Designation Document expands the boundary of the Sanctuary and the regulations implement the expansion, establish and implement the Tortugas Ecological Reserve, and make other revisions to the Sanctuary regulations.

DATES: The final regulations published at 66 FR 4267 (January 17, 2001) are effective March 8, 2001.

FOR FURTHER INFORMATION CONTACT: Mr. Billy Causey, (305) 743–2437.

SUPPLEMENTARY INFORMATION:

Background

This document announces the effective date in Federal waters for the Revised Designation Document expanding the boundary of the Florida Keys National Marine Sanctuary (FKNMS or Sanctuary) and the final regulations that implement the boundary expansion, establish and implement the Tortugas Ecological Reserve, and that make certain revisions to the Sanctuary regulations. The expansion of the Sanctuary boundary encompasses an area of the State of Florida waters and Federal waters at the far western end of the Florida Keys, and the submerged lands thereunder. The **Federal Register** document publishing those regulations also contained the Revised Designation Document and summarized the final supplemental management plan for the Sanctuary. The Revised Designation Document sets forth the geographical area included within the Sanctuary, the characteristics of the area that give it conservation, recreational, ecological, historical, research, education, or esthetic value, and the type of activities subject to regulation. The supplemental management plan details the goals and objectives, management responsibilities, research activities, interpretive and educational programs, and enforcement activities of the area. As stated in the preamble to the final rule, the regulations become effective after the close of a review period of 45 days of continuous session of Congress beginning on the day on which the final rule was published unless the Governor of the State of Florida certifies to the Secretary of Commerce that the designation or any of its terms is unacceptable, in which case the designation or any unacceptable terms shall not take effect in State of Florida waters unless and until approved by the Board of Trustees of the Internal Improvement Fund of the State of Florida. The Congressional review period ended on March 7, 2001. On March 6, 2001, the Governor of the State of Florida certified to the Secretary of Commerce that the revised designation, the supplemental management plan, and the regulations implementing the Tortugas Ecological Reserve were unacceptable unless and until approved by the Board of Trustees. The Governor further advised the Secretary that the State of Florida is committed to the protection of the Tortugas area and its resources and that it is expected that the Board of Trustees will consider the proposed designation, ecological reserve, and the implementing regulations within a reasonable time.

Accordingly, the designation of the Sanctuary and the regulations implementing that designation became effective in Federal waters on March 8, 2001. The regulations will not take effect in Florida State waters until approved by the Board of Trustees of the Internal Improvement Fund of the State of Florida. This **Federal Register** document announces the effective date of the Revised Designation Document and the final regulations as March 8, 2001.

Ted I. Lillestolen,

Deputy Assistant Administrator for Ocean Services and Coastal Zone Management.

[FR Doc. 01–7273 Filed 3–22–01; 8:45 am]

BILLING CODE 3510–08–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 33

[Docket No. RM98–4–001; Order No. 642–A]

Revised Filing Requirements Under Part 33 of the Commission's Regulations

Issued March 15, 2001.

AGENCY: Federal Energy Regulatory Commission.

ACTION: final rule; order on rehearing.

SUMMARY: The Federal Energy Regulatory Commission (Commission) is issuing an order addressing requests for rehearing of Order No. 642, a final rule updating the filing requirements applications filed under the Commission's regulations. (65 FR 70984 (Nov. 28, 2000).) Order No. 642 was designed to implement the Commission's Policy Statement concerning mergers under the Federal Power Act. The final rule codified the Commission's screening approach to mergers that may raise horizontal competitive concerns, provided specific filing requirements consistent with Appendix A of the Commission's Merger Policy Statement, established guidelines for vertical competitive analysis, and identified filing requirements for mergers that potentially raise vertical market power concerns. The order on rehearing addresses issues relating to the Merger Policy Statement, the abbreviated filing requirements, adequacy of data requirements, consideration of retail competitive effects, generic conditions for mergers, a temporary moratorium on mergers and other miscellaneous issues.

FOR FURTHER INFORMATION CONTACT: Diana Moss, Office of Markets, Tariffs and Rates, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 208–0087.

SUPPLEMENTARY INFORMATION:

Federal Energy Regulatory Commission

Before Commissioners: Curt Hébert, Jr., Chairman; William L. Massey, and Linda Breathitt.

Order No. 642–A; Order on Rehearing

I. Introduction

The Federal Energy Regulatory Commission (Commission) is issuing an order addressing requests for rehearing of Order No. 642, a final rule updating the filing requirements applications filed under Part 33 of the Commission's regulations, including public utility mergers.[1] The rehearing order denies rehearing but provides clarification on these issues.

II. Background

Pursuant to section 203 of the Federal Power Act (FPA), Commission authorization is required for public utility acquisitions or dispositions of jurisdictional facilities, including public utility mergers and consolidations.[2] Since 1996, the Commission has approved such transactions if they are consistent with the public interest under guidelines established in the Merger Policy Statement.[3] The Policy Statement sets out three factors the Commission will generally consider when analyzing a merger proposal: effect on competition, effect on rates, and effect on regulation.

Order No. 642 revised the filing requirements in Part 33 of the Commission's regulations to enable

[1] 65 FR 70984 (Nov. 28, 2000); III FERC Stats. & Regs. ¶ 31,111 (Nov. 15, 2000), codified at, 18 CFR Part 33.

[2] 16 U.S.C. 824(b).

[3] *Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement,* Order No. 592, 61 FR 68595 (Dec. 30, 1996), III FERC Stats. & Regs. ¶ 31,044 (Dec. 18, 1996), *reconsideration denied,* Order No. 592-A, 62 FR 33341 (1997), 79 FERC ¶ 61,321 (1997) (Policy Statement).

applicants and intervenors to address more effectively and predictably the types of issues that have arisen in applications filed since the issuance of the Policy Statement, as well as issues that we anticipate may arise as the energy industry continues to make the transition to more competitive markets. Order No. 642 was also designed to implement the Policy Statement and provide detailed guidance to applicants for preparing applications under section 203 of the FPA. The revised filing requirements are designed to assist the Commission in determining whether applications are consistent with the public interest, and to provide more certainty and expedite the Commission's handling of such applications.

Among other things, Order No. 642 codifies the Commission's screening approach to mergers that may raise horizontal competitive concerns, provided specific filing requirements consistent with Appendix A of the Commission's Merger Policy Statement, established guidelines for vertical competitive analysis, and set forth filing requirements for mergers that potentially raise vertical market power concerns. Order No. 642 also streamlined and eliminated outdated and unnecessary Part 33 filing requirements, and reduced the information burden for dispositions of jurisdictional facilities that raise no competitive concerns.

Requests for rehearing were filed by the National Rural Electric Cooperative Association (NRECA) and jointly by the American Public Power Association and the Transmission Access Policy Study Group (APPA/TAPS). As discussed below, the Commission denies rehearing, but clarifies certain aspects of the filing requirements in Order No. 642.

III. Discussion

A. Reversal of the Policy Statement

Rehearing Requests

NRECA and APPA/TAPS are concerned that Order No. 642 relies too heavily on the Appendix A competitive screen analysis and improperly shifts the burden of proof regarding a disposition's competitive effects from applicants to intervenors. This, they argue, reverses the Policy Statement without adequate explanation. Specifically, Petitioners are concerned about Order No. 642's declaration that:

> If the screen is violated, the Commission will take a closer look at whether the merger would harm competition. If not, and no intervenors make a convincing case that the merger has anticompetitive effects despite passing the screen, the horizontal analysis stops there.

APPA/TAPS contend that, if the foregoing is read literally, the Commission will treat passing the screen as creating a ''nearly irrebuttable'' presumption that intervenors may overcome only by ''a convincing case that the merger has anti-competitive effects.'' This, they argue, flips the statutory burden of proof from applicants to intervenors by requiring intervenors to make a ''convincing case'' of competitive problems, a standard that was not proposed in the Notice of Proposed Rulemaking (NOPR). APPA/TAPS point to the standard in the Policy Statement, which stated:

> [S]uch claims must be substantial and specific. In other words, they should focus on errors or other factual challenges to the data or assumptions used in the analysis, or whether the analysis has overlooked certain effects of the merger.[4]

While APPA/TAPS understand the ''substantial and specific'' standard articulated in the Policy Statement to be consistent with the assignment of the burden of proof under the FPA, they assert that the ''convincing case'' terminology used in Order No. 642 suggests application of an unlawfully heavier burden.

Therefore, Petitioners argue that the Commission should clarify that the applicant bears the ultimate burden of proof to demonstrate that the transaction is consistent with the public interest. In addition, APPA/TAPS state that it is not clear whether, if applicants take advantage of the safe harbors outlined in Order No. 642, intervenors may be left with the impossible task of ''making a convincing case'' based on other factors, in less than the 60 day period for comments, without the benefit of the information required in an Appendix A analysis.

Moreover, NRECA points out that the statement ''the horizontal analysis stops there'' is ambiguous. This deviates from the Policy Statement, Petitioners state, and abandons the Commission's statutory duty to be pro-active regarding mergers. They note that the Policy Statement made clear that the screen was just one factor to be considered in setting a case for hearing and described the screen as a tool, allowing mergers of concern to be identified based on facts not fully reflected in or completely outside the screen. APPA/TAPS reiterate that the Policy Statement instructed intervenors to provide specific concerns, not generalized claims, consistent with the ''substantial and specific'' standard.

APPA/TAPS also cite past instances where the Commission looked beyond the screen, such as the hearing order for the merger between American Electric Power Company and Central and South West Corporation.[5] Thus, Petitioners contend that the Commission must clarify that it will look beyond the screen at other market power concerns which may arise. NRECA also requests that the Commission clarify that, even absent an intervenor making a clear and convincing case, the Commission has the authority and the duty to inquire further into a merger's competitive effects.

Commission Response

The Commission believes that Order No. 642 does not reverse the PolicyStatement. Rather, Order No. 642 implements the Policy Statement and sets forth filing requirements that are consistent with the Policy Statement.[6] APPA/TAPS' concern that under Order No. 642, passing the screen creates an irrebuttable presumption which can be overcome only with ''a convincing case'' that the merger has anti-competitive effects is misplaced. The term ''convincing case'' is consistent with the Policy Statement, to which APPA/TAPS themselves cite:

> [there] also may be disputes over the data used by applicants or over the way applicants have conducted the screen analysis. However, these claims must be substantial and specific.[7]

As envisioned in Order No. 642, unsubstantiated, unspecific claims made by any party to the proceeding do not constitute a convincing case.

Given the foregoing, we also disagree with NRECA's claim that the phrase ''the horizontal analysis stops there'' is ambiguous. To the contrary, it makes clear that the Commission will be satisfied that there is no need for further investigation on this issue if the criteria for passing the screen are met. As stated in Order No. 642, these criteria include: (1) Intervenors do not make a convincing case (*i.e.,* they do not raise substantial and specific claims) that the merger has anticompetitive effects[8] and (2) the evidence as to the lack of effect on competition is convincing and verifiable.[9] In crafting Order No. 642 to

[4] Order No. 592 at 30,119.

[5] *American Electric Power Company, et al.,* 85 FERC ¶ 61,201 (1998), *reh'g* 87 FERC ¶ 61,274 (1999), *appeal pending sub nom.,* Wabash Valley Power Assn. v. FERC, Docket 00–1297 (D.C. Cir. 2000).

[6] Order No. 642 at 31,872 and 31,874.

[7] Order No. 592 at 30,119.

[8] Order No. 642 at 31,897.

[9] *Id.* at 31,878.

be consistent with the Policy Statement, the Commission was cognizant of the value of the screen as ''* * * a standard, generally conservative check to allow the Commission, applicants and intervenors to quickly identify mergers that are unlikely to present competitive problems.'' [10] However, to ensure that mergers with potential competitive problems will be appropriately identified and analyzed, the Commission was also careful to state in Order No. 642 that ''[the] horizontal screen is not meant to be a definitive test of the likely competitive effects of a proposed merger.'' [11]

Therefore, we do not agree with Petitioners that Order No. 642 reverses the Policy Statement and we deny their request for rehearing on this issue.

B. Abbreviated Filing Requirements

Rehearing Request

APPA/TAPS argue that the abbreviated filing requirements specified in Order No. 642 are inappropriate because: (1) They are erroneously based on whether applicants are actual or potential competitors in each other's geographic markets; (2) they create strong incentives to craft potentially anti-competitive combinations that can be portrayed to qualify for abbreviated filing requirements; and (3) the procedures allow less than 60 days for interventions, giving intervenors (whom the Commission relies on as a critical source of information) less time and information to accomplish the task of making a ''convincing case'' that a corporate disposition has anti-competitive effects. APPA/TAPS urge the Commission to impose the same (non-abbreviated) filing requirements on all applicants under section 203 and, absent that, to require a competitive analysis if the applicants would own or control 5,000 MWs or more of generation. Petitioners also urge the Commission not to shorten the 60-day intervention period. At a minimum, APPA/TAPS suggest the Commission automatically grant extensions to a 60-day notice period if any intervenor requests additional time to prepare its case.

Commission Response

As stated in Order No. 642, the abbreviated filing requirements apply when it is relatively easy to determine that a disposition will not harm competition.[12] In cases where this determination is not obvious, as also explained in Order No. 642, the Commission would be unlikely to consider merger applications for review under the abbreviated filing requirements, but would make such decisions after examining the specifics of each case.[13] Given the foregoing, Petitioners' proposals regarding the 60-day notice period are unnecessary, and defeat the purpose of the abbreviated filing requirements. In addition, APPA/TAPS have not demonstrated why non-abbreviated filing requirements should be required of all applicants that own or control 5,000 MW or more of generation.

APPA/TAPS' concern that the Commission will overlook market power issues in abbreviated filings if applicants do not have a pre-merger presence in each other's geographic markets is based on a misreading of Order No. 642. As explained in Order No. 642, to be eligible for an abbreviated filing, applicants must demonstrate that the merging entities do not currently operate in the same geographic markets, or if they do, that the extent of such overlapping operation is *de minimis.*[14] Relevant geographic markets include, but are not limited to, Applicants' own geographic markets. In the case of a horizontal merger, the overlapping relevant markets in question would be downstream electricity markets and in a vertical merger case, they would be upstream input and downstream electricity markets.[15] As such, the abbreviated filing requirements do not overlook either horizontal or vertical market power issues. We therefore deny Petitioners' request for rehearing on this issue.

C. Confidentiality of ''Market Strategy'' Information

Rehearing Requests

Petitioners object to the presumption of confidentiality for applicant's ''market strategy'' information unless intervenors can show that denying disclosure would violate intervenors' due process rights. NRECA believes that this provision creates an incentive to shield large classes of information by labeling it ''market strategies.'' APPA/TAPS point out that there is a constitutional dimension to the burden placed upon requests for secrecy, and there is also long-established Commission precedent placing an exacting standard on those seeking to justify confidential treatment. NRECA also points out that the Commission's existing discovery rules provide procedures for invoking privilege to limit discovery of specific information. APPA/TAPS argue that due process and the Commission's *ex parte* rules require disclosure in all cases to intervenors willing to abide by reasonable protective orders and that denying intervenor access to that information even under a protective order directly conflicts with the Commission's *ex parte* rules.

Petitioners suggest that the Commission clarify that merger applicants are subject to a heavy burden to demonstrate that confidential treatment is required and that to the extent information is treated as confidential, it will be made available to intervenors willing to execute protective agreements. Absent this, NRECA argues that the Commission should clarify that the confidentiality provision applies only to ''market strategy'' information voluntarily submitted by applicants in response to intervenor concerns about perceived potential competition but not to data or information labeled by applicants as ''market strategies'' but submitted for other reasons or obtained through discovery.

Commission Response

As we explained in Order No. 642, the Commission's treatment of confidential information in merger applications will be consistent with the Commission's long-standing rules governing the protection of any documents filed at the Commission for which the confidentiality privilege is claimed.[16] Under these regulations, applicants may claim confidentiality for certain information included in their merger applications at the time the application is filed, and parties to the proceeding may seek access to that information pursuant to § 388.107 of the Commission's regulations.[17] At that time, we will review the documents to determine whether the information falls within the exemption from public disclosure under the Freedom of Information Act (FOIA) for ''trade secrets and commercial or financial information obtained from a person and privileged or confidential.''[18] We therefore deny Petitioners' request for rehearing on this issue.

D. Inadequacy of Data Requirements

Rehearing Requests

APPA/TAPS allege that Order No. 642 fails to address their concern that the data collected for merger analysis may be inadequate. In their comments on the NOPR, APPA/TAPS explained the need

[10] *Id.* at 31,879.

[11] *Id.*

[12] *Id.* at 31,901.

[13] *Id.* at 31,902.

[14] *Id.*

[15] *Id.* at 31,901 and 31,907.

[16] 18 CFR 388.112.

[17] 18 CFR 388.107.

[18] 18 CFR 388.107(d).

for data and information obtained through a ''second request'' issued by the Department of Justice or the Federal Trade Commission. APPA/TAPS argue that despite the Commission's claim that it can request additional data, the Commission has not demonstrated that it has the time or resources to do so. Therefore, APPA/TAPS argue that ''second request''-type data should be submitted automatically with the merger filing and be made available to intervenors when they execute the appropriate confidentiality agreements. Alternatively, APPA/TAPS suggest that the Commission should permit intervenors to obtain limited discovery during the initial intervention period.

Commission Response

We disagree with Petitioners that Order No. 642 does not addresses their concern that data collected for merger analysis may be inadequate. To the contrary, Order No. 642 sets forth data and information requirements sufficient to ensure comprehensive review of applications under section 203. Moreover, as we stated several times in Order No. 642, the Commission retains the right to request additional information that we deem necessary to evaluate the economic and regulatory impacts brought about by a prospective corporate disposition.[19] Contrary to Petitioners' assertions, the Commission has requested additional information in a number of instances and intervenors have benefitted from that information.[20] Thus, we believe that expanding the data requirements to cover all contingencies is unnecessary. We will therefore deny Petitioners' request for rehearing on this issue.

E. Consideration of Retail Competitive Effects

Rehearing Requests

Petitioners argue that Order No. 642 fails to adequately consider the effect of mergers by limiting the Commission's review of retail markets to only those situations where ''a state lacks authority in these kinds of circumstances and asks us to do so.'' APPA/TAPS argue that the Commission is responsible for considering the impact of its actions and ensuring that those actions further the public interest, which includes an analysis of retail markets. NRECA argues that state merger evaluation standards are not necessarily related to those required under the FPA, and that the Commission should not substitute state determinations (or lack thereof) for its own determination.

Commission Response

We stated in Order No. 642 that we will look at retail competitive impacts only when a state lacks authority and asks us to do so.[21] The petitions for rehearing offer no reasoned basis for changing our policy. Accordingly, we will deny Petitioners' request for rehearing on this issue.

F. Generic Conditions for Mergers

Rehearing Requests

Petitioners claim that Order No. 642 should impose certain generic conditions on mergers. APPA/TAPS claim that all mergers should be generically conditioned on: (1) The requirement (as APPA/TAPS originally proposed in their comments on the NOPR) that applicants take service to meet their retail load under their Open Access Transmission Tariffs and ''treat their own dispatch comparably with service to others;'' (2) participation in a properly structured Regional Transmission Organization (RTO) prior to the consummation of the merger; and (3) continued or expanded reserve sharing, or equivalent mechanisms. NRECA also argues that if merger applicants voluntarily commit to join an RTO, the Commission's regulations should include provisions to enforce that commitment. APPA/TAPS also argues that Order No. 642 should provide for other conditions—such as financial disincentives—to address the improper use of merger-related market power.

Commission Response

Order No. 642 does not specifically address APPA/TAPS' proposal that mergers be generically conditioned on applicants taking service to meet their retail load under their Open Access Transmission Tariff (OATT). However, we did explain in Order No. 642 that while there are numerous mitigation measures that may be effective, the adequacy of specific mitigation proposals must still be evaluated on a case-by-case basis.[22] Petitioners have not supported the need for generic mitigation measures such as participation in an RTO, expanded reserve sharing requirements or the use of financial disincentives, and we deny rehearing on this issue.

With regard to the RTO issue raised by NRECA, we note that when voluntary commitments to join Commission-approved RTOs are recognized in our approval of mergers, we expect applicants to honor such commitments.

G. Temporary Moratorium on Mergers

Rehearing Requests

Petitioners claim that Order No. 642 fails to adequately explain why the Commission rejected a moratorium on large utility mergers. They cite recent events in electricity markets around the country, including California, as support for just such a moratorium. Absent a moratorium, APPA/TAPS contend that mergers should be approved only if merger-related benefits are shown to be sufficient to offset harm to actual or potential competition.

Commission Response

We will deny Petitioners' request for rehearing on this issue. As we explained in Order No. 642, regulatory safeguards are in place to prevent such adverse competitive effects, regardless of the size of a merger.[23] Moreover, in implementing the Policy Statement, Order No. 642 states that we will determine, on a case-by-case basis, whether a merger will adversely affect competition. We disagree with Petitioners' proposals that applicants should be required to demonstrate that merger-related benefits offset competitive harm. Such a specific requirement would conflict with the flexibility embedded in Order No. 642 and the Policy Statement, which provide that merger applicants failing the competitive analysis screen should propose mitigation *or* go on to evaluate the following four factors: (1) The potential adverse competitive effects of the merger; (2) whether entry by competitors can deter anticompetitive behavior or counteract adverse competitive effects; (3) the effects of efficiencies that could not be realized absent the merger; and (4) whether one or both of the merging firms is failing and, absent the merger, the failing firm's assets would exit the market.[24] This is consistent with our finding that a transaction taken as a whole must be consistent with the public interest.[25]

[19] *See, e.g.,* Order No. 642 at 31,881 (on deficient filings), 31,902 (on abbreviated filing requirements) and 31,918 (on retail access).

[20] *See id.* at 31,881, n. 26.

[21] *Id.* at 31,918 and 31,919. In reviewing Order No. 642, we found a typographical error. The second to last sentence in the paragraph before Section C at 31,919 should read: ''We take this opportunity to clarify that we will consider retail market issues when circumstances warrant.''

[22] *Id.* at 31,900.

[23] Order No. 642 at 31,919.

[24] *Id.* at 31,898.

[25] *See, e.g., Northeast Utilities Service Co.* v. *FERC,* 993 F.2d 937 (1st Cir. 1993).

H. Regulatory Flexibility Act Certification Analysis

Rehearing Requests

NRECA argues that, contrary to the Commission's assertion that the rule will not have a ''significant economic impact on a substantial number of small entities,'' there are an increasing number of rural electric cooperatives, some of them modest in size, that have become subject to the Commission's jurisdiction as they have paid off their debt from the Rural Utilities Service. NRECA argues that Order No. 642 will affect ''small'' public utilities if those entities choose to merge to better deal with the increasing market power of larger public utilities. NRECA requests that the Commission either perform the Regulatory Flexibility Act analysis, or provide for waivers of the reporting requirements for small public utilities.

Commission Response

The Commission has evaluated the various types of mergers and other section 203 transactions subject to these revised filing requirements. The number of cooperatives subject to Commission jurisdiction as public utilities, and therefore affected by these requirements, is small. In addition, Order No. 642 does not increase the number of small entities that are subject to the Commission's jurisdiction under section 203. In fact, the final rule reduces the regulatory burdens and reporting requirements on most entities, both large and small, by streamlining and eliminating outdated and unnecessary filing requirements.

The Commission therefore certifies that Order No. 642 will not have a significant economic impact on small entities.

I. Miscellaneous Issues

Rehearing Requests

APPA/TAPS argue that Order No. 642 fails to reflect components of a detailed competitive analysis that are not adequately captured by market concentration statistics. They point to the failure of market concentration analysis to reveal the constraints which they believe are now apparent in California, including: transmission constraints and their manipulation; incentives not to build transmission; insufficient generation; and gas supply, water, and emission constraints. NRECA requests that the Commission modify § 33.3(c) of the Commission's regulations to require horizontal merger applicants to analyze firm requirements power as a relevant product.

Commission Response

Petitioners' concern that the Commission will rely exclusively on the horizontal screen analysis in evaluating the effect of a merger on competition is misplaced. For example, we stated in Order No. 642 that:

> [T]he horizontal screen is not meant to be a definitive test of the likely competitive effects of a proposed merger. Instead, it is intended to provide a standard, generally conservative check to allow the Commission, applicants and intervenors to quickly identify mergers that are unlikely to present competitive problems.[26]

This is consistent with the Policy Statement.

We also note in Order No. 642 the limitations on the use of concentration statistics.[27] In addition, Order No. 642 points out that we have sought additional information from merger applicants when circumstances warranted and that the intervention process itself allows other market participants to raise concerns.[28] Together, these factors indicate that the Commission will not rely exclusively on market concentration statistics in evaluating the competitive effects of mergers.

Finally, we disagree with NRECA's position that firm requirements power should be considered as a separate relevant product. In Order No. 642, we explain that it is important to define relevant products from the perspective of the consumer, *i.e.,* including in a product group those products considered by the consumer to be good substitutes.[29] NRECA has not demonstrated how firm requirements power meets this standard. We therefore deny Petitioners' request for rehearing on these issues.

The Commission orders:

For the reasons discussed above, the Commission denies rehearing of Order No. 642.

By the Commission.

David P. Boergers,

Secretary.

[FR Doc. 01–7200 Filed 3–22–01; 8:45 am]

BILLING CODE 6717–01–P

[26] Order No. 642 at 31,879.

[27] *Id.* at 31,882, 31,897.

[28] *Id.* at 31,881.

[29] *Id.* at 31,883.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 558

New Animal Drugs for Use in Animal Feeds; Monensin and Tylosin

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the animal drug regulations to reflect approval of two supplemental new animal drug applications (NADA's) filed by Elanco Animal Health. These supplemental NADA's provide for using tylosin or monensin and tylosin single-ingredient Type A medicated articles to make tylosin liquid Type B medicated feeds or combination drug liquid Type B medicated feeds. The liquid Type B medicated feeds are used to make dry Type C medicated feeds for cattle.

DATES: This rule is effective March 23, 2001.

FOR FURTHER INFORMATION CONTACT: Daniel A. Benz, Center for Veterinary Medicine (HFV–126), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 301–827–0223.

SUPPLEMENTARY INFORMATION: Elanco Animal Health, A Division of Eli Lilly & Co., Lilly Corporate Center, Indianapolis, IN 46285, filed supplemental NADA 12–491 that provides for use of TYLAN® (40 or 100 grams per pound (g/lb) tylosin phosphate) Type A medicated articles to make liquid Type B medicated feeds. The tylosin liquid Type B medicated feeds are, in turn, used to make dry Type C medicated feeds for reduction of the incidence of liver abscesses caused by *Fusobacterium necrophorum* and *Actinomyces* (*Corynebacterium*) *pyogenes* in beef cattle. Elanco Animal Health also filed supplemental NADA 104–646 that provides for use of RUMENSIN® (20, 30, 45, 60, 80, or 90.7 g/lb monensin activity as monensin sodium) and TYLAN® Type A medicated articles to make liquid combination drug Type B medicated feeds. The combination drug liquid Type B medicated feeds are, in turn, used to make dry Type C medicated feeds used for improved feed efficiency and reduction of the incidence of liver abscesses caused by *F. necrophorum* and *A.* (*Corynebacterium*) *pyogenes* in cattle fed in confinement for slaughter. The supplemental NADA's are approved as of February 2, 2001, and the regulations are amended in 21 CFR