

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

Filing of Privileged Materials and Answers to )  
Motions )

Docket No. RM12-2-000

**COMMENTS OF THE  
INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA**

Pursuant to the Notice of Proposed Rulemaking (NOPR) issued by the Federal Energy Regulatory Commission (FERC or Commission), 137 FERC ¶ 61,219 (2011), regarding the Commission's proposal to revise its regulations regarding the filing of privileged material and critical energy infrastructure information (CEII) and the timeframe permitted for responding to motions requesting an extension of time,<sup>1</sup> the Interstate Natural Gas Association of America (INGAA) submits the following comments.

INGAA is a non-profit trade association that represents the interstate and interprovincial natural gas pipeline industry operating in North America. INGAA is comprised of 27 members, representing the vast majority of the interstate natural gas transmission pipeline companies in the U.S. and comparable companies in Canada. INGAA's members, who operate approximately 200,000 miles of pipelines, are regulated by the Commission pursuant to the Natural Gas Act, 15 U.S.C. §§ 717-717w.

**BACKGROUND**

In this NOPR, the Commission is proposing to revise 18 C.F.R. § 388.112 (2011) to provide for a single set of uniform procedures for the filing of privileged material and CEII. As proposed, the revised regulations would eliminate the protective category of material and

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<sup>1</sup> *Filing of Privileged Materials and Answers to Motions*, Notice of Proposed Rulemaking, 137 FERC ¶ 61,219 (2011).

establish two categories of non-public material: privileged material and CEII.<sup>2</sup> The Commission's proposal also would permit materials subject to an Administrative Law Judge protective order to be filed electronically as either privileged or CEII.

In addition, the Commission is proposing to revise Rule 213(d) of its Rules of Practice and Procedure, 18 C.F.R. 385.213(d), 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. The Commission's proposal, if adopted, would reduce the time for responding to such motions to five days, unless another time period is established by Commission. The Commission also proposes to clarify that in addition to the Secretary of the Commission, it will delegate authority to respond to such motions to other office directors.<sup>3</sup>

## COMMENTS

INGAA appreciates the Commission's continued effort to streamline its regulations consistent with the Chairman's work to ensure that regulations are efficient, effective and up to date.<sup>4</sup> INGAA generally is supportive of the Commission's proposal to establish a set of uniform procedures for filing privileged and CEII materials and for shortening the timeline for answering motions for an extension of time. At the same time, INGAA is concerned with specific elements of the NOPR. These comments articulate INGAA's concerns and provide solutions that further the NOPR's underlying policies and objectives.

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<sup>2</sup> INGAA is requesting that the Commission replace the term "privileged" in the Commission's regulations with the term "protected." However, for purposes of these comments, INGAA retains use of the term "privileged" as used in the NOPR.

<sup>3</sup> See 18 C.F.R. § 375.307(b)(1)(ii).

<sup>4</sup> See Chairman J. Wellinghoff's July 11, 2011 News Release, "FERC to Institute Public Review of Regulations."

**I. INGAA Supports the Commission’s Proposal to Reduce the Timeframe for Answering Motions Requesting Extension of Time.**

INGAA generally supports the Commission’s proposal to reduce the timeframe for responding to motions requesting an extension of time to five days as proposed in revised § 385.213(d)(1)(i). In association with this proposed change, however, it appears that the Commission may have inadvertently proposed to delete part of a related regulation, 18 C.F.R. § 375.302(b), which provides that “[a]bsent 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.”<sup>5</sup> As proposed in the NOPR, it appears that the proposed deletion would grant the Secretary, or the Secretary’s designee, authority to shorten any answer period, including a pipeline’s ability to respond to a complaint, not just a motion for extension of time, to any period with no minimum specified. The Commission has not provided any justification for removal of this provision which would result in a wholesale change. Companies should continue to be provided adequate time to answer complaints, petitions, and other motions that do not request an extension of time. Accordingly, INGAA requests that the Commission maintain the provision permitting a 10-day minimum period for answering complaints, petitions, motions and other documents that do not request an extension of time pursuant to 18 C.F.R. § 375.302(b).

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<sup>5</sup> The Commission authorizes the Secretary, or the Secretary’s designee to: “Except as provided in § 385.213 of this chapter, 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. Absent a waiver, no answers will be required to be filed by party within less than ten days after the date of service of the document.” See 18 C.F.R. § 375.302(b).

## **II. Pipelines Should Not Be Required to Provide Privileged or CEII Materials to Parties Who Have Not Yet Been Granted Intervenor Status.**

Modeled after the Commission's current rules for how a complainant seeks privileged treatment under 18 C.F.R. § 385.206(e), the Commission's proposed revisions to § 388.112 would require a filer to serve privileged material or CEII to parties who have filed a notice or motion to intervene and who have signed a protective agreement. Specifically, the Commission proposes that:

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. Proposed Section 388.112(b)(2)(iii).

In addition, the proposed regulation would require that "[i]f no objection 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."<sup>6</sup> Further, "[i]f 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."<sup>7</sup>

INGAA asserts that a filer should not be required to provide privileged materials to parties who have not yet been granted intervention. The Commission's Rules of Practice and Procedure require that "[a]ny person seeking to intervene to become a party, other than the entities specified in paragraphs (a)(1) and (a)(2) of the section, must file a motion to intervene,"<sup>8</sup> where such motions must demonstrate in sufficient factual detail the movant's right to participate

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<sup>6</sup> Proposed § 388.112(b)(2)(iv).

<sup>7</sup> *Id.*

<sup>8</sup> 18 C.F.R. § 385.214(a)(3).

and how they would be directly affected by the outcome of the proceeding. However, the act of filing to intervene, alone, does not automatically grant the filer party status. Importantly, the regulations state that party status is granted either if no answer in opposition to a timely motion to intervene is filed<sup>9</sup> or, if an answer in opposition to a timely motion to intervene is filed, the movant becomes a party only when the motion is expressly granted.<sup>10</sup>

Accordingly, INGAA requests that a filer should be required to provide privileged materials and CEII under the protection of a protective order only to those participating in the proceeding (i.e., the parties and intervenors), not those who have not yet been granted intervenor status.

### **III. Filers Should Not Have to Serve Public Versions of Documents that Are Completely Redacted.**

The stated purpose of these rules is to “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.” NOPR at P. 2. Providing copies of public, completely redacted documents neither facilitates that process by which the filer exchanges the privileged materials with the requester nor facilitates the Commission’s review process. Redacting an entire document can be burdensome to the filer and circulation of such document does not provide any benefit to its recipients. For documents that are fully redacted, companies should be permitted to comply with proposed § 388.112(b)(1) by submitting, in its cover page requesting privileged treatment, a statement that the entire document contains privileged, confidential and/or CEII treatment, and a short title or description of the type of information it contains. In this case, the cover page should fulfill the Commission’s objective of making a public version available, “to

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<sup>9</sup> See 18 C.F.R. 385.214(c)(1).

<sup>10</sup> See 18 C.F.R. 385.214(c)(2).

the extent practicable,”<sup>11</sup> without providing the fully redacted document. INGAA requests clarification that this treatment of fully redacted documents would comply with proposed § 388.112(b)(1). If a filer requests privileged treatment of a document that is partially redacted, companies should continue to serve partially redacted public documents.

#### **IV. The Commission Should Clarify that Reference to “Privileged Materials” in This Section Does Not Refer to Common Law Privileges.**

As the Commission recognizes in fn. 40 of the NOPR, “[t]he 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 work product privilege.” Despite this clarification in the NOPR preamble, the regulations do not specifically exclude common law privileged material from disclosure under § 388.112. In addition, use of the term “privileged material” in § 388.112 and related sections of the Commission’s regulations<sup>12</sup> is a misnomer, and has the potential of being misleading, in that “privileged” material ordinarily is referred to as material that is not required to be produced, even under protective order. For example, a filer is not required to produce, much less serve on all parties, a document that qualifies for the attorney-client privilege. The same would apply to documents that qualify for the settlement privilege, a privilege frequently in play at the Commission. In order to avoid confusion, INGAA suggests that the Commission revise § 388.112 and related regulations identified in footnote 12 herein and replace the term “privileged material” with the term “protected material.” Referring to information in § 388.112 as “protected material” would remove any confusion with attorney-client, settlement and other

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<sup>11</sup> “The filer must also submit to the Commission a public version with the information that is claimed to be privileged redacted, *to the extent practicable*.” Proposed Section 388.112(b)(1) (Italics added).

<sup>12</sup> As listed by cross-reference in the NOPR, use of the term “privileged” material(s) or information also appears in proposed sections 4.39(e), 5.29(c), 16.8(g), 33.8, 35.37(f), 157.21(h), 157.34(d)(4), 348.2(a), 375.302(b), 380.12(f)(4), 380.16(f)(4), 385.213(c)(5), 385.213(d), and 386.606(f)-(g) of the Commission’s regulations.

common law privilege categories and would facilitate what information is required to be produced. If the Commission, however, decides to retain the term “privileged material,” INGAA suggests that the Commission revise the scope of § 388.112 of its regulations to explicitly exempt documents protected under common law privilege from mandatory public disclosure under § 388.112.

### **CONCLUSION**

Wherefore, for the following reasons, INGAA requests that the Commission grant INGAA’s clarifications as detailed herein.

Respectfully submitted,

/s/

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