

**United States Department of Energy
Office of Hearings and Appeals**

In the Matter of Portland General Electric)	
)	
Filing Date: March 21, 2024)	Case Nos.: HEA-24-0072
)	HEA-24-0074
_____)	

Issued: June 21, 2024

Decision and Order

This Decision considers appeals (Appeals) filed by Portland General Electric (Appellant) on March 21, 2024, relating to the Maintaining and Enhancing Hydroelectricity Incentive 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 Appeals, Appellant challenged determinations by the Department of Energy’s (DOE) Grid Deployment Office (GDO) that it was ineligible for the Program with respect to two hydroelectric projects. GDO filed its responses to the Appeals (Responses), each of which included two enclosures (Encls. 1–2), on May 17, 2024. For the reasons set forth below, we deny the Appeals.

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) “a hydroelectric project 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 Any substantial changes to a FERC-licensed hydroelectric project require prior approval by FERC. 16 U.S.C. § 803(b); 18 C.F.R. § 4.200.

On June 13, 2023, GDO published guidance describing procedures for filing an application for incentive payments under the Program and the criteria that GDO would use to make eligibility determinations. *Application Guidance for the Maintaining and Enhancing Hydroelectricity Incentives – Section 247 of the Energy Policy Act of 2005 (EPAAct 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). Among other criteria, the Program Guidance required applicants to submit “if applicable, documentation of FERC authorization of the capital improvement project, or if an amendment to the license is required, proof that a final application for authorization has been filed with FERC.” *Id.* § VIII(b)(8)(viii).

B. Procedural History

Appellant applied for incentive payments under the Program for two hydroelectric projects identified as applications 3088-2100 (Project 1) and 3088-2091 (Project 2) (collectively, the “Projects”). Appellant appended project plans to its applications in which it indicated that it would “obtain the necessary FERC approvals and consultations before commencing construction work.” Response to Project 1 Appeal, Encl. 1 Project Plan at 7; Response to Project 2 Appeal, Encl. 1 Project Plan at 6.

On March 11, 2024, GDO issued Determination Letters notifying Appellant that its applications were denied because the Projects required FERC approval and Appellant had not provided documentation of FERC authorization. Response to Project 1 Appeal, Encl. 2; Response to Project 2 Appeal, Encl. 2. On March 21, 2024, Appellant filed timely Appeals of each of the Determination Letters. With respect to Project 1, Appellant asserted that “FERC is well-informed about the project and will grant authorization in due course.” Project 1 Appeal at 1. However, Appellant acknowledged that it had not filed a final application for FERC authorization and did not expect to do so until early 2025. *Id.* Regarding Project 2, Appellant indicated that it had received FERC authorization on October 18, 2023, and provided a copy of a letter from FERC containing the authorization. Project 2 Appeal at 1; Project 2 Appeal, Att. 2.

GDO filed its Responses to the Appeals on May 17, 2024. In the Responses, GDO noted that Appellant had not alleged that GDO violated any law, rule, regulation, or delegation in denying the applications or that GDO acted arbitrarily or capriciously. Response to Project 1 Appeal at 4; Response to Project 2 Appeal at 4. GDO further argued that it had acted reasonably in denying each of the applications because Appellant failed to provide documentation of FERC authorization as required under the Program Guidance. Response to Project 1 Appeal at 4; Response to Project 2 Appeal at 4. Finally, with respect to Project 1, GDO noted that Appellant’s own Appeal conceded

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 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).

that future FERC authorization was required for Project 1 to proceed. Response to Project 1 Appeal at 5; *see also* Project 1 Appeal at 1 (stating that “FERC’s approval is contingent” on documents that will not be available until 2025).

OHA invited Appellant to submit a reply to the Responses on or before May 31, 2024. Reply Briefing Order (May 17, 2024). Appellant did not submit a reply.

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

An agency action is arbitrary and capricious if it:

relied on factors . . . [it was] not intended 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). As noted by GDO, nothing in the Appeals alleges that GDO acted arbitrarily or capriciously in denying Appellant’s applications. With respect to Project 1, Appellant has acknowledged that FERC cannot provide the required authorization until 2025. Appellant could not have provided documentation for an event that has yet to occur with its October 2023 application for Project 1, and thus it was neither arbitrary nor capricious for GDO to conclude that such documentation was absent from Appellant’s application.

Appellant submitted evidence that FERC provided authorization for Project 2 several weeks after it submitted the Project 2 application. While Appellant may well have been in the final stages of seeking FERC authorization for Project 2 at the time it submitted its application to GDO, its application merely indicated that it “need[ed] to obtain approvals from FERC for several aspects of this project” without elaboration as to the status of those efforts. Response to Project 2 Appeal, Encl. 1 Project Plan at 3. It was neither arbitrary nor capricious for GDO to rely on Appellant’s characterization of its own project when determining that Project 2 required proof of FERC authorization or a final application for authorization. Accordingly, Appellant has not established that GDO acted arbitrarily or capriciously in denying its applications.

IV. Conclusion

It is hereby ordered that the Appeals filed by Portland General Electric on March 21, 2024, are denied.

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

Poli A. Marmolejos
Director
Office of Hearings and Appeals