United States Department of Energy
Office of Hearings and Appeals

In the Matter of Monterey County Water Resources Agency	)	
Filing Date: May 21, 2024	)	Case No.: HEA-24-0083

Issued: July 17, 2024

Decision and Order

This Decision considers an appeal (Appeal) filed by Monterey County Water Resources Agency (Appellant) on May 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 Appeal, which included three attachments (Atts. 1–3), Appellant challenged a determination by the Department of Energy's (DOE) Grid Deployment Office (GDO) denying its application to the Program. GDO filed its response to the Appeals (Response), which included three enclosures (Encls. 1–3), on June 14, 2024. Appellant filed a reply to the Response (Reply) on June 28, 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 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).

B. Procedural History

Appellant submitted an application for incentive payments under the Program. Appellant appended a project plan to its application in which it indicated that it would "provide FERC with 30% design plans to begin coordination on FERC authorization and final approval will be requested once 90% design plans have been completed." Response, Encl. 1 Project Plan at 5.

On March 11, 2024, GDO issued a Determination Letter notifying Appellant that its application was denied because the capital improvement project covered by the application required FERC authorization and Appellant had not provided documentation of FERC authorization. Appeal, Att. 1. On March 20, 2024, Appellant submitted the Appeal to GDO.[2] In the Appeal, Appellant asserted that the Program Guidance's qualification that applicants must provide documentation of FERC authorization only "if applicable" was ambiguous and did not require Appellant to provide such documentation. Appeal at 1. Additionally, Appellant alleged that "FERC is in support of this project" and that Appellant had "a plan to submit the project [to FERC] at 60 percent design . . . ." *Id.* (emphasis omitted); *see also* Appeal, Att. 2; Appeal, Att. 3 (containing 2022 communications between Appellant and FERC concerning the work required for the capital improvement project addressed in Appellant's application to the Program).

GDO filed its Response on June 14, 2024. In the Response, GDO noted that Appellant had not 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 further argued that the plain

[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] Pursuant to the Program Guidance, Appellant was required to file the Appeal with OHA within ten days of receipt of GDO's Determination Letter. Program Guidance § XIV(f)(1). As Appellant filed its Appeal within ten days, albeit to GDO rather than OHA, and GDO did not argue that Appellant's Appeal was untimely in the Response, we have decided to exercise our discretion to consider the Appeal despite that it was not filed timely with OHA. *See id.* § XIV(f)(3) (indicating that OHA "*may* issue an order summarily dismissing an appeal" for untimeliness) (emphasis added).

language of the Program Guidance specified that documentation of FERC authorization was required to be included with an application whenever a capital improvement would require FERC authorization before on-site activity could commence and that Appellant's argument concerning the phrase "if applicable" was illogical as Appellant did not deny that it required FERC authorization to perform the work described in its application. *Id.* at 4–5. Finally, GDO argued that it had acted reasonably in denying Appellant's application because the application lacked documentation of FERC authorization, the application acknowledged that Appellant had not yet sought or obtained FERC authorization, and FERC's support for the capital improvement, as described in the Appeal, did not constitute authorization. *Id.* at 5.

Appellant submitted the Reply on June 28, 2024. In the Reply, Appellant denied that it had intended to argue in the Appeal that FERC authorization would not be required for its capital improvement project. Instead, Appellant alleged that the capital improvement required numerous authorizations from FERC and that the Program Guidance was ambiguous as to which authorization was required in order to establish eligibility for the Program. Reply at 1–2. Appellant acknowledged that it interpreted the word "authorization" "to mean[ ] final design, due to the phrase . . . 'authorization of the capital improvement project,'" but argued that this interpretation presented "a 'Catch-22'" because such late-stage approval would be detrimental to applicants to the Program, such as Appellant, which require financial support "throughout the entire project implementation cycle . . . ." *Id.* at 2 (emphasis omitted).

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). As noted by GDO, nothing in the Appeal alleges that GDO acted arbitrarily or capriciously in denying Appellant's application. Furthermore, Appellant does not dispute that the phrase "FERC authorization of the capital improvement project" can reasonably be interpreted to mean final FERC authorization for the capital improvement in its entirety rather than preliminary authorization. Reply at 2. There is likewise no dispute that Appellant did not provide

documentation of authorization in its application, nor could it have as FERC had not provided such authorization as of the date of the Appeal. *Id.*; Appeal at 1. Thus, there is no meaningful dispute that GDO acted reasonably in concluding that Appellant did not provide documentation of FERC authorization for its capital improvement in the application.

Appellant raised policy considerations that could have reasonably guided GDO to draft the Program Guidance differently so as to prioritize funding for applicants in the early stages of a capital improvement project rather than later stage applicants. However, Appellant has not identified any statutory obligation established by Section 247 that GDO ignored in requiring applicants to the Program to provide documentation of FERC authorization. Absent such a showing, an agency's prioritization of one set of objectives over others does not establish that the agency acted arbitrarily or capriciously. *See Fresno Mobile Radio, Inc. v. FCC*, 165 F.3d 965, 971 (D.C. Cir. 1999) (finding that the FCC acted reasonably in adopting a policy that adversely affected some small businesses where the policy represented a prioritization of one set of statutory objectives over others). Accordingly, Appellant has not established that GDO acted arbitrarily or capriciously in denying its application.

IV. Conclusion

It is hereby ordered that the Appeal filed by Monterey County Water Resources Agency on May 21, 2024, is denied.

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

Poli A. Marmolejos
Director
Office of Hearings and Appeals