

Federal Energy Regulatory Commission

§ 388.102

makes or causes to be made a prohibited off-the-record communication, the Commission may require the party, agent, or representative to show cause why the party's claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected because of the prohibited off-the-record communication.

(2) If a person knowingly makes or causes to be made a prohibited off-the-record communication, the Commission may disqualify and deny the person, temporarily or permanently, the privilege of practicing or appearing before it, in accordance with Rule 2102 (Suspension).

(3) Commission employees who are found to have knowingly violated this rule may be subject to the disciplinary actions prescribed by the agency's administrative directives.

(j) *Section not exclusive.* (1) The Commission may, by rule or order, modify any provision of this section as it applies to all or part of a proceeding, to the extent permitted by law.

(2) The provisions of this section are not intended to limit the authority of a decisional employee to decline to engage in permitted off-the-record communications, or where not required by any law, statute or regulation, to make a public disclosure of any exempted off-the-record communication.

[Order 607-A, 65 FR 71254, Nov. 30, 2000, as amended by Order 623, 66 FR 67482, Dec. 31, 2001]

§ 385.2202 Separation of functions (Rule 2202).

In any proceeding in which a Commission adjudication is made after hearing, no officer, employee, or agent assigned to work upon the investigation or trial of the proceeding or to assist in the trial thereof, in that or any factually related proceeding, shall participate or advise as to the findings, conclusion or decision, except as a witness or counsel in public proceedings.

PART 388—INFORMATION AND REQUESTS

Sec.

388.101 Scope.

388.102 Notice of proceedings.

388.103 Notice and publication of decisions, rules, statements of policy, organization and operations.

388.104 Informal advice from Commission staff.

388.105 Procedures for press, television, radio, and photographic coverage.

388.106 Requests for Commission records available in the Public Reference Room.

388.107 Commission records exempt from public disclosure.

388.108 Requests for Commission records not available through the Public Reference Room (FOIA requests).

388.109 Fees for record requests.

388.110 Procedure for appeal of denial of requests for Commission records not publicly available or not available through the Public Reference Room, denial of requests for fee waiver or reduction, and denial of requests for expedited processing.

388.111 Procedures in event of subpoena.

388.112 Requests for privileged treatment of documents submitted to the Commission.

388.113 Accessing critical energy infrastructure information.

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

SOURCE: Order 488, 53 FR 1473, Jan. 20, 1988, unless otherwise noted.

§ 388.101 Scope.

This part prescribes the rules governing public notice of proceedings, publication of decisions, requests for informal advice from Commission staff, procedures for press, television, radio and photographic coverage, requests for Commission records, requests for confidential treatment of documents submitted to the Commission, procedures for responding to subpoenas seeking documents or testimony from Commission employees or former employees, fees for various requests for documents, and requests for reduction or waiver of these fees.

§ 388.102 Notice of proceedings.

(a) Public sessions of the Commission for taking evidence or hearing argument; public conferences and hearings before a presiding officer; and public conferences or hearings in substantive rulemaking proceedings, will not be held except upon notice.

(b) Notice of applications, complaints, and petitions, is governed by Rule 2009 (notice) in part 385 of this

chapter. Notice of applications for certificates of public convenience and necessity under section 7 of the Natural Gas Act is governed by §157.9 of this chapter (notice of application). Notice of public sessions and proceedings and of meetings of the Commission is governed by Rule 2009 (notice) in part 385 of this chapter. Notice of hearings and of initiation or pendency of rulemaking proceedings is governed by Rule 1903 (notice in rulemaking proceedings) in part 385 of this chapter. Notice of application under Part I of the Federal Power Act for preliminary permits and licenses is governed by §§4.31 and 4.81 of this chapter (acceptance or rejection and contents). Notice of proposed alterations or surrenders of license under section 6 of the Federal Power Act may be given by filing and publication in the FEDERAL REGISTER as stated in Rule 1903 (notice in rulemaking proceedings) in part 385 of this chapter, and where deemed desirable by the Commission, by local newspaper advertisement. Notice of rates charged and changes therein is governed by the filing requirements of subchapters B and E of this chapter (regulations under the Federal Power Act and regulations under the Natural Gas Act). Other notice required by statute, rule, regulation, or order, or deemed desirable, may be given by filing and publication in the FEDERAL REGISTER as governed by Rule 1903 in part 385 of this chapter (notice in rulemaking proceedings) or by service as governed by Rule 2010 (service) in part 385 of this chapter.

§ 388.103 Notice and publication of decisions, rules, statements of policy, organization and operations.

Service of intermediate and final decisions upon parties to the proceedings is governed by Rule 2010 (service) in part 385 of this chapter. Descriptions of the Commission's organization, its methods of operation, statements of policy and interpretations, procedural and substantive rules, and amendments thereto will be filed with and published in the FEDERAL REGISTER. Commission opinions together with accompanying orders, Commission orders, and intermediate decisions will be released to the press and made available to the

public promptly. Copies of Commission opinions, orders in the nature of opinions, rulemakings and selected procedural orders, and intermediate decisions which have become final are published in the *Federal Energy Guidelines* and upon payment of applicable charges, may be obtained from: Commerce Clearing House, Inc. 4025 West Peterson Avenue, Chicago, Illinois 60646. Attention: Order Department.

§ 388.104 Informal advice from Commission staff.

(a) The Commission staff provides informal advice and assistance to the general public and to prospective applicants for licenses, certificates, and other Commission authorizations. Opinions expressed by the staff do not represent the official views of the Commission, but are designed to aid the public and facilitate the accomplishment of the Commission's functions. Inquiries may be directed to the chief of the appropriate office or division.

(b) Any inquiry directed to the Chief Accountant that requires a written response must be accompanied by the fee prescribed in §381.301 of this chapter.

(c) A request directed to the Office of the General Counsel for a legal interpretation of any statute or implementing regulation under the jurisdiction of the Commission must be accompanied by the fee prescribed in §381.305 of this chapter.

[53 FR 15383, Apr. 29, 1988]

§ 388.105 Procedures for press, television, radio, and photographic coverage.

(a) The Commission issues news releases on major applications, decisions, opinions, orders, rulemakings, new publications, major personnel changes, and other matters of general public interest. Releases are issued by and available to the media from the Office of External Affairs. Releases may be obtained by the public through the Public Reference Room.

(b) Press, television, radio and photographic coverage of Commission proceedings is permitted as follows:

(1) Press tables are located in each hearing room, and all sessions of hearings are open to the press, subject to

standards of conduct applicable to all others present;

(2) Television, movie and still cameras, and recording equipment are permitted in hearing rooms prior to the opening of a hearing or oral arguments, and during recesses, upon prior arrangement with the Commission or presiding administrative law judge. All equipment must be removed from the room before hearings or oral arguments begin or resume;

(3) Television, movie and still cameras, and recording equipment may not be used while hearings and oral arguments before administrative law judges are in progress;

(4) Television and press cameras and recording equipment may be used at Commission press conferences under prior arrangement with the Office of External Affairs, provided their use does not interfere with the orderly conduct of the press conference;

(5) Regulations pertaining to the use of television, movie and still cameras, and recording equipment in connection with the Commission's open public meetings under the Government in the Sunshine Act are found in §375.203 of this chapter.

§ 388.106 Requests for Commission records available in the Public Reference Room.

(a)(1) A Public Reference Room is maintained at the Commission's headquarters and is open during regular business hours as provided in §375.101(c) of this chapter. Documents may be obtained in person or in writing from the Public Reference Room by reasonably describing the records sought.

(2) Documents created by FERC on or after November 1, 1996, or earlier in some instances, also are electronically available on the Commission's World Wide Web site, (www.ferc.fed.us), and the Bulletin Board Network. All public documents created or received by the Commission since November 1995 will be electronically available upon implementation of the Records and Information Management System (RIMS) on the Web. These may be accessed in person using a personal computer in the Public Reference Room, or by using a

personal computer with a modem at a remote location.

(b) The public records of the Commission that are available for inspection and copying upon request in the Public Reference Room, or are otherwise available under paragraph (a)(2) of this section, include:

(1) Applications, declarations, complaints, petitions, and other papers seeking Commission action;

(2) Financial, statistical, and other reports to the Commission, power system statements of claimed cost of licensed projects, original cost and reclassification studies, proposed accounting entries, certificates of notification (under section 204(e) of the Federal Power Act), rates or rate schedules and related data and concurrences, and other filings and submittals to the Commission in compliance with the requirements of any statute, executive order, or Commission rule, regulation, order, license, or permit;

(3) Answers, replies, responses, objections, protests, motions, stipulations, exceptions, other pleadings, notices, certificates, proofs of service, transcripts of oral arguments, and briefs in any matter of proceeding;

(4) Exhibits, attachments and appendices to, amendments and corrections of, supplements to, or transmittals or withdrawals of any of the foregoing;

(5) All parts of the formal record in any matter or proceeding set for formal or statutory hearing, and any Commission correspondence related thereto;

(6) Presiding officer actions, correspondence, and memoranda to or from others, with the exception of internal communications within the Office of Administrative Law Judges;

(7) Commission orders, notices, findings, opinions, determinations, and other actions in a matter or proceeding;

(8) Commission correspondence relating to any furnishing of data or information, except to or by another branch, department, or agency of the Government;

(9) Commission correspondence with respect to the furnishing of data, information, comments, or recommendations to or by another branch, department, or agency of the Government

§ 388.107

18 CFR Ch. I (4-1-03 Edition)

where furnished to satisfy a specific requirement of a statute or where made public by that branch, department or agency;

(10) Staff reports on statements of claimed cost by licensees when such reports have been served on the licensee;

(11) Commission correspondence on interpretation of the Uniform System of Accounts and letters on such interpretation signed by the Chief Accountant and sent to persons outside the Commission;

(12) Commission correspondence on the interpretation or applicability of any statute, rule, regulation, order, license, or permit issued or administered by the Commission, and letters of opinion on that subject signed by the General Counsel and sent to persons outside the Commission;

(13) Copies of the filings, certifications, pleadings, records, briefs, orders, judgments, decrees, and mandates in court proceedings to which the Commission is a party and the correspondence with the courts or clerks of court;

(14) The Commission's Directives System;

(15) The Commission's opinions, decisions, orders and rulemakings;

(16) Reports, decisions, maps, and other information on electric power and natural gas industries;

(17) Subject index of major Commission actions;

(18) Annual report to Congress in which the Commission's operations during a past fiscal year are described; and

(19) Statements of policy and interpretations which have been adopted by the Commission and are not published in the FEDERAL REGISTER;

(20) Administrative staff manuals and instructions to staff that affect a member of the public;

(21)(i) Copies of all records released under § 388.108, which, because of their nature and subject, the Director of the Office of External Affairs has determined are likely to be requested again, and

(ii) An index of the records so designated;

(22) Reference materials and guides for requesting Commission records as required by 5 U.S.C. § 552(g), as amended; and

(23) Commission correspondence relating to the foregoing.

(c) For purposes of this section,

(1) *Commission correspondence* includes written communications and enclosures, in hard copy or electronic format, received from others outside the staff and intended for the Commission or sent to others outside the staff and signed by the Chairman, a Commissioner, the Secretary, the Executive Director, or other authorized official, except those which are personal.

(2) *Formal record* includes:

(i) Filings and submittals in a matter or proceeding,

(ii) Any notice or Commission order initiating the matter or proceeding, and

(iii) If a hearing is held, the designation of the presiding officer, transcript of hearing, exhibits received in evidence, exhibits offered but not received in evidence, offers of proof, motions, stipulations, subpoenas, proofs or service, references to the Commission, and determinations made by the Commission thereon, certifications to the Commission, and anything else upon which action of the presiding officer or the Commission may be based.

The *formal record* does not include proposed testimony or exhibits not offered or received in evidence.

(3) *Matter or proceeding* means the Commission's elucidation of the relevant facts and applicable law, consideration thereof, and action thereupon with respect to a particular subject within the Commission's jurisdiction, initiated by a filing or submittal or a Commission notice or order.

[Order 488, 53 FR 1473, Jan. 20, 1988, as amended by Order 597, 63 FR 5453, Feb. 3, 1998]

§ 388.107 Commission records exempt from public disclosure.

The following records are exempt from disclosure.

(a)(1) Records specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy, and

(2) Those records are in fact properly classified pursuant to such Executive order;

Federal Energy Regulatory Commission

§ 388.108

(b) Records related solely to the internal personnel rules and practices of an agency;

(c) Records specifically exempted from disclosure by statute, provided that such statute:

(1) Requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or

(2) Establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(d) Trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(e) Interagency or intraagency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency;

(f) Personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(g) Records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information:

(1) Could reasonably be expected to interfere with enforcement proceedings,

(2) Would deprive a person of a right to a fair trial or an impartial adjudication,

(3) Could reasonably be expected to constitute an unwarranted invasion of personal privacy,

(4) Could reasonably be expected to disclose the identity of a confidential source, including a state, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source,

(5) Would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be ex-

pected to risk circumvention of the law, or

(6) Could reasonably be expected to endanger the life or physical safety of any individual;

(h) Geological and geophysical information and data, including maps, concerning wells.

[Order 488, 53 FR 1473, Jan. 20, 1988, as amended by Order 597, 63 FR 5453, Feb. 3, 1998]

§ 388.108 Requests for Commission records not available through the Public Reference Room (FOIA requests).

(a)(1) Except as provided in paragraph (a)(2) of this section, a person may request access to Commission records, including records maintained in electronic format, that are not available through the Public Reference Room, by using the following procedures:

(i) The request must be in writing, addressed to the Director, Office of External Affairs, and clearly marked "Freedom of Information Act Request."

(ii) The request must include:

(A) A statement by the requester of a willingness to pay a reasonable fee or fees not to exceed a specific amount, or

(B) A request for waiver or reduction or fees.

(iii) The request must identify the fee category of the request, consistent with the provisions of § 388.109(b) (1) and (2).

(2) A request that fails to provide the identification required in paragraph (a)(1)(iii) of this section will not be processed until the Director, Office of External Affairs, can ascertain the requester's fee category.

(3) A request for records received by the Commission not addressed and marked as indicated in paragraph (a)(1)(i) of this section will be so addressed and marked by Commission personnel as soon as it is properly identified, and forwarded immediately to the Director, Office of External Affairs.

(4) Requests made pursuant to this section will be considered to be received upon actual receipt by the Director, Office of External Affairs, unless otherwise indicated in paragraph (a)(5) of this section.

(5) Except for the purpose of making a determination regarding expedited processing under paragraph (d)(3) of this section, no request will be deemed received while there is an unresolved fee waiver issue under § 388.109(b)(6), unless the requester has provided a written statement agreeing to pay some or all fees pending the outcome of the waiver question.

(b)(1) *Multitrack processing.* Upon receipt of a request, the Director, Office of External Affairs, will place the request in one of three tracks for processing:

(i) Track One—records that are readily identifiable and were previously cleared for release (including those subject to multiple requests and placed in the Public Reference Room);

(ii) Track Two—records that are readily identifiable, and require limited review; and

(iii) Track Three—complex and/or voluminous records requiring a significant search and/or review.

(2) Each track specified in paragraph (b)(1) of this section will be processed on a first in, first out basis, where practicable. A requester may modify a request to obtain processing on a faster track.

(c)(1) *Timing of response.* Except as provided in paragraphs (c)(4) and (d)(3) of this section, within 20 working days after receipt of the request for agency records, the Director, Office of External Affairs, will comply with the request or deny the request in whole or in part, and will notify the requester of the determination, of the reasons for a decision to withhold any part of a requested document, and of the right of the requester to appeal any adverse determination in writing to the General Counsel or General Counsel's designee.

(2) The Director, Office of External Affairs, will attempt to provide records in the form or format requested, where feasible, but will not provide more than one copy of any record to a requester.

(3) Any determination by the Director, Office of External Affairs, to withhold information will, where feasible, indicate the approximate volume of information withheld, and will indicate, for partially-released materials, where redactions have been made, unless to

do so would harm an interest protected by a FOIA exemption.

(4) The time limit for the initial determination required by paragraph (c)(1) of this section may be extended as set forth in § 388.110(b).

(d)(1) *Expedited processing.* A requester may seek expedited processing on the basis of a compelling need. Expedited processing will be granted if the requester demonstrates that:

(i) Failure to obtain the records on an expedited basis can reasonably be expected to pose an imminent threat to the life or physical safety of an individual, or

(ii) In the case of a requester primarily engaged in the dissemination of information, there is an urgency to inform the public concerning Federal Government activity.

(2) A request for expedited processing under this section must be supported with detailed credible documentation, including a statement certified to be true and correct to the requester's best knowledge and belief.

(3) The Director, Office of External Affairs, will decide within 10 calendar days of receipt of the request whether it is eligible for expedited processing. The Director will notify the requester of the reasons for denial of expedited processing and of the right of the requester to appeal to the General Counsel or General Counsel's designee.

(e) The procedure for appeal of denial of a request for Commission records, or denial of a request for expedited processing, is set forth in § 388.110.

[Order 488, 53 FR 1473, Jan. 20, 1988, as amended by Order 562, 58 FR 62521, Nov. 29, 1993; Order 597, 63 FR 5453, Feb. 3, 1998]

§ 388.109 Fees for record requests.

(a) *Fees for records available through the Public Reference Room—(1) General rule.* The fee for finding and duplicating records available in the Commission's Public Reference Room will vary depending on the size and complexity of the request. A schedule of fees for such services is prescribed annually. A person can obtain a copy of the schedule of fees in person or by mail from the Public Reference Room. Copies of documents also may be made on self-service duplicating machines located in the Public Reference Room. In addition,

copies of data extracted from the Commission's files through electronic media are available on a reimbursable basis, upon written request to the Public Reference Room.

(2) Stenographic reports of Commission hearings are made by a private contractor. Interested persons may obtain copies of public hearing transcripts from the contractor at prices set in the contract, or through the search and duplication service noted above. Copies of the contract are available for public inspection in the Public Reference Room.

(3) Copies of transcripts, electronic recordings, or minutes of Commission meetings closed to public observation containing material nonexempt pursuant to §375.206(f) of this chapter are also available at the actual cost of duplication or transcription.

(4)(i) The public may purchase hard copies of documents available in electronic form from the Commission's Federal Energy Regulatory Records Information System (FERRIS) for 20 cents per page.

(ii) The public may purchase hard copies of documents that are available on microform from RIMS for 15 cents per page. There will be no fee for requests for RIMS microform documents consisting of ten or fewer pages.

(5) Except for requests for certification by Government agencies, certification of copies of official Commission records must be accompanied by a fee of \$5.00 per document. Inquiries and orders may be made to the Public Reference Room in person or by mail.

(6) The fee schedule for Commission documents is available on the Commission's Web site at www.ferc.fed.us.

(b) *Fees for records not available through the Public Reference Room (FOIA requests).* The cost of duplication of records not available in the Public Reference Room will depend on the number of documents requested, the time necessary to locate the documents requested, and the category of the persons requesting the records. The procedures for appeal of requests for fee waiver or reduction are set forth in §388.110.

(1) *Definitions.* For the purpose of paragraph (b) of this section:

(i) *Commercial use* request means a request from or on behalf of one who seeks information for a use or purpose that furthers commercial, trade, or profit interests as these phrases are commonly known or have been interpreted by the courts in the context of the Freedom of Information Act;

(ii) *Educational institution* refers to a preschool, a public or private elementary or secondary school, an institution of graduate higher education, an institution of undergraduate higher education, an institution of professional education, and an institution of vocational education, which operates a program of scholarly research;

(iii) *Noncommercial scientific institution* refers to an institution that is not operated on a commercial basis and which is operated solely for the purpose of conducting scientific research the results of which are not intended to promote any particular product or industry;

(iv) *Representative of the news media* refers to any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public. The term *news* means information that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations broadcasting to the public at large, and publishers of periodicals (but only in those instances when the periodicals can qualify as disseminations of "news") who make their products available for purchase or subscription by the general public. These examples are not intended to be all-inclusive. Moreover, as traditional methods of news delivery evolve (e.g., electronic dissemination of newspapers through telecommunications services), such alternative media may be included in this category. A *freelance* journalist may be regarded as working for a news organization if the journalist can demonstrate a solid basis for expecting publication through that organization, even though the journalist is not actually employed by the news organization. A publication contract would be the clearest proof, but the Commission may also look to the past publication record of a requester in making this determination.

(2) *Fees.* (i) If documents are requested for commercial use, the Commission will charge the employee's hourly pay rate plus 16 percent for benefits for document search time and for document review time, and 15 cents per page for duplication. Commercial use requests are not entitled to two hours of free search time or 100 free pages of reproduction of documents.

(ii) If documents are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research, or a representative of the news media, the Commission will charge 15 cents per page for duplication. There is no charge for the first 100 pages.

(iii) For a request not described in paragraphs (b)(2)(i) or (ii) of this section the Commission will charge the employee's hourly pay rate plus 16 percent for benefits for document search time and 15 cents per page for duplication. There is no charge for the first 100 pages of reproduction and the first two hours of search time will be furnished without charge.

(iv) The Director, Office of External Affairs, will normally provide documents by regular mail, with postage prepaid by the Commission. However, the requester may authorize special delivery, such as express mail, at the requester's own expense.

(v) The Commission, or its designee, may establish minimum fees below which no charges will be collected, if it determines that the costs of routine collection and processing of the fees are likely to equal or exceed the amount of the fees. If total fees assessed by Commission staff for a Freedom of Information Act request are less than the appropriate threshold, the Commission may not charge the requesters.

(vi) Payment of fees must be by check or money order made payable to the U.S. Treasury.

(vii) Requesters may not file multiple requests at the same time, each seeking portions of a document or documents, solely in order to avoid payment of fees. When the Commission reasonably believes that a requester, or a group of requesters acting in concert,

is attempting to break a request down into a series of requests for the purpose of evading assessment of fees, or otherwise reasonably believes that two or more requests constitute a single request, the Commission may aggregate any such requests and charge the requester accordingly. The Commission will not aggregate multiple requests on unrelated subjects from a requester. Aggregated requests may qualify for an extension of time under § 388.110(b).

(3) *Fees for unsuccessful search.* The Commission may assess charges for time spent searching, even if it fails to locate the records, or if records located are determined to be exempt from disclosure. If the Commission estimates that search charges are likely to exceed \$25, it will notify the requester of the estimated amount of search fees, unless the requester has indicated in advance willingness to pay fees as high as those anticipated. The requester can meet with Commission personnel with the object of reformulating the request to meet his or her needs at a lower cost.

(4) *Interest—notice and rate.* The Commission will assess interest charges on an unpaid bill starting on the 31st day following the day on which the billing was sent. Interest will be at the rate prescribed in 31 U.S.C. 3717 and will accrue from the date of the billing.

(5) *Advance payments.* The Commission will require a requester to make an advance payment, *i.e.*, payment before work is commenced or continued on a request, if:

(i) The Commission estimates or determines that allowable charges that a requester may be required to pay are likely to exceed \$250. The Commission will notify the requester of the estimated cost and either require satisfactory assurance of full payment where the requester has a history of prompt payment of fees, or require advance payment of the charges if a requester has no history of payment; or

(ii) A requester has previously failed to pay a fee charged in a timely fashion. The Commission will require the requester to pay the full amount owed plus any applicable interest, and to make an advance payment of the full amount of the estimated fee before the Commission will begin to process a new

request or a pending request from that requester. When the Commission requires advance payment or an agreement to pay under this paragraph, or under § 388.108(a)(5), the administrative time limits prescribed in this part will begin only after the Commission has received the required payments, or agreements.

(c) *Fee reduction or waiver.* (1) Any fee described in this section may be reduced or waived if the requester demonstrates that disclosure of the information sought is:

(i) In the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government, and

(ii) Not primarily in the commercial interest of the requester.

(2) The Commission will consider the following criteria to determine the public interest standard:

(i) Whether the subject of the requested records concerns the operations or activities of the government;

(ii) Whether the disclosure is likely to contribute to an understanding of government operations or activities;

(iii) Whether disclosure of the requested information will contribute to public understanding; and

(iv) Whether the disclosure is likely to contribute significantly to public understanding of government operations or facilities.

(3) The Commission will consider the following criteria to determine the commercial interest of the requester:

(i) Whether the requester has a commercial interest that would be furthered by the requested disclosure; and, if so

(ii) Whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is primarily in the commercial interest of the requester.

(4) This request for fee reduction or waiver must accompany the initial request for records and will be decided under the same procedures used for record requests.

(d) *Debt collection.* The Commission will use the authorities mandated in the Debt Collection Act of 1982, 31 U.S.C. 3711, 3716–3719 (1982), including

disclosure to consumer reporting agencies and use of collection agencies, where appropriate, to encourage payment of outstanding unpaid FOIA invoices.

(e) *Annual adjustment of fees—(1) Update and publication.* The Commission, by its designee, the Executive Director, will update the fees established in this section each fiscal year. The Executive Director will publish the fees in the FEDERAL REGISTER.

(2) *Payment of updated fees.* The fee applicable to a particular Freedom of Information Act request will be the fee in effect on the date that the request is received.

[Order 488, 53 FR 1473, Jan. 20, 1988, as amended by Order 597, 63 FR 5454, Feb. 3, 1998; Order 640, 65 FR 33448, May 24, 2000; Order 625, 67 FR 21996, May 2, 2002]

§ 388.110 Procedure for appeal of denial of requests for Commission records not publicly available or not available through the Public Reference Room, denial of requests for fee waiver or reduction, and denial of requests for expedited processing.

(a)(1) A person whose request for records, request for fee waiver or reduction, or request for expedited processing is denied in whole or part may appeal that determination to the General Counsel or General Counsel's designee within 45 days of the determination. Appeals filed pursuant to this section must be in writing, addressed to the General Counsel of the Commission, and clearly marked "Freedom of Information Act Appeal." Such an appeal received by the Commission not addressed and marked as indicated in this paragraph will be so addressed and marked by Commission personnel as soon as it is properly identified and then will be forwarded to the General Counsel. Appeals taken pursuant to this paragraph will be considered to be received upon actual receipt by the General Counsel.

(2) The General Counsel or the General Counsel's designee will make a determination with respect to any appeal within 20 working days after the receipt of such appeal. An appeal of the denial of expedited processing will be considered as expeditiously as possible within the 20 working day period. If, on

§ 388.111

18 CFR Ch. I (4-1-03 Edition)

appeal, the denial of the request for records, fee reduction, or expedited processing is upheld in whole or in part, the General Counsel or the General Counsel's designee will notify the person making the appeal of the provisions for judicial review of that determination.

(b)(1) *Extension of time.* In unusual circumstances, the time limits prescribed for making the initial determination pursuant to § 388.108 and for deciding an appeal pursuant to this section may be extended by up to 10 working days, by the Secretary, who will send written notice to the requester setting forth the reasons for such extension and the date on which a determination or appeal is expected to be dispatched.

(2) The extension permitted by paragraph (b)(1) of this section may be made longer than 10 working days when the Commission notifies the requester within the initial response time that the request cannot be processed in the specified time, and the requester is provided an opportunity to limit the scope of the request to allow processing within 20 working days; or to arrange with the Commission an alternative time frame.

(3) Two or more requests aggregated into a single request under § 388.109(b)(2)(vii) may qualify for an extension of time if the requests, as aggregated, otherwise satisfy the unusual circumstances specified in this section.

(4) *Unusual circumstances* means:

(i) The need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the requests;

(ii) The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(iii) The need for consultation, which will be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having

substantial subject-matter interest therein.

[Order 488, 53 FR 1473, Jan. 20, 1988, as amended by Order 597, 63 FR 5455, Feb. 3, 1998]

§ 388.111 Procedures in event of subpoena.

(a)(1) The procedures specified in this section will apply to all subpoenas directed to Commission employees that relate in any way to the employees' official duties. These procedures will also apply to subpoenas directed to former Commission employees if the subpoenas seek nonpublic materials or information acquired during Commission employment. The provisions of paragraph (c) of this section will also apply to subpoenas directed to the Commission.

(2) For purposes of this section,

(i) *Employees*, except where otherwise specified, includes "special government employees" and other Commission employees; and

(ii) *Nonpublic* includes any material or information which is exempt from availability for public inspection and copying;

(iii) *Special government employees* includes consultants and other employees as defined by section 202 of Title 18 of the United States Code.

(iv) *Subpoena* means any compulsory process in a case or matter, including a case or matter to which the Commission is not a party;

(b) Any employee who is served with a subpoena must promptly advise the General Counsel of the Commission of the service of the subpoena, the nature of the documents or information sought, and all relevant facts and circumstances. Any former employee who is served with a subpoena that concerns nonpublic information shall promptly advise the General Counsel of the Commission of the service of the subpoena, the nature of the documents or information sought, and all relevant facts and circumstances.

(c) A party causing a subpoena to be issued to the Commission or any employee or former employee of the Commission must furnish a statement to the General Counsel of the Commission. This statement must set forth the

party's interest in the case or matter, the relevance of the desired testimony or documents, and a discussion of whether the desired testimony or documents are reasonably available from other sources. If testimony is desired, the statement must also contain a general summary of the testimony and a discussion of whether Commission records could be produced and used in lieu of testimony. Any authorization for testimony will be limited to the scope of the demand as summarized in such statement.

(d) Commission records or information which are not part of the public record will be produced only upon authorization by the Commission.

(e) The Commission or its designee will consider and act upon subpoenas under this section with due regard for statutory restrictions, the Commission's Rules of Practice and Procedure, and the public interest, taking into account factors such as applicable privileges including the deliberative process privilege; the need to conserve the time of employees for conducting official business; the need to avoid spending the time and money of the United States for private purposes; the need to maintain impartiality between private litigants in cases where a substantial government interest is not involved; and the established legal standards for determining whether justification exists for the disclosure of confidential information and records.

(f) The Commission authorizes the General Counsel or the General Counsel's designee to make determinations under this section.

§ 388.112 Requests for privileged treatment of documents submitted to the Commission.

(a) *Scope.* Any person submitting a document to the Commission may request privileged treatment by claiming that some or all of the information contained in a particular document is exempt from the mandatory public disclosure requirements of the Freedom of Information Act, 5 U.S.C. 552, and should otherwise be withheld from public disclosure.

(b) *Procedures.* A person claiming that information is privileged under (a) of this section must file:

(1) For documents submitted in hard copy,

(i) A written statement requesting privileged treatment for some or all of the information in a document, and the justification for nondisclosure of the information;

(ii) The original document, boldly indicating on the front page "Contains Privileged Information—Do Not Release" and identifying within the document the information for which the privileged treatment is sought;

(iii) Fourteen copies of the document without the information for which privileged treatment is sought, and with a statement indicating that information has been removed for privileged treatment;

(iv) The name, title, address, telephone number, and telecopy information of the person or persons to be contacted regarding the request for privileged treatment of documents submitted to the Commission.

(2) For documents submitted on electronic media,

(i) A written statement requesting privileged treatment for some or all of the information on the electronic media, and the justification for nondisclosure of the information;

(ii) One copy of a complete filing on the electronic media marked "Contains Privileged Information—Do Not Release" and identifying on the electronic media only the information for which the privileged treatment is sought with one paper copy also marked "Contains Privileged Information—Do Not Release";

(iii) One copy of the electronic media without the information for which privileged treatment is sought and with a statement that information has been removed for privileged treatment with fourteen paper copies without the information for which privileged treatment is sought; and

(iv) The name, title, address, telephone number and telecopy information of the person or persons to be contacted regarding the request for privileged treatment of documents submitted to the Commission.

(c) *Effect of privilege claim—(1) For documents filed with the Commission.* (i) The Secretary of the Commission will place documents for which privileged

§ 388.112

18 CFR Ch. I (4–1–03 Edition)

treatment is sought in accordance with paragraph (b)(1)(ii) of this section in a nonpublic file, while the request for privileged treatment is pending. By placing documents in a nonpublic file, the Commission is not making a determination on any claim for privilege. The Commission retains the right to make determinations with regard to any claim of privilege, and the discretion to release information as necessary to carry out its jurisdictional responsibilities.

(ii) The Secretary of the Commission will place the request for privileged treatment described in paragraph (b)(1) of this section and a copy of the original document described in paragraph (b)(1)(iii) of this section in a public file, while the request for privilege treatment is pending.

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

(d) *Notification of request and opportunity to comment.* When a FOIA requester seeks a document for which privilege is claimed, the Commission official who will decide whether to make the document public will notify the person who submitted the document and give the person an opportunity (at least five days) in which to comment in writing on the request. A copy of this notice will be sent to the FOIA requester.

(e) *Notification before release.* Notice of a decision by the Director, Office of External Affairs, the Chairman of the Commission, 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, will be given to any person claiming that information is privileged no less than five days before public 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 requester.

(f) *Notification of suit in Federal courts.* When a FOIA requester brings suit to compel disclosure of confidential commercial information, the Commission will notify the person who submitted

documents containing confidential commercial information of the suit.

[Order 488, 53 FR 1473, Jan. 20, 1988, as amended at 53 FR 15032, Apr. 27, 1988; Order 448-A, 54 FR 47761, Nov. 17, 1989; Order 562, 58 FR 62521, Nov. 29, 1993; Order 597, 63 FR 5455, Feb. 3, 1998]

EFFECTIVE DATE NOTE: By Order 630, 68 FR 9869, Mar. 3, 2003, §388.112 was revised, effective Apr. 2, 2003. For the convenience of the user, the revised text follows:

§ 388.112 Requests for privileged treatment of documents submitted to the Commission.

(a) *Scope.* (1) Any person submitting a document to the Commission may request privileged treatment by claiming that some or all of the information contained in a particular document is exempt from the mandatory public disclosure requirements of the Freedom of Information Act, 5 U.S.C. 552, and should be withheld from public disclosure.

(2) Any person submitting documents containing critical energy infrastructure information (CEII) as defined in §388.113 should follow the procedures specified in this section.

(b) *Procedures.* A person claiming that information is privileged under paragraph (a) of this section must file:

(1) For documents submitted in hard copy,

(i) A written statement requesting privileged treatment for some or all of the information in a document, and the justification for nondisclosure of the information;

(ii) One of the following:

(A) In all cases where the privileged information or CEII can, as a practical matter, be segregated into a separate document or appendix:

(1) Fourteen copies of the original document, indicating in bold print on the front page either "Privileged Information Contained in Attachment" or "Critical Energy Infrastructure Information Contained in Attachment," and

(2) One separate document or appendix, indicating in bold print on the front page either "Contains Privileged Information—Do Not Release" or "Contains Critical Energy Infrastructure Information—Do Not Release," with every page in the document or appendix marked either "Privileged Information—Do Not Release" or "Critical Energy Infrastructure Information—Do Not Release," or

(B) In cases where the privileged information or CEII cannot reasonably or coherently be separated into a separate document or appendix:

(1) The original document, indicating in bold print on the front page either "Contains Privileged Information—Do Not Release," or "Contains Critical Energy Infrastructure Information—Do Not Release" and, on every

Federal Energy Regulatory Commission

§ 388.112

page containing privileged information or CEII, the marking "Privileged Information—Do Not Release," or "Critical Energy Infrastructure Information—Do Not Release," with the privileged information or CEII clearly identified, and

(2) Fourteen copies of the document without the information for which privileged treatment is sought, and with a statement indicating that information has been removed for privileged treatment, and

(iii) The name, title, address telephone number, e-mail address, and facsimile number of the person or persons to be contacted regarding the request for privileged treatment of documents submitted to the Commission.

(2) For documents submitted on electronic media,

(i) A written statement requesting privileged treatment for some or all of the information on the electronic media, and the justification for non-disclosure of the information;

(ii) One of the following:

(A) In all cases where the privileged information or CEII can, as a practical matter, be segregated into a separate document or appendix:

(1) One copy of the electronic media and fourteen paper copies of a filing all without the privileged information or CEII, and all marked either "Privileged Information Contained in Separate Attachment" or "Critical Energy Infrastructure Information Contained in Separate Attachment," and

(2) One copy of the electronic media and one paper copy of a separate document or appendix, in both cases marked on media itself and on the front page either "Contains Privileged Information—Do Not Release" or "Contains Critical Energy Infrastructure Information—Do Not Release," with every page in the document or appendix marked either "Privileged Information—Do Not Release" or "Critical Energy Infrastructure Information—Do Not Release," and

(3) An index identifying each file on the media and whether it is public, contains Critical Energy Infrastructure Information, or contains other privileged information; or

(B) In cases where the privileged information or CEII cannot reasonably or coherently be separated into a separate document or appendix:

(1) One copy of a complete filing on the electronic media and a paper copy, both marked on the media itself and on the front page either "Contains Privileged Information—Do Not Release" or "Contains Critical Energy Infrastructure Information—Do Not Release," with every page containing privileged information or CEII marked either "Privileged Information—Do Not Release" or "Critical Energy Infrastructure Information—Do Not Release" and with the

privileged information or CEII clearly and specifically identified, and

(2) One copy of the electronic media without the information for which privileged treatment is sought and with a statement that information has been removed for privileged treatment, together with fourteen paper copies without the information for which privileged treatment is sought,

(3) An index identifying each file on the media and whether it is public, contains Critical Energy Infrastructure Information, or contains other privileged information, and

(iii) The name, title, address, telephone number, e-mail address, and facsimile number of the person or persons to be contacted regarding the request for privileged treatment of documents submitted to the Commission.

(c) *Effect of privilege claim*— (1) For documents filed with the Commission. (i) The Secretary of the Commission will place documents for which privileged treatment is sought in accordance with paragraph (b)(1)(ii) of this section in a nonpublic file, while the request for privileged treatment is pending. By placing documents in a nonpublic file, the Commission is not making a determination on any claim for privilege. The Commission retains the right to make determinations with regard to any claim of privilege, and the discretion to release information as necessary to carry out its jurisdictional responsibilities.

(ii) The Secretary of the Commission will place the request for privileged treatment described in paragraph (b) of this section and a copy of the original document with the privileged information removed in a public file while the request for privileged treatment is pending.

(2) *For documents submitted to Commission staff.* The notification procedures of paragraphs (d), (e), and (f) of this section will be followed by staff 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 is claimed, or when the Commission itself is considering release of the information, the Commission official who will decide whether to make the document public will notify the person who submitted the document and give the person an opportunity (at least five 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, will

§ 388.113

18 CFR Ch. I (4-1-03 Edition)

be given to any person claiming that information is privileged no less than five days before public 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 Accessing critical energy infrastructure information.

(a) *Scope.* This section governs access to critical energy infrastructure information (CEII). The rules governing submission of CEII are contained in 18 CFR 388.112(b). The Commission reserves the right to restrict access to previously filed documents as well as Commission-generated documents containing CEII.

(b) *Purpose.* The procedures in this section are available at the requester's option as an alternative to the FOIA procedures in § 388.108 where the information requested is exempted from disclosure under the FOIA and contains CEII.

(c) *Definitions.* For purposes of this section:

(1) *Critical energy infrastructure information* means information about proposed or existing critical infrastructure that:

(i) Relates to the production, generation, transportation, transmission, or distribution of energy;

(ii) Could be useful to a person in planning an attack on critical infrastructure;

(iii) Is exempt from mandatory disclosure under the Freedom of Information Act, 5 U.S.C. 552; and

(iv) Does not simply give the location of the critical infrastructure.

(2) *Critical infrastructure* means existing and proposed systems and assets, whether physical or virtual, the incapacity or destruction of which would negatively affect security, economic security, public health or safety, or any combination of those matters.

(d) *Optional procedures for requesting critical energy infrastructure information.*

(1) An owner/operator of a facility, including employees and officers of the owner/operator, may obtain CEII relat-

ing to its own facility directly from Commission staff without going through the procedures outlined in paragraph (d)(3) of this section.

(2) An agent or representative of an owner/operator must obtain information from the owner/operator.

(3) If any other requester has a particular need for information designated as CEII, the requester may request the information using the following procedures:

(i) File a written request with the Commission's CEII Coordinator. The request shall contain the following: Requester's name, date and place of birth, title, address, and telephone number; the name, address, and telephone number of the person or entity on whose behalf the information is requested; a detailed statement explaining the particular need for and intended use of the information; and a statement as to the requester's willingness to adhere to limitations on the use and disclosure of the information requested. Requesters are also requested to include their social security number for identification purposes.

(ii) Once the request is received, the CEII Coordinator will determine if the information is CEII, and, if it is, whether to release the CEII to the requester. The CEII Coordinator will balance the requester's need for the information against the sensitivity of the information. If the requester is determined to be eligible to receive the information requested, the CEII Coordinator will determine what conditions, if any, to place on release of the information. Where appropriate, the CEII Coordinator will forward a non-disclosure agreement (NDA) to the requester for execution. Once the requester signs any required NDA, the CEII Coordinator will make the critical energy infrastructure information available to the requester. The CEII Coordinator's decisions regarding release of CEII are subject to rehearing as provided in § 385.713 of this chapter.

(iii) The CEII Coordinator will attempt to respond to the requester under this section according to the timing required for responses under the Freedom of Information Act in § 388.108(c), and will provide notice to

Federal Energy Regulatory Commission

§ 389.101

the submitter in accordance with § 388.112(d) and (e).

EFFECTIVE DATE NOTE: By Order 630, 68 FR 9870, Mar. 3, 2003, § 388.113 was added, effective Apr. 2, 2003.

PART 389—OMB CONTROL NUMBERS FOR COMMISSION INFORMATION COLLECTION REQUIREMENTS

AUTHORITY: 44 U.S.C. 3501–3520.

§ 389.101 OMB control numbers assigned pursuant to the Paperwork Reduction Act.

(a) *Purpose.* This part collects and displays control numbers assigned to information collection requirements of the Commission by the Office of Management and Budget (OMB) pursuant to the Paperwork Reduction Act of 1980. This part fulfills the requirements of section 3507(f) of the Paperwork Reduction Act, which requires that agencies display a current control number assigned by the Director of OMB for each agency information collection requirement.

(b) *Display.*

18 CFR part or section where the information collection requirement is located	Current OMB control number (all numbers begin with 1902–)
2.19	0058, 0015
2.55	0161
2.56a	0055
2.69	0060
2.75	0052
2.76	0051, 0052, 0055
2.77	0051, 0052, 0055
2.78	0066
2.79	0060
2.80	0128
Part 4 Subpart D	0073
Part 4 Subpart E	0058
Part 4 Subpart F	0058
Part 4 Subpart G	0115
Part 4 Subpart H	0115
Part 4 Subpart J	0115
Part 4 Subpart L	0058
Part 4 Subpart L	0115
Part 4 Subpart M	0136
4.30	0073
4.31	0073
4.32	0058, 0073, 0115, 0136
4.33	0073
4.34	0073
4.80	0073
4.81	0073
4.82	0073
Part 6	0068
Part 9	0069
11.3(c)	0136
11.3(d)	0136
11.4(b)	0136

18 CFR part or section where the information collection requirement is located	Current OMB control number (all numbers begin with 1902–)
11.16	0087
16.1	0058, 0115
16.14	0058, 0115
16.15	0058, 0115
16.16	0058, 0115
24.1	0079
Part 33	0082
Part 34	0043
Part 35 Subpart A	0096
35.12	0096
35.13	0096
35.26	0096
35.27	0096
35.30	0096
Part 45	0083
46.3	0114
46.6	0099
Part 101	0021, 0029
Part 116	0021
Part 125	0098
141.1	0021
141.2	0029
141.14	0106
141.51	0140
141.61	0024
Part 152	0116
Part 153	0062
Part 154	0052
154.38	0070
154.52	0070
154.61	0070
154.62	0070
154.63	0070
154.64	0070
154.65	0070
154.66	0070
154.67	0070
154.91	0055
154.92	0055
154.93	0055
154.94	0055
154.94(k)	0057
154.95	0055
154.96	0055
154.97	0055
154.98	0055
154.99	0055
154.100	0055
154.101	0055
154.102	0055
154.103	0055
154.104	0055
154.105	0055
154.106	0055
154.107	0055
154.108	0055
154.109	0055
154.110	0055
154.111(a)(3)	0070
154.301	0070
154.303	0070
154.304	0070
154.305	0070
154.306	0070
154.308	0070
154.309	0070
154.310	0070
Part 156	0061
Part 157	0052
157.5	0060
157.6	0060
157.7	0060