

DRAFT

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

UP Hydro, LLC

)

Project No. 10856-___

APPLICATION FOR SURRENDER OF LICENSE

Pursuant to Section 6 of the Federal Power Act (“FPA”), 16 U.S.C. § 799 (2012), and 18 C.F.R. § 6.1 (2019), Renewable World Energies, LLC (“RWE”), on behalf of UP Hydro, LLC (“UP Hydro”), licensee of the Au Train Hydroelectric Project No. 10856 (“Project”), hereby applies to surrender its license for the Project. As discussed herein, UP Hydro has determined that it is no longer economically feasible to operate the Project long term.

Approval of this surrender would be consistent with the public interest and the Federal Energy Regulatory Commission’s (“FERC” or “Commission”) policy that a licensee is free to surrender its license and cease project operations.¹ As discussed herein, RWE does not propose to remove the Project dams, as North Dam provides flood control for the downstream Village of Au Train. RWE intends to perform spillway capacity upgrades at the Project to meet Michigan state dam safety standards, as well as remove all the power generating and appurtenant equipment from the powerhouse and other measures to secure the site. These measures will have a minimal impact on environmental resources and historic properties. Accordingly, this surrender application should be approved.

¹ *Ariz. Pub. Serv. Co.*, 109 FERC ¶ 61,036 at P 39 (2004); *Niagara Mohawk Power Corp.*, 98 FERC ¶ 61,227 at p. 61,903, *reh’g denied*, 100 FERC ¶ 61,185 (2002); *Niagara Mohawk Power Corp.*, 83 FERC ¶ 61,226 at p. 62,007, *reh’g denied*, 85 FERC ¶ 61,420 (1998).

DRAFT

I. COMMUNICATIONS

All inquiries and correspondence regarding this surrender application should be sent to the persons listed below, and such persons should be placed on the official service list to be established by the Commission's Secretary in this proceeding:

Jason Kreuzscher
Vice President
Renewable World Energies, LLC
100 State St.
PO Box 264
Neshkoro WI 54960
Phone: 855-99HYDRO ext 102
jason@rwehydro.com

Sharon L. White
Julia S. Wood
Van Ness Feldman, LLP
1050 Thomas Jefferson Street, NW
Washington, D.C. 20007
Phone: (202) 298-1800
slw@vnf.com
jsw@vnf.com

Jonathan Walton
Fraser Trebilcock
One Woodward Avenue, Suite 1550
Detroit, MI 48226
Phone: 313-965-9038
jwalton@fraserlawfirm.com

II. BACKGROUND

The Project is located on the Au Train River in Alger County, Michigan. The current license, issued in 1997,² expires on May 31, 2037.

The Project includes licensed Project works consisting of: (1) a 1,500-foot-long dam with a spillway section topped with two-foot-high wooden flashboards (the North Dam); (2) a 2,516-foot-long steel pipeline connecting the reservoir intake to the surge tank; (3) a 3,700-foot-long bypassed reach; (4) a reservoir with a surface area of 1,557 acres at normal pool elevation; (5) a powerhouse containing two turbine generators with a total installed capacity of 1,120 kilowatts (kW); (6) a substation; (7) a 2.3-kilovolt (kV), 2,500-foot-long overhead transmission line; (8) an earth-filled dike at the south end of the

² *Upper Peninsula Power Co.*, 79 FERC ¶ 62,217 (1997). The license order and all amendments are attached hereto as Appendix A.

DRAFT

basin (referred to as the South Levee) that is designed as a non-overflow structure; and (9) appurtenant facilities.³ The Project does not use or occupy any federal facilities or land.

III. REASON FOR SURRENDER

UP Hydro acquired the Project from Upper Peninsula Power Company in 2010.⁴ Prior to UP Hydro's acquisition of the Project, the Commission determined that the Project required additional spillway capacity. Since its acquisition of the Project, UP Hydro has been working with Commission staff to develop plans to increase spillway capacity at the Project. On February 4, 2019, as supplemented on March 25, 2019 and January 2, 2020, RWE filed a design package for the construction of additional spillway capacity at the Project. However, since that time, RWE has made the difficult decision that it is unable to make the investments necessary to continue operating the Project long term. On June 2, 2020, RWE submitted a revised proposal for spillway upgrades, along with a request to withdraw its pending proposal and a notice of intent to surrender the license ("June 2 Request").⁵

IV. PLAN OF SURRENDER

To transition the Project to state jurisdiction, RWE has proposed spillway capacity upgrades that meet Michigan state dam safety standards. However, because there is an immediate need to perform the spillway improvements at the Project to protect the safety, stability, and integrity of the structures prior to the upcoming winter season, RWE filed the June 2 Request for authorization to perform the dam safety improvements

³ *Id.* at p. 64,581.

⁴ *Upper Peninsula Power Co.*, 131 FERC ¶ 62,125 (2010).

⁵ Notice of Intent to Surrender License and Expedited Request for Authorization to Commence Spillway Upgrades, Project No. 10856-000 (filed June 2, 2020), as amended on June 4, 2020.

DRAFT

beginning in August 2020, when the Au Train reservoir is at its lowest elevation.⁶ That request is pending before the Commission. The license surrender requested herein would be contingent on completion of these spillway capacity upgrades to the Commission's satisfaction.

RWE's proposal includes cutting down the spillway crest at North Dam to elevation 773.45 NAVD88 in order to pass the 200 year flood at elevation below 777.0 NAVD88. By cutting down the North Dam, RWE will significantly increase flow capacity for a given reservoir elevation – allowing more water to be discharged at a lower pool elevation. The lower pool elevation and 200 year flood surcharge will not allow the South Levee to become wetted, and RWE would lower the South Levee to below 6 feet in height so that it is an inland lake dam and not a high hazard dam under Michigan state law. Under RWE's proposal, the Project will continue to operate to maintain water levels until the surrender is approved and decommissioning is complete. RWE will continue to provide a 50 cfs minimum flow through the penstock for the protection of fish and wildlife after decommissioning.

RWE has requested advanced approval by FERC's Regional Engineer to perform the spillway capacity upgrades because the North Dam has no gates, and lake levels can only be lowered by passing water through the penstock and powerhouse. Thus, the only potentially feasible window for construction during the year is in August through the fall. If construction does not begin in August of 2020, RWE cannot perform these important safety improvements until August 2021 at the earliest. If the Regional Engineer declines to approve RWE's June 2 Request to commence the spillway capacity upgrades in

⁶ See *id.*

DRAFT

August 2020, RWE requests that the Commission authorize the upgrades as part of this surrender application.

In addition to the proposed spillway capacity upgrades, RWE proposes to decommission the Project by taking the following measures:

- Continue to provide a 50 cfs minimum flow through the existing butterfly valve by modifying the penstock as it exits the intake structure, in the event that reservoir levels drop below the crest level
- Remove breaker from powerhouse
- Retain trashracks to stop debris from entering the minimum flow outlet
- Remove all hydraulic fluids from the powerhouse
- Disconnect the generators and switch gear
- Remove transformer from substation

Other than the spillway capacity upgrades described above, there would be no modifications to the existing dams, buildings, or structures or ground disturbing activities. After decommissioning, RWE will continue to provide a minimum flow of 50 cfs over the spillway or, if water levels drop below the crest, through the penstock, for the protection of fish and wildlife resources.

The proposed spillway upgrades and other decommissioning measures will have a minimal impact on environmental resources. The archeological survey performed in 2017 did not identify any cultural resource sites within the Project boundary,⁷ and a historical review of the Project facilities determined that they are not eligible for

⁷ Article 408 Historic Resources Management Plan 10-Year Archeological Survey (filed Dec. 22, 2017) (finding that there are no presently known archaeological sites on the shoreline that are disturbed by project operation).

DRAFT

inclusion in the National Register of Historic Places.⁸ However, RWE will consult with the Michigan SHPO prior to initiating construction on the spillway capacity upgrades, as required by license Article 408, to protect potential cultural resources that may be discovered during construction. There are no anticipated impacts from the construction and surrender to federally threatened and endangered species that potentially occur in the Project vicinity, including bald eagle, peregrine falcon, and gray wolf. Thus, there will be minimal environmental impacts to the site from the surrender.⁹

V. PUBLIC INTEREST CONSIDERATIONS

The North Dam and South Levee will remain in place and continue to provide flood protection for the downstream Village of Au Train. As part of the decommissioning process, RWE will perform dam safety improvements that will bring the Project facilities into compliance with Michigan dam safety standards. The Project structures have been inspected routinely by the Commission's Chicago Regional Office ("CRO"). The most recent inspection was July 18, 2019. In its October 8, 2019 inspection follow-up letter, the CRO stated that "[n]o immediate dam safety concerns were noted during the dam safety inspection."¹⁰ The letter required minor remediation and maintenance, which RWE has discussed with CRO and addressed.

⁸ See Historic Resource Management Plan at 4, Project No. 10856-002 (filed Mar. 3, 1999).

⁹ Because the plan of surrender involves only spillway capacity upgrades and removal of the electric generating equipment from the powerhouse and does not entail dam removal or any other activity involving a discharge into navigable waters, no water quality certification from any state under Section 401 of the Clean Water Act is needed for the Commission to approve the surrender. See 33 U.S.C. § 1341(a)(1) (2012); see also *North Carolina v. FERC*, 112 F.3d 1175 (D.C. Cir. 1997) (reduction in discharge from a dam does not trigger the Section 401 certification requirement).

¹⁰ Letter to Jason Kreuzscher, RWE, from John Zygaj, FERC, Project No. 10856-000 (issued Oct. 8, 2019).

DRAFT

Following surrender, the Michigan Department of Environment, Great Lakes, and Energy will be responsible for regulating the dams in accordance with Michigan dam safety laws and regulations.

VI. AGENCY CONSULTATION

On [June 12, 2020], RWE sent a draft of this surrender application to potentially interested federal, state, and local agencies and tribes. A copy of the draft application, together with a list of the consulted agencies and tribes, is contained in Appendix B.

RWE received responses from the following stakeholders which are found in Appendix C: [DESCRIBE]

VII. CONCLUSION

Based on all of the considerations above, UP Hydro respectfully requests that the Commission issue an order authorizing it to surrender the license for Project No. 10856, consistent with UP Hydro's plan for surrender described herein.

Respectfully submitted,

Sharon L. White
Julia S. Wood
Van Ness Feldman, LLP
1050 Thomas Jefferson Street, NW
Washington, D.C. 20007
Tel: (202) 298-1800
slw@vnf.com
jsw@vnf.com

Counsel for Renewable World Energies

Dated: July __, 2020

APPENDIX A

License Order

APPENDIX B

**Draft Surrender Application and Outreach to Federal, State,
and Local Agencies and Tribes**

APPENDIX C

**Federal, State, and Local Agency and Tribe Comments
on Draft Surrender Application**