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UNITED STATES GENERAL ACCOUNTING OFFICE

WASHINGTON, D.C. 20548

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B-207549

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The Honorable Richard L. Ottinger
Chairman, Subcommittee on Energy
Conservation and Power
Committee on Energy and Commerce
House of Representatives



118752

Dear Mr. Chairman:

Subject: Interpretation and Potential Impact of the Federal Energy Regulatory Commission's Fiscal Year 1983 Budget Request (GAO/EMD-82-94)

Your May 4, 1982, letter requested that we address several questions concerning the Federal Energy Regulatory Commission's (FERC's) fiscal year 1983 budget request. FERC's budget request has been complicated by the Office of Management and Budget's (OMB's) submission of an amendment to the original FERC budget submission. FERC has expressed concern that the amendment appears to reduce its request from \$92.5 million to \$32.5 million with the remaining \$60 million coming from the collection and retention of user charges by FERC. As you pointed out in your letter, OMB believes that the language in the amendment ensures that FERC will receive the full \$92.5 million regardless of the level of collections. In other correspondence, however, it appears that OMB is limiting its request for budget authority to \$32.5 million.

To respond to your specific questions, we interviewed OMB, FERC, Congressional Budget Office, and Congressional Research Service officials, and analyzed memoranda and other materials obtained from FERC. FERC officials also provided data on the dollar value of rate filings received and amounts approved, suspended, and refunded for the last 5 years. Reporting time constraints prevented us from verifying this data and other funding and expenditure data obtained from FERC. We performed our review in accordance with GAO's "Standards for Audit of Governmental Organizations, Programs, Activities, and Functions."

Your specific questions, as enumerated in your letter, and our responses are provided below.

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QUESTIONS AND ANSWERS

1. Question: "The Administration recently amended the FERC budget request by adding a clause which would permit FERC to retain its collections to offset its appropriation. The amended language reads as follows:

'For necessary expenses of the Federal Energy Regulatory Commission, including services as authorized by 5 U.S.C. 3109, \$92,500,000 of which not more than \$60,000,000 will be derived from license and other fees and charges.'

"According to OMB * * *, the proposed language ensures that FERC would receive \$92.5 million regardless of the level of its collections:

'However, in the event that collections fall short of our projections, the proposed appropriation language provides for covering the shortfall without further action by the Congress.'

"(a) Do you agree with OMB's interpretation of the budget request?"

Answer: No. While OMB's interpretation appears to be one reasonable interpretation of the proposed appropriation language, the vagueness of the language would lead to other interpretations just as reasonable. However, if it were enacted, the ambiguous language could raise questions about Congress' intent. We believe the language should be clarified to precisely express congressional intent.

Most of the interpretive problems concern the clause "not more than \$60,000,000 will be derived from [FERC collections]." Does the verb "will be derived" indicate that the Congress would be appropriating revenues FERC collects? Does this assume that FERC's proposed fee collection legislation, S. 2358, will be enacted? Does the language authorize FERC to retain fees and charges it collects? If so, where is the money to be deposited when collected--in FERC's appropriations account or in the U.S. Treasury as miscellaneous receipts? Does "will be derived" indicate that part of the total appropriation must come from revenue FERC collects? Does "not more than" mean--"less than or equal to"? When used in conjunction with "will be derived," does it mean \$60,000,000, but not over \$60,000,000? If FERC is unable to collect \$60,000,000, where does the shortfall come from--general revenues? If so, how should FERC initiate a transfer from general revenues to its appropriations account--through a supplemental request?

While we do not endorse the approach suggested by OMB, OMB's objective, to use charges collected by FERC to pay FERC's operating expenses, can be achieved with more precisely drafted language:

"For necessary expenses of the Federal Energy Regulatory Commission, including services as authorized by 5 U.S.C. 3109,"

"\$92,500,000; any revenues received by the Commission in this fiscal year from license and other fees and charges shall also be available for expenditure for necessary expenses of the Commission; notwithstanding the foregoing, however, the total expenditure for necessary expenses of the Commission shall not exceed \$92,500,000."

We have consistently maintained that budget authority, to have optimum meaning and usefulness as a concept and tool in the congressional budgetary process, should express the maximum potential obligations which may be incurred under authority being made available. Such a broad concept of budget authority provides the best assurance that budget totals and individual schedules provide a full disclosure of the possible financial consequences of budgetary decisions being requested by the President and considered by the Congress. The Congress cannot effectively exercise budgetary control on budget totals if it does not have complete and accurate information on the new obligational authority being made available to executive branch agencies.

If the Congress determines that FERC requires an appropriation of \$92,500,000, we believe the initial budget authority should be \$92.5 million. The basis for our position is in prior GAO opinions. For example, B-159687, Mar. 16, 1976, stated:

"* * * the fundamental objective of the Congressional Budget Act of 1974 was to establish a process through which Congress could systematically consider the total Federal budget and determine priorities for the allocation of resources. We believe this process achieves its maximum effectiveness when the budget represents as complete as possible a picture of the financial activities of Federal agencies. We further believe it is vital to maximizing the effectiveness of the process that Federal financial resources be measured as accurately as possible because proprieties are actually established through decisions on the conferring of this authority. From this standpoint, therefore, the concept of budget authority should (a) encompass all actions which confer authority to spend money, (b) reflect as accurately as possible the amount of such authority which is conferred and (c) be recognized at the point at which control over the spending of the money passes from the Congress to the administering agency."

In yet another opinion (B-114828, Jan. 31, 1977), concerning the Department of Housing and Urban Development's discretionary emergency mortgage purchase assistance program, we noted that the correct statement of budget authority was the "maximum" new authority made available by law, and not merely the portion which the executive branch uses.

For these reasons, we endorse more direct appropriation language, as follows:

"For necessary expenses of the Federal Energy Regulatory Commission, including services as authorized by 5 U.S.C. 3109, \$92,500,000."

Any user fees, license fees, or other charges collected by FERC should be deposited in the Treasury as miscellaneous receipts.

"(b) Assuming OMB is correct in its interpretation, what advantages or disadvantages arise from this method of funding FERC, i.e., permitting FERC to offset its direct appropriation with its collections?"

Answer: The major advantage of offsetting is that it relates specific receipts to specific spending for a related purpose, and it therefore improves cost awareness. The major disadvantage is a reduced level of congressional control over specific spending. Also, using collections to offset expenditures lowers the reported (1) total receipts, (2) budget authority, and (3) outlays because only the net differences are included in these budget totals. This is viewed as an advantage by some people because it lowers the totals, but we view it as a disadvantage because the actual level of Federal activity is understated by this netting process.

"(c) An earlier proposal for the FERC budget reads as follows: '\$32,500,000 and, in addition, not to exceed \$60,000,000 of revenues received from license and other fees and charges shall be credited to this account and will be available for the purposes of this appropriation.'

"Such a provision would appear to have tied FERC's operating budget directly to its level of collections. Is the language of the earlier proposal deficient? If so, why? Are the problems solved by the final appropriation request cited in Question #1?"

Answer: This earlier language would limit FERC's operating budget to \$32.5 million plus any collections up to \$60 million. Whether it is deficient depends on congressional intent. If the intent is to ensure an operating level of \$92.5 million, then the earlier language could be deficient. The new language is more ambiguous than the earlier proposal. But, it can be clarified to make sure \$92.5 million is provided as budget authority. (See answer to question No. 1 (a)).

The language in this earlier proposal would result in FERC's receiving between \$32,500,000 and \$92,500,000, depending on how much revenue it collects from fees and charges. If FERC is unable to collect \$60,000,000 it would have to submit a supplemental appropriations request, should the agency require more funds.

"(d) Section 3 of proposed legislation on FERC's fee collections would permit FERC to retain its collections when so specified"

"in an appropriation act. What are the advantages and disadvantages of such an approach?"

Answer: See response to Question No. 1(b), above.

"(e) Are you aware of any other agencies that directly fund their regulatory activities from collections, or do most, if not all, deposit such collections in the U.S. Treasury?"

Answer: Due to the limited time allowed to respond to this request, we did not analyze all the regulatory agencies and their use of collections. We are aware, however, that some programs, such as the Food and Drug Administration's antibiotic certification program, use revolving funds to fund their regulatory activities. Other agencies, such as the U.S. Customs Service, return their receipts to the U.S. Treasury. Still other agencies, such as the Agricultural Marketing Service, operate under both methods. In fiscal year 1981, the Securities and Exchange Commission received collections covering about 80 percent of their costs, but all the receipts went directly to the Treasury.

2. Question: "What activities of the FERC would be halted if the appropriation consisted of \$32.5 million plus retained fees, assuming retained fees were about \$27 million?"

Answer: FERC has not conducted a formal shutdown analysis, and was therefore unable to provide us any detailed explanation as to which particular activities could or would be curtailed in a reduced budget operation. However, in oral discussions, the Director, Office of Program Management, told us that, in general, FERC would have to stop all activities in early February 1983 if only \$32.5 million were appropriated. He explained that FERC would not be able to operate on a piecemeal or reduced level and would shut down. FERC officials said they would not be able to stretch their available resources beyond that time because of the high level of initial costs such as building rents, shuttle services, guard service, court reporters, etc. They estimate that about \$6-\$7 million will be needed for nondiscretionary fixed costs, of which 80 percent is for space rental. They told us that the cost of operations, including variable overhead, equals \$290,000 a day. Thus, at a \$32.5-million level, the Commission could operate 88 work days, or until February 2, 1983. An additional \$27 million from retained fees could add another 93 work days or extend operations to mid-June 1983.

In response to our questions, however, FERC officials told us that they estimate fiscal year 1983 collections from existing programs, i.e., hydropower user charges, etc., would amount to only about \$24 million to \$28 million and that collections are not uniform throughout the year. They further noted that in order for these fees to be retained, there would have to be legislative approval to make the funds available for day-to-day operations. Without such actions, FERC would only have its \$32.5-million appropriation.

A total FERC shutdown could seriously affect industry and consumers, because more than 90 percent of the Commission's activities are explicitly required by statute. We believe such a shutdown would, in effect, eliminate FERC's regulatory role. This role, as defined by the Department of Energy, encompasses regulating " * * * the national operations of electric utilities, hydroelectric powerplants, and interstate natural gas and petroleum pipelines--to ensure that industry, business, and consumers have adequate supplies of energy at 'just and reasonable' prices, while allowing energy producers rates of return that provide sufficient incentive for increased production and efficiency." 1/

If FERC stopped operating, the Government would be unable to carry out its established rate-setting activities. For example, in fiscal year 1981, FERC received requests for rate increases from electric utilities amounting to \$759 million. Only \$15 million was allowed to be put into immediate effect, with \$594 million being suspended for periods of time, ranging from 1 day to 5 months before being put into effect. The Commission also ordered utilities to refund \$152 million in overcharges to consumers as a result of its rate-setting activities in fiscal year 1981. Furthermore, total gas pipeline rate increase filings amounted to \$1.651 billion for fiscal year 1981. FERC suspended \$1.529 billion of this amount. It also ordered refunds of \$1.274 billion, which had been overcharged in previous rate filings.

Without FERC's regulatory control, the foregoing suspensions could not have taken place, and the requested rates would automatically have gone into effect. Even though later action may be brought against the utilities, FERC officials believe it is doubtful that any overcharges could be recovered and returned to consumers.

The Commission was also very active in the area of hydro-power licensing in fiscal years 1980 and 1981, as shown in the following table.

<u>Applications filed</u>	<u>FY 80</u>	<u>FY 81</u>
New capacity	73	91
Preliminary permits	501	1,856
Other	<u>269</u>	<u>477</u>
Total	<u>843</u>	<u>2,424</u>

1/Report to the Congress by the Department of Energy "Sunset Review Summary Report," February 1982.

<u>Completions</u>	<u>FY 80</u>	<u>FY 81</u>
New capacity	38	59
Preliminary permits	191	1,280
Other	<u>496</u>	<u>464</u>
Total	<u>725</u>	<u>1,803</u>
Dam safety inspections	1,152	1,185

Source: FERC

Without FERC licensing of hydroplants and other projects, substantial delays in project completion would occur, and the safety of hydroplants could be affected. For example, delays in FERC action on the soon to be filed Application for License for the Susitna hydroelectric project in Alaska could amount to more than \$700 million a year.

Lengthy delays on any project could result in increased costs to the consumers simply because of higher construction and financing costs as the projects are pushed out into the future. These delays could only be mitigated if the statutory requirements for regulating the projects were suspended in concert with FERC's cessation of activity.

The Commission could possibly order a suspension of all existing applications for rate increases on the day before it suspends business for lack of funds. However, there is nothing to prevent all interstate electric utilities and natural gas pipeline firms from filing new rates for all their services the next day. Carrying this one step further, there is nothing to prevent these filings from being exorbitant. Problems would be further compounded by the expected exodus of Commission personnel if the shutdown were for 30 days or more, and restarting FERC activities would be difficult even if funds were restored at a later date.

3. Question: "The fee legislation appears to permit FERC to assess annual charges to electric utilities and interstate natural gas or oil pipelines at a discretionary level to recover all or part of its operating costs.

"(a) In general, is it sensible to fund all regulatory activities through fees upon regulated entities? If not, what standards have been used in the past for determining the appropriate level of collections?"

Answer: Assessing the sensibleness of funding all regulatory activities through fees upon regulated entities is a difficult matter. At present, the Commission collects fees from hydropower operators at levels commensurate with the Commission's hydropower operating

costs and places these funds into the general Treasury. Hydro-plant licensees receive several benefits from holding plant licenses, such as monopoly rights to operate the facility, public and State utility commission acceptance of the plant, and assurance of operational safety.

However, the harder questions occur when we look to those companies which are required by law to file for FERC approval of proposed rate increases. On one hand, it can be argued that the rate-setting procedure serves to protect individual companies by assuring that throughout the industry, rates are fair and equitable. On the other hand, however, it could be argued that companies' interests are not served by having certain costs disallowed or their rate of return limited by regulatory actions.

Another complicating factor is the role of the consumer. The consumer is the one who eventually pays the costs for the Commission's activities. User fees and/or charges are regulatory costs to companies which can be passed on to consumers as a part of their operating costs. Some may argue that the existence of the Commission ensures that the rates are fair and equitable as discussed earlier. (See answer to question No. 2.) The rates could start becoming exorbitant without the existence of the Commission. Others may argue, however, that the Commission takes so long to process rate cases that the so-called benefits are not worthwhile. However, FERC officials point out that FERC presents a forum for both consumer and company interests to have grievances heard. They also believe that FERC presents a central focus on many issues that would otherwise need to be dealt with by the Congress in case-specific legislation.

As previously discussed, several agencies now collect fees to cover a portion of their regulatory costs. However, no uniform criteria exist for determining the appropriate level of collections.

We note that even under section 10(e) of the Federal Power Act, hydroplant charges for cost of administration are not fully reimbursed since public licensees are entitled to an exemption to the extent that power is sold without profit. FERC estimates that 10 percent of its administrative costs cannot be recouped due to this exemption authority.

"(b) Should considerations such as competitive impacts of fees and the impact on legislative purpose of the underlying statutes be included in the legislation?"

Answer: A requirement that FERC consider the competitive impact of fees on regulated companies could be included as part of FERC's waiver authority under section 2(d) of S.2358. As currently drafted, FERC would be given broad discretion as to when to waive all or part of a fee. Without limiting FERC's discretion

to deal with unforeseen circumstances, section 2(d) could be re-drafted as follows:

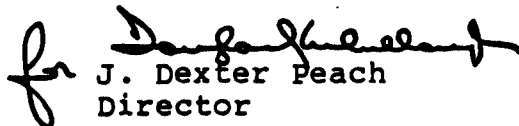
"The Commission may, by rule or order, waive all or part of an annual charge or fee assessed under this Act, if the Commission finds that such waiver is consistent with the public interest, with equal regulation of natural gas companies, of public utilities, and of common carriers, and with competition among natural gas companies, among public utilities, and among common carriers."

It would be more appropriate to consider the impact of fees and charges on the legislative purposes of the underlying statutes while the bill is under consideration rather than after the bill has passed. We are not in a position to anticipate how fees and charges might impact on the legislative purposes of the underlying statutes. But, if fees and charges will, in some manner, hinder or alter proper regulation of these companies, that fact should be determined now so that the bill can be rewritten, should the Congress so choose, to prevent such impacts.

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Because of the reporting time constraints imposed by this request, we did not obtain official FERC comments. As arranged with your office, unless you publicly announce its contents earlier, we plan no further distribution of this report until 14 days from the date of issuance. At that time, we will send copies to the Chairman, Federal Energy Regulatory Commission; the Director, Office of Management and Budget; and the Chairmen of the House and Senate Appropriations Committees; and make copies available to others upon request.

Sincerely yours,


for J. Dexter Peach
Director