

Calendar No. 618

108TH CONGRESS }
2d Session }

SENATE

{ REPORT
{ 108-299

TAPOCO PROJECT LICENSING ACT OF 2004

JULY 7, 2004.—Ordered to be printed

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

R E P O R T

[To accompany S. 2319]

The Committee on Energy and Natural Resources, to which was referred the bill (S. 2319) to authorize and facilitate hydroelectric power licensing of the Tapoco Project, having considered the same, reports favorably thereon with an amendment and recommends that the bill, as amended, do pass.

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the “Tapoco Project Licensing Act of 2004”.

SEC. 2. DEFINITIONS.

In this Act:

(1) **APGI.**—The term “APGI” means Alcoa Power Generating Inc. (including its successors and assigns).

(2) **COMMISSION.**—The term “Commission” means the Federal Energy Regulatory Commission.

(3) **MAP.**—The term “map” means the map entitled “Tapoco Hydroelectric Project, P-2169, Settlement Agreement, Appendix B, Proposed Land Swap Areas, National Park Service and APGI”, numbered TP514, Issue No. 9, and dated June 8, 2004.

(4) **PARK.**—The term “Park” means Great Smoky Mountains National Park.

(5) **PROJECT.**—The term “Project” means the Tapoco Hydroelectric Project, FERC Project No. 2169, including the Chilhowee Dam and Reservoir in the State of Tennessee.

(6) **SECRETARY.**—The term “Secretary” means the Secretary of the Interior.

SEC. 3. LAND EXCHANGE.

(a) **AUTHORIZATION.**—

(1) **IN GENERAL.**—Upon the conveyance by APGI of title acceptable to the Secretary of the land identified in paragraph (2), the Secretary shall simultaneously convey to APGI title to the land identified in paragraph (3).

(2) DESCRIPTION OF LAND TO BE CONVEYED BY APGI.—The land to be conveyed by APGI to the Secretary is the approximately 186 acres of land, subject to any encumbrances existing before February 21, 2003—

(A) within the authorized boundary of the Park, located northeast of United States Highway 129 and adjacent to the APGI power line; and

(B) as generally depicted on the map as “Proposed Property Transfer from APGI to National Park Service”.

(3) DESCRIPTION OF LAND TO BE CONVEYED BY THE SECRETARY.—The land to be conveyed by the Secretary to APGI are the approximately 110 acres of land within the Park that are—

(A) adjacent to or flooded by the Chilhowee Reservoir;

(B) within the boundary of the Project as of February 21, 2003; and

(C) as generally depicted on the map as “Proposed Property Transfer from National Park Service to APGI”.

(b) MINOR ADJUSTMENTS TO CONVEYED LAND.—The Secretary and APGI may mutually agree to make minor boundary or acreage adjustments to the land identified in paragraphs (2) and (3) of subsection (a).

(c) OPPORTUNITY TO MITIGATE.—If the Secretary determines that all or part of the land to be conveyed to the Park under subsection (a) is unsuitable for inclusion in the Park, APGI shall have the opportunity to make the land suitable for inclusion in the Park.

(d) CONSERVATION EASEMENT.—The Secretary shall reserve a conservation easement over any land transferred to APGI under subsection (a)(3) that, subject to any terms and conditions imposed by the Commission in any license that the Commission may issue for the Project, shall—

(1) specifically prohibit any development of the land by APGI, other than any development that is necessary for the continued operation and maintenance of the Chilhowee Reservoir;

(2) authorize public access to the easement area, subject to National Park Service regulations; and

(3) authorize the National Park Service to enforce Park regulations on the land and in and on the waters of Chilhowee Reservoir lying on the land, to the extent not inconsistent with any license condition considered necessary by the Commission.

(e) APPLICABILITY OF CERTAIN LAWS.—Section 5(b) of Public Law 90–401 (16 U.S.C. 460l–22(b)), shall not apply to the land exchange authorized under this section.

(f) REVERSION.—

(1) IN GENERAL.—The deed from the Secretary to APGI shall contain a provision that requires the land described in subsection (a)(3) to revert to the United States if—

(A) the Chilhowee Reservoir ceases to exist; or

(B) the Commission issues a final order decommissioning the Project from which no further appeal may be taken.

(2) APPLICABLE LAW.—A reversion under this subsection shall not eliminate APGI’s responsibility to comply with all applicable provisions of the Federal Power Act (16 U.S.C. 791a et seq.), including regulations.

(g) BOUNDARY ADJUSTMENT.—

(1) IN GENERAL.—On completion of the land exchange authorized under this section, the Secretary shall—

(A) adjust the boundary of the Park to include the land described in subsection (a)(2); and

(B) administer any acquired land as part of the Park in accordance with applicable law (including regulations).

(2) NATIONAL PARK SERVICE LAND.—Notwithstanding the exchange of land under this section, the land described in subsection (a)(3) shall remain in the boundary of the Park.

(3) PUBLIC NOTICE.—The Secretary shall publish in the Federal Register notice of any boundary revised under paragraph (1).

SEC. 4. PROJECT LICENSING.

Notwithstanding the continued inclusion of the land described in section 3(a)(3) in the boundary of the Park (including any modification made pursuant to section 3(b)) on completion of the land exchange, the Commission shall have jurisdiction to license the Project.

SEC. 5. LAND ACQUISITION.

(a) IN GENERAL.—The Secretary or the Secretary of Agriculture may acquire, by purchase, donation, or exchange, any land or interest in land that—

(1) may be transferred by APGI to any nongovernmental organization; and

- (2) is identified as “Permanent Easement” or “Term Easement” on the map entitled “Tapoco Hydroelectric Project, P-2169, Settlement Agreement, Appendix B, Proposed Land Conveyances in Tennessee”, numbered TP616, Issue No. 15, and dated March 11, 2004.
- (b) LAND ACQUIRED BY THE SECRETARY OF THE INTERIOR.—The Secretary shall—
- (1) adjust the boundary of the Park to include any land or interest in land acquired by the Secretary under subsection (a);
 - (2) administer any acquired land or interest in land as part of the Park in accordance with applicable law (including regulations); and
 - (3) publish notice of the adjustment in the Federal Register.
- (c) LAND ACQUIRED BY THE SECRETARY OF AGRICULTURE.—
- (1) BOUNDARY ADJUSTMENT.—The Secretary of Agriculture shall—
 - (A) adjust the boundary of the Cherokee National Forest to include any land acquired under subsection (a);
 - (B) administer any acquired land or interest in land as part of the Cherokee National Forest in accordance with applicable law (including regulations); and
 - (C) publish notice of the adjustment in the Federal Register.
 - (2) MANAGEMENT.—The Secretary of Agriculture shall evaluate the feasibility of managing any land acquired by the Secretary of Agriculture under subsection (a) in a manner that retains the primitive, back-country character of the land.

SEC. 6. AUTHORIZATION OF APPROPRIATIONS.

There are authorized to be appropriated such sums as are necessary to carry out this Act.

PURPOSE OF THE MEASURE

The purpose of S. 2319 is to authorize and facilitate hydroelectric power licensing of the Tapoco Project through the exchange of certain lands with Great Smoky Mountains National Park on the Little Tennessee River.

BACKGROUND AND NEED

The Chilhowee Reservoir was constructed in 1957. The reservoir flooded approximately 100 acres of Great Smoky Mountains National Park in three embayments, including Abrams, Chiligate and Shop creeks. The dams are owned by Tapoco, a subsidiary of the Aluminum Company of America (ALCOA) and provide power for their aluminum plant in Blount County, Tennessee. Because the dams are privately owned, they must be licensed by the Federal Energy Regulatory Commission (FERC). Dams owned by federal agencies such as the Tennessee Valley Authority or the Army Corps of Engineers are exempt from the FERC licensing requirement.

Although Congress expressly forbid FERC and its predecessor, the Federal Power Commission, from licensing any water project “within the limits * * * of any national park * * * without specific authority of Congress,” the Federal Power Commission licensed the Tapoco hydroelectric facility in 1955. That license will expire on February 28, 2005, and given the statutory prohibition, FERC cannot relicense the project without a specific statutory authorization. In order to continue to operate the Tapoco facility, ALCOA must acquire legal ownership of the flooded embayments currently owned by the National Park Service.

S. 2319 will authorize the Secretary of the Interior to exchange the flooded park land for approximately 186 acres of land currently owned by ALCOA and located within the boundary of Great Smoky Mountains National Park. Once the land exchange has been completed, the bill would grant FERC the jurisdiction to relicense the Tapoco facility.

Agreement on the proposed land exchange is the result of more than seven years of negotiations between ALCOA, the Nature Conservancy, the National Park Service, the United States Fish and Wildlife Service, the Eastern Band of Cherokee Indians, the Bureau of Indian Affairs, and numerous state agencies, environmental organizations and private landowners. The land to be acquired by the National Park Service includes a biologically diverse habitat that is occupied by 21 endangered species, including the Junaluska salamander. Under the negotiated Settlement Agreement, ALCOA will also grant a permanent easement to the Forest Service on 6,000 acres that are adjacent to Great Smoky Mountains National Park and the Cherokee National Forest and a 40-year recreation easement on more than 4,000 acres to the Tennessee Nature Conservancy.

LEGISLATIVE HISTORY

S. 2319 was introduced on April 19, 2004 by Senator Alexander. The Senate Subcommittee on National Parks held a hearing on S. 2319 on April 27, 2004. On June 16, 2004, the Committee on Energy and Natural Resources ordered S. 2319, as amended, favorably reported.

COMMITTEE RECOMMENDATION

The Committee on Energy and Natural Resources, in an open business session on June 16, 2004, by a voice vote of a quorum present, recommends that the Senate pass S. 2319, if amended as described herein.

COMMITTEE AMENDMENT

During its consideration of S. 2319, the Committee adopted an amendment in the nature of a substitute. The amendment makes several technical and clarifying changes. The amendment also eliminated language from the original section 3(g) which exempted the land exchange from the requirements of National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.), and the National Historic Preservation Act (16 U.S.C. 470 et seq.). The amendment is described in detail in the section-by-section analysis below.

SECTION-BY-SECTION ANALYSIS

Section 1 titles the bill "Tapoco Licensing Act of 2004."

Section 2 defines key terms used in the Act.

Section 3(a) directs the Secretary of the Interior (Secretary) to acquire from the Alcoa Power Generating Inc. (APGI) approximately 186 acres of land located within the boundary of Great Smoky Mountain National Park in exchange for approximately 110 acres of land that are flooded by the Chillowee Reservoir. This section also references maps and the locations of the land to be exchanged. The current hydropower license for the Tapoco project expires on February 28, 2005. In order for the Federal Energy Regulatory Commission (FERC) to act on APGI's relicensing application before this expiration date, it is imperative that the Department of the Interior complete the land transfer authorized by this legislation no later than December 2004. Based on the testimony provided

by the Department of the Interior at the Subcommittee hearing, the Committee understands that the Department is aware of this deadline and expects to have the land transfer completed by December 2004.

If the Department fails to complete the land transfer within this time frame, the Department should provide the Committee with a written explanation as to the nature of the delay, as well as a proposed schedule for completion.

Subsection (b) authorizes the Secretary to make minor acreage adjustments to the land described in Section 3(a) if mutually agreeable with APGI.

Subsection (c) allows APGI the opportunity to mitigate resource issues should the Secretary determine that the land described in section 3 be unsuitable for inclusion in the park.

Subsection (d) requires that the Secretary reserve a conservation easement over the land that is transferred to APGI.

Paragraph (1) prohibits development other than that which is required for the operation and maintenance of the reservoir or required by FERC.

Paragraph (2) allows public access to the lands under the conservation easement and makes them subject to both park service regulations and the terms and conditions required by FERC.

Paragraph (3) authorizes the National Park Service to enforce park regulations on the transferred lands that are consistent with the terms and conditions required by FERC.

Subsection (e) exempts the land exchanged under this section from section 5(b) of Public Law 90-401 (16 U.S.C. 4601-22(b)).

Subsection (f) requires that the land described in subsection (a) revert to the United States if the Chilowee dam is breached or the project is decommissioned. This provision does not eliminate APGI's responsibilities under the Federal Power Act (16 U.S.C. 791a et seq.).

Subsection (g) describes administrative procedures for adjusting the park boundary and is self explanatory.

Section 4 grants the Commission the jurisdiction to license the project upon completion of the land exchange and states that FERC shall have jurisdiction to license the Tapoco Project, notwithstanding that the land conveyed to APGI under section 3(a)(3) remains within the boundary of Great Smoky Mountains National Park. The Committee notes that this section provides permanent authority for FERC to license the project so long as the terms of this Act are satisfied. This jurisdiction is granted even though the land described in section 3(a)(3) and any adjustments made pursuant to section 3(b) will remain within the boundary of the park. The Committee intends that FERC jurisdiction to relicense the Tapoco Project attaches once the land exchange described in section 3(a) is completed, and is not contingent on the completion of additional minor exchanges that may be undertaken pursuant to Section 3(b).

Section 5(a) authorizes the Secretary of the Interior to acquire land that may be transferred to a non governmental organization by APGI pursuant to the Tapoco Hydroelectric Project, P-2169, Settlement Agreement, March 11, 2004.

Subsection (b) describes administrative procedures for adjusting the park boundary and required that the Secretary administer the acquired land in accordance with applicable law and regulation.

Subsection (c)(1) describes administrative procedures for adjusting the Cherokee National Forest boundary and requires that the Secretary of Agriculture administer the acquired land in accordance with applicable law and regulation.

Paragraph (2) requires the Secretary of Agriculture to evaluate the feasibility of managing the Cherokee National Forest lands acquired under this Act in a way that retains its backcountry character.

Section 6 authorizes the appropriation of such funds as are necessary to carry out this Act.

COST AND BUDGETARY CONSIDERATIONS

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

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, June 23, 2004.

Hon. PETE V. DOMENICI,
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. 2319, the Tapoco Project Licensing Act of 2004.

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

Sincerely,

ELIZABETH ROBINSON
(For Douglas Holtz-Eakin, Director).

Enclosure.

S. 2319—Tapoco Project Licensing Act of 2004

CBO estimates that implementing S. 2319 would cost \$6 million over the 2005–2009 period, assuming appropriation of the necessary amounts. Enacting the bill would not affect direct spending or revenues. S. 2319 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no significant costs on state, local, or tribal governments.

S. 2319 would authorize the Secretary of the Interior to exchange 100 acres of land within the Great Smoky Mountains National Park in Tennessee for 186 acres of other land within the authorized boundary of that park owned by Alcoa Power Generating Inc. (APGI). APGI would use the land it receives for the Tapoco Hydroelectric Project. According to the National Park Service (NPS), the federal land to be conveyed currently generates no receipts and is not expected to do so over the next 10 years. Hence, we estimate that the proposed exchange would not affect offsetting receipts (a credit against direct spending). We estimate that the agency would spend about \$30,000 in 2005 to complete the transaction, assuming the availability of appropriated funds.

S. 2319 also would authorize the Secretaries of Agriculture and the Interior to acquire certain other land that is currently owned by APGI. Based on information from APGI and local tax assessors regarding the value of that land, CBO estimates that the federal government would spend \$6 million over the 2006–2009 period to acquire that land, assuming appropriation of the necessary funds. We also estimate that any resulting increase in federal spending for land management would total less than \$500,000 a year.

The CBO staff contact for this estimate is Megan Carroll. This estimate was approved by Peter H. Fontaine, 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 S. 2319.

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 program. Therefore, there would be no impact on personal privacy.

Little, if any, additional paperwork would result from the enactment of S. 2319.

EXECUTIVE COMMUNICATIONS

On April 21, 2004, the Committee on Energy and Natural Resources requested legislative reports from the Department of the Interior, the Federal Energy Regulatory Commission and the Office of Management and Budget setting forth Executive agency recommendations on S. 2319. These reports had not been received when this report was filed. The testimony provided by the Department of the Interior and the Federal Energy Regulatory Commission at the Subcommittee hearing on S. 2319 follows:

STATEMENT OF PAUL HOFFMAN, DEPUTY ASSISTANT SECRETARY, FISH AND WILDLIFE AND PARKS, U.S. DEPARTMENT OF THE INTERIOR

Mr. Chairman, thank you for the opportunity to present the Department of the Interior's views regarding S. 2319. This bill would authorize and facilitate hydroelectric power re-licensing of the Tapoco Project, near Great Smoky Mountains National Park.

The Department supports S. 2319 with the amendments discussed later in this testimony. We believe that the exchange authorized in S. 2319, together with the comprehensive Settlement Agreement discussed later in this testimony, is an excellent example of Secretary Norton's 4 C's, Conservation through Cooperation, Consultation and Communication and demonstrates how environmental groups, local and state governments, industry, tribes, and the Federal government can work cooperatively on the conservation of important environmental resources.

S. 2319 would resolve a jurisdictional issue by allowing the Federal Energy Regulatory Commission (FERC) to issue a new license to Alcoa Power Generating Inc. (APGI) to operate its existing Tapoco Project (FERC project #2169), a system of four hydropower dams on the Little Tennessee and Cheoah rivers straddling the North Carolina-Tennessee border. The bill also authorizes the Secretary to exchange lands within Great Smoky Mountains National Park (park) with APGI. Once the exchange is completed, the bill allows FERC to re-license the project. The Secretary and the Secretary of Agriculture are also authorized to acquire title to additional lands that may be transferred to a nongovernmental organization, as part of the Settlement Agreement related to this project, and add them to the boundaries of the park or the Cherokee National Forest.

In 1999, when APGI began work on a re-licensing application with FERC to continue the operation of the Tapoco Project, it was discovered that a portion of the project, known as Chilhowee Reservoir, inundates approximately two miles of government-owned lands along Abrams Creek and shorter segments along three other streams, all within the 1926 authorized boundary of the park. This situation has existed since the 1950's when Chilhowee Dam was completed and originally licensed by the former Federal Power Commission. FERC does not have the legal authority to issue licenses for hydropower projects that flood lands within authorized national park boundaries.

The Federal Power Act and the enabling legislation for the park specifically prohibit hydropower projects within the park. The historical record, from the 1950's and earlier, of how the licensing was allowed to occur is unclear. Records indicate that the NPS and the Federal Power Commission were aware of the jurisdictional defect, but no evidence has been found that proves that the issue was legally resolved. It appears that the Federal Power Commission granted the license and the decision was not challenged.

S. 2319 would resolve this situation by requiring a transfer of approximately 100 acres of submerged lands along Abrams Creek, and three smaller tributaries within the park, to APGI and granting jurisdiction to FERC to re-license the Tapoco Project and the operations at Chilhowee Dam and Reservoir. In exchange, the park would receive fee title to 186 acres of forested uplands within its authorized boundary that are currently under APGI ownership and retain management and enforcement rights over the 100 acres transferred to APGI. The bill also contains a reversionary clause that stipulates if the dam is ever breached or removed, the submerged lands would revert to the NPS.

The exchange would extend park-owned land to the east shoulder of U.S. Highway 129 for approximately three miles. Currently, park-owned land stops at a powerline easement well to the northeast of the highway. This gap

between the highway and the powerline creates an isolated pocket of land within the park boundary that poses ongoing management and law enforcement problems. Because of the reserved management easement, NPS rangers would continue to patrol the four flooded creek embayments within the park and enforce park rules, even though the underlying fee interest in the land will now belong to APGI.

Critical to our support of this bill are additional conservation provisions in a comprehensive Settlement Agreement that has recently been developed among APGI, the Department of the Interior, the U.S. Forest Service, Tennessee and North Carolina natural resource agencies, the Eastern Band of Cherokee Indians, local governments, and several nongovernmental organizations. The Settlement Agreement has widespread support from the involved parties and will be filed with FERC to address the issues in the re-licensing of the Tapoco Project, including whether or not Chilhowee should continue to operate as a reservoir.

In addition to the land exchange proposed in S. 2319, under the Settlement Agreement APGI will donate to The Nature Conservancy (TNC) a permanent conservation easement on an additional 400 acres of land it owns in Tennessee, within the park's authorized boundary, but lying southwest of Highway 129 and the previously mentioned 186-acre parcel. These lands will continue to be maintained as a wildlife management area under an existing agreement with the State of Tennessee until such time as they might be acquired by the NPS. APGI will also grant an option to TNC to buy the fee interest of this tract for a price reflecting impact on value of the donated easement, and TNC will be restricted from selling the tract to any entity other than the NPS.

In addition to the land exchange provisions in S. 2319, the Settlement Agreement also stipulates that APGI will donate conservation easements to TNC for several other parcels of land. The first permanent conservation easement is on approximately 5,500 acres of land that will be the centerpiece of a "conservation corridor" linking the park with the Cherokee National Forest, immediately south of the project's reservoirs on the Little Tennessee River. TNC will hold the easement and the property will be available for purchase in fee for future addition to the Cherokee National Forest or the park, as appropriate.

The second conservation easement is on approximately 4,000 more acres of APGI lands in Tennessee and would last for the term of the new FERC license. If APGI decides to sell these lands or to sell the project to a different company, it has agreed to make these lands available for purchase by TNC. Though in essence a right of first refusal, TNC would only be authorized to sell these lands to the Tennessee Wildlife Resources Agency, the U.S. Forest Service or the park.

Finally, APGI has agreed to establish a mitigation fund for the project area in Tennessee that will make \$100,000 per year available to the NPS, the U.S. Fish and Wildlife

Service, the U.S. Forest Service, TNC, the State of Tennessee, and other stakeholders for actions to mitigate the ecological impacts of the hydroelectric project, such as reducing invasive, non-native, terrestrial and aquatic species, improving wildlife habitats, and conducting relevant ecological research. A similar, but smaller mitigation fund (\$25,000 per year) will be established for projects on the North Carolina portion of the project. APGI will also restore biologically important minimum stream flows to sections of the Little Tennessee River and the Cheoah River that have been bypassed for the last 50 years for power generation.

We should note that an appraisal has not been done on the lands to be exchanged. The value of these lands would normally be determined through an objective appraisal conducted in accordance with the Uniform Appraisal Standards for Federal Land Acquisitions (UASFLA). However, we are mindful that legislated land transfers often promote other considerations that may not lend themselves readily to the standard appraisal process or to equal value exchanges in all cases. In this instance, NPS conveys approximately 100 acres of land to APGI and receives in return a reservation of a conservation easement on the 100 acres of land, a reversion interest on the 100 acres of land, and 186 additional acres of land or suitable equivalent. Conservation provisions also are provided for in the related Settlement Agreement. For these reasons, this exchange results in environmental, management, energy-related and economic benefits for the parties and the public. The balancing of important public policy considerations against the financial implications of proposed transfers are ultimately a question that rests with Congress.

We also have several amendments to suggest. Section 4(c) provides for the reversion of fee simple title to the United States. We would like to work with the Committee, APGI, and other interested parties to address several issues in this subsection. First, the provision requires reversion for fee simple title for the Chilhowee Dam, and we believe the intention of the provision is to require the reversion of the lands identified in Section 4(a)(2), not the dam itself. Second, we would like to discuss with the parties further refinement of the circumstances under which reversion of fee title should occur.

Section 4(g) of the bill states, among other things, that the exchange is deemed to meet the requirements of the National Environmental Policy Act of 1969 and the National Historic Preservation Act. The Department does not believe this broad exemption is necessary. Much of the environmental compliance work necessary to implement the exchange has already been conducted. We therefore recommend striking these provisions from the bill.

In addition, we suggest one technical amendment that will make the land acquisition authority in Section 6(a)(2) of the bill consistent with that in Section 4(f). The amendment is attached to this testimony.

S. 2319, which will authorize the re-licensing of the Tapoco Project, and the accompanying Settlement Agreement together provide a solution that makes sense, helps protect ecosystem sustainability within the Southern Appalachians, and is widely supported by the involved agencies and groups. We look forward to working with the committee to help this bill move forward.

Mr. Chairman, this concludes my statement. I would be pleased to answer any questions you or other members of the subcommittee may have.

STATEMENT OF J. MARK ROBINSON, DIRECTOR, OFFICE OF ENERGY PROJECTS, FEDERAL ENERGY REGULATORY COMMISSION

Mr. Chairman and members of the committee, my name is J. Mark Robinson and I am the Director of the Office of Energy Projects at the Federal Energy Regulatory Commission (Commission). I appreciate the opportunity to appear before you to discuss S. 2319, the Tapco Project Licensing Act of 2004, which relates to a hydroelectric project regulated by the Commission. As a member of the Commission's staff, the views I express in this testimony are my own, and not those of the Commission.

BACKGROUND

Pursuant to Part I of the Federal Power Act (FPA), the Commission is responsible for licensing and relicensing non-Federal hydropower projects, managing those projects during their license terms, and overseeing the safety of hydropower dams. Section 4(e) of the FPA authorizes the Commission to issue licenses for projects which, among other things, are located "upon" reservations of the United States.

The Federal Water Power Act of 1920 (FWPA), which in 1935 became Part I of the FPA, originally included national parks in the definition of "reservations." In 1921, Congress amended the FWPA to remove national parks and monuments from the Commission's jurisdiction, and to retain in Congress the jurisdiction to authorize the construction of dams in parks. In 1935, when the FWPA was amended and became Part I of the FPA, Congress revised the definition of the term "reservation" to state that "reservations shall not include national monuments or national parks."

Establishment of the Great Smoky Mountain National Park was first provided for by a Congressional Act approved on May 22, 1926, with a provision specifying that the provisions of the FWPA did not apply to the park.

The 359.8-megawatt (MW) Tapoco Hydroelectric Project is located on the Little Tennessee and Cheoah Rivers in Graham and Swain Counties, North Carolina, and Blount and Monroe Counties, Tennessee. The project consists of the 49.2-MW Santeetlah Development, located on the Cheoah River, and the 118-MW Cheoah Development, the

140.4-MW Calderwood Development, and the 52.2-MW Chilhowee Development, all located on the Little Tennessee River. The project occupies 387 acres within the Nantahala National Forest, which is administered by the U.S. Forest Service. Notwithstanding the prohibitions discussed above on the Commission licensing projects within national parks, the reservoir of the Chilhowee project is located in part on one hundred acres of land within the Great Smoky Mountain National Park, which is administered by the National Park Service.

The Commission issued the original license for the Tapoco Project on March 17, 1955, for a period of 50 years, effective March 1, 1955, and expiring on February 28, 2005. The 1955 license authorized the construction and operation of the Chilhowee Development, and the continued operation of the Calderwood, Cheoah, and Santeetlah Developments. The license order did not state that a portion of the project would occupy national park land. Moreover, the license application, filed on October 25, 1954, states that “[n]o lands or reservations of the United States will be affected by the * * * [p]roject.” A search of the Commission’s filed has produced no information that sheds further light on the matter.

As I have mentioned, the only portion of the Tapoco Project that is located on national park land is a part of the Chilhowee Reservoir. When the reservoir, which has a surface area of about 1,734 acres at normal full pond elevation of 874.0 feet msl, is at full elevation, it inundates approximately 100 acres of national park land.

Water in the reservoir is stored and released in order to provide head for generation at the project. In addition, the reservoir supports the second highest recreational use of the four developments, due to its proximity to Knoxville, and the availability of several boating access points and campgrounds. Also, Chilhowee’s upper end supports a cold-to cool-water fishery, while the lower portion of the reservoir supports a cool-water fishery. The Tennessee Wildlife Resources Agency actively manages the upper portion of the reservoir as a stocked put-and-take trout fishery and stock catchable sized trout.

THE RELICENSING PROCEEDINGS

On February 21, 2003, Tapoco Division of Alcoa Power Generating Inc. (Alcoa) filed an application for a new license for the project. On July 23, 2003, the Commission issued a public notice of the application. In response to the notice, several agreements in principle were filed with the Commission, setting forth the framework of a comprehensive settlement agreement among Alcoa, the U.S. Department of the Interior, the U.S. Department of Agriculture, the Eastern Band of Cherokee Indians, resource agencies of the States of North Carolina and Tennessee, local governments, and national, regional, and local non-governmental organizations, with respect to relicensing the Tapoco Project. The parties have indicated to Commission

staff that they expect to file a settlement agreement with the Commission on or before May 14, 2004.

As part of the agreement in principle, Alcoa agrees to convey to the Park Service, in fee simple, approximately 200 acres of land located outside of the Tapoco Project boundary, and within the authorized boundary of the Great Smoky Mountain National Park. In return, the Park Service would transfer to Alcoa the approximate 100 acres of the Great Smoky Mountain National Park inundated by Chilhowee Reservoir. If these transfers were accomplished, no portion of the Tapoco Project would be located within a national park. However, it is my understanding that the Secretary of the Interior must obtain Congressional authorization in order to complete the transfers.

On March 15, 2004, Commission staff issued an environmental assessment (EA) for the relicensing of the Tapoco Hydroelectric Project.

The EA states that there is essentially no shoreline development on any of the Little Tennessee River mainstem reservoirs other than project-related facilities (project works and recreation facilities), and some small, public, non-project recreation areas. All of the shoreline surrounding the Chilhowee, Calderwood and Cheoah reservoirs is owned by Alcoa, the Tennessee Valley Authority, the Forest Service, the National Park Service, and the Tennessee Department of Transportation. Moreover, with the exception of a few parcels, most of the property adjoining the project boundary is also owned by these entities. The EA concluded that topography and existing property ownership virtually ensure that these reservoir shorelines will continue to be protected from future development. Further, nothing proposed by Alcoa is expected to change development patterns around the reservoir, or the current uses of the reservoir. Finally, as is often the case for projects in the southeastern U.S., the EA recommends that Alcoa be required to develop and implement a shoreline management plan, in order to protect important aquatic and terrestrial habitats and cultural sites, and to enhance recreation resources by establishing specifications and criteria to ensure that all private and multi-use recreation facilities are properly constructed and maintained.

On the other hand, the EA indicates that, were the reservoir lowered to an elevation where it would no longer inundate the Great Smoky Mountain National Park, virtually the entire 1,724 acre Chilhowee Reservoir would be eliminated, resulting in the loss of the fishery, boating, and other recreation opportunities, as well as the annual loss of 52.2 MW capacity, or enough to power about 52,000 homes.

The EA recommended that the Commission issue a new license for the Tapoco Project consistent with the agreements in principle. Comments on the EA are due by May 14, 2004.

THE PROPOSED LEGISLATION

S. 2319 would authorize the Secretary of the Interior, consistent with the agreements in principle, to transfer to Alcoa the 100 acres of national park land that are occupied by the Chilhowee Reservoir, in exchange for some 186 acres of land located elsewhere in Great Smoky Mountain National Park, or for equivalent land. S. 2319 further states that, on completion of the land exchange, the Commission will have jurisdiction to license the Tapoco Project.

The land exchange provided for by S. 2319 will allow the Commission to consider Alcoa's proposal to relicense the project in its current form, as contemplated by the agreements in principle, without the need to address the issue of a portion of the project being located in a national park. If the legislation were to provide that the transfer be concluded by December 2004, it would help ensure the Commission's ability to act on Alcoa's proposal by the date the license expires on February 28, 2005.

Thank you. I will be pleased to answer any questions you may have.

CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, the Committee notes that no changes in existing law are made by the bill S. 2319 as ordered reported.

