

137 FERC ¶ 61,219
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

18 CFR Parts 4, 5, 16, 33, 35, 157, 348, 375, 380, 385 and 388

Docket No. RM12-2-000

Filing of Privileged Materials and Answers to Motions

(Issued December 16, 2011)

AGENCY: Federal Energy Regulatory Commission.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: The Commission proposes changes in 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 will establish for filing purposes two categories of privileged material: 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. Second, the Commission proposes to revise its regulations to provide a single set of uniform procedures for filing privileged materials. This effort is being undertaken as part of the Commission's effort to reassess and streamline its regulations to ensure that they are efficient, effective and up to date.

Also, the Commission proposes to revise 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: Comments are due [**INSERT DATE** 60 days after publication in the **FEDERAL REGISTER**].

ADDRESSES: Comments, identified by docket number, may be filed in the following ways:

- Electronic Filing through <http://www.ferc.gov>. Documents created electronically using word processing software should be filed in native applications or print-to-PDF format and not in a scanned format.
- Mail/Hand Delivery: Those unable to file electronically may mail or hand-deliver comments to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street, NE, Washington, DC 20426.
- *Instructions:* For detailed instructions on submitting comments and additional information on the rulemaking process, see the Comment Procedures Section of this document.

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SUPPLEMENTARY INFORMATION:

137 FERC ¶ 61,219
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
and Cheryl A. LaFleur.

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

NOTICE OF PROPOSED RULEMAKING

(Issued December 16, 2011)

1. The Commission proposes changes in its rules and regulations relating to the filing of privileged material,¹ in keeping with the Commission's efforts to comply with the Paperwork Reduction Act,² the Government Paperwork Elimination Act³ and

¹ The revised regulations explain that, for the purposes of the Commission's filing requirements, information subject to an outstanding claim of exemption from disclosure under the Freedom of Information Act (FOIA) will be referred to as privileged. *See* proposed section 388.112(a)(1). Thus, material that is filed pursuant to any claim that it is privileged, confidential, commercially sensitive or Critical Energy Infrastructure Information (CEII), or otherwise constitutes material for which an exemption may be asserted under the Freedom of Information Act will be referred to as privileged. 5 U.S.C. 552; 18 CFR 388.107. One distinction outside of the proposed section 388.112 context between materials claimed to be privileged and those claimed to be CEII is that materials designated privileged may be accessed in accordance with 18 CFR 388.108, and those designated CEII in accordance with 18 CFR 388.113.

² Pub. L. No. 104-13, 109 Stat. 163 (1995).

³ Title XVII, Pub. L. No. 105-277, 112 Stat. 2681 (1998).

E-Government Act of 2002.⁴ First, the Commission proposes to establish only two categories for filing privileged material: privileged and Critical Energy Infrastructure Information (CEII). This change will expand the ability to file electronically by permitting electronic filing of material subject to protective orders in proceedings set for hearing before Administrative Law Judges (ALJ).

2. Second, the Commission proposes to revise section 388.112 of its regulations to provide a single set of uniform procedures for filing materials for which privilege is claimed in initial filings before the Commission. Under this revision, filers claiming privileged treatment will be required to include a protective agreement along with the filing and must provide the material for which privilege is claimed to intervening parties who sign the agreement. This revision will expedite the process by which privileged material is exchanged in administrative proceedings and will help facilitate the Commission's ability to review and process such filings. This effort is being undertaken as part of the Commission's effort to reassess and streamline its regulations to ensure that they are efficient, effective and up to date.⁵

⁴ Pub. L. No. 107-347, 116 Stat. 2899 (2002).

⁵ See Chairman J. Wellinghoff's July 11, 2011 News Release, "FERC to Institute Public Review of Regulations."

3. Third, the Commission proposes conforming revisions to several sections of its regulations to ensure that privileged materials are treated consistently and to bring the regulations up to date. These proposals will remove a significant paper filing requirement in the regulations (subject to the exceptions discussed below) and permit electronic filing of privileged documents in uniform formats using software that is readily available and easy to use.⁶

4. Also, the Commission proposes to revise 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 for a person to take action (for which the existing time for compliance may fall fifteen days or fewer from the date of filing) or a shortened time period for action.⁷ Instead, the time for responding to such motions will be set at five days, unless the Commission establishes another time period by notice based on the circumstances.

⁶ See Rule 2004, 18 CFR 385.2004, providing that filings conform to the requirements posted on the Commission's web site at <http://www.ferc.gov>.

⁷ 18 CFR 385.213(d) (providing for answers to motions to be filed in 15 days unless otherwise ordered).

5. The Commission seeks comment on these proposals, which are described more fully below.⁸

I. Background

6. In 2000, the Commission first permitted filers to use the Internet for submission of documents to the Commission.⁹ 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.¹⁰ In 2007, the Commission implemented eFiling 7.0 which permitted a much broader range of documents to be submitted through the eFiling interface.¹¹ 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

⁸ In addition to the proposed amendments provided following this preamble, an informational comparison has been prepared showing proposed changes to the current regulations in redline and strikeout format. This informational comparison will be provided separately in this docket.

⁹ *Electronic Filing of Documents*, Order No. 619, 65 FR 57088 (Sept. 21, 2000), FERC Stats. & Regs. ¶ 31,107 (2000).

¹⁰ See Rule 2003(c) of the Commission's Rules of Practice and Procedure, 18 CFR 385.2003(c).

¹¹ *Filing Via the Internet*, Order No. 703, FERC Stats. & Regs. ¶ 31,259 (2007) (amending Rule 2003(c)).

Commission.¹² 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.¹³ A list of qualified documents is published on the Commission's web site.¹⁴ The Secretary also is authorized to issue filing instructions.¹⁵

7. 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.¹⁶ The Commission's eRegistration system for electronic registration is required for users of its eFiling system and other specified activities.¹⁷ Filing via the Internet is optional for eligible documents.¹⁸ The eFiling system now is receiving a substantial

¹² *Electronic Tariff Filings*, Order No. 714, FERC Stats. & Regs. ¶ 31,276 (2008).

¹³ Rule 2003(c), 18 CFR 385.2003(c).

¹⁴ See <http://www.ferc.gov/docs-filing/efiling/docs-efiled.asp>.

¹⁵ Rule 2003(c)(1)(ii), 18 CFR 385.2003(c)(1)(ii); see <http://www.ferc.gov/docs-filing/efiling/user-guide.asp>.

¹⁶ Pub. L. No. 105-277, Sec. 1702-1704 (1998); see OMB Circular A-130 Paragraph 8.a.1(k).

¹⁷ 18 CFR 390.1 and 18 C.F.R. 390.2.

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

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>.

8. Currently, the Commission accepts through electronic filing all documents, including privileged and CEII material,¹⁹ except for documents submitted pursuant to an ALJ's protective order and some forms.²⁰ 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.

¹⁹ 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 and CEII material 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).

²⁰ 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.

9. The Commission's complaint and notice regulations (sections 385.206 and 385.213) also contain detailed requirements for submission of 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.²¹ 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.

10. In recent years, the Commission has been receiving a larger number of requests for privileged treatment of documents not associated with complaints or answers.²² 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

²¹ 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>.

²² See *ANR Pipeline Co.*, 129 FERC ¶ 61,080 (2009); *PPL Montana, LLC*, 113 FERC ¶ 61,231 (2005).

notices to ensure that parties could obtain access to the privileged material they needed in order to be able to participate in the proceeding.²³ 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.

II. Discussion

A. Proposed Regulations for Filing Privileged Materials

11. The Commission is proposing to revise its regulations to (1) provide two categories of privileged material for filing purposes, namely categories for privileged and CEII materials, (2) set up a uniform process (based upon the current complaint/answer process in Rules 206 and 213)²⁴ for filing and accessing privileged materials in most proceedings with a right to intervene, and (3) consolidate the Commission's regulations for submitting privileged materials in proposed section 388.112.

²³ 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), <http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=10542333>; *PJM Interconnection, L.L.C.*, Notice of Filing, Docket No. ER04-539-002 (April 30, 2004), <http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=10131785>.

²⁴ 18 CFR 385.206, -.213.

12. Under current regulations and procedures, material filed pursuant to protective orders in hearings before Administrative Law Judges must be filed on paper.²⁵ The Commission is proposing to eliminate the protected category of material and establish only two categories of non-public material: privileged or CEII. This revision will permit material filed pursuant to ALJ protective orders to be treated the same as any other privileged information; that is, this material should be filed as either privileged or CEII material. This proposal is in keeping with this Commission's intent to continue decreasing our reliance on paper documents, as far as practicable, and to continue to upgrade eFiling capabilities in furtherance of the Commission's responsibilities under the Government Paperwork Elimination Act.²⁶

13. The Commission also proposes to revise section 388.112 of its regulations to establish standardized procedures for handling the filing of privileged materials in initial filings.²⁷ In particular, for complaints and proceedings where a right to intervention exists, the Commission is proposing to utilize the same process for filing privileged

²⁵ Order No. 703, FERC Stats. & Regs. ¶ 31,259 at P 2, 9, 16; Federal Energy Regulatory Commission eFiling v7.0 User Guide, at 2 (<http://www.ferc.gov/docs-filing/efiling-user-guide.pdf>).

²⁶ Pub. L. No. 105-277, § 1704, 112 Stat. 2681, 2681-750 (1998).

²⁷ The Commission is not changing procedures or provisions that apply to submission of documents pursuant to an investigation conducted under Part 1b of the Commission's regulations. 18 CFR Part 1b; *see also* 18 CFR 385.101(b)(1).

information that is currently found in the Commission's complaint and answer rules (sections 385.206 and 385.213).²⁸ The complaint process is the model for the procedures under proposed section 388.112, which, upon adoption, may be used to file and access privileged and CEII material in all types of proceedings where a right to intervene exists. Under this process (subject to the exceptions discussed below), the participant requesting privileged or CEII treatment will submit a public request for privileged or CEII treatment of documents, a public document with privileged and CEII information redacted, a privileged unredacted document, and a proposed form of protective agreement. The filer must serve the public, redacted copy on appropriate persons and must provide a copy of the unredacted document to participants and persons who have filed a notice of intervention or motion to intervene and signed the protective agreement.²⁹

14. Filers that have specific reasons for not providing privileged or CEII material to a person or persons may file with the Commission an objection with a justification for not providing such information. In statutory proceedings with statutory deadlines, such as rate filings under section 4 of the Natural Gas Act or section 205 of the Federal Power Act, filers that choose not to provide privileged or CEII information to all or certain

²⁸ For rulemaking proceedings, interested persons may continue to seek privileged or CEII information through the Commission's existing procedures in 18 CFR 388.108 and 18 CFR 388.113.

²⁹ See proposed section 388.112(b)(2) (ii).

persons should be aware that a failure to provide the privileged information pursuant to a protective agreement may result in a suspension of the filing, rejection or other delays in the processing of the application.³⁰

15. We discuss below the specific changes to section 388.112, as well as the procedures that will apply to requests for privileged or CEII treatment. The Commission seeks comment on its proposal, as described more fully below.

1. Proposed Revisions to Section 388.112

16. In this rulemaking, the Commission proposes to revise and expand section 388.112 of its regulations, which governs requests for privileged treatment, to establish a uniform set of procedures to file all requests for privileged and CEII treatment, privileged materials and accompanying public versions of documents. In addition, the proposed revisions incorporate procedures for releasing privileged information to participants to Commission proceedings, modeled after the filing procedures contained in the Commission's existing complaint procedures.³¹ The proposed revisions are as follows:

- a. Proposed section 388.112(a)(1) clarifies that the term privileged materials refers to information subject to an outstanding claim of exemption from

³⁰ See the Commission's Guidelines for Filing Critical Energy Infrastructure Information, noting the potential for rejection of applications in which information is mislabeled as CEII.

³¹ 18 CFR 385.206(e).

disclosure under FOIA, including CEII.³² The proposed changes retain the disclaimer that by 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 privileged or CEII status.³³

- b. The procedures for filing privileged and CEII material in proposed section 388.112(b) retain the requirement that a filer include a justification for privileged treatment in its filing, following the procedures posted on the Commission's website at <http://www.ferc.gov>.³⁴
- c. Following the model in the Commission's complaint rule, proposed 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, using privilege and CEII headings.
- d. When requesting privileged treatment of such materials, the proposed regulations require a person filing materials in a complaint proceeding or other proceeding in which a right to intervene exists to include a public, redacted copy of the filing and a proposed form of protective agreement³⁵

³² See also 18 CFR 388.107(g); 18 CFR 388.113 (defining CEII materials as exempt from mandatory disclosure under FOIA, providing that CEII be filed under section 388.112(b), and establishing alternative procedures for making CEII available).

³³ See proposed section 388.112(c)(i).

³⁴ See the "Submission Guidelines" on the eFiling link at <http://www.ferc.gov>.

³⁵ Proposed section 388.112(b)(2). We intend that the proposed protective agreement will be self implementing and not require action or approval by the Commission. That is, following the proposed procedures discussed below, once a person signs the proposed protective agreement and returns it to the party submitting privileged material, including CEII, the submitter is expected to provide the material promptly to a requester, consistent with proposed section 388.112(b)(2). The Commission's Model Protective Order may be used as a guide for protective agreements, as 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).

to be filed with public status (as denoted in eLibrary). The public version should be prepared with the privileged information redacted to the extent practicable. If a document or filing contains both public and privileged material, the Commission expects filers to prepare and 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.³⁶

- e. The proposed regulations provide that a filer must serve the public, redacted version of the filing on the appropriate persons, that is, those required by Commission rule or order, or by law.³⁷ For materials filed in a complaint proceeding or any proceeding for which a right of intervention exists, the filer must serve the public, redacted materials and proposed form of protective agreement on the entities required to be served.³⁸
- f. The proposed regulations provide that persons may obtain access to the privileged materials by making a written request to the filer for a copy of the complete unredacted document, including an executed copy of the protective agreement and a statement of its right to party or participant status or a copy of its intervention.³⁹ The filer is obligated to provide a

³⁶ *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).

³⁷ *See* proposed section 388.112(b)(2)(ii).

³⁸ *E.g.*, 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.

³⁹ Trial Staff, as identified in 18 CFR 385.102(b)(2), should be treated similarly to other persons making a request.

complete, unredacted copy of the document to a person submitting such a request within 5 days after receipt or file an objection with the Commission.⁴⁰

- g. The proposed regulations establish 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. Thus, filers are not automatically required to provide intervenors with such material.⁴¹ The proposed 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 proposed regulations retain provisions permitting the Commission to request full size maps in licensing applications under section 4.32(d) of its rules and regulations.⁴²
- h. 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.
- i. Under proposed 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

⁴⁰ Proposed section 388.112(b)(2)(iv). The Commission uses the term "privileged" to refer to items that are claimed to be exempt from disclosure under FOIA. Use of this term 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.

⁴¹ See proposed 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).

⁴² 18 CFR 4.32(d).

order, according to policies established by the Commission's Office of Administrative Law Judges.⁴³

- j. For convenience, other regulations containing procedures for filing privileged materials will be revised to reference section 388.112 as the regulation governing all filings containing privileged or CEII material.⁴⁴ Consequently, we propose to remove duplicate provisions for filing privileged materials, and consolidate provisions relating to submittal of and access to privileged material in section 388.112.⁴⁵ Conforming changes are proposed throughout the Commission's regulations.

2. eFiling Procedures

17. Under the eFiling procedures, when a user accesses the File Upload screen, the user will see tabs for three submission categories: Public, Privileged, and CEII. The current eFiling procedures are not being changed and are consistent with the proposed

⁴³ 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.*

⁴⁴ Changes to consolidate and supersede current procedures for filing privileged material are proposed to 18 CFR 33.8(a) and 33.9 (merger procedures), 18 CFR 35.37(f) (market based rate applications), 348.2(a) (oil pipeline market power application procedures), 380.12(f)(4) and 380.16(f)(4) (environmental reports for Natural Gas Act and Federal Power Act section 216 applications), 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 proposed 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).

⁴⁵ In certain instances, we have kept the reference as a guide to practitioners in a particular Commission program.

revisions for filing privileged materials.⁴⁶ Filers can upload multiple files under each security class or they may upload .zip files containing numerous files if the files all have the same security class.⁴⁷ If a user submits both a redacted and a privileged form of a document, the latter should be submitted as privileged and the former as public. The form of protective agreement should be included with the public version.

18. In some instances, a document may contain portions that are privileged and other portions that constitute CEII. In such an instance, the public, privileged, and the CEII portions should be separated. The CEII portions would be filed as CEII and the privileged portions would be filed separately and designated as privileged.

19. Parties retain the ability to file privileged or CEII material in paper-only format (with the exception of materials subject to our electronic tariff filing requirements), unless otherwise required.⁴⁸ With the exception of filings by regulated entities subject to

⁴⁶ See Order No. 703, FERC Stats. & Regs. ¶ 31,259 at P 12-14 (discussing procedures).

⁴⁷ A .zip file cannot contain other embedded .zip files or .exe files. For ease of access, all components of a document (public, privileged, and/or CEII) are linked and made available under the Document Components tab in eLibrary, with each component assigned an accession number and appropriate security designation.

⁴⁸ Filers submitting paper filings should conform their filings to the requirements for paper filing posted on the Commission's web site, <http://www.ferc.gov>, pursuant to Rule 2004. 18 CFR 385.2004.

our eTariff requirements,⁴⁹ filers who do not wish to use eFiling need not do so. Filers are not permitted to split their filings into an electronic component and a paper component, as the Commission cannot assume the responsibility for merging paper and electronic components of a single filing.

3. **Miscellaneous Revisions and Merger Application Requirements**

20. The Commission has reviewed its existing regulations and proposes to revise various provisions to bring them up to date with the Commission's practices and ensure clarity and consistency with the revisions proposed herein. Generally, we are proposing revisions to reflect the fact that there will be only one regulation for submission of privileged materials, proposed section 388.112.

21. Accordingly, the Commission proposes to revise its requirements for filing merger applications to likewise make these regulations dovetail with the proposed filing requirements for privileged materials. We propose to remove from section 33.8 provisions specific to the merger program that relate to privileged materials, including

⁴⁹ Under the Commission eTariff procedures, every attachment must have an Attachment Security Level code for three submission categories: Public, Privileged, and CEII. The current Attachment Security Level codes are not being changed and are consistent with the proposed revisions for filing privileged materials. Implementation Guide for Electronic Filing of Parts 35, 154, 284, 300, and 341 Tariff Filings, found on the Commission's website: <http://www.ferc.gov/docsfiling/etariff/implementation-guide.pdf>.

provisions providing for the number of non-public copies to be filed when applicants file privileged material. These merger specific provisions will be superseded by proposed section 388.112.

22. Furthermore, we propose to remove the requirement in section 33.8 establishing the number of copies to be submitted and propose that applicants be required to submit their application or petition in accordance with filing procedures posted on the Commission's web site at <http://www.ferc.gov>.⁵⁰ These procedures were recently updated to include a requirement that 3 courtesy copies of an application be delivered to the Office of Energy Market Regulation (OEMR) for the use of the merger analysts (including public and non-public format, if applicable, and copies of CDs or other digital media containing the studies and competitive analyses required by 18 CFR 33.3 and 33.4).⁵¹ Once section 33.8 is revised, applicants will only need to file the number of copies specified in the filing procedures posted on the web site, and provide the courtesy copies to OEMR.

⁵⁰ *See also* proposed section 33.8. The "Quick Reference Guide for Paper Submissions" (revised Oct. 1, 2011) adopted the courtesy copy requirement for merger applications and is available via the Documents and Filing section of <http://www.ferc.gov>.

⁵¹ 18 CFR 385.2004. This is a reduction of the requirement to file 7 copies.

B. Rule 213(d) – Proposed Timeline for Responding to Motions Requesting Extensions of Time

23. Another procedural issue recently has arisen which highlights the need to revise the Commission's regulations regarding the time period for filing answers to motions seeking extensions of time. Under Commission regulations, the standard time for filing an answer to a motion is 15 days, including motions requesting procedural relief such as an extension of time.⁵² In many cases, filers do not make such filings until less than 15 days remains before the substantive filing is due, and the Commission, therefore, frequently has less than 15 days on which to act on such motions.⁵³ There also may be cases in which filers make the request outside of the 15 day period, but, for planning purposes, need to know whether their request will be granted. In most cases, such procedural filings are not controversial or complex, so any issues that might arise can be addressed with a shorter answer period. The Commission therefore proposes to revise Rule 213(d) 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

⁵² Authority to act on motions for extensions of time is delegated to the Secretary of the Commission and to Office Directors. 18 CFR 375.302(f); 375.303(b)(1)(ii); 375.307 (b)(1)(ii); 375.308(c)(4).

⁵³ See *Black Oak Energy, L.L.C. v. PJM Interconnection, L.L.C.*, 131 FERC ¶ 61,024, at P 29, 43 (2010) (denying rehearing of Commission's grant of extension of time for failure to provide 15 days for answer).

is to occur, will be due five days⁵⁴ from the date on which the motion was filed, unless otherwise ordered.⁵⁵

24. Given the lack of complexity attendant to such motion filings, the five-day shortened notice period appears to strike a reasonable balance between the interests of those needing to request relief on short notice and those having to respond to such motions. The Commission, however, seeks comment on whether additional or less time would effect a better balance of interests.

25. In addition, a related change is being proposed to the Secretary's delegation authority under 18 CFR 375.302(b) to revise the regulation to make clear the delegated authority of the Secretary of the Commission to address shortened answer periods for requests for extension of time. The delegated authority of other office directors also permits them to respond to such requests.⁵⁶ Exercise of such authority will help expedite requests for extension of time.

⁵⁴ Pursuant to Rule 2007, if the day for responding falls on a weekend or other day on which the Commission is closed, the response is due by the close of the next day on which the Commission remains open. *See* 18 CFR 385.2007(a)(2). The Commission intends that, subject to Rule 2007, answers would be filed in five calendar days.

⁵⁵ The Commission ordinarily will not issue a notice of the request for extension or expedited treatment, since parties will be served with such requests.

⁵⁶ *See* 18 CFR 375.307 (b)(1)(ii).

III. Information Collection Statement

26. Office of Management and Budget (OMB) regulations require OMB to approve certain information collection requirements imposed by agency rule.⁵⁷ This proposed rule does not contain any information collection requirements and compliance with the OMB regulations is thus not required. For those filers of certain privileged material that now choose to file electronically there should be a reduction in burden due to the efficiencies and ease associated with electronic submission. The Commission is submitting a copy of this proposed rulemaking to OMB for informational purposes.

IV. Environmental Analysis

27. 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.⁵⁸ This proposed 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

⁵⁷ 5 CFR 1320.12.

⁵⁸ *Regulations Implementing the National Environmental Policy Act of 1969*, Order No. 486, 52 FR 47897 (Dec. 17, 1987), FERC Stats. & Regs. ¶ 30,783 (1987).

for procedural, ministerial or internal administrative actions.⁵⁹ This proposed rulemaking is exempt under that provision.

V. Regulatory Flexibility Act Certification

28. The Regulatory Flexibility Act of 1980 (RFA)⁶⁰ 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 proposed 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.⁶¹ 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.⁶²

⁵⁹ 18 CFR 380.4(1) and (5).

⁶⁰ 5 U.S.C. §§ 601-612.

⁶¹ 13 C.F.R. 121.101 (2011).

⁶² 13 C.F.R. 121.201, Sector 22 Utilities & n.1.

29. This proposed rule concerns procedural matters and is expected to increase the ease and convenience of filing.⁶³ 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.

VI. Comment Procedures

30. The Commission invites interested persons to submit comments on the matters and issues proposed in this notice to be adopted, including any related matters or alternative proposals that commenters may wish to discuss. Comments are due **[INSERT DATE 60 days after publication in the FEDERAL REGISTER]**. Comments must refer to Docket No. RM12-2-000, and must include the commenter's name, the organization they represent, if applicable, and their address in their comments.

31. The Commission encourages comments to be filed electronically via the eFiling link on the Commission's web site at <http://www.ferc.gov>. The Commission accepts most standard word processing formats. Documents created electronically using word processing software should be filed in native applications or print-to-PDF format and not

⁶³ 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.

in a scanned format. Commenters filing electronically do not need to make a paper filing.

32. Commenters that are not able to file comments electronically must send an original of their comments to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street, NE, Washington, DC 20426.

33. All comments will be placed in the Commission's public files and may be viewed, printed, or downloaded remotely as described in the Document Availability section below. Commenters on this proposal are not required to serve copies of their comments on other commenters.

VII. Document Availability

34. 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 the Commission's Home Page (<http://www.ferc.gov>) and in the Commission'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.

35. From the Commission'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

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document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

36. User assistance is available for eLibrary and the Commission's web site during normal business hours from FERC Online Support at (202) 502-6652 (toll free at 1-866-208-3676) or e-mail at ferconlinesupport@ferc.gov, or the Public Reference Room at (202) 502-8371, TTY (202) 502-8659. E-mail the Public Reference Room at public.referenceroom@ferc.gov.

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, Reporting and recordkeeping requirements.

Electric Utilities, Reporting and recordkeeping requirements, Securities.

18 CFR Part 33

Electric utilities, Reporting and recordkeeping requirements.

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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 380

Environmental impact statements, Reporting and recordkeeping requirements.

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 direction of the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

In consideration of the foregoing, the Commission proposes to amend Parts 4, 5, 16, 33, 35, 157, 348, 380, 375, 385, 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.

2. In § 4.39, paragraph (e), delete 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. 791a–825v, 2601–2645; 42 U.S.C. 7101–7352.

4. Revise the heading and text of § 5.29, paragraph (c) as set forth below:

§ 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–825v, 2601–2645; 42 U.S.C. 7101–7352.

6. In § 16.8, paragraph (g), insert the phrase “or Critical Energy Infrastructure Information” after the word “privileged” in the introductory sentence.

PART 33—APPLICATIONS UNDER FEDERAL POWER ACT SECTION 203

7. The authority citation for Part 33 should be revised to read as follows:

Authority: 16 U.S.C. 791a–825v, 2601–2645; 31 U.S.C. 9701; 42 U.S.C. 7101–7352; Pub. L. No. 109-58, 119 Stat. 594.

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 the Commission's regulations, 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.

9. Revise § 33.9 to read as follows:

§ 33.9 **[Reserved]**.

PART 35 — FILING OF RATE SCHEDULES AND TARIFFS

10. The authority citation for Part 35 should be revised to read as follows:

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

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

(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**

12. The authority citation for Part 157 should continue to read as follows:

Authority: 15 U.S.C. 717–717w.

13. In § 157.21, paragraph (h), delete the phrase “for the submission of documents containing critical energy infrastructure information, as defined in § 388.113.” and insert the phrase “of this chapter for the submission of documents containing privileged materials or critical energy infrastructure information.” in its place.

14. In § 157.34, paragraph (d)(4), delete the phrase “under confidential treatment pursuant to § 388.112 of this chapter if desired.” and insert the phrase “seeking privileged treatment pursuant to § 388.112 of this chapter.” in its place.

**PART 348— OIL PIPELINE APPLICATIONS FOR MARKET POWER
DETERMINATIONS**

15. The authority citation for Part 348 should be revised to add the date reference “(1988)” following the citation “49 App. U.S.C. 1–85” as follows:

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

16. 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

17. 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. 791–825v, 2601–2645; 42 U.S.C. 7101–7352.

18. 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 380—REGULATIONS IMPLEMENTING THE NATIONAL ENVIRONMENTAL POLICY ACT

17. The authority citation for Part 380 continues to read as follows:

Authority: 42 U.S.C. 4321–4370a, 7101–7352; E.O. 12009, 3 CFR 1978

Comp., p. 142.

18. In § 380.12, paragraph (f)(4), and § 380.16, paragraph (f)(4), delete the second sentence reading “The cover and relevant pages or portions of the report should be clearly labeled in bold lettering: “CONTAINS PRIVILEGED INFORMATION—DO NOT RELEASE.”

PART 385—RULES OF PRACTICE AND PROCEDURE

19. 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. 791a–825v, 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).

20. Delete the text of § 385.206, paragraph (e) and insert “[**Reserved**].” in its place.

21. Revise § 385.213, paragraph (c)(5) to read as follows:

§ 385.213 Answers (Rule 213).

* * * * *

(c) *Contents.* * * *

(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.

22. Revise § 385.213, paragraph (d)(1) to read as follows:

* * * * *

(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.

(2) * * *

23. In § 385.606, paragraph (f), delete the sentence “See sections 385.410 and 388.112 of this chapter.” and in paragraph (j), delete the phrase “section 388.112 of”.

PART 388 – INFORMATION AND REQUESTS

24. 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.

25. 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 filing procedures posted on the Commission's web site at <http://www.ferc.gov>. A person requesting that a document filed with the Commission be treated as privileged or CEII must designate the document as privileged or CEII in making an electronic filing or clearly indicate a request for such treatment on a paper filing. The cover page and pages

or portions of the document containing material for which privileged treatment is claimed should be clearly labeled in bold, capital lettering, indicating that it contains privileged, confidential and/or Critical Energy Infrastructure Information, as appropriate, and marked "DO NOT RELEASE." The filer also must submit to the Commission a public version with the information that is claimed to be privileged redacted, to the extent practicable.

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

- (i) If material is filed as privileged or CEII in a complaint proceeding or other proceeding to which a right to intervention exists, a proposed form of protective agreement must be included with the filing. 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 (iv) to provide intervenors with landowner lists and the other materials identified in the previous sentence.

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

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

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

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

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

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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.

26. In § 388.113, paragraph (d)(1) and paragraph (d)(2), delete the phrase “paragraph (d)(3)” and insert the phrase “paragraph (d)(4)” in its place.

Document Content(s)

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