

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

In the Matter of KC Brighton, LLC )  
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Filing Date: April 14, 2016 ) Case No.: HEA-16-0002  
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Issued: May 6, 2016

**Decision and Order**

This Decision considers an Appeal filed by KC Brighton, LLC (hereinafter Brighton) relating to the Hydroelectric Production Incentives 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, Brighton contests a notice (Notice) issued by the EERE denying Brighton’s application for an incentive payment under the Section 242 Program for energy generated in calendar year 2014. For the reasons discussed in this decision, we have determined that Brighton’s Appeal must be denied.

**I. Background**

**A. Section 242 of the Energy Policy Act of 2005**

In the Energy Policy Act of 2005 (Public Law 109-58, hereinafter “the Act”), 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 the Act, 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 for a specified 10-year period. *See* 42 U.S.C. §15881. Section 242 of the Act 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 ....

42 U.S.C. §15881.

On July 2, 2014, DOE published a notice in the Federal Register soliciting comments on a draft Guidance Document for incentive payments under the Act. 79 Fed. Reg. 37733 (July 2, 2014). Following two comment periods, the Guidance Document was finalized, and notification was published in the Federal Register. That Guidance Document was utilized for determining incentive payments for energy generated in calendar year 2013. 80 Fed. Reg. 2685 (January 20, 2015).

Subsequently, on December 15, 2015, DOE published a notification in the Federal Register of a Revised Guidance Document (hereinafter “Revised Guidance”), for use in determining incentive payments for energy generated in calendar year 2014, the year for which Brighton has applied. 80 Fed. Reg. 78215 (December 16, 2015). The Federal Register notice states that the Revised Guidance “includes certain minor modifications to the [previous] guidance based on DOE’s experience with the [previous] application process. Specifically, DOE is amending some portions of the guidance document to more precisely describe what types of production are considered ‘new’ production and the information necessary to demonstrate adequate metering.” *Id.* at 78216.

The Revised Guidance sets forth procedures for the filing of an application for an incentive payment, the information necessary for DOE to make a determination of eligibility under the Program, and the manner in which the amount of an incentive payment would be calculated. In addition, the Revised Guidance provides for an administrative appeal process where an application for a Section 242 Program incentive payment is denied in whole or in part. In this regard, the Revised Guidance 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.

Revised Guidance at 8. The Revised Guidance further specifies the procedures governing OHA's adjudication of such appeals.<sup>1</sup> *Id.* at 8-9.

### **B. The Present Appeal**

On or about January 25, 2016, Brighton filed an application for a Section 242 Program incentive payment based upon its production and sale of hydroelectric power from its Brighton Dam Project facility in Brookeville, MD, in calendar year 2014. Subsequently, DOE issued a decision denying the application on the basis that:

Electricity produced from the facility did not result from the addition of a new generator or generation device placed in operation on or after October 1, 2005, as required. Rather, electricity production resulted from maintenance or rehabilitation of an existing facility.

Letter from Timothy Welch, Hydropower Program, Wind and Water Technologies Project (April 5, 2016). Brighton timely filed its Appeal on April 14, 2016. At the request of OHA, Brighton provided additional information, by three separate emails, on April 19, 2016.

The Revised Guidance provides that each application shall include “[a] detailed description of the new hydropower facility, including, but not limited to: the state of the site before construction, a listing of the equipment that has been installed ... the type of turbine that has been installed, and the capacity of the turbine.” Revised Guidance, Sec. V(e).

In its original application for funds, Brighton states, *inter alia*:

This somewhat remote site is on a municipal water supply dam so the water level is completely controlled by the water company to meet demand. This means that the amount of water released needs to be changed by the Water Municipality on short notice, and due to its rural setting it often went off line due to power failures. Since the site was not automated, this meant that the hydro was often bypassed by the water company and not restarted after power failures until it was discovered it was off-line.

The site was operating at roughly 1/3rd annual generation capacity due primarily to operational constraints caused by not having an automated and remote operation capability.

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<sup>1</sup> Under the appeal procedures specified in the Revised Guidance, 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* Revised Guidance, Sec. VI.

Our major improvement was to change from manual controls to an automated and remote operation equipment. We installed an automated and remote cell-data-accessible SCADA system. This dramatically increased output - not because of any turbine modifications (there were none). There was an effective capacity increase because of the installation of the automated and remote SCADA controls.

Application (January 25, 2016), 1. The application lists the specific parts installed, all related to the automated and remote operation equipment, and states, “Note that the installation of the automatic and remote operation control equipment was not maintenance. There was no such equipment there before; it was strictly manual push-button operation. It is this automated control equipment that engendered the increase in capacity.” *Id.* at 2.

By way of further explanation, the application states:

The site was changed in 2010 from a manually operated facility to a computer controlled and remotely controlled facility. No changes in the generators themselves or total generation turbine capacity happened; it was the complete change in control of operation by the addition of SCADA PLC and a remote operation computer. This was not a repair or replacement. The original push button controls are still there.

The effect was profound (roughly tripling the output) because personnel access is difficult to this site. The facility is guarded behind monitored, barbed wire fencing because the empondment of the dam is the water supply dam for Washington DC. Security concerns and remoteness previously made operational access difficult, time consuming, and therefore occasional. This difficulty of access led to low operational availability and low generation. This was solved in 2010 with the addition of automated control equipment and remote operation, and production increased significantly. We are addressing the increase in production due to the added automated control and telemetry equipment – there was none before.

*Id.* at 3. Extensive supporting document has been provided by Brighton, evidencing an increase in energy production following the installation of the automated and remote SCADA controls.

The Revised Guidance states that:

Payments may be made under this part only for net electric energy generated from a *qualified hydroelectric facility* [emphasis added] that begins operation at an existing dam or conduit during the inclusive period beginning October 1, 2005 and ending on September 30, 2015. Improvements on an existing facility may be eligible for payment under Section 242, only if the new turbine or generating device included significant changes to the mechanical equipment installed to capture kinetic energy from moving water, equipment used to transfer that energy, the electric generator driven by the energy transfer, and control equipment to manage the entire facility for safe and reliable electricity output. Changes to existing facilities and equipment, such as maintenance that replace damaged or worn equipment or cause incremental increases in energy output from facilities do not qualify for payment under Section 242. Examples of maintenance include, but are not limited to:

repairing or replacing hydropower turbines, runners, bearings, lubrication equipment, electrical windings, housings, piping, valves, electrical generators, control wiring and cables, control sensors, servo motors, computers, control software, electrical transformers, substation components or controls, or other equipment expected to have a lifetime shorter than the projected hydroelectric facility life.

Revised Guidance, Sec. III.2. In turn, a “qualified hydroelectric facility” is defined as:

...a turbine or other generating device (including conventional or new and innovative technologies capable of continuous operation) ... that: (1) began producing hydroelectric energy for sale on or after October 1, 2005; (2) is added to an existing dam completed before August 8, 2005 (“added” means new hydropower generation where none existed before, or where an existing facility had been offline because of disrepair or dismantling for at least five consecutive years prior to October 1, 2005 before new construction); and (3) the majority of which was developed through new construction incorporating new equipment, refurbished equipment, or both.

*Id.* at Sec. II.

## II. Analysis

For the reasons set forth herein, we believe that Brighton’s Appeal reflects a misinterpretation of both the Act and the Revised Guidance.

Both the Act itself and the Revised Guidance make clear that Congress envisioned incentive payments for new turbines and generating devices. Indeed, the Act itself 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.” Energy Policy Act of 2005, Sec. 242(b)(1). Similarly, the Revised Guidance (promulgated by DOE pursuant to explicit authorization in the Act) clarifies the definition as “a turbine or other generating device, ... added to an existing dam completed before August 8, 2005,” where “added” is defined as “new hydropower generation where none existed before ... the majority of which was developed through new construction incorporating new equipment, refurbished equipment, or both.” Revised Guidance, Sec. III.2.

Taken as a whole, these definitions make clear that a qualified hydroelectric facility is a turbine or similar generating device which, in and of itself, produces energy for sale; the definition does not encompass the mere addition of control equipment which enhances the efficiency of existing turbines and generating devices.

Brighton points to Section III.2 of the Revised Guidance, which references potential payments for changes to control equipment. However, a reading of the Section as a whole makes clear that Brighton’s argument represents a misunderstanding of the language of the provision. The provision states that improvements on an existing facility may be eligible for incentive payments “only if the new turbine or generating device included significant changes to the mechanical equipment installed to capture kinetic energy from moving water, equipment used to transfer that energy, the electric generator driven by the energy transfer, *and* [emphasis added] control equipment

to manage the entire facility for safe and reliable electricity output.” *Id.* Those criteria are separated by the word “and,” a conjunction the plain meaning of which indicates that, to qualify for payment, an improvement must meet all of those criteria, not just one.

We note that these explicit eligibility requirements were added to the Revised Guidance, “to more precisely describe what types of production are considered “new” production”; they were not included in the original Guidance Document used for processing incentive payment applications for the previous year. 80 Fed. Reg. at 78216. Thus, it is clear that DOE was seeking to ensure that payments were available only for turbines or other similar generating devices meeting all of these criteria.

Further, the Revised Guidance added language (not contained in the previous Guidance Document) that “changes to existing facilities” do not qualify for incentive payments. Revised Guidance at Sec. III.2. It provides explicit examples, such as “control wiring and cables, control sensors, servo motors, computers, control software...substation components or controls, or other equipment expected to have a lifetime shorter than the projected hydroelectric facility life” that do not qualify for incentive payment. *Id.* Contrary to Brighton’s assertion, the added automated and remote SCADA controls fall clearly within this exclusion.

### **III. Conclusion**

For the reasons set forth herein, we find that DOE properly denied Brighton’s application for an incentive payment under the Sec. 242 Program. Accordingly, the Appeal filed by Brighton must be denied.

#### **It is Therefore Ordered That:**

- (1) The Appeal filed by KC Brighton LLC on April 14, 2016, is hereby denied.
- (2) This is the 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