

155 FERC ¶ 61,262  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;  
Cheryl A. LaFleur, Tony Clark,  
and Colette D. Honorable.

David O. Harde

Project No. 8722-018

ORDER TERMINATING LICENSE BY IMPLIED SURRENDER

(Issued June 16, 2016)

1. This order terminates, by implied surrender, the license for the Landis-Harde Water Power Project No. 8722 (Landis-Harde Project). The project is located on Perry Creek, in El Dorado County, California.

**I. Background**

2. On April 27, 1990, the Commission issued a 50-year license to David O. Harde (licensee) for the Landis-Harde Project.<sup>1</sup> As authorized, the project consists of: (1) a 4-foot-high, 42-foot-long diversion; (2) a 1,000-foot-long, 24-inch-diameter penstock; (3) a powerhouse containing a single generating unit rated at 100 kilowatts; (4) a 182-foot-long, 480-volt transmission line connecting to a transformer; (5) a 664-foot-long, 21-kilovolt transmission line from the transformer to Pacific Gas & Electric Company's (PG&E) transmission line; and (6) appurtenant facilities.<sup>2</sup>

3. The project has not operated since 2006 when the licensee determined that low water flows and the cost of liability insurance required by PG&E made the project uneconomical. On September 22, 2009, Commission staff inspected the project and found it to be non-operational. In a follow-up letter on February 16, 2010, Commission staff requested that the licensee inform the Commission of his future plans regarding the

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<sup>1</sup> *David O. Harde*, 51 FERC ¶ 61,088 (1990).

<sup>2</sup> *David O. Harde*, 63 FERC ¶ 62,054 (1993) (amending license).

project.<sup>3</sup> In response, on April 8, 2010, the licensee notified the Commission of his intent to resume project operation when water flows were adequate.<sup>4</sup>

4. On September 6, 2012, Commission staff conducted a subsequent inspection of the project and found that it was still not operating. By letter dated September 11, 2012, Commission staff requested that the licensee file a plan and schedule to restore project operation or an application to surrender the project license.<sup>5</sup> In response, on November 7, 2012, the licensee filed a letter with the Commission stating that he was working with a consultant and considering his options to proceed with transferring or surrendering the project license.<sup>6</sup> The licensee explained that he would work with the consultant to evaluate all of his options and make a decision regarding the disposition of the project within a year.

5. On December 4, 2013, Commission staff sent a letter to the licensee, noting that a year had passed since the licensee's previous correspondence and again requesting that the licensee file a plan and schedule to resume project operation or an application to surrender the license.<sup>7</sup> On January 6, 2014, Ms. Kelly Sackheim, the licensee's consultant, filed a letter with the Commission expressing the licensee's intent to file a transfer application within six months.<sup>8</sup> On February 7, 2014, Commission staff noted the licensee's stated intent to transfer the project license and requested the licensee file, by September 1, 2014, a transfer application or a revised plan and schedule.<sup>9</sup> The licensee filed neither.

6. On November 26, 2014, Commission staff requested that the licensee file a license transfer application or a revised plan and schedule within 15 days.<sup>10</sup> On December 11,

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<sup>3</sup> Letter from Wing H. Lee (San Francisco Regional Engineer) to Mr. David O. Harde.

<sup>4</sup> Letter from David O. Harde to Wing H. Lee.

<sup>5</sup> Letter from Robert B. Finucane (San Francisco Regional Engineer) to David O. Harde.

<sup>6</sup> Letter from David O. Harde to Robert B. Finucane.

<sup>7</sup> Letter from Charles K. Cover to David O. Harde.

<sup>8</sup> Letter from Kelly W. Sackheim to the Secretary of the Commission.

<sup>9</sup> Letter from Charles K. Cover to David O. Harde.

<sup>10</sup> Letter from Charles K. Cover to David O. Harde

2014, the licensee requested an extension until February 28, 2015, to make the filing.<sup>11</sup> On December 17, 2014, Commission staff granted the extension of time.<sup>12</sup>

7. On March 4, 2015, Ms. Sackheim filed a revised plan and schedule, stating that she would file a joint transfer application with the licensee, transferring the project to her, and that completion of the license transfer was dependent upon finding a favorable power purchase agreement by August 1, 2015.<sup>13</sup> On September 1, 2015, Ms. Sackheim notified the Commission that she had “confirmed the availability of a power purchase contract” but nonetheless had “opted to facilitate a joint License Transfer Application from Mr. Harde to another qualified hydropower professional, rather than obtaining ownership of this project myself.”<sup>14</sup> Neither the licensee nor Ms. Sackheim thereafter filed a license transfer application.

8. On October 27, 2015, Commission staff requested that the licensee file a licensee transfer application and a plan and schedule to restore project operation within 30 days.<sup>15</sup> Staff stated that failure to respond in a timely manner would result in Commission action to terminate the license by implied surrender.<sup>16</sup> The licensee did not file a response.

9. On December 11, 2015, the Secretary of the Commission issued a public notice stating the Commission’s intent to terminate the license by implied surrender. The notice established January 11, 2016, as the deadline for filing comments, protests, and motions to intervene. On January 11, 2016, Mr. Scott Simmons filed a motion to intervene and protest, stating that he has been discussing the acquisition of the project with the licensee and would like to file a joint transfer application. The licensee did not respond to the notice.

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<sup>11</sup> E-mail from David O. Harde to Ashish Desai, filed on December 12, 2014.

<sup>12</sup> Letter from Charles K. Cover to David O. Harde

<sup>13</sup> Letter from Kelly W. Sackheim to the Secretary of the Commission

<sup>14</sup> Letter from Kelly W. Sackheim to the Secretary of the Commission

<sup>15</sup> Letter from M. Joseph Fayyad to David O. Harde

<sup>16</sup> The October 27, 2015 letter from M. Joseph Fayyad to David O. Harde was delivered to the licensee by certified mail.

## II. Discussion

10. The doctrine of implied surrender is typically invoked where, as here, the entity responsible for the project has, by action or inaction, clearly indicated its intent to abandon the project, but has not filed a surrender application (e.g., the licensee has physically abandoned the project property, dissolved its corporate or other legal entity, or has failed for several years to operate or maintain the project with no indication of doing so in the reasonably foreseeable future).

11. Article 16 of the license for the project provides, in relevant part, that:

If the Licensee shall cause or suffer essential project property to be removed or destroyed or to become unfit for use, without adequate replacement, or shall abandon or discontinue good faith operation of the project or refuse or neglect to comply with the terms of the license and the lawful order of the Commission mailed to the record address of the Licensee or its agents, the Commission will deem it to be the intent of the Licensee to surrender the license.<sup>17</sup>

12. The licensee's inaction in this case has made it clear that he does not intend or is unable to resume operation of the project. As described above, the Landis-Harde Project has not operated since 2006, and the licensee has repeatedly failed to respond to correspondence from Commission staff in a timely manner. This long-term failure to maintain the project in accordance with the specifications set forth in the license, and the licensee's lack of substantial progress toward restoring project operation or transferring the project to someone capable of restoring project operation, demonstrates the licensee's implied intent to surrender the project license.

13. Mr. Simmons protests the Commission's termination of the project license, stating that he is interested in acquiring the project and believes that restoring operation of the project is the public interest. Mr. Simmons further states that it would be inefficient for the Commission to require him to obtain a separate license, and that he would be willing to file a joint license transfer application with the licensee if the Commission were to allow it.

14. As discussed above, the Landis-Harde Project has not operated for ten years, and the licensee has repeatedly failed to respond to directives from Commission staff. On at least four occasions, the licensee or his agent has stated that he would file a transfer

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<sup>17</sup> *David O. Harde*, 51 FERC ¶ 61,088 at ordering para. (E) (citing form L-12, Terms and Conditions of License for Constructed Minor Project Affecting Interests of Interstate or Foreign Commerce, 54 FPC 1896 (1975)).

application with the Commission and yet no transfer application has been filed to date. Mr. Simmons suggests that he has “been discussing” acquisition of the project with Mr. Harde; however, Mr. Harde, a necessary party to such a proceeding, has responded neither to Commission staff’s repeated requests for information nor to Mr. Simmons’ pleading. As noted, Mr. Harde did not respond to the public notice of termination and gives no indication that he is either interested in filing a transfer application or would follow through with one. Under these circumstances, we find that delaying this implied surrender proceeding to accommodate the potential, but unsubstantiated, possibility of a transfer of the project license is not in the public interest. Following surrender, Mr. Simmons, or any other entity or individual wishing to operate and maintain the project, will have the opportunity to file a license application.

15. The Landis-Harde Project is a small-scale hydroelectric facility classified as having a low downstream hazard potential. The diversion structure is only four feet high and impounds less than one acre-foot of water. Further, there is little or no development immediately downstream of the project. Therefore, failure of the dam or improper operation would not be expected to cause loss of human life or economic or environmental harm.

16. Commission staff inspected the project on May 21, 2015, and found no adverse conditions that would threaten the immediate safety of the dam or the public. On May 26, 2016, Commission staff contacted the state of California’s dam safety office to notify it that with the termination of the license, the Commission’s jurisdiction over the dam would end. In response, the state of California said the dam would not be under its jurisdiction either because of the dam’s minimal height and storage volume.

17. Terminating this license will not authorize any action or alter the current condition of the project or surrounding environment. Rather, this is an administrative action designed to terminate an authorization for a license that is, for all practical purposes, no longer in effect. As such, there is no effect on the environment and an environmental analysis is not required.<sup>18</sup>

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<sup>18</sup> See 18 C.F.R. § 380.4(a)(1) (2015). See, e.g., *James B. Boyd and Janet A. Boyd*, 136 FERC ¶ 62,119 (2011), *order denying reh’g*, 138 FERC ¶ 61,085, at P 31 (2012) (finding that under 18 C.F.R. § 380.4(a)(1), environmental analysis was not necessary for the implied surrender of a license where all project facilities were left in place and such termination would not authorize any action or alter the current condition of the project or surrounding environment); *Watervliet Paper Co.*, 35 FERC ¶ 61,030 (1986) (finding that license surrender that left all project features in place was not a major federal action significantly affecting the quality of the environment).

The Commission orders:

(A) The license for the Landis-Harde Water Power Project No. 8722 is terminated by implied surrender, effective at the close of business on the issuance date of this order. No applications for this site may be submitted until July 18, 2016.

(B) This order constitutes final agency action. Any party may file a request for rehearing of this order within 30 days from the date of its issuance, as provided in section 313(a) of the Federal Power Act, 16 U.S.C. § 825*l* (2012), and section 385.713 of the Commission's regulations, 18 C.F.R. § 385.713 (2015). The filing of a request for rehearing does not operate as a stay of the effective date of this order. The licensee's failure to file a request for rehearing shall constitute acceptance of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.