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Locke Lord QuickStudy: Generating Debate: D.C. Circuit Affirms ?That AC Output Determines PURPA Eligibility, ?While Dissent ?Decries *Chevron* Maximalism

Locke Lord LLP

WRITTEN BY

M. Benjamin Cowan | Shane P. Early | Bruce Grabow | Jennifer Brough

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On February 14, 2023, a divided D.C. Circuit panel affirmed FERC's March 2021 ruling[1] that the power output capacity of a generating facility – not the nameplate capacity of its component parts – determines its eligibility as a Qualifying Facility ("QF") under the Public Utilities Regulatory Policy Act of 1978 ("PURPA").[2] Although the opinion enhances opportunities for clean energy generation and storage, developers should remain cautious as the D.C. Circuit's decision may not be the last word on the issue. A lengthy dissenting opinion from a former clerk of Justice Kavanaugh decries the *Chevron* doctrine on which the majority opinion relies, raising the distinct possibility of rehearing en banc or Supreme Court review.

PURPA

PURPA provides a number of benefits for QFs. A key benefit is a mandatory purchase obligation that requires electric utilities to buy the power produced by a QF, which relieves the developers of such projects from the need to compete for offtake contracts. To be eligible as a QF, among other requirements, the power production capacity of the facility cannot exceed 80 megawatts ("MW"). The FERC ruling at issue in the *Broadview Solar* case determined that the capacity relevant to becoming a small power production QF is its alternating current ("AC") output capacity to the electric grid rather than its direct current ("DC") generating capacity (which must be converted to AC before it can be fed onto the transmission grid). Under the D.C. Circuit's opinion that upheld FERC's orders, any generating facility with AC output capacity of not more than 80 MW can receive the benefits of PURPA.

DC Generating Capacity or AC Output Capacity?

The underlying FERC orders addressed PURPA eligibility of the Broadview I facility in Montana that includes a 160 MW DC solar array, a 50 MW DC battery energy storage system ("BESS"), and inverters with an 80 MW AC capacity. The solar array and the battery connect to the inverters that then connect to the electric grid. The inverters convert the DC power from the solar array and the BESS to grid-usable AC power. The inverters' capacity caps the facility's output to the electric grid at 80 MW. Broadview Solar argued, and FERC agreed, that

the Broadview I facility is a QF because of the 80 MW limit on its AC output to the grid, notwithstanding its greater DC generating capacity.

The court followed *Chevron's* two-step analysis in evaluating FERC's orders. First, if "Congress has directly spoken to the precise question at issue," then FERC and the court "must give effect to the unambiguously expressed intent of Congress."[3] Second, "if the statute is silent or ambiguous with respect to the specific issue," then the court must uphold any agency interpretation that is reasonable.[4]

The decision hinges on the meanings of "facility" and "power production capacity" in the Federal Power Act (16 U.S.C. § 796(17)(A)). The court noted that PURPA does not define these terms and it is unclear whether the relevant capacity under statute is the capability of the solar array to generate DC power or the capability of all the components of the facility working together to create grid-usable AC power. Therefore, the court turned to whether FERC's interpretation was reasonable and found that FERC's interpretation was "eminently reasonable" because the inverters act as an integral component with the solar array and battery to produce the AC power (*i.e.*, the only grid-usable power).

The court explained that FERC's interpretation also was reasonable because it is consistent with the purpose and structure of PURPA. First, it comports with the mandatory purchase obligation, which applies only to AC grid-usable power. Second, PURPA is meant to encourage the development of small electric generation facilities and promote the use of their electricity. The court found that excluding facilities with an 80 MW output due to the DC capacity of individual component parts would restrict the use of these alternative energy sources and run counter to the purpose of PURPA.

Finally, the court explained that FERC's interpretation is consistent with the legislative history. A House Committee Report stated that the power production capacity of a facility means the rated capacity *of the facility*. As noted in the opinion, the Broadview I facility consists of the solar array, BESS, and the inverters. Those components of the facility work together and have a capacity of 80 MW of grid-usable AC power.

Judge Walker Blasts Majority for "*Chevron* maximalism"?

In a strongly worded dissent, Judge Walker stated that the judiciary is the final authority on statutory construction and that the majority opinion engaged in "*Chevron* maximalism," an approach he claimed "is alive and well" on the D.C. Circuit. Judge Walker asserted that the Supreme Court's recent decisions repudiate maximalism, highlighting that the Supreme Court has not deferred to an agency under *Chevron* since 2016. Judge Walker cited multiple concurrences and a law review article, all from Justice Kavanaugh, for whom he clerked, to stress that the majority opinion disregarded the court's duty to use traditional tools of statutory construction to resolve the meaning of PURPA before deferring to the interpretation of an agency.

In his dissent, Judge Walker found that the normal tools of statutory interpretation show that the facility has a power production capacity greater than 80 MW and therefore is not a QF under PURPA. The dissent contended that the reference to power in PURPA is not limited to AC power because, although Congress specifically references AC power in other statutes, it never specifies that the power relevant to PURPA production capacity is AC power. According to the dissent, the facility has a power production capacity of 130 MW, which exceeds the 80 MW cap in PURPA: at full capacity the facility's solar array can send 80 MW of AC power to the electric grid

through the inverters while simultaneously producing another 80 MW of DC power that is used to charge the BESS. Because the facility has the capacity to produce more than 80 MW of power, it is not a “small” facility, and to classify it as such violates the intent of PURPA.

Outlook and Implications

It remains to be seen whether the utilities that challenged FERC’s orders will seek rehearing en banc or appeal the court’s decision to the Supreme Court, and if so, whether Judge Walker’s dissent will be persuasive to either. Until then, developers of co-located generation and BESS facilities similar to Broadview I should proceed with caution and not simply assume that this *Broadview Solar* decision is the final word on QF eligibility for facilities with a generating capacity that exceeds 80 MW.

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

[2] *SEIA v. FERC*, Dkt. No. 21-1126, 2023 WL 1975079 (D.C. Cir. 2023).

[3] *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).

[4] *Id.* at 843.

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