

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

In the Matter of Empire District Electric Company)

Filing Date: March 18, 2024)

Case No.: HEA-24-0007

Issued: June 28, 2024

Decision and Order

This Decision considers an appeal (Appeal) filed by Empire District Electric Company (Appellant) on March 18, 2024, 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). The Appeal includes one enclosure (Appeal Encl.). 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. GDO filed its response to the Appeal (Response), which included two enclosures (Response Encls. 1–2), on May 24, 2024. 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) “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 requirements, the Program Guidance directed 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 to “repair[] the scouring in the spillway of its Ozark Beach Hydroelectricity Plant [(Facility)]” Response Encl. 1 at 90.² In its application, Appellant indicated that “FERC ha[d] been notified and has given provided [sic] feedback on required documentation.” *Id.* at 91. Appellant planned to submit requirements for construction, including design plans, to FERC by August 31, 2025. *Id.* Appellant also stated that, “[w]hen this project is approved by the DOE, [Appellant] will proceed with completing the required documentation.” *Id.* On March 11, 2024, GDO issued a Determination Letter notifying Appellant that its application was denied because its proposed project required FERC approval and Appellant had not provided documentation of FERC authorization. Response Encl. 2.

On March 18, 2024, Appellant filed a timely Appeal of the Determination Letter, having been “denied eligibility for [its] [S]ection 247 submissions due to [its] lack of FERC authorizations for capital improvements at the time of application.” Appeal. Appellant asserted that “[i]n the intervening period between . . . [its] application and [GDO’s] notification on March 11, [Appellant] ha[d] received authorization for [its] license application and capital improvements,” and Appellant purported to provide proof of such authorization as an enclosure with its Appeal. *Id.* However, the enclosure with the Appeal is simply a notice issued on November 9, 2023, from FERC (FERC Notice) that Appellant’s hydroelectric application had been accepted for filing. Appeal Encl. Furthermore, the FERC Notice pertained to the “replace[ment] [of] the existing 4-foot-high Obermeyer gates with the new 5.15-foot-high Obermeyer gates,” which was not the project for

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).

² GDO submitted a folder comprised of individual PDFs entitled Enclosure 1 to the Office of Hearings and Appeals (OHA). OHA combined the folder’s contents into a single PDF. This Decision will refer to the pages of Enclosure 1 in the order in which they appear, as if each were one sequentially numbered document, regardless of their internal pagination.

which Appellant was seeking incentive payments under the Program. *Id.* at 3.

GDO filed its Response to the Appeal on May 24, 2024. In the Response, GDO noted that Appellant had not alleged that GDO violated any law, rule, regulation, or delegation in denying its application or that GDO acted arbitrarily or capriciously. Response at 4. GDO further argued that it had acted reasonably in denying the application because Appellant failed to provide documentation of FERC authorization as required under the Program Guidance. *Id.* Instead, “Appellant’s application indicated Appellant did not expect to meet FERC’s requirements before August 2025 and stated that Appellant did not plan to complete the required documentation until it received approval from DOE” *Id.* GDO noted that Appellant “only received FERC Notice—which is not FERC authorization of the capital improvement” and that Appellant “did not have documentation of a FERC authorization at the time it submitted its application.” *Id.* GDO also asserted that the submitted FERC Notice “would not have satisfied the documentation requirement for FERC authorization” even had it been an authorization as it concerned work other than the capital improvement described in Appellant’s application. *Id.* at 5.

OHA invited Appellant to submit a reply to the Response on or before June 7, 2024. Reply Briefing Order (May 28, 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 Appeal alleged that GDO acted arbitrarily or capriciously in denying Appellant’s application. Response at 4. However, Appellant’s own application made several statements indicating that it lacked FERC authorization, in particular that it would submit plans to FERC in August 2025 and that it would await seeking FERC authorization contingent upon DOE approval. Response Encl. 1 at 91. Appellant also submitted with its Appeal the FERC Notice, which is not equivalent to documentation of FERC authorization. Furthermore, the FERC Notice pertains to a capital improvement that is entirely distinct from the proposed capital improvements

detailed in the application. *Compare* Appeal Encl. at 3 (describing the scope of work as “replace[ment] [of] the existing 4-foot-high Obermeyer gates with the new 5.15-foot-high Obermeyer gates”) *with* Response Encl. at 90 (describing the proposed capital improvement as “repairing the scouring in the spillway of its [Facility] . . . ”). In conclusion, GDO acted neither arbitrarily nor capriciously when relying on Appellant’s characterization of its own project and determining that Appellant had not provided the required proof of FERC authorization or a final application for authorization. Appellant has not established that GDO acted arbitrarily or capriciously in denying its application.

IV. Conclusion

It is hereby ordered that the Appeal filed by Empire District Electric Company on March 18, 2024, is denied.

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

Poli A. Marmolejos
Director
Office of Hearings and Appeals