Administration Order 7400.9W, Airspace Designations and Reporting Points, dated August 8, 2012, effective September 15, 2012, is amended as follows:

Paragraph 6005 Class E airspace areas extending upward from 700 feet or more above the surface of the earth.

* * * * *

ASO FL E5 La Belle, FL [New]

La Belle Municipal Airport, FL
(lat. 26°44′26″ N., long. 81°25′42″ W.)

That airspace extending upward from 700 feet above the surface within a 6.7-mile radius of La Belle Municipal Airport.

Issued in College Park, Georgia, on October 11, 2012.

Barry A. Knight,

Manager, Operations Support Group, Eastern Service Center, Air Traffic Organization.

[FR Doc. 2012–26333 Filed 10–26–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Parts 4, 5, 16, 33, 34, 35, 157, 348, 375, 385 and 388

[Docket No. RM12–2–000; Order No. 769]

Filing of Privileged Materials and Answers to Motions

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Final rule.

SUMMARY: In this Final Rule, the Commission revises its rules and regulations relating to the filing of privileged material in keeping with the Commission's efforts to comply with the Paperwork Reduction Act, the Government Paperwork Elimination Act and the E-Government Act of 2002. First, the Commission establishes two categories of privileged material for filing purposes: Privileged material and critical energy infrastructure information. This revision will expand the ability to file electronically by permitting electronic filing of materials subject to Administrative Law Judge protective orders as appropriate. Second, the Commission revises its regulations to provide a single set of uniform procedures for filing privileged materials. These revisions continue the Commission's effort to reassess and streamline its regulations to ensure that they are efficient, effective and up to date.

Also, the Commission revises Rule 213(d) of its Rules of Practice and Procedure, which establishes the timeline for filing answers to motions, to clarify that the standard fifteen day reply time will not apply to motions requesting an extension of time or a shortened time period for action. Instead, the Commission proposes to set the time for responding to such motions at five days, unless another time period is established by notice based on the circumstances.

DATES: *Effective Date:* This final rule is effective December 28, 2012.

FOR FURTHER INFORMATION CONTACT:
Christopher Cook (Technology/Procedural Information), Office of the Executive Director, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, Telephone: (202) 502–8102.
Richard M. Wartchow (Legal Information), Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, Telephone: (202) 502–8744.

SUPPLEMENTARY INFORMATION:

Order No. 769

Final Rule

Table of Contents

Order No. 769

Final Rule

Issued October 18, 2012.

1. In this Final Rule, the Commission revises its rules and regulations relating to the filing of privileged material in keeping with the Commission's efforts to comply with the Paperwork Reduction Act, the Government Paperwork Elimination Act and the E-Government Act of 2002. First, the Commission establishes two categories of privileged material for filing purposes: privileged material and critical energy infrastructure information (CEII). This revision will expand the ability to file electronically by permitting electronic filing of materials subject to Administrative Law Judge (ALJ) protective orders as appropriate. Second, the Commission revises its regulations to provide a single set of uniform procedures for filing privileged materials. These revisions continue the Commission's effort to reassess and streamline its regulations to ensure that they are efficient, effective and up to date.

2. Also, the Commission revises Rule 213(d) of its Rules of Practice and Procedure, which establishes the timeline for filing answers to motions, to clarify that the standard fifteen day reply time will not apply to motions requesting an extension of time or a shortened time period for action. Instead, the Commission proposes to set the time for responding to such motions at five days, unless another time period is established by notice based on the circumstances.

I. Background

A. Electronic Filing Procedures

3. In 2000, the Commission first permitted filers to use the Internet to submit documents to the Commission.[1] Such submissions were limited to categories of documents specified by the Secretary of the Commission (Secretary), with the intention of gradually expanding the range of eligible documents.[2] In 2007, the Commission implemented eFiling 7.0 which permitted a much broader range of documents to be submitted through the eFiling interface.[3] In 2008, the Commission, in collaboration with the wholesale electric and gas quadrants of the North American Energy Standards Board and representatives from the Association of Oil Pipelines, implemented a set of standards to be used by companies in electronically filing tariff and tariff-related documents at the Commission.[4] Under the Commission's regulations, only ''qualified documents'' may be filed via the Internet, and the Secretary is authorized to specify which documents are qualified and to issue filing instructions.[5] A list of qualified documents is published on the Commission's Web site.[6]

4. The eFiling system plays an important role in the Commission's efforts to comply with the Government Paperwork Elimination Act, which requires that agencies provide the option to submit information electronically, when practicable, as a substitute for paper.[7] Users of the Commission's eFiling system and related activities must register electronically through the Commission's eRegistration system.[8] Filing via the Internet is optional for eligible documents.[9] The eFiling system now is receiving a substantial majority of all documents filed at the Commission. The system is accessible through the Commission's Web site at *http://www.ferc.gov/docs-filing/efiling.asp.*

5. [Paragraph blank]

6. Currently, the Commission accepts through electronic filing all documents, including privileged material and CEII,[10] except for documents submitted pursuant to an ALJ's protective order and some forms.[11] The Commission's current procedures for submitting materials subject to ALJ protective orders require filers to submit an original copy of the document in hard copy or on electronic media, along with the requisite number of copies, pursuant to section 388.112 of the Commission's regulations. While the Commission permits electronic filing of documents subject to a claim of privilege not subject to an ALJ protective order, the Commission currently does not have a standard set of procedures for submitting such documents.

7. The Commission's current complaint and answer regulations (sections 385.206 and 385.213) contain detailed requirements for submitting privileged materials. Under these regulations, a party filing a complaint or an answer with privileged and/or confidential material is required to submit a request for privileged treatment of documents, a public redacted document, a privileged unredacted document, and a proposed form of protective agreement.[12] The filer must serve the public, redacted copy on appropriate parties and other entities required to be served and must provide a copy of the non-public, unredacted material to any participant or entity whose name is on the official service list (compiled by the Secretary) and who has signed the protective agreement.

8. In recent years, the Commission has been receiving a larger number of requests for privileged treatment of documents not associated with

[1] *Electronic Filing of Documents,* Order No. 619, 65 FR 57088 (Sept. 21, 2000), FERC Stats. & Regs. ¶ 31,107 (2000).

[2] *See* Rule 2003(c) of the Commission's Rules of Practice and Procedure, 18 CFR 385.2003(c).

[3] *Filing Via the Internet,* Order No. 703, FERC Stats. & Regs. ¶ 31,259 (2007) (amending Rule 2003(c)).

[4] *Electronic Tariff Filings,* Order No. 714, FERC Stats. & Regs. ¶ 31,276 (2008).

[5] Rule 2003(c), 18 CFR 385.2003(c); Rule 2003(c)(1)(ii), 18 CFR 385.2003(c)(1)(ii); *see http://www.ferc.gov/docs-filing/efiling/user-guide.asp.*

[6] *See http://www.ferc.gov/docs-filing/efiling/docs-efiled.asp.*

[7] Public Law 105–277, Sec. 1702–1704 (1998); *see* OMB Circular A–130 Paragraph 8.a.1(k).

[8] 18 CFR 390.1 and 18 CFR 390.2.

[9] Rule 2001(a) of the Commission's Rules of Practice and Procedure, 18 CFR 385.2001(a).

[10] *See Critical Energy Infrastructure Information,* Order No. 630, FERC Stats. & Regs. ¶ 31,140, *order on reh'g,* Order No. 630–A, FERC Stats. & Regs. ¶ 31,147, at P 65 (2003) (providing that privileged material and CEII may be filed under 18 CFR 388.112 on electronic media—including compact discs, computer diskettes, and tapes—and noting that the Commission would accept non-public documents through its electronic filing process at some point in the future).

[11] Order No. 703, FERC Stats. & Regs. ¶ 31,259 at P 9. The following are submitted through eForms: FERC Form No. 1, FERC Form No. 2, FERC Form No. 2–A, FERC Form No. 3–Q, FERC Form No. 6, FERC Form No. 6–Q, FERC Form No. 60, FERC Form No. 714, and Electric Quarterly Reports. FERC Form 1–F is currently not included in eForms.

[12] *See Astoria Generating Co., L.P.* v. *New York Independent System Operator, Inc.,* 136 FERC ¶ 61,155, at P 25 (2011) (*Astoria*). The Commission's filing requirements for CEII and privileged material are provided in the ''Submission Guidelines'' available via the eFiling link on the Commission's Web site at *http://www.ferc.gov.*

complaints or answers.[13] The request for privileged treatment has in some cases delayed the ability of the Commission to process such filings because the Commission was required to issue special orders or notices to ensure that parties could obtain access to the privileged material they needed in order to be able to participate in the proceeding.[14] 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.

B. Notice of Proposed Rulemaking and Comments

9. In its December 16, 2011 Notice of Proposed Rulemaking (NOPR), the Commission proposed to revise its regulations to address two outstanding concerns.[15] First, the Commission proposed uniform procedures for filing privileged materials in any proceeding in which a right of intervention exists. The Commission proposed to (a) provide two categories of privileged material for filing purposes, namely categories for CEII and all other privileged materials, (b) set up uniform procedures for filing and accessing privileged materials in most proceedings with a right to intervene, based upon the current complaint/answer process in Rules 206 and 213,[16] and (c) consolidate the Commission's regulations for submitting privileged materials in proposed section 388.112.

10. Second, the Commission proposed to revise its answer regulations, Rule 213, to provide an opportunity for parties to file answers to requests for extension of the time to take action under the Commission's orders and regulations or seeking expedited action where the time to act on these requests may fall sooner than the standard 15 day answer date. To provide an opportunity for interested parties to respond and facilitate the Commission's response to such motions, the Commission proposed to shorten the answer period for these motions to five business days. In addition, the Commission proposed conforming revisions, in particular, revisions to the Secretary's delegated authority under 18 CFR 375.302(b), to clarify the Secretary's authority to address shortened answer periods for requests for extension of time, consistent with the delegated authority of other office directors.[17]

11. In response to the NOPR, American Public Gas Association (APGA), Edison Electric Institute (EEI), Electric Power Supply Association (EPSA), Interstate Natural Gas Association (INGA), International Transmission Co. (ITC), MidAmerican Energy Holdings Company (MidAmerican), North American Electric Reliability Corp. (NERC), PJM Interconnection, L.L.C. and Transmission Dependent Utility Systems (TDU)[18] submitted comments. EPSA and PJM support the Commission's proposal to consolidate and establish uniform procedures for filing privileged materials and establish two categories for filing purposes, citing efficient and easily implemented procedures to allow market participants to designate materials as confidential and provide assurance that commercially sensitive and other confidential information will be safe from inadvertent disclosure, without the need for procedural orders. The Commission will address other concerns raised in the comments in the discussion below.

II. Regulations for Filing Privileged Materials

12. In this Final Rule, the Commission largely adopts the NOPR proposal to consolidate the Commission's regulations for filing privileged materials in section 388.112 and establish procedures in that section for distribution of such materials pursuant to a protective agreement in proceedings with a right to intervene. The protective agreement provisions largely parallel the existing regulations governing complaints and answers. These regulations will expand those procedures to cover other types of filings, such as statutory public utility or pipeline filings, and protests in those filings, containing confidential information. With these revisions, the Commission is taking advantage of the technologies available to the Commission to safely and securely accept materials by designating them as privileged, while providing for limited use of the materials in proceedings in which other parties must review the materials, by requiring the filing party to make them available pursuant to a protective agreement. In instances where the filer elects to electronically file materials with a protective agreement, submission of the identical hard copy files to the Commission will no longer be necessary. Permitting privileged materials to be submitted via eFiling will facilitate entry of the documents into the Commission's document repository, eLibrary, and will make them available to staff conducting analysis of the documents. Electronic filing will simplify retrieval of the documents in the course of the Commission's duties because the documents may be accessed via the Commission electronic archive in eLibrary, and Commission staff will no longer have to retrieve hard copy documents from offsite document storage. This will avoid the resulting delay in obtaining materials.

13. The consolidated filing procedures, as well as the protective agreement provisions for proceedings in which a right to intervene exists are included in revised section 388.112. Revised section 388.112(a)(1) adopts the Commission's long-standing usage of the term ''privileged materials'' to refer to information subject to an outstanding claim of exemption from mandatory disclosure under the Freedom of Information Act (FOIA), including CEII.[19] The changes adopted in this rule retain the disclaimer that by permitting the filing of privileged materials and treating the documents for which a privilege is claimed as nonpublic, the Commission is not making a determination on the merits as to any claim of privilege or CEII status.[20] Revised section 388.112(b) retains the requirement that a filer include a justification for privileged treatment in its filing, following the procedures posted on the Commission's Web site.[21] Revised section 388.112(b)(1) requires a person requesting privileged or CEII treatment to designate the material as privileged or CEII in an electronic filing, or clearly indicate a request for privileged treatment on a paper filing, with headings indicating privileged and

[13] *See ANR Pipeline Co.,* 129 FERC ¶ 61,080 (2009); *PPL Montana, LLC,* 113 FERC ¶ 61,231 (2005).

[14] *See West Deptford Energy, LLC,* 134 FERC ¶ 61,189 (2011) (denying request to limit parties' rights to see documents). *See also PPL Montana, LLC,* 113 FERC ¶ 61,231 (2005); *PJM Interconnection, L.L.C., Notice of Filing,* Docket No. ER05–10–000 (May 6, 2005); *PJM Interconnection, L.L.C., Notice of Filing,* Docket No. ER04–539–002 (April 30, 2004).

[15] *Filing of Privileged Materials and Answers to Motions,* Notice of Proposed Rulemaking, 76 FR 80838 (Dec. 27, 2011) (NOPR), FERC Stats. & Regs. ¶ 32,685 (2011).

[16] 18 CFR 385.206–.213.

[17] *See, e.g.,* 18 CFR 375.307(b)(1)(ii).

[18] Consisting of Arkansas Electric Coop. Corp., Golden Spread Electric Coop., Inc., Kansas Electric Power Coop., Inc., North Carolina Electric Membership Corp., Power South Energy Coop. and Seminole Electric Coop., Inc.

[19] *See also* 18 CFR 388.107(g); 18 CFR 388.113(c) (defining CEII as information that is exempt from mandatory disclosure under FOIA, providing that CEII be filed under section 388.112(b), and establishing specific procedures for making CEII available pursuant to a non-disclosure agreement).

[20] *See* revised section 388.112(c)(i).

[21] *See* the Submission Guidelines on the Documents and Filing link at *http://www.ferc.gov.*

CEII material.[22] Section 388.112(b)(1) states that 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 header of the first page of the cover sheet or transmittal letter and of the 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.''

This means that, when a person files a document containing privileged material, that person must prominently indicate the fact that the filing contains privileged material, using an appropriate header on the cover page of the filing. In most cases, the header must be included on the accompanying filing letter or first page of a pleading or motion, and on the separate cover of any portion of the document that contains privileged material, such as an affidavit, exhibit, attachment, etc. In addition, the individual pages should be marked to indicate that the page contains privileged material, and the material identified on the page.

14. The revised regulations make special provision in proceedings featuring a right to intervene, including complaint, certificate, merger and rate filings, to facilitate review of the privileged materials by intervening parties. In such proceedings, a person filing privileged material is required to include a public, redacted copy of the filing and a proposed form of protective agreement and serve these items on the appropriate persons, that is, those required by Commission rule or order, or by law.[23] The revised regulations provide that the filing person will thereafter provide a copy of the privileged materials to interveners that request the material and execute the protective agreement within five days or file an objection.[24]

15. The Commission's Model Protective Order may be used as a guide for protective agreements, and the Commission's prior orders may also provide guidance as to how to address particular confidentiality concerns.[25] The protective agreement should be self implementing and not require action or approval by the Commission. That is, persons wishing to rely on privileged material to support their filings should make provision for timely and adequate review of these materials under the protective agreement by intervening parties. While the Commission will resolve disputes to the extent necessary to carry out its statutory duties, the Commission intends that these standardized procedures will minimize the need for Commission action, with the accompanying delay in processing filings and applications subject to the Commission's jurisdiction. Where a person wishing to use privileged materials has reason to anticipate objection or difficulty in such disclosure and review, it may be appropriate to negotiate in advance with likely intervenors and attempt to resolve any disputes and come to agreement prior to making the filing. If acceptable terms for use of the material in a proceeding are negotiated prior to filing, the possibility of delay in processing the filing may be avoided.

16. The public version of the filing should be prepared with only the privileged information redacted to the extent practicable. If a document or filing contains both public and privileged material, the Commission expects filers to file a public version in which the privileged material has been removed or redacted thereby making the non-privileged portion of a document available for use by the Commission and participants in the proceeding.[26]

17. The revised regulations incorporate exceptions for landowner lists, certain cultural resources and liquefied natural gas facility (LNG) information, and proceedings set for hearing or settlement procedures in accordance with the Commission's Rules of Practice and Procedure.[27] Thus, filers are not automatically required to provide intervenors with such material.[28] The revised regulations retain procedures to address practical and confidentiality concerns with the submission of these materials, due to difficulty in copying and manipulating the material (i.e., maps or spreadsheets presenting voluminous data). To that end, the revised regulations retain provisions permitting the Commission to request full size maps in licensing applications under section 4.32(d) of its rules and regulations.[29]

18. Conforming changes were made throughout the Commission's regulations, including revisions to reflect that section 388.112 provides the procedures for filing privileged materials. To simplify and clarify the regulations, the Commission largely avoided directly referencing section 388.112. Since section 388.112 is intended to apply to all submittals and filings containing privileged or CEII material, it is unnecessary to specify the provision that applies in the many parts of the regulations that refer to filing of privileged materials.[30] Consequently, we adopt the NOPR proposals to remove duplicate provisions for filing privileged materials and consolidate and adopt the proposed provisions relating to submittal of and access to privileged material in section 388.112, as revised and discussed below.[31]

19. The Commission responds to the comments filed in response to the NOPR below.

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[22] This provision follows the Commission's existing practice for filing privileged materials in complaint proceedings in Rule 206, 18 CFR 385.206.

[23] Revised section 388.112(b)(2). Under revised section 388.112(b)(2)(ii) service is to be made to persons to be served under Rule 206(c), 18 CFR 385.206(c) (complaints) or Rule 213, 18 CFR 385.213(c)(5) (answers), or otherwise as appropriate.

[24] Trial Staff, as identified in 18 CFR 385.102(b)(2), should be treated similarly to other persons making a request.

[25] The Model Protective Order developed by the Commission's Office of Administrative Litigation is available at *http://www.ferc.gov/legal/admin-lit/model-protective-order.doc. See also Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities,* Order No. 697, FERC Stats. & Regs. ¶ 31,252, at P 393 (2007).

[26] *Astoria,* 136 FERC ¶ 61,155 at P 25 (requiring the submission of a public redacted copy of documents that contain both privileged and public information).

[27] Under revised section 388.112(b)(2)(v), a participant's access to privileged material submitted in a trial-type hearing or for settlement purposes continues to be governed by the presiding official's protective order, according to policies established by the Commission's Office of Administrative Law Judges. *See* Part 385 of the Commission's Rules of Practice and Procedure, Subpart D, 18 CFR 385.401, *et seq.* (hearing procedures), and 18 CFR 385.602, *et seq.*

[28] *See* revised section 388.112(b)(2)(vi); *see also Columbia Gas Transmission Corp.,* 128 FERC ¶ 61,050, at P 32 (2009) (finding insufficient need to disclose storage field maps and landowner lists).

[29] 18 CFR 4.32(d). Landowner lists, cultural resource information required in sections 380.12(f) and 380.16(f), LNG information filed under sections 380.12(m) and (o), forms filed with the Commission and other documents not covered under proposed section 388.112 disclosure provisions may be sought pursuant to a FOIA or CEII request, in accordance with section 388.108 or section 388.113, as applicable.

[30] Changes to consolidate and supersede current procedures for filing privileged material are made to 18 CFR 33.8(a) and 33.9 (merger procedures), 18 CFR 35.37(f) (market based rate applications), 18 CFR 34.7 (filing requirements for application for approval of issuance of securities and assumptions of liabilities), 18 CFR 348.2(a) (oil pipeline market power application procedures), Rule 206, 18 CFR 385.206(e) (complaint procedures), and Rule 213, 18 CFR 385.213(c)(5) (answers). In addition, changes for clarity and to reflect the consolidation of privileged filing procedures are made to 18 CFR 4.39(e), 5.29(c), 16.8(g), 157.21(h), 157.34(d)(4), and 385.606(f) and (j), and changes are proposed to 18 CFR 388.113(d) (1) and (2) to reference procedures in paragraph (d)(4).

[31] In certain instances, we have kept the reference as a guide to practitioners in a particular Commission program.

A. Designation of Confidential Materials as ''Privileged''

20. In the NOPR, the Commission proposed to continue its long-standing practice of referring to confidential material as privileged.

1. Comments

21. A number of commenters object to the scope of the revised regulations, arguing that the privileged filing procedures, in particular the disclosure procedures developed for proceedings with a right to intervene, should not apply to materials eligible for common law evidentiary privileges such as attorney-client or work product privileges or CEII, which are subject to the disclosure procedures in 18 CFR 388.113.

2. Commission Response

22. The Commission disagrees with suggestions made by EEI and INGAA that use of the term privilege detracts from a filing party's ability to assert a common law evidentiary privilege. The Commission's power to withhold information from mandatory public disclosure is established by FOIA and presented in its rules and regulations, chiefly 18 CFR 388.107. The Commission's long-standing practice has been to refer to materials subject to an outstanding claim of exemption from mandatory disclosure as privileged.[32] The Commission is not aware of any confusion arising out of use of this term with materials claimed to be subject to a common law privilege, confidential business trade secrets or CEII. These types of materials are already addressed in the Commission's FOIA regulations in the categories of materials for which a filer may request an exemption from mandatory disclosure under FOIA.[33]

23. The Commission likewise disagrees with EEI's and INGAA's suggestions that failure to make separate provision for information subject to a claim of common law privilege will create a risk of improper disclosure and loss of privilege.[34] Indeed, as we stated in the NOPR, the term privileged material ''is not intended to detract from any person's right to assert a common law privilege, e.g., attorney-client or attorney work product privilege.'' [35] More importantly, the Commission is not requiring any filing party to submit materials that are subject to an evidentiary privilege in support of their filings or any confidential material. The choice whether to include such materials is left to the person making the filing whether to rely on such materials subject to the protective agreement disclosure provisions established in this Final Rule.[36] If a party is asked to produce information in an investigation or discovery request that it believes is subject to a common law privilege, the proper course of action is to file a notice of that party's objection to producing the document, identifying the document and the justification of the claim, to facilitate review of the claim of privilege in a confidential setting to determine if the claim is justified.[37]

B. Establishing Separate Regulations Governing CEII Information

24. In the NOPR, the Commission proposed to retain its current regulations (sections 285.206, 385.213 and 388.112) under which privileged and CEII information are subject to the same requirements with respect to disclosure.

25. EEI contends that CEII should be a separate category subject to separate disclosure procedures, as provided for in 18 CFR 388.113.

26. We do not find that using the same regulatory framework for ''privileged materials'' and ''CEII'' in section 388.112 will cloud the procedures in 18 CFR 388.113 for handling CEII or that continuation of these procedures will not provide adequate protection for CEII. The Commission's regulations specify that to qualify as CEII, the material must be ''exempt from mandatory disclosure under the Freedom of Information Act.'' [38] Thus, CEII is already a subset of privileged material under the Commission's regulations. Any party relying on CEII information in a filing needs to be prepared to provide that information to intervenors that need the information to understand the filing.

27. We also disagree with EEI that CEII should be treated separately and distributed within a Commission proceeding under procedures modeled after the current CEII procedures in 18 CFR 388.113, providing for review of privilege requests with a determination.[39] A filing party that has reason to question whether a party has a legitimate need to review information in a Commission proceeding may file an objection to disclosure to that person under section 388.112(b)(2)(iii)),[40] which is equivalent to the existing and retained provision for notice of FOIA requests in section 388.112(d).[41]

28. The Commission is not changing its rules for acquiring materials through a FOIA or CEII request, and materials that may be sought through the protective agreement procedures established herein also remain available through FOIA and CEII requests where appropriate. However, the Commission has determined that reliance on the existing CEII procedures exclusively would serve to delay the processing of filings and other pleadings in Commission proceedings. To facilitate timely distribution of materials without the potential for delay pending Commission review, participants who choose to submit CEII information as part of a Commission proceeding must follow the procedures provided in

[32] *E.g., Revision of Freedom of Information Act Rules,* Order No. 488, FERC Stats & Regs ¶ 30,789 (1988) (establishing rules for requesting privileged treatment of documents claimed to be exempt from mandatory disclosure under FOIA).

[33] In particular, see 18 CFR 388.107(d) (incorporating FOIA exemption 4 for trade secrets and commercial or financial information obtained from a person that are privileged or confidential); 18 CFR 388.107(g) (records or information compiled for law enforcement purposes, including information that could interfere with enforcement proceedings or deprive a person of a right to fair trial, if produced). *See also Cargill, Inc.* v. *Saltville Gas Storage Co., L.L.C.,* 99 FERC ¶ 61,043, at PP 12–13 (2002) (describing privileged treatment under section 388.107(d) and FOIA exemption 4); *Critical Energy Infrastructure Information,* Order No. 630, FERC Stats. & Regs. ¶ 31,140, at P 14, *order on reh'g,* Order No. 630–A, FERC Stats. & Regs. ¶ 31,147 (2003) (discussing privileged treatment for CEII under FOIA exemption 4, and exemption 2 for ''records related solely to the internal personnel rules and practices of an agency'' and exemption 7 for certain law enforcement information, including information which might jeopardize a person's life or safety, if disclosed).

[34] EEI at 5 (citing *West Deptford Energy, LLC,* 134 FERC ¶ 61,189 (2011) (seeking to protect sensitive market information); *Mojave Pipeline Corp.,* 38 FERC ¶ 61,249, at 61,842 (1987) (discussing Commission's discovery regulations)). MidAmerican supports the EEI comments.

[35] NOPR, FERC Stats. & Regs. ¶ 32,685 at P 16, item g & n.40 (discussing proposed § 388.112(b)(2)(iv)).

[36] We note that filing information for which a common law privilege is asserted is likely to breach the confidentiality necessary to maintain the privilege. *See generally McCormick on Evidence* § 93 (2007).

[37] *See, e.g., Independent Oil & Gas Association of West Virginia,* 21 FERC ¶ 63,030 (1983) (appointing special administrative law judge to perform *in camera* review of privileged status of discovery materials, to preserve confidentiality).

[38] 18 CFR 388.113(c)(1).

[39] EEI at 4.

[40] This provision states: ''A filer, or any other person, may file an objection to disclosure, generally or to a particular person or persons who have sought intervention.'' Indeed, this provision provides greater rights to the submitter than section 388.113, which does not provide for notice to the submitter prior to the determination by the CEII Coordinator.

[41] This provision states: ''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.''

section 388.112. We find this a reasonable method to permit the use of such materials by the Commission and participants in Commission proceedings while protecting the confidentiality of the information.[42]

C. Form and Use of Protective Agreement

29. The Commission proposed that its existing procedures regarding protective agreements in its complaint and answer regulations be applied to other filings. Under these procedures, the filing party must provide a ''proposed form of protective agreement to each entity that is to be served.'' [43] Although the Commission pointed to the Model Protective Order developed by the Commission's Office of Administrative Litigation as a guide in developing protective agreements, it did not propose to require a uniform protective agreement.

1. Comments

30. Several commenters ask the Commission to establish one or more standard protective agreements, based on the Model Protective Order or tailored to meet particular circumstances.[44] APGA predicts that, absent such a requirement, filers may attempt to frustrate the interests of requesting parties, who have limited time to respond. ITC supports the Commission's proposal that the proposed protective agreement be self implementing and not require action by the Commission. ITC nevertheless supports use of the Model Protective Order, except when modifications are justified or no party objects. TDUs note that the NOPR does not provide guidance on what provisions may be appropriate for a protective agreement, and notes that clarification will help ensure customer access to information and avoid disputes.[45] TDUs advocate adoption of the Model Protective Order as a basis for a protective agreement, with a requirement that parties justify any change.

31. MidAmerican suggests refinements to the requirement that a proposed form of protective agreement be served on each entity that is required to be served with the filing, arguing that service need not be required after the first time the protective agreement is used.[46] In particular, MidAmerican argues that such a requirement is not needed when a party is using information that it obtained using the protective agreement provided by the original filer.

32. APGA urges the Commission to require that a party may execute a non-conforming agreement under protest, with issues to be resolved at a later date by the Commission.[47] TDUs likewise argue that parties should have access to materials while any objection is outstanding. TDUs ask the Commission to ensure access to materials during negotiations over terms of delivery, so that a party challenging a protective agreement may still participate effectively in the proceeding. TDUs state that such an approach will permit a party to participate meaningfully in the relevant docket without sacrificing the opportunity to test a filing party's privilege claims.[48]

33. APGA urges the Commission to lessen the requirements for signing the protective agreement and receiving the privileged materials and permit any person to whom service is required under the regulations to seek access, rather than require filing of an intervention.[49] According to APGA, requiring a person to draft and file an intervention wastes time and should not be a condition to receiving the material. APGA argues that the fact that a person is required to be served justifies access to the material. EEI, on the other hand, asks that the Commission not require release of privileged material to persons or organizations that have not been granted intervenor status.[50] EEI seeks to avoid conflict with the Commission's regulations that permit a party 15 days to oppose a motion to intervene. EEI asks the Commission to clarify that intervention in one sub-docket would not provide the right to access material in another sub-docket.[51]

34. APGA argues that the Commission's proposal requiring delivery of privileged materials within five days after a protective agreement is signed is insufficient to ensure that interested persons have timely access to privileged materials filed in pipeline filings due to the short (30-day) statutory action period.[52] APGA does not believe that its suggestions prejudice the rights of filers to protect privileged material, but are intended to facilitate meaningful access by interested entities.[53]

35. Citing procedures developed in applying the Model Protective Order, TDUs ask the Commission to clarify that the burden of proof is on the party asserting a claim of privilege in any dispute of privileged status. TDUs also question whether the provision permitting a party to object to the terms in a protective agreement is effective, given statutory deadlines. TDUs ask the Commission to specify limits on the terms that may be included in a protective agreement, so that parties will not be forced to agree to unduly restrictive access or engage in fruitless litigation. TDUs argue that this is needed because, unlike in a proceeding overseen by an administrative law judge, the Commission cannot delay a statutory deadline to provide time to resolve a dispute.[54]

2. Commission Response

a. Standard Protective Agreement

36. The Commission declines to adopt a standard protective agreement or provide detailed guidance as to appropriate departures or additions to the Model Protective Order in this proceeding, in light of the need for flexibility in handling different types of privileged material. In the NOPR, the Commission suggested that parties filing privileged materials in a proceeding with a right to intervene may use the Office of Administrative Litigation's Model Protective Order as a guide for protective agreements.[55] Parties choosing to use a protective agreement based on the Model Protective Order may avoid potential litigation over the terms of the agreement that may delay the processing of their filing. For example, disputes that cannot be resolved prior to filing or through the protective agreement procedures may lead to further procedures such as suspending a filing, setting the proceeding for hearing, deficiency letters, and requests for additional procedures or information.

37. In the event a protective agreement is protested, the Commission has reviewed proposed protective orders in other contexts and provided for appropriate additions to address particular confidentiality concerns.[56] Parties wishing to file privileged material may consult the Commission's

[42] *Pennzoil Co.* v. *FPC,* 534 F.2d 627, 632 (5th Cir. 1976) (requiring consideration of alternatives to full disclosure to provide consumers with adequate knowledge to participate in Commission proceedings).

[43] 18 CFR 385.206(e)(2), 385.213(c)(5)(i)(ii).

[44] *E.g.,* APGA, EEI, ITC. APGA provides draft text to implement its proposals.

[45] TDUs at 3.

[46] MidAmerican at 4.

[47] APGA at 3.

[48] TDUs at 5.

[49] APGA at 3–4.

[50] EEI at 8.

[51] EEI at 8.

[52] APGA at 2 (citing NGA section 4, 15 U.S.C. §§ 717c(d) and (e)).

[53] APGA at 5.

[54] TDUs at 4.

[55] Available at *http://www.ferc.gov/legal/admin-lit/model-protective-order.doc.*

[56] *E.g., Illinois* v. *Exelon Generation Co., LLC,* 119 FERC ¶ 61,027 (2007) (proposing protective order restricting access to certain materials by competitive duty personnel).

prior orders for approaches that have been employed to address particular concerns that arose in prior proceedings.

b. Right To Object to Protective Agreement and Privileged Treatment

38. APGA expresses concern that a participant may be bound by undesirable terms of a protective agreement, prior to having the opportunity to object. We do not find that signing a protective agreement should result in a waiver of the right to challenge the privileged status of the information. This procedure ensures solely that the case can be processed, not that it result in a waiver of any procedural rights. We note that the Model Protective Order contains procedures under which the signatory reserves its right to challenge the privileged status of documents covered by the agreement, and we encourage parties to include such provisions in their protective agreements. Should a protective agreement purport to contain such a waiver requriement, a party may preserve its rights by filing an objection under section 388.112(b)(2)(iii) and the Commission can then require the protective agreement be revised.

39. TDU's are concerned that the right to object to a protective agreement may not be effective given statutory deadlines. As indicated above, the Commission has procedures that may be used to resolve such disputes fairly.

c. Requirement To File an Intervention

40. We decline to adopt the revision proposed by APGA that a filing party must provide privileged materials to any person to whom service is required on request, rather than only those who have filed an intervention. As Mid-American suggests, the regulations provide that parties who are entitled to receive service will receive a copy of the filing with the protective order when served.[57] It is not too great a burden to require such parties to intervene prior to being given a copy of the privileged information. Filing an intervention is not a great burden. Indeed, the Commission has provided for an electronic document-less form of intervention that can be filled out very quickly. The requirement for intervention ensures that copies of the confidential material are provided only to those with sufficient interest in the proceeding and provides the Commission with information about a party's interest in the privileged materials in the event an objection to disclosure is filed.

41. We likewise reject EEI's suggestion that materials should not be provided until an intervention has been granted. We do not believe that lack of intervenor status alone provides justification for refusing to provide the privileged materials.[58] Furthermore, waiting for intervention to be granted could unnecessarily delay an interested person's access to privileged materials. As APGA notes, this could be a particular burden in Natural Gas Act cases which must be decided within 30 days. The intervention itself will provide the party filing privileged materials with information to determine whether a requesting party has an interest to support disclosure in the event that an objection to disclosure is filed under section 388.112(d)(iii).

d. Other Issues

42. In response to EEI's inquiry whether a protective agreement may apply in separate subdockets, the filer should determine whether a protective agreement signed in one subdocket is sufficient for the information that may be produced in another subdocket. The different character of such information may require a somewhat different form of protective agreement.

43. TDU argues that the burden of proof should be on the party seeking privileged status. This rulemaking does not change existing procedures regarding assignment of burdens. While the determination as to the applicability of the privileged designation is not a hearing with formal burdens of proof, the applicant needs to justify why the information is confidential under the FOIA categories.[59]

D. Consistency With Discovery Procedures Used in Administrative Proceedings

44. In the NOPR, the Commission proposed that, for filings made prior to hearing, the party filing the privileged material will propose a form of protective agreement. However, in proceedings set for trial-type hearing, the NOPR proposed to leave intact the authority of the ALJ to administer the hearing and determine the appropriate scope of a protective order.

1. Comments

45. TDUs suggest that the Commission is inconsistent in removing the designation ''Protected Materials'' covered by an ALJ-approved protective order and treating these materials as privileged. It asserts that an ALJ's protective order may cover a broader range of materials than filings in proceedings not set for hearing. TDUs explain that, in discovery, the term protected materials refers to materials that customarily are treated by a participant as sensitive or proprietary, which are not available to the public and which, if disclosed freely, would subject the participant to competitive harm.[60] TDUs ask the Commission to clarify that eliminating the category ''protected materials'' is for filing purposes and does not expand the definition of privileged materials pursuant to section 388.112.[61] EPSA states that establishing separate procedures for materials provided pursuant to a protective order issued by an ALJ may lead to confusion and inadvertent disclosure.

2. Commission Response

46. Revised section 388.112(b)(2)(v), adopted in this proceeding, states, ''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.'' The term protected material is a colloquial term that some parties apply to materials covered by a protective order. For consistency, the Commission has used the word ''privileged,'' as it existed in the regulations prior to this rule, to refer to all material for which confidential treatment is claimed. But the use of the term privileged does not change the scope of material eligible for confidential treatment.

47. TDUs assert that the discovery materials that may be protected by an administrative law judge's protective order include materials that customarily are treated by a participant as sensitive or proprietary, which are not available to the public and which, if disclosed freely, would subject the participant to competitive harm. This description is comparable to the type of information that qualifies for confidential treatment under FOIA Exemption No. 4, which protects information where disclosure is likely ''to cause substantial harm to the competitive position of the person from whom the information was obtained.'' [62]

[57] Section 388.112(b)(2)(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'').

[58] Under Rule 214, an intervenor obtains party status fifteen days after a timely intervention is filed, if no opposition is filed. 18 CFR 385.203.

[59] 18 CFR 388.112(d) (providing an applicant for privilege treatment the ability to respond to a requested disclosure).

[60] TDUs at 8 & n.5.

[61] TDUs at 9.

[62] *See Reporting of Natural Gas Sales to the California Market,* 96 FERC ¶ 61,119 at 61,466–68 (2001) (citing *National Parks and Conservation Association* v. *Morton,* 498 F.2d 765, 770 (D.C. Cir.

Continued

We therefore find no reason to apply a different standard to materials collected during discovery than filed materials in proceedings not in hearing.[63]

E. Procedures for Distributing Privileged Information

48. The NOPR proposed procedures obtaining access to material that is filed as privileged in complaint proceedings and in any proceeding with a right to intervene. The Commission proposed that any participant or person filing an intervention in the proceeding may request the filer to provide a copy of the complete, non-public version of the document, by providing an executed copy of the protective agreement and showing appropriate party, participant or intervenor status. The proposed regulations provide that the filer provide a copy of the complete, non-public document to the requesting person within five days of receiving the request, if no objection is filed.

1. Comments

49. To provide adequate due process for responses to requests for information, EEI asks the Commission to modify the requirement that confidential information be released ''within'' five days, to a requirement that the information not be released until the 5th business day, in order to permit parties to object, and suggests the Commission provide a bit more time for objections to be lodged.[64] EEI notes that in the NOPR the Commission proposed to revise 18 CFR 388.112 to give parties that have submitted privileged material to FERC staff at least five calendar days to respond to requests for information and a separate five calendar days to respond to a proposed disclosure. *See* 18 CFR 388.112(c)(2). EEI notes that the Commission has not afforded the same protection for information filed under section 388.112(b)(2) and states that the Commission should apply the same protective procedures to all privileged materials submitted to staff or to the Commission.[65] To provide adequate due process rights for responses to requests for information, EEI states that the Commission should withhold a proposed release of confidential information if the filing party files notice of intent to seek judicial review to block the release.[66]

50. TDUs object to the five day delay in delivering privileged materials after receipt of an executed copy of the non-disclosure agreement; instead they request delivery by the next business day. TDUs argue that delay prejudices the party seeking the information, by providing limited time for review.[67] APGA similarly recommends that the proposed 5-day period for delivering privileged materials be shortened to 24 hours. APGA states that it only takes minutes to deliver the non-redacted version which was filed with the Commission and there is no basis for delay, given the short time frame to review and address the privileged material in a pleading.[68] APGA states that, because the contents of suspension orders may depend on the contents of protests, that it is not sufficient for protesting parties to receive the material at or after the intervention deadline. APGA suggests a typical protest schedule in which a section 4 rate case is noticed after five days, interventions are due within 13 days and an order issued in 30, and asserts that there is no way to secure and review the filing, draft an intervention, execute the protective agreement and prepare a protest based on the privileged material.[69]

51. INGAA objects to its reading of the proposed regulations to require service of ''fully redacted'' documents. According to INGAA, redacting an entire document can be burdensome to the filer and circulation of the document does not provide any benefit to recipients.[70] INGAA asks that filers be permitted to comply with the requirement in proposed section 388.112(b)(1) by submitting in its cover page requesting privileged treatment, a statement that the entire document qualifies for privileged, confidential and/or CEII treatment and a short title or description of the type of information it contains. INGAA asks that such a disclosure meet the Commission's objective under 388.112(b)(1) to provide a redacted version ''to the extent practicable.'' [71]

52. EEI responds to the Commission's observation in the NOPR that a failure by the filing party to afford intervenors a meaningful opportunity to review confidential information under a protective agreement could lead to suspension of the filing, rejection, or other delays in processing an application. EEI acknowledges some delay may be necessary to respond to requests for confidential information, but states that such delay should not be punitive and a filer should not be prejudiced through rejection or suspension, as long as the confidential information designation and ensuing objection to release of the information are made in good faith.[72]

53. According to EEI, parties seeking to justify non-disclosure of privileged materials should only be required to submit a brief, good-faith articulation of the reason for non-disclosure, but that in the event the designation is challenged or anyone seeks access to the information, the filing party will have the right to expand and supplement the justification prior to Commission action.[73]

54. ITC suggests that, in the event that a delay in disclosure is caused by a dispute over the protective agreement, a party would not be harmed if the dispute were to result in a late filing, such as an answer to a complaint.[74]

2. Commission Response

a. Five Day Distribution

55. Various parties filed comments expressing concerns with the distribution procedures. Several parties raise issues with respect to the requirement to distribute privileged information within five days. EEI wants to mandate that the information not be released in less than five days, while TDU and APGA argue that the five day requirement should be shortened. We find that the five day requirement establishes a reasonable balance between all the interests.

56. With respect to EEI's suggestion that the five days be made mandatory to permit parties to object to disclosure, we see no reason to adopt this rule for all filings. As other commenters note, early release of information is preferable because it provides other parties with more time to evaluate the filing. To the extent that EEI's concern is that the filing party is claiming confidentiality for third-party information in its possession, the filing party ought to inform the third-party before filing, should consult with the third-party as to the appropriate form of protective agreement for the information, and may want to choose the full five days to permit a response.

57. We similarly reject the TDU and APGA arguments that the information

1974)). FOIA Exemption No. 4 is incorporated in the Commission's regulations in section 388.107(d).

[63] Indeed, it would be inconsistent for the Commission to use a different standard for defining material submitted in an application compared with material submitted through an ALJ proceeding. The same FOIA provisions apply to both sets of information and an FOIA request can be filed for material submitted during discovery in an administrative proceeding.

[64] EEI at 9.

[65] *Id.*

[66] EEI at 10.

[67] TDUs at 5.

[68] APGA at 4.

[69] *Id.* at 4–5.

[70] INGAA at 5.

[71] *Id.* at 6.

[72] EEI at 10.

[73] EEI at 8.

[74] ITC at 3.

be disclosed in less than five days through electronic delivery. While immediate electronic service may be appropriate for certain materials, a filer may have a legitimate interest in not providing such material electronically. Even in natural gas cases, five days from the date of the request should provide sufficient opportunity to obtain and review such information.[75] In those cases in which a party shows that given the extensive nature of the privileged information, it did not have adequate time to review the material, the Commission has procedures to ensure an adequate review period.

b. Redaction of Entire Document

58. INGAA requests that the Commission clarify that the requirement for filing a redacted public copy still permits, in appropriate circumstances, the filing party in the transmittal letter to provide a description of the document and identify the entire document as privileged. The regulation requires that a redacted public version be filed, to the extent practicable. The regulation, therefore, would not preclude a filer from identifying the entire document as privileged if it, in good faith, is unable to separate sensitive or confidential material from the remainder of the document.

c. Opportunity to Respond

59. The Commission declines to adopt EEI's suggestion that filing parties be provided with an opportunity to respond to requests for information by arguing their justification for withholding material. Under the Commission's current regulations a filing party must include in its filing a justification for privileged treatment, demonstrating that the material is exempt from mandatory disclosure under FOIA according to the categories defined in section 388.107 of the Commission's Rules and Regulations. The procedures promulgated in this proceeding continue that practice. If a filing party objects to disclosure to a particular party, it may file an objection under section 388.112(b)(2)(iii) as appropriate. Furthermore, a non-filing party may object to the privileged status of the materials under review. The Commission may address each of these objections by issuing an order, by which time the parties should have had time to assert their interests in their pleadings. However, we emphasize that failure to resolve such disputes may result in delay in processing the filing.

d. Need for Additional Procedures

60. EEI is concerned that delaying approval of filings due to the submission of privileged information may be ''punitive.'' The Commission needs to provide due process to allow for adequate review of all filings and that includes filings containing privileged information. If parties can demonstrate that they have not had sufficient time to review a filing, the Commission may adopt whatever procedures it deems appropriate to ensure due process to all parties. Indeed, the Commission is adopting this rule to clarify procedures for handling privileged material to expedite proceedings. As noted in the NOPR, the Commission previously has preceded on an ad hoc basis when addressing filings (other than complaints and answers) containing privileged information which has contributed to delay in the Commission's ability to process such filings expeditiously. To permit parties to participate fully in these proceedings, the Commission has issued special orders or notices to ensure access to privileged material.[76] By clarifying the filing procedures for privileged information, this rule will reduce the need to use additional processes and therefore should expedite, not delay, proceedings.

F. NERC Notices of Penalty and Other Communications

1. Comments

61. NERC asks the Commission to clarify that the procedures proposed in the NOPR will not apply to NERC's filing of a notice of penalty, to filings of remediated issues in a Find, Fix, Track and Report spreadsheet, or to other communications or exchanges of documents between NERC and FERC that are not made through formal filings.[77]

62. According to NERC, it submits notices of penalty and Find, Fix, Track reports on a monthly basis, and points out that it treats such materials as non-public under 18 CFR 39.7(b)(4). NERC's practice is to file some portion of the notices and reports as non-public, absent a public hearing sought by the Commission or a penalized entity under section 39.7(e)(1 and 7). NERC requests that the Commission clarify that NERC is not required to submit a protective agreement with Notice of Penalty or Find, Fix, Track filings or other communications or documents that are not exchanged through formal filings. According to NERC, the Commission's decision to review a Notice of Penalty may include instructions for NERC to submit a protective agreement.

63. NERC also asks the Commission to clarify that NERC's regular nonpublic exchanges of information exchanged through means other than formal filings do not require a protective agreement.[78]

2. Commission Response

64. We agree that NERC need not submit a protective agreement when filing its notices of penalties. The protective agreement procedures apply in the case of regulations that apply to ''any proceeding to which a right to intervention exists.'' With respect to NERC's filing of notices of penalty, no right to intervene exists unless the Commission issues an order initiating review of the filing and provides for public intervention and comment.[79] If the Commission establishes such a proceeding, it will establish whatever procedures with respect to the materials are necessary.

65. As for NERC's remaining concern with respect to materials distributed in informal settings, NERC states that the communications that it refers to are not made through formal filings. Consequently, we confirm that the protective agreement requirement does not apply. This rulemaking does not revise the applicable FOIA procedures and the Commission will continue to abide by those procedures.

G. Electronic Filing Procedures

66. EEI proposes various revisions to the Commission's electronic filing procedures, such as the types of media that may be used, extension of electronic filing procedures to certain Commission forms under 18 CFR 385.2011. In addition, EEI supports the Commission broadly preserving the option to file on paper for parties that need such an option and encourages the

[75] As APGA has noted, many of these parties will be served by the pipeline and therefore will have immediate notice that confidential information is included. Moreover, the Commission issues notices of these filings very shortly after they are filed.

[76] *See West Deptford Energy, LLC,* 134 FERC ¶ 61,189 (2011) (denying request to limit parties' rights to see documents). *See also PPL Montana, LLC,* 113 FERC ¶ 61,231 (2005); *PJM Interconnection, L.L.C., Notice of Filing,* Docket No. ER05–10–000 (May 6, 2005); *PJM Interconnection, L.L.C., Notice of Filing,* Docket No. ER04–539–002 (Apr. 30, 2004).

[77] NERC at 3 (discussing FPA section 215(e); 18 CFR 39.7(c)(2)).

[78] *Id.*

[79] 18 CFR § 39.7(e)(1); *see also North American Electric Reliability Corp.,* Order Initiating Review of Notice of Penalty, 136 FERC ¶ 61,135 (2011); *Rules Concerning Certification of the Electric Reliability Organization,* Order No. 672, FERC Stats. & Regs. ¶ 31,204, at PP 510–11 (2006) (noting that Commission conducts initial review of NERC Notice of Penalty as nonpublic pursuant to its FPA Part 1b investigatory authority, until an on the record hearing is provided for).

Commission to minimize requirements that limit flexibility.

67. Revising the Commission's electronic filing procedures and treatment of Forms is beyond the scope of this proceeding, and the Commission is not prepared to implement such changes in this proceeding. Filings may still be made on paper except in those circumstances (tariffs, forms, etc) where the Commission requires electronic filing.

H. Prospective Effect

68. EEI asks the Commission to clarify that the new regulations apply prospectively only as to new dockets or sub-dockets and that parties that have already made filings should not be compelled to provide a protective agreement after-the-fact.[80]

69. We agree that these regulations will apply only to filings made after their implementation. With respect to filings made previously, the procedures adopted in those proceedings will need to be followed.

I. Changes to Text of Proposed Regulations

70. The Commission has made three changes to the text of the revised regulations in response to commenters' suggestions for changes in the regulatory text, as discussed below. The remaining suggestions are also discussed in turn below.

1. Changes Adopted

71. MidAmerican proposes the following underlined clarifications to reflect that a single protective agreement may apply to all materials filed in a proceeding: ''The filer must provide the public version of the document and its proposed form of protective agreement, if an applicable protective agreement does not currently exist, to each entity that is required to be served with the filing. If an applicable protective agreement currently exists, the filer must identify where the protective agreement can be obtained.''

72. The Commission agrees, based on the provisions in the Model Protective Order, that one protective agreement may be drafted to apply to all materials in a proceeding. Consequently, we have revised the final regulations to accommodate such use.

73. EEI asks the Commission to modify 18 CFR 34.7, which it claims requires paper filings of privileged information submitted in applications for authorization to issue securities and assumptions of liability under FPA section 204. EEI asks the Commission to cross reference 18 CFR 388.112.

74. Section 34.7 states that applications for authorization to issue securities and assumptions of liability under section 204 should be filed in accordance with the filing procedures posted on the Commission's web site, in reflection of the Commission's moving such instructions out of its regulations and placing them on the internet. Consistent with other regulations, we add a sentence to section 34.7 to reflect that privileged materials may be filed electronically.

75. EEI proposes that the Commission consult with the Counsel on Environmental Quality as to its proposal to remove the requirement in sections 380.12 and 380.16 that ''The cover and relevant pages or portions of the report should be clearly labeled in bold lettering: 'CONTAINS PRIVILEGED INFORMATION—DO NOT RELEASE.' '' [81] According to EEI, the Commission must consult with the Counsel on Environmental Quality before changing National Environmental Policy Act regulations, including 18 CFR Part 380.[82]

76. The NOPR proposed to adopt generic instructions in section 388.112 to permit a party to customize their headings to reflect the privilege being claimed and identify the material in question. Thus, the instruction may apply to either confidential trade secrets or CEII. As for EEI's concern, while we see no inconsistency with the revised instruction and the requirements in Part 380, we will not revise the labeling instructions in the current versions of sections 380.12(f)(4) and 380.16(f)(4), in order not to run afoul of the environmental regulation review requirements.

2. Proposed Changes Not Accepted

77. MidAmerican cites inconsistency in section 388.112, which refers to ''procedures for filing and obtaining privileged and CEII material'' rather than ''privileged material.'' [83] Since CEII is a sub-set of privileged materials, we see no confusion as the procedures we establish here apply to both, and we will not make the requested change.[84]

78. Mid-American objects to what is sees as inconsistent usage, noting the lack of a reference to ''Privileged Materials'' in section 388.112(b) and the requirements instead to label a filed document, ''indicating that it contains privileged, confidential and/or Critical Energy Infrastructure Information, as appropriate, and marked 'DO NOT RELEASE.' '' [85] According to Mid-American use of the term confidential and describing material as privileged make the section hard to follow. The Commission disagrees, but clarifies that the provision was drafted to permit the use and filing of several categories of privileged material and permit filing parties to customize the notification that a filing contains privileged material to fit their circumstances.

79. TDUs state that the Commission should include a cross-reference to Rule 410, 18 CFR 385.410, and section 388.112 in Rules 206 and 213 to avoid ambiguity, 18 CFR 385.206 and 18 CFR 385.213. According to TDUs, a cross-reference would clarify that the treatment of information for which a claim of confidentiality or privilege is asserted will be governed by Rule 410 and section 388.112. In addition TDUs support retaining the reference to Rule 410 and section 388.112 in Rule 606, 18 CFR § 385.606, governing the treatment of privileged and protected information in settlement proceedings.[86]

80. The Commission's intention is to consolidate its regulations for filing privileged materials in section 388.112. Consequently, we found it unnecessary to reference section 388.112 as the regulation describing how one should file privileged materials, because section 388.112 is the only regulation defining how such materials should be handled.

III. Revised Time for Filing Answers to Motions for Extensions of Time or Expedited Action Dates

81. To facilitate the Commission's ability to respond to motions requesting extensions of time or shortened time to take actions required under the Commission's orders or regulation, the Commission proposed to revise Rule 213 in its Rules of Practice and Procedure to provide that answers to motions requesting an extension of time as well as motions seeking to expedite a deadline, that is, shorten the period of time in which action is to occur, will be

[80] EEI at 7–8.

[81] EEI at 10. In the NOPR, the Commission proposed to replace this with the general requirement in 388.112 that ''The cover page and relevant pages or portions of the filing 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 CEII, as appropriate, and marked 'DO NOT RELEASE.' ''

[82] EEI at 10 (citing Counsel on Environmental Quality regulations at 40 CFR 1507.3(a)).

[83] MidAmerican at 3.

[84] Nevertheless, clarifying changes were made throughout the regulations.

[85] MidAmerican at 3.

[86] TDUs at 9.

due in five days.[87] The Commission explained that frequently, parties filing such motions do not know 15 days before a filing is due that they require a change in compliance time periods, and these motions are not controversial or complicated. The Commission stated that, with a 15-day comment period, the Secretary of the Commission (under delegated authority) has had to issue notices shortening comment periods on such motions. Since motions regarding the time period for responding are not controversial or complex, five days appeared to provide a reasonable time for responses that will eliminate the burden and additional delay created by the need for the Secretary to issue a notice shortening the comment period.

82. In addition, the NOPR proposed a related change to the Secretary's delegation authority under 18 CFR 375.302(b) to clarify that the Secretary of the Commission has authority to address requests for shortened answer periods and expedite requests to extend or shorten the times to take actions consistent with the delegated authority of other office directors.[88] Exercise of such authority will help expedite requests for extension of time.

1. Comments

83. INGAA, APGA, PJM, and ITC generally support the Commission's proposal to reduce the time for responding to requests for extensions of time. APGA finds the five day answer period appropriate in most cases.[89] PJM suggests lengthening the time for response to five business days. While supporting the five days, ITC suggests that for circumstances where action may be needed in a shorter time period, the filing party be permitted to request a shorter time period in its filing.

84. INGAA objects to the removal of the provision in the secretary's delegated authority in 18 CFR 375.302(b) stating, ''Absent a waiver, no answers [to complaints, petitions, motions and other documents] will be required to be filed by a party within less than ten days after the date of service of the document.'' INGAA notes that removal of this provision could permit the Secretary to shorten any answer period, including the time for responding to a complaint, to any time period. INGAA describes this as a wholesale change, which it states the Commission has failed to justify.[90] INGAA asks the Commission to maintain the minimum ten-day answer period for complaints, petitions, motions and other documents that do not request an extension of time.

2. Commission Response

85. The Commission will adopt the revised regulation to provide for shortened answer periods to the motions for extensions of time or requesting expedited action and to clarify the Secretary's authority to act on such motions. We find that the five day answer period strikes an appropriate balance for the need to expedite action on such requests while preserving interested parties ability to respond to such requests. Since motions regarding time periods are not controversial or complex, five days provides a reasonable time for answers.[91] The five-day notice period also will help reduce the burden and delay caused by the Secretary of the Commission (under delegated authority) having to issue notices shortening answer periods.

86. ITC requests that the Commission affirm that parties may request a shortened answer period. While such a filing is permitted, the purpose of the revised regulation is to eliminate the need to issue notices shortening answer periods. Also, given the time it takes to issue such a notice, it will be difficult, in any but extreme cases, for the Secretary to issue a notice shortening an answer period in time to provide parties the ability to respond. Participants contemplating making filings to change time periods should be able to anticipate the need for such a filing five days in advance.

87. As for INGAA's concern with the Commission's revision of the Secretary's delegated authority, we affirm our decision. As noted in the NOPR, the change to the Secretary's delegated authority will clarify that the Secretary has authority to respond to motions in a shortened time frame when necessary to respond to a request for extension of time or expedited action period. While INGAA is correct that the change would also permit the Secretary to shorten the time for filing answers in other contexts, we anticipate that the Secretary would shorten the time for action only when justified and will do so in such a way as not to prejudice any party.

IV. Information Collection Statement

88. Office of Management and Budget (OMB) regulations require OMB to approve certain information collection requirements imposed by agency rule.[92] This rule does not contain any information collection requirements and compliance with the OMB regulations is thus not required. The Commission anticipates this rulemaking will reduce the burden of making filings because it will allow filers who previously filed on paper to take advantage of the efficiencies and ease associated with electronic submission in the standardized procedures. In addition, this Final Rule does not make any substantive or material changes to requirements specified in the NOPR, where the Commission similarly found no information collection requirements.

89. EEI suggests that the requirement to submit a protective agreement along with the filing of privileged materials embodies a new burden in the Commission's Paperwork Reduction Act analysis.[93] The Commission disagrees. The Commission is not requiring any party to file and rely on privileged material in proceedings before the Commission. Furthermore, the requirement to use a protective agreement to facilitate meaningful review of the material by interested parties has long been a part of our regulations pertaining to the filing of complaints and answers. Additionally, those regulations have served as a model in practice for parties filing privileged materials in other proceedings. Thus, the requirement to provide and to use a protective agreement represents a codification of the Commission's existing practice under which a party seeking to rely on privileged materials must provide interested persons the opportunity for meaningful review of privileged materials in Commission proceedings, which typically occurs through the use of a protective agreement. Therefore, we find that codifying the requirement to deliver a protective agreement does not represent a new burden, but simply reflects the Commission's existing practice of applying the procedures developed in the complaint regulations on a case-by-case basis for all filings in which a right of intervention exists. Furthermore, by facilitating filing and service of the protective agreement by electronic means, the revised regulations minimize any impact and reduce the burden of using privileged materials in Commission proceedings.

90. The Commission will submit a copy of this Final Rule to OMB only for informational purposes.

[87] See revised Rule 213, 18 CFR 385.213.

[88] *See* 18 CFR 375.307(b)(1)(ii).

[89] MidAmerican notes that the summary of section 385.213(d) set forth in P 4 of the NOPR states that the revised regulations apply to all motions requesting an extension of time, not just to those ''for which the existing time for compliance may fall fifteen days or fewer from the date of filing.''

[90] INGAA at 3.

[91] In most cases, such filings are not opposed.

[92] 5 CFR 1320.12.

[93] EEI at 8. Paperwork Reduction Act of 1995, section 3507(d), 44 U.S.C. 3507(d).

V. Environmental Analysis

91. 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.[94] This rule would not represent a major federal action having a significant adverse effect on the quality of the human environment under the Commission's regulations implementing the National Environmental Policy Act. Part 380 of the Commission's regulations lists exemptions to the requirement to draft an Environmental Analysis or Environmental Impact Statement. Included is an exemption for procedural, ministerial or internal administrative actions.[95] This rulemaking is exempt under that provision.

VI. Regulatory Flexibility Act

92. The Regulatory Flexibility Act of 1980 (RFA) [96] generally requires a description and analysis of proposed rules that will have significant economic impact on a substantial number of small entities. The RFA mandates consideration of regulatory alternatives that accomplish the stated objectives of a rulemaking while minimizing any significant economic impact on a substantial number of small entities. The Small Business Administration's (SBA) Office of Size Standards develops the numerical definition of a small business.[97] The SBA has established a size standard for electrical utilities, stating that a firm is small if, including its affiliates, it is primarily engaged in the transmission, generation, and/or distribution of electric energy for sale and its total electric output for the preceding twelve months did not exceed four million MWh.[98]

93. The Commission finds this rule concerns procedural matters and expects it to increase the ease and convenience of filing.[99] The Commission certifies that it will not have a significant economic impact upon participants in Commission proceedings. An analysis under the RFA is not required.

VII. Document Availability

94. In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through FERC's Home Page (*http://www.ferc.gov*) and in FERC's Public Reference Room during normal business hours (8:30 a.m. to 5:00 p.m. Eastern time) at 888 First Street NE., Room 2A, Washington, DC 20426.

95. From FERC's Home Page on the Internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

96. User assistance is available for eLibrary and the FERC's Web site during normal business hours from FERC Online Support at (202) 502–6652 (toll free at 1–866–208–3676) or email at *ferconlinesupport@ferc.gov,* or the Public Reference Room at (202) 502–8371, TTY (202) 502–8659. Email the Public Reference Room at *public.referenceroom@ferc.gov.*

VIII. Effective Date and Congressional Notification

97. These regulations are effective December 28, 2012.

List of Subjects

18 CFR Part 4

Administrative practice and procedure, Electric power, Reporting and recordkeeping requirements.

18 CFR Part 5

Administrative practice and procedure, Electric power, Reporting and recordkeeping requirements.

18 CFR Part 16

Administrative practice and procedure, Electric power, Electric utilities, Reporting and recordkeeping requirements, Securities.

18 CFR Part 33

Electric utilities, Reporting and recordkeeping requirements.

18 CFR Part 34

Electric power, Electric utilities, Reporting and recordkeeping requirements, Securities.

18 CFR Part 35

Electric power rates, Electric utilities, Reporting and recordkeeping requirements.

18 CFR Part 157

Administrative practice and procedure, Natural gas, Reporting and recordkeeping requirements, Uniform system of accounts.

18 CFR Part 348

Pipelines, Reporting and recordkeeping requirements.

18 CFR Part 375

Authority delegations (Government agencies), Seals and insignia, Sunshine Act.

18 CFR Part 385

Administrative practice and procedure, Electric utilities, Penalties, Pipelines, Reporting and recordkeeping requirements.

18 CFR Part 388

Confidential business information; Freedom of information.

By the Commission.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

In consideration of the foregoing, the Commission amends Parts 4, 5, 16, 33, 34, 35, 157, 348, 375, 385, and 388, Chapter I, Title 18, of the Code of Federal Regulations, as follows.

PART 4—LICENSES, PERMITS, EXEMPTIONS, AND DETERMINATIONS OF PROJECT COSTS

■ 1. The authority citation for Part 4 is revised to read as follows:

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

§ 4.39 [Amended]

■ 2. In paragraph (e) of § 4.39, remove the phrase ''Critical Energy Infrastructure Information in §§ 388.112 and 388.113 of subchapter X of this chapter'' and add the phrase ''privileged materials and Critical Energy Infrastructure Information in §§ 388.112 and 388.113 of this chapter'' in its place.

PART 5—INTEGRATED LICENSE APPLICATION PROCESS

■ 3. The authority citation for Part 5 is revised to read as follows:

Authority: 16 U.S.C. 792–828c, 2601–2645; 42 U.S.C. 7101–7352.

[94] *Regulations Implementing the National Environmental Policy Act of 1969,* Order No. 486, 52 FR 47897 (Dec. 17, 1987), FERC Stats. & Regs. ¶ 30,783 (1987).

[95] 18 CFR 380.4(1) and (5).

[96] 5 U.S.C. 601–612.

[97] 13 CFR 121.101 (2011).

[98] 13 CFR 121.201, Sector 22 Utilities & n.1.

[99] *See* Order No. 703, FERC Stats. & Regs. ¶ 31,259 at P 39. The Commission does not believe that an RFA analysis similar to that provided in Order No. 714, FERC Stats. & Regs. ¶ 31,276 at P 113, is required or would be useful, because persons making filings with the Commission would not need new software, systems or training, and would not be required to convert existing materials to the new format, as was the case in that proceeding.

■ 4. Revise paragraph (c) of § 5.29 to read as follows:

§ 5.29 Other provisions.

* * * * *

(c) *Requests for privileged or Critical Energy Infrastructure Information treatment of pre-filing submission.* If a potential Applicant requests privileged or critical energy infrastructure information treatment of any information submitted to the Commission during pre-filing consultation (except for the information specified in § 5.4), the Commission will treat the request in accordance with the provisions in § 388.112 of this chapter until the date the application is filed with the Commission.

* * * * *

PART 16—PROCEDURES RELATING TO TAKEOVER AND RELICENSING OF LICENSED PROJECTS

■ 5. The authority citation for Part 16 is revised to read as follows:

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

§ 16.8 [Amended]

■ 6. In the heading of § 16.8(g), add the phrase ''or Critical Energy Infrastructure Information'' after the word ''privileged''.

PART 33—APPLICATIONS UNDER FEDERAL POWER ACT SECTION 203

■ 7. The authority citation for Part 33 is revised to read as follows:

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

■ 8. Revise § 33.8 to read as follows:

§ 33.8 Requirements for filing applications.

The applicant must submit the application or petition to the Secretary of the Commission in accordance with filing procedures posted on the Commission's Web site at *http://www.ferc.gov.*

(a) If the applicant seeks to protect any portion of the application, or any attachment thereto, from public disclosure, the applicant must make its filing in accordance with the Commission's instructions for submission of privileged materials and Critical Energy Infrastructure Information in § 388.112 of this chapter.

(b) If required, the applicant must submit information specified in paragraphs (b), (c), (d), (e) and (f) of § 33.3 or paragraphs (b), (c), (d) and (e) of § 33.4 on electronic recorded media (i.e., CD/DVD) in accordance with § 385.2011 of this chapter, along with a printed description and summary. The printed portion of the applicant's submission must include documentation for the electronic information, including all file names and a summary of the data contained in each file. Each column (or data item) in each separate data table or chart must be clearly labeled in accordance with the requirements of §§ 33.3 and 33.4. Any units of measurement associated with numeric entries must also be included.

§ 33.9 [Removed and Reserved].

■ 9. Remove and reserve § 33.9.

PART 34—APPLICATION FOR AUTHORIZATION OF THE ISSUANCE OF SECURITIES OR THE ASSUMPTION OF LIABILITIES

■ 10. The authority citation for Part 34 is revised to read as follows:

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

■ 11. In § 34.7, add a sentence after the first sentence to read as follows:

§ 34.7 Filing requirements.

* * * If an applicant seeks to protect any portion of an application from public disclosure, the applicant must make its filing in accordance with the Commission's instructions for filing privileged materials and critical energy infrastructure information in this chapter.

PART 35—FILING OF RATE SCHEDULES AND TARIFFS

■ 12. The authority citation for Part 35 is revised to read as follows:

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

■ 13. Revise § 35.37, paragraph (f) to read as follows.

§ 35.37 Market power analysis required.

* * * * *

(f) If the Seller seeks to protect any portion of a filing from public disclosure, the Seller must make its filing in accordance with the Commission's instructions for filing privileged materials and critical energy infrastructure information in § 388.112 of this chapter.

PART 157—APPLICATIONS FOR CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY AND FOR ORDERS PERMITTING AND APPROVING ABANDONMENT UNDER SECTION 7 OF THE NATURAL GAS ACT

■ 14. The authority citation for Part 157 continues to read as follows:

Authority: 15 U.S.C. 717–717z.

§ 157.21 [Amended]

■ 15. In § 157.21(h), remove the phrase ''for the submission of documents containing critical energy infrastructure information, as defined in § 388.113.'' and add the phrase ''of this chapter for the submission of documents containing privileged materials or critical energy infrastructure information.'' in its place.

§ 157.34 [Amended]

■ 16. In § 157.34(d)(4), remove the phrase ''under confidential treatment pursuant to § 388.112 of this chapter if desired.'' and add the phrase ''seeking privileged treatment pursuant to § 388.112 of this chapter.'' in its place.

PART 348—OIL PIPELINE APPLICATIONS FOR MARKET POWER DETERMINATIONS

■ 17. The authority citation for Part 348 is revised to read as follows:

Authority: 42 U.S.C. 7101–7352, 49 U.S.C. 60502; 49 App. U.S.C. 1–85 (1988).

■ 18. Revise § 348.2, paragraph (a) to read as follows:

§ 348.2 Procedures.

(a) All filings under this part must be made electronically pursuant to the requirements of §§ 341.1 and 341.2 of this chapter. A carrier seeking privileged treatment for all or any part of its filing must submit a request for privileged treatment in accordance with § 388.112 of this chapter.

* * * * *

PART 375—THE COMMISSION

■ 19. The authority citation for Part 375 is revised to read as follows:

Authority: 5 U.S.C. 551–557; 15 U.S.C. 717–717w, 3301–3432; 16 U.S.C. 791–825r, 2601–2645; 42 U.S.C. 7101–7352.

■ 20. Revise § 375.302, paragraph (b) to read as follows:

§ 375.302 Delegations to the Secretary.

* * * * *

(b) Prescribe, for good cause, a different time than that required by the Commission's Rules of Practice and Procedure or Commission order for filing by public utilities, licensees, natural gas companies, and other persons of answers to complaints, petitions, motions, and other documents.

* * * * *

PART 385—RULES OF PRACTICE AND PROCEDURE

■ 21. The authority citation for Part 385 continues to read as follows:

Authority: 5 U.S.C. 551–557; 15 U.S.C. 717–717z, 3301–3432; 16 U.S.C. 792–828c, 2601–2645; 28 U.S.C. 2461; 31 U.S.C. 3701, 9701; 42 U.S.C. 7101–7352, 16441, 16451–16463; 49 U.S.C. 60502; 49 App. U.S.C. 1–85 (1988).

§ 385.206 [Amended]

■ 22. In § 385.206, remove and reserve paragraph (e).

■ 23. Revise § 385.213, paragraphs (c)(5) and (d)(1) to read as follows:

§ 385.213 Answers (Rule 213).

* * * * *

(c) * * *

(5) When submitting with its answer any request for privileged treatment of documents and information in accordance with this chapter, a respondent must provide a public version of its answer without the information for which privileged treatment is claimed and its proposed form of protective agreement to each entity that has either been served pursuant to § 385.206(c) or whose name is on the official service list for the proceeding compiled by the Secretary.

* * * * *

(d) *Time limitations.* (1) Any answer to a motion or to an amendment to a motion must be made within 15 days after the motion or amendment is filed, except as described below or unless otherwise ordered.

(i) If a motion requests an extension of time or a shortened time period for action, then answers to the motion to extend or shorten the time period shall be made within 5 days after the motion is filed, unless otherwise ordered.

(ii) [Reserved]

* * * * *

§ 385.606 [Amended]

■ 24. In § 385.606:

■ a. In paragraph (f), remove the sentence ''See sections 385.410 and 388.112 of this chapter.''

■ b. In paragraph (j), remove the phrase ''section 388.112 of.''

PART 388—INFORMATION AND REQUESTS

■ 25. The authority citation for part 388 continues to read as follows:

Authority: 5 U.S.C. 301–305, 551, 552 (as amended), 553–557; 42 U.S.C. 7101–7352.

■ 26. Revise § 388.112 to read as follows:

§ 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 the 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 material 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 a person files material as privileged material or CEII in a complaint proceeding or other proceeding to which a right to intervention exists, that person must include a proposed form of protective agreement with the filing, or identify a protective agreement that has already been filed in the proceeding that applies to the filed material. 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 may make a written request 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 party or participant status or a copy of their motion to intervene or notice of intervention. Any person may file an objection to the proposed form of protective agreement. A filer, or any other person, may file an objection to disclosure, generally or to a particular person or persons who have sought intervention.

(iv) If no objection to disclosure is filed, the filer must provide a copy of the complete, non-public document to the requesting person 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 (b)(2)(iv) of this section 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.

§ 388.113 [Amended]

■ 27. In § 388.113(d)(1) and (d)(2), remove the phrase ''paragraph (d)(3)'' and add the phrase ''paragraph (d)(4)'' in its place.

[FR Doc. 2012–26126 Filed 10–26–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF STATE

22 CFR Part 52

[Public Notice 8074]

RIN 1400–AD27

Repeal of Regulations on Marriages

AGENCY: Department of State.

ACTION: Final rule.

SUMMARY: In accordance with Executive Order 13563, the Bureau of Consular Affairs is repealing the regulations on marriages. The current regulations are outdated and duplicative of other authorities that detail procedures for authentications and documentation of life events. Further, in light of other authorities, it is unnecessary to specifically state in the regulations how consular authority is limited.

DATES: *Effective Date:* This rule is effective October 29, 2012.

FOR FURTHER INFORMATION CONTACT: Dara Morenoff, Office of Legal Affairs, Overseas Citizen Services, U.S. Department of State, 2201 C Street NW., SA–29, Washington, DC 20520, (202) 736–4995, *morenoffdj@state.gov*.

SUPPLEMENTARY INFORMATION: This rule removes Part 52 of the Code of Federal Regulations, which relates to the consular role in marriages. The Department is removing Part 52 because it is outdated and duplicative of other federal laws and regulations. For example:

—Section 52.1 provides that consular officers may not conduct marriages or serve as witnesses to a marriage. The law authorizing consular officers to act in this capacity, 22 U.S.C. 4192, was repealed in 1990.

—Section 52.2 relates to authentication of marriage documents. This section is unnecessary because the laws and regulations that apply to authentications in general also apply to marriage documents, and these functions are already covered in 22 CFR 92.41.

—Finally, Section 52.3 is unnecessary because there is no longer demand for official certificates with respect to marriage laws in foreign countries.

Regulatory Analysis and Notices

Administrative Procedure Act

This action is being taken as a final rule pursuant to the ''good cause'' provision of 5 U.S.C. 553(b). It is the position of the Department that notice and comment are not necessary in light of the fact that Part 52 is obsolete or duplicative of other authorities.

Regulatory Flexibility Act

It is hereby certified that the repeal of these regulations will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act, 5 U.S.C. 605(b), because the issues addressed are not of an economic nature. In addition, the repeal of this regulation does not have federalism implications under E.O. 13132.

Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1532, generally requires agencies to prepare a statement before proposing any rule that may result in an annual expenditure of $100 million or more by State, local, or tribal governments, or by the private sector. This rule will not result in any such expenditure, nor will it significantly or uniquely affect small governments.

Executive Orders 12866 and 13563

The Department of State has reviewed this rule to ensure its consistency with the regulatory philosophy and principles set forth in Executive Order 12866 and has determined that the benefits of this regulation justify its costs. The Department does not consider this rule to be an economically significant action within the scope of section 3(f)(1) of the Executive Order since it is not likely to have an annual effect on the economy of $100 million or more or to adversely affect in a material way the economy, a sector of the economy, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities. The Department has considered this rule in light of Executive Order 13563, dated January 18, 2011, and affirms that this regulation is consistent with the guidance therein.

Federalism

This regulation will not have substantial direct effects on the States, on the relationship between the national government and the States, or the distribution of power and responsibilities among the various levels of government. Nor will the rule have federalism implications warranting the application of Executive Orders No. 12372 and No. 13132.

Civil Justice Reform

The Department has reviewed the regulations in light of sections 3(a) and 3(b)(2) of Executive Order No. 12988 to eliminate ambiguity, minimize litigation, establish clear legal standards, and reduce burden.