United States Department of Energy
Office of Hearings and Appeals

In the Matter of Chittenden Falls Hydropower, Inc)		
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Filing Date: March 20, 2024)	Case No.:	HEA-24-0043
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Issued: June 27, 2024

Decision and Order

This Decision considers an appeal (Appeal) filed by Chittenden Falls Hydropower, Inc. (Appellant) on March 20, 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). In its Appeal, Appellant challenged a determination by the Department of Energy's (DOE) Grid Deployment Office (GDO) that its facility 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

[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 (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). 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). Section VII of the Program Guidance provides that "where authorizations have not yet been obtained, any awards would be conditioned upon successful completion of permitting." *Id.* § VII.

B. Procedural History

Appellant submitted an application for incentive payments under the Program. The proposed capital improvement project includes "installation of [an] upstream [eel] passage system" and "[i]nstallation of [d]ownstream [f]ish [p]assage [f]acilities." Response Encl. 1 at 234–36.[2] For the upstream component of the eel passage system, Appellant indicated that it was "now advancing the design to the 60% stage and anticipate[d] final design and installation of the upstream passage system [to] be completed in late 2024." *Id.* at 234.

Appellant's application indicated that "none of the proposed work will trigger approval from FERC." *Id.* at 242. However, Appellant also submitted with its application a copy of its FERC license issued on October 31, 2022, which includes a provision entitled "Article 401. Commission Approval, Reporting, and Filing of Amendments" (Article 401). *Id.* at 151–53. Article 401 provided that "[t]he following plans must also be submitted to [FERC] for approval: . . . [t]rash rack installation and monitoring plan[;] [e]lway operation and maintenance plan . . . [;] [and] [d]esign plans for the eel ladder and eel exclusion and downstream passage facility[.]" *Id.* at 152. Article 401 further provided that "changes to the location, design, and/or flows associated with the eelways . . . may not be implemented until the licensee has filed an application to amend the license and [FERC] has approved the application." *Id.* at 153.

On March 11, 2024, GDO issued to Appellant a Determination Letter notifying Appellant that its application was denied because the "application did not provide documentation of FERC authorization of the proposed capital improvement." Response Encl. 2. GDO cited to "Article 401

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 individual PDFs into a single PDF. This Decision will refer to the pages of Enclosure 1 PDF in the order in which they appear, as if each were one sequentially numbered document, regardless of their internal pagination.

. . . of the license [which] require[d] [Appellant] to submit a plan for a new eel passage system to FERC for final approval" and noted that Appellant "provide[d] no documentation that a plan ha[d] been filed with FERC for approval." *Id.* The Determination Letter included notice to Appellant of its right to file its appeal with OHA within ten (10) days of receiving the notice. *Id.*

On March 20, 2024, Appellant filed this Appeal "based on the following statement of fact:"

(1) Appellant asserted that its FERC license issued on October 31, 2022, provides "existing FERC authorization . . . ." Appeal.

(2) Appellant indicated that, pursuant to Section 18 of the Federal Power Act (FPA), the United States Fish and Wildlife Service (USFWS) may prescribe a fishway and that FERC "must require [the fishway's] construction, maintenance, and operation by a licensee at its own expense of such fishways as may be prescribed . . . ." *Id.*

(3) Appellant indicated that the USFWS exercised its authority pursuant to Section 18 of the FPA to prescribe a fishway. *Id.*

(4) Appellant also quoted a phrase in Article 401, stating that its Section 18 prescription "require[d] the licensee to prepare plans in consultation with the conditioning agencies for approval and to implement specific measures without prior approval, or do not specify when the plan(s) would be filed with the Commission for approval." *Id.* (quoting Response Encl. 1 at 151–52). It concluded that pursuant to Article 401 "FERC approval is not required to implement these measures." *Id.*

GDO filed its Response to the Appeal on May 24, 2024. In the Response, GDO noted that nothing in the Appeal alleged that GDO violated any law, rule, regulation, or delegation in denying the application or that GDO acted arbitrarily or capriciously. Response at 4. GDO disputed Appellant's fourth "statement of fact" that Article 401 of its FERC license permits Appellant to undertake the proposed capital improvements without FERC approval. *Id.* at 5–6. Regarding the remaining three "statements of fact," GDO noted their irrelevancy to its determination of Appellant's ineligibility. *Id.* at 7.

OHA invited Appellant to submit a reply to the Response on or before June 7, 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

Appellant asserted four "statements of fact" as the basis for its Appeal: (1) that its FERC license issued on October 31, 2022, provided "existing FERC authorization . . . "; (2) that pursuant to Section 18 of the FPA, the USFWS may prescribe a fishway and that FERC "must require [the fishway's] construction, maintenance, and operation by a licensee at its own expense of such fishways as may be prescribed . . ."; (3) that USFWS exercised its authority pursuant to Section 18 of the FPA to prescribe a fishway; and (4) that pursuant to Article 401 of its license, "FERC approval is not required to implement these measures." Appeal. As noted by GDO, Appellant failed 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. 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). This Decision considers together the first and fourth "statements of fact," and then considers together Appellant's second and third "statements of fact."

Appellant disputed GDO's determination that it needed FERC approval for the proposed capital improvement project. Again, pursuant to the Program Guidance, applicants were required to provide "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." Program Guidance § VIII(b)(8)(viii). Appellant argued that it has "existing FERC authorization" pursuant to its license and that "[a]s noted in Article 401, FERC approval is not required to implement these measures." Appeal.

However, this single phrase in Appellant's license cannot be read in isolation. *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 596 (2004) ("[L]anguage must be read in context since a phrase gathers meaning from the words around it."). Without selective omission, the text of Article 401 provides as follows:

> (a) *Requirement to File Plans for [FERC] Approval.*
>
> The New York State Department of Environmental Conservation's (New York DEC) section 401 water quality certification (certification) (Appendix A) and the U.S. Department of the Interior's section 18 prescription (Appendix B) require the licensee to prepare plans in consultation with the conditioning agencies for approval and to implement specific measures without prior [FERC] approval, or do not specify when the plan(s) would be filed with [FERC] for approval. <u>The following plans must also be submitted to [FERC] for approval by the deadlines specified below:</u>

New York DEC Certification Condition No.	Interior Section 18 Prescription No.	Plan Name	Commission Due Date
25	11.8.1	Trask rack installation and monitoring plan	Within 18 months of the effective date of the license
25	11.3	Eelway operation and maintenance plan	Within 18 months of the effective date of the license
25	11.8.1-11.8.3	Design plans for the eel ladder and eel exclusion and downstream passage facility	Within 14 days of Interior's approval of the 90% design plans

The eelway operation and maintenance plan must also specify the annual deadline for filing (with [FERC]) the annual eelway operation and maintenance report required by prescription 11.3 and certification condition 25.

The licensee must include with each plan filed with [FERC], documentation that the licensee developed the plan in consultation with New York DEC and U.S. Fish and Wildlife Service (FWS), and received approval from the New York DEC and FWS, as appropriate. The licensee must allow a minimum of 30 days for the agencies to comment and to make recommendations before filing the plan with [FERC]. If the licensee does not adopt a recommendation, the filing must include the licensee's reasons, based on project-specific information. [FERC] reserves the right to make changes to any plan submitted. Upon [FERC] approval, the plan becomes a requirement of the license, and the licensee must implement the plan or changes in project operations or facilities, including any changes required by the Commission.

. . .

(c) *Requirement to File Amendment Applications*

Certain New York DEC certification conditions in Appendix A and Interior section 18 prescriptions in Appendix B contemplate unspecified long-term or conditional changes to project operation or facilities for the purpose of mitigating environmental impacts. For example, prescription 11.5 and certification condition 25 specify that changes to the location, design, and/or flows associated with the eelways may be needed based on the results of the post-licensing hydraulic measurements required by prescription 11.4. Such changes may not be implemented until the licensee has filed an application to amend the license and [FERC] has approved the application. In any amendment request, the licensee must

> identify related project requirements and request corresponding amendments or extensions of time as needed to maintain consistency among requirements.

Response Enclosure 1 at 151–53 (emphasis added).

Article 401 of the Appellant's license thus distinguishes between circumstances in which the Appellant must implement specific measures without prior FERC approval and circumstances in which the Appellant must obtain FERC approval. Circumstances that explicitly mandate FERC approval include: (1) the "[t]rash rack installation and monitoring plan"; (2) the "[e]elway operation and maintenance plan"; (3) "[d]esign plans for the eel ladder and eel exclusion and downstream passage facility"; and (4) "changes to the location, design, and/or flows associated with the eelways . . . ." *Id.* at 152–53. The proposed capital improvement project had two components: installation of upstream eel passage and installation of downstream fish passage facilities. Response Encl. 1 at 234–36. Installation of an upstream eel passage and downstream fish passage facilities clearly fell within those circumstances explicitly mandating FERC approval—more specifically, design plans for eel ladder, eel exclusion, and the downstream facility, as well as changes to the location, design, or flows associated with the eelways. Accordingly, from a review of Appellant's own FERC license and its application's characterization of the proposed capital improvement project, it is readily apparent that GDO considered the application materials before it when determining that FERC approval was needed for the capital improvement project and in finding Appellant ineligible due to its failure to provide documentation of FERC authorization or a final application for FERC authorization.

As for the Appellant's other "statements of fact," there is no dispute that: (1) pursuant to Section 18 of the FPA, the USFWS may prescribe a fishway and that FERC "must require [its] construction, maintenance, and operation by a licensee" or (2) the USFWS exercised its authority pursuant to Section 18 of the FPA to prescribe a fishway. Appeal; *see* Response at 7 ("[GDO] does not deny that the Facility has a FERC [l]icense or that USFWS has authority to mandate requirements at the Facility (within the terms and conditions of the FERC [l]icense[.]"). However, these statements of fact have no relevancy to whether Appellant's license required prior FERC authorization of the proposed capital improvement projects related to the eelway and thus have no bearing on whether Section VIII(b)(8)(viii) of the Program Guidance applied to the Appellant.

In conclusion, Appellant failed to specify how GDO acted arbitrarily and capriciously. Instead, after considering Appellant's arguments, the record reflects that GDO denied Appellant's application based on the application materials before it and in adherence to the explicit Program Guidance. 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.

IV. Conclusion

It is hereby ordered that the Appeal filed by Chittenden Falls Hydropower, Inc. on March 20,

2024, is denied.

This is a final decision and order of the Department of Energy from which Chittenden Falls Hydropower, Inc. may seek judicial review in the appropriate U.S. District Court.

Poli A. Marmolejos
Director
Office of Hearings and Appeals