

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

In the Matter of Puget Sound Energy)
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Filing Date: August 16, 2024) Case No.: HEA-24-0089
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Issued: September 20, 2024

Decision and Order

This Decision considers an appeal (Appeal) filed by Puget Sound Energy (Appellant) on August 16, 2024, related to the hydroelectric production incentive program authorized by Section 242 of the Energy Policy Act of 2005 (“Section 242”), currently being administered by the Grid Deployment Office (GDO) of the Department of Energy (DOE). In its Appeal, which includes two attachments (Appeal, Attachs. A–B), Appellant contests a decision issued by DOE denying Appellant’s application for an incentive payment for the Baker River Hydroelectric Project Lower Baker Unit 4 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 Appellant’s Appeal should be denied.

I. Background

A. Section 242 of the Energy Policy Act of 2005

In the Energy Policy Act of 2005 (“EPAAct of 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 available, 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. 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).¹ The incentive period “shall begin with the fiscal year in which electric energy generated from the facility is first eligible for such payments.” *Id.*

¹ Fiscal year is “the period beginning October 1 and ending on September 30.” *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 at 3 (March 14, 2024) (available at <https://www.energy.gov/sites/default/files/2024-03/Hydroelectric%20Section%20242%20Guidance%20Document%20CY2023.pdf>) (“Program Guidance”).

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. Program Guidance. The Program Guidance defines “incentive period” as follows:

Incentive Period means a period of 10 consecutive years that begins with the first fiscal year hydroelectric energy was generated and sold by a qualified hydroelectric facility, regardless of funding appropriated for section 242 or an application submitted by the applicant. Receipt of an incentive payment by an eligible applicant is limited to this 10-year period.

Id. at 3 (emphasis in original). Furthermore, the Program Guidance makes clear (1) that “a hydroelectric generation facility may receive payments for a period of 10 consecutive fiscal years”; (2) that this period “shall begin with the first fiscal year in which the facility began producing hydroelectric energy for sale” and (3) that “[a]ny year in which a hydroelectric generation facility does not operate partially or fully will be considered an eligible year if the facility could potentially operate during in [sic] the 10-year period” *Id.* at 6.

B. Procedural History

On March 27, 2024, Appellant submitted its application for incentive payments under Section 242. Response, Attach. 2 at 1. In its application, Appellant indicated in at least three sections that its hydroelectric facility began operating in July 2013:

- “Lower Baker Unit 4 is a qualified hydroelectric facility that began operation at an existing dam on July 25, 2013.” *Id.* at 3;
- “The date of the first sale of electricity form Lower Baker Unit 4 is based on the start of commercial operation, July 25, 2013.” *Id.* at 5; and
- “Lower Baker Unit 4 commenced commercial operation on July 25, 2013, and is the subject of this application.” *Id.* at 6.

Appellant’s application also included correspondence with a Federal Energy Regulatory Commission (FERC) Regional Engineer memorializing that “the on-line date or start of commercial operation was July 25, 2013.” *Id.* at 28.

On August 7, 2024, the GDO issued its Determination Letter reasoning that “[b]ecause the Baker River Hydroelectric Project Lower Baker Unit 4 began producing hydroelectric energy for sale on July 25, 2013, its incentive period started in fiscal year 2013 and ended in fiscal year 2022.” Response, Attach. 1 at 1. GDO thus concluded that the Applicant’s hydroelectric facility was “not eligible for an incentive payment under” Section 242. *Id.*

On August 16, 2024, Appellant filed its Appeal. The Appeal detailed that during the startup of Lower Baker Unit 4, there were issues that “severely limited the operation . . . to a very narrow range of 14-20 MW.” Appeal at 1. The Appellant further indicated that “work to bring the Unit to intended capacity [was] not completed until 2015.” *Id.* The Appellant included a 2014 FERC Order that was not included with its original application. *Compare* Appeal, Attach. B (2014 FERC Order) with Response, Attach. 2 (Section 242 application without the 2014 FERC Order). The 2014 FERC Order granted Appellant an extension of time to October 2015 for its facility to operate at the capacity described and agreed upon in its FERC license. Appeal, Attach. B at 6–7. Given the above, Appellant requested that “the year considered for the hydroelectric incentive payment eligibility commencement match the FERC extension and be 2015.” Appeal at 2.

GDO filed its Response to the Appeal on September 6, 2024. In the Response, GDO noted that nothing in the Appeal alleged that GDO “acted in violation of a law rule, regulation, or delegation.” Response at 4. According to GDO, Appellant’s sole argument was that “the date [Appellant] began operations should be ‘extended’ because the [hydroelectric facility] did not operate at full capacity until 2015” based on additional information and documentation provided for the first time in its Appeal. Response at 4. GDO argued that it was not arbitrary or capricious to consider the information presented in the original application materials. *Id.* GDO further argued that, even considering the post-application information and submissions, the Appeal must be dismissed because the hydroelectric facility fails to meet the eligibility requirements and because Appellant fails to consider “the definition of ‘incentive payment’” *Id.*

OHA invited Appellant to submit a reply to the Response on or before September 13, 2024. Acknowledgment Letter (Aug. 20, 2024). Appellant did not submit a reply.

II. Standard of Review

Appeals of denials of applications under Section 242 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 at 13 (indicating that appeals of denials of applications under Section 242 will be decided under the Part 1003 regulations). An appeal of a denial of a Section 242 application 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

Appellant asserts that “the year considered for the hydroelectric incentive payment eligibility commencement [should] . . . be 2015.” Appeal at 2. In support of this argument, Appellant cites the following considerations, which it did not raise in its application: (1) the hydroelectric facility required repairs, which “severely limited [its] operation”; (2) “work to bring the [hydroelectric facility] to intended capability [was] not completed until 2015”; and (3) a 2014 FERC Order extending the deadline to meet operation requirements agreed to in its FERC license. Appeal at 1; Appeal, Attach. B at 7. Appellant fails to specify whether it believes that GDO acted arbitrarily, capriciously, or in violation of a law, rule, regulation, or delegation. Nevertheless, this Decision reviews the record to determine whether GDO acted in such a manner.

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). It is readily apparent that GDO considered the evidence that was submitted with Appellant's application and strictly adhered to the terms of the Program Guidance in determining that Appellant was ineligible.

The information regarding the fact that the hydroelectric facility was not fully operational until 2015, and the 2014 FERC Order extending the deadline for Appellant to meet operating requirements set forth in its FERC license, were not provided with the Appellant's original application for incentive payments. Instead, the application repeatedly stated that Appellant's hydroelectric facility began operating in July 2013. *See* Response, Attach. 2 at 3, 5–6, 28. Accordingly, GDO relied on the "evidence before the agency" when it denied Appellant's application and thus acted without arbitrariness or capriciousness. *Motor Vehicle Mfrs. Ass'n, Inc.*, 463 U.S. at 43.

Even considering Appellant's additional information and the 2014 FERC Order, Appellant's assertion—that GDO should consider the year it began operations as being 2015—must fail. Taken together, the new information and 2014 FERC Order indicate (1) that the Appellant's hydroelectric facility began commercial operation in 2013 with issues, (2) that Appellant's hydroelectric facility could only partially operate due to those issues, and (3) that FERC permitted Appellant an extension of time to 2015 before it was required to meet its operation obligations outlined in its FERC license. However, GDO cannot consider the incentive period to begin in 2015. The Program Guidance clearly states that the incentive period "begins with the first fiscal year hydroelectric energy was generated and sold" Program Guidance at 3.² Furthermore, the Program Guidance provides that "[a]ny year in which a hydroelectric generation facility does not operate partially or fully will be considered an eligible year if the facility could potentially operate" *Id.* at 6. The Program Guidance is unambiguous in its explanation that the incentive period began when hydroelectric energy was generated and sold, regardless of whether it was only partially operating. Accordingly, that Appellant experienced "severely limited [] operation[s]" in 2013 would have no bearing on when the incentive period began. Appeal at 1. Appellant has therefore failed to establish that it would have met the eligibility requirements in the Program Guidance even if it provided the information contained in the Appeal with its application.

In summary, GDO determined that the incentive period for Appellant's hydroelectric facility ended in fiscal year 2022 prior to calendar year 2023 by relying on the Appellant's own application evincing that Appellant's hydroelectric facility commenced operations in July 2013. Even

² The Program Guidance is consistent with the statutory language of Section 242. 42 U.S.C. § 15881(d) (mandating that the incentive period "shall begin with the fiscal year in which electric energy generated from the facility is first eligible for such payments").

considering the information provided for the first time in this Appeal, the fact remains that Appellant's hydroelectric facility was partially operating in 2013 and thus Appellant would have remained ineligible under the GDO's Program Guidance even had it supplied the information with its application. Accordingly, there is no basis to conclude that GDO acted arbitrarily and capriciously in denying Appellant's application.

IV. Conclusion

It is hereby ordered that the Appeal filed by Puget Sound Energy on August 16, 2024, is denied.

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

Poli A. Marmolejos
Director
Office of Hearings and Appeals