United States Department of Energy
Office of Hearings and Appeals

In the Matter of Sollos Energy LLC	)	
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Filing Date: August 8, 2024	)	Case No.: HEA-24-0086
	)	
	)	

Issued: September 20, 2024

Decision and Order

This Decision considers an appeal (Appeal) filed by Sollos Energy LLC (Appellant) on August 8, 2024, related to the hydroelectric production incentives program authorized by Section 242 of the Energy Policy Act of 2005 (Program), currently being administered by the Grid Deployment Office (GDO) of the Department of Energy (DOE). In its Appeal, the Appellant contests a decision issued by DOE denying its application for an incentive payment for the Burton Creek Hydroelectric Facility (Facility) for calendar year 2023. On September 6, 2024, GDO filed its response to the Appeal (Response), which included two attachments (Response Attachs. 1–2). For reasons discussed in this Decision, we have determined that the Appeal should be denied.

I. Background

A. Section 242 of the Energy Policy Act of 2005

In the Energy Policy Act of 2005 ("EPAct 2005"), Congress established a program to support the expansion of hydropower energy development at existing dams and conduits through an incentive payment procedure. 109 P.L. 58 (2005) (codified as amended at 42 U.S.C. § 15881). Section 242 requires that "the Secretary [ ] make, subject to the availability of appropriations, incentive payments to" qualified hydroelectric facilities "for electric energy generated and sold . . . during the incentive period . . . ." 42 U.S.C. § 15881(a). Section 242 includes the following pertinent definitions:

> (1) Qualified hydroelectric facility
>
> The term "qualified hydroelectric facility" means a turbine or other generating device owned or solely operated by a non-Federal entity –
>
> (A) that generates hydroelectric energy for sale; and
>
> (B) (i) that is added to an existing dam or conduit . . . .
>
> . . . .

> (2) Existing dam or conduit
>
> The term "existing dam or conduit" means any dam or conduit the construction of which was completed before November 15, 2021, and which does not require any construction or enlargement of impoundment or diversion structures (other than repair or reconstruction) in connection with the installation of a turbine or other generating device.

Id. § 15881(b)(1)(A)–(B). Under Section 242, "[a] qualified hydroelectric facility may receive payments under this section for a period of 10 fiscal years" referred to as the "incentive period." *Id.* § 15881(d). The incentive period "shall begin with the fiscal year in which electric energy generated from the facility is first eligible for such payments." *Id.*

To further qualify for incentive payments, applicants must submit "an incentive payment application which establishes that the applicant is eligible . . . and which satisfies such other requirements as the Secretary deems necessary." *Id.* § 15881(a). Accordingly, on March 14, 2024, GDO published guidance describing procedures and requirements for filing an application for incentive payments under Section 242. *U.S. Department of Energy Grid Deployment Office Guidance on Implementing Section 242 of the Energy Policy Act of 2005*, U.S. DEP'T. OF ENERGY (March 14, 2024) (*available at* https://www.energy.gov/sites/default/files/2024-03/Hydroelectric%20Section%20242%20Guidance%20Document%20CY2023.pdf) ("Program Guidance"). The Program Guidance states that, among other things, a qualified hydroelectric facility is a facility that:

> Began producing hydroelectric energy for sale on or after October 1, 2005, either through added generation capability, or at a facility where operations began prior to October 1, 2005, so long as the facility had been offline because of disrepair or dismantling for at least five consecutive years prior and underwent significant changes.

Id. at 5.

Further, under the Program Guidance, "added" means:

> [T]o install a turbine or other generating device where none existed before. In addition, 'added' can mean to repair or replace an existing turbine or other electricity generating device that has been offline because of disrepair or dismantling for at least five consecutive years immediately prior to October 1, 2005, and is subsequently repaired or replaced on or after October 1, 2005, and on or before September 30, 2027.

Id. at 2.

B. Procedural History

The Appellant applied for incentive payments under the Program for the Facility. In its application, the Appellant noted that the Facility "consists of an aluminum [C]oanda screen style diversion," over a thousand feet of steel pipe, "and a three nozzle Pelton turbine with controls and switchgear inside a concrete masonry building." Response, Attach. 1 at 2. The Appellant stated that although the Facility began producing and selling power in 1997, it was "mostly offline" from 2004 through 2013 following a rockslide that caused damage to the powerhouse. *Id.* The intake structure also needed to be redesigned and reconstructed. *Id.* The Facility went "back online after 2013[,]" and has been online since. *Id.*

On August 7, 2024, GDO notified the Appellant, via Determination Letter, that the application was reviewed and that the Appellant was not eligible for payments for calendar year 2023. Response, Attach. 2 at 1. GDO specifically noted that, in contravention of the requirements of section V(d) of the Program Guidance, the Facility "began operations prior to October 1, 2005, and was not offline for a period of five consecutive years immediately prior" to that date; accordingly, "it [was] not eligible for an incentive payment under the Program." *Id.*

The Appellant filed an appeal on August 8, 2024, asserting that the Facility "added generation capability after 2005." Appeal at 1. The Appellant stated that the Facility was "inoperable for several years" because "[b]etween 2006 and 2010 the former owners [of the Facility] received a letter from [the Federal Energy Regulatory Commission (FERC)] and the [United States Forest Service] that [the Facility's] annual permit requirements [were not] being upheld[.]" *Id*. From 2012 to 2014, a new aluminum intake screen and piping were installed, and following "FERC approval and inspection of the new intake, the [Facility] was then legally granted approval from FERC and agencies to operate based on . . . new capacity." *Id.* Accordingly, the Appellant suggested that the aforementioned "meets the criteria of added generation[,]" because the Facility would not have been generating any electricity save for the new piping and intake. *Id.*

GDO filed its Response to the Appeal on September 6, 2024, and first noted that the Appellant did "not argue that DOE acted arbitrar[ily], capriciously, or in violation of law, rule, regulation, or delegation." Response at 3. GDO went on to state that the Facility began operations prior to October 1, 2005, as the Appellant asserted in its application. *Id.* GDO argued that although the Appellant stated that it should be eligible due to "added generation[,]" the Appellant did not "consider the eligibility requirements and the definition of 'added' as offered by Program Guidance." *Id.* at 3. Pursuant to the Program Guidance, the Appellant would be eligible if the Facility "began operations on or after October 1, 2005, and added generation capability." *Id.* at 4. Alternatively, the facility may be eligible if "[i]t began operations prior to October 1, 2005, [so] long as the facility was offline for at least five consecutive years *prior* to October 1, 2005." *Id.* (emphasis in original). GDO asserted that the Facility began operations in 1997, and that the Appellant thus does not fall within the first eligibility category. *Id.* GDO asserted that the second eligibility category also does not apply as "the Facility concerns a generating device that existed before and went offline *well after* October 1, 2005." *Id*.

OHA invited the Appellant to submit a reply to the Response on or before September 13, 2024. Acknowledgment Letter and Reply Briefing Order (August 20, 2024). The Appellant did not submit a reply.

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 § XI(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 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). The Appellant does not assert that the GDO acted arbitrarily or capriciously when the application for an incentive payment was denied. Instead, the Appellant argues that its Facility should be found eligible based on "added generation capability after 2005." Appeal at 1.

Although the Appellant argues in the Appeal that it qualifies for the incentive payment based on "added" capability following the installment of a new intake screen and piping, GDO is correct in its assertion that the circumstances do not meet the definition of "qualified hydroelectric facility" as per the Program Guidance. First, as the Appellant noted in the application, the Facility first began operations in 1997, well before the October 1, 2005, date noted in the Program Guidance. Second, although a qualified hydroelectric facility could be one that began operations prior to October 1, 2005, it must have been offline due to dismantling or disrepair for a minimum of five consecutive years prior. Further, the changes must have been significant, pursuant to Program Guidance. While it appears that the Facility underwent significant changes, the Appellant never noted a five-year period prior to October 1, 2005, during which the Facility was offline due to disrepair.

Further, the situation does not meet the definition of "added" generation capability pursuant to the Program Guidance. While the Appellant alleged that it repaired an existing turbine or other electricity generating device that had been previously been offline due to disrepair, again, the Appellant never asserted that the "electricity generating device" had been offline for five consecutive years prior to October 1, 2005, even though the device had been repaired after October 1, 2005, and before September 30, 2027.

For the foregoing reasons, the Appellant is ineligible under the GDO's Program Guidance. Accordingly, there is no basis to conclude that GDO acted arbitrarily and capriciously in denying the Appellant's application.

IV. Conclusion

It is hereby ordered that the Appeal filed by Sollos Energy LLC on August 8, 2024, is denied.

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

Poli A. Marmolejos
Director
Office of Hearings and Appeals