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FERC VOLUNTARY LICENSING OF HYDROELECTRIC PROJECTS ON FRESH WATERS IN THE STATE OF HAWAII

APRIL 27 (legislative day, APRIL 24), 1995.—Ordered to be printed

Mr. MURKOWSKI, from the Committee on Energy and Natural Resources, submitted the following

REPORT

[To accompany S. 225]

The Committee on Energy and Natural Resources, to which was referred the bill (S. 225) to amend the Federal Power Act to remove the jurisdiction of the Federal Energy Regulatory Commission to license projects on fresh waters in the State of Hawaii, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

PURPOSE OF THE MEASURE

The purpose of S. 225 is to remove the authority of the Federal Energy Regulatory Commission to issue a voluntarily-requested license for hydroelectric projects located on fresh waters of the State of Hawaii.

BACKGROUND AND NEED

Section 4(e) of the Federal Power Act contains the Federal Energy Regulatory Commission's basic authority to issue a license for hydroelectric projects. Section 23(b) of the Federal Power Act requires the licensing of a hydroelectric project built after 1935 on navigable waters or affecting interstate commerce.

Section 4(e) has been interpreted by the courts as permitting the voluntary licensing of a hydroelectric project where licensing is not required by section 23(b). (*Cooley* v. *Federal Energy Regulatory Commission*, 843 F.2d 1464 (D.C. Cir. 1988)

S. 225 would amend the Federal Power Act to remove the jurisdiction of the Federal Energy Regulatory Commission to issue a

voluntarily-requested license for hydroelectric projects on fresh waters in the State of Hawaii. The policy justification for exempting Hawaii from the voluntary licensing provisions of the Federal Power Act is based on the uniqueness of Hawaii's situation.

The Hawaiian islands are over 2,000 miles from the nearest land mass. They are the most geographically isolated group of islands in the world.

Unlike the long interstate rivers of the continental United States, Hawaii's streams are isolated on individual islands and run quickly off steep volcanic slopes. Hawaii has a total of 376 streams that flow year-round in at least part of their course. These streams are located on five islands—Hawaii (132), Maui (90), Kauai (61), Oahu (57), and Molokai (36). Only twenty-eight are longer than ten miles and only seven have an average flow greater than 80 cubic feet per second. Hawaii's streams are generally not navigable except for a few which have brief wide stretches near their mounts as they open to the sea. There are no interstate rivers, few if any streams crossing Federal lands, and no Federal dams.

Over one-half of Hawaii's streams have been diverted for a variety of uses. Irrigating taro fields was the chief historic use of Hawaii's surface water. During the past century, irrigation of sugarcane and a booming tourist industry have become major water users.

The populations and distribution of native Hawaiian aquatic species are in decline due to stream modification and the introduction of non-native competitors and predators. Although Hawaiian streams contain a small number of native fish, insect, crustacean, and mollusk species, most are only found in Hawaii. The middle and lower sections of Hawaii's streams contain eight diadromous fauna (animals that migrate between fresh and salt water) and two euryhaline fishes (animals that exist in waters with varying levels of salt). All require access to the ocean. There are no native freshwater species.

The islands of Hawaii contain one-third of all listed threatened and endangered species. Eighteen species of threatened and endangered birds live in the riparian zone of 199 of Hawaii's 376 streams. Four of the species are waterbirds, and the rest are forest birds whose habitat include streams. Although none of the currently listed threatened and endangered plants are associated with Hawaiian streams, about 180 taxa and rare plants are associated with 86 of those streams.

Eighteen Hawaiian streams are listed on the nationwide inventory of potential wild, scenic, and recreational rivers. Seventeen are listed because of outstanding scenic value. Four are listed because of outstanding recreational value. Ten perennial, four intermittent and four minor streams pass through or along parts of the National Park System.

Hawaii's streams are subject to protection under Article XXII of the State Constitution, the State Water Code, and a comprehensive statewide stream assessment which serves as a basic for protecting stream resources. They are still subject to the Rivers and Harbors Act of 1899.

Only about 1.5 percent of the State's electric energy currently comes from hydroelectric power. The island of Kauai receives 16

percent its electricity from hydroelectric power. On the islands of Hawaii, Kauai, and Maui, there is a total of eighteen operating plants—sixteen run by sugar companies and two managed by a local utility. The combined capacity of the existing plants is only 18.5 megawatts (MW). The new 10 MW Wailuku River Project, which went into operation in 1993, is the only hydropower project built in Hawaii in the past fifty years. None are FERC-licensed projects.

The FERC estimates that there is about 50 MW of unused generated capacity in Hawaii, at twenty-eight potential sites. All of these potential sites would have a capacity of 5 MW or less, with the exception of a potential 11.7 MW site in the Wailua River Basin on Kauai. Nine operating plants are proposed, with a total potential generating capacity of 21 MW.

There are about 28 state permits and 30 to 35 county permits and approvals that are applicable to land and water use proposals. The Department of Land and Natural Resources has the primary responsibility for overseeing many of the regulatory programs involving hydropower development. Proposed hydroelectric projects are subject to a thorough review both when they seek to amend instream flow standards to obtain a State water lease and when they seek to obtain a Conservation District Use Permit.

Section 2408 of the Energy Policy Act of 1992 (Public Law 102–486) directed the Federal Energy Regulation Commission (FERC), in consultation with the State of Hawaii, to study hydroelectric licensing in Hawaii. The purpose of the study is to determine whether such licensing should be transferred to the state. Section 2408 required the FERC to analyze the following:

(1) the State regulatory programs applicable to hydroelectric power production and the extent to which such programs are suitable as a substitute for regulation of such projects under the Federal Power Act, taking into consideration all aspects of such regulation, including energy, environmental, and safety considerations;

(2) any unique geographical, hydrological, or other characteristics of waterways in Hawaii or any other aspects of hydroelectric power development and natural resource protection in Hawaii that would justify or not justify the permanent transfer of FERC jurisdiction over hydroelectric power projects to that State;

(3) the adequacy of mechanisms and procedures for consideration of fish and wildlife and other environmental values applicable in connection with hydroelectric power development in Hawaii under the state programs referred to in paragraph (1);

(4) any national policy considerations that would justify or not justify the removal of FERC jurisdiction over hydroelectric power projects in Hawaii; and

(5) the precedent-setting effect, if any, of provisions of law adopted by the Congress removing FERC jurisdiction over hydroelectric power projects in Hawaii.

On April 13, 1994, the FERC submitted its report to the House Committee on Energy and Commerce and to the Senate Committee on Energy and Natural Resources as required by section 2408. In addition to consulting with the State of Hawaii, the FERC solicited

the views of other Federal agencies involved with the regulations of hydropower projects. The report did not reach any overall conclusion as to whether the Federal Power Act should be amended to exempt projects on the fresh waters of Hawaii from FERC's jurisdiction. The FERC stated that the Commission will express no opinion on this issue because it properly falls within the purview of the Congress to decide.

S. 225 amends section 4(e) of the Federal Power Act to exempt projects on the fresh waters of the State of Hawaii from the voluntary licensing authority of the FERC.

S. 225 does not amend section 23(b) of the Federal Power Act which requires the licensing of hydroelectric projects built after 1935 on navigable waters or affecting interstate commerce or are located on federal lands or use water from a government dam.

LEGISLATIVE HISTORY

S. 225 was introduced by Senator Akaka on January 12, 1995. Last Congress, a broader measure, S. 2115, was introduced. A hearing was held on July 8, 1994, and it was reported by the Committee as part of S. 2384. S. 2384, as amended on the floor, passed the Senate on October 5, 1994. As amended, S. 2384 contained a provision identical to S. 225.

COMMITTEE RECOMMENDATION AND TABULATION OF VOTES

The Senate Committee on Energy and Natural Resources, in open business session on March 15, 1995, by a majority vote of a quorum present, recommends that the Senate pass the bill as described herein.

The rollcall vote on reporting the measure was 18 yeas, 0 nays, as follows:

YEAS	NAYS
Mr. Murkowski	
Mr. Hatfield [1]	
Mr. Domenici	
Mr. Nickles [1]	
Mr. Craig	
Mr. Thomas	
Mr. Kyl [1]	
Mr. Grams	
Mr. Jeffords [1]	
Mr. Burns	
Mr. Campbell	
Mr. Johnston	
Mr. Bumpers	
Mr. Ford	
Mr. Bradley	
Mr. Bingaman [1]	
Mr. Akaka	
Mr. Wellstone	

[1] Indicates vote by proxy.

COST AND BUDGETARY CONSIDERATIONS

The following estimate of costs of this measure has been provided by the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, March 30, 1995.

Hon. FRANK H. MURKOWSKI,
Chairman, Committee on Energy and Natural Resources,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed S. 225, a bill to amend the Federal Power Act to remove the jurisdiction of the Federal Energy Regulatory Commission to license projects on fresh waters in the State of Hawaii, as ordered reported by the Senate Committee on Energy and Natural Resources on March 15, 1995. CBO estimates that enacting the bill would have no net effect on the federal budget.

The bill would provide exemptions for certain hydroelectric projects currently subject to licensing by the Federal Energy Regulatory Commission (FERC). These provisions may have a minor impact on FERC's workload. Because FERC recovers 100 percent of its costs through user fees, any change in its administrative costs would be offset by an equal change in the fees that the commission charges. Hence, the bill's provisions would have no net budgetary impact.

Because FERC's administrative costs are limited in annual appropriations, enactment of this bill would not affect direct spending or receipts. Therefore, pay-as-you-go procedures would not apply to the bill. In addition, CBO estimates that enacting the bill would have no significant impact on the budgets of state or local governments.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Kim Cawley.

Sincerely,

JUNE E. O'NEILL, *Director.*

REGULATORY IMPACT EVALUATION

In compliance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee makes the following evaluation of the regulatory impact which would be incurred in carrying out this measure.

The bill is not a regulatory measure in the sense of imposing Government-established standards or significant economic responsibilities on private individuals and businesses.

No personal information would be collected in administering the provisions of the bill. Therefore, there would be no impact on personal privacy.

Little, if any additional paperwork would result from the enactment of this measure.

EXECUTIVE COMMUNICATIONS

The pertinent communications received by the Committee from the Federal Energy Regulatory Commission setting forth Executive agency relating to this measure are set forth below:

FEDERAL ENERGY REGULATORY COMMISSION,
Washington, DC, March 14, 1995.

Hon. FRANK H. MURKOWSKI,
Chairman, Committee on Energy and Natural Resources,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: Thank you for your letters of February 27 and March 2, 1995, and Committee staff's inquiries of March 13 and 14, requesting my comments on a number of bills to allow for the extension of the construction deadlines applicable to nine hydroelectric projects licensed by the Federal Energy Regulatory Commission. Because it is my understanding that the Committee is scheduled to mark all these bills on March 15, I have combined my comments on these bills in one letter.

This letter also responds to your March 2, 1995 request for comments on S. 225, a bill to remove the Commission's jurisdiction to license projects on fresh waters in the State of Hawaii; and to Committee staff's March 13 request for comments on S. 522, a bill to exempt from Part I the Federal Power Act the primary transmission line for a project in New Mexico. The bills fall into four general categories. Each bill is discussed below.

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3. HYDROPOWER PROJECTS IN HAWAII

S. 225 would amend Section 4(e) of the Federal Power Act by inserting the following parenthetical limitation: "(except fresh waters in the State of Hawaii, unless a license would be required by section 23 of the Act)". These words would modify the reference to "several States," so as to partially limit the authority of the Commission to issue licenses under Section 4(e) with respect to proposed hydropower projects in Hawaii.

Section 4(e) of the FPA contains the Commission's authority to issue licenses for hydropower projects. Section 23(b)(1) sets forth the circumstances under which a project cannot be constructed, operated, or maintained without a license. In certain circumstances, the Commission has authority to issue a license for a hydropower project in response to a voluntary application under Section 4(e), even if licensing is not required under Section 23(b)(1). See *Cooley* v. *Federal Energy Regulatory Commission,* 843 F.2d 1464, 1469 (D.C. Cir. 1988).

Under S. 225, the Commission would continue to have jurisdiction to issue licenses to construct, operate, and maintain hydropower projects in Hawaii whenever Section 23(b)(1) would require a license for such activities. However, the Commission would be precluded from issuing a license for a project in Hawaii if Section 23(b)(1) did not require a license for such activities.

Pursuant to Section 2408 of the Energy Policy Act of 1992, the Commission on April 13, 1994, submitted to the Senate and House Committees a study of regulation of hydropower projects in Hawaii.

The study noted that the Commission has never licensed a hydropower project in Hawaii, and is thus not currently regulating any project in Hawaii. Therefore, enactment of S. 225 would not significantly disrupt the Commission's current operations. However, as noted in the study, there are two pending requests for rehearing of Commission decisions concerning proposals to develop a hydroelectric project to be located on the Hanalei River in Kauai County, Hawaii. In *Island Power Co.* (Docket No. EL87–5–001), an intervenor is seeking rehearing of a determination by the Director of the Commission's Office of Hydropower Licensing that the proposed project need not be licensed under Section 23(a)(1) of the FPA because of its effect on diadromous fish and anadromous shrimp. 42 FERC ¶ 62,129 (1988). In *Hanalei Hydropower, Inc.* (Project No. 11161), the State of Hawaii is seeking rehearing of the Director's issuance of a preliminary permit for the project pursuant to licensing authority under Section 4(e) of the FPA because of its location on a Commerce Clause water. 57 FERC ¶ 62,142 (1991).

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Thank you for offering me an opportunity to comment on bills affecting the Commission's hydropower program. If I can be of further assistance to you in this or any other Commission matter,

With best wishes,

Sincerely,

ELIZABETH A. MOLER, *Chair.*

CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill S. 225, as ordered reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

FEDERAL POWER ACT

The Act of June 10, 1920, Chapter 285

SEC. 4. * * *

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(e) To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation, organized under the laws of the United States, or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the [several States, or upon] *several States (except fresh waters in the State of Hawaii, unless a license would be required by section 23 of the Act), or upon any* part of the public lands and reservations of the United States (including

the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: *Provided,* That licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation. *Provided further,* That no license affecting the navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affecting navigation have been approved by the Chief of Engineers and the Secretary of the Army. Whenever the contemplated improvement is, in the judgement of the Commission, desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, a finding to that effect shall be made by the Commission and shall become a part of the records of the Commission: *Provided further,* That in case the Commission shall find that any Government dam may be advantageously used by the United States for public purposes in addition to navigation, no license therefor shall be issued until two years after it shall have reported to Congress the facts and conditions relating thereto, except that this provision shall not apply to any Government dam construction prior to June 10, 1920. And provided further, That upon the filing of any application for a license which has not been preceded by a preliminary permit under subsection (f) of this section, notice shall be given and published as required by the proviso of said subsection. In deciding whether to issue any license under this Part for any project, the Commission, in addition to the power and development purposes for which licenses are issued, shall give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality.

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