United States Department of Energy
Office of Hearings and Appeals

In the Matter of City of Ouray, CO	)	
	)	
Filing Date: April 6, 2016	)	Case No.: HEA-16-0001
	)	
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Issued: May 6, 2016

Decision and Order

This Decision considers an Appeal filed by the City of Ouray, CO (hereinafter Ouray) relating to the Hydroelectric Incentive Payments Program authorized by Section 242 of the Energy Policy Act of 2005 (Section 242 Program), being administered by the Office of Energy Efficiency and Renewable Energy (EERE), U.S. Department of Energy (DOE). In its Appeal, Ouray contests a notice (Notice) issued by the EERE that would result in a lower incentive payment to Ouray than the one that it requested. For the reasons discussed in this decision, we have determined that Ouray's 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; Public Law 109-58), Congress established a new program to support the expansion of hydropower energy development at existing dams and impoundments through an incentive payment procedure. Under Section 242 of EPAct 2005 (Section 242), the Secretary of Energy is directed to provide incentive payments to the owner or operator of qualified hydroelectric facilities for electric energy generated and sold by a qualified hydroelectric facility for a specified 10-year period. *See* 42 U.S.C § 15881. Section 242 states in relevant part:

> *SEC. 242. HYDROELECTRIC PRODUCTION INCENTIVES.*
>
> (a) INCENTIVE PAYMENTS. For electric energy generated and sold by a qualified hydroelectric facility during the incentive period, the Secretary shall make, subject to the availability of appropriations, incentive payments to the owner or operator of such facility. The amount of such payment made to any such owner or operator shall be as determined under subsection (e) of this section. Payments

> under this section may only be made upon receipt by the Secretary of an incentive payment application which establishes that the applicant is eligible to receive such payment and which satisfies such other requirements as the Secretary deems necessary. Such application shall be in such form, and shall be submitted at such time, as the Secretary shall establish.
>
> (b) DEFINITIONS. For purposes of this section:
>
> > (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 which generates hydroelectric energy for sale and which is added to an existing dam or conduit. . . .
>
> (e) AMOUNT OF PAYMENT.
>
> > (1) IN GENERAL. Payments made by the Secretary under this section to the owner or operator of a qualified hydroelectric facility shall be based on the number of kilowatt hours of hydroelectric energy generated by the facility during the incentive period. For any such facility, the amount of such payment shall be 1.8 cents per kilowatt hour . . . , subject to the availability of appropriations . . . , except that no facility may receive more than $750,000 in 1 calendar year. . . .

42 U.S.C. § 15881. DOE did not initially make incentive payments under the Section 242 Program due to a lack of Congressional appropriations. The conference report to the Fiscal Year 2014 Omnibus Appropriations bill, however, included $3,600,000 for payments for conventional hydropower under the Section 242 Program. In response, DOE solicited and processed applications from qualified hydroelectric facilities for hydroelectricity generated and sold in calendar year 2013. *See* 80 Fed. Reg. 2685 (January 20, 2015). On December 16, 2015, in response to another Congressional appropriation of $3,960,000 to the Section 242 Program, DOE solicited a second round of applications from qualified hydroelectric facilities for hydroelectricity generated and sold in calendar year 2014. 80 Fed. Reg. 78215 (December 16, 2015).

In administering the Section 242 Program, DOE has developed, with public input, a guidance document that outlines how the Program will function. *See* Guidance for EPAct Section 242 Program (Guidance Document); *see also* 79 Fed. Reg. 37733 (July 2, 2015); 80 Fed. Reg. at 2685-86; 80 Fed. Reg. at 78215-16. The Guidance Document sets forth procedures for the filing of an application for a Section 242 Program incentive payment, the information necessary for DOE to make eligibility determinations and the manner in which the amount of an incentive payment will be calculated. *See* Guidance Document. In addition, the Guidance Document provides for an administrative appeal process for circumstances in which an application for a section 242 incentive payment is denied in whole or in part. In this regard, the Guidance Document states:

> In order to exhaust administrative remedies, an applicant who receives a notice denying an application in whole or in part must file an appeal with the DOE Office of Hearings and Appeals, 1000 Independence Avenue, S.W., Washington, D.C. 20585, in accordance with the procedures set forth below.

> If an applicant does not file an appeal in accordance with these requirements, the determination of the Secretary or designee shall become final. If an applicant files an appeal on a timely basis in accordance with these requirements, the decision and order of the Office of Hearings and Appeals shall be final. If the Office of Hearings and Appeals orders an incentive payment, the Director of the Office of Hearings and Appeals shall send a copy of such order to the DOE Finance Office with a directive to make the required payment.

Id. at 8. The Guidance Document further specifies the procedures governing OHA's adjudication of such appeals.[1] *Id.* at 8-9.

B. The Present Appeal

Between December 16, 2015, and February 1, 2016, DOE accepted applications for an incentive payment under the Section 242 Program for hydroelectricity generated and sold in calendar year 2014. *See* 80 Fed. Reg. at 78216. During the application period, Ouray filed an application for an incentive payment based upon its production and sale, during 2014, of hydroelectric power from its municipally-owned hydroelectric facility in Ouray, Colorado. *See* Application from Robert Risch, Ouray, to DOE (December 17, 2015) (Application).

According to the Application, Ouray's hydroelectric facility is built on an existing waterline and became fully operational, for the first time, in 2013. *Id*. at 1. The facility generates energy that is delivered to the grid through an agreement with Ouray's electricity provider, the San Miguel Power Association (SMPA). *Id*. In its Application, Ouray asserted that, in 2014, its facility "delivered a total of 77,020 kilowatt-hours of electricity to SMPA meter #12008809 where the grid tie occurs." *Id*. at 2. Section 242 requires DOE to calculate incentive payments "based on the number of [relevant] kilowatt hours of hydroelectric energy." 42 U.S.C § 15881(e). Ouray contended that it is eligible for an incentive payment based on 77,020 kilowatt hours of energy. *Id*.

On April 5, 2016, DOE issued a Notice finding that Ouray was eligible for an incentive payment, but based only on 26,280 kilowatt hours of energy. Notice at 1. Based on net meter readings at the facility's powerhouse, DOE found that Ouray's facility generated 77,021 kilowatt hours of energy in 2014.[2] *Id*; *see also* Email from Robert Risch, Ouray, to Terri Krantz, DOE (December 28, 2015). However, DOE determined that most of this energy was used to power pumps for a nearby pool

[1] Under the appeal procedures specified in the Guidance Document, an appeal must be filed within ten (10) days of receiving the notice to deny the application for payment, in whole or in part. OHA may issue an order summarily dismissing an appeal if: (a) it is not filed in a timely manner, unless good cause is shown; (b) the filing is defective on its face; or (c) there is insufficient information on which to base a decision and if, upon request, the necessary additional information is not submitted within the time specified by OHA. Within thirty (30) days of receiving all required information, OHA shall issue a written decision that will include a written statement setting forth the relevant facts and basis for the determination. *See* Guidance Document at 9.

[2] We note that there is a small discrepancy between the 77,020 kilowatt hours claimed by Ouray in its original Application and the 77,021 kilowatt hours specified by DOE in its Notice. Given DOE's factual findings, we will assume that 77,021 kilowatt hours reflects the correct total number of kilowatt hours generated.

and did not reach the grid.[3] *See id*. Based on net meter readings at the connection to the grid, DOE calculated that the amount of energy reaching the grid was 26,280 kilowatt hours. *Id*. DOE indicated that this smaller total reflected the proper basis for an incentive payment because it represents the "energy sold to the grid." *Id*.

In its Appeal, filed on April 6, 2016, Ouray contends that it should be credited with the full amount of energy generated by its facility, or 77,021 kilowatt hours. Ouray Appeal at 1. Ouray observes that the Guidance Document specifies that energy consumed by pumps *inside* a qualified hydroelectric facility does not count as energy eligible for an incentive payment. *Id*. Ouray argues that since its municipal pool pump is *outside* its facility, the energy consumed by the pump should not be excluded. *Id*. Ouray further asserts that, based on the goals of the Section 242 Program, it should receive credit for the entire amount of energy generated. *Id*. Finally, in communications with OHA, Ouray has made additional arguments in support of its Appeal.

II. Analysis

There is no dispute that Ouray's hydroelectric facility generated 77,021 kilowatt hours of energy in 2014 or that the facility physically supplied 26,280 kilowatt hours to the grid. At issue here is whether the payment to Ouray should be calculated based on the higher or lower number. We have carefully considered Ouray's Appeal and find that DOE's interpretation of the amount of energy eligible for an incentive payment—i.e. 26,280 kilowatt hours—is correct.

The text of EPAct provides in two different places that incentive payments under the Section 242 Program must be based not just on the amount of energy a qualified hydroelectric facility generates, but on the amount that the facility generates and *sells*. Specifically, in its first line, Section 242 directs the Secretary of Energy to make incentive payments "[f]or electric energy generated and *sold* by a qualified hydroelectric facility." 42 U.S.C § 15881(a) (emphasis added). Section 242 also defines a "qualified hydroelectric facility" as "a turbine or other generating device . . . which generates hydroelectric energy *for sale* and which is added to an existing dam or conduit." 42 U.S.C § 15881(b)(1) (emphasis added).

It is true that Section 242 omits a reference to the sale of hydroelectric energy when it states that incentive payments "shall be based on the number of kilowatt hours of hydroelectric energy *generated* by the facility during the incentive period." 42 U.S.C § 15881(e) (emphasis added). Nevertheless, in light of the other references to the sale of hydroelectric energy in Section 242, we believe that the most natural reading of the statute is that Congress intended incentive payments to be based only on hydroelectric energy that is generated and sold. Indeed, we read the phrase "generated by the *facility*" (emphasis added) as incorporating a sales requirement because the statute provides that a qualified facility is one which "generates hydroelectric energy for sale."

In any case, to the extent that there is any ambiguity in the statute, Section 242 gives the Secretary of Energy discretion to require payment applications to satisfy "such other requirements as the

[3] Ouray's subsequent Appeal indicates that the facility powers only a single, large pump serving a municipal pool and not multiple pumps. Appeal at 1.

Secretary deems necessary." 42 U.S.C § 15881(a). The Guidance Document, which reflects the requirements that DOE has found necessary, is unambiguous that only energy that is generated and sold qualifies for an incentive payment. Specifically, the Guidance Document requires that payments be based on a calculation of "net electric energy." Guidance Document at 4. The Guidance Document provides that "net electric energy" means:

> the metered kilowatt-hours (kWh) generated and *sold*, and excludes electric energy used within the hydroelectric facility to power equipment such as pumps, motors, controls, lighting, heating, cooling, and other systems needed to operate the facility.

Id. at 3 (emphasis added). In addition, reiterating the requirement that the energy be sold, the Guidance Document defines the term "sale." Under the Guidance Document, a "sale" is "a transfer of currency between two unrelated parties in exchange for delivered electrical current."[4] *Id*.

Based on the statute and the Guidance Document, we conclude that the Section 242 Program requires payments to be based on the amount of hydroelectricity energy generated and sold by a qualified hydroelectric facility. In the instant matter, we confirmed that the pool pump that consumed most of the energy generated by Ouray's hydroelectric facility is used to circulate water at a municipal pool owned by Ouray and that the pool is not owned by an unrelated third party. *See* Memorandum of Telephone Conversation between Gregory Krauss, OHA, and Robert Risch, Ouray (April 21, 2016) (Risch Memo). Accordingly, this energy does not qualify as energy that was "sold." By contrast, records submitted by Ouray indicate that it received credit, in the form of a discount on its electricity bills, for the 26,280 excess kilowatt hours it sent to SMPA. These credits can be interpreted as "a transfer of currency between two unrelated parties."

Ouray nevertheless has contended that the energy that its pool pump consumed should also be considered as "sold" to SMPA because, by not purchasing that energy from SMPA, Ouray increased the amount of energy available on the grid. *Id*. Ouray also states that the energy that went from its hydroelectric facility to its pool pump helped reduce Ouray's electricity bills, much like the energy that Ouray physically supplied to SMPA. *Id*. We are aware that, to Ouray, the difference between the energy it sent to the grid and to its pool pump may appear insignificant. However, we find that adopting Ouray's interpretation would render the language in Section 242, as well as the Guidance Document, meaningless and eliminate the distinction between energy that is generated at a qualified hydroelectric facility and energy that is both generated and sold. Given that both the statute and the Guidance Document require a sale, and that the Guidance Document requires an exchange of currency, we decline to adopt Ouray's interpretation.

We further find no merit to Ouray's contention that it should receive credit for the energy consumed by its pool pump because the pump is located *outside* its hydroelectric facility. Ouray's argument refers to the definition of "net electric energy," which excludes energy consumed by

[4] The Guidance Document mentions, in other places, the requirement that the energy be sold. For example, the Guidance Document outlines the requirements for filing an "application for an incentive payment for electric energy generated and *sold* in a calendar year." Guidance Document at 5 (emphasis added). It also requires applicants to submit certain documentation showing that a sale occurred. *Id*. at 6. Further, the above-referenced Federal Register notices regarding the Section 242 Program have consistently stated that the Program provides incentive payments for hydroelectric energy that is "generated and sold."

pumps inside a hydroelectric facility. The issue here, however, is not confusion over the location of Ouray's pool pump. DOE excluded the energy consumed by the pump because the term "net electric energy" requires that the energy be "generated and sold." The energy consumed by the pool pump was not sold and so it is not eligible for an incentive payment.

Ouray's remaining arguments are unconvincing. Ouray has indicated that it received an incentive payment based on the full amount of energy it generated in calendar year 2013 and that it therefore expected a payment on the same basis in 2014. *See* Risch Memo. DOE's determination for the prior year is not relevant to calculating the hydroelectric energy generated and sold by Ouray's facility in 2014. As a final matter, Ouray argues that if the goal of the Section 242 Program is to reduce the need for energy from non-renewable sources, all of the energy generated by its hydroelectric facility should qualify for an incentive payment. *See id*. To this argument, we can only respond that, given limited funding, there are reasons why Congress and DOE may have preferred to restrict incentive payments to hydroelectric energy that was generated and sold by a qualified facility. In any case, it is not necessary to conduct that policy analysis here due to the plain meaning of Section 242 and the Guidance Document.

For the above reasons, we have determined that Ouray is eligible for an incentive payment based on 26,280 kilowatt hours of energy, which is the amount of energy that it generated and sold to SMPA in calendar year 2014.

It Is Therefore Ordered That:

(1) The Appeal filed by the City of Ouray, CO on April 6, 2016, OHA Case No. HEA-16-0001, is hereby denied.

(2) This is a final Order of the Department of Energy from which the Appellant may seek judicial review in the appropriate U.S. District Court.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: May 6, 2016