

appropriate action under this chapter or the Federal Power Act.

(h) A prospective applicant, prior to submitting its application for filing, may seek advice from the Commission staff regarding the sufficiency of the application. For this purpose, five copies of the draft application should be submitted to the Director of the Division of Hydropower, Environment and Engineering. 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.

(k) *Critical Energy Infrastructure Information.* (1) If this section requires an applicant to reveal Critical Energy Infrastructure Information (CEII), as defined in § 388.113(c) of this chapter, to any person, the applicant shall omit the CEII from the information made available and insert the following in its place:

(i) A statement that CEII is being withheld;

(ii) A brief description of the omitted information that does not reveal any CEII; and

(iii) This statement: "Procedures for obtaining access to Critical Energy Infrastructure Information (CEII) may be found at 18 CFR 388.113. Requests for access to CEII should be made to the Commission's CEII Coordinator."

(2) The applicant, in determining whether information constitutes CEII, shall treat the information in a manner consistent with any filings that applicant has made with the Commission and shall to the extent practicable adhere to any previous determinations by the Commission or the CEII Coordinator involving the same or like information.

(3) The procedures contained in §§ 388.112 and 388.113 of this chapter regarding designation of, and access to, CEII, shall apply in the event of a challenge to a CEII designation or a request for access to CEII. If it is determined that information is not CEII or that a requester should be granted access to CEII, the applicant will be directed to make the information available to the requester.

(4) Nothing in this section shall be construed to prohibit any persons from voluntarily reaching arrangements or agreements calling for the disclosure of CEII.

[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; Order 2002, 68 FR 51115, Aug. 25, 2003; Order 643, 68 FR 52094, Sept. 2, 2003; 68 FR 61742, Oct. 30, 2003]

§ 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 interfere with a licensed project in a manner that, absent the licensee's consent, would be precluded by Section 6 of the Federal Power Act.

(3) 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 submissions and acceptance of a license application.* The

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Commission will not accept an application for a license or project works that would develop, conserve, or utilize, in whole or part, the same water resources that would be developed, conserved, and utilized by a project for which there is:

(1) An unexpired preliminary permit, unless the permittee has submitted an application for license; or

(2) An unexpired license, as provided for in Section 15 of the Federal Power Act.

(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.

(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; Order 2002, 68 FR 51116, Aug. 25, 2003]

§ 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