

**Testimony of
J. Mark Robinson
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Federal Energy Regulatory Commission
Before the
Subcommittee on Water and Power
Committee on Energy and Natural Resources
United States Senate**

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Madam Chairman and Members of the Subcommittee:

My name is J. Mark Robinson and I am the director of the Office of Energy Projects at the Federal Energy Regulatory Commission. Our office is responsible for the licensing, administration, and safety of non-federal hydropower projects; the certification of interstate natural gas pipelines and storage facilities; and the authorization, safety, and security of liquefied natural gas (LNG) terminals. I appreciate the opportunity to appear before you to comment on two bills: (1) S. 2070, a bill to provide certain requirements for hydroelectric projects on the Mohawk River in the State of New York; and (2) S. 3851, a bill that would allow extension of preliminary permit periods by the Federal Energy Regulatory Commission for the Thomas Bay projects in Alaska, defined as FERC Project Nos. 12495, 12619 and 12621.

I appear today as a Commission staff witness speaking with the approval of the Chairman of the Commission. The views I express are my own and not necessarily those of the Commission or of any individual Commissioner.

Under Part I of the Federal Power Act (FPA), the Commission issues licenses to non-federal interests authorizing the construction, operation and maintenance of water

power projects on navigable waters of the United States, on federal lands and on streams, over which the Congress has jurisdiction. Licenses are also required to utilize surplus water or waterpower from government dams.

Licenses are issued under the FPA for terms up to 50 years and contain conditions that reflect consideration of all environmental and developmental aspects of the project, including such factors as the effect of project construction and operation on fish and wildlife resources, irrigation, flood control, water supply, recreation, and the safety of the public. Section 15 of the FPA, authorizes the Commission, at the expiration of an existing license and where the United States does not exercise its right to take over the licensed project, to issue a new license to the existing licensee or to a new licensee. Where there is no federal takeover and where the Commission does not issue a new license before the existing license expires, the Commission must issue from year to year an annual license to the current licensee under the terms and conditions of the current license until the project is taken over or a new license is issued. Section 15(c)(1) provides that “[e]ach application for a new license pursuant to this section shall be filed with the Commission at least 24 months before the expiration of the term of the existing license.”

S. 2070

S. 2070 would require the Commission to accept other valid license applications, if submitted not later than July 31, 2006, to develop the project works or water resources of a hydroelectric project located on the Mohawk River in the State of New York that has been operating under annual licenses for 10 or more years. S. 2070

would require that the Commission expeditiously process any pending valid license applications and issue a license only if the Commission determines that the project will best develop the affected water resources. S. 2070 further requires that any such new license issued shall include the same license conditions relating to the use of affected waters provided in articles 32 and 33 of the license for Potomac Light & Power Company's Millville Project, FERC No. 2343. The Commission included Article 32 in the Millville license to reserve its authority to issue a license for a project that was recommended in a comprehensive plan by the Department of the Army, Corps of Engineers to be constructed downstream of the Millville Project and would more completely utilize the water resources of the Shenandoah River. Article 33 requires the Millville Project licensee to surrender its license if its project becomes inoperative by reason of inundation by a more complete hydroelectric project.

S. 2070 would affect one project licensing proceeding currently pending before the Commission. On December 23, 1991, Niagara Mohawk Power Corporation filed an application to relicense the 38.8-megawatt School Street Project, FERC No. 2539. The project is located at river mile 2.5 on the Mohawk River in Albany and Saratoga counties, New York.

Since the application was filed, the license was transferred to Erie Boulevard, LP (Erie). The School Street Project was among a group of 10 projects filed in 1991 by Erie's predecessor for which the New York Department of Environmental Conservation (New York DEC) denied Clean Water Act water quality certification, the grant or waiver of which is a prerequisite to the Commission issuing a hydropower license.

Following these denials, the state, along with Erie's predecessor and other interested parties, entered into settlement negotiations for each project. Settlement negotiations have been concluded for each of the 10 projects. The New York DEC has issued water quality certifications and the Commission has issued licenses for nine of the projects. The School Street Settlement Agreement, dated March 7, 2005, was signed by Erie and seven other parties including the New York DEC, although New York DEC has not yet issued water quality certification for the project. The School Street Project, the last of the 10 projects, has been operating under annual licenses since 1993.

In response to the draft water quality certification notice issued by New York DEC on March 7, 2005, Green Island Power Authority (GIPA) and the Town and Village of Green Island sought party status in the certification proceeding and challenged various aspects of the project. The water quality certification process before the New York DEC is currently undergoing adjudication proceedings. Because the New York DEC has not yet issued water quality certification for the project, the Commission has been unable to act on the School Street license application.

On July 19, 2004, GIPA filed an application for a preliminary permit to study the potential development of the 100-megawatt Cohoes Falls Project and asked the Commission to waive its regulations to the extent necessary to consider GIPA's application. As described in its application, the project would be located at the site of the existing School Street Project. GIPA proposes to construct, slightly downstream of the School Street Project's dam, a new dam, remove part of the existing School Street dam, and decommission various other facilities of the School Street Project.

On January 21, 2005, the Commission dismissed GIPA's application for preliminary permit for the proposed Cohoes Falls Project, stating that the statutory deadline established by FPA section 15(c)(1) for filing relicense applications for the Cohoes Falls Project (including competing applications) fell in 1991, 2 years before the School Street license would have expired, and that any development application GIPA might file would be more than 13 years late. Because such applications are not permitted by section 15(c)(1), the Commission found that there was no reason to process a preliminary permit to study a project for which an application cannot lawfully be filed.

On February 22, 2005, GIPA filed a timely request for rehearing which was denied by the Commission on March 24, 2005. Subsequently, GIPA filed an appeal of the Commission's orders with the U.S. Circuit Court of the District of Columbia. The appeal was voluntarily dismissed in December 2005.

On May 15, 2006, GIPA filed its offer of settlement in the proceeding to relicense Erie's School Street Project. GIPA's offer proposed two alternatives: (1) terminate Erie's license and dismiss its relicense application; or (2) issue a relicense to Erie that would terminate upon the licensing and construction by GIPA of its Cohoes Falls Project. GIPA attached to its offer of settlement an application for licensing the Cohoes Falls Project. By notice issued May 24, 2006, the Commission rejected GIPA's offer of settlement on the previously stated grounds that its competitive proposal was not filed within the time frame established by section 15(c)(1) of the FPA. On June 5, 2006, GIPA and Adirondack Hydro Development filed a motion to present evidence or,

in the alternative, offer of proof and if necessary, motion to reopen the record in the proceeding to relicense the School Street Project. The motion sought to put into the record GIPA's previously rejected pleading. As before, the Commission rejected the motion by notice issued June 28, 2006. Rehearings of both Commission notices are currently pending.

The FPA provides a complete and well-reasoned method for the orderly development of the nation's non-federal hydropower resources. It also provides hydropower licensees certainty regarding the period when competitive license applications may be filed. This bill would negate that certainty in the case of the School Street Project.

In addition, this bill would provide a special advantage to an entity which did not meet the requirements of the FPA to the disadvantage of an entity which met the statutory deadline. Approval of this bill could encourage applicants in other cases and locations to petition Congress for similar relief in order to promote their interests at the expense of the FPA's well-established procedures and of other existing licensees and could introduce further uncertainty into the licensing process.

As a result of these concerns, I do not support S. 2070.

S. 3851

This legislation provides that notwithstanding section 5 of the FPA or any other provision of law (including regulations), on receipt of a request from the preliminary permit holder of a Thomas Bay project and after providing reasonable notice, the Commission may extend the period for the Thomas Bay project for not more than two

consecutive three-year periods following the expiration of the initial preliminary permit for the Thomas Bay project, in accordance with applicable procedures of the Commission. S. 3851 defines the term “Thomas Bay project” as including: (1) the hydroelectric project of the Commission at Cascade Creek, Alaska, preliminary permit number 12495; (2) the hydroelectric project of the Commission at Ruth Lake, Alaska, preliminary permit number 12619; and (3) the hydroelectric project of the Commission at Scenery Lake, Alaska, preliminary permit number 12621.

Section 5 of the FPA allows for the filing of applications for preliminary permit by a potential hydroelectric project developer before the filing of a license application. The Commission issues preliminary permits for three years for the following purpose. The purpose of a preliminary permit is to maintain priority of application for a license during the term of the permit while the permittee conducts investigations and secures data necessary to determine the feasibility of the proposed project, and if the project is found to be feasible, prepares an acceptable license application.

Cascade Creek LLC filed applications for preliminary permits for the proposed 80-megawatt (MW) Cascade Creek Project, FERC No. 12495, on May 4, 2004; 20-MW Ruth Lake Project FERC No. 12619, on October 12, 2005; and 80-MW Scenery Creek Project, FERC No. 12621, on October 11, 2005.

The Cascade Creek permit was issued on October 8, 2004, and will expire September 30, 2007. The Ruth Lake and Scenery Creek permits were issued on February 23, 2006, and will expire January 31, 2009. Standard Article 4 of all issued preliminary permits requires a permittee to file six-month progress reports. If the

permittee fails to comply with these conditions, the permit is subject to cancellation.

As required by Article 4 of the issued permits, Cascade Creek LLC, the permittee, filed six-month progress reports for Project No. 12495 on May 25, 2005, September 29, 2005, and March 31, 2006, generally describing for that report period, the nature and timing of what it has done under the pre-filing requirements, and other applicable Commission regulations and what studies it was planning on conducting the following six months. The first report shows that the permittee obtained information from previous studies, from the British Columbia Transmission Corporation, and from British Columbia, Canada; on transmission line routing, characteristics, and permitting requirements. The second report indicates the permittee provided drawings and consulted with U.S. and Canadian government agencies and private companies. The third report shows the permittee persuaded the State of Alaska and British Columbia Transmission Corporation to conduct feasibility studies for an interconnection, which found the interconnection to be feasible.

Likewise, Cascade Creek, LLC filed timely progress reports for Project No. 12619 and Project No. 12621 on July 31, 2006. The initial progress reports for these two projects indicate the permittee has developed stream flow data and did reconnaissance inspections of the sites.

In general, if a permittee has not completed the studies and consultation at the expiration of a permit necessary to file an application for license, it may file an application for a new preliminary permit. The Commission may grant another permit if it concludes that the applicant has diligently and in good faith pursued the requirements

of its prior permit. Because there is already a mechanism whereby a permittee can apply for a new three-year permit to pursue development of a proposed hydroelectric project, I do not support the proposed legislation.

I appreciate the opportunity to present my views to the Subcommittee. Thank you.