

150 FERC ¶ 61,194
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Hydraco Power, Inc. and
Warren David Long

Project No. 12588-011

ORDER DENYING REHEARING

(Issued March 19, 2015)

1. On November 20, 2014, the Commission terminated, by implied surrender, the exemption for the 150-kilowatt A.H. Smith Dam, Project No. 12588 (Order Terminating Exemption).¹ The project is located on the San Marcos River in Caldwell County, Texas. On December 19, 2014, Hydraco Power, Inc. and Warren David Long² (collectively, Hydraco) filed a request for rehearing of the Order Terminating Exemption. For the reasons discussed below, we deny rehearing.

I. Background

2. On June 2, 2006, the Commission granted Hydraco an exemption from the licensing requirements of Part I of the Federal Power Act for its proposed A.H. Smith Dam Project.³ 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;

¹ *Hydraco Power, Inc.*, 149 FERC ¶ 61,135 (2014) (Order Terminating Exemption).

² As noted in the Order Terminating Exemption, 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). *Id.* P 21 n.18.

³ *Hydraco Power, Inc.*, 115 FERC ¶ 62,250 (2006).

(6) a trashrack with 2-inch bar spacing; and (7) appurtenant facilities. Hydraco 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.⁴ Standard Article 1 provided, 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."⁵ Article 10 of the exemption required 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 trash racks to operating condition. Article 10 and standard Article 3 also stated that the Commission could terminate the exemption if actual construction of any proposed or required facility had not begun within two years or had not been completed within four years of the date of issuance of the exemption.

4. As explained in greater detail by the Order Terminating Exemption, Hydraco had over eight years to bring the project on line, but it failed to do so.⁶ In July 2007, Hydraco filed its initial construction plan and schedule, stating that the project would be operational by January 2008. It was not. In May 2008, Hydraco filed its second construction plan and schedule, stating that the project would be operational by June 2009. It was not. Subsequently, Commission staff sent Hydraco numerous letters directing it to file a revised plan and schedule for restoring project operation or an application to surrender the exemption.⁷ Hydraco either failed to respond or responded by stating that it could not estimate a schedule for restoring project operation because

⁴ See *Hydraco Power, Inc.*, 115 FERC ¶ 62,250 (2006) (citing 18 C.F.R. § 4.106 (2006)).

⁵ 18 C.F.R. § 4.106(a)(1) (2006).

⁶ Order Terminating Exemption, 149 FERC ¶ 61,135 at PP 7-16.

⁷ See *id.* (summarizing Commission staff's letters dated March 13 and November 16, 2012; November 6 and December 20, 2013; April 1 and June 20, 2014; and the May 2, 2014 Compliance Order).

project construction, including major component repairs, was on hold due to lack of funds.⁸

5. On August 7, 2014, the Commission issued a public notice stating its intent to terminate the project exemption due to Hydraco's longstanding violation of exemption Article 10 and its failure to provide a timeframe for restoring project generation.⁹ On September 8, 2014, Hydraco filed a protest to the Commission's notice of intent to terminate, stating that it was exploring potential financing opportunities, including a U.S. Department of Agriculture Rural Energy for America Program grant and/or loan guarantee, which, if granted, would facilitate restoration of the project by the end of 2017.

6. On November 20, 2014, we issued the Order Terminating Exemption. The order found that Hydraco has only performed minimal work at the project since obtaining its exemption in 2006 and that it lacks the funding to proceed with the necessary component repairs, including construction of the powerhouse interior and generating unit.¹⁰

7. On December 19, 2014, Hydraco filed a request for rehearing of the Order Terminating Exemption. On rehearing, Hydraco claims that it has reached a financing agreement with a new investor and, consequently, it is ready to perform the work needed to comply with its exemption. Hydraco also argues on rehearing that the Order Terminating Exemption erred by finding that project construction is at a standstill, by failing to excuse construction delays caused by severe flooding on October 30-31, 2013, and by finding that Hydraco intended to abandon the project.

II. Discussion

A. Project Financing

8. On rehearing, Hydraco objects to the statement in the Order Terminating Exemption that it lacks the financial capability to rehabilitate the project and bring it on line. It asserts that it has obtained the financing its needs to comply with its exemption. Specifically, Hydraco claims that it has "reached an agreement" with a local landowner, Mr. R. Gordon Hall, who "is financially ready willing and able to immediately provide

⁸ *See id.* (summarizing Hydraco's filings of December 17, 2013, and April 15, May 9, and July 1, 2014).

⁹ 79 Fed. Reg. 48,138 (Aug. 15, 2014) (establishing September 8, 2014 as the deadline for filing comments, protests, and motions to intervene).

¹⁰ Order Terminating Exemption, 149 FERC ¶ 61,135 at PP 20-21.

all the financing required to bring the generation facility back on-line [emphasis added].” In addition, Hydraco claims that Mr. Hall is an engineer with work experience at similar hydropower projects and is qualified to oversee all aspects of the project restoration.

9. We disagree. Hydraco has not demonstrated that it now has the money needed to bring the project on line. The letter of intent from Mr. Hall that is attached to the rehearing request states that Mr. Hall and Mr. Long “are contemplating” a financial arrangement whereby Mr. Hall would purchase 50 percent of the stock and the assets (i.e. project structures) of Hydraco, for a purchase price of \$55,000.¹¹ The letter estimates that an additional \$100,000 investment would be necessary to bring the project on line, and proposes to divide that cost with Hydraco on a “50/50 basis.” Thus, apart from being a non-final agreement,¹² it does not, as Hydraco alleges, show that Mr. Hall is willing to provide all the funds necessary to rehabilitate the project and bring it on line. To the contrary, Hydraco would need to provide approximately \$50,000 in restoration costs.¹³

10. Notwithstanding Mr. Hall’s potential investment, nothing in Hydraco’s request for rehearing demonstrates whether, or when, it could successfully obtain any financing of its

¹¹ Unlike licenses, exemptions attach to the project lands and structures. Thus, under the proposed arrangement, Mr. Hall, as part owner of the project structures, would become co-exemptee, subject to the Commission’s authority.

In addition, with respect to Mr. Hall’s proposal to purchase 50 percent of the stock of Hydraco, Hydraco’s status as a Texas corporate entity has been revoked 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). On rehearing, Hydraco claims that it has taken steps to correct its status as a corporate entity in the State of Texas, citing to a letter to the Texas Secretary of State, which it purports to have attached to its rehearing request as Exhibit 5. However, the rehearing request includes no such attachment.

¹² *See* request for rehearing, Exhibit 1. In fact, the letter of intent provides that Hydraco must sign the letter (thereby accepting that Mr. Hall has accurately described the parties’ intent) before Mr. Hall would move forward with drafting a formal purchase contract. The attached letter is unsigned.

¹³ *See* request for rehearing, Exhibit 1.

own. Nor does Hydraco provide a construction plan and schedule, other than to say that the project “could” be back on line “much sooner than [] the end of 2017.”¹⁴

B. Project Construction

11. On rehearing, Hydraco argues that the Order Terminating Exemption erred by finding that “project construction is at a standstill.” Hydraco claims that it regularly inspects the dam and removes debris from the dam’s spillway, trashracks, and grates. It states it also has secured the powerhouse and its contents against vandalism, and installed safety and security lighting. In addition, it argues that the Order Terminating Exemption failed to consider its recent repairs to the right side apron of the dam structure (including placement of 13 cubic yards of concrete and 200 linear feet of rebar) to repair damage caused by a severe flood on October 30-31, 2013.

12. We disagree. The Order Terminating Exemption acknowledged that Hydraco has performed minimal work at the project, but the activities to which it cites are either maintenance or repair, not project development. Moreover, it never informed Commission staff of any issues at the project associated with the October 2013 flooding prior to its request for rehearing of the Order Terminating Exemption; and, in any event, the repairs to the dam necessitated by the flooding were completed by January 2014.¹⁵ Thus, the delay caused by these repairs was of short duration (three months). The Order Terminating Exemption correctly found that project construction is at a standstill because Hydraco lacks the funds to proceed with the work needed to bring the project on line, including construction of the powerhouse interior and generating unit.¹⁶

C. Intent to Abandon Project

13. Lastly, Hydraco argues that the Order Terminating Exemption erred by finding that it intended to abandon the project, stating that it still hopes to complete the project restoration.

¹⁴ Request for rehearing at 2. Consequently, we have no basis for reviewing how Mr. Hall arrived at his cost estimation or for assessing whether his estimate is realistic.

¹⁵ Request for rehearing at 2. Moreover, the October 2013 flood occurred over three years after the June 2010 deadline by which Hydraco was to have completed project construction. Consequently, delays caused by the October 2013 flood are no excuse for Hydraco’s failure to timely complete construction, as required by its exemption.

¹⁶ Order Terminating Exemption, 149 FERC ¶ 61,135 at PP 20-21.

14. Hydraco misunderstands the function of an implied surrender proceeding such as this. As explained in the Order Terminating Exemption, 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 exemptee has physically abandoned the project, 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).¹⁷ Despite Hydraco's expressed willingness to continue as an exemptee, it had more than eight years to restore the project's generating capacity, but failed to do so. We accordingly affirm the finding in the Order Terminating Exemption that Hydraco's intent to abandon the project is presumed by its inaction.

The Commission orders:

Hydraco Power, Inc.'s and Warren David Long's December 19, 2014 request for rehearing of the November 20, 2014 order terminating exemption is denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

¹⁷ *River Bounty, Inc.*, 142 FERC ¶ 61,126 (2013) (finding implied surrender of exemption despite exemptee's request for an extension of the repair schedule); *James B. Boyd and Janet A. Boyd*, 138 FERC ¶ 61,085, at 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)); and *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 conditions and despite licensee's expressed desire to continue as a licensee), *reh'g denied*, 90 FERC ¶ 61,250 (2000).