

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

In the Matter of PacifiCorp Renewable Resources )		
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Filing Date: March 21, 2024	)	Case No.: HEA-24-0076
	)	
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Issued: June 28, 2024

**Decision and Order**

This Decision considers an appeal (Appeal) filed PacifiCorp Renewable Resources (Appellant) 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 it was ineligible for the Program. 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 GDO 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) “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).<sup>1</sup> 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 the application requirements and process for incentive payments under the Program. *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](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 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. On March 11, 2024, GDO issued a letter informing Appellant that it was ineligible for incentive payments. HEA-24-0076 Determination Letter at 1 (Mar. 11, 2024) (Determination Letter). Specifically, GDO stated that Appellant’s application indicated that “final design review and authorization is expected in early 2024,” but Appellant “did not include documentation of FERC authorization[,] nor did it provide proof that a final application for authorization has been filed with FERC.” *Id.* Therefore, pursuant to section VIII(b)(8)(viii) of the Program Guidance, GDO denied Appellant’s application as ineligible for the Program. *Id.* The Determination Letter included notice to Appellant of its right to file an appeal with DOE’s Office of Hearings and Appeals (OHA) within ten (10) days of receiving the notice. *Id.*

On March 21, 2024, Appellant filed a timely appeal. HEA-24-0076 Appeal (Mar. 21, 2024) (Appeal). Appellant attached, as part of its Appeal, two letters it received from FERC, one dated August 25, 2020 (2020 FERC Letter), which was not included in its application, and the other dated December 15, 2021 (2021 FERC Letter), which was included in its application.<sup>2</sup> *See* Appeal Attachment 4 (2020 FERC Letter); Appeal Attachment 2 (2021 FERC Letter). In the Appeal, Appellant argued that its application should be considered eligible because “FERC has been engaged in the development of the Project,” and Appellant “is simply awaiting final FERC approval of the design and specifications.” *Id.* at 1. Appellant stated that FERC first identified a need to assess the condition of its surge tank and surge tank anchors in 2015, and in September 2019, it submitted a Dam Surveillance and Safety Monitoring Report (2019 DSSMR) to FERC, which indicated that Appellant would “select an upgrade or replacement option” for its surge tank shell.<sup>3</sup> *Id.* Appellant

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<sup>1</sup> 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).

<sup>2</sup> Appellant submitted its attachments in separate PDF files; therefore, this Decision will cite to the PDF page numbers on each attachment.

<sup>3</sup> Appellant did not provide a copy of the 2019 DSSMR.

next asserted that, in the 2020 FERC Letter, FERC “accepted the 2019 DSSMR and concluded, presumably including in its assessment the planned work that [Appellant] indicated was necessary, that the [hydroelectric facility] was safe for operation.”<sup>4</sup> *Id.*

Appellant further explained that it divided the surge tank repair into “a single project with two phases,” with Phase 1 being the updated anchor system, and Phase 2 being the replacement of the surge tank shell. *Id.* Appellant stated that it submitted the Phase 1 construction package to FERC on December 3, 2021, which stated that “planning for the anchor system assumed (based on the 2019 DSSMR) that the surge tank shell would be replaced.” *Id.* at 1–2. Appellant asserted that, in the 2021 FERC Letter, FERC authorized the Phase 1 construction package. *Id.* at 2. However, Appellant also acknowledged that in the 2021 FERC Letter, FERC stated its authorization only extended to Phase 1, not Phase 2, which FERC declined to review at that time.<sup>5</sup> *Id.* at 1–2 (citing 2021 FERC Letter at 2). Appellant argued that “[b]ecause the concept of replacing the surge tank shell was presented to FERC” in the 2019 DSSMR and Phase 1 construction package, and “acknowledged” by FERC in its authorization for Phase 1, “Appellant believes the eligibility of the Project should be reconsidered and considers the decision to deny the Project’s eligibility to be arbitrary.” *Id.* at 2. Appellant attached, as part of its Appeal, the 2020 FERC Letter, and the 2021 FERC Letter.

GDO responded to the Appeal on May 24, 2024. GDO Response to Appeal (May 24, 2024) (Response). In the Response, GDO argued that Appellant’s application “unambiguously states that FERC’s ‘[f]inal design review and authorization is expected in early 2024,’ which is long-after the close of the application deadline on October 6, 2023.” *Id.* at 5 (citing Enclosure (Encl.) 1 to Response, *3088-1850\_PacifiCorp\_Renewable\_Resources\_Project\_Plan.pdf*, at 5). GDO noted that the 2021 FERC Letter specifically stated that FERC’s “authorization does not include construction of the new surge tank,” which indicates that FERC “approved a prior project at the Facility, but not the proposed capital improvements that Appellant seeks Section 247 funding for here.” *Id.* (citing 2021 FERC Letter at 2). GDO therefore asserted that the 2021 FERC Letter “affirms that FERC had not reviewed or authorized the proposed capital improvements.” *Id.* at 6.

GDO additionally argued that because the deadline to submit a complete application was October 6, 2024, the additional documents that Appellant provided on appeal should not be considered. *Id.* GDO asserted that “allowing the Appellant to complete its application after the established deadline would be unfair to other applicants and potential applicants that submitted incomplete applications and accepted the resulting ineligibility determination.” *Id.*

Appellant’s reply to the Response was due on June 7, 2024. No reply was filed.

## II. Standard of Review

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<sup>4</sup> In the 2020 FERC Letter, FERC stated that it acknowledged Appellant’s conclusion “that there are no developing dam safety issues, and that the dam is safe for continued operation.” 2020 FERC Letter at 1. FERC further indicated that it had “no additional comments on the [2019 DSSMR].” *Id.*

<sup>5</sup> In the 2021 FERC Letter, FERC stated that its “authorization does not include construction of the new surge tank which has not been submitted.” 2021 FERC Letter at 2. FERC additionally stated that its “authorization does not include review of the adequacy of the proposed seismic anchors for the new surge tank, which will be reviewed in conjunction with the new surge tank design, which we understand will be submitted as Phase 2.” *Id.*

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 at § 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**

In its Appeal, Appellant makes no allegation that GDO violated any law, rule, regulation, or delegation in denying it incentive payments under the Program, and therefore we will consider whether GDO's determination was arbitrary or capricious. 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 an initial matter, because the Program Guidance required Appellant to submit a "properly completed" application by the submission due date, we cannot consider Appellant's attachments submitted with its appeal. *Id.* § VIII(a)(5). Accordingly, we consider the record as it existed when GDO issued its decision.

Appellant's application did not contain any document from FERC authorizing the new surge tank project. In fact, Appellant's application materials explicitly state that FERC had not authorized the new surge tank project. 2021 FERC Letter at 2. We find unconvincing Appellant's argument that FERC's acknowledgment of the need for a new surge tank shell is equivalent to authorization. As evidenced by the details of the 2021 FERC Letter, authorization is a complex process involving detailed review of plans and reports on a variety of subjects. *See id.* Notification and an acknowledgment of a need do not resemble this rigorous process. Accordingly, we cannot find that FERC's involvement in the project is sufficient to qualify as authorization.

As stated in the Program Guidance, evidence of FERC authorization, or proof of a final application for authorization, was a requirement for a complete application. Appellant's application was incomplete because the evidence it submitted regarding FERC authorization indicates that the project is not authorized and because Appellant did not submit evidence that it had filed a final application for authorization. Therefore, we find that GDO did not act arbitrarily or capriciously in determining that Appellant was not eligible for the program.

### **IV. Conclusion**

For the foregoing reasons, it is hereby ordered that the Appeal filed by Appellant on March 21,

2024, is denied.

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

Poli A. Marmolejos  
Director  
Office of Hearings and Appeals