

Report of the Committee on Regulations—Part I of the Federal Power Act

The major developments during 1985 in the area of hydroelectric licensing centered on the continuing evolution of the law in areas of prior controversy. These included the application of municipal preference in relicensing; FERC's desire to streamline its role in the licensing process by requiring applicants to provide more information at the time applications are submitted; the continuing tension between FERC's duty to expedite the development of new resources through granting exemptions to small projects versus its duty to examine the environmental effects of all projects under its jurisdiction; and the conflicting jurisdiction over hydroelectric projects among the FERC, other federal agencies charged with regulation in areas affected by hydroelectric projects, and the states. These issues were the subject of discussions and decisions at the FERC (through both adjudications and rulemakings), before the federal courts, and in Congress.

I. DEVELOPMENTS INVOLVING THE STATUS OF LICENSE APPLICANTS AND LICENSES

A. *Municipal Preference*

1. Court Actions Concerning Preference or Relicensing: *Clark-Cowlitz Joint Operating Agency v. FERC*, 775 F.2d 366 (D.C. Cir. 1985)

Last year's Committee Report addressed the status of the pending D.C. Circuit litigation in *Clark-Cowlitz Operating Agency v. FERC*.¹ That litigation involved an appeal by the Clark-Cowlitz Joint Operating Agency (Clark-Cowlitz) from a decision of the Federal Energy Regulatory Commission granting Pacific Power and Light Company a new license for the Merwin Dam Project which is located in southwest Washington State. In what is now commonly referred to as the "Merwin case" the Commission reversed the initial decision of its Administrative Law Judge, who had held that the plans of Clark-Cowlitz were equally well adapted to those of Pacific Power and Light and that the new license should therefore be issued to Clark-Cowlitz, a "municipality," pursuant to Sections 7 and 15 of the Federal Power Act. In the Merwin case the Commission had also held that the municipal preference does not apply on relicensing, thereby overturning its earlier decision in *City of Bountiful*,² where it had held that states and municipalities do have a tie-breaking preference under Section 7(a) of the FPA.

On October 22, 1985, a panel of the D.C. Circuit issued its decision in

1. 6 ENERGY L.J. 157 (1985).

2. 11 F.E.R.C. ¶ 61,337, *reh'g denied*, 12 F.E.R.C. ¶ 61,179 (1980), *aff'd sub nom.* Alabama Power Co. v. FERC, 685 F.2d 1311 (11th Cir. 1982), *cert. denied*, 463 U.S. 1230 (1983).

Clark-Cowlitz Joint Operating Agency v. FERC.³ The D.C. Circuit's opinion reversed and remanded the case to FERC "with directions to reinstate the initial award in favor of Clark-Cowlitz."⁴ However, on January 16, 1986, the Circuit Court issued an Order vacating the earlier opinion⁵ and granting rehearing *en banc*. The court requested supplemental briefs addressing the following questions:

1. What was the relationship of the *Merwin* proceeding to the *Bountiful* licensing proceeding and the *Bountiful* declaratory proceeding?
2. How often are declaratory proceedings like *Bountiful* undertaken?
3. Have such declaratory proceedings been viewed as rulemakings in the past? Under what circumstances?
4. Do adjudicatory proceedings and rulemakings have the same preclusive effect?
5. What is the role that "economic impacts" may play in an evaluation of "public interest" pursuant to section 7(a) of the Federal Power Act?

Oral argument before the court, sitting *en banc* was scheduled for March 31, 1986.

2. Congressional Proposals Concerning Preference On Relicensing

Last year's Committee Report addressed the status of pending legislative proposals which would modify the existing relicensing provisions of the Federal Power Act.⁶ That report indicated that earlier relicensing legislation died with

3. 775 F.2d 366 (1985).

4. *Id.* at 382.

5. In the original (but now vacated) opinion for the court, Judge Abner Mikva stated with regard to the municipal preference provisions of the Federal Power Act:

In short, the statute on its face may be somewhat unclear; but the legislative history removes any shadow of doubt as to what Congress wanted to happen when relicensing time arrived. The municipal preference applies to all relicensing including those involving an incumbent license. 775 F.2d at 379.

The opinion criticized FERC for reversing its own earlier opinion in the *City of Bountiful*, particularly when that FERC opinion had been subsequently affirmed by the 11th Circuit in *Alabama Power Co. v. FERC*, 685 F.2d 1311 (11th Cir. 1982) and certiorari had been denied on the question, *Utah Power and Light Co. v. FERC*, 103 S. Ct. 3573 (1983).

Judge Mikva's opinion described the events leading up to the Commission decision to reverse its opinion the *City of Bountiful* case, which included a closed meeting of the Commission to discuss its litigation posture in the Supreme Court. 775 F.2d at 369. The D.C. Circuit's original opinion also held that FERC's changed interpretation of the Federal Power Act was "unsupported by either the statute's language or its legislative history." *Id.* at 375-76.

The court also rejected that part of the Commission's decision holding that Pacific Power and Light Company should receive the license on the basis of "broad economic considerations" which Pacific alleged favored its ratepayers receiving the benefits of the new license. Instead the court agreed with Clark-Cowlitz that the "Commission's position if adopted, would render the statutorily-mandated municipal preference a nullity. We cannot believe that Congress would have enacted a specific statutory preference with one hand and with the other given the Commission the power to disregard it at will." *Id.* at 380.

In a concurring opinion, Judge Wright disagreed with the majority's ruling that relitigation of the relicensing preference issue was barred by the doctrine of preclusion. Judge Wright also disagreed with the majority's holding regarding "broad economic considerations." On this point, Judge Wright "would allow the Commission greater latitude" and would have remanded the case for that consideration. "I think the 'public interest' easily comprehends consumer cost inequities." *Id.* at 383.

6. 6 ENERGY L.J. 157, 157-58 (1985).

the 98th Congress but that on January 3, 1985 Congressman Shelby reintroduced in the 99th Congress a bill designated as H.R. 44 which is identical to his previous bill (H.R. 4402). In addition to the Shelby Bill, relicensing bills were introduced in the House by Rep. George Miller (H.R. 1959) and Rep. Matsui (H.R. 1815).

In addition there were several relicensing bills introduced in the Senate during the 99th Congress. A bill identical to Rep. Shelby's H.R. 44 was introduced by Senator Wallop as S. 426. Senator Johnston introduced S. 403, Senator Metzenbaum S. 1219 and Senator Evans S. 1260.

A hearing on the Senate bills was held by the Senate Energy and Natural Resources Committee on June 11, 1985 and mark-up sessions were held during July, September and October. S. 426 was the mark-up vehicle and the Senate was first to report out a bill, doing so on October 22, 1985 (S. Rep. No. 99-161 99th Cong. 1st Sess). There had been no floor action on S. 426 at the time of this writing but it may be brought to the Senate floor early during the Second Session of the 99th Congress.

S. 426 provides that in competitive cases between an existing licensee and another applicant, the new license will be issued to the existing licensee unless the Commission determines that the plans of the competitor are better adapted to serve the public interest. The bill also sets forth the factors that FERC must consider in the licensing process for both new and initial licenses. It generally limits new license terms to 30 years. The bill also addresses matters unrelated to the relicensing question such as establishing a maximum term for exemptions and placing qualifications on hydro projects eligible for PURPA financial benefits. The amendments to the Federal Power Act proposed by S. 426 are intended to apply to all pending and future relicensing proceedings except the pending Merwin Dam relicensing proceedings which is "grandfathered" by the bill.

The House Subcommittee on Energy Conservation and Power held hearings on relicensing bills during June and July 1985. Mark-up sessions on an amendment offered by Chairman Markey to H.R. 44 were held on December 44, as amended, was approved by a unanimous vote of the subcommittee and was unanimously voted out of the full committee on February 6, 1986, and now awaits floor action. The Committee approved the bill substantially as amended. A Committee Report is pending.

The House bill, unlike S. 426, does not provide an existing licensee preference. Instead it provides that "any new license issued . . . shall be issued to the applicant having the final proposal which the Commission determines is best adapted to serve the public interest." The bill goes on to provide a number of specific factors that must be explicitly considered by the Commission in issuing a new license. These include, *inter alia*, the need of each applicant for the power.

The bill sets forth criteria for the Commission's consideration in issuing both new and initial licenses, which appear intended to increase FERC's attention to environmental concerns, *e.g.*, energy conservation, the protection, mitigation of damage to, and the enhancement of fish and wildlife (including spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality. The bill sets

forth new relicensing procedures and, like S. 246, addresses issues unrelated to relicensing such as the terms of exemptions and the qualifications which must be met in order to obtain financial incentives and benefits under PURPA for project development at new dams or diversions.

With regard to pending competitive relicensing proceedings other than Merwin, the House bill provides an election procedure whereby an existing licensee can opt to proceed under the bill's provisions after compensating the license competitor in an amount negotiated by the two parties or ordered by FERC based on the competitor's costs of competition and percentage of new investment in the project. If that election is not made by the existing licensee, the pending competition would be governed under prior provisions of the Federal Power Act. The Merwin project would be grandfathered and all further relicensing proceedings for that project would be governed by pre-existing provisions of the Federal Power Act. Should subsequent judicial review result in a remand to FERC for further consideration, the reconsideration would be governed by the pre-amended Act.

3. FERC Decisions: *PASNY*—Opinion No. 229

FERC Opinion Nos. 229⁷ and 229A⁸ concerned Commission review, pursuant to the Niagara Redevelopment Act ("NRA"),⁹ and the Niagara Project license, of the Power Authority of the State of New York's ("PASNY") 1980 allocations of Niagara project hydropower and energy to the states "neighboring" New York. For the period 1980-85, PASNY had allocated 145 MW of Niagara firm power and 35 MW of Niagara firm peaking power to "preference" entities (*i.e.*, "public bodies and non-profit cooperatives") located in the states of Vermont, Pennsylvania, and Ohio.

In these opinions the FERC found that: (1) PASNY had violated the NRA by failing to allocate a "reasonable" amount of project power and energy to the neighboring states, and that where economically feasible PASNY is required to export a full ten percent of all categories of project power and energy to the neighboring states; (2) PASNY violated the NRA by failing in 1980 to allocate a share of Niagara power to preference entities in Massachusetts and Connecticut; and (3) the NRA term "public bodies" means "publicly-owned sellers and distributors of electricity at retail," and therefore neither the Vermont Department of Public Service ("VDPS") nor the Metropolitan Transportation Authority ("MTA") (which operates New York City's subway system) qualify as NRA "public bodies." VDPS acts as a wholesale broker selling power to Vermont investor-owned utilities and publicly and cooperatively owned utilities; MTA is a power consumer. After reviewing various statutes with preference provisions, and the history of preference generally, the FERC concluded that Congress in the NRA intended to accord preference only to publicly-owned entities capable of selling and distributing electric power directly to consumers at retail. This is a preference for a certain type of entity, and places

7. 30 F.E.R.C. ¶ 61,323 (1985).

8. 31 F.E.R.C. ¶ 61,194 (1985), *appeal pending sub nom.* Metropolitan Transportation Authority v. FERC, No. 85-4115 (2d Cir.).

9. 16 U.S.C. § 836 (1982).

no restriction on the use to which the power is put. Finally, the FERC denied requests for "retroactive relief" to Connecticut and Massachusetts, and instead ordered that as of July 1, 1985 (the date on which the 1980 allocations expired), PASNY would be required to make available to the neighboring states ten percent of every classification of project power and energy, and to allocate that power and energy among the eligible states on the basis of their respective numbers of rural and domestic customers.

The case is on appeal to the Second Circuit Court of Appeals. The issues raised on appeal include the definition of "public bodies"; the requirement that, where economic, ten percent of the project's power and energy output be sold out-of-state; and the FERC's denial of request for "retroactive" relief.

B. Joint Financing/License Transfers

The Commission during 1985 approved several innovative financing arrangements between licensees and non-licensees. The Commission did not depart, however, from its prior policies that (1) the licensee(s) of a project must retain all property interests and control over project works necessary to effectuate any Commission directives under the license; (2) if any necessary property interests or control are transferred to a third party, that party must be either added as a joint licensee or made a transferee of the license; and (3) a license may not be transferred, in whole or in part, from a municipality to a nonmunicipal venturer, at least without first subjecting the proposed conveyance to a competitive transfer proceeding.

1. Cases Involving Municipal Licenses .

In May the Commission resolved the competitive transfer proceeding it had initiated during 1984 in *City of Vidalia*.¹⁰ In that case the Commission had denied the City's request for a partial transfer of its license for the Old River Project to Catalyst Old River Hydroelectric Limited Partnership ("Catalyst"). FERC had ruled that the proposed transfer from a municipal licensee to a non-municipal financier could compromise the integrity of the competitive licensing process, particularly the municipal preference under section 7(a) of the Act. The Commission instead had set up a "competitive transfer proceeding" whereby it issued public notice of the proposed transfer and solicited competing applications from entities desiring to become the transferee.

The Commission received two competing applications in response to the notice. One, submitted by Independence Electric Corporation, was found to be too skeletal to warrant serious consideration and was dismissed. The other, filed by Combustion Engineering Applicants (CE), was well supported but proposed a development which from a technical standpoint was nearly identical to the Vidalia/Catalyst proposal.

The Commission determined that it would resolve the competition by examining how any differences in the proposals of Vidalia/Catalyst and CE "may affect the general public interest and [FERC's] regulatory policies under

10. 28 F.E.R.C. ¶ 61,328 (1984).

Part 1 of the Federal Power Act.”¹¹ The Commission ruled that a preponderance of public interest considerations favored the Vidalia/Catalyst proposal. The Commission first found that Vidalia/Catalyst had shown a markedly superior ability to finance the project. It also noted that Vidalia had already negotiated a long-term power sale agreement with the local investor-owned utility, whereas CE’s power market was speculative. Other factors the Commission felt weighed in Vidalia’s favor included the City’s plan to use up to 15% of the project power itself, compared with CE’s intent to sell the entire output to an investor-owned utility; the fact that the Vidalia/Catalyst proposal allowed the City ultimately to become the sole owner-licensee, thereby furthering the Act’s policy favoring municipal ownership; and the fact that Vidalia had already made considerable expenditures on the project and was further along than CE in the technical and agency-consultative details of the development.¹²

Although FERC used the competitive transfer process in response to the specific factual situation in *Vidalia*, there is reason to expect that a similar procedure may be employed again should similar cases arise in the future. The procedure would appear to be appropriate where a municipality has received a license but has been unable to finance the project itself, provided there is no evidence of abuse of the municipal preference or concealed collusion between the municipality and the private financier.

In *City of New Martinsville*,¹³ the Commission gave its blessing to a joint financing arrangement that was very similar to the one approved a year earlier in *El Dorado Irrigation District*.¹⁴ In *New Martinsville*, a municipal licensee sought to contract with a limited partnership headed by Catalyst Energy Development Corporation (Catalyst) to provide financing and other services in connection with the proposed project. The City would have full title to all project works and any real property required for project purposes, and would retain all powers necessary to carry out license obligations without Catalyst’s prior approval. Catalyst would have a security interest in the project works and would harm any net operating revenues with the City under a contractual formula.

The Commission confirmed that neither Catalyst’s security interest in the project works nor its entitlement to a share of project revenues would render this a hybrid venture. FERC observed that section 8 of the Act specifically recognizes and accommodates such security interests; moreover, “[m]ere beneficiaries of a project do not as such possess project property interests.”¹⁵ The Commission also offered guidance on when a licensee should seek FERC’s approval of a proposed financing arrangement: prior approval is necessary only when the scheme would involve a license transfer or a deviation from the requirements of Standard License Article 5.

11. *City of Vidalia*, 31 F.E.R.C. ¶ 61,237 at 61,465 (1985).

12. *Id.* at 61,465-67.

13. 32 F.E.R.C. ¶ 61,268 (1985).

14. 29 F.E.R.C. ¶ 61,375 (1984). See 6 ENERGY L.J. 157, 161-162 (1985).

15. 32 F.E.R.C. at 61,637 n.10.

2. Cases Not Involving Municipalities

In situations not involving a municipal licensee, the Commission hinted that it may be willing to relax the property ownership requirements of Standard Article 5 so long as the license retains sufficient control over the project and its operation to effectuate any Commission directives under the license.

In *Long Lake Energy Corp.*,¹⁶ the Commission approved a complicated financing arrangement which included both a complete and a partial transfer of the license at progressive phases of the license term. Prior to commencement of construction, the license and title to all project lands and existing facilities would be transferred from Long Lake to Philadelphia Corporation (Philadelphia). During the construction phase, Philadelphia would be the sole licensee, even though it would convey to its financing partners leasehold interests in project lands and title to most project works as they are built. Through an elaborate series of lease, sublease and other contractual arrangements among Philadelphia, an industrial development agency (IDA) and the trustee of a grantor trust (trustee), Philadelphia would retain sufficient possession and control over all project properties to assure compliance with any terms and conditions of the license during construction. Construction financing would be provided by Prudential Interfunding Corporation (Prudential) and Citibank, N.A., through issuance of building loan and supplemental loan bonds in the name of the IDA.

Within 90 days after the project comes on line, Prudential would be made a co-licensee with Philadelphia. Prudential would assume from Philadelphia all rights and obligations as beneficiary/trustor of the grantor trust, including certain beneficial interests in project facilities and leasehold interests in project properties. Philadelphia would continue to hold fee title in the real property and water rights of the project, and would hold a leasehold interest in new project facilities. Actual legal title to the new facilities would be held by the IDA until sixteen and one-half years after the commencement of project operations, at which time title would pass to the trustee for the benefit of Prudential.

In approving this financing arrangement (which has been drastically simplified for purposes of this summary), the Commission determined that the IDA and the trustee need not be made joint licensees even though they would at various times hold certain fee and leasehold interests in project property. The Commission noted that the trustee would have only a passive role and would be under the direct control of the trust beneficiary, which would always be a named licensee. With respect to the IDA, the Commission noted that its fees and leasehold interests would be in the nature of security interests held pursuant to an installment sales contract. Further, the IDA is contractually restricted from interfering with the trustee of the trust beneficiary in the acquisition, construction or operation of the project.

FERC acknowledged that this deviates somewhat from the requirements of standard Article 5. It concluded however, that "[t]he duties and authority retained by Philadelphia as a lessee of the real property interests of the project during both phases of the proposed transfer are sufficiently broad to include all legitimate project purposes without resort to the lessor, its successors or as-

16. 33 F.E.R.C. ¶ 61,265 (1985).

signs.”¹⁷ The Commission also observed that, notwithstanding the complex lease agreements, the named licensee would acquire fee title to all real property interests at the expiration of the license term. Accordingly, sufficient control over project properties was assured not only for the current license term, but for future licensees as well.

The Commission also approved several relatively routine license transfers during 1985. FERC has made it clear that it will sanction pre-construction license transfers, at least when the original licensee is a non-municipal entity, when the transfer would facilitate project financing or development.¹⁸ In *Niagara Mohawk* the Commission cautioned, however, that no property interests should actually be transferred prior to Commission approval of the license transfer.

C. *Changed Conditions*

Section 6 of the Federal Power Act,¹⁹ gives licensees a measure of protection against unilateral changes in license terms by providing that licenses “may be altered . . . only upon mutual agreement between the licensee and the Commission after thirty days’ public notice.” In recent years the Commission has been able to avoid the structures of section 6 by including “open-ended” conditions in all license orders. Such conditions specifically reserve for the FERC, on its own initiative or at the request of an interested party or agency, authority to alter the terms of license when it is demonstrated that new conditions are necessary in the interest of fish and wildlife, navigation, water quality, recreation, etc.²⁰

In *Niagara Mohawk Power Corp.*,²¹ a whitewater rafting organization sought to take advantage of the open-ended recreation terms in a license that had been issued more than three years earlier. The rafters, who had not intervened in the original license proceeding, sought late intervention and asserted that changed conditions since the license was issued warranted imposing new license conditions for recreational purposes. Specifically, they claimed that Black River in New York (on which the project is situated) had recently been cleansed of pollution and had become an exceptionally high-quality whitewater sporting stream. They asked the Commission to order carefully timed reservoir releases for the benefit of rafting; that boat passage facilities be built at the dam; and that the powerhouse be redesigned to prevent interference with passing boats and to minimize negative visual impact. The licensee objected both to the lateness of the rafters’ intervention and to the relief requested.

Although conceding that it did not have sufficient information to evaluate the project’s impact on the “newly developed whitewater recreation potential of the river,” FERC ruled that the rafters had made a sufficient showing of changed circumstances to warrant their post-licensing intervention as well as

17. *Id.* at 61,534.

18. *E.g.*, Hydro Development Group, Inc., 31 F.E.R.C. ¶ 61,198 (1985); *Niagara Mohawk Power Corp.*, 31 F.E.R.C. ¶ 61,054 (1985); *Booth Mills*, 25 F.E.R.C. ¶ 61,386 (1983).

19. 16 U.S.C. § 799 (1982).

20. *See, e.g.*, 54 F.P.C. 1824, 1828-32 (1975) (Form L-4, Standard Articles 9, 10, 12, 15, 17, 19, 25).

21. 31 F.E.R.C. ¶ 61,090 (1985).

the convening of a hearing to determine whether new license conditions are appropriate. The Commission thus ordered a hearing "for the limited purposes of determining the value of the use of the Black River for power generation as compared to whitewater recreation and the compatibility of the competing uses under the proposed scheme of development and operation or alternative schemes."²²

D. Competence Under State Law

In *Palisade Irrigation District*,²³ the Commission rescinded the Office Director's acceptance for filing of a license application after a state court ruled that the applicant, a Colorado irrigation district, was incompetent under state law to develop hydropower for commercial sale. The district had filed a competing license application for a project to be located on the Colorado River, which the Office Director accepted for processing in a formal letter of acceptance in December 1984. Later the same month a Colorado court, in a suit brought by several dissident landowners within the district, ruled that in the 1905 law under which the district was organized did not empower it to develop hydropower other than for the district's own uses. The court thus enjoined the district from making further expenditures on the proposed project.

In an attempt to prevent the total loss of its embedded investment in the project to date, the district in August 1985 submitted a motion asking the FERC to allow it to transfer its application to a private corporation, or, alternatively, to add the corporation as a joint applicant. The former option would necessitate a waiver of the Commission's usual policy against application transfers (18 C.F.R. § 4.35); under the latter alternative, the district would remain as only a passive participant based on its proprietary interest in certain project lands. The Commission declined, however, to rule on the district's motion, instead opting to rescind the original acceptance of the license application.

The Commission relied on section 9(b) of the Act,²⁴ which requires all license applicants to provide "[s]atisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect . . . to the right to engage in the business of developing, transmitting, and distributing power." Because the district did not in fact have the requisite authority under Colorado law, FERC ruled that its application was "fatally flawed from the start and the Director, had he been aware of this, would not have accepted it for filing in the first place." The Commission also decided that the flaw was of such a fundamental nature as to deprive the application of any continued vitality for purposes of further processing, including the amendment or transfer requested by the district.²⁵ A petition for rehearing of the Commission's order was denied at the Commission meeting on March 12, 1986.

22. *Id.* at 61,168.

23. 32 F.E.R.C. ¶ 61,459 (1985).

24. 16 U.S.C. § 802(b) (1982).

25. 32 F.E.R.C. at 62,052-53.

II. FERC JURISDICTION

A. *Congressional Proposals to Increase State Involvement in Licensing* —H.R. 1314

H.R. 1314 proposed to amend Part I of the Federal Power Act by the addition of a new section providing states with certain authority regarding permits and licenses for small hydroelectric power projects. In essence, H.R. 1314 would give the state in which a proposed small hydro project (15 MW or less) is located the authority to block or condition the issuance of a proposed license, amendment or license reissuance with regard to *any* "interest or concern of the State," including any publicly owned or administered lands or waters.

Under proposed section 31, the State in which a small project is located would be granted: (a) the right to receive notice of all license and permit applications submitted to the Commission; (b) the right to receive (1) prior to notice of the Commission's intention to issue, amend, or reissue a license for a small project and (2) a copy of the proposed license or amendment; and (c) the authority to review and include conditions or provisions in the proposed license regarding any publicly owned or administered lands or waters or any other interest or concern of the State.

The Commission would be directed to include in the license all of the conditions and provisions submitted by the affected State except those which the Commission determined to be inconsistent with the Federal Power Act or with other applicable provisions of Federal law. Section 31(c)(2). Should the Commission make such a determination, it must notify the State and propose modifications to the State. Thus, the affected State would retain the ultimate authority to modify its own proposed license conditions or provisions.

Under proposed section 31(c)(3), no small project license would take effect unless (a) the affected state had notified the Commission of its approval of issuance of the license as originally proposed by the Commission, or (b) the conditions or provisions submitted by the affected state had been included in the license, or (c) the affected state had agreed with the inclusion in the license of the Commission's modification of conditions or provisions submitted by the State. Finally, subsection (d) authorized the Governor of each State to designate an appropriate State authority to exercise the authorities described in section 31, effective upon notification to the Commission of such designation by the Governor.

The bill was introduced in the House of Representatives by Mr. Jeffords (R.-Vt.) on February 27, 1985 and referred to the Committee on Energy and Commerce. On March 5, 1985 H.R. 1314 was referred to the Subcommittee on Energy, Conservation and Power. As of early March, 1986, no action had been taken on H.R. 1314.

B. Role of State and Federal Agencies

1. Water Quality Certification and Other State Agency Requirements

a. FERC Decisions

In *Potomac Edison Co.*,²⁶ the Commission held that (1) for a project located on a river forming the border between Maryland and West Virginia, because West Virginia had jurisdiction of water above the low water mark on the West Virginia side, its state agency had authority to issue a water quality certificate under section 401 of the Clean Water Act; and (2) section 401 certification is required for any amendment to license that may affect water quality.

In *Griswold Textile Print, Inc.*,²⁷ the Commission affirmed dismissal of a license application, after section 401 Water Quality certification was denied. The Commission held that a section 401 certificate must be obtained for all licensed projects; and that the state's requirements regarding fresh water wetlands were a matter of the state's method of implementing the Clean Water Act and were beyond the Commission's review.

In *Michael Russo*,²⁸ the Commission affirmed dismissal of a license application after the state water quality certificate was denied. The Commission again held that it has no jurisdiction to review a state's method of implementing its responsibilities under the Clean Water Act. It reaffirmed earlier determinations that, although failure of a state agency to act within one year will waive the section 401 requirement, that time period commences only when an application has been accepted for processing.²⁹ The Commission declined to issue a license conditionally, except in exceptional circumstances, stating that its policy was to dismiss applications where water quality certification had been denied.

In *City of Gold Hill*,³⁰ the Director dismissed an application for license. The state water quality agency denied the requested certification pursuant to section 401 of the Clean Water Act because state law specifically withdrew that section of the river from hydroelectric development.

b. Regulations—Rulemaking on Waiver of Water Quality Certification Requirement, RM 85-6

In Docket No. RM85-6, *Waiver of Water Quality Certification Requirement of Section 401(a)(1) of the Clean Water Act*,³¹ the Commission proposed an amendment to its agency consultation regulations, 18 C.F.R. § 4.38, to address the question of waiver of the section 401 requirement. The Clean Water Act, provides that if an agency "fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of the subsection shall be

26. 30 F.E.R.C. ¶ 61,078 (1985).

27. *Id.* ¶ 61,240.

28. 31 F.E.R.C. ¶ 61,111 (1985).

29. *But see* RM85-6, proposing to reverse that policy.

30. 31 F.E.R.C. ¶ 62,047 (1985).

31. 50 Fed. Reg. 32,229 (1985).

waived."³²

In *Washington County Hydro Associates*,³³ the Commission had held that the statute's one year period did not run literally from the date of "receipt," but from the date a water quality certification was accepted for processing. Otherwise applicants could trigger the beginning of the one-year period by filing applications devoid of the necessary information, thus threatening to deprive the states of the ability to rule on such requests within the year allotted.

The new rulemaking was prompted by difficulties with the *Washington County* decision. A state agency pointed out to the Commission that, under that particular agency's procedure, a 401 certification application was "accepted" when minimal filing requirements were met, not necessarily when all necessary information had been obtained.

In the rulemaking, the Commission proposed that it would deem the "reasonable period of time" for state agency review to be the *earlier* of: (a) one year from the date the state agency received the request for certification, or (b) ninety days after Commission issuance of public notice of the application. As under existing regulations, the licensee would have to request state water quality certification before applying for a license. The Commission pointed out that the 90-day provision would enable state agencies to have a complete license application before them. At the same time, the Commission would have access to the state water quality analysis before beginning its own environmental review of the application. The Commission pointed out that two other Federal agencies, interpreting the waiver provision of section 401(a)(1), have by regulation provided sixty days for a state agency ruling on water quality certification.

The proposal's discussion suggests that the Commission intends to retreat from its *Washington County* rule and interpret the outer limit of one year to be measured literally from the state agency's "receipt" of the application. Comments on the rulemaking were due in October. The Commission had not acted as of the beginning of 1986.

2. Exemptions

In *The Steamboaters v. FERC*,³⁴ the Ninth Circuit considered a series of orders granting an exemption. The court held that the National Marine Fisheries Service was *not* among those fish and wildlife agencies which Congress intended to authorize to impose mandatory conditions on exemptions. NMFS retained only an advisory role in the exemption process.³⁵

On another issue, the court found that FERC had failed to comply with the National Environmental Policy Act ("NEPA") by not preparing an environmental assessment as part of its determination whether to propose a full-fledged environmental impact statement ("EIS"). It also failed adequately to

32. 33 U.S.C. § 1241(a)(1) (1982).

33. 28 F.E.R.C. ¶ 61,341 (1984).

34. 749 F.2d 1382 (9th Cir. 1985).

35. The court noted that, although the FERC's regulations indicated NMFS conditions were mandatory, the FERC was permitted to disregard a regulation in conflict with a statutory policy. Also, the 1985 amendments to the FERC regulations (not in effect at the time of the action under review) made clear that the NMFS does not have the authority to impose binding conditions.

explain its decision not to prepare an EIS. Moreover, it was not permissible for the FERC to rely on recommendations of federal and state agencies. It has an obligation independently to assess the environmental consequences of a project. Also, although conditions designed to mitigate environmental effects may justify a decision not to prepare an EIS, the FERC failed to explain how the conditions would mitigate the impact of the project. In an order denying rehearing, issued December 5, 1985, the court refused to permit continued operation of the project pending remand. Accordingly, the Commission rescinded the exemption.³⁶

The *Steamboaters* case also held that despite substantial projected repairs of an existing wooden dam, including the construction of a new concrete dam immediately downstream, the proposed project still qualified as an exemption at the existing dam. The wooden dam would remain in place and be used. Also, the applicant provided only a general description of proposed modifications. It should have amended its application once its plans were finalized, the court held. Nevertheless, the Commission and the parties here were adequately informed, and the FERC had the discretion to waive or relax its rules.

In *Middle Fork Irrigation District*,³⁷ an exemption proceeding, the Commission determined that, in delegating to the United States Fish and Wildlife Service (USFWS) and comparable state agencies the power to impose on exemptions mandatory conditions related to fish and wildlife, Congress did not intend for the Commission to retain any authority to impose additional terms and conditions concerning fish and wildlife. Although the Commission's responsibility pursuant to NEPA is not eliminated where exemptions are concerned, fish and wildlife NEPA responsibilities fall on the fish and wildlife agencies that can impose conditions. Concern for basin-wide impacts on fish and wildlife should be addressed to these agencies. (The Commission did not explain how to coordinate the analysis, since it retains jurisdiction for *licensed* projects in the basin).

In *David Cereghino*,³⁸ the Commission rescinded an exemption, after the USFWS stated it lacked sufficient information to determine the impacts of the project, and requested the Commission to deny the application. USFWS had originally agreed to the exemption, with a special, open-ended condition giving it the authority to add or alter terms and conditions. The Commission held that the original, open-ended condition was permissible, because Congress gave USFWS the authority to control exemptions as to fish and wildlife matters. The Commission had no control, and was required to defer to USFWS' judgment, whether it was based on information before it, or on lack of information.

3. Wild and Scenic Rivers

In *Swanson Mining Corp.*,³⁹ the Commission upheld on rehearing its vacation of an exemption issued in 1982. It had been informed that the project would have a direct effect on a river designated as a component of the National

36. Winchester Water Control Dist., 33 F.E.R.C. ¶ 61,387 (1985).

37. *Id.* ¶ 61,258 (1985).

38. *Id.* ¶ 61,256 (1985).

39. *Id.* ¶ 61,109 (1985).

Wild and Scenic Rivers System in 1981. This determination was made by the Secretary of the Interior in a 1984 letter. The Commission held that this determination removed its jurisdiction to authorize the project, under Section 7(a) of the Wild and Scenic River Act.⁴⁰ The applicant's arguments about the effect of its project on the river should be made to the Department of the Interior.⁴¹ The Commission's decision was appealed to the U.S. Court of Appeals for the D.C. Circuit (No. 85-1189). Oral argument was heard in February, 1986.

In *Carrasan Power Co.*,⁴² the Commission dismissed an application for license. After the application was filed, Congress designated the river for study inclusion in the National Wild and Scenic Rivers System. The Commission wrote the Secretary of Agriculture, who determined that the project was located within the area of study. The Commission explained that it would not allow the application to remain pending for up to three years (the duration of the study period), because the information would become stale, and an essentially new application would have to be filed in any event. There was also an administrative burden associated with holding the proceeding open.

In October, 1985, the United States Court of Appeals for the District of Columbia Circuit heard oral argument in *Town of Summerville v. FERC*, No. 84-1517. This is an appeal of *Town of Summerville*,⁴³ in which the Commission dismissed two accepted applications for a license for a project on a river designated for study for inclusion in the National Wild and Scenic Rivers System. The Commission explained to the court that it is prohibited by 16 U.S.C. § 1278(b) from issuing a license for a project on a river under study for inclusion in the System. Therefore, it will not entertain license applications, because of its policy against holding license applications in abeyance. The determination whether a proposed project is on or directly affects a wild and scenic river is to be made not by the Commission, but by the Secretary of the Interior or the Secretary of Agriculture, whichever administers the river in question.

However, the Commission *will* issue preliminary permits for sites at rivers under study, so long as there is a possibility that the proposed project site might be removed from the study status, either by relocation of the site or removal from study status. It will not issue a preliminary permit where no license could be issued, *e.g.*, where a site already has Wild and Scenic River status and the project cannot be reconfigured.

Early in 1986, the Court of Appeals for the D.C. Circuit upheld the Commission's *Summersville* orders. *Summersville, W. Va. v. FERC*, No. 84-1517 (D.C. Cir. Jan. 10, 1986).

In *City of Rome*,⁴⁴ the Director dismissed an exemption application for a project to be located on a stretch of river designated for study for potential inclusion in the National Wild and Scenic Rivers System. The Department of the Interior's report on the river was due October 1, 1984, but had not been timely filed. The exemption application was filed in December, 1984, but was

40. 16 U.S.C. § 1278(a) (1982).

41. In some cases the Secretary of Agriculture would make the determination on the effect of proposed projects on a river.

42. 32 F.E.R.C. ¶ 61,150 (1985).

43. 27 F.E.R.C. ¶ 61,206 (1984); 28 F.E.R.C. ¶ 61,257 (1984).

44. 33 F.E.R.C. ¶ 62,252 (1985).

dismissed nevertheless.

4. National Recreation Areas

In *Gentry Resources Corp.*,⁴⁵ the Commission issued a preliminary permit, over the Department of the Interior's opposition, for a proposed project in a national recreational area. The Commission held that the Federal Power Act prohibits in "national Parks" and "national monuments,"⁴⁶ but not other elements of the national park system, including national recreation areas. The Commission further noted that Congress, in creating the national recreation area at issue in this case, had not prohibited the Commission from licensing projects in this particular area. Conversely, when Congress intended to prohibit the Commission from issuing licenses in other recently created national recreation areas, it had specifically so stated in the relevant enabling legislation.

5. Conditions Imposed on Licenses by Federal Agencies In The Protection Of Reservations

In *El Dorado Irrigation District*,⁴⁷ the Commission amended licenses already issued, to permit changes in license conditions requested by the United States Forest Service. These were conditions which were intended to protect a federal reservation, and which the Federal department with jurisdiction over the reservation (here USFS) could therefore impose.⁴⁸ The Commission had jurisdiction to amend the license because the order issuing the license had been stayed pending the appropriate disposition of the USFS's revised conditions.

6. Limits on Agency Authority In Licensing

In *South Fork Resources, Inc.*,⁴⁹ a licensing proceeding, the Commission rejected proposed conditions which would require resolution of certain disputes with agencies before commencement of construction. The conditions would have delegated too much power to the agencies by, for example, vesting in the agencies authority to halt, at least temporarily, construction of the project.

In *Delaware River Basin Commission*,⁵⁰ the Director accepted a state-approved water quality maintenance plan for a licensed project. The Director rejected the U.S. Fish and Wildlife Service's more stringent recommendations.

C. Navigability and Other Jurisdictional Issues

One of the issues in *Washington Water Power Co. v. FERC*⁵¹ was whether the Spokane River is now navigable or was navigable in 1906-10. The court found it was not. Although logs have been floated occasionally in high

45. 32 F.E.R.C. ¶ 61,137 (1985).

46. 16 U.S.C. §§ 796(2), 797 (1982).

47. 32 F.E.R.C. ¶ 61,289 (1985).

48. *Escondido Mut. Water Co. v. LaJolla Band of Mission Indians*, 104 S. Ct. 2105 (1984).

49. 32 F.E.R.C. ¶ 61,042 (1985).

50. *Id.* ¶ 62,144 (1985).

51. 775 F.2d 305 (D.C. Cir. 1985).

water over the relevant stretch of the river, there was no general practice to this effect. The fact that reasonable improvements may be taken into account in determining navigability was of no avail here, where the alleged "improvement" was the Grand Coulee Dam, completely disproportionate in cost to the navigational improvement that incidentally resulted from the dam's construction. The Commission's determination of navigability was held not to be based on substantial evidence.

In *Clifton Power Corp.*,⁵² the Commission considered whether the operation of an 800 kW unlicensed project violated Section 23(b) of the Federal Power Act⁵³ because it "affected interstate commerce." One requirement under this provision is that there must have been construction after August 26, 1935. The applicant's sworn statements on this point were contradictory. An intervenor also asserted that the river was a navigable water of the United States, which would have provided a separate basis for Commission jurisdiction and a finding no violation of Section 23(b). The Commission refused to consider as conclusive on the issue of navigability the findings of a state water resources commission, because a state's finding is generally based on a definition of navigability different from that of the Federal Power Act.

The Commission went on to rescind an earlier show cause order. It stated that the issue of jurisdiction was close, and that further enforcement action would be inappropriate. Pursuing enforcement of Section 23(b) would be an unjustified use of Commission resources, particularly as a hearing on navigability could be lengthy. The Commission also had before it an application for license for the project.

In *City of Centralia*,⁵⁴ the Commission adopted portions of an Administrative Law Judge's order finding the Nisqually River navigable in fact because it could be and was used for commerce, particularly shingle bolts. The Commission found no need to adopt two other portions of the ALJ's order: whether a river must form a continuous highway for interstate commerce in order to be navigable (the portion of the river under consideration was landlocked); and whether rivers under the influence of the tide are therefore navigable.

In *Energy Stream, Inc.*,⁵⁵ the Director determined that no license was required for a project. Navigational use of the creek was unlikely; the project would not use surplus water or water power from a federal dam; no power from the project would be in interstate commerce (the project was located in Alaska); and lands formerly owned by the United States had been conveyed to a native corporation. There was thus no basis for Commission jurisdiction.

In *Robert L. Jackman*,⁵⁶ the Director found no license required for a project not located on a navigable stream. The power from the project was for use in a home that was not interconnected to any electric utility.

52. 31 F.E.R.C. ¶ 61,279 (1985).

53. 16 U.S.C. § 817(b) (1982).

54. 33 F.E.R.C. ¶ 61,221 (1985).

55. 31 F.E.R.C. ¶ 62,335 (1985).

56. *Id.* ¶ 62,400 (1985).

III. THE PERMIT AND LICENSE PROCESS

A. *Application Requirements and Competing Applications*

1. Revisions to Procedural Regulations

On March 20, 1985 the Commission issued revised regulations governing its hydroelectric licensing program.⁵⁷ The new regulations reestablish the stringent filing deadlines for applications filed in competition with applications for initial preliminary permits. In addition, the regulations raise the minimum standards for prefilings consultation and study. In short, the competing applicant has more material to file and less time in which to file it.

Under the new regulations, license applications filed in competition with an initial preliminary permit application must be filed within 120 days of the intervention deadline established in the original application's notice of acceptance for filing. 18 C.F.R. § 4.36(a)(3). This deadline reverses the Commission's opinion in *Georgia Pacific Corp.*,⁵⁸ which permitted competing license or exemption applications to be filed at any time before the preliminary permit was actually issued. Thus, Order No. 413 gives competitors less time to file their applications.

Order No. 413 also increases the volume of material which must appear in the filing. In a break from the earlier practice of permitting studies to be completed after an application has been accepted, the new regulations provide that no application (including competing applications) will be accepted for filing unless the application includes all studies related to the economic or technical feasibility of the project, the design or location of project features, the effect of the project on natural or cultural resources, the suitability of mitigative measures, or the measures, if any, used to minimize the project's effect on significant resources. 18 C.F.R. § 4.38(2)(i)(A)-(F).

By emphasizing prefiling studies, the regulations necessarily emphasize prefiling consultations. As in the past, an applicant may file its application without performing all of the studies recommended by the consultant resource agencies. However, in such case the applicant bears the heavy burden of overcoming the Commission's policy of according great weight to agency determinations on the necessity of particular studies.⁵⁹

By coupling stringent timing requirements with increased burdens of consultation and study, the new regulations require a potential competing appli-

57. *Applications for License, Permit, and Exemption from Licensing for Water Power Projects*, Order No. 413, 50 Fed. Reg. 11,658 (codified at 18 C.F.R. Part 4 (1985)). On May 29, 1985, the Commission granted rehearing of Order No. 413 for purposes of further consideration in response to applications filed by the National Hydropower Association, the Pacific Gas and Electric Company, the National Wildlife Federation, the National Audubon Society and the friends of the Earth. The Commission had not acted as of March, 1986.

On June 7, 1985, the Commission suspended the 90- and 120-day periods for certain specified accepted exemption applications, in order to prevent the applicants from erroneously expecting that their exemptions would be issued automatically at the end of their 90- or 120-day periods. Under the new regulations, exemptions can be granted only by written order of the Commission or its delegate.

58. 17 F.E.R.C. ¶ 61,174 (1981).

59. 50 Fed. Reg. at 11,666.

cant to draft its application, undertake consultations, perform necessary studies and file its final draft within 120 days after the intervention deadline. In preparing its application, however, a competing applicant must allow the consulting agencies either 30 days (for a permit application) or 60 days (for a license or exemption application) to comment on the draft and on the results of any studies. 18 C.F.R. § 4.38(b)(2)(iv)(A)-(B). Thus, this comment period further reduces the time available for a potential competitor to prepare its application. Other changes to the regulations which were brought about by Order No. 413 are discussed below in Section III.A.4 (Competing Applications).

2. Existing Applications: Post-Rulemaking Amendment of Pre-Rulemaking Applications

The preamble to Order No. 413 stated that the new regulations would apply to all proceedings, including those already pending. It also stated, however, that "there may be instances in which applicants that have relied on the old regulations would be put at an unfair disadvantage by application of the new regulations" and that the Commission "will consider petitions by such applicants requesting it to apply all or part of the old rules in these instances and will grant the petitions to void any unfairness."⁶⁰

In light of the burdens imposed by Order No. 413, several competing applicants who had prepared applications in accordance with the old regulations petitioned the Commission to waive the new requirements. In two companion cases, F & T Energy Corporation (F & T) argued that it would be placed at an unfair disadvantage if it were required to meet the new standards.⁶¹ F & T's preliminary permits for the two projects were about to expire, and F & T requested that it be allowed to prepare its license applications in accordance with the old regulations. In the alternative, it requested that its permits each be extended for six months. The Commission Staff argued that F & T had ample time to revise its license applications, noting that Order No. 413 was publicly noticed over six months before F & T's permit was to expire; moreover, F & T had not requested the waivers until over 60 days after Order No. 413 took effect.

Finding that Order No. 413 had become an integral part of the licensing process, the Director of the Office of Hydropower licensing refused to grant either request for waiver. However, since the Director found that F & T had diligently honored its study obligations to date, he extended F & T's permits for six months so that F & T could modify its license applications.⁶²

60. *Id.* at 11,659. See also *Electro Technologies, Ltd.*, 33 F.E.R.C. ¶ 61,299 at n.7 (1985) ("It would have been unfair to hold [applicant] responsible for not fulfilling in 1984 a filing requirement that would not have been imposed until 1985, a year after it had filed its application").

61. *F & T Energy Corp.*, 33 F.E.R.C. ¶ 62,102 (1985); *F & T Energy Corp.*, *id.* ¶ 62,103 (1985).

62. Although these extensions have been subsequently revoked (*F & T Energy Corporation*, 33 F.E.R.C. ¶ 62,269 (1985); *F & T Energy Corporation*, 33 F.E.R.C. ¶ 62,270 (1985)), the reason for their revocation was that F & T filed its requests for extensions within 30 days of the expiration of the preliminary permits. Section 4.82(c) of the Commission's regulations, 18 C.F.R. § 4.82(c), prohibits filing of requests for extensions within 30 days prior to the termination of a preliminary permit.

3. Cumulative Environmental Impact Studies.

a. Not Required For Permits

In a series of decisions issued in late 1984 and early 1985, the Commission underscored its position against requiring permittees to study the cumulative environmental impact of basin-wide hydroelectric development. In *WP, Inc.*,⁶³ *Michael Arkoosh*,⁶⁴ and *Granite Associates*,⁶⁵ intervenors insisted that the Commission should not issue a preliminary permit unless it specifically required the permittee to study the cumulative effects of the proposed project. The intervenors founded this position on *Confederated Tribes and Bands of the Yakima Indian Nation v. FERC*,⁶⁶ where the Ninth Circuit ruled that the National Environmental Policy Act of 1969,⁶⁷ required cumulative impact assessment prior to licensing or relicensing. In *Michael Arkoosh*, the intervenors also supported their arguments with references to Sections 4(e)⁶⁸ and 10(a)⁶⁹ of the Federal Power Act, the Pacific Northwest Electric Power Planning and Conservation Act,⁷⁰ the Fish and Wildlife Coordination Act,⁷¹ and the Wild and Scenic Rivers Act.⁷² In all three cases the Commission determined that both *Yakima* and the directives in the cited statutes apply at most during the licensing process, not during the preliminary permit process.⁷³ The basis for this distinction rests upon the realization that many projects studied under preliminary permits are never proposed for licensing. In the Commission's view, any relevant environmental study could be conducted at the licensing stage, while many studies done *per force* at permit stage would ultimately be irrelevant.⁷⁴

b. Rulemaking: Clustered Projects

While the Commission refused to direct permittees to conduct cumulative impact studies, the Commission recognized that the clustering of projects in a single river basin presents a potential for adverse cumulative effects. As a result, the Commission issued a notice requesting comments on a staff-proposed "cluster impact assessment procedure" (CIAP).⁷⁵ The CIAP is composed of four sequential steps: the Geographic Sort, the Resource Sort, the Multiple

63. 30 F.E.R.C. ¶ 61,049 (1985).

64. *Id.* ¶ 61,002 (1985).

65. 29 F.E.R.C. ¶ 61,296 (1984).

66. 734 F.2d 1347 (9th Cir. 1984).

67. 42 U.S.C. §§ 4321-4370 (1982).

68. 16 U.S.C. § 797(e) (1982).

69. *Id.* § 803(a) (1982).

70. *Id.* §§ 839-839g (1982).

71. *Id.* §§ 666-668ee (1982).

72. *Id.* §§ 1271-1287 (1982).

73. *Accord Lester Kelley*, 25 F.E.R.C. ¶ 61,140 (1984), *reh'g denied*, *id.* ¶ 61,330 (1984), *appeal pending sub nom. Natural Wildlife Federation v. FERC*, *appeal docketed*, No. 84-7325 (9th Cir. filed May 14, 1984).

74. *Granite Associates*, 29 F.E.R.C. at 61,607.

75. *Procedures for Assessing Hydropower Projects Clustered in River Basins*, 30 F.E.R.C. ¶ 61,069 (1985).

Project Assessment and the National Environmental Policy Act document phase. The Geographic Sort uses public participation to define the area of environmental concern within a river basin. The Resource Sort identifies the projects within that area that carry the potential to adversely affect target resources. The Multiple Project Assessment attempts to catalog and quantify the potential adverse effects and the energy value attendant to each project in the cluster. The final step calls for the Commission to determine whether the contemplated cluster development does or does not carry the potential for significant environmental damage. Depending on the results of the final phase, the Commission would prepare either an Environmental Impact Statement or an Environmental Assessment of the cluster.

c. FERC Decisions

Three months after issuing the request for comments, the Commission directed the Commission Staff to implement the CIAP in the Snohomish, Owen and Salmon River Basins.⁷⁶ Shortly thereafter, the Commission decided not to issue a stay for a major license that was about to be granted for a project in the Snohomish River Basin. In *South Fork II, Inc.*,⁷⁷ the Commission issued a license for the Weeks Falls Project after finding that it was not necessary to subject the project to CIAP analysis. The Commission based its holding on record evidence that South Fork had engaged in extensive consultation with interested Federal and state resource agencies and with an interested Indian tribe in order to identify, study and mitigate any environmental hazards posed by the project. In addition, the agencies and the nongovernment intervenor all agreed that the project should be processed on an individual basis. Thus, the Commission quickly established an exception to the CIAP analysis. In the Commission's view, when the record evidence and the consensus of the parties support the issuance of a license, the Commission should consider proceeding with license approval without waiting for the results of the CIAP. Subsequently, in *South Fork Resources, Inc.*,⁷⁸ the Commission cited *South Fork II, Inc.*, as controlling authority for licensing another project in the Snohomish River Basin, without requiring coordination of proceeding by a CIAP.

The exception was also applied in *Jack M. Fuls*,⁷⁹ when the Commission licensed a project to be located in a river basin that had yet to be designated for CIAP analysis, a fact that would certainly have increased the delays attendant to CIAP reviews.

While the Commission's April 24, 1985 order identified three river basins for CIAP treatment, the list was far from exhaustive. In *Michael Arkoosh*,⁸⁰ the Idaho Park and Recreation Board (Board) petitioned for rehearing of the earlier grant of three preliminary permits for projects in the Henry's Fork Basin, arguing that the Commission should conduct CIAP analysis of Henry's

76. *Producers for Assessing Hydro-power Projects Clustered in River Basins*, 31 F.E.R.C. ¶ 61,095 (1985).

77. 31 F.E.R.C. ¶ 61,097 (1985).

78. *Id.* ¶ 61,151 (1985).

79. 32 F.E.R.C. ¶ 61,424 (1985).

80. 31 F.E.R.C. ¶ 61,126 (1985).

Fork Basin. The Commission denied relief, reiterating its previous reasoning that any relevant environmental study is more properly conducted at the licensing stage. In addition, the Commission rejected the Board's request that the Commission develop a comprehensive plan for the Henry's Fork Basin, stating that notwithstanding the Commission's responsibilities at the licensing stage, the preparation of a comprehensive plan would be neither necessary nor fruitful at the preliminary permit stage.

4. Competing Applications

Competition among prospective preliminary permittees, licensees, and exemption holders remains commonplace. The state of the law and Commission practice as they affect such competition, therefore, continues to be a matter of considerable interest.

The competition-related matter that generated the greatest interest and controversy in 1985 was the issue of municipal preference in the relicensing context. That issue is addressed in Part I of this Report, *supra*. The following text discusses various other aspects of Commission practice and policy concerning competitive proceedings as they have continued to evolve in the past year. While the new procedural regulations adopted by the Commission in Order No. 413 are addressed in Part III(A)(1) of this Report, *supra*, further occasional reference will be made to those regulations as they affect competing applications.

The issues that come to the fore in competitive proceedings tend to differ according to the mix of applications involved. Adopting the Commission's classification of "development application" to denote either a license application or an application for exemption from licensing,⁸¹ the topics addressed below shall, therefore, be grouped under general headings that indicate whether the proceeding in question involves preliminary permit applications, development applications, or both.

a. Preliminary Permit v. Preliminary Permit Applications

(i) Concurrent Permits

Much of what the Commission did and said in 1985 with respect to competing applications constituted reaffirmation or refinement of policies that had been established in prior years. In *Ashuelot Hydro Partners, Ltd.*,⁸² an unsuccessful competitor for a preliminary permit argued, among other things, that the Commission should issue concurrent preliminary permits to the competing applicants and defer, until the licensing stage, a decision as to which project would best develop the waterway. While the Commission's disposition of the case did not turn on this point, for the would-be competitor's application had been rejected as untimely, the Commission nevertheless reaffirmed its policy against concurrent preliminary permits for mutually exclusive projects. The Commission pointed out that the very purpose of a preliminary permit is to

81. See 18 C.F.R. § 4.30(b)(5) (1985).

82. 30 F.E.R.C. ¶ 61,048 (1985).

preserve the permittee's priority of application for a license while the permittee studies the feasibility of the project and, if warranted, prepares the license application. Granting concurrent permits to competing permittees would render both permits valueless by depriving the permittees of the intended protections.⁸³

The Commission also reconfirmed in *Ashuelot* that proposed projects need not be at the same geographic location on the waterway in order to be deemed mutually exclusive, as long as the projects would clearly "use substantially the same water resources."⁸⁴ Sometimes the existence of a conflict in use of water resources cannot be confirmed at the preliminary permit stage, however. In such instances, the Commission's will try to accommodate both prospective developers. In *Streamline Hydro, Inc.*,⁸⁵ a permittee for a proposed project challenged the Commission's subsequent issuance of a preliminary permit to another entity for a project that was alleged to be mutually exclusive. The Commission found that available information would not permit a determination as to whether the projects were indeed fundamentally incompatible. The Commission concluded that the preliminary permits for both projects should be allowed to stand, but added that, if a conflict over the use of the water resource were confirmed at the licensing stage, the permittee that was first granted a preliminary permit would be treated as the "priority applicant" within the meaning of section 4.37(c) of the Commission's regulations.⁸⁶ The second permittee was placed on notice of this eventuality with a special article in its permit.⁸⁷

(ii) Successive Permits

The Commission has, of course, extended the terms of preliminary permits on many occasions. Not until December, 1984, however, did the Commission begin to articulate its policy on successive, or "back-to-back" preliminary permits for proposed projects at the same site.

In *Long Lake Energy Corp.*,⁸⁸ the Commission addressed competing preliminary permit applicants by a private developer and a municipal entity. A previous preliminary permit had been issued to a related municipal entity in the face of competition by the private developer. The prior municipal permittee had neither filed a license application during the term of the permit, nor sought an extension of the permit.

The Commission found, first, that state law confirming the control relationship between the successive municipal applicants, and similarities in the successive project proposals and accounts of project activities, supported the conclusion that the successive municipal applicants should be imputed with the

83. *Id.* at 61,076.

84. *Id.* at 61,075 n.2.

85. 33 F.E.R.C. ¶ 61,361 (1985).

86. 18 C.F.R. § 4.37(c) (1985). *See* 33 F.E.R.C. at 61,712.

87. In a similar vein, *see* *Kimshew Hydro Partners*, 30 F.E.R.C. ¶ 62,047 (1985) and *Robley Point Hydro Partners*, 30 F.E.R.C. ¶ 62,046 (1985), where special articles were inserted in preliminary permits to ensure that the design and operation of the proposed projects, if ultimately licensed, would be compatible with, and secondary to, the design and operation of a proposed project for which a license application had already been filed.

88. 29 F.E.R.C. ¶ 61,290 (1984).

same identity for the purposes of the competitive proceedings. The Commission then stated that no question of abuse of municipal preference was raised by the municipal entity's attempt to obtain a second successive permit; as long as each new proceeding is open to all prospective competitors, the municipal entity may participate and invoke municipal preference again in the event the competing applications are found equally well adapted. The Commission also found, however, that in determining which of two applications is best adapted, the prior permittee's performance is a relevant consideration, and "[t]he failure of the prior permittee to produce a licensing proposal in the time allotted under its permit inherently draws its diligence and fitness into question."⁸⁹ Noting that the prior municipal permittee had "failed not only to complete the necessary studies within the allotted time period, but to even request an extension of the permit term," the Commission concluded that it could not be assured of the municipal applicant's fitness to pursue its permit activities or its capability to produce a license proposal that is potentially best or equally well adapted. The permit was accordingly awarded to the private developer.

Competitive preliminary permit proceedings, of course, are almost invariably determined by "first in time" or municipal preference factors, rather than on the basis of "best adapted" considerations. The *Long Lake* case effectively created a rebuttable presumption against fitness that must be confronted by the prior permittee before it may take advantage of its place in line or municipal status. Some indication of the kind of showing that will rebut the presumption was provided in *Allegheny County*.⁹⁰ In that case, once again, a municipal entity that had held a prior preliminary permit for a proposed project was seeking a second preliminary permit in competition with a private developer. This time, however, the Commission found that the municipal entity had proceeded diligently under the prior permit. The analysis undertaken during the permit had, in fact, led the former permittee to change the location and size of its proposed project in the new application. Additional evidence of diligence was found in the former permittee's meeting with investment bankers and its consultation with state and federal agencies.⁹¹ A back-to-back preliminary permit was awarded on the basis of municipal preference.

The question of the propriety of back-to-back preliminary permits came up again in *Amsterdam Associates*.⁹² In that case, a state authority sought a preliminary permit for a proposed project for which another authority of the same state had already held a preliminary permit. A competing private developer argued that the second preliminary permit should be foreclosed by the policy enunciated in *Long Lake*. The Commission found that the state authorities that had applied for the successive preliminary permits, unlike the successive municipal applicants in *Long Lake*, were not in a relationship of common control and, hence, could not be imputed with the same identity. In the absence of such common identity, no question of diligence and fitness was raised, and

89. *Id.* at 61,592.

90. 32 F.E.R.C. ¶ 62,254 (1985).

91. *Id.* at 63,284-85.

92. *Id.* ¶ 62,625 (1985).

the competing applications were reviewed "pursuant to the normal criteria."⁹³ The permit was awarded to the state authority on the basis of municipal preference.

The policy enunciated in *Long Lake* was applied and found controlling in *Rocky Mountain Hydro, Inc.*⁹⁴ In that case, the municipal entity that held the initial preliminary permit failed to file a license application during the term of the permit, as it indicated it would in its 18-month progress report. Nor did that entity seek to extend the initial permit. Instead, over a year and a half after the first permit expired, and over a month after a private developer filed an application for a preliminary permit for the project, the municipal entity filed an application for a second preliminary permit. The Commission found that *Long Lake* had established an "additional burden" that must be met by applicants in the former permittee's position, and the former permittee had failed to provide any information with respect to that burden.⁹⁵ The permit was therefore awarded to the competing private entity.

(iii) Vulnerability of Multi-Development Projects to Piecemeal Competition

In two orders involving a single multi-development project proposal, *Amsterdam Associates*,⁹⁶ the Commission demonstrated, once again, that such proposals are vulnerable to piecemeal competition, particularly at the preliminary permit stage. A private developer had sought a preliminary permit for a proposed project consisting of four "independent" developments. Subsequent preliminary permit applications were filed by municipal entities, each covering one or two of the developments. The Commission awarded the permit to the municipal entities on the basis of municipal preference.

Multi-development license applications are, of course, also subject to piecemeal competition, unless the license applicant can demonstrate that the developments are electrically or hydraulically coordinated. Given the typical characterization of preliminary permit applications as inchoate and unsubstantiated, an assertion that a proposed multi-development project is integrated could be difficult to sustain in the face of piecemeal competition at the preliminary permit stage.

(iv) The Impact of Competitive Preliminary Permit Proceedings on Subsequent Competitive License Proceedings

A permittee whose license application is accepted for filing during the term of its preliminary permit is accorded favored, "priority" status in competitive license proceedings, even against competitors that could otherwise bring municipal preference to bear.⁹⁷ For that reason, unresolved questions concerning the validity of the Commission's choice of permittees can cast a cloud over

93. *Id.* at 63,780.

94. *Id.* ¶ 62,665 (1985).

95. *Id.* at 63,838.

96. 32 F.E.R.C. ¶¶ 62,324 and 62,625 (1985).

97. *See* 18 C.F.R. § 4.37(c) (1985).

subsequent license proceedings.

Such lingering uncertainty was the subject of the Commission's order in *Energenics Systems, Inc.*⁹⁸ That case involved, at its core, the status of a preliminary permit issued to a private developer several years earlier. A municipal entity that wished to compete for the permit sought reconsideration of the order granting the permit four months after the order was issued and 72 days after the municipal entity had received actual notice of the site of the private developer's proposed project. The Commission rejected the petition for reconsideration as untimely.

On appeal to the United States Court of Appeals for the District of Columbia Circuit, the Commission's order rejecting the petition for reconsideration was reversed and remanded.⁹⁹ The court found that the municipal entity was entitled to written notice of the private developer's application, which it had not received, and that the passage of 72 days between the municipal entity's receipt of actual notice and the filing of its petition for reconsideration was not, in itself, sufficient reason to reject the petition. The court added that the Commission was not constrained to accept the petition for reconsideration without question, but could hold hearings to investigate the reasonableness of the municipal entity's delay in filing its petition.¹⁰⁰

While the appeal before the court was being resolved, the private entity that had been awarded the preliminary permit filed an application for the license. The municipal entity filed a competing license application in turn. Had the challenge to the preliminary permit not been pending, the private entity would automatically have been entitled to "priority applicant" status in the license proceeding.

In the above-cited order, however, the Commission noted that its disposition of the municipal entity's claims on remand from the court could have a bearing on the relative status of the pending license applications. The Commission prescribed a hearing at which the municipal entity would be afforded an opportunity to establish that its delay in seeking reconsideration of the order granting the preliminary permit was reasonable. If the delay was found to be unreasonable, the private entity would retain its priority status in the competitive license proceeding. If, on the other hand, the delay was found to be reasonable, the Commission would take "appropriate measures" to establish the competitive status of the two parties in the license proceeding. While the Commission did not specify what the "appropriate measures" would be, it stated that if the municipal entity's explanation for its delay was reasonable, it would be retroactively awarded the permit if both permit applications were equally meritorious. The Commission also noted that its regulations gave a permittee the right to match a competitor's superior application—"a potentially dispositive advantage."¹⁰¹ The private entity subsequently withdrew its license application, rendering an evidentiary hearing unnecessary.¹⁰²

98. 32 F.E.R.C. ¶ 61,010 (1985).

99. *Northern Colo. Water Conservancy Dist. v. FERC*, 730 F.2d 1509 (D.C. Cir. 1984).

100. *Id.* at 1523-24.

101. 32 F.E.R.C. at 61,045.

102. *Energenics Systems, Inc.*, 33 F.E.R.C. ¶ 61,176 (1985).

b. Preliminary Permit v. Development Applications

(i) Changing of Policy Concerning Timing of Competing License Applications

In *Georgia Pacific Corp.*,¹⁰³ the Commission established a policy of allowing the filing of a license application in competition with an initial preliminary permit application at any time prior to the issuance of the preliminary permit. This policy is abandoned in the new regulations. Under Section 4.36(a) of those regulations,¹⁰⁴ any development application that competes with an initial preliminary permit application must be filed either by the prescribed intervention deadline, or, if a timely notice of intent has been filed, within 120 days after the prescribed intervention deadline. For competing applications filed prior to the effective date of the new regulations (June 10, 1985), the *Georgia Pacific* policy continues to apply.¹⁰⁵

(ii) New Approach to Disposing of Unsubstantiated Preliminary Permit Applications That Compete With Development Applications

Under the Commission's regulations, unless an applicant for a preliminary permit can substantiate that its plans to develop the proposed project are superior to the plans of an applicant seeking a license or exemption for a mutually exclusive project, the Commission will favor the competing development application.¹⁰⁶ Until mid-1985, the Commission disposed of "unsubstantiated" preliminary permit applications competing with development applications by denying them in the same orders in which the development applications were granted. The latter approach was typified by *Town of Wells*,¹⁰⁷ and *Stockport Milling Co.*¹⁰⁸

In August, 1985, the Commission issued an order in *Dennis v. McGrew*,¹⁰⁹ in which it adopted a new policy for disposing of preliminary permit applications in competition with development applications. Under the *McGrew* approach, if, as is most often the case, the applicant for a preliminary permit has not substantiated the various technical, economic, environmental, and other aspects of its proposal, the application will be dismissed without prejudice in a separate order without awaiting disposition of the competing development application. In the event the competing development application is ultimately dismissed or denied, the preliminary permit application will be reinstated with its original filing date and no reopening of the proceeding for new competitive filings. If, on the other hand, the competing development application is granted,

103. 17 F.E.R.C. ¶ 61,174 (1981).

104. 18 C.F.R. § 4.36(a) (1985).

105. See *Ada County*, 33 F.E.R.C. ¶ 61,046 at 61,100 n.3 (1985).

106. See C.F.R. §§ 4.37(a) and (d)(1) (1985).

107. 32 F.E.R.C. ¶ 62,398 (1985) (license issued; competing unsubstantiated preliminary permit application denied).

108. 31 F.E.R.C. ¶ 62,269 (1985) (exemption granted; competing unsubstantiated preliminary permit application denied).

109. 32 F.E.R.C. ¶ 61,229 (1985).

the dismissal of the preliminary permit application will become "with prejudice" as of that date, and the permit applicant will be advised that its right to appeal the disposition of the competing applications has been triggered by the order granting the development application.¹¹⁰

A spate of orders dismissing preliminary permit applications was issued in the wake of *McGrew*. The Commission was thus able to effectively remove dozens of pending applications from its books before the end of the fiscal year. Beyond such administrative considerations, however, the substantive benefits of *McGrew* are difficult to discern. Theoretically, the ultimate outcome of the competitive proceedings is not affected; the Commission merely substitutes boilerplate language in the separate orders dismissing the preliminary permit applications for boilerplate language that would otherwise be contained in the orders acting on the competing applications.¹¹¹ Further, since the preliminary permit application is invariably the first-filed application in such competitive proceedings, and is usually submitted without foreknowledge that a competing development application will be filed, it is unlikely that the formalization of policy and practice in *McGrew* will affect the frequency or substance of future preliminary permit applications.

(iii) Preservation of the Competitive Status Of Preliminary Permit Applicants Pending Final Disposition of Development Applications

Preliminary permit applicants that compete with development applicants are not out of the game until the Commission's action on the development application is final and nonappealable. Such a return from the brink of oblivion is exemplified by *Hydro Resource Co.*¹¹² In that case, the Commission had, in an earlier order, issued an exemption for a proposed project while denying several competing applications for a preliminary permit. One of the preliminary permit applicants appealed from the order, and the appeal was denied. The applicant then requested rehearing.

While the request for rehearing was pending, the United States Court of Appeals for the Ninth Circuit rendered its opinion in *Tulalip Tribes of Washington v. F.E.R.C.*,¹¹³ finding the Commission's "natural water feature" regulations, under which the exemption had been granted, invalid. In the wake of *Tulalip*, the Commission voided the exemption and others like it, and gave the former exemption-holder an opportunity to revise its exemption application or file a license application. The former exemption holder elected to do neither.

110. *Id.* at 61,541.

111. There is at least one pending challenge to a perfunctory, *McGrew*-type dismissal by a preliminary permit applicant that claims to have met its burden of showing a superior plan of development. Cosumnes River Water and Power Authority, 32 F.E.R.C. ¶ 62,520 (1985) (appeal to Commission pending). In that case, the Office of Hydropower Licensing dismissed, without prejudice, a permit application for a multi-development project that competed with a development application for a single-development project (*see supra* section III.A.4.a(iii)). Whether the Commission will insist on awaiting disposition of the competing development application before addressing the challenge remains to be seen.

112. 31 F.E.R.C. ¶ 61,079 (1985).

113. 732 F.2d 1451 (9th Cir. 1984).

In *Hydro Resource Co.*,¹¹⁴ the Commission found that, under the circumstances, the pending request for rehearing of the order granting the exemption and denying the competing preliminary permit applications was moot, and should be dismissed. The Commission also found that the appeal and request for rehearing had prevented the order from becoming final, and that the preliminary permit applications had consequently remained viable. The Director of the Office of Hydropower Licensing was ordered to resolve the competition by choosing from among the preliminary permit applicants.¹¹⁵

Section 4.33(e) of the Commission's regulations¹¹⁶ provides that "[a]ny preliminary permit or license application submitted by a person who later applies for exemption of the project from licensing will retain its validity and priority . . . until the preliminary permit or license application is withdrawn or the project is exempted from licensing." In *Phoenix Hydro Corp. v. F.E.R.C.*,¹¹⁷ the United States Court of Appeals for the District of Columbia Circuit addressed, among other matters, an (apparently) anomalous occurrence in which the Commission had failed to follow this rule, and found that an applicant with concurrent preliminary permit and exemption applications before the Commission is legally entitled to preservation of the former on an independent track against the eventuality that the latter may be dismissed or denied.

In the *Phoenix* case, an applicant had filed an application for a preliminary permit and, somewhat later, an application for an exemption for the same project. The Commission accepted the exemption application for filing, and notified the applicant that its preliminary permit application was deemed withdrawn as of the acceptance date. Subsequently, the Commission rescinded the acceptance for filing of the exemption application, but did not reinstate the preliminary permit application. On appeal, the court found that licensing and exemption from licensing are separate and alternative approaches to authorized development of a project. The court found further that the preliminary permit process is an integral part of the licensing track and, as such, may be pursued independently from, and concurrently with, an exemption from licensing. While the grant of an exemption would render the parallel pursuit of a license (or preliminary permit) no longer meaningful, the mere acceptance of an exemption application for filing leaves open the possibility that the exemption application may yet be dismissed or denied. In the latter event, the applicant would have a continuing interest in pursuing the alternative route to authorized development, and the concurrent preliminary permit application should thus have been preserved to meet that contingency. Accordingly, the court remanded the case to the Commission with instructions to reinstate the preliminary permit application as of the original filing date.¹¹⁸

In view of the fact that, as noted above, the approach to parallel preliminary permit and exemption applications mandated in *Phoenix* is already pro-

114. 31 F.E.R.C. ¶ 61,079.

115. *Id.* at 61,149.

116. 18 C.F.R. § 4.33(e) (1985). Prior to the recodification effected by Order No. 413, this provisions was located at section 4.104(b) of the regulations.

117. 775 F.2d 1187 (D.C. Cir. 1985).

118. *Id.* at 1192-93.

vided for in Section 4.33(e) of the Commission's regulations,¹¹⁹ *Phoenix* is significant primarily in confirming the legal underpinnings of the regulations.

c. Development v. Development Applications

(i) New Approach to "Best Adapted" Statements

Under the Commission's regulations prior to recodification and revision in Order No. 413, any applicant filing a preliminary permit or license application in competition with an initial preliminary permit or license application was obliged to include in its application a detailed and complete statement as to how its plans were as well or better adapted than the plans reflected in the initial application to develop, conserve, and utilize in the public interest the water resources of the region. The initial applicant was then given an opportunity to rebut the "best adapted" statement and submit a counterstatement.¹²⁰ The Commission required strict adherence to this requirement, as evidenced in such orders as *Nevada Irrigation District*¹²¹ and *New Jersey Water Supply Authority*.¹²²

In Order No. 413, the Commission adopted regulations that modify its approach to "best adapted" statements. Competing applications for a preliminary permit need no longer include a "best adapted" statement. Development applications filed in competition with initial preliminary permit or development applications are not to incorporate a "best adapted" statement, either. Under Section 4.36(e)(2) of the regulations,¹²³ however, once the deadline for filing applications in competition with an initial development application has passed, the Commission will notify each competing development applicant of the identity of the others, and, after a full distribution of applications among the competitors, each development applicant must file a statement with the Commission explaining how its plans are as well or better adapted than the plans of each of the others to develop, conserve, and utilize in the public interest the water resources of the region. As no opportunity for rebuttal or counterstatement is provided, it is likely that all such statements will be submitted at the last possible moment consistent with timely filing.

(ii) Approval of Settlement Agreement Between Competing License Applicants

In *Long Lake Energy Corp.*,¹²⁴ the Commission approved a settlement agreement between competing license applicants that would dispose of the com-

119. See also section 4.33(d)(3) of the regulations, 18 C.F.R. § 4.33(d)(3) (1985), which allows a license applicant, under appropriate circumstances, to request that its application be treated initially as an exemption application.

120. See former sections 4.33(d)(2) and (e) of the regulations.

121. 31 F.E.R.C. ¶ 62,238 (1985) (competing transmission line license application rejected for failure to include statement).

122. 30 F.E.R.C. ¶ 61,172 (1985) (competing preliminary permit application rejected for failure to include statement).

123. 18 C.F.R. § 4.36(e)(2) (1985).

124. 31 F.E.R.C. ¶ 61,013 (1985).

petitive aspect of the proceeding without reaching the merits of the applications. One of the two applicants, a state authority, owned real property at the project site that had been used for a long-standing and compatible prior public purpose. That applicant and its competitor, a private developer, agreed that, if the Commission granted the license to the private developer, the developer would not exercise its power of eminent domain as a licensee to obtain real property owned by the state authority, but would instead use its best efforts to obtain a hydroelectric easement to use the property. If such an easement could not be obtained within a time certain, the restriction on use of the power of eminent domain would be terminated. The public authority also agreed to withdraw its competing application if the Commission approved the settlement and no request for rehearing or reconsideration of the order approving the settlement was filed. Finally, the competing applicants requested in their offer of settlement that any license issued to the private developer include special articles requiring, among other things, that the developer's use of the project be consistent with continuation of the prior compatible use by the state authority, and that future design and construction of new project works be carried out in consultation with the state authority.

In its order, the Commission stated that, as a general rule, it would decline to approve a settlement committing the Commission to certain license conditions in advance of a license order wherein all necessary terms and conditions could be weighed and considered together. In this instance, however, because the public interest in acknowledging and preserving the integrity of the preexisting public use of the properties was "unquestionable," and the proposed provisions to that end were "reasonable," the advance approval of the conditions was deemed appropriate. The Commission concluded that advance approval of the settlement terms would not inhibit its ability to fashion appropriate license conditions to meet all reasonably foreseeable comprehensive development interests in any license that might be issued to the private developer.¹²⁵

(iii) Factors Deemed Determinative In Choosing Among Competing Development Applications

The Commission's choices among competing development applications in 1985 provided further information, but no surprises, with respect to factors that would be deemed determinative.

In *New York State Electric and Gas Corp.*,¹²⁶ the Commission addressed an application for a license in competition with an application for amendment of an existing license. While the applications did not propose development at the same project, they were mutually exclusive in the sense that the existing licensee proposed to raise the elevation of its reservoir, which would have the effect of reducing the head at the competing upstream project to such an extent as to render that project economically infeasible.

The Commission compared the competing proposals on the basis of power generation, impacts to the environment, economic feasibility, and impacts to

125. *Id.* at 61,025.

126. 33 F.E.R.C. ¶ 61,389 (1985).

navigation. The Commission found that, while the license applicant's proposed development of the upstream project would result in greater power generation,¹²⁷ the proposal was also only marginally feasible from an economic standpoint, carried risks to the water quality of the river, and was likely to conflict with navigation on an adjoining barge canal. Moreover, any modifications to solve the environmental or navigational problems would render the project economically infeasible. The license amendment proposal, on the other hand, would have relatively few unmitigated environmental impacts, would not affect navigation, and was clearly economically feasible. Finally, while the license applicant had proposed beneficial recreational facilities, the Commission found that the proposal did not represent an advantage in that the facilities could be provided by either applicant. Taking all of these considerations into account, the Commission found the license amendment proposal to be best adapted, and denied the competing license application.¹²⁸

In *Ithaca Falls Development Association*,¹²⁹ the Commission selected the best adapted plans from among three competing license applications, one of which was submitted by a municipal applicant. The Commission found that, while all three applicants proposed "similar project configurations," one of the non-municipal applicants would install more capacity and generate more energy than either of its competitors.¹³⁰ In addition, the applicant proposing the higher capacity and energy production would develop the project at a lower cost per kilowatt than the other non-municipal applicant,¹³¹ and, although, the environmental impacts associated with the three proposals were about the same, had more flexibility than the municipal applicant to adjust to upward revisions in the minimum flow, should such revisions become necessary after further study.

On this basis, the non-municipal applicant with the specified advantages was deemed to have the best adapted plans, and the other non-municipal applicant was eliminated from the competition. Pursuant to the Federal Power Act¹³² and the Commission's regulations,¹³³ however, the municipal applicant was given 60 days in which to render its plans at least as well adapted as those of the prevailing non-municipal applicant.¹³⁴

In *Forrest E. Speck*,¹³⁵ the Commission reviewed a license application, an exemption application, and a preliminary permit application in competition with one another. The preliminary permit application was denied routinely as unsubstantiated in the pre-*McGrew* manner. As between the license and ex-

127. The license proposal projected about 55% more power generation than the license amendment proposal.

128. 33 F.E.R.C. at 61,754.

129. *Id.* ¶ 61,342 (1985).

130. More specifically, it would install about 71% and 20% more capacity, and generate about 32% and 14% more energy, than the non-municipal and municipal competitors, respectively.

131. The Commission did not state whether the competing applicants proposed to be qualifying small power producers selling project power to a utility at the same avoided-cost rates, and, if so, why the cost per kilowatt of producing the power would be relevant to a public interest determination.

132. See section 7(a) of the Federal Power Act, 16 U.S.C. § 800(a) (1982).

133. See section 4.37(b)(4) of the Commission's regulations, 18 C.F.R. § 4.37(b)(4) (1985).

134. 33 F.E.R.C. at 61,678.

135. 32 F.E.R.C. ¶ 61,069 (1985).

emption applications, the Commission stated that it would consider them "for the comprehensiveness of their plans for developing the hydroelectric potential of the site and for the type, scope and duration of their impacts upon the environment of the project area."¹³⁶

Focusing first upon hydroelectric potential, the Commission found that the exemption applicant proposed about 15 percent greater installed capacity and about 13.3 percent greater energy production than the license applicant. Turning to environmental impacts, the Commission found that both projects would result in similar environmental consequences. The exemption application was therefore found better adapted on the strength of its greater projected capacity and energy production.¹³⁷

(iv) Potential Disparity In Considerations Applied to Competing License and Exemption Applications

The *Speck* case seems to indicate that the Commission will decide between competing license and exemption applications by applying common criteria.¹³⁸ In *Middle Fork Irrigation District*,¹³⁹ however, the Commission stated explicitly that it would be contrary to Congressional intent to subject exemption applications to the comprehensive development analysis mandated for license applications under Section 10(a) of the Federal Power Act.¹⁴⁰

Two cases handed down by the United States Court of Appeals for the Ninth Circuit in 1985 illustrate one factor on which the analysis of license and exemption applications may diverge. In *Idaho Power Co. v. FERC*,¹⁴¹ the court confirmed that, in issuing an exemption from licensing for "conduit hydroelectric facilities" pursuant to Section 30 of the Federal Power Act,¹⁴² the Commission need not require that there be a need for the power to be produced by the facilities.¹⁴³ Two weeks later, in another opinion denominated *Idaho Power Co. v. FERC*,¹⁴⁴ the court found that the Commission's requirement that a license applicant demonstrate the need for the power to be produced as its proposed project is fully supported by the pertinent provisions of the Federal Power Act, and that the different treatment afforded to applicants for conduit hydroelectric facility exemptions is justified by the underlying authorizing legislation¹⁴⁵ and the Congressional policies embodied therein.

In view of the *Idaho Power* cases, it is at least conceivable that, in a situation where a license applicant and an exemption applicant are competing for

136. *Id.* at 61,173.

137. *Id.* at 61,174.

138. This conclusion is implicit in the commission's new regulation governing "best adapted" statements, as well. See the account of 18 C.F.R. § 4.36(e)(2) (1985) in part III(A)(4)(c)(i) of this report.

139. 30 F.E.R.C. ¶ 61,258 at 61,538 (1985).

140. 16 U.S.C. § 803(a) (1982).

141. 766 F.2d 1348 (9th Cir. 1985).

142. 16 U.S.C. § 823(a) (1982).

143. The court interpreted the law in such a way as to leave open the possibility that the Commission may consider the need for power in granting such exemptions.

144. 767 F.2d 1359 (9th Cir. 1985).

145. Section 213 of the Public Utility Regulatory Policies Act of 1978 ("PURPA"), Pub. L. No. 95-617, 92 Stat. 3148 (1978).

the same hydroelectric potential in a conduit facility,¹⁴⁶ the Commission's disposition of the matter could turn in favor of the exemption applicant on the basis of a comprehensive development factor—*i.e.*, the need for the power from the project—that must be considered for one but not the other.

5. Miscellaneous Decisions Regarding Application Requirements and Competing Applications

a. Need for Current Information

Although section 401 water quality certification was not an issue in *Kenai Hydro, Inc.*,¹⁴⁷ that case did discuss the requirement (of 18 C.F.R. § 4.41(f)) that license applicants consult with various state agencies prior to submitting a license application. In *Kenai*, the Commission affirmed rejection of a license application for failing to correct deficiencies. The applicant had submitted a study of the project conducted by a consultant for another entity, arguing that the study constituted adequate agency consultation and that the Commission's regulations did not require personal consultation by the applicant with the agencies. The Commission said the Director could require the applicant to consult with the agencies based upon the facts of its own application. Prior consultations by the other entity were not an adequate substitute because they did not reflect the particular elements of the project specifically proposed in *Kenai's* application.

In a similar situation the Commission again rejected a license application where, among other things, the consultations with agencies had been performed by an entity other than the applicant (the applicant's parent company performed the consultations) and where the project described in the license application was substantially different in size and capacity than the project design that was the subject of the agency consultation. *California Hydroelectric*.¹⁴⁸ The Commission there recognized that changes in project design could occur during the consultation process, but stressed that the consulted agencies must be made aware of those changes and given the opportunity to review the plans for the project as ultimately proposed in the license application.¹⁴⁹

The FERC also may require new or updated information when an applicant materially amends its original application. In *Trans Mountain Construction Co.*,¹⁵⁰ the Commission upheld the rejection of a license application as patently deficient when the applicant amended its original application to move the proposed project 1,000 feet upstream to avoid a potential property rights problem. While many aspects of the relocated project remained the same as

146. While the court's findings were limited to the Commission's responsibilities with respect to conduit hydroelectric facilities, the conclusions concerning Congressional intent are, arguably, equally valid with respect to the Commission's authority to exempt certain small hydroelectric projects at existing dams under Section 405(d) of PURPA, 16 U.S.C. § 2705(d). See *Briggs Hydroelectric*, 32 F.E.R.C. ¶ 61,399 (1985) (a determination as to the applicant's need for power is not necessary prior to issuing an exemption for a project having an installed capacity of 5 MW or less).

147. 30 F.E.R.C. ¶ 61,003 (1985).

148. 33 F.E.R.C. ¶ 61,056 (1985).

149. *Id.* at 66,119-20.

150. *Id.* ¶ 61,231 (1985).

those described in the original application, the Commission found that other aspects, such as the plan view of the powerhouse and an estimate of the project costs, would necessarily differ. Since new information regarding these aspects were not provided, the Commission upheld the rejection of the amended application as patently deficient.

b. Applications That Are Contingent Upon Further Occurrences

In at least two instances in 1985 the Commission showed its unwillingness to accept applications that are contingent upon future occurrences. In *Town of Vidalia*,¹⁵¹ the Commission dismissed a license application for a project that would be located at an Army Corps of Engineers' lock and dam that would not be constructed until after 1991. The applicant proposed to construct the project concurrent with construction of the lock and dam, concurring with the Corps' suggestion that the issuance of the license be delayed until more progress was made on the construction of the lock and dam.

The Commission dismissed the application without prejudice to refile in the future, stating that "[i]t would not be in the public interest to suspend for an indefinite time the processing of the application either to enable the applicant to develop plans that are more than merely preliminary and conceptual or to protect the applicant from impending difficulties" regarding the Federal Power Act requirement that construction of a project commence no later than two years after the issuance of the license.¹⁵²

Similarly, in *Borough of Weatherly*,¹⁵³ the license applicant's proposed project would utilize an existing Corps' dam, substantial modifications to which were subsequently authorized by Congress. The proposed project was incompatible with the modified design. Although the applicant offered to alter its project to suit the modifications, the FERC denied the application based on the undisputed conflict between the original proposal and the approved modifications. The Commission noted that the applicant's offer to alter its project had not been embodied in any amendment to the original application, stating "The Commission does not consider indefinite proposals such as contained in the [applicant's] response to the Corps. The Commission will consider only proposed projects filed with it in the required detail and form."¹⁵⁴

c. Application Information In Addition To That Specifically Required By The Regulations

When the Office of Hydropower Licensing rejected its license application for failure to submit responsive supplemental information or dissolved oxygen levels at the proposed project, the applicant appealed to the Commission, claim-

151. 32 F.E.R.C. ¶ 61,384 (1985).

152. *Id.* at 61,866. The Commission noted that section 13 of the Act empowered it to extend the period for commencement of construction for two years, but found that even with such an extension, construction would have to begin before it was feasible. Moreover, granting a license at this time for a project that could not be constructed without the additional two years would be prejudging the extension, which the Commission refused to do.

153. 32 F.E.R.C. ¶ 61,398 (1985).

154. *Id.* at 61,692.

ing that (1) such information is not specifically required under the FERC's license application regulations, (2) the time afforded to supply the information (45 days) was unrealistically short, and (3) other applicants were routinely allowed 4 months to supply similar information or were allowed to supply it after licensing.¹⁵⁵

Although the Commission recognized that the requested information was not specifically required by the regulations, it found that such information would be required under the regulations as information important to an informed decision. 18 C.F.R. § 4.31(f). Failure to apply such information upon the initial filing of the application, however, was not a deficiency and would not prevent acceptance of the application for filing. Therefore, the Commission reinstated the application and allowed the applicant to request an extension of time in which to collect the information. The Commission did not agree that the applicant was entitled to perform the requested study after—as opposed to before—licensing, even if that approach had been allowed in the past: “The fact that some past licensing decisions have deferred identifying project impacts on dissolved oxygen levels to post licensing compliance does not preclude the Commission or the Director [of the Office of Hydropower Licensing], as its delegate, from improving our decision making by requiring such relevant additional information before licensing.”¹⁵⁶

d. Environmental Impact Statements

As already discussed above in Section II.B.2, the Ninth Circuit held that FERC should have prepared an environmental assessment in order to determine whether a full environmental impact statement (“EIS”) was required.¹⁵⁷ In *Sierra Club v. FERC*,¹⁵⁸ the Ninth Circuit held that an EIS was not required before issuance of a preliminary permit, under the circumstances. The permit alone did not authorize the applicants to enter federal land and conduct feasibility tests that might disturb the environment; separate special use permits were required from the United States Forest Service and the Bureau of Land Management, which managed the land on which the project would be built. These agencies would therefore be responsible for evaluating the environmental impacts of their special use permits. The Commission's issuance of a preliminary permit here did not change the status quo, because further permission from other federal agencies was required.

The court also agreed with the Commission that it was premature to determine whether the proposed facility was outside of FERC jurisdiction by reason of the Raker Act.¹⁵⁹ Theoretically, the project could be under the exclusive jurisdiction of the Secretary of the Interior, depending on how closely related it was to the original Hetch-Hetchy facilities authorized by Congress in the Raker Act. The issue of whether the project was licensable could be reserved to the licensing stage, in view of the inherent flexibility of design plans at the

155. *City of Jackson*, 30 F.E.R.C. ¶ 61,241 (1985).

156. *Id.* at 61,480.

157. *The Steamboaters v. FERC*, 759 F.2d 1382 (9th Cir. 1985).

158. 754 F.2d 1506 (9th Cir. 1985).

159. 58 Stat. 242 (1913).

project stage.

B. Terms of Licenses, Permits and Exemptions

1. Project Boundaries

In several proceedings in 1985 the Commission had occasion to discuss the lands that should be encompassed by the boundaries of licensed hydroelectric projects. In *Wisconsin River Power Co.*,¹⁶⁰ the Assessor of the local town opposed the licensee's request to amend project boundaries. The Assessor claimed that the proposal would adversely affect the property tax base of the town and therefore was not in the public interest. Since the Assessor had not offered evidence for its claim nor shown how any adverse impact on local tax revenues would outweigh other beneficial aspects of the proposal, the Commission found no basis for denying the amendment. It implied, however, that a hearing might have been required if the Assessor had made an adequate proffer of evidence to support its allegations.¹⁶¹

In *Georgia Power Co.*,¹⁶² the licensee sought a declaratory order regarding the Commission's ability to extend a project boundary to provide adequate public access to project recreational facilities. In the earlier licensing proceeding, the Commission had stated that if the licensee's recommendations for road improvements near the project failed to give the public sufficient access to recreational facilities, the Commission would review the need for measures such as extending the project boundary to include road segments in need of enlargement. The licensee sought a declaratory judgment as to whether "the Commission [had] the authority to extend the project boundary in order to require a licensee to undertake road improvements to ensure the public adequate access to and use of project recreational facilities."¹⁶³ The Commission held that it had such authority, citing section 10(a) of the Federal Power Act.¹⁶⁴ It stated that reasonable provision for access to project recreational facilities is an inherent part of a licensee's recreational development responsibilities, but explained that the extent of a licensee's obligations to provide public access for recreational purposes at any particular project would be based on the Commission's judgment as to what is reasonable in light of the facts present in each case.¹⁶⁵ On rehearing the Commission further emphasized that the range of properties encompassed by a license is necessarily much broader than mere physical structures and obviously included lands and property necessary to construct, maintain or operate project works and necessary to provide for the beneficial public uses required by section 10(a) of the Act.¹⁶⁶

In *Ada County*,¹⁶⁷ the Commission clarified that a licensee could acquire

160. 30 F.E.R.C. ¶ 61,052 (1985).

161. *Id.* at 61,081 n.3 (citing *City of Ukiah v. FERC*, 729 F.2d 793, 799 (D.C. Cir. 1984)).

162. 31 F.E.R.C. ¶ 61,014, *reh'g denied*, 32 F.E.R.C. ¶ 61,237 (1985).

163. *Id.* at 61,027.

164. 16 U.S.C. § 803(a) (1982).

165. 31 F.E.R.C. at 61,027.

166. 32 F.E.R.C. at 61,561.

167. 33 F.E.R.C. ¶ 61,046 (1985).

the lands necessary for construction, operation or maintenance of a project either by acquiring title in fee or by acquiring the right to use such land in perpetuity. A conveyance of the right to use such lands in perpetuity, by the owner to the licensee, would comply with this requirement.

2. Joint Relicensing Under A Settlement Agreement

In *Montana Power Co.*,¹⁶⁸ the Commission approved a settlement agreement providing for a novel resolution of a relicensing dispute. Under the terms of the settlement, a joint license was issued to the original licensee and its relicensing competitor, a group of Native American Tribes. The original licensee would hold and operate the project for the first 30 years while the Tribes, upon payments and additions, would hold and operate the project for the balance of the 50 year license term. The original licensee would undertake to train tribal members to operate the project beginning five years before conveyance. The annual charge payable to the Tribes for use of their land during the first 30 years of the license was fixed initially, but would be automatically adjusted annually to reflect changes in the Consumer Price Index.

3. Miscellaneous Licensing And Permit Conditions

Until mid-1985, preliminary permits for certain projects were issued for periods of less than 36 months. The orders issuing those permits routinely contained the following boilerplate language:

The proposed project is considered a small scale development. Feasibility studies for small projects are limited in scope and should not require the maximum term for a preliminary permit (36 months) permitted under the Act. Therefore, the term of this permit is limited to 18 months. Review of this project indicates that this permit term should be fully adequate to complete the necessary studies if they are pursued expeditiously. Extension of the term of this permit will not be granted, except in unusual circumstances where good cause for extension is clearly demonstrated.¹⁶⁹

Beginning in the last week of July, 1985, that boilerplate language disappeared and all subsequent permits, as far as can be determined, have been issued for a full term of 36 months.

IV. EXEMPTIONS

A. Property Interests

The Commission's regulations governing applications for exemptions from licensing¹⁷⁰ require that the applicant hold real property rights necessary for development of the project at the time the application is filed.¹⁷¹ In 1985, the Commission continued its practice of strictly construing this requirement by

168. 32 F.E.R.C. ¶ 61,070, *amended on reconsideration*, *id.* ¶ 61,460 (1985).

169. See, e.g., *Weyerhaeuser Co.*, 32 F.E.R.C. ¶ 62,188 (1985) (thought to be the last order to contain that language).

170. 18 C.F.R. §§ 4.90-4.96, 4.101-4.113.

171. E.g., *North American Hydro, Inc.*, 32 F.E.R.C. ¶ 61,419 (1985) (resolution by county and letter from county's district attorney evidencing intent to enter lease conveying real property interests necessary for project are insufficient for purposes of exemption application).

rejecting applications when a contesting party or competitor demonstrates that a non-frivolous dispute exists regarding an applicant's possession of such rights. "The Commission is not the proper forum to settle such disputes, nor does the purpose underlying exemptions from licensing accommodate the potentially lengthy process of sifting through the competing claims."¹⁷²

In *South Fork Hydroelectric Association*,¹⁷³ the Commission affirmed the Deputy Director, Office of Hydropower Licensing's dismissal of an exemption application where the applicant had included in its project a "prescriptive easement" authorizing the use of an access road located on an adjoining landowner's property. At the time the application was filed, the existence of this easement was the subject of a lawsuit in state court. The Commission therefore held that because the use of the access road was a part of the application and the existence of the applicant's easement was in issue, dismissal was proper.

Possession of water rights is not required for certain exemptions, however. In *Electro Technologies, Ltd.*,¹⁷⁴ mentioned above in the discussion regarding the Order No. 413 changes in regulations relating to applications, the Commission clarified that applicants for conduit exemptions did not need to own necessary water rights to otherwise qualify for an exemption.

In addition to discussing what must be included in an acceptable exemption application, the Commission also discussed what must not be included. Thus, in *City of Haines*,¹⁷⁵ the Commission affirmed rejection of an exemption application where the proposed project would use some of the project works (the forebay impoundment) included in another licensed project. The Commission's regulations, 18 C.F.R. § 4.103(c) [now § 4.103(b)], provided that the Commission would not accept for filing an exemption application for a project that is part of a licensed power project.

B. Natural Water Feature Exemption After Tulalip

Following the Ninth Circuit Court of Appeal decision, *Tulalip Tribes of Washington v. FERC*,¹⁷⁶ which invalidated the "natural water feature" exemption rule, the Commission issued in June, 1984 four orders resolving the status of issued and applied for natural water feature exemptions.¹⁷⁷ In *Snowbird*,¹⁷⁸

172. Foundry Assocs., 33 F.E.R.C. ¶ 61,118 at 61,254 (1985) (citing Ted Lance Slater, 21 F.E.R.C. ¶ 61,234 (1982)). In *Foundry Associates*, the exemption application was denied not only because of the dispute over property rights, but also because the dam to be used for the project was built in 1979 to replace (30 feet upstream), a deteriorating impoundment structure, and therefore was not an "existing dam" under section 408(1)(6) of PURPA and section 4.30(b)(6)(ii) of the Commission's regulations.

173. 30 F.E.R.C. ¶ 61,110 (1985).

174. 33 F.E.R.C. ¶ 61,299 (1985).

175. 31 F.E.R.C. ¶ 61,200 (1985).

176. 732 F.2d 1451 (9th Cir. 1984). In its natural water feature rule, the FERC had permitted certain projects utilizing dams or impoundments to qualify for exemptions. The Ninth Circuit held that this was contrary to the intent of section 408 of the Public Utility Regulatory Policies Act of 1978, as amended by the Energy Security Act of 1980, 16 U.S.C. § 32,705 (1982), 2708(b) because the underlying statutes expressly excluded from exemption any project which utilizes "any dam or impoundment," 16 U.S.C. § 2708(b) (1982).

177. Pigeon Cove Power Co., 28 F.E.R.C. ¶ 61,064 (1984) (hereinafter "*Pigeon Cove I*"), Forward Power and Energy Co., *id.* ¶ 61,063 (1984); Eagle Power Co., *id.* ¶ 61,061 (1984) (hereinafter "*Eagle Power I*"); Snowbird, Ltd., *id.* ¶ 61,062 (1984).

the Commission dismissed all unaccepted applications for natural water feature exemptions deemed invalid under *Tulalip* and gave accepted exemption applicants 120 days to either convert their applications to license applications or amend them to comply with *Tulalip*, provided the applicant informs the Commission of its intent to do so within 30 days. In this same order, it held failure to comply with the 30-day notice requirement would result in automatic dismissal of the exemption application.¹⁷⁹ In *Forward Power and Energy Co.*,¹⁸⁰ the Commission held that *Tulalip* should not be applied retroactively to exempted projects constructed and operating as of May 10, 1984, the date of the Ninth Circuit decision. In *Pigeon Cove Power Co.*,¹⁸¹ the Commission enumerated those projects subject to issued exemptions or pending exemption applications which it determined were in compliance with the statutory definition of natural water feature and were therefore not affected by *Tulalip*. Finally, in *Eagle Power Co.*,¹⁸² the Commission declined to give *Tulalip* retroactive effect with respect to exempted projects under physical construction as of May 10, 1984.

In its 1984 *Eagle Power II* decision,¹⁸³ the Commission addressed applications for rehearing with respect to *Eagle Power I* and *Snowbird* and reaffirmed its refusal to give *Tulalip* retroactive application to projects under physical construction or operating as of May 10, 1984:

We chose commencement of physical construction as the critical point in our retroactivity analysis because, if exemption holders were forced to halt development after starting construction, we reasoned that there would be an unacceptably high risk of adverse environmental effects. . . . [W]e considered physical construction to encompass significant activities, the commencement (and the interruption) of which would have environmental and financial consequences, such as construction of project works, site clearing or grading, construction or rehabilitation of access roads, clearing paths for penstocks or transmission lines, and the like.¹⁸⁴

In *Pigeon Cove II*,¹⁸⁵ the Commission responded to claims that it failed to articulate the criteria used to determine which projects were unaffected by *Tulalip* and that certain projects deemed eligible for exemption under *Pigeon Cove I* were inconsistent with the limits placed on the natural water feature rule by the Ninth Circuit. The Commission rejected the rehearing requests and defended its earlier determination that diversion and intake structures that extend only partially across a stream and that do not significantly block the natu-

178. 28 F.E.R.C. ¶ 61,062 (1984).

179. In *Northeast Hydro, Inc.*, 32 F.E.R.C. ¶ 61,027 (1985), the Commission denied an appeal of the Director, Office of Hydropower Licensing's dismissal of an exemption application where the applicant had failed to comply with the 30-day notice requirement. In *Pankratz Lumber Company*, 31 F.E.R.C. ¶ 61,076, 32 F.E.R.C. ¶ 61,462 (1985), the Commission held that an exemption applicant whose application has been rejected prior to the *Tulalip* decision was not entitled to the equitable right to convert or amend as provided for in *Snowbird*.

180. 28 F.E.R.C. ¶ 61,063.

181. *Id.* ¶ 61,064.

182. *Id.* ¶ 61,061.

183. 30 F.E.R.C. ¶ 61,254, 31 F.E.R.C. ¶ 61,314 (1985). No application for rehearing of the *Forward Power and Energy Co.* decision was filed.

184. 30 F.E.R.C. ¶ 61,254 at 61,519 (footnotes omitted).

185. *Pigeon Cove Power Co.*, 30 F.E.R.C. ¶ 61,253 (1985).

ral flow are not dams and therefore are eligible for exemptions:

"[c]atch-basins unbedded in the stream bed, and perforated pipes, catch-basins, and small wingwalls located on the bank of the stream essentially act as intakes through which water flows to a turbine. Even a project located at a waterfall or perched lake must use some such design to capture water. It is quite plain that these designs do not come within the plain meaning of the terms "dams" or "impoundment" and the natural water feature exemption remained intact for those projects, after examination on a case-by-case basis.¹⁸⁶

C. Long Penstocks

In a dissent to an otherwise routine order granting exemption from licensing, Commissioner Stalon proposed that the Commission modify its exemption regulations to preclude exemption applications which propose the use of penstocks in excess of 500 feet in length.¹⁸⁷ The Commissioner recommended that this limitation be adopted because a penstock, by removing water from the natural flow of the stream, subjects fish and wildlife resources, cultural resources, and scenic values to economic detriment. Reliance upon the mandatory conditioning authority of state and federal fish and wildlife agencies is insufficient because such conditions are designed to insure "minimum" water flow levels to ensure the survival of the species. The Commission has an independent responsibility to insure that the Congressionally-mandated intent to limit exemptions to environmentally benign projects is not eroded by recent technological developments which now permit economic construction of penstocks several miles in length.

V. MISCELLANEOUS DEVELOPMENTS

A. Practice and Procedure

1. Late Filings

As a general rule it is receipt by the Commission, and not mailing by the submitter, that constitutes submission for filing.¹⁸⁸ From this principle, the Commission has generally held those submitting documents responsible for assuming the risk that a document mailed to the Commission might not arrive on time or might not arrive at all.¹⁸⁹ In 1985 the Commission held two entities to this rule, while making exceptions for four others under the extraordinary circumstances exception Rule 2008(b), 18 C.F.R. § 385.2008(b). The outcomes tended to rest on whether the applicant could provide proof of mailing, whether there was actual (although late) receipt of the document, and the equities present in each particular situation.

In *New York State Energy Research and Development Authority*,¹⁹⁰ the

186. *Id.* at 61,501 (footnote omitted).

187. Cameron A. Curtiss, 32 F.E.R.C. ¶ 61,498 (1985).

188. Milton Zack, 21 F.E.R.C. ¶ 61,123 (1982).

189. City of Gillette, 32 F.E.R.C. ¶ 61,221 (1985).

190. 30 F.E.R.C. ¶ 61,177 (1985).

Commission granted a motion to allow a competing license application to be filed one day late. The applicant originally had delivered the application to an overnight delivery service five days in advance of the filing deadline. The service first delivered the package to the wrong city and, on its second attempt, failed to deliver it because the suite number was missing from the address. On the deadline date, the applicant tendered another copy of its application package to a same-day delivery service, whose courier's car was towed while he was picking up the package at the airport. Both packages ultimately arrived at the Commission one day late, at which time the staff rejected it as untimely. The Commission, however, allowed the untimely filing because the applicant made a good faith effort to dispatch its application well in advance of the filing deadline and selected an appropriate means of delivery in light of the time constraints.¹⁹¹

Similarly, in *Thomas A. Nelson*,¹⁹² the Commission overturned the staff's rejection of an untimely submission to correct deficiencies in a license application. There, the applicant submitted the materials by express mail one day before the filing deadline. The Post Office had promised next day delivery (and so stated in a letter to the Commission), but the package was delivered four days late and it took two more days before the Commission's dockets section timestamped it as filed. The Commission nevertheless treated the submission as timely, because the applicant had selected an appropriate means of delivery and relied on the Postal Service's guarantee of next day delivery.

The Commission again accepted a late delivery—this time revisions to a permit application—in *Kittitas Reclamation District*,¹⁹³ citing the same considerations discussed above. In *Kittitas*, the applicant had posted its submission by certified mail three days in advance of the deadline. It arrived one day late.

The Commission made a special exception, based on equitable grounds, to overturn the staff's dismissal of an untimely filed license application in *Gerald Ohs*.¹⁹⁴ In that case the applicants had originally been granted an exemption for their project, which was subsequently invalidated by the Ninth Circuit Court of Appeals' decision in *Tulalip Tribes*, discussed above. The applicants then filed conversion license applications in accordance with *Eagle Power*, also discussed above, for which the staff requested additional information. The applicant claimed that it mailed the requested information twice; once four days before the deadline and again a month after the deadline when staff informed the applicant that the first submission had not been received. Neither package arrived. The Commission stated that these circumstances alone did not constitute an extraordinary circumstances necessary to justify accepting an untimely filing. However, because the applicants had already undergone hardships and undertaken a number of financial commitments because of the need to convert their exemption to a license application after *Tulalip*, their appeal of the dismissal was granted.¹⁹⁵

191. *Id.* at 61,363.

192. 31 F.E.R.C. ¶ 61,110 (1985).

193. 32 F.E.R.C. ¶ 61,245 (1985).

194. 33 F.E.R.C. ¶ 61,266 (1985).

195. *Id.* at 61,537.

The *Tulalip* decision was also implicated (but not instrumental in the decision) in another dispute over untimely filings, but in that case the applicant was not successful. *Northeast Hydro Inc.*,¹⁹⁶ involved a dispute between a permit applicant and an exemption applicant, both of whose applications were initially accepted. After the Court of Appeals decision in *Tulalip*, however the Commission invited the exemption applicant to convert to a license application or to amend its exemption application in accordance with the procedures outlined in *Snowbird*, discussed above. The Commission's records indicated that the *Snowbird* decision was served by mail on the exemption applicant, to its correct address. The exemption applicant claimed that it never received a copy of the decision, however. Not having received a notice of intent to file a license application by the deadline established in *Snowbird*, the staff dismissed the exemption application and issued a preliminary permit for the project to the competitor. The exemption applicant then appealed for equitable relief, essentially asking the Commission to extend the deadline for filing a notice of intent.

The Commission explained that service was effectuated when the *Snowbird* decision was deposited in the mail, creating a rebuttable presumption that it was received by the addressee. The applicant's single, brief affidavit attesting to non-receipt was insufficient to rebut that presumption. Of equal weight was the fact that a permit had already been issued to the competitor for the same site. The Commission stated:

The integrity of our regulatory process depends, in large part, upon the degree of finality and certainty that parties may assign to Commission action. [The competitor's] preliminary permit was a valid and binding Commission action on which [it] should be entitled to rely for its budgetary and regulatory commitments. In our opinion, sufficient cause has not been shown to justify disturbing the public confidence in, and reliance on, our adjudicatory action.¹⁹⁷

A late filing competitor for a permit was also unsuccessful in *City of Gillette*.¹⁹⁸ In that case the applicant mailed a notice of intent to file a competing permit application. The notice never arrived. When the applicant subsequently filed the permit application, it was rejected as untimely. The applicant immediately objected to the rejection by means of a letter to the Director of the Office of Hydropower Regulation, but not by a formal appeal to the Commission in conformance with the regulations. A formal appeal was eventually filed six months later and rejected as untimely. The permit was issued to the original applicant.

The court of appeals instructed the Commission to address the reasons asserted by the competitor to justify a waiver of the regulations requiring a timely filing of a notice of intent. On remand, the Commission held that it was reasonable and fair to hold the competitor responsible for assuming the risk that a document mailed to the Commission might not arrive on time. Similarly, the Commission found no convincing reason to waive its regulations and allow the late-filed appeal to the staff's rejection of its permits application.¹⁹⁹

196. 32 F.E.R.C. ¶ 61,207 (1985).

197. *Id.* at 61,088.

198. *Id.* ¶ 61,221 (1985).

199. *Id.* at 61,507-08.

2. Stay of License Order

In *Kings River Conservation District*,²⁰⁰ the Commission responded to an intervenor's claim that the Commission had no authority to stay a license order pending completion of judicial review of the license order in the court of appeals. The intervenor claimed that, under section 313(c) of the Federal Power Act,²⁰¹ only the court of appeals could stay the license. The Commission disagreed. It found first that it had authority to issue a stay under section 309 of the Act, which provides in pertinent part:

The Commission shall have the power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this Act.²⁰²

Similarly, section 705 of the Administrative Procedure Act,²⁰³ provides that "[w]hen any agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review." On the other hand, while section 313(b) of the Federal Power Act gives the court of appeals exclusive jurisdiction to affirm, modify, or set aside a Commission order, nothing in section 313(b) or 313(c) diminishes the Commission's power to issue a stay of a license order under section 309. The Commission concluded that it retained the right to stay its orders even when an order is challenged in the court of appeals.²⁰⁴ Moreover, the stay was valid even though it was issued after the day by which the licensee was to commence construction under its license because the licensee had requested the stay well in advance of that deadline.²⁰⁵

Less than a week later, the Commission stayed certain aspects of another license, this time acting on its own motion. In *City of Vidalia*,²⁰⁶ (also discussed above in section I.B., "License Transfers"), the Commission stayed the date by which a licensee would otherwise be required to commence construction, pending resolution of the competitive license transfer proceedings discussed above. The Commission again cited section 309 of the Federal Power Act for its authority to issue this stay to maintain the status quo pending completion of the competitive license transfer proceeding. It noted, however, that a stay requested merely to relieve a licensee from the statutorily prescribed commencement of construction deadline would not be viewed in the same light.²⁰⁷

3. Waiver Of Regulations Regarding Amendments To Applications And Date of Acceptance

Under section 4.35 of the Commission's regulations, 18 C.F.R. § 4.35, if an applicant amends its final license application to materially amend the proposed plans of development—including a change in the location of the power-

200. 30 F.E.R.C. ¶ 61,151 (1985).

201. 16 U.S.C. § 8251(c) (1982).

202. *Id.* § 825h.

203. 5 U.S.C. § 705 (1982).

204. 30 F.E.R.C. at 61,320.

205. *Id.*

206. *Id.* ¶ 61,158 (1985).

207. *Id.* at 61,334-35 n.4.

house—the Commission will change the date of acceptance of the application to the date of the amendment. In *South Fork Resources*,²⁰⁸ a license applicant filed an amendment proposing to relocate its powerhouse. The Commission noted that the proposed relocation occurred as a result of consultations and negotiations with various agencies and affected parties for the sole purpose of improving the environmental and aesthetic aspects of the project. Under those circumstances, it would not be equitable to penalize the license applicant for its efforts to make those improvements and for cooperating with the other entities concerned.²⁰⁹ It is worth noting, however, that the license applicant was competing only with two preliminary permit applicants and that under section 4.33(f) of the Commission's regulations, 18 C.F.R. § 4.33(f), the license application would have been preferred over the permit applications regardless of the filing dates.

4. Attorney's Fees—*Hirschey v. FERC*

Mary Jane Ruderman Hirschey filed an application for an exemption in December, 1981, which became effective on June 7, 1982. On July 20, 1982, the Commission, *sua sponte*, issued an order vacating the exemption. Ms. Hirschey's first petition for review to the court of appeals was rejected for failure to exhaust administrative procedures. In her second appeal, the court upheld her claim to an exemption.²¹⁰ She then applied for an award of attorneys fees and costs pursuant to the Equal Access To Justice Act (EAJA).²¹¹ The court of appeals held that attorneys' fees may be granted under the EAJA, but that an award of costs was barred by section 317 of the Federal Power Act.²¹² On the fee issue in *Hirschey v. FERC*,²¹³ the court remanded the fee request to the Commission for initial determination as to whether the agency proceedings were an "adversary adjudication" for which attorneys' fees were available.²¹⁴ When the case returned to the court of appeals, it held that Hirschey (1) was not entitled to fees for her original proceedings before the Commission, including her unsuccessful opposition to intervention by a competitor, (2) was not entitled to all of the fees relating to her first (unsuccessful) appeal because she was not a "prevailing party" in that action, but that she was eligible for a portion of those fees because some of the research done there was useful in the subsequent successful appeal; and (3) was entitled to award of reasonable fees incurred for work connected with her successful EAJA action.²¹⁵

5. Service To Parties

The consequences of untimely filing have already been discussed above. In 1985 the Commission also discussed its own obligations to serve documents on

208. 31 F.E.R.C. ¶ 61,151 (1985).

209. *Id.* at 61,289.

210. 701 F.2d 215 (D.C. Cir. 1983).

211. 28 U.S.C. § 2412 (1982).

212. 16 U.S.C. § 825p (1982).

213. 760 F.2d 305 (D.C. Cir. 1985).

214. *Id.* at 310-11.

215. 777 F.2d 1 (D.C. Cir. 1985).

participants. In *Jamaica Waterpower Company*,²¹⁶ the Director of the Office of Hydropower Licensing had requested, by means of a letter, additional information from a license applicant. The applicant appealed, stating that its application had included the names of two agents authorized to receive copies of correspondence with the Commission, a Washington counsel and a Vermont counsel. The Director's request for information had been sent only to one of the agents, who apparently mishandled it. Under these circumstances, the Commission agreed that the applicant had shown good cause for excusing its failure to respond to the Director's letters, and reinstated its application:

In its application, [the applicant] listed two agents for service to protect itself from what happened here—the failure of one agent to properly handle incoming mail. We believe that the Office of Hydropower Licensing should serve all agents designated by an applicant in its application with any correspondence with respect to that application. We therefore shall grant [applicant's] appeal and direct the Director, Office of Hydropower Licensing, to henceforth mail all such communications with applicants to all agents designated in their applications.²¹⁷

In two other cases, *Douglas Mendenhall*²¹⁸ and *Kings River Conservation District*,²¹⁹ the Commission was confronted with a question that it had not been before specifically addressed: the post-issuance status of entities who enjoyed party status prior to the issuance of a final permit, license or exemption order. In each of those cases, the Director had approved certain actions by a permittee or licensee. In each case, these approvals were subsequently appealed by entities that had been granted intervenor status during the prior permit or license application proceedings, asserting that they had not been served with the relevant documents (compliance reports in *Kings River*; request for extension of time in *Douglas Mendenhall*), in violation of Commission Rule 2010, 18 C.F.R. § 385.2010. In each case the Commission, to avoid the possibility of unfairness, granted the intervenors 15 days to provide specific and detailed objections to the orders that were the subject of their appeals. The Commission also stated that it would consider alternative methods for dealing with such situations in the future.²²⁰ As of early March, however, the Commission had not announced a plan for resolving such situations.

B. Miscellaneous Rulemakings—Deletion of Filing Requirement for FERC Form No. 80, Order No. 419

By a final rule issued May 10, 1985, the Commission amended its regulations to eliminate the filing requirement for FERC Form No. 80.²²¹ FERC Form No. 80, entitled "Licensed Hydropower Development Recreation Report," would otherwise have had to be filed by April 1, 1987 by all licensees of projects under major or minor licenses. The Commission determined that Form

216. 32 F.E.R.C. ¶ 61,149 (1985).

217. *Id.* at 61,376.

218. 33 F.E.R.C. ¶ 61,383 (1985).

219. *Id.* ¶ 61,384 (1985).

220. *Id.* at 61,742-43.

221. *Deletion of a 1987 Filing Requirement for FERC Form No. 80*, Order No. 419, 50 Fed. Reg. 19,912 (May 13, 1985).

No. 80 would not be required in light of the availability of similar data from alternative sources, such as input from interested agencies and members of the public and staff inspection.

C. FERC Delay

In December, oral argument was heard in *City of Santa Clara v. FERC*, No. 85-1084 (D.C. Cir.). The case was filed in February as a petition for mandamus to compel action unreasonably delayed. A competing applicant in a pending relicensing proceeding sought to compel the Commission to schedule a hearing.

The D.C. Circuit's jurisdiction to hear such a petition was established in *Telecommunications Research and Action Center v. FCC*.²²² This case held that, for agencies' final actions which are reviewed exclusively by the Courts of Appeals, the appellate court also has exclusive jurisdiction to hear actions affecting future review jurisdiction, including claims of unreasonable delay. In *In re GTE Service Corp.*,²²³ the court clarified the internal procedures it would apply to applications for writs of mandamus to compel agency action unreasonably delayed. Such petitions would be treated as petitions for review, that is, not given expedited action nor preliminary review by a motions panel. If immediate consideration were desired, an appropriate additional motion should be filed.

David P. Yaffe, *Chairman*

Christopher D. Williams, *Vice Chairman*

Peyton G. Bowman, III

Thomas P. Brown, Jr.

Joel L. Greene

Barbara S. Jost

Peter B. Kelsey

Peter C. Kissel

Amy S. Koch

Peter C. Lesch

Marcia B. Libes

Michael N. McCarty

Robert R. Nordhaus

Marc R. Poirier

Louis Rosenman

Thomas C. Watson

222. 750 F.2d 70 (D.C. Cir. 1984). *Telecommunications Research* held that such jurisdiction over a mandamus action was exclusive to the court of appeals. However, section 317 of the Federal Power Act, 16 U.S.C. § 825p, states that "The District Courts of the United States . . . shall have exclusive jurisdiction . . . of all suits . . . brought to enforce liability or duty created by . . . this Act or any rule, regulation, or order thereunder." This provision does not appear to have been used to assert jurisdiction in the District Courts over mandamus actions, however.

223. 762 F.2d 1024, 1026 n.5 (D.C. Cir. 1985).