

149 FERC ¶ 61,135
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Hydraco Power, Inc. and
Warren David Long

Project No. 12588-010

ORDER TERMINATING EXEMPTION BY IMPLIED SURRENDER

(Issued November 20, 2014)

1. This order terminates, by implied surrender, the exemption for the 150-kilowatt (kW) A.H. Smith Dam Project No. 12588, located on the San Marcos River in Caldwell County, Texas.

I. Background

2. On June 2, 2006, the Commission granted Hydraco Power, Inc. (Hydraco or exemptee) an exemption from the licensing requirements of Part I of the Federal Power Act (FPA) for its proposed A.H. Smith Dam Project.¹ The project was to utilize the following existing facilities: (1) a 10.5-foot-high by 86.5-foot-long concrete dam; (2) a 3-foot-wide by 4-foot-high wooden stopgate positioned in the east bank of the dam which regulates flow to the turbine; (3) a 10.62-acre impoundment; (4) a powerhouse; (5) a non-operating 150-kW turbine-generator unit; (6) a trashrack with 2-inch bar spacing; and (7) appurtenant facilities. The exemptee had stated that rehabilitation of the project would require: (1) repairs to the existing powerhouse; (2) refurbishment of the existing turbine and trashrack; (3) installation of a new 100-foot-long, 480-volt buried transmission line; and (4) installation of a water surface elevation gate in the headpond.

3. The exemption was made subject to standard articles contained in the Commission's regulations.² Standard Article 1 provides, in part, that "[i]f any term or condition of the exemption is violated, the Commission may revoke the exemption ... or take appropriate action for enforcement, forfeiture, or penalties under Part III of the Federal Power Act."³ Standard Article 3 provides, in part, that the Commission may

¹ *Hydraco Power, Inc.*, 115 FERC ¶ 62,250 (2006).

² *See* 115 FERC ¶ 62,250 (citing 18 C.F.R. § 4.106 (2006)).

³ 18 C.F.R. § 4.106(a)(1) (2006).

terminate the exemption if actual construction of any proposed generating facilities has not begun within two years or has not been completed within four years of the date of issuance of the exemption.

4. Article 10 of the exemption requires the exemptee, within 120 days of exemption issuance (i.e., by October 2, 2006), to file with the Commission a plan and schedule to install the new transmission line and restore the powerhouse, turbine, and trashracks to operating condition. Article 10 also states that the Commission may terminate the exemption if actual construction of any proposed or required facility has not begun within two years or has not been completed within four years of the date of issuance of the exemption.

5. The exemptee did not file the Article 10 plan and schedule, and, on June 28, 2007, Commission staff issued a letter informing the exemptee that it was in violation of its exemption. The letter directed the exemptee to file, within 20 days (i.e., by July 18, 2007), the required construction plan and schedule or a request for an extension of time to do so. In addition, the letter notified the exemptee that a violation of an exemption condition may subject the exemptee to the penalty provisions of section 31 of the Federal Power Act (FPA).⁴ On July 13, 2007, the exemptee filed its construction plan and schedule. The construction plan and schedule indicated that the project would begin generating power by January 2008.

6. On March 31, 2008, Commission staff informed the exemptee, via letter, that the work schedule filed on July 13, 2007 was out of date. The letter directed the exemptee to file a revised work schedule within 30 days (i.e., by April 30, 2008). On May 1, 2008, the exemptee filed the revised work schedule, indicating that the project would begin generating power by June 2009. On June 26, 2008, staff approved the construction plan and revised schedule.

7. On July 22, 2011, Commission staff inspected the project and found that the exemptee had not implemented the approved work plan and schedule. Accordingly, on March 13, 2012, Commission staff sent a letter requiring the exemptee to file, by May 1, 2012, a revised plan and schedule for restoring electrical generating capacity at the project. The exemptee did not respond. On November 16, 2012, staff sent a second letter to the exemptee, directing it to file a revised plan and schedule within 45 days (i.e., by December 31, 2012). The exemptee did not respond.

8. On November 6, 2013, Commission staff issued a letter notifying the exemptee that staff's records indicated that the only work completed at the project site to date was the installation of new trash racks, and that restoration of the powerhouse and generating unit was at a standstill. The letter required the exemptee to file, within 30 days (i.e., by December 6, 2013), a construction plan and schedule for restoring the project's

⁴ See 16 U.S.C. § 823b (2012).

generating capacity or an application to surrender the exemption.⁵ Staff also notified the exemptee that if it failed to respond, the Commission would begin a proceeding to terminate the exemption by implied surrender.

9. On December 17, 2013, the exemptee responded. It stated that financial constraints had hindered progress of many of the project's construction requirements, and that construction was currently on hold. The exemptee also stated that: (1) installation of the underground portion of the transmission line was complete; (2) installation of the weather head at the pole end⁶ and meter rack at the power house would be completed by February 28, 2014; (3) powerhouse interior restoration would resume after a certified electrical engineering firm conducted an inspection of the project and presented recommendations during the second week of January 2014; and (4) vegetation growth was removed from the project area, as required by staff's March 2012 letter.

10. On December 20, 2013, Commission staff responded to the exemptee's December 17 filing. Staff directed the exemptee to file, by February 14, 2014, a status report that: (1) detailed the exemptee's progress to date, including any supporting documentation; and (2) included a plan and schedule to restore project operation. The exemptee did not respond.

11. On April 1, 2014, Commission staff issued an additional letter allowing the exemptee the opportunity to file, within 15 days (i.e., by April 16, 2014), a plan and schedule to restore project operation or an application to surrender the exemption. The letter also notified the exemptee that failure to respond would result in the Commission taking steps to terminate the exemption by implied surrender.

12. On April 15, 2014, the exemptee filed a brief status report describing the progress at the project as of December 17, 2013. The report failed to provide any up-to-date information concerning progress at the project and failed to include a plan and schedule for restoring project operation or an application to surrender the exemption.

13. On May 2, 2014, Commission staff issued a Compliance Order finding that the exemptee was in violation of Article 10 of its exemption.⁷ The order required the exemptee to file, within 15 days of order issuance (i.e., by May 19, 2014), a status report

⁵ See section 4.102 of the Commission's regulations, 18 C.F.R. § 4.102 (2014).

⁶ A weather head is a waterproof cap shaped like a hood that acts as a weatherproof service drop entry point where overhead power or telephone wires enter a building, or where wires transition between overhead and underground cables.

⁷ *Hydraco Power, Inc.*, 147 FERC ¶ 62,082 (2014) (May 2 Order).

including a plan and schedule to restore project operation or an application to surrender the exemption.⁸

14. On May 9, 2014, the exemptee responded that it could not predict a schedule for restoring project generating capacity, but that it had scheduled an on-site meeting with a member of the Engineering Department at Texas State University to discuss the potential for collaboration between the University and the exemptee in restoring the project's powerhouse and electrical generating equipment.⁹

15. On June 20, 2014, Commission staff issued a letter informing the exemptee that its May 9 filing failed to include a status report with a plan and schedule to restore project operation or an application to surrender the exemption, as required by the May 2 Order.¹⁰ Staff allowed the exemptee a final opportunity to file, within 15 days (i.e., by July 7, 2014), a status report that included a plan and schedule to restore project operation or an application to surrender the exemption. Staff also directed the exemptee to file the results from the May 19 meeting with Texas State University.

16. On July 1, 2014, the exemptee responded, repeating that it could not estimate a schedule for restoring project generation or completing major component repairs.¹¹ On August 1, 2014, the exemptee filed the results from the meeting with Texas State University's Engineering Department. The exemptee explained that the University was unable to assist with project restoration because the Engineering Department does not have a licensed electrical engineer on staff. The August 1 filing reiterated that the exemptee could not estimate a time frame for restoring project operation, but stated that it was "hopeful" the project would begin generating within the next three years, or sooner.

17. On August 7, 2014, the Commission issued a public notice stating its intent to terminate the exemption for the project due to the exemptee's longstanding violation of Article 10 of its exemption and its failure to provide a timeframe for restoring project generation.¹² The notice established September 8, 2014, as the deadline for filing comments, protests, and motions to intervene.

⁸ The order also warned that failure to comply could result in civil penalties or revocation of the exemption pursuant to section 31 of the FPA.

⁹ The exemptee also explained in its May 9 filing, and in a June 2, 2014 filing, that it was working on public safety signage (required by Article 15 of the exemption).

¹⁰ Staff's letter also informed the exemptee that its June 2 filing failed to comply with the May 2 Order.

¹¹ The filing included an update on installation of the public safety signage.

¹² 79 Fed. Reg. 48,138 (Aug. 15, 2014).

18. On September 8, 2014, the exemptee filed a protest to the Commission's notice of intent to terminate.¹³ The exemptee states that it is currently "in the process of identifying potential funding opportunities," and it is "strongly considering pursuing" a U.S. Department of Agriculture Rural Energy for America Program (Rural Energy Program) grant and/or loan guarantee.¹⁴ According to the protest, the exemptee plans to apply for a Rural Energy Program grant in July 2016, which, if awarded, would facilitate restoration of the project's generating capacity by the end of 2017. Consequently, the exemptee asks the Commission to withhold terminating its exemption and to amend exemption Article 10 to accommodate its proposed schedule for obtaining a Rural Energy Program grant and/or loan guarantee.

II. Discussion

19. The doctrine of implied surrender has typically been 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 exemptee 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).¹⁵

20. As discussed above, the exemptee has had over eight years to bring the project on line, but has failed to do so. The exemptee has performed minimal work at the project, and construction of the powerhouse interior and generating unit remains to be done.¹⁶ The exemptee's 2007 construction plan and schedule stated that the project would be

¹³ Mr. Randy M. Bunker, project manager for the A.H. Smith Project, filed the protest on behalf of the exemptee.

¹⁴ The Rural Energy Program provides, *inter alia*, financial assistance to rural small businesses to construct renewable energy systems for the benefit of rural America. USDA RURAL DEVELOPMENT, http://www.rurdev.usda.gov/bcp_reap.html (last visited October 27, 2014). According to the exemptee, under the program 25 percent of the total cost to rehabilitate the plant and bring it online could be funded by grants with another 50 percent funded by a guaranteed loan.

¹⁵ *River Bounty, Inc.*, 142 FERC ¶ 61,126 (2013); *James B. Boyd and Janet B. Boyd*, 138 FERC ¶ 61,085, at P 16 (2012) (citing *James Lichoulas Jr.*, 124 FERC ¶ 61,255 (2008), *reh'g denied*, 125 FERC ¶ 61,195 (2008), *aff'd*, *Lichoulas v. FERC*, 606 F.3d 769 (D.C. Cir. 2010)).

¹⁶ The exemptee has provided safety signage for the public and installed new trashracks and the underground portion of the transmission line. However, the transmission line is not connected to the powerhouse or power pole because it has not been certified as meeting the requirements for interconnection with the transmission grid.

operational by January 2008. It was not. The exemptee's May 2008 plan and schedule said the project would be operational by June 2009. It was not. Subsequently, Commission staff sent numerous letters to the exemptee, directing it to file a revised construction schedule. The exemptee either failed to respond or responded by stating that construction was on hold due to the lack of funds. Only after Commission staff issued the notice proposing to terminate the exemption did the exemptee provide a schedule of sorts, stating that it is pursuing various finding options that, if successful, could result in the project being operational by the end of 2017.

21. The exemptee's response is unconvincing. Project construction is at a standstill because the exemptee lacks the financial capability to bring the project on line. The exemptee does not have the money to perform the needed work, and it is entirely speculative whether, or when, it would be able to obtain financing through the Rural Energy Program or by some other means.¹⁷ Consequently, the exemptee has failed to live up to the obligations of its exemption. The exemptee's long term failure to restore the project's generating capacity and its financial inability to carry out the exemption terms warrant a finding that it is the exemptee's intent to abandon the project.¹⁸ We deem this sufficient to support implied surrender of the exemption.¹⁹

¹⁷ For example, the exemptee explains that a project feasibility study and an interconnection agreement with a local utility are prerequisites for a Rural Energy Program grant application, but provides no information indicating that it will begin, let alone complete these tasks.

¹⁸ We note that the State of Texas has evidently revoked Hydraco's status as a corporate entity due to a tax or administrative forfeiture. *See* State of Texas Taxable Entity Search, TEXAS COMPTROLLER OF PUBLIC ACCOUNTS, <https://mycpa.cpa.state.tx.us/coa/Index.html> (search "Entity Name" for "Hydraco Power, Inc." then follow "Search by Name" hyperlink). Because exemptions from licensing require, and run with, ownership of the project, this order applies to Hydraco and any successor in interest (e.g., Mr. Warren David Long, the owner and president of Hydraco).

¹⁹ *See River Bounty, Inc.*, 142 FERC ¶ 61,126 (2013) (finding implied surrender of exemption despite exemptee's request for an extension of the repair schedule); *Fourth Branch Associates (Mechanicville) v. Niagara Mohawk Power Corp.*, 89 FERC ¶ 61,194, at 61,598 (1999) (finding implied surrender of license due to licensee's financial inability to carry out the license terms and despite licensee's desire to continue as a licensee), *reh'g denied* 90 FERC ¶ 61,250 (2000). In addition, we acknowledge that Hydraco's failure to timely complete construction as required by exemption Article 10 and Standard Article 3 would provide a sufficient basis, in the alternative, to terminate the exemption. *See Hydraco Power, Inc.*, 115 FERC ¶ 62,250 (2006).

22. Public safety will not be affected by terminating the exemption. An inspection of the project on October 18, 2012, by Commission staff found no adverse conditions that should threaten the immediate safety of the dam or the public. With our termination of this exemption from licensing, the Commission's jurisdiction will end, and authority over the site will pass to the State of Texas's dam regulatory authorities.

The Commission orders:

(A) The exemption from licensing for the A.H. Smith Dam Hydroelectric Project No. 12588 is terminated by implied surrender, effective December 22, 2014. No applications for this site may be submitted until December 23, 2014.

(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 FPA, 16 U.S.C. § 8251 (2012), and the Commission's regulations at 18 C.F.R. § 385.713 (2014). The filing of a request for rehearing does not operate as a stay of the effective date of this order, or of any other date specified in this order. The exemptee's failure to file a request for rehearing shall constitute acceptance of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.