:

Authority: Administrative Procedure Act, 5 U.S.C. 551 et seq., Natural Gas Policy Act of 1978, Pub. L. 95-621, 92 Stat. 3350, Department of Energy Organization Act, Pub. L. 95-91, E.O. 12009, 42 FR 46267.

6. Sections 286.103 through 286.109 are added as follows:

**DISPOSITION OF CONTESTED AUDIT FINDINGS AND PROPOSED
REMEDIES**

§286.103 Notice to audited person.

An audit conducted by the Commission or its 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) a filed tariff or tariffs, contracts, data, records, accounts, books, communications or papers relevant to the audit of the audited person; (b) matters under the Standards of Conduct or the Code of Conduct; and (c) 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, including any and all proposed remedies, 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 and any proposed remedies with which the audited person disagreed. The Commission shall

provide the audited person a specified number of days to respond with respect to the finding or findings and any proposed remedies 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: (a) 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 (b) 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 section 286.103 above notifies the Commission that it seeks to challenge one or more audit findings, with or without proposed remedies, 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, by the date specified by the Commission in 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. In the notice, the Commission shall also set a date for the filing of reply memoranda, which may be filed only by participants that filed initial memoranda. Subpart T of Part 385 of the Commission's

regulations shall apply to all filings. A person that consents to the matter being handled pursuant to the shortened procedure has waived any right to subsequently request a hearing pursuant to section 286.109 and may not later request such a 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.

7. Part 349 is added to read as follows:

PART 349 – DISPOSITION OF CONTESTED AUDIT FINDINGS AND PROPOSED REMEDIES.

8. The authority citation for Part 349 reads as follows:

Authority: 42 U.S.C. 7101-7352; 49 U.S.C. 60502; 49 App. U.S.C. 1-85.

9. Sections 349.1 through 349.7 are added 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) a filed tariff or tariffs, contracts, data, records, accounts, books, communications or papers relevant to the audit of the audited person; (b) matters under the Standards of Conduct or the Code of Conduct; and (c) 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, including any and all

proposed remedies, 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 and any proposed remedies with which the audited person disagreed. The Commission shall provide the audited person a specified number of days to respond with respect to the finding or findings and any proposed remedies with which it disagreed.

§ 349.2 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: (a) 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 (b) 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.

§ 349.3 Shortened procedure.

If the audited person subject to a Commission order described in section 349.1 above notifies the Commission that it seeks to challenge one or more audit findings, with or without proposed remedies, 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, by the date specified by the Commission in 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. In the notice, the Commission shall also set a date for the filing of reply memoranda, which may be filed only by participants that filed initial memoranda. Subpart T of Part 385 of the Commission's regulations shall apply to all filings. A person that consents to the matter being handled pursuant to the shortened procedure has waived any right to subsequently request a hearing pursuant to section 349.7 and may not later request such a 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.