

application should be found deficient and rejected if it attempts to use the licensee's studies for that purpose.

203. Given that the thrust of Section 31 is the enforcement of Commission requirements with respect to the construction, operation, and maintenance of licensed projects, and not the license application process, it is not clear that the section is applicable to licensees as potential applicants. In any event, we consider imposing civil penalties to be inappropriate in this context and do not propose to do so.

204. With respect to the concern raised by PG&E about the unfair use by a competitor of another competitor's work product, the Commission has pointed out that any improper use of a copyrighted filing is subject to remedy in an appropriate judicial forum.¹⁷⁸ There has not been an instance of a potential competitor copying another applicant's license application since the late 1980s,¹⁷⁹ and since ECPA was enacted in 1986, there have been but two instances of competing applications for a new license.¹⁸⁰ We are aware of only one instance where a potential competitor and an existing licensee have been involved in a dispute over whether an existing licensee should have to share with a potential competitor information required to be made public.¹⁸¹

205. In any event, as discussed below, we are requiring non-licensee potential applicants for a new license to file the NOI and PAD no later than the statutory deadline for an existing licensee to file its NOI.¹⁸² Under these circumstances, it will be difficult for a potential non-licensee competitor to game the regulations.

206. NHA similarly requests that we add to the regulations a requirement that as a condition of invoking the formal dispute resolution process agencies must agree to be bound by the Director's decision. This, NHA states, would ensure that the cost and effort of formal dispute resolution is not wasted. As just stated, we cannot bind states or Indian tribes with respect to the administration of their water quality

certification programs under the Clean Water Act. NHA does not moreover speak for a united industry on this issue. Several licensee commenters indicate that they may feel compelled to seek rehearing of the Director's decision, and we can see no distinction between a potential applicant, agency, or Indian tribe in this regard.

207. Finally, PG&E and SCE request that we modify the proposed rule to make clear that agencies and Indian tribes with mandatory conditioning authority may not invoke the Commission's dispute resolution processes and then use authorities they have under other statutes to require potential applicants to do information gathering or studies in addition to those the Commission requires. We cannot do this, for we have no authority to control the activities of these entities under other statutes. We do however fully expect these entities to participate in the integrated process in good faith in order that the Commission's decisional record will, to the extent reasonably possible, serve as the basis for the decisions of entities with conditioning authority, and that any additional information these entities may require is known early in the process.

I. Other Uses for Dispute Resolution

208. Washington DNR recommends that the Commission establish a conflict resolution process for disputes between potential applicants and the owners of lands on which a project would be located, and that the license application not be accepted until the conflict resolution process has run its course. Such a conflict is likely to occur only in the case of a new project proposal. We think it is inappropriate to hold processing of the application in abeyance until the concerns of one party are resolved. Affected landowners, like all interested entities, are encouraged to participate in the pre-filing consultation process and to intervene if a license application is filed. If the potential applicant and the landowner are not able to resolve any differences,¹⁸³ the Commission will do so in the context of its public interest analysis under the FPA.

209. Skagit recommends that we require tribal approval of consultants engaged by potential applicants for tribal cultural resources analysis. Nez Perce recommends that a dispute resolution process be made available for disagreements between Indian tribes and potential applicants over the

identity of consultants engaged by the potential applicant to do information gathering or studies related to tribal cultural resources because potential applicants sometimes engage persons who are not acceptable to the Indian tribe. As discussed in the NOPR, we agree that it is appropriate for potential applicants to consult with interested tribes concerning the identity of consultants and, indeed, it is in their best interest to do so, but we also think that applicants need flexibility in this regard and should not be required to obtain tribal approval before engaging a consultant.¹⁸⁴ We note however that our regulations require potential applicants and those in their service to protect sensitive cultural resources information from disclosure.¹⁸⁵

J. Evidentiary Hearings

210. A few licensee commenters¹⁸⁶ want the rules to provide that a party is entitled to an evidentiary hearing before an administrative law judge (ALJ) whenever there are disputed issues of fact.¹⁸⁷ They indicate that such hearings would not be for resolving study disputes, but for "disputed issues of fact material to disputed mandatory terms and conditions."¹⁸⁸ They state that such hearings would help foster settlements, and improve the quality and probative value of the record by encouraging resource agencies to support their terms and conditions, and help to limit post-license litigation. They add that such hearings should not delay the process because they would be narrowly focused on specified factual disputes and an ALJ decision could be rendered in about six months.

211. Substantially the same recommendation was made by some of the same commenters prior to the NOPR. We there stated that while we do not intend to change our general practice of resolving most hydroelectric licensing matters by means of notice and comment procedures, we are open to setting discrete issues of fact for hearing before an ALJ in appropriate circumstances, and will give due

¹⁷⁸ See *WV Hydro, Inc. and the City of St. Mary's*, WV, 45 FERC ¶ 61,220 (1988).

¹⁷⁹ *Id.*

¹⁸⁰ One case was *N.E.W. Hydro, Inc. and City of Oconto Falls, WI*, 81 FERC ¶ 1,238 (1997), *order on reh'g*, 85 FERC ¶ 61,222 (1998), *aff'd, sub nom. City of Oconto Falls, WI v. FERC*, 204 F.3d 1154 (D.C. Cir. 2000). The other was *Holyoke Water and Power Co., et al.*, 88 FERC ¶ 61,186 (1999). In neither case did the competitor prevail.

¹⁸¹ See P.U.D. No. 2 of Grant County, WA, 96 FERC ¶ 61,211 (2001) and ¶ 61,362 (2001). In that instance, the non-licensee potential competitor elected not to file a license application.

¹⁸² See Section III.S and 18 CFR 5.5(a).

¹⁸⁴ 68 FR at p. 14003; IV FERC Stats. & Regs. ¶ 32,568 at p. 34,718.

¹⁸⁵ See discussion of this issue in the NOPR; 68 FR at p. 14002; IV FERC Stats. & Regs. ¶ 32,568 at p. 34,717.

¹⁸⁶ NHA, WPPD, Idaho Power, EEL, NEU.

¹⁸⁷ EEL recommends that the regulations include the following language from APA Section 556(d): "a party is entitled to present his case or defense by oral or documentary evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts."

¹⁸³ We note that the Commission's Dispute Resolution Service is available to assist willing parties to resolve disagreements.

¹⁸⁸ EEL, p.15. Such a rule would however also logically apply to disputed facts pertaining to license conditions originating with the Commission staff.