

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

In the Matter of Green Mountain Power)	
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Filing Date: March 18, 2024)	Case No.: HEA-24-0008
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Issued: June 27, 2024

Decision and Order

This Decision considers an appeal (Appeal) filed by Green Mountain Power (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 included three attachments (Att. 1–3). 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 (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

¹ Section 247 further requires that the hydroelectricity facility be placed into service before November 15, 2021. 42

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 capital improvements to increase river access for migratory fish (Project). Response, Encl. 1 Project Plan at 1. Appellant appended a project plan for the Project to its application in which it indicated that “[t]his project is required by the 2022 Settlement Agreement between [Appellant] and [the U.S. Fish and Wildlife Service]. Plans will be submitted for FERC approval and auth[or]ization once designs have been complete[d].” *Id.* at 2. According to the Settlement Agreement, which Appellant appended to its application, Appellant was required to construct and operate certain facilities to support the migratory fish “UNLESS within two years of license issuance, [Appellant] ha[d] submitted . . . [a] request to [FERC] for approval of plans to construct [the Project described in Appellant’s application to the Program]” Response, Encl. 1 Settlement Agreement at 4–5 (emphasis in original). Appellant’s project plan also estimated that Appellant would “[s]ubmit plans and [a] license am[en]dment for FERC approval” in April 2024. Response Encl. 1 Project Plan at 2.

On March 11, 2024, GDO issued a Determination Letter notifying Appellant that its application was denied because the Project required FERC approval and Appellant had not provided documentation of FERC authorization. Response, Encl. 2. On March 18, 2024, Appellant filed the Appeal. Appellant provided a copy of a June 16, 2022, order from FERC issuing a subsequent license for the hydroelectric facility (FERC Order), which incorporated the terms of the Settlement Agreement. Appeal, Att. 3. According to the FERC Order, Appellant was required to undertake various actions “UNLESS within two years of license issuance . . . [Appellant] submitted [] [a] request to [FERC] for approval of plans to construct facilities [as described in Appellant’s application to the Program].” *Id.* at 95–96 (emphasis in original). According to Appellant, the FERC Order constituted authorization for the Project because “the requirement to [undertake the Project] was authorized by [FERC] as a condition of the [FERC Order].” Appeal at 1–2.

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

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).

application or that GDO acted arbitrarily or capriciously. Response at 4. GDO further argued that it had acted reasonably in denying Appellant's application because Appellant failed to provide documentation of FERC authorization as required under the Program Guidance, and the application indicated that Appellant would not seek authorization until April 2024. *Id.* Finally, GDO indicated that the FERC Order would not have altered GDO's determination had it been provided with Appellant's application because the FERC Order required further approvals from FERC for the Project 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 alleges that GDO acted arbitrarily or capriciously in denying Appellant's application. Appellant's application indicated that Appellant required additional authorization from FERC and that Appellant would not seek such authorization until April 2024 – approximately six months after it submitted its application to the Program. The Settlement Agreement submitted by Appellant with its application likewise indicated that further approvals from FERC were required to undertake the Project. It was neither arbitrary nor capricious for GDO to rely on Appellant's characterization of the Project or the plain language of the Settlement Agreement when determining that Appellant required additional FERC authorization to proceed with the Project and that Appellant had not provided proof that it had filed a final application for such authorization.

The FERC Order provided by Appellant with its Appeal does not constitute the required authorization. Rather, as the FERC Order made clear, Appellant was not ordered to undertake the Project described in Appellant's application to the Program. Instead, the FERC Order indicated that Appellant could, at its discretion, pursue the Project as an alternative to the construction and

operations dictated by the Settlement Agreement if Appellant first obtained FERC authorization. As the FERC Order did not provide Appellant with authorization for the Project, it is not evidence that GDO acted arbitrarily or capriciously in denying Appellant's application.²

IV. Conclusion

It is hereby ordered that the Appeal filed by Green Mountain Power on March 18, 2024, is denied.

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

Poli A. Marmolejos
Director
Office of Hearings and Appeals

² GDO indicated in its Response that Appellant may have submitted an application to FERC to amend its license after it filed the Appeal. Response at 5 n.29. Whether Appellant submitted a final application for a license amendment to FERC subsequent to filing the Appeal has no relevance to whether GDO's March 2024 denial of Appellant's application was arbitrary or capricious as GDO could not have definitively known in March 2024 when or if Appellant would submit such an application in the future.