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ALASKA SMALL HYDROELECTRIC PROJECTS

MARCH 19, 1999.—Ordered to be printed

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

REPORT

[To accompany S. 422]

The Committee on Energy and Natural Resources, to which was referred the bill (S. 422) to provide for Alaska state jurisdiction over small hydroelectric projects, having considered the same, reports favorably thereon with an amendment and recommends that the bill, as amended, do pass.

The amendment is as follows:

On page 4, line 21, insert the word "not" between the words "are" and "located".

PURPOSE OF THE MEASURE

S. 422 authorizes the State of Alaska to assume responsibility for licensing small hydroelectric projects of 5 megawatts or smaller. The State of Alaska may assume jurisdiction over these projects only after it certifies that it has in place a licensing program that protects the public interest and the environment to the same extent as does the FERC licensing process.

BACKGROUND AND NEED

CURRENT LAW

Part I of the Federal Power Act was enacted in 1920 to establish a "complete scheme of national regulation which would promote comprehensive development of the water resources of the Nation." *First Iowa Hydro-Electric Coop:* v. *FPC,* 328 U.S. 152, 180 (1946). Section 4(e) of the Federal Power Act authorizes the Federal Energy Regulatory Commission (FERC) to issue licenses for hydroelectric projects that (1) are located on waters over which Congress

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has jurisdiction under the Commerce Clause, (2) are located on public land or a federal reservation, or (3) use surplus water or power from a federal dam. Section 23(b)(1) of the Act requires anyone building or operating a hydroelectric project to obtain a FERC license if the project (1) is located on navigable water, (2) is located on public land or a federal reservation, (3) uses surplus water or power from federal dam, or (4) is located on a body of water over which Congress has jurisdiction under the Commerce Clause, was built after 1935, and affects interstate or foreign commerce.

In 1991, the Bush administration proposed a National Energy Strategy designed to reduce our nation's dependence on foreign oil and increase domestic energy security. Among other things, the President's strategy called for legislation "exempting from FERC regulation non-Federal hydropower projects with a capacity of 5 MW or less." The Bush administration asserted that a nationwide 5 MW exemption was "appropriate because the issues raised by small hydropower projects are local and ought not to require a FERC decision; and small projects have little or no impact on navigation and interstate commerce, the motivation for FERC jurisdiction over many projects." *National Energy Strategy,* p. 123 (1991).

The Committee on Energy and Natural Resources included a nationwide 5 megawatt exemption in the energy policy bill (S. 1220) it reported in 1991. S. Rept. 102–72, pp. 51–52, 243–244. The Senate adopted an amendment to strike the exemption, however, and the Energy Policy Act of 1992 became law without the 5 megawatt exemption.

In the 103rd, 104th, and 105th Congresses, the Committee included 5 megawatt exemptions for projects in Alaska in hydroelectric bills (S. 2384 in the 103rd Congress; S. 737 in the 104th Congress; S. 439 in the 105th Congress). These provisions would have given the State of Alaska the option of assuming licensing authority over hydroelectric projects in Alaska that have a capacity of 5 megawatts or less. Although the Senate passed both bills, neither was enacted into law.

S. 422, like the three earlier provisions, is premised on the belief that Alaska presents special circumstances that favor local control over projects that would otherwise be subject to FERC licensing. Unlike the lower 48 states, Alaska is not connected to the interstate electric grid. Small hydro is especially important in remote sections of Alaska, where the availability of energy sources is limited and the resulting cost of producing electricity is high. Over 150 villages in Alaska are not interconnected into any larger electrical grid, and each is supplied with power almost exclusively from its own diesel generators—the most expensive type of electric power producer. As a result, the cost of power in these communities is the highest in the United States. Residential rates are between 40 and 45 cents per kilowatt-hour, four to five times the average residential rate in the United States. In the absence of hydroelectric power, the only practical source of electric power is small-scale diesel generation, which is not only very expensive but also can have undesirable environmental impacts. FERC testified at the hearing on S. 439 in 1997 that, while the Commission would object to a generic 5 MW exemption for projects located in the lower 48 States, it would not object to an Alaska exemption, based on Alaska's

unique circumstances, provided an Alaska program would adequately evaluate project impacts.

LEGISLATIVE HISTORY

S. 422 was introduced on February 11, 1999. No hearing has been held. S. 422 is identical to section 1 of S. 439 in the 105th Congress. S. 439 was reported by the Committee on October 15, 1997 (Report 105–111), and passed the Senate on June 25, 1998. No action was taken by the House.

COMMITTEE RECOMMENDATIONS

The Senate Committee on Energy and Natural Resources, in open business session on March 4, 1999, by a voice vote with a quorum present, recommends that the Senate pass S. 422 with an amendment.

COMMITTEE AMENDMENT

The Committee inserted the word "not," which had been mistakenly omitted when the bill was originally printed.

SECTION-BY-SECTION ANALYSIS

Section I directs the FERC to discontinue exercising its licensing and regulatory authority over qualifying project works in the State of Alaska upon certifying that the State has in place a regulatory program for such projects that provide the same level of protection to the public interest and the environment as Federal regulation, gives certain non-power interests equal consideration with power development interests, and requires licensees to observe the same conditions for navigation and fish and wildlife protection that are now required by Federal law.

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 9, 1999.

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

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 422, a bill to provide for Alaska state jurisdiction over small hydroelectric projects.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts for this estimate are Kim Cawley (for federal costs), and Lisa Cash Driskill (for the state and local impact).

Sincerely,

BARRY B. ANDERSON
(For Dan L. Crippen, Director).

Enclosure.

S. 422—A bill to provide for Alaska state jurisdiction over small hydroelectric projects

The bill would direct the Federal Energy Regulatory Commission (FERC) to end its licensing and regulatory authority over certain hydroelectic projects in Alaska when the state has a comparable regulatory program in place for such projects.

CBO estimates that enacting this bill would have no net effect on the federal budget. S. 422 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would have no impact on the budgets of state, local, or tribal governments. The state's costs associated with establishing and carrying out a regulatory program for the hydroelectric projects affected by this bill would be voluntary.

The bill's 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 would have no net budgetary impact.

Because FERC's administrative costs are limited in annual appropriations, enacting S. 422 would not affect direct spending or receipts. Therefore, pay-as-you go procedures would not apply to the bill.

The CBO staff contacts for this estimate are Kim Cawley (for federal costs), and Lisa Cash Driskill (for the state and local impact). This estimate was approved by Robert A. Sunshine, Deputy Assistant Director for Budget Analysis.

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

No executive communications were received by the Committee on S. 422. Executive communications were received by the Committee on identical legislation in the 105th Congress, S. 439, which appear in Senate Report 105–111.

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. 422, 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

PART I

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SEC. 32. ALASKA STATE JURISDICTION OVER SMALL HYDROELECTRIC PROJECTS.

(a) DISCONTINUANCE OF REGULATION BY THE COMMISSION.—Notwithstanding sections 4(e) and 23(b), the Commission shall discontinue exercising licensing and regulatory authority under this Part over qualifying project works in the State of Alaska, effective on the date on which the Commission certifies that the State of Alaska has in place a regulatory program for water-power development that—

(1) protects the public interest, the purposes listed in paragraph (2), and the environment to the same extent provided by licensing and regulation by the Commission under this Part and other applicable Federal laws, including the Endangered Species Act (16 U.S.C. 1531 et seq.) and the Fish and Wildlife Coordination Act (16 U.S.C. 661 et seq.);

(2) gives equal consideration to the purposes of—

(A) energy conservation,

(B) the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat),

(C) the protection of recreational opportunities,

(D) the preservation of other aspects of environmental quality,

(E) the interests of Alaska Natives, and

(F) other beneficial public uses, including irrigation, flood control, water supply, and navigation; and

(3) requires, as a condition of a license for any project works—

(A) the construction, maintenance, and operation by a licensee at its own expense of such lights and signals as may be directed by the Secretary of the Department in which the Coast Guard is operating, and such fishways as may be prescribed by the Secretary of the Interior or the Secretary of Commerce, as appropriate,

(B) the operation of any navigation facilities which may be constructed as part of any project to be controlled at all times by such reasonable rules and regulations as may be made by the Secretary of the Army, and

(C) conditions for the protection, mitigation, and enhancement of fish and wildlife based on recommendations received pursuant to the Fish and Wildlife Coordination Act (16 U.S.C. 661 et seq.) from the National Marine Fisheries Service, the United States Fish and Wildlife Service, and State fish and wildlife agencies.

(b) DEFINITION OF "QUALIFYING PROJECT WORKS".—For purposes of this section, the term "qualifying project works" means project works—

(1) that are not part of a project licensed under this Part or exempted from licensing under this Part or section 405 of the Public Utility Regulatory Policies Act of 1978 prior to the date of enactment of this section;

(2) for which a preliminary permit, a license application, or an application for an exemption from licensing has not been accepted for filing by the Commission prior to the date of enactment of subsection (c) (unless such application is withdrawn at the election of the applicant);

(3) that are part of a project that has a power production capacity of 5,000 kilowatts or less;

(4) that are located entirely within the boundaries of the State of Alaska; and

(5) that are not located in whole or in part on any Indian reservation, conservation system unit (as defined in section 102(4) of the Alaska national Interest Lands Conservation Act (16 U.S.C. 3102(4))), or segment of a river designated for study for addition to the Wild and Scenic Rivers System.

(c) ELECTION OF STATE LICENSING.—In the case of nonqualifying project works that would be a qualifying project works but for the fact that the project has been licensed (or exempted from licensing) by the Commission prior to the enactment of this section, the licensee of such project may in its discretion elect to make the project subject to licensing and regulation by the State of Alaska under this section.

(d) PROJECT WORKS ON FEDERAL LANDS.—With respect to projects located in whole or in part on a reservation, a conservation system unit, or the public lands, a State license or exemption from licensing shall be subject to—

(1) the approval of the Secretary having jurisdiction over such lands, and

(2) such conditions as the Secretary may prescribe.

(e) CONSULTATION WITH AFFECTED AGENCIES.—The Commission shall consult with the Secretary of the Interior, the Secretary of Agriculture, and the Secretary of Commerce before certifying the State of Alaska's regulatory program.

(f) APPLICATION OF FEDERAL LAWS.—Nothing in this section shall preempt the application of Federal environmental, natural resources, or cultural resources protection laws according to their terms.

(g) OVERSIGHT BY THE COMMISSION.—The State of Alaska shall notify the Commission not later than 30 days after making any significant modification to its regulatory program. The Commission shall periodically review the State's program to ensure compliance with the provisions of this section.

(h) RESUMPTION OF COMMISSION AUTHORITY.—Notwithstanding subsection (a), the Commission shall reassert its licensing and regulatory authority under this Part if the Commission finds that the State of Alaska has not complied with one or more of the requirements of this section.

(i) DETERMINATION BY THE COMMISSION.—

(1) Upon application by the Governor of the State of Alaska, the commission shall within 30 days commence a review of the State of Alaska's regulatory program for water-power development to determine whether it complies with the requirements of subsection (a).

(2) The Commission's review required by paragraph (1) shall be completed within one year of initiation and the Commission shall within 30 days thereafter issue a final order determining whether or not the State of Alaska's regulatory program for water-power development complies with the requirements of subsection (a).

(3) If the Commission fails to issue a final order in accordance with paragraph (2), the State of Alaska's regulatory program for water-power development shall be deemed to be in compliance with subsection (a).

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