United States Department of Energy
Office of Hearings and Appeals

In the Matter of 3RValve	)	
	)	
Filing Date: March 14, 2024	)	Case No.: HEA-24-0005
	)	
	)	

Issued: May 24, 2024

Decision and Order

This Decision considers an appeal (Appeal) filed by 3RValve (Appellant) relating to the Maintaining and Enhancing Hydroelectricity Incentives Program (Program) authorized by Section 247 of the Energy Policy Act of 2005, as amended by Section 40333 of the Infrastructure Investment and Jobs Act of 2021 (IIJA), Pub. L. No. 117-58. (Section 247). In its Appeal, Appellant challenged a determination by the Department of Energy's (DOE) Grid Deployment Office (GDO) that it was ineligible for the Program. For the reasons set forth below, we deny the Appeal.

I. Background

A. Section 247 of the Energy Policy Act of 2005

Pursuant to Section 247:

> The Secretary shall make incentive payments to the owners or operators of qualified hydroelectric facilities for capital improvements directly related to . . . (1) improving grid resiliency . . . ; (2) improving dam safety to ensure acceptable performance under loading conditions . . . ; or (3) environmental improvements . . . .

42 U.S.C. § 15883(b). The IIJA authorized DOE to provide $553,600,000 in incentive payments under the Program for fiscal year 2022. *Id.* § 15883(c).

To meet the definition of a "qualified hydroelectric facility" under Section 247, the hydroelectric project must be (A) "licensed by the Federal Energy Regulatory Commission [(FERC)]" or (B) "constructed, operated, or maintained pursuant to a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to the Federal Power Act [FPA] (16 U.S.C. 791a et seq.)[.]" 42 U.S.C. § 15883(a)(1).[1] On June 13, 2023, GDO published guidance describing

[1] Section 247 further requires that the hydroelectricity facility be placed into service before November 15, 2021. 42 U.S.C. § 15883(a)(2); *see also* Program Guidance § V(b). Additionally, it requires that the facility comply with all

the application requirements and process for incentive payments under the Program. *Application Guidance for the Maintaining and Enhancing Hydroelectricity Incentives – Section 247 of the Energy Policy Act of 2005 (EPAct 2005)*, U.S. DEP'T. OF ENERGY (June 13, 2023) (*available at* https://www.energy.gov/sites/default/files/2023-06/247-Final-Guidance_Modification_0001-0007_6-13-23.pdf) (Program Guidance). The Program Guidance also defines a "qualified hydroelectric facility" as one that "has a FERC-issued exemption[.]" *Id.* § V(a).

B. Procedural History

Appellant applied for incentive payments under the Program. Appellant's application failed to "provide documentation that the existing facility [(Facility)] is licensed or has received an exemption from licensing from FERC nor did it provide documentation of a pre-1920 permit or valid existing right-of-way." Determination Letter (March 11, 2024) at 3.[2] Accordingly, on March 11, 2024, GDO issued to Appellant a letter notifying Appellant of its ineligibility for the Program. *Id.* The Determination Letter included notice to Appellant of its right to file an appeal with the Office of Hearings and Appeals (OHA) within ten days of receiving the notice. *Id.*

On March 14, 2024, Appellant filed a timely Appeal.[3] In the Appeal, Appellant states that it had "applied to FERC for a ruling on their jurisdiction . . . ."[4] Appeal at 1. However, "because [the Facility's] technology does not use surface water, FERC ruled that 'the project does not require licensing under section 23(b)(1) of the FPA[.]'" *Id.* (citing Order Ruling on Declaration of Intention and Finding Licensing Not Required (May 4, 2010) at 6 (FERC Order)). Appellant attached, as part of its Appeal, the FERC Order ruling that a license is not required.[5] *Id.* at 5–7.

In its Appeal, Appellant characterizes its technology as "a closed loop pumped hydroelectricity facility in Oregon, with the lower reservoir [being] the static water level in the underground aquifer

---

applicable Federal, Tribal, and State requirements, or would be brought in compliance, as a result of incentive payments. 42 U.S.C. § 15883(a)(3); *see also* Program Guidance § V(c).

[2] Appellant submitted, among other attachments, the Determination Letter with the Appeal. As the Appeal and its attachments are one PDF file, this Decision will refer to the PDF page number when citing to Appellant's attachments.

[3] The Appeal is dated March 13, 2024; however, the Appeal was submitted to OHA's inbox, OHA.filings@hq.doe.gov, on March 14, 2024.

[4] FERC has jurisdiction to issue licenses for hydroelectric projects which, among other things, are located in bodies of water over which Congress has regulatory jurisdiction under the Commerce Clause. *See* 16 U.S.C. 797(e) (indicating FERC's licensing powers). FERC-issued exemptions from licensing must meet specific statutory qualifications. *See* 16 U.S.C. §§ 823a(b), 2505 (outlining that a facility may be eligible for an exemption if it "(1) utilizes for such generation only the hydroelectric potential of a conduit; and (2) has an installed capacity that does not exceed 40 megawatts" and granting FERC the "discretion (by rule or order) [to] grant an exemption . . . to small hydroelectric power projects having a proposed installed capacity of 10,000 kilowatts or less . . ."). Furthermore, facilities with an exemption are subject to the same monitoring, investigations, and enforcement mechanisms as those that are licensed, including revocation of license or exemption and civil penalties. *Id.* § 823b(a)–(c).

[5] The FERC Order discussed that "there [was] no evidence that the [Facility] would be located on a Commerce Clause stream, because the water collected . . . is groundwater and there is no outlet to a stream." Appeal at 6. Accordingly, FERC concluded that the Facility "does not require licensing under section 23(b)(1) of the FPA." *Id.* However, FERC noted that the Facility "would be eligible for a voluntary license or exemption . . . ." *Id.*

and the upper reservoir [being] the ground surface level." *Id.* at 1. While it is "a relatively new hydropower technology application[,]" Appellant asserts that its Facility's production of electricity using groundwater "flowing through a turbine" is "[e]xactly the same technology" as FERC-licensed projects using surface water. *Id.* Appellant further provides that "because [this Facility] uses existing wells and distribution lines, there is virtually no environmental impact from this potential new hydro generation source." *Id.*

Appellant further provides that its new application of hydropower technology is part of "two demonstration projects funded by the California Energy Commission . . . ." *Id.* Appellant argues GDO's "ruling of ineligibility . . . serves to stifle innovative technologies and applications . . . in the hydropower realm" and the application of this technology possesses "potential for tens of thousands of these [projects] operating as new generation sources." *Id.* Appellant concludes that it "should be eligible to compete with existing, established hydropower projects for grants . . . ." *Id.* at 1–2.

GDO responded to the Appeal on April 26, 2024. GDO Response to Appeal (April 26, 2024) (Response). In the Response, GDO argues that GDO properly denied Appellant's application because the application failed to "show that the Facility is a 'qualified hydroelectricity facility' to establish eligibility for a Section 247 incentive payment." *Id.* at 1. In particular, GDO noted Appellant failed to provide "evidence of a FERC or FPA license; a FERC-issued exemption; or [evidence] that the Facility was constructed, operated, or maintained pursuant to a permit or valid existing right-of-way granted prior to June 10, 1920." *Id.* at 5. Instead, Appellant only provided the FERC Order, which "makes clear that the . . . Order is <u>not</u> an Exemption." *Id.* at 4 (emphasis in original).

Appellant's reply to the Response was due on May 17, 2024. No reply was filed.

II. Standard of Review

Appeals of denials of applications to the Program are evaluated under OHA's procedural regulations codified at Part 1003 of Title 10 of the Code of Federal Regulations (Part 1003). 10 C.F.R. § 1003.1(a) (indicating that OHA's procedural regulations apply to proceedings not covered under any other DOE regulations); Program Guidance § XIV(a) (indicating that appeals of denials of applications to the Program will be decided under the Part 1003 regulations). An appeal of a denial of an application to the Program will be granted only "upon a showing that the DOE acted arbitrarily, capriciously, or in violation of a law, rule, regulation, or delegation . . . ." 10 C.F.R. § 1003.17(b).

III. Analysis

Construing its Appeal liberally, Appellant appears to make four arguments: (1) that FERC has ruled that this Facility "does not require licensing under section 23(b)(1) of the FPA[;]" (2) that the Facility's use of groundwater is functionally equivalent to technology using surface water and thus "should be eligible to compete with existing, established hydropower projects" that are required to obtain a FERC-issued license; (3) that GDO's denial "serves to stifle innovative technologies and applications[;]" and (4) that the Facility's technology has "virtually no environmental impact . . . ." Appeal at 1–2. Appellant fails to specify whether it believes that GDO

acted arbitrarily, capriciously, or in violation of a law, rule, regulation, or delegation. Regardless, this decision reviews the record to determine whether GDO acted in such a manner.

First, an agency action is arbitrary and capricious if it:

> relied on factors which Congress ha[d] not intended [the agency] to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43 (1983). Again, Appellant made no specific allegations as to whether GDO acted arbitrarily or capriciously. Instead, it is readily apparent that GDO strictly adhered to the terms of the statute and Program Guidance in determining that Appellant failed to provide sufficient documentation of a FERC-issued license or exemption or proof of a pre-1920 permit or valid existing right-of-way. Accordingly, there is no basis to conclude that GDO relied on factors it was not intended to consider, offered an explanation that runs counter to the evidence, or made a determination so implausible that it could not be ascribed to a difference in view.

In its Appeal, Appellant makes no specific allegation that GDO violated any law, rule, regulation, or delegation in denying Appellant incentive payments under the Program. Instead, Appellant's only citation to law is FERC's previous ruling that "the project does not require licensing under section 23(b)(1) of the FPA." Appeal at 1 (quoting the FERC Order). To the extent that Appellant raises this as a possible "FERC-issued exemption" under the Program Guidance, this is unpersuasive. Program Guidance § V(a). FERC's determination that it lacked jurisdiction to mandate that the Facility be licensed is not equivalent to the issuance of an exemption, as made explicit in the FERC Order. Appeal at 6 (determining that, while licensing was not required, the Facility had the option of seeking a "a voluntary license or exemption"). Accordingly, there is no basis for determining that DOE violated any law, rule, regulation, or delegation.

Appellant's remaining arguments are that the Facility's technology is functionally equivalent to others, that the DOE's decision stifles innovation, and that its Facility has minimal environmental impact. None directly addresses the fact that Appellant provided no documentation of a FERC-issued license or exemption nor proof of a pre-1920 permit or valid existing right-of-way pursuant to Section 247 and the Program Guidance. The record also lacks any persuasive evidence or argument showing that the Department acted arbitrarily, capriciously, or in violation of a law, rule, regulation or delegation—especially given that DOE's denial of the application aligned with explicit statutory language and the Program Guidance.

IV. Conclusion

It is hereby ordered that the Appeal filed by 3RValve on March 14, 2024, is denied.

This is a final decision and order of the Department of Energy from which 3RValve may seek judicial review in the appropriate U.S. District Court.

Poli A. Marmolejos
Director
Office of Hearings and Appeals