

application. For this purpose, five copies of the draft application should be submitted to the Director of the Division of Project Management. An applicant or prospective applicant may confer with the Commission staff at any time regarding deficiencies or other matters related to its application. All conferences are subject to the requirements of § 385.2201 of this chapter governing ex parte communications. The opinions or advice of the staff will not bind the Commission or any person delegated authority to act on its behalf.

(i) Intervention in any preliminary permit proceeding will not constitute intervention in any subsequent licensing or exemption proceeding.

(j) Any application, the effectiveness of which is conditioned upon the future occurrence of any event or circumstance, will be rejected.

[Order 413, 50 FR 11678, Mar. 25, 1985, as amended by Order 480, 52 FR 37285, Oct. 6, 1987; Order 487, 52 FR 48404, Dec. 22, 1987; Order 499, 53 FR 27001, July 18, 1988; Order 533, 56 FR 23147, May 20, 1991; 56 FR 61155, Dec. 2, 1991; Order 540, 57 FR 21737, May 22, 1992]

#### § 4.33 Limitations on submitting applications.

(a) *Limitations on submission and acceptance of a preliminary permit application.* The Commission will not accept an application for a preliminary permit for project works that:

(1) Would develop, conserve, and utilize, in whole or in part, the same water resources that would be developed, conserved, and utilized by a project for which there is an unexpired preliminary permit.

(2) Would develop, conserve, and utilize, in whole or in part, the same water resources that would be developed, conserved, and utilized by a project for which an initial development application has been filed unless the preliminary permit application is filed not later than the time allowed under § 4.36(a) for the filing of applications in competition against an initial application for a preliminary permit that would develop, conserve, and utilize, in whole or in part, the same resources.

(b) *Limitations on submission and acceptance of a license application.* The

Commission will not accept an application for a license for project works that would develop, conserve, and utilize, in whole or in part, the same water resources that would be developed, conserved, and utilized by a project for which there is an unexpired preliminary permit, unless the permittee has submitted an application for license.

(c) *Limitations on submission and acceptance of an application for a license that would affect an exempted project.* (1) Except as permitted under § 4.33(c)(2), § 4.94(d), or § 4.106 (c), (e) or (f), the Commission will not accept an application for a license for project works that are already exempted from licensing under this part.

(2) If a project is exempted from licensing pursuant to § 4.103 or § 4.109 and real property interests in any non-Federal lands would be necessary to develop or operate the project, any person who is both a qualified license applicant and has any of those real property interests in non-Federal lands may submit a license application for that project. If a license application is submitted under this clause, any other qualified license applicant may submit a competing license application in accordance with § 4.36.

(d) *Limitations on submission and acceptance of exemption applications—(1) Unexpired permit or license.* (i) If there is an unexpired permit in effect for a project, the Commission will accept an application for exemption of that project from licensing only if the exemption applicant is the permittee. Upon acceptance for filing of the permittee's application, the permit will be considered to have expired.

(ii) If there is an unexpired license in effect for a project, the Commission will accept an application for exemption of that project from licensing only if the exemption applicant is the licensee.

(2) *Pending license applications.* If an accepted license application for a project was submitted by a permittee before the preliminary permit expired, the Commission will not accept an application for exemption of that project from licensing submitted by a person other than the former permittee.

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(3) *Submitted by qualified exemption applicant.* If the first accepted license application for a project was filed by a qualified exemption applicant, the applicant may request that its license application be treated initially as an application for exemption from licensing by so notifying the Commission in writing and, unless only rights to use or occupy Federal lands would be necessary to develop and operate the project, by submitting documentary evidence showing that the applicant holds the real property interests required under § 4.31. Such notice and documentation must be submitted not later than the last date for filing protests or motions to intervene prescribed in the public notice issued for its license application under § 4.32(d)(2).

(e) *Priority of exemption applicant's earlier permit or license application.* Any accepted 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 under this subpart until the preliminary permit or license application is withdrawn or the project is exempted from licensing.

[Order 413, 50 FR 11680, Mar. 25, 1985, as amended by Order 499, 53 FR 27002, July 18, 1988]

#### **§ 4.34 Hearings on applications; consultation on terms and conditions; motions to intervene; alternative procedures.**

(a) *Trial-type hearing.* The Commission may order a trial-type hearing on an application for a preliminary permit, a license, or an exemption from licensing upon either its own motion or the motion of any interested party of record. Any trial-type hearing will be limited to the issues prescribed by order of the Commission. In all other cases the hearings will be conducted by notice and comment procedures.

(b) *Notice and comment hearings.* All comments (including mandatory and recommended terms and conditions or prescriptions) on an application for exemption or license must be filed with the Commission no later than 60 days after issuance by the Commission of public notice declaring that the application is ready for environmental analysis. All reply comments must be filed

within 105 days of that notice. All comments and reply comments and all other filings described in this section must be served on all persons listed in the service list prepared by the Commission, in accordance with the requirements of § 385.2010 of this chapter. If a party or interceder (as defined in § 385.2201 of this Chapter) submits any written material to the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, the party or interceder must also serve a copy of the submission on this resource agency. The Commission may allow for longer comment or reply comment periods if appropriate. A commenter or reply commenter may obtain an extension of time from the Commission only upon a showing of good cause or extraordinary circumstances in accordance with § 385.2008 of this chapter. Late-filed fish and wildlife recommendations will not be subject to the requirements of paragraphs (e), (f)(1)(ii), and (f)(3) of this section, and late-filed terms and conditions or prescriptions will not be subject to the requirements of paragraphs (f)(1)(iv), (f)(1)(v), and (f)(2) of this section. Late-filed fish and wildlife recommendations, terms and conditions, or prescriptions will be considered by the Commission under section 10(a) of the Federal Power Act if such consideration would not delay or disrupt the proceeding.

(1) *Agencies responsible for mandatory terms and conditions and presentations.* Any agency responsible for mandatory terms and conditions or prescriptions for licenses or exemptions, pursuant to sections 4(e), 18, and 30(c) of the Federal Power Act and section 405(d) of the Public Utility Regulatory Policies Act of 1978, as amended, must provide these terms and conditions or prescriptions in its initial comments filed with the Commission pursuant to paragraph (b) of this section. In those comments, the agency must specifically identify and explain the mandatory terms and conditions or prescriptions and their evidentiary and legal basis. If ongoing agency proceedings to determine the terms and conditions or prescriptions