United States Department of Energy
Office of Hearings and Appeals

In the Matter of Seattle City Light	)		
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Filing Date: March 21, 2024	)	Case Nos.:	HEA-24-0080
	)		HEA-24-0081
	)		

Issued: July 12, 2024

Decision and Order

This Decision considers appeals (Appeals) filed by Seattle City Light (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 two hydroelectric projects. Appellant attached documentation to its Appeals which it claimed established the eligibility of its applications for the Program (Appeal Att.). GDO filed its responses to the Appeals (Responses), each of which included three enclosures (Encls. 1–3), on May 31, 2024. Appellant submitted replies to the Responses (Replies) on June 14, 2024, and appended three attachments (Reply Atts. 1–3) thereto. For the reasons set forth below, we grant 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.)[.]" *Id.* § 15883(a)(1).[1]

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

Section VIII of the Program Guidance is titled "What are the general application requirements?" *Id.* § VIII. Paragraph (b) of Section VIII states "[a] full application for an incentive payment must include:" and is followed by thirteen subparagraphs, some of which contain additional clauses and subclauses, identifying specific information and documents that must be included in an application to the Program. *Id.* § VIII(b)(1)–(13). Among the required information, the Program Guidance specifies that applications must include "[a] description of the hydroelectric generation facility, including FERC license or exemption type and docket number and the year the facility began commercial operation." *Id.* § VIII(b)(5).

B. Procedural History

Appellant applied for incentive payments under the Program for two hydroelectric projects identified as applications 3088-2113 (Project 1) and 3088-2114 (Project 2) (collectively, the "Projects"). In submissions concerning authorization and compliance for the Projects, under a heading titled "Facility Description—DOE §247 Guidance VIII(b)(5)," Appellant stated that a 1993 judicial decision affirmed a determination by FERC that it lacked jurisdiction over the hydroelectric facility. Response to Project 1 Appeal, Encl. 1 Authorization and Compliance at 1; Response to Project 2 Appeal, Encl. 1 Authorization and Compliance at 1. Appellant also stated that "[c]ompleted in 1904, the first generators [at the hydroelectric facility] provided power to the city of Seattle the same year. Additional expansion and upgrade work on the Masonry Dam, as well as the penstocks, powerhouse, and company town, was completed in 1914." *Id.*

On March 11, 2024, GDO issued Determination Letters notifying Appellant that its applications were denied because the applications "did not include documentation of a license or exemption from FERC nor did [they] provide proof [] of a pre-1920 permit or valid existing right-of-way . . . ." Response to Project 1 Appeal, Encl. 2; Response to Project 2 Appeal, Encl. 2. On March 21, 2024, Appellant filed timely Appeals of each of the Determination Letters. In the Appeals, Appellant alleged that GDO's denial of its applications was arbitrary and capricious because the Program Guidance did not specify that documentation that a hydroelectric facility was "constructed, operated, or maintained pursuant to a permit or valid existing right-of-way granted prior to June 10, 1920" was

[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).

a required element of an application to the Program. Appeals at 2. The Appeal also provided financial statements and deeds to show ownership of the hydroelectric facility prior to 1920. Appeals Att.

GDO filed its Responses to the Appeals on May 31, 2024. In the Responses, GDO alleged that Appellant had notice that it was required to demonstrate that its hydroelectric facility was a qualified hydroelectric facility, citing sections IV, V, IX, and XII of the Program Guidance. Responses at 5. Upon review, Sections IV and V of the Program Guidance define "qualified hydroelectric facility" and identify entities eligible to apply to the Program. Program Guidance §§ IV, V. Neither section specifies any documentation that must be provided with an application. *Id.* Section IX of the Program Guidance states the following:

> DOE will evaluate each application to determine whether the project meets the criteria included in this Guidance, including (1) whether the facility meets the definition of a qualified hydroelectric facility (Section V) and (2) whether the improvement is an eligible capital improvement as defined in this section. This section describes the type of capital improvement projects that may qualify for incentive payments as well as the specific data and information DOE needs to determine whether the project is eligible to receive payment. In addition, this section describes how the materials submitted in the application will meet the project-specific criteria used to prioritize projects in the event the program is oversubscribed.

Id. § IX. Section IX then identifies categories and subcategories of capital improvement projects and differing documentation required for each category and subcategory of application. *Id.* Section XII of the Program Guidance provides responses to frequently asked questions and does not identify any specific documentation required for an application. *Id.* § XII.

GDO further argued that Appellant's statements in the applications that FERC lacked jurisdiction over its hydroelectric facility did not establish that the hydroelectric facility was licensed by FERC or had been issued an exemption from licensure by FERC.[2] Responses at 5. Finally, GDO asserted that "Appellant provide[d] no evidence—in neither the Application nor on Appeal—to show that the Facility is a hydroelectric project constructed, operated, or maintained pursuant to a permit or valid existing right-of-way granted prior to June 10, 1920" and that the evidence submitted by Appellant on appeal should be disregarded in any case because it was not provided with the applications. *Id.* at 6.

Appellant submitted the Replies on June 14, 2024. In the Replies, Appellant argued that sections

[2] FERC has jurisdiction to issue licenses for hydroelectric projects which, among other things, are located in bodies of water 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* 16 U.S.C. §§ 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).

VIII and XV of the Program Guidance specify the documents applicants were required to provide with their applications to the Program and that "nowhere does the [Program] Guidance suggest that evidence is required for hydroelectric facilities operated pursuant to a valid existing right-of-way granted prior to June 10, 1920." Replies at 3. Section XV of the Program Guidance lists "[d]ocumentation required for all applications," citing the documentation specified in section VIII(b). Program Guidance § XV. Section XV also identifies "documentation required for each subcategory," which Section XV indicates is specified in Section IX. *Id.*

Appellant further argued that the sections of the Program Guidance cited by GDO in the Responses as establishing such a requirement do not do so, and that interpreting them as such would be arbitrary and capricious because doing so would render Section VIII(b) of the Program Guidance superfluous and would improperly elevate definitions in other sections to requirements. Replies at 4.

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's applications indicated that its hydroelectric facility was constructed and placed in operation prior to 1920, and the Appeals asserted that GDO improperly denied the applications for lack of documentation showing that its hydroelectric facility was constructed, operated, or maintained pursuant to a permit or valid existing right-of-way granted prior to June 10, 1920. GDO's Responses did not dispute that Appellant claimed this basis for eligibility in its applications. Thus, the only question before OHA is whether GDO acted arbitrarily or capriciously in denying Appellant's applications for failing to provide documentation that its hydroelectric facility was constructed, operated, or maintained pursuant to a permit or valid existing right-of-way granted prior to June 10, 1920.[3]

[3] In its Replies, Appellant denied that it intended to show that it had been issued an exemption from FERC licensure

Section VIII(b) of the Program Guidance provides specific, detailed instructions concerning information and documentation required of applicants to the Program. However, nothing in Section VIII(b) indicates that applicants to the Program must provide documentation related to establishing eligibility as a hydroelectric facility constructed, operated, or maintained pursuant to a permit or valid existing right-of-way granted prior to June 10, 1920. GDO appears to concede this point as the Responses cite to Sections IV, V, IX, and XII of the Program Guidance rather than Section VIII(b) in support of GDO's claim that Appellant was required to provide proof of a pre-1920 permit or valid existing right-of-way for its hydroelectric facility with its applications. Responses at 5–6. Instead, Section VIII(b) merely requires applicants to provide "the year the facility began commercial operation." Program Guidance § VIII(b)(5). Appellant provided this information as required in its applications. *Supra* p. 2. GDO's specific instructions in Section VIII(b) with respect to the voluminous application requirements set forth therein, and the absence of any instructions regarding submitting documentation of construction, operation, or maintenance pursuant to a permit or valid existing right-of-way granted prior to June 10, 1920, are strong evidence that GDO did not intend to require this documentation at the time of an application. *Meritor, Inc. v. EPA*, 966 F.3d 864, 871 (D.C. Cir. 2020) (finding that "[w]here an agency includes particular language in one section of a [document] but omits it in another[,] [courts] generally presume[] that the agency acts intentionally and purposely in the disparate inclusion or exclusion") (quoting *Yonek v. Shinseki*, 722 F.3d 1355, 1359 (Fed. Cir. 2013)).

GDO's claim that the documentation requirements were contained in other sections of the Program Guidance is contradicted by the plain language of the Program Guidance. Section XV of the Program Guidance clearly identifies section VIII(b) as the only location in which documentation required of all applicants is specified. Section XV makes no mention of any documentation requirements contained in sections IV, V, or XII, and review of the text of these sections confirms that they contain no documentation requirements. While Section IX of the Program Guidance does identify required documentation, it is apparent from both Section XV's characterization of Section IX and the text of Section IX itself that the requirements of Section IX are specific to the category of capital improvement covered in an application and are not generally applicable to all applicants. Even if the requirements of Section IX are generally applicable, there is nothing in Section IX specifying documentation required to show construction, operation, or maintenance of a hydroelectric facility pursuant to a permit or valid existing right-of-way granted prior to June 10, 1920.

Appellant provided the information specified in the Program Guidance. While GDO may have needed additional documentation to determine whether Appellant's hydroelectric facility was a qualified hydroelectric facility, nothing in the Program Guidance identified what that documentation would be or that it had to be provided with the application. As the Responses indicate that GDO relied on three sections of the Program Guidance containing no documentation requirements and one section of the Program Guidance containing documentation requirements unrelated to the basis for GDO's denial of Appellant's application, while failing to rely on the only

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and asserted that it provided information in its applications concerning FERC's lack of jurisdiction as background to explain why it did not have a FERC license or exemption. Replies at 1, 3. As Appellant does not assert that it provided documentation of a FERC-issued exemption with its applications, we need not consider GDO's arguments as to the inadequacy of Appellant's documentation of a FERC-issued exemption.

section of the Program Guidance providing specific documentation requirements applicable to all applicants, we find that GDO denied Appellant's applications for reasons not set forth in the Program Guidance and that doing so was arbitrary or capricious. *See Metlife, Inc. v. Fin. Stability Oversight Council*, 177 F.Supp.3d 219, 236 (D.D.C. 2016) (finding that an agency's nonadherence to unambiguous provisions of its guidance was arbitrary and capricious where the agency failed to state good reasons for doing so); *Sierra Club v. Salazar*, 177 F.Supp.3d 512, 537–38 (D.D.C. 2016) (determining that an agency's disregard for its own guidance was evidence of arbitrary and capricious decision making). Accordingly, we will remand this matter to GDO to reverse or revise its Determination Letters in accordance with this Decision and Order.

IV. Conclusion

It is hereby ordered that the Appeals filed by Seattle City Light on March 21, 2024, are granted.

This is a final decision and order of the Department of Energy which is subject to judicial review in the appropriate U.S. District Court.

Poli A. Marmolejos
Director
Office of Hearings and Appeals