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 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]

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

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

[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

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 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]

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).

[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).

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

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[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.

[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).

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 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 "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

[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.

[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.*

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 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;

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[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.

[30] *Id.* P 25.

[31] *Id.*

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 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, 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,

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[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 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.

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]

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

[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 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.

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 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 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

[43] *Id.* at 7.

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

[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.").

[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).

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 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,

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[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.

[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.

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 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 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]

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

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

[56] *Id.*

[57] *Id.*

[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

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:

> [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

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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).

[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).

facilities."[63] The rates for these sales or purchases must be just and 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 capacity.[68] Alternatively, the Commission could, as it has for nearly

[63] 16 U.S.C. § 824a-3(a).

[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.

[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

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, 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

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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 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.)").

Commissioner Danly recognizes, the 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 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]

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[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.").

[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),

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 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 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

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(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 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.*

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 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

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[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.

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

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

[84] *Id.*

equipment)."[85] In that rule, the 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 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

[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).

[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.

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 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.

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[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*.

[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").

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 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 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

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

[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.

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 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

[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).

[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).

having to examine the Commission's regulations and precedent to certify.[99] 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 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

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[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) (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).

[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

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 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 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

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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).

[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.

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. 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

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[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.*

[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.

would 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 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]

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[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 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.

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.

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 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

[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).

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

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 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 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

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[4] Application at 2 (emphasis added).

[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.*

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, 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 determining power production capacity, namely "the whole facility's net output to the electric utility, taking into account all components necessary to produce and

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[11] *Id.* at 2.

[12] *Id.* at 7.

[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).

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, 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,

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[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.*

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

[19] 16 U.S.C. § 796(17)(A)(i)-(ii).

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 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]

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

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

[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 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.

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* 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 that is not even present in the statute, is, as

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[24] *Id.*

[25] *Id.* P 25.

[26] *Id.*

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

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 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.

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[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.

[32] *Id.* at 810.

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 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] 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

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

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 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

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[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.

"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 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

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[38] *Id.* P 32.

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

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

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 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 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]

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

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

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

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

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

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

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 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 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.

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

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

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, 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

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[49] Application at 7.

[50] *Id.* at 2.

[51] *Id.* at 7.

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

[53] *Id.*

than 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.

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James P. Danly
Commissioner

[54] *Id.*