United States Department of Energy
Office of Hearings and Appeals

In the Matter of Central Hudson Gas & Electric Corp.	)	
Filing Date: March 21, 2024	)	Case No.: HEA-24-0058

Issued: August 6, 2024

Decision and Order

This Decision considers an appeal (Appeal) filed by Central Hudson Gas & Electric Corp. (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 Appeal, Appellant challenged a determination by the Department of Energy's (DOE) Grid Deployment Office (GDO) that it was ineligible for the Program. Appellant attached documentation to its Appeal which it claimed established its eligibility for the Program (Appeal Att.). GDO filed its response to the Appeal (Response), which included three enclosures (Encls. 1–3), on June 7, 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.)[.]" *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[.]"[2] *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 . . ." among other requirements "[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. In a submission concerning authorization and compliance for the project described in its application, under a heading titled "Facility Description—DOE §247 Guidance VIII(b)(5)," Appellant stated that its dam was "constructed in 1919-1920, going into service in 1922," and that the facility was "exempt from FERC licensing per an August 17, 1988[,] ruling [(1988 FERC Order)] in which FERC determined that the Wallkill River is not a navigable waterway at the site of/in the vicinity of the dam." Response, Encl. 1 Authorization and Compliance. Appellant also provided a copy of the 1988 FERC Order determining that Appellant's facility was not subject to FERC's licensing jurisdiction. Response, Encl. 1 Proof of FERC Exemption at 7–10.

On March 11, 2024, GDO issued a Determination Letter notifying Appellant that its application was denied because the application "did not include documentation of a license or exemption from FERC nor did it provide proof [] of a pre-1920 permit or valid existing right-of-way . . . ." Response, Encl. 2. On March 21, 2024, Appellant filed a timely Appeal of the Determination Letter. In the Appeal, Appellant requested to amend its application to omit the reference to the 1988 FERC

[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).

Order and replace it with the following statement: "Construction and operation of the [hydroelectric facility] is authorized under the November 10, 1919, permit issued to the United Hudson Electric Corporation. Attachment 1 provides a copy of the November 10, 1919, permit." Appeal at 2. The Appeal also provided a November 1919 order from the New York State Conservation Commission approving plans for the construction of the dam. Appeal Att.

GDO filed its Response to the Appeal on June 7, 2024. In the Response, GDO argued that Appellant's application mistakenly cited the 1988 FERC Order as documentation of a FERC-issued exemption when in fact the 1988 FERC Order indicated that FERC lacked jurisdiction over Appellant's hydroelectric facility. Response at 5; *see also* Response, Encl. 3 (containing an example of a FERC-issued exemption from licensing). As the 1988 FERC Order stated that Appellant's hydroelectric facility did not require a FERC license to operate, GDO asserted that it was neither arbitrary nor capricious for it to conclude that the 1988 FERC Order did not establish that Appellant was eligible for the Program. Response at 5.

GDO further noted that the documentation provided by Appellant with its Appeal to show that its hydroelectric facility was constructed, operated, or maintained pursuant to a pre-1920 permit or right-of-way was not submitted with Appellant's application. *Id.* GDO argued that Appellant could not establish that GDO had acted arbitrarily or capriciously based on documentation that was not provided to GDO, and of which GDO was unaware, when it issued the Determination Letter. *Id.*

OHA invited Appellant to submit a reply to the Response on or before July 24, 2024. Reply Briefing Order (July 10, 2024). On July 23, 2024, Appellant informed OHA by e-mail that it did not intend to submit a reply brief. Appellant E-mail Declining Reply Brief (July 23, 2024) (E-mail). In the E-mail, Appellant indicated that "[b]ased on the [] [R]esponse, it is understood that there is a distinction between 'exempt' and 'non-jurisdictional' as it relates to [FERC's] authority over a given hydropower facility under the [FPA]." *Id.* However, Appellant asserted that the Appeal demonstrated that its hydroelectric facility was a qualified hydroelectric facility under the Program based on a pre-1920 permit or right-of-way and that finding it "eligible for incentive payments under Section 247 [would be] consistent with the intent of the [P]rogram." *Id.*

On July 25, 2024, OHA invited the parties to submit supplemental briefs concerning the applicability of *Seattle City Light*, OHA Case Nos. HEA-24-0080-81 (2024), an OHA decision concerning the denial of applications to the Program based on the absence of documentation of a pre-1920 permit or right-of-way, to the facts of the Appeal.[3] Request for Supplemental Briefing (July 25, 2024). On August 5, 2024, GDO submitted a supplemental brief arguing that: (1) Appellant did not assert that it was eligible for the Program based on a pre-1920 permit or right-of-way in its application, (2) it could not have been arbitrary or capricious for GDO to conclude that Appellant had not established eligibility based on a pre-1920 permit or right-of-way when Appellant had not asserted that basis for eligibility in its application, and (3) allowing applicants to change their applications at the appeal stage would make it impossible to administer the Program

[3] In *Seattle City Light*, we concluded that GDO had acted arbitrarily and capriciously in denying applications to the Program based on lack of documentation of a pre-1920 permit or valid existing right-of-way. In that case, the appellant argued that the Program Guidance did not require applicants to submit such documentation with their applications and that GDO's denial of its applications was arbitrary and capricious because the basis for the denials was not authorized under the Program Guidance. *Id.* at 2–4.

efficiently.[4] GDO Supplemental Brief at 2–4. Appellant did not submit a supplemental brief.

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 recognized in the E-mail that FERC's determination that it lacks jurisdiction over a hydroelectric facility is not a FERC-issued exemption from licensing. Moreover, it is readily apparent from review of the 1988 FERC Order that the 1988 FERC Order was not a FERC-issued exemption. *Compare* Response, Encl. 1 Proof of FERC Exemption at 7–8 (considering whether FERC had licensing jurisdiction over Appellant's hydroelectric facility under the FPA) *with* Response, Encl. 3 (sample FERC Order explicitly addressing "an exemption from licensing . . ." under the "*10-megawatt exemption* [] subject to the [statutory] requirements . . . of the FPA . . .") (emphasis added); *see also Guadalupe-Blanco River Auth.*, OHA Case No. HEA-24-0046 at 5–6 (2024) (explaining that a FERC determination that it lacks jurisdiction over a hydroelectric facility does not establish eligibility for the Program on the basis of a FERC-issued exemption from licensing). Thus, we conclude that it was neither arbitrary nor capricious for GDO to conclude that Appellant lacked a FERC-issued exemption from licensing.

Appellant likewise does not allege that GDO's determination to deny its application for lack of proof of a pre-1920 permit or valid existing right-of-way was arbitrary or capricious. Rather, Appellant indicated in the Appeal that it sought to modify the information it provided in the

[4] GDO also made several arguments as to why it might have denied Appellant's application even had it included the 1919 permit with its application, arguing that the permit did not establish the Appellant's eligibility for the Program. GDO Supplemental Brief at 4–5. Whether the 1919 permit established Appellant's eligibility for the Program is irrelevant to the issue raised in *Seattle City Light* concerning whether the Program Guidance required applicants claiming eligibility for the Program based on a pre-1920 permit or right-of-way to submit documentation of the pre-1920 permit or right-of-way with their applications. *Seattle City Light*, OHA Case Nos. HEA-24-0080-81 at 5–6. Thus, we need not determine whether the 1919 permit submitted by Appellant would have established its eligibility for the Program had the 1919 permit been submitted with Appellant's application.

application to establish its eligibility. However, whether Appellant could have established that it was eligible for the Program at the time of its application if it had written the application materials differently or provided additional documentation is irrelevant to whether GDO acted arbitrarily or capriciously based on the application materials Appellant provided. As Appellant has not alleged any basis under which GDO's determination was arbitrary or capricious, we cannot conclude that GDO acted arbitrarily or capriciously in denying Appellant's application to the Program for lack of documentation of a pre-1920 permit or valid existing right-of-way.[5]

IV. Conclusion

It is hereby ordered that the Appeal filed by Central Hudson Gas & Electric Corp. on March 21, 2024, is denied.

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

[5] While Appellant could have made a similar argument to the appellant in *Seattle City Light* in this case, Appellant did not do so. Even after being provided the opportunity to submit a supplemental brief concerning the applicability of *Seattle City Light* to the present matter, Appellant declined to do so. Whatever Appellant's reasons for not making such an argument, it would be inconsistent with OHA's role as an impartial adjudicator to substitute our judgment for that of a party in determining how to pursue an appeal and therefore we do not consider the arguments raised in *Seattle City Light* in this case. *See U.S. v. Real Prop. Identified as: Parcel 03179-005R*, 287 F. Supp. 2d 45, 61 (D.D.C. 2003) (stating that "[i]t is not this Court's role to act as an advocate for the parties and construct legal arguments on their behalf . . . .") (alterations omitted).