

ENERGY ALERT

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FERC news for renewables: Power production capacity calculation for Qualifying Facilities

On Monday, Nov. 2, 2020, the [Federal Energy Regulatory Commission](#) (FERC or Commission) denied requests for rehearing of an Order that shocked the solar energy industry last month by abruptly changing course on how FERC will measure power production capacity for purposes of Qualifying Facility (QF) status.

By way of context, FERC regulations implementing Section 210 of the Public Utility Regulatory Policies Act (PURPA) exempt [Qualifying Facilities](#) (QFs) from certain requirements of the Federal Power Act, as well as other federal and state laws. In other words, PURPA established QFs as a new class of generating facilities that receive special rate and regulatory treatment. Under PURPA, electric utilities have mandatory purchase obligations for power produced by QFs, and must provide backup electric energy to QFs on a non-discriminatory basis and at just and reasonable rates. PURPA was intended to encourage investment in QFs, instructing the Commission to prescribe rules “as it determines necessary to encourage cogeneration and small power production.” In order to meet FERC requirements for small power production QF status, a generating facility must use renewables as its primary energy source and its maximum power production capacity is limited to 80 megawatts (MW). “Power production capacity” is a statutory phrase set forth in Section 3(17) of the Federal Power Act.

Until last month, FERC’s long-standing rule for determining a QF’s maximum power production capacity was the send out analysis set forth in its Occidental decision: a facility’s send out—the “net output” that power production equipment delivers to the point of interconnection with the

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purchasing electric utility's transmission system—was determinative of whether the facility complied with the 80 MW power production capacity threshold established in PURPA. See *Occidental Geothermal, Inc.*, 17 FERC ¶ 61,231 (1981).

This all changed with FERC's Order in [Broadview Solar, LLC \(Broadview Order\)](#). On Sept. 1, 2020, FERC rejected Broadview Solar, LLC's (Broadview's) application for recertification as a small power production QF and revoked Broadview's QF status. Broadview was developing a combined solar photovoltaic and battery storage facility in Yellowstone County, Montana. According to Broadview's most recent Form No. 556, the facility would have a gross capacity of 180 MW and a net capacity of 80 MW. Broadview's facility met the QF size limit under *Occidental* because certain inverters installed would limit the maximum gross output of the facility to 82.5 MW and, after deducting facility loads and losses, the maximum net capacity of the facility would be 80 MW. Yet FERC ruled that its prior analysis in *Occidental* was inconsistent with the 80 MW power production capacity limitation in PURPA for small power production QFs and that the measure of Broadview's power production capacity should not include adjustments for inverters or other output-limiting devices. Consequently, Broadview's facility was deemed to exceed the size limit on small power production QFs, even though Broadview's net output sold to an electric utility did not exceed the 80 MW ceiling. Commissioner Glick dissented from the majority's Order on the grounds that the Commission should determine a QF's power production capacity by looking to the facility as a whole rather than to its component parts.

Preventing solar QFs from measuring power production capacity based on alternating current (AC) inverter ratings—even though AC energy is what is actually delivered to the electric grid at the point of interconnection—arguably results in FERC's judging power production capacity for solar QFs differently than for other QFs. Because solar panels only produce direct current (DC), with all electrons flowing in the same direction, inverters are required to convert the DC energy into AC energy for delivery into the electric grid. So under the *Broadview* rule, a solar QF is required to report its maximum capacity as a DC rating while other forms of QF technologies can report an AC rating.

After the *Broadview* Order was issued, the [Solar Energy Industries Association](#) (SEIA), among others, filed out-of-time motions to intervene and requests for rehearing. In the alternative, SEIA sought clarification that all previously certified QFs will not be threatened with a *Broadview* rule challenge upon future recertifications made during the facility's useful life (e.g., due to ownership change or substantial modifications). SEIA contends that FERC acted unlawfully in issuing the *Broadview* Order because it overturned a well-settled and long-established precedent in an individual proceeding without notice and comment rulemaking mandated under the Administrative Procedures Act. SEIA also argues in its brief that the proposed *Broadview* rule is "vague, confusing, and untethered from

the physical or electrical realities of renewable installations;" and "[i]f not reversed, the Broadview Order will result in discrimination against solar QFs and will discourage capital market investors from providing financial to facilities under FERC's jurisdiction."

Likely further adding to the solar industry's confusion, FERC had just revised its PURPA rules on July 16, 2020 (to become effective after Dec. 31, 2020). Broadview Solar's application for certification was pending on FERC's docket during this rulemaking process, yet FERC never provided notice that it would reexamine its *Occidental* precedent by revising the definition of the statutory phrase "power production capacity."

Because FERC did not act on the requests for rehearing by the Nov. 2 deadline, they are deemed denied. An appeal may be filed within 60 days. And in the event of an appeal, FERC may modify or set aside its order until the record has been filed in the court of appeals.

For more information please contact [Devan Flahive](#).