

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Filing of Privileged Materials)	Docket No. RM12-2-000
and Answers to Motions)	

**COMMENTS OF THE
AMERICAN PUBLIC GAS ASSOCIATION**

Pursuant to the Notice of Proposed Rulemaking (“NOPR”) issued by the Federal Energy Regulatory Commission (“Commission” or “FERC”) in the above-captioned proceeding on December 16, 2011, the American Public Gas Association (“APGA”) hereby submits its response to the Commission’s request for comments regarding the Commission’s proposals (1) to streamline the procedures for filing and accessing privileged material and Critical Energy Infrastructure Information (“CEII”), referred to collectively by the Commission as privileged material, and (2) to shorten the time for answering certain procedural motions. APGA commends the Commission’s efforts to rationalize its filing procedures for privileged materials, and with certain qualifications, supports the proposals in the NOPR.

APGA is the national, non-profit association of publicly-owned natural gas distribution systems, with some 700 members in 36 states. Overall, there are some 950 publicly-owned systems in the United States. Publicly-owned gas systems are not-for-profit retail distribution entities that are owned by, and accountable to, the citizens they serve. They include municipal gas distribution systems, public utility districts, county districts, and other public agencies that have natural gas distribution facilities.

COMMENTS

Proposed Revised § 388.112

APGA members are typically participating in proceedings at the FERC as customers of pipelines and are usually responding to filings by the pipelines, more often than not filings made pursuant to Natural Gas Act (“NGA”) Section 4. Time is of the essence for persons responding to pipeline filings due to the short (30-day) statutory period for FERC action under NGA Section 4, 15 U.S.C. §§ 717c(d) and (e) (versus the 60-day notice period under Federal Power Act Section 205, 16 U.S.C. §§ 824d(d) and (e)). Hence, the proposals of the Commission to ensure that interested persons have timely access to privileged material resonate very positively with APGA. Frequently a customer is unable to determine even whether to intervene or protest without access to privileged material, so the proposed requirement that filing entities include a form of protective agreement with the filing and turn the material over to entities signing such agreements within a discrete period of time are steps in the right direction, albeit insufficient ones to achieve the Commission’s stated goals, as explained below.

The Commission explains in note 35 of the NOPR (at page 12) that it intends the proposed protective agreement to “be self implementing and not require action or approval by the Commission. That is, following the proposed procedures discussed below, once a person signs the proposed protective agreement and returns it to the party submitting privileged material, including CEII, the submitter is expected to provide the material promptly to a requester, consistent with proposed § 388.112(b)(2).” Unfortunately, the process set forth in § 388.112 will not “expedite the process by which privileged material is exchanged in administrative proceedings” (NOPR at P 2) unless the Commission adopts revisions to proposed § 388.112 regarding (1) the form of the model protective order that is filed and the rights of

parties executing non-conforming protective agreements and (2) who can execute the protective agreement and the time period for turning over the protective materials to the requesting entity. These suggested changes are discussed below and, along with certain more minor edits, are reflected in the market-up version of § 388.112 appended hereto as an attachment.

First, regarding the proposed requirement that a protective agreement be filed with the privileged material (§ 388.112(b)(2)(i)), it is important that the Commission require that, absent good cause shown by the filer, the protective agreement conform to the model protective agreement (found at <http://www.ferc.gov/legal/admin-lit/model-protective-order.doc>); counsel for applicants have shown a remarkable propensity for amending the model protective agreement in ways adverse to the interests of requesting parties, and there simply is no time at this stage of the process for negotiation/litigation over this matter. If requesting parties are to have the protective material in time to use it in a protest, they must have it immediately. In addition, the Commission should provide that a requesting party may execute a non-conforming protective agreement under protest, with the grounds of the protest to be resolved at a later time by the Commission or the presiding officer, as appropriate. This will permit the requesting party to access the privileged material timely without forfeiting any of its substantive rights; also, the party providing the material will not be prejudiced because the protective agreement will not be changed absent an order of the FERC or a presiding officer on the merits.

The second alteration that APGA urges is that for the entity to qualify to sign the protective agreement, it need only be a person on whom service of the filing was required under the Commission's regulations. Requiring an entity to draft and file a motion to intervene in order to qualify to execute a protective agreement (see § 388.112(b)(2)(iii)) wastes precious time, and should not be a condition precedent to executing a protective agreement and receiving

the protected material. The fact that a filer was required under the Commission's regulations to serve an entity with a filing should be adequate evidence of that entity's potential interest in the proceeding to justify its right to secure the privileged material upon execution of a protective agreement. In addition, an entity may not know whether it even wants to intervene until after it has reviewed the protective material, and thus requiring an intervention as the *sine qua non* for securing privileged material is simply unnecessary as well as wasteful of time and resources.

The third change that APGA recommends is that the 5-day period for turning over the privileged material (§ 388.112(b)(2)(iv)) be shortened to, at most, 24 hours from the time the executed protective agreement is forwarded to the filing entity. In virtually all cases, all that the filing entity will be required to do is to email the requesting entity the same non-redacted version that it filed with the Commission, a process taking minutes - not hours or days. The non-redacted filing in effect is an off-the-shelf item, and there is absolutely no basis for delay, especially given the very short time for a requesting party to review the material and incorporate it in its comments or protest, as the case may be. And since the contents of the suspension orders often depend upon the contents of protests, it is not sufficient for protestants to receive the material at or after the deadline for intervention and protests.

To illustrate the need for above-discussed changes to proposed revised § 388.112, consider a typical NGA Section 4 rate case in which APGA members were involved. Florida Gas Transmission filed its last major rate case on October 1, 2009 in RP10-21; it was noticed on October 5, 2009, with interventions due on October 13, 2009 – some 12 days (9 working days) from the filing date and 8 days (6 working days) from the notice date. There is simply no way that, under the guidelines being suggested by the Commission in the NOPR, counsel for an interested entity can take the necessary steps – secure and review the filing, get client

authorization to proceed, draft and file an intervention, execute the protective agreement, be provided the protective material, review same, and draft a protest incorporating the privileged material to the extent warranted. The Commission's intentions in promulgating the NOPR are excellent – namely, to afford interested entities prompt access to privileged material so that they can use it substantively in addressing the Commission by way of comments or a protest in response to a filing by a jurisdictional entity.¹ But the Commission's good intentions will come to naught if § 388.112(b)(2) is not amended in the fashion suggested above (and reflected in the attached marked-up version of § 388.112). It is important to keep in mind that none of the suggestions made above in any way prejudices the rights of entities seeking to keep privileged material under wraps; rather, these suggestions simply facilitate meaningful access by interested entities to such materials.

Proposed Revised § 385.213

The Commission is proposing to revise § 385.213(d)(i) to shorten from 15 days to 5 days the period for answers to motions requesting to extend or shorten time periods. APGA believes this proposal is a good one and should be adopted. APGA has considered the Commission's request for suggestions as to whether 5 days should be longer or shorter (NOPR at P 24), and while the porridge may seem too warm or not warm enough, depending upon whether you support or oppose a given motion, APGA believes that the 5-day period is just right in the vast majority of situations, and thus should be adopted.

¹ As the Commission noted in the NOPR (at P 10), "Particularly, in cases involving statutory deadlines, such delays affect the ability of parties to submit timely, well informed comments, as well as the Commission's ability to process those comments."

CONCLUSION

For the foregoing reasons, APGA respectfully requests that the Commission (i) adopt the recommendations in the comments above (and reflected in the attachment hereto) regarding necessary amendments to § 388.112(b) of the Commission's regulation in order to ensure that interested entities have access to privileged material in a timely fashion and (ii) adopt the NOPR proposal shortening the time period for certain answers under § 385.213(d)(i).

Respectfully Submitted,

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§ 388.112 Requests for privileged treatment and Critical Energy Infrastructure Information (CEII) treatment for documents submitted to the Commission.

(a) *Scope.* (1) By following the procedures specified in this section, any person submitting a document to the Commission may request privileged treatment for some or all of the information contained in a particular document that it claims is exempt from the mandatory public disclosure requirements of the Freedom of Information Act, 5 U.S.C. 552 (FOIA), and should be withheld from public disclosure. For the purposes of the Commission's filing requirements, information subject to an outstanding claim of exemption from disclosure under FOIA, including critical energy infrastructure information (CEII), will be referred to as privileged material.

(2) Any person submitting documents containing CEII as defined in § 388.113, or seeking access to such information should follow the procedures in this chapter.

(b) *Procedures for filing and obtaining privileged or CEII material.* (1) *General Procedures.* A person requesting that material be treated as privileged information or CEII must include in its filing a justification for such treatment in accordance with filing procedures posted on the Commission's web site at <http://www.ferc.gov>. A person requesting that a document filed with the Commission be treated as privileged or CEII must designate the document as privileged or CEII in making an electronic filing or clearly indicate a request for such treatment on a paper filing. The cover page and pages or portions of the document containing material for which privileged treatment is claimed should be clearly labeled in bold, capital lettering, indicating that it contains privileged, confidential and/or Critical Energy Infrastructure Information, as appropriate, and

marked “DO NOT RELEASE.” The filer also must submit to the Commission a public version with the information that is claimed to be privileged redacted, to the extent practicable.

(2) *Procedures for Proceedings with a Right to Intervene.* The following procedures set forth the methods for filing and obtaining access to material that is filed as privileged in complaint proceedings and in any proceeding to which a right to intervention exists:

(i) If material is filed as privileged or CEII in a complaint proceeding or other proceeding to which a right to intervention exists, a proposed form of protective agreement must be included with the filing [that, absent good cause shown, conforms to the Commission’s model protective agreement \(found at http://www.ferc.gov/legal/admin-lit/model-protective-order.doc\)](http://www.ferc.gov/legal/admin-lit/model-protective-order.doc). This requirement does not apply to material submitted in hearing or settlement proceedings, or if the only material for which privileged treatment is claimed consists of landowner lists or privileged information filed under §§ 380.12(f), (m), (o) and 380.16(f) of this chapter.

(ii) The filer must provide the public version of the document and its proposed form of protective agreement to each entity that is required to be served with the filing.

(iii) Any person who is a participant in the proceeding or has filed a motion to intervene or notice of intervention in the proceeding [or is a person upon whom service of the public version of the document is required under the Commission’s regulations](#) may make a written request [\(via electronic mail or other suitable means\)](#) to the filer for a copy of the complete, non-public version of the document. The request must include an executed copy of the protective agreement and a statement of the person’s right [to service under](#)

the Commission's regulations or to party or participant status or a copy of ~~their~~ its motion to intervene or notice of intervention. Any person ~~may file an objection that objects~~ to the proposed form of protective agreement may execute same under protest and thereby reserve its rights to challenge same at a later date. A filer, or any other person, may file an objection to disclosure, generally or to a particular person or persons who have sought intervention. Frivolous objections by the filer will be taken into account by the Commission in dealing on the merits with the relief being sought by the filer in the subject proceeding.

(iv) If no objection to disclosure is filed, the filer must provide a copy of the complete, non-public document to the requesting person immediately, and in no case later than 24 hours ~~within 5 days~~ after receipt of the written request that is accompanied by an executed copy of the protective agreement. If an objection to disclosure is filed, the filer shall not provide the non-public document to the person or class of persons identified in the objection until ordered by the Commission or a decisional authority.

(v) For material filed in proceedings set for trial-type hearing or settlement judge proceedings, a participant's access to material for which privileged treatment is claimed is governed by the presiding official's protective order.

(vi) For landowner lists, information filed as privileged under §§ 380.12(f), (m), (o) and 380.16(f), forms filed with the Commission, and other documents not covered above, access to this material can be sought pursuant to a FOIA request under § 388.108 or a CEII request under § 388.113 of this chapter. Applicants are not required under

paragraph (iv) to provide intervenors with landowner lists and the other materials identified in the previous sentence.

(c) Effect of privilege or CEII claim. (1) For documents filed with the Commission:

(i) The documents for which privileged or CEII treatment is claimed will be maintained in the Commission's document repositories as non-public until such time as the Commission may determine that the document is not entitled to the treatment sought and is subject to disclosure consistent with §§ 388.108 or 388.113 of this chapter. By treating the documents as nonpublic, the Commission is not making a determination on any claim of privilege or CEII status. The Commission retains the right to make determinations with regard to any claim of privilege or CEII status, and the discretion to release information as necessary to carry out its jurisdictional responsibilities.

(ii) The request for privileged or CEII treatment and the public version of the document will be made available while the request is pending.

(2) For documents submitted to Commission staff. The notification procedures of paragraphs (d), (e), and (f) of this section will be followed before making a document public.

(d) Notification of request and opportunity to comment. When a FOIA or CEII requester seeks a document for which privilege or CEII status has been claimed, or when the Commission itself is considering release of such information, the Commission official who will decide whether to release the information or any other appropriate Commission official will notify the person who submitted the document and give the person an opportunity (at least five calendar days) in which to comment in writing on the request.

A copy of this notice will be sent to the requester.

(e) *Notification before release.* Notice of a decision by the Commission, the Chairman of the Commission, the Director, Office of External Affairs, the General Counsel or General Counsel's designee, a presiding officer in a proceeding under part 385 of this chapter, or any other appropriate official to deny a claim of privilege, in whole or in part, or to make a limited release of CEII, will be given to any person claiming that the information is privileged or CEII no less than 5 calendar days before disclosure. The notice will briefly explain why the person's objections to disclosure are not sustained by the Commission. A copy of this notice will be sent to the FOIA or CEII requester.

(f) *Notification of suit in Federal courts.* When a FOIA requester brings suit to compel disclosure of information for which a person has claimed privileged treatment, the Commission will notify the person who submitted the documents of the suit.