

**Testimony Submitted for the Record
by
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Federal Energy Regulatory Commission
to 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 non-federal hydroelectric licensing, administration, and safety; certification of interstate natural gas pipelines and storage facilities; and, authorization and oversight over the construction, operation, and safety of Liquefied Natural Gas (LNG) terminals.

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.

I appreciate the opportunity to comment on S. 2028 and S. 2035. S. 2028 would reinstate the license and extend until December 31, 2007 the deadline for the commencement of project construction for the Tygart Dam Project No. 7307, located in West Virginia. S. 2035 would provide for reinstatement of the license and extend the deadline for the commencement of project construction for the Arrowrock Project No. 4656, located in Idaho, for a three-year period from the enactment of the legislation.

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 federal lands, on navigable waters of the United States, which utilize the surplus water or water power from a federal dam, and on streams over which the Congress has jurisdiction. Licenses may be issued under the FPA only if, in the judgment of the Commission, the proposed project is best adapted to a comprehensive plan for the development and utilization of the water resources of the river basin involved for all public purposes. The licenses are issued for terms of up to 50 years and contain terms and conditions that are designed to ensure that the comprehensive development standard is met.

The FPA requires that the licensee will proceed expeditiously with the development and construction of the proposed project once a license has been issued. Section 13 of the FPA requires that construction of a licensed project be commenced within two years of issuance of the license and authorizes the Commission to extend this deadline once, for a maximum of two additional years. If project construction has not commenced by the deadline, the Commission is required to terminate the license.

Tygart Dam Project

S. 2028 would authorize the Commission to reinstate the license and extend the deadline for the commencement of project construction for the Tygart Dam Project No. 7307, located in West Virginia, until December 31, 2007.

The Tygart Dam Project was licensed on September 27, 1989, to the City of Grafton, West Virginia (Grafton). The license gave Grafton the maximum two years permitted by Section 13 to start construction – that is, until September 27, 1991.

On December 17, 1990, the Commission issued an order granting partial stays of the licenses for the Tygart Project and 11 other projects in the Ohio River Basin, pending resolution of judicial appeals of the Commission's licensing orders. On April 16, 1992, after the orders were affirmed, the Commission issued an order lifting the stays.

On November 4, 1992, pursuant to a request by Grafton, the Commission extended the deadline for commencement of construction to April 15, 1995. This represented the maximum period for the commencement of construction (two years plus one two-year extension) that the Commission could grant under FPA Section 13.

Subsequent legislation enacted as Public Law No. 104-246 directed the Commission to issue up to three additional two-year orders granting further extensions of time to commence and complete construction. After the Commission did so, September 26, 1999 became the final deadline to commence project construction. On June 23, 1999, Grafton again requested a stay of those license conditions that require pre-construction filings because it was seeking another legislative extension of the commencement of construction deadline. The Commission dismissed this request on February 9, 2000.

Because the licensee did not commence project construction by September 26, 1999, the Commission on November 19, 1999 issued a notice of probable termination of the license for failure to meet the commencement of construction deadline. Grafton did

not respond to the notice. The Commission subsequently terminated the license by order issued on March 27, 2000.

On July 24, 2000, Grafton subsequently filed an application for a preliminary permit for the project, as a predicate for filing a new license application. The Commission issued the requested preliminary permit on March 16, 2001, for the Tygart Dam Project No. 11851 (because the previous license had been terminated, the preliminary permit received a new project number). Grafton made very little progress towards developing the project, and the three-year preliminary permit expired, by its terms, on February 28, 2004. The Commission denied a request for an extension of the preliminary permit term on March 28, 2003.

On March 1, 2004 Grafton filed another application for a preliminary permit for the Tygart Dam Project No. 12490. This application was dismissed on March 28, 2005, for failure to provide additional information related to Grafton's progress towards developing the project. Currently, Grafton has pending before the Commission a third application for a subsequent preliminary permit for the Tygart Dam Project No. 12640. The Commission also has before it a competing application for preliminary permit filed on September 23, 2005, by Tygart LLC for the Tygart Dam Project No. 12613.

Arrowrock Project

S. 2035 would provide for license reinstatement and extend the deadline for the commencement of project construction for the Arrowrock Project No. 4656, located in Idaho, for a three-year period from the date of enactment of the legislation. The Arrowrock Project was licensed on March 27, 1989, to the Boise-Kuna Irrigation District,

the Nampa & Meridian Irrigation District, the New York Irrigation District, the Wilder Irrigation District, and the Big Bend Irrigation District (Districts). The license gave the Districts the maximum two-year time permitted by Section 13 to start construction -- that is, until March 26, 1991. On January 9, 1991, pursuant to Section 13, the Commission granted the Districts' request for the one additional two-year extension to commence construction permitted by the statute, thereby extending the deadline for commencement of construction to March 26, 1993.

Section 1701(c) of the Energy Policy Act of 1992 subsequently authorized the Commission to extend the deadline for commencement of construction of the project for an additional six years, until March 26, 1999. The Commission granted this extension.

On March 23, 1999, three days prior to the expiration of the extended deadline, the Districts requested a stay of the commencement of construction and compliance deadlines, while they sought Congressional legislation permitting further extensions of the construction deadline. The Commission denied that request, and on May 19, 1999, issued an order noticing probable termination of the license for failure to meet the commencement of construction deadline.

In June, 1999 legislation was introduced in the Senate (S. 1236) authorizing a further extension of the Section 13 deadline for the project until March 26, 2005. Former Commission Chairman James Hoecker submitted written testimony to the Senate Energy and Natural Resources Committee on July 28, 1999 stating that because this bill would extend the construction commencement date beyond 10 years from the issuance date of the project license, he did not support its enactment.

This legislation, which was subsequently enacted and signed into law in October, 2000 as Public Law No. 106-343, authorized the Commission, upon the Districts' request, to reinstate the license, if necessary, and to further extend the deadline for commencement of construction for three consecutive two-year periods, to take effect on the date of the expiration of the last extension issued by the Commission (*i.e.*, as of March 26, 1999).

As requested by the Districts, the Commission thereafter granted three extensions, making the new final deadline for starting construction March 26, 2005.

On March 25, 2005, the Districts filed a request for a stay of the license, and to backdate the stay for 120 days to allow them time to comply with license articles containing requirements that must be completed before start of construction.

On May 27, 2005, the Commission denied the request for stay of license and, in the same order, issued notice of the probable termination of the project license. The Commission denied rehearing by order issued September 1, 2005.

S. 2028 and S. 2035

I do not support either S. 2028 or S.2035. Grafton had more than 11 years after license issuance to begin construction on the Tygart Dam Project, following which it failed to make substantial progress during the term of one three-year preliminary permit, and had a second permit application dismissed for the failure to provide adequate information.

The Districts have had more than 16 years after license issuance to start construction of the Arrowrock Project, and have been unable to do so. The licensee has

cited numerous reasons for their delays, ranging from inability to obtain financing or a power sales agreement to several technical redesigns of the project.

As a general matter, enactment of bills authorizing or requiring commencement of construction extensions for individual projects leaves the development of an important energy resource in the hands of an entity that has shown an inability to develop a project, and therefore has not been recommended. The last several Chairmen of the Commission have had a policy of opposing legislation extending commencement of construction deadlines that would allow an entity more than 10 years to develop a project. This policy has been based on the notion that allowing an entity that is not showing progress in developing a project to control a hydropower site for a greater length of time is not consistent with the public interest in developing clean, renewable hydroelectric energy.

Recent Commission orders have also noted that the purposes of the provisions of Section 13 of the FPA are to require prompt development of a licensed project. These instances demonstrate why that policy makes sense.

In addition, the record on which the projects were originally licensed in the 1980s, including the examination of environmental and developmental issues, may be out of date in various respects. For example, in the case of the Arrowrock Project, in 1998, after the license was issued, the U.S. Fish and Wildlife Service listed the Columbia River bull trout as a threatened species pursuant to the Endangered Species Act, for the stream on which the project is located. The Service has requested that endangered species consultation be conducted for that project. To ensure that the public interest is served would require not simply reinstating the license and/or extending the license timeframes

for commencement of construction, but reexamining and, as necessary, updating the record.

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