United States Department of Energy
Office of Hearings and Appeals

In the Matter of Guadalupe-Blanco River Authority	)	
Filing Date: March 21, 2024	)	Case Nos.: HEA-24-0046 HEA-24-0047 HEA-24-0048 HEA-24-0049

Issued: July 16, 2024

Decision and Order

This Decision considers four appeals (Appeals) filed by Guadalupe-Blanco River Authority (Appellant) on March 21, 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 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 four hydroelectric projects. GDO filed its Responses to the Appeals (Responses), each of which included three enclosures (Encls. 1–3), on June 7, 2024. Appellant filed Replies to the Responses (Replies) on June 21, 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] On June 13, 2023, GDO published guidance describing procedures for filing an application for incentive payment 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). The Program Guidance includes in the definition of a "qualified hydroelectric facility" one that "has a FERC-issued exemption[.]" *Id.* § V(a).[2] The Program Guidance also defines an "*[e]xemption* from licensing" as "a small hydroelectric power project or a small conduit hydroelectric facility as defined by 18 C.F.R. § 4.30."[3] *Id.* § III (emphasis in original).

B. Procedural History

Appellant submitted applications for incentive payments under the Program for four hydroelectric projects identified as applications 3088-1605 (Project 1), 3088-1664 (Project 2), 3088-1607 (Project 3), and 3088-1606 (Project 4). Project 1 Response, Encl. 1; Project 2 Response, Encl. 1; Project 3 Response, Encl. 1; Project 4 Response, Encl. 1 (collectively, "the Projects").[4] In each of its applications, Appellant indicated that in 1963 it "purchased six dams on the Guadalupe River that are referred to collectively as the Guadalupe Valley Hydroelectric system." Project 1 Response, Encl. 1 at 1; Project 2 Response, Encl. 1 at 1; Project 3 Response, Encl. 1 at 1; Project 4 Response, Encl. 1 at 1. Each of these dams in Projects 1 through 4 "were constructed and placed into service between 1927 and 1932 . . . "; furthermore, FERC issued a May 22, 1980, order (1980

[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] FERC has jurisdiction to issue licenses for hydroelectric projects which, among other things, are located in navigable waters 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 id.* §§ 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).

[3] This regulation implements the FPA, including the FERC-issued exemptions for small hydroelectric power projects and small conduit hydroelectric facilities, as defined by 16 U.S.C. §§ 823a(b), 2505. *See supra* note 2.

[4] GDO submitted a folder entitled Enclosure 1 as an attachment to each of its Responses. Each folder labeled Enclosure 1 contained files submitted by Appellant with its applications. The Office of Hearings and Appeals (OHA) combined each folder's contents into a single PDF. This Decision will refer to the pages of each Response's Enclosure 1 in the order in which they appear in the PDF compiled by OHA, as if each were one sequentially numbered document, regardless of their internal pagination.

Order) "finding that licensing is not required" for the Projects.[5] Project 1 Response, Encl. 1 at 1; Project 2 Response, Encl. 1 at 1; Project 3 Response, Encl. 1 at 1; Project 4 Response, Encl. 1 at 1. On March 11, 2024, GDO issued to Appellant four Determination Letters notifying Appellant that the aforementioned four applications were denied because the "application[s] did not provide documentation that the existing facilit[ies] [were] licensed or ha[d] received an exemption from licensing from FERC nor did [they] provide documentation of a pre-1920 permit or valid existing right-of-way." Project 1 Response, Encl. 2 at 1; Project 2 Response, Encl. 2 at 1; Project 3 Response, Encl. 2 at 1; Project 4 Response, Encl. 2 at 1.

On March 21, 2024, Appellant filed four timely Appeals,[6] each of them raising the same arguments. According to Appellant, all of its Projects' facilities were "qualified hydroelectric facilities" and GDO "misapplied Section 247," which Appellant characterized as "broadly authoriz[ing] funding for facilities that have permission to operate, whether with or without a FERC license." Project 1 Appeal at 2; Project 2 Appeal at 2; Project 3 Appeal at 2; Project 4 Appeal at 2. Appellant further argued that the 1980 Order "concluded . . . the [hydroelectric facilities] were exempted from—and not subject to—the licensing requirements of Section 23(b)" of the FPA. Project 1 Appeal at 3; Project 2 Appeal at 3; Project 3 Appeal at 3; Project 4 Appeal at 3. In the 1980 Order, which Appellant appended to the Appeals, FERC specifically concluded that there was insufficient evidence that Appellant's hydroelectric facilities were located on navigable waters to establish FERC's jurisdiction or that Appellant had engaged in post-1935 construction that would have conferred jurisdiction over the hydroelectric facilities to FERC, and thus the FPA "does not appear . . . . to require licensing . . . ." Project 1 Appeal at 12; Project 2 Appeal at 12; Project 3 Appeal at 12; Project 4 Appeal at 12. Appellant asserted that when "evaluating [Appellant's] Application[s], GDO failed to consider the 1980 Order and [the 1980 Order's] finding that the Facilities were exempted from FERC licensing under Section 23(b)" of the FPA. Project 1 Appeal at 3; Project 2 Appeal at 3; Project 3 Appeal at 3; Project 4 Appeal at 3.

Appellant also asserted that the purpose of the Section 247 "is to provide widespread funding for the support and maintenance of the nation's hydroelectric infrastructure" and that "[a]s part of supporting hydroelectric power infrastructure, GDO should recognize that the [Projects' facilities], although excused from FERC licensure, are entitled to incentive funding." Project 1 Appeal at 3; Project 2 Appeal at 3; Project 3 Appeal at 3; Project 4 Appeal at 3. As evidence of the purported purpose of Section 247, Appellant quoted the Bill Summary of Section 247, authored by the Congressional Research Service (CRS): "[T]he IIJA 'reauthorizes, expands, and establishes programs that support . . . hydroelectric infrastructure[.]'" Project 1 Appeal at 3 (quoting *Summary: H.R. 3684 - 117th Congress (2021-2022)*, CONGRESSIONAL RESEARCH SERVICE (available at https://www.congress.gov/bill/117thcongress/house-bill/3684) (CRS Summary)); Project 2 Appeal at 3 (quoting CRS Summary); Project 3 Appeal at 3 (quoting CRS Summary); Project 4 Appeal at 3 (quoting CRS Summary).

[5] In concluding that licensing was not required, FERC specifically found that there was insufficient evidence to establish FERC's jurisdiction. Project 1 Appeal at 12; Project 2 Appeal at 12; Project 3 Appeal at 12; Project 4 Appeal at 12.

[6] For each Appeal, Appellant submitted a single PDF comprised of its Appeal brief and three exhibits. This Decision will refer to the pages of each Appeal brief and exhibits in the order in which they appear in the PDF, as if each were one sequentially numbered document, regardless of their internal pagination.

On June 7, 2024, GDO filed its Responses. In its Responses, GDO first asserted that Appellant had "not allege[d] that DOE violated any law, rule, regulation, or delegation in denying its application[s]." Project 1 Response at 4; Project 2 Response at 4; Project 3 Response at 4; Project 4 Response at 4. In response to the allegation that GDO acted arbitrarily and capriciously by failing to consider the 1980 Order, GDO argued that the 1980 Order was not submitted as part of Appellant's applications and thus could not be considered. Project 1 Response at 4; Project 2 Response at 4; Project 3 Response at 4; Project 4 Response at 4. GDO's Responses also argued that, even if it were to consider the 1980 Order, the additional documentation only "concluded that [Appellant's hydroelectric facilities] [do] not require a license under the FPA" and failed to demonstrate that Appellant had a FERC-issued exemption. Project 1 Response at 4; Project 2 Response at 4; Project 3 Response at 4; Project 4 Response at 4.

In response to the argument that Section 247 broadly authorizes funding for hydroelectric facilities with or without a FERC license, GDO's Responses noted that this assertion is contradicted by Section 247, which "explicitly defines a 'qualified hydroelectric facility' as a facility that either is licensed by FERC; or is 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 FPA." Project 1 Response at 5; Project 2 Response at 5; Project 3 Response at 5; Project 4 Response at 5. GDO further noted that its Program Guidance "clarified that a FERC license included a FERC-issued exemption" and that the 1980 Order "is not a FERC-issued exemption for the purposes of Section 247" because "a FERC-issued exemption is a specific FERC order that is labeled as such." Project 1 Response at 5; Project 2 Response at 5; Project 3 Response at 5; Project 4 Response at 5.

On June 21, 2024, Appellant filed its Replies to the Responses. Appellant asserted that GDO "incorrectly limit[ed] its interpretation of the relevant 'exemption' to exclude FERC's 1980 Order that, by its terms, exempts [Appellant] from FERC licensure . . . ignor[ing] the statutory text and context of the FPA." Project 1 Reply at 2; Project 2 Reply at 2; Project 3 Reply at 2; Project 4 Reply at 2. According to Appellant, GDO misconstrued the term "exemption" under the FPA to only mean FERC-issued exemptions; Appellant proffered that "[b]ecause the FPA does not define the term 'exemption' . . . [,]" exemption should be given its "plain meaning" and "common law definition." Project 1 Reply at 3; Project 2 Reply at 3; Project 3 Reply at 3; Project 4 Reply at 3. In reply to GDO's assertion that it could not consider the 1980 Order as it was not submitted with the application, Appellant asserted that the Program Guidance only requested a "*description* of the hydroelectric generation facility, including FERC license or exemption type and docket number and the year the facility began commercial operation." Project 1 Reply at 2 (quoting Program Guidance § VIII(b)(5)) (emphasis in original); Project 2 Reply at 2 (quoting Program Guidance § VIII(b)(5)) (emphasis in original); Project 3 Reply at 2 (quoting Program Guidance § VIII(b)(5)) (emphasis in original); Project 4 Reply at 2 (quoting Program Guidance § VIII(b)(5)) (emphasis in original).

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). Appellant asserted that GDO acted arbitrarily and capriciously by (1) misapplying Section 247, (2) ignoring as evidence the 1980 Order that purportedly granted Appellant an exemption from licensing, and (3) narrowly construing "exemption." For the reasons explained in this Decision, Appellant has not demonstrated that GDO acted arbitrarily and capriciously because GDO reasonably applied Section 247, reasonably construed the term "exemption" in accordance with the FPA and Program Guidance, and reasonably determined that Appellant lacked a FERC-issued exemption and thus could not meet the requirements of a "qualified hydroelectric facility."

The plain text of Section 247 defines a qualified hydroelectric facility as one licensed by FERC or "constructed, operated, or maintained pursuant to a permit or valid existing right-of-way granted prior to June 10, 1920 . . . ." 42 U.S.C. § 15883(a)(1). The Program Guidance includes in the definition those facilities that "ha[ve] a FERC-issued exemption[.]" Program Guidance § V(a).[7] The Program Guidance specifically defined an "*[e]xemption* from licensing" as "a small hydroelectric power project or a small conduit hydroelectric facility as defined by 18 C.F.R. § 4.30." *Id.* § III (emphasis in original).

Appellant's basis for its Appeals was not GDO's finding that Appellant's hydroelectric facilities lack a FERC license or a pre-1920 right-of-way. Appellant also did not contest GDO's "determin[ation] in its own [Program] Guidance that holders of FERC licensing exemptions qualify for grants under the Program." Project 1 Reply at 1; Project 2 Reply at 1; Project 3 Reply at 1; Project 4 Reply at 1. Instead, Appellant took issue with GDO's interpretation that an "exemption" does not include a FERC determination that a hydroelectric facility falls outside of FERC's jurisdiction and licensing requirement. Project 1 Reply at 1–2; Project 2 Reply at 1–2; Project 3 Reply at 1–2; Project 4 Reply at 1–2.

Appellant reasoned that its 1980 Order must amount to an "exemption" from FERC "[b]ecause the FPA does not define the term exemption . . . [,]" and thus a "plain meaning" and "common law definition" of exemption must prevail. Project 1 Reply at 1–2; Project 2 Reply at 1–2; Project 3 Reply at 1–2; Project 4 Reply at 1–2. However, Appellant's premise—that the FPA does not define

[7] GDO characterized its Program Guidance as "clarif[ying] that a FERC license included a FERC-issued exemption." Project 1 Response at 5; Project 2 Response at 5; Project 3 Response at 5; Project 4 Response at 5.

the term exemption—is false. The FPA explicitly defines "exemptions" with provisions outlining specific statutory criteria that must be met. *See* 16 U.S.C. §§ 823a(b), 2505 (outlining that a hydroelectric 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, the FPA states that facilities with a statutory 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).[8] Additionally, based on a sample order provided by GDO with its Responses, FERC makes explicit when it lacks jurisdiction to mandate that a hydroelectric facility be licensed and when it issues an exemption from licensing. *Compare e.g.* Project 1 Appeal at 11–12 (Appellant's 1980 FERC Order only discussing whether "the six hydroelectric projects are . . . required by" the FPA "to be licensed" and lacking any reference to a FERC-issued exemption) *with* Project 1 Response, Encl. 3 at 1, 7 (sample FERC Order explicitly addressing "an *exemption* from licensing . . ." under the "*10-megawatt exemption* [ ] subject to the [statutory] requirements . . . of the FPA . . .") (emphasis added).

The text of the Program Guidance also supports GDO's interpretation of "exemption" and evinces that GDO had not acted arbitrarily and capriciously in denying Appellant's applications. When GDO published its Program Guidance, GDO defined a FERC-issued exemption consistently with the exemptions set forth in the FPA: "*Exemption* from licensing means a small hydroelectric power project or a small conduit hydroelectric facility as defined by 18 C.F.R. § 4.30." Program Guidance § III (emphasis in original). The cited regulation in the Program Guidance implements and adopts the definitions in the FPA, including the FERC-issued exemptions defined by 16 U.S.C. §§ 823a(b), 2505. Accordingly, both the plain text of the FPA and the Program Guidance are in alignment and directly contradict Appellant's assertion that a FERC determination that it lacks jurisdiction to require a license must be considered a FERC-issued "exemption." GDO acted without arbitrariness and capriciousness when it adopted an interpretation of "exemption" that reflected the definitions set forth in the Program Guidance and the FPA, applied the eligibility requirement to Appellant, and determined that Appellant had not demonstrated that it held a FERC-issued exemption.

Appellant generally asserted that the intent of Section 247 "is to provide widespread funding for the support and maintenance of the nation's hydroelectric infrastructure[,]" and therefore Congress would not have intended to exclude Appellant's hydroelectric facilities from eligibility. Project 1 Appeal at 3; Project 2 Appeal at 3; Project 3 Appeal at 3; Project 4 Appeal at 3. This argument ignores the plain language of Section 247, which explicitly defined "qualified hydroelectric facility" to require, in relevant part, that the facility have FERC-issued license or, as the Program Guidance clarified, a FERC-issued exemption. As explained above, Appellant has not demonstrated that its hydroelectric facilities have either.

The parties also dispute whether the 1980 Order was required to be submitted with Appellant's applications; however, given that the 1980 Order would not have demonstrated the facilities'

[8] If Appellant's hydroelectric facilities fell within FERC jurisdiction and were subject to an exemption as it claims, Appellant's hydroelectric facilities would be subject to FERC monitoring, investigations, and enforcement, which Appellant has not alleged nor provided proof thereof.

eligibility even if it had been submitted sooner, this Decision need not resolve this dispute. *See Blumenthal v. Trump*, 949 F.3d 14, 19 (D.C. Cir. 2020) ("The cardinal principle of judicial restraint is if it is not necessary to decide more, it is necessary not to decide more."). That Appellant has no FERC-issued license, no FERC-issued exemption, and no proof of a pre-1920 permit or valid existing right-of-way disqualified Appellant from receiving incentive payments.

IV. Conclusion

It is hereby ordered that the four Appeals filed by Guadalupe-Blanco River Authority on March 21, 2024, are denied.

This is a final decision and order of the Department of Energy from which Guadalupe-Blanco River Authority may seek judicial review in the appropriate U.S. District Court.

Poli A. Marmolejos
Director
Office of Hearings and Appeals