

*Report of The Committee
On Regulation Under Part I
Of The Federal Power Act*

I. SUMMARY AND COMMENTARY

Much of the Federal Energy Regulatory Commission's (FERC or Commission) general effort during 1981-1982 in the area of hydroelectric regulation has gone into standardizing and clarifying requirements and procedures, in order to deal with the massive influx of applications. Thus, various categories of license applications were established in a standard format; regulations governing exemption applications were established and clarified; and procedures governing competing applications, as well as the mechanics of filings, were set out. Many of the decisions discussed herein serve the purpose of clarifying and refining the regulatory framework thus established.

Because of the press of applications, the Commission has adopted a very strict approach towards enforcement of its rules, particularly for deadlines for filing, and for compliance with permit and license conditions. Nevertheless, there have been exceptions and we have attempted to highlight these. Delegation of many decisions to the Director of the Office of Electric Power Regulation has alleviated the Commission's burden.

The area of preliminary permits has received more attention than ever before, due to the sheer volume, and to the fact that for the first time there are a substantial number of competing applications for preliminary permit. The Commission's approach to preliminary permits is governed by the recognition that permit applications are necessarily unspecific and speculative. One consequence is that competition between permit applicants is almost always governed by the Commission's first-in-time rule, since the Commission considers the statutory best adapted standard impossible to apply.

As a number of licenses begin to expire, the Commission has also been faced with a substantial number of issues regarding relicensing, including applicability of environmental laws, license term, annual charges, upgrading of existing facilities, and, last but not least, competing applications at the license stage, including takeover by preference entities. The stage has been set for what will undoubtedly be an increasing number of competitive relicensing proceedings, but the Commission's lead case in this area, while underway, has not yet been resolved.

The Commission has required that a licensee be able to control all the necessary project property, so as to be able to carry out its duties under the Act. The Commission has not yet articulated what types of arrangements will satisfy this control criterion. Exemption applicants must also establish that they own all necessary property rights; but the two standards are not necessarily identical in terms of the property interest required.

The Commission has finally determined that joint applications involving preference and on-preference entities (so-called hybrid applications) are not eligible for preference. However, in instances where a hidden hybrid allegation has been raised, the Commission has refused to investigate at the preliminary permit stage the underlying arrangements. The Commission has stated that at the licensing stage, it would require disclosure of all parties with an interest in the project and their participation as joint license applicants.

The Commission has interpreted Section 6 of the Act as prohibiting substantial alterations to an existing licensed project, even where the proposed project that would cause the alterations has been found to provide, overall, the best comprehensive development. Permit applications have been rejected, and a licensed

project reduced in scope, as a result of this interpretation, which is now being challenged in the courts.

In the future, the nature of the Staff's activities will change, as at least some of the outstanding permits will be converted to licenses; for other sites, surrendered permits will be reissued to new parties. The impending expiration of some of the tax benefits associated with privately-funded development of hydro, and the decline in oil prices, may dampen the flow of applications. In addition, a number of legislative measures proposed at one time or another during 1981-1982 would have altered substantially the contours of the Commission's hydroelectric regulation, *e.g.*, permitting exemptions for projects up to 15 MW, giving owners of sites an absolute priority in development, and allowing only the Corps of Engineers to develop capacity at Corps dams. These or other proposals may surface again. The Commission also continues to refine and reconsider its existing regulations and procedures, *e.g.*, on hybrid applications, the control criterion for licenses, and annual charges.

II. FEDERAL ENERGY REGULATORY COMMISSION RULE CHANGES

A. Revisions to Requirements for Applications for Licenses, Transmission Line Licenses, Amendments to License

The Commission completed its revisions of the requirements for license applications with two orders issued November 6, 1981, RM80-39, Order No. 184, and RM81-10, Order No. 185. The regulations now provide for three basic categories of applications for license: licenses for major constructed projects and major modified projects, 18 C.F.R. §§ 4.40-4.41 (RM80-39), 46 Fed. Reg. 55926 (November 13, 1981); for major projects at existing dams, 18 C.F.R. §§ 4.50-4.51 (these regulations were issued November 29, 1979 in RM79-36, Order No. 59, 44 Fed. Reg. 67644 (November 27, 1979)); and for minor license (1.5 MW or less) and major water power projects of 5 MW or less (the so-called "short form" license application), 18 C.F.R. §§ 4.60-4.61 (RM81-10), 46 Fed. Reg. 55944 (November 13, 1981).

All license applications now follow the same format, although the type and detail of information required varies with the size of construction undertaken and the amount of site or environmental disturbance projected. An initial formal statement supplies basic information, including, if an applicant is a municipality, a statement of the state or local laws or other authorities establishing municipal competence. The required exhibits are: Exhibit A, a description of the project; Exhibit B, a statement of project operation and resource utilization; Exhibit C, a proposed construction schedule; Exhibit D, a statement of project costs and financing; Exhibit E, an environmental report; Exhibit F, general design drawings; and Exhibit G, maps. Only Exhibits A, E, F and G are required for the short form.

In preparation of the environmental report, consultation with all relevant state, federal and local agencies must begin no later than 60 days before submission of the application (30 days for the short-form application). The environmental report itself is substantially reorganized into the following sections: water use and quality; fish, wildlife and botanical resources; historical and archaeological resources; socio-economic impact; geologic and soil resources; recreational resources; aesthetic resources; land use; alternative designs, locations and energy sources. Because of the new requirements for Exhibit E, Appendix A of Part 2 of the Commission's Regulations, which discusses the Commission's general obligations under NEPA, no longer applies to any hydroelectric project. Exhibit G is quite specific about how to

draw the project boundary for various types of features. Generally, the reorganization of Exhibit requirements has deleted some previously required information and mandated new information in other areas.

Projects which otherwise would fall into the major project-existing dam class must meet the more extensive requirements applicable to unconstructed and major modified projects if they would result in a significant change in the normal maximum surface area or normal maximum elevation of an existing impoundment, or would have a significant environmental impact. Consultation with the Commission is available to determine which applications should be filed.

In RM80-39, Order No. 184, the Commission also revised its regulations governing applications for license for transmission line only, pegging the type of application required to the applicable category for the project the transmission line would serve.

In RM80-39, Order No. 184, the Commission also revised its procedures governing applications for amendment to license, eliminating Part 5 of its regulations and substituting Sections 4.200-4.202. The Exhibits required depend on the total installed generating capacity of the project and whether the project is already constructed or not. In its discussion of comments on the proposed changes in the amendment regulations, the Commission did not set a specific threshold above which proposed amendments would be considered new projects subject to competing applications for license. It stated that this would vary from project to project, and invited consultation from licensees as to whether a contemplated amendment would be within the scope of the existing project. The Commission has not set a threshold below which applications of its new amendment regulations is necessary, although it provided that an applicant could consult as to any specific exhibit it felt was not warranted in a particular case.

B. Revisions to procedures governing Applications for License and Permit

In an Order issued January 21, 1981, RM81-11, Order No. 123, 46 Fed. Reg. 9027 (January 28, 1981), the Commission changed various requirements relating to applications for preliminary permit, licenses and exemptions. It also clarified its deficiency procedures, set out in 18 C.F.R. § 4.31(d). An applicant submitting a deficient application will be notified and has up to 45 days (for a permit) or 90 days (for a license) to correct its deficiencies. An application that substantially fails to meet the requirements is patently deficient, and will be rejected with an explanation of the deficiencies. A rejected application may be resubmitted, but the date of filing the revised application will be considered the new filing date. It may thus be late, or second in time so as to lose to a competing application.

The Commission clarified that failure to follow the requirements of § 4.33, which requires a statement by a competing applicant of how its plans are better adapted, will be treated as a patent deficiency. This Order also clarified that the statement of competing applicant, § 4.33(d)(2), may be accompanied by a technical report. It revised the requirements for Exhibit F for major projects at existing dams. More detail was required in preliminary permit applications as to the details of the proposed project (energy, head, type and size of generators) and as to use of project power. Exemption regulations were clarified to require that the agency consultation process be commenced at least 30 days before an exemption application is submitted.

By Order No. 183, issued October 29, 1981 in Docket No. RM81-15, 46 Fed. Reg. 55245 (November 9, 1981), the Commission amended in several respects its regulations governing procedures for preliminary permit and license applications.

These changes address *inter alia* administration of municipal preference (§ 7(a) of the Act) and preliminary permits generally. New § 4.30(d) requires that anyone possessing or intending to acquire proprietary interests necessary to construct, operate or maintain a proposed project be listed as a co-applicant, both at the preliminary permit stage and at the licensing stage. This requirement is “for the purpose of assigning the public preference under section 7(a) of the Act, and carrying out, through the permittee or licensee, the regulatory responsibilities mandated by the Act . . .” 46 Fed. Reg. 55245, 55246 (November 9, 1981).

The Commission provided, in new § 4.33(i), that a municipal applicant must provide evidence of competence under state law, or it will be considered a non-municipal applicant for purposes of disposing of competing applications, *i.e.*, in the matter of Section 7(a) preference. The Commission’s comments on this point are illuminating. It rejected a suggestion that where a municipality already had one license, it not be required to demonstrate competence again. The Commission reasoned that state law might differ from project to project. As for joint power agencies, the evidence to be submitted could address the joint power agency’s competence or that of its member municipalities as a class. The Commission refused to consider failure to submit evidence of competence as a *per se* deficiency in an application. It also stated that the requirement for competence was imposed by statute. But see the development of this standard in the discussion on *Village of Channahon, Illinois*, 19 FERC ¶ 61,111 (May 4, 1982), *infra* at 78-79; and see generally the discussion in *New York State Department of Parks*, 22 FERC ¶ 61,194 (February 22, 1983), and *Chain Dam Hydroelectric Corp.*, 22 FERC ¶ 61,183 (February 22, 1983), *infra* at 79-80.

The Commission also dealt with the subject of amendments to filed applications for permit or license, providing in new § 4.35 that an amendment changing the status or identity of the applicant or materially amending the proposed plan of development would change the date of acceptance of the application to the date on which the amendment is filed, for purposes of timeliness and for purposes of disposing of competing applications under the first-in-time rule. The Commission provided definitions of what material amendments would be. It did not clarify a potential conflict between this new regulation and the right granted by § 7(a). A preference entity has, pursuant to Section 7(a), the right to make its application equally well adapted to best comprehensive development as any competing application within a reasonable time. Such a change will not trigger § 4.35, the Commission clarified, in its Order Granting Rehearing in Part and Denying Rehearing in Part, Docket No. RM81-15, issued April 8, 1983.

The Commission clarified its regulations by amending §§ 4.33(g)(3) and (4) not to take into account the financial ability of public applicants where they compete with non-preference entities. The Commission stated this change was required to bring its rules into line with Section 7(a) requirements.

The Commission eliminated notices of intent to file competing preliminary permit applications at existing dams; but provided an additional 30 days for submitting the actual competing permit application. (For other types of projects, notices of intent to submit competing preliminary permits still exist.) It also provided that petitions to intervene in preliminary permit proceedings will be automatically granted in the absence of a specific timely objection. These provisions were intended to speed up and streamline the ever-increasing burden of administering applications for preliminary permit.

C. Exemptions

The Commission responded to requests for clarification of its Order No. 106,

governing exemptions, by issuing Order No. 106-A in RM80-65 on October 29, 1981. 46 Fed. Reg. 55252 (November 9, 1981). The question was whether breached dams could qualify as “existing dams” for purposes of the exemption regulations. The Commission held this was a case-specific issue of fact. Where little or none of the former impoundment remained, the breached dam would not be considered an existing dam. The Commission listed additional factors that might influence the determination: will the water level be raised, how long has the dam been breached, what effect would the project have on migratory fisheries.

In Order No. 202, Docket No. RM81-7, 47 Fed. Reg. 4232 (January 29, 1982), issued January 19, 1982, the Commission designated two categories of projects entitled to exemption which, it determined, would not significantly impact the human environment. These types of projects can automatically obtain exemptions from licensing thirty days after filing a Notice of Exemption in the format provided. One category, described in § 4.109(b), is for “micro-hydro,” *i.e.*, projects of 100 kw or less, at existing dams, where there is no significant population of migratory fish that would be affected, where water would not be diverted more than 300 feet, and where construction would not adversely affect any endangered or threatened species. The other category, described in § 4.109(a), involves projects between 100 kw and 5 Mw. In addition to the above requirements, these projects must not change the normal maximum impoundment or the regime of storage and release of the waters, must not involve construction of transmission lines of more than 69 kV, must not violate applicable water quality standards, and must not affect sites included or eligible for inclusion in the National Register of Historic Places. For both categories, the exemption applicant must obtain, and submit with the Notice of Exemption, certification from prescribed state and Federal agencies that the regulations’ environmental standards have been met. Standard exemption terms for both categories are set out. The Commission also established rules governing competition among categorical exemption applicants and other types of applicants, and it delegated to the Director of the OEPR authority to deal with the various new matters established in the Order.

In Order No. 202-B, RM81-7, issued October 12, 1982, 47 Fed. Reg. 46269 (October 18, 1982), the Commission basically rejected challenges by environmental groups to its categorical exemption rules. The National Wildlife Federation *et al.* have filed for review of these Orders with the United States Court of Appeals for the District of Columbia Circuit, Docket No. 82-2434. Apparently the basis of the challenge is in part that Congress intended environmental issues relating to exemptions to be considered on a case-by-case basis. The FERC has unexpectedly asked the Court to remand to it for reconsideration.

The Commission revised its regulations on case-by-case exemptions in Order No. 255, RM82-2, issued August 27, 1982, 47 Fed. Reg. 38506 (September 1, 1982). The major focus was a definition of “natural water feature,” one of the categories generally included in the Energy Security Act’s provision for exemptions.¹ The Commission determined to exempt such projects on a case-by-case basis, rather than as a category, due to the distinctive geological features likely to be present at each site. The Commission allowed a project at a “natural water feature” to include a diversion structure of prescribed limited dimensions, with a very limited impoundment. Where a proposed project would require a dam and man-made impoundment, it could not qualify as a natural water feature exemption. The

¹The Energy Security Act of 1980, Pub. Law 96-294, 94 Stat. 611, amending Section 408 of the Public Utilities Regulatory Policies Act, provides the basic authority for the Commission to exempt projects of 5 MW and under from the licensing provisions of Part I.

Commission also eliminated the notice of intent to file a competing preliminary permit application for this type of proposed exempted project. It also discussed the time for filing competing exemption applications of this type, and the steps to occur in the agency consultation process.

The Commission denied rehearing, but further discussed its interpretation of dams, impoundments, and natural water features, by Order No. 255-A, issued December 29, 1982, 48 Fed. Reg. 1276 (January 12, 1983). The National Wildlife Federation *et al.* and the Upper Skagit Indian Tribe *et al.* have filed separate petitions for review of these Orders with the United States Court of Appeals for the Ninth Circuit, Docket Nos. 82-7149 and 82-7140, respectively.

D. Delegation of Authority to the Director of The Office of Electric Power Regulation

On February 13, 1981, in RM81-14, Order No. 132, 46 Fed. Reg. 14119 (February 26, 1981), the Commission delegated to the Director of the Office of Electric Power Regulation (Director of OEPR) the authority to rule on competing preliminary permit applications, so long as they were not contested by any party other than a competing applicant, and did not propose and substantiate materially different plans of development. The Commission stated it did this because an inordinate amount of time was being spent on matters that do not require the attention of the full Commission.

On May 22, 1981, in RM81-20, Order No. 147, 46 Fed. Reg. 29700 (June 3, 1981), the Commission delegated authority to several Office Directors, including the Director of OEPR. The Director of OEPR was authorized to act on competing applications for permit, license, and exemption, provided that no party other than a competing applicant had contested the applications, and that the competing applications did not propose and substantiate materially different plans of development. See pp. 114-15 *infra*. Other authority delegated to the Director of OEPR included determination of headwater benefits from the operation of Federal reservoir projects; action on declarations of intention pursuant to § 23 of the Act; and rejection as well as acceptance for filing of data, reports, and amendments to agreements.

As part of Order No. 224, RM82-27, issued April 21, 1982, 47 Fed. Reg. 17806 (April 26, 1982), the Commission delegated additional powers to the Director of OEPR. He was authorized to act on license applications, whether or not they required an Environmental Impact Statement (EIS). He was also authorized, after at least thirty days notice, and where the holder of the permit, exemption or license did not object, to cancel permits for failure to comply with their terms; to revoke small conduit exemptions and small hydropower exemptions for failure to begin or complete construction within the time specified; and to terminate licenses where construction was not commenced within the specified period. Presumably this delegation was in part a response to the growing number of permits that, once obtained, languished, with no studies ever carried out; and to other delays in construction of projects.

E. Revision of Other Forms

On January 21, 1981, in RM80-31, Order No. 122, 46 Fed. Reg. 9029 (January 29, 1981), the Commission consolidated its orders, regulations and practices relating to project safety. This Order was summarized in a previous Report on Part I of the Federal Power Act, 2 *Energy Law Journal* 195, 198 (1981).

On September 29, 1981, in RM81-36, Order No. 179, 46 Fed. Reg. 50055

(October 9, 1981), the Commission amended its Form 80, the Licensed Hydropower Development Recreation Report, and the corresponding regulations at 18 C.F.R. §§ 8.11, 141.14. Form 80 is submitted every other year by some 160 project licensees to allow the Commission to determine whether the public need for water-based recreation facilities is being met. The Commission reduced by 60% the data required by the Form, and provided that in filings subsequent to the initial filing only changes in the previously supplied data had to be provided.

III. JURISDICTION

A. *Effect on Interstate Commerce*

In *Swan Lumber Company*, 15 FERC ¶ 61,082 (April 27, 1981), Swan Lumber Company was required to obtain a license for its proposed hydroelectric project on the Pistol River in southwestern Oregon. The river was non-navigable. The transmission line proposed, however, would interconnect to the Coos Curry Electric Cooperative's main transmission line, which is interconnected to the north with the Bonneville Power Administration (BPA) system, and to the south at the California/Oregon border with Pacific Power & Light's (PP&L) transmission system. The PP&L/Coos Curry interconnection is usually operated "open", but when emergencies occur it is operated "closed" and flows pass into the adjoining state. Usually, these flows are southbound, with BPA power transmitted to PP&L. The Commission relied for jurisdiction on the *Taum Sauk* case, *FPC v. Union Electric Company*, 381 U.S. 90 (1965). It held that since some Pistol River power, commingled with BPA power, would occasionally flow from Oregon to California, and thus flow in interstate commerce, the project would affect the interests of interstate commerce, and under Section 23(b) of the Act the Commission had jurisdiction.

In *City of Centralia, Washington v. FERC*, 661 F.2d 787 (November 16, 1981), the Ninth Circuit overturned a Commission decision requiring the City of Centralia, Washington to file a license application for its Yelm Project on the Nisqually River in Washington State. Centralia normally uses all the Yelm power. On some occasions, however, the power flows over transmission lines of the Bonneville Power Administration (BPA) to the Lewis County Public Utility District (PUD). The lines between Centralia and the PUD form a closed loop, and electricity generated at Yelm never flows beyond Washington's borders.

The Court said that there must be a "real and substantial" effect on interstate commerce in order for Congress (and the Commission) to have jurisdiction. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 255 (1964). The amount of power generated at Yelm clearly affected the flow of interstate energy, since Yelm power on occasion commingled with BPA power destined for Lewis PUD, reducing the amount the suppliers to the BPA grid, including out-of-state suppliers, had to contribute. The Court reversed the Commission's conclusion that this slight influence amounted to a substantial effect on interstate commerce. The Commission lacked substantial evidence on this record to make a finding that interstate commerce was substantially affected.

B. *Navigable Waters*

In *Sierra Pacific Power Co. v. FERC*, 681 F.2d 1134 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 1769 (1983), the Court reversed a Commission determination of

jurisdiction based on the navigability of the Truckee River. The court held that there was no substantial evidence that the reach of the Truckee across the State line in California was used for navigation; that the river did not form a continuous highway between states; and that improvements authorized by Congress on the state line reach of the river were for flood control or reclamation, not navigation.

The Commission held jurisdictional a project located along the Chicago Sanitary and Ship Canal. It was not exempt pursuant to Section 23(a) of the Act because it did not possess a valid *federal* permit antedating the Federal Power Act, only a state permit. Although not obstructing a navigable waterway, it used water from a navigable waterway. Projects located on diversions of navigable waterways which were constructed for purposes other than hydroelectric generation are still subject to licensing jurisdiction. *The Metropolitan Sanitary District of Greater Chicago*, 19 FERC ¶ 61,176 at p. 61,337 (May 21, 1982).

C. Public Lands

Where the sole possible basis for Commission jurisdiction was public lands, the Commission held it did not have jurisdiction under Section 23(b) of lands selected by a native corporation pursuant to the Alaska Native Claims Settlement Act, even though only an interim conveyance, and not a patent, had been received. *Kodiak Electric Association, Inc.*, 16 FERC ¶ 61,045 at p. 61,079 (July 24, 1981).

D. Power Purpose of Project

In *Escondido Mutual Water Co. v. FERC*, 692 F.2d 1223 (9th Cir. November 2, 1982), the Court affirmed the Commission's determination that it had jurisdiction over a project the primary purpose of which was not development of power, but to convey water. The Court deferred to the Commission's broad interpretation of Sections 4(e) and 23(b), noting that the statute did not limit jurisdiction even to projects where power generation was only "significant" or "non-*de minimis*." 692 F.2d at 1230. The Court reserved the possibility of a case where power elements would be "mere sham and makeweight." *Id.*

E. State Ownership

The Commission asserted jurisdiction over state-owned project works at which private applicants proposed to install hydroelectric generation. It required that the state-owned facilities be included within the project boundary, or that a separate license application be filed by the state, within a year of issuance of the license, in two separate proceedings. *New York State Electric & Gas Corp.*, 15 FERC ¶ 61,066 (April 23, 1981); 16 FERC ¶ 61,176 (September 10, 1981); *Niagara Mohawk Power Corp.*, 16 FERC ¶ 62,044 (July 15, 1981); 16 FERC ¶ 61,180 (September 10, 1981). The Commission held it irrelevant that the state-owned facilities were originally constructed for purposes other than hydroelectric generation. Since the facilities were part of the complete unit of development, they must be licensed to assure Commission control of the entire project (see *infra* at 38, 99). State ownership did not affect this determination.

F. Limitations in Other Federal Statutes

The Tennessee Valley Authority (TVA) has exclusive use, possession and control over its facilities, although it can approve development of a project by other

parties. In *JBC Hydro Tennessee, Ltd.*, 21 FERC ¶ 61,113 (November 22, 1982), the Commission held that the Director of OEPR acted correctly on the facts before him in dismissing without prejudice applications for a project at a TVA-owned site, because it appeared TVA would not reach a decision on development in the foreseeable future. However, since new evidence suggested TVA might soon decide whether or not it was interested in development the project itself, the Commission reinstated the applications and deferred processing until a decision was made by TVA.

The States of Arizona and Nevada raised a jurisdictional issue by filing with the Commission an application for preliminary permit for modifications at the Hoover Dam on the Colorado River. *Arizona Power Authority and the Division of Colorado River Resources of the State of Nevada*, Project No. 4922, Notice of Application for Preliminary Permit (September 9, 1981), 46 Fed. Reg. 46, 172 (September 17, 1981). The Hoover Dam is owned by the Bureau of Reclamation, was constructed pursuant to the Boulder Dam Act, 43 U.S.C. 617 *et seq.*, and power now generated at the project is allocated pursuant to provisions of that Act. The applicants proposed to develop 400-1000 MW of additional capacity. Other parties interested in allocations of power from the project (the present contracts expire in 1987) have argued that the proposed project is not jurisdictional because the federal government is presently undertaking studies of similar improvements. The Commission has not ruled on the relevant motions.

In *Guadalupe-Blanco River Authority*, 21 FERC ¶ 61,131 (November 24, 1982), the Commission held that it has jurisdiction to license projects at dams constructed pursuant to the Flood Control Act of 1954, 68 Stat. 1248. This act allows installation of facilities for the development of electric power by the Federal Government *or* by local interests. It prevails over Section 4.30(c) of the Commission's Regulations, which states that the Commission will not accept applications for license for project works authorized by law for Federal development. The Commission did not determine, finally, what a "local interest" would be, since this was an application for preliminary permit, and the question would be relevant at the license stage.

In *City of Santa Clara*, 20 FERC ¶ 61,257 (August 31, 1982), the Orland Unit Water Users Association (Orland Unit) challenged issuance of a license to Santa Clara for a project at a Bureau of Reclamation Dam operated by Orland Unit. The Commission found Orland Unit's interest in being compensated should be addressed to the Bureau of Reclamation, because the impoundment structure was not a project work subject to the Commission's Section 4(a) licensing authority. Further, Orland Unit's concern about safety at the dam should also be addressed to the Bureau of Reclamation. At the same time, the Bureau of Reclamation's interest in the project did not entitle it to designate a preferred license applicant.

The Commission may not authorize development affecting a wilderness area designated under the Wilderness Act, 16 U.S.C. § 1133(c). Where an application for preliminary permit included four developments, one of which would be within a wilderness area, the Commission rejected the application as to that development and accepted it as to the other developments. *Woods Creek, Inc.*, 19 FERC ¶ 61,181 (May 21, 1982). Where a project to be studied under a permit would involve an area proposed to be designated as a wilderness area [Roadless Area Review and Evaluation (RARE II)], the Commission will issue the permit, at least where the studies to be conducted will not substantially affect the environment. *E.g.*, *Mason County Public Utility District No. 1*, 17 FERC ¶ 61,042 (October 9, 1981). Similarly, the Wild and Scenic Rivers Act prohibits the issuance of a license for construction of a project on or directly affecting a designated segment of the Wild and Scenic Rivers System, nor may the Commission license projects that would invade or unnecessarily

diminish the values protected by this Act. 16 U.S.C. § 1278(a). Nevertheless, the Commission will issue preliminary permits for projects that might conflict with these provisions, advising the permittee to study all feasible schemes and to be mindful of statutory limitations on the Commission's licensing authority. *Oroville-Wyandotte Irrigation District*, 19 FERC ¶ 61,301 (June 24, 1982); *Modesto Irrigation District*, 17 FERC ¶ 61,144 (November 19, 1981).

G. Matters Within Part I Jurisdiction

Anticompetitive considerations may be considered in Part I proceedings. In *South Carolina Electric & Gas Company*, Project No. 3726, Notice Granting Intervention (June 19, 1981), see 16 FERC ¶ 62,417 (September 10, 1981), the Commission allowed the intervention of a cooperative that claimed its efforts to reach wheeling and pooling agreements had been unsuccessful and that the applicant had an entrenched anticompetitive posture, conduct and demeanor. The Commission found participation on this basis to be in the public interest. However, it reserved the matter whether the preliminary permit stage was the proper time to hear these claims.

The Commission declined to become involved in a contract dispute in which an applicant was allegedly obligated by contract to include two water districts as co-applicants. *The Public Utility Commission of the City and County of San Francisco, California*, 19 FERC ¶ 61,224 (June 4, 1982). The Commission also declined to become involved in allegations of copyright infringement by a competing applicant. *Hydroelectric Power Engineers*, 20 FERC ¶ 61,233 (August 30, 1982); *Tuolumne Regional Water District*, 19 FERC ¶ 61,132 (May 10, 1982); *Southern California Edison Co.*, 18 FERC ¶ 61,212 (March 3, 1982).

H. Limitations on State Authority

In *New England Power Co. v. New Hampshire*, 455 U.S. 331 (February 24, 1982), the Supreme Court held that the New Hampshire Public Utilities Commission could not, pursuant to a 1913 New Hampshire statute, prohibit the New England Power Company from selling outside the state hydroelectric power generated in New Hampshire. Absent an affirmative grant of authority by Congress to the States, this state action would violate the Commerce Clause. The Court held that Section 201(b) of the Act — which provides that the provisions of Part II shall not deprive a State or State commission of lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a state line — did not constitute such a grant of authority over interstate commerce to the States.

In *Town of Springfield, Vermont v. McCarren*, 549 F. Supp. 1134 (D. Vt. October 15, 1982), *aff'd*, Order No. 82-7837 (2d Cir. 1983), the court ruled, on a motion for summary judgment, that the Vermont Public Service Board did not have concurrent jurisdiction with the FERC over hydroelectric projects in the state, by means of a certificate of public good. It relied on *First Iowa Hydro Electric Cooperative v. FPC*, 328 U.S. 152 (1946), for the principle that federal licensing preempts state authority; and it held that *California v. United States*, 438 U.S. 645 (1978), did not implicitly overrule *First Iowa*. That case dealt with a different statute, and involved the primary jurisdiction of the states over proprietary rights in water.

IV. RELICENSING

The relicensing of hydroelectric projects proceeds apace, as many licenses

issued in the 1920s, 1930s and 1940s expire. Where there is no competition for the new license, the issues raised in relicensing are in many respects similar to issues generally raised in licensing, and discussions of these matters will be found in Section V of this Report, on Licensing. Specific environmental issues related to relicensing and matters related to annual licenses are discussed below. Where competing applications for the new license are filed, many additional important questions are likely to be raised. Although the stage is set, there was no final action on any of the competing relicensing proceedings before it during 1981-1982, although a hearing was held on the first competing relicensing proceeding.

A. *Competitive Relicensing*

1. *Preference*

A small but significant group of competitive relicensing proceedings involve competing applications submitted by municipal applicants claiming preference pursuant to Section 7(a) of the Act. In a landmark decision in *City of Bountiful*, 11 FERC ¶ 61,337 (1980), *reh. denied*, 12 FERC ¶ 61,179 (1980), the Commission, over the objections of a large part of the investor-owned electric utility industry involved in hydroelectric generation, held that Section 7(a) preference did apply at the relicensing stage. Several pages of this opinion discuss in a general way what factors might weigh in the decision on preference in relicensing. In *Alabama Power Co. v. FERC*, 685 F.2d 1311 (11th Cir. September 17, 1982, *reh. and reh. en banc*, November 12, 1982), the Eleventh Circuit affirmed the Commission, finding that the plain language of Section 7(a) (*i.e.*, whether in referring to "new licenses" a new application for license by the existing licensee was included or excluded) was ambiguous, and that the Commission's interpretation of the legislative history was permissible. Several parties have now sought *certiorari* in this case. *E.g.*, No. 82-1312 (United States Supreme Court (February 10, 1983)).²

The *Bountiful* standard is only now receiving its first application, in a FERC proceeding involving Pacific Power & Light Company's (PP&L) Merwin Project, Project No. 935, on the Lewis River in southwestern Washington. A competing preference application was filed by the Clark-Cowlitz Joint Operation Authority (JOA), Project No. 2791. The Commission, in its "Order Providing for Hearing" in this case, (September 29, 1981), stated that it believed the development of a record in individual adjudicated cases was necessary to address the applicability and relevance of the factors articulated generally in *Bountiful*. Hearings in *Merwin* were held in the fall of 1982. An Initial Decision was issued on April 28, 1983, 23 FERC ¶ 63,037, issuing the new license to JOA, the preference applicant, on the basis of Section 7(a) preference.

Issues relating to the *Bountiful* factors, as framed in the *Merwin* proceeding, include, *inter alia*:

- (1) What would be the short-term impact on the cost-of-service for the JOA and PP&L with or without the Merwin project?
- (2) What would be the long-term cost for JOA and PP&L to meet system load with or without the Merwin project?

² Although this decision is beyond the temporal scope of this summary, and will undoubtedly be thoroughly reviewed by the Commission, its signal importance warrants discussion herein. (Ed. note: see *Pacific Power & Light Co.*, Opinion No. 191, "Opinion and Order Overruling Opinion No. 88, etc." (issued Oct. 6, 1983).)

- (3) What are the consequences for economic development in PP&L's or JOA's service territory of any increased cost of service due to the unavailability of Merwin project power?
- (4) If the JOA were selected as the new licensee for the Merwin project, could project operation be sufficiently coordinated with the operation of PP&L's upstream project to avoid any significant adverse effect on the public interest in power operation, flood control, recreation and maintenance of aquatic habitat?
- (5) How do the competing applicants' plans for recreational development compare?
- (6) If the JOA is selected as the new licensee, can it within one year complete and implement a wildlife mitigation plan equal to that proposed by PP&L?
- (7) Is the JOA, as a public entity, to be considered inherently more responsive to meet the public needs in operating the Merwin project?

The Staff's position on these issues, and the holdings of the Presiding Law Judge, are as follows: Staff argued that the Commission should focus on long-term effects on cost as opposed to short-term effects, since the project will be licensed for many years. Uncertainty as to future Bonneville Power Administration (BPA) rates and alternative sources of power makes long-term cost analysis meaningless. Short-term cost differences are relatively small and not significant. The Staff concluded that the effect on competition of issuing the license to the JOA would be small and would be desirable. PP&L proposed analysis of JOA's recapture as part of a monopolization contrary to the policies expressed in the anti-trust laws.

The Presiding Law Judge held that the relative long-term cost impact projections were inherently unreliable. Slip opinion at 32-36. He also rejected PP&L's claim of monopolization of hydropower in the Pacific Northwest by municipalities. *Id.* at 36-38. Most importantly, he held that the broad public interest determination under Section 7(a) was not intended to include these economic factors. Section 7(a) provides that a municipal applicant may cure "within a reasonable time" its application so as to make it "equally well adapted." JOA could not amend its application to remedy the economic shortcomings advanced by PP&L, which were due to fundamental economic and legislatively created differences between the entities. Therefore, he concluded, those factors were not included in Section 7(a). *Id.* at 38-40.

Staff argued that coordination of all three projects on the Lewis River was necessary to protect the beneficial uses, but that it was not necessary to issue the new license to PP&L to insure that coordination. The Judge agreed, requiring coordination by PP&L pursuant to articles in its other licenses for projects on the Lewis River. The Staff argued, and the Judge found, no significant difference with respect to the power output proposed by the two applicants. Although JOA had not proposed a detailed recreational plan, the Staff argued, and the Judge found, that there was no basis for preferring either applicant on this ground. If JOA received the license, it would be required to formulate a detailed recreational proposal. The Staff did not accord JOA any additional advantage for superior accountability to the public, saying this principle was already included in the Section 7(a) preference. Staff rejected JOA's argument that PP&L should be disfavored because of inadequate sensitivity in seeking and responding to public needs. The Judge agreed with this approach.

2. *Net Investment and Severance Damages*

When a competing license applicant receives the new license (or when the

Federal government exercises its takeover option, Section 14(a)), the prior licensee is entitled to receive compensation for its net investment and for severance damages. The method of calculation of these amounts, and in general what kinds of interests may be included as "severance damages," have not been definitively resolved.

As with Section 7(a) preference, these important issues were addressed in the *Merwin* litigation. PP&L argued that severance damages should include the collateral economic consequences of a takeover, here the cost of constructing a coal plant to replace the lost project generation. Staff and JOA argued that severance damages are to compensate only a direct and immediate loss caused by injury to property not taken but rendered useless by the severance from property taken. They said there was no such property damage in *Merwin*. The Presiding Law Judge agreed, holding that there was no damage to PP&L's other properties by issuance of the *Merwin* license to JOA; and therefore no severance damages. Slip op. at 59-60. The Law Judge also held that depreciation is to be deducted from the "net investment" compensation. Slip op. at 52.

3. *Other Competing License Proceedings*

The Commission had indicated its intent to use the *Merwin* proceeding as a lead case, although it will not necessarily wait until a Commission decision on *Merwin* before initiating other proceedings. Reply of the Federal Energy Regulatory Commission on the Claims of Unreasonable Administrative Delay, June 3, 1982, at 4-6, in *City of Santa Clara v. FERC*, No. 81-2360 (D.C. Cir.).³ Whether *Merwin* will serve appropriately as a lead case on all issues is not clear, since it involves the special power supply arrangements present in the Pacific Northwest, as well as specific contractual arrangements governing projects on the Lewis River. It is also unclear how the Commission will proceed with its other competing license cases, hearing one or several at a time. Indeed, in some pending cases, preliminary motions have awaited rulings for more than two years.

B. *Conditional Applications for New License*

Some applicants have attempted to extend their initial license terms by submitting a conditional request to amend an existing license by shortening its term so that it would expire, conditional on the Commission granting a new license for the project. *E.g.*, *Central Maine Power Co.*, 6 FERC ¶ 61,122 (1979); *Niagara Mohawk Power Corp.*, 11 FERC ¶ 62,011 (1980). In *Niagara Mohawk Power Corp.*, 20 FERC ¶ 61,454 (September 30, 1982), the Commission noted that "[t]he conditional aspect of Niagara Mohawk's applications would . . . bar competition for the new license . . ." *Id.* at 61,936. *The Commission held that*

Conditional applications would obstruct the Commission's statutory responsibility to ensure that the relicensing process is open to competition by any qualified applicant. It is not in the public interest to institute a relicensing proceeding where no meaningful competition can exist and where the expenditure of Staff resources to analyze the relicense application would be for naught if the conditional application were withdrawn.

Id. As a general policy, therefore, the Commission will henceforth reject such

³In that proceeding, the City of Santa Clara, California challenged a Commission action noticing amendments to a Pacific Gas & Electric Company (PG&E) application for new license, claiming undue delay in the competing relicensing procedure. In an Order issued August 4, 1982, the Court granted the FERC's motion to dismiss for lack of jurisdiction.

conditional applications. *Id.* This policy is apparently prospective only, however. In *Central Maine Power Co.*, 21 FERC ¶ 62,483 (December 22, 1982), the Director of OEPB granted applications that in effect allowed the expiration of the original license early and issued a new license, authorizing an additional 8.5 MW, for a 40-year term. Footnote 3 of this Order pointed out that the *Niagara Mohawk* decision discussed above came down after the applications here were accepted. It also noted that an opportunity had been provided for competing applications, consideration of possible Federal takeover, and opposition to the redeveloped project, so that the action was in the public interest.

C. Environmental Issues

In issuing a new license in *Public Utility District No. 1 of Chelan County, Washington*, 15 FERC ¶ 62,168 (May 12, 1981), the Director rejected the recommendation by the Department of the Interior that fish and wildlife be restored to pre-project levels. The Commission staff agreed with the applicant that factors other than project development may have contributed to the decline in these resources, and the Commission concluded that mitigation to this level was "unrealistic and unwarranted." *Id.* at 63,280. The Staff and Presiding Law Judge also rejected this position in *Merwin*.

It was also unnecessary for the applicant to provide information about pre-project levels in its application, because the action proposed was continued operation of an existing project. *Id.* For the same reason, issuance of the new license did not constitute a major Federal action significantly affecting the quality of the human environment, and no EIS was required. *Id.* at 63,280-81.

D. Annual Licenses

In *Escondido Mutual Water Co.*, 17 FERC ¶ 61,157 (November 20, 1981), the Commission stated as a general principle that it had authority to amend annual licenses to authorize new construction. It relied on *Swinomish Tribal Community v. FERC*, 627 F.2d 499, 505-06 (D.C. Cir. 1980), which reached the same result, although perhaps on different facts. In *Escondido Mutual Water Co.*, 18 FERC ¶ 61,299 (March 31, 1982), the Commission reiterated its general opinion, and authorized Escondido, holder of an annual license, to demolish and reconstruct a powerhouse that had been destroyed by flooding and a mudslide. The Commission did not consider determinative the fact that this new construction would increase the net investment and might pose an impediment to takeovers by a competing applicant. In the same order, the Commission refused to amend Escondido's annual license to authorize installation of additional generation that would double the capacity of the original project. The case was on appeal to the Ninth Circuit at that time, and the Commission held modification of the scheme of development of the original license was therefore not possible under Section 313(b) without authorization of the Court. In an Order Denying Rehearing, 20 FERC ¶ 61,157 (August 5, 1982), the Commission stated that its action, which preserved the status quo, was in accord with the purposes of annual licenses; and that in any event its approval of the application was not an amendment of the license. Thus, the Commission's three orders in *Escondido* do not provide a clear resolution of the Commission's authority to amend annual licenses.

V. TERMS AND CONDITIONS OF LICENSES

A. *Scope of License – Control of Complete Unit of Development*

In *New York State Electric & Gas Corp.*, 15 FERC ¶ 61,066 (April 23, 1981); 16 FERC ¶ 61,176 (September 10, 1981), the Commission asserted its need to maintain control over the complete unit of development. It asserted a need to control the continued generating capacity and safety of the project. Although the dam here was owned by the State of New York, the Commission required the licensee to include the dam in its project, or to have the State submit a separate project, within one year. The applicant subsequently acquired a perpetual, transferable hydroelectric easement. See *Niagara Mohawk Power Corp.*, 16 FERC ¶ 62,044 (July 15, 1981); 16 FERC ¶ 61,180 (September 10, 1981).

B. *License Term*

In *Niagara Mohawk Power Corp.*, 22 FERC ¶ 62,020 (January 10, 1983), the Commission did not apply its standard policy of issuing a license to expire twenty years after issuance for a project with no post-1935 construction. See *Bangor Hydro-Electric Co.* (“Medway”), 6 FERC ¶ 61,287 (1979). The Director had promised a thirty-year period from the date of issuance, and the Commission honored this promise. The effective date of the license, under *Public Service Co. of New Hampshire*, 27 F.P.C. 830 (1962) (the “Androscoggin” rule), is the earlier of April 1, 1962 or the date a finding of navigability was made. The Commission could not follow this rule because of the statutory limitation to a fifty-year maximum. It dated the license from January 1, 1963.

In *Village of Morrisville, Vermont*, 19 FERC ¶ 61,174 (May 21, 1982), the Director established an effective date of May 1, 1965 for projects affecting interstate commerce with post-1935 construction. See *FPC v. Union Electric Co.* (“Taum Sauk”), 381 U.S. 90 (1965). The Director rejected the standard policy, which would have had the license terminate fifty years from 1947, the date of construction of the project. See *Pacific Power & Light Co.*, 56 F.P.C. 1804 (1976). Instead, the Director gave the applicant fifty years from the 1965 date, because it proposed substantial new construction at one of the developments under the license. See *Montana Power Co.*, 56 F.P.C. 2008 (1976), holding that substantial new construction at an existing dam warrants a forty or fifty year term instead of a thirty year term, depending on the extent of construction. Here, the licensee asked the Commission on appeal for a fifty-year *prospective* license term. The Commission denied the request and upheld the Director. The Effective date put the licensee in the position it would have been in had it carefully observed the licensing requirements of the Federal Power Act; and optimization of financing opportunities for new construction could not be regarded *per se* as a reason for disregarding this policy.

In *Idaho Power Company*, 16 FERC ¶ 61,071 (July 24, 1981), the Commission modified the Androscoggin rule, *supra*, that where projects are located on streams subsequently found to be navigable, and where post-1935 construction occurred, the effective date of the license should be the date of construction. This rule’s justification is that after the enactment of Section 23(b), there was no excuse for not filing either an application or a declaration of intention. Here, however, because construction commenced in 1937, strict application of the Androscoggin rule would have resulted in a license expiring in 1986, six years after issuance. The Commission therefore expanded the Medway rule, *supra*, and issued a license that would expire twenty years from the issuance date.

In *Utah Power & Light Co.*, 15 FERC ¶ 62,137 (May 1, 1981), a relicensing proceeding, the Director of OEPR rejected recommendations of the Idaho Water Resources Board and the Department of the Interior for a five year license, and of the State of Wyoming for an annual or biennial license. It said such a license term would be administratively inefficient and inconsistent with the policy of issuing licenses for essentially unchanged construction for 30 years. Possible changes in the Bear River Compact were accommodated by specific license conditions. The license was issued for thirty years.

In *Diamond International Corp.*, 17 FERC ¶ 62,487 (December 28, 1981), the Director authorized an amendment to install new generation at a licensed project, and extended the license term. The magnitude of the new development there warranted only a 40-year total term, rather than the 50 years the licensee requested. In *Vermont Marble Company*, 17 FERC ¶ 62,044 (October 15, 1981), the Director authorized an amendment to install additional capacity and extended the license term to 50 years from the constructive original license date. See above for discussion of Commission policy refusing to accept surrender of license conditional upon issuance of a new license.

C. Annual Charges

1. Reimbursement for Costs of Administration

In *Monongahela Power Company*, 20 FERC ¶ 61,134 (August 2, 1982), *reh. denied*, 21 FERC ¶ 61,100 (November 22, 1982), the Commission refused to defer the payment of annual charges, even though it had stayed the time for commencement of construction under the license because of ongoing judicial review proceedings. The Commission stated its intent to collect annual charges from the effective date of the license. On rehearing, it stated that annual charges are by statute assessed on a group — existing licensees — and not for benefits conferred upon a specific licensee.

In *Idaho Power Company*, 16 FERC ¶ 61,071 (July 24, 1981), the Commission issued a license with a 50 year term beginning in 1949. The Commission had followed its Medway rule, granting a license that would expire 20 years from the date of issuance. See *supra* at p. 38. However, construction on the project had begun in 1937. The Commission assessed a payment in lieu of annual charges for the 1937-1948 period, in order to prevent an unwarranted advantage to a project owner who had enjoyed years of unregulated operation. The Commission's general policy is to place the licensee as nearly as it would have been in if it had carefully followed the licensing requirements of the Federal Power Act. The payment in lieu of annual charges here was part of this policy.

The Commission denied an appeal of an order requiring a licensee to pay annual charges on a project even though the project never became operational before the license was surrendered. The government, in carrying out its administrative duties, incurred considerable expense, and its reimbursement was not contingent on success or completion of the project. Waiver of annual charges was appropriate only in the most extraordinary circumstances, as where a licensee was no longer a financially viable entity. This was not the case here. *Consolidated Edison Company of New York, Inc.*, 18 FERC ¶ 61,300 (March 31, 1982).

2. Compensation for Use of Government Dam

The Commission held, in *Louisville Gas and Electric Company*, 20 FERC ¶ 61,346

(September 23, 1982), that it could assess annual charges retroactively to the date upon which a new license was issued, even if this increased the amount the licensee was already paying. A prospective-only policy would not protect the United States' interest in compensation. The Commission held it appropriate to delay determination of the new annual charge pending its general review of annual charges. In *Louisville Gas and Electric Company*, 22 FERC ¶ 61,138 (February 8, 1983), the Commission stated it would complete its review in 1983. A proposed rulemaking on annual charges has now been issued, RM83-13 (March 31, 1983).

The Commission held that placing a ceiling on potential annual charges protected the licensee from unfair uncertainty. At the same time, it denied a request by the Department of the Interior to set specific annual charges, pending comprehensive reassessment. *Solano Irrigation District*, 15 FERC ¶ 61,068 (April 23, 1981).

The Commission held that contracts between licensee Irrigation Districts and the Bureau of Reclamation which provided all revenues from the facilities would remain the property of the licensees did not bar imposition of annual charges. The reclamation laws and the Federal Power Act are separate legislative schemes. *East Columbia Basin Irrigation District*, 21 FERC ¶ 61,091 (November 22, 1982).

In the same order, the Commission deferred any ruling on whether annual charges should be reduced because the United States has been fully repaid the cost of constructing and maintaining the irrigation system canals. It said such equitable arguments would be discussed in its general review.

3. Charges For Use of Tribal Lands

In *Portland General Electric Co.*, Opinion No. 123-A, 20 FERC ¶ 61,294 (September 1, 1982), the Commission determined appropriate readjusted annual charges to be paid for the use of tribal lands as required by Section 10(e). The Commission determined to take a base figure and apply an index to it, in order to facilitate subsequent readjustment of annual charges. Tying the annual charge to the Consumer Price Index will, in the Commission's view, promote development of hydropower in the public interest; avoid an unreasonable increase in the cost of power to consumers; and give fair compensation to the Indians for the use of their land. The Commission determined the original annual charge was not suitable as a base figure. Although the Commission said a level charge was not appropriate, its selection of a base charge appears to be based on a figure for 1978 that would produce what the Commission found was an appropriate annualized amount for 1981 to 1983.

In *Escondido Mutual Water Co.*, 17 FERC ¶ 61,157 (November 20, 1981), the Commission, in a relicensing proceeding, agreed to stay pending judicial review the increase in annual charges over the original amount.

D. Eminent Domain

The Commission discussed in dictum several applications of the Section 21 Federal eminent domain power that licensees possess. This power extends to condemnation of state-owned dams. *Robert W. Shaw*, 19 FERC ¶ 61,153 (May 18, 1982). Section 21 eminent domain power gives a licensee authority to condemn necessary water rights. *City of Santa Clara*, 20 FERC ¶ 61,257 (August 31, 1982); *State of California Department of Water Resources*, 18 FERC ¶ 61,056 (January 26, 1982). Eminent domain pursuant to Section 21 is not available to exemption applicants. *Seneca Hydroelectric Company, Inc.*, 18 FERC ¶ 61,057 (January 26, 1982).

E. Consent of Existing Licensee to Substantial Alterations – Section 6

Section 6 of the Federal Power Act provides in part that “Licenses . . . may be altered . . . only upon mutual agreement between the licensee and the Commission” In situations where there is an existing licensee on generally the same stretch of the river, this provision has become problematic in permitting and licensing, because a proposed project may involve alteration, to one degree or another, of an existing licensee’s project. If the licensee withholds consent — demanding, perhaps, more compensation than the applicant is willing to pay — the project can be prevented. But this may be contrary to the comprehensive development required by Section 10(a).

The only recent treatment of the Section 6 issue in the licensing context is *Calaveras County Water District*, 18 FERC ¶ 61,124 (February 8, 1982); 20 FERC ¶ 61,031 (July 9, 1982), *appeal pending sub nom. Pacific Gas and Electric Co. v. FERC*, Docket No. 82-2021 (D.C. Cir.). The Commission has interpreted Section 6 to mean that no *substantial* alteration to an existing license may occur without consent. In *Calaveras*, it found that two of three Pacific Gas and Electric Company (PG&E) licenses affected by a proposed project would be substantially altered, and that without PG&E’s consent the proposed project would have to be modified. This was so even though the best comprehensive development would require inclusion of these features in Calaveras’ project. As to some features of one of these licenses, however, the Commission found that conditions in the PG&E license constituted PG&E’s prior consent to whatever alterations the Commission might order. As to the third PG&E license, encroachment on the tailwater at that project was not substantial, even though a compensable injury to PG&E might result. The Commission required Calaveras and PG&E to negotiate (1) to try to include the remaining features of the proposed project by obtaining PG&E’s consent, and (2) as to features where Calaveras could proceed, to determine appropriate compensation. The Commission reserved the right to determine compensation if the parties did not reach agreement.

A dissent was filed in which the argument was that *any* alteration of an existing licensee’s project requires consent.

On rehearing, the Commission clarified that its “substantial alteration” test was based on a practical application of Section 6 in light of all of the provisions of Part I. It said that the position articulated by the dissent (which PG&E adopted):

would inflate the rights of existing licensees far beyond any needs for protecting their investment or ensuring the continued operation of their projects and place them in a position to veto any proposal by other entities Section 6 must be read in conjunction with the rest of Part I of the Act, including the Commission’s duty under Section 10(a) to promote the comprehensive development of the Nation’s water resources.

20 FERC at 61,058.

In response to the licensee’s request for a more expansive Section 6 interpretation, the Commission stated:

We agree that Section 6 was not intended to afford licensees such a complete monopoly. We see no reasons, however, for extending this argument as NCPA and CCWD propose, to deprive licensees of their legitimate expectations with respect to the continued operation of their projects during their license terms.

20 FERC at 61,059. The Commission also clarified that any compensation determination it might make would be final action subject to review, and that it might deem certain such determinations more appropriately made by another forum.

On appeal to the United States Court of Appeals for the District of Columbia Circuit, all sides argue that their position is supported by the statute, by precedent and by legislative history. If the court reaches a determination on the general interpretation of Section 6, it will be of considerable importance.

The Section 6 issue has arisen more frequently in the context of preliminary permits. It can in some circumstances be determinative at that stage. In *North Kern Water Storage District*, 15 FERC ¶ 61,131 (May 6, 1981), 16 FERC ¶ 61,082 (July 30, 1981), the Commission rejected an application for a preliminary permit because the proposed project involved diversion of a stream and consequent retirement of two licensed projects. The Commission rejected the District's claim that the Commission had the power under Section 10(a) to require the retirement of licensed project works, upon just compensation, in order to license a project better adapted to the comprehensive development of the waterway. The Commission distinguished the situation from one of limited encroachment by a downstream project on an upstream project. On rehearing, the Commission distinguished precedent cited by the District. It also rejected the argument that, assuming consent is required, it should not be required prior to issuance of the permit.

Such a procedure would be burdensome to both applicants and the Commission's staff. To encourage applicants to undergo the expense of preparing an application and likewise to require the Commission's staff to commit its resources to processing an application without any assurance that at the end of the process the relevant licensee would consent to the surrender or substantial alteration of its license to accommodate the proposed project would be irresponsible.

16 FERC at 61,153 (footnote omitted). A court appeal of the *North Kern* decision was voluntarily dismissed.

In a recent order, *Gas and Electric Department of the City of Holyoke, Massachusetts*, Project No. 3283, 21 FERC ¶ 61,357 (December 28, 1982), the Commission dismissed a preliminary permit application on Section 6 grounds, relying on *North Kern*. The Department sought a permit to study a project to be installed at a dam including a project already licensed to another licensee. At the same time, the Commission was concerned enough about prompt development of the resource that it directed a letter be sent to the existing licensee requiring it to study and report on the economic feasibility of additional capacity at the dam.

Where there is only a possibility of substantial alteration, the Commission has issued the permit, allowing the permittee to study different possible developments. *E.g.*, *Tuolumne County Water District No. 2*, 19 FERC ¶ 61,173 (May 21, 1982); *Howard W. Bair*, 20 FERC ¶ 61,092 (July 23, 1982). There has also been at least one instance where the Commission determined that the encroachment of a proposed project on an existing licensed project would not be substantial, and has issued the permit on that basis. *The Fluid Energy System, Inc.*, 20 FERC ¶ 61,017 (July 8, 1982).

The Commission's Section 6 interpretation was also central to its ruling in *Marsh Island Hydro Associates*, 16 FERC ¶ 61,236 (September 25, 1981). There the Commission ruled that the second-filed applicant for a preliminary permit should receive the permit. It had "significantly greater flexibility to achieve an optimal plan for the comprehensive development of the water resources" because it could choose to flood out an existing upstream project licensed to it.⁴ The Commission assumed the first-filed applicant would not have such an option, although the opinion

⁴For a discussion of the evolution of the "significantly greater flexibility" standard, see discussion *infra*.

contains no discussion of whether the existing licensee had refused to consent to the alteration of its project.

F. Study of Potential Additional Development

A license or amendment to license is occasionally issued on condition that a study of potential additional development be made and, if feasible, that license amendments be submitted. *E.g.*, *Niagara Mohawk Power Corp.*, 22 FERC ¶ 62,020 (January 10, 1983); *Vermont Marble Co.*, 17 FERC ¶ 62,044 (October 15, 1981).

G. Support of Navigation Required (Section 11)

The Commission held that it could require, as a condition of a license, that power be supplied to the United States at no cost to operate a navigation lock, even though the project was constructed prior to 1920. It construed Section 11 of the Act as not limited to post-1920 projects, and as applying to all non-federal hydro projects constructed without the federal permission required at the time of construction. The Commission distinguished *Portland General Electric Co. v. FPC*, 328 F.2d 165 (9th Cir. 1964), as not containing a ruling on the facts.

H. Extension of Deadlines in Licenses

In *Georgia Power Co.*, 18 FERC ¶ 62,567 (March 31, 1982), the Director of OEPR extended by five years the time for completion of the project. Reasons given were the applicant's large construction program and uncertainties in the economy. Construction had been commenced. In *New York Irrigation District*, 19 FERC ¶ 62,213 (May 10, 1982), the time for commencement and completion of construction was extended by two years due to an unfavorable bond market. In *Antrim County, Michigan*, 18 FERC ¶ 62,400 (February 26, 1982), the date of construction of a minor license was extended by one year due to difficulties in obtaining engineering contracts and financing. A two-year extension for commencement of construction was granted in *Lower Valley Power & Light, Inc.*, 20 FERC ¶ 62,442 (September 3, 1982), where the Commission staff was still considering a minimum flow recommendation made by the U.S. Forest Service.

In *White Current Corp.*, 17 FERC ¶ 61,179 (November 24, 1981), an applicant for minor license sought rehearing and meanwhile did not accept the license. It subsequently withdrew its application for rehearing, but more than four-fifths of the time for construction had expired. Rather than grant an extension, the Commission modified the date of its order issuing the license, to the same effect.

I. Denial of Extension and Termination of License

The Commission denied an extension of time and directed issuance of a notice of intent to terminate a license for failure to commence construction of the project in *Arizona Power Authority*, 18 FERC ¶ 61,207 (March 3, 1982). The project was originally licensed in 1968. The expenditures and activities to date, the Commission held, did not constitute construction. Failure to complete Palo Verde 4 and 5 and difficulties on the financial market were the reasons unsuccessfully advanced by the licensee.

J. Stay of Effective Date of License

In *Escondido Mutual Water Company*, 17 FERC ¶ 61,157 (November 20, 1981), the Commission discussed a request for an extension of a stay of an order granting a new license. The Commission held that the original stay, issued pursuant to Section 14(b), was limited to a maximum of two years.⁵ Because the order issuing the license was on appeal, the Commission did not have jurisdiction to affirm, modify or set aside its orders. Section 313(b). Nevertheless, the Commission held that it had authority to issue a new stay under the Administrative Procedure Act, 5 U.S.C. § 705, to postpone the effective date of its action, pending judicial review.

After the Commission found four projects of Sierra Pacific Power Company jurisdictional, it required the filing of license applications. Both the Commission and the Court, where review was pending, denied a stay of this order. In the interim, Congress passed the legislation allowing for exemptions, and Sierra Pacific filed applications for exemptions for the projects, and again requested a stay of the deadline for license application. The Commission granted the request, in view of the changed circumstances, until the Commission had decided on the exemption applications. Jurisdiction to grant the stay was based on 5 U.S.C. § 705, and was not precluded by § 313(b). *Pyramid Paiute Tribe of Indians v. Sierra Pacific Power Co.*, 15 FERC ¶ 61,098 (April 29, 1981).

VI. TERMS AND CONDITIONS OF PERMITS

A. Conditions in Permits

In accordance with its view that the project at the permit stage is speculative and indeterminate, the Commission regularly issues permits where there may be an impediment to an eventual project, such as a statutory reservation of property or a contractual reservation of rights to another. In issuing such permits, the Commission typically requires the permittee to consult with whatever interests would be affected by the project, in order to maximize the possibility of accommodating all interests. *E.g.*, *Cascade Waterpower Development Corp.*, 18 FERC ¶61,247 (March 17, 1982) (Indian fishing rights); *Tuolumne County Water District No. 2*, 19 FERC ¶ 61,173 (May 21, 1982) (licensees claiming protection under Section 6 of the Act); *Sunnyside Valley Irrigation District*, 20 FERC ¶ 61,234 (August 30, 1982) (Federally protected watershed).

B. Cancellation of Permit

The preliminary permit now typically requires a permittee to designate a liaison officer, to pursue studies diligently, and to submit six-month reports on progress with studies and agency consultation. If these conditions are not complied with, the Commission may cancel the permit. Indeed, a pattern emerged in 1982 in which permittees would fail to designate a liaison officer or to submit the six-month reports required as a standard condition of permits. Typically, the Commission engaged in a considerable exchange of letters. If it did not receive a satisfactory response — and most often it received no response — it cancelled the permit. *E.g.*,

⁵A stay pursuant to § 14(b) is issued for the purpose of allowing Congress to consider Federal takeover.

John M. Jordan, 19 FERC ¶ 61,030 (April 14, 1982); *Seiden and Sons, Inc.*, 19 FERC ¶ 62,359 (May 27, 1982); *City of Guttenberg, Iowa*, 19 FERC ¶ 61,031 (April 14, 1982).

C. Extension of Permit Term

Extensions of permit terms — at least within the three-year statutory limit for a permit term — are available, under certain circumstances. With this practice certain patterns have appeared. Some types of problems are not unusual or unexpected, and thus will not justify extension of a preliminary permit term: inability to obtain financing, *e.g.*, *Harrison Western Corp.*, Project No. 3187, Order Denying Extension of Time (September 4, 1981); *Hydro Corporation of Pennsylvania*, 19 FERC ¶ 62,364 (May 28, 1982); or inability to locate a market for the power, *Northeast Texas Electric Cooperative, Inc.*, 22 FERC ¶ 62,018 (January 10, 1983).

On the other hand, there are some circumstances that appear to constitute valid grounds for an extension, for example: no stream flow study has ever been performed, *Clear Creek Community Services District*, 22 FERC ¶ 62,070 (January 20, 1983); unusual weather conditions delay study, *Consolidated Hydroelectric, Inc.*, 22 FERC ¶ 62,214 (February 22, 1983); delays by federal agencies, *South San Joaquin Irrigation District and Oakdale Irrigation District*, 20 FERC ¶ 62,186 (August 3, 1982); disputes over state agency jurisdiction, *Sunnyside Valley Irrigation District*, 21 FERC ¶ 61,308 (December 17, 1982); difficulty in obtaining access to the site, *Northern Wasco County People's Utility District*, 19 FERC ¶ 62,482 (June 16, 1982); and, in part, the burden of trying to complete three license applications at the same time, *Electric Plant Board of the City of Glasgow, Kentucky*, 18 FERC ¶ 62,247 (February 17, 1982).

One consideration is always that "granting the requested extension may preclude others, who are able to adequately perform, from studying and developing the site." *Shoshone Irrigation District*, 20 FERC ¶ 61,362 (September 24, 1982).

D. Extension of Permits Due to Appeal of Issuance

A particular problem stems from the fact that one of the quintessential advantages of a permit is the security Section 5 allows a permittee in the studies preparatory to a license application. If the permit's issuance to one of several competing applicants is appealed, the Section 5 security vanishes because the possibility that an appeal will be successful. If the permittee is nevertheless required to proceed with the studies on the timetable set out in the permit, it is in essence forced to proceed to do studies without security.

In *Gregory Wilcox*, 19 FERC ¶ 61,187 (May 21, 1982), the permittee requested a stay of the permit's investigation and reporting requirements pending the outcome of an appeal by a competing applicant. The Commission held that the pendency of an appeal is not in itself grounds for a stay, and that when the time required for compliance with a permit's terms and conditions presents an unreasonable and undue burden, the permittee may seek an extension as to specific conditions, or of the permit term, so long as it does not exceed the statutory three-year maximum. (In this proceeding, Wilcox subsequently submitted requests for extension which were granted.)

One problem with this approach (a problem that did in fact subsequently occur in the *Gregory Wilcox* proceeding) is that if the appeal of the permit takes any length of time to resolve — as it often does — the permittee will have exhausted the statutory three-year limit for the total length of a permit. Also, the Commission does not always consider the mere fact of pending litigation to be enough to justify an extension. It did so in *Gregory Wilcox*, Project No. 3878, Notice of Extension of Time

(June 9, 1982); Notice of Further Extension of Time (October 18, 1982). *Accord, Borough of Lehighton*, 19 FERC ¶ 62,285 (May 19, 1982).

In contrast, in *Appalachian Power Company*, 19 FERC ¶ 61,219 (June 1, 1982), the Commission denied a request for a stay pending appeals by environmental intervenors. It said that having to expend funds on studies while the appeal was pending was not irreparable harm. 19 FERC ¶ 61,433. *See also Vaso Hydro*, 17 FERC ¶ 62,280 (November 23, 1981), wherein the Director denied an extension requested on the basis of inability to obtain financing because of litigation related to issuance of the permit.

In *Appalachian Power Company*, *supra*, while denying the stay, the Commission suggested that it might indirectly extend the preliminary permit beyond the three-year statutory maximum on a strong showing of good cause. It took a similar position more recently in *Public Utility District No. 1 of Klickitat County, Washington*, 22 FERC ¶ 61,188 (February 22, 1983), where it denied requests for “non-continuous” permits that would have been generated by suspending the permits for two years pending resolution of matters involving the Bonneville Power Administration; and then reinstating the permits. The Commission acted on the basis of a balancing of the public interest in the indirect extension, however, not on the basis that it was prohibited by statute.

A proceeding at odds with all of the above is *Brasfield Development, Ltd.*, Project No. 3612. The Director issued a permit to Brasfield and denied the application of a competing applicant. 16 FERC ¶ 62,286 (August 26, 1981). The competing applicant appealed. A Notice of Intent to Act, issued October 26, 1981, suspended the effective date of Brasfield’s preliminary permit. The appeal was denied, 20 FERC ¶ 61,358 (September 24, 1982) and the permit reinstated, with an 18-month term from the date of the Notice of Commission Action Lifting Preliminary Permit Suspension, (issued January 19, 1983). Indeed, on the basis of the extension granted in *Brasfield Development*, an extension was recently granted to a permittee in a related project in order to allow coordinated studies. *Chesdin Development Ltd.*, 22 FERC ¶ 62,346 (March 18, 1983).

VII. TERMS AND CONDITIONS OF EXEMPTIONS

A. *Adequate or Optimal Development*

The Commission may reject an exemption application that is not consistent with the public interest. 18 C.F.R. § 4.104(b). The standard it applies is not clear, however. The Director has stated that “[e]ach exemption application is reviewed to determine whether the proposal makes *optimal* use of the water resources at the site, taking into account other considerations such as environmental constraints.” *Eagle Power Co.*, 22 FERC ¶ 62,083 at 63,144 (January 20, 1983) (emphasis supplied). In another recent order, the Commission stated, “each exemption application is reviewed to determine whether the proposal makes *adequate* use of the water resources at the site, taking into account other considerations such as environmental constraints.” *Frontier Technology, Inc.*, 22 FERC ¶ 61,267 at 61,479 (March 4, 1983) (emphasis supplied). Whether the standard is optimal or adequate use of the resource is unclear. Also unclear is how either standard would measure up against the best comprehensive development standard if an application for permit or license for an overlapping project were subsequently submitted.

B. Install Or Increase Capacity

An exemption is only available where new generating capacity is installed. In *Sierra Pacific Power Co.*, 18 FERC ¶ 61,246 (March 17, 1982), the Commission held that increasing the head by six inches at three existing but unlicensed projects, resulting in an increase in capacity of from 10 kW to 15.6 kW, did not constitute "installing or increasing" capacity, within the meaning of Section 4.102(m), so as to make the project eligible for exemption.

C. Ownership Of All Necessary Property Rights

In order to qualify for an exemption, the applicant must establish at the time of application that it owns or has an option to acquire all property rights (other than those on Federal land) necessary to develop and operate the project. 18 C.F.R. § 4.103(b)(2)(ii). The Commission seeks written documentary evidence of real property interests, not just a letter from an attorney, *Long Lake Energy Corp.*, 20 FERC ¶ 61,130 (August 2, 1982); or resolutions enacted by one party to an alleged agreement, *American Hydro Power Co.*, 21 FERC ¶ 61,128 (November 23, 1982).

In *Myron Jones, Nola Jones and John Hansen, Jr.*, 22 FERC ¶ 61,187 (February 22, 1983), the Commission on appeal vacated an exemption. The applicant did not establish clear ownership of all property rights or an option to acquire such rights, as required by Section 4.103(b)(2)(ii). A County Commissioner's letter was not the type of documentary evidence required. In any event, it was dated two months after the filing of the application. The necessary rights must be documented at the time of the original filing of the application.

In *Long Lake Energy Corp.*, *supra*, the Commission held that failure to provide such documentary evidence did not make an application for exemption patently deficient, and that an opportunity should be given to correct the deficiency. However, in *Lawrence J. McMurtrey and Jay R. Bingham*, 20 FERC ¶ 61,359 (September 24, 1982), the Commission held patently deficient an application for exemption that indicated the penstock would cross private property and Washington State property and that the power house would be located on Washington State property. The applicants claimed they intended to show the location as on Federal land, and that the Exhibit G map thus contained an inadvertent error. The Commission refused to allow this revision without a corresponding change in the date of filing which would make the application untimely. It held the applicants to their original unequivocal statements.

In *Niagara Mohawk Power Corp.*, 16 FERC ¶ 61,180 (September 10, 1981), the Commission stated that a revocable permit (from the State of New York) would sustain an application for exemption, even though the same revocable property interest would not be sufficient for a license project.

Where there is a non-frivolous dispute regarding the applicant's possession of the necessary property interests, the Commission will not accept the exemption application. It is not the proper forum to settle such disputes, and the purpose underlying exemptions — speedy development — does not accommodate the potentially lengthy process of resolving competing claims. *Ted Lance Slater*, 21 FERC ¶ 61,234 (December 1, 1982); *Fluid Energy Systems, Inc.*, 19 FERC ¶ 61,040 (April 13, 1982).

Where competing exemption applicants both appear to have the property rights necessary to proceed with somewhat overlapping projects, however, the Commission will issue both exemptions. *Seneca Hydroelectric Co., Inc.*, 18 FERC ¶ 61,057 (January 26, 1982).

D. *Pre-Filing Consultation With Agencies*

The Commission has stated that pre-filing agency consultation is a linchpin of the exemption process, and has refused to waive this requirement. *Joe G. Paesano*, 19 FERC ¶ 61,027 (April 13, 1982). Failure to consult is a patent deficiency. Even inadvertent omission of letters documenting consultation will serve as grounds for rejection of an exemption application. *Comtu Falls Corp. and Comtu Associates*, 20 FERC ¶ 61,154 (August 5, 1982).

In *Lester Kelley, Vernon Ravenscroft, and Helen Chenoweth*, 20 FERC ¶ 61,357 (September 24, 1982), the applicants for exemption failed to consult with the National Marine Fisheries Service. They argued that anadromous fisheries would not be affected by their projects. The Commission denied their appeals of the rejection of their applications: it was up to the agency, not the applicants, to determine the impact the project might have on fish and wildlife resources.

Where a proposed exempted project is modified after submittal to agencies for comment, it must be resubmitted for a new set of comments. Consultation must be able to generate site-specific comments, terms and conditions. *Lawrence J. McMurtrey*, 20 FERC ¶ 61,158 (August 5, 1982).

In *Western Hydro Electric, Inc.*, 19 FERC ¶ 61,298 (June 24, 1982), issuance of an exemption was challenged by a competing applicant who argued that the exemption applicant had failed to consult with the Washington State Department of Ecology (Ecology). The Commission held that Ecology's primary responsibility is in air and water pollution control and solid waste management. It was not Ecology, but the Washington State Departments of Game and of Fisheries, with which consultation was required by Section 4.107(e)(3). Thus, the exemption application was not patently deficient by reason of failure to consult. Nevertheless, the Commission stated that many Federal, state and local agencies with which consultation was not required might need to be consulted about environmental impacts, and that failure to consult might result in the application being deficient.

In *Niagara Mohawk Power Corp.*, 20 FERC ¶ 61,312 (September 16, 1982), the Commission refused on appeal to take into account comments and recommended conditions submitted by the New York State Department of Environmental Conservation (DEC). DEC's recommendations were not filed within the 60-day comment period provided by Section 4.105(b)(3). The Commission stressed the "self-activating" nature of the exemption process, and the consequent importance of strict adherence to regulatory deadlines in order for the Commission to be able to toll the otherwise applicable automatic 120-day issuance.

E. *Mandatory Conditions Regarding Fish and Wildlife*

The typical exemption includes a standard Article 2 requiring compliance with any terms and conditions that Federal or State fish and wildlife agencies have determined appropriate to prevent loss of, or damage to, fish and wildlife resources. 18 C.F.R. §§ 4.106(b), 4.111(a)(2).⁶ These terms and conditions are normally contained in the agency letters forwarded to the Commission in conjunction with the application. See *Pre-filing Consultation With Agencies, supra E.G., New Hampshire Hydro Associates*, 16 FERC ¶ 62,414 (September 10, 1981). The Commission will determine if a condition in such a letter is outside the scope of Article 2.

In *Sierra Pacific Power Company*, 18 FERC ¶ 61,246 (March 17, 1982), the U.S. Fish and Wildlife Service (FWS), in response to the public notice, filed comments

⁶Exemptions for projects of 100 kw or less do not include this Article. 18 C.F.R. § 4.111(b).

requiring a higher minimum flow than it had recommended during the pre-filing consultation process. The Commission held the FWS recommendation must be followed. Because the project was located entirely in Nevada, however, the recommendations of the California Department of Fish and Game were not mandatory under Article 2.

F. Automatic Issuance

In *Hydro Development Group, Inc.*, 20 FERC ¶ 61,059 (July 20, 1982), the Commission had not acted on several pending competing application within 120 days, and exemptions were automatically issued. The Commission, which was still awaiting the filing of more competing applications, then vacated the exemptions. On appeal, the court held the Commission's proceeding had terminated when it issued the exemption; and that the Commission had no authority to vacate the exemption. *Mary Jane Ruderman Hirschey v. FERC*, Docket No. 82-2170 (D.C. Cir. February 25, 1983).

G. Exempted Projects May be Modified

Granting an exemption does not preclude issuance of a preliminary permit for another project that is in whole or in part inconsistent with the development authorized under an exemption. The Commission can later modify the exempted project in the public interest and for comprehensive development. *The Metropolitan District of Hartford, Connecticut*, 16 FERC ¶ 61,254 (September 30, 1981); *Wells River Hydro Associates*, 18 FERC ¶ 61,157 (February 23, 1982); *Hydro Development Group, Inc.*, 19 FERC ¶ 61,229 (June 4, 1982).

VIII. COMPETING APPLICATIONS

For desirable sites, the Commission often receives more than one application for permit, license or exemption. The Commission's decision among competing applicants is governed by Section 7(a), as well as by rules the Commission has articulated. This section discusses the Commission's application of these principles to various combinations of competing applications. In particular, it also discusses the application of the preference granted to State and municipal applications by Section 7(a).

A. Ashbacker Applied to Hydro Licensing

In *Alabama Electric Cooperative, Inc.*, 15 FERC ¶ 61,168 (May 27, 1981), *aff'd sub nom. City of Dothan, Alabama v. FERC*, 684 F.2d 159 (D.C. Cir. 1982), the Commission discussed the applicability of *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945), to competing applications for federal hydro licenses. The Commission stated that it complied with *Ashbacker* in holding one comparative proceeding for competing applications. It stated generally that *Ashbacker* did not speak to the substantive criteria it should apply; and did not even require a hearing, since Part I of the Federal Power Act, unlike the statute in *Ashbacker*, carries no right to a hearing.

B. Factors in the Best-Adapted Determination

In one competing license situation, the Commission discussed its application of the "best adapted" standard of Section 7(a). The Commission agreed that it must

consider not just project works, but other aspects of the competing proposals. The differences in recreation plans upon which one applicant based its claim of a superior project were related, however, to the existing dam and reservoir, which were owned by The Water and Power Resources Service (WPRS) and were *not* part of the project. The FERC held that in these circumstances WPRS, not the FERC, had jurisdiction over the recreation facilities, and the FERC did not take them into account in comparing the plans. *Solano Irrigation District*, 15 FERC ¶ 61,068 (April 23, 1981).

The Commission has stated that it is not required by statute to favor distribution of the benefits of hydropower through a municipality rather than an investor-owned utility. *Solano Irrigation District*, *supra*. Insofar as this statement was intended to say that in determining Section 7(a) preference, the ultimate sale of the power to a non-preference applicant would be irrelevant, the statement is dictum. Preference was not the issue in this case; the issue was Section 5 priority.

Contribution toward the cost of a dam does not entitle an entity to favored status in a competitive proceeding. *California Department of Water Resources*, 19 FERC ¶ 61,098 (May 3, 1982).

An appellant failed to persuade the Commission that its application for a permit was better adapted because the Bureau of Reclamation preferred it. *Mitchell Energy Co., Inc.*, 21 FERC ¶ 61,153 (November 24, 1982).

The Commission appeared to indicate it did not care who originated a specific technical proposal in *California Department of Water Resources*, 19 FERC ¶ 61,098 (May 3, 1982).

A permit proposal that would develop several hydraulically interdependent sites is preferable to one that does not include some of the sites. *Water Power Development Corp.*, 19 FERC ¶ 61,001 (April 2, 1982). This case should be distinguished from the more typical set of facts, in which the Commission refuses to consider significant at the permit stage differences in capacity, for example, because the proposal is still flexible. Conversely, hydraulically independent sites are considered separately, and an applicant does not gain an advantage by including several sites in one permit application. *Little Falls Hydroelectric Associates*, 17 FERC ¶ 61,215 (December 9, 1981).

In *Pennsylvania Hydroelectric Development Corp.*, 15 FERC ¶ 61,152 (May 18, 1981), the Commission held that the authority of applicants to coordinate water resources within their jurisdiction was not a factor, as the Commission could require any permittee to coordinate the project with other regional resources.

The Commission's decision that Section 6 prevails over the Section 10(a) standard of the best comprehensive development of the water resource is discussed *supra* at pp. 45-50.

C. *Special Considerations at the Permit Stage*

Because permit applications are preliminary and intended to allow the permittee to study potential development, the Commission normally will not compare the technical details of competing permit applications as a factor in determining which is better adapted. This principle is well established. *E.g.*, *Seminole Electric Cooperative, Inc.*, Project No. 2886, 9 FERC ¶ 61,245 (November 26, 1979); *Town of Windsor, Vermont*, 10 FERC ¶ 61,094 (January 30, 1980); *Town of Madison Electric Works Dept.*, 11 FERC ¶ 61,318 (June 25, 1980).

At the permit stage, the willingness or ability of an applicant to carry out studies will not be considered in the absence of specific substantial allegations *Pennsylvania Hydroelectric Development Corp.*, 15 FERC ¶ 61,152 (May 18, 1981). At the permit stage, allegations of ownership of transmission lines, lower transmission costs, and local use

of the energy are irrelevant. *Western Montana Electric Generating and Transmission Cooperative*, 19 FERC ¶ 61,028 (April 14, 1982). The Commission has reiterated that it does not attach significance, at the permit stage, to annual generation, geographical distance from the site, ability to finance, profit sharing or creation of new tax base. *E.g.*, *Chain Dam Hydroelectric Corp.*, 22 FERC ¶ 61,183 (February 22, 1983). Nor are superior revenue reinvestment, service reliability or operational modes factors at the permit stage. *Energenics Systems, Inc.*, 21 FERC ¶ 61,185 (November 26, 1982).

The Commission has also refused to consider that an applicant might have overextended itself by filing too many permit applications. *Missouri Joint Municipal Electric Utility Commission*, 17 FERC ¶ 61,147 (November 19, 1981); but it limited this holding to the facts of the case.

D. *Significantly Greater Flexibility – Uniquely Qualified Test*

In *Marsh Island Hydro Associates*, 16 FERC ¶ 61,236 (September 25, 1981), the Commission awarded a preliminary permit to a second-in-time applicant. The Commission did not do so on the basis of what it found was a demonstrably different net capacity and annual energy production. Rather, the second-in-time applicant had “significantly greater flexibility to achieve an optimal plan for the comprehensive development of the water resources.” This conclusion was premised on the assumption that one applicant could choose to flood out its own upstream licensed project — an option the other applicant could not duplicate because of the prohibition against substantial alteration of an existing license without consent.

In *City of Ukiah, California*, 18 FERC ¶ 61,108 (February 10, 1982), the Commission issued the permit to the second-filed of two competing applicants for permit. The second-filed applicant’s partial control of releases from the dam where the project would be located made it “uniquely qualifie[d]” as a superior applicant for the permit, because it had the ability to produce substantially more power at the site.

Other competing applicants for permits have tried to meet the “significantly greater flexibility” and “uniquely qualified” standard of *Marsh Island* and *City of Ukiah*, but to no avail. *E.g.*, *California Department of Water Resources*, 19 FERC ¶ 61,098 (May 3, 1982) (ownership of storage capacity in a reservoir); *Cook Electric Co.*, 20 FERC ¶ 62,167 (July 28, 1982) (ownership of dam and water rights); *Jack M. Fuls*, 19 FERC ¶ 61,119 (May 7, 1982) (control of water rights for irrigation seven months of the year); *Mitchell Energy Co., Inc.*, 21 FERC ¶ 61,153 (November 24, 1982) (operation of federally-owned dam); *Crown Zellerbach Corp.*, 21 FERC ¶ 61,093 (November 22, 1982) (control over municipal water supply).

E. *Time for Preference Entity to Upgrade*

In *Arkansas Valley Electric Cooperative*, 13 FERC ¶ 61,048 (1980), the Commission issued a permit to a non-preference applicant based on the fact that the preference applicant’s proposal was vague and that the non-preference applicant proposed more capacity and energy at the site. The Commission also allowed the preference applicant thirty days to make its proposal equally well adapted.

F. *Preference and Priority*

1. *Generally*

The Commission described the basic purpose of the preference provision in *City*

of *Fayetteville Public Works Commission*, 16 FERC ¶ 61,209 (September 16, 1981). It is intended to provide a competitive advantage to proposals for the public development of water power projects, due to Congress' concern for protecting the public interest in the Nation's water power resources. See further at p. 99 *infra*.

In *W.P.B. Power, Inc.*, 17 FERC ¶ 61,008 (October 5, 1981), the Commission held that the *Bountiful* criteria under Section 7(a) (see pp. 28-32 *supra*) apply at the permit and licensing stages as well as in relicensing; however, normally at the permit stage there is not enough information to distinguish the proposals.

In the Order Providing for a Hearing in the *Merwin* proceeding, *Clark-Cowlitz Joint Operating Authority*, Project No. 2791 (September 23, 1981), the Commission stated that, in the beginning at least, it required the development of a record in individual adjudicated cases to give specific meaning to the broad statutory terms of Section 7(a).

In *Solano Irrigation District*, 15 FERC ¶ 61,068 (April 23, 1981), the Commission held that preference did not apply in a competing license situation, because a permit had been issued. It also stated that Section 7(a) did not favor a policy requiring the distribution of the benefits of hydro development through a municipality rather than an investor-owned utility. In other words, a preference entity could resell the power to a non-preference entity for distribution without jeopardizing its preference status. This holding is at odds with the interpretation of preference provisions in other laws, *e.g.*, the Niagara Redevelopment Act, see *Power Authority of the State of New York*, 21 FERC ¶ 61,021 (October 13, 1982).

The Commission does not consider that issuance of a permit to one entity precludes another entity, legally or as a practical matter, from making studies or submitting a competing license application. Nor does priority by itself ensure that the permittee will be awarded a license. *Continental Hydro Corp.*, 18 FERC ¶ 61,216 (March 4, 1982).

In *Commonwealth of Pennsylvania*, 15 FERC ¶ 61,255 (June 10, 1981), 18 FERC ¶ 61,107 (February 10, 1982), the Commission stated that Section 7(a)'s provision for a time to make an application equally well adapted only comes into play after an application has been accepted. *Accord, Fort Muller Pulp and Paper Co.*, 18 FERC ¶ 61,096 (February 8, 1982); *Modesto Irrigation District*, 20 FERC ¶ 61,088 (July 23, 1982).

In *Energenics Systems, Inc.*, 20 FERC ¶ 61,085 (July 23, 1982), the Commission stated that priority would apply at the licensing stage only after the Commission determined that a competing license application proposed a plan as well or better adapted to develop the resource. A study of proceedings was not necessary until this point was reached. Even after the competing license application was filed, the priority provision did not apply until the *Commission* had determined whether the competing application was as well or better adapted. 22 FERC ¶ 61,190 (February 22, 1983).

2. Municipal Competence

Competence under state law to carry on the business of developing, transmitting, utilizing, or distributing power, is part of the definition of "municipality" in Section 3(7) of the Act, 16 U.S.C. §796(7). It is relevant for these purposes: to establish a right to preference, discussed herein; to establish a right to notice of preliminary permit applications, as provided by Section 4(f), 16 U.S.C. §797(f), discussed at pp. 115-117 *infra*; and generally, at the licensing stage, as part of general competence to proceed and compliance with state laws as required by Section 9, 16 U.S.C. §802.

The Commission itself, not a state attorney general, makes the determination of competence. *East Coast Energy Technology, Inc.*, 18 FERC ¶ 61,254 (March 18, 1982).

In *Village of Channahon, Illinois*, 19 FERC ¶ 61,111 (May 4, 1982) and *Mitchell Energy Co., Inc.*, 19 FERC ¶ 61,179 (May 21, 1982), the Commission held that Section 3(7) did not require authorization under state law to operate a specific project, but only legal competence to be in any of four businesses — developing, transmitting, utilizing or distributing power. Thus, a municipality authorized to operate an electric utility within its corporate limits could qualify as a preference entity for a project outside its corporate limits. The Commission distinguished Section 9(b)'s requirements of specific compliance with state laws at the licensing stage from the requirement for Section 7(a) preference status at the permit stage.⁷

In *Brasfield Development, Ltd.*, 20 FERC ¶ 61,358 (September 24, 1982), the Commission held that "An application's eligibility for preference is determined by the status of the named applicants, not by the status of any unnamed entity which the applicant may represent." *Id.* at p. 61,739. Thus, it was irrelevant that an applicant consisted entirely of municipalities; the applicant itself was not clearly competent under state law. This holding would appear to represent an unexplained shift in position from *Central Vermont Public Service Corp.*, 10 FERC ¶ 61,132 (1980), where an entity not a municipality but acting on behalf of municipalities was entitled to preference status.

The Commission acts on applications for permit based on the applicants' legal competence at the time of the action. *Brasfield Development, Ltd.*, 20 FERC ¶ 61,358 (September 24, 1982); *American Hydroelectric Development Corp.*, 19 FERC ¶ 61,296 (June 24, 1982). The latter case suggests that a change in legislation affecting competence could potentially change the filing date of an application.

At the permit stage, it is irrelevant whether a municipality has statutory authority to develop the project. If it invokes municipal preference, it needs to show only enough authority to satisfy the *Village of Channahon* test. *Chain Dam Hydroelectric Corp.*, 22 FERC ¶ 61,183 (February 22, 1983).

The regulations require an applicant to supply evidence of competence in the application. *E.g.*, 18 C.F.R. §4.81(a)(4) (preliminary permits). The Commission has held that, at the permit stage, the penalty for failure to comply with this regulation is simply loss of any otherwise available preference — not rejection of the application. *New York State Office of Parks, Recreation and Historic Preservation*, 22 FERC ¶ 61,194 (February 22, 1983).

3. Hybrid Applications and Hidden Hybrid Applications

One of the unanswered questions in the administration of the preference provision was whether a hybrid application — that is, an application jointly by a preference entity and a non-preference entity — would be entitled to preference. Initially, the Commission issued a Notice of Inquiry, EL81-9 (February 13, 1981), asking for comments, *inter alia*, on this issue. It made its basic policy determination in *City of Fayetteville Public Works Commission*, 16 FERC ¶ 61,209 (September 16, 1981) involving competing applications for preliminary permit. It held that a hybrid application was not entitled to preference under any circumstances. It based its holding first on the plain language of the statute, which limits preference to states

⁷*But cf. First Iowa Hydro-Electric Corp. v. FPC*, 328 U.S. 152 (1946), holding that even at the license stage state laws may not impede the purpose of hydroelectric development contained in the Federal Power Act.

and municipalities. Thus, a hybrid should not get preference status in competition with either a preference or a non-preference entity.

Second, the Commission discussed legal and policy considerations justifying its holding. Section 7(a) provides a competitive advantage to proposals for the public development of hydroelectric resources. In addition it was concerned that

Joint ventures between public and private entities, which often offer desirable means to promote hydropower development, could become merely devices for private developers to obtain a statutory privilege reserved for public entities. A municipality might, for example, lend its name to a project without retaining control over its construction, financing or the use of its power. The Commission is concerned that a municipal applicant's participation in power development should represent more than tokenism to receive statutory preference. The proliferation of such unequal joint ventures could significantly dilute the role of the preference in assisting those States and municipalities which do intend to retain control of the development and operation of the projects for which they apply. In other words, were hybrid applicants accorded the preference, however insubstantial the participation of a municipal co-venturer, the preference to which a "pure" municipality might otherwise be entitled could be canceled out. The result would be a triumph of form over substance which would contradict the statutory purpose of encouraging public control of waterpower development.

16 FERC at 61,456 (footnotes omitted). Thus the Commission rejected in principle a two-tiered preference scheme. It acted on this principle by denying preference to a hybrid vis-a-vis a pure non-preference applicant in *Jack M. Fuls*, 18 FERC ¶ 61,065 (January 26, 1982).

The Commission also in *Fayetteville* addressed generally the question of hidden hybrids, since it could expect that hybrid joint ventures might attempt to circumvent the *Fayetteville* holding by concealing the existence of a non-municipal partner and filing in the municipality's name alone. Because a licensee must have sufficient proprietary rights to carry out the duties of a licensee, it held, an application for license must include the names of all parties that will hold the rights necessary for project purposes during the license term (see "*Control*" at p. 38 *supra*, p. 99 *infra*). Similarly, an applicant for a preliminary permit, if it intends to hold the necessary rights jointly, must include this other party on the application. Otherwise, at the licensing stage the subsequent joint application would not be entitled to the Section 5 priority that the permit provides. This requirement of listing parties having property interests was formalized in new Section 4.30(d) of the Commission's rules (see discussion *supra*).

The hidden hybrid issue has generated further litigation. A non-preference joint applicant often withdrew after *Fayetteville* was issued. In some cases, this was treated as a timing problem, creating a new filing date for the remaining applicant (see pp. 108-110 *infra*).

In other instances, a competing municipal applicant has alleged that an applicant claiming preference concealed its relationship with a non-preference entity and was not entitled to preference. So far, this has occurred only at the permit stage, and no order involving a hidden hybrid at the licensing stage has been issued. At the permit stage, the Commission has held that it will not investigate, and will rely strictly on the face of the application. *E.g.*, *Pennsylvania Renewable Resources, Inc.*, 17 FERC ¶ 61,031 (October 5, 1981); 19 FERC ¶ 61,033 (April 14, 1982); *City of Summersville, West Virginia*, 17 FERC ¶ 61,030 (October 5, 1981); 19 FERC ¶ 61,032 (April 14, 1982); *consolidated appeal pending sub nom. Cities of Bedford v. FERC*, No. 82-1655 (D.C. Cir.). The Commission held that existing licensing requirements by themselves would defeat any attempt to circumvent the *Fayetteville* policy, that the Commission would investigate at the licensing stage, and that it believed it had adequate authority at that time to fashion an effective remedy for abuse of

preference. It cited the claim on limited staff resources and administrative delay as problems with investigating at the permit stage. The Commission described its investigation at the licensing stage in more detail in *Consolidated Hydroelectric, Inc.*, 21 FERC ¶ 61,134 (November 24, 1982), although this case is still dictum on the point, since no investigations have taken place. The municipal group appealing these orders argues basically that the Commission has a statutory duty to apply preference at the permit stage, which it cannot abandon; and that it is unable to return them to the position they would have been in if the permit had been issued to them.

One possible scenario is that a hidden non-preference partner at the permit stage could simply join openly at the license stage. Even though the Section 5 priority would be lost, and the license application would not have preference status, it may still have the advantages of stemming from a longer study period. See, e.g., *Liberty County, Montana, the Town of Chester, Montana, and Montana Renewable Resources, Inc.*, Project No. 6432.

The Commission halted an attempt to circumvent its policy of non-investigation at the permit stage in *Borough of Central City, Pennsylvania*, 20 FERC ¶ 61,084 (July 23, 1982), 21 FERC ¶ 61,108 (November 22, 1982), dismissing a complaint in essence charging that a permittee was a hidden hybrid, based on the same rationale.

In *Idaho Renewable Resources, Inc. and City of Ashton, Idaho*, 20 FERC ¶ 61,230 (August 30, 1982), 21 FERC ¶ 61,127 (November 23, 1982), the Commission refused to award preference to a hybrid application where the parties agreed that the non-preference applicant was merely the agent of the preference applicant. Along the same lines, in *Hydroelectric Power Engineers*, 20 FERC ¶ 61,233 (August 30, 1982), the Commission refused the permit in a situation where, after an engineering firm filed, allegedly on behalf of a municipality, a competing preference applicant filed, and the municipality represented by the engineering firm then filed in its own name. The "agent" was not accorded preference and the principal was not accorded the agent's filing date.

4. *Statement of Competing Applicant, Section 4.33(d)(2)*

Failure, in a competing application, to include the statement of how plans are as well or better adapted to develop the resource, 18 C.F.R. §4.33(d)(2), is a patent deficiency. The statement may not be inferred from information in the competing application; and the Commission will not allow correction of this deficiency after the filing date is past. *City of Hibbing, Minnesota*, 16 FERC ¶ 61,035 (July 21, 1981); *Modesto Irrigation District*, 19 FERC ¶ 61,038 (April 13, 1982), 20 FERC ¶ 61,088 (July 23, 1982).

Where a competing application is submitted before the notice of the initial application has issued — so that the competing applicant does not know it is a competing applicant — its application is not automatically patently deficient. E.g., *City of Hibbing, Minnesota, supra*, 16 FERC at 61,060.

In *Eric R. Johnson*, 18 FERC ¶ 61,214 (March 4, 1982), where a competing applicant allegedly could not obtain a timely copy of the original application in order to prepare a Section 4.33(d)(2) statement, the Commission still treated the competing application as deficient. It took eight weeks after receipt of the competing application for the applicant to submit the Section 4.33(d)(2) statement. The Commission said that in extraordinary circumstances, not present here, it might grant a short additional time.

There is an opportunity for an initial applicant to respond to a better adapted statement, as provided in 18 C.F.R. §4.33(e), but it is optional, and failure by the

initial applicant to respond is not a deficiency. *Alabama Electric Cooperative, Inc.*, 15 FERC ¶ 61,168 (May 27, 1981).

G. *The First-In-Time Rule*

The Commission has provided by regulation that among applications otherwise equally well adapted, it will prefer the first-filed application. 18 C.F.R. §4.33(g)(2). One consequence of this regulation is the extreme importance of a number of regulations governing filing dates. See pp. 108-110 *infra*.

In *Alabama Electric Cooperative, Inc.*, 15 FERC ¶ 61,168 (May 27, 1981), a competing preference applicant complained that the Commission had established a pattern of always selecting the first-filed applicant regardless of the merits of the applications. The Commission held that its procedures did not violate the requirement of *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945), that competing applications be heard on the merits. Rather, at the permit stage, development at existing dams usually does not lend itself to radically different proposals. The court affirmed the FERC's application of the first-in-time rule at the permit stage in *City of Dothan, Alabama v. FERC*, 684 F.2d 159 (D.C. Cir. 1982). Judge Mikva filed a dissent, in which he reasoned that a preliminary permit was a valuable right, and that the Commission's first-in-time rule, a tie-breaker provision, had become the principle for awarding permits in all but the most exceptional cases,⁸ in possible derogation of the Commission's Section 7(a) duty to issue a permit to the best adapted project.

The first-filed rule was also affirmed in *Delaware River Basin Authority v. FERC*, 680 F.2d 16 (3d Cir. June 2, 1982). A similar challenge to the first-in-time rule was dismissed in *Mrs. Charles L. Baily and Mr. Everett M. Baily v. FERC*, No. 82-7077 (9th Cir. Sept. 16, 1982).

In *Water Power Development Corp.*, 19 FERC ¶ 61,001 (April 2, 1982), involving several overlapping permit applications, the Commission awarded two permits. One went to an applicant which, although not first filed, had proposed a project involving several sites that could be hydraulically coordinated. The other permit went to an applicant that was first filed. It covered two sites that were hydraulically independent, but did not include a site that, although applied for, was part of the more comprehensive proposal of the competing applicant as well.

In *Energenics Systems, Inc.*, 21 FERC ¶ 61,185 (November 26, 1982), the Commission rejected a challenge to its first-in-time rule based on an asserted adverse effect on applicants filing in response to the public notice.

H. *Competition – Conflicting or Overlapping Proposals*

Where two permit applications proposed diversions from the same streams, the Commission issued two permits after finding both projects might coexist by apportioning the water flows. *Messrs. Thomas M. McMaster and Robert L. Schroder*, 13 FERC ¶ 61,288 (December 31, 1980). In *Fort Miller Pulp and Paper Co.*, 18 FERC ¶ 61,096 (February 8, 1982), competing applications were filed for sites at the upstream and downstream junctures of a river and a canal. The Commission determined the staff had acted reasonably in finding the proposed projects in competition for the same water flow, and in refusing to issue two permits. In *Seneca Hydroelectric Co. Inc.*, 18 FERC ¶ 61,057 (January 26, 1982), the Commission issued

⁸Only two were cited: *Marsh Island Hydro Associates*, 16 FERC ¶ 61,236 (September 25, 1981); and *City of Ukiah, California*, 18 FERC ¶ 61,108 (February 10, 1982). See *supra* at pp. 73-74.

two exemptions even though there was some conflict over water rights during low flow periods. The Commission held the dispute was over non-essential rights. In *City of Boulder, Colorado*, 22 FERC ¶ 61,127 (February 7, 1983), the Commission held that even though a permit application was general about the several sites it proposed to study, such generally must be expected and did not mean there was no competition for one of the sites for which a specific competing application was filed.

I. License/Exemption Competition

An exemption application filed in competition with a license application must be filed no later than the last day for interventions, or it will be untimely. 18 C.F.R. § 4.104(a)(2)(ii); see *Comtu Falls Corp. and Comtu Associates*, 20 FERC ¶ 61,154 (August 5, 1982).

In competition between a license and exemption, 18 C.F.R. § 4.104(e)(2) provides the Commission will favor the first-filed application unless the plans of one are better adapted. In *Suncook Power Corp.*, 22 FERC ¶ 61,230 (February 24, 1983), the Commission favored the second-filed exemption, because it would provide about 5.9% more energy annually. In *J.R. Ferguson & Associates, Inc.*, 22 FERC ¶ 61,275 (March 3, 1983), the Commission found no substantial difference and awarded a license to the first-filed applicant.

J. Permit/License Competition

A license application may be filed in competition with a preliminary permit application at any time until the permit has been issued. *Georgia Pacific Corp.*, 17 FERC ¶ 61,174 (November 12, 1981). On rehearing, 19 FERC ¶ 61,034 (April 14, 1982), the Commission affirmed its earlier position, holding that a contrary statement in *Southern California Edison Co.*, 15 FERC ¶ 61,099 (April 29, 1981), was incorrect dictum. Once the permit has been issued, a license application will not be accepted. *Little Falls Hydroelectric Assoc.*, 18 FERC ¶ 61,273 (March 29, 1982). The filing of a license application initiates a new phase of the proceeding, and the Federal Power Act requires public notice and an opportunity for competition at both phases. *Georgia Pacific Co.*, *supra*; *Utah Power and Light Co.*, 18 FERC ¶ 61,042 (January 20, 1982); *Fluid Energy Systems, Inc.*, 19 FERC ¶ 61,040 (April 13, 1982).

Where a notice of intent to file a competing license application is filed in response to an initial notice on a preliminary permit application, the proceeding is held open for 120 days, and anyone may file a competing license application. *Utah Power & Light Co.*, *supra*.

The regulations provide that the Commission will favor a license application over a preliminary permit application if the competing applications would develop, conserve and utilize the same water resources, and the licensee has demonstrated its ability to carry out the plan. 18 C.F.R. § 4.33(f); see *Long Lake Energy Corp.*, 22 FERC ¶ 62,208 (February 17, 1983). Thus, a license application for a project with a smaller installed capacity may prevail over a permit for a proposed project with a larger installed capacity. *E.g.*, *Hydro Energies Corp.*, 22 FERC ¶ 62,063 (January 20, 1983). A non-preference license applicant will also prevail over a preference preliminary permit applicant. *Long Lake Energy Corp.*, *supra*.

In *Southern California Edison Co.*, 15 FERC ¶ 61,099 (April 29, 1981), 16 FERC ¶ 61,178 (September 10, 1981), *appeal dismissed*, *Cities of Anaheim and Riverside, California v. FERC*, 692 F.2d 773 (D.C. Cir. 1982), the Commission allowed an applicant for preliminary permit to submit instead an application amending an already-issued license, which would include the same proposed project. The

competing applicants appealed, saying that the Commission could not shift from the permit to the licensing phase after the time for filing competing applications had ended and processing of the competing permit applications was underway. The Commission said it would allow such a change, since the application for amendment was the equivalent of a new application for license; but that notice and an opportunity to file a competing license application would be provided. On rehearing, the Commission held that, because a distinct licensing phase had commenced, a party wishing to compete for the license must file a license application: otherwise, it may at most receive the preliminary permit. It does not have a right under Section 7(a) to match the license application. In other words, Section 7(a) does not allow a preference entity to defer its decision whether to compete until the end of the licensing process.

On appeal, the court ruled that the matter was premature, since there was no final order, only a Commission notice accepting the application for amendment. A dissenting opinion by Judge Mikva held that the court should have reached the merits, because the notice effectively terminated the preliminary permit proceeding and thus denied applicants' request. On the merits, Judge Mikva would have affirmed, based on the Commission's discretion in administering its statute to move from one phase to another.

K. *Permit/Permit Competition*

The Commission continues to apply generally its policy that as between preliminary permit applicants differences in plans are speculative and cannot be the basis of a determination that one proposal is better adapted than another. *See, e.g., Town of Madison Electric Works Dept.*, 11 FERC ¶ 61,318 (1980). Thus, although the public interest criteria discussed (in a relicensing context) in Opinion No. 88, *City of Bountiful, Utah*, 11 FERC ¶ 61,337 (1980), *aff'd*, *Alabama Power Co. v. FERC*, 685 F.2d 1311 (11th Cir. 1982), *cert. applied for*, No. 82-1312 (S. Ct.), are in theory applicable, they generally cannot be weighed at the permit stage. *W.P.B. Power, Inc.*, 17 FERC ¶ 61,008 (October 5, 1981). The first-in-time rule is almost always determinative at the permit stage. *See supra* pp. 86-87.

In *Water Power Development Corporation*, 19 FERC ¶ 61,001 (April 2, 1982), involving several applicants for permits for several sites, the Commission preferred, as to several hydraulically interdependent sites, the applicant that proposed to coordinate development at all the sites. As to other sites that were not hydraulically interdependent, there was no basis for distinguishing the applications, and the first-filed applicant prevailed. In *Little Falls Hydroelectric Associates*, 18 FERC ¶ 61,273 (March 29, 1982), the Commission held that because potential developments at Locks 12 through 18 were hydraulically independent, economic feasibility at each site must be evaluated independently, and it upheld on appeal an order issuing a permit for one particularly attractive site without considering the potential effect on development of the remaining sites.

In *City of Santa Clara, California*, 19 FERC ¶ 62,363 (May 28, 1982), the Director refused to defer action on pending preliminary permit applications pending feasibility studies by Federal agencies. It held it was not in the public interest to wait for potential Federal action when an applicant was willing to take immediate action to undertake additional studies.

L. *Sequential Permits, New Permit Issued After Surrender or Revocation*

In *Missouri Joint Municipal Electric Utility Commission*, 17 FERC ¶ 61,147 (November 19, 1981), the Commission rejected a request that it issue a competing

applicant a sequential permit that would take effect automatically if the first permit were surrendered or revoked. The Commission said the Federal Power Act did not address the permissibility of sequential permits. The Commission apparently ruled them out on discretionary grounds. Where a permit is surrendered or revoked, various factors might be present that could bear on the conditions on a subsequent permit or militate against *any* further issuance of permits. These factors could not be foreseen in advance. Issuing sequential permits would also increase the Commission's administrative burden.

Nevertheless, something approximating the effect of sequential permits, in cases where an appeal is still pending, has now occurred. In *City of Bedford*, 20 FERC ¶ 61,360 (September 24, 1982), a permit was revoked because of a determination that its application was not timely filed. The Commission held that if there had been no pending appeal, a new round of competition should have been opened. Because an appeal was pending, however, the action was not final, the Commission's jurisdiction was preserved, and it had the option to issue the permit to one of the remaining applicants; indeed, it was "required" to do so. It issued the permit to the remaining preference applicant.

In one offshoot of the *City of Bedford* opinion, the applicant in *Gregory Wilcox*, Project Nos. 4024, 6439, sought rehearing (filed September 27, 1982), arguing that the proceedings there remained open by virtue of an appeal to the courts, and that upon surrender of a challenged permit the Commission should have returned to the original pool of applicants and issued another permit. Instead, the Commission accepted an application for license from an applicant other than the permittee. That application for rehearing is pending.

In recent opinions applying the *City of Bedford* rule, the Commission has not automatically issued a new permit, but has delegated to the Director of OEPR the responsibility of awarding a new permit. *E.g.*, *Southeastern Renewable Resources, Inc. and the Town of Grafton, West Virginia*, 22 FERC ¶ 61,189 (February 22, 1983). Under some circumstances, *e.g.*, a license application being filed in the interim, the Commission might prefer the license application (*see* the discussion of *Georgia Pacific* at 89 *supra*) and might defeat the *City of Bedford* rule.

Another earlier order that does not square entirely with *Missouri Joint Electric Utility Commission, supra*, is *Thomas M. McMaster and Robert L. Schroder*, 13 FERC ¶ 61,288 (December 31, 1980). There, the Commission issued permits for projects that might overlap but were not necessarily mutually exclusive. It provided that to the extent the subsequent license applications overlapped, the license application filed by the first-filed permit applicant would be treated as the priority application. But a different result — no simultaneous permits — was reached in *Fort Miller Pulp and Paper Company*, 18 FERC ¶ 61,096 (February 8, 1982). Factual distinctions probably explain the differences in result; but the principle is not totally clear.

M. Exemption/Permit Competition

In *Eagle Power Co.*, 22 FERC ¶ 62,083 (January 20, 1983), the Director issued an exemption over a competing permit application. The application of this priority, 18 C.F.R. § 4.104(e), was described as a rebuttable presumption. To prevail against an exemption applicant, a permit applicant would have to show that its proposal was superior.

In *Hydro Development Group, Inc.*, 19 FERC ¶ 61,229 (June 4, 1982), the Commission issued an exemption even though the exempted project might in part overlap a project for which a permit had been issued. Even if there were some

conflict between the two projects, the Commission could later take action in the public interest.

In *City of Tenino, Washington*, 18 FERC ¶ 61,075 (February 9, 1982), the Commission limited the scope of 18 C.F.R. § 4.104(c), which states that an application for preliminary permit or license will not be accepted for filing if a competing application for exemption has been accepted. This rule was limited to cases where an exemption application is filed initially. Where an exemption application is filed in response to a notice of an initial application, the time for others to file competing applications is not cut off.

N. Copying of a Competing Application

The Commission has held that whether a competing application is copied from another application is irrelevant, so long as any application filed comports with the regulations and presents the highest quality proposal feasible. It stated that any matter of copyright infringement was not within its jurisdiction, and that it was by no means clear that assuring the right to copy was in the public interest or was necessarily inherent in the Section 7(a) right of States and municipalities to make their applications equally well adapted. *Southern California Edison Co.*, 18 FERC ¶ 61,212 (March 3, 1982); *Tuolumne Regional Water District*, 19 FERC ¶ 61,132 (May 10, 1982); *Hydroelectric Power Engineers*, 20 FERC ¶ 61,233 (August 30, 1982).⁹

This statement does not square altogether with the suggestion in *California Department of Water Resources*, 19 FERC ¶ 61,098 (May 3, 1982), that, at the permit stage at least, it does not matter who originated a proposal. See also *Alabama Electric Cooperative, Inc.*, 15 FERC ¶ 61,168 (May 27, 1981).

O. Extensions for Filing Competing Applications

In *Long Lake Energy Corp.*, 21 FERC ¶ 61,344 (December 29, 1982), the Commission refused to extend the deadline for filing a competing application for license, pending resolution in an unrelated docket of whether the appealing party was a municipal applicant. The result of this decision was to obligate applicants to decide whether or not they may file a competing application without the security provided by Section 7(a) preference, to which they might be entitled.

Similarly, in *Southern California Edison Co.*, 16 FERC ¶ 61,179 (September 10, 1981), 18 FERC ¶ 61,212 (March 3, 1982), the Commission tolled a 150-day period for filing a competing license application, pending resolution of several legal issues, when only seventeen days remained before the deadline. Then, upon resolution of the questions, it reinstated the remaining seventeen-day deadline. Once again, as a result the competing applicants could not prepare their application in certainty as to the applicable rules.

IX. APPLICATIONS AND PROCESSING OF APPLICATIONS

A. Permit Requirements vs. License Requirements

Because of the Commission's view that the sole purpose of the permit is to allow

⁹Although *City of Hibbing, Minnesota*, 16 FERC ¶ 61,035 (July 21, 1982), was decided on the basis of failure to include the § 4.33(d)(2) competing statement, the competing applicant there essentially xeroxed the initial application, and the Commission's discussion of the draft order at its open meeting made clear their concern that the application had been copied.

for preparation of a license application, in a number of areas showings necessary at the licensing stage are not relevant or not required at the permit stage. For example, the Commission held in *Appalachian Power Co.*, 19 FERC ¶ 61,219 (June 1, 1982), that economic feasibility was more properly considered at the licensing stage than at the permit stage. Similar examples are mentioned throughout this section, including *e.g.*, control of project works, ownership of property, access to the site.

B. Control of Project Works

The Commission held that all of the project works of a complete unit of development must be included within a license so that the Commission will have control over the project. In this area the Commission required the licensee within one year to gain a sufficient property interest in a state-owned dam at which the project was located; or to have the state file a separate license application. *New York State Electric & Gas Corp.*, 15 FERC ¶ 61,066 (April 23, 1981); 16 FERC ¶ 61,176 (September 10, 1981); *Niagara Mohawk Power Corp.*, 16 FERC ¶ 61,180 (September 10, 1981).

In *Public Utility District No. 1 of Chelan County, Washington*, 15 FERC ¶ 62,168 (May 12, 1981), the Director determined that, where parts of the project consisted of privately held lands subject to a flowage easement, the licensee's property interests were insufficient to prevent or regulate use of the land for recreation purposes, and he required the licensee to obtain sufficient property interests to be able to control the project for all purposes.

In *Pennsylvania Renewable Resources, Inc.*, 17 FERC ¶ 61,031 (Oct. 5, 1981); 19 FERC ¶ 61,033 (April 14, 1982), and *City of Summersville, West Virginia*, 17 FERC ¶ 61,030 (Oct. 5, 1981); 19 FERC ¶ 61,032 (April 14, 1982), *consol. appeal pending sub nom. Cities of Bedford v. FERC*, Docket No. 82-1655 (D.C. Cir.), the Commission held that control was only relevant at the license stage. Therefore, it need not investigate control at the permit stage; in fact, a contract divesting an applicant of control at the permit stage might be irrelevant to licensing. *See also Consolidated Hydroelectric, Inc.*, 21 FERC ¶ 61,134 (November 24, 1982).

Lack of ownership of property rights is *not* a factor at the preliminary permit stage. *E.g.*, *Jack M. Fuls*, 18 FERC ¶ 61,065 (January 26, 1982).

C. Access to Site

Access to the land on which a project will be built (in this case Indian lands) is not necessary prior to issuance of a permit, but must be arranged during the permit term so as to allow studies to go forward. *Consolidated Hydroelectric, Inc.*, 20 FERC ¶ 61,086 (July 23, 1982); *Consolidated Hydroelectric, Inc.*, 21 FERC ¶ 61,129 (November 23, 1982).

D. Indian Rights

In *Escondido Mutual Water Co. v. FERC*, 692 F.2d 1223 (9th Cir. November 2, 1982), *cert. granted*, 52 U.S.L.W. _____ (U.S. Oct. 17, 1983) (No. 82-2056), the Court addressed the Commission's orders in Project No. 176, Opinion No. 36, 6 FERC ¶ 61,189 (February 26, 1979) and 36-A, 9 FERC _____ (November 26, 1979), and held that Section 8 of the Mission Indians Relief Act of 1891 (MIRA), 26 Stat. 712, requires consent of the Indians for rights-of-way for projects located on their lands. Section 29 of the Federal Power Act, 16 U.S.C. § 823, did not repeal or limit § 8 of MIRA; indeed, § 4(e) of the Act explicitly requires that a license not interfere with the purpose for which federal reservations (including

Indian reservations) are acquired. Thus, a project may require both a license, pursuant to § 23(b) of the Act, and a right-of-way, as provided in MIRA. In addition, as to three reservations which were in the proximate area of the project but on which none of the project was located, the Commission still had to consider the effect of the project on the groundwater rights of the Indians.

In this regard, the Court held that the Commission *must* include conditions recommended by the Department of the Interior for the protection and utilization of the reservation.

The Commission has issued permits despite asserted Indian rights, providing for consultation and for final decision at the licensing stage. *E.g.*, *Cascade Water Power Development Corp.*, 18 FERC ¶ 61,247 (March 17, 1982) (treaty fishing rights); *Consolidated Hydroelectric, Inc.*, 20 FERC ¶ 61,086 (July 23, 1982) (irrigation and water project on reservation).

E. Environmental Issues

Environmental effects of a project are irrelevant at the permit stage. *Modesto Irrigation District*, 17 FERC ¶ 61,144 (November 19, 1981). See *Tehama County Flood Control and Water Conservation District*, 18 FERC ¶ 61,245 (March 17, 1982), issuing a permit although a portion of the lands comprising the project had been nominated for a wilderness area.

In appropriate circumstances, the Commission will conduct a separate proceeding on system-wide fisheries issues. *Public Utility District No. 1 of Chelan County, Washington*, 19 FERC ¶ 61,223 (June 4, 1982).

In *Escondido Mutual Water Co.*, 20 FERC ¶ 61,157 (August 5, 1982), the Commission affirmed its authorization to reconstruct a powerhouse without first issuing an EIS. There are no impacts affecting the existing environment in this situation. Similarly, in *Utah Power & Light Co.*, 15 FERC ¶ 62,137 (May 1, 1981), the Commission did not regard relicensing as a major federal action significantly affecting the quality of the human environment, and no EIS was required. Approval of a recreation plan filed separately after a license was issued did not require an EIS. *Minnesota Power and Light Co.*, 15 FERC ¶ 62,186 (May 13, 1981). In *Robert W. Shaw.*, 19 FERC ¶ 61,153 (May 18, 1982), the Commission affirmed the issuance of a license without an EIS for a project involving inundation of 80 acres and clearing of 52 acres. There were also impacts to the fishery resources and to whitewater recreation, but the Commission held them not of sufficient magnitude to affect the human environment.

Where the State of Michigan sought a change in a license's minimum flow conditions, the Commission held that it had an obligation under 18 C.F.R. §§ 2.81 and 4.51(f) to prepare an environmental report from which the staff could decide whether to prepare an EIS. Non-Licensees that formally request or recommend changes in the operating regimes of licensed projects have the same obligations as licensees to inform the Commission of the prospective consequences, including the environmental consequences, of proposed actions. Because the State had failed to bear the burden of providing an environmental report, it could not complain of the failure to prepare an EIS, where the Commission rejected its proposal and was allowing the license to continue the operation regime already underway for thirty-five years. *Upper Penninsula Power Co.*, 15 FERC ¶ 61,147 (May 13, 1981).

The Commission held that Executive Order No. 11990, protecting wetlands, is not applicable to it as an independent agency; but that its obligation to consider the public interest pursuant to § 10(a) covers the same issue. *Calaveras County Water District*, 20 FERC ¶ 61,031 (July 9, 1982).

Dams in themselves might be viewed as causing pollution by inducing changes in water quality such as low dissolved oxygen, dissolved minerals and nutrients, temperature changes, sediment, and supersaturation. Reversing the lower court, the D.C. Circuit held that the Environmental Protection Agency (EPA) did not have a duty to require dam operators to apply for pollutant discharge permits under § 402(a) of the Clean Water Act, 33 U.S.C. § 1342(a). *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. Nov. 5, 1982), *reversing* 530 F.Supp. 1291 (D.D.C. Jan. 29, 1982); *see also State of Missouri ex rel. Ashcroft v. Department of the Army, Corps of Engineers*, 526 F.Supp. 660 (W.D. Mo. 1980), *aff'd*, 672 F.2d 1297 (8th Cir. March 9, 1982).

F. Agency Consultation

Failure to consult with agencies at least the minimum period in advance of filing, and to document the consultation, will result in rejection of an application. *Joe G. Paesano*, 19 FERC ¶ 61,027 (April 13, 1982) (exemption); *Comtu Falls Corp. and Comtu Associates*, 20 FERC ¶ 61,154 (August 5, 1982) (exemption); *Eastern Sierra Energy Development*, 20 FERC ¶ 61,348 (September 23, 1982) (exemption).

When a proposal for a project is substantially amended, a new set of agency consultations is required. *Lawrence J. McMurtrey*, 20 FERC ¶ 61,158 (August 5, 1982).

G. No Hearing Necessary on Contested Issues

The Commission has not always ordered a hearing on contested issues, even where there was disagreement by intervenors. For example, where economic feasibility has been contested, the Commission has held that public notice and its regulations provide ample opportunities for opposing intervenors to file relevant evidence and arguments. *Holyoke Water Power Co.*, 17 FERC ¶ 61,035 (October 8, 1981); *Escondido Mutual Water Co.*, 20 FERC ¶ 61,157 (August 5, 1982).

H. Action on Staged License

In *Public Utility District No. 1 of Snohomish County*, 17 FERC ¶ 61,056 (October 16, 1981), the Commission allowed amendment to a license to include a 111.8 MW powerhouse. The license had originally been issued in 1960 for a two-stage project, but the second stage, which included installation of generation, had never been built. The Commission treated this approval of staged development essentially like a new license application. Agencies were consulted and an EIS was prepared. This contrasts with the action in *Holyoke Water Power Company*, 13 FERC ¶ 61,121 (November 13, 1980), where the Commission authorized addition of a second 15 MW unit, included in a 1949 license, without an extensive review or an EIS.

I. Project Boundaries and Project Works

In a project at a Federal dam, the map showing the project boundaries should not include the dam and reservoir in the project. *E.g.*, 18 C.F.R. § 4.81(e)(3). Nevertheless, the map must be provided, showing the location of the project works. *Commonwealth of Pennsylvania and the Susquehanna River Basin Commission*, 15 FERC ¶ 61,255 (June 10, 1981).

J. Joint Filing

When applicants file jointly, a joint subscription and verification is required, and failure to comply may result in rejection of the application. *Town of Gassaway, West Virginia*, 19 FERC ¶ 61,175 (May 21, 1982).

The Commission held irrelevant at the permit stage (and perhaps also at the licensing stage) an alleged contractual commitment by one applicant to join others as co-applicants. *Public Utility Commission of the City and County of San Francisco, California*, 19 FERC ¶ 61,224 (June 4, 1982).

K. Notice of Intent

In *Banister Development, Ltd.*, 17 FERC ¶ 61,034 (October 8, 1981), the Commission refused to consider a notice of intent to file a competing preliminary permit application as including an exemption application.

A patently deficient application may be considered a notice of intent. *Enagenics, Inc.*, 17 FERC ¶ 61,049 (October 8, 1981); *City of Hibbing, Minnesota*, 20 FERC ¶ 61,235 (August 30, 1982).

The Commission denied a request by an initial applicant to prove that a competing applicant did not have “unequivocal intent” to file a competing application, as provided in 18 C.F.R. § 4.33(c).

The rule permitting notices of intent is a procedural mechanism designed to permit a prospective applicant to obtain more time to prepare and file an application. It was not intended to require a binding commitment to file an application.

Rocky Brook Electric Corp., 15 FERC ¶ 61,155 at 61,373 (May 20, 1981).

In *County of Calaveras, California*, 20 FERC ¶ 61,167 (August 5, 1982), the Commission accepted a permit filed by one applicant even though the preceding notice of intent had been joint.

After a notice of intent has been filed, if the original application is deficient, a revised application may be filed any time within the additional period provided due to the Notice of Intent. *Modesto Irrigation District*, 19 FERC ¶ 61,038 (April 13, 1982).

L. Deficiencies

The Commission considers acceptance of a competing application to be unappealable as an interlocutory order. *E.g., J.R. Ferguson and Associates*, 20 FERC ¶ 61,132 (August 2, 1982); *Pacific Gas & Electric Co.*, 19 FERC ¶ 61,300 (June 24, 1982), *on appeal, McKinley v. FERC*, Docket No. 82-7628 (9th Cir.). In other words, a competing applicant may not argue immediately on appeal that the application was deficient and should have been rejected.

In *Tehama County Flood Control and Water Conservation District*, 18 FERC ¶ 61,245 (March 17, 1982), the Commission held that an incorrect statement on whether a wilderness area was included in the project was not a deficiency.

If a preference entity’s application is patently deficient, Section 7(a) does not entitle the applicant to correct the deficiencies as part of making its application as well or better adapted. *Commonwealth of Pennsylvania and the Susquehanna River Basin Commission*, 15 FERC ¶ 61,255 (June 10, 1981).

See discussion of deficiencies in § 4.33(d), *supra*; and in exemption section, *supra*.

M. Amendments and Withdrawals

In *Pennsylvania Renewable Resources, Inc.*, 17 FERC ¶ 61,031 (October 5, 1981), 19 FERC ¶ 61,033 (April 14, 1982), and *City of Summersville, West Virginia*, 17 FERC ¶ 61,030 (October 5, 1981), 19 FERC ¶ 61,032 (April 14, 1982), *consol. appeal pending sub nom. Cities of Bedford v. FERC*, Docket No. 82-1655 (D.C. Cir.), the Commission treated as amendments (§ 1.11(a))-rather than withdrawals (§ 1.11(d)) the removal of one of two applicants that had initially filed jointly. The initial filing date was preserved, and the Director had authority to act. In *Noah Corp.*, 20 FERC ¶ 61,156 (August 5, 1982), the Commission treated as a withdrawal and new filing a request by an initial applicant to remove itself and substitute two (preference) applicants. The date of withdrawal became the filing date for the substituted applicants. In this case, the new filing date was within the time for filing competing applications. In *Southeastern Renewable Resources, Inc. and the County of Mingo, West Virginia*, 22 FERC ¶ 61,197 (February 22, 1983), and *Southeastern Renewable Resources, Inc. and the Town of Grafton, West Virginia*, 22 FERC ¶ 61,189 (February 22, 1983), the Commission faced a situation where an initial sole applicant added another (preference) applicant and then later withdrew. The Commission treated this as a withdrawal and assigned the withdrawal date to the remaining preference applicant. In the circumstances here, this action made the applications untimely, and permits issued pursuant to them were rescinded. The Commission is considering its actions on rehearing in these two cases.

In *Sequoia Energy Corp.*, 18 FERC ¶ 61,291 (March 30, 1982), the Commission affirmed the Director's decision that allowed a non-preference joint applicant to remove itself from an application, leaving a remaining preference applicant. The amendment occurred between the time *Fayetteville* was issued (September 16, 1981; see pp. 80-85 *supra*) and the time § 4.35 went into effect (October 29, 1981). There was no need to notice this amendment, because it was not a material change; nor was the Director obligated to wait until § 4.35 went into effect; at which time the amendment would have resulted in a change in filing date.

New § 4.35 provides that where an application is amended to change the status or identity of the applicant, or to materially amend the proposed plan of development, the Commission will consider the date of amendment to be the date of acceptance and the date for making determinations among competing applicants under § 4.33. Section 4.35 only applies to proceedings initiated after October 29, 1981. The Commission does not apply § 4.35 retroactively. *E.g., Borough of Central City, Pennsylvania and Mitchell Energy Co. Inc.*, 18 FERC ¶ 61,058 (January 26, 1982). See *City of Dothan, Alabama v. FERC*, 684 F.2d 159, 162 n. 2 (D.C. Cir. 1982).

The Commission stated in dictum in *American Hydroelectric Development Corp.*, 19 FERC ¶ 61,296 (June 24, 1982), that addition of a new joint applicant would result in a change in filing date under § 4.35.

N. Supplementing Application by Commission Order

In *Town of Springfield, Vermont*, 14 FERC ¶ 61,103 (February 5, 1981), the Commission stated that, based on the information thus far submitted, it would deny a license application for failure to demonstrate feasibility, but provided 60 days for the applicant to submit specified additional information.

O. Changing From One Category to Another

In *North American Hydro, Inc.*, 16 FERC ¶ 61,225 (September 24, 1981), the

Commission refused to accept an exemption application filed in substitution for a permit application, where the exemption application was not filed by the last date for filing protests or petitions to intervene, as required by 18 C.F.R. § 4.104(a)(2).

X. PROCEDURAL AND MISCELLANEOUS MATTERS

A. *Discovery*

The Commission denied a competing applicant's petition for discovery insofar as it sought information for the preparation of a competing license application. Initially the Commission denied all discovery requests, holding that, since the time had passed for filing a competing license application, it would be inappropriate to burden the other applicant with discovery. *Southern California Edison Co.*, 19 FERC ¶ 61,255 (June 4, 1982). On rehearing, 21 FERC ¶ 61,152 (November 24, 1982), the Commission distinguished information needed to participate as a customer of the prospective licensee, and granted discovery as to information it considered necessary for this purpose. It denied the remaining requests, stating its reason to be a refusal to compel an applicant to underwrite the efforts of a competing applicant.

In *Pennsylvania Renewable Resources*, 17 FERC ¶ 61,031 (Oct. 5, 1981); 19 FERC ¶ 61,033 (April 14, 1982) and *City of Summersville, West Virginia*, 17 FERC ¶ 61,030 (Oct. 5, 1981); 19 FERC ¶ 61,032 (April 14, 1982), *consol. appeal pending sub som. Cities of Bedford v. FERC*, Docket No. 82-1655 (D.C.Cir.), the Commission denied requests for discovery relating to alleged hidden hybrid arrangements, holding that such information was not relevant at the permit stage. See *supra*.

B. *Ex parte*

The Commission has held its *ex parte* rules were not violated where in a permit proceeding there were communications between a party and the staff on the type of leasing arrangement that would be used at the licensing stage. This issue was not relevant at the permit stage to the resolution of the conflicting claims before the Commission. *East Coast Energy Technology, Inc.*, 20 FERC ¶ 61,231 (August 30, 1982); *Accord, Gregory Wilcox*, 18 FERC ¶ 61,271 (March 29, 1982) (communication as to procedural issues non-prejudicial).

C. *Consolidation is not Intervention*

A petition to intervene in one of two competing application dockets does not automatically result in intervention in both. Thus, the Director was technically correct in finding no opposition to issuance of a permit in one of the dockets. *Consolidated Hydroelectric, Inc.*, 21 FERC ¶ 61,129 (November 23, 1982).

D. *Intervention*

The Commission will allow a party to intervene in a proceeding even though the application filed in that proceeding has not been formally accepted. *Long Lake Energy Corp.*, 20 FERC ¶ 61,252 (Aug. 31, 1982).

E. *Filing By Mail*

A filing by mail is at the applicant's peril, and if it does not arrive at the Secretary's office in time, it will be rejected. *E.g., Milton and Morris Zack*, 21 FERC

¶ 61,123 (November 23, 1982). Where an application was filed timely but at the wrong location within the FERC, on the advice of FERC staff, and only arrived at the Secretary's office after the deadline, the Commission refused to accept the application, treating it as untimely. *New York State Energy Research and Development Authority*, 22 FERC ¶ 61,304 (March 14, 1983).

F. *Uncontested Applications*

The Director of OEPR is authorized under 18 C.F.R. § 375.308(d) to act on competing applications only so long as they are not "contested." In *Pennsylvania Renewable Resources, Inc.*, 17 FERC ¶ 61,031 (October 5, 1981), the Commission held that intervention of a power company, without more, does not make a proceeding contested, since § 1.1(23) of the Act states that an uncontested matter is one in which no petition for intervention "in opposition to the pending matter" has been received. Moreover, issues not appropriate until the licensing stage are not "in opposition" to a permit. *Accord, Western Montana Electric Generating and Transmission Cooperative*, 18 FERC ¶ 61,049 at n. 3 (Jan. 25, 1982). In *Robert Shaw W. Shaw*, 19 FERC ¶ 61,153 (May 18, 1982), the Commission rejected a challenge by two environmental groups based on the Director's alleged issuance of a license that was contested and therefore in excess of his authority. The Commission reviewed carefully the environmentalists' petitions to intervene, and found that they did not state opposition to issuance of a license. Rather, they argued that the project might have a significant impact on fishery resources and whitewater recreation, and that intervention was necessary to protect those interests. Technically, this was not opposition.

G. *Notice*

Where the Commission erred, failing to be aware that an application was competing and providing in its notice an additional time for compliance, the public was entitled to rely on the time period in the notice and the Commission refused to close the competition earlier. *Woods Creek, Inc.*, 19 FERC ¶ 61,122 (May 7, 1982).

Actual notice of Commission action is not required where a competing applicant did not formally intervene, and where its application was separately rejected. *Town of Gassaway, West Virginia*, 19 FERC ¶ 61,175 (May 21, 1982).

H. *Notice of Permit Applications to Municipalities § 4(f)*

In *City of Idaho Falls, Idaho*, 20 FERC ¶ 61,066 (July 21, 1982), the Commission held that § 4(f) notice is only required by statute to municipalities "likely to be interested in or affected by such application . . ." and determined it would provide written notice only to towns of 5000 or more, within fifteen miles of the project site. This policy would appear to vitiate the effect of § 4(f), especially in sparsely populated regions, where very few municipalities are large enough to satisfy the Commission's criteria. Moreover, it seems unrealistic to limit notice to municipalities within fifteen miles from a site in this time of high voltage transmission and interconnected systems.

In the same order, the Commission stated it was also its practice to provide written notice to the county or counties in which a project is located. It was stated that any town or city must qualify under Section 3(7) of the Act in order to be entitled to receive notice, although receipt of written notice was not a determination that a municipality qualified, due to administrative infeasibility of making such findings at the notice state. This requirement is difficult to reconcile with the statutory mandate

that notice be afforded to municipalities in *or affected by* the proposed project.

In *Allegheny Electric Cooperative, Inc.*, 20 FERC ¶ 61,049 (July 15, 1982), a competing applicant was held not entitled to § 4(f) notice because it was not competent as a municipality. The Commission examined the relevant state law closely, and applied it as of the time the notices were issued, refusing to consider subsequent legislative changes that granted the municipality competence.

An appeal of issuance of a permit on the grounds of failure to comply with Section 4(f) notice is now pending. *Northern Colorado Water Conservancy District v. FERC*, Docket No. 82-1576 (D.C. Cir.).

I. Published Notice

In *Water Power Development Corp.*, 17 FERC ¶ 61,143 (November 19, 1981), the Commission held that the § 4(f) requirement of published notice had been satisfied where a newspaper was not printed in the county where the project was located; it was nevertheless “published” in that county, within the meaning of the statute.

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