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Title 18 - Conservation of Power and Water Resources

Chapter I - Federal Energy Regulatory Commission, Department of Energy

Subchapter X - Procedural Rules

Part 388 Information and Requests

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PART 388 - INFORMATION AND REQUESTS

Authority: 5 U.S.C. 301-305, 551, 552 (as amended), 553-557; 42 U.S.C. 7101-7352; 16 U.S.C. 824(o-l).

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 and from the Commission's web site, <http://www.ferc.gov>.

- (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. Publicly available documents may be obtained in person or in writing from the Public Reference Room by reasonably describing the records sought. Additional information on charges and services is available on the Web site and in the Public Reference Room.
 - (2) Documents created by or received by FERC on or after November 1981 also are available on the Commission's Web site through its document management system. These may also be accessed in person using a personal computer in the Public Reference Room.
- (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 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.
 - (24) Records that have been requested three or more times and determined eligible for public disclosure will be made publicly available on the Commission's Web site or through other electronic means.
- (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; Order 647, 69 FR 32440, June 10, 2004; Order 832, 81 FR 86575, Dec. 1, 2016]

§ 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;

- (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, except that the deliberative process privilege shall not exempt any record 25 years or older.
- (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 expected 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; Order 832, 81 FR 86575, Dec. 1, 2016]

§ 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 of 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 Director will consider whether partial disclosure of information is possible whenever it is determined that a document is exempt and will take reasonable steps to segregate and release nonexempt information.
- (5) The Director will only withhold information where it is reasonably foreseeable that disclosure would harm an interest protected by an exemption or disclosure is prohibited by law or otherwise exempted from disclosure under FOIA Exemption 3.

(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; Order 832, [81 FR 86575](#), Dec. 1, 2016]

§ 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 person can obtain a copy of the schedule of fees in person or by mail from the Public Reference Room. This schedule is also available on the Commission's Web site. 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.

(b) **Fees for records not available through the Public Reference Room (FOIA or CEII 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 installation 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) **Representatives 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 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 telecommunication 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% 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 non-commercial 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 employees hourly pay rate plus 16 percent for benefits for document search 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 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.*, payments 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 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.
- (f) The Commission will not charge search fees (or duplication fees for requesters with preferred fee status) where, after extending the time limit for unusual circumstances, as described in § 388.110, the Director does not provide a timely determination.

- (1) If there are unusual circumstances, as described in § 388.110, and there are more than 5,000 responsive pages to the request, the Commission may charge search fees (or, for requesters in preferred fee status, may charge duplication fees) where the requester received timely written notice and the Commission has discussed with the requester via written mail, electronic mail, or telephone (or made not less than 3 good-faith attempts to do so) how the requester could effectively limit the scope of the request; or
- (2) If a court determines that exceptional circumstances exist, the Commission's failure to comply with a time limit will be excused for the length of time provided by the court order.

[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; Order 648, 69 FR 41191, July 8, 2004; 72 FR 63985, Nov. 14, 2007; 73 FR 45609, Aug. 6, 2008; Order 832, 81 FR 86575, Dec. 1, 2016]

§ 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) Determination letters shall indicate that a requester may seek assistance from the FOIA Public Liaison. A person whose request for records, request for fee waiver, or request for expedited processing is denied in whole or in part may seek dispute resolution services from the Office of Government Information Services, or may appeal the determination to the General Counsel or General Counsel's designee within 90 days of the determination.
- (2) 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.
- (3) 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 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.
- (5) Whenever the Commission extends the time limit, pursuant to paragraph (b)(1) of this section, by more than ten additional working days, the written notice will notify the requester of the right to seek dispute resolution services from the Office of Government Information Services.

[Order 488, 53 FR 1473, Jan. 20, 1988, as amended by Order 597, 63 FR 5455, Feb. 3, 1998; Order 832, 81 FR 86575, Dec. 1, 2016]

§ 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 for documents submitted to the Commission.

- (a) **Scope.** 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, non-CEII subject to an outstanding claim of exemption from disclosure under FOIA will be referred to as privileged material. The rules governing CEII are contained in § 388.113.
- (b) **Procedures for filing and obtaining privileged material.**
 - (1) **General Procedures.** A person requesting that material be treated as privileged information must include in its filing a justification for such treatment in accordance with the filing procedures posted on the Commission's Web site at <http://www.ferc.gov>. A person requesting that a document filed with the Commission be treated as privileged in whole or in part must designate the document as privileged 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 or confidential information, as appropriate, and marked "DO NOT RELEASE." The filer also must submit to the Commission a public version with the information that is claimed to be privileged material redacted, to the extent practicable.

- (2) Procedures for Proceedings with a Right to Intervene. The following procedures set forth the methods for filing and obtaining access to material that is filed as privileged in complaint proceedings and in any proceeding to which a right to intervention exists:
- (i) If a person files material as privileged material in a complaint proceeding or other proceeding to which a right to intervention exists, that person must include a proposed form of protective agreement with the filing, or identify a protective agreement that has already been filed in the proceeding that applies to the filed material. This requirement does not apply to material submitted in hearing or settlement proceedings, or if the only material for which privileged treatment is claimed consists of landowner lists or privileged information filed under §§ 380.12(f) 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) and 380.16(f) of this chapter, 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. Applicants are not required under paragraph (b)(2)(iv) of this section to provide intervenors with landowner lists and the other materials identified in the previous sentence.

(c) *Effect of privilege or CEII claim.*

- (1) For documents filed with the Commission:
- (i) The documents for which privileged 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. By treating the documents as nonpublic, the Commission is not making a determination on any claim of privilege status. The Commission retains the right to make determinations with regard to any claim of privilege status, and the discretion to release information as necessary to carry out its jurisdictional responsibilities.

- (ii) The request for privileged 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 requester seeks a document for which privilege status has been claimed, or when the Commission itself is considering release of such information, the Commission official who will decide whether to release the information or any other appropriate Commission official will notify the person who submitted the document and give the person an opportunity (at least five calendar days) in which to comment in writing on the request. A copy of this notice will be sent to the requester.
- (e) **Notification before release.** Notice of a decision by the Commission, the Chairman of the Commission, the Director, Office of External Affairs, the General Counsel or General Counsel's designee, a presiding officer in a proceeding under part 385 of this chapter, or any other appropriate official to deny a claim of privilege, in whole or in part, will be given to any person claiming that the information is privileged 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 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.

[Order 769, 77 FR 65476, Oct. 29, 2012, as amended by Order 833, 81 FR 93748, Dec. 21, 2016]

§ 388.113 Critical Energy/Electric Infrastructure Information (CEII).

- (a) **Scope.** This section governs the procedures for submitting, designating, handling, sharing, and disseminating Critical Energy/Electric Infrastructure Information (CEII) submitted to or generated by the Commission. The Commission reserves the right to restrict access to previously filed information as well as Commission-generated information containing CEII. Nothing in this section limits the ability of any other Federal agency to take all necessary steps to protect information within its custody or control that is necessary to ensure the safety and security of the electric grid. To the extent necessary, such agency may consult with the CEII Coordinator regarding the treatment or designation of such information.
- (b) **Purpose.** The procedures in this section implement section 215A of the Federal Power Act, and provide a comprehensive overview of the manner in which the Commission will implement the CEII program.
- (c) **Definitions.** For purposes of this section:
 - (1) **Critical electric infrastructure information** means information related to critical electric infrastructure, or proposed critical electrical infrastructure, generated by or provided to the Commission or other Federal agency other than classified national security information, that is designated as critical electric infrastructure information by the Commission or the Secretary of the Department of Energy pursuant to section 215A(d) of the Federal Power Act. Such term includes information that qualifies as critical energy infrastructure information under the Commission's regulations. Critical Electric Infrastructure Information is exempt from mandatory disclosure under the Freedom of Information

Act, 5 U.S.C. 552(b)(3) and shall not be made available by any Federal, State, political subdivision or tribal authority pursuant to any Federal, State, political subdivision or tribal law requiring public disclosure of information or records pursuant to section 215A(d)(1)(A) and (B) of the Federal Power Act.

- (2) **Critical energy infrastructure information** means specific engineering, vulnerability, or detailed design information about proposed or existing critical infrastructure that:
- (i) Relates details about 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 general location of the critical infrastructure.
- (3) **Critical electric infrastructure** means a system or asset of the bulk-power system, whether physical or virtual, the incapacity or destruction of which would negatively affect national security, economic security, public health or safety, or any combination of such matters.
- (4) **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) **Criteria and procedures for determining what constitutes CEII.** The following criteria and procedures apply to information labeled as CEII:

- (1) For information submitted to the Commission:
- (i) A person requesting that information submitted to the Commission be treated as CEII must include with its submission a justification for such treatment in accordance with the filing procedures posted on the Commission's Web site at <http://www.ferc.gov>. The justification must provide how the information, or any portion of the information, qualifies as CEII, as the terms are defined in paragraphs (c)(1) and (2) of this section. The submission must also include a clear statement of the date the information was submitted to the Commission, how long the CEII designation should apply to the information and support for the period proposed. Failure to provide the justification or other required information could result in denial of the designation and release of the information to the public.
 - (ii) In addition to the justification required by paragraph (d)(1)(i) of this section, a person requesting that information submitted to the Commission be treated as CEII must clearly label the cover page and pages or portions of the information for which CEII treatment is claimed in bold, capital lettering, indicating that it contains CEII, as appropriate, and marked "DO NOT RELEASE." The submitter must also segregate those portions of the information that contain CEII (or information that reasonably could be expected to lead to the disclosure of the CEII) wherever feasible. The submitter must also submit to the Commission a public version with the information where CEII is redacted, to the extent practicable.
 - (iii) If a person files material as CEII in a complaint proceeding or other proceeding to which a right to intervention exists, that person must include a proposed form of protective agreement with the filing, or identify a protective agreement that has already been filed in the proceeding that applies to the filed material.

- (iv) The information for which CEII treatment is claimed will be maintained in the Commission's files as non-public until such time as the Commission may determine that the information is not entitled to the treatment sought. By treating the information as CEII, the Commission is not making a determination on any claim of CEII status. The Commission retains the right to make determinations with regard to any claim of CEII status at any time, and the discretion to release information as necessary to carry out its jurisdictional responsibilities. Although unmarked information may be eligible for CEII treatment, the Commission will treat unmarked information as CEII only if it is properly designated as CEII pursuant to Commission regulations.
- (v) The CEII Coordinator will evaluate whether the submitted information or portions of the information are covered by the definitions in paragraphs (c)(1) and (2) of this section prior to making a designation as CEII.
- (vi) Subject to the exceptions set forth in paragraph (f)(5) of this section, when a CEII requester seeks information for which CEII status has been claimed, or when the Commission itself is considering release of such information, the CEII Coordinator or any other appropriate Commission official will notify the person who submitted the information and give the person an opportunity (at least five business days) in which to comment in writing on the request. A copy of this notice will be sent to the requester. Notice of a decision by the Commission, or the CEII Coordinator to make a release of CEII, will be given to any person claiming that the information is CEII no less than five business days before disclosure. The notice will respond to any objections to disclosure from the submitter that are not sustained. Where applicable, a copy of this notice will be sent to the CEII requester.

(2) For Commission-generated information:

- (i) After consultation with the Office Director for the office that created the information, or the Office Director's designee, the CEII Coordinator will designate Commission-generated information as CEII after determining that the information or portions of the information are covered by the definitions in paragraphs (c)(1) and (2) of this section. Commission-generated CEII shall include clear markings to indicate the information is CEII and the date of the designation.
- (ii) The Commission will segregate non-CEII from Commission-generated CEII or information that reasonably could be expected to lead to the disclosure of CEII wherever feasible.

(e) **Duration of the CEII designation.** All CEII designations will be subject to the following conditions:

- (1) A designation may last for up to a five-year period, unless re-designated. In making a determination as to whether the designation should be extended, the CEII Coordinator will take into account information provided in response to paragraph (d)(1)(i) of this section, and any other information, as appropriate.
- (2) A designation may be removed at any time, in whole or in part, if the Commission determines that the unauthorized disclosure of CEII could no longer be used to impair the security or reliability of the bulk-power system or distribution facilities or any other form of energy infrastructure.
- (3) The Commission will treat CEII or documents marked as CEII as non-public after the designation has lapsed until the CEII Coordinator determines to un-designate the information.

(4) If a CEII designation is removed, the submitter will receive notice and an opportunity to comment. The CEII Coordinator will notify the submitter of the information and give the submitter an opportunity (at least five business days) in which to comment in writing prior to the removal of the designation. Notice of a removal decision will be given to any submitter claiming that the information is CEII no less than five business days before disclosure. The notice will briefly explain why the submitter's objections to the removal of the designation are not sustained by the Commission

(f) **Voluntary sharing of CEII.** The Commission, taking into account standards of the Electric Reliability Organization, will facilitate voluntary sharing of CEII with, between, and by Federal, state, political subdivision, and tribal authorities; the Electric Reliability Organization; regional entities; information sharing and analysis centers established pursuant to Presidential Decision Directive 63; owners, operators, and users of critical electric infrastructure in the United States; and other entities determined appropriate by the Commission. The process will be as follows:

- (1) The Director of any Office of the Commission or his designee that wishes to voluntarily share CEII shall consult with the CEII Coordinator prior to the Office Director or his designee making a determination on whether to voluntarily share the CEII.
- (2) Consistent with paragraph (d) of this section, the Commission retains the discretion to release information as necessary to carry out its jurisdictional responsibilities in facilitating voluntary sharing or, in the case of information provided to other federal agencies, the Commission retains the discretion to release information as necessary for those agencies to carry out their jurisdictional responsibilities.
- (3) All entities receiving CEII must execute either a non-disclosure agreement or an acknowledgement and agreement. A copy of each agreement will be maintained by the Office Director with a copy to the CEII Coordinator.
- (4) When the Commission voluntarily shares CEII pursuant to this subsection, the Commission may impose additional restrictions on how the information may be used and maintained.
- (5) Submitters of CEII shall receive notification of a limited release of CEII no less than five business days before disclosure, except in instances where voluntary sharing is necessary for law enforcement purposes, to maintain infrastructure security, to address potential threats, when notice would not be practicable, and where there is an urgent need to quickly disseminate the information. When prior notice is not given, the Commission will provide submitters of CEII notice of a limited release of the CEII as soon as practicable.

(g) **Accessing CEII.**

- (1) An owner/operator of a facility, including employees and officers of the owner/operator, may obtain CEII relating to its own facility, excluding Commission-generated information except inspection reports/operation reports and any information directed to the owner-operators, directly from Commission staff without going through the procedures outlined in paragraph (g)(5) of this section. Non-employee agents of an owner/operator of such facility may obtain CEII relating to the owner/operator's facility in the same manner as owner/operators as long as they present written authorization from the owner/operator to obtain such information. Notice of such requests must be given to the CEII Coordinator, who shall track this information.

- (2) An employee of a federal agency acting within the scope of his or her federal employment may obtain CEII directly from Commission staff without following the procedures outlined in paragraph (g)(5) of this section. Any Commission employee at or above the level of division director or its equivalent may rule on requests for access to CEII by a representative of a federal agency. To obtain access to CEII, an agency employee must sign an acknowledgement and agreement, which states that the agency will protect the CEII in the same manner as the Commission and will refer any requests for the information to the Commission. Notice of each such request also must be given to the CEII Coordinator, who shall track this information.
- (3) A landowner whose property is crossed by or in the vicinity of a project may receive detailed alignment sheets containing CEII directly from Commission staff without submitting a non-disclosure agreement as outlined in paragraph (g)(5) of this section. A landowner must provide Commission staff with proof of his or her property interest in the vicinity of a project.
- (4) Any person who is a participant in a proceeding or has filed a motion to intervene or notice of intervention in a proceeding may make a written request to the filer for a copy of the complete CEII version of the document without following the procedures outlined in paragraph (g)(5) of this section. The request must include an executed copy of the applicable protective agreement and a statement of the person's right to party or participant status or a copy of the person's 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. If no objection to disclosure is filed, the filer must provide a copy of the complete, non-public document to the requesting person within five business 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.
- (5) If any requester not described above in paragraphs (g)(1) through (4) of this section has a particular need for information designated as CEII, the requester may request the information using the following procedures:
 - (i) File a signed, written request with the Commission's CEII Coordinator. The request must contain the following:
 - (A) Requester's name (including any other name(s) which the requester has used and the dates the requester used such name(s)), title, address, and telephone number; and the name, address, and telephone number of the person or entity on whose behalf the information is requested;
 - (B) A detailed Statement of Need, which must state: The extent to which a particular function is dependent upon access to the information; why the function cannot be achieved or performed without access to the information; an explanation of whether other information is available to the requester that could facilitate the same objective; how long the information will be needed; whether or not the information is needed to participate in a specific proceeding (with that proceeding identified); and an explanation of whether the information is needed expeditiously.
 - (C) An executed non-disclosure agreement as described in paragraph (h)(2) of this section;
 - (D) A signed statement attesting to the accuracy of the information provided in the request; and

- (E) A requester shall provide his or her date and place of birth upon request, if it is determined by the CEII Coordinator that this information is necessary to process the request.
- (ii) A requester who seeks the information on behalf of all employees of an organization should clearly state that the information is sought for the organization, that the requester is authorized to seek the information on behalf of the organization, and that all individuals in the organization that have access to the CEII will agree to be bound by a non-disclosure agreement that must be executed.
- (iii) After 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.
- (iv) If the CEII Coordinator determines that the CEII requester has not demonstrated a valid or legitimate need for the CEII or that access to the CEII should be denied for other reasons, this determination may be appealed to the General Counsel pursuant to § 388.110. The General Counsel will decide whether the information is properly classified as CEII, which by definition is exempt from release under FOIA, and whether the Commission should in its discretion make such CEII available to the CEII requester in view of the requester's asserted legitimacy and need.
- (v) Once a CEII requester has been verified by Commission staff as a legitimate requester who does not pose a security risk, his or her verification will be valid for the remainder of that calendar year. Such a requester is not required to provide detailed information about himself or herself with subsequent requests during the calendar year. He or she is also not required to file a non-disclosure agreement with subsequent requests during the calendar year because the original non-disclosure agreement will apply to all subsequent releases of CEII.
- (vi) An organization that is granted access to CEII pursuant to paragraph (g)(5)(ii) of this section may seek to add additional individuals to the non-disclosure agreement within one (1) year of the date of the initial CEII request. Such an organization must provide the names of the added individuals to the CEII Coordinator and certify that notice of each added individual has been given to the submitter. Any newly added individuals must execute a supplement to the original non-disclosure agreement indicating their acceptance of its terms. If there is no written opposition within five business days of notifying the CEII Coordinator and the submitter concerning the addition of any newly added individuals, the CEII Coordinator will issue a standard notice accepting the addition of these names to the non-disclosure agreement. If the submitter files a timely opposition with the CEII Coordinator, the CEII Coordinator will issue a formal determination addressing the merits of such opposition. If an organization that is granted access to CEII pursuant to paragraph (g)(5)(ii) of this section wants to add new individuals to its non-disclosure agreement more than one year after the date of its initial CEII request, the organization must submit a new CEII request pursuant to paragraph (g)(5)(ii) of this section and a new non-disclosure agreement for each new individual added.
- (vii) The CEII Coordinator will attempt to respond to the requester under this section according to the timing required for responses under the FOIA in § 388.108(c).
- (viii) Fees for processing CEII requests will be determined in accordance with § 388.109.

- (ix) Nothing in this section should be construed as requiring the release of proprietary information, personally identifiable information, cultural resource information, information on rare species of plants and animals, and other comparable data protected by statute or any privileged information, including information protected by the deliberative process privilege.

(h) **Duty to protect CEII.** Unauthorized disclosure of CEII is prohibited.

- (1) To ensure that the Commissioners, Commission employees, and Commission contractors protect CEII from unauthorized disclosure, internal controls will describe the handling, marking, and security controls for CEII.
- (2) Any individual who requests information pursuant to paragraph (g)(5) of this section must sign and execute a non-disclosure agreement, which indicates the individual's willingness to adhere to limitations on the use and disclosure of the information requested. The non-disclosure agreement will, at a minimum, require the following: CEII will only be used for the purpose for which it was requested; CEII may only be discussed with authorized recipients; CEII must be kept in a secure place in a manner that would prevent unauthorized access; CEII must be destroyed or returned to the Commission upon request; the Commission may audit the recipient's compliance with the non-disclosure agreement; CEII provided pursuant to the agreement is not subject to release under either FOIA or Sunshine Laws; a recipient is obligated to protect the CEII even after a designation has lapsed until the CEII Coordinator determines the information should no longer be designated as CEII under paragraph (e)(2) of this section; and a recipient is required to promptly report all unauthorized disclosures of CEII to the Commission.

(i) **Sanctions.** Any officers, employees, or agents of the Commission who knowingly and willfully disclose CEII in a manner that is not authorized under this section will be subject to appropriate sanctions, such as removal from the federal service, or possible referral for criminal prosecution. Commissioners who knowingly and willfully disclose CEII without authorization may be referred to the Department of Energy Inspector General. The Commission will take responsibility for investigating and, as necessary, imposing sanctions on its employees and agents.

(j) **Administrative appeals of CEII determinations.**

- (1) Submitters who receive a determination that the Commission intends to remove a CEII designation may appeal that determination. The submitter must file notice of its intent to appeal that determination within five business days of the determination. The notice of intent to file an appeal must be sent to the General Counsel, with a copy to the CEII Coordinator. A statement in support of the notice of appeal must be submitted to the General Counsel within 20 business days of the date of the determination. The appeal will be considered received upon receipt of the statement in support of the notice of appeal.
- (2) Individuals who receive a determination denying a request for the release of CEII, in whole or in part, or a determination denying a request to change the designation of CEII may appeal such determinations. Such appeals must be submitted to the General Counsel within 20 business days of the date of the determination.
- (3) The Commission's General Counsel or the General Counsel's designee will make a determination with respect to any appeal within 20 business days after the receipt of the appeal. If, on appeal, the General Counsel or the General Counsel's designee upholds the determination in whole or in part, then the General Counsel or the General Counsel's designee will notify the person submitting the appeal of the availability of judicial review.

- (4) The time limits prescribed for the General Counsel or his designee to act on an appeal may be extended pursuant to § 388.110(b)(1).
- (5) Prior to seeking judicial review in federal district court pursuant to section 215A(d)(11) of the Federal Power Act, a person who received a determination from the Commission concerning a CEI designation must first appeal the determination to the Commission's General Counsel.

[Order 833, 81 FR 93749, Dec. 21, 2016]