No.

In the Supreme Court of the United States

EDISON ELECTRIC INSTITUTE; NORTHWESTERN CORPORATION D/B/A NORTHWESTERN ENERGY,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

JEREMY C. MARWELL
Counsel of Record
JAMES T. DAWSON
VINSON & ELKINS LLP
2200 Pennsylvania Ave., NW, Suite 500 West
Washington, DC 20037
(202) 639-6507
jmarwell@velaw.com

Counsel for Petitioners

(Additional counsel listed inside cover)

EMILY S. FISHER
EDISON ELECTRIC INSTITUTE
701 Pennsylvania Ave., NW
Washington, DC 20004

Counsel for Petitioner
Edison Electric Institute

SHANNON M. HEIM
SARAH N. NORCOTT
MITCHELL L. WERBELL V
NORTHWESTERN
CORPORATION D/B/A
NORTHWESTERN ENERGY
208 N. Montana Ave.,
Suite 200
Helena, MT 59601

Counsel for Petitioner
NorthWestern Corporation
d/b/a NorthWestern Energy

QUESTION PRESENTED

The Public Utility Regulatory Policies Act of 1978 ("PURPA") created a class of electricity generators called "qualifying facilities" that receive highly favorable regulatory and commercial treatment, including a legal guarantee that electric utilities must purchase all the power they generate. Under PURPA, a "qualifying facility" must have "a power production capacity, which * * * is not greater than 80 megawatts." 16 U.S.C. § 796(17)(A). This case involves a proposed solar energy project that can *create* up to 160 megawatts of power, but that will *deliver* only 80 megawatts to the electric grid at any given time. Over Petitioners' protest, the Federal Energy Regulatory Commission certified this project as a "qualifying facility." The D.C. Circuit upheld the certification by deferring to the agency's statutory interpretation under *Chevron*. In dissent, Judge Walker sharply criticized the panel's opinion for embracing the same "*Chevron* maximalism" employed in the D.C. Circuit's prior decision in *Loper Bright Enterprises, Inc.* v. *Raimondo*, a case in which this Court has since granted certiorari.

The questions presented are:

1. Whether "power production capacity" refers to a facility's maximum net output to the grid at any one time, or whether that term instead refers to the maximum amount of power that a facility can create.

2. Whether this Court should reconsider how and when *Chevron* should apply, or at least clarify that courts must exhaust normal statutory-interpretation tools before concluding that a statute is "ambiguous" at *Chevron* step one.

PARTIES TO THE PROCEEDINGS

Petitioner Edison Electric Institute was a Petitioner in the court of appeals, and an intervenor in proceedings before FERC.

Petitioner NorthWestern Corporation d/b/a NorthWestern Energy ("NorthWestern Energy") was a Petitioner at the court of appeals, and an intervenor in proceedings before FERC.

Respondent the Federal Energy Regulatory Commission was also a Respondent at the court of appeals.

Respondent Broadview Solar, LLC was a Respondent-Intervenor at the court of appeals, and was the applicant in the FERC proceedings.

Respondent NewSun Energy, LLC was a Respondent-Intervenor at the court of appeals, and was an intervenor in the FERC proceedings.

Respondent the Solar Energy Industries Association was a Petitioner in the court of appeals, and was an applicant for intervention in the FERC proceedings.

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Supreme Court Rule 29.6, Petitioners provide the following disclosures:

1. The Edison Electric Institute is an incorporated, not-for-profit trade association representing all U.S. investor-owned electric companies. The Edison Electric Institute has no parent corporation and no publicly held company has 10% or greater ownership in the Edison Electric Institute.

2. NorthWestern Corporation d/b/a NorthWestern Energy ("NorthWestern Energy") is a publicly traded company (Nasdaq: NWE) that is incorporated in Delaware. NorthWestern Energy has no parent corporations. Based on a June 12, 2023, review of the most recent statements filed with the Securities and Exchange Commission pursuant to Sections 13(d), 13(f), and 13(g) of the Securities Exchange Act of 1934, two publicly held companies own 10% or more of NorthWestern Energy's stock: BlackRock Inc. and Vanguard Group Inc.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

- Order Denying Application for Certification and Revoking Status as a Qualifying Small Power Production Facility, *Broadview Solar, LLC*, 172 FERC ¶ 61,194 (Sept. 1, 2020);
- Notice of Denial of Rehearings by Operation of Law and Providing for Further Consideration, *Broadview Solar, LLC*, 173 FERC ¶ 62,056 (Nov. 2, 2020);
- Order Addressing Arguments Raised on Rehearing and Setting Aside Prior Order, *Broadview Solar, LLC*, 174 FERC ¶ 61,199 (Mar. 19, 2021);
- Notice of Denial of Rehearings by Operation of Law and Providing for Further Consideration, *Broadview Solar, LLC*, 175 FERC ¶ 62,100 (May 17, 2021);
- Order Addressing Arguments Raised on Rehearing, *Broadview Solar, LLC*, 175 FERC ¶ 61,228 (June 17, 2021); and
- *Solar Energy Industries Ass'n et al.* v. *FERC*, Nos. 21-1126 et al., 59 F.4th 1287 (D.C. Cir. Feb. 14, 2023).

TABLE OF CONTENTS

APPENDIX CONTENTS

TABLE OF AUTHORITIES

Cases: **Page(s)**

Cases—Continued: **Page(s)**

Cases—Continued: **Page(s)**

Statutes:

Regulations: **Page(s)**

Administrative Materials:

Other Authorities:

Other Authorities—Continued: **Page(s)**

Other Authorities—Continued: **Page(s)**

PETITION FOR A WRIT OF CERTIORARI

Edison Electric Institute ("EEI") and NorthWestern Corporation d/b/a NorthWestern Energy ("NorthWestern Energy") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINION BELOW

The D.C. Circuit's opinion is reported at 59 F.4th 1287 and is reproduced at Appendix A to the Petition. App., *infra*, 1a-28a. The relevant orders of the Federal Energy Regulatory Commission ("FERC" or "Commission") are reported at 175 FERC ¶ 61,228; 174 FERC ¶ 61,199; and 172 FERC ¶ 61,194, and they are reproduced at Appendices B, D, and F to the Petition, App. 29a-60a, 63a-124a, and 127a-154a, respectively.

JURISDICTION

The D.C. Circuit issued its opinion and judgment on February 14, 2023. No rehearing petitions were filed. On May 5, 2023, the Chief Justice extended the deadline for a certiorari petition to and including June 14, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant statutes and regulations are reproduced at Appendix G to the Petition, App. 155a-184a.

INTRODUCTION

The Public Utility Regulatory Policies Act of 1978 ("PURPA") affords an extraordinary set of non-market-based benefits to a class of electricity generating

facilities known as "qualifying facilities." Those benefits include, among other things, guaranteeing such facilities a market for whatever power they produce, by imposing a legal obligation on electric utilities to buy all of that power. A qualifying facility may not have a "power production capacity" that is "greater than 80 megawatts." 16 U.S.C. § 796(17)(A). This case involves the question of what the statutory term "power production capacity" means.

Respondent Broadview Solar, LLC ("Broadview") is developing a solar energy project in Montana. The facility's solar panels will be capable of creating up to 160 megawatts of power. But Broadview intends to artificially limit the facility's output, such that the project will deliver to the grid no more than 80 megawatts at any one time. It did so in an apparent effort to qualify for PURPA's special benefits, which include a guaranteed buyer for all the power it produces, and, in many cases, the ability to sell that power at above-market prices. When Broadview applied to FERC for an order confirming that its project is a "qualifying facility," the agency was presented with the question at the heart of this case: whether the statutory term "power production capacity" refers to a facility's output to the grid at one particular time, or instead to the amount of power the project can create.

As a matter of ordinary meaning, that is not a hard question. The word "production"—as defined by dictionaries, as understood in the electric industry, and as any ordinary speaker of English knows—refers to the *creation* or *generation* of something. The word "capacity," in turn, refers to the maximum amount of production. Thus, the unambiguous meaning of

"power production capacity" is the maximum amount of power that can be created. That reading follows not only from the plain text, but also from the statute's context, purpose, and history.

Because the Broadview Project will be capable of generating much more than 80 megawatts of power, it is ineligible for qualifying facility status. FERC's initial order recognized exactly that. But the agency then flip-flopped in a series of sharply divided rehearing orders following a change in composition of the Commission. Ultimately, a bare majority of Commissioners determined that the term "power production capacity" should be read to refer to the maximum amount of power that a project can *deliver* to the grid at any one point in time.

The D.C. Circuit upheld the agency's orders on the ground that FERC's reading of PURPA is entitled to *Chevron* deference. But the D.C. Circuit's application of *Chevron* was wrong from beginning to end.

At "step one" of the *Chevron* analysis, a court must "employ[] traditional tools of statutory construction" to determine whether a statute is ambiguous, and the court cannot advance to "step two" without first assuring itself that Congress had no "intention on the precise question at issue." *Chevron, U.S.A., Inc.* v. *Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984). The D.C. Circuit's *Chevron* step one analysis, however, consisted of precisely three sentences, and it neither gave any consideration to the usual sources of ordinary meaning (*e.g.*, dictionaries), nor addressed statutory context, purpose, or history. The D.C. Circuit simply concluded that, because "PURPA does not define the[] term[]" "power production capacity"

explicitly, the statute is ambiguous and the court should skip straight to the deferential "step two" of *Chevron*. App. 6a.

That approach was wrong. As Judge Walker explained in dissent, the panel here made the same error that the D.C. Circuit has committed in a number of other recent cases—*i.e.*, "mak[ing] a beeline to agency deference" without first inquiring "into statutory structure, cross-references, context, precedents, dictionaries, or canons of construction." App. 19a (Walker, J., dissenting). Judge Walker viewed the opinion below as entrenching a "vertical split between how the Supreme Court and lower courts apply *Chevron*," and expressed concern that the D.C. Circuit has continued to follow the "path of *Chevron* maximalism" despite the fact that this Court appears to have "given up on *Chevron* * * * altogether." *Id.* at 19a, 21a & n.2 (internal quotation marks omitted).

The D.C. Circuit misapplied *Chevron* here, effectively and erroneously equating the lack of an express definition of particular terms with a "statutory silence" giving rise to ambiguity. Taken to its logical end, the court's stated rationale would, in effect, deem a statute ambiguous any time Congress has not provided an express definition of a particular term. That approach misperceives the *Chevron* inquiry by failing to recognize that statutory meaning can be clear even without bespoke, term-by-term definitions. In many cases (including this one), plain meaning can be discerned through the ordinary suite of textual interpretation tools. The panel's departure from that approach is reason enough to grant review, given the importance of the issue and the D.C. Circuit's central role in

reviewing federal agency action. But if *Chevron* is properly understood to condone the result reached here, then this case is further evidence that the time has come to reconsider *Chevron* by, at the very least, clarifying its limits.

This Petition should be granted or, at minimum, held pending disposition of *Loper Bright Enterprises, Inc.* v. *Raimondo* (No. 22-451), in which this Court has granted certiorari. In *Loper Bright*, this Court has granted certiorari to consider whether *Chevron* should be clarified or overruled outright. The questions presented in *Loper Bright* bear directly on the central issue in this case, and the panel decision here rests squarely on affording *Chevron* deference to the agency's interpretation. Judge Walker—who dissented both here and in *Loper Bright*—has noted that this case and *Loper Bright* are two particularly apt examples of the "*Chevron* maximalism" that is "alive and well" on the D.C. Circuit. App. 19a.

STATEMENT

1. Legal Background.

"PURPA was enacted in 1978 as part of a package of legislative proposals intended to reduce the country's dependence on oil and natural gas." Order No. 872, 172 FERC ¶ 61,041, P 47 (2020). PURPA accomplished that goal by "set[ting] forth a framework to encourage the development of alternative generation resources that do not rely on * * * fossil fuels." *Ibid.*

In the 1970s, most utilities were fully integrated providers of electricity generation, transmission, and distribution services. In PURPA, Congress determined that non-traditional electricity generators could

help reduce the nation's reliance on foreign fuel sources. See App. 2a. Congress also identified two potential impediments to the development of such facilities: "(1) traditional electricity utilities were reluctant to purchase power from, and to sell power to, the nontraditional facilities, and (2) the regulation of these alternative energy sources by state and federal utility authorities imposed financial burdens upon the nontraditional facilities and thus discouraged their development." *FERC* v. *Mississippi*, 456 U.S. 742, 750-751 (1982) (footnote omitted).

In an effort to remove those two impediments, PURPA created a new class of third-party generators that were not subject to the same requirements, regulations, and oversight as electric utilities. These "qualifying facilities" consist of small power producers and co-generators that would receive special rate- and regulatory-related treatment under the Federal Power Act and PURPA. See 16 U.S.C. § 796(17)-(18); 18 C.F.R. § 292.203.

The most important advantage granted to qualifying facilities was a dramatic, non-market-based innovation: Electric utilities would be *legally required* to purchase *all* of the electricity generated by qualifying facilities, at the utility's "incremental cost of alternative electric energy." 16 U.S.C. § 824a-3(d). This is commonly known as the "mandatory-purchase obligation." App. 3a.

Under PURPA, a "qualifying facility" must constitute a "small power production facility," defined to mean:

> a facility which is an eligible solar, wind, waste, or geothermal facility, or a facility which (i) produces electric energy solely by the use, as a primary energy source, of biomass, waste, renewable resources, geothermal resources, or any combination thereof; and (ii) has a *power production capacity, which, together with any other facilities located at the same site (as determined by the Commission), is not greater than 80 megawatts*.

16 U.S.C. § 796(17)(A) (emphasis added). FERC's regulations in turn state that:

> the power production capacity of a facility for which qualification is sought, together with the power production capacity of any other small power production facilities that use the same energy resource, are owned by the same person(s) or its affiliates, and are located at the same site, may not exceed 80 megawatts.

18 C.F.R. § 292.204(a).

2. Factual Background.

This case involves a solar energy project being developed by Broadview in Montana. See App. 3a. The Broadview Project will consist of two primary components: (1) an array of more than 470,000 solar panels which together have a gross capacity of 160 megawatts (the "solar array")[1]; and (2) a 50-megawatt battery

[1] The term "megawatt" refers to one million watts, and is approximately equal to the power output of ten car engines. See *What Is a Megawatt and a Megawatt-hour?*, CleanEnergyAuthority.com (May 4, 2010), https://perma.cc/DL2G-NG24. The term

energy storage system (the "battery") that Broadview intends to charge exclusively from the on-site solar array. See App. 3a, 17a; C.A. App. JA21-22, JA24, JA102.

Broadview purposefully designed the solar array and battery so that, when the sun is shining, it can divert a portion of the solar-generated power into the battery. Broadview can then deliver that stored power from the battery to the grid at night or when the sun is not shining, thus extending the facility's electricity delivery. See App. 8a, 17a, 52a-54a P 29.

The Broadview Project will also include twenty 4.127-megawatt inverters. App. 31a-32a P 4. An "inverter" is a system of circuitry that changes "direct current" or "DC" power (which is a one-directional flow of electric current) into "alternating current" or "AC" power (which is an electric current that changes direction periodically, and is the typical form of power delivered to U.S. homes and businesses). See App. 3a. The solar array generates DC power, and both the solar array and the battery will be located "upstream" of the DC-to-AC inverters. *Id.* at 56a-57a P 34. Broadview designed its project to include inverters that limit, to 80 megawatts, the amount of AC power that can be sent out from its project to the grid at any one point in time.

Broadview intends to interconnect with the electricity transmission system owned by Petitioner

---

"megawatt-hour" refers to the amount of electricity generated by a one-megawatt generator in one hour. One megawatt-hour is equivalent to the amount of electricity used by roughly 330 homes in one hour. *Ibid.*

NorthWestern Energy and to sell the energy produced by the Broadview Project to NorthWestern Energy. See App. 3a. The Project has an expected commercial operation date of "Q4 2024." See *Montana Projects*, Broad Reach Power, https://perma.cc/CDA6-G7JJ (last accessed June 9, 2023).

3. FERC Certifies the Broadview Facility In a Sharply Divided Series of Orders.

In 2019, Broadview filed an application with the Commission seeking to have its Project certified as a qualifying facility. See App. 3a. NorthWestern Energy timely intervened in the FERC proceedings and objected to Broadview's application. See *id.* at 4a. EEI—a not-for-profit trade association representing all U.S. investor-owned electric companies—also timely intervened and objected. See *id.* at 3a-4a. EEI and NorthWestern Energy argued that the Project is not a qualifying facility because its "power production capacity" exceeds 80 megawatts.

In September 2020, FERC issued an order denying Broadview's application for qualifying facility status. App. 127a-154a. FERC concluded that a facility's "power production capacity" was *not* measured by its "send out," but rather the amount of energy the project could *create*. *Id.* at 142a-143a P 23. FERC found that "Broadview cannot meet the statutory [80-megawatt] limit by relying on inverters as a limiting element on a [qualifying facility's] output" and that it would "not comply with the plain language of PURPA" to confer qualifying facility status on "a facility purposefully designed with a 160 [megawatt] solar array." *Id.* at 141a-145a PP 21, 23, 25.

In March 2021, following appointment of two new Commissioners, FERC voted 3-2 to grant rehearing, set aside its initial order, and approve Broadview's application for qualifying facility status. App. 63a-124a ("Rehearing Order"). Contrary to the agency's prior view that the statutory text was clear, the Rehearing Order concluded that "the statute is ambiguous as to how the Commission is to measure a facility's power production capacity." *Id.* at 81a P 23. In the agency's new view, "the 80-[megawatt] limit on a facility's power production capacity" should be understood as "a limit on the facility's net output to the electric utility" at "any one point in time." *Id.* at 80a-84 PP 23, 26. Commissioner Danly dissented. He criticized the Rehearing Order for relying on "elaborately confected arguments and 'structural' interpretations of PURPA" that were contrary to "the unambiguous terms of the statute." *Id.* at 115a-116a P 24 (Danly, Comm'r, dissenting). Commissioner Christie also dissented. *Id.* at 101a.

In June 2021, the Commission denied rehearing of the March 2021 order, again by a 3-2 vote. App. 29a-60a (the "Second Rehearing Order," and, together with the Rehearing Order, the "Rehearing Orders").

4. The D.C. Circuit Defers to FERC's Interpretation of the Act.

A divided panel of the D.C. Circuit sustained FERC's Orders. App. 1a-14a. Judge Walker dissented in pertinent part. *Id.* at 15a-28a.

At step one of *Chevron*, the panel "agree[d]" with FERC that the statute is "ambiguous." In support of that conclusion, the Court explained that "PURPA

does not define" the phrase "power production capacity" or the related term "facility." App. 6a. On that basis, the court reasoned that the statute "does not state whether the relevant capacity is that of the individual subcomponent generating DC power, *i.e.*, the solar array, or of all the facility's components working together to produce grid-usable AC power, which would include the inverters." *Ibid.* As such, in the panel's view, "Congress has not spoken to the issue." *Ibid.*

Proceeding directly to step two of *Chevron*, the panel held that FERC's interpretation was entitled to deference. The panel credited FERC's view that the relevant form of "power" was the "grid-usable * * * AC power" that passed from the inverters to the grid. App. 7a. And because the facility can only deliver 80 megawatts of AC power to the grid at any one time, the panel found it "reasonable" for FERC to define "power production capacity" by reference to maximum AC power output. *Ibid.*

In dissent, Judge Walker criticized the majority for "mak[ing] a beeline to agency deference" instead of first conducting a meaningful "inquiry into statutory structure, cross-references, context, precedents, dictionaries, [and] canons of construction." App. 19a. He characterized the majority's approach as "*Chevron* maximalism." *Ibid.* (quoting *Buffington* v. *McDonough*, 143 S. Ct. 14, 21 (2022) (Gorsuch, J., dissenting from denial of certiorari)). In his view, the panel majority here made the same error as the D.C. Circuit had in *Loper Bright—i.e.*, concluding that "'some question' about the meaning of a statute is enough to trigger *Chevron* deference." *Ibid.* (quoting

Loper Bright Enters., Inc. v. *Raimondo*, 45 F.4th 359, 369 (D.C. Cir. 2022)).

Judge Walker explained that the meaning of "power production capacity" could "be resolved using normal interpretive tools." App. 21a. Based on the plain language of the statute, as informed by dictionary definitions and other indicia of ordinary meaning, Judge Walker concluded that the term "power" "includes both DC power and AC power," *id.* at 23a; that the term "produce" means to "create" or "generate," *id.* at 24a; and that the term "capacity" means "the maximum amount of power that the facility can produce," rather than what the facility can "deliver[]," *id.* at 25a. In Judge Walker's view, the Project is not a "qualifying facility," because its power production capacity exceeds 80 megawatts. *Id.* at 27a.

REASONS FOR GRANTING THE PETITION

I. The D.C. Circuit's Split Decision Applying *Chevron* Deference Is Clearly Wrong.

A. The Term "Power Production Capacity" Unambiguously Refers to the Maximum Amount of Power that a Facility Can Create, Not "Net Output."

Chevron itself explained that "[i]f a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." 467 U.S. at 843 n.9. "In other words, courts must try every tool of statutory construction *before* declaring the text ambiguous and proceeding to agency deference." App. 20a (Walker, J., dissenting). Before advancing to *Chevron* step two, a court "must *exhaust*

all the 'traditional tools' of [statutory] construction," which include "text, structure, history, and purpose." *Kisor* v. *Wilkie*, 139 S. Ct. 2400, 2415 (2019) (emphasis added). After all, "only when that legal toolkit is empty and the interpretive question still has no single right answer can a judge conclude that it is 'more [one] of policy than of law.'" *Ibid.* (quoting discussion of *Chevron* deference in *Pauley* v. *BethEnergy Mines, Inc.*, 501 U.S. 680, 696 (1991)).

Had the D.C. Circuit followed this Court's guidance and carefully applied the standard suite of statutory-interpretation tools instead of "mak[ing] a beeline to agency deference," App. 19a (Walker, J., dissenting), it would have readily concluded that a facility's "power production capacity" is the maximum amount of power it can create, and not its maximum "send out." That reading is compelled by the ordinary meaning of the statutory text, as informed by statutory context and purposes.

1. The D.C. Circuit's Opinion Is at Odds with the Plain Meaning of the Statute.

The "ordinary meaning" of a statutory word or phrase can often be discerned by reference to common usage, context, statutory cross-references, and other indicia of meaning. Dictionaries are an important primary source in discerning meaning. See *Wisconsin Cent. Ltd.* v. *United States*, 138 S. Ct. 2067, 2070-2071 (2018).

Dictionaries contemporaneous with the 1978 enactment of PURPA make clear that the term "production"

refers to the "*creation*" of something;[2] to "[t]hat which is * * * *made*";[3] or to that which is "*generate[d]*" or "*manufacture[d].*"[4] FERC's Rehearing Orders did not consider or even acknowledge dictionary definitions of "production."[5] Nor, remarkably, did the D.C. Circuit panel majority. The majority opinion did not cite or

---

[2] *Collins Concise Dictionary of the English Language* 597 (1978) (emphasis added) ("production" means "the creation of economic value" and "produce" means "to create"); see *In re Amex-Protein Dev. Corp.*, 504 F.2d 1056, 1058 & n.1 (9th Cir. 1974) (per curiam) (discussing dictionaries that regard "create" and "produce" as synonyms); see also *infra* note 4.

[3] Production, *Black's Law Dictionary* 1089 (5th ed. 1979) (emphasis added); accord Production, *The Oxford English Dictionary* 566 (2d ed. 1989) ("production" means the "action of . . . making").

[4] *Webster's New Twentieth Century Dictionary of the English Language* 1436 (2d ed. 1978) (emphasis added) (defining "production" to mean "to produce" and defining "produce" to mean "to generate" or "to manufacture"); see Generation, *Collins Concise Dictionary of the English Language* 313 (1978) (defining "generation" to mean "production"); Produce, *Funk & Wagnall's New Comprehensive International Dictionary of the English Language* 1006 (1978) ("produce" means to "manufacture; make"); *id.* at 526 ("generation" means "[p]roduction" or "creation"); *Facebook, Inc.* v. *Duguid*, 141 S. Ct. 1163, 1171 (2021) (discussing dictionaries that regard the word "produce" as synonymous with "generat[e]").

[5] Instead, the agency reasoned that the terms "'production' and 'delivery' * * * are overlapping." App. 82a-83a P 25. But that is plainly wrong, as a matter of ordinary meaning. The term "delivery" refers to "the act of handing over." See Delivery, *Merriam-Webster New Collegiate Dictionary* 298 (1981). Equating "production" with "delivery" ignores the fact that "production" refers to the amount of a thing that was *created*, while "delivery" refers instead to the amount of a thing that is *transferred* after its creation, which can be some amount less than the whole amount that was created.

discuss even a single dictionary definition of this or other key statutory terms, despite extensive briefing on that topic and the dissenting opinion's discussion of dictionary definitions undermining the majority's analysis. This "strained effort to avoid the available dictionary evidence," *Noel Canning* v. *NLRB*, 705 F.3d 490, 509 (D.C. Cir. 2013) (internal quotation marks omitted), aff'd, 573 U.S. 513 (2014), in a rush to find ambiguity misperceives the *Chevron* inquiry.

Consider next the word "power." Dictionaries agree that "power" means "a source or means of supplying energy." App. 23a (Walker, J., dissenting) (quoting *Merriam Webster* (2023)); see App. 108a-109a P 13 (Danly, Comm'r, dissenting). AC power and DC power are forms of "power." See CADC Oral Arg. at 38:52 (Sept. 7, 2022) (counsel for FERC agreeing that "DC power is power"), https://perma.cc/Q7GE-K7LZ. But here FERC asserted, and the D.C. Circuit deferred to, an interpretation that "only the 80 megawatts of AC power sent to the grid should count as Broadview's power-production capacity." App. 23a-24a (Walker, J., dissenting). "That [interpretation] adds an atextual limit that Congress didn't adopt." *Id.* at 24a.

As to "capacity," dictionaries contemporaneous with PURPA's enactment suggest that this word refers to the "maximum amount that can be *contained*"[6] or to the "maximum or most efficient level of production"[7] or

---

[6] Capacity, *The American Heritage School Dictionary* 135 (1977) (emphasis added).

[7] Capacity, *The American Heritage School Dictionary* 135 (1977).

"the ability to produce; equivalent to 'full capacity.'"[8] Here, FERC ignored dictionary definitions of "capacity" and instead stated without explanation or citation that "the term 'capacity' is generally equated to 'output.'" App. 82a-83a P 25. The D.C. Circuit deferred to that interpretation of "capacity" as "eminently reasonable," again without a meaningful analysis of ordinary meaning or citing even a single dictionary. App. 7a.[9]

To the extent the panel suggested that, under *Chevron*, FERC could reasonably treat the excess DC power from the solar array as not being "produced" until it is delivered to the grid in AC form, that reading cannot be reconciled with the ordinary meaning of the phrase "power production capacity." See *supra* notes 2-4 and accompanying text. An example makes the point. Suppose a factory can generate 160 widgets a day and is operated to achieve that level of production, but the

---

[8] Capacity, *The Oxford English Dictionary* 857 (2d ed. 1989).

[9] As to "facility," all parties agree that this term refers to the aggregation of components at a generation plant. The D.C. Circuit reasoned that generators should not be excluded from qualifying facility status "because their component parts have individual production capacities over 80 [megawatts]," so long as "the overall facility cannot send out more than 80 [megawatts] to the grid." App. 8a. But that reasoning is irreconcilable with the statutory text: A limitation on the amount of power a facility can "send out" does not change how much power the facility can produce. The "limited ability of [the Broadview Project] to *convert* DC energy into AC for delivery is irrelevant to ascertaining the maximum *power production capacity* of the Facility" because the inverters' limitations on power conversion or output do not diminish the solar array's ability to *generate* substantially more than 80 megawatts of power. App. 115a P 23 (Danly, Comm'r, dissenting) (emphasis added).

owner places 50 of those 160 widgets into inventory instead of immediately selling them. No layperson would suggest that the factory's "production capacity" is anything other than 160 widgets per day or that the 50 widgets sitting on the factory's shelf have somehow not been "produced." So too here. The "power production capacity" of a 160-megawatt solar generator is not transformed into some lesser amount just because some of the generated power is stored temporarily before being delivered to the grid.

In sum, given the ordinary meaning of its constituent terms, the phrase "power production capacity" plainly refers to the maximum amount of power that can be created. There is no dispute that the Broadview Project can create 160 megawatts of power. Thus, its "power production capacity" is greater than 80 megawatts, and it is ineligible for qualifying-facility status.

2. Statutory Context Confirms Petitioners' Reading of PURPA.

Other portions of the statute confirm that the term "power production capacity" does not refer to a facility's "send out" but rather to the amount of power the facility can generate by "us[ing] * * * [an] energy source." 16 U.S.C. § 796(17)(A)(i) (defining "small power production facility" as one which "*produces* electric energy solely *by the use*" of a "primary energy source" such as a renewable resource (emphasis added)); *id.* § 796(17)(E) ("eligible solar, wind, waste, or geothermal facility" defined to mean facilities which "produce[] electric energy solely *by the use*" of certain "energy source[s]" (emphasis added)). In these provisions, Congress repeatedly defined the term "production" by reference to the phrase "use * * * of

[an] * * * energy source." This supports the notion that the word "production" refers to the amount of energy that can be *created* or *generated* by "using" or harvesting an "energy source" (here, the sun) regardless of what constraints may later be placed on output.

If Congress had meant to define "small power production facility" by reference to the facility's "*output* capacity" or "*delivery* capacity," it would have said so. See *Tennessee Valley Auth.* v. *Hill*, 437 U.S. 153, 173 n.18 (1978). When Congress has intended to modify the term "capacity" in that manner, it has done so explicitly—as when it repeatedly used the phrase "transmission capacity" in the text of PURPA to refer to the ability of particular facilities to transmit or deliver power. See Pub. L. No. 95-617 §§ 202, 203, 92 Stat. 3117, 3135-3138 (1978). "[W]hen the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended." *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004) (internal quotation marks omitted). The D.C. Circuit strayed from the proper interpretive inquiry by disregarding the difference between the phrase Congress chose ("power production capacity") and different phrases (*e.g.*, "transmission capacity" or other similar concepts) used in neighboring statutory provisions to refer to delivery or transmission, not generation.

3. Petitioners' Reading of PURPA Accords with the Statute's Purposes.

Congress's intent in enacting PURPA was to encourage only "*small* power production facilities," 16 U.S.C. § 796(17)(C) (emphasis added), and not "large power production facilities that masquerade as small

power production," Order No. 872-A, 173 FERC ¶ 61,158, P 245 (2020). By deferring to FERC's interpretation of PURPA, the D.C. Circuit's ruling will have the practical effect of requiring utilities to purchase energy from increasingly *larger* resources. Under the orders challenged in this case, any facility, regardless of size, can be a qualifying facility as long as it installs equipment to limit instantaneous output to 80 megawatts. And as this case clearly illustrates, highly sophisticated and well-resourced developers are designing projects in an attempt to obtain PURPA's market-distorting benefits for, and in practice to force utility customers effectively to subsidize, ever larger projects. See *infra* p. 32 and note 15. That seems a far cry from the "*small* * * * facilities" that PURPA sought to encourage.

This Court has recognized that another of Congress's purposes in enacting PURPA was to promote the development of renewables by encouraging competition among generators. *Mississippi*, 456 U.S. at 750-751. FERC's reading of "power production capacity," granted deference by the D.C. Circuit, does the opposite. The practical effect of that test is to expand the universe of facilities that enjoy guaranteed customers for their power, over the long run often at above-market prices. That will eliminate or reduce opportunities for non-PURPA renewables and other carbon-free generation—which must instead compete on the open market, without the tailwinds of above-market pricing and guaranteed purchasers.

Nor was PURPA "intended to require the rate payers of a utility to subsidize * * * small power producers." H.R. Rep. 95-1750, at 98 (Oct. 10, 1978)

(Conf. Rep.); see Order 872 P 14. But, as the Commission has recently recognized, in practice and as implemented by state public utility commissions, PURPA-compelled power purchase agreements have historically reflected significantly higher pricing than contracts negotiated on the open market. See Order 872 PP 253-254. The D.C. Circuit's decision will effectively penalize utilities and their customers by forcing them to purchase overpriced power from oversized qualifying facilities rather than from non-PURPA renewables.

B. The D.C. Circuit's Application of *Chevron* Was Wrong.

In this context, the D.C. Circuit's application of *Chevron* was flawed from beginning to end.

Consider first the panel's application of *Chevron* step one. Its analysis of statutory text consists of three sentences spanning less than one paragraph. App. 6a. The majority observed that "PURPA does not define the[] terms" "facility" or "power production capacity." From that premise, it jumped to the conclusion that "Congress has not spoken to the issue" and thus the Court should "move to step two" of *Chevron*. *Ibid.*

That approach fundamentally misperceives the *Chevron* inquiry. The mere fact that Congress has not included an express definition for a particular statutory term does not automatically render a statute ambiguous. "Even under *Chevron,* [courts] owe an agency's interpretation of the law no deference unless, after 'employing traditional tools of statutory construction,'" the court finds itself "unable to discern Congress's meaning." *SAS Inst. Inc.* v. *Iancu*, 138

S. Ct. 1348, 1358 (2018) (quoting *Chevron*, 467 U.S. at 843 n.9). If a court applies the "traditional tools" of statutory construction at the outset of its analysis, it "will almost always reach a conclusion about the best interpretation" of the statute, thus resolving any ambiguity. *Kisor*, 139 S. Ct. at 2448 (Kavanaugh, J., concurring); accord Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2152 (2016). Here, the D.C. Circuit did not meaningfully employ the "traditional tools of statutory construction" at *Chevron* step one. The majority's analysis at step one cited no dictionaries or other evidence of ordinary meaning, and did not discuss the statute's structure, context, or purpose.

To be sure, the majority did *eventually* discuss the statute's text, purpose, and structure. But it did so only as part of its *Chevron* step two analysis. See App. 7a-8a. As a result, the majority stacked the deck in the agency's favor, essentially assuming without analysis that Congress actually left a "gap" for the agency to fill, and asking only whether the agency filled that purported gap in a reasonable way—without ever seriously considering the threshold question of whether any such gap in ordinary meaning exists in the first place.

Short-circuiting *Chevron* in this way—or, as Judge Walker put it, adopting this kind of "*Chevron* maximalism"—is deeply problematic. It diminishes the role of Article III courts under *Chevron* as properly construed, *i.e.*, to decide whether a statute conveys an unambiguous meaning, or instead is truly ambiguous. When step one is functionally ignored, as here, the court risks an "abdication of [its] judicial duty."

Gutierrez-Brizuela v. *Lynch*, 834 F.3d 1142, 1149-1158 (10th Cir. 2016) (Gorsuch, J., concurring); see also *Buffington*, 143 S. Ct. at 19-22 (Gorsuch, J., dissenting from denial of certiorari) (expressing this concern, and collecting opinions of other members of this Court criticizing *Chevron* maximalism).

To make matters worse, the majority's approach to statutory interpretation was deeply flawed, even viewed only as part of its *Chevron* step two analysis.

The D.C. Circuit began on the right foot, purporting to "start with the text." App. 7a. But in fact, the panel offered scant reasoning to explain how the text shows that FERC's interpretation was reasonable. The panel concluded that "the Commission's interpretations of 'power production capacity' * * * and of 'facility' * * * were eminently reasonable," without saying why. *Ibid.* On that point, the panel consulted no dictionaries, did not analyze the statute's structure, and said nothing about the statutory context suggesting that, when Congress wants to refer to a facility's "output capacity" or "delivery capacity," it does so explicitly. See *supra* p. 18.

At bottom, the D.C. Circuit held that FERC's interpretation of "power production capacity" was reasonable because the "only grid-usable 'power' that Broadview produces is AC power," such that "power production capacity" means the amount of AC power delivered for use on the grid. App. 7a. But PURPA sets an 80-megawatt ceiling for "*power* production capacity," not "*AC power* production capacity." And all agree that DC power is a form of power. See *supra* p. 15. The panel's decision to substitute its preferred term "AC power production capacity" for the actual

statutory term "power production capacity" disregards basic interpretive principles. See *Murphy* v. *Smith*, 138 S. Ct. 784, 788 (2018) ("[R]espect for Congress's prerogatives as policymaker means carefully attending to the words it chose rather than replacing them with others of our own.").[10]

As another example of how its *Chevron* step two analysis shortchanged ordinary textual principles, the panel also failed to engage with the fact that, when Congress wants eligibility for regulatory benefits to be determined by reference to a facility's *AC* power production, it says so explicitly. For example, Congress recently expanded a tax credit for "qualified facilities," defined in that context as those "with a maximum net output of less than 1 megawatt (*as measured in alternating current*)." 26 U.S.C. § 48E(a)(2)(A)(ii) (emphasis added); see App. 24a (Walker, J., dissenting) (discussing this provision). The statute here, by contrast, refers to "power" generally, not limited to power "measured in alternating current." Cf. *Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("[I]t is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion [of

[10] FERC's orders do not—and could not—fill the gaps in the panel's own reasoning. FERC did note in passing that "the appropriate measure of 'creation' * * * should be the creation of * * * AC electricity," but it made that argument only in one sentence of a footnote in the Second Rehearing Order. App. 41a P 17 n.61. FERC should not be permitted to "bury what it believes to be the heart of its order in the last line of a footnote," *McElroy Elecs. Corp.* v. *FCC*, 990 F.2d 1351, 1366 (D.C. Cir. 1993), only then to have the footnote become the centerpiece of judicial deference. See Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 519 (1989).

specific statutory language]." (internal quotation marks omitted)).

To the extent the panel's *Chevron* step two analysis considered the statutory purposes, it reasoned that "[e]xcluding facilities from qualifying facility status because their component parts have individual production capacities over 80 [megawatts]" would "be inconsistent with [PURPA's] goal" of "encourag[ing] the development of * * * small power production facilities." App. 8a (internal quotation marks omitted). But that simply begs the critical question of what Congress meant by "*small* power production" facilities. FERC's orders here, upheld by the D.C. Circuit, encourage increasingly *large* power production facilities by decoupling a facility's generation capabilities from its qualifying facility status.

Under the challenged agency orders, the developer of a massive project similar to California's 579-megawatt, 5-square-mile Solar Star Project could arrange to send only 80 megawatts of the power generated by the project through inverters to the public grid, use the rest of the power for other on-site or "behind-the-meter" purposes, and receive qualifying facility status. It strains credulity to suggest that such a facility (the largest industrial solar park in the United States) would constitute a "small power production facility" with a "power production capacity" of only 80 megawatts, so long as it is connected to 80-megawatt inverters. And it indisputably would not advance

PURPA's goals. But that is the necessary result of the D.C. Circuit's opinion.[11]

C. If *Chevron* Tolerates the Result Below, Then *Chevron*'s Application Should Be Reconsidered or Clarified.

As explained above, the D.C. Circuit clearly misapplied *Chevron* en route to upholding an agency interpretation that contravenes the plain language, structure, and intent of PURPA. But if the D.C. Circuit's decision is viewed as consistent with *Chevron*, then the time has come for this Court to reconsider how and when *Chevron* should be applied, and at a minimum to clarify its limits.

---

[11] The D.C. Circuit's *Chevron* step two analysis also misunderstood relevant legislative history. PURPA's Conference Report, for instance, states that "[t]he power production capacity of the facility means the *rated capacity* of the facility." H.R. Rep. 95-1750, at 89 (emphasis added). "[R]ated capacity" is used in the electric industry to refer to the "nominal rating of generating equipment"—*i.e.*, to the amount of electricity that a generator can make when operating "under standard operating conditions," as distinct from the "actual output" of a facility after considering variations in operating conditions or other restrictions. *Occidental Geothermal, Inc.*, 17 FERC ¶ 61,231, at pp. 61,444-61,445 (1981). The D.C. Circuit read this Conference Report to equate "power production capacity" with the "rated capacity of the facility," not just the solar panels. App. 9a. But it nonetheless deferred to an agency interpretation that effectively gives talismanic significance to a single component of the facility (*i.e.*, the inverters). That the inverters can only send 80 megawatts of power to the grid at any one time does not change the reality that the Broadview Project can generate 160 megawatts of power.

Several current and former members of this Court have sharply criticized how *Chevron* is applied in lower courts today.[12] As Judge Walker recognized in dissent below, this "Court has not deferred to an agency under *Chevron* since 2016." App. 19a. To the extent this Court has addressed the issue in recent years, it has either "policed the limits of deference to agencies," *id.* at 19a-20a,[13] or declined to rely on *Chevron* even in cases implicating the doctrine.[14]

But the story in the lower courts—and especially in the D.C. Circuit—is quite different. As Judge Walker explained, "[t]hough the Supreme Court has given up on *Chevron* maximalism (and perhaps on *Chevron* altogether), lower courts have not." App. 21a n.2. "Between 2003 and 2013, lower courts applied *Chevron* in 74.8% of statutory interpretation cases involving agencies and reached step two 65.7% of the time." *Ibid.* (citing Kent H. Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 Mich. L. Rev. 1, 29, 33 (2017)). And in "2020 and 2021, circuit

---

[12] See, *e.g.*, *Michigan* v. *EPA*, 576 U.S. 743, 760-64 (2015) (Thomas, J., concurring); *Gutierrez-Brizuela*, 834 F.3d at 1149-1158 (Gorsuch, J., concurring); Kavanaugh, *Fixing Statutory Interpretation*, at 2150-2154; see also *Pereira* v. *Sessions*, 138 S. Ct. 2105, 2120-2121 (2018) (Kennedy, J., concurring); *Perez* v. *Mortgage Bankers Ass'n*, 575 U.S. 92, 108-112 (2015) (Scalia, J., concurring).

[13] See, *e.g.*, *West Virginia* v. *EPA*, 142 S. Ct. 2587 (2022).

[14] See, *e.g.*, *Becerra* v. *Empire Health Found.*, 142 S. Ct. 2354 (2022) (not mentioning *Chevron*); *Nat'l Fed'n of Indep. Bus.* v. *Dep't of Lab.*, 142 S. Ct. 661 (2022) (per curiam) (same); *BNSF Ry. Co.* v. *Loos*, 139 S. Ct. 893 (2019) (same).

courts applied *Chevron* 84.5% of the time and reached step two in 59.2% of those cases." *Ibid.*

The D.C. Circuit has acknowledged the "recent cases" in which this Court "has not applied the [*Chevron*] framework," but concluded that those cases "do[] not affect" *Chevron*'s applicability, because only this Court can overrule one of its own precedents. *Loper Bright*, 45 F.4th at 369. It therefore remains this Court's prerogative to "reconsider * * * the premises that underlie *Chevron*." *Pereira*, 138 S. Ct. at 2121 (Kennedy, J., concurring).

Whatever this Court's intentions when the case was originally decided, in practice *Chevron* has often been applied to "wrest[] from Courts the ultimate interpretative authority to 'say what the law is,'" in contravention of separation-of-powers principles and centuries of American legal tradition. *Michigan* v. *EPA*, 576 U.S. 743, 761 (2015) (Thomas, J., concurring) (quoting *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). And as applied in the lower courts today, *Chevron* has expanded the Executive Branch's authority, weakened the judiciary, and reduced Congress's incentive to exercise its lawmaking responsibilities, because agencies can "fill the gap" whenever bicameralism and presentment prove difficult.

This case presents an important opportunity for this Court to explain how *Chevron* should operate. Although this Court has intimated that courts should exhaust the normal statutory interpretation toolkit before deciding that a statute is "ambiguous," see *supra* pp. 12-13, 20-21, the lower courts generally do not apply *Chevron* in that way. That has generated what Judge Walker aptly characterized as a "vertical split

between how the Supreme Court and lower courts apply *Chevron*." App. 21a (Walker, J., dissenting). This Court can and should clarify (whether in *Loper Bright* or this case) that courts must exhaust the usual tools of statutory construction before reflexively deeming a statute ambiguous and resorting to *Chevron* step two.

Even if *Chevron* might make sense for a certain category of cases involving truly ambiguous statutes, this case does not fit that bill. In a telling footnote in its appellate brief, FERC conceded that interpreting the statutory language here "turns on legal principles of the sort that a court usually makes—i.e., principles of statutory interpretation—and not determinations specifically entrusted to an agency's expertise." FERC CADC Br. (Doc. 1934740), at 40 n.9 (Feb. 10, 2022). During oral argument, Judge Pillard aptly described that footnote as "surprising." CADC Oral Arg. at 42:25. As Judge Walker later explained in dissent, the footnote confirmed that PURPA "does not invite FERC to fill a policy gap." App. 21a. For its part, the majority opinion simply ignored the issue entirely.

At a minimum, this case presents a chance for this Court to clarify that lower courts should not grant *Chevron* deference when, as here, the agency itself has disclaimed the notion that interpretation of a particular statute is informed by agency expertise. See *PBGC* v. *LTV Corp.*, 496 U.S. 633, 651-652 (1990) (noting that "agency expertise is one of the principal justifications behind *Chevron* deference"); accord *Keyspan-Ravenswood, LLC* v. *FERC*, 474 F.3d 804, 812 (D.C. Cir. 2007) ("[W]e cannot defer when the agency simply has not exercised its expertise." (internal quotation marks omitted)).

The problems with the D.C. Circuit's application of *Chevron* here are exacerbated by the fact that this case implicates an extraordinary claim of regulatory power: the so-called "mandatory purchase obligation." See *supra* p. 6. That obligation effectively intervenes in power markets by forcing utilities to purchase all the power generated by a favored class of generators, over the long run often requiring them to pay above-market prices. And it does so even when the utility and its customers would rationally prefer not to do so—and indeed, even when a utility will be consigned to reselling that power into the open market at a loss. *Chevron* deference is at its most tenuous when, as here, it greenlights an agency decision that interferes with markets in an unusual and highly disruptive way, effectively allowing federal agencies to pick winners and losers without evidence that Congress intended that outcome. Cf. *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 666 (noting that "'lack of historical precedent' * * * is a 'telling indication' that [asserted power] * * * extends beyond the agency's legitimate reach" (quoting *Free Enter. Fund* v. *Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 505 (2010))). And the D.C. Circuit deferred here to an agency interpretation offered in a third-in-time agency order, after FERC had flip-flopped on the question following a change in the Commission's composition. This case cries out for further review.

Whatever benefits *Chevron* may have had when decided decades ago, the doctrine's current implementation problems can no longer be ignored. This Court's intervention is warranted to rein in the *Chevron* maximalism that is alive and well in the lower courts.

D. At a Minimum, This Petition Should Be Held Pending Disposition of *Loper Bright*.

On May 1, 2023, this Court granted certiorari in *Loper Bright Enterprises, Inc.* v. *Raimondo* to address "[w]hether the Court should overrule *Chevron* or at least clarify [it]." No. 22-451, 2023 WL 3158352; see Pet. at i-ii, *Loper Bright* (No. 22-451) (Nov. 10, 2022) ("*Loper Bright* Pet."). The Petitioners in *Loper Bright* are advancing arguments that overlap considerably with Petitioners' position here, including that *Chevron* should be clarified to make clear that "courts are supposed to exhaust the statutory-construction toolkit before declaring an ambiguity that causes the tie to go to the agency." *Loper Bright* Pet. at 29-30. Indeed, the overlap between this case and *Loper Bright* is not subject to serious dispute. Judge Walker specifically identified this case and *Loper Bright* as emblematic of the "*Chevron* maximalism" that is "alive and well" in the D.C. Circuit, App. 19a (Walker, J., dissenting), and cited both cases as evidence of a "vertical split between how the Supreme Court and lower courts apply *Chevron*," *id.* at 21a & n.2.

As the United States has recently explained, a certiorari petition should be held when the "Court's resolution of the question presented in [a granted case] could conceivably affect the judgment of the court of appeals" in the case where the petition has been filed. Mem. for Resp. at 2, *Mangine* v. *Withers* (No. 22-738) (U.S. Apr. 10, 2023); see *Tucker* v. *Kemp*, 481 U.S. 1063, 107 S. Ct. 2209, 2209 (1987) (Brennan, J., dissenting) ("petition[s] should be held" when they present questions "similar" to those in a pending case).

That standard is easily met here. If this Court were to overrule *Chevron*, the judgment of the Court of Appeals could not stand, since it explicitly relied on the *Chevron* framework. The panel majority spent precisely one paragraph attempting to discern whether the statute had an ordinary meaning, and then framed the rest of its discussion around the limited question of whether "the Commission's interpretation was reasonable." App. 5a-10a. Even if this Court in *Loper Bright* merely provides clarification on when and how the *Chevron* framework should apply, a vacatur and remand would still be warranted, so that the D.C. Circuit can reconsider its decision in light of whatever guardrails *Loper Bright* might impose on *Chevron* deference. See *Lawrence ex rel. Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996) (per curiam) (summary grant, vacate, and remand order appropriate when there is a "reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration" in light of intervening caselaw).

II. This Case Is an Ideal Vehicle to Address Exceptionally Important Issues.

1. The question presented here is exceptionally important to the energy industry and the country as a whole. Generally speaking, the integration of renewable energy resources into the electric grid is among the most important technological and infrastructure-related developments facing the United States today. That development is raising a host of legal and policy issues about the pace and manner in which this integration should occur, and who should bear the costs. This case will decide a critically important question in

this field: Whether electric utilities have a mandatory legal obligation under PURPA to purchase power from oversized solar facilities such as the Broadview Project, regardless of whether it would be optimal to do so from a customer, operational, or market standpoint.

Indeed, after FERC issued the Rehearing Orders challenged here, numerous other projects based on the Broadview model were announced (or were modified to adopt that model). FERC has dutifully certified those other projects as qualifying facilities, and challenges to those orders are being held in abeyance pending disposition of this Petition.[15] Absent this Court's intervention, the arrangement FERC endorsed in the Rehearing Orders—*i.e.*, building 160-megawatt (or larger) solar arrays with artificially restricted inverter banks that limit output at any given time, solely to reap the benefits of qualifying facility status under PURPA—appears set to become an industry-standard practice. And that trend will continue regardless of whether that model makes technical or financial sense without the artificial support FERC's interpretation of PURPA confers.

The proliferation of the Broadview model will have enormous impacts for Petitioner NorthWestern Energy and other electric utilities subject to the

---

[15] See, *e.g.*, *Gallatin Power Partners LLC*, 176 FERC ¶ 61,120 (Trident Solar 1 project), reh'g denied, 177 FERC ¶ 62,048 (2021), petition for review filed *sub nom. NorthWestern Corp.* v. *FERC* (D.C. Cir. Dec. 21, 2021) (No. 21-1269); *Gallatin Power Partners LLC*, 177 FERC ¶ 61,181 (2021) (Shields Valley project), reh'g denied, 178 FERC ¶ 62,088 (2022), petition for review filed *sub nom. NorthWestern Corp.* v. *FERC* (D.C. Cir. Apr. 6, 2022) (No. 22-1055).

mandatory purchase obligation. In effect, the Rehearing Orders will dramatically expand the class of generators from which utilities will be required to purchase power under PURPA's mandatory purchase obligation, often at above-market rates. See *supra* pp. 19-20. Indeed, the lure of higher prices and a guaranteed customer for their power is presumably why developers are fighting so hard to expand qualifying-facility eligibility.

Given the enormous impact that the agency orders here will have on the dynamics of the U.S. power markets and ultimately the pocketbooks of utility customers, it comes as no surprise that the opinion below has attracted significant attention. One recent article characterized the questions in this case as having "dramatic, nationwide consequences."[16] And a former FERC Chairman described the D.C. Circuit opinion as a "big time" decision.[17]

2. That said, the importance of this case is by no means limited to the energy industry alone. Courts and regulated parties alike have a direct interest in knowing whether agencies can significantly disrupt market operations without undertaking a meaningful analysis of the statutory text at *Chevron* step one to determine whether such disruptions are actually what Congress intended. See Fischell & Walker, *supra* note 16, at 2 (noting that this case "exemplif[ies] the

---

[16] Jennifer Fischell & Lucas Walker, Chevron *Still Has Power (For Now): The D.C. Circuit Defers to FERC in Recent Ruling*, at 1, Nat'l Law J. (Feb. 21, 2023), https://perma.cc/7WHQ-EBE4.

[17] Neil Chatterjee (@FERChatterjee), Twitter (Feb. 14, 2023 9:52 PM), https://perma.cc/B432-84CV.

ongoing judicial debate about *Chevron* deference" and that this Court "might look" at the D.C. Circuit's opinion here as a means of reaching "the question of *Chevron*'s continuing vitality," which this Court "has sidestepped" for years).

3. This case is an ideal vehicle to resolve the questions presented. FERC has struggled with the definition of "power production capacity" for decades, but prior cases involving that issue have fizzled before reaching this Court.[18] This case, by contrast, has no procedural defects: The D.C. Circuit clearly reached and resolved the lead question about PURPA's meaning. Moreover, the D.C. Circuit's decision rests squarely on affording deference to the agency under *Chevron*. See App. 6a.

That this case arises from the D.C. Circuit makes certiorari all the more appropriate. The D.C. Circuit has outsized importance for review of FERC orders under the Federal Power Act, 16 U.S.C. § 825*l*(b), as well as challenges to federal agency action more generally. And, as Judge Walker explained in dissent, "*Chevron* maximalism is alive and well" on that court. App. 19a. That is true even if *Chevron* may have "fallen into desuetude" in some other courts of appeals. *Buffington*, 143 S. Ct. at 22 (Gorsuch, J., dissenting from the

---

[18] FERC's earliest decisions in this area—including *Occidental Geothermal, Inc.*, 17 FERC ¶ 61,231 (1981), and *Malacha Power Project, Inc.*, 41 FERC ¶ 61,350 (1987)—were never tested on judicial review. Those precedents are often applied by FERC, but have caused significant confusion among regulated parties and among FERC Commissioners themselves. Compare App. 42a-43a P 18, 49a-50a P 25, with App. 120a P 33, 144a-145a P 25 & n.62 (debating the meaning of these precedents).

denial of certiorari); see Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 Harv. L. Rev. 1298, 1301-1302 (2018) (survey of federal appellate judges confirmed that "[m]ost of them are not fans of *Chevron*, with the significant exception of the judges we interviewed from the D.C. Circuit, the court that hears the most *Chevron* cases"); see also Kavanaugh, *Fixing Statutory Interpretation*, at 2153 (D.C. Circuit deals with *Chevron* "all the time" in cases that have "significant practical consequences"). Guidance on the continued vitality and scope of *Chevron* deference would restore a uniform approach in lower courts and have a major impact on a vast range of agencies, regulated parties, and other stakeholders.

CONCLUSION

The petition for a writ of certiorari should be granted. At a minimum, the petition should be held for *Loper Bright Enterprises, Inc.* v. *Raimondo*, No. 22-451, and then disposed of accordingly in light of this Court's decision in that case.

Respectfully submitted.

EMILY S. FISHER
EDISON ELECTRIC INSTITUTE
701 Pennsylvania Ave., NW
Washington, DC 20004

Counsel for Petitioner
Edison Electric Institute

SHANNON M. HEIM
SARAH N. NORCOTT
MITCHELL L. WERBELL V
NORTHWESTERN CORPORATION D/B/A NORTHWESTERN ENERGY
208 N. Montana Ave., Suite 200
Helena, MT 59601

Counsel for Petitioner
NorthWestern Corporation
d/b/a NorthWestern Energy

JEREMY C. MARWELL
Counsel of Record
JAMES T. DAWSON
VINSON & ELKINS LLP
2200 Pennsylvania Ave., NW, Suite 500 West
Washington, DC 20037
(202) 639-6507
jmarwell@velaw.com

Counsel for Petitioners

JUNE 2023

APPENDIX

APPENDIX CONTENTS

Page

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 7, 2022
Decided February 14, 2023

No. 21-1126

SOLAR ENERGY INDUSTRIES ASSOCIATION,
PETITIONER
v.
FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT
NEWSUN ENERGY LLC AND BROADVIEW SOLAR, LLC,
INTERVENORS

Consolidated with 21-1136, 21-1142, 21-1149, 21-1175

On Petitions for Review of Orders of
the Federal Energy Regulatory Commission

Before: PILLARD and WALKER, *Circuit Judges*, and SENTELLE, *Senior Circuit Judge*.

Opinion for the Court filed by *Senior Circuit Judge* SENTELLE.

Opinion concurring in part and dissenting in part filed by *Circuit Judge* WALKER.

SENTELLE, *Senior Circuit Judge*: The Edison Electric Institute and NorthWestern Corporation, d/b/a NorthWestern Energy, (collectively, "Utilities") petition for review of an order by the Federal Energy Regulatory Commission ("Commission") in which the Commission granted Broadview Solar's application to become a qualifying facility under the Public Utility Regulatory Policies Act of 1978 ("PURPA"). The Solar Energy Industries Association ("SEIA") petitions for review of the Commission's denial of its motion to intervene in the adjudication of Broadview's application.

Because we conclude that the Commission's interpretation of the statute is entitled to deference and that the Commission did not act arbitrarily or capriciously, we deny the Utilities' petitions. We dismiss SEIA's petitions because it lacks Article III standing.

Background

Section 210 of PURPA was enacted with the goal of promoting the creation and use of alternative energy. *See Am. Paper Inst., Inc. v. Am. Elec. Power Serv. Corp.*, 461 U.S. 402, 404–05 (1983). It does so, in part, by directing the Commission to prescribe rules affording "qualifying small power production facilities," also commonly known as "qualifying facilities," certain benefits. *See* 16 U.S.C. § 824a-3(a)–

(b). To be a qualifying facility under the Act, a facility must use "biomass, waste, renewable resources, geothermal resources, or any combination thereof" to produce energy and have "a power production capacity which, together with any other facilities located at the same site . . . , is not greater than 80 megawatts." *Id.* § 796(17)(A)(i)–(ii). Facilities may self-certify that they meet these requirements, or they may apply for certification from the Commission. *See* 18 C.F.R. § 292.207(a)–(b). One notable benefit to being a qualifying facility is the mandatory purchase obligation. Under it, electric utilities are required to purchase the energy generated by qualifying facilities, providing those facilities with a guaranteed market. *See* 16 U.S.C. § 824a-3(a)(2); 18 C.F.R. § 292.303(a).

In September 2019, Broadview applied for certification from the Commission that its Montana facility was a qualifying facility. That facility consists of a 160 MW solar array and a 50 MW battery storage system, both of which produce or store direct current, or DC, power. Because the nation's electric grid runs on alternating current, or AC, power, solar facilities must also have devices known as inverters to convert DC power into grid-usable AC power. Broadview's Montana facility has inverters with a total net capacity of 80 MW.

In its application, Broadview noted its intent to interconnect with and sell energy to NorthWestern Energy, as it would be entitled to do under the mandatory purchasing requirement as a qualifying facility. The Edison Electric Institute, a trade association representing investor-owned electric companies across the United States subject to

mandatory purchasing requirements, and NorthWestern Energy filed motions to intervene in the Broadview docket, objecting to certification of Broadview's facility. Both motions were timely filed by the October 2, 2019, deadline.

The Commission denied Broadview's application for certification in a September 2020 Order, determining that Broadview's facility exceeded the statute's maximum "power production capacity" of 80 MW. *See Broadview Solar, LLC*, 172 FERC ¶ 61,194 (2020), *set aside*, 174 FERC ¶ 61,199 (2021), *reh'g denied and modified*, 175 FERC ¶ 61,228 (2021). In reaching this conclusion, the Commission determined that the relevant "capacity" was that of the solar array, which was 160 MW of DC power, and not the inverters' "conversion limit" of 80 MW of AC power. *Id.* at 62,276. The Commission acknowledged it was departing from its previous approach set out in *Occidental Geothermal, Inc.*, 17 FERC ¶ 61,231 (1981), which focused on the facility's net output, or "send-out," capacity. It determined, however, that the send-out approach was inconsistent with the statute's text. Broadview filed a request for rehearing. After the Commission issued its September 2020 Order, SEIA also filed a motion to intervene, nearly one year after the original deadline.

In March 2021, the Commission issued a new Order granting Broadview qualifying facility status and setting aside its September 2020 Order. *Broadview Solar, LLC*, 174 FERC ¶ 61,199 (2021). After determining that § 796(17)(A) was ambiguous as to the proper measure of a facility's "power production capacity," the Commission determined that its former send-out approach was the best

interpretation because it takes into account all of the facility's components working together, not just the maximum capacity of one subcomponent, and focuses on grid-usable AC power. *Broadview Solar, LLC*, 174 FERC ¶ 61,199, at 61,797. Because Broadview's send-out capacity at any single point in time is capped by the inverters' net output capacity of 80 MW of power, the Commission determined that Broadview's facility met the statutory requirements and granted it qualifying facility status. *Id.* at 61,799, 61,801–02. In the same March 2021 Order, the Commission also determined SEIA failed to establish good cause for its untimely motion to intervene and denied that motion. *Id.* at 61,795.

The Utilities and SEIA filed requests for rehearing. The Commission issued its June 2021 Order, reaffirming that Broadview was a qualifying facility and modifying its March 2021 Order to reject the Utilities' arguments that Broadview's facility represented a novel subversion of the statute and that the battery's capacity had to be calculated separately from the capacity of the solar array. *Broadview Solar, LLC*, 175 FERC ¶ 61,228 (2021). This appeal followed.

Analysis

A. PURPA

i. *Chevron* Challenge

The Utilities argue that the Commission exceeded its statutory authority because, in their view, the "power production capacity" of Broadview's facility is the total amount of DC power generated by the solar array and not the grid-usable AC power produced by the inverters working in conjunction with the solar array and battery. The Commission argues that the

statute is ambiguous as to the proper measure of a facility's "power production capacity" and that its interpretation, focusing on the amount of AC power being sent out to the grid, is reasonable. We agree with the Commission.

In interpreting the statute, this Court's analysis is governed by the two-step framework set out in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Under step one, the court asks "whether Congress has directly spoken to the precise question at issue." *Id.* at 842. If it has, "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842–43. But "if the statute is silent or ambiguous with respect to the specific issue," the court moves to step two and must uphold any agency interpretation that is "reasonable." *Id.* at 843–44.

The parties' dispute in this case turns on the meanings of "facility" and "power production capacity" in 16 U.S.C. § 796(17)(A). PURPA does not define these terms. In plain language, a facility's "power production capacity" is the maximum amount of power that the facility can produce. But the statute does not state whether the relevant capacity is that of the individual subcomponent generating DC power, *i.e.*, the solar array, or of all the facility's components working together to produce grid-usable AC power, which would include the inverters. Because Congress has not spoken to the issue, we move to step two and must defer to any reasonable agency interpretation.

To determine whether the Commission's interpretation was reasonable, we look to see if it "is based on a permissible construction of the statute in light of its language, structure, and purpose" and

consistent with the legislative history. *Nat'l Treasury Emps. Union v. Fed. Lab. Rels. Auth.*, 754 F.3d 1031, 1042 (D.C. Cir. 2014) (quoting *Am. Fed'n of Labor v. Chao*, 409 F.3d 377, 384 (D.C. Cir. 2005)); *see also Bell Atl. Tel. Co. v. FCC*, 131 F.3d 1044, 1048-49 (D.C. Cir. 1997).

We start with the text. On appeal, the Commission raised for the first time the argument that "capacity" has an industry-specific definition meaning the maximum amount of power that can be supplied to the power grid, *i.e.*, for end-user demand. Because this was not a basis for the Commission's decision, we do not consider it here. *See Secs. & Exch. Comm'n v. Chenery Corp.*, 318 U.S. 80, 87, 95 (1943). Even so, the Commission's interpretations of "power production capacity" as "the facility's net output to the electric utility," and of "facility" as "all of the putative [qualifying facility's] component parts as they work together as a whole," were eminently reasonable. *See* 175 FERC ¶ 61,228, at 62,316–17 (internal quotation marks and citation omitted). As discussed, the statute is ambiguous on the meanings of "power production capacity" and "facility." The only grid-usable "power" that Broadview produces is AC power, and Broadview's inverters work with the solar array and battery as an integral component in producing that power.

The Commission's interpretation was further guided, and is amply supported, by the statute's structure and purpose. Determining qualifying facility status by the facility's net output brings various provisions of PURPA into harmony. One of the main benefits of being a qualifying facility is the mandatory purchasing requirement. But the

mandatory purchasing requirement only applies to grid-usable power—meaning AC power. The Commission's interpretation of "power production capacity" similarly focuses on net output of grid-usable AC power. Thus, the measure used to determine whether a facility is eligible for qualifying facility status is the same used to determine benefits available to those qualifying facilities.

The Commission's focus on net output is likewise "consistent with the statutory purpose" of PURPA. *Troy Corp. v. Browner*, 120 F.3d 277, 285 (D.C. Cir. 1997) (citing *Chevron*, 467 U.S. at 843). Title II of PURPA was intended "to encourage the development of . . . small power production facilities" and promote the use of alternative energy sources, such as solar. *Conn. Valley Elec. Co. v. FERC*, 208 F.3d 1037, 1045 (D.C. Cir. 2000) (quoting *FERC v. Mississippi*, 456 U.S. 742, 750 (1982)). Excluding facilities from qualifying facility status because their component parts have individual production capacities over 80 MW, even though the overall facility cannot send out more than 80 MW to the grid, would be inconsistent with that goal.

Compared to facilities that rely on other energy sources, solar facilities are relatively inefficient at generating power. A solar array needs sunlight; cloud cover and nighttime hinder its production capabilities. Broadview addressed this by installing a solar array with a capacity of 160 MW and a battery, enabling it to produce extra power to be stored in the battery while conditions are optimal and then release that power to the grid when conditions prevent the array from producing enough power to meet the inverters' 80 MW limit. The Utilities complain that

this allows Broadview to circumvent the statutory restrictions on qualifying facilities. But viewed in light of the statute's purpose, this arrangement is a feature, not a bug: Broadview is able to more consistently produce, send out, and sell the maximum amount of renewable energy permitted under the statute.

The Commission's interpretation is also consistent with the legislative history. *See City of Cleveland v. U.S. Nuclear Reg. Comm'n*, 68 F.3d 1361, 1367–68 (D.C. Cir. 1995). The Utilities rely on one sentence from a House Committee Report stating that "[t]he power production capacity of the facility means the rated capacity of the facility." H.R. Rep. No. 95-1750, at 89 (1978) (Conf. Rep.). While neither the legislative history nor PURPA defines "rated capacity," it is most frequently used to refer to the performance anticipated under "standard operating conditions." *Occidental*, 17 FERC ¶ 61,231, at 61,444–45. The Utilities adopt this definition in their briefing but fail to apply that definition to the House Committee's full quote, which referred to the "rated capacity *of the facility*." H.R. Rep. No. 95-1750, at 89 (1978) (Conf. Rep.) (emphasis added). Broadview's facility consists of a solar array, battery, and inverters that can regularly produce 80 MW of grid-usable power. As the Commission previously recognized, "a facility's power production capacity is not necessarily determined by the nominal rating of even a key component of the facility. . . . [I]t is not uncommon for smaller facilities to find it most economic to employ commercially available components[,] some of which have individual capabilities significantly exceeding the

overall facility capabilities." *Occidental*, 17 FERC ¶ 61,231, at 61,445.

The Commission's determination that Broadview is a qualifying facility with a "power production capacity . . . not greater than 80 megawatts," 16 U.S.C. § 796(17)(A)(ii), because its component parts, working together, produce no more than 80 MW of grid-usable AC power was reasonable and well-supported by the statute's text, structure, purpose, and legislative history.

ii. Arbitrary and Capricious Challenges

The Utilities raise several other arguments, none of which compels a different result than their first. First, the Utilities claim the Commission acted arbitrarily and capriciously by granting Broadview's application and ignoring errors on one of Broadview's form submissions. The Commission requires that all qualifying facility applicants complete its Form 556. *See* 18 C.F.R. § 292.207(a)(1), (b)(2). That form provides a formula for calculating the facility's maximum net power production capacity, starting with the "maximum gross power production capacity at the terminals of the individual generator(s)" and subtracting out certain enumerated figures, including electrical losses and power used to run the facility's equipment. FERC Form No. 556. When asked for the "maximum gross power production capacity at the terminals of the individual generator(s)," Broadview, in one submission, reported a value of approximately 82.5 MW, while the Utilities claim the correct value was 160 MW. Because of that error, the Utilities claim the Commission could not grant Broadview's application.

This argument fails because it treats an applicant's completion of Form 556—a tool meant to aid the Commission in its eligibility determination—as itself determinative. As the Commission explained in its March 2021 Order, "Form No. 556 was always intended to be a flexible tool . . . to submit information relevant to whether a facility meets the requirements to be considered a [qualifying facility]." 174 FERC ¶ 61,199, at 61,800. Even assuming the correct input on the form was 160 MW, Broadview explained its facility's novel setup and why its "maximum net power production capacity" was 80 MW. The Commission's decision to treat Broadview's Form 556 submissions as helpful for determining, but not dispositive of, the facility's eligibility was not arbitrary or capricious.

The Utilities also argue the Commission's decision to treat the solar array and battery as a single facility was arbitrary and capricious. Because the Commission's decision to do so was not inconsistent with the statutory text nor the Commission's own precedent, this argument also fails.

When determining whether a facility is eligible for qualifying facility status, the Commission must look at the combined power production capacity of "facilities located at the same site." 16 U.S.C. § 796(17)(A)(ii); *see also* 18 C.F.R. § 292.204(a)(1)–(2). As we have discussed, the Commission's interpretation of "facility" to encompass all the components working together to produce grid-usable AC power was reasonable. But standing on its own, Broadview's battery can store only DC power and cannot deliver any usable power to the grid. Accordingly, the battery is not a separate "facility"

under the Commission's reasonable interpretation of the statutory text.

Citing *Luz Development & Finance Corp.*, 51 FERC ¶ 61,078 (1990), the Utilities argue that Broadview's battery must be considered a separate facility and its capacity aggregated with that of the solar array or inverters. But *Luz* merely recognized that a battery can be a standalone qualifying facility, *id.* at 61,172; that possibility does not compel the result that it must be a separate facility. The battery in *Luz* was used to store energy purchased from the grid until it was later resold during periods of higher demand, *id.* at 61,168, and is easily distinguishable from Broadview's battery that stores DC power until it can be sent through the inverters and transformed into grid-usable AC power.

Finally, the Utilities challenge the Commission's decision to look at Broadview's instantaneous net power output and not its power output over time. The statute measures "power production capacity" in "megawatts." But power production over time is measured in "megawatt-hours." Rather than being arbitrary and capricious, the Commission's focus on instantaneous power production adhered to the statutory language.

B. SEIA's Petitions

Turning now to SEIA's petitions for review of the Commission's denial of its motion to intervene, "[o]ur analysis begins and ends with consideration of our jurisdiction." *Swanson Grp. Mfg. LLC v. Jewell*, 790 F.3d 235, 239 (D.C. Cir. 2015).

For this Court to have jurisdiction, the plaintiff must have standing. "The 'irreducible constitutional

minimum of standing contains three elements': (1) the plaintiff must have suffered injury in fact, an actual or imminent invasion of a legally protected, concrete and particularized interest; (2) there must be a causal connection between the alleged injury and the defendant's conduct at issue; and (3) it must be 'likely,' not 'speculative,' that the court can redress the injury." *Ctr. for Law & Educ. v. Dep't of Educ.*, 396 F.3d 1152, 1157 (D.C. Cir. 2005) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560– 61 (1992)).

SEIA fails on the first requirement as it has not suffered an Article III injury-in-fact. SEIA's claimed injury is that it was "effectively precluded" from defending the net output, or send-out, approach in the Commission's adjudication of Broadview's application. Pet. Br. at 9–10. According to SEIA, any reconsideration of that approach was likely to occur, if at all, during the Commission's contemporaneous rulemaking or the ensuing Ninth Circuit litigation. Because SEIA failed to anticipate FERC's decision to reconsider the send-out approach in the Broadview adjudication, it also failed to timely intervene in that proceeding and thus could not participate to defend the approach.

At the outset, it should be noted that agencies have "very broad discretion to decide whether to proceed by adjudication or rulemaking." *Conf. Grp., LLC v. FCC*, 720 F.3d 957, 965 (D.C. Cir. 2013). The Commission's decision to consider the send-out approach in the Broadview adjudication, rather than through the rulemaking process, was within the bounds of its discretion. SEIA's claimed injury presupposes that it had a right to participate in any proceedings regarding the send-out approach. It did not. "[T]he

mere fact that an adjudication creates a precedent that could harm a non-party does not create the injury-in-fact required for Article III standing." *Id.* at 959.

SEIA's failure to timely intervene is the result of its own mistaken judgment. The effect of that mistake—SEIA's inability to participate in the Commission's proceedings—does not give rise to an Article III injury. Accordingly, its petitions are dismissed.

CONCLUSION

For the reasons stated above, we deny the Utilities' petitions and dismiss SEIA's petitions.

WALKER, *Circuit Judge*, concurring in part and dissenting in part:

The Public Utility Regulatory Policies Act gives lucrative benefits to small facilities that produce solar power. It defines them as facilities with a "power production capacity" of no more than 80 megawatts. 16 U.S.C. § 796(17)(A)(ii).

Broadview is a solar-power facility. At its peak, it can produce up to 130 megawatts of useful power. So it is not a "small facility."

Because the Federal Energy Regulatory Commission concluded otherwise, I would grant the petitions for review and vacate FERC's decision.

I. Background

A. The Public Utility Regulatory Policies Act

The Public Utility Regulatory Policies Act encourages companies to produce renewable energy. *See* 16 U.S.C. § 824a-3(a); *see generally FERC v. Mississippi*, 456 U.S. 742, 745-46, 750-51 (1982) (describing the Act's history).

To achieve that goal, the Act gives extraordinary benefits to "small power production facilit[ies]." 16 U.S.C. § 796(17)(A). Those facilities produce electricity from "biomass, waste, renewable resources, [or] geothermal resources." *Id.* § 796(17)(A)(i). The Act exempts them from several regulatory burdens. *Id.* § 824a-3(e)(1) (directing FERC to make rules exempting "small power production facilities" from regulation under various statutes). And it guarantees them a viable market by forcing public utilities to buy power that small facilities produce. 16 U.S.C. § 824a-3(a)(2), (b).

Requiring public utilities to purchase all the power produced by small facilities is strong medicine. It can force them to buy power that they do not need or to buy power at an above-market price. That cost is passed on to consumers. *Powering America: Reevaluating the Public Utility Regulatory Policies Act's Objectives and its Effects on Today's Consumers: Hearing Before the H. Subcomm. on Energy & Commerce*, 115th Cong. 84 (2017) (testimony of Terry L. Kouba, Vice President, Alliant Energy).

Thus, the Act's definition of "small facility" plays a key role in the statutory scheme: It keeps the mandatory-purchasing regime within bounds. The broader the definition of "small facility," the greater the number of power plants that get special regulatory treatment under the Act.

The Act defines "small facility" as a "facility" with a "power production capacity" of no more than 80 megawatts. *Id.* § 796(17)(A)(ii).

B. Broadview's Design

Broad Reach Power makes solar and wind energy in California, Montana, Texas, Utah, and Wyoming. Its complex in Yellowstone County, Montana cost at least $2 billion to build. In 2019, the Montana Complex could deliver 620 megawatts of power. That is only slightly less than the amount of power produced by the Hoover Dam in 1939, when it became the world's largest hydroelectric facility. *The Story of the Hoover Dam*, Bureau of Reclamation (July 13, 2022), https://perma.cc/6JWN-BY77.

In 2019, the Montana Complex contained four separate but similar solar-power projects. One of them is called Broadview I.

Broadview includes a solar array, a battery, and inverters. With 470,000 solar panels, its solar array produces up to 160 megawatts of direct-current power. The battery stores some of those megawatts. And the inverters convert up to 80 megawatts from DC power to alternating-current power. Because the electric grid accepts only AC power, inversion makes the power ready for the grid to receive it.

Depending on the time of day, Broadview's components serve different purposes. During the day, the solar array sends 80 megawatts of power to the inverters and charges the battery. But at night, it can't generate power. That's when the battery matters most. At night, it sends stored power to the inverters and then on to the grid. With the battery, Broadview can deliver more power to the grid than it could without it.

C. FERC's Decision

In 2019, Broadview asked FERC to certify it as a "small facility." It argued that its "power production capacity" was not greater than 80 megawatts because its inverters can send only 80 megawatts to the grid at once. 16 U.S.C. § 796(17)(A)(ii).[1]

FERC initially denied Broadview's application, but it reversed course on rehearing. According to FERC, the Public Utility Act's definition of "small facility" is

---

[1] Because Broadview is more than one mile apart from the other facilities in the Montana Complex, FERC analyzes it separately under the small-facility rule. 18 C.F.R. § 292.204(a)(1)-(2); *see also* Order re. Broadview Solar III, 2021 WL 3641570 (Aug. 13, 2021) (accepting withdrawal of an application for small-facility status for another plant in Montana Complex).

ambiguous because the statute "neither defines the terms 'facility' and 'power production capacity,' nor explains how the Commission is supposed to ascertain the 'power production capacity' of any particular 'facility.'" JA 200. FERC decided to interpret "power production capacity" to mean the "maximum output that the facility can produce for the electric [grid]." JA 201.

Two intervenors, Northwestern Energy and the Edison Electric Institute, petitioned for this Court's review. If Broadview is a small facility, the Public Utility Act's mandatory-purchasing rule will force Northwestern and some of Edison's members to buy Broadview's power — even if they don't need it.

II. *Chevron*

The majority opinion captures the central issue: "The parties' dispute in this case turns on the meanings of 'facility' and 'power production capacity' in 16 U.S.C. § 796(17)(A). [The Public Utility Act] does not define these terms. In plain language, a facility's 'power production capacity' is the maximum amount of power that the facility can produce. But the statute does not state whether the relevant capacity is that of the individual subcomponent generating DC power, *i.e.*, the solar array, or of all the facility's components working together to produce grid-usable AC power, which would include the inverters." Majority Op. 6-7.

I agree with that summary. The statute does not expressly state whether "power production capacity" includes "all the facility's components working together." But a lack of express language does not mean that the statute has no answer to the question presented. I would not so quickly conclude, as the

Court's next sentence does, that "Congress has not spoken to the issue" and so we "must defer to any reasonable agency interpretation" under *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Majority Op. 7.

That is the path of "*Chevron* maximalism." *Buffington v. McDonough*, 143 S. Ct. 14, 21 (2022) (Gorsuch, J., concurring in denial of certiorari). When no express text makes the answer immediately obvious, some maximalists make a beeline to agency deference — before any inquiry into statutory structure, cross-references, context, precedents, dictionaries, or canons of construction. Then, they use the tools of statutory interpretation not to find the best reading of the text but instead to test whether the agency's interpretation is "reasonable." *Id.* at 20.

On the D.C. Circuit, *Chevron* maximalism is alive and well. *See, e.g.*, *Loper Bright Enterprises, Inc. v. Raimondo*, 45 F.4th 359, 369 (D.C. Cir. 2022) ("some question" about the meaning of a statute is enough to trigger *Chevron* deference); *American Hospital Association v. Azar*, 967 F.3d 818 (D.C. Cir. 2020) (relying heavily on *Chevron*), *rev'd sub nom American Hospital Association v. Becerra*, 142 S. Ct. 1896, 1906 (2022) (not mentioning *Chevron*).

But the Supreme Court's recent decisions repudiate maximalism. Indeed, the Court has not deferred to an agency under *Chevron* since 2016. *See, e.g.*, *Becerra v. Empire Health Foundation*, 142 S. Ct. 2354 (2022) (not mentioning *Chevron*); *National Federation of Independent Business v. OSHA*, 142 S. Ct. 661 (2022) (same); *BNSF Railway Co. v. Loos*, 139 S. Ct. 893 (2019) (same). Instead, the Court has

policed the limits of deference to agencies. *See, e.g.*, *West Virginia v. EPA*, 142 S. Ct. 2587 (2022).

The most important limit is found in *Chevron* itself: "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Chevron*, 467 U.S. at 843 n.9. In other words, courts must try every tool of statutory construction *before* declaring the text ambiguous and proceeding to agency deference. If they do, they "will almost always reach a conclusion about the best interpretation" of the statute, thus resolving any ambiguity. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2448 (2019) (Kavanaugh, J., concurring); *see also SAS Institute Inc. v. Iancu*, 138 S. Ct. 1348, 1358 (2018) (quoting *Chevron*, 467 U.S. at 843 n.9) ("Even under *Chevron*, we owe an agency's interpretation of the law no deference unless, after 'employing traditional tools of statutory construction,' we find ourselves unable to discern Congress's meaning.").

True, Congress may leave "a gap for the agency to fill." *Chevron*, 467 U.S. at 843. "For example, Congress might [direct] an agency to issue rules to prevent companies from dumping 'unreasonable' levels of certain pollutants. In such a case, what rises to the level of 'unreasonable' is a policy decision." Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2152 (2016). Where an agency uses its expertise to fill such a gap, courts should not second guess the agency's decision. *Id.*

But today's case is different. The Public Utility Act does not invite FERC to fill a policy gap. Instead, as FERC recognizes, the meaning of the statute's

technical language "turns on legal principles of the sort that a court usually [applies] — i.e., principles of statutory interpretation — and not determinations specifically entrusted to an agency's expertise." FERC Br. 40 n.9 (cleaned up). And courts should not defer when a statute's meaning can be resolved using normal interpretive tools. "The judiciary is the final authority on issues of statutory construction." *Chevron*, 467 U.S. at 843 n.9.

So here there is every reason to resist the temptation "habitua[lly] to defer to the interpretive views of [the] agenc[y]." *Valent v. Commissioner of Social Security*, 918 F.3d 516, 525 (6th Cir. 2019) (Kethledge, J., dissenting). Instead, we can decide this case by applying, in FERC's words, the "legal principles of the sort that a court usually [applies] — i.e., principles of statutory interpretation." FERC Br. 40 n.9 (cleaned up). That approach follows the Supreme Court's recent *Chevron* caselaw and avoids further entrenching a vertical split between how the Supreme Court and lower courts apply *Chevron*.[2]

---

[2] Though the Supreme Court has given up on *Chevron* maximalism (and perhaps on *Chevron* altogether), lower courts have not. Between 2003 and 2013, lower courts applied *Chevron* in 74.8% of statutory interpretation cases involving agencies and reached step two 65.7% of the time. Kent H. Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 Mich. L. Rev. 1, 29, 33 (2017). That trend has continued since then. In 2020 and 2021, circuit courts applied *Chevron* 84.5% of the time and reached step two in 59.2% of those cases. See Brief of the Cato Institute and Liberty Justice Center as Amicus Curiae in Support of Petitioners at 21, *Loper Bright v. Raimondo*, No. 22-451 (2022) (supporting petition for certiorari).

III. Broadview Is Not a "Small Facility"

Applying the normal tools of statutory interpretation, Broadview is not a "small facility" under the Public Utility Act because its "power production capacity" is greater than 80 megawatts.

A. "Facility"

Start with the term "facility." 16 U.S.C. § 796(17)(A). A facility is "something . . . that is built, installed, or established to serve a particular purpose." Facility (def. 4b), *Merriam-Webster* (2023). The statute's focus on a "facility" suggests that we should assess the production capacity of a power plant *as a whole*, not the capacity of an individual component.

That rules out a few possibilities.

First, it tells us that we should not look only at the capacity of Broadview's 160-megawatt solar array. That approach would ignore the facility's other components — for instance, the inverters that limit the array's output to the grid.

Second, it tells us that we should not exclude the power used to charge the facility's battery. The battery is part of the facility. So refusing to count power that the solar array sends to the battery fails to give full meaning to the word "facility."

FERC says we shouldn't count power sent to the battery because it is "not useful to anybody." *See* Oral Arg. Tr. 31. But a battery like Broadview's lets a solar facility send power to the grid at times when it otherwise could not. By allowing the facility to deliver power at night, the battery "increase[s] [Broadview's]

ability to provide reliable and/or timely service to . . . customers." JA 54 (Pasley Affidavit).

The battery also makes Broadview more efficient. A solar-power facility without a battery sends to the grid "approximately 25 to 30 percent" of the maximum power its array could theoretically generate each day. *Id.* With the battery, Broadview sends "approximately 35 to 40 percent," *id.*, because it is "capable of sustaining its maximum output for additional hours in the day," JA 23. That increased efficiency makes the facility more profitable. *See* Christopher Cerny, *A Broad View of Broadview Solar: How FERC's Whiplash-Inducing Orders Expand the Scope of PURPA*, 23 Minn. J.L. Sci. & Tech. 363, 406 (2022).

In short, the battery *is* useful. It lets Broadview make more money by prolonging its maximum output.

B. "Power Production Capacity"

Turn next to the phrase "power production capacity."

1. "Power"

Power means "a source or means of supplying energy, especially[] electricity." Power (def. 6), *Merriam-Webster* (2023). "Power" includes both DC power and AC power. *See Chemeheuvi Tribe of Indians v. Federal Power Commission*, 489 F.2d 1207, 1217 (D.C. Cir. 1973) (discussing history of power transmission). So both the DC power used to charge the battery and the AC power sent directly to the grid count as "power."

Yet FERC claims that only the 80 megawatts of AC power sent to the grid should count as Broadview's power-production capacity. That adds an atextual limit that Congress didn't adopt. The Public Utility Act says "power production capacity," not "AC power production capacity." And Congress is perfectly capable of saying "AC" when it wants to. *See, e.g.*, 26 U.S.C. § 48E(a)(2)(A)(ii) (defining a "qualified facility" as one "with a maximum net output of less than 1 megawatt (*as measured in alternating current*))" (emphasis added).

2. "Production"

After "power" comes "production." To "produce" something is to "create" it, or to "cause [it] to accrue." Produce (defs. 6 & 7), *Merriam-Webster* (2023). Another apt synonym is to "generate." *See Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1171-72 (2021) (noting the "close[] connect[ion]" between the verb "produce" and the noun "generator").

Power sent to a battery like Broadview's is created and does accrue. Before the sun's rays hit Broadview's array, the battery is empty. It is charged when the facility converts solar energy into useful power. If Broadview did not "produce" the power used to charge the battery, what did?[3]

---

[3] Some power at facilities like Broadview is lost to inefficiencies during production. FERC allows power plants to deduct those "electrical losses" from their power production capacity. *See* JA 210. So if Broadview had a 160-megawatt array, 80-megawatt inverters, and no battery, it would count as a "small facility" — albeit an inefficient one that loses half of its potential output during production.

Consider what happens when the battery charges. Broadview uses a lithium-ion battery. Charging that battery prompts a chemical reaction, causing lithium ions to move within the battery. *How Does a Lithium-Ion Battery Work?*, Energy.gov (Sept. 14, 2017), https://perma.cc/CUA8-Y9UK (during charging "[l]ithium ions are released by the cathode and received by the anode"). Without power, that chemical reaction could not happen. So Broadview must "produce" the power used to charge the battery.

3. "Capacity"

In the statute's context, "capacity" means "the maximum amount of power that the facility can produce." Majority Op. 6-7; *see also* Capacity (def. 5), *Merriam-Webster* (2023) (defining "capacity" as "maximum output").

But here, FERC rewrites the statute. It says "capacity" includes only the power that a facility supplies to the electric grid.

Yet that changes "power production capacity" to "power delivery capacity." And the word "production" means something different from "delivery." *See* Deliver (def. 5), *Merriam-Webster* (2023) ("[T]o send . . . to an intended target or destination.").[4]

To its credit, FERC conceded at oral argument that "power production capacity" would likely include

---

[4] FERC conflated "production" and "delivery" in its rehearing order, although its counsel wisely retreated from that approach on appeal. *Compare* JA 201 (FERC: "'production' and 'delivery' . . . are overlapping"), *with* Oral Arg. Tr. 33 (FERC: "we're not talking about delivery"); *id.* at 37 ("[Y]ou're not depending on a conflation of the words production and delivery — right? [FERC:] Correct.").

power never delivered to the grid if it is used "on site" for a "useful" purpose like powering an on-site factory. Oral Arg. Tr. 30. But that concession just highlights the problem with FERC's approach: Charging a battery like Broadview's *is* a useful purpose.

C. Broadview's "Power Production Capacity"

Broadview has the capacity to produce 130 megawatts of power. It produces 80 megawatts of inverted AC power that is delivered to the grid *while* producing 50 megawatts of not-yet-inverted DC power to charge its battery.[5] Because "power" includes AC and DC power, Broadview's power production capacity is the sum of the two:

$$80 + 50 = 130$$

Consider an analogy. Every weekday, a lumberjack cuts down two trees and chops them into sellable timber. But he has a small truck and can take only one tree's worth of timber to market daily. What is the lumberjack's daily timber "production capacity"? Two trees. Every day he works, he can turn two trees into sellable timber. (Maybe he delivers some of the other trees on the weekends.)

Broadview is similar. When the sun is out, Broadview produces 80 megawatts of power for the inverters and 50 megawatts of power for the battery — the equivalent of the lumber-jack's two trees. Like

---

[5] The record is unclear on the amount of power the battery can receive from the array. But the parties agree that the battery can take in up to 50 megawatts. *Compare* Edison Br. 10 n.3 ("The Broadview Project's battery can be charged at the same rate as it discharges — i.e., it can receive and send out 50 megawatts of energy each hour."), *with* FERC Br. 14 ("[U]p to 50 megawatts of power is diverted to battery storage for later release.").

the lumberjack's second tree, the 50 megawatts of power sent to the battery is still produced even though it isn't immediately delivered to the market for use on the grid. The key is that the 50 megawatts produced by the solar array and sent first to the battery is not wasted by the facility. Those 50 megawatts end up on the grid — just like the 80 megawatts sent from the solar array directly to the inverters.

That gives Broadview a power production capacity of 130 megawatts. And because the power production capacity of a "small facility" cannot exceed 80 megawatts, Broadview is not a "small facility." 16 U.S.C. § 796(17)(A).

IV. Conclusion

The following three facts are uncontested:

1. When the Public Utility Act says "power," it does not specify between AC power and DC power.

2. Broadview can send 80 megawatts of AC power directly to the grid for sale via the inverters.

3. At the exact same moment, up to 50 megawatts of DC power goes straight to the battery, then later to the inverters, and then on to the grid for sale.

Because Broadview can produce 80 megawatts for its inverters while it simultaneously produces 50 megawatts for its battery, Broadview's facility is capable of producing more than 80 megawatts of power. So it is too large to be a "small facility."

For that reason, I would grant the petitions, vacate the rehearing orders, and remand to FERC for reconsideration.[6]

[6] I agree with the majority that Solar Energy lacks standing to challenge FERC's denial of its motion to intervene.

APPENDIX B

175 FERC ¶ 61,228

UNITED STATES OF AMERICA

FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Richard Glick, Chairman;
Neil Chatterjee, James P. Danly,
Allison Clements, and Mark C. Christie.

Broadview Solar, LLC Docket No. QF17-454-007

ORDER ADDRESSING ARGUMENTS RAISED ON REHEARING

(Issued June 17, 2021)

1. On March 19, 2021, the Commission issued an order on rehearing[1] that set aside the Commission's prior decision[2] to deny Broadview Solar, LLC's (Broadview) application for Commission certification that Broadview's proposed hybrid solar photovoltaic (PV) facility is a qualifying small power production facility (QF) pursuant to the Public Utility Regulatory Policies Act of 1978 (PURPA)[3] and section 292.207(b) of the Commission's regulations.[4] The Edison Electric Institute (EEI), NewSun Energy LLC (NewSun),

---

[1] *Broadview Solar, LLC*, 174 FERC ¶ 61,199 (2021) (March 2021 Order)

[2] *Broadview Solar, LLC*, 172 FERC ¶ 61,194 (2020) (September 2020 Order).

[3] 16 U.S.C. §§ 796(17), 824i, 824a-3.

[4] 18 C.F.R. § 292.207(b) (2020).

NorthWestern Corporation (NorthWestern), and the Solar Energy Industries Association (SEIA) filed timely requests for rehearing of the March 2021 Order.[5]

2. Pursuant to *Allegheny Defense Project v. FERC*,[6] the rehearing requests filed in this proceeding may be deemed denied by operation of law. However, as permitted by section 313 of the Federal Power Act,[7] we are modifying the discussion in the March 2021 Order and continue to reach the same result in this proceeding, as discussed below.[8]

I. Background

3. To be certified as a QF, a small power production facility must comply with the fuel use and size criteria specified in the Commission's regulations and must either file for self-certification of QF status or apply for and obtain Commission certification of

---

[5] EEI April 16, 2021 Request for Rehearing (EEI Rehearing Request); NewSun April 19, 2021 Request for Rehearing (NewSun Rehearing Request); NorthWestern April 19, 2021 Request for Rehearing (NorthWestern Rehearing Request); SEIA April 19, 2021 Request for Rehearing (SEIA Rehearing Request).

[6] 964 F.3d 1 (D.C. Cir. 2020) (en banc).

[7] 16 U.S.C. § 825*l*(a) ("Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.").

[8] *Allegheny Def. Project*, 964 F.3d at 16-17. The Commission is not changing the outcome of the March 2021 Order. *See Smith Lake Improvement & Stakeholders Ass'n v. FERC*, 809 F.3d 55, 56-57 (D.C. Cir. 2015).

QF status.[9] Regarding size, the "power production capacity" of the facility cannot exceed 80 megawatts (MW).[10]

4. Broadview is developing a combined solar PV and battery storage facility in Yellowstone County, Montana, that will interconnect to NorthWestern's transmission system.[11] The facility will include a coupled array of solar PV panels with a gross capacity of 160 MW of direct current (DC) electricity and a battery energy storage system with the capacity to discharge 50 MW of DC electricity for up to 4 hours (i.e., a total of 200 MW-hours (MWh)).[12] Broadview's solar PV panels and battery energy storage system will connect to 20 inverters, each capable of converting DC electricity into a maximum output of 4.127 MW alternating current (AC) electricity.[13] Together, the inverters will have a maximum output

---

[9] 18 C.F.R. § 292.203(a) (2020) (citing 18 C.F.R. §§ 292.204(a) (2020) (size limit), 292.204(b) (fuel use), 292.207(a) (self-certification), and 292.207(b) (application for Commission certification)).

[10] *Id.* § 292.204(a)(1).

[11] Broadview Solar, LLC September 11, 2019 Application at 1 (Broadview 2019 Application).

[12] *Id.* at 2.

[13] Broadview states that, without the DC-to-AC inverters, the power is not in a form that can be transmitted onto the grid. Broadview claims that these inverters are the "gateway" between the DC power provided by the solar array and battery storage system and the AC grid because the amount that the 20 inverters can deliver limits the maximum gross power capacity of the facility (i.e., power that can be delivered to the AC grid). September 2020 Order, 172 FERC ¶ 61,194 at PP 2-3 (citing Broadview 2019 Application, attach. B, Aff. of Lloyd Pasley at PP 2-4).

of 82.548 MW of AC electricity. After deducting facility loads and losses totaling 2.548 MW, the facility's maximum net output to NorthWestern's system will be 80 MW of AC electricity.[14] When the solar array produces more DC electricity than the inverters can convert to AC electricity, the excess DC electricity will be stored in the battery energy storage system and will not be delivered to the point of interconnection with NorthWestern's system until a later time.[15]

5. On September 11, 2019, Broadview applied for Commission certification that Broadview's proposed facility is a small power production QF. Broadview's accompanying Form No. 556 reported the facility's maximum gross power production capacity as 82.548 MW to reflect the facility's design capabilities, including limiting elements. The form reported the facility's maximum net power production capacity as 80 MW.[16] The March 2021 Order provides full details about Broadview's other filings for self-certification, which date back to December 2016.[17] Across all of Broadview's filings, Broadview reported a net power production capacity of 80 MW to be delivered to NorthWestern's system. Consistent with that fact, Broadview has entered into a standard Large

---

[14] Broadview 2019 Application at 7-8.

[15] September 2020 Order, 172 FERC ¶ 61,194 at P 6 (citing Broadview 2019 Application at 7).

[16] Broadview 2019 Application at 9.

[17] March 2021 Order, 174 FERC ¶ 61,199 at P 6.

Generator Interconnection Agreement with NorthWestern for 80 MW of interconnection service.[18]

6. In the September 2020 Order, the Commission explained that Broadview's facility "represents a significant departure from any project that the Commission has previously considered under a QF application."[19] The Commission thus "reconsider[ed] whether it is a facility's 'send out' that is determinative of whether the facility complies with the 80 MW threshold established in PURPA."[20] Upon that reconsideration, the Commission departed from its previous, longstanding interpretation that a facility's "power production capacity" is determined by the facility's "maximum net output" or "send out."[21] The Commission concluded that the "send out" analysis first applied in *Occidental* is inconsistent with the 80-MW "power production capacity" limit for small power production QFs.[22] The Commission found that, because the inverters at Broadview's facility impose a conversion or output limit rather than a limit on the solar PV array's power production

---

[18] Broadview September 11, 2019 Application at 2 n.3; Broadview October 17, 2019 Answer at 4 (noting that the agreement provides that the total size of the project "will be 80 MW based on the max output of the inverters").

[19] September 2020 Order, 172 FERC ¶ 61,194 at P 22.

[20] *Id.*

[21] *Id.* PP 18-23 (citing *Occidental Geothermal, Inc.*, 17 FERC ¶ 61,231 (1981) (*Occidental*); *Malacha Power Project, Inc.*, 41 FERC ¶ 61,350 (1987) (*Malacha*); *Am. Ref-Fuel Co. of Bergen Cty.*, 54 FERC ¶ 61,287 (1991)).

[22] *Id.* P 23.

capacity of 160 MW, Broadview could not meet the 80-MW statutory limit for "power production capacity."[23]

7. Broadview sought rehearing. In the March 2021 Order, the Commission set aside the September 2020 Order.[24] The Commission determined that the best reading of the PURPA's 80-MW limit on a facility's power production capacity is "a limit on the facility's net output to the electric utility (i.e., at the point of interconnection), taking into account all components necessary to produce electric energy in a form useful to an interconnected entity."[25] Applying this interpretation, the Commission concluded that "Broadview's facility will conform to the size limit for a qualifying small power production facility established in PURPA and the Commission's regulations."[26]

II. Discussion

A. Procedural Matters

8. In the March 2021 Order, the Commission denied late motions to intervene from NewSun; Pine Gate Renewables, LLC; SEIA; Southern Current, LLC; and TerraForm Power, LLC.[27] The Commission concluded that the movants had not demonstrated good cause for their delay, as required by Rule 214(d) of the Commission's Rules of Practice and Procedure.[28] Because these entities are not parties to

---

[23] *Id.* P 25.

[24] March 2021 Order, 174 FERC ¶ 61,199 at P 23.

[25] *Id.* P 26.

[26] *Id.* PP 32-33.

[27] *Id.* PP 10-18.

[28] *Id.* P 15; 18 C.F.R. § 385.214(d) (2020).

this proceeding, the Commission rejected their requests for rehearing.[29]

9. NewSun and SEIA claim on rehearing that the Commission erred in denying their motions to intervene. SEIA restates its position that it had no indication of a need to intervene because the Commission did not indicate in this individual proceeding or in its later-opened rulemaking on PURPA that the Commission was considering revising its rules for interpreting the statutory phrase "power production capacity."[30] SEIA and NewSun also note that the March 2021 Order relied, in part, on the late intervention standard established in *Tennessee Gas Pipeline Company, LLC*.[31] They claim that the Commission's recent decision in *Northern Natural Gas Company*[32] reversed *Tennessee Gas* and introduced a more permissive intervention policy.[33] SEIA and NewSun state that granting late intervention will satisfy the goals expressed in Commissioner Clements' concurrence to *Northern Natural*: to create "a fuller record and the expression of a wider range of perspectives, both of which lead to

---

[29] March 2021 Order, 174 FERC ¶ 61,199. at P 17.

[30] SEIA Rehearing Request at 4.

[31] *Id.* at 4-5; NewSun Rehearing Request at 2 (citing March 2021 Order, 174 FERC ¶ 61,199 at PP 11, 15); *see Tenn. Gas Pipeline Co., LLC*, 162 FERC ¶ 61,013, at P 10 (2018) (*Tennessee Gas*).

[32] 175 FERC ¶ 61,052 (2021) (*Northern Natural*).

[33] SEIA Rehearing Request at 4-5; NewSun Rehearing Request at 3-4.

better-informed and more durable decisions fulfilling the Commission's obligations."[34]

10. We continue to find that the movants have not satisfied the higher burden to demonstrate good cause for their delay in seeking intervention until after the issuance of a dispositive order.[35] Courts have recognized that "the Commission has steadfastly and consistently held that a person who has actual or constructive notice that his interests might be adversely affected by a proceeding, but who fails to intervene in a timely manner, lacks good cause under Rule 214."[36] This case is not analogous to *Northern Natural*.[37] In that case, a natural gas pipeline company intervened out-of-time, but before the Commission's dispositive order, based on general concerns that the Commission may change industry-wide policy in another natural gas pipeline's certification proceeding.[38] Here, the pleadings of the parties filed between October 2019 and March 2020 addressed the parties' dispute concerning the Commission's methodology for determining a facility's "power production capacity" and specifically

---

[34] *Id.* at 5 (quoting *Northern Natural*, 175 FERC ¶ 61,052 (Clements, Comm'r, concurring at P 1)); NewSun Rehearing Request at 4 (quoting same).

[35] March 2021 Order, 174 FERC ¶ 61,199 at P 15 (internal citations omitted).

[36] *See, e.g.*, *Cal. Trout v. FERC*, 572 F.3d 1003, 1022 (9th Cir. 2009).

[37] *See Northern Natural*, 175 FERC ¶ 61,052.

[38] Enbridge Gas Pipelines, Motion to Intervene Out-of-Time, Docket No. CP20-487-000, at 3 (filed Mar. 17, 2021).

discussed *Occidental*."[39] These parties recognized that Broadview's proposal for certification represented a novel project configuration that the Commission had not previously considered for certification. In contrast to *Northern Natural*, movants fail to "explain why they could not have sought to intervene prior to the Commission's September 2020 Order,"[40] given the clarity with which these issues were presented in this proceeding from an early stage. Entities interested in becoming a party to Commission proceedings may not wait to see how issues might evolve before deciding whether to intervene to protect their interests.[41] NewSun and SEIA have not persuaded us that a different result is warranted here.

B. Substantive Matters

---

[39] March 2021 Order, 174 FERC ¶ 61,199 at P 15 (citing Broadview 2019 Application at 3-5, 8; NorthWestern October 2, 2019 Motion to Intervene and Protest at 6; EEI October 2, 2019 Motion to Intervene and Protest at 2; Broadview October 17, 2019 Answer at 7-8; NorthWestern November 1, 2019 Motion for Leave to Answer and Answer at 3; Broadview November 5, 2019 Motion for Leave to Answer and Answer at 2).

[40] *Id.*

[41] *See, e.g.*, *Bradwood Landing, LLC*, 126 FERC ¶ 61,035, at PP 11, 16 (2009) (denying late intervention to movant who claimed that scientific studies made it more aware of its interests in the proceeding); *Cent. Neb. Pub. Power & Irrigation Dist.*, 125 FERC ¶ 61,192, at P 12 (2008) ("The Commission expects parties to intervene in a timely manner based on the reasonably foreseeable issues arising from the applicant's filings and the Commission's notice of proceedings."); *Broadwater Energy, LLC*, 124 FERC ¶ 61,225, at P 13 (2008) ("Those entities with interests they intend to protect are not entitled to wait until the outcome of a proceeding and then file a motion to intervene once they discover the outcome conflicts with their interests.").

1. Interpreting PURPA

11. Under PURPA, a "qualifying small power production facility" means a facility:

> [that] produces electric energy solely by the use, as a primary energy source, of biomass, waste, renewable resources, geothermal resources, or any combination thereof;[42]
>
> [that] has a power production capacity which, together with any other facilities located at the same site (as determined by the Commission), is not greater than 80 megawatts;[43] and
>
> that the Commission determines, by rule, meets such requirements (including requirements respecting fuel use, fuel efficiency, and reliability) as the Commission may, by rule, prescribe.[44]

12. EEI asserts that the Commission erred by adopting interpretations of the terms "small power production facility," "qualifying small power production facility," and "power production capacity" that are either contrary to the plain language of PURPA or are unreasonable interpretations of the statutory text.[45]

13. As support for its claim, EEI provides historical and current definitions of "production" and "capacity."[46] EEI explains that "production" means

---

[42] 16 U.S.C. § 796(17)(A)(i) (defining "small power production facility").

[43] *Id.* § 796(17)(A)(ii).

[44] *Id.* § 796(17)(C).

[45] EEI Rehearing Request at 3, 8.

[46] *Id.* at 8-11.

the "creation" of something or "that which is made."[47] EEI contrasts this definition from those for "delivery" or "send out," which refer to the amount of a thing that is transferred, in whole or in part, after its creation.[48] In turn, EEI explains that "capacity" refers to a thing's "ability to produce," i.e., what it is "capable" of making.[49] EEI contrasts "capacity" with "output," asserting that if a facility is able to generate and contain more power than it is able to send to the grid, then the facility's capacity is greater than its output.[50]

14. EEI also claims that the broader statutory context supports its preferred approach. EEI contends that PURPA's criterion that a QF "produces electric energy solely by the use" of certain "energy source[s]"[51] supports an interpretation that "production" refers to the total amount of energy that can be generated by using or harvesting an energy source, irrespective of what constraints may later be placed on output.[52] EEI further claims that Congress intentionally modified the meaning of "capacity" in different contexts, for example using the phrase "transmission capacity" in other provisions of PURPA.[53] Because Congress chose to cap a facility's "power production capacity," not its "output capacity," EEI asserts that the term capacity is focused on

---

[47] *Id.* at 8-9 (internal citations omitted).

[48] *Id.* at 9 (internal citations omitted).

[49] *Id.* at 11-12 (internal citations omitted).

[50] *Id.*

[51] *Id.* at 10-11 (quoting 16 U.S.C. § 796(17)(A), (E)).

[52] *Id.* at 10-11.

[53] *Id.* at 13.

generation equipment and refers to generation output.[54] EEI states that PURPA does not contain language suggesting that the "power production capacity" of a facility should be judged by reference to its send out or net output, for example "PURPA does not explicitly limit the overall amount of energy that can be sold from a QF or the size of interconnections to such facilities."[55]

15. Turning to legislative history, EEI notes that the House Conference Report for PURPA includes a sentence that "[t]he power production capacity of the facility means the rated capacity of the facility."[56] Although the phrase "rated capacity" is nowhere defined in PURPA or in the House Conference Report, EEI proposes to define it as "planned aggregate nameplate capacity."[57] EEI counts a "rated capacity" of at least 120 MW at Broadview's proposed facility by "look[ing] only at the rated capacity of all the devices that can send power to the grid at the location and ignor[ing] the use of artificial devices that prevent the rated capacity from ultimately reaching the electricity system."[58] By what appears to be a similar method, NorthWestern calculates a "power production capacity" of 210 MW at Broadview's facility by combining the 160-MW solar PV array and the 50-MW battery.[59] NorthWestern claims that the Commission unlawfully expanded the statute by

---

[54] *Id.* at 12.

[55] *Id.* at 25.

[56] *Id.* at 13 (citing H.R. Rep. 95-1750 at 89 (1978)).

[57] *Id.* at 13. EEI cites no basis for this definition.

[58] *Id.* at 14 (quoting EEI October 2, 2019 Comments at 6).

[59] NorthWestern Rehearing Request at 5-6.

granting QF status to a facility with a power production capacity almost three times larger than the statute's 80-MW limit.[60]

16. We are not persuaded by EEI's efforts to define "power" and "production" and "capacity," as applied to PURPA.

17. In the March 2021 Order, the Commission explained that "facility" and "power production capacity" are not defined in the statute and do not have commonly understood meanings that, taken together, speak directly to the specific question raised in this proceeding: how should the Commission measure the power production capacity of a novel facility whose generating subcomponents (e.g., solar panels) have a nameplate capacity of greater than 80 MW, but that is physically incapable of producing more than 80 MW for sale to the interconnected electric utility at any one point in time.[61] The Commission explained that, in answering that question, it could either look: (1) only to generating subcomponents or (2) to the maximum output that the facility as a whole can produce for the electric

---

[60] *Id.* at 5-6.

[61] March 2021 Order, 174 FERC ¶ 61,199 at P 23. Even if we were to track EEI's proposed approach, i.e., that under PURPA "production" should mean the "creation" of something or "that which is made" and that under PURPA "capacity" refers to a thing's "ability to produce," our ultimate determination does not change. Because the grid is an AC grid, the appropriate measure of "creation" and of the "ability to produce" should be the creation of and the ability to produce AC electricity. And no one disputes that, when AC electricity is measured, Broadview's solar cells will produce no more than 80 MW of AC electricity as described in the March 2021 Order and elsewhere in this order.

utility after accounting for all the constituent parts that make up the facility, which in this case includes the inverters.[62] In light of those multiple interpretations, the Commission found that the statute is ambiguous as to how the Commission is to measure a facility's power production capacity, and the Commission concluded that the latter approach is the best reading of the statute. [63]

18. EEI would have us take the former approach, arguing that PURPA does not suggest that "power production capacity" be judged by reference to a facility's send out."[64] Doing so would mark a sharp break with Commission precedent. Beginning nearly 40 years ago, shortly after PURPA was enacted, the Commission in *Occidental* specifically rejected an approach tied to the words "rated capacity."[65] The Commission noted flaws in approaches that determine power production capacity by "the nominal rating of generating equipment in the facility" or by "the nominal rating of even a key component of the facility."[66] Instead, the Commission reasonably selected the second approach, described above, which is rooted in "the maximum net output of the facility which can be safely and reliably achieved under the

---

[62] *Id.*

[63] *Id.* (internal citations omitted).

[64] EEI Rehearing Request at 25.

[65] *Occidental*, 17 FERC ¶ 61,231 at 61,444; *see, e.g.*, *Davis v. U.S.*, 495 U.S. 472, 484 (1990) (explaining that courts "give an agency's interpretations and practices considerable weight where they involve contemporaneous construction of a statute and where they have been in long use").

[66] *Occidental*, 17 FERC ¶ 61,231 at 61,144-45.

most favorable operating conditions likely to occur over a period of several years."[67] *Occidental*, *Malacha,* and later cases applying the "send out" approach relied on the related premises that power production capacity means output in a form useful to an interconnected entity and that the owner or operator of a facility should not be allowed to obtain the benefits of QF status for more than the facility's net output because only the amount of the net output will be capable of being avoided on an interconnected utility's system.[68] To replace this approach with one based on the rated capacity of selected components of the facility as EEI requests would disrupt decades of reliance by the industry on Commission precedent.

19. Moreover, EEI's position that Congress used "power production capacity" intentionally to focus on the capacity of generation equipment and to refer only to generation output fails to adequately give meaning to Congress's application of the size limit to the "facility" seeking certification. After all, it is the "facility" that is being certified as a QF pursuant to PURPA, and the term "facility" is best read to encompass all of the putative QF's component parts as they work together as a whole, rather than just specific individual components, which, on their own, could not provide power to the interconnecting

---

[67] *Id.* at 61,445

[68] March 2021 Order, 174 FERC ¶ 61,199 at PP 27-30 (discussing or citing *Occidental*, 17 FERC ¶ 61,231; *Malacha*, 41 FERC ¶ 61,350; *Power Developers, Inc.*, 32 FERC ¶ 61,101 (1985); *Penntech Papers, Inc.*, 48 FERC ¶ 61,120 (1989); *Turners Falls Limited P'ship*, 53 FERC ¶ 61,075 (1990)).

utility.[69] Accordingly, focusing only on the solar panels in this instance would ignore the commonly understood meaning of the term facility without any textual indication that Congress intended us to do so.[70]

20. The Commission also considered the terms "power production capacity" and "facility" in light of "their context and with a view to their place in the overall statutory scheme."[71] Although EEI is correct that "PURPA does not explicitly limit the overall amount of energy that can be sold from a QF or the size of interconnections to such facilities,"[72] the Commission's approach appropriately fulfills the long-established principle of statutory construction to

---

[69] March 2021 Order, 174 FERC ¶ 61,199 at P 24 (internal citations omitted).

[70] *Id.* P 24.

[71] *Id.* P 26 (citing *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989) ("[S]tatutory language cannot be construed in a vacuum. It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.")). *See Graham Cty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 559 U.S. 280, 290 (2010) (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 568 (1995)) ("Courts have a duty to 'construe statutes, not isolated provisions.'"); *Johnson v. United States*, 559 U.S. 133, 139 (2010) ("Ultimately, context determines meaning."); *Gen. Dynamics Land Sys. v. Cline*, 540 U.S. 581, 596 (2004) (It is a "cardinal rule that statutory language must be read in context [since] a phrase gathers meaning from the words around it." (quotations omitted)); *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) (We look to "the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.")).

[72] EEI Rehearing Request at 25.

read the provisions of a statute as a harmonious whole. As we explained in the March 2021 Order:

> The purpose of PURPA's 80 MW "power production capacity" limitation is to reserve the benefits of QF status for only certain types of facilities. When a facility meets the QF requirements, the benefits of that status—e.g., the right to interconnect with the relevant electric utility and sell the facility's output to that utility at an avoided-cost rate —accrue to the facility as a whole. … [The Commission's approach] aligns the 80-MW limitation with the mandatory obligations and interconnection rights that are the foundation of Congress's efforts to "encourage" QF development under PURPA.[73]

We continue to find that a comprehensive reading of the statute, as we explained in the March 2021 Order, supports the Commission's approach, in which power production capacity is measured based on what the facility can actually produce for sale to the interconnected electric utility.[74] EEI has not demonstrated that the Commission's interpretation of the statute is incorrect or unreasonable. Thus, we continue to find that "the best interpretation of the 80-MW limit on a facility's power production capacity is as a limit on the facility's net output to the electric utility (i.e., at the point of interconnection), taking into account all components necessary to produce electric energy in a form useful to an interconnected entity."[75] As the Commission explained, this interpretation is consistent with four decades of

---

[73] March 2021 Order, 174 FERC ¶ 61,199 at P 26.

[74] *Id.* P 25.

[75] *Id.* P 26.

precedent using the "send out" analysis to determine the "power production capacity" of a facility and is also consistent with the information-reporting requirements of the Commission's Form No. 556 which is submitted when seeking certification.[76]

2. Novel Facility

21. In the March 2021 Order, the Commission explained that the novel aspects of Broadview's proposed facility do not cause the facility to exceed PURPA's "power production capacity" limit:

To be sure, Broadview's facility is distinct in certain respects from the facilities that the Commission considered when it first applied the "send out" test. Nevertheless, on reconsideration, we do not believe that those differences, including the presence of a 200-MWh battery energy storage system and a 160-MW solar array, are material for the purposes of determining whether Broadview's "facility" has a "power production capacity" of no more than 80 MW. Although Broadview's configuration allows it to more consistently deliver a higher share of the 80 MW power production capacity, that configuration does not change the fact that the Broadview facility is not actually capable of providing more than 80 MW at any one point in time at its point of interconnection with NorthWestern. On reconsideration, we find that while this effectively increases the Broadview facility's capacity factor, it does not change the Broadview facility's "power production capacity" or call into question our longstanding reliance on the

[76] *Id.* PP 27-33

"send out" analysis to measure power production capacity.[77]

* * *

Because Broadview's facility—including the PV panels, inverters, and the battery system—can deliver a maximum of 80 MW of power to NorthWestern's system at any one point in time, the power production capacity of Broadview's facility cannot and will not exceed 80 MW.[78]

22. On rehearing, EEI raises several related arguments that the solar PV array, battery system, and DC-to-AC inverters at Broadview's facility cause the facility to exceed PURPA's "power production capacity" limit.[79] EEI argues that the Commission's decision in the March 2021 Order to grant QF status for Broadview's novel facility frustrates Congress's purposes in PURPA.[80]

23. EEI argues that *Occidental*, *Malacha*, and similar precedent address "normal operations"[81] of "facilities that can only deliver the power generated by 80 MW of generation equipment,"[82] where "the amounts of power deducted from the nominal capacity reflected power that would not, and could not, ever be delivered to an interconnected entity because those

---

[77] *Id.* P 32.

[78] *Id.* P 33.

[79] EEI Rehearing Request at 18-25.

[80] *Id.* at 15-18.

[81] *Id.* at 21.

[82] *Id.* at 25.

amounts were lost due to the facility's 'essential electricity uses.'"[83]

24. By contrast, EEI characterizes Broadview's facility as a facility that "can deliver the power created by equipment capable of generating substantially more than 80 MW."[84] Put another way, EEI states that Broadview's facility is purposefully designed with a 160-MW solar PV array "to generate and ultimately deliver to the grid double the statutory limit of 80 MW."[85] EEI argues that the facility does so by making "artificial diversions of electricity to batteries—that involve not losses of power required for essential electricity uses, but rather time-shifting for later delivery to the grid."[86] EEI asserts that Broadview uses "the configuration of the [facility's] inverters to artificially suppress the maximum output of the plant onto the grid solely for QF-qualification purposes."[87]

---

[83] *Id.* at 19.

[84] *Id.* at 25.

[85] *Id.* at 20. Broadview cannot "ultimately deliver to the [AC] grid double the statutory limit of 80 MW." It can only deliver 80 MW of AC electricity to the grid, as we have described in the March 2021 Order and elsewhere in this order.

[86] *Id.* at 23. Based on the use of the battery, EEI criticizes the Commission's conclusion that power sent to the battery storage system is only "produced" when it is later delivered to the grid, which EEI says is an unnatural and unreasonable interpretation of "production." *Id.* at 10. For the same reason, EEI criticizes the Commission's conclusion that the facility's net output to the electric utility is only 80 MW. *Id.* at 24.

[87] *Id.* at 21. We disagree with EEI; inverters do not "artificially" suppress output. Rather, inverters convert DC electricity, which

25. EEI argues that the Commission's approach to determining the "power production capacity" of Broadview's proposed facility frustrates Congress's purposes as reflected in PURPA. EEI claims that the practical effect of the Commission's "new" interpretation is that "any facility, regardless of size, can apparently qualify as a small power production facility as long as it can afford the equipment needed to limit output to 80 MW at any given time."[88] EEI believes that the Commission's "new" interpretation "encourages sophisticated resource developers to 'game' their power production metrics to gain competitive advantages that are not available to other clean generators of similar size."[89] EEI states that the Commission has, in effect, "expand[ed] the universe of facilities that enjoy guaranteed purchasers for their power, often at above-market prices."[90] EEI asserts that, contrary to Congress's purposes, the Commission's expanded universe of facilities eliminates or reduces competition from non-PURPA renewables and other carbon-free generation.[91] EEI states that the increased costs of the Commission's "new" interpretation will ultimately be borne by customers during a time when current energy market

---

the grid cannot accept, into AC electricity, which the grid can accept.

[88] *Id.* at 15-16. EEI similarly describes the practical effect is "to impose a requirement on utilities to purchase energy from increasingly large resources, without consideration of the rated capacity of the resource, as long as the resource does not place more than 80 MW onto the grid at one time." *Id.*

[89] *Id.* at 15.

[90] *Id.*

[91] *Id.*

dynamics are producing the opposite result—i.e., incentives and opportunities for carbon-free energy and energy storage are increasing, technology is improving, deployment of carbon-free energy and energy storage is increasing, and costs of technology are decreasing.[92]

26. To the extent that EEI's positions are based on an interpretation of "power production capacity" that is limited to the generating subcomponents of a facility, the Commission has explained why an interpretation focusing on the facility's net output is the more reasonable interpretation of the statute.[93]

27. The Commission has acknowledged that some aspects of Broadview's proposed facility are distinct in certain respects from the facilities that the Commission considered when it first applied the "send out" test.[94] Other aspects are not. That the owner or operator of a facility would seek to send out as close to 80 MW as possible to an interconnected utility at all times *and* would configure a facility not to exceed that limit is not novel; it is no more than the owner or operator of QF trying to maximize the value of its facility within the given constraints. From the earliest cases under PURPA, the Commission has equated "power production capacity" under PURPA with the amount of power that a facility is capable of safely and reliably sending to the interconnecting

---

[92] *Id.* at 16-17.

[93] *See supra* PP 18-20; March 2021 Order, 174 FERC ¶ 61,199 at PP 21-26.

[94] March 2021 Order, 174 FERC ¶ 61,199 at P 32.

utility.[95] EEI is correct that the calculations in past cases of facilities' "send out" or "net output" did not involve the particular facts before the Commission in this proceeding—a 160-MW solar PV array, a 200-MWh battery system, and a bank of DC-to-AC inverters. But the Commission has explained its March 2021 decision to apply the longstanding "send out" test, with its focus on overall facility capabilities measured at the point of interconnection, to determine the "power production capacity" of Broadview's facility.[96] This application of existing policy to new facts does not mean the Commission is now coming up with a new interpretation of the statute. The Commission's decision in the March 2021 Order thus does not constitute an unlawful reversal of policy, as EEI claims;[97] it was an

---

[95] *Id.* at PP 27-30 (discussing *Occidental*, 17 FERC ¶ 61,231; *Malacha* 41 FERC ¶ 61,350; *Streamlining of Regulations Pertaining to Parts II and III of the Federal Power Act and the Public Utility Regulatory Policies Act of 1978*, Order No. 575, FERC Stats. & Regs. ¶ 31,014 (1995) (cross-referenced at 70 FERC ¶ 61,022)).

[96] *Id.* at PP 27-30.

[97] EEI Rehearing Request at 21-23. In a related argument, EEI states that the Commission should use notice-and-comment rulemaking if the Commission wishes to develop a test under PURPA "to accommodate resources that have a rated capacity significantly over 80 MW and to explore whether any such test can be reconciled with the statutory text." *Id.* at 25-26. The courts have made clear, however, that the choice between proceeding by general rule or by individual, ad hoc adjudication is one that lies primarily in the informed discretion of the administrative agency. *See, e.g., SEC v. Chenery Corp.*, 332 U.S. 194, 202-04 (1947). Here, the issue of how to determine the power production capacity of Broadview's facility was squarely before the Commission, and fully addressed in the parties'

application of the Commission's longstanding policy. Indeed, it was the September 2020 Order that adopted a change from longstanding policy.[98]

28. Broadview's proposed use of a 160-MW solar PV array, a 200-MWh battery system, and a bank of DC-to-AC inverters is not contrary to PURPA's "power production capacity" limit. EEI states that it is uncontested that Broadview's facility can deliver more power over time to NorthWestern than another facility with only 80 MW of solar panels.[99] This is the very purpose of Broadview's hybrid design. It seeks to deliver up to 80 MW of AC electricity (and no more) in any hour, and thus comply with PURPA's 80 MW statutory limit on power production capacity, but at a higher average capacity factor than a facility with fewer solar panels and no battery system. Accordingly, from NorthWestern's perspective, Broadview's facility will never produce (and, thus, NorthWestern will never avoid) more than 80 MW at any given time.

29. The design of Broadview's facility is not "gaming" the power production capacity limit, as EEI asserts.[100] Rather, as the Commission explained in the March 2021 Order, the facility's design to use the 160-MW solar PV array, 200-MWh battery, and bank

---

pleadings, and it was reasonable for the Commission to act as it did. In any event, the Commission in the March 2021 Order did not reverse an existing policy but instead applied a longstanding policy.

[98] March 2021 Order, 174 FERC ¶ 61,199 at PP 22-23.

[99] EEI Rehearing Request at 24. EEI's argument conflates power production capacity, which measures the instantaneous net output of a facility, with total generation over time.

[100] *Id.* at 15.

of DC-to-AC inverters "will allow Broadview to more consistently deliver a higher share of the 80 MW power production capacity"[101] using a variable energy resource. Broadview asserts that, by configuring its facility in this way, in contrast to a typical solar project which has a capacity factor of approximately 25 to 30%, Broadview will be able to increase its facility's capacity factor to up to approximately 35 to 40%.[102] Specifically, Broadview explained that its facility can sustain its maximum net output for more daylight hours, even when the sun is not at full strength, and it can continue to deliver up to 50 MW of power from the battery system even when no sunlight is available.[103] Moreover, PURPA contains no limit on the amount of energy over time that a facility may generate, so long as a facility's power production capacity is no more than 80 MW.[104] The fact that a new facility design can generate more energy over time than one composed of solar panels alone does not reflect non-compliance with PURPA, but rather simply that technological developments have enabled a solar facility to be combined with energy storage to generate more energy over time while remaining an eligible qualifying facility under PURPA. Consistent with PURPA's purpose to

---

[101] March 2021 Order, 174 FERC ¶ 61,199 at P 32.

[102] Broadview October 17, 2019 Answer at 5. (citing Broadview 2019 Application, Attach. B, Aff. of Lloyd Pasley at 4). *See also id.*(explaining that "to maximize the Facility's capacity factor and to be able to produce during non-daylight hours … mitigates reliability concerns inherent with integration of solar projects.").

[103] Broadview 2019 Application, attach. B., Aff. of Lloyd Pasley at P 11.

[104] 16 U.S.C. § 796(17)(A)(ii); 18 C.F.R. § 292.204(a).

"encourage" the development of QFs,[105] the novel aspects of Broadview's facility will increase its value, as compared with other generators including other QFs, like those using biomass or waste, that because of their fuel can more consistently deliver 80 MW of AC electricity to their points of interconnection in all hours.

30. Finally, the Commission has not created a policy that "any facility, regardless of size, can apparently qualify as a small power production facility" if it can afford the equipment needed to "artificially" limit output to 80 MW at any given time, as EEI claims.[106] Broadview has explained how these components increase the facility's ability to sustain an output of up to 80 MW for additional hours in the day.[107] In this regard, we emphasize again that, as the Commission explained in the March 2021 Order, "any solar-PV QF can produce power for delivery to the purchasing utility only to the extent enabled by the inverters because the grid operates predominantly using AC power." The bank of DC-to-AC inverters physically enables the integrated facility to "send out" a maximum of 82.5 MW of AC power, before deducting certain losses.[108] Broadview's configuration is not "artificial" or otherwise

---

[105] 16 U.S.C. § 824a-3.

[106] EEI Rehearing Request at 15-16. EEI similarly describes the practical effect is "to impose a requirement on utilities to purchase energy from increasingly large resources, without consideration of the rated capacity of the resource, as long as the resource does not place more than 80 MW onto the grid at one time." *Id.* at 15.

[107] Broadview 2019 Application at 4.

[108] *Id.* at 4-5.

impermissible: it cannot produce grid-useable power without the inverters as they are an integral and essential component of its facility. Put another way, if the Broadview facility did not include any inverters, the 160 MW of solar panels would be able to deliver 0 MW of power production capacity to the point of interconnection with Northwestern. Broadview cannot increase the facility's send out unless Broadview physically adds additional DC-to-AC inverters (in which case Broadview would have made a material change in its facility and would need to seek recertification).[109]

3. Aggregating Small Power Production Facilities at the Same Site

31. PURPA and the Commission's regulations require that we add together the power production capacity of a facility seeking certification and the power production capacity of "any other small power production facilities that use the same energy resource, are owned by the same person(s) or its affiliates, and are located at the same site."[110]

32. On rehearing, NorthWestern cites *Luz Development and Finance Corporation*[111] for the position that a battery is a separate facility that must be combined with the generation resource in order to determine the total nameplate capacity of the facility seeking certification as a QF.[112] NorthWestern claims that the Commission failed to consider this

---

[109] *Id.* at 6-7; *see* 18 C.F.R. § 292.207(d).

[110] 16 U.S.C. § 796(17)(A)(ii); 18 C.F.R. § 292.204(a)(1).

[111] 51 FERC ¶ 61,078 (1990) (*Luz*).

[112] NorthWestern Rehearing Request at 8-9.

precedent.[113] NorthWestern states that, under the Commission's regulations, the Commission must combine both the power production capacity of Broadview's solar PV array and, separately, the power production capacity of Broadview's battery system.[114] By this method, NorthWestern calculates a sum of 130 MW, exceeding PURPA's 80-MW limit.[115]

33. The aggregation requirement is not triggered in this proceeding. There is no "other" small power production facility at the same site, only Broadview's hybrid facility. NorthWestern's reading of *Luz* is inaccurate. In that case, the Commission addressed the question whether a stand-alone battery system was eligible for certification as a QF. *Luz* did not address the question whether a battery storage system that is integrated with a solar PV system must be considered a separate QF from the solar PV system.

34. In the March 2021 Order, the Commission explained that "the Broadview facility is not actually capable of providing more than 80 MW at any one point in time at its point of interconnection with NorthWestern."[116] Both Broadview's solar PV array and its battery system operate in DC power and both are upstream of a single pathway through the DC-to-AC inverters to the interconnection with

---

[113] *Id.* at 6-7.

[114] *Id.* at 7-8 (citing 18 C.F.R. § 292.204(a)(1)).

[115] *Id.* at 8.

[116] March 2021 Order, 174 FERC ¶ 61,199 at P 32.

NorthWestern.[117] NorthWestern is mistaken to claim that precedent requires the Commission to find that the solar PV array's net output must be added to the battery storage system's net output.[118] It is not possible for the solar PV array and the battery system to have a power production capacity of more than 80 MW at any one point in time at the single point of interconnection with NorthWestern. Accordingly, the Commission need not treat Broadview's battery as a separate facility that must be combined with the generation resource in order to determine the power production capacity under PURPA.

The Commission orders:

In response to EEI's, NewSun's, NorthWestern's, and SEIA's requests for rehearing, the March 2021 Order is hereby modified and the result sustained, as discussed in the body of this order.

By the Commission. Commissioner Danly is concurring in part and dissenting in part

with a separate statement attached.

Commissioner Christie is dissenting.

(S E A L)

Kimberly D. Bose,

Secretary

---

[117] Broadview 2019 Application at 4, 5

[118] NorthWestern Rehearing Request at 8.

UNITED STATES OF AMERICA

FEDERAL ENERGY REGULATORY COMMISSION

Broadview Solar, LLC Docket No. QF17-454-007

(Issued June 17, 2021)

DANLY, Commissioner, *concurring in part and dissenting in part*:

1. The Commission's order today upholds its prior ruling[1] that Broadview Solar, LLC's (Broadview) facility satisfies the statutory 80 MW power production capacity limit even though Broadview's own Form 556 filing shows that the facility has a power production capacity of approximately 155 MW.[2] I dissent from the central holding in today's order that the actual power production capacity of Broadview's facility is irrelevant because the facility is designed so as to be capable of delivering no more than 80 MW to the point of interconnection at any particular time. As I explained in my dissent to the March 2021 Order, not a single word of the Commission's "for-delivery-to-the-utility" standard, which was adopted in the March 2021 Order, appears anywhere in the text of the Public Utility Regulatory Policies Act of 1978 (PURPA) establishing the 80 MW power production capacity limit.[3] As I explained in my dissent to the March 2021 Order, not a single word of the Commission's "for-delivery-to-the-utility" standard,

---

[1] *See Broadview Solar, LLC*, 174 FERC ¶ 61,199 (2021) (March 2021 Order).

[2] *See id.* (Danly, Comm'r, dissenting at P 4).

[3] *Id.* (Danly, Comm'r, dissenting at P 9).

which was adopted in the March 2021 Order, appears anywhere in the text of the Public Utility Regulatory Policies Act of 1978 (PURPA) establishing the 80 MW power production capacity limit.[4] Nor, as I also explained, does this standard find any support in the Commission's regulations or precedent.[5] Nothing in today's order causes me to revise my opinion on these issues.

2. I do, however, agree with the Commission's rejection of NorthWestern Corporation's argument that Broadview's 50 MW battery storage system must be considered part of the Broadview facility's power production capacity,[6] albeit for somewhat different reasons. In my view, batteries (and other storage systems) cannot be included in determining the "power production capacity" of a facility because, by definition, batteries (and other storage systems) do not "produce" power but simply store it for delivery at a later time. There is no more support in the statutory language of PURPA for Northwestern's position that batteries must be included in a facility's power production capacity than there is in the Commission's position that it is a facility's delivery capability, and not its actual power production capacity, that counts towards the statutory 80 MW limit.

---

[4] *Id.* (Danly, Comm'r, dissenting at P 9).

[5] *See id.* (Danly, Comm'r, dissenting at P 1).

[6] *See Broadview Solar, LLC*, 175 FERC ¶ 61,228, at PP 31-34 (2021).

For these reasons, I respectfully concur in part and dissent in part.

_____

James P. Danly

Commissioner

APPENDIX C

175 FERC ¶ 62,100

UNITED STATES OF AMERICA

FEDERAL ENERGY REGULATORY COMMISSION

Broadview Solar, LLC Docket No. QF17-454-007

NOTICE OF DENIAL OF REHEARINGS BY OPERATION OF LAW AND PROVIDING FOR FURTHER CONSIDERATION

(May 17, 2021)

Rehearings have been timely requested of the Commission's order issued on March 19, 2021, in this proceeding. *Broadview Solar*, *LLC*, 174 FERC ¶ 61,199 (2021). In the absence of Commission action on the requests for rehearing within 30 days from the date the requests were filed, the requests for rehearing (and any timely requests for rehearing filed subsequently)[1] may be deemed denied. 16 U.S.C. § 825*l*(a); 18 C.F.R. § 385.713 (2020); *Allegheny Def. Project v. FERC*, 964 F.3d 1 (D.C. Cir. 2020) (en banc).

As provided in 16 U.S.C. § 825*l*(a), the rehearing request of the above-cited order filed in this proceeding will be addressed in a future order to be issued consistent with the requirements of such

[1] *See San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs. Into Mkts. Operated by Cal. Indep. Sys. Operator & Cal. Power Exch.*, 95 FERC ¶ 61,173 (2001).

section. As also provided in 16 U.S.C. § 825*l*(a), the Commission may modify or set aside its above-cited order, in whole or in part, in such manner as it shall deem proper. As provided in 18 C.F.R. § 385.713(d), no answers to the rehearing request will be entertained.

Kimberly D. Bose,

Secretary.

APPENDIX D

174 FERC ¶ 61,199

UNITED STATES OF AMERICA

FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Richard Glick, Chairman;
Neil Chatterjee, James P. Danly,
Allison Clements, and Mark C. Christie.

Broadview Solar, LLC Docket No. QF17-454-006

ORDER ADDRESSING ARGUMENTS RAISED ON REHEARING AND

SETTING ASIDE PRIOR ORDER

(Issued March 19, 2021)

1. On September 1, 2020, the Commission issued an order[1] denying Broadview Solar, LLC's (Broadview) application seeking Commission certification that Broadview's proposed hybrid solar photovoltaic (PV) facility is a qualifying small power production facility (QF) pursuant to the Public Utility Regulatory Policies Act of 1978 (PURPA)[2] and section

[1] *Broadview Solar, LLC*, 172 FERC ¶ 61,194 (2020) (September 2020 Order).

[2] 16 U.S.C. §§ 796(17), 824i, 824a-3.

292.207(b) of the Commission's regulations.[3] In the same order, the Commission also revoked Broadview's self-certification of QF status filed on January 29, 2020, while the application for Commission certification was still pending.

2. On September 14, 2020, Broadview filed a request for rehearing of the September 2020 Order.[4] On October 1, 2020, the Commission received requests for rehearing or clarification from NewSun Energy, LLC; Pine Gate Renewables, LLC; the Solar Energy Industries Association; Southern Current, LLC; and TerraForm Power, LLC.[5]

3. Pursuant to *Allegheny Defense Project v. FERC*,[6] the rehearing requests filed in this proceeding may be deemed denied by operation of law. However, as permitted by section 313(a) of the

---

[3] 18 C.F.R. § 292.207(b) (2020).

[4] Broadview Solar, LLC September 14, 2020 Request for Rehearing (Broadview Rehearing Request).

[5] NewSun Energy, LLC October 1, 2020 Motion for Late Intervention and Petition for Rehearing; Pine Gate Renewables LLC, October 1, 2020 Motion to Intervene Out-of-Time, Request for Rehearing, or in the Alternative, Clarification; Solar Energy Industries Association September 28, 2020 Motion to Intervene Out-of-Time; Solar Energy Industries Association October 1, 2020 Request for Rehearing and Clarification; Southern Current, LLC October 1, 2020 Motion to Intervene Out-of-Time; Southern Current, LLC October 1, 2020 Request for Rehearing and Clarification; Terraform Power, LLC October 1, 2020 Motion to Intervene Out-of-Time and Request for Clarification, or in the Alternative, Limited Rehearing.

[6] 964 F.3d 1 (D.C. Cir. 2020) (en banc).

Federal Power Act,[7] we are modifying the discussion in the September 2020 Order and setting aside the result in this proceeding, as discussed below.[8]

I. Background

4. To be certified as a QF, a small power production facility must comply with the fuel use and size criteria specified in the Commission's regulations and must either file for self-certification of QF status or apply for and obtain Commission certification of QF status.[9] Both filings incorporate Form No. 556. The primary energy source of the facility must be biomass, waste, renewable resources, geothermal resources or any combination thereof.[10] The power production capacity of the facility cannot exceed 80 megawatts (MW).[11]

5. Broadview is developing a combined solar PV and battery storage facility in Yellowstone County, Montana, that will interconnect to NorthWestern

---

[7] 16 U.S.C. § 825*l*(a) ("Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.").

[8] *Allegheny Def. Project*, 964 F.3d at 16-17.

[9] 18 C.F.R. § 292.203(a) (2020) (citing 18 C.F.R. §§ 292.204(a) (size limit), 292.204(b) (fuel use), 292.207(a) (self-certification), and 292.207(b) (application for Commission certification)).

[10] *Id.* § 292.204(b).

[11] *Id.* § 292.204(a)(1).

Corporation's (NorthWestern) transmission system.[12] The facility will include a coupled array of solar PV panels with a gross capacity of 160 MW of direct current (DC) electricity and a battery energy storage system with the capacity to discharge 50 MW of DC electricity for up to 4 hours (i.e., a total of 200 MW-hours (MWh)).[13] Broadview explained that the solar PV panels and battery energy storage system will connect to 20 inverters, each capable of converting DC electricity into a maximum output of 4.127 MW alternating current (AC) electricity.[14] Together, the inverters will have a maximum output of 82.548 MW of AC electricity. After deducting facility loads and losses totaling 2.548 MW, the facility's maximum net output to NorthWestern's grid will be 80 MW of AC electricity.[15] When the solar array produces more DC electricity than the inverters can convert to AC electricity, the excess DC electricity will be stored in the battery energy storage system and will not be

---

[12] Broadview Solar, LLC September 11, 2019 Application at 1 (Broadview 2019 Application).

[13] *Id.* at 2.

[14] Broadview states that without the DC-to-AC inverters, the power is not in a form that can be transmitted onto the grid. Broadview claims that these inverters are the "gateway" between the DC power provided by the solar array and battery storage system and the AC grid because the amount that the 20 inverters can deliver limits the maximum gross power capacity of the facility (i.e., power that can be delivered to the AC grid). September 2020 Order, 172 FERC ¶ 61,194 at PP 2-3 (citing Broadview 2019 Application, Attachment B at 2-4 (Pasley Aff.)).

[15] Broadview 2019 Application at 7-8.

delivered to the point of interconnection with NorthWestern's grid until a later time.[16]

6. Over the course of three years, Broadview filed three notices of self-certification for its facility and one application for Commission certification. In December 2016, Broadview filed a Form No. 556 to self-certify its proposed facility as a small power production QF with a maximum gross power production capacity of 104.25 MW and a maximum net power production capacity of 80 MW.[17] In March 2019, Broadview revised its Form No. 556 to reflect a maximum gross power production capacity of 160 MW, while maintaining the net power production capacity of 80 MW.[18] On September 11, 2019, Broadview applied for Commission certification that Broadview's proposed facility is a small power production QF. Broadview's accompanying Form No. 556 revised the facility's maximum gross power production capacity down to 82.548 MW to reflect the facility's design capabilities, including limiting elements, while maintaining the previously documented maximum net power production capacity of 80 MW.[19] On January 29, 2020, Broadview filed a revised Form No. 556 to reflect the same revised

---

[16] September 2020 Order, 172 FERC ¶ 61,194 at P 6 (citing Broadview 2019 Application at 7).

[17] Broadview Solar LLC December 19, 2016, Form No. 556 at 9 (filed in Docket No. QF17-454-000) (Broadview 2016 Form No. 556).

[18] Broadview Solar LLC March 13, 2019, Form No. 556 at 9 (filed in Docket No. QF17-454-003) (Broadview 2019 Form No. 556).

[19] Broadview 2019 Application at 9.

maximum gross power production capacity of 82.548 MW.[20] Across all of Broadview's filings, it consistently reported a net power production capacity of 80 MW to be delivered to NorthWestern's system.

7. Under PURPA and the Commission's regulations, the "power production capacity" of a small power production QF may not exceed 80 MW.[21] In the September 2020 Order, based on the record in this proceeding, the Commission reconsidered its previous, longstanding interpretation that a facility's "power production capacity" is determined by the facility's "maximum net output" or "send out."[22] The Commission described its precedent under the "send out" analysis as allowing "design capabilities that may incidentally or occasionally cross PURPA's 80 MW threshold due to certain components or variances, such as fuel or ambient temperature."[23] The Commission observed that there was a "significant difference" between facilities that may incidentally or occasionally exceed 80 MW and a facility "purposefully designed with a 160-MW solar array."[24] Upon reconsidering the "send out" analysis and the potential that it creates for the approval of

---

[20] Broadview Solar LLC January 29, 2020 Form No. 556 (filed in Docket No. QF17-454-005) (Broadview 2020 Form No. 556).

[21] 16 U.S.C. § 796(17)(A)(ii); 18 C.F.R. § 292.204(a)(1) (2020).

[22] September 2020 Order, 172 FERC ¶ 61,194 at PP 18-23 (citing *Occidental Geothermal, Inc.*, 17 FERC ¶ 61,231 (1981) (*Occidental*); *Malacha Power Project, Inc.*, 41 FERC ¶ 61,350 (1987) (*Malacha*); *Am. Ref-Fuel Co. of Bergen Cty.*, 54 FERC ¶ 61,287 (1991)).

[23] September 2020 Order, 172 FERC ¶ 61,194 at P 21.

[24] *Id.*

"projects that do not comply with the plain language of PURPA," the Commission concluded that it has improperly focused on "output" and "send out" instead of on "power production capacity," which is the standard established both in the statute and in the Commission's regulations.[25] The Commission stated that in the factual context of Broadview's proposed facility, these concepts are not the same.[26] This led the Commission to conclude that the "send out" analysis first applied in *Occidental* is inconsistent with the 80-MW "power production capacity" limit for small power production QFs, based on the Commission's reading of the statute and the Commission's regulations.[27]

8. In support of this conclusion, the Commission noted that the reporting formula in Form No. 556 starts with the facility's "maximum gross power production capacity at the terminals of the individual generator(s) under the most favorable anticipated design conditions."[28] The reporting formula then subtracts an exclusive list of parasitic loads and losses to yield "the facility's maximum net power production capacity" which the Commission described as "the facility's ultimate certified capacity."[29]

9. The Commission found that because the inverters at Broadview's facility impose a conversion

---

[25] *Id.* P 23 (citing 16 U.S.C. § 796(17)(A)(ii); 18 C.F.R. § 292.204(a)(1)).

[26] *Id.*

[27] *Id.*

[28] *Id.* PP 24-25.

[29] *Id.* P 24.

limit or output limit rather than a limit on the solar PV array's power production capacity of 160 MW, Broadview could not meet the 80-MW statutory limit for "power production capacity."[30] The Commission explained that it did not view Form No. 556 as including adjustments for inverters or other output-limiting devices in the reported "maximum gross power production capacity.[31]

II. Discussion

A. Procedural Matters

10. Within the 30-day period to file a request for rehearing, the Commission received five late motions to intervene and requests for rehearing or clarification from NewSun Energy, LLC; Pine Gate Renewables, LLC; the Solar Energy Industries Association; Southern Current, LLC; and TerraForm Power, LLC.[32] On October 13, 2020, NorthWestern filed an answer to the late motions to intervene.

11. In ruling on late motions to intervene, we apply the criteria set forth in Rule 214(d) of the Commission's Rules of Practice and Procedure.[33] We consider, among other factors, whether the movants had good cause for failing to file the motion within the time prescribed.[34] The Commission considers

---

[30] *Id.* P 25.

[31] *Id.*

[32] *See supra* note 5.

[33] 18 C.F.R. § 385.214(d) (2020).

[34] *Id.* § 385.214(b)(3), (d)(i). Other factors include the potential disruption caused by such late intervention, whether the movants' interest are not adequately represented by other

whether the movants explain why they should not be held to the Commission's expectation that entities should intervene "in a timely manner based on reasonably foreseeable issues arising from the applicant's filing and the Commission's notice of the proceeding."[35]

12. Here, the movants seek to intervene one year after the original deadline in the underlying proceeding of October 2, 2019.[36] They claim that there was no indication in this proceeding that the Commission would overturn the line of precedent that began with *Occidental* in 1981.[37] NewSun Energy, the Solar Energy Industries Association, Southern Current, and TerraForm Power emphasize that,

---

parties, and any prejudice to existing parties. *Id.* § 385.214(d)(ii)-(iv).

[35] *Tenn. Gas Pipeline Co., L.L.C.*, 162 FERC ¶ 61,167, at P 51 (2018) (citing *Alcoa Power Generating, Inc.*, 144 FERC ¶ 61,218, at P 13 (2013)); *see also Idaho Power Co.*, 171 FERC ¶ 61,238, at PP 16-17 (2020).

[36] *See Combined Notice of Filings*, 84 Fed. Reg. 49,291, 49,292 (Sept. 19, 2019) (publishing notice of Broadview's application to recertify its proposed facility and requiring that any person desiring to intervene or protest must file to do so by October 2, 2019).

[37] *See, e.g.*, NewSun Energy, LLC October 1, 2020 Motion for Late Intervention and Petition for Rehearing at 2-3; Pine Gate Renewables, LLC October 1, 2020 Motion to Intervene Out-of-Time, Request for Rehearing, or in the Alternative, Clarification at 1-4; Solar Energy Indus. Ass'n September 28, 2020 Motion to Intervene Out-of-Time at 2-3; Southern Current, LLC October 1, 2020 Motion to Intervene Out-of-Time at 2-3; Terraform Power, LLC October 1, 2020 Motion to Intervene Out-of-Time and Request for Clarification, or in the Alternative, Limited Rehearing at 4-5.

while Broadview's application was pending, the Commission separately began and completed a rulemaking in Docket No. RM19-15-000 to revise the Commission's PURPA-implementing regulations, including some aspects of the size limit for QFs,[38] but that the Commission gave no indication that it would revise how it calculates a facility's "power production capacity."[39] All of the movants seeking late intervention state that they will accept the record as it stands,[40] that they represent interests not adequately represented by the other parties in the proceeding, and that permitting their late intervention will not prejudice or burden the existing parties.[41]

---

[38] *See, e.g.*, *Qualifying Facility Rates and Requirements*, Order No. 872, 85 Fed. Reg. 54,638, 54,702-03 (Sept. 2, 2020), 172 FERC ¶ 61,041, at PP 515-24 (2020), (discussing the aggregation of affiliated small power production QFs based on proximity of "electrical generating equipment").

[39] NewSun Energy, LLC October 1, 2020 Motion for Late Intervention and Petition for Rehearing at 3; Solar Energy Indus. Ass'n September 28, 2020 Motion to Intervene Out-of-Time at 2-3; Southern Current, LLC October 1, 2020 Motion to Intervene Out-of-Time at 2-3; Terraform Power, LLC October 1, 2020 Motion to Intervene Out-of-Time and Request for Clarification, or in the Alternative, Limited Rehearing at 4-5.

[40] Having said that, however, they all also seek reconsideration of the Commission's earlier order, indicating that they, in fact, do not accept the record developed prior to their motions for late intervention. *See* 18 C.F.R. § 385.214(d)(3)(ii) (2020).

[41] NewSun Energy, LLC October 1, 2020 Motion for Late Intervention and Petition for Rehearing at 3-4; Pine Gate Renewables LLC, October 1, 2020 Motion to Intervene Out-of-Time, Request for Rehearing, or in the Alternative, Clarification at 4; Solar Energy Indus. Ass'n September 28, 2020 Motion to

13. In its answer, NorthWestern contends that the late movants' motions to intervene should be denied as they adopted a wait-and-see approach in this proceeding and do not meet the higher burden for demonstrating good cause for late intervention at the rehearing stage.[42] NorthWestern notes that Broadview's application explicitly identified the "send out" analysis first established in *Occidental* as the primary authority for Broadview's facility to obtain QF status. Given this framing, NorthWestern states that it was not unforeseeable that the Commission might disagree with the applicability of the "send out" line of cases to a solar PV-based facility. According to NorthWestern, the Commission was not required to go beyond its public notice of Broadview's application in the Federal Register, to instead provide notice of the full range of possible outcomes to the case or to provide these specific movants with actual notice.[43] NorthWestern notes that the Commission has discretion to make policy decisions through rulemakings, policy statements, or case-by-case adjudication and that *Occidental* is an example of the Commission making a policy decision in an adjudication.[44] Responding to the late movants' claims that they represent interests not adequately

---

Intervene Out-of-Time at 3; Southern Current, LLC October 1, 2020 Motion to Intervene Out-of-Time at 3; Terraform Power, LLC October 1, 2020 Motion to Intervene Out-of-Time and Request for Clarification, or in the Alternative, Limited Rehearing at 5.

[42] NorthWestern October 13, 2020 Answer at 6-9.

[43] *Id.* at 7.

[44] *Id.* at 7-8.

represented by the other parties in the proceeding, NorthWestern notes that all movants are either solar QF developers or representatives of QF developers whose interests are already represented by Broadview as a solar QF developer.[45] NorthWestern points out that NewSun attempts to add facts to the record.

14. Courts have recognized that "the Commission has steadfastly and consistently held that a person who has actual or constructive notice that his interests might be adversely affected by a proceeding, but who fails to intervene in a timely manner, lacks good cause under Rule 214."[46] Entities interested in becoming a party to Commission proceedings may not "sleep on their rights" and wait to see how issues might evolve before deciding whether to intervene to protect their interests.[47] As the Commission has explained, "[w]hen late intervention is sought after the issuance of a dispositive order, the prejudice to

---

[45] *Id.* at 8-9.

[46] *See, e.g.*, *Cal. Trout v. FERC*, 572 F.3d 1003, 1022 (9th Cir. 2009).

[47] *See, e.g.*, *Bradwood Landing, LLC*, 126 FERC ¶ 61,035, at PP 11, 16 (2009) (denying late intervention to movant who claimed that scientific studies made it more aware of its interests in the proceeding); *Cent. Neb. Pub. Power & Irrigation Dist.*, 125 FERC ¶ 61,192, at P 12 (2008) ("The Commission expects parties to intervene in a timely manner based on the reasonably foreseeable issues arising from the applicant's filings and the Commission's notice of proceedings."); *Broadwater Energy, LLC*, 124 FERC ¶ 61,225, at P 13 (2008) ("Those entities with interests they intend to protect are not entitled to wait until the outcome of a proceeding and then file a motion to intervene once they discover the outcome conflicts with their interests.").

other parties and burden upon the Commission of granting the late intervention may be substantial."[48] In such circumstances, movants bear a higher burden to demonstrate good cause for granting the late intervention,[49] and generally it is Commission policy to deny late intervention at the rehearing stage.[50]

15. The movants fail to demonstrate good cause for their delay. We are not persuaded by the claim that the movants had inadequate notice that the outcome of this proceeding could affect their interests. Broadview proposed a facility with a 160 MW solar PV array (and also a 200 MWh battery energy storage facility) and noted its reliance on *Occidental* in its application.[51] Movants do not explain why they could

---

[48] *Nat'l Fuel Gas Supply Corp.*, 139 FERC ¶ 61,037, at P 18 (2012) (*National Fuel*); *see also, e.g.*, *Fla. Gas Transmission Co.*, 133 FERC ¶ 61,156, at P 6 (2010).

[49] *See, e.g.*, *Big Rivers Elec. Corp. v. Midcontinent Indep. Sys. Operator, Inc.*, 161 FERC ¶ 61,225, at P 12 (2017); *Cal. Dep't of Water Res. & the City of Los Angeles*, 120 FERC ¶ 61,057, at P 8 n.3, *reh'g rejected*, 120 FERC ¶ 61,248 (2007), *aff'd sub nom.*, *Cal. Trout v. FERC*, 572 F.3d 1003 (9th Cir. 2009) (*Cal. Trout*).

[50] *See PennEast Pipeline Co.*, 162 FERC ¶ 61,279 (2018) (denying two motions for late intervention and rejecting requests for rehearing filed 20 and 27 days after the Commission issued a certificate order for the PennEast Project); *Tenn. Gas Pipeline Co., L.L.C.*, 162 FERC ¶ 61,013, at P 10 (2018) (denying late motions to intervene and rejecting requests for rehearing filed two weeks and thirteen months after the Commission issued a certificate order for the Connecticut Expansion Project); *National Fuel*, 139 FERC ¶ 61,037 at PP 18-19 (denying a late motion to intervene and request for rehearing filed 30 days after the Commission issued a certificate order for the Northern Access Project).

[51] *See* Broadview 2019 Application at 3-5, 8.

not have sought to intervene prior to the Commission's September 2020 Order here, where the pleadings of the parties filed between October 2019 and March 2020 addressed the parties' dispute concerning the Commission's methodology for determining a facility's "power production capacity" and specifically discussed *Occidental*.[52] We conclude that the movants have not satisfied the higher burden to demonstrate good cause for their delay in seeking intervention until after the issuance of a dispositive order.

16. When the Commission determines that good cause does not exist, it is not obligated to consider Rule 214's remaining factors.[53] Accordingly, we deny NewSun Energy, LLC's; Pine Gate Renewables, LLC's; the Solar Energy Industries Association's; Southern Current, LLC's; and TerraForm Power, LLC's late motions to intervene.

17. Under FPA section 313(a) and Rule 713(b) of the Commission's Rules and Practice and Procedure, only a party to a proceeding may request rehearing of a final Commission decision.[54] Because NewSun Energy, LLC; Pine Gate Renewables, LLC; the Solar

---

[52] *E.g.*, Broadview 2019 Application at 3-5, 8; NorthWestern October 2, 2019 Motion to Intervene and Protest at 6; EEI October 2, 2019 Motion to Intervene and Protest at 2; Broadview October 17, 2020, Motion for Leave to Answer and Answer at 7-8; NorthWestern November 1, 2019 Motion for Leave to Answer and Answer at 3; Broadview November 5, 2019 Motion for Leave to Answer and Answer at 2.

[53] *See Power Co. of Am., L.P. v. FERC*, 245 F.3d 839, 843 (D.C. Cir. 2001); *see also Cal. Trout*, 572 F.3d at 1023.

[54] 16 U.S.C. § 825*l*(a); 18 C.F.R. § 385.713(b).

Energy Industries Association; Southern Current, LLC; and TerraForm Power, LLC are not parties to this proceeding, we reject their requests for rehearing of the September 2020 Order.

18. However, we also note that, in setting aside the September 2020 Order and determining that Broadview's facility meets the requirements for certification as a small power production QF, as discussed below, we have addressed the movants' concerns articulated in their late motions to intervene and requests for rehearing.

B. Substantive Matters

19. On rehearing, Broadview argues that the Commission failed to provide a principled explanation for overturning the Commission's longstanding "send out" analysis of "power production capacity," which Broadview describes as focusing on the amount of power that the entire facility can provide at the point of interconnection to the grid.[55] Broadview states that the Commission erred by adopting a "component-by-component" approach to determining "power production capacity," which Broadview describes as focusing on the capability of each individual component of a generating facility.[56] Broadview claims that this new "component-by-component" approach is inconsistent with PURPA.[57] Broadview claims that the Commission's focus on "the DC capability of a single component of the facility" is

---

[55] Broadview Rehearing Request at 1-3, 8, 12-14, 17-21.

[56] *Id.*

[57] *Id.*

misguided and unsupportable given that the DC power is not a form of power that can be transmitted on the grid.[58] Broadview asserts that the Commission erred by dismissing the inverters as "output-limiting devices," even though the Commission accounts for the fact that the lowest-capacity component of other types of generating facilities imposes a "send out" limit on the entire facility's output.[59]

20. Upon further consideration, we set aside the September 2020 Order. Broadview's application, and the protests from NorthWestern and Edison Electric Institute (EEI), presented the first occasion for the Commission to interpret how PURPA's 80 MW limitation on a qualifying small power production facility's "power production capacity" applies to a facility such as Broadview's. We find that, in denying Broadview's application, the Commission erred by departing from and overturning its longstanding precedent. On rehearing, we conclude that Broadview's proposed facility meets PURPA's requirements for a qualifying small power production facility, as discussed below.

1. PURPA and the Commission's Send-Out Analysis

21. Under PURPA, a "qualifying small power production facility" means a facility:

---

[58] *Id.* at 6.

[59] *Id.* at 6, 7, 18 (noting examples of a biomass energy facility that pairs an off-the-shelf boiler capable of producing steam to generate 100 MW and a turbine-generator rated to 80 MW, or a wind energy facility that pairs blades sized to produce over 80 MW and a turbine-generator rated to 80 MW).

> [that] produces electric energy solely by the use, as a primary energy source, of biomass, waste, renewable resources, geothermal resources, or any combination thereof;[60]
>
> [that] has a power production capacity which, together with any other facilities located at the same site (as determined by the Commission), is not greater than 80 megawatts;[61] and
>
> that the Commission determines, by rule, meets such requirements (including requirements respecting fuel use, fuel efficiency, and reliability) as the Commission may, by rule, prescribe.[62]

For a facility with "qualifying" status, Congress conferred additional rights, most importantly mandatory purchase and sale obligations on electric utilities.

22. Specifically, Congress directed the Commission to prescribe "such rules as it determines necessary to encourage … small power production" including to "require electric utilities to offer to (1) sell electric energy to qualifying cogeneration facilities and qualifying small power production facilities and (2) purchase electric energy from such facilities."[63] The rates for these sales or purchases must be just and

---

[60] 16 U.S.C. § 796(17)(A)(i) (2018) (defining "small power production facility").

[61] *Id.* § 796(17)(A)(i)(ii).

[62] *Id.* § 796(17)(C).

[63] 16 U.S.C. § 824a-3(a).

reasonable and must not discriminate against QFs.[64] The rates for utility purchases from QFs cannot exceed "the cost to the electric utility of the electric energy which, but for the purchase from such cogenerator or small power producer, such utility would generate or purchase from another source."[65]

23. PURPA, however, neither defines the terms "facility" and "power production capacity," nor explains how the Commission is supposed to ascertain the "power production capacity" of any particular "facility." Nor do those terms have commonly understood meanings that, taken together, speak directly to the specific question[66] before us: namely, how to measure the power production capacity of a facility whose generating subcomponents (e.g., solar panels) have a nameplate capacity of greater than 80 MW, but which is physically incapable of producing more than 80 MW for sale to the interconnected electric utility at any one point in time.[67] For example, the Commission could, as Commissioner Danly advocates, look only to generating subcomponents when evaluating power production

---

[64] 16 U.S.C. § 824a-3(b), (c).

[65] 16 U.S.C. § 824a-3(b), (d).

[66] *See S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 54 (D.C. Cir. 2014) ("If the court determines 'Congress has directly spoken to the *precise* question at issue,' and 'the intent of Congress is clear, that is the end of the matter.'") (emphasis added) (quoting *Chevron U.S.A. Inc. v. Nat. Resources Def. Council, Inc.,* 467 U.S. 837, 842 (1984)).

[67] We note that, because the statutory 80 MW limit is expressed in MW of capacity, not MWh of energy, no more than 80 MW may permissibly be put to the utility at any one time.

capacity.[68] Alternatively, the Commission could, as it has for nearly forty years,[69] look to the maximum output that the facility can produce for the electric utility after accounting for all the constituent parts that make up the facility, which in this case includes the inverters. This latter approach would view power sent to or consumed by the various components of the facility as inputs to the calculation of the facility's power production capacity. In light of those multiple interpretations, we find that the statute is ambiguous as to how the Commission is to measure a facility's power production capacity,[70] and, as explained below,

---

[68] Commissioner Danly's dissent suggests that the statute is unambiguous because each of the words "power," "production," and "capacity" have a plain meaning and that those terms compel us to adopt the nameplate capacity of Broadview's solar array as its power production capacity. Dissent at P 13. Elsewhere in his dissent, however, he endorses the Commission's send-out analysis, at least in certain circumstances not present here. Dissent at P 31. But the send-out analysis, by its very terms, rejects reliance on nameplate, or nominal, capacity. In other words, the send-out test contemplates that a resource's generating subcomponents can have a nameplate capacity greater than 80 MW. Otherwise, there would be no need to look to the resource's power production capacity net of parasitic load, line losses, and other essential electricity uses. The tension in those conflicting positions only underscores the extent to which the statute does not unambiguously address the question before us.

[69] As discussed below, the Commission first adopted this so-called "send-out" approach in 1980.

[70] *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997) (*Robinson*) (If any of the statute's terms are subject to more than one reasonable interpretation, the language is ambiguous, and the Court looks beyond the statute's terms to determine Congress's intent in enacting the law); *Automated*

we find that the latter approach is the best reading of the statute.

24. As an initial matter, we believe that the statute's emphasis on the "power production capacity" of the "facility" supports the latter approach, in which power production capacity is measured based on what the facility can actually produce for sale to the interconnected electric utility. After all, the term "facility" is best read to include all components of a particular structure as whole, not any of its individual parts.[71] Focusing only on the solar panels in this instance would ignore the commonly understood meaning of the term facility without any textual indication that Congress intended us to do so.

25. Although Commissioner Danly seeks to draw a bright line distinction between "production" and "delivery," these terms are overlapping, at least in this context. As Commissioner Danly recognizes, the

---

Power Exch., Inc. v. FERC, 204 F.3d 1144, 1151 (D.C. Cir. 2000) (finding that the "phrase 'facilities ... for [wholesale] sale' of electricity admits of more than one meaning" and, ultimately, that FERC's reasonable interpretation of the ambiguous language warranted deference).

[71] *See, e.g.*, *facility*, Merriam Webster Dictionary, https://www.merriam-webster.com/dictionary/facility (last visited Mar. 1, 2021) (defining a facility, for these purposes, as "something (such as a hospital) that is built, installed, or established to serve a particular purpose"); *facility,* North American Electric Reliability Corporation, *Glossary of Terms Used in NERC Reliability Standards* (Jan. 4, 2021), https://www.nerc.com/pa/Stand/Glossary%20of%20Terms/Glossary_of_Terms.pdf (defining facility as "a set of electrical equipment that operates as a single Bulk Electric System Element (e.g., a line, a generator, a shunt compensator, transformer, etc.)").

term "capacity" is generally equated to "output."[72] As applied to just the facility's solar panels in this instance, output could be read to refer to the raw quantity of electricity generated. But when applied to the facility as a whole, as PURPA requires, power sent from the solar panels to other internal components, rather than to the grid, cannot properly be considered the output of the facility.

26. That interpretation is further confirmed when we consider the terms "facility" and "power production capacity" in light of "their context and with a view to their place in the overall statutory scheme."[73] The purpose of PURPA's 80 MW "power production capacity" limitation is to reserve the benefits of QF status for only certain types of facilities. When a facility meets the QF requirements, the benefits of that status—e.g., the right to interconnect with the relevant electric utility and sell

---

[72] Dissent at P 13 n.22.

[73] *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989) ("[S]tatutory language cannot be construed in a vacuum. It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."). *See Graham Cty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 559 U.S. 280, 290 (2010) (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 568 (1995)) ("Courts have a duty to 'construe statutes, not isolated provisions.'"); *Johnson v. United States*, 559 U.S. 133, 139 (2010) ("Ultimately, context determines meaning."); *Gen. Dynamics Land Sys. v. Cline*, 540 U.S. 581, 596 (2004) (It is a "cardinal rule that statutory language must be read in context [since] a phrase gathers meaning from the words around it." (quotations omitted)); *Robinson*, 519 U.S. 337 at 341 (We look to "the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.").

the facility's output to that utility at an avoided-cost rate[74]—accrue to the facility as a whole. Given that statutory structure, and the importance of the rights at the point of interconnection, we find that the best interpretation of the 80-MW limit on a facility's power production capacity is as a limit on the facility's net output to the electric utility (i.e., at the point of interconnection), taking into account all components necessary to produce electric energy in a form useful to an interconnected entity. This interpretation aligns the 80-MW limitation with the mandatory obligations and interconnection rights that are the foundation of Congress's efforts to "encourage" QF development under PURPA.[75]

27. The Commission's early proceedings applying its PURPA regulations were consistent with this interpretation that "power production capacity" is best understood as the amount of power that a facility is capable of safely and reliably sending to the interconnecting utility. In formulating the "send out" test in *Occidental*,[76] the Commission recognized that

---

[74] *See, e.g.*, 18 C.F.R. § 292.303(a), (c).

[75] *See, e.g.*, 16 U.S.C. § 824a-3(a). Where Congress did not wish to limit a facility's net output to the electric utility, as in the case for "qualifying cogeneration facilities," Congress did not impose a power production capacity limit. *E.g.,* 16 U.S.C. § 796(18)(A), (B) (defining "qualifying cogeneration facility" based on the nature of its output but not, as with a qualifying small power production facility, based on its power production capacity).

[76] Commissioner Danly characterizes today's order as establishing a new test, which he dubs the "for delivery to the utility" standard. Dissent at P 9. We disagree. As discussed below, in the four decades since the Commission first adopted the send-out test in *Occidental*, it has consistently measured a

while the nominal rating of a facility's generating equipment may exceed 80 MW, it is "the maximum net output of the facility which can be safely and reliably achieved under the most favorable operating conditions likely to occur over a period of several years" that determines the facility's "power production capacity".[77] The Commission further explained that "the nominal rating of even a key component of the facility" is not necessarily determinative because, for example, "it is not uncommon for smaller facilities to find it most economic to employ commercially available components some of which have individual capabilities significantly exceeding the overall facility capability."[78]

28. The Commission stated that the net output of a facility is "its send out after subtraction of the power used to operate auxiliary equipment in the facility necessary for power generation (such as pumps, blowers, fuel preparation machinery, and exciters) and for other essential electricity uses in the facility from the gross generator output."[79] Because the Commission explicitly focused on the overall facility capabilities, *Occidental* supports the proposition that power production capacity means output in a form

---

QF's power production capacity at the point of interconnection with the interconnecting electric utility. See *infra* PP 27-29. That the Commission is applying that long-established standard to new facts presented by Broadview's application does not turn it into a new standard.

[77] *Occidental Geothermal, Inc.*, 17 FERC ¶ 61,231 at 61,445.

[78] *Id.* at 61,444-45.

[79] *Id.*

useful to an interconnected entity. The Commission's subsequent applications of the *Occidental* approach likewise reflect that the owner or operator of a facility should not be allowed to obtain the benefits of QF status for more than the facility's net output because only the amount of the net output will be capable of being avoided on an interconnected utility's system.[80]

29. The Commission reinforced that reasoning in *Malacha Power Project, Inc.*,[81] in which the Commission again concluded that "power production capacity" is determined from the facility's net output after taking into account all components necessary to produce electric energy in a form useful to an interconnected entity. In *Malacha*, the Commission addressed the issue of whether "certain interconnection equipment required for the transmission of the electric power produced by the facility to [the purchasing utility's] transmission

---

[80] *E.g.*, *Accord Power Developers, Inc.*, 32 FERC at 61,276 (reasoning from *Occidental*'s focus on net output that QF sales are limited to net output, otherwise "the QF would be receiving avoided cost prices for an amount of power that it does not enable the utility to avoid generating or purchasing); *Penntech Papers, Inc.*, 48 FERC at 61,423 (explaining that for a cogeneration QF, an economic distortion may result if the Commission were to grant certification for the facility's maximum rated capacity and allow Penntech to sell gross output at one utility's avoided cost rates while the cogenerator purchases its needed auxiliary power, which is properly an internal cost of the facility, at another utility's retail rates); *Turners Falls*, 53 FERC at 61,225-26 (denying proposal to certify and sell a facility's gross output even though the facility would purchase its auxiliary power from utilities, again focusing on the proposed facility's "net capability").

[81] *Malacha*, 41 FERC ¶ 61,350.

system will be part of the qualifying small power production facility."[82] The Commission held that the interconnection equipment can be included as "auxiliary equipment in the facility necessary for power generation."[83] The Commission also determined that, when interconnection equipment is included, the power production capacity of the facility is determined not at the facility's powerhouse substation but at the point of interconnection with the purchasing utility's transmission system, after deducting losses resulting from transmission over the interconnection equipment.[84] That is, the facility's power production capacity was determined after taking into consideration all of the components of the facility, including components necessary for interconnection.

30. The Commission codified *Malacha* in a 1995 rulemaking. There, the Commission updated the definition of "qualifying facility" to include certain "transmission lines and other equipment used for interconnection purposes (including transformers and switchyard equipment)."[85] In that rule, the

---

[82] *Id.* at 61,945.

[83] *Id.* at 61,946.

[84] *Id.*

[85] *Streamlining of Regulations Pertaining to Parts II and III of the Federal Power Act and the Public Utility Regulatory Policies Act of 1978*, Order No. 575, FERC Stats. & Regs. ¶ 31,014 at 31,279-81 (1995) (cross-referenced at 70 FERC ¶ 61,022); *id.* FERC Stats. & Regs. ¶ 31,014 at 31,279 n.46 (citing *Clarion Power Co.*, 39 FERC ¶ 61,317 (1987); *Kern River Cogeneration Co.*, 31 FERC ¶ 61,183 (1985); *Malacha*, 41 FERC ¶ 61,350; *Oxbow Geothermal Corp.*, 67 FERC ¶ 61,193 (1994)); 18 C.F.R. § 292.101(b)(1)(i)-(iii).

Commission explained that such equipment was part of the "facility" if it was used to transmit the QF's power output to the interconnecting utility or to transmit the interconnected utility's supplementary, standby, maintenance and backup power to the QF.[86] In so doing, Order No. 575 further underscored the Commission's view that a qualifying facility includes all components necessary to produce electric energy in a form useful to an interconnected entity—an interpretation that is consistent with the send-out analysis insofar as it supports measuring a "facility's" "power production capacity" based on the power that the facility can deliver to the interconnected utility.

31. At the same time in 1995, the Commission introduced the first version of Form No. 556, which standardized the information to be included in a self-certification of QF status or an application for Commission certification of QF status. Specifically, Line 4a of Form No. 556 required a filer to "describe the principal components of the facility including boilers, prime movers and electric generators, and explain their operation."[87] In 2010, the Commission transferred and expanded the required description of

---

[86] 18 C.F.R. § 292.101(b)(i)-(iii); *see* Order No. 575, FERC Stats. & Regs. ¶ 31,014 at 31,280. (explaining that included transmission lines and interconnection equipment "may be used only for the purpose of effectuating the QF's sale of power" or to otherwise "serve the same users that are served by the power production components of the QFs, to serve other QFs, and to serve the backup, etc. needs of the QF, and its thermal host, in appropriate circumstances."). The regulation also includes equipment used to transmit power to or from the utility on behalf of other QFs. 18 C.F.R. § 292.101(b)(1)(i)(C).

[87] Order No. 575, 60 Fed. Reg. 4831 at 4855.

primary components into Line 7h of Form No. 556. It requires a filer to "identify all … electrical generators, *photovoltaic solar equipment*, … and/or other primary power generation equipment used in the facility"[88] and describe "how the components operate as a system."[89] The text and structure of Form No. 556 show a focus on how a facility's principal components, which have been clarified to include photovoltaic solar equipment (not merely panels), operate together.

32. Based on the analysis above, we conclude that Broadview's facility will conform to the size limit for a qualifying small power production facility established in PURPA and the Commission's regulations. To be sure, Broadview's facility is distinct in certain respects from the facilities that the Commission considered when it first applied the "send out" test. Nevertheless, on reconsideration, we do not believe that those differences, including the presence of a 200-MWh battery energy storage system and a 160-MW solar array, are material for the purposes of determining whether Broadview's "facility" has a "power production capacity" of no more than 80 MW. Although Broadview's configuration allows it to more consistently deliver a higher share

---

[88] *Revisions to Form, Procedures, and Criteria for Certification of Qualifying Facility Status for a Small Power Production or Cogeneration* Facility, Order No. 732, 130 FERC ¶ 61,214, (2010), at appendix A – Proposed FERC Form No. 556, Line 7h (emphasis added). The current version of Form No. 556 uses identical text at Line 7h. Form No. 556, https://www.ferc.gov/media/form-no-556 (OMB Control # 1902-0075, Expiration Nov. 30, 2022).

[89] *Id.*

of the 80 MW power production capacity, that configuration does not change the fact that the Broadview facility is not actually capable of providing more than 80 MW at any one point in time at its point of interconnection with NorthWestern. On reconsideration, we find that while this effectively increases the Broadview facility's capacity factor,[90] it does not change the Broadview facility's "power production capacity" or call into question our longstanding reliance on the "send out" analysis to measure power production capacity.

33. Likewise, consistent with *Malacha*, we further find that it is reasonable to measure power production capacity of a facility like Broadview's at the point of interconnection because its inverters are an integral part of a solar PV facility's generation equipment and are necessary to produce power in a form useful to the interconnecting utility.[91] Indeed any solar-PV QF can

---

[90] *See, e.g.*, *capacity factor*, U.S. Energy Information Administration, *Glossary*, https://www.eia.gov/tools/glossary/index.php?id=C (last visited Mar. 3, 2021) (defining capacity factor as "the ratio of the electrical energy produced by a generating unit for the period of time considered to the electrical energy that could have been produced at continuous full power operation during the same period"). *See also, e.g.*, Dykes et al., National Renewable Energy Laboratory, *Opportunities for Research and Development of Hybrid Power Plants*, at 41 (May 2020) (noting that "[i]f it is valuable to maximize the interconnection capacity factor, the system may be oversized on the DC side to generate more power during off-peak hours and clip or store the power during hours of overproduction, relative to inverter capacity").

[91] *E.g.*, Broadview Rehearing Request at 9-10, 18 (discussing inverters).

produce power for delivery to the purchasing utility only to the extent enabled by the inverters because the grid operates predominantly using AC power.[92] Without the inverters, a solar PV QF cannot benefit from its rights to interconnect and exchange power with an electric utility, as Congress intended to "'encourage the development of cogeneration and small power production facilities' by addressing 'problems imped[ing] the development of nontraditional generating facilities.'"[93] Because Broadview's facility—including the PV panels, inverters, and the battery system—can deliver a maximum of 80 MW of power to NorthWestern's system at any one point in time,[94] the power

---

[92] Broadview's interconnection agreement with NorthWestern provides that the total size of the "[p]roject will be 80 MW based on the max output of the inverters." Broadview October 17, 2019 Answer at 4.

[93] *E.g.*, *Conn. Valley Elec. Co., Inc. v. FERC*, 208 F.3d 1037, 1045 (D.C. Cir. 2000) (quoting *FERC v. Miss.*, 456 U.S. 742, 750 (1982)). 16 U.S.C. § 824a-3 ("the Commission shall prescribe, and from time to time thereafter revise, such rules as it determines necessary to encourage cogeneration and small power production"). Congress sought to encourage the development of QFs to provide electricity to a transmission system that had operated on AC power since the turn of the twentieth century.

[94] Lending further support to that conclusion, the interconnection studies executed by NorthWestern, the interconnecting utility, identify Broadview's summer and winter output as 80 MW, and the interconnection agreement, provides that the total size of the "Project will be 80 MW based on the max output of the inverters." Broadview October 17, 2019 Answer at 4.

production capacity of Broadview's facility cannot and will not exceed 80 MW.

2. The Certification Filing

34. Upon further consideration of the arguments on rehearing, we conclude that Broadview Solar has satisfied our regulatory requirements for Commission certification of QF status.

35. Before 2006, the QF status of a small power production facility depended only on the facility's conformance to the regulatory requirements about maximum size and primary energy source, as interpreted in Commission precedent.[95] The Commission noted that QFs and purchasing utilities could agree that a generation facility met the requirements for QF status, and the facility would qualify for PURPA benefits without making any filing with the Commission.[96] In 2006, the Commission added the requirement that the owner or operator must make a certification filing, either by filing for

---

[95] *Revisions to Form, Procedures, and Criteria for Certification of Qualifying Facility Status for a Small Power Production or Cogeneration* Facility, Order No. 732, 130 FERC ¶ 61,214, at PP 34, 37 (reviewing historical context); *Small Power Production and Cogeneration Facilities – Qualifying Status*, Order No. 70, FERC Stats. & Regs. ¶ 30,134, at 30,937-38, 30,954-55 (cross-referenced at 10 FERC ¶ 61,230) (rejecting a proposal to require Commission certification of all facilities seeking QF status, instead providing that facilities that met the requirements for QF status needed only to furnish an informational notice to the Commission of QF status).

[96] *Revisions to Form, Procedures, and Criteria for Certification of Qualifying Facility Status for a Small Power Production or Cogeneration Facility*, 129 FERC ¶ 61,034, at P 8 (2009) (NOPR for Order No. 732).

self-certification or filing an application for Commission certification.[97] Both approaches involve filing a Form No. 556 (which was introduced earlier, in 1995).[98]

36. Form No. 556 was always intended to be a flexible tool for a facility owner or operator to submit information relevant to whether a facility meets the requirements to be considered a QF. The form does not supplant Commission precedent regarding the requirements that a facility must satisfy to secure QF status. For that reason, we conclude that the Commission erred in the September 2020 Order by relying on particular lines of Form No. 556 to support its decision to overturn the "send out" line of precedent. In addition, as discussed below, we find that the Commission also overlooked the extent to which the pragmatic approach it has always taken with respect to Form No. 556 can be consistent with our "send out" precedent.

37. When the Commission published the first version of Form No. 556 in 1995, it sought to incorporate a standardized form into the regulations to save developers from having to examine the Commission's regulations and precedent to certify.[99]

---

[97] *Revised Regulations Governing Small Power Production and Cogeneration Facilities*, Order No. 671, 114 FERC ¶ 61,102, *order on reh'g*, Order No. 671-A, 115 FERC ¶ 61,225 (2006); 18 C.F.R. § 292.207(a) (self-certification); *id*. § 292.207(b) (application for Commission certification).

[98] 18 C.F.R. § 292.207(a), (b)(2).

[99] *Streamlining of Regulations Pertaining to Parts II and III of the Federal Power Act and the Public Utility Regulatory Policies Act of 1978*, FERC Stats. & Regs. ¶ 32,489, at 32,648 (1992)

Form No. 556 required a report of the "power production capacity" of a facility in compliance with the approach that had evolved in precedent.[100] This would provide the Commission with sufficient information to verify that the facility's "net capacity is below the 80-MW threshold" and would satisfy the need "to indicate to electric utilities their qualified power purchase obligations."[101] The Commission believed that the Form No. 556 would better delineate the information requirements and provide for the step-by-step application of pertinent regulations to an owner or operator's facility.[102] But the Commission also cautioned that "any form requires some degree of flexibility since the uniqueness of individual facilities and novel applications may require supplemental data submissions."[103] The text of the form itself explained that the form was "to be completed for the purpose of demonstrating up-to-date conformance with the qualification criteria of Section 292.203(a)(1) [for small power production QFs] or Section 292.203(b) [for cogeneration facilities], based on actual or planned operating experience."[104] The form has always provided flexibility in how the filer would demonstrate this conformance. For example, Item 4a

---

(cross-referenced at 61 FERC ¶ 61,243) (NOPR for Order No. 575).

[100] *Id.*

[101] *Id.*

[102] *Id.*

[103] NOPR for Order No. 575, FERC Stats. & Regs. ¶ 32,489 at 32,649.

[104] Order No. 575, 60 Fed. Reg. 4831, 4855 (Jan. 25, 1995) (Form No. 556).

of the original Form No. 556 required the filer to "describe the principle components of the facility … and explain their operation." Item 4b further required the filer to "indicate the maximum gross and maximum net power production capacity of the facility at the point(s) of delivery and *show the derivation*."[105] The Commission did not specify how a filer must show the derivation.

38. In 2010, the Commission introduced a more specific reporting requirement for "power production capacity" in a revised Form No. 556, but still recognized that Form No. 556 would not be a perfect fit for all possible QFs. The Commission explained that most changes to the content and organization of Form No. 556 were intended to gain the benefits of electronic filing while in most cases collecting the same data as before.[106] The Commission retained some core requirements. For example, a filer still must "identify utilities purchasing the [QF's] *useful electric power output*."[107] A filer still must "indicate the maximum gross and maximum net electric power

---

[105] *Id.* (Form No. 556, Part A, Item 4b).

[106] Order No. 732, 130 FERC ¶ 61,214 at P 22 (changes "will allow FERC to electronically process QF applications, dramatically reducing required staff resources and human error, and allowing the Commission to identify patterns of reporting errors and noncompliance that would be difficult to detect through manual processing"); *Id.* at 130 FERC ¶ 61,214 at PP 90-91 (noting the problems of inaccurate or missing responses that resulted from the open-ended nature of the pre-existing form).

[107] Form No. 556, Line 4c, https://www.ferc.gov/media/form-no-556 (OMB Control # 1902-0075, Expiration Nov. 30, 2022) (emphasis added).

production capacity of the facility *at the point(s) of delivery*,"[108] although the Commission created an automated worksheet (Lines 7a to 7g) to calculate the relevant figures. This calculation begins with the "maximum gross power production capacity at the terminals of the individual generator(s) under the most favorable anticipated design conditions" (Line 7a).[109] Consistent with the "send out" line of Commission cases, Form No. 556 calculates deductions for parasitic station power at the facility (Line 7b), electrical losses in interconnection transformers (Line 7c), electrical losses in AC/DC conversion equipment (Line 7d), and "other interconnection losses in power lines or facilities … between the terminals of the generator(s) and the point of interconnection with the utility" (Line 7e).[110] The result of the automated calculation is the facility's "maximum net power production capacity" (Line 7g).[111] Importantly, Line 7h carries forward the requirement to describe the facility and its operation. The filer must "[i]dentify all … electrical generators, photovoltaic solar equipment … and/or other primary power generation equipment used in the facility" and "[p]rovide a description of how the components operate as a system."[112] All of these changes were designed to provide the information needed to apply

---

[108] *Id.* Section 7 Technical Facility Information (introductory text) (emphasis added).

[109] *Id.* Line 7a.

[110] *Id.* Lines 7b-7e.

[111] *Id.* Line 7g.

[112] *Id.* Line 7h.

the send out calculation to the types of QFs that were generally under development at that time.

39. But the Commission never intended to turn this data collection tool into a mechanical rule that dictated whether a facility constituted a QF. Instead, even with Form No. 556 the Commission contemplated it would make a determination under PURPA based on all of the facts of the matter and not merely on the contents of the form. Indeed, the form acknowledges that its design may not be suitable for all instances.[113] For example, Line 1m on the form allows an applicant to indicate if it "has special circumstances … that make the demonstration of compliance via this form difficult or impossible."[114] In addition, the form directs the filer to "complete the form to the extent possible, explaining any special circumstances in the Miscellaneous section" at the end of the form.[115] Thus, although double-counting is prohibited, an owner or operator may use Form No.

---

[113] For example, the Commission recently revised its PURPA-implementing regulations to accommodate the evolution of cogeneration facilities using fuel cell systems with integrated hydrocarbon reformation equipment. *Fuel Cell Thermal Energy Output*, Order No. 874, 86 Fed. Reg. 8133 (Feb. 14, 2021), 173 FERC ¶ 61,226 (2021). The Commission did not revise Form No. 556; instead it directed owners or operators of these fuel cell systems to use the existing version of the Form No. 556 and provided guidance on how respondents should complete self-certifications or applications for Commission certification. *Id.* at 8139 n.64.

[114] Form No. 556, Line 1M, https://www.ferc.gov/media/form-no-556 (OMB Control # 1902-0075, Expiration Nov. 30, 2022).

[115] *Id.*

556's flexibility to account for all effects of its conversion equipment.[116]

40. We conclude that Broadview has satisfied the Commission's certification requirement through the Form No. 556 filed with its application. Broadview's differing approaches to how best to complete Form No. 556 over time do not prevent the Commission from determining that Broadview ultimately has satisfied the requirements that its facility, as proposed in its application on September 11, 2019, uses a primary energy source of solar energy and that its facility will not have a "power production capacity" in excess of 80 MW. Across all of Broadview's filings with the Commission, in fact, Broadview has consistently reported a net power production capacity of 80 MW to be delivered to the point of interconnection with NorthWestern's system. Although Broadview did not take advantage of Line 1m and the Miscellaneous section to explain the special circumstances presented by using Form No. 556 to demonstrate compliance with the Commission's regulations, Broadview did describe in Line 7h how its facility would operate with the inverters to produce at most 82.548 MW of AC power before deducting eligible loads and losses, for a maximum net power production capacity of 80 MW. And beyond Form No. 556, Broadview sufficiently explained in its submittals that its facility would

---

[116] For example, Broadview reported its gross power production capacity as 82.548 MW of AC power (Line 7a), while acknowledging in line 7h that the total capacity of the solar PV array is 160 MW before accounting for the inverter limitations.

comply with the size limit on "power production capacity" in PURPA and our regulations.[117]

3. Commission Certification of Broadview's Facility as a QF

41. Because Broadview has demonstrated that its facility meets the Commission's requirements for QF status, we grant certification of small power production QF status for the facility, provided that the facility is operated in the manner described in Broadview's application on September 11, 2019, Broadview's answer on October 17, 2019, in the Commission's September 2020 Order, and in this order. To the extent that facts or representations that form the basis of this order change, this order cannot be relied upon.[118] Although Broadview's facility might still meet the technical requirements for QF status under the changed circumstances, self-recertification or Commission-recertification at that point will be necessary to maintain QF status.[119]

C. Other Issues

42. In light of our determination above, we dismiss, as moot, Broadview's arguments that the Commission should have changed its interpretation of "power production capacity" by formal rulemaking rather than apply the interpretation retroactively in an adjudication.[120] For the same reason, we dismiss, as

---

[117] Application at 2-8.

[118] 18 C.F.R. § 292.207(d)(1)(i).

[119] *Id.*

[120] *E.g.*, Broadview Rehearing Request at 9, 21-22; *see also* SEIA October 1, 2020 Request for Rehearing and Clarification

moot, Broadview's arguments that the Commission should have discussed in the September 2020 Order how its changed interpretation of "power production capacity" could affect facilities that had previously been exempt from the Commission's filing requirements based on the facilities' "net power production capacity" of 1 MW or less.[121]

The Commission orders:

(A) In response to Broadview's request for rehearing, the September 2020 Order is hereby modified and the result set aside, as discussed in the body of this order.

(B) The Commission hereby grants Broadview's application for Commission certification of its facility as a qualifying small power production facility, as discussed in the body of this order.

---

at 6-12; Southern Current LLC October 1, 2020 Request for Rehearing and Clarification at 4-6.

[121] *E.g.*, Broadview Rehearing Request at 9 (citing exemption in 18 C.F.R. § 292.203(d)); *see also* Terraform Power, LLC October 1, 2020 Request for Clarification at 1-2; SEIA October 1, 2020 Request for Rehearing and Clarification at 23-25; New Sun Energy, October 1, 2020 Request for Rehearing at 20-21; Pine Gate Renewables, LLC, October 1, 2020, Request for Rehearing or Clarification at 6-11; Southern Current LLC October 1, 2020 Request for Rehearing and Clarification at 8.

By the Commission. Commissioner Danly is dissenting with a separate statement attached.

Commissioner Christie is dissenting.

(S E A L)

Kimberly D. Bose,

Secretary.

UNITED STATES OF AMERICA

FEDERAL ENERGY REGULATORY COMMISSION

Broadview Solar, LLC Docket No. QF17-454-006

(Issued March 19, 2021)

DANLY, Commissioner, *dissenting*:

1. Today's order (Order) finds that Broadview Solar, LLC's (Broadview) proposed 160 MW solar power facility has a power production capacity of only 80 MW. This counterintuitive finding is contrary to both the plain language and the structure of the Public Utility Regulatory Policies Act of 1978 (PURPA).[1] It is also inconsistent with the instructions for calculating power production capacity in Form 556, which under our regulations is required for self-certifications and certifications of qualifying facilities (QFs) under PURPA.[2] Nor does this holding find any support in the Commission's regulations or precedent. I am therefore compelled to dissent in full.

I. The Facility's Power Production Capacity is Well Above 80 MW When Determined by the

[1] 16 U.S.C. §§ 796(17), 824i, 824a-3.

[2] 18 C.F.R. § 131.80 (2020). Although our regulations adopt Form 556, the form itself is found at https://www.ferc.gov/media/form-no-556 (OMB Control # 1902-0075, Expiration Nov. 30, 2022).

Method Established by the Commission for Calculating Power Production Capacity

2. Section 201 of PURPA and section 204(a)(1) of the Commission's implementing regulations limit the size of small power production QFs to a "power production capacity" of 80 MW.[3] Therefore, the issue raised by Broadview's QF certification application (Application) is whether Broadview's proposed facility (Facility), comprised of 160 MW of solar panels and other equipment, would have a power production capacity greater than 80 MW.

3. Form No. 556 specifies how an applicant should ordinarily calculate and report the power production capacity of its facility. A project sponsor must report maximum gross power production capacity "at the terminals of the individual generators under the most favorable anticipated design conditions" (line 7a). The project sponsor may then subtract parasitic station power used at the facility (line 7b), electrical losses in interconnection transformers (line 7c), electrical losses in AC/DC conversion equipment (line 7d), and other interconnection losses (line 7e) to yield the facility's maximum net power production capacity (line 7g).

4. In its Application, Broadview stated that "the Facility will be comprised of a direct current ("dc") coupled array of solar PV panels with *a gross capacity of 160 MW* (dc)."[4] Broadview also stated that

---

[3] 16 U.S.C. § 796(17)(A)(ii); 18 C.F.R. § 292.204(a)(1) (2020).

[4] Application at 2 (emphasis added).

parasitic station power is 1,245 kW,[5] transformer AC electrical losses are 800 kW,[6] AC/DC conversion losses are 1,978 kW,[7] and other interconnection losses are 503 kW.[8] The total in deductions from the 160 MW gross power production capacity of the Facility is 4.526 MW, which results in a net power production capacity of approximately 155.5 MW. This is 75.5 MW above the statutory maximum allowable power production capacity for a QF. The Facility does not meet the statutory requirement to be a QF.

5. The fact that Form 556 calculations show a 160 MW facility to have a net power production capacity considerably greater than 80 MW is not surprising. However, after stating that the gross power production capacity of its solar facility is 160 MW of direct current (DC) energy, Broadview goes on to assert that "the maximum gross output of the Facility at its inverters will be approximately 82.5 MW(ac)."[9] The reason for using this much lower number as the gross output of the Facility, according to Broadview, is that "[a]t their terminals, the solar PV panels and BESS connect to twenty 4.127 MW(dc) to alternating current ("ac") inverters."[10] In other words, the Facility employs inverters to convert the DC energy produced by the solar panels into alternating current (AC) that is delivered to the interconnection. The

---

[5] *Id.* at 7.

[6] *Id.* at 8.

[7] *Id.*

[8] *See* Form 556 filed with Application, line 7e.

[9] Application at 2.

[10] *Id.*

Facility only employs a sufficient number of inverters to convert the 82.5 MW of the 160 MW of DC produced by the Facility into AC. Surplus DC energy produced by the solar panels is diverted to the Facility's battery storage equipment where it is stored for later conversion and delivery to the interconnection.

6. However, Line 7a of Form 556, the line on which the gross power production capacity is reported, requires that filers provide "[t]he maximum gross power production capacity *at the terminals of the individual generator(s)* under the most favorable anticipated design conditions." (Emphasis added). Broadview affirmatively states in its Application that the inverters are connected to the solar panels "[a]t their terminals."[11] Therefore the gross capacity of the Facility at "the terminals of the individual generator(s)" is 160 MW, and the gross conversion capacity of the inverters reported by Broadview is downstream of those terminals. Form 556, which requires Broadview to report the gross power production capacity of its solar panels at their terminals, does not permit Broadview to report power production capacity measured downstream of the solar panels' terminals.

7. Broadview also affirmatively states in its Application that, "when there is more dc power available from the solar array than can [be] converted to ac power by the inverters, that power is stored in the [battery storage system]."[12] In other words, even when the Facility is producing 82.5 gross MW of AC,

---

[11] *Id.* at 2.

[12] *Id.* at 7.

which is the maximum quantity of DC energy that can be converted by the inverters, the Facility is capable of producing additional energy that is diverted to the Facility's batteries for later delivery to the interconnection. It simply is not possible to conclude that the "gross" power production capacity of the Facility is only 82.5 MW, when the Facility can produce additional energy at the same time that 82.5 MW AC is being delivered to the interconnection and when the additional energy can later be converted to AC and delivered to the interconnection.

8. That should be the end of the story, as the Commission found in its original order issued on September 1, 2020.[13] However, today, the Commission reverses its holding on rehearing, finding that the 160 MW Facility satisfies PURPA's 80 MW power production capacity limit. The Commission does not appear to disagree that application of the Form 556 methodology to Broadview's Application would result in a calculated power production capacity well in excess of 80 MW. However, the Commission dismisses Form 556 as a mere "data collection tool" and notes that Form 556 allows an applicant to "indicate if it 'has special circumstances . . . that make the demonstration of compliance via this form difficult or impossible.'"[14]

9. After disavowing the calculation required by Form 556, the Commission applies a new standard for

---

[13] *Broadview Solar, LLC*, 172 FERC ¶ 61,194 (2020) (September 2020 Order).

[14] *Broadview Solar, LLC*, 174 FERC ¶ 61,199, at P 39 (2021) (quoting Form No. 556, Line 1M) (Order).

determining power production capacity, namely "the whole facility's net output to the electric utility, taking into account all components necessary to produce and provide electric energy in a form useful to an interconnected entity."[15] Not a single word of this long sentence (which for convenience I refer to as the "for-delivery-to-the-utility" standard) appears in the statute.[16] The Commission goes on to find that Broadview's Facility meets this new standard.[17]

10. I do not agree that Form 556 is simply a data collection tool, given its very specific instructions for calculating power production capacity and the importance the result has for a generator's status as a QF. Rather, Form 556 requires a certain approach to perform the calculation of power production capacity but permits deviations from that approach based on the special circumstances of a particular proposed project. Here, however, Broadview did not claim any special circumstances, and I do not know how it could, given the fact that solar panel technology is well established and specifically referenced in Form 556. Thus, the Facility is unlike the fuel cell systems referenced by the Commission,

---

[15] Order, 174 FERC ¶ 61,199 at P 26.

[16] The Commission asserts that this standard is not new, but merely reflects the application of four decades of precedent to new facts. *Id.* P 27 n.85. As I explain below, this is simply not correct. The new for-delivery-to-the-utility standard represents a material deviation from our precedent.

[17] *Id.*

which in fact are a new technology not contemplated by Form 556.[18]

11. Nevertheless, I concede that a Form 556 calculation would not be dispositive if a different result were compelled by PURPA or our regulations or precedent. No such deviation is required here. The Commission's new for-delivery-to-the-utility standard is inconsistent with PURPA and finds no support in our regulations or our precedent.

II. PURPA Requires Consideration of Power Production Capacity, Not Delivery Capacity

12. PURPA's 80 MW power production capacity limit appears in the statutory definition of a small power production facility, which is defined as a solar, wind, waste, or geothermal facility that, among other things, "has a power production capacity which, together with any other facilities located at the same site (as determined by the Commission), is not greater than 80 megawatts."[19] Notably absent from this statutory limit on the size of a small power production facility is any language stating, or even implying, that the facility producing the power also must be physically capable of delivering the power it produces to the purchasing utility in a useful form.

13. The Commission justifies its new interpretation of the statutory language by asserting that the term "power production capacity" is ambiguous.[20] But this claim is merely a stratagem to

---

[18] *Id.* P 39 n.144.

[19] 16 U.S.C. § 796(17)(A)(i)-(ii).

[20] Order, 174 FERC ¶ 61,199 at P 23.

permit the introduction of a new standard that is inconsistent with the statute's language. In fact, there is no material ambiguity as to what "power production capacity" could mean. "Power" in this context means energy, and there is nothing in the statutory text to suggest that it means only AC energy and not DC energy. Power "production" unambiguously means the *production* of power, not the delivery of power. And the "capacity" of a generation facility is generally understood to mean its installed capacity[21] or its maximum power production output.[22]

---

[21] The Commission asserts that I take the position that the provisions of the statutory standard "compel us to adopt the nameplate capacity of Broadview's solar array as its power production capacity." *Id.* P 23, n.76. That is not correct. I am providing the reference to installed capacity because it illustrates that the term "capacity" focuses on generation equipment, not delivery. As my dissent makes clear, I believe that the statutory term is capable of being interpreted as referring to net generation capacity with the power consumed in station power and other essential uses subtracted out.

[22] *See e.g.* PJM Open Access Tariff, section I.1, Definitions ("'Capacity' shall mean the installed capacity requirement of the Reliability Assurance Agreement or similar such requirements as may be established."); *Elec. Storage Participation in Mkts. Operated by Reg'l Transmission Orgs. & Indep. Sys. Operators*, Order No. 841, 162 FERC ¶ 61,127, at P 93 (2018) (capacity of electric storage resources defined as "the maximum output that the resource can sustain for the duration of the minimum run-time."). That capacity refers to generation output rather than delivery capacity also is supported by the Energy Information Administration's glossary, which defines "capacity factor" as "the ratio of *the electrical energy produced by a generating unit for the period of time considered* to the electrical energy that could have been produced at continuous full power operation

14. The Commission nevertheless claims that the statutory language is ambiguous because "PURPA . . . neither defines the terms "facility" and "power production capacity," nor explains how the Commission is supposed to ascertain the "power production capacity" of any particular "facility."[23] Of course, the lack of a further definition of an unambiguous term does not somehow render the term ambiguous. Nor does the fact that the statutory term does not specify how the term should be applied to a particular facility create ambiguity when the term unambiguously says that the 80 MW limit should be based on power production capacity.

15. The Commission also suggests ambiguity in the statutory language because "the Commission could, as it has for nearly forty years, look to the maximum output that the facility can produce for the electric utility after accounting for all the constituent parts that make up the facility, which in this case includes the inverters."[24] As I explain below, the Commission's attempt to fit its new for-delivery-to-the-utility standard into its past precedent strains that precedent beyond recognition. But in any event, the Commission cannot create ambiguity as to the intent of Congress when it enacted in PURPA *in 1978*

---

during the same period"). U.S. Energy Information Administration, *Glossary*, https://www.eia.gov/tools/glossary/index.php?id=C (emphasis added).

[23] Order, 174 FERC ¶ 61,199 at P 23.

[24] *Id.*

based on the Commission's desire to extend its past precedent to establish a new standard *in 2021*.

16. Next, the Commission cites to my statement above that "the term 'capacity' is generally equated to 'output.'"[25] From this, the Commission asserts:

As applied to just the facility's solar panels in this instance, output could be read to refer to the raw quantity of electricity generated. But when applied to the facility as a whole, as PURPA requires, power sent from the solar panels to other internal components, rather than to the grid, cannot properly be considered the output of the facility.[26]

17. This assertion might carry some force if one were only to consider the word "output" in isolation, and if that word actually was in the statute (the statutory term is "capacity"). But the Supreme Court has counseled against relying on the "hypertechnical reading" of a statutory provisions by reading them in isolation, and has held instead that statutory provisions should be read as a whole.[27] Here, PURPA does not contain an 80 MW "capacity" limit, but an 80 MW "*power production* capacity" limit. When the fact that Congress modified the word "capacity" by the words "power production" is considered, it is clear that the statute refers to the capacity of the facility to produce power, not to deliver power to the interconnection. The Commission's interpretation, derived from its hypertechnical focus on a single word

---

[25] *Id.* P 25.

[26] *Id.*

[27] *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989) (*Davis*).

that is not even present in the statute, is, as the Supreme Court held in *Davis*, "implausible at best."[28] This is not a case in which the Commission is grappling with an ambiguity, it is one where the ambiguity is (unconvincingly) manufactured in order to circumvent the plain language of the statute.

18. Having claimed that "power production capacity" is ambiguous, the Commission goes on to say that its interpretation "is further confirmed when we consider the terms 'facility' and 'power production capacity' in light of 'their context and with a view to their place in the overall statutory scheme.'"[29] For this proposition the Commission relies on the Supreme Court's statement in *Davis* that "statutory language cannot be construed in a vacuum. It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."[30]

19. Far be it for me to disagree with the Supreme Court's declaration of a fundamental canon of statutory construction. But as I explain above, in *Davis*, the Court was addressing a "hypertechnical reading" of a statutory provision that it found was "not inconsistent with the language of that provision examined in isolation."[31] When the Court considered the language in the statutory provision as a whole, it

---

[28] *Id.* at 810.

[29] Order, 174 FERC ¶ 61,199 at P 26 (quoting *Davis*, 489 U.S. at 809).

[30] *Id.* n.82.

[31] *Davis*, 489 US at 809.

determined that the hypertechnical interpretation being advanced by the State of Michigan "would be implausible at best."[32]

20. Thus, the fundamental canon of statutory construction referenced by the Supreme Court prohibits taking isolated phrases of statutes out of context in order to reach hypertechnical interpretations that are implausible when read in conjunction with the remainder of the statute. It does not permit the use of conjecture to avoid the plain meaning of a complete statutory provision. Here, the September 2020 Order did not take the term "power production capacity" of out context. Interpreting that term to mean the capacity to produce power, as opposed to deliver power, is not hypertechnical at all. Instead it affords that term its ordinary meaning. Nor does the Commission cite to any other statutory language in PURPA that renders this plain reading implausible.

21. Instead, the Commission uses the holding in *Davis* as a jumping off point for an unconvincing speculation as to a possible alternative meaning untethered to any particular statutory provision:

[W]hen a facility meets the QF requirements, the benefits of that status—e.g., the right to interconnect with the relevant electric utility and sell the facility's output to that utility at an avoided-cost rate —accrue to the facility as a whole. Given that statutory structure, and the importance of the rights at the point of interconnection, we find that the best interpretation of the 80-MW limit on a facility's power

---

[32] *Id.* at 810.

production capacity is as a limit on the whole facility's net output to the electric utility (i.e., at the point of interconnection), taking into account all components necessary to produce electric energy in a form useful to an interconnected entity.[33]

It is not apparent how this explanation puts the statutory language in context or shows its place in the overall statutory scheme. Why does the fact that a QF has the right to interconnect with and sell its output to a utility at avoided cost rates lead to the conclusion that the "best interpretation" of the statute is that the 80 MW power production limit should be read as a limit on the facility's ability to produce electric energy in a form useful to an interconnected entity? The two points are wholly unrelated.

22. The only possible connection could be if there was a provision in PURPA that limited a small power production facility's interconnection and sales rights to 80 MW. But that is not the case. PURPA simply requires the Commission to promulgate rules obligating utilities to purchase electricity from QFs (without distinguishing between small power production facilities and cogeneration facilities) at avoided costs without any mention of limiting either interconnection or sales rights.[34] Indeed, there are many qualifying cogeneration facilities with capacities of 300 MW, 500 MW, and more.[35]

---

[33] Order, 174 FERC ¶ 61,199 at P 26.

[34] *See* PURPA § 210(a)(2); 16 U.S.C. § 824a-3(a)(2).

[35] *See, e.g. S. Cal. Edison Co.*, 143 FERC ¶ 61,222, at P 4 (385 MW cogeneration QF); *Chevron U.S.A. Inc.*, 153 FERC ¶ 61,192, at P 2 (two 300 MW cogeneration QFs); *Elk Hills Power, LLC*,

Whatever the reason for the 80 MW power production capacity limit, it cannot be that Congress was concerned about the consequences of allowing small power production facilities larger than 80 MW to require utilities to interconnect with them and purchase their electricity at avoided cost rates. There is no logical reason why Congress would try to provide utilities with such protections against small power producers delivering more than 80 MW but at the same allowed cogenerators to interconnect and deliver electricity in unlimited quantities.[36]

23. The Commission also asserts that the statutory term "facility" is ambiguous.[37] It relies on this purported ambiguity to support its claim that power production capacity applies to the "whole" facility, including the inverters and their limited capacity to convert DC into AC. I completely agree that nothing in PURPA suggests that inverters cannot be deemed part of a small power production facility. However, the limited ability of Broadview's Facility to *convert* DC energy into AC for delivery is irrelevant to ascertaining the maximum *power production* capacity of the Facility, which is the only attribute at issue in determining whether the Facility qualifies as a QF.

24. In sum, the majority's justification for deviating from the plain language of PURPA is not

---

Docket No. QF12-252-001 (June 8, 2012) (586 MW cogeneration QF).

[36] A simpler, and more logical, explanation is that Congress wanted to limit the benefits PURPA provided to renewable resources and chose an 80 MW power production capacity as an objective standard for the cut-off.

[37] Order, 174 FERC ¶ 61,199 at P 23.

credible. Recall that not a single word of the Commission's new 29-word for-delivery-to-the-utility standard appears in the statute. We are asked to believe that the Commission's fidelity to the intent of Congress is best achieved by establishing new tests supported by elaborately confected arguments and "structural" interpretations of PURPA when instead the Commission could simply read the unambiguous terms of the statute as Congress authored it.

III. The Commission's New For-Delivery-to-the-Utility Standard is Not Supported by its Regulations or Precedent

25. I have explained why the new for-delivery-to-the-utility standard is inconsistent with the statutory language of PURPA. The Commission's regulations and precedent offer no better support for its new test than does the statute.

26. First, the Commission does not cite to anything in its regulations to support the conclusion that power production capacity means the ability to deliver energy to the purchasing utility. This is not surprising because the only regulation addressing how to determine power production capacity is Form 556, and a Form 556 calculation leads to the conclusion that the Facility has a power production capacity well in excess of the 80 MW threshold, as we have seen.

27. The Commission does cite to its precedent, but the cited precedent likewise fails to support its new for-delivery-to-the-utility standard. The Commission concedes that "Broadview's facility is distinct in certain respects from the facilities that the

Commission considered when it first established and initially applied the "send out" test."[38] That is an understatement. In fact, Broadview's Facility is distinct from every facility in every case in which the Commission has ever addressed the question of how power production capacity should be calculated. In none of the cases cited in the Order did the Commission hold that a facility capable of continuously producing more than 80 MW of power nevertheless satisfies PURPA's 80 MW power production capacity limit because a facility's ability to deliver energy to a utility is a limiting factor defining the power production capacity of the facility.

28. The Commission cites to the *Occidental* decision,[39] which is the leading send-out case and was the first case in which the Commission was required to define the "power production facility" of a QF. That case's definition is as follows:

The Commission will consider the "power production capacity" of a facility to be the maximum net output of the facility which can be safely and reliably achieved under the most favorable operating conditions likely to occur over a period of several years. The net output of the facility is *its send out* after *subtraction of the power used to operate auxiliary equipment in the facility necessary for power generation* (such as pumps, blowers, fuel preparation machinery, and exciters) *and for other essential*

---

[38] *Id.* P 32.

[39] *Occidental Geothermal, Inc.,* 17 FERC ¶ 61,231 (1981) (*Occidental*).

electricity uses in the facility from the gross generator output.[40]

29. As this definition makes clear, "send out" means nothing more than that the power production capacity of a facility is not the *gross* power production capacity of the facility, but rather is its *net* power production capacity after "essential electricity uses" in the facility are subtracted. The question of the facility's ability to deliver the power produced by the facility to the purchasing utility was not even mentioned, much less factored into Commission's analysis. Nothing in *Occidental* suggests that the Commission would have found that a facility with a 160 MW DC energy gross power production capacity has only an 80 MW net power production capacity merely because only 80 MW of the 160 MW of DC energy produced could be converted to AC for delivery.

30. The Commission cites to part of the discussion in *Occidental* explaining that it would not determine a facility's power production capacity based on the maximum capability of any particular component of the generating equipment, but instead would look to the overall capability of the facility.[41] This is true, but it also is true that in *Occidental* the Commission focused on the components of the facility's "generating equipment"[42] and did not suggest that a limitation on delivery capability was relevant. And the Commission did not establish a definition of power

---

[40] *Id.* at 61,445.

[41] Order, 174 FERC ¶ 61,199 at P 27.

[42] *Occidental*, 17 FERC ¶ 61,231 at 61,445.

production capacity that bears the slightest resemblance to the new for-delivery-to-the-utility standard but instead, as noted above, used a definition based on maximum output less station use.

31. The Commission also asserts that "[b]ecause the Commission explicitly focused on the overall facility capabilities, *Occidental* supports the proposition that power production capacity means output in a form useful to an interconnected entity."[43] This is a *non sequitur*. The "overall facility capabilities" the Commission focused on in *Occidental* involved a facility consisting of different pieces of standard commercially available power generation equipment that were somewhat mismatched in their power production capabilities. Nothing in *Occidental* even suggests that the Commission considered that the power production capacity of a facility could be limited by deliberately installing only enough inverters to convert half of the power produced by a facility from DC into AC.

32. Next, the Commission cites to the *Malacha* decision.[44] This was the first case that applied the definition of net power production capacity in *Occidental* to a facility that also owned interconnection facilities. The Commission asserts that this case stands for the proposition "that 'power production capacity' is determined from the whole facility's net output after taking into account all components necessary to produce electric energy in a

---

[43] Order, 174 FERC ¶ 61,199 at P 25.

[44] *Malacha Power Project, Inc.,* 41 FERC ¶ 61,350 (1987) (*Malacha*).

form useful to an interconnected entity."[45] That is a rather broad reading of this decision, in which the Commission found that:

> The Occidental decision . . . suggests that: 1) interconnection equipment could be included as "auxiliary equipment in the facility necessary for power generation;" and 2) *the resistive and reactive losses associated with interconnection equipment's operation could be considered as subsumed in the QF's "other essential electricity uses*."[46]

33. Read in this context, it is clear that *Malacha* simply expands the *Occidental* definition of "other essential electricity uses" that are to be subtracted from the maximum output of the facility. In addition to station power, it also is necessary to subtract out the losses incurred in transmitting electricity from the generation equipment to the point of interconnection with the purchasing utility. *Malacha* did not use the term "electric energy in a form useful to an interconnected entity." Nor did it address the question of whether a limited ability to deliver could itself be deemed a limitation on the power production capacity of the facility. Nothing in the *Malacha* decision supports the Commission's position that less than all of a facility's gross power production capacity should be counted if only a portion of it can be converted to AC.

34. I recognize that, in our September 2020 Order, we held that we would no longer apply the send-out

---

[45] Order, 174 FERC ¶ 61,199 at P 29.

[46] *Malacha,* 41 FERC ¶ 61,350 at 61,445 (emphasis added).

test established in *Occidental* and subsequent cases.[47] Upon further consideration, I now conclude that this holding went too far. Rather, I believe we should have upheld those cases, but clarified that they mean what they say, i.e. that it is appropriate to reduce the gross maximum production capability of a facility by station power and line losses, consistent with the calculation methodology set forth in Form 556. But I do not believe that the send-out cases hold, and should not be read to hold, that a facility whose generation equipment is capable of generating more than 80 MW can satisfy the statutory 80 MW limit simply because the facility is configured so as to convert no more than 80 MW of the output into AC energy for delivery. Any such reading of those cases would stretch the Commission's precedent beyond its breaking point.

35. When considering our precedent, it is important to keep in mind that none of it was issued in a vacuum. Instead, the Commission's rulings were governed by the statutory provision that limits the power production capacity of small power production facilities to 80 MW. It is clear that the Commission was aware of this standard when it issued its prior orders because all of them are couched in terms of what sources of power consumption could be subtracted from the "maximum output" of the generation equipment, as permitted in *Occidental*. None of these cases suggest that the power production capacity of a facility's power generation equipment could be limited by a facility's ability to deliver power to the interconnection, which is not surprising

---

[47] September 2020 Order, 172 FERC ¶ 61,194 at P 23.

because delivery capability is not mentioned in the statute. I disagree with the Commission that Broadview's Application presents "new facts" that obligate us to expand our precedent,[48] given that solar panels and inverters have been around for a long time. But even if the facts of Broadview's Application were new, we cannot extend our past precedent beyond our statutory authority, no matter how logical the Commission might think such extension would be.

IV. Broadview's Facility is Capable of Delivering More than 80 MW of the Energy Produced by the Facility to the Purchasing Utility

36. Finally, Broadview does not qualify as a QF even under the Commission's new test. It is not correct that the Facility's net output to the electric utility is only 80 MW, even when taking into account all components necessary to produce electric energy in a form useful to an interconnected utility. Broadview does not discharge the surplus electricity into the ground or the air. Instead, "when there is more dc power available from the solar array than can converted to ac power by the inverters, that power is stored in the [battery storage system]."[49] The battery storage system is capable of storing up to 200 MWh of power.[50] Later, the electricity stored in the battery storage system is discharged, converted by inverters, and delivered to the purchasing utility.[51] Therefore,

---

[48] Order at P 27, n.85.

[49] Application at 7.

[50] *Id.* at 2.

[51] *Id.* at 7.

the Facility is capable of delivering the entire 160 MWh generated by the solar panels to the purchasing utility. The Commission does not contest this fact, acknowledging that Broadview's configuration allows it to deliver more power over time to NorthWestern than a facility with only 80 MW of solar panels.[52]

37. The Commission attempts to discount the significance of its concession by noting that the Facility can deliver only 80 MW of the 160 MW generated by the solar panels to the utility at any particular time.[53] This fact would be relevant if the Commission were correct that the provisions of PURPA governing interconnection and avoided cost sales provided that such rights were not conferred on small power production facilities with power production capacities in excess of 80 MW. But as I have pointed out, PURPA contains no limit on the size of QF interconnections or the amount of energy that can be sold to utilities. And so we are left with a strained interpretation of the statutory language which allows facilities to produce and deliver to utilities 160 MW of electricity and still satisfy the statutory 80 MW power production capacity limit for small power production facilities. That interpretation finds no support in the statutory language, the Commission's regulations, or applicable precedent.

38. It is unclear, but it appears that the Commission may also justify its statutory interpretation on the grounds that, by finding the Facility is a QF, it is doing nothing more than

---

[52] Order, 174 FERC ¶ 61,199 at P 32.

[53] *Id.*

enabling an increase in the capacity factor of the Facility.[54] If so, that justification is misplaced. The Facility's capacity factor is completely unaffected by the Commission's ruling, but rather is determined by the amount of sunlight that reaches the Facility's solar panels and the proportion of time the solar panels are out of service. The purported "increase" in capacity factor is entirely illusory and is achieved only by pretending that the Facility can produce no more than 80 MW, when in fact it is capable of producing and delivering 160 MW. The only real change effectuated by today's Order is that some of the 160 MW of power produced by the Facility is delivered at a different time than if all 160 MW were delivered as it was produced.

For these reasons, I respectfully dissent.

James P. Danly
Commissioner

[54] *Id.*

APPENDIX E

173 FERC ¶ 62,056

UNITED STATES OF AMERICA

FEDERAL ENERGY REGULATORY COMMISSION

Broadview Solar, LLC Docket No. QF17-454-006

NOTICE OF DENIAL OF REHEARINGS BY OPERATION OF LAW AND PROVIDING FOR FURTHER CONSIDERATION

(November 2, 2020)

Rehearings have been timely requested of the Commission's order issued on September 1, 2020, in this proceeding. *Broadview Solar*, *LLC*, 172 FERC ¶ 61,194 (2020). In the absence of Commission action on the requests for rehearing within 30 days from the date the requests were filed, the request for rehearing (and any timely requests for rehearing filed subsequently)[1] may be deemed denied. 16 U.S.C. § 825*l*(a); 18 C.F.R. § 385.713 (2020); *Allegheny Def. Project v. FERC*, 964 F.3d 1 (D.C. Cir. 2020) (en banc).

---

[1] *See San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs. Into Mkts. Operated by Cal. Indep. Sys. Operator & Cal. Power Exch.*, 95 FERC ¶ 61,173 (2001).

As provided in 16 U.S.C. § 825*l*(a), the rehearing requests of the above-cited order filed in this proceeding will be addressed in a future order to be issued consistent with the requirements of such section. As also provided in 16 U.S.C. § 825*l*(a), the Commission may modify or set aside its above-cited order, in whole or in part, in such manner as it shall deem proper. As provided in 18 C.F.R. § 385.713(d), no answers to the rehearing request will be entertained.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

APPENDIX F

172 FERC ¶ 61,194

UNITED STATES OF AMERICA

FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman; Richard Glick, Bernard L. McNamee, and James P. Danly.

Broadview Solar, LLC	Docket Nos.	QF17-454-004 QF17-454-005

ORDER DENYING APPLICATION FOR CERTIFICATION AND REVOKING STATUS AS A QUALIFYING SMALL POWER PRODUCTION FACILITY

(Issued September 1, 2020)

1. On September 11, 2019, in Docket No. QF17-454-004, Broadview Solar, LLC (Broadview) filed an application (Application) seeking Commission recertification as a small power production qualifying facility (QF) pursuant to the Public Utility Regulatory Policies Act of 1978 (PURPA)[1] and section 292.207(b) of the Commission's regulations.[2] On January 29, 2020, while Broadview's Application was pending

[1] 16 U.S.C. §§ 796(17), 824a-3 (2018).

[2] 18 C.F.R. § 292.207(b) (2019).

before the Commission, in Docket No. QF17-454-005, Broadview filed a Form No. 556 self-certification of QF status identical to its Application. As discussed below, we deny the Application and revoke QF status for Broadview's duplicate self-certification.

I. Filing

2. Broadview states that it is developing a combined solar photovoltaic and battery storage facility in Yellowstone County, Montana that will interconnect to NorthWestern Corporation's (NorthWestern) transmission system.[3] In December 2016, Broadview self-certified this facility as a small power production QF with a gross capacity of 104.25 MW and a net capacity of 80 MW.[4] In March 2019, Broadview revised its Form No. 556 to reflect a gross capacity of 160 MW, while maintaining the net capacity of 80 MW.[5] In the instant Application, Broadview proposes to revise the facility's gross capacity from 160 MW to 82.5 MW to reflect the facility's design capabilities, including limiting elements, while again maintaining the previously documented net capacity of 80 MW.[6] Broadview

---

[3] Broadview states that it has entered into a standard Large Generator Interconnection Agreement (LGIA) with NorthWestern for 80 MW of interconnection service. Transmittal at n.3.

[4] Form No. 556, Application, Docket No. QF17-454-000, at 9 (filed Dec. 19, 2016).

[5] Form No. 556, Docket No. QF17-454-003, at 9 (March 13, 2019).

[6] Form No. 556, Application, Docket No. QF17-454-004, at 9 (filed Sept. 11, 2019) (updating Broadview's Form No. 556 and requesting Commission certification of the facility that

explains that the terminals of the 160 MW solar array and 50 MW battery storage system will both connect directly to 20 4.2 megavolt ampere (MVA) DC-to-AC inverters, which will convert the DC power produced by the solar array or discharged from the battery storage system to AC power. According to Broadview, solar arrays and battery storage facilities generate and store electricity as DC power, and the grid generally operates using AC power.[7] Broadview states that, without the DC-to-AC inverters, the power is not in a form that can be transmitted onto the grid.[8]

3. Broadview claims that these inverters are the "gateway" between the DC power provided by the solar array and battery storage system and the AC grid because the amount that the 20 inverters can deliver limits the maximum gross power capacity of the facility (i.e., power that can be delivered to the AC grid). Broadview explains that, if the solar array produces more DC power than can be converted to AC power through the inverters or stored in the battery storage system, the inverters will cause the solar array to produce less power.[9] Broadview states that

---

Broadview originally self-certified as an 80 MW solar facility in December 2016.)

[7] Broadview Aff. at 2-4 (Pasley Aff.).

[8] *Id.*

[9] Broadview explains that: (1) the solar inverters are current-limited devices where the current limit is set by the safe operating temperature of the power electronics used to convert DC power to AC power; and (2) the capacity limitations imposed by the solar inverter are physical and the only way to increase

the maximum gross output of the facility at any given time will be 82.5 MW and that, after deducting facility loads and losses, the maximum net capacity of the facility will be 80 MW.[10]

4. Broadview indicates that its facility is configured to optimize MWh production from the solar array and battery storage system within the 80 MW capacity limit specified in PURPA.[11] Broadview further explains that oversizing the solar array and combining it with battery storage increases the facility's capacity factor from a typical 25% for solar facilities to nearly 40%. Broadview states that, therefore, regardless of how the facility is operated, the facility is physically incapable of exceeding the 80 MW limit because of the presence of the 20 inverters.[12]

5. Broadview asserts that the Commission's finding in *Occidental Geothermal, Inc.* that "a facility's power production capacity is not necessarily determined by the nominal rating of even a key component of the facility" supports Broadview's claim that the facility is within the 80 MW limit.[13]

---

the AC output of the facility is by adding additional inverters. *See id.* at 8, 9.

[10] Transmittal at 7-8.

[11] *Id.* at 4.

[12] *See id.* at 3-5, 8-9. Broadview notes that the facility will be capable of sustaining its maximum output for additional hours in the day.

[13] *Id.* at 3-5 (citing *Occidental Geothermal, Inc.*, 17 FERC ¶ 61,231, at 61,445 (1981) (*Occidental*)). Broadview notes that, in *Conn. Valley Elec. Co. v. Wheelabrator Claremont Co.*, the Commission defined net capacity as "the maximum net output

Broadview also points to the Commission's determination in *Malacha Power Project, Inc.*, which states that "the electric power production capacity of the facility is the capacity that the electric power production equipment delivers to the point of interconnection with the purchasing utility's transmission system."[14] Based on this precedent, Broadview argues that the size and capability of the individual components that will comprise the facility, including the solar array and the battery storage system, are not relevant to the determination of the facility's capacity but rather it is the facility's configuration (together, the solar array, battery storage system, and inverters), which limits the potential output to 80 MW.[15]

6. Broadview states that its facility is different from a configuration that relies on SCADA or other automated generation control to limit the net power production of a facility. Broadview asserts that the inverters are unable to convert any more than 82.5 MW from DC power to AC power. Broadview explains that the only way to increase the facility's capacity would be to physically install additional inverters.[16] Broadview states that 2.5 MW of output

---

that the facility can safely and reliably achieve at the point of interconnection under the most favorable operating conditions likely to occur over a period of several years." *Id.* at n.5 (citing *Conn. Valley Elec. Co. v. Wheelabrator Claremont Co.*, 82 FERC ¶ 61,116, at 61,421 n.25 (1998) (*Connecticut Valley*)).

[14] *Id.* at 8 (quoting *Malacha Power Project, Inc.*, 41 FERC ¶ 61,350 (1987)) (*Malacha*).

[15] *Id.* at 2-5.

[16] *Id.* at 7.

is consumed by parasitic station power (primarily cooling for the battery storage system as well as the substation electrical enclosure), electrical losses, and interconnection losses.[17] Broadview explains that, when the solar array produces more DC energy than the inverters can convert to AC energy, that excess energy is stored in the battery and not delivered to the point of interconnection.[18]

7. Broadview states that its battery storage system qualifies as part of a QF because the solar array will provide all of the charging energy used for the battery storage system.[19] Broadview contends that viewing its facility's solar array and battery storage system instead as two separate QFs, so that their power production capacities would be subject to aggregation, would artificially inflate the aggregate capacity of the facility components.[20] Broadview claims that, because both the solar array and the battery storage system are behind the inverters and the inverters can convert no more than 82.5 MW of energy from the facility, the maximum gross power production capacity of the combined solar array and battery storage system is properly viewed as 82.5

---

[17] *Id.* at 7-8; Pasley Aff. at 5-7.

[18] Transmittal at 7.

[19] *Id.* at 5 (citing *Luz Dev. and Finance Corp.*, 51 FERC ¶ 61,078, at 61,171 (1990) (*Luz*) (finding that battery storage qualifies as a QF if it is charged at least 75% by a qualifying fuel source)).

[20] *Id.* at 5-6.

MW, and, with the various losses, the maximum net power production capacity is 80 MW.[21]

II. Notice and Pleadings

8. Notice of the Application was published in the *Federal Register*, 84 Fed. Reg. 49,291 (Sept. 19, 2019), with interventions and protests due on or before October 2, 2019.[22] Edison Electric Institute (EEI) and NorthWestern filed timely motions to intervene and protests. NorthWestern and Broadview filed answers.

A. Protests

9. NorthWestern argues that Broadview's facility is not a single QF and thus exceeds the 80 MW limit in PURPA.[23] NorthWestern asserts that, contrary to Broadview's interpretation of *Occidental*, a facility's individual components are relevant to the calculation of net capacity.[24] NorthWestern contends that, in *Occidental*, the Commission found that, if a facility has the potential to produce more than 80 MW for limited periods of time due to circumstances outside

---

[21] *Id.*

[22] Section 292.207(b)(3) of the Commission's regulations requires the Commission to act within 90 days of the filing of an application for Commission certification of QF status. 18 C.F.R. § 292.207(b)(3). In order to allow sufficient time for due consideration of the matters raised, on December 6, 2019, the Commission issued a notice tolling the time for issuance of an order in Docket No. QF17-454-004. *Broadview Solar, LLC*, 169 FERC ¶ 61,189 (2019).

[23] NorthWestern Protest at 6.

[24] *Id.* at 12-13.

of the facility's control, the facility can still qualify as a QF.[25]

10. NorthWestern argues that the solar array and battery storage system should be considered two distinct small power production facilities at the same site because the 160 MW solar array exceeds the 80 MW net capacity limit and, consistent with *Luz*, the battery storage system also qualifies separately as a small power QF.[26] NorthWestern asserts that Broadview's reliance on *Connecticut Valley* is misplaced because that proceeding did not involve the combination of multiple small power production facilities as a single QF nor did the Commission's determination overrule or otherwise support a reading of section 292.204(a)(1) of the Commission's regulations implementing the 80 MW limit that is contrary to the plain terms of that regulation.[27] NorthWestern points to *Northern Laramie Range Alliance*, where the Commission rejected the concept that two separate QFs should be treated as a single QF if they use the same line to deliver energy from their facilities to a single point on the transmission system.[28] Based on that precedent, NorthWestern argues that Broadview's facility should not be considered a single QF because the solar array and battery storage system utilize the same point of

---

[25] *Id*. at 13 (citing *Occidental*, 17 FERC ¶ 61,231 at 61,445).

[26] *Id*. 6-7, 10-11 (citing *Luz*, 51 FERC ¶ 61,078 at 61,170, 61,172).

[27] *Id*. at 9 (citing 18 C.F.R. § 292.204(a)(1)) (2019).

[28] *Id*. at 10 (citing *Northern Laramie Range Alliance*, 138 FERC ¶ 61,171, at PP 15-16 (2012) (*Northern Laramie*)).

interconnection.[29] NorthWestern asserts that, instead, the net output of the solar array and battery storage system should be calculated individually and then aggregated to determine if the combined system is within the 80 MW limit.[30] NorthWestern contends that, under that analysis, Broadview cannot be a QF because its capacity exceeds the 80 MW limit.[31] NorthWestern argues that treating Broadview's battery storage facility as part of the overall facility instead of as a separate power production facility would have far-reaching impacts because the Commission currently treats storage facilities as primary generation resources and does not treat them as ancillary or secondary to the generation process.[32]

11. EEI argues that the Commission should not allow resource providers to artificially limit the output from their facilities at a single location in order to stay within the 80 MW limit.[33] With the growth of new technologies, such as batteries, and the increased sophistication of resources, EEI asks the Commission

---

[29] *Id.* at 10.

[30] *Id.* at 9.

[31] *Id.* at 6, 9.

[32] *Id.* at 11-12 (citing *Electric Storage Participation in Markets Operated by Regional Transmission Organizations and Independent System Operators*, Order No. 841, 162 FERC ¶ 61,127 (2018), *order on reh'g*, Order No. 841-A, 167 FERC ¶ 61,154 (2019); *Reform of Generator Interconnection Procedures and Agreements*, Order No. 845, 163 FERC ¶ 61,043, at P 275 (2018), *order on reh'g*, Order No. 845-A, 166 FERC ¶ 61,137 (2019), *errata notice*, 167 FERC ¶ 61,123, *order on reh'g*, Order No. 845-B, 168 FERC ¶ 61,092 (2019)).

[33] EEI Protest at 2.

to reconsider whether it is still appropriate to measure QF power production capacity based on net capacity as established in *Occidental*, rather than the rated capacity test that EEI asserts was initially intended by Congress.[34] EEI states that, under a rated capacity test, the Commission would only assess the rated capacity of all devices capable of delivering power to the grid and ignore the use of artificial devices that prevent the rated capacity from ultimately reaching the electric utility's system.[35] EEI argues against permitting batteries or other storage devices paired with renewable facilities located at the same site to qualify as a QF if the combined rated capacity of all devices is above 80 MW.[36] EEI asserts that Congress' use of the term "power production capacity" means that Congress did not intend to allow such arrangements.[37]

B. Answers

12. Broadview argues that, contrary to NorthWestern's description, the solar array and battery storage system will operate as a single, integrated hybrid facility interconnected at a single interconnection point pursuant to a single interconnection agreement.[38] Broadview explains that, while the planned solar array is sized greater than 80 MW to increase the facility's capacity factor,

---

[34] *Id*. at 6.

[35] *Id*.

[36] *Id*. at 7.

[37] *Id*. at 6-7.

[38] Answer at 3-6.

the aggregate capacity of the solar array and battery storage system cannot exceed 80 MW net capacity due to the DC-to-AC inverters.[39] Broadview further notes that, because the facility's components that exceed the 80 MW to improve the facility's capacity factor exist only behind the inverters, they do not affect the facility's maximum net output of 80 MW.[40]

13. In response to EEI's argument for determining a small power production facility's production capacity based on its rated capacity, Broadview argues that EEI ignores the fact that the physical limitations of the inverters and the LGIA with NorthWestern ensure that the net output of the facility will not be greater than 80 MW. Broadview adds that, in *Occidental*, the Commission rejected the argument that a QF's power production capacity should be its rated capacity because the actual output of the facility's equipment will often be different than its rated capacity.[41]

14. Broadview notes that the Commission has also rejected the argument that the net output rule in *Occidental* allows a QF to artificially limit the power production capacity of its facility.[42] Broadview adds that there is nothing artificial about measuring a facility's power production capacity as the net output

---

[39] Broadview adds that, in order to remain within the manufacturer's warranty, it cannot use the inverters to convert additional power from the facility. *Id.* at 5.

[40] *Id.* at 6.

[41] *Id.* at 7 (citing *Occidental*, 17 FERC ¶ 61,231 at 61,445).

[42] *Id.* at 8 (citing *Lyonsdale Biomass*, *LLC*, 116 FERC ¶ 61,133 (2006); *Maryland Solar*, *LLC*, 146 FERC ¶ 61,071 (2014)).

of its physical inverters because an inverter is an equally integral component of the facility like a boiler or generator that may be of lower capacity than another facility component that is used to determine a facility's output.[43] Broadview contends that the Commission's adoption of EEI's rated capacity proposal would disrupt markets and contracts for untold numbers of facilities already in operation because developers have relied upon Commission precedent to develop solar QFs with nameplate capacities that exceed 80 MW but with power production capacities (i.e., net output) that do not exceed 80 MW.[44]

15. NorthWestern argues that Broadview's answer is not responsive to NorthWestern's assertions that the solar array and battery storage system are separate QFs and that their combined capacity exceeds 80 MW. NorthWestern claims that neither Broadview's LGIA nor shared interconnection point support Broadview's claim that it is a single QF because, in Order No. 2003, the Commission stated that a "Generation Facility" under the Large Generator Interconnection Process could consist of multiple generating units and that Commission precedent permits multiple QFs to interconnect at a single point.[45]

---

[43] *Id*. at 9.

[44] *Id*. at 8.

[45] NorthWestern Answer at 2-3 (citing *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, 104 FERC ¶ 61,103 at P 46 (2003); *Gamma Mariah, Inc*., 44 FERC ¶ 61,442 (1988)).

16. In response, Broadview reiterated its claim that, despite whether the solar array and battery storage are separate facilities, their aggregate capacities do not exceed 80 MW because the facility's inverters and interconnection facilities ensure that the delivery at the point of interconnection cannot exceed 80 MW.[46]

III. Commission Determination

17. As discussed below, we deny Broadview's Application. We find that its facility exceeds the 80 MW statutory limit for small power production QFs that Congress imposed in PURPA.

18. PURPA and the Commission's regulations limit small power production QFs to a "power production capacity" of 80 MW.[47] In *Occidental*, the Commission discussed its interpretation of the term "power production capacity" as it applies to QFs.[48] In that order, the Commission emphasized that the facility's "send out," not the size of individual components, was determinative. The Commission stated that it would consider the "power production capacity" of a facility to be the maximum net output of the facility that can be safely and reliably achieved under the most favorable operating conditions likely to occur over a period of several years. The Commission further specified that "[t]he net output of the facility is its send out after subtraction of the power used to operate auxiliary equipment in the

---

[46] Broadview Second Answer at 2-3.

[47] 16 U.S.C. § 796(17)(A)(ii) (2018); 18 C.F.R. § 292.204(a)(1).

[48] *Occidental*, 17 FERC ¶ 61,231 at 61,445.

facility necessary for power generation (such as pumps, blowers, fuel preparation machinery, and exciters) and for other essential electricity uses in the facility from the gross generator output."[49]

19. In *Malacha*,[50] the Commission determined that, because the switchyards and transmission lines should be considered part of the facility, the facility's capacity should be measured at the end of such switchyards and lines. The Commission found that the facility's net electric power production capacity should be determined at the point of interconnection and not within the facility itself (i.e., after consideration of losses, etc.).[51]

20. In *American Ref-Fuel Co.*, the Commission granted American Ref-Fuel Company of Bergen County's (American Ref-Fuel) application for recertification of its small power production biomass facility as a QF.[52] American Ref-Fuel proposed to replace two turbines with a single turbine with a maximum gross output of 91 MW and a maximum net output of 80 MW, after accounting for auxiliary loads but acknowledged that its net output would often exceed 80 MW due to the substantial variation in the heat content of the solid waste that the facility burned as fuel. The facility was equipped with an automatic control system that would restore net generation at the 80-MW level, on average, over any 60-minute

---

[49] *Id.* at 61,445.

[50] *Malacha*, 41 FERC ¶ 61,350.

[51] *Id.*

[52] *American Ref-Fuel Co. of Bergen County*, 54 FERC ¶ 61,287 (1991) (*American Ref-Fuel*).

span measured at any point in time. The Commission stated that the issue was "whether the small power production facility, as reconfigured, continue[d] to satisfy the requirement of both [PURPA] and the Commission's regulations that a small power production facility have a power production capacity that is not greater than 80 MW."[53] The Commission found that American Ref-Fuel's facility did *not* exceed the 80 MW limit, explaining that, although PURPA and the Commission's regulations limit the power production capacity of a qualifying small power production facility to 80 MW, PURPA and the Commission's regulations do not offer guidance on how to compute the maximum size. The Commission accepted that the control system would limit the maximum net output to 80 MW in any rolling one-hour period and concluded that QF status was appropriate.[54]

21. Through PURPA, Congress sought to encourage small power production facilities of not more than 80 MW capacity and, in fact, specified that such facilities should have a "power production capacity" of not greater than 80 MW.[55] Prior Commission precedent sometimes allowed facilities with greater power production capacities to be certified as QFs when the net output was no more than 80 MW and also sometimes allowed intermittent net outputs slightly in excess of 80 MW. We find, however, there is a significant difference between (i)

---

[53] *Id.* at 61,816.

[54] *Id.* at 61,817.

[55] 16 U.S.C. §§ 796(17)(A)(ii), 824a-3(a).

design capabilities that may incidentally or occasionally[56] cross PURPA's 80 MW threshold due to certain components or variances, such as fuel or ambient temperature and (ii) a facility purposefully designed with a 160 MW solar array.[57]

22. Broadview's proposal represents a significant departure from any project that the Commission has previously considered under a QF application. That such a project arguably could satisfy the "send out" analysis the Commission applied in *Occidental* compels us to reconsider whether it is a facility's "send out" that is determinative of whether the facility complies with the 80 MW threshold established in PURPA.

23. Based on such reconsideration, we find that the Commission's statement in *Occidental* that "'the power production capacity' of a facility is 'the maximum net output of the facility,' which is 'its send out,'"[58] is not consistent with the 80 MW "power production capacity" limit expressly specified by the statute and regulations. Re-examining *Occidental* and the potential such an analysis creates for the approval of projects that do not comply with the plain language of PURPA, we conclude that we have improperly focused on "output" and "send out,"

---

[56] *Occidental*, 17 FERC ¶ 61,231 at 61,445.

[57] In this order, because the 160 MW solar array is double the 80 MW statutory limit for power production capacity, we do not need to address whether the associated battery storage system is a separate facility or whether and how the battery storage system should be considered in determining the facility's power production capacity.

[58] *Occidental*, 17 FERC ¶ 61,231 at 61,445.

instead of on "power production capacity," which is the standard established both in the statute and our regulations.[59] In circumstances such as the factual context before us in this proceeding, the two are not the same. Therefore, on further consideration, we find that the "send out" analysis applied in *Occidental* is inconsistent with the 80 MW "power production capacity" limitation in PURPA for small power production QFs, based on our reading of the statute and regulations.

24. We note, in this regard, that Form No. 556 starts with the facility's maximum gross power production capacity at line 7a and then subtracts certain parasitic loads and losses to yield the facility's maximum net power production capacity, that is, the facility's ultimate certified capacity. Such parasitic loads and losses—and only those amounts—can be recorded in lines 7b through 7e, as deductions, with the total deductions reflected in line 7f.[60] Line 7g

---

[59] 16 U.S.C. § 796(17)(A)(ii); 18 C.F.R. § 292.204(a)(1). The dissent argues that allowing 160 MW of solar array along with a 50 MW battery improves the facility's capacity factor. Dissent at P 2. But the applicable statutory standard considers a facility's power production capacity, not its capacity factor. This argument proves no more than that the ability of the facility to increase its capacity factor is dependent on having a power production capacity that exceeds 80 MW; hence, the necessity for the Commission to return to the statutory language and limit set forth in PURPA.

[60] Therefore, we find that Broadview incorrectly filled out the Form No. 556 by entering 82.5 MW for line 7a. We clarify that, to the extent it was not already clear, lines 7b through 7e of Form No. 556 may record only the parasitic loads and losses that occur

reflects the difference between the maximum gross power production capacity provided in line 7a minus the total deductions allowed in line 7f. Consistent with the application of the statute and regulation noted above, the amount in line 7g, the net power production capacity, cannot exceed the 80 MW statutory and regulatory limit.

25. Here, Broadview's facility exceeds the 80 MW statutory limit for "power production capacity." We find that Broadview cannot meet the statutory limit by relying on inverters as a limiting element on a QF's output. As Broadview acknowledges, the solar array has the capability to produce 160 MW of DC power.[61] The inverters are capable of converting only 80 MW into AC power, but that is a conversion limit, not a limit on the facility's power production capacity. Thus, line 7a of Form No. 556 records the "maximum gross power production capacity at the terminals of the individual generator(s) under the most favorable anticipated design conditions" and does not include adjustments for inverters or other output-limiting devices. Utilizing inverters to limit the output of an otherwise above-80 MW power production facility to 80 MW is, we believe, inconsistent with the type of facility that Congress specified can qualify as a small

---

independent of the output limiting function of inverters or other output limiting devices.

[61] As we noted above, we do not address the associated battery storage system in this order. *See supra* note 57.

power production facility (i.e., a facility sized 80 MW or less).[62]

26. We clarify that our findings here related to the measure of a QF's certified capacity, that is, its maximum net power production capacity, will not change the way in which maximum net power production capacity is reported on Form No. 556. That is, on the Form No. 556, the maximum gross power production capacity shall still be reduced for load and line losses to calculate the "maximum net power production capacity."[63]

27. In response to Broadview's comments regarding industry disruption, this finding is prospective and does not affect QFs that have self-certified or have been granted Commission certification prior to the date of this order. If a QF that has listed a maximum net power production capacity of 80 MW or less has a Form No. 556 on file with the Commission prior to the date of this order, even if it may have included adjustments for inverters or other output-limiting devices to calculate its maximum net power production capacity as 80 MW or less, then it will be grandfathered with regard to the holding in *Occidental*. In other words, those previously certified QFs will still be considered to be small power production facilities for purposes of

---

[62] Consistent with the Commission's determination in *Malacha* regarding allowable deductions, load and line losses may still be deducted from a QF's gross power production capacity to determine net power production capacity. *Malacha*, 41 FERC ¶ 61,350.

[63] *See supra* note 57.

PURPA. Moreover, procurement of a legally enforceable obligation, by itself, is insufficient; given the nature of our ruling today, explaining how we now see that the requisite Form No. 556 must be completed, it is appropriate that the grandfathering adopted here for existing QFs be tied to such QFs having submitted a Form No. 556.

28. For the same reasons discussed herein, we also revoke QF status of Broadview's facility based on its January 29, 2020 Form No. 556 self-certification, in Docket No. QF17-454-005, which is identical to the Form No. 556 filed in the instant Application and was filed while the Application was before the Commission.[64]

The Commission orders:

(A) Broadview's Application in Docket No. QF17-454-004 is hereby denied, as discussed in the body of this order.

(B) Broadview's self-certification of QF status in Docket No. QF17-454-005 is hereby revoked, as discussed in the body of this order.

---

[64] Form No. 556, Application, Docket No. QF17-454-005 (filed Jan. 29, 2020).

By the Commission. Commissioner Glick is dissenting with a separate statement attached.

(S E A L)

Nathaniel J. Davis, Sr.,

Deputy Secretary.

UNITED STATES OF AMERICA

FEDERAL ENERGY REGULATORY COMMISSION

Broadview Solar, LLC Docket Nos. QF17-454-004
QF17-454-005

(Issued September 1, 2020)

GLICK, Commissioner, *dissenting*:

1. I dissent from today's order denying Broadview Solar LLC's (Broadview) application for Qualifying Facility (QF) status under the Public Utility Regulatory Policies Act of 1978 (PURPA).[1] Under any fair reading of the statute or Commission precedent, Broadview's power production capacity is 80 MW, making it eligible for QF status. The Commission's contrary determination will make QF status turn on the capacity of any one component of the facility, rather than the actual power production capacity of the facility itself. That conclusion finds no support in the statute, our precedent, or common sense.

2. Broadview's facility is a hybrid resource that is made up of, among other things, a 160 MW solar array and a 50 MW battery storage resource.[2] Critically, however, the inverters that convert the DC

---

[1] Pub. L. No. 95-617, 92 Stat. 3117 (1978).

[2] *Broadview Solar, LLC*, 172 FERC ¶ 61,194, at P 2 (2020) (Order).

electricity generated by the solar panels into AC electricity that can be delivered to the grid have a net capacity of only 80 MW.[3] That means that Broadview's facility is physically incapable of producing more than 80 MW of electricity for any subsequent use.[4] Instead of increasing the *power production capacity* of Broadview's facility, the large solar array enhances its *capacity factor*, meaning that the facility will, all else equal, generate a higher fraction of its total 80 MW capacity than it would with a smaller array. That makes the system more efficient—a result I would have thought the Commission would be eager to encourage. In addition, Broadview's 50 MW battery system cannot "produce" power in any conventional sense of that term.[5] Instead, the electricity discharged by the

---

[3] Broadview states that the 20 inverters would be capable of converting only 82.5 MW of capacity from DC to AC power, with a maximum net capacity of 80 MW after accounting for on-site parasitic load of 2.5 MW. Broadview October 17, 2019 Answer at 4 ("[P]ower generated by the Solar PV Arrays or discharged from the [battery energy storage system] must be converted by inverters from dc to ac power before being sent out for injection into the ac transmission grid.").

[4] Lending further support to that conclusion, the interconnection studies executed by NorthWestern Corporation, the interconnecting utility, identify Broadview's summer and winter output as 80 MW, and the interconnection agreement, provides that the total size of the "Project will be 80 MW based on the max output of the inverters." *Id.* at 4.

[5] Although today's order does not address the battery storage resource because it disqualifies Broadview on the basis of its solar array alone, *see* Order, 172 FERC ¶ 61,194 at n.57, I must address the battery as part of my reasoning for why Broadview qualifies as a QF.

battery is produced exclusively by the solar array. As with the solar array, the battery increases the capacity factor of the facility, not the facility's actual power production capacity. The bottom line is that while Broadview's configuration may allow it to more predictably produce electricity, that configuration does not give it a power production capacity greater than 80 MW.

3. And that is what matters under PURPA. The statute provides that QF status is available to a "small power production facility," which is defined as, among other things, a "facility" that produces power from one of a series of enumerated resource types and has a "power production capacity" of not more than 80 MW.[6] It is hard for me to understand how the term "facility" could mean anything other than the power plant as a whole. After all, as used in this context, the term "facility" typically refers to an entire building or structure, not its component parts.[7] For that reason, when someone uses the terms "transportation facilities" or "educational facilities"[8] no one would think those terms refer to the engine of a train or the books in a school, even though they are utterly essential to serving those facilities' respective

---

[6] 16 U.S.C. § 796(17).

[7] *See, e.g.*, *facility*, Merriam Webster Dictionary, https://www.merriam-webster.com/dictionary/facility (last visited Sept. 1, 2020) (defining a facility, for these purposes, as "something (such as a hospital) that is built, installed, or established to serve a particular purpose").

[8] Both are listed as examples of a facility. *See facility*, Dictionary.com, https://www.dictionary.com/browse/facility (last visited Sept. 1, 2020).

purposes. The same goes when it comes to defining the power production capacity of a small power production facility: the term "facility" indicates that QF status should turn on the actual power production capacity of the resource as a whole, not the capacity of its largest individual component part.[9]

4. Commission precedent is consistent with that common-sense understanding. In order after order, the Commission has conducted a straightforward examination of the power production capacity of the facility as a whole, rather than nitpicking the capability of each component. That approach makes sense for several reasons, including, as the Commission explained in *Occidental Geothermal, Inc.*, the commercial reality that "it is not uncommon for smaller facilities to find it most economic to employ commercially available components some of which have individual capabilities significantly

---

[9] And there is every reason to believe that is what Congress had in mind. The conference report accompanying PURPA describes a small power production facility by referring to, for example, "solar electric systems." H.R. Rep. No. 95-1750, at 89 (1978). As with facility, "system" would seem to contemplate the power plant as a whole, not just its photovoltaic panels. That understanding is also consistent with contemporary terminology: The North American Electric Reliability Corporation's definition of bulk power system equipment describes solar "power producing resources" as, together, the photovoltaic panels *and* the associated inverters. *See* N. Am. Elec. Reliability Corp., *Bulk Electric System Definition Reference Document* at 18-20 (Aug. 2018), *available at* www.nerc.com/pa/Stand/2018%20Bulk%20Electric%20System%20Definition%20Reference/BES_Reference_Doc_08_08_2018_Clean_for_Posting.pdf.

exceeding the overall facility capabilities."[10] Looking to the size of each component would upset that otherwise straightforward inquiry and cause the Commission to insert itself unnecessarily into commercial decisions that are better made by project developers than federal regulators. Perhaps that is why the Commission has, until today, consistently taken a pragmatic approach to defining the power production capacity[11]—one that is consistent with Congress's directive that the Commission should "encourage" QF development.[12] Those interpretations have been settled policy for decades at this point.

5. Nevertheless, in a break from precedent, today's order denies Broadview's application for QF status. The Commission concludes that Broadview's

---

[10] 17 FERC ¶ 61,231, 61,445 (1981) (expressly rejecting the idea that a facility's "power production capacity" should be "determined by the nominal rating of even a key component of the facility").

[11] *See, e.g.*, *American Ref-Fuel Co.*, 54 FERC ¶ 61,287, 61,816-17 (1991) (finding that a waste-to-energy facility's power production capacity was 80 MW because it had a control system that would restore net generation to an average of no more than 80 MW over any 60-minute span measured at any point in time, even though the installed nameplate capacity of the facility exceeded 80 MW and the minute-to-minute output might vary with the energy content of the waste being burned); *Malacha Power Project, Inc.*, 41 FERC ¶ 61,350 (1987) (finding that "electric power production capacity of the facility is the capacity that the electric power production equipment delivers to the point of interconnection with the purchasing electric utility's transmission system"); *Occidental*, 17 FERC ¶ 61,231 at 61,444 (looking to the power production capacity of a facility as a whole rather than any single component).

[12] 16 U.S.C. § 824a–3(a).

power production capacity exceeds the 80-MW ceiling for qualifying as a QF based entirely on the fact that its solar array is rated at 160 MW. But the Commission makes no effort to explain why it is appropriate to determine a qualifying *facility's* power production capacity based on that facility's component parts rather than looking to the power production capacity of the facility as a whole. As noted above, Broadview's inverters prevent the facility from ever providing more than 80 MW of electricity to the grid and focusing on that figure—*i.e.*, the potential output of the facility as a whole, not its sub-components—is far more consistent with the PURPA's text, purpose, and legislative history.[13] The Commission's failure to wrestle with those arguments is arbitrary and capricious.

6. Making matters worse, in order to reach its preferred outcome, the Commission throws overboard *Occidental*, a 40-year old precedent.[14] *Occidental* focused the QF determination on a facility's "send out" capacity, expressly rejecting the component-by-component approach adopted in today's order.[15] The Commission justifies its abandonment of that precedent by asserting that focusing on "send out" capacity might allow a facility whose power production capacity exceeds 80 MW to qualify as a QF.[16]

---

[13] *See supra* PP 3-4.

[14] Order, 172 FERC ¶ 61,194 at PP 22-23.

[15] *Supra* P 4 & n.10.

[16] Order, 172 FERC ¶ 61,194 at P 23.

7. But that just takes us back to square one. The problem that purportedly justifies jettisoning *Occidental* arises only as a result of the Commission's misguided component-by-component approach to determining power production capacity. If the Commission were to instead continue to look to the power production capacity of a facility as a whole, as advocated for above, its stated concerns about *Occidental* would evaporate. Finally, on a broader level, I cannot help but express my concern that so casually upending settled precedent creates unnecessary uncertainty, making it hard for developers to know which precedents they can count on and which they cannot.

For these reasons, I respectfully dissent.

Richard Glick

Commissioner

APPENDIX G

STATUTORY AND REGULATORY PROVISIONS

1. 16 U.S.C. §§ 796(17)(A)–(B) provide:

(17)(A) "small power production facility" means a facility which is an eligible solar, wind, waste, or geothermal facility, or a facility which--

(i) produces electric energy solely by the use, as a primary energy source, of biomass, waste, renewable resources, geothermal resources, or any combination thereof; and

(ii) has a power production capacity which, together with any other facilities located at the same site (as determined by the Commission), is not greater than 80 megawatts;

(B) "primary energy source" means the fuel or fuels used for the generation of electric energy, except that such term does not include, as determined under rules prescribed by the Commission, in consultation with the Secretary of Energy--

(i) the minimum amounts of fuel required for ignition, startup, testing, flame stabilization, and control uses, and

(ii) the minimum amounts of fuel required to alleviate or prevent--

(I) unanticipated equipment outages, and

(II) emergencies, directly affecting the public health, safety, or welfare, which would result from electric power outages;

(C) "qualifying small power production facility" means a small power production facility that the Commission determines, by rule, meets such requirements (including requirements respecting fuel use, fuel efficiency, and reliability) as the Commission may, by rule, prescribe;

(D) "qualifying small power producer" means the owner or operator of a qualifying small power production facility;

(E) "eligible solar, wind, waste or geothermal facility" means a facility which produces electric energy solely by the use, as a primary energy source, of solar energy, wind energy, waste resources or geothermal resources; but only if--

(i) either of the following is submitted to the Commission not later than December 31, 1994:

(I) an application for certification of the facility as a qualifying small power production facility; or

(II) notice that the facility meets the requirements for qualification; and

(ii) construction of such facility commences not later than December 31, 1999, or, if not, reasonable diligence is exercised toward the completion of such facility taking into account all factors relevant to construction of the facility.

(18)(A) "cogeneration facility" means a facility which produces--

(i) electric energy, and

(ii) steam or forms of useful energy (such as heat) which are used for industrial, commercial, heating, or cooling purposes;

(B) "qualifying cogeneration facility" means a cogeneration facility that the Commission determines, by rule, meets such requirements (including requirements respecting minimum size, fuel use, and fuel efficiency) as the Commission may, by rule, prescribe;

(C) "qualifying cogenerator" means the owner or operator of a qualifying cogeneration facility;

2. 16 U.S.C. § 824a-3 provides:

(a) Cogeneration and small power production rules

Not later than 1 year after November 9, 1978, the Commission shall prescribe, and from time to time thereafter revise, such rules as it determines necessary to encourage cogeneration and small power production, and to encourage geothermal small power production facilities of not more than 80 megawatts capacity, which rules require electric utilities to offer to--

(1) sell electric energy to qualifying cogeneration facilities and qualifying small power production facilities and

(2) purchase electric energy from such facilities.

Such rules shall be prescribed, after consultation with representatives of Federal and State regulatory agencies having ratemaking authority for electric utilities, and after public notice and a reasonable opportunity for interested persons (including State and Federal agencies) to submit oral as well as written data, views, and arguments. Such rules shall include provisions respecting minimum reliability of qualifying cogeneration facilities and qualifying small power production facilities (including reliability of such facilities during emergencies) and rules respecting reliability of electric energy service to be available to such facilities from electric utilities during emergencies. Such rules may not authorize a qualifying cogeneration facility or qualifying small power production facility to make any sale for purposes other than resale.

(b) Rates for purchases by electric utilities

The rules prescribed under subsection (a) shall insure that, in requiring any electric utility to offer to purchase electric energy from any qualifying cogeneration facility or qualifying small power production facility, the rates for such purchase--

(1) shall be just and reasonable to the electric consumers of the electric utility and in the public interest, and

(2) shall not discriminate against qualifying cogenerators or qualifying small power producers.

No such rule prescribed under subsection (a) shall provide for a rate which exceeds the incremental cost to the electric utility of alternative electric energy.

(c) Rates for sales by utilities

The rules prescribed under subsection (a) shall insure that, in requiring any electric utility to offer to sell electric energy to any qualifying cogeneration facility or qualifying small power production facility, the rates for such sale--

(1) shall be just and reasonable and in the public interest, and

(2) shall not discriminate against the qualifying cogenerators or qualifying small power producers.

(d) "Incremental cost of alternative electric energy" defined

For purposes of this section, the term "incremental cost of alternative electric energy" means, with respect to electric energy purchased from a qualifying cogenerator or qualifying small power producer, the

cost to the electric utility of the electric energy which, but for the purchase from such cogenerator or small power producer, such utility would generate or purchase from another source.

(e) Exemptions

(1) Not later than 1 year after November 9, 1978, and from time to time thereafter, the Commission shall, after consultation with representatives of State regulatory authorities, electric utilities, owners of cogeneration facilities and owners of small power production facilities, and after public notice and a reasonable opportunity for interested persons (including State and Federal agencies) to submit oral as well as written data, views, and arguments, prescribe rules under which geothermal small power production facilities of not more than 80 megawatts capacity, qualifying cogeneration facilities, and qualifying small power production facilities are exempted in whole or part from the Federal Power Act, from the Public Utility Holding Company Act, from State laws and regulations respecting the rates, or respecting the financial or organizational regulation, of electric utilities, or from any combination of the foregoing, if the Commission determines such exemption is necessary to encourage cogeneration and small power production.

(2) No qualifying small power production facility (other than a qualifying small power production facility which is an eligible solar, wind, waste, or geothermal facility as defined

in section 3(17)(E) of the Federal Power Act) which has a power production capacity which, together with any other facilities located at the same site (as determined by the Commission), exceeds 30 megawatts, or 80 megawatts for a qualifying small power production facility using geothermal energy as the primary energy source, may be exempted under rules under paragraph (1) from any provision of law or regulation referred to in paragraph (1), except that any qualifying small power production facility which produces electric energy solely by the use of biomass as a primary energy source, may be exempted by the Commission under such rules from the Public Utility Holding Company Act and from State laws and regulations referred to in such paragraph (1).

(3) No qualifying small power production facility or qualifying cogeneration facility may be exempted under this subsection from--

(A) any State law or regulation in effect in a State pursuant to subsection (f),

(B) the provisions of section 210, 211, or 212 of the Federal Power Act or the necessary authorities for enforcement of any such provision under the Federal Power Act, or

(C) any license or permit requirement under part I of the Federal Power Act, any provision under such Act related to such a license or permit requirement, or

the necessary authorities for enforcement of any such requirement.

(f) Implementation of rules for qualifying cogeneration and qualifying small power production facilities

(1) Beginning on or before the date one year after any rule is prescribed by the Commission under subsection (a) or revised under such subsection, each State regulatory authority shall, after notice and opportunity for public hearing, implement such rule (or revised rule) for each electric utility for which it has ratemaking authority.

(2) Beginning on or before the date one year after any rule is prescribed by the Commission under subsection (a) or revised under such subsection, each nonregulated electric utility shall, after notice and opportunity for public hearing, implement such rule (or revised rule).

(g) Judicial review and enforcement

(1) Judicial review may be obtained respecting any proceeding conducted by a State regulatory authority or nonregulated electric utility for purposes of implementing any requirement of a rule under subsection (a) in the same manner, and under the same requirements, as judicial review may be obtained under section 2633 of this title in the case of a proceeding to which section 2633 of this title applies.

(2) Any person (including the Secretary) may bring an action against any electric utility,

qualifying small power producer, or qualifying cogenerator to enforce any requirement established by a State regulatory authority or nonregulated electric utility pursuant to subsection (f). Any such action shall be brought only in the manner, and under the requirements, as provided under section 2633 of this title with respect to an action to which section 2633 of this title applies.

(h) Commission enforcement

(1) For purposes of enforcement of any rule prescribed by the Commission under subsection (a) with respect to any operations of an electric utility, a qualifying cogeneration facility or a qualifying small power production facility which are subject to the jurisdiction of the Commission under part II of the Federal Power Act, such rule shall be treated as a rule under the Federal Power Act. Nothing in subsection (g) shall apply to so much of the operations of an electric utility, a qualifying cogeneration facility or a qualifying small power production facility as are subject to the jurisdiction of the Commission under part II of the Federal Power Act.

(2)(A) The Commission may enforce the requirements of subsection (f) against any State regulatory authority or nonregulated electric utility. For purposes of any such enforcement, the requirements of subsection (f)(1) shall be treated as a rule enforceable under the Federal Power Act. For purposes of any such action, a State regulatory authority or

nonregulated electric utility shall be treated as a person within the meaning of the Federal Power Act. No enforcement action may be brought by the Commission under this section other than--

(i) an action against the State regulatory authority or nonregulated electric utility for failure to comply with the requirements of subsection (f) or

(ii) an action under paragraph (1).

(B) Any electric utility, qualifying cogenerator, or qualifying small power producer may petition the Commission to enforce the requirements of subsection (f) as provided in subparagraph (A) of this paragraph. If the Commission does not initiate an enforcement action under subparagraph (A) against a State regulatory authority or nonregulated electric utility within 60 days following the date on which a petition is filed under this subparagraph with respect to such authority, the petitioner may bring an action in the appropriate United States district court to require such State regulatory authority or nonregulated electric utility to comply with such requirements, and such court may issue such injunctive or other relief as may be appropriate. The Commission may intervene as a matter of right in any such action.

(i) Federal contracts

No contract between a Federal agency and any electric utility for the sale of electric energy by such

Federal agency for resale which is entered into after November 9, 1978, may contain any provision which will have the effect of preventing the implementation of any rule under this section with respect to such utility. Any provision in any such contract which has such effect shall be null and void.

(j) New dams and diversions

Except for a hydroelectric project located at a Government dam (as defined in section 3(10) of the Federal Power Act) at which non-Federal hydroelectric development is permissible, this section shall not apply to any hydroelectric project which impounds or diverts the water of a natural watercourse by means of a new dam or diversion unless the project meets each of the following requirements:

(1) No substantial adverse effects

At the time of issuance of the license or exemption for the project, the Commission finds that the project will not have substantial adverse effects on the environment, including recreation and water quality. Such finding shall be made by the Commission after taking into consideration terms and conditions imposed under either paragraph (3) of this subsection or section 10 of the Federal Power Act (whichever is appropriate as required by that Act or the Electric Consumers Protection Act of 1986) and compliance with other environmental requirements applicable to the project.

(2) Protected rivers

At the time the application for a license or exemption for the project is accepted by the

Commission (in accordance with the Commission's regulations and procedures in effect on January 1, 1986, including those relating to environmental consultation), such project is not located on either of the following:

(A) Any segment of a natural watercourse which is included in (or designated for potential inclusion in) a State or national wild and scenic river system.

(B) Any segment of a natural watercourse which the State has determined, in accordance with applicable State law, to possess unique natural, recreational, cultural, or scenic attributes which would be adversely affected by hydroelectric development.

(3) Fish and wildlife terms and conditions

The project meets the terms and conditions set by fish and wildlife agencies under the same procedures as provided for under section 30(c) of the Federal Power Act.

(k) "New dam or diversion" defined

For purposes of this section, the term "new dam or diversion" means a dam or diversion which requires, for purposes of installing any hydroelectric power project, any construction, or enlargement of any impoundment or diversion structure (other than repairs or reconstruction or the addition of flashboards or similar adjustable devices) 2

(l) Definitions

For purposes of this section, the terms "small power production facility", "qualifying small power

production facility", "qualifying small power producer", "primary energy source", "cogeneration facility", "qualifying cogeneration facility", and "qualifying cogenerator" have the respective meanings provided for such terms under section 3(17) and (18) of the Federal Power Act.

(f) Termination of mandatory purchase and sale requirements

(1) Obligation to purchase

After August 8, 2005, no electric utility shall be required to enter into a new contract or obligation to purchase electric energy from a qualifying cogeneration facility or a qualifying small power production facility under this section if the Commission finds that the qualifying cogeneration facility or qualifying small power production facility has nondiscriminatory access to--

> (A)(i) independently administered, auction-based day ahead and real time wholesale markets for the sale of electric energy; and (ii) wholesale markets for long-term sales of capacity and electric energy; or
>
> (B)(i) transmission and interconnection services that are provided by a Commission-approved regional transmission entity and administered pursuant to an open access transmission tariff that affords nondiscriminatory treatment to all customers; and (ii) competitive wholesale markets that provide a meaningful opportunity to sell capacity, including long-term and short-term sales, and electric energy, including long-term,

short-term and real-time sales, to buyers other than the utility to which the qualifying facility is interconnected. In determining whether a meaningful opportunity to sell exists, the Commission shall consider, among other factors, evidence of transactions within the relevant market; or

(C) wholesale markets for the sale of capacity and electric energy that are, at a minimum, of comparable competitive quality as markets described in subparagraphs (A) and (B).

(2) Revised purchase and sale obligation for new facilities

(A) After August 8, 2005, no electric utility shall be required pursuant to this section to enter into a new contract or obligation to purchase from or sell electric energy to a facility that is not an existing qualifying cogeneration facility unless the facility meets the criteria for qualifying cogeneration facilities established by the Commission pursuant to the rulemaking required by subsection (n).

(B) For the purposes of this paragraph, the term "existing qualifying cogeneration facility" means a facility that--

(i) was a qualifying cogeneration facility on August 8, 2005; or

(ii) had filed with the Commission a notice of self-certification, self recertification or an application for

Commission certification under 18 CFR 292.207 prior to the date on which the Commission issues the final rule required by subsection (n).

(3) Commission review

Any electric utility may file an application with the Commission for relief from the mandatory purchase obligation pursuant to this subsection on a service territory-wide basis. Such application shall set forth the factual basis upon which relief is requested and describe why the conditions set forth in subparagraph (A), (B), or (C) of paragraph (1) of this subsection have been met. After notice, including sufficient notice to potentially affected qualifying cogeneration facilities and qualifying small power production facilities, and an opportunity for comment, the Commission shall make a final determination within 90 days of such application regarding whether the conditions set forth in subparagraph (A), (B), or (C) of paragraph (1) have been met.

(4) Reinstatement of obligation to purchase

At any time after the Commission makes a finding under paragraph (3) relieving an electric utility of its obligation to purchase electric energy, a qualifying cogeneration facility, a qualifying small power production facility, a State agency, or any other affected person may apply to the Commission for an order reinstating the electric utility's obligation to purchase electric energy under this section. Such application shall set forth the factual basis upon which the application is based and describe why the conditions set forth in subparagraph (A), (B), or (C) of

paragraph (1) of this subsection are no longer met. After notice, including sufficient notice to potentially affected utilities, and opportunity for comment, the Commission shall issue an order within 90 days of such application reinstating the electric utility's obligation to purchase electric energy under this section if the Commission finds that the conditions set forth in subparagraphs (A), (B) or (C) of paragraph (1) which relieved the obligation to purchase, are no longer met.

(5) Obligation to sell

After August 8, 2005, no electric utility shall be required to enter into a new contract or obligation to sell electric energy to a qualifying cogeneration facility or a qualifying small power production facility under this section if the Commission finds that--

(A) competing retail electric suppliers are willing and able to sell and deliver electric energy to the qualifying cogeneration facility or qualifying small power production facility; and

(B) the electric utility is not required by State law to sell electric energy in its service territory.

(6) No effect on existing rights and remedies

Nothing in this subsection affects the rights or remedies of any party under any contract or obligation, in effect or pending approval before the appropriate State regulatory authority or non-regulated electric utility on August 8, 2005, to purchase electric energy or capacity from or to sell electric energy or capacity to a qualifying cogeneration facility or qualifying small power

production facility under this Act (including the right to recover costs of purchasing electric energy or capacity).

(7) Recovery of costs

(A) The Commission shall issue and enforce such regulations as are necessary to ensure that an electric utility that purchases electric energy or capacity from a qualifying cogeneration facility or qualifying small power production facility in accordance with any legally enforceable obligation entered into or imposed under this section recovers all prudently incurred costs associated with the purchase.

(B) A regulation under subparagraph (A) shall be enforceable in accordance with the provisions of law applicable to enforcement of regulations under the Federal Power Act (16 U.S.C. 791a et seq.).

(n) Rulemaking for new qualifying facilities

(1)(A) Not later than 180 days after August 8, 2005, the Commission shall issue a rule revising the criteria in 18 CFR 292.205 for new qualifying cogeneration facilities seeking to sell electric energy pursuant to this section to ensure--

(i) that the thermal energy output of a new qualifying cogeneration facility is used in a productive and beneficial manner;

(ii) the electrical, thermal, and chemical output of the cogeneration facility is used fundamentally for industrial, commercial, or institutional purposes and is not intended fundamentally for sale to an electric utility, taking into account technological, efficiency, economic, and variable thermal energy requirements, as well as State laws applicable to sales of electric energy from a qualifying facility to its host facility; and

(ii) continuing progress in the development of efficient electric energy generating technology.

(B) The rule issued pursuant to paragraph (1)(A) of this subsection shall be applicable only to facilities that seek to sell electric energy pursuant to this section. For all other purposes, except as specifically provided in subsection (m)(2)(A), qualifying facility status shall be determined in accordance with the rules and regulations of this Act.

(2) Notwithstanding rule revisions under paragraph (1), the Commission's criteria for qualifying cogeneration facilities in effect prior to the date on which the Commission issues the final rule required by paragraph (1) shall continue to apply to any cogeneration facility that--

(A) was a qualifying cogeneration facility on August 8, 2005, or

(B) had filed with the Commission a notice of self-certification, self-recertification or an application for Commission certification under 18 CFR 292.207 prior to the date on which the Commission issues the final rule required by paragraph (1).

3. 18 C.F.R. § 292.203 provides:

(a) **Small power production facilities**. Except as provided in paragraph (c) of this section, a small power production facility is a qualifying facility if it:

(1) Meets the maximum size criteria specified in § 292.204(a);

(2) Meets the fuel use criteria specified in § 292.204(b); and

(3) Unless exempted by paragraph (d), has filed with the Commission a notice of self-certification, pursuant to § 292.207(a); or has filed with the Commission an application for Commission certification, pursuant to § 292.207(b)(1), that has been granted.

(b) **Cogeneration facilities**. A cogeneration facility, including any diesel and dual-fuel cogeneration facility, is a qualifying facility if it:

(1) Meets any applicable standards and criteria specified in §§ 292.205(a), (b) and (d); and

(2) Unless exempted by paragraph (d), has filed with the Commission a notice of self-certification, pursuant to § 292.207(a); or has

filed with the Commission an application for Commission certification, pursuant to § 292.207(b)(1), that has been granted.

(c) Hydroelectric small power production facilities located at a new dam or diversion.

(1) A hydroelectric small power production facility that impounds or diverts the water of a natural watercourse by means of a new dam or diversion (as that term is defined in § 292.202(p)) is a qualifying facility if it meets the requirements of:

(i) Paragraph (a) of this section; and

(ii) Section 292.208.

(2) [Reserved]

(d) Exemptions and waivers from filing requirement.

(1) Any facility with a net power production capacity of 1 MW or less is exempt from the filing requirements of paragraphs (a)(3) and (b)(2) of this section.

(2) The Commission may waive the requirement of paragraphs (a)(3) and (b)(2) of this section for good cause. Any applicant seeking waiver of paragraphs (a)(3) and (b)(2) of this section must file a petition for declaratory order describing in detail the reasons waiver is being sought.

4. 18 C.F.R. § 292.204 provides:

(a) Size of the facility—

(1) **Maximum size**. Except as provided in paragraph (a)(4) of this section, the power production capacity of a facility for which qualification is sought, together with the power production capacity of any other small power production qualifying facilities that use the same energy resource, are owned by the same person(s) or its affiliates, and are located at the same site, may not exceed 80 megawatts.

(2) **Method of calculation**.

(i)(A) For purposes of this paragraph (a)(2), there is an irrebuttable presumption that affiliated small power production qualifying facilities that use the same energy resource and are located one mile or less from the facility for which qualification or recertification is sought are located at the same site as the facility for which qualification or recertification is sought.

(B) For purposes of this paragraph (a)(2), for facilities for which qualification or recertification is filed on or after December 31, 2020 there is an irrebuttable presumption that affiliated small power production qualifying facilities that use the same energy resource and are located 10 miles or more from the facility for which qualification or recertification is sought

are located at separate sites from the facility for which qualification or recertification is sought.

(C) For purposes of this paragraph (a)(2), for facilities for which qualification or recertification is filed on or after December 31, 2020, there is a rebuttable presumption that affiliated small power production qualifying facilities that use the same energy resource and are located more than one mile and less than 10 miles from the facility for which qualification or recertification is sought are located at separate sites from the facility for which qualification or recertification is sought.

(D) For hydroelectric facilities, facilities are considered to be located at the same site as the facility for which qualification or recertification is sought if they are located within one mile of the facility for which qualification or recertification is sought and use water from the same impoundment for power generation.

(ii) For purposes of making the determinations in paragraph (a)(2)(i), the distance between two facilities shall be measured from the edge of the closest electrical generating equipment for which qualification or recertification is sought to the edge of the nearest electrical generating equipment of the

other affiliated small power production qualifying facility using the same energy resource.

(3) **Waiver**. The Commission may modify the application of paragraph (a)(2) of this section, for good cause.

(4) **Exception**. Facilities meeting the criteria in section 3(17)(E) of the Federal Power Act (16 U.S.C. 796(17)(E)) have no maximum size, and the power production capacity of such facilities shall be excluded from consideration when determining the size of other small power production facilities less than 10 miles from such facilities.

(b) Fuel use.

(1)(i) The primary energy source of the facility must be biomass, waste, renewable resources, geothermal resources, or any combination thereof, and 75 percent or more of the total energy input must be from these sources.

(ii) Any primary energy source which, on the basis of its energy content, is 50 percent or more biomass shall be considered biomass.

(2) Use of oil, natural gas and coal by a facility, under section 3(17)(B) of the Federal Power Act, is limited to the minimum amounts of fuel required for ignition, startup, testing, flame stabilization, and control uses, and the minimum amounts of fuel required to alleviate or prevent unanticipated equipment outages, and emergencies, directly affecting the public

health, safety, or welfare, which would result from electric power outages. Such fuel use may not, in the aggregate, exceed 25 percent of the total energy input of the facility during the 12–month period beginning with the date the facility first produces electric energy and any calendar year subsequent to the year in which the facility first produces electric energy.

5. 18 C.F.R. § 292.207 provides:

(a) Self-certification—

(1) FERC Form No. 556. The qualifying facility status of an existing or a proposed facility that meets the requirements of § 292.203 may be self-certified by the owner or operator of the facility or its representative by properly completing a FERC Form No. 556 and filing that form with the Commission, pursuant to § 131.80 of this chapter, and complying with paragraph (e) of this section.

(2) Factors. For small power production facilities pursuant to § 292.204, the owner or operator of the facility or its representative may, when completing the FERC Form No. 556, provide information asserting factors showing that the facility for which qualification or recertification is sought is at a separate site from other facilities using the same energy resource and owned by the same person(s) or its affiliates.

(3) Commission action. Self-certification and self-recertification are effective upon filing.

If no protests to a self-certification or self-recertification are timely filed pursuant to paragraph (c) of this section, no further action by the Commission is required for a self-certification or self-recertification to be effective. If protests to a self-certification or self-recertification are timely filed pursuant to paragraph (c) of this section, a self-certification or self-recertification will remain effective until the Commission issues an order revoking QF certification. The Commission will act on the protest within 90 days from the date the protest is filed; provided that, if the Commission requests more information from the protester, the entity seeking qualification or recertification, or both, the time for the Commission to act will be extended to 60 days from the filing of a complete answer to the information request. In addition to any extension resulting from a request for information, the Commission also may toll the 90–day period for one additional 60–day period if so required to rule on a protest. Authority to toll the 90–day period for this purpose is delegated to the Secretary or the Secretary's designee. Absent Commission action before the expiration of the tolling period, a protest will be deemed denied, and the self-certification or self-recertification will remain effective.

(b) Optional procedure—Commission certification —

(1) Application for Commission certification. In lieu of the self-certification

procedures in paragraph (a) of this section, an owner or operator of an existing or a proposed facility, or its representative, may file with the Commission an application for Commission certification that the facility is a qualifying facility. The application must be accompanied by the fee prescribed by part 381 of this chapter, and the applicant for Commission certification must comply with paragraph (c) of this section.

(2) General contents of application. The application must include a properly completed FERC Form No. 556 pursuant to § 131.80 of this chapter. For small power production facilities pursuant to § 292.204, the owner or operator of the facility or its representative may, when completing the FERC Form No. 556, provide information asserting factors showing that the facility for which qualification is sought is at a separate site from other facilities using the same energy resource and owned by the same person(s) or its affiliates.

(3) Commission action.

(i) Within 90 days of the later of the filing of an application or the filing of a supplement, amendment or other change to the application, the Commission will either: Inform the applicant that the application is deficient; or issue an order granting or denying the application; or toll the time for issuance of an order. Any order denying certification shall identify the

specific requirements which were not met. If the Commission does not act within 90 days of the date of the latest filing, the application shall be deemed to have been granted.

(ii) For purposes of paragraph (b) of this section, the date an application is filed is the date by which the Office of the Secretary has received all of the information and the appropriate filing fee necessary to comply with the requirements of this Part.

(c) Protests and Interventions—

(1) Filing a Protest. Any person, as defined in § 385.102(d) of this chapter, who opposes either a self-certification or self-recertification making substantive changes to the existing certification filed pursuant to paragraph (a) of this section or an application for Commission certification or Commission recertification making substantive changes to the existing certification filed pursuant to paragraph (b) of this section for which qualification or recertification is filed on or after December 31, 2020, may file a protest with the Commission. Any protest to and any intervention in a self-certification or self-recertification must be filed in accordance with §§ 385.211 and 385.214 of this chapter, on or before 30 days from the date the self-certification or self-recertification is filed. Any protestor must concurrently serve a copy of such filing pursuant to § 385.211 of this chapter. Any protest must be adequately

supported, and provide any supporting documents, contracts, or affidavits to substantiate the claims in the protest.

(2) Limitations on protest. Protests may be filed to any initial self-certification or application for Commission certification filed on or after the effective date of this final rule, and to any self-recertification or application for Commission recertification that are filed on or after December 31, 2020 that makes substantive changes to the existing certification. Once the Commission has certified an applicant's qualifying facility status either in response to a protest opposing a self-certification or self-recertification, or in response to an application for Commission certification or Commission recertification, any later protest to a self-recertification or application for Commission recertification making substantive changes to a qualifying facility's certification must demonstrate changed circumstances that call into question the continued validity of the certification.

(d) Response to protests. Any response to a protest must be filed on or before 30 days from the date of filing of that protest and will be allowed under § 385.213(a)(2) of this chapter.

(e) Notice requirements—

(1) General. An applicant filing a self-certification, self-recertification, application for Commission certification or application for Commission recertification of the qualifying

status of its facility must concurrently serve a copy of such filing on each electric utility with which it expects to interconnect, transmit or sell electric energy to, or purchase supplementary, standby, back-up or maintenance power from, and the State regulatory authority of each state where the facility and each affected electric utility is located. The Commission will publish a notice in the Federal Register for each application for Commission certification and for each self-certification of a cogeneration facility that is subject to the requirements of § 292.205(d).

(2) Facilities of 500 kW or more. An electric utility is not required to purchase electric energy from a facility with a net power production capacity of 500 kW or more until 90 days after the facility notifies the facility that it is a qualifying facility or 90 days after the utility meets the notice requirements in paragraph (c)(1) of this section.

(f) Revocation of qualifying status.

(1)(i) If a qualifying facility fails to conform with any material facts or representations presented by the cogenerator or small power producer in its submittals to the Commission, the notice of self-certification or Commission order certifying the qualifying status of the facility may no longer be relied upon. At that point, if the facility continues to conform to the Commission's qualifying criteria under this part, the cogenerator or small power producer may file either a notice of self-recertification of

qualifying status pursuant to the requirements of paragraph (a) of this section, or an application for Commission recertification pursuant to the requirements of paragraph (b) of this section, as appropriate.

(ii) The Commission may, on its own motion or on the motion of any person, revoke the qualifying status of a facility that has been certified under paragraph (b) of this section, if the facility fails to conform to any of the Commission's qualifying facility criteria under this part.

(iii) The Commission may, on its own motion or on the motion of any person, revoke the qualifying status of a self-certified or self-recertified qualifying facility if it finds that the self-certified or self-recertified qualifying facility does not meet the applicable requirements for qualifying facilities.

(2) Prior to undertaking any substantial alteration or modification of a qualifying facility which has been certified under paragraph (b) of this section, a small power producer or cogenerator may apply to the Commission for a determination that the proposed alteration or modification will not result in a revocation of qualifying status. This application for Commission recertification of qualifying status should be submitted in accordance with paragraph (b) of this section.