

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

In the Matter of Public Utility District)	
No. 1 of Lewis County)	
)	
Filing Date: March 21, 2024)	Case Nos.: HEA-24-0077
)	HEA-24-0078
)	HEA-24-0079
)	

Issued: June 28, 2024

Decision and Order

This Decision considers three appeals (Appeals) filed by Public Utility District No. 1 of Lewis County (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).¹ In its Appeals, Appellant challenged determinations 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 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 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)

¹ Appellant submitted three identical applications for the same project and GDO treated each as a separate application. All of the denials were the same, as were the issues raised on appeal in each case. Accordingly, we have consolidated the appeals in these cases.

“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).² 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 (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). The Program Guidance also defines a “qualified hydroelectric facility” as one that “has a FERC-issued exemption[.]” *Id.* § V(a).³ 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).

For an application to be complete, the Program Guidance required the submission of a Community Benefits Plan (CBP) that “demonstrates the applicant’s approach to ensuring the capital improvement advances the following four goals: (1) community and labor engagement; (2) investing in the American workforce; (3) advancing diversity, equity, inclusion, and accessibility (DEIA); and (4) contributing to the Justice40 Initiative.” *Id.* § VIII(b)(13). The Program Guidance further provided that the DEIA section of the CBP “should detail how the applicant will partner with underrepresented businesses, educational institutions, and training organizations that serve workers who face barriers to accessing quality jobs, and/or other project partners to help address DEIA.” *Id.* § VIII(b)(13)(iii).

B. Procedural History

Appellant applied for incentive payments under the Program with respect to the hydroelectric facility referenced in the applications for the above-captioned cases. In each of its applications, Appellant stated:

A formal license amendment proceeding, inclusive of NEPA analysis, is not anticipated as being necessary at this time given the in-kind rehabilitation and replacement nature of the work on existing/authorized Project features. Instead, this work is being performed under the terms and authorization of the existing license

² 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).

³ 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).

which, among other things, requires adherence to, and implementation of FERC's dam safety program and associated requirements

GDO Response to HEA-24-0077 Appeal Encl. 3 at 9 (May 31, 2024); GDO Response to HEA-24-0078 Appeal Encl. 3 at 9 (May 31, 2024); GDO Response to HEA-24-0079 Appeal Encl. 3 at 9 (May 31, 2024) (collectively, Responses) Appellant did not include a copy of its FERC license with its applications. On March 11, 2024, GDO issued letters informing Appellant that it was ineligible for incentive payments under the Program with respect to each of its applications. HEA-24-0077 Determination Letter at 1 (Mar. 11, 2024); HEA-24-0078 Determination Letter at 1 (Mar. 11, 2024); HEA-24-0079 Determination Letter at 1 (Mar. 11, 2024) (collectively, Determination Letters). Specifically, GDO noted that Appellant's applications stated that the "proposed sluice gate will [be] at 100 percent design in mid-October 2023 and it will be submitted to FERC for approval in November." *Id.*; Responses Encl. 3 at 7. GDO indicated that, based on this statement, it believed Appellant "did not provide documentation of FERC authorization of [this] proposed capital improvement." Determination Letters at 1. GDO also stated that Appellant's CBP "indicated [it] d[id] not plan to incorporate DEIA objectives into the Project," and "[a]s a result, the [CBP] did not demonstrate the capital improvement would advance the four goals." *Id.* The Determination Letters included notice to Appellant of its right to file its appeals with DOE's Office of Hearings and Appeals (OHA) within ten (10) days of receiving the notice. *Id.*

On March 21, 2024, Appellant filed timely appeals. HEA-24-0077 Appeal (Mar. 21, 2024); HEA-24-0078 Appeal (Mar. 21, 2024); HEA-24-0079 Appeal (Mar. 21, 2024) (collectively, Appeals). In the Appeals, Appellant stated that the 2019 FERC Part 12D Independent Consultant Report (2019 Consultant Report), which it attached to its applications, recommended that it "proceed with plans to replace the sluice gates and improve the hydraulics in the sluice ways." Appeals at 2. Appellant noted that it submitted the 2019 Consultant Report to FERC in November 2019. *Id.* Appellant further stated that, in its applications, it "identified the timeline for this improvement project" and projected submittal of its design to FERC in November 2023. *Id.* at 2. Appellant indicated that, on January 17, 2024, it submitted its "100% Design" for the sluice gate replacement to FERC and "received a request for additional information from FERC on January 25, 2024" (January 2024 FERC Letter). *Id.* at 2–3. Appellant explained that it "will timely respond[] to FERC to ensure that the improvement project proceeds forthwith." *Id.* at 3. Appellant attached, as part of its Appeals, the January 2024 FERC Letter.⁴

Regarding its CBPs, Appellant argued that "nowhere in its subject application[s] did [Appellant] state it did not plan to incorporate DEIA objectives into the improvement project." *Id.* at 2. Appellant asserted that its CBPs "contain[] [] section[s] specifically dedicated to DEIA (Section C) which provided a specific, measurable, achievable, relevant, and timely goal (CBP, page 7) to support DEIA engagement throughout the project." *Id.* Appellant noted that its DEIA goal stated that it will "annually review and consider policies that support diversity, equity, inclusion, and accessibility (DEIA) initiatives." *Id.* (citing CBP at 7). Appellant also asserted that "neither the program guidance, additional information requests, nor the notification of ineligibility state that the CBP[s] or its constituent parts are evaluated against a rubric to determine adequacy." *Id.*

⁴ Appellant submitted its attachments in separate PDF files; therefore, this Decision will cite to the PDF page numbers on each attachment.

GDO responded to the Appeals on May 31, 2024. In the Responses, GDO argued that “Appellant concedes that it did not plan to seek FERC authorization until after the October 6, 2023 deadline, in November 2023.” *Id.* at 6. GDO asserted that, although Appellant argued that it continues to communicate with FERC regarding approval of its capital improvement, “the Application Guidance required applicants to provide documentation of FERC authorization—not documentation of *communication* with FERC and *plans* for future approvals.” *Id.* (emphasis in original). GDO argued that “[b]ecause FERC authorization is required for the capital improvement and Appellant did not provide this information as required by the Application Guidance, DOE acted reasonably when it determined that Appellant’s application was ineligible.” *Id.*

GDO also argued that Appellant’s CBP “did not provide *any* details of how DEIA objectives will be incorporated *into the capital improvement.*” *Id.* (emphasis in original). GDO noted that “Appellant’s only specific goal is that Appellant ‘will annually review and consider policies that support diversity, inclusion, and accessibility (DEIA) initiatives.’” *Id.* GDO argued that this goal does not “provide any information on how the DEIA objectives would be incorporated into the capital improvement or how the Applicant planned to partner with organizations that serve specific workers to address DEIA.” *Id.*

Appellant’s replies to the Responses were due on June 14, 2024. No replies were filed.

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

In its Appeals, 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 late-filed

submissions that it attached to its Appeal. *Id.* § VIII(a)(5). Accordingly, we consider the record as it existed when GDO issued its decision.

GDO and Appellant appear to be at odds as to whether the project was authorized by Appellant's existing FERC license, or whether FERC's approval of the project design, submitted to FERC in January 2024, will constitute the necessary authorization. We need not resolve this dispute. Either way, it is clear that Appellant failed to provide with its application documentation of FERC authorization, or a filed final application for authorization, as required by the Program Guidance. Appellant did not submit its existing FERC license, which it claims to provide authorization for the project, nor did it submit its "100% Design" that is pending FERC approval, as that had not been completed at the time of the application deadline. As such, GDO's determination that Appellant failed to meet the requirement for a full application found in Section VIII(b)(8)(viii) of the Program Guidance, and was therefore ineligible for the Program, was not arbitrary and capricious.

Because the application is incomplete due to the missing FERC license documentation, it is unnecessary to decide whether Appellant's CBP was complete. In the interest of judicial economy, we make no finding on that question.

IV. CONCLUSION

It is hereby ordered that the Appeals filed by Appellant on March 21, 2024, are 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