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V. Effective Date

141. This revisions in this order on rehearing will be effective September 9, 2004.

List of Subjects in 18 CFR Part 358

Electric power plants, Electric utilities, Natural gas, Reporting and recordkeeping requirements.

By the Commission, Commissioners Brownell and Kelliher dissenting in part with separate statements attached.

Magalie R. Salas,
Secretary.

In consideration of the foregoing, the Commission revises part 358, Chapter I, Title 18 of the Code of Federal Regulations, as follows:

PART 358—STANDARDS OF CONDUCT

1. The authority citation for part 358 continues to read as follows:

Authority: 15 U.S.C. 717-717w, 3301-3432; 16 U.S.C. 791-825r, 2601-2645; 31 U.S.C. 9701; 42 U.S.C. 7101-7352.

- 1. In § 358.3:
(a) paragraph (d)(5) is revised,
(b) paragraph (d)(6)(iv) is revised,
(c) in paragraph (d)(6)(v), the terms "on-system customers" and "on-system customer sales" are removed and the words "on-system sales" are added in their place, and
(d) paragraph (d)(6)(vi) is added, to read as follows:

§ 358.3 Definitions.

- (d) (5) An LDC division of an electric public utility Transmission Provider shall be considered the functional equivalent of an Energy Affiliate, unless it qualifies for the exemption in § 358.3(d)(6)(v).
(6) (iv) An affiliate that purchases natural gas or energy solely for its own consumption. "Solely for its own consumption" does not include the purchase of natural gas or energy for the subsequent generation of electricity.
(vi) A producer, gatherer, Hinshaw pipeline or an intrastate pipeline that

makes incidental purchases or sales of de minimus volumes of natural gas to remain in balance under applicable pipeline tariff requirements and otherwise does not engage in the activities described in §§ 358.3(d)(1), (2), (3) or (4).

* * * * *

- 2. In § 358.4:
(a) in paragraph (a)(5), the word "shared" is inserted between the words "its" and "senior" in the second sentence, and
(b) in paragraphs (e)(2) and (e)(3), the words "September 1, 2004" are removed and the words "September 22, 2004" are inserted in their place.
(c) paragraph (e)(5) is revised to read as follows:

§ 358.4 Independent functioning.

- (e) Written procedures.
(5) Transmission Providers shall train officers and directors as well as employees with access to transmission information or information concerning gas or electric purchases, sales or marketing functions. The Transmission Provider shall require each employee to sign a document or certify electronically signifying that s/he has participated in the training.

Appendix A

This Appendix A will not be published in the Code of Federal Regulations.

List of Petitioners Requesting Rehearing or Clarification or Submitting Comments

- Allegheny Energy, Inc. (Allegheny)
American Electric Power Service Corp. (AEP)
American Gas Association (AGA)
American Public Gas Association (APGA)
American Transmission Company, LLC
BP America Production and BP Energy Company (BP)
CenterPoint Energy Gas Transmission Company (CenterPoint)
Cinergy Services, Inc. (Cinergy)
Duke Energy Corporation (Duke Energy)
Edison Electric Institute (EEI)
El Paso Corporation (El Paso)
Enbridge Offshore Pipelines (Enbridge)
Entergy Services, Inc. (Entergy)
Entrega Gas Pipeline Inc. (Entrega)
Gulf South Pipeline, Company, L.P. (Gulf South)
Interstate Natural Gas Association of America (INGAA)
Kinder Morgan Interstate Pipelines (Kinder Morgan Pipelines)
Large Public Power Counsel (LPPC)
National Association of State Utility Consumer Advocates (NASUCA)
National Fuel Gas Distribution Corporation (National Fuel—Distribution)
National Grid USA (National Grid)
National Rural Electric Cooperative Association (NRECA)
Natural Gas Supply Association (NGSA)

- NiSource, Inc. (NiSource)
Questar Pipeline Co. (Questar Pipeline)
Questar Gas Co. (Questar-Gas)
Saltville Gas Storage Co., LLC (Saltville)
Sempra Energy (Sempra)
Shell Gas Transmission, LLC (Shell Gas)
Shell Offshore, Inc. (Shell Offshore)
Southern Company Services, Inc. (Southern)
Texas Gas Transmission Co. (Texas Gas)
Westar Energy, Inc. (Westar)
Williston Basin Interstate Pipeline Company (Williston Basin)
XCEL Energy Services, Inc. (Xcel)

Nora Mead BROWNELL, Commissioner, dissenting in part.

1. For the reasons set forth in my dissent in part to Order No. 2004, Standards of Conduct for Transmission Providers, 68 FR 69134 (Dec 11, 2003), III FERC Stats. & Regs. ¶ 31,155 (Nov. 25, 2003), I would have retained the existing exemptions under Order No. 497 for affiliated producers.

Nora Mead Brownell,
Kelliher, Commissioner, dissenting in part.

For the reasons set forth in my dissent in part on the Order on Rehearing, Order No. 2004-A, Standards of Conduct for Transmission Providers, I believe the Standards of Conduct rule is fundamentally flawed. That flaw is the lack of record evidence supporting expanding the scope of the rule beyond Marketing Affiliates.

Accepting nonetheless that new Standards of Conduct are being adopted, I would further limit application of the rule. With respect to this order, I agree with the clarifications provided by the Commission, which may make the Standards of Conduct rule more workable.

Joseph T. Kelliher,
Commissioner.

[FR Doc. 04-18091 Filed 8-9-04; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 388

[Docket Nos. RM02-4-002, PL02-1-002, RM03-6-001; Order No. 649]

Critical Energy Infrastructure Information

Issued August 3, 2004.

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Final rule.

SUMMARY: The Federal Energy Regulatory Commission (Commission) is issuing this final rule amending its regulations for gaining access to critical energy infrastructure information (CEII). These changes are being made based on comments filed in response to the February 13, 2004 notice seeking public comment on the effectiveness of the Commission's CEII rules. The final rule

primarily eases the burden on agents of owners or operators of energy facilities that are seeking CEII relating to the owner/operator's own facility. The rule also simplifies federal agencies' access to CEII. These changes will facilitate legitimate access to CEII without increasing vulnerability of the energy infrastructure.

EFFECTIVE DATE: The rule will become effective September 9, 2004.

FOR FURTHER INFORMATION CONTACT: Carol C. Johnson, Office of the General Counsel, GC-13, Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, DC 20426, (202) 502-8521.

SUPPLEMENTARY INFORMATION:

Before Commissioners: Pat Wood, III, Chairman; Nora Mead Brownell, Joseph T. Kelliher, and Suedeem G. Kelly.

1. On February 13, 2004, the Commission issued a "Notice Soliciting Public Comment" (the Notice) on its procedures for dealing with critical energy infrastructure. 69 FR 8636 (Feb. 25, 2004). The Commission's CEII procedures were established by Order Nos. 630 and 630-A. *See* Critical Energy Infrastructure Information, Order No. 630, 68 FR 9857 (Mar. 3, 2003), FERC Stats. & Regs. ¶ 31,140 (2003); *order on reh'g*, Order No. 630-A, 68 FR 46456 (Aug. 6, 2003), FERC Stats. & Regs. ¶ 31,147 (2003). In Order Nos. 630-A and 643,¹ the Commission committed to solicit public comment after six months in order to identify any potential problems with the Commission's regulations regarding CEII. The Notice provided an opportunity for those with experience under Order Nos. 630, 630-A, and 643 to provide feedback on the CEII process. The Commission received comments on Order Nos. 630 and 630-A from the following five entities: the American Public Power Association and Transmission Access Policy Study Group (APPA/TAPS), the Hydropower Reform Coalition (HRC), the National Hydropower Association (NHA), Southern California Edison Company (SCE), and the United States Department of Interior (DOI). No comments were received regarding Order No. 643. In light of those comments and the Commission's own experience, this order amends 18 CFR 388.113 and

clarifies some other points regarding CEII.

Background

2. The Commission began its efforts with respect to CEII shortly after the attacks of September 11, 2001. *See* Statement of Policy on Treatment of Previously Public Documents, 66 FR 52917 (Oct. 18, 2001), 97 FERC ¶ 61,130 (2001). The Commission's initial step was to remove from its public files and Internet page documents such as oversized maps that were likely to contain detailed specifications of facilities licensed or certified by the Commission, directing the public to request such information pursuant to the Freedom of Information Act (FOIA) process detailed in 5 U.S.C. 552 and in the Commission's regulations at 18 CFR 388.108. In September 2002, the Commission issued a notice of proposed rulemaking regarding CEII, which proposed an expanded definition of CEII to include detailed information about proposed facilities as well as those already licensed or certificated by the Commission. Notice of Rulemaking and Revised Statement of Policy, 67 FR 57,994 (Sept. 13, 2002); FERC Stats. & Regs. ¶ 32,564 (2002). The Commission issued its final rule on CEII on February 21, 2003, defining CEII to include information about proposed facilities, and to exclude information that simply identified the location of the infrastructure. Order No. 630, 68 FR 9857, FERC Stats. & Regs. ¶ 31,140. After receiving a request for rehearing on Order No. 630, the Commission issued Order No. 630-A on July 23, 2003, denying the request for rehearing, but amending the rule in several respects. Order No. 630-A, 68 FR 46456, FERC Stats. & Regs. ¶ 31,147. Specifically, the order on rehearing made several minor procedural changes and clarifications, added a reference in the regulation regarding the filing of non-Internet public (NIP) information, a term first described in Order No. 630, and added the aforementioned commitment to review the effectiveness of the new process after six months. The Notice issued on February 13, 2004, facilitated the review contemplated in Order No. 630-A. This order addresses the comments received in response to the Notice.

Summary and Discussion of Comments Received

A. Clarification and Guidance on What Constitutes CEII

3. The comments received fall primarily into the following two broad categories: Concerns about

inconsistencies and over-designation of material as CEII, and concerns regarding the CEII clearance/approval process. The HRC and NHA both indicate that there is a need for additional guidance and clarity regarding which materials qualify for CEII and NIP protection. HRC at p. 2; NHA at pp. 1-3. The HRC states that submitters are over-designating information as CEII, and claims that "the breadth of information submitted as CEII has led to an unnecessary withholding of information that does not meet the regulatory definition." HRC at pp. 2-3. The HRC notes that permitting some filers to over-designate information as CEII is unfair both to those who claim CEII status prudently and those who are unable to access information that should be publicly available. The HRC encourages the Commission to assume responsibility for reviewing information as it is submitted to determine whether it qualifies as CEII, and classify it accordingly. HRC at p. 2. As now explained, although such an approach might add consistency, the Commission does not believe such an approach is necessary or practical.

4. Even before CEII existed, the Commission's rule at 18 CFR 388.112 permitted filers to designate information for non-public treatment. Such documents received non-public treatment by default until the Commission or a member of the public (through the filing of a FOIA request) questioned whether or not the information deserved non-public treatment. The Commission never found it necessary to review claims for non-public treatment prior to affording documents such status in order to save a requester the time and expense of filing a FOIA request for the information. Indeed, the burden on the Commission associated with previewing each such filing would be excessive.

5. Similarly, the Commission presently does not see a need to review claims for CEII treatment before anyone has indicated an interest in the document by filing a CEII request. CEII requests usually present less burden and greater chance of success than FOIA requests. There is no fee associated with a request for CEII. In addition, CEII requests are granted more often than FOIA requests, giving requesters access to information that would not be available to them under the FOIA. Nevertheless, although it is not practical for Commission staff to review all material filed as CEII, staff will continue to take steps to have the status of information promptly changed if they notice information has erroneously been filed as CEII. Those steps include notice

¹ Amendments to Conform Regulations With Order No. 630 (Critical Energy Infrastructure Information Final Rule), Order No. 643, 68 FR 52089 (Sept. 2, 2003), FERC Stats. & Regs. ¶ 31,149 (2003). Order No. 643 amended several Commission regulations to eliminate requirements that filers provide outsiders with information that qualifies as CEII under 18 CFR 388.113.

and an opportunity for the submitter to defend the CEII designation, and notice to the submitter prior to denying CEII status to the document. For documents designated as CEII by the Commission, CEII status can be changed even more quickly, without notice or an opportunity for comment. The Commission encourages members of the public to bring such matters to the attention of its staff, who are committed to responding timely.²

6. In addition, the Commission believes improving instructions to filers and Commission staff regarding which information qualifies for treatment as CEII is an effective way to combat the problem of inconsistency in claims for CEII treatment. Therefore, the Commission will be providing additional direction to filers on this subject, and will begin this effort in the area of hydropower information because that appears to be the area of the most uncertainty. Any guidance developed will be disseminated to the appropriate entities through the relevant industry associations, namely the National Hydropower Association, the Edison Electric Institute, and the Interstate Natural Gas Association of America by the effective date of this rule. In addition, as suggested by the NHA, the Commission will designate certain staff members in each program area who will be available to answer specific questions filers may have regarding appropriate designation of certain information. This contact information will be made available on the Commission's Web site within the same timeframe.

7. The HRC also questions whether the Commission's definition of CEII is too broad. The Commission defines CEII as "information about proposed or existing critical infrastructure that (i) Relates to the production, generation, transportation, transmission, or distribution of energy; (ii) Could be useful to a person in planning an attack of critical infrastructure; (iii) Is exempt from mandatory disclosure under the [FOIA]; and (iv) Does not simply give the location of the critical infrastructure." 18 CFR 388.113(c)(1). The HRC is concerned that parts two and four of the definition are too broad. HRC at p. 5. As an initial matter, the Commission notes that its definition of CEII is limited to information that is exempt from disclosure under the FOIA, and the remaining elements of the definition only serve to create a subset of FOIA-exempt information that may

be released to requesters who evidence a need for such information. While the Commission agrees that part two of the definition is fairly subjective, the requirement that the information fall within a FOIA exemption serves to limit its applicability appropriately. As discussed above, the Commission will provide additional guidance that will help define elements two and four of the definition.

8. The HRC also raises the issue of the Commission's reliance on FOIA Exemption 7 to protect CEII, stating "FERC's current interpretation of FOIA's exemptions is disturbingly broad particularly with respect to information compiled for law enforcement purposes." HRC at p. 3. The HRC notes that Exemption 7 has traditionally been used to protect information relating to criminal investigations, and states that FERC's use of Exemption 7 to protect CEII "is neither legally defensible nor good public policy." HRC at p. 4. The Commission disagrees. While it is true that Exemption 7 has most often been applied in the context of criminal investigations, it is not limited to that context. Courts have found that both the Federal Communication Commission's authority to revoke or deny licenses and the Federal Trade Commission's authority over advertising practices were law enforcement activities. See *Kay v. FCC*, 867 F. Supp. 11, 16–18 (D.D.C. 1994); *Ehringhaus v. FTC*, 525 F. Supp. 21, 22–23 (D.D.C. 1980). More recently, courts have found that the law enforcement threshold was met with respect to Bureau of Reclamation dam inundation maps used to develop emergency actions plans. See *Living Rivers, Inc. v. United States Bureau of Reclamation*, 272 F. Supp. 2d 1313, 1316 (D. Utah 2003). This is very similar to information protected by the Commission in the hydropower area. The Commission continues to believe that such information may appropriately be protected under Exemption 7(F).

9. The HRC indicates particular concern regarding project boundary maps. In Order No. 630, the Commission specified that "maps of projects (including location of project works with respect to water bodies, permanent monuments, or other structures that can be noted on the map and recognized in the field) such as those found in Exhibit G" are considered to be CEII. 68 FR at 9862, FERC Stats. & Regs. ¶ 31, 140 at p 32. In light of the concerns raised by the HRC regarding project boundary maps, the Commission has revisited this issue, and determined that such information should not be treated as CEII. The Commission hereby directs that in the

future such maps generally should not be treated as CEII or submitted with requests for CEII treatment, but should instead be submitted as NIP information in accordance with 18 CFR 388.112 and instructions from the Office of the Secretary.

B. Handling CEII Requests

10. The commenters raise several issues regarding the filing and processing of CEII requests. The HRC contends that it is unnecessarily burdensome to require individual members of an organization to file separate requests and non-disclosure agreements (NDAs). See HRC at pp. 7–8. The Commission disagrees. When it first adopted the CEII request rules, the Commission chose not to clear entire entities, deciding instead to clear each individual requesting access. As the Commission noted in Order No. 630, "the more people who have access to information, the greater likelihood that it may find its way into the wrong hands." Order No. 630, 68 FR at p. 9865, FERC Stats. & Regs. ¶ 31,140 at p 48. The Commission believes that the current approach is necessary to effectively limit the number of people getting access to CEII. Moreover, the burden associated with filing a CEII request is minimal. For the ease of requesters, the Commission has posted a form on its Web site that requesters may use to file a request, which simplifies the request process. See <http://www.ferc.gov/help/how-to/file-ceii.asp>. The average request takes approximately five minutes to complete. To read and sign a non-disclosure agreement requires about the same amount of time. Under the circumstances, the Commission believes that the current policy of requiring each requester to file separately continues to be the best way to control access to CEII, and does not pose an undue burden on requesters.

11. While noting that for the most part their members have not had problems gaining access to CEII, the HRC suggests that the Commission consider automatically allowing all parties in a proceeding access to the same information in the proceeding, including CEII. HRC at p. 8. The Commission is reluctant to automatically grant parties access to CEII because it may cause people to intervene solely to receive CEII. Under the Commission's rules, "[i]f no answer in opposition to a timely motion to intervene is filed within 15 days after the motion to intervene is filed, the movant becomes a party at the end of the 15 day period." 18 CFR 385.214(c)(1). Therefore, many motions

² The Commission's staff responsible for processing CEII requests and other matters are located within the Office of External Affairs and the General and Administrative Law section of the Office of the General Counsel.

to intervene are granted with no evaluation of the motion. The Commission is not comfortable granting CEII access without an affirmative analysis of the requester and his or her need for the information, so it will not automatically grant interveners access to CEII. Alternatively, the HRC urges the Commission to adopt a lower threshold for parties to a proceeding where others in the proceeding have access to CEII. In effect, this already happens. Under the Commission's regulations, someone has a right to participate in a Commission proceeding if such right is granted by law, if they have or represent an interest which may be directly affected by the proceeding, or if their participation is in the public interest. 18 CFR 388.214(b)(2). Therefore, if a CEII requester puts forth the same information required in a motion to intervene, that same information would most likely suffice to show that he is a legitimate requester with a need for the information requested, making it very likely his request for CEII would be granted.

12. While the HRC is concerned that the Commission's rules are too burdensome on requesters, SCE is concerned that the Commission's threshold for granting requests for CEII is too low. SCE urges the Commission to "provide stricter limitations on the use of the [CEII] and require a greater showing of legitimate need for the CEII requested in order to ensure its confidentiality is maintained." SCE at p. 2. SCE believes that absent a showing of a valid need and legitimate use of the information, little protection is afforded by the requester's willingness to sign a non-disclosure agreement. *Id.* The Commission has found that CEII such as Form Nos. 715 and 567 are heavily requested by consultants who use the information to advise clients, often not with respect to a particular docketed Commission proceeding. The Commission believes that it is not always necessary for requesters to identify a particular Commission matter or even a particular client in order to qualify as a legitimate requester, especially where the Commission has been able to verify that the individual or firm provides legitimate consulting services. These consultants often provide a valuable service by giving market participants information necessary to make business decisions regarding expansion of the infrastructure, ultimately making it less vulnerable to attack. The Commission is unwilling to restrict access to information necessary to make such critical decisions.

13. The HRC also voices concern with the notice and comment process applicable to requests for information that has been submitted to the Commission with a request for CEII treatment, stating that "FERC has not outlined a compelling reason to provide licensees with the opportunity [to] comment on the release of CEII to a requester." HRC at p. 6. The notice and comment process existed previous to September 11, 2001, with respect to information that was submitted to the Commission with a request for non-public treatment. The prior version of 18 CFR 388.112(d) stated that "[w]hen a FOIA requester seeks a document for which privilege is claimed, the Commission official who will decide whether to make the document public will notify the person who submitted the document and give the person an opportunity (at least five days) in which to comment in writing on the request." This provision has its foundations in Executive Order No. 12600, which applies specifically to confidential commercial information traditionally protected by FOIA Exemption 4. For more than fifteen years, the Commission has extended the procedural safeguards found in E.O. 12600 to any information submitted with a request for privileged treatment, and more recently in Order No. 630, the Commission extended those safeguards to information submitted with a request that it be treated as CEII. The executive order aside, the Commission believes there are benefits to affording the submitter of the information an opportunity to comment on the request. First, this gives the submitter of the information an opportunity to explain in more detail which exemption applies to protect the information and the potential harm that could result from disclosure of the information. Second, in many instances the submitter is familiar with the requester, and can provide information useful to the Commission in verifying the identity of the requester, providing a better foundation for the CEII Coordinator's decision. Third, if notice and comment were only afforded where the submitter claimed that the information was confidential commercial information, it would give companies incentives to make such claims where they might otherwise not be made.

14. The HRC also claims that providing notice and an opportunity for submitters to comment on release "could undermine a part[y's] negotiating position in a settlement proceeding." HRC at p. 6. The HRC goes on to state that "[t]he CEII coordinator

should be vested with the authority to determine when information qualifies as CEII and whether a requestor has demonstrated a need for the information." *Id.* The HRC appears to misunderstand the purpose of providing notice and an opportunity to comment. The submitter does not make the decision regarding whether the information is CEII or whether to release the information to the requester; the submitter's comments only inform the CEII Coordinator's decision. There have been numerous instances where the CEII Coordinator has released CEII despite the submitter's opposition to such a release. The Commission continues to find that the benefits of maintaining the notice and comment process outweighs the inconvenience to the requesters and concludes that there is little danger of the process undermining settlement proceedings.

15. Although generally finding that the Commission responds "almost immediately" to CEII requests, the HRC has indicated concern with the time it takes to process CEII requests, especially in matters with quick turnaround times, specifically referencing the Commission's integrated licensing process (ILP). HRC at p. 7. The Commission agrees that HRC has raised a legitimate concern given that the ILP has defined deadlines for all participants, including the Commission, throughout the process. However, the majority of the documents filed as part of the licensing process typically are not CEII, so the problem will not be widespread. Given the Commission's contemporaneous decision to no longer consider Exhibit G project boundary maps as CEII, the most likely information to be filed in the ILP as CEII is Exhibit F (details of project facilities),³ which will be part of the draft license application, if prepared, and the final license application filed with the Commission. The comment deadlines for these two steps are 90 days and 120 days respectively. Given these deadlines, requesters should have little trouble getting timely access to the information. In other instances with shorter timeframes, the Commission will strive to respond as quickly as possible. Requesters should highlight short deadlines so staff can expedite the request if possible. Requesters also have the option of seeking the information directly from the applicant, and the Commission will encourage applicants

³ In Order No. 630, the Commission listed general design drawings such as those found in Exhibit F as an example of CEII commonly found in hydropower filings. 68 FR at p. 9862; FERC Stats. & Regs. ¶ 31,147 at p. 32.

to negotiate with requesters to provide CEII directly to them wherever possible. In fact, the Commission already encourages such cooperation.

16. The DOI has asked the Commission to loosen some of the requirements on federal agency requesters. Specifically, the DOI urges that “[f]ederal agencies should be able to identify themselves one time in each proceeding, and be granted complete access to the docket from then on.” DOI at p. 2. The Commission has reconsidered the position of federal agency requesters and agrees that once an agency has been granted access to CEII in a particular docket, it is entitled to receive subsequent CEII in that docket. However, the Commission will not assume an affirmative duty to transmit such information absent a subsequent request from the agency. Such subsequent request may be as informal as a phone call or e-mail to a staff contact requesting additional CEII in the docket. The burden must remain on the requesting agency to voice such requests; otherwise the burden on Commission staff to keep track of such ongoing requests would be too great.

17. The NHA has requested clarification of the owner/operator request process, and has suggested that the Commission designate a specific person for owner/operators to contact to obtain CEII on their own projects. NHA at 3. Currently, 18 CFR 388.113(d)(1) provides that “[a]n owner/operator of a facility, including employees and officers of the owner/operator, may obtain CEII relating to its own facility directly from Commission staff without going through the procedures outlined in paragraph (d)(3) of this section.” In most instances, the owner/operator representative has a contact on Commission staff and the CEII request is sent directly to that staff person. In cases where an owner/operator does not have a relationship with a staff person from the Office of Energy Projects, the request may be sent to the General and Administrative Law Section of the Commission’s Office of the General Counsel, directed to the attention of Carol Johnson (*carol.johnson@ferc.gov*). The telephone number for General and Administrative Law is 202–502–6457 and the facsimile number is 202–208–0056.

18. The NHA has also requested that the Commission alter its policy that agents of an owner/operator may not file CEII requests. The current regulation requires that agents or other non-employee representatives of owner/operators obtain CEII directly from the owner/operator. In several instances this has resulted in an unwieldy process.

The Commission has reconsidered its approach with respect to agents of owner/operators and has decided to permit the agents to have the same access as the owner/operator as long as they present written authorization from the owner/operator for such access. Therefore, the Commission is amending § 388.113(d)(1) to include agents of owner/operators, deleting § 388.113(d)(2), and re-designating § 388.113(d)(3) as 388.113(d)(2).

19. SCE requests that the Commission require that consultants agree to return or destroy CEII when the proceeding is finished, or within two years of receipt, arguing that Form No. 715 data does not necessarily become stale. SCE at pp. 2–3. SCE has advocated this approach in several of its responses to Form No. 715 notice and comment letters. The Commission has considered the advantages and disadvantages of placing time limits on a recipient’s use of CEII. The advantage is that it limits the amount of time such information is vulnerable to disclosure. A primary disadvantage of such an approach is that it would require monitoring and follow up, which would be quite a large administrative task when one considers the volume of CEII requests, which are averaging over 200 requests per year thus far. Another problem is that some of the recipients use the CEII to develop some sort of product or database. Once the time limit expires, they would not only need to return the original information, they would have to dismantle the product or database that utilized the information. That could be an expensive proposition, and discourage recipients from undertaking the analysis in the first place. These analyses are often performed to assist market participants in making critical decisions about where to invest in new infrastructure. The Commission is reluctant to take steps that could discourage such analyses. Finally, the Commission does believe that the sensitivity of much of the information will diminish over time. For these reasons, the Commission declines to routinely place time limits on a recipient’s access to CEII, but would consider doing so in a unique case where a compelling need could be shown.

C. Follow Up

20. The APPA/TAPS cautions the Commission not to presume too much given the absence of complaints to date, noting that there have not been many controversial rate requests and no significant merger applications filed since the CEII rules took effect. APPA/TAPS at p. 2. The APPA/TAPS

encourages the Commission to re-evaluate the effectiveness of the rules again in another year. *Id.* at p. 3. The HRC also urges the Commission to continue to evaluate the CEII rules “using measures of success in addition to evaluating comments and input from the public.” HRC at p. 3. The Commission will continue to monitor and review the success of the CEII program. It will continue to be alert to situations where a party’s ability to effectively participate in a proceeding may be impacted by the rules. In addition, the Commission will re-examine the effectiveness of the rules again within one year. That evaluation will take into account the potential threats and what level of protection is required given the current world situation.

Information Collection Statement

21. The Office of Management and Budget’s (OMB’s) regulations require that OMB approve certain information collection requirements imposed by agency rule. 5 CFR 1320.12 (2004). This final rule does not impose any additional information collection requirements. Therefore, the information collection regulations do not apply to this final rule.

Environmental Analysis

22. The Commission is required to prepare an Environmental Assessment or an Environmental Impact Statement for any action that may have a significant adverse effect on the human environment.⁴ The Commission has categorically excluded certain actions from this requirement as not having a significant effect on the human environment. Included in the exclusions are rules that are clarifying, corrective, or procedural or that do not substantially change the effect of the regulations being amended. 18 CFR 380.4(a)(2)(ii). This rule is procedural in nature and therefore falls under this exception; consequently, no environmental consideration is necessary.

Regulatory Flexibility Act Certification

23. The Regulatory Flexibility Act of 1980 (RFA)⁵ generally requires a description and analysis of final rules that will have significant economic impact on a substantial number of small entities. The Commission is not required to make such analyses if a rule would not have such an effect. The

⁴ Order No. 486, Regulations Implementing the National Environmental Policy Act, 52 FR 47897 (Dec. 17, 1987), FERC Stats. & Regs. Preambles 1986–1990 ¶ 30,783 (1987).

⁵ 5 U.S.C. 601–612

Commission certifies that this proposed rule, if finalized, would not have such an impact on small entities.

Document Availability

24. In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through FERC's Home Page (<http://www.ferc.gov>) and in FERC's Public Reference Room during normal business hours (8:30 a.m. to 5 p.m. Eastern time) at 888 First Street, NE., Room 2A, Washington DC 20426.

25. From FERC's Home Page on the Internet, this information is available in the Commission's document management system, eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

26. User assistance is available for eLibrary and the FERC's Web site during normal business hours. For assistance, please contact FERC Online Support at 1-866-208-3676 (toll free) or 202-502-6652 (e-mail at FERCOnlineSupport@FERC.gov), or the Public Reference Room at 202-502-8371, TTY 202-502-8659 (e-mail at public.referenceroom@ferc.gov).

Effective Date

27. These regulations are effective September 9, 2004. The provisions of 5 U.S.C. 801 regarding Congressional review of Final Rules do not apply to this Final Rule, because the rule concerns agency procedure and practice and will not substantially affect the rights of non-agency parties.

List of Subjects in 18 CFR Part 388

Confidential business information, Freedom of information.

By the Commission.

Magalie R. Salas,
Secretary.

■ In consideration of the foregoing, the Commission amends part 388, Chapter I, Title 18, *Code of Federal Regulations*, as follows:

PART 388—INFORMATION AND REQUESTS

■ 1. The authority citation for part 388 continues to read as follows:

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

■ 2. In § 388.113, paragraph (d)(1) is revised, paragraph (d)(2) is removed, and (d)(3) is redesignated as (d)(2), to read as follows:

§ 388.113 Accessing critical energy infrastructure information.

* * * * *

(d) *Optional procedures for requesting critical energy infrastructure information.* (1) An owner/operator of a facility, including employees and officers of the owner/operator, may obtain CEII relating to its own facility directly from Commission staff without going through the procedures outlined in paragraph (d)(2) 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.

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[FR Doc. 04-18189 Filed 8-9-04; 8:45 am]

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DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 524

Ophthalmic and Topical Dosage Form New Animal Drugs; Doramectin

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 a supplemental new animal drug application (NADA) filed by Pfizer, Inc. The supplemental NADA provides for an increased period of protection from reinfection with three species of internal parasites following topical administration of doramectin solution on cattle.

DATES: This rule is effective August 10, 2004.

FOR FURTHER INFORMATION CONTACT:

Janis Messenheimer, Center for Veterinary Medicine (HFV-135), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 301-827-7578, e-mail: janis.messenheimer@fda.gov.

SUPPLEMENTARY INFORMATION: Pfizer, Inc., 235 East 42d St., New York, NY 10017, filed a supplement to NADA 141-095 for DECTOMAX (doramectin) Pour-On Solution for Cattle. The

supplemental application provides for an increased period of protection from reinfection with three species of internal parasites following topical administration of doramectin solution on cattle. Specifically, the period of persistent effectiveness is increased from 21 days to 28 days for *Cooperia oncophora*, from 28 days to 35 days for *C. punctata*, and from 21 days to 28 days for *Dictyocaulus viviparus*. The supplemental NADA is approved as of June 30, 2004, and the regulations in 21 CFR 524.770 are amended to reflect the approval and a current format. The basis of approval is discussed in the freedom of information summary.

In accordance with the freedom of information provisions of 21 CFR part 20 and 21 CFR 514.11(e)(2)(ii), a summary of safety and effectiveness data and information submitted to support approval of this application may be seen in the Division of Dockets Management (HFA-305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852, between 9 a.m. and 4 p.m., Monday through Friday.

Under section 512(c)(2)(F)(iii) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 360b(c)(2)(F)(iii)), this approval qualifies for 3 years of marketing exclusivity beginning June 30, 2004. Exclusivity applies only to the extension of the persistent effectiveness claims for the three species of parasites listed previously.

The agency has carefully considered the potential environmental impact of this action and has concluded that the action will not have a significant impact on the human environment and that an environmental impact statement is not required. FDA's finding of no significant impact and the evidence supporting that finding, contained in an environmental assessment, may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

This rule does not meet the definition of "rule" in 5 U.S.C. 804(3)(A) because it is a rule of "particular applicability." Therefore, it is not subject to the congressional review requirements in 5 U.S.C. 801-808.

List of Subjects in 21 CFR Part 524

Animal drugs.

■ Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Center for Veterinary Medicine, 21 CFR part 524 is amended as follows: