

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

NOTICE TO THE PUBLIC

REVISIONS TO MODEL PROTECTIVE ORDER AND  
UPDATED PROCEDURE FOR SUBMISSION

(Issued November 9, 2016)

1. The Commission requires that confidential or protected materials, including Critical Energy Infrastructure Information (CEII), commercially sensitive, proprietary, or otherwise similar sensitive information, be referred to as “privileged.”<sup>1</sup> Consistent with this requirement, the Model Protective Order has been revised to comply with this adopted terminology. The current version of the Model Protective Order is available on the Commission’s Administrative Litigation webpage: <http://www.ferc.gov/legal/admin-lit.asp>
2. Additionally, any Participant filing a motion for the adoption of a Protective Order in a proceeding before an administrative law judge must also submit a Word version of the proposed Protective Order by email. Depending on the posture of the proceeding, the email should either be sent to the Chief Judge’s staff or to the Presiding Judge’s staff.

Carmen A. Cintron  
Chief Administrative Law Judge

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<sup>1</sup> *Filing of Privileged Materials and Answers to Motions*, Order No. 769, 141 FERC ¶ 61,049, at PP 20-23 (2012); 18 C.F.R. § 388.112 (2016).

MODEL PROTECTIVE ORDER

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Name of Proceeding

Docket No.

PROTECTIVE ORDER

(Issued \_\_\_\_\_ )

1. This Protective Order shall govern the use of all Privileged Materials produced by, or on behalf of, any Participant. Notwithstanding any order terminating this proceeding, this Protective Order shall remain in effect until specifically modified or terminated by the Presiding Administrative Law Judge (Presiding Judge) or the Chief Administrative Law Judge (Chief Judge) or the Federal Energy Regulatory Commission (Commission).

2. This Protective Order applies to the following two categories of materials: (A) A Participant may designate as privileged those materials which customarily are treated by that Participant as sensitive or proprietary, which are not available to the public, and which, if disclosed freely, would subject that Participant or its customers to risk of competitive disadvantage or other business injury; and (B) A Participant shall designate as privileged those materials which contain critical energy infrastructure information, as defined in 18 CFR § 388.113(c)(1) (Critical Energy Infrastructure Information).

3. Definitions -- For purposes of this Order:

(a) The term "Participant" shall mean a Participant as defined in 18 CFR § 385.102(b).

(b) (1) The term "Privileged Materials" means (A) materials (including depositions) provided by a Participant in response to discovery requests and designated by such Participant as privileged; (B) any information contained in or obtained from such designated materials; (C) any other materials which are made subject to this Protective Order by the Presiding Judge or the Chief Judge, by the Commission, by any court or other body having appropriate authority, or by agreement of the Participants; (D) notes of Privileged Materials; and (E) copies of Privileged Materials. The Participant producing the Privileged Materials shall physically mark them on each page as "PRIVILEGED MATERIALS" or with words of similar import as long as the term "Privileged Materials" is included in that designation to indicate that they are Privileged Materials. If the Privileged Materials contain Critical Energy Infrastructure Information, the Participant

producing such information shall additionally mark on each page containing such information the words "Contains Critical Energy Infrastructure Information – Do Not Release."

(2) The term "Notes of Privileged Materials" means memoranda, handwritten notes, or any other form of information (including electronic form) which copies or discloses materials described in Paragraph 3(b)(1). Notes of Privileged Materials are subject to the same restrictions provided in this order for Privileged Materials except as specifically provided in this order.

(3) Privileged Materials shall not include (A) any information or document that has been filed with and accepted into the public files of the Commission, or contained in the public files of any other federal or state agency, or any federal or state court, unless the information or document has been determined to be privileged by such agency or court, or (B) information that is public knowledge, or which becomes public knowledge, other than through disclosure in violation of this Protective Order, or (C) any information or document labeled as "Non-Internet Public" by a Participant, in accordance with Paragraph 30 of FERC Order No. 630, FERC Stat. & Reg. ¶ 31,140. Privileged Materials do include any information or document contained in the files of the Commission that has been designated as Critical Energy Infrastructure Information.

(c) The term "Non-Disclosure Certificate" shall mean the certificate annexed hereto by which Participants who have been granted access to Privileged Materials shall certify their understanding that such access to Privileged Materials is provided pursuant to the terms and restrictions of this Protective Order, and that such Participants have read the Protective Order and agree to be bound by it. All Non-Disclosure Certificates shall be served on all parties on the official service list maintained by the Secretary in this proceeding.

(d) The term "Reviewing Representative" shall mean a person who has signed a Non-Disclosure Certificate and who is:

- (1) Commission Trial Staff designated as such in this proceeding;
- (2) an attorney who has made an appearance in this proceeding for a Participant;
- (3) attorneys, paralegals, and other employees associated for purposes of this case with an attorney described in Subparagraph (2);
- (4) an expert or an employee of an expert retained by a Participant for the purpose of advising, preparing for or testifying in this proceeding;

(5) a person designated as a Reviewing Representative by order of the Presiding Judge or the Chief Judge or the Commission; or

(6) employees or other representatives of Participants appearing in this proceeding with significant responsibility for this docket.

4. Privileged Materials shall be made available under the terms of this Protective Order only to Participants and only to their Reviewing Representatives as provided in Paragraphs 7-9.

5. Privileged Materials shall remain available to Participants until the later of the date that an order terminating this proceeding becomes no longer subject to judicial review, or the date that any other Commission proceeding relating to the Privileged Material is concluded and no longer subject to judicial review. If requested to do so in writing after that date, the Participants shall, within fifteen days of such request, return the Privileged Materials (excluding Notes of Privileged Materials) to the Participant that produced them, or shall destroy the materials, except that copies of filings, official transcripts and exhibits in this proceeding that contain Privileged Materials, and Notes of Privileged Material may be retained, if they are maintained in accordance with Paragraph 6, below. Within such time period each Participant, if requested to do so, shall also submit to the producing Participant an affidavit stating that, to the best of its knowledge, all Privileged Materials and all Notes of Privileged Materials have been returned or have been destroyed or will be maintained in accordance with Paragraph 6. To the extent Privileged Materials are not returned or destroyed, they shall remain subject to the Protective Order.

6. All Privileged Materials shall be maintained by the Participant in a secure place. Access to those materials shall be limited to those Reviewing Representatives specifically authorized pursuant to Paragraphs 8-9. The Secretary shall place any Privileged Materials filed with the Commission in a non-public file. By placing such documents in a non-public file, the Commission is not making a determination of any claim of privilege. The Commission retains the right to make determinations regarding any claim of privilege and the discretion to release information necessary to carry out its jurisdictional responsibilities. For documents submitted to Commission Trial Staff (Staff), Staff shall follow the notification procedures of 18 CFR § 388.112 before making public any Privileged Materials.

7. Privileged Materials shall be treated as privileged by each Participant and by the Reviewing Representative in accordance with the certificate executed pursuant to Paragraph 9. Privileged Materials shall not be used except as necessary for the conduct of this proceeding, nor shall they be disclosed in any manner to any person except a

Reviewing Representative who is engaged in the conduct of this proceeding and who needs to know the information in order to carry out that person's responsibilities in this proceeding. Reviewing Representatives may make copies of Privileged Materials, but such copies become Privileged Materials. Reviewing Representatives may make notes of Privileged Materials, which shall be treated as Notes of Privileged Materials if they disclose the contents of Privileged Materials.

8. (a) If a Reviewing Representative's scope of employment includes the marketing of energy, the direct supervision of any employee or employees whose duties include the marketing of energy, the provision of consulting services to any person whose duties include the marketing of energy, or the direct supervision of any employee or employees whose duties include the marketing of energy, such Reviewing Representative may not use information contained in any Privileged Materials obtained through this proceeding to give any Participant or any competitor of any Participant a commercial advantage.

(b) In the event that a Participant wishes to designate as a Reviewing Representative a person not described in Paragraph 3 (d) above, the Participant shall seek agreement from the Participant providing the Privileged Materials. If an agreement is reached that person shall be a Reviewing Representative pursuant to Paragraphs 3(d) above with respect to those materials. If no agreement is reached, the Participant shall submit the disputed designation to the Presiding Judge for resolution.

9. (a) A Reviewing Representative shall not be permitted to inspect, participate in discussions regarding, or otherwise be permitted access to Privileged Materials pursuant to this Protective Order unless that Reviewing Representative has first executed a Non-Disclosure Certificate; provided, that if an attorney qualified as a Reviewing Representative has executed such a certificate, the paralegals, secretarial and clerical personnel under the attorney's instruction, supervision or control need not do so. A copy of each Non-Disclosure Certificate shall be provided to counsel for the Participant asserting privilege prior to disclosure of any Privileged Material to that Reviewing Representative.

(b) Attorneys qualified as Reviewing Representatives are responsible for ensuring that persons under their supervision or control comply with this order.

10. Any Reviewing Representative may disclose Privileged Materials to any other Reviewing Representative as long as the disclosing Reviewing Representative and the receiving Reviewing Representative both have executed a Non-Disclosure Certificate. In the event that any Reviewing Representative to whom the Privileged Materials are disclosed ceases to be engaged in these proceedings, or is employed or retained for a position whose occupant is not qualified to be a Reviewing Representative under Paragraph 3(d), access to Privileged Materials by that person shall be terminated. Even if no longer engaged in this proceeding, every person who has executed a Non-Disclosure Certificate shall continue to be bound by the provisions of this Protective Order and the certification.

11. Subject to Paragraph 18, the Presiding Judge or the Chief Judge or the Commission shall resolve any disputes arising under this Protective Order. Prior to presenting any dispute under this Protective Order to the Presiding Judge or the Chief Judge or the Commission, the parties to the dispute shall use their best efforts to resolve it. Any Participant that contests the designation of materials as privileged shall notify the Participant that provided the privileged materials by specifying in writing the materials the designation of which is contested. This Protective Order shall automatically cease to apply to such materials five (5) business days after the notification is made unless the designator, within said 5-day period, files a motion with the Presiding Judge or the Chief Judge or the Commission, with supporting affidavits, demonstrating that the materials should continue to be privileged. In any challenge to the designation of materials as privileged, the burden of proof shall be on the Participant seeking protection. If the Presiding Judge or the Chief Judge or the Commission finds that the materials at issue are not entitled to privilege, the procedures of Paragraph 18 shall apply. The procedures described above shall not apply to privileged materials designated by a Participant as Critical Energy Infrastructure Information. Materials so designated shall remain privileged and subject to the provisions of this Protective Order, unless a Participant requests and obtains a determination from the Commission's Critical Energy Infrastructure Information Coordinator that such materials need not remain privileged.

12. All copies of all documents reflecting Privileged Materials, including the portion of the hearing testimony, exhibits, transcripts, briefs and other documents, which refer to Privileged Materials, shall be filed and served in sealed envelopes or other appropriate containers endorsed to the effect that they are sealed pursuant to this Protective Order. Such documents shall be marked "PRIVILEGED MATERIALS" and shall be filed under seal and served under seal upon the Presiding Judge and all Reviewing Representatives who are on the service list. Such documents containing Critical Energy Infrastructure Information shall be additionally marked "Contains Critical Energy Infrastructure Information – Do

Not Release." For anything filed under seal, redacted versions or, where an entire document is privileged, a letter indicating such, will also be filed with the Commission and served on all Participants on the service list and the Presiding Judge. Counsel for the producing Participant shall provide to all Participants who request the same, a list of Reviewing Representatives who are entitled to receive such material. Counsel shall take all reasonable precautions necessary to assure that Privileged Materials are not distributed to unauthorized persons.

13. If any Participant desires to include, utilize or refer to any Privileged Materials or information derived therefrom in testimony or exhibits during the hearing in these proceedings in such a manner that might require disclosure of such material to persons other than reviewing representatives, such Participant shall first notify both counsel for the disclosing Participant and the Presiding Judge of such desire, identifying with particularity each of the Privileged Materials. Thereafter, use of such Privileged Material will be governed by procedures determined by the Presiding Judge.

14. Nothing in this Protective Order shall be construed as precluding any Participant from objecting to the use of Privileged Materials on any legal grounds.

15. Nothing in this Protective Order shall preclude any Participant from requesting the Presiding Judge, the Chief Judge, the Commission, or any other body having appropriate authority, to find that this Protective Order should not apply to all or any materials previously designated as Privileged Materials pursuant to this Protective Order. The Presiding Judge or the Chief Judge or the Commission may alter or amend this Protective Order as circumstances warrant at any time during the course of this proceeding.

16. Each Participant governed by this Protective Order has the right to seek changes in it as appropriate from the Presiding Judge or the Chief Judge or the Commission.

17. All Privileged Materials filed with the Commission, the Presiding Judge, or any other judicial or administrative body, in support of, or as a part of, a motion, other pleading, brief, or other document, shall be filed and served in sealed envelopes or other appropriate containers bearing prominent markings indicating that the contents include Privileged Materials subject to this Protective Order. Such documents containing Critical Energy Infrastructure Information shall be additionally marked "Contains Critical Energy Infrastructure Information – Do Not Release."

18. If the Presiding Judge or the Chief Judge finds at any time in the course of this proceeding that all or part of the Privileged Materials need not be privileged, those materials shall, nevertheless, be subject to the privilege afforded by this Protective Order for three (3) business days from the date of issuance of the Presiding Judge's or the Chief Judge's determination, and if the Participant seeking privilege files an interlocutory appeal or requests that the issue be certified to the Commission, for an additional seven (7) business days. None of the Participants waives its rights to seek additional administrative or judicial remedies after the Presiding Judge's or the Chief Judge's decision respecting Privileged Materials or Reviewing Representatives, or the Commission's denial of any appeal thereof. The provisions of 18 CFR §§ 388.112 and 388.113 shall apply to any requests under the Freedom of Information Act (5 U.S.C. § 552) for Privileged Materials in the files of the Commission.

19. Nothing in this Protective Order shall be deemed to preclude any Participant from independently seeking through discovery in any other administrative or judicial proceeding information or materials produced in this proceeding under this Protective Order.

20. None of the Participants waives the right to pursue any other legal or equitable remedies that may be available in the event of actual or anticipated disclosure of Privileged Materials.

21. The contents of Privileged Materials or any other form of information that copies or discloses Privileged Materials shall not be disclosed to anyone other than in accordance with this Protective Order and shall be used only in connection with this (these) proceeding(s). Any violation of this Protective Order and of any Non-Disclosure Certificate executed hereunder shall constitute a violation of an order of the Commission.

Presiding Administrative Law Judge

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Name of Proceeding

Docket No.

NON-DISCLOSURE CERTIFICATE

I hereby certify my understanding that access to Privileged Materials is provided to me pursuant to the terms and restrictions of the Protective Order in this proceeding, that I have been given a copy of and have read the Protective Order, and that I agree to be bound by it. I understand that the contents of the Privileged Materials, any notes or other memoranda, or any other form of information that copies or discloses Privileged Materials shall not be disclosed to anyone other than in accordance with that Protective Order. I acknowledge that a violation of this certificate constitutes a violation of an order of the Federal Energy Regulatory Commission.

By: \_\_\_\_\_  
Printed Name: \_\_\_\_\_  
Title: \_\_\_\_\_  
Representing: \_\_\_\_\_  
Date: \_\_\_\_\_