

THE UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Revised Filing and Reporting Requirements)
for Interstate Natural Gas Company Rate)
Schedules and Tariffs) Docket No. RM21-18-000

REPLY COMMENTS OF
THE INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA

The Federal Energy Regulatory Commission (“Commission” or “FERC”) issued a Notice of Proposed Rulemaking on May 19, 2022 in the above-captioned docket (the “Proposed Rule”) that “proposes to establish a rule to require natural gas pipelines to submit all supporting statements, schedules and workpapers in native format (e.g., Microsoft Excel) with all links and formulas intact when filing a Natural Gas Act section 4 rate case.”¹ On June 24, 2022, American Gas Association, American Public Gas Association, American Forest & Paper Association, Industrial Energy Consumers of America, Process Gas Consumers Group, and Natural Gas Supply Association (collectively “AGA, *et al.*”) filed comments² requesting that the Commission modify its Proposed Rule to require that the rate model spreadsheets that are the subject of the Proposed Rule be filed as public (*i.e.*, not as privileged) in all cases, without any ability to seek privileged treatment under Section 388.112 of the Commission’s regulations for any portion of the spreadsheets that the natural gas pipeline company treats as confidential for commercial reasons.³ The Interstate Natural Gas Association of America (“INGAA”)

¹ Proposed Rule at p.1.

² Comments of the American Gas Association, American Public Gas Association, American Forest & Paper Association, Industrial Energy Consumers of America, Process Gas Consumers Group, and Natural Gas Supply Association at 11-12, Docket No. RM21-18-000 (June 24, 2022) (“AGA Comments”).

³ 18 C.F.R. § 388.112 (2021).

hereby respectfully moves for leave to file and files these Reply Comments in opposition to AGA, *et al.*'s request.⁴

Good cause exists to grant INGAA leave to file these Reply Comments. AGA, *et al.* has requested that the Commission, in any final rule in this proceeding, implement a blanket denial of any request under Section 388.112 for privileged treatment of any portion of the rate model spreadsheets that the Commission is requiring natural gas pipelines to file as part of the Proposed Rule. AGA, *et al.*'s request seeks a substantive change to the Proposed Rule for which no notice was provided to the public. AGA, *et al.* essentially asks the Commission to modify its long-standing rule under Section 388.112 by making Section 388.112 apply to some types of privileged treatment, but not to others. Because AGA *et al.*'s request was not reflected in the Proposed Rule, INGAA could not have known to comment on the request and, therefore, good cause exists to permit INGAA to file these Reply Comments at this time.⁵ To the extent the Commission considers AGA, *et al.*'s requested change to the Proposed Rule, these Reply Comments would assist the

⁴ INGAA is a trade association that advocates regulatory and legislative positions of importance to the interstate natural gas pipeline industry in the United States. INGAA's 26 members represent the majority of interstate natural gas transmission pipeline companies in the U.S. INGAA's members, which operate approximately 200,000 miles of interstate natural gas pipelines, serve as an indispensable link between natural gas producers and consumers. Its members' interstate natural gas pipelines are regulated by the Commission pursuant to the Natural Gas Act ("NGA"). 15 U.S.C. §§ 717-717w (2018). INGAA filed comments in response to the Proposed Rule on June 24, 2022. Comments of the Interstate Natural Gas Association of America, Docket No. RM21-18-000 (June 24, 2022) ("INGAA Comments").

⁵ The Commission has accepted reply comments under similar circumstances and should do so again here. See, *Revisions to Electric Reliability Organization Definition of Bulk Electric System and Rules of Procedure*, 141 FERC ¶ 61,236, P 30, n.27 (2012) ("Although the NOPR did not allow for reply comments, we will accept these pleadings because they have assisted our understanding of NERC's proposal in this Final Rule."); see also *Equitrans, LP*, 152 FERC ¶ 61,103, P 10, n.4 (2015) ("[T]he Commission accepts Equitrans' Reply since it will not delay the proceeding, may assist the Commission in understanding the issues raised, and will ensure a complete record."); *Seaway Crude Pipeline Co.*, 142 FERC ¶ 61,201, P 10, n.8 (2013) ("The Commission grants leave and accepts Seaway's reply comments, as they provide the Commission a full understanding of the issues in this proceeding and will assist in our decision making.").

Commission in understanding why such a change is both unnecessary and inconsistent with the Commission's long-standing treatment of privileged information under its regulations.⁶

ARGUMENT

As reflected in its comments regarding the Proposed Rule, INGAA appreciates the Commission's exploration of ways to "streamline the rate case process," to "expedite settlement negotiations," and "to update the filing requirements to reflect current information technology capabilities."⁷ In its comments, INGAA indicated its general support for a requirement to submit all supporting statements, schedules, and workpapers necessary to initiate an NGA Section 4 rate case in native format and with (1) all formulas and (2) all links within and between the statements, schedules and workpapers filed in the same rate case, subject to the Commission's clarification of certain ambiguities in the Proposed Rule.⁸ The INGAA Comments did not address the request by AGA, *et al.* to require that the statements and schedules that are the subject of the Proposed Rule be filed as public, even where such documents would qualify as privileged under the Commission's existing regulations at 18 C.F.R. §388.112 (2021), because the Proposed Rule did not include such a requirement. Accordingly, INGAA hereby respectfully submits these Reply Comments in opposition to the comment seeking to require INGAA members to file confidential information as publicly available information in eLibrary.

The Commission should not modify a natural gas company's right to designate statements and schedules with formulas and links intact as privileged materials under

⁶ To the extent AGA, *et al.*'s requested change is implemented in any file rule in this proceeding, such implementation could violate the notice and comment procedures under the Administrative Procedure Act.

⁷ INGAA Comments at 2 (citing Proposed Rule at PP 6-8).

⁸ *Id.*

18 C.F.R. § 388.112 to the extent that such designation is appropriate.⁹ The Commission’s regulations allow a person to request privileged treatment of documents that the person claims are “exempt from the mandatory public disclosure requirements of the Freedom of Information Act, 5 U.S.C. 552 (FOIA).”¹⁰ Pipelines submit certain information in rate case filings, including the statements and schedules with proprietary formulas and links, as privileged where the information contains commercially sensitive information that the pipelines treat as confidential, which is covered by FOIA Exemption 4.¹¹ Information is “confidential” within the meaning of FOIA’s Exemption 4 “where commercial or financial information is both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy.”¹²

The statements, schedules and workpapers with formulas and links intact are commercial information that certain pipelines treat as private and are provided by those pipelines to the Commission with the expectation that, while the information will be available to the Commission’s Office of Energy Markets (“OEMR”), Commission Trial Staff and all intervenors for use in any manner necessary for purposes of the rate case proceeding, the information will not be generally available on the public docket for use outside of the rate case.¹³ In fact, the Commission acknowledged in Order No. 703 that

⁹ The AGA Comments seem to be requesting that the Commission require privileged information to be filed as public; however, the comments are ambiguous because in certain statements AGA, *et al.* equivocate by acknowledging that there are circumstances where confidentiality is warranted. AGA Comments at 11.

¹⁰ 18 C.F.R. § 388.112.

¹¹ 5 U.S.C. § 552(b)(4) (identifying “trade secrets and commercial or financial information obtained from a person and privileged or confidential” as exempt from mandatory disclosure); 18 C.F.R. § 388.107(d) (2021) (using identical language).

¹² *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2366 (2019) (“Argus Leader”).

¹³ *See, e.g., Seife v. Food & Drug Admin.*, 492 F. Supp. 3d 269, 276-77 (S.D.N.Y. 2020) (limited disclosures subject to nondisclosure agreements and “not made to the general public, do not preclude Exemption 4 protection”).

the pipeline is entitled to submit spreadsheets as privileged and only provide the flat files or a PDF as the public version of the protected information.¹⁴ Accordingly, privileged treatment of the statements and schedules that are the subject of the Proposed Rule is consistent with the Commission's treatment of confidential information under its regulations and orders.

Privileged treatment of the rate model statements, schedules and workpapers with formula and links intact is also consistent with the treatment of information as confidential under the Chief Administrative Law Judge's Model Protective Order. The Model Protective Order provides protection to "material which customarily is treated by that [pipeline] as commercially sensitive or proprietary . . . , which is not otherwise available to the public, and which, if disclosed, would subject that [pipeline] . . . to risk of competitive disadvantage or other business injury."¹⁵ By including the requirement that disclosure would subject the disclosing party to "competitive disadvantage or other business injury," which exceeds the requirement for seeking privileged treatment under 18 C.F.R. § 388.112, the model protective order allows an administrative law judge to determine based on evidence in the record in a specific proceeding, whether there is a reason to require disclosure of information that is exempt from mandatory disclosure under FOIA. Accordingly, there are already procedures in place that address AGA, *et al.*'s concerns

¹⁴ Filing Via the Internet, Order No. 703, FERC Stats. & Regs., ¶ 31,259 (2007) (cross-reference at 121 FERC ¶ 61,171) ("Order No. 703") at P 26.

¹⁵ See Model Protective Order at P 2(A) (Revised May 11, 2020), available at <https://www.ferc.gov/administrative-litigation-0>. In *Argus Leader*, the U.S. Supreme Court found that whether the disclosure would subject the disclosing party to "substantial competitive harm" was not relevant to whether FOIA Exemption 4 would apply. 139 S. Ct. at 2365-66. As such, statements, schedules and workpapers with formula and links intact that the pipeline maintains as private and are submitted to the Commission under seal qualify as privileged information under the Commission's regulation irrespective of whether a pipeline demonstrates competitive harm.

about access to privileged information,¹⁶ provide safeguards if materials are not properly designated as privileged, allow for a reasoned case-by-case analysis of the circumstances,¹⁷ and contradict AGA, *et al.*'s claim that "confidentiality [would] swallow[] the rule."¹⁸

There are many reasons to seek protection of the rate model spreadsheets based on concerns that disclosure may result in "competitive disadvantage or other business injury." One concern is that third parties such as data miners, financial analysts, and other entities with no legitimate interest in the ratemaking process may misuse, modify, or misrepresent the cost allocation or rate design results associated with running the model contained within the spreadsheets in ways that would be difficult or impossible to clarify. Such misuse could be the basis for unsupported claims that the pipeline is earning more than a reasonable return or unfairly allocating costs, which could affect the pipeline's value to potential investors, lenders, shippers or other market participants. A pipeline can identify and correct the misuse of the spreadsheets in the rate proceeding through discovery, responsive testimony and cross-examination, but these avenues for identifying and correcting the misuse are not available outside a Commission proceeding. The pipeline may not even be aware that such misuse is occurring.

Any administrative convenience (i.e. intervening parties not having to execute a non-disclosure certificate) is outweighed by the risk of competitive harm or other business

¹⁶ See 18 C.F.R § 388.112(b).

¹⁷ Because pipelines have always been permitted to file statements and schedules with proprietary formulas and links as privileged, there is an element of uncertainty regarding the business injuries that might result from a blanket rule denying such materials the protections of 18 C.F.R. § 388.112. The model protective order allows for each party to argue the facts of each case, based upon the most recent evidence available, whereas a Commission rule would prejudge and limit a pipeline's ability to show actual harm in the future, to the extent additional harms not currently contemplated occur.

¹⁸ AGA Comments at 11. Under 18 C.F.R. § 388.112, rate models that were filed as public in prior rate cases could not be filed as privileged in subsequent rate cases because they would not satisfy FOIA Exemption 4, so any claim that confidentiality would "swallow the rule" is overstated.

injury that would result from publicly filing proprietary information. The Commission’s OEMR Staff, Trial Staff and all intervenors in a Commission proceeding have full and complete access to documents filed with the Commission in a proceeding marked as privileged materials.¹⁹ The Commission and these participants have the unobstructed right and ability to use the documents to review the rate case filing and record and prosecute their respective positions in the proceeding. Consequently, no purpose would be served by publicly disclosing these documents.

The statements and schedules with formulas and links intact addressed in the Proposed Rule should be afforded the same protection as other privileged information to the extent they satisfy the criteria in 18 C.F.R. § 388.112 and an administrative law judge can determine whether the “risk of competitive disadvantage or other business injury” warrants maintenance of such protection. The AGA Comments simply indicate AGA, *et al.*’s, unsupported opinion that the information should be public and their preference is to avoid expending effort to procure privileged information.²⁰ However, the Commission has already addressed a filer’s right to designate materials as privileged and the balance between protecting confidential information and the minimal effort required to receive privileged information pursuant to a non-disclosure agreement when it revised 18 C.F.R. § 388.112.²¹ Contrary to AGA, *et al.*’s claim, the “time, effort, and resources” required to “enter[] into a non-disclosure agreement” are immaterial in the context of an NGA Section 4 rate case proceeding.²² There is simply no record in this proceeding to support a

¹⁹ 18 C.F.R. § 388.112(b).

²⁰ AGA Comments at 11.

²¹ *Filing of Privileged Materials and Answers to Motions*, Order No. 769, FERC Stats. & Regs. ¶ 31,337, at PP 23, 40 (2012).

²² AGA Comments at 11.

departure from prior precedent or to support a modification of the Commission's treatment of privileged material.

This rulemaking docket also is not the appropriate forum for modifying the information that qualifies as privileged under the Commission's regulations. Neither INGAA nor any other interested stakeholder had notice that the Commission was considering requiring the filing of confidential rate models as public information, which would be a change to the Commission's longstanding treatment of privileged information under its regulations.²³ The Proposed Rule did not include any discussion of the designation of the materials as public (or privileged), did not reference a presumption that the statements and schedules be filed publicly, and did not propose any revisions to 18 C.F.R. § 388.112 despite AGA, *et al.* including the same comment in their Petition for Rulemaking filed in the above-referenced docket on June 24, 2021.²⁴ Accordingly, there was insufficient notice under the Administrative Procedure Act for the Commission to adopt a rule requiring the statements and schedules described in the Proposed Rule to be filed publicly and the Commission should not include such language in a final rule.²⁵

CONCLUSION

For the foregoing reasons, INGAA respectfully requests that the Commission grant leave to file these Reply Comments and decline to modify a natural gas pipeline's right to

²³ See 18 C.F.R. § 388.112 (permitting a person to "request privileged treatment for [] information [] 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.").

²⁴ Petition for Rulemaking to Update Pipeline Filing Requirements of the American Gas Association, American Public Gas Association, American Forest & Paper Association, Industrial Energy Consumers of America, Process Gas Consumers Group, and Natural Gas Supply Association at 12-14, Docket No. RM21-18-000 (June 24, 2021).

²⁵ 5 U.S.C.A. § 553(b)(3).

seek privileged treatment under Section 388.112 for any portion of the rate model spreadsheets that the pipeline treats as confidential for commercial reasons.

Respectfully submitted,

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