ORAL ARGUMENT HAS NOT BEEN SCHEDULED

In the United States Court of Appeals for the District of Columbia Circuit

Nos. 21-1126, 21-1136, 21-1142, 21-1149, and 21-1175 (consolidated)

SOLAR ENERGY INDUSTRIES ASSOCIATION, *ET AL.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

BROADVIEW SOLAR, LLC, *ET AL.*,
Respondent-Intervenors.

ON PETITIONS FOR REVIEW
OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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FINAL BRIEF: APRIL 12, 2022

Certificate as to Parties, Rulings, and Related Cases

A. Parties and Amici

The parties before this Court are identified in Petitioners' Circuit Rule 28(a)(1) certificates.

B. Rulings Under Review

1. *Broadview Solar, LLC*, "Order Addressing Arguments Raised on Rehearing and Setting Aside Prior Order," 174 FERC ¶ 61,199 (Mar. 19, 2021) ("Rehearing Order I"), JA189–227; and
2. *Broadview Solar, LLC*, "Order Addressing Arguments Raised on Rehearing," 175 FERC ¶ 61,228 (June 17, 2021), ("Rehearing Order II"), JA274–95.

C. Related Cases

Undersigned counsel is aware of two cases currently pending before this Court that involve substantially similar issues as the instant matter: *NorthWestern Corp. d/b/a NorthWestern Energy v. FERC*, No. 21-1269 (petition filed December 21, 2021; in abeyance pursuant to this Court's order of January 18, 2022, Doc. No. 1930980, pending this Court's disposition of Nos. 21-1126, *et al.*); *NorthWestern Corp. d/b/a NorthWestern Energy v. FERC*, No. 22-1055 (petition filed April 6, 2022).

No other cases are pending regarding the Commission orders on review here, nor has this case previously been before this Court or any other court.

/s/ Jared B. Fish
Jared B. Fish

April 12, 2022

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GLOSSARY

A	Addendum
Association	Petitioner Solar Energy Industries Association
Commission or FERC	Respondent Federal Energy Regulatory Commission
Initial Order	*Broadview Solar, LLC*, 172 FERC ¶ 61,194 (Sept. 1, 2020), JA113–30
P	Internal paragraph number in a FERC order
PURPA	Public Utility Regulatory Policies Act of 1978
Qualifying Facility	An electric generation resource that meets PURPA's fuel use, size, and other requirements
Rehearing Order I	*Broadview Solar, LLC*, "Order Addressing Arguments Raised on Rehearing and Setting Aside Prior Order," 174 FERC ¶ 61,199 (Mar. 19, 2021), JA189–227
Rehearing Order II	*Broadview Solar, LLC*, "Order Addressing Arguments Raised on Rehearing," 175 FERC ¶ 61,228 (June 17, 2021), JA274–95
Utilities	Petitioners Edison Electric Institute and NorthWestern Corporation d/b/a NorthWestern Energy

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BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUES

Impelled by the 1973 energy crisis, Congress enacted the Public Utility Regulatory Policies Act of 1978 ("PURPA") to speed deployment of renewable generation resources and conserve energy. To those ends, Congress required traditional electric utilities to purchase power from certain renewable generation facilities.

PURPA's purchase mandate comes with a caveat. A renewable generation resource is only a PURPA-Qualifying Facility, and thus a

beneficiary of the mandate, if it is a "small power production facility." Such facilities have a "power production capacity" of no more than 80 megawatts. 16 U.S.C. § 796(17)(A), (C); 18 C.F.R. §§ 292.203(a)(1); 292.204(a)(1).

Respondent-Intervenor Broadview Solar, LLC ("Broadview") is building a solar facility in Montana (the "Broadview Facility" or "Facility"). In 2019 it sought certification from Respondent Federal Energy Regulatory Commission ("Commission" or "FERC") as a Qualifying Facility. Such status would oblige Petitioner NorthWestern Corporation ("NorthWestern")—an electric utility whose grid will interconnect with Broadview's development—to purchase the Broadview Facility's power.

The Nation's electric grid runs on alternating current power. Most fossil fuel-fired generators—e.g., those that combust coal, oil, or natural gas—produce alternating current in the first instance. Solar panels, however, generate direct current, which a solar facility must convert into alternating current before it can traverse the grid for delivery to customers.

The Broadview Facility comprises a solar array that can produce 160 megawatts of direct current, a battery that can store 50 megawatts of direct current, and a bank of inverters that can convert up to 80 megawatts of direct current into alternating current. The solar array and battery are both upstream of the same set of inverters, meaning the Facility as a whole can never produce more usable alternating current than the inverters can process at any given time—i.e., 80 megawatts.

NorthWestern and Petitioner Edison Electric Institute (collectively, the "Utilities") do not dispute that the Broadview Facility can produce, at most, 80 megawatts of alternating current for NorthWestern's grid. But they insist it is not a PURPA-Qualifying Facility because its solar array can generate double that amount: up to 160 megawatts of direct current. Thus, they reason, the Facility's power production capacity exceeds PURPA's 80-megawatt maximum.

For its part, Petitioner Solar Energy Industries Association (the "Association") agrees with the Commission's approach to measuring power production capacity. But it challenges the Commission's denial of its late motion to intervene in the Broadview proceeding. The Association filed its motion after the Commission initially rejected

PURPA-certification for the Facility, but before FERC reversed course in the orders on rehearing that are now on judicial review.

* * *

The issues presented are:

1. Did the Commission reasonably interpret PURPA's ambiguous reference to the "power production capacity" of a "small power production facility" to mean the total power the Broadview Facility as a whole can produce for the electric grid, which is never greater than the 80-megawatt statutory limit?
2. Does the Association, which ultimately received the merits determination on agency rehearing that it originally sought, have Article III standing to press its claim challenging the Commission's denial of its late motion to intervene; and, if so, did the Commission act within its broad discretion in denying it late intervention?

STATUTORY AND REGULATORY PROVISIONS

Pertinent statutes and regulations are reproduced in the Addendum to this brief.

STATEMENT OF JURISDICTION

The Commission agrees with the Utilities' Statement of Jurisdiction and disagrees with the Association's own. As explained *infra* pp.80–84, the Association lacks Article III standing because, at the time it filed its petition for judicial review on May 27, 2021, it suffered no redressable injury. *See California v. Texas*, 141 S. Ct. 2104, 2113 (2021); *Narragansett Indian Tribal Historical Pres. Office v. FERC*, 949 F.3d 8, 12 (D.C. Cir. 2020). Accordingly, the Court should dismiss its consolidated petitions (Nos. 21-1126, 21-1175).

STATEMENT OF FACTS

I. Background

A. PURPA requires utilities to purchase up to 80 megawatts of power from PURPA-Qualifying Facilities

1. In the wake of the 1973 energy crisis, Congress enacted Title II of PURPA, Pub.L. No. 95–617, 92 Stat. 3144 (1978). *Portland Gen. Elec. Co. v. FERC*, 854 F.3d 692, 694 (D.C. Cir. 2017); *Conn. Valley Elec. Co. v. FERC*, 208 F.3d 1037, 1039 (D.C. Cir. 2000). The statute's primary goal is to reduce the Nation's dependence on fossil fuels and spur the deployment of alternative energy generation facilities. *See Am. Paper Inst., Inc. v. Am. Elec. Power Serv. Corp.*, 461 U.S. 402, 404–05 (1983). To

that end, Section 210 of PURPA, 16 U.S.C. § 824a-3, seeks to "increas[e] the number of what are known as energy-efficient cogeneration and small power-production facilities." *Portland Gen. Elec.*, 854 F.3d at 694.

Cogeneration facilities harness heat that is otherwise wasted and convert it into usable electric power, while "small power-production facilities produce energy … primarily by using 'biomass, waste, renewable resources, geothermal resources, or any combination thereof.'" *Id*. at 695 (quoting Federal Power Act Section 3(17), 16 U.S.C. § 796(17)).[1] Unlike cogeneration facilities, a "small power production facility" must have a "power production capacity" of no more than 80 megawatts to qualify under PURPA.[2] *Id*.; 16 U.S.C. § 796(17)(A)(ii).

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[1] Different provisions of PURPA either amended the Federal Power Act or constitute parts of a new statutory scheme. *See Midland Power Coop. v. FERC*, 774 F.3d 1, 3 (D.C. Cir. 2014).

[2] "A **megawatt** is a unit of **power**, while a **megawatt per hour** is a unit of **energy**. This amounts to the amount of power it would take to run something that requires a megawatt of power for one hour." Holly Duke, *Encouraging Rooftop Solar: What Policy Is Right for Kentucky?*, 47 N. KY. L. REV. 155, 163 n.71 (2020) (emphasis added).

The statutory provision central to the matter here on judicial review provides that

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

16 U.S.C. § 796(17)(A). Further, a "'qualifying small power production facility'"—i.e., a PURPA-Qualifying Facility—"means a small power production facility that the Commission determines, by rule, meets such requirements (including requirements respecting fuel use, fuel efficiency, and reliability) as the Commission may, by rule, prescribe…." *Id*. § 796(17)(C).

The heart of PURPA is Section 210, 16 U.S.C. § 824a-3, which is a "self-contained scheme," *Niagara Mohawk Power Corp. v. FERC*, 117 F.3d 1485, 1488 (D.C. Cir. 1997), designed to address "problems imped[ing] the development of nontraditional generating facilities,"

FERC v. Mississippi, 456 U.S. 742, 750 (1982). "Subsection (a) of [S]ection 210 directs FERC to promulgate broad, generally applicable rules that encourage small power production by, among other things, requiring utilities to sell power to and buy power from such facilities at favorable rates, as detailed in subsections (b) through (d)." *Portland Gen. Elec.*, 854 F.3d at 695 (citing 16 U.S.C. § 824a-3(a)–(d)).

For its part, subsection (b) instructs that "[n]o … rule prescribed under subsection (a) shall provide for a rate which exceeds the incremental cost to the electric utility of alternative electric energy." 16 U.S.C. § 824a-3(b). In its 1980 rulemaking implementing PURPA Section 210, the Commission required utilities to buy power from small power producers "'at a rate reflecting the cost that the purchasing utility could avoid by obtaining energy ... from the small power producer, rather than by generating an equivalent amount of energy itself ….'" *Portland Gen. Elec.*, 854 F.3d at 695 (cleaned up) (quoting *Small Power Prod. and Cogeneration Facilities; Regulations Implementing Section 210 of the Pub. Util. Regulatory Policies Act of 1978*, 45 Fed. Reg. 12,214, 12,215 (1980) (codified at 18 C.F.R. Part 292)). In industry vernacular, a utility must purchase a Qualifying Facility's

output at the utility's full "avoided cost"—a "rate [that] usually exceeds the market price for wholesale power." *Id*. The Supreme Court long-ago confirmed—as consistent with Congress's intent—"the Commission's judgment that the entire country will ultimately benefit from the increased development of these technologies and the resulting decrease in the nation's dependence on fossil fuels." *Am. Paper Inst.*, 461 U.S. at 417.

Taking together the PURPA provisions setting forth (1) eligibility criteria for Qualifying Facilities (Section 3(17)), and (2) the mandatory purchase obligation (Section 210), Congress sought to encourage the development of renewable generation facilities—up to a point. *See id*.; *Mississippi*, 456 U.S. at 750. Such facilities are only PURPA-eligible, and thus subject to the mandatory purchase requirement, if the "facility's" "power production capacity" is no more than 80 megawatts. 16 U.S.C. § 796(17)(A), (C); 18 C.F.R. §§ 292.203(a)(1); 292.204(a)(1).

2. A facility has two options for securing PURPA-qualifying status. It may self-certify as a Qualifying Facility, or it may seek the Commission's imprimatur that it is, indeed, a Qualifying Facility. 18 C.F.R. §§ 292.207(a) (self-certification); 292.207(b) (application for

Commission certification); *see also Broadview Solar, LLC*, 174 FERC ¶ 61,199, P 4 n.9 (Mar. 19, 2021) ("Rehearing Order I"), JA190. Either way, the facility must make a filing with the Commission, which includes submitting a Commission Form 556. 18 C.F.R. § 292.207(a)(1), (b)(2); *see also* Rehearing Order I P 35, JA207–08; FERC Form No. 556, reproduced at Addendum ("A") 22–45. Form 556 includes fields pertaining to, among other things, a facility's technical and operating characteristics, *see* Rehearing Order I P 38, JA209–10, and so assists Commission staff in determining "whether a facility substantially complies with the applicable criteria," *Streamlining of Regulations Pertaining to Parts II and III of the Federal Power Act and the Pub. Util. Regulatory Policies Act of 1978*, Order No. 575, 60 Fed. Reg. 4,831, 4,844 (1995).

B. The Broadview solar-powered facility

1. On September 11, 2019, Broadview filed an application with the Commission seeking certification as a small power production Qualifying Facility. *Broadview Solar, LLC*, 175 FERC ¶ 61,228, P 5 (June 17, 2021) ("Rehearing Order II"), JA276. The development would be a combined solar photovoltaic and battery electric generation

resource (the "Broadview Facility") in Yellowstone County, Montana. Rehearing Order I P 5, JA191. It would interconnect with—and sell power to—a utility, Petitioner NorthWestern. *See* Broadview Solar LLC Application for Certification, FERC Dkt. No. QF17-454, at 2 n.3 (Sept. 11, 2019) ("Broadview Application"), JA021; Broadview Solar Form 556, FERC Dkt. No. 17-454, at 7 (July 27, 2021), A28.

Electric power has two forms: direct current and alternating current. In the late 1800s, the "war of the currents" was thrashed out between Thomas Edison (proponent of direct current), and George Westinghouse (proponent of alternating current). Gina S. Warren, *Vanishing Power Lines and Emerging Distributed Generation*, 4 WAKE FOREST J.L. & POL'Y 347, 352–53 (2014). After Westinghouse bought the patent to the Tesla Electric Company's alternating current design, it began promoting alternating current—which is superior at sending electricity over long distances—as better suited for the Nation's blossoming electric grid. *Id.*; Chloé Margulis, Charles Goulding, *Note: Waymo vs. Uber May Be the Next Edison vs. Westinghouse*, 99 J. PAT. & TRADEMARK OFF. SOC'Y 500, 503 (2017). Edison ultimately lost the battle for the grid to Westinghouse, "despite Edison's attempts to

publicly illustrate [alternating current's] dangers by electrocuting several animals, including an elephant and a 1230-pound horse." Warren, *supra*, at 352–53.

Unlike most types of power generators, whose turbines create alternating current from the start, solar panels produce direct current.[3] That means solar facilities must include devices called inverters that transform direct current into alternating current before it can be transmitted across the electric grid.[4]

The Broadview Facility is no different. Its solar array produces a maximum 160 megawatts of direct current. Rehearing Order I P 5, JA191. That power is transformed into alternating current by 20, 4.127 megawatt inverters, which have a maximum total output of 82.548 megawatts of alternating current power. *Id*.; Broadview Application at 5, JA024. Electric losses and the Broadview Facility's own power needs siphon off 2.548 megawatts of that power. Rehearing Order I P 5,

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[3] *See* U.S. Dep't of Energy, "Solar Integration: Inverters and Grid Services Basics," https://tinyurl.com/37s2v4ak; University of Calgary, "Electrical Generation," https://tinyurl.com/azv9kxhe; University of Calgary, "AC vs DC," https://tinyurl.com/2p8c3aj2.

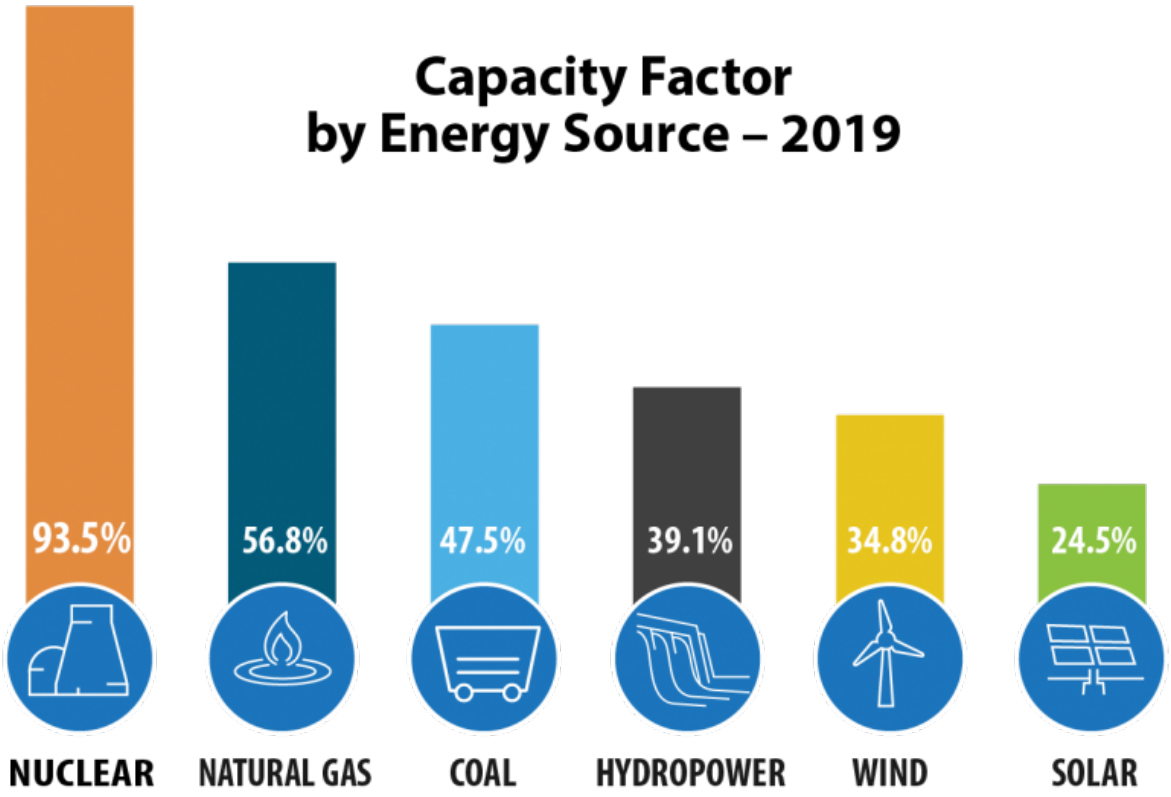
[4] Department of Energy, *supra* note 3 ("An inverter is one of the most important pieces of equipment in a solar energy system.").

JA191. Thus, the Broadview Facility's maximum net output to NorthWestern's grid is 80 megawatts of alternating current. *Id*. The Utilities do not dispute this fact. *See, e.g.*, Rehearing Order II P 17 n.61, JA282; Utilities Br. 10 ("[N]o more than 80 megawatts of power will be delivered from the Broadview Project to the grid at any one time.").

Solar facilities are relatively poor at generating as much power as their component parts are technically capable of producing—i.e., they have a low "capacity factor."[5] The Broadview Facility increases a typical solar resource's baseline capacity factor by pairing its solar array with a battery. The battery has a storage capacity of up to 50 megawatts of direct current, which it can release for up to four hours, yielding 200 megawatt-hours of energy. Rehearing Order I P 5, JA191; *see also* Broadview Application, Att. B (Affidavit of Lloyd Pasley), at 2 (Sept. 10, 2019) ("Pasley Affidavit"), JA051; *supra* p.6 n.2 (distinguishing power, measured in megawatts, from energy, measured in megawatt-hours).

[5] "Capacity factor" means "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." CAPACITY FACTOR, U.S. Energy Info. Admin., https://tinyurl.com/bdh69m66. In plain English, a facility's "capacity factor" measures its efficiency in producing power over time using the capacity available.

So on cloudy days or at night, when the solar array generates little or no power, the battery steps in to cover the deficit. *See* Pasley Affidavit at 5, JA054. And on sunny days when the solar array generates more direct current than the inverters can process, up to 50 megawatts of power is diverted to battery storage for later release. *See id.*; Broadview Application at 2, JA021.



Source: U.S. Dep't of Energy, "What is Generation Capacity?", https://tinyurl.com/44jzw369.

The upshot is that the Broadview Facility has a capacity factor of up to 40%, compared to a typical solar facility whose capacity factor is

closer to 25% (see figure above). Rehearing Order II P 29, JA290. Thus, while a traditional 80-megawatt solar facility might, on average, produce for the grid 480 megawatt-hours of energy per day ((80 megawatts x 24 hrs.) x 25% = 480 megawatt-hrs.), the Broadview Facility can, on average, produce up to 768 megawatt-hours of energy per day ((80 megawatts x 24 hrs.) x 40% = 768 megawatt-hrs.). Importantly, both the solar array and battery send their power through the same bank of inverters, meaning the Broadview Facility as a whole can never produce more than 80 megawatts of alternating current power at any one point in time. Rehearing Order II P 34, JA292; *see also* Rehearing Order I P 32, JA206.

2. Broadview's September 2019 application for Commission certification followed self-certification filings, in December 2016 and March 2019, each accompanied by a completed FERC Form 556. Rehearing Order I P 6, JA191–92. Broadview also filed a Form 556 with its 2019 application for Commission certification, which it revised in January 2020. *Id.*; *see also* Rehearing Order II P 5, JA276. While Broadview interpreted some of the line items on the Form differently across its filings, it consistently explained the Facility's (undisputed)

ability to produce a maximum 80 megawatts of alternating current for NorthWestern's grid. Rehearing Order I PP 6, 40, JA191–92, 211–12; Rehearing Order II P 5, JA276.

II. The Commission orders on review

Under the so-called "send out" approach, first articulated in *Occidental Geothermal, Inc.*, 17 FERC ¶ 61,231, at p.61,445 (1981), a facility's "power production capacity" reflects its total output, rather than the nameplate capacity of its generation subcomponents. In other words, a facility's power production capacity is its "net power production output," measured as the amount of power that is "capable of being avoided on the [purchasing utility's] … system." *Penntech Papers, Inc.*, 48 FERC ¶ 61,120, at p.61,423 (1989).

In its September 1, 2020 Initial Order rejecting Broadview's application for PURPA-certification, the Commission abandoned its four decade-old "send out" policy. *Broadview Solar, LLC*, 172 FERC ¶ 61,194, P 23 (Sept. 1, 2020) ("Initial Order"), JA122–23. Over the dissent of then-Commissioner (now-Chairman) Glick, the Commission "f[ound] that the Commission's statement in *Occidental* … is not consistent with the 80[-megawatt] 'power production capacity' limit

expressly specified by the statute and regulations." *Id.* It reasoned that Congress "sought to encourage small power production facilities of not more than 80 [megawatt] capacity[.]" *Id*. P 21, JA122. Because the Broadview Facility was "purposefully designed with a 160[-megawatt] solar array," the Commission held that it did not qualify as a PURPA-Qualifying Facility. *Id*. PP 17, 21, JA120, 122.

Nearly a month after the Commission issued the Initial Order, Petitioner Solar Energy Industries Association filed a motion to intervene and request for agency rehearing. Rehearing Order I PP 2 n.5, 10, JA189–90, 193–94. The Association articulated an interest in challenging the Commission's abandonment of the "send out" approach, a policy it supported. *See* Solar Energy Industries Association Motion to Intervene Out of Time, FERC Dkt. No. QF17-454, at 3 (Sept. 28, 2020) ("Association Late Motion to Intervene"), JA161. In its March 2021 Rehearing Order I, as reaffirmed in its June 2021 Rehearing Order II, the Commission denied the Association's motion because it was filed nearly one year after the October 2, 2019 deadline established in the public notice of Broadview's application. Rehearing Order I PP 12 n.36, 15–16, JA194, 197–98; Rehearing Order II P 10,

JA278–79. The Commission noted, however, that its Rehearing Orders remedied the Association's grievance by reversing the Initial Order's rejection of the traditional "send out" approach. Rehearing Order I P 18, JA198.

Indeed, the Rehearing Orders found that the Initial Order erred in departing from 40 years of precedent. Over the dissents of Commissioners Danly and Christie, FERC reinstated the "send out" policy. It reasoned that PURPA is ambiguous on the meaning of a facility's power production capacity, and found that the statute could accommodate two interpretations. Rehearing Order I P 23, JA200–01; Rehearing Order II P 17, JA282–83. Under one interpretation, a facility's power production capacity reflects the capacity of its generation subcomponent—in the case of the Broadview Facility, its solar array. *See id*. Under the other interpretation, its power production capacity captures the whole facility's production, accounting for all of its constituent parts—in this case, the Broadview Facility's solar array, battery, *and* inverters. *See id*.

The Commission settled on the latter interpretation as the better one, in part because it reflects the "facility's"—the term actually used in PURPA, *see* 16 U.S.C. § 796(17)(A)—"power production," rather than the

power production of mere portions *of* a facility. Rehearing Order I PP 23–24, JA200–01; Rehearing Order II P 19, JA283–84. Because the Broadview Facility as a whole produces a maximum 80 megawatts of (alternating current) power for the electric grid, the Commission determined that—consistent with the "send out" approach—the Facility's power production capacity is 80 megawatts. *See* Rehearing Order I P 33, JA207; Rehearing Order II P 34, JA292.

Several parties sought judicial review in this Court and in the Fifth and Ninth Circuits. After a lottery was held pursuant to 28 U.S.C. § 2112(a), this Court was chosen as venue for the consolidated petitions for review filed by the Edison Electric Institute (the "Institute"), NorthWestern, and the Association.

SUMMARY OF ARGUMENT

It is undisputed that the Broadview Facility—a solar array-plus-battery hybrid electric generation resource—can produce a maximum 80 megawatts of alternating current power for NorthWestern's grid. Only by focusing solely on a subcomponent *of* the Facility—the solar array—can the Utilities argue that its power production capacity exceeds that amount.

1. FERC's determination that the Broadview Facility has a power production capacity of 80 megawatts, and is thus a PURPA-Qualifying Facility, reflects a reasonable interpretation and application of PURPA. It therefore deserves *Chevron* deference.

2. Even absent deference, the Commission's interpretation of PURPA is the better one because it is faithful to the statute's text, structure, and purpose. First, the industry-accepted definition of "facility" captures all of a resource's component parts involved in generating power. The Broadview Facility's inverters are one such part, as they are integral to producing the only type of power that NorthWestern's grid can use—alternating current. Their capacity limit is the statutory ceiling of 80 megawatts.

Second, the Commission's definition of "small power production facility" makes sense in context. PURPA defines the term to mean "a facility … [that] produces electric energy solely *by the use … of* … renewable resources[.]" 16 U.S.C. § 796(17)(A) (emphasis added). Congress conspicuously did not define "small power production facility" to mean only the equipment that *harnesses* that renewable resource (the sun) in the first instance (the Broadview Facility's solar array).

Third, PURPA's structure favors a focus on the *usable* power a facility produces for the grid, not just the power a subcomponent part can generate. PURPA requires a utility to purchase all of a Qualifying Facility's net output. Thus, defining a facility's power production capacity in terms of its net output aligns its PURPA-eligibility with the mandatory purchasing requirement triggered *by* such eligibility.

Fourth, the Commission's approach vindicates Congress's goal of encouraging the development of small renewable resources to displace fossil fuel-generated power. Defining a facility's power production capacity in terms of the power it can actually displace on the grid—rather than the amount of power that any one of its subcomponent parts can generate—reflects that goal.

Finally, the Commission's interpretation is consistent with its four decade-old "send out" approach to measuring a facility's power production capacity—i.e., by assessing the amount of power that a facility can produce *for* the interconnecting utility.

3. The Utilities' several alternative interpretations are less reasonable constructions of the statute. While taking no issue with the Commission's holistic definition of "facility," they nevertheless argue

that the Broadview Facility's inverters are irrelevant to its power production capacity. The Utilities reason that the inverters do not contribute *to* the Facility's power production, but rather are an "artificial limit" *on* its production. But the inverters are crucial to producing the only type of usable power: alternating current. The Utilities fail to explain how a component can artificially limit that which it makes possible.

Taking a different tack, the Utilities insist that, even if the Commission reasonably measured the Broadview Facility's power production capacity at the inverters (i.e., 80 megawatts), it failed to account for the 50-megawatt capacity of the Facility's battery storage system. But the 50-megawatt battery and 160-megawatt solar array are upstream of the same bank of inverters. So regardless of whether power is released from the solar array, the battery, or some combination of the two, the Facility as a whole never has a power production capacity greater than 80 megawatts.

The Utilities' second alternative approach concedes even more ground. They acknowledge that the Broadview Facility's power production capacity is reasonably measured at the inverters, but argue

that its power production capacity *over time* is much greater. That, however, mixes apples and oranges. A facility's power production *capacity* is measured in megawatts. Power production over time reflects a facility's electric generation, which is measured in megawatt-*hours*.

Finally, the Utilities criticize the Commission for certifying the Broadview Facility as PURPA-qualifying notwithstanding perceived errors on its FERC Form 556. Besides being jurisdictionally forfeited, the argument fails on the merits. The Commission's charge is to determine Qualifying Facility status, not to approve an informational form. Here, the Commission explained that, regardless of any form-completion errors, the uncontroverted record evidence showed that the Broadview Facility will produce no more than 80 megawatts of alternating current power for NorthWestern's grid.

4. Unlike the Utilities, the Association supports the Commission's "send out" approach to measuring a facility's power production capacity. But that observation also explains why the Association lacks Article III standing. The Association's injury stemmed from the Initial Order's rejection of the "send out" policy—a grievance now remedied by the Rehearing Orders.

Even if the Association *did* have standing, the Court should uphold FERC's denial of its nearly-one-year-late motion to intervene. The Commission enjoys wide discretion to deny late intervention, and it adhered to its longstanding policy here of denying such motions that are filed after a dispositive order (the Initial Order) has issued.

ARGUMENT

I. Standard of review

The Court reviews FERC orders under the deferential arbitrary and capricious standard of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A). *E.g.*, *NextEra Energy Res., LLC v. FERC*, 898 F.3d 14, 20 (D.C. Cir. 2018). Review under this standard is narrow. *FERC v. Elec. Power Supply Ass'n*, 577 U.S. 260, 292 (2016). "[T]he court must uphold a [decision] if the agency has examined the relevant considerations and articulated a satisfactory explanation for its action, including a rational connection between the facts found and the choice made." *Id*. (cleaned up).

On questions of law, the Commission enjoys *Chevron* deference for its interpretations of the Federal Power Act and PURPA, statutes it administers. *TNA Merchant Projects, Inc. v. FERC*, 857 F.3d 354, 358–

59 (D.C. Cir. 2017); *Greensboro Lumber Co. v. FERC*, 825 F.2d 518, 522 (D.C. Cir. 1987); *see also Chevron, U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984).

II. The Commission's determination that the Broadview Facility's power production capacity is 80 megawatts is consistent with PURPA's text, structure, purpose, and judicial and agency precedent

The core dispute in this matter is the proper measure of a facility's power production capacity. Under PURPA, a "facility" is a "small power production facility"—and thus eligible for PURPA-Qualifying Facility status—only if it "has a power production capacity which, together with any other facilities located at the same site (as determined by the Commission), is not greater than 80 megawatts." 16 U.S.C. § 796(17)(A); *see also* 18 C.F.R. §§ 292.203(a)(1); 292.204(a)(1) (substantively similar).

As the Commission expressly recognized, Federal Power Act Section 3(17), 16 U.S.C. § 796(17), which was amended in relevant part by PURPA, is ambiguous on the meaning of a "facility's" "power production capacity." Rehearing Order I P 23, JA200–01; Rehearing Order II P 17, JA282–83. The statute does not, for example, specify whether power production capacity refers only to the capacity of a facility's primary generation component—here, the solar array—or

rather refers to *all* of a facility's component parts as they work together as a whole. *Id*.

The Commission reasonably chose the latter interpretation in the orders on review. Because the Broadview Facility's inverters determine how much power exits the Facility at any one time—a maximum 80 megawatts—the Commission found that the Facility *as a whole* has a power production capacity of 80 megawatts. Rehearing Order I PP 24–26, 32–33, JA201–02, 206–07 (explaining that the Broadview Facility "as a whole" "is not actually capable of providing more than 80 [megawatts] at any one point in time at the point of interconnection with NorthWestern"); Rehearing Order II PP 19, 34, JA283–84, 292 (substantively similar).

The Court should defer to the Commission's reasonable interpretation of the statute. *TNA Merchant Projects*, 857 F.3d at 358–59; *Greensboro Lumber*, 825 F.3d at 522; *see also Chevron*, 467 U.S. at 842–43. "Congress granted the Commission" "broad discretion … to determine the requirements for [Qualifying Facility] certification," *Conn. Valley*, 208 F.3d at 1041, and, more generally, "clear[ly]

commit[ted] … PURPA's administration to the Commission," *Greensboro Lumber*, 825 F.2d at 522.

The Utilities insist that no deference is warranted, but do so only by ignoring Federal Power Act Section 3(17)'s ambiguous text. *See* Utilities Br. 38. And their insistence that the term "power production capacity" has a plain meaning is belied by the fact that, as explained *infra* pp.38–59, the Utilities' interpretation is the *less* reasonable one.

The Utilities also suggest that deference is unwarranted because "the Commission's interpretation of 'power production capacity' [in the orders on review] has been neither consistent nor longstanding." *Id*. at 40. But that is incorrect. In fact, as discussed *infra* pp.52–56, the Commission has long interpreted the term to mean the power a facility can produce for transmission across the electric grid. The only departure was with the Initial Order in the instant matter, which the Commission corrected on agency rehearing in the orders on review. Rehearing Order II P 6, JA276–77; *see also Granholm ex rel. Mich. Dep't of Nat. Res. v. FERC*, 180 F.3d 278, 281 (D.C. Cir. 1999) ("The [rehearing] requirement," set forth at 16 U.S.C. § 825*l*(a)–(b), "permits the agency an initial opportunity to correct its errors."). Indeed, an earlier order's

findings are "beside the point" in light of a lawful subsequent order on rehearing. *Murray Energy Corp. v. FERC*, 629 F.3d 231, 236 (D.C. Cir. 2011).

A. The Commission reasonably defined "facility" to mean all of the Broadview Facility's component parts, including the inverters

"To discern the Congress's intent, [the Court] generally examine[s] the statutory text, structure, purpose and its legislative history." *Kiewit Power Constructors Co. v. Sec'y of Labor*, 959 F.3d 381, 395 (D.C. Cir. 2020) (cleaned up). "As in all statutory construction cases, [the Court] begin[s] with the language of the statute," *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002), read "in … context and with a view to [its] place in the overall statutory scheme," *Parker Drilling Mgmt. Servs., Ltd. v. Newton*, 139 S. Ct. 1881, 1888 (2019) (cleaned up).

1. *PURPA's text and context.* The first interpretive step is to determine the meaning of the term "facility." After all, it is the "power production capacity" of a "facility" that matters for purposes of determining Qualifying Facility status. *See* 16 U.S.C. § 796(17)(A); *see also* Rehearing Order II P 19, JA283–84. Unless a facility has a power production capacity of no more than 80 megawatts, it is not eligible to

be a "*qualifying* small power production facility." 16 U.S.C. § 796(17)(A), (C) (emphasis added).

Because PURPA does not define "facility," it was left to FERC to interpret the term in the first instance. *See* Rehearing Order II P 17, JA282–83. Here, the Commission read the word to mean, as it has long done, "all of the putative [Qualifying Facility's] component parts as they work together as a whole, rather than just specific individual components"—here, that "includes the inverters." *Id*. PP 17, 18 & n.68, 19, JA282–84; *see also* Rehearing Order I P 33, JA207.

a. The Commission's interpretation is consistent with the common meaning of "facility" in the electric industry. "Where the [statutory] text is addressing a scientific or technical subject, a specialized meaning is to be expected." Justice Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 73, 75 (2012) (criticizing reliance on "an abridged, outdated, nonscholarly dictionary" where a specialized meaning was appropriate). Thus, courts assess statutory terms in "the way that an *appropriately informed* speaker of the language would understand the[ir] meaning," "tak[ing] note of terms that carry 'technical meanings.'" *Van Buren v. United States*, 141 S. Ct.

1648, 1657 (2021) (cleaned up; emphasis added; quoting Scalia & Garner at 73).

The industry-specific meaning of "facility" captures all of a generation resource's component parts that are involved in producing electric energy. The U.S. Energy Information Administration—"the primary federal government authority on energy statistics and analysis"[6]—defines "facility" to mean "[a]n existing or planned location or site at which prime movers, electric generators, and/or equipment for converting mechanical, chemical, and/or nuclear energy into electric energy are situated or will be situated." FACILITY, U.S. Energy Info. Admin., https://tinyurl.com/3s833b7m (emphasis added). In other words, a "facility" includes the various components involved in producing energy.

Similarly, the North American Electric Reliability Corporation ("Reliability Corporation"), a non-profit international regulatory

[6] "The U.S. Energy Information Administration (EIA) is the statistical and analytical agency within the U.S. Department of Energy …. EIA is the nation's premier source of energy information and, by law, its data, analyses, and forecasts are independent of approval by any other officer or employee of the U.S. government." U.S. Energy Info. Admin., "About EIA," https://tinyurl.com/bdedakk7.

authority,[7] defines "facility" to mean "[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.)." FACILITY, N. Am. Elec. Reliability Corp. (June 28, 2021) (emphasis added), https://tinyurl.com/5n8xjsrc (quoted at Rehearing Order I P 24 n.71, JA201 (also citing standard dictionary definition of "facility"). As the Commission explained, the Reliability Corporation definition validates its conclusion that "the term 'facility' is best read to include all components of a particular structure as [a] whole, not any of its individual parts." Rehearing Order I P 24 & n.71, JA201.

b. The technical meaning of "facility" is consistent with its statutory context. *See 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.").

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[7] "About NERC," https://tinyurl.com/5775ep63. "[The North American Electric Reliability Corporation (NERC) is the Electric Reliability Organization (ERO) for North America, subject to oversight by the Federal Energy Regulatory Commission (FERC) and governmental authorities in Canada. NERC's jurisdiction includes users, owners, and operators of the bulk power system, which serves nearly 400 million people." *Id*.

PURPA defines the term "small power production facility" to mean "a facility … [that] produces electric energy solely *by the use … of* biomass, waste, renewable resources, geothermal resources, or any combination thereof[.]" 16 U.S.C. § 796(17)(A) (emphasis added). Congress could have, but did not, define "facility" to mean "the equipment that transforms a renewable resource into electrical energy"—e.g., a solar array. Instead, it went broader, requiring only that a "facility" "*use*" a renewable resource, without restricting the parameters of the facility itself to the component parts that initially *harness* that resource. Thus, while a Qualifying Facility includes renewable energy-generating components, nothing in PURPA limits the term "facility" *to* those components. *See Lozano v. Montoya Alvarez*, 572 U.S. 1, 16 (2014) (where drafters do not use "obvious alternative" language, "the natural implication is that they did not intend" "that alternative").

2. *PURPA's structure*. The Commission's interpretation of "facility" also maps onto PURPA's broader structure. *See Kiewit Power*, 959 F.3d at 395. Under PURPA Section 210, 16 U.S.C. § 824a-3, and its implementing regulations, *e.g.*, 18 C.F.R. § 292.303(a), a utility must purchase a Qualifying Facility's total production to the grid—i.e., its

"net output." *See S. Cal. Edison Co. v. FERC*, 443 F.3d 94, 96 (D.C. Cir. 2006). That production represents the power a facility "actually contributes to the system—[i.e.,] the amount that will displace electricity produced by traditional means." *Id*.

Measuring a putative Qualifying Facility's power production capacity against the power the facility as a whole releases to the grid aligns (1) the statutory provision governing PURPA-qualifying status with (2) the statutory provisions governing a utility's mandatory purchase obligations and the price they must pay for a Qualifying Facility's output. *Compare* 16 U.S.C. § 796(17)(A), (C) (defining "qualifying small power production facility" as a "facility" that has a "power production capacity" of no more than 80 megawatts); *with* 16 U.S.C. § 824a-3(a)–(b), *and* 18 C.F.R. §§ 292.303(a), 292.304(a)(2), (b)(2) (requiring a utility to purchase the "energy and capacity *which is made available* from a qualifying facility" at a maximum price of the utility's "avoided cost" (emphasis added)); Rehearing Order I P 26, JA202 (crediting the "statutory structure" in finding that the Commission's "interpretation aligns the 80-[megawatt] limitation with the mandatory [purchase] obligations and interconnection rights that are the

foundation of Congress's efforts to 'encourage' [Qualifying Facility] development under PURPA.").

This is nothing new. As discussed *infra* pp.52–56, for forty years the Commission has assessed Qualifying Facility status in the same terms as it has quantified an interconnecting utility's purchase obligation.

3. *Congress's purposes.* The Commission's interpretation of "facility" also effectuates Congress's goals. Congress enacted PURPA "'to encourage the development of cogeneration and small power production facilities' by addressing 'problems impeding the development of nontraditional generating facilities.'" *Conn. Valley*, 208 F.3d at 1045 (quoting *Mississippi*, 456 U.S. at 750) (cleaned up); *see also* Rehearing Order I P 33, JA207. Whether a facility can actually send and sell its power is critical to any such "encourage[ment]." *See* Rehearing Order I P 33, JA207. After all, developers do not sink vast sums into energy projects without some assurance of recouping their capital costs through the sale of electric power. Thus, in addressing "problems imped[ing] the development" of renewable resources, Congress reasonably sought to "encourage the development" of the *whole*

resource—including those component parts that ensure power is used by, and useful for, the electric grid. *See Mississippi*, 456 U.S. at 750 (Congress sought to overcome utilities' reluctance to buy small generation resources' power). Congress was not solely interested in spurring the manufacture and installation of solar panels. *Cf.* Rehearing Order II P 19, JA283–84 ("[F]ocusing 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.").

As applied here, it would make little sense to exclude from consideration the Broadview Facility's inverters, as the inverters are crucial to producing *usable* alternating current for sale to NorthWestern. *See id*. P 20, JA284–85 (explaining that the 80-megawatt limit accounts for "all components necessary to produce electric energy in a form useful to an interconnected entity" (cleaned up)). Crucially, in line with Congress's intent to encourage "*small* power production facilit[ies]"—i.e., those with a top power production capacity of 80 megawatts, 16 U.S.C. § 796(17)(A) (emphasis added)—the Facility's inverters ensure that no more than 80 megawatts of usable,

purchasable power can be "produce[d]" for NorthWestern's grid "at any given time." Rehearing Order II P 28, JA289–90.

The Utilities respond with a recent Commission statement characterizing Congress's intent as discouraging "'large power production facilities that masquerade as small power production.'" Utilities Br. 35 (quoting *Qualifying Facility Rates and Requirements*, 173 FERC ¶ 61,158, Order No. 872-A, P 245 (2020)). But the quoted language, extracted from a separate FERC rulemaking proceeding,[8] is divorced from its context. The Commission was referring to developers' artificial separation of what is functionally a single facility into multiple small facilities, with the goal of circumventing PURPA's 80-megawatt limit. *See* Order 872-A, PP 238, 243–45. In fact, the Commission expressly stated that disputes over the proper measurement of a facility's power production capacity—the relevant issue in *this* matter—were "beyond the scope of [the Order 872 rulemaking] proceeding." *See Qualifying Facility Rates and Requirements*, 172 FERC ¶ 61,041, Order No. 872, PP 583, 596 (2020).

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[8] The Order 872 rulemaking proceeding is the subject of a separate petition for judicial review in the Ninth Circuit. *See Solar Energy Indus. Ass'n v. FERC*, Nos. 20-72788, *et al.* (9th Cir.).

4. Given all this, it is no surprise that the Utilities abandon any challenge to the Commission's definition of "facility." In fact, the Utilities accept that the term "refer[s] collectively to the components of the Broadview Project (e.g., solar array, battery, and inverters)." Utilities Br. 29; *see also id*. at 16–17 (arguing that it does not matter how "facility" is defined). That implicit "concession[] radically simplifies the legal question" for the Court, *Conn. Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477, 481 (D.C. Cir. 2009), and bars the Utilities from advancing a different definition of "facility" on reply, *see Fox v. Gov't of D.C.*, 794 F.3d 25, 29 (D.C. Cir. 2015) ("[An] argument first appearing in a reply brief is forfeited."). It also means that, instead of assessing the Commission's interpretations of both "facility" and "power production capacity," the Court need only address the latter. *See Connecticut*, 569 F.3d at 481.

B. The Commission reasonably found that the Broadview Facility's power production capacity is 80 megawatts

Having determined that PURPA requires measuring the power production capacity of the *whole* Broadview Facility (inverters included), the Commission reasonably found that the Facility's power production capacity is 80 megawatts. *See* 16 U.S.C. § 796(17)(A)(ii);

Rehearing Order II P 17, JA282–83 (explaining that the 80-megawatt figure accounts for "all the constituent parts that make up the facility, which in this case includes the inverters"). The Commission's determination is a reasonable—and arguably the *most* reasonable—one because it (1) accords with the common understanding of the term "capacity"; (2) considers *both* the maximum 160 megawatts of direct current generated by the solar array *and* the maximum 80 megawatts of alternating current released by the inverters; and (3) aligns with long-standing Commission and judicial precedent.

1. The Commission's interpretation of "power production capacity" adheres to the common understanding of the term "capacity" in the industry

1. The Utilities insist that because the Broadview Facility's solar array can generate up to 160 megawatts of direct current, the Facility as a whole must have a power production capacity of the same. *See* Utilities Br. 26. Marshaling several generic dictionaries in support, the Utilities reason that the Facility's "capacity" is a measure of the "power" it can "produce." *Id*. at 25–26. Their ultimate conclusion is that "power production capacity" refers to production of power, not the delivery of power to the grid. *See id*. at 26.

The Utilities' distinction between production and delivery misapprehends the Commission's findings. The Commission *agrees* that "power production capacity" means the amount of power the Broadview Facility *produces*. *See* Rehearing Order II P 17, JA282–83 (considering the "maximum output that the facility as a whole can *produce*" (emphasis added)); *id*. P 17 n.61, JA282 ("Broadview's solar cells will *produce* no more than 80 [megawatts] of [alternating current] electricity" (emphasis added)); *id*. P 20, JA284–85 ("power production capacity is measured based on what the facility can actually *produce* for sale to the interconnected electric utility" (emphasis added)); Rehearing Order I P 33, JA207 (the Broadview Facility's "inverters are an integral part of a solar [photovoltaic] facility's generation equipment and are necessary to *produce* power in a form useful to the interconnecting utility" (emphasis added)). The issue is not whether production is the proper yardstick, but how to apply it—i.e., whether to credit the power produced by the solar array (160 megawatts of direct current), or the power produced by the solar array *and* inverters (80 megawatts of alternating current). (As discussed, the Commission chose the latter approach as it reflects the power production capacity of the whole

"facility" as the Commission interpreted that term.) And on that question, the Utilities fail to substantiate their view that "production" must mean the former. Their only proffer is a conclusory assertion: that the relevant figure is 160 megawatts because that is "the maximum amount of power that can be created." Utilities Br. 26; *see also GTE Serv. Corp. v. FCC*, 224 F.3d 768, 772 (D.C. Cir. 2000) (rejecting petitioners' "*ipse dixit*" challenge to an agency order).

2. Measuring the Broadview Facility's power production capacity against the amount released by the inverters, as the Commission did, is more reasonable on several grounds. As a first matter, the Commission's approach accords with the industry-relevant definition of "capacity."[9] The Energy Information Administration defines "capacity"

[9] This argument is properly asserted on appeal notwithstanding its absence from the Commission's orders on review. It turns on "'legal principles' of the sort 'that a court usually makes'"—i.e., principles of statutory interpretation—and not "'determinations specifically entrusted to an agency's expertise.'" *Sierra Club v. FERC*, 827 F.3d 36, 49 (D.C. Cir. 2016) (quoting *Canonsburg Gen. Hosp. v. Burwell*, 807 F.3d 295, 304 (D.C. Cir. 2015)). It therefore does not constitute an inappropriate *post hoc* rationalization. *See id*. at 48–49 (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943)). The Utilities are wrong that the Commission is barred from offering additional legal arguments on appeal that support the Commission's statutory interpretation. *See* Utilities Br. 24 n.15.

to mean "generator capacity," which in turn means "[t]he maximum output, commonly expressed in megawatts (MW), that generating equipment can *supply to system load*, adjusted for ambient conditions." CAPACITY; GENERATOR CAPACITY, U.S. Energy Info. Admin. (emphasis added), https://tinyurl.com/2p8adfza; https://tinyurl.com/5extb3ws; *see also* CAPACITY, U.S. Department of Energy, https://tinyurl.com/4f3n2kvk (defining "capacity" to mean "Maximum Power Output," which "helps utilities project just how big of an electricity *load* a generator can handle" (emphasis added)). Importantly, "'[l]oad' refers to end-use customers of the transmission system, the primary source of 'demand' for electric energy." *Sacramento Mun. Util. Dist. v. FERC*, 616 F.3d 520, 524 n.4 (D.C. Cir. 2010).

Thus, the operative measure of a generation resource's "capacity" is the number of megawatts it can supply at any given time to meet customer demand. Here, the Broadview Facility's ability to serve that demand maxes out at 80 megawatts of power. *See, e.g.*, Rehearing Order II P 28, JA289–90 ("[F]rom NorthWestern's perspective, Broadview's facility will never produce (and, thus, NorthWestern will never avoid) more than 80 [megawatts] at any given time.").

To be sure, the Utilities are correct that the statute refers to a resource's "*power production* capacity," not just its "capacity." Utilities Br. 26; *see also* 16 U.S.C. § 796(17)(A)(ii) (emphasis added). But nothing in that three-word phrase compels reading "power production" to, as the Utilities aver, undermine the industry-accepted meaning of the word it modifies. *See* Utilities Br. 24, 26 (claiming that the words "power production" limit an otherwise "broader meaning" of the word "capacity"). To the contrary, the modifier "power production" simply clarifies that the object "capacity" bears its energy-specific meaning, rather than a generic meaning gleaned from non-specialized dictionaries. *See, e.g.*, CAPACITY, *Merriam-Webster Online Dictionary*, https://tinyurl.com/2p824yz8 (meaning, among other things, "the potential or suitability for holding, storing, or accommodating"); CAPACITY, *Black's Law Dictionary* (3d ed. 2006) (meaning, among other things, "[t]he power to create or enter into a legal relation under the same circumstances in which a normal person would have the power to create or enter into such a relation"). As discussed with regard to PURPA's use of the term "facility," in a technical context like this one

"capacity" reasonably takes its "'technical meaning.'" *See Van Buren*, 141 S. Ct. at 1657 (quoting Scalia & Garner at 73); *supra* pp.29–30.

An example makes the point. Say a statute refers to "railroad conductors." The unadorned word "conductor" means, among other things, (1) one who collects fares on a train, (2) the leader of a musical ensemble, and (3) a material that conducts electric current. *See, e.g.*, CONDUCTOR, *Merriam-Webster Online Dictionary*, https://tinyurl.com/4s9yj6s5. The modifier "railroad" clarifies that the apt definition is the first one.

So too here. The modifier "power production" clarifies that the pertinent definition of "capacity" is the one relevant to electric generation. And the common understanding of the word "capacity" in that context is "[t]he maximum output … that generating equipment can *supply to system load*." *See supra* p.41. That textual reading fortifies the Commission's rationale that "power production capacity means output in a form useful to an interconnected entity[.]" Rehearing Order II P 18, JA283.

3. The Commission's interpretation of "power production capacity" is anchored in doctrine. As the Supreme Court recently confirmed, a

statutory term's meaning is informed by its interaction with neighboring words—i.e., its linguistic context. *Borden v. United States*, 141 S. Ct. 1817, 1825–26 (2021) (plurality opinion), concerned the meaning of the word "against" when used in the statutory phrase "use of physical force against the person of another." Both parties to the case cited dictionary definitions of "against," but the Court adopted only the definition that made sense in the context of "us[ing] … physical force" in opposition to an object. *See id*. (choosing the meaning that "introduc[es] the conscious object (not the mere recipient) of the force," rather than the meaning that signifies only incidental contact).

4. The Utilities violate this precept of statutory construction by interpreting "power production" in opposition to, rather than in accordance with, its neighboring term "capacity." *See Borden*, 141 S. Ct. at 1825–26. Defining "power production capacity" to mean the amount of power produced by the Broadview Facility's solar array *only*, as the Utilities urge (*see* Br. 26, 33), undercuts the industry-appropriate meaning of "capacity," which refers to output that "can supply … system load." *See supra* p.41. As discussed, it is undisputed that the Broadview

Facility can supply customers—system load—with a maximum 80 megawatts of (alternating current) power at any one time.

2. The Commission's interpretation of power production capacity credits all parts of the Broadview Facility

1. The Commission's interpretation also makes sense in context. The statute ties "power production capacity" to the whole "facility," not just to some of its component parts. *See supra* pp.28–32; 16 U.S.C. § 796(17)(A), (A)(ii). Finding, as the Commission did, that 80 megawatts is the appropriate figure takes into consideration both the Broadview Facility's solar array *and* its inverters (and everything in between). It accounts for the solar array's direct current generation because without it there could be no alternating current—indeed, no power at all—released from the Facility. And it accounts for the inverters' contribution because they are responsible for generating the alternating current that the Facility produces for the grid. Rehearing Order II PP 17, 30, JA282–83, 290–91. Thus, Amicus Pacificorp d/b/a Pacific Power and Rocky Mountain Power ("Pacificorp") is simply wrong that "the Commission relied on a single component of the facility—the inverters" in calculating the Project's capacity, Pacificorp Amicus Br. 3,

as are the Utilities in accusing the Commission of "exclud[ing]" the solar array-generated direct current from its calculation, Utilities Br. 26–27 n.19.

In fact, it is the interpretation of Pacificorp and the Utilities that arbitrarily ignores a key component of the Facility. By focusing only on the direct current generated by the solar array, they ignore entirely the 80 megawatts of alternating current produced by the Facility as a whole—and made possible by the inverters. *See id*. at 26; *see also* Rehearing Order II P 30, JA290–91 ("[I]f the Broadview facility did not include any inverters, the 160 [megawatts] of solar panels would be able to deliver 0 [megawatts] of power production capacity to the point of interconnection with North[W]estern."). That, of course, is a meaningful omission for purposes of determining PURPA-qualifying status, as the inverters cap the Facility's total power production for NorthWestern's grid *at* 80 megawatts. Rehearing Order II PP 4 & n.13, 30, JA275–76, 290–91.

The analysis might be different if only direct current electricity were considered "power." In that case, it would be clearer that the Broadview Facility's "*power* production capacity" was whatever direct

current the facility produced—i.e., 160 megawatts. The problem for the Utilities is that, as they acknowledge, alternating current is also a form of power, and so the Commission had to choose which type of power to credit for purposes of determining the Broadview Facility's PURPA-qualifying status. *See* Utilities Br. 9–10 ("'alternating current' … is the typical *form of power* delivered to homes and businesses" (emphasis added)).

2. The Utilities' definitions of "power production capacity" and "facility" are also internally inconsistent. On the one hand, they insist that the Broadview Facility's power production capacity is the 160 megawatts of direct current generated by the solar array. *Id*. at 3 (referencing "[t]he 'power production capacity' of a 160-megawatt solar array"); 26 ("[T]he term 'power production capacity' refers to the maximum amount of power that can be created. There is no dispute that the Broadview Project can create 160 megawatts of power."). Yet on the other hand, the Utilities do not dispute that a *facility's* power production capacity is appropriately calculated *after* subtracting from the total power generated any power siphoned off by the facility's own components. *See id*. at 31.

The Utilities cannot have it both ways. If (1) "power production capacity" "clearly … means the ability to create [power]," as the Utilities urge; and if (2) the Broadview Facility clearly "create[s] 160 megawatts of power," as the Utilities conclude, *see id.* at 26, then what is the principled basis for subtracting from 160 megawatts the Facility's own power needs to determine its "power production capacity"? Or, viewed from a different angle, once one accepts the Utilities' suggestion that power production capacity *can* mean the total initially generated *minus* amounts consumed by the facility itself, *see id*. at 31, then what is the principled basis for excluding the inverters from consideration?

The Utilities fail to square that circle. They assert that it is consistent with "industry standards" to subtract "parasitic loads"—i.e., energy consumed internally—from a facility's total generation to calculate its power production capacity. *Id*. But besides being non-responsive, that is an odd statement from parties that elsewhere advocate strict adherence to generic dictionary definitions of "production" and "capacity." *See id*. at 23–26. If anything, the Utilities' acknowledgment that industry practice matters serves to buttress reliance on the industry-specific meaning of "capacity." As discussed,

"capacity" in industry parlance means not the initial power produced by a facility's generation subcomponent, but the power that the (whole) facility "suppl[ies] to system load." *See supra* p.41.

A second internal rift further undermines the Utilities' interpretation of "power production capacity." They do not dispute that "facility" reasonably "refer[s] collectively to the components of the Broadview Project (e.g., solar array, battery, and inverters)." *Id.* at 29. Nor do they contest the determinative factor in calculating power production capacity to be "*the Project's* 'power production capacity'"—i.e., that of the Facility as a whole. *See id*. (emphasis added). Yet on the very same page, they make the contradictory assertion that power production capacity refers only to "*portions* of the facility." *See id*. (emphasis added). What's more, they allege that the relevant "portion" is the "solar array" (only). *Id*.

But that reasoning only highlights the fundamental flaw pervading the Utilities' entire claim: they assess the Broadview Facility's capacity in terms of only *one component part*, rather than—as PURPA reasonably instructs—in terms of the *whole* "small power production facility." *See* 16 U.S.C. § 796(17)(A).

3. Unable to disclaim the inverters' centrality to the Broadview Facility's power production, the Utilities try to recast the inverters themselves. First, they argue that instead of playing a role in producing power, the inverters serve only to "artificially limit" power production. *See, e.g.*, Utilities Br. 2, 33; *see also* Pacificorp Amicus Br. 2–3, 8. That, however, is a non-starter because the inverters are undisputedly an essential part of producing power in a form NorthWestern's grid can use: alternating current. A device cannot artificially limit that which it makes possible. *See* Rehearing Order II PP 24 n.87, 30, JA287, 290–91.

Nor does a solar developer artificially limit its power production by "cho[osing]" to install inverters that can convert only 80 megawatts of direct current into alternating current. *See* Utilities Br. 33 n.22. Nothing in PURPA requires a facility as a whole to produce the same amount of power that is generated at the start of the production process—here, at the solar array. Nor does PURPA require using components that all share the same nameplate capacity—e.g., requiring the inverters to have the same 160-megawatt rated capacity as the solar array. *See Occidental*, 17 FERC ¶ 61,231, at p.61,445 (recognizing that small facilities often include components of different rated capacities).

The operative question is more straightforward: what is the amount of power the "small power production facility" can produce? *See* 16 U.S.C. § 796(17)(A).

Second, the Utilities seize on PURPA's definition of "facility" as being something that "produces electric energy solely by the use, as a primary energy source, of … renewable resources …." *See* 16 U.S.C. § 796(17)(A)(i) (discussed at Utilities Br. 27). Because the Broadview Facility's solar array uses the sun—undisputedly a renewable resource—to generate power, the Utilities conclude that its power production capacity is the amount of power produced *at* the solar array. *See* Utilities Br. 27. So, the theory goes, even if one considers the inverters to be part of the facility as a whole, they are not part of the power *production* process within the meaning of the statute.

The Utilities' linguistic logic garbles PURPA's grammar. The statute refers to a "*facility's*" "power production capacity," 16 U.S.C. § 796(A), (A)(ii) (emphasis added), not to the "power production capacity" of the generation component that initially "use[s] … renewable resources," *id*. § 796(A)(i)–(ii). In other words, that a facility must produce energy using renewable resources does not inform which

component parts *of* the facility are relevant to determining the entire facility's power production capacity. Indeed, the Commission reasonably included the inverters in its assessment here because they are essential to producing one type of power in particular: alternating current. *See* Rehearing Order II PP 17 & n.61, 30, JA282–83, 290–91.

C. The Commission's determination that the Broadview Facility has a power production capacity of 80 megawatts adheres to judicial and agency precedent

1. The Commission's determination that the Broadview Facility has a power production capacity of 80 megawatts is bolstered by decades of precedent. While consistency with past practice is not necessary for an agency's reasonable statutory interpretation to be accorded deference, *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005), such adherence to agency precedent is reflective of reasoned decisionmaking, *Williams Gas Processing-Gulf Coast Co. v. FERC*, 475 F.3d 319, 326 (D.C. Cir. 2006), and so reinforces the case for deference, *see Fall River Rural Elec. Coop., Inc. v. FERC*, 543 F.3d 519, 529 (9th Cir. 2008) (deference accorded where FERC's decision was "entirely consistent with its precedents").

In 1981, three years after Congress enacted PURPA, the Commission explained that it "w[ould] 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." *Occidental*, 17 FERC ¶ 61,231, at p.61,445 (discussed at Rehearing Order I P 28, JA203–04; Rehearing Order II P 18, JA283). The Commission termed this the "send out" approach to calculating power production capacity. *Id.*; *see also Malacha Power Project, Inc.*, 41 FERC ¶ 61,350, at p.3 (1987) (substantively similar).

The Commission elaborated on the "send out" approach in subsequent orders. Most pertinent here, it explained that a facility's power production capacity is the amount of power that is "capable of being avoided on the [purchasing utility's] system." *Penntech Papers*, 48 FERC ¶ 61,120, at p.61,423 (equating "net power production output"—i.e., the power that is "capable of being avoided"—with a facility's "power production capacity"); *accord Turner Falls Ltd. P'ship*, 53 FERC ¶ 61,075, at p.61,225 (1990). In other words, the Commission credits the power a facility produces that is "in a form useful to an

interconnected entity … because only the amount of the net output will be capable of being avoided on an interconnected utility's system." Rehearing Order II P 18, JA283.

This Court has approved the Commission's approach in the related context of determining a Qualifying Facility's total output—i.e., the amount of power an interconnecting utility must purchase under PURPA Section 210, 16 U.S.C. § 824a-3. In *Southern California Edison*, the Court deemed it in "accord[ance] with the purposes behind PURPA" for the Commission to "certif[y] the amount of output that the [Qualifying Facility] *actually contributes to the [grid] system—[i.e.,] the amount that will displace electricity* produced by traditional means," also known as "net output." 443 F.3d at 96 (emphasis added); *see also Conn. Valley Elec. Co.*, 82 FERC ¶ 61,116, at p.61,421 n.25 (1998) (substantively similar), *denying reh'g and granting in part and denying in part clarification*, 83 FERC ¶ 61,136 (1998), *aff'd*, *Conn. Valley*, 208 F.3d 1037.

It similarly "accords with the purposes behind PURPA" to determine Qualifying Facility status the same way—i.e., to measure a facility's power production capacity against its power output to the grid.

See S. Cal. Edison, 443 F.3d at 95–96; *Penntech Papers*, 48 FERC ¶ 61,120, at p.61,423 (adopting this approach). As discussed (*supra* pp.5, 34–35), Congress's purpose was to "reduce the demand for traditional fossil fuels" on the grid, *Mississippi*, 456 U.S. at 750, not simply to promote solar panel installation.

The Utilities ignore all this. Instead of wrestling with the Commission's "send out" policy, they attempt to distinguish the facts in the Broadview proceeding from those found in FERC's past orders. Specifically, they question the relevance of *Occidental* and *Malacha*, which did not involve inverters. *See* Utilities Br. 31. That fact-bound distinction, however, fails to undercut the Commission's reasonable application of its policy to the Broadview Facility, or to provide a principled basis for limiting the Commission's longstanding policy. *See* Rehearing Order II P 18, JA283 (explaining that, in determining the Facility's power production capacity, the Commission adhered to its "send out" approach). Indeed, the maximum amount of power that is, under the "send out" approach, "capable of being avoided on [NorthWestern's] … system" is undisputedly 80 megawatts. *See, e.g.*, *Penntech Papers*, 48 FERC ¶ 61,120, at p.61,423; *see also* Rehearing

Order II PP 17 n.61, 30, JA282, 290–91. The Commission's interpretation and application of its own precedent are accorded deference. *Mo. Pub. Serv. Comm'n v. FERC*, 783 F.3d 310, 316 (D.C. Cir. 2015).

2. The Commission's entrenched "send out" policy has the added virtue of reflecting the technical realities of electric power generation. In 1981, the Commission observed that "it is not uncommon for smaller facilities to find it most economic to employ commercially available components some of which have *individual capabilities significantly exceeding the overall facility capabilities*." *Occidental*, 17 FERC ¶ 61,231, at p.61,445 (emphasis added). In other words, smaller facilities often produce less power than indicated by the "rated capacities" of their individual component parts—i.e., the "nominal rating of generating equipment." *See id*. at pp.61,444–45. The Commission has therefore eschewed "rated capacity" in favor of "maximum net output" as better reflecting a facility's power production capacity. *See* Rehearing Order II P 18, JA283; *Occidental*, 17 FERC ¶ 61,231, at pp.61,444–45.

Beyond making practical sense, the Commission's rejection of the "rated capacity" approach also respects PURPA's text. The relevant

statutory provision refers to a facility's "power production capacity," not to its "rated capacity." 16 U.S.C. § 796(17)(A). Contrary to the Utilities' endorsement of a rated capacity test (at Br. 32–33), the Commission was not obliged to read the word "rated" into the statute. And while the legislative history refers to "'the rated capacity of the facility'" as reflecting "'[t]he power production capacity of the facility,'" that statement is at best ambiguous. *See* Rehearing Order II P 15, JA281–82 (quoting H.R. Rep. No. 95-1750, at 89 (1978)) (observing that "the phrase 'rated capacity' is nowhere defined in PURPA or in the House Conference Report"). The Utilities do not, for example, explain why "rated capacity" must mean the nameplate capacity of the Broadview Facility's solar array (160 megawatts of direct current), rather than the total capacity of, as the legislative history puts it, "the facility" (80 megawatts of alternating current). *See id*. PP 15, 18, JA281–83 (rejecting the Institute's approach of using "the rated capacity of *selected components* of the facility" to calculate power production capacity (emphasis added)).

Putting it all together, the Commission's fidelity to its "send out" policy in the orders on review reflects consistent agency decisionmaking,

fortified by a reasonable interpretation of PURPA. It is not, as the Utilities dramatize, a "stalking horse" for expanding PURPA's reach to cover "large-scale solar generation." *See* Utilities Br. 3. Regardless of a facility's "scale," it can—and only ever could—be a Qualifying Facility if its ability to displace power on the grid does not exceed 80 megawatts. Rehearing Order I P 33, JA207.

In fact, it is the *Utilities'* proposed rule that represents a Trojan horse for renewable generation more broadly: previously eligible generation resources might no longer qualify for PURPA-status. Under the Utilities' rigid reimagining of the statute, the Qualifying Facility implicated in the 1981 *Occidental* decision likely would have flunked out. FERC found that the facility met the 80-megawatt threshold *after* deducting from its maximum power produced any amounts consumed by the facility itself—i.e., after applying its "send out" policy. *See Occidental*, 17 FERC ¶ 61,231, at p.61,445. The Utilities, however, seek to impose a new rule defining "power production capacity" according to the maximum output of a facility's generation subcomponents, *irrespective of downstream losses*. They even invite the Court to invalidate the Commission's *Occidental* line of cases. *See* Utilities

Br. 26 (asserting that because the Broadview Facility's solar array can produce 160 megawatts of power, its power production capacity is 160 megawatts); *id*. at 31–32 (suggesting that *Occidental* and *Malacha* may "contravene[] plain statutory meaning").

III. The Utilities' fallback arguments are meritless

A. PURPA does not require treating Broadview's interdependent solar array and battery as independent facilities, whose capacities must be combined

The Utilities offer two alternative approaches to calculating the Broadview Facility's power production capacity, neither of which is persuasive. Their first assumes as correct the Commission's measure of power production capacity in terms of the maximum 80 megawatts of alternating current released by the inverters. Utilities Br. 47. But the Utilities insist that the Facility's total power production capacity still exceeds 80 megawatts because that figure fails to account for the 50 megawatts stored in the Facility's battery. *Id*.

1. The Utilities' fallback theory goes nowhere. Their concession that the solar array's capacity is 80 megawatts is no different from saying that the whole Facility's capacity is 80 megawatts. That is

because the Broadview Facility includes only one set of inverters for both the solar array *and* battery. *See* Rehearing Order II P 34, JA292. So it matters not whether the solar array sends 80 megawatts of direct current to the inverters and the battery sends zero, or whether the solar array sends, say, 30 megawatts to the inverters and the battery sends all of its 50. No matter the source of the direct current, the inverters can never release more than 80 megawatts of alternating current.

Put another way, the battery's ability to *store* 50 megawatts does not somehow increase the ability of the Broadview Facility as a whole—inclusive of the solar array and battery—to *produce* more than 80 megawatts at any one time. The Utilities' aggregation approach only makes sense in the context of a different facility altogether—e.g., one where the battery's capacity is processed through a dedicated set of inverters. In that case, the facility's total power production capacity would likely be the sum of the 80-megawatt capacity of the solar array-specific inverters *plus* the capacity of the battery-specific inverters.[10]

[10] The Utilities make the confusing assertion that the 80 megawatts released by the inverters (for purposes of measuring the solar array's capacity), should be combined with the 50 megawatts stored in the

The analysis is the same regardless of whether the solar array and battery are considered components of a single facility, or deemed to be two separate facilities "located at the same site" as the Utilities urge. *See* Utilities Br. 47. To be sure, the Utilities start off on the right foot. They assert (at *id*.) that to calculate a facility's overall power production capacity, "the power production capacity of a facility for which qualification is sought" must be combined with "the power production capacity of any other small power production qualifying facilities … at the same site." 18 C.F.R. § 292.204(a)(1); *see also* 16 U.S.C. § 796(17)(A). But their argument quickly goes sideways. The Utilities reason that because a standalone battery can, itself, be a Qualifying Facility, *see Luz Dev. and Fin. Corp.*, 51 FERC ¶ 61,078 (1990), then Broadview's battery must be deemed its own distinct "facility" too, whose capacity must be combined with that of the solar array. Utilities Br. 48.

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battery (for purposes of measuring the battery's capacity). Utilities Br. 47. But a like comparison would mean either (1) measuring the capacities of both the solar array and battery at the inverters' termini (which yields a combined total of 80 megawatts); or (2) measuring the capacities of both according to their individual rated maximums (160 megawatts for the solar array and 50 megawatts for the battery).

Not so. First, *Luz* did not address whether a hybrid facility, which includes an interdependent solar array and battery, must be treated as two separate "facilities." Rehearing Order II P 33, JA292. True, "the statutory history of PURPA clearly evinces Congress's intent that battery storage systems could be qualifying facilities." Utilities Br. 48–49. And the Utilities are also correct that the Commission in *Luz* found that a battery could be so eligible. *See Luz*, 51 FERC ¶ 61,078, at pp.61,171–72. But *Luz* involved a *standalone* battery; the Commission had no occasion to assess a battery that works in conjunction with a solar array to produce a maximum 80 megawatts of power. *See* Rehearing Order II P 33, JA292 ("*Luz* did not address the question whether a battery storage system that is integrated with a solar [photovoltaic] system must be considered a separate [Qualifying Facility] from the solar [photovoltaic] system."). And nothing in PURPA requires a battery to be deemed a distinct facility, with its own capacity rating, in all circumstances. Indeed, treating Broadview's solar array and battery separately arbitrarily ignores the Facility's other component parts that are integral to its production of power—namely, the inverters. *See supra* pp.45–46; *see also* Rehearing Order II P 30,

JA290–91 (deeming the inverters "integral" to "produc[ing] grid-useable power").

Second, *Luz* does nothing to undercut the Commission's conclusion that the Broadview Facility's power production capacity is best assessed by measuring the alternating current power produced by the facility as a whole. So even if the solar array and battery must be deemed independent "facilities," the combined total capacity of the solar array-plus-battery is still a maximum 80 megawatts. *See* Rehearing Order II P 34, JA292 (Because "Broadview's solar [photovoltaic] array and its battery system … both are upstream of a single pathway through the [direct current]-to-[alternating current] inverters," the Facility's total "power production capacity" is "80 [megawatts]."). Accordingly, in light of the "rule of prejudicial error," even were the Court to find—and it should not—that PURPA compels treating the solar array and battery as independent "facilities," that would not trigger a remand. *See Jicarilla Apache Nation v. U.S. Dep't of Interior*, 613 F.3d 1112, 1121 (D.C. Cir. 2010) (quoting 5 U.S.C. § 706).

This observation also dispenses with the Utilities' inapt analogy to a widget-making factory. They posit that a factory capable of

generating 160 widgets per day, but which stores 50 of them for later delivery, has a production capacity of 160, not 110, widgets. *See* Utilities Br. 3. But there, the 160 widgets are the finished product; the factory presumably does not further refine them before they leave the facility. Here, the finished product is not the 160 megawatts of direct current; it is the no-more-than 80 megawatts of alternating current released by the inverters. *See* Rehearing Order II P 34, JA292. And that 80 megawatts is a hard ceiling, no matter how much power is stored in, or released from, the Broadview Facility's battery.

2. The Utilities' discussion of *Northern Laramie Range Alliance*, 138 FERC ¶ 61,171, PP 15–16 (2012) (at Br. 49–50), is similarly wide of the mark. That matter concerned two wind farm "facilities" that were not "located at the same site," meaning that, under 18 C.F.R. § 292.204(a)(1), their respective capacities were not appropriately combined for purposes of calculating the total power production capacity. *See id*. P 16. The challenger disagreed, arguing that because the two wind farms used the same line to interconnect to the grid, they should be deemed a single facility—meaning their capacities *should* be combined. *Id*. P 15. The Commission rejected the theory. It explained

that the two developments' use of the "same single line" was irrelevant to deciding whether they were located at the same site. *Id*. P 16.

The Utilities draw a parallel between the two wind farm facilities in *Northern Laramie* and the Broadview Facility's solar array and battery: both involve shared use of a line. Here, the solar array and battery use the same line to the inverters. Utilities Br. 49–50. And because the Broadview solar array and battery *are* undisputedly located at the "same site" (unlike in *Northern Laramie*), the Utilities further reason that their individual capacities must be combined under 18 C.F.R. § 292.204(a)(1). *See id*. at 47.

The Utilities' reliance on *Northern Laramie* is misplaced. *Northern Laramie* did not hold that the two wind farms were separate "facilities" *because* they shared a common line; it found that they were not a single facility *notwithstanding* their use of a common line. 138 FERC ¶ 61,171, P 16. And so the case offers the Utilities no assist on the pertinent question here: whether the Broadview Facility's solar array and battery are independent "facilities" in the first place.

In sum, because the Broadview Facility is not "similarly situated" to the entities in *Luz* and *Northern Laramie*, the Commission did not

unlawfully depart from its precedent in the orders on review here. *Balt. Gas and Elec. Co. v. FERC*, 954 F.3d 279, 283 (D.C. Cir. 2020); *see also* Utilities Br. 46.

3. The Utilities also err with their inchoate allusion to combining the power production capacities of the Broadview Facility and two other solar facilities. The Utilities observe that Broadview is planning two more solar array-plus-battery projects near the Broadview Facility: Broadview Solar II and Broadview Solar III. *See* Utilities Br. 12. To the extent the Utilities imply that Broadview might circumvent PURPA's 80-megawatt limit by seriatim seeking PURPA-certification for each facility, that argument is jurisdictionally forfeited for failure to raise it in their rehearing applications, *e.g.*, *Sacramento*, 616 F.3d at 535 (citing 16 U.S.C. § 825*l*(b)), and also forfeited under Federal Rule of Appellate Procedure 28(a)(8)(A) for failure to develop it fully on appeal, *e.g.*, *Mo. River Energy Servs. v. FERC*, 918 F.3d 954, 960 (D.C. Cir. 2019); *SEC v. Banner Fund Int'l*, 211 F.3d 602, 613–14 (D.C. Cir. 2000). Accordingly, the Court should not consider any such argument.

In any event, the Utilities would be incorrect. The Commission rejected PURPA-status for Broadview Solar II in 2017 because the

facility has a power production capacity of 300 megawatts—much higher than PURPA's 80-megawatt ceiling. FERC Letter Order to Broadview Solar II LLC, FERC Dkt. No. QF17-455 (Aug. 2, 2017), A46–47. And Broadview has not sought PURPA-status for Broadview Solar III. *See* FERC Letter Order re Broadview Solar III, LLC, 176 FERC ¶ 61,094, P 1 (2021) (accepting Broadview Solar III's withdrawal of its Form 556 to self-certify as a Qualifying Facility).

Further, nothing in PURPA bars an entity from building a PURPA-Qualifying Facility, and then constructing additional facilities nearby. True, a subsequently constructed facility would not be PURPA-eligible if its capacity, when combined with the capacity of the original Qualifying Facility "located at the same site," were greater than 80 megawatts. *See* 16 U.S.C. § 796(17)(A)(ii); 18 C.F.R. § 292.204(a)(1). But PURPA does not *ex ante* disqualify an otherwise eligible resource just because the owner might build more facilities "at the same site" in the future.

B. PURPA requires measuring a facility's power production capacity, not its electricity generation, to determine Qualifying Facility eligibility

The Utilities' next alternative argument is even further afield. They implicitly concede that the Broadview Facility has a maximum capacity of 80 megawatts at any one point in time, but assert that power production capacity must reflect production *over* time. Utilities Br. 51–53.

The Utilities' novel mode of measuring capacity is incorrect. It is undisputed that a facility's power production capacity is measured in megawatts. *See, e.g.*, Utilities Br. 53 (acknowledging that 16 U.S.C. § 796(17)(A) limits a Qualifying Facility's power production capacity to no "greater than 80 megawatts"); *see also* CAPACITY; GENERATOR CAPACITY, U.S. Energy Info. Admin., *supra* p.41. But power produced over time reflects something different, "electricity generation," which is measured in megawatt-*hours*. *See* U.S. Energy Info. Admin., "What is the difference between electricity generation capacity and electricity generation?", https://tinyurl.com/bdf4nt8x. For example, the Broadview Facility has a power production capacity of 80 megawatts and a capacity factor of 40%, meaning it can generate 768 megawatt-hours of energy

for the grid in one day ((80 megawatts x 24 hrs.) x 40% = 768 megawatt-hrs.). *See supra* pp.14–15, p.6 n.2 (distinguishing power, measured in megawatts, from energy, measured in megawatt-hours). Contrary to the Utilities' logic, the Facility's daily energy production of 768 megawatt-hours does not mean it exceeds PURPA's power production capacity cap of 80 megawatts. *Cf.* Rehearing Order II P 28 & n.99, JA289–90 (explaining that the Institute "conflates power production capacity … with total generation over time"); *id*. P 4, JA275–76 (explaining that power production over time is measured in megawatt-hours).

That the Facility incorporates battery storage does not change the analysis. *See* Utilities Br. 53. The battery compensates for the solar array's dips in power production on cloudy days (or at night) by releasing its own stored energy to the grid through the inverters. *See* Pasley Affidavit at 5, JA054. But all that means is that the Facility can achieve its full power production potential of 80 megawatts more often, not that it can somehow *exceed* its capacity of 80 megawatts. *See* Rehearing Order II P 28, JA289–90 (explaining that the Facility's solar array-plus-battery "hybrid design" can "deliver up to 80 [megawatts] of

[alternating current] electricity *(and no more)* in any hour, and thus compl[ies] with PURPA's 80[-megawatt] statutory limit on power production capacity, *but at a higher capacity factor* than a facility with fewer solar panels and no battery system" (emphasis added)).

Put another way, the battery changes the Broadview Facility's *capacity factor*,[11] not its power production capacity. *Id*. So the Facility can generate more energy per hour than, say, an 80-megawatt wind farm with a capacity factor of only 35%. *See supra* p.14 (chart showing different types of generation resources' capacity factors). And because it can "more consistently deliver a higher share of the 80 [megawatt] power production capacity," the Facility can also more consistently serve NorthWestern customers' energy demands. *Id*. P 29, JA290 (cleaned up).

But, the Utilities insist, it matters that up to 50 megawatts of the solar array-produced power can be diverted to the batteries for later release—i.e., it is not wasted. *See* Utilities Br. 53. So, they reason, "more than 80 megawatts" of the solar array-produced power will make its way through the inverters *eventually*, meaning the Facility's power

[11] *See supra* p.13 n.5 for definition of "capacity factor."

production capacity is greater than 80 megawatts when measured over time. *Id*. at 52. But that is a contradiction in terms. Once one accepts that the power production capacity of the Facility as a whole is measured at the inverters—i.e., 80 megawatts of alternating current—that is the end of the inquiry. Assessing how much power passes through the inverters *over time* measures *electricity generation* (megawatt-hours), not *capacity* (megawatts). *See* Rehearing Order II P 28 & n.99, JA289–90; U.S. Energy Info. Admin., "What is the difference between electricity generation capacity and electricity generation?", *supra* p.68. And it is only the latter metric that is relevant: PURPA-eligibility turns on "power production *capacity*." 16 U.S.C. § 796(17)(A)(ii) (emphasis added).

The Utilities' inapt analogy to winemaking underscores the point. They hypothesize a winery that produces 60 gallons of wine per cycle, but which can transport only 30 gallons to a big barrel per minute due to the volume limits of a connecting pipe. Utilities Br. 52. The wine pipe in their hypothetical is analogous to the Broadview Facility's inverters. The Utilities reason that the production capacity of the winery is still 60 gallons notwithstanding the pipe's limitations, just as

the production capacity of the Broadview Facility is greater than the maximum 80 megawatts it can produce at any single moment. *See id*.

The analogy crumbles under scrutiny. The amount of wine that is delivered through the 30 gallon-per-minute pipe into the big barrel in two minutes (60 gallons) reflects production *over time*. But the production *capacity* of the pipe is 30 gallons. Similarly, the amount of power that is released from the Broadview Facility's inverters in, say, two hours is production *over time*—i.e., electricity generation, not capacity. *See* Rehearing Order II PP 4, 28 & n.99, JA275–76, 289–90.

C. The Commission reasonably considered Broadview's Form 556 submittals in its overall assessment of the Broadview Facility's PURPA-qualifying status

An entity seeking PURPA-qualifying status must submit FERC Form 556 along with its application. 18 C.F.R. § 292.207(a)(1), (b)(2). Between 2016 and 2020, Broadview filed four Form 556s with the Commission. Rehearing Order I P 6, JA191–92. While Broadview's various Form 556 filings indicated differing interpretations of some of the Form's fields, *all* of its filings explained that the Facility's "net power production capacity" is capped at 80 megawatts. *Id*. PP 6, 40, JA191–92, 211–12.

The Utilities seize on discrepancies across Broadview's Form 556 filings in asserting that the Commission acted arbitrarily and capriciously in approving them. *See* Utilities Br. 44–45. The argument is jurisdictionally forfeited for failure to raise it in the rehearing applications of either the Institute or NorthWestern, and so the Court should not consider it. *See, e.g.*, *Sacramento*, 616 F.3d at 535 ("'No objection to an order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do.'" (cleaned up) (quoting 16 U.S.C. § 825*l*(b)); *see also* Edison Electric Institute Application for Rehearing, FERC Dkt. No. QF17-454, at 20 (Apr. 16, 2021), JA248 (explaining, in its view, the Broadview Facility's net power production capacity under Form 556, but nowhere objecting to Broadview's completion of the Form or the Commission's evaluation of its Form 556 filings).

The argument is also meritless. The Commission's task was to decide whether to certify the Broadview Facility as a PURPA-Qualifying Facility. *See* Rehearing Order I P 1, JA189; *see also* 18 C.F.R. § 292.207(b)(1) ("[A]n owner or operator of an existing or a proposed

facility … may file with the Commission an application for Commission *certification that the facility is a qualifying facility*" (emphasis added)). It was not to determine the accuracy of Broadview's Form 556. *See* Rehearing Order I P 40, JA211–12 (explaining that discrepancies across Broadview's Form 556s did not preclude the Commission from determining that the Facility is PURPA-eligible). And given Form 556's utility as an informational tool rather than a source of dispositive fact, the relevant question is whether the Commission's ultimate certification is rationally related to substantial record evidence. *See, e.g.*, *Biestek v. Berryhill*, 139 S. Ct. 1148, 1154 (2019) ("Substantial evidence … is more than a scintilla. It means—and means only—such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." (cleaned up)).

1. Form 556 is an "information requirement" and "guide" to assist in determining a facility's PURPA eligibility. *See* Order No. 575, 60 Fed. Reg. at 4,840. To that end, the Form "facilitate[s] successful applications for Commission certification of qualifying status," helps "reveal whether a facility substantially complies with the applicable criteria," and "reduce[s] the number of [Commission] Staff inquires for

more information from applicants." *Id*. at 4,844. Its data fields are not, however, determinative of PURPA-status. *See* Rehearing Order I P 36, JA208 ("[Form 556] does not supplant Commission precedent regarding the requirements that a facility must satisfy to secure [Qualifying Facility] status."). As the Commission long-ago explained, "'any form requires some degree of flexibility since the uniqueness of individual facilities and novel applications may require supplemental data submissions.'" *Id*. P 37, JA208–09 (quoting *Regulations Pertaining to Parts II and III of the Federal Power Act and the Pub. Util. Regulatory Policies Act of 1978*, Notice of Proposed Rulemaking, 61 FERC ¶ 61,243, at p.13 (1992)).

Form 556 retained its core informational purpose when the Commission updated it 15 years later, in 2010. The Commission explained that any changes to the Form focused on "clarify[ing] the content of the form and … tak[ing] advantage of newer technologies that will reduce" filing and processing burdens. *Revisions to Form, Procedures, and Criteria for Certification of Qualifying Facility Status for a Small Power Production or Cogeneration Facility*, Notice of Proposed Rulemaking, 129 FERC ¶ 61,034, P 2 (2009); *see also*

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, P 22 (2010) (explaining benefits of new electronic filing process).

Form 556 itself dispels any suggestion of determinative import. It permits an applicant to indicate if it "'has special circumstances … that make the demonstration of compliance via this form difficult or impossible,'" and instructs an applicant to "'complete the form *to the extent possible*.'" Rehearing Order I P 39, JA210–11 (emphasis added) (quoting Form No. 556, Line 1m, A27). One such "special circumstance[]" is "the employment of unique or innovative technologies not contemplated by the structure of this form"—e.g., the Broadview Facility's inverters. Form No. 556, Line 1m. *Cf.* Rehearing Order I P 39, JA210–11. In short, Form No. 556 is flexible and helpful, not rigid and dispositive. *See* Rehearing Order I PP 37, 39, JA209–11 ("[T]he Commission never intended to turn this data collection tool into a mechanical rule that dictated whether a facility constituted a [Qualifying Facility].").

2. Broadview's Form 556 submissions provided useful information to the Commission. While Broadview did not check the box next to a "special circumstance[]" in line 1m, it did describe the operation of its innovative solar array-plus-battery hybrid model in line 7h. It explained how the facility would produce a maximum 82.548 megawatts of alternating current power (before deducting eligible loads and losses), and why its net power production capacity is 80 megawatts. Rehearing Order I P 40, JA211–12; *see also* Pasley Affidavit at 5–7, JA054–56. And while Broadview interpreted one item in particular—line 7a, "maximum gross power production capacity at the terminals of the individual generator(s)"—differently across its four Form 556 submittals, it consistently reported the Facility's "net power production capacity" (line 7g) to be 80 megawatts. *See* Rehearing Order I PP 6, 40, JA191–92, 211–12. Further, "beyond Form No. 556," the Commission found that "Broadview sufficiently explained in its submittals that its facility would comply with the size limit on 'power production capacity' in PURPA and our regulations." *Id*. P 40, JA211–12 (citing Broadview Application at 2–8, JA021–27).

3. The Utilities criticize the Commission for "overlook[ing]" any "errors" on Broadview's Form 556—particularly in line 7a—and make an inapt comparison to an applicant's failure to file *any* Form 556 in another matter. *See* Utilities Br. 44 (citing *Branch St. Solar Partners, LLC*, 169 FERC ¶ 61,269, PP 5–8 (2019), where the Commission faulted an applicant for failing to file a Form 556, as required by 18 C.F.R. § 292.203(a)(3)). But by fixating on Broadview's different interpretations of line 7a, the Utilities fail to appreciate the explicitly stated purpose of the line 7 series: to calculate the "'maximum gross and maximum net electric power production capacity of the facility *at the point(s) of delivery*[.]'" Rehearing Order I P 38, JA209–10 (quoting Form 556, Section 7 introductory text). And on that point the Utilities *agree* that "no more than 80 megawatts of power will be delivered from the Broadview Project to the grid at any one time." Utilities Br. 10.

Section 7 of Form 556 is reproduced here:

FERC Form 556 Page 10 - All Facilities

Technical Facility Information

Indicate the maximum gross and maximum net electric power production capacity of the facility at the point(s) of delivery by completing the worksheet below. Respond to all items. If any of the parasitic loads and/or losses identified in lines 7b through 7e are negligible, enter zero for those lines.	
7a The maximum gross power production capacity at the terminals of the individual generator(s) under the most favorable anticipated design conditions	kW
7b Parasitic station power used at the facility to run equipment which is necessary and integral to the power production process (boiler feed pumps, fans/blowers, office or maintenance buildings directly related to the operation of the power generating facility, etc.). If this facility includes non-power production processes (for instance, power consumed by a cogeneration facility's thermal host) , do not include any power consumed by the non-power production activities in your reported parasitic station power.	kW
7c Electrical losses in interconnection transformers	kW
7d Electrical losses in AC/DC conversion equipment, if any	kW
7e Other interconnection losses in power lines or facilities (other than transformers and AC/DC conversion equipment) between the terminals of the generator(s) and the point of interconnection with the utility	kW
7f Total deductions from gross power production capacity = 7b + 7c + 7d + 7e	0 kW
7g Maximum net power production capacity = 7a - 7f	0 kW
7h Description of facility and primary components: Describe the facility and its operation. Identify all boilers, heat recovery steam generators, prime movers (any mechanical equipment driving an electric generator), electrical generators, photovoltaic solar equipment, fuel cell equipment and/or other primary power generation equipment used in the facility. Descriptions of components should include (as applicable) specifications of the nominal capacities for mechanical output, electrical output, or steam generation of the identified equipment. For each piece of equipment identified, clearly indicate how many pieces of that type of equipment are included in the plant, and which components are normally operating or normally in standby mode. Provide a description of how the components operate as a system. Applicants for cogeneration facilities do not need to describe operations of systems that are clearly depicted on and easily understandable from a cogeneration facility's attached mass and heat balance diagram; however, such applicants should provide any necessary description needed to understand the sequential operation of the facility depicted in their mass and heat balance diagram. If additional space is needed, continue in the Miscellaneous section starting on page 24.	

In any event, the Commission acknowledged Broadview's "differing approaches to … complet[ing] Form No. 556," including its inconsistent data entries for line 7a. *See* Rehearing Order I PP 6, 39 n.116, 40, JA191–92, 211–12. But it found that it could still "determin[e] that Broadview ultimately has satisfied the requirements

that its facility, as proposed in its application on September 11, 2019, … will not have a 'power production capacity' in excess of 80 [megawatts]." *Id*. P 40, JA211–12. The Court should "defer to [that] reasonably explained decision[]." *Old Dominion Elec. Coop. v. FERC*, 892 F.3d 1223, 1230 (D.C. Cir. 2018); *see also Biestek*, 139 S. Ct. at 1154.

IV. The Solar Energy Industries Association lacks Article III Standing

Solar Energy Industries Association (the "Association") challenges the Commission's denial of its undisputedly late motion to intervene in the agency proceeding below. The Court should not entertain the Association's claim because it lacks Article III standing to press it: the Association fails to show any ongoing or imminent injury to itself.

1. The Article III standing doctrine reflects the Constitution's limitation on federal courts' judicial power to resolve only "genuine 'Cases' and 'Controversies.'" *California v. Texas*, 141 S. Ct. 2104, 2113 (2021) (quoting U.S. Const. art. III, § 2). A petitioner "has standing only if he can 'allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.'" *Id*. (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006)); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–561

(1992). Further, the petitioner must be able to make such a showing "at the time the action commences, which in the case of a petition for review is the time the petitioner sought relief from an Article III court." *Narragansett Indian Tribal Historical Pres. Office v. FERC*, 949 F.3d 8, 12 (D.C. Cir. 2020) (cleaned up).

The Association fails to show any injury to itself at "the time [it] sought relief from" this Court. *Id*. In fact, its opening brief explains why it is *not* harmed by the Commission's orders on review. The Association's averred injury stemmed from the Commission's "*sua sponte* resci[ssion] of th[e] long-standing and well-accepted [send out] rule" in the September 2020 Initial Order. *See* Ass'n Br. 8; *see also id*. at 9 ("[The Association's] members rely on [the] Send Out Rule …."); *id*. at 12 ("Petitioner did not have actual or constructive notice that FERC would use the Broadview Docket to *sua sponte* abandon the long-standing Send Out Rule.").

The problem for the Association is that the Commission cured that allegedly unlawful act with the Rehearing Orders. Reversing its September 2020 rejection of the "send out" approach, *see* Initial Order P 23, JA122–23, the Commission revived the policy in the March and

June 2021 Rehearing Orders now on judicial review, *see, e.g.*, Rehearing Order I P 32, JA206 (invoking and applying the Commission's "longstanding reliance on the 'send out' analysis to measure power production capacity"); *id*. P 38, JA209–10 ("Consistent with the 'send out' line of Commission cases …."); Rehearing Order II P 18, JA283 (declining to "replace" the "'send out' approach"); *id*. P 20, JA284–85 (explaining that the Commission's "interpretation is consistent with four decades of precedent using the 'send out' analysis to determine the 'power production capacity' of a facility").

So perhaps the Association had Article III standing to challenge the Commission's denial of its late intervention motion after issuance of the Initial Order. But its standing evaporated when the Commission issued the Rehearing Orders. *See Narragansett*, 949 F.3d at 12. Indeed, the Association's very reason for declining to timely seek intervention in the Broadview proceeding—i.e., by October 2, 2019, Rehearing Order I P 12, JA194–95—betrays the absence of any injury *now*: the Association expected the Commission to *adhere* to the "send out" approach in assessing Broadview's application for PURPA-status, and so

did not anticipate any injury to itself prior to issuance of the Initial Order. Ass'n Br. 8, 19–20.

Further, the Association fails to show a "'real and immediate threat'" that the Commission will repeat its allegedly harmful conduct—i.e., that it will, once again, abandon its "send out" approach. *See Narragansett*, 949 F.3d at 13 (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 110 (1983)). Absent that, there exists no cognizable specter of the Association suffering the same injury in the future. *See id*. (explaining that, where a past injury is no longer redressable, petitioner must "identify an ongoing or future injury"). Nor can the Association proffer a different standing theory in its forthcoming submission; substantiating standing in the first instance in a reply brief "comes too late." *Sierra Club v. EPA*, 292 F.3d 895, 900 (D.C. Cir. 2002) (cleaned up).

2. The Association attempts to untangle its standing predicament by criticizing the Commission for "effective[ly] preclud[ing] [the Association] from raising a merits challenge to the Send Out Rule." Ass'n Br. 9–10. That claim, contrived for the apparent purpose of manufacturing standing, contradicts the balance of the Association's

brief. Every place else the Association *endorses* the "Send Out Rule." *See id*. at 8–9, 12. In fact, just one paragraph earlier it represents that "[its] members *rely* on [the] Send Out Rule to maintain qualifying status for a multitude of projects." *Id*. at 9 (emphasis added).

The Association further confuses the analysis by seeking to bootstrap a separate Commission rulemaking into the adjudicative proceeding here on review. *Id*. at 9, 21. But the Commission's declination to revise the "send out" approach through its recent Order 872 rulemaking[12]—a proceeding in which the Association *did* participate, *see supra* p.36 n.8—has no bearing on the Association's standing to challenge the Commission orders here.

V. The Commission did not abuse its discretion in denying the Solar Energy Industries Association's late motion to intervene

If the Court reaches the merits of the Association's claim (which it should not), it should deny its petition for review. The Association fails to show that the Commission abused its discretion in denying the Association's belated motion to intervene in the Broadview proceeding, which it filed approximately one year after the deadline.

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[12] *See generally* 172 FERC ¶ 61,041, Order No. 872.

The Commission's denial of a motion to intervene out-of-time is reviewed for abuse of discretion. *City of Orrville v. FERC*, 147 F.3d 979, 991 (D.C. Cir. 1998). Under that deferential standard, the Court considers whether the Commission committed a "clear error of judgment." *Id*. (cleaned up). Disagreement with the agency's judgment alone does not suffice to reject the Commission's decision. *See ExxonMobil Gas Mktg. Co. v. FERC*, 297 F.3d 1071, 1083–84 (D.C. Cir. 2002).

Commission regulations set forth discretionary factors it "may" weigh in considering a request for late intervention: (1) whether the movant had good cause for filing late; (2) whether any disruption of the proceeding might result from allowing late intervention; (3) whether the movant's interests are adequately represented by other parties to the proceeding; and (4) whether prejudice to, or additional burdens on, existing parties might result from late intervention. 18 C.F.R. § 385.214(d)(1); *see also* Rehearing Order I P 11 & n.34, JA194; *City of Orrville*, 147 F.3d at 991 (explaining that "18 C.F.R. § 385.214(d)(1) does not compel consideration of each of the factors; it merely states that the Commission 'may consider' them").

As to the first discretionary factor—good cause—the movant must clear an even higher hurdle if it seeks late intervention after the Commission issues a dispositive order. Rehearing Order I P 14, JA196–97; Rehearing Order II P 10, JA278–79. "'[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.'" Rehearing Order I P 14, JA196–97 (quoting *Nat'l Fuel Gas Supply Corp.*, 139 FERC ¶ 61,037, P 18 (2012)). "[G]enerally it is Commission policy to deny late intervention" in such circumstances. *Id*. P 14 & n.50, JA196–97 (collecting Commission orders).

The deadline to intervene in the Broadview proceeding was October 2, 2019. *Id*. P 12 n.36, JA194–95. The Commission issued its dispositive order denying the Broadview Facility PURPA-qualifying status on September 1, 2020. *See* Initial Order P 1, JA113. The Association, however, waited until September 28, 2020 to file its intervention motion. Rehearing Order I P 12 n.37, JA194. Accordingly, Commission policy required the Association to show good cause not just for intervening nearly one year late, but for intervening so late that the

Commission only received its motion 27 days *after* issuing the Initial Order. As the Commission has previously admonished, "[e]ntities interested in becoming a party to Commission proceedings may not wait to see how issues might evolve before deciding whether to intervene to protect their interests." Rehearing Order II P 10 & n.41, JA278–80 (collecting Commission orders).

The Association's proffer of good cause against this inauspicious backdrop comes up short. First, the Association complains that it expected the Commission to revisit its "send out" approach to measuring a facility's power production capacity not in the Broadview adjudication, but in the parallel Order 872 rulemaking. *See* Ass'n Br. 13. The implication is that the Commission hoodwinked the Association into thinking it would implement a policy change one way, only to do so by other means. *See id*. at 13, 20–21. The Association chides the Commission for "abus[ing] its discretion when it used the Broadview Docket to implement the request of the Edison Electric Institute" to revise its "send out" rule with the Initial Order. *Id*. at 20.

The Association misapprehends the Commission's prerogative to change its policy through adjudication. It is black letter administrative

law that "agencies have very broad discretion whether to proceed by way of adjudication or rulemaking[.]" *Qwest Servs. Corp. v. FCC*, 509 F.3d 531, 536 (D.C. Cir. 2007) (cleaned up). The Association points to nothing that compels the Commission to choose rulemaking *over* adjudication to revise its "send out" policy.

Similarly, the Association is incorrect that the Administrative Procedure Act "requires FERC [to] observe notice and comment [rulemaking] procedures when FERC is implementing a change in substantive law or policy[.]" *See* Ass'n Br. 21. As this Court has explained, "[Administrative Procedure Act] notice and comment [is] not required" where an agency proceeds by adjudication. *Dana-Farber Cancer Inst. v. Hargan*, 878 F.3d 336, 343 (D.C. Cir. 2017) (cleaned up). The Association's case citations (at Br. 21) purportedly supporting its contrary rule are inapposite. *See Ass'n of Flight Attendants-CWA, AFL-CIO v. Huerta*, 785 F.3d 710, 713–14 (D.C. Cir. 2015) (distinguishing legislative rules, which are subject to notice-and-comment procedures, from interpretive rules, which are not);

Cal. Cmtys. Against Toxics v. EPA, 934 F.3d 627, 635 (D.C. Cir. 2019) (similar).[13]

The Association rejoins that it lacked adequate notice of the Commission's change to its "send out" approach because Broadview did not challenge that policy in its FERC application for PURPA-qualifying status. Ass'n Br. 12. But the Association's own elaboration on that point shows that it *was* on notice. As it candidly admits, "the viability of the Send Out Rule was … presented by … the Edison Electric Institute" in its October 2, 2019 motion to intervene.[14] *Id*. at 13; *see also* Rehearing Order II P 10 & n.39, JA278–79 ("Here, the pleadings of the parties," including that of the Institute, "filed between October 2019 and March 2020 addressed the parties' dispute concerning the Commission's

[13] The Association also relies on a district court case, *Lightfoot v. Dist. of Columbia*, 355 F. Supp. 2d 414, 434 (D.D.C. 2005) (at Br. 21), but fails to acknowledge that this Court reversed that decision on appeal, *Lightfoot v. Dist. of Columbia*, 448 F.3d 392, 398 (D.C. Cir. 2006) ("There is certainly no conceivable due process claim that could be predicated on the notion that an agency must proceed to establish … standards through rulemaking rather than case-by-case determinations.").

[14] *See* Edison Electric Institute Motion to Intervene and Protest, FERC Dkt. No. QF17-454, at 6 (Oct. 2, 2019), JA065 ("[T]he Commission should evaluate whether it is still appropriate to use *Occidental*'s net output test"—i.e., the "send out" approach—"rather than the rated capacity test initially intended by Congress.").

methodology for determining a facility's 'power production capacity' and specifically discussed *Occidental*," which first articulated the "send out" approach). Indeed, the Institute initiated its challenge on the Commission's longstanding policy *nearly one year before* the Association belatedly filed its own such motion.

Further, the Institute's timely intervention only underscores the adequacy of the Commission's public notice of the Broadview proceeding itself, which was published in the Federal Register. *See* Rehearing Order I P 12 n.36, JA194 (citing *Combined Notice of Filings*, 84 Fed. Reg. 49,291, 49,292 (Sept. 19, 2019)). Denial of late intervention in this circumstance accords with FERC's "steadfast[] and consistent[] [holdings] 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." *Cal. Trout v. FERC*, 572 F.3d 1003, 1022 (9th Cir. 2009) (quoted at Rehearing Order II P 10, JA278–79). *Cf. Hatch v. FERC*, 654 F.2d 825, 826, 837 (D.C. Cir. 1981) (inapposite case cited by the Association (at Br. 11–12), in which FERC failed to give a party to an adjudicatory proceeding

adequate notice of a new standard of proof that would be applied in that proceeding).

The Association's invocation of a recent FERC matter offers it no help. *See* Ass'n Br. 18–19 (citing *N. Natural Gas Co.*, 175 FERC ¶ 61,052 (2021)). First, in *Northern Natural*, the relevant intervention motion was filed *before* FERC issued a dispositive order (albeit by one day). *See* Rehearing Order II P 10, JA278–79. Second, the issue motivating intervention—general concerns that the Commission might change its policy—was not specifically raised previously by the parties to the matter. *See id*.

Nor can the Association claim lack of notice due to its subjective expectation that the Commission would address the Institute's challenge to the "send out" policy in the Order 872 rulemaking proceeding. *See* Ass'n Br. 13. The Association's own argument again makes the point. It acknowledges that Order 872 determined that the Institute's proposed revision was "'[beyond] the scope of [the Order 872] proceeding.'" *Id*. (quoting Order 872, PP 583, 596). Thus, by July 16, 2020 when Order 872 issued, the Association knew that the Commission would not address any changes to its "send out" policy through that

rulemaking. Yet it still waited more than two months—until September 28, 2020—to seek intervention in the Broadview matter.

Finally, while it was not required to do so, *see City of Orrville*, 147 F.3d at 991; Rehearing Order I P 16, JA197–98, the Commission considered the potential prejudice denial of intervention would cause the Association, *see* Rehearing Order I P 18, JA198; 18 C.F.R. § 385.214(d)(1). It reasonably found no such risk for the same reason the Association lacks Article III standing: the Association's position was vindicated at the rehearing stage of this proceeding. "[I]n setting aside the September 2020 [Initial] Order and determining that Broadview's facility meets the requirements for certification as a small power production [Qualifying Facility]," the Commission's March 2021 Rehearing Order "addressed the [Association's] concerns articulated in [its] late motion[] to intervene and request[] for rehearing." Rehearing Order I P 18, JA198.

In other words, the Association may have lost the battle to intervene, but it won the war to uphold the Commission's "send out" policy. Consistent with the Association's view of the law, the Commission ultimately held that the Broadview Facility is a

PURPA-Qualifying Facility because, under its longstanding "send out" approach, the Facility has a power production capacity of 80 megawatts.

CONCLUSION

For the foregoing reasons, the Court should deny the Utilities' petitions for review and dismiss (or in the alternative deny) the Association's petitions for review.

Respectfully submitted,

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April 12, 2022

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g) and Circuit Rule 32(e), I certify that this brief complies with the type-volume limitation in Fed. R. App. P. 32(a)(7)(B) and this Court's September 3, 2021 Order (Doc. No. 1912823), because this brief contains 17,406 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in New Century Schoolbook 14-point font using Microsoft Word 365.

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April 12, 2022

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system on April 12, 2022. Participants in the case will be served by the appellate CM/ECF system.

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In the United States Court of Appeals for the District of Columbia Circuit

Nos. 21-1126, 21-1136, 21-1142, 21-1149, and 21-1175 (consolidated)

SOLAR ENERGY INDUSTRIES ASSOCIATION, *ET AL.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

BROADVIEW SOLAR, LLC, *ET AL.*,
Respondent-Intervenors.

ON PETITIONS FOR REVIEW
OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION

ADDENDUM TO BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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APRIL 12, 2022

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.....	5 U.S.C. 1009(b).	June 11, 1946, ch. 324, §10(b), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

Editorial Notes

AMENDMENTS

1976—Pub. L. 94–574 provided that if no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer as defendant.

§ 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 392.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1009(c).	June 11, 1946, ch. 324, §10(c), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

§ 705. Relief pending review

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 393.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1009(d).	June 11, 1946, ch. 324, §10(d), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 393.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1009(e).	June 11, 1946, ch. 324, §10(e), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

Statutory Notes and Related Subsidiaries

ABBREVIATION OF RECORD

Pub. L. 85–791, Aug. 28, 1958, 72 Stat. 941, which authorized abbreviation of record on review or enforcement of orders of administrative agencies and review on the original papers, provided, in section 35 thereof, that: ''This Act [see Tables for classification] shall not be construed to repeal or modify any provision of the Administrative Procedure Act [see Short Title note set out preceding section 551 of this title].''

CHAPTER 8—CONGRESSIONAL REVIEW OF AGENCY RULEMAKING

Sec.

§ 801. Congressional review

(a)(1)(A) Before a rule can take effect, the Federal agency promulgating such rule shall submit

CODIFICATION

All appointments referred to in the first sentence are subject to the civil service laws unless specifically excepted by those laws or by laws enacted subsequent to Executive Order 8743, Apr. 23, 1941, issued by the President pursuant to the Act of Nov. 26, 1940, ch. 919, title I, §1, 54 Stat. 1211, which covered most excepted positions into the classified (competitive) civil service. The Order is set out as a note under section 3301 of Title 5, Government Organization and Employees.

As to the compensation of such personnel, sections 1202 and 1204 of the Classification Act of 1949, 63 Stat. 972, 973, repealed the Classification Act of 1923 and all other laws or parts of laws inconsistent with the 1949 Act. The Classification Act of 1949 was repealed Pub. L. 89–554, Sept. 6, 1966, §8(a), 80 Stat. 632, and reenacted as chapter 51 and subchapter III of chapter 53 of Title 5. Section 5102 of Title 5 contains the applicability provisions of the 1949 Act, and section 5103 of Title 5 authorizes the Office of Personnel Management to determine the applicability to specific positions and employees.

In text, ''chapter 51 and subchapter III of chapter 53 of title 5'' substituted for ''the Classification Act of 1949, as amended'' on authority of Pub. L. 89–554, §7(b), Sept. 6, 1966, 80 Stat. 631, the first section of which enacted Title 5, Government Organization and Employees.

In text, ''chapters 1 to 11 of title 40 and division C (except sections 3302, 3306(f), 3307(e), 3501(b), 3509, 3906, 4104, 4710, and 4711) of subtitle I of title 41'' substituted for ''the Federal Property and Administrative Services Act of 1949, as amended'' on authority of Pub. L. 107–217, §5(c), Aug. 21, 2002, 116 Stat. 1303, which Act enacted Title 40, Public Buildings, Property, and Works, and Pub. L. 111–350, §6(c), Jan. 4, 2011, 124 Stat. 3854, which Act enacted Title 41, Public Contracts.

AMENDMENTS

1951—Act Oct. 31, 1951, inserted reference to applicable regulations of the Federal Property and Administrative Services Act of 1949, as amended, at end of section.

1949—Act Oct. 28, 1949, substituted ''Classification Act of 1949'' for ''Classification Act of 1923''.

1930—Act June 23, 1930, substituted provisions permitting the commission to appoint, prescribe the duties, and fix the salaries of, a secretary, a chief engineer, a general counsel, a solicitor, and a chief accountant, and to appoint such other officers and employees as are necessary in the execution of its functions and fix their salaries, and authorizing the detail of officers from the Corps of Engineers, or other branches of the United States Army, to serve the commission as engineer officers, or in any other capacity, in field work outside the seat of government, and the detail, assignment or transfer to the commission of engineers in or under the Departments of the Interior or Agriculture for work outside the seat of government for provisions which required the commission to appoint an executive secretary at a salary of $5,000 per year and prescribe his duties, and which permitted the detail of an officer from the United States Engineer Corps to serve the commission as engineer officer; and inserted provisions permitting the commission to make certain expenditures necessary in the execution of its functions, and allowing the payment of expenditures upon the presentation of itemized vouchers approved by authorized persons.

REPEALS

Act Oct. 28, 1949, ch. 782, cited as a credit to this section, was repealed (subject to a savings clause) by Pub. L. 89–554, Sept. 6, 1966, §8, 80 Stat. 632, 655.

§ 793a. Repealed. Pub. L. 87–367, title I, § 103(5), Oct. 4, 1961, 75 Stat. 787

Section, Pub. L. 86–626, title I, §101, July 12, 1960, 74 Stat. 430, authorized the Federal Power Commission to place four additional positions in grade 18, one in grade 17 and one in grade 16 of the General Schedule of the Classification Act of 1949.

§§ 794, 795. Omitted

CODIFICATION

Section 794, which required the work of the commission to be performed by and through the Departments of War, Interior, and Agriculture and their personnel, consisted of the second paragraph of section 2 of act June 10, 1920, ch. 285, 41 Stat. 1063, which was omitted in the revision of said section 2 by act June 23, 1930, ch. 572, §1, 46 Stat. 798. The first and third paragraphs of said section 2 were formerly classified to sections 793 and 795 of this title.

Section 795, which related to expenses of the commission generally, consisted of the third paragraph of section 2 of act June 10, 1920, ch. 285, 41 Stat. 1063. Such section 2 was amended generally by act June 23, 1930, ch. 572, §1, 46 Stat. 798, and is classified to section 793 of this title. The first and second paragraphs of said section 2 were formerly classified to sections 793 and 794 of this title.

§ 796. Definitions

The words defined in this section shall have the following meanings for purposes of this chapter, to wit:

(1) ''public lands'' means such lands and interest in lands owned by the United States as are subject to private appropriation and disposal under public land laws. It shall not include ''reservations'', as hereinafter defined;

(2) ''reservations'' means national forests, tribal lands embraced within Indian reservations, military reservations, and other lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws; also lands and interests in lands acquired and held for any public purposes; but shall not include national monuments or national parks;

(3) ''corporation'' means any corporation, joint-stock company, partnership, association, business trust, organized group of persons, whether incorporated or not, or a receiver or receivers, trustee or trustees of any of the foregoing. It shall not include ''municipalities'' as hereinafter defined;

(4) ''person'' means an individual or a corporation;

(5) ''licensee'' means any person, State, or municipality licensed under the provisions of section 797 of this title, and any assignee or successor in interest thereof;

(6) ''State'' means a State admitted to the Union, the District of Columbia, and any organized Territory of the United States;

(7) ''municipality'' means a city, county, irrigation district, drainage district, or other political subdivision or agency of a State competent under the laws thereof to carry on the business of developing, transmitting, utilizing, or distributing power;

(8) ''navigable waters'' means those parts of streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, and which either in their natural or improved condition notwithstanding interruptions between the

navigable parts of such streams or waters by falls, shallows, or rapids compelling land carriage, are used or suitable for use for the transportation of persons or property in interstate or foreign commerce, including therein all such interrupting falls, shallows, or rapids, together with such other parts of streams as shall have been authorized by Congress for improvement by the United States or shall have been recommended to Congress for such improvement after investigation under its authority;

(9) ''municipal purposes'' means and includes all purposes within municipal powers as defined by the constitution or laws of the State or by the charter of the municipality;

(10) ''Government dam'' means a dam or other work constructed or owned by the United States for Government purposes with or without contribution from others;

(11) ''project'' means complete unit of improvement or development, consisting of a power house, all water conduits, all dams and appurtenant works and structures (including navigation structures) which are a part of said unit, and all storage, diverting, or forebay reservoirs directly connected therewith, the primary line or lines transmitting power therefrom to the point of junction with the distribution system or with the interconnected primary transmission system, all miscellaneous structures used and useful in connection with said unit or any part thereof, and all water-rights, rights-of-way, ditches, dams, reservoirs, lands, or interest in lands the use and occupancy of which are necessary or appropriate in the maintenance and operation of such unit;

(12) ''project works'' means the physical structures of a project;

(13) ''net investment'' in a project means the actual legitimate original cost thereof as defined and interpreted in the ''classification of investment in road and equipment of steam roads, issue of 1914, Interstate Commerce Commission'', plus similar costs of additions thereto and betterments thereof, minus the sum of the following items properly allocated thereto, if and to the extent that such items have been accumulated during the period of the license from earnings in excess of a fair return on such investment: (a) Unappropriated surplus, (b) aggregate credit balances of current depreciation accounts, and (c) aggregate appropriations of surplus or income held in amortization, sinking fund, or similar reserves, or expended for additions or betterments or used for the purposes for which such reserves were created. The term ''cost'' shall include, insofar as applicable, the elements thereof prescribed in said classification, but shall not include expenditures from funds obtained through donations by States, municipalities, individuals, or others, and said classification of investment of the Interstate Commerce Commission shall insofar as applicable be published and promulgated as a part of the rules and regulations of the Commission;

(14) ''Commission'' and ''Commissioner'' means the Federal Power Commission, and a member thereof, respectively;

(15) ''State commission'' means the regulatory body of the State or municipality having jurisdiction to regulate rates and charges for the sale of electric energy to consumers within the State or municipality;

(16) ''security'' means any note, stock, treasury stock, bond, debenture, or other evidence of interest in or indebtedness of a corporation subject to the provisions of this chapter;

(17)(A) ''small power production facility'' means a facility which is an eligible solar, wind, waste, or geothermal facility, or a facility which—

(i) produces electric energy solely by the use, as a primary energy source, of biomass, waste, renewable resources, geothermal resources, or any combination thereof; and

(ii) has a power production capacity which, together with any other facilities located at the same site (as determined by the Commission), is not greater than 80 megawatts;

(B) ''primary energy source'' means the fuel or fuels used for the generation of electric energy, except that such term does not include, as determined under rules prescribed by the Commission, in consultation with the Secretary of Energy—

(i) the minimum amounts of fuel required for ignition, startup, testing, flame stabilization, and control uses, and

(ii) the minimum amounts of fuel required to alleviate or prevent—

(I) unanticipated equipment outages, and

(II) emergencies, directly affecting the public health, safety, or welfare, which would result from electric power outages;

(C) ''qualifying small power production facility'' means a small power production facility that the Commission determines, by rule, meets such requirements (including requirements respecting fuel use, fuel efficiency, and reliability) as the Commission may, by rule, prescribe;

(D) ''qualifying small power producer'' means the owner or operator of a qualifying small power production facility;

(E) ''eligible solar, wind, waste or geothermal facility'' means a facility which produces electric energy solely by the use, as a primary energy source, of solar energy, wind energy, waste resources or geothermal resources; but only if—

(i) either of the following is submitted to the Commission not later than December 31, 1994:

(I) an application for certification of the facility as a qualifying small power production facility; or

(II) notice that the facility meets the requirements for qualification; and

(ii) construction of such facility commences not later than December 31, 1999, or, if not, reasonable diligence is exercised toward the completion of such facility taking into account all factors relevant to construction of the facility.[1]

(18)(A) ''cogeneration facility'' means a facility which produces—

[1] So in original. The period probably should be a semicolon.

(i) electric energy, and
(ii) steam or forms of useful energy (such as heat) which are used for industrial, commercial, heating, or cooling purposes;

(B) ''qualifying cogeneration facility'' means a cogeneration facility that the Commission determines, by rule, meets such requirements (including requirements respecting minimum size, fuel use, and fuel efficiency) as the Commission may, by rule, prescribe;

(C) ''qualifying cogenerator'' means the owner or operator of a qualifying cogeneration facility;

(19) ''Federal power marketing agency'' means any agency or instrumentality of the United States (other than the Tennessee Valley Authority) which sells electric energy;

(20) ''evidentiary hearings'' and ''evidentiary proceeding'' mean a proceeding conducted as provided in sections 554, 556, and 557 of title 5;

(21) ''State regulatory authority'' has the same meaning as the term ''State commission'', except that in the case of an electric utility with respect to which the Tennessee Valley Authority has ratemaking authority (as defined in section 2602 of this title), such term means the Tennessee Valley Authority;

(22) ELECTRIC UTILITY.—(A) The term ''electric utility'' means a person or Federal or State agency (including an entity described in section 824(f) of this title) that sells electric energy.[1]

(B) The term ''electric utility'' includes the Tennessee Valley Authority and each Federal power marketing administration.[1]

(23) TRANSMITTING UTILITY.—The term ''transmitting utility'' means an entity (including an entity described in section 824(f) of this title) that owns, operates, or controls facilities used for the transmission of electric energy—

(A) in interstate commerce;
(B) for the sale of electric energy at wholesale.[1]

(24) WHOLESALE TRANSMISSION SERVICES.—The term ''wholesale transmission services'' means the transmission of electric energy sold, or to be sold, at wholesale in interstate commerce.[1]

(25) EXEMPT WHOLESALE GENERATOR.—The term ''exempt wholesale generator'' shall have the meaning provided by section 79z–5a[2] of title 15.[1]

(26) ELECTRIC COOPERATIVE.—The term ''electric cooperative'' means a cooperatively owned electric utility.[1]

(27) RTO.—The term ''Regional Transmission Organization'' or ''RTO'' means an entity of sufficient regional scope approved by the Commission—

(A) to exercise operational or functional control of facilities used for the transmission of electric energy in interstate commerce; and
(B) to ensure nondiscriminatory access to the facilities.[1]

(28) ISO.—The term ''Independent System Operator'' or ''ISO'' means an entity approved by the Commission—

(A) to exercise operational or functional control of facilities used for the transmission of electric energy in interstate commerce; and
(B) to ensure nondiscriminatory access to the facilities.[3]

(29) TRANSMISSION ORGANIZATION.—The term ''Transmission Organization'' means a Regional Transmission Organization, Independent System Operator, independent transmission provider, or other transmission organization finally approved by the Commission for the operation of transmission facilities.

(June 10, 1920, ch. 285, pt. I, § 3, 41 Stat. 1063; renumbered pt. I and amended, Aug. 26, 1935, ch. 687, title II, §§ 201, 212, 49 Stat. 838, 847; Pub. L. 95–617, title II, § 201, Nov. 9, 1978, 92 Stat. 3134; Pub. L. 96–294, title VI, § 643(a)(1), June 30, 1980, 94 Stat. 770; Pub. L. 101–575, § 3, Nov. 15, 1990, 104 Stat. 2834; Pub. L. 102–46, May 17, 1991, 105 Stat. 249; Pub. L. 102–486, title VII, § 726, Oct. 24, 1992, 106 Stat. 2921; Pub. L. 109–58, title XII, §§ 1253(b), 1291(b), Aug. 8, 2005, 119 Stat. 970, 984.)

REFERENCES IN TEXT

Section 79z–5a of title 15, referred to in par. (25), was repealed by Pub. L. 109–58, title XII, § 1263, Aug. 8, 2005, 119 Stat. 974.

AMENDMENTS

2005—Par. (17)(C). Pub. L. 109–58, § 1253(b)(1), amended subpar. (C) generally. Prior to amendment, subpar. (C) read as follows: '' 'qualifying small power production facility' means a small power production facility—

''(i) which the Commission determines, by rule, meets such requirements (including requirements respecting fuel use, fuel efficiency, and reliability) as the Commission may, by rule, prescribe; and

''(ii) which is owned by a person not primarily engaged in the generation or sale of electric power (other than electric power solely from cogeneration facilities or small power production facilities);''.

Par. (18)(B). Pub. L. 109–58, § 1253(b)(2), amended subpar. (B) generally. Prior to amendment, subpar. (B) read as follows: '' 'qualifying cogeneration facility' means a cogeneration facility which—

''(i) the Commission determines, by rule, meets such requirements (including requirements respecting minimum size, fuel use, and fuel efficiency) as the Commission may, by rule, prescribe; and

''(ii) is owned by a person not primarily engaged in the generation or sale of electric power (other than electric power solely from cogeneration facilities or small power production facilities);''.

Pars. (22), (23). Pub. L. 109–58, § 1291(b)(1), added pars. (22) and (23) and struck out former pars. (22) and (23) which read as follows:

''(22) 'electric utility' means any person or State agency (including any municipality) which sells electric energy; such term includes the Tennessee Valley Authority, but does not include any Federal power marketing agency.

''(23) TRANSMITTING UTILITY.—The term 'transmitting utility' means any electric utility, qualifying cogeneration facility, qualifying small power production facility, or Federal power marketing agency which owns or operates electric power transmission facilities which are used for the sale of electric energy at wholesale.''

Pars. (26) to (29). Pub. L. 109–58, § 1291(b)(2), added pars. (26) to (29).

1992—Par. (22). Pub. L. 102–486, § 726(b), inserted ''(including any municipality)'' after ''State agency''.

Pars. (23) to (25). Pub. L. 102–486, § 726(a), added pars. (23) to (25).

[2] See References in Text note below.

[3] So in original. The period probably should be ''; and''.

1991—Par. (17)(E). Pub. L. 102–46 struck out ‘‘, and which would otherwise not qualify as a small power production facility because of the power production capacity limitation contained in subparagraph (A)(ii)’’ after ‘‘geothermal resources’’ in introductory provisions.

1990—Par. (17)(A). Pub. L. 101–575, § 3(a), inserted ‘‘a facility which is an eligible solar, wind, waste, or geothermal facility, or’’.

Par. (17)(E). Pub. L. 101–575, § 3(b), added subpar. (E).

1980—Par. (17)(A)(i). Pub. L. 96–294 added applicability to geothermal resources.

1978—Pars. (17) to (22). Pub. L. 95–617 added pars. (17) to (22).

1935—Act Aug. 26, 1935, § 201, amended definitions of ‘‘reservations’’ and ‘‘corporations’’, and inserted definitions of ‘‘person’’, ‘‘licensee’’, ‘‘commission’’, ‘‘commissioner’’, ‘‘State commission’’ and ‘‘security’’.

FERC REGULATIONS

Pub. L. 101–575, § 4, Nov. 15, 1990, 104 Stat. 2834, provided that: ‘‘Unless the Federal Energy Regulatory Commission otherwise specifies, by rule after enactment of this Act [Nov. 15, 1990], any eligible solar, wind, waste, or geothermal facility (as defined in section 3(17)(E) of the Federal Power Act as amended by this Act [16 U.S.C. 796(17)(E)]), which is a qualifying small power production facility (as defined in subparagraph (C) of section 3(17) of the Federal Power Act as amended by this Act)—

‘‘(1) shall be considered a qualifying small power production facility for purposes of part 292 of title 18, Code of Federal Regulations, notwithstanding any size limitations contained in such part, and

‘‘(2) shall not be subject to the size limitation contained in section 292.601(b) of such part.’’

STATE AUTHORITIES; CONSTRUCTION

Pub. L. 102–486, title VII, § 731, Oct. 24, 1992, 106 Stat. 2921, provided that: ‘‘Nothing in this title [enacting sections 824*l*, 824m, and 825*o*–1 of this title and former sections 79z–5a and 79z–5b of Title 15, Commerce and Trade, and amending this section, sections 824, 824j, 824k, 825n, 825*o*, and 2621 of this title, and provisions formerly set out as a note under former section 79k of Title 15] or in any amendment made by this title shall be construed as affecting or intending to affect, or in any way to interfere with, the authority of any State or local government relating to environmental protection or the siting of facilities.’’

TERMINATION OF FEDERAL POWER COMMISSION; TRANSFER OF FUNCTIONS

Federal Power Commission terminated and functions, personnel, property, funds, etc., transferred to Secretary of Energy (except for certain functions transferred to Federal Energy Regulatory Commission) by sections 7151(b), 7171(a), 7172(a), 7291, and 7293 of Title 42, The Public Health and Welfare.

ABOLITION OF INTERSTATE COMMERCE COMMISSION AND TRANSFER OF FUNCTIONS

Interstate Commerce Commission abolished and functions of Commission transferred, except as otherwise provided in Pub. L. 104–88, to Surface Transportation Board effective Jan. 1, 1996, by section 1302 of Title 49, Transportation, and section 101 of Pub. L. 104–88, set out as a note under section 1301 of Title 49. References to Interstate Commerce Commission deemed to refer to Surface Transportation Board, a member or employee of the Board, or Secretary of Transportation, as appropriate, see section 205 of Pub. L. 104–88, set out as a note under section 1301 of Title 49.

§ 797. General powers of Commission

The Commission is authorized and empowered—

(a) Investigations and data

To make investigations and to collect and record data concerning the utilization of the water resources of any region to be developed, the water-power industry and its relation to other industries and to interstate or foreign commerce, and concerning the location, capacity, development costs, and relation to markets of power sites, and whether the power from Government dams can be advantageously used by the United States for its public purposes, and what is a fair value of such power, to the extent the Commission may deem necessary or useful for the purposes of this chapter.

(b) Statements as to investment of licensees in projects; access to projects, maps, etc.

To determine the actual legitimate original cost of and the net investment in a licensed project, and to aid the Commission in such determinations, each licensee shall, upon oath, within a reasonable period of time to be fixed by the Commission, after the construction of the original project or any addition thereto or betterment thereof, file with the Commission in such detail as the Commission may require, a statement in duplicate showing the actual legitimate original cost of construction of such project addition, or betterment, and of the price paid for water rights, rights-of-way, lands, or interest in lands. The licensee shall grant to the Commission or to its duly authorized agent or agents, at all reasonable times, free access to such project, addition, or betterment, and to all maps, profiles, contracts, reports of engineers, accounts, books, records, and all other papers and documents relating thereto. The statement of actual legitimate original cost of said project, and revisions thereof as determined by the Commission, shall be filed with the Secretary of the Treasury.

(c) Cooperation with executive departments; information and aid furnished Commission

To cooperate with the executive departments and other agencies of State or National Governments in such investigations; and for such purpose the several departments and agencies of the National Government are authorized and directed upon the request of the Commission, to furnish such records, papers, and information in their possession as may be requested by the Commission, and temporarily to detail to the Commission such officers or experts as may be necessary in such investigations.

(d) Publication of information, etc.; reports to Congress

To make public from time to time the information secured hereunder, and to provide for the publication of its reports and investigations in such form and manner as may be best adapted for public information and use. The Commission, on or before the 3d day of January of each year, shall submit to Congress for the fiscal year preceding a classified report showing the permits and licenses issued under this subchapter, and in each case the parties thereto, the terms prescribed, and the moneys received if any, or account thereof.

(e) Issue of licenses for construction, etc., of dams, conduits, reservoirs, etc.

To issue licenses to citizens of the United States, or to any association of such citizens, or

§ 825*l*. Review of orders

(a) Application for rehearing; time periods; modification of order

Any person, electric utility, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, electric utility, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any entity unless such entity shall have made application to the Commission for a rehearing thereon. 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.

(b) Judicial review

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States court of appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

(c) Stay of Commission's order

The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

(June 10, 1920, ch. 285, pt. III, § 313, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 860; amended June 25, 1948, ch. 646, § 32(a), 62 Stat. 991; May 24, 1949, ch. 139, § 127, 63 Stat. 107; Pub. L. 85–791, § 16, Aug. 28, 1958, 72 Stat. 947; Pub. L. 109–58, title XII, § 1284(c), Aug. 8, 2005, 119 Stat. 980.)

CODIFICATION

In subsec. (b), ''section 1254 of title 28'' substituted for ''sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347)'' on authority of act June 25, 1948, ch. 646, 62 Stat. 869, the first section of which enacted Title 28, Judiciary and Judicial Procedure.

AMENDMENTS

2005—Subsec. (a). Pub. L. 109–58 inserted ''electric utility,'' after ''Any person,'' and ''to which such person,'' and substituted ''brought by any entity unless such entity'' for ''brought by any person unless such person''.

1958—Subsec. (a). Pub. L. 85–791, § 16(a), inserted sentence to provide that Commission may modify or set aside findings or orders until record has been filed in court of appeals.

Subsec. (b). Pub. L. 85–791, § 16(b), in second sentence, substituted ''transmitted by the clerk of the court to'' for ''served upon'', substituted ''file with the court'' for ''certify and file with the court a transcript of'', and inserted ''as provided in section 2112 of title 28'', and in third sentence, substituted ''jurisdiction, which upon the filing of the record with it shall be exclusive'' for ''exclusive jurisdiction''.

CHANGE OF NAME

Act June 25, 1948, eff. Sept. 1, 1948, as amended by act May 24, 1949, substituted ''court of appeals'' for ''circuit court of appeals''.

§ 825m. Enforcement provisions

(a) Enjoining and restraining violations

Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this chapter, or of any rule, regulation, or order thereunder, it may in its discretion bring an action in the proper District Court of the United

(A) the level of reliability appropriate to adequately serve the needs of electric consumers, taking into account cost effectiveness and the need for energy conservation,

(B) the various methods which could be used in order to achieve such level of reliability and the cost effectiveness of such methods, and

(C) the various procedures that might be used in case of an emergency outage to minimize the public disruption and economic loss that might be caused by such an outage and the cost effectiveness of such procedures.

Such study shall be completed and submitted to the President and the Congress not later than 18 months after November 9, 1978. Before such submittal the Secretary shall provide an opportunity for public comment on the results of such study.

(2) The study under paragraph (1) shall include consideration of the following:

(A) the cost effectiveness of investments in each of the components involved in providing adequate and reliable electric service, including generation, transmission, and distribution facilities, and devices available to the electric consumer;

(B) the environmental and other effects of the investments considered under subparagraph (A);

(C) various types of electric utility systems in terms of generation, transmission, distribution and customer mix, the extent to which differences in reliability levels may be desirable, and the cost-effectiveness of the various methods which could be used to decrease the number and severity of any outages among the various types of systems;

(D) alternatives to adding new generation facilities to achieve such desired levels of reliability (including conservation);

(E) the cost-effectiveness of adding a number of small, decentralized conventional and nonconventional generating units rather than a small number of large generating units with a similar total megawatt capacity for achieving the desired level of reliability; and

(F) any standards for electric utility reliability used by, or suggested for use by, the electric utility industry in terms of cost-effectiveness in achieving the desired level of reliability, including equipment standards, standards for operating procedures and training of personnel, and standards relating the number and severity of outages to periods of time.

(b) Examination of reliability issues by reliability councils

The Secretary, in consultation with the Commission, may, from time to time, request the reliability councils established under section 202(a) of the Federal Power Act [16 U.S.C. 824a(a) of this title] or other appropriate persons (including Federal agencies) to examine and report to him concerning any electric utility reliability issue. The Secretary shall report to the Congress (in its annual report or in the report required under subsection (a) if appropriate) the results of any examination under the preceding sentence.

(c) Department of Energy recommendations

The Secretary, in consultation with the Commission, and after opportunity for public comment, may recommend industry standards for reliability to the electric utility industry, including standards with respect to equipment, operating procedures and training of personnel, and standards relating to the level or levels of reliability appropriate to adequately and reliably serve the needs of electric consumers. The Secretary shall include in his annual report—

(1) any recommendations made under this subsection or any recommendations respecting electric utility reliability problems under any other provision of law, and

(2) a description of actions taken by electric utilities with respect to such recommendations.

(Pub. L. 95–617, title II, § 209, Nov. 9, 1978, 92 Stat. 3143.)

CODIFICATION

Section was enacted as part of the Public Utility Regulatory Policies Act of 1978, and not as part of the Federal Power Act which generally comprises this chapter.

DEFINITIONS

For definitions of terms used in this section, see section 2602 of this title.

§ 824a–3. Cogeneration and small power production

(a) Cogeneration and small power production rules

Not later than 1 year after November 9, 1978, the Commission shall prescribe, and from time to time thereafter revise, such rules as it determines necessary to encourage cogeneration and small power production, and to encourage geothermal small power production facilities of not more than 80 megawatts capacity, which rules require electric utilities to offer to—

(1) sell electric energy to qualifying cogeneration facilities and qualifying small power production facilities[1] and

(2) purchase electric energy from such facilities.

Such rules shall be prescribed, after consultation with representatives of Federal and State regulatory agencies having ratemaking authority for electric utilities, and after public notice and a reasonable opportunity for interested persons (including State and Federal agencies) to submit oral as well as written data, views, and arguments. Such rules shall include provisions respecting minimum reliability of qualifying cogeneration facilities and qualifying small power production facilities (including reliability of such facilities during emergencies) and rules respecting reliability of electric energy service to be available to such facilities from electric utilities during emergencies. Such rules may not authorize a qualifying cogeneration facility or qualifying small power production facility to make any sale for purposes other than resale.

(b) Rates for purchases by electric utilities

The rules prescribed under subsection (a) shall insure that, in requiring any electric utility to offer to purchase electric energy from any quali-

[1] So in original. Probably should be followed by a comma.

fying cogeneration facility or qualifying small power production facility, the rates for such purchase—

(1) shall be just and reasonable to the electric consumers of the electric utility and in the public interest, and

(2) shall not discriminate against qualifying cogenerators or qualifying small power producers.

No such rule prescribed under subsection (a) shall provide for a rate which exceeds the incremental cost to the electric utility of alternative electric energy.

(c) Rates for sales by utilities

The rules prescribed under subsection (a) shall insure that, in requiring any electric utility to offer to sell electric energy to any qualifying cogeneration facility or qualifying small power production facility, the rates for such sale—

(1) shall be just and reasonable and in the public interest, and

(2) shall not discriminate against the qualifying cogenerators or qualifying small power producers.

(d) "Incremental cost of alternative electric energy" defined

For purposes of this section, the term ''incremental cost of alternative electric energy'' means, with respect to electric energy purchased from a qualifying cogenerator or qualifying small power producer, the cost to the electric utility of the electric energy which, but for the purchase from such cogenerator or small power producer, such utility would generate or purchase from another source.

(e) Exemptions

(1) Not later than 1 year after November 9, 1978, and from time to time thereafter, the Commission shall, after consultation with representatives of State regulatory authorities, electric utilities, owners of cogeneration facilities and owners of small power production facilities, and after public notice and a reasonable opportunity for interested persons (including State and Federal agencies) to submit oral as well as written data, views, and arguments, prescribe rules under which geothermal small power production facilities of not more than 80 megawatts capacity, qualifying cogeneration facilities, and qualifying small power production facilities are exempted in whole or part from the Federal Power Act [16 U.S.C. 791a et seq.], from the Public Utility Holding Company Act,[2] from State laws and regulations respecting the rates, or respecting the financial or organizational regulation, of electric utilities, or from any combination of the foregoing, if the Commission determines such exemption is necessary to encourage cogeneration and small power production.

(2) No qualifying small power production facility (other than a qualifying small power production facility which is an eligible solar, wind, waste, or geothermal facility as defined in section 3(17)(E) of the Federal Power Act [16 U.S.C. 796(17)(E)]) which has a power production capacity which, together with any other facilities located at the same site (as determined by the Commission), exceeds 30 megawatts, or 80 megawatts for a qualifying small power production facility using geothermal energy as the primary energy source, may be exempted under rules under paragraph (1) from any provision of law or regulation referred to in paragraph (1), except that any qualifying small power production facility which produces electric energy solely by the use of biomass as a primary energy source, may be exempted by the Commission under such rules from the Public Utility Holding Company Act[2] and from State laws and regulations referred to in such paragraph (1).

(3) No qualifying small power production facility or qualifying cogeneration facility may be exempted under this subsection from—

(A) any State law or regulation in effect in a State pursuant to subsection (f),

(B) the provisions of section 210, 211, or 212 of the Federal Power Act [16 U.S.C. 824i, 824j, or 824k] or the necessary authorities for enforcement of any such provision under the Federal Power Act [16 U.S.C. 791a et seq.], or

(C) any license or permit requirement under part I of the Federal Power Act [16 U.S.C. 791a et seq.] any provision under such Act related to such a license or permit requirement, or the necessary authorities for enforcement of any such requirement.

(f) Implementation of rules for qualifying cogeneration and qualifying small power production facilities

(1) Beginning on or before the date one year after any rule is prescribed by the Commission under subsection (a) or revised under such subsection, each State regulatory authority shall, after notice and opportunity for public hearing, implement such rule (or revised rule) for each electric utility for which it has ratemaking authority.

(2) Beginning on or before the date one year after any rule is prescribed by the Commission under subsection (a) or revised under such subsection, each nonregulated electric utility shall, after notice and opportunity for public hearing, implement such rule (or revised rule).

(g) Judicial review and enforcement

(1) Judicial review may be obtained respecting any proceeding conducted by a State regulatory authority or nonregulated electric utility for purposes of implementing any requirement of a rule under subsection (a) in the same manner, and under the same requirements, as judicial review may be obtained under section 2633 of this title in the case of a proceeding to which section 2633 of this title applies.

(2) Any person (including the Secretary) may bring an action against any electric utility, qualifying small power producer, or qualifying cogenerator to enforce any requirement established by a State regulatory authority or nonregulated electric utility pursuant to subsection (f). Any such action shall be brought only in the manner, and under the requirements, as provided under section 2633 of this title with respect to an action to which section 2633 of this title applies.

(h) Commission enforcement

(1) For purposes of enforcement of any rule prescribed by the Commission under subsection

[2] See References in Text note below.

(a) with respect to any operations of an electric utility, a qualifying cogeneration facility or a qualifying small power production facility which are subject to the jurisdiction of the Commission under part II of the Federal Power Act [16 U.S.C. 824 et seq.], such rule shall be treated as a rule under the Federal Power Act [16 U.S.C. 791a et seq.]. Nothing in subsection (g) shall apply to so much of the operations of an electric utility, a qualifying cogeneration facility or a qualifying small power production facility as are subject to the jurisdiction of the Commission under part II of the Federal Power Act.

(2)(A) The Commission may enforce the requirements of subsection (f) against any State regulatory authority or nonregulated electric utility. For purposes of any such enforcement, the requirements of subsection (f)(1) shall be treated as a rule enforceable under the Federal Power Act [16 U.S.C. 791a et seq.]. For purposes of any such action, a State regulatory authority or nonregulated electric utility shall be treated as a person within the meaning of the Federal Power Act. No enforcement action may be brought by the Commission under this section other than—

(i) an action against the State regulatory authority or nonregulated electric utility for failure to comply with the requirements of subsection (f)[3] or

(ii) an action under paragraph (1).

(B) Any electric utility, qualifying cogenerator, or qualifying small power producer may petition the Commission to enforce the requirements of subsection (f) as provided in subparagraph (A) of this paragraph. If the Commission does not initiate an enforcement action under subparagraph (A) against a State regulatory authority or nonregulated electric utility within 60 days following the date on which a petition is filed under this subparagraph with respect to such authority, the petitioner may bring an action in the appropriate United States district court to require such State regulatory authority or nonregulated electric utility to comply with such requirements, and such court may issue such injunctive or other relief as may be appropriate. The Commission may intervene as a matter of right in any such action.

(i) Federal contracts

No contract between a Federal agency and any electric utility for the sale of electric energy by such Federal agency for resale which is entered into after November 9, 1978, may contain any provision which will have the effect of preventing the implementation of any rule under this section with respect to such utility. Any provision in any such contract which has such effect shall be null and void.

(j) New dams and diversions

Except for a hydroelectric project located at a Government dam (as defined in section 3(10) of the Federal Power Act [16 U.S.C. 796(10)]) at which non-Federal hydroelectric development is permissible, this section shall not apply to any hydroelectric project which impounds or diverts the water of a natural watercourse by means of a new dam or diversion unless the project meets each of the following requirements:

(1) No substantial adverse effects

At the time of issuance of the license or exemption for the project, the Commission finds that the project will not have substantial adverse effects on the environment, including recreation and water quality. Such finding shall be made by the Commission after taking into consideration terms and conditions imposed under either paragraph (3) of this subsection or section 10 of the Federal Power Act [16 U.S.C. 803] (whichever is appropriate as required by that Act [16 U.S.C. 791a et seq.] or the Electric Consumers Protection Act of 1986) and compliance with other environmental requirements applicable to the project.

(2) Protected rivers

At the time the application for a license or exemption for the project is accepted by the Commission (in accordance with the Commission's regulations and procedures in effect on January 1, 1986, including those relating to environmental consultation), such project is not located on either of the following:

(A) Any segment of a natural watercourse which is included in (or designated for potential inclusion in) a State or national wild and scenic river system.

(B) Any segment of a natural watercourse which the State has determined, in accordance with applicable State law, to possess unique natural, recreational, cultural, or scenic attributes which would be adversely affected by hydroelectric development.

(3) Fish and wildlife terms and conditions

The project meets the terms and conditions set by fish and wildlife agencies under the same procedures as provided for under section 30(c) of the Federal Power Act [16 U.S.C. 823a(c)].

(k) "New dam or diversion" defined

For purposes of this section, the term ''new dam or diversion'' means a dam or diversion which requires, for purposes of installing any hydroelectric power project, any construction, or enlargement of any impoundment or diversion structure (other than repairs or reconstruction or the addition of flashboards or similar adjustable devices)[4]

(*l*) Definitions

For purposes of this section, the terms ''small power production facility'', ''qualifying small power production facility'', ''qualifying small power producer'', ''primary energy source'', ''cogeneration facility'', ''qualifying cogeneration facility'', and ''qualifying cogenerator'' have the respective meanings provided for such terms under section 3(17) and (18) of the Federal Power Act [16 U.S.C. 796(17), (18)].

(m) Termination of mandatory purchase and sale requirements

(1) Obligation to purchase

After August 8, 2005, no electric utility shall be required to enter into a new contract or ob-

[3] So in original. Probably should be followed by a comma.

[4] So in original. Probably should be followed by a period.

ligation to purchase electric energy from a qualifying cogeneration facility or a qualifying small power production facility under this section if the Commission finds that the qualifying cogeneration facility or qualifying small power production facility has nondiscriminatory access to—

(A)(i) independently administered, auction-based day ahead and real time wholesale markets for the sale of electric energy; and (ii) wholesale markets for long-term sales of capacity and electric energy; or

(B)(i) transmission and interconnection services that are provided by a Commission-approved regional transmission entity and administered pursuant to an open access transmission tariff that affords nondiscriminatory treatment to all customers; and (ii) competitive wholesale markets that provide a meaningful opportunity to sell capacity, including long-term and short-term sales, and electric energy, including long-term, short-term and real-time sales, to buyers other than the utility to which the qualifying facility is interconnected. In determining whether a meaningful opportunity to sell exists, the Commission shall consider, among other factors, evidence of transactions within the relevant market; or

(C) wholesale markets for the sale of capacity and electric energy that are, at a minimum, of comparable competitive quality as markets described in subparagraphs (A) and (B).

(2) Revised purchase and sale obligation for new facilities

(A) After August 8, 2005, no electric utility shall be required pursuant to this section to enter into a new contract or obligation to purchase from or sell electric energy to a facility that is not an existing qualifying cogeneration facility unless the facility meets the criteria for qualifying cogeneration facilities established by the Commission pursuant to the rulemaking required by subsection (n).

(B) For the purposes of this paragraph, the term ''existing qualifying cogeneration facility'' means a facility that—

(i) was a qualifying cogeneration facility on August 8, 2005; or

(ii) had filed with the Commission a notice of self-certification, self recertification or an application for Commission certification under 18 CFR 292.207 prior to the date on which the Commission issues the final rule required by subsection (n).

(3) Commission review

Any electric utility may file an application with the Commission for relief from the mandatory purchase obligation pursuant to this subsection on a service territory-wide basis. Such application shall set forth the factual basis upon which relief is requested and describe why the conditions set forth in subparagraph (A), (B), or (C) of paragraph (1) of this subsection have been met. After notice, including sufficient notice to potentially affected qualifying cogeneration facilities and qualifying small power production facilities, and an opportunity for comment, the Commission shall make a final determination within 90 days of such application regarding whether the conditions set forth in subparagraph (A), (B), or (C) of paragraph (1) have been met.

(4) Reinstatement of obligation to purchase

At any time after the Commission makes a finding under paragraph (3) relieving an electric utility of its obligation to purchase electric energy, a qualifying cogeneration facility, a qualifying small power production facility, a State agency, or any other affected person may apply to the Commission for an order reinstating the electric utility's obligation to purchase electric energy under this section. Such application shall set forth the factual basis upon which the application is based and describe why the conditions set forth in subparagraph (A), (B), or (C) of paragraph (1) of this subsection are no longer met. After notice, including sufficient notice to potentially affected utilities, and opportunity for comment, the Commission shall issue an order within 90 days of such application reinstating the electric utility's obligation to purchase electric energy under this section if the Commission finds that the conditions set forth in subparagraphs (A), (B) or (C) of paragraph (1) which relieved the obligation to purchase, are no longer met.

(5) Obligation to sell

After August 8, 2005, no electric utility shall be required to enter into a new contract or obligation to sell electric energy to a qualifying cogeneration facility or a qualifying small power production facility under this section if the Commission finds that—

(A) competing retail electric suppliers are willing and able to sell and deliver electric energy to the qualifying cogeneration facility or qualifying small power production facility; and

(B) the electric utility is not required by State law to sell electric energy in its service territory.

(6) No effect on existing rights and remedies

Nothing in this subsection affects the rights or remedies of any party under any contract or obligation, in effect or pending approval before the appropriate State regulatory authority or non-regulated electric utility on August 8, 2005, to purchase electric energy or capacity from or to sell electric energy or capacity to a qualifying cogeneration facility or qualifying small power production facility under this Act (including the right to recover costs of purchasing electric energy or capacity).

(7) Recovery of costs

(A) The Commission shall issue and enforce such regulations as are necessary to ensure that an electric utility that purchases electric energy or capacity from a qualifying cogeneration facility or qualifying small power production facility in accordance with any legally enforceable obligation entered into or imposed under this section recovers all prudently incurred costs associated with the purchase.

(B) A regulation under subparagraph (A) shall be enforceable in accordance with the

provisions of law applicable to enforcement of regulations under the Federal Power Act (16 U.S.C. 791a et seq.).

(n) Rulemaking for new qualifying facilities

(1)(A) Not later than 180 days after August 8, 2005, the Commission shall issue a rule revising the criteria in 18 CFR 292.205 for new qualifying cogeneration facilities seeking to sell electric energy pursuant to this section to ensure—

(i) that the thermal energy output of a new qualifying cogeneration facility is used in a productive and beneficial manner;

(ii) the electrical, thermal, and chemical output of the cogeneration facility is used fundamentally for industrial, commercial, or institutional purposes and is not intended fundamentally for sale to an electric utility, taking into account technological, efficiency, economic, and variable thermal energy requirements, as well as State laws applicable to sales of electric energy from a qualifying facility to its host facility; and

(iii) continuing progress in the development of efficient electric energy generating technology.

(B) The rule issued pursuant to paragraph (1)(A) of this subsection shall be applicable only to facilities that seek to sell electric energy pursuant to this section. For all other purposes, except as specifically provided in subsection (m)(2)(A), qualifying facility status shall be determined in accordance with the rules and regulations of this Act.

(2) Notwithstanding rule revisions under paragraph (1), the Commission's criteria for qualifying cogeneration facilities in effect prior to the date on which the Commission issues the final rule required by paragraph (1) shall continue to apply to any cogeneration facility that—

(A) was a qualifying cogeneration facility on August 8, 2005, or

(B) had filed with the Commission a notice of self-certification, self-recertification or an application for Commission certification under 18 CFR 292.207 prior to the date on which the Commission issues the final rule required by paragraph (1).

(Pub. L. 95–617, title II, §210, Nov. 9, 1978, 92 Stat. 3144; Pub. L. 96–294, title VI, §643(b), June 30, 1980, 94 Stat. 770; Pub. L. 99–495, §8(a), Oct. 16, 1986, 100 Stat. 1249; Pub. L. 101–575, §2, Nov. 15, 1990, 104 Stat. 2834; Pub. L. 109–58, title XII, §1253(a), Aug. 8, 2005, 119 Stat. 967.)

REFERENCES IN TEXT

The Federal Power Act, referred to in subsecs. (e), (h), (j)(1), and (m)(7)(B), is act June 10, 1920, ch. 285, 41 Stat. 1063, as amended, which is classified generally to this chapter (§791a et seq.). Part I of the Federal Power Act is classified generally to subchapter I (§791a et seq.) of this chapter. Part II of the Federal Power Act is classified generally to this subchapter (§824 et seq.). For complete classification of this Act to the Code, see section 791a of this title and Tables.

The Public Utility Holding Company Act, referred to in subsec. (e), probably means the Public Utility Holding Company Act of 1935, title I of act Aug. 26, 1935, ch. 687, 49 Stat. 803, as amended, which was classified generally to chapter 2C (§79 et seq.) of Title 15, Commerce and Trade, prior to repeal by Pub. L. 109–58, title XII, §1263, Aug. 8, 2005, 119 Stat. 974. For complete classification of this Act to the Code, see Tables.

The Electric Consumers Protection Act of 1986, referred to in subsec. (j)(1), is Pub. L. 99–495, Oct. 16, 1986, 100 Stat. 1243. For complete classification of this Act to the Code, see Short Title of 1986 Amendment note set out under section 791a of this title and Tables.

This Act, referred to in subsecs. (m)(6) and (n)(1)(B), is Pub. L. 95–617, Nov. 9, 1978, 92 Stat. 3117, as amended, known as the Public Utility Regulatory Policies Act of 1978. For complete classification of this Act to the Code, see Short Title note set out under section 2601 of this title and Tables.

CODIFICATION

Section was enacted as part of the Public Utility Regulatory Policies Act of 1978, and not as part of the Federal Power Act which generally comprises this chapter.

August 8, 2005, referred to in subsec. (n)(1)(A), was in the original ''the date of enactment of this section'', which was translated as meaning the date of enactment of Pub. L. 109–58, which enacted subsecs. (m) and (n) of this section, to reflect the probable intent of Congress.

AMENDMENTS

2005—Subsecs. (m), (n). Pub. L. 109–58 added subsecs. (m) and (n).

1990—Subsec. (e)(2). Pub. L. 101–575 inserted ''(other than a qualifying small power production facility which is an eligible solar, wind, waste, or geothermal facility as defined in section 3(17)(E) of the Federal Power Act)'' after first reference to ''facility''.

1986—Subsecs. (j) to (*l*). Pub. L. 99–495 added subsecs. (j) and (k) and redesignated former subsec. (j) as (*l*).

1980—Subsec. (a). Pub. L. 96–294, §643(b)(1), inserted provisions relating to encouragement of geothermal small power production facilities.

Subsec. (e)(1). Pub. L. 96–294, §643(b)(2), inserted provisions relating to applicability to geothermal small power production facilities.

Subsec. (e)(2). Pub. L. 96–294, §643(b)(3), inserted provisions respecting a qualifying small power production facility using geothermal energy as the primary energy source.

EFFECTIVE DATE OF 1986 AMENDMENT

Pub. L. 99–495, §8(b), Oct. 16, 1986, 100 Stat. 1250, provided that:

''(1) Subsection (j) of section 210 of the Public Utility Regulatory Policies Act of 1978 (as amended by subsection (a) of this section) [16 U.S.C. 824a–3(j)] shall apply to any project for which benefits under section 210 of the Public Utility Regulatory Policies Act of 1978 are sought and for which a license or exemption is issued by the Federal Energy Regulatory Commission after the enactment of this Act [Oct. 16, 1986], except as otherwise provided in paragraph (2), (3) or (4) of this subsection.

''(2) Subsection (j) shall not apply to the project if the application for license or exemption for the project was filed, and accepted for filing by the Commission, before the enactment of this Act [Oct. 16, 1986].

''(3) Paragraphs (1) and (3) of such subsection (j) shall not apply if the application for the license or exemption for the project was filed before the enactment of this Act [Oct. 16, 1986] and accepted for filing by the Commission (in accordance with the Commission's regulations and procedures in effect on January 1, 1986, including those relating to the requirement for environmental consultation) within 3 years after such enactment.

''(4)(A) Paragraph (3) of subsection (j) shall not apply for projects where the license or exemption application was filed after enactment of this Act [Oct. 16, 1986] if, based on a petition filed by the applicant for such project within 18 months after such enactment, the Commission determines (after public notice and opportunity for public comment of at least 45 days) that the

applicant has demonstrated that he had committed (prior to the enactment of this Act) substantial monetary resources directly related to the development of the project and to the diligent and timely completion of all requirements of the Commission for filing an acceptable application for license or exemption. Such petition shall be publicly available and shall be filed in such form as the Commission shall require by rule issued within 120 days after the enactment of this Act. The public notice required under this subparagraph shall include written notice by the petitioner to affected Federal and State agencies.

''(B) In the case of any petition referred to in subparagraph (A), if the applicant had a preliminary permit and had completed environmental consultations (required by Commission regulations and procedures in effect on January 1, 1986) prior to enactment, there shall be a rebuttable presumption that such applicant had committed substantial monetary resources prior to enactment.

''(C) The applicant for a license or exemption for a project described in subparagraph (A) may petition the Commission for an initial determination under paragraph (1) of section 210(j) of the Public Utility Regulatory Policies Act of 1978 [16 U.S.C. 824a–3(j)(1)] prior to the time the license or exemption is issued. If the Commission initially finds that the project will have substantial adverse effects on the environment within the meaning of such paragraph (1), prior to making a final finding under that paragraph the Commission shall afford the applicant a reasonable opportunity to provide for mitigation of such adverse effects. The Commission shall make a final finding under such paragraph (1) at the time the license or exemption is issued. If the Federal Energy Regulatory Commission has notified the State of its initial finding and the State has not taken any action described in paragraph (2) of section 210(j) before such final finding, the failure to take such action shall be the basis for a rebuttable presumption that there is not a substantial adverse effect on the environment related to natural, recreational, cultural, or scenic attributes for purposes of such finding.

''(D) If a petition under subparagraph (A) is denied, all provisions of section 210(j) of the Public Utility Regulatory Policies Act of 1978 [16 U.S.C. 824a–3(j)] shall apply to the project regardless of when the license or exemption is issued.''

Amendment by Pub. L. 99–495 effective with respect to each license, permit, or exemption issued under this chapter after Oct. 16, 1986, see section 18 of Pub. L. 99–495, set out as a note under section 797 of this title.

Calculation of Avoided Cost

Pub. L. 102–486, title XIII, §1335, Oct. 24, 1992, 106 Stat. 2984, provided that: ''Nothing in section 210 of the Public Utility Regulatory Policies Act of 1978 (Public Law 95–617) [16 U.S.C. 824a–3] requires a State regulatory authority or nonregulated electric utility to treat a cost reasonably identified to be incurred or to have been incurred in the construction or operation of a facility or a project which has been selected by the Department of Energy and provided Federal funding pursuant to the Clean Coal Program authorized by Public Law 98–473 [see Tables for classification] as an incremental cost of alternative electric energy.''

Applicability of 1980 Amendment to Facilities Using Solar Energy as Primary Energy Source

Pub. L. 100–202, §101(d) [title III, §310], Dec. 22, 1987, 101 Stat. 1329–104, 1329–126, provided that:

''(a) The amendments made by section 643(b) of the Energy Security Act (Public Law 96–294) [amending this section] and any regulations issued to implement such amendment shall apply to qualifying small power production facilities (as such term is defined in the Federal Power Act [16 U.S.C. 791a et seq.]) using solar energy as the primary energy source to the same extent such amendments and regulations apply to qualifying small power production facilities using geothermal energy as the primary energy source, except that nothing in this Act [see Tables for classification] shall preclude the Federal Energy Regulatory Commission from revising its regulations to limit the availability of exemptions authorized under this Act as it determines to be required in the public interest and consistent with its obligations and duties under section 210 of the Public Utility Regulatory Policies Act of 1978 [this section].

''(b) The provisions of subsection (a) shall apply to a facility using solar energy as the primary energy source only if either of the following is submitted to the Federal Energy Regulatory Commission during the two-year period beginning on the date of enactment of this Act [Dec. 22, 1987]:

''(1) An application for certification of the facility as a qualifying small power production facility.

''(2) Notice that the facility meets the requirements for qualification.''

Study and Report to Congressional Committees on Application of Provisions Relating to Cogeneration, Small Power Production, and Interconnection Authority to Hydroelectric Power Facilities

Pub. L. 99–495, §8(d), Oct. 16, 1986, 100 Stat. 1251, provided that:

''(1) The Commission shall conduct a study (in accordance with section 102(2)(C) of the National Environmental Policy Act of 1969 [42 U.S.C. 4332(2)(C)]) of whether the benefits of section 210 of the Public Utility Regulatory Policies Act of 1978 [16 U.S.C. 824a–3] and section 210 of the Federal Power Act [16 U.S.C. 824i] should be applied to hydroelectric power facilities utilizing new dams or diversions (within the meaning of section 210(k) of the Public Utility Regulatory Policies Act of 1978).

''(2) The study under this subsection shall take into consideration the need for such new dams or diversions for power purposes, the environmental impacts of such new dams and diversions (both with and without the application of the amendments made by this Act to sections 4, 10, and 30 of the Federal Power Act [16 U.S.C. 797, 803, 823a] and section 210 of the Public Utility Regulatory Policies Act of 1978 [16 U.S.C. 824a–3]), the environmental effects of such facilities alone and in combination with other existing or proposed dams or diversions on the same waterway, the intent of Congress to encourage and give priority to the application of section 210 of Public Utility Regulatory Policies Act of 1978 to existing dams and diversions rather than such new dams or diversions, and the impact of such section 210 on the rates paid by electric power consumers.

''(3) The study under this subsection shall be initiated within 3 months after enactment of this Act [Oct. 16, 1986] and completed as promptly as practicable.

''(4) A report containing the results of the study conducted under this subsection shall be submitted to the Committee on Energy and Commerce of the United States House of Representatives and the Committee on Energy and Natural Resources of the United States Senate while both Houses are in session.

''(5) The report submitted under paragraph (4) shall include a determination (and the basis thereof) by the Commission, based on the study and a public hearing and subject to review under section 313(b) of the Federal Power Act [16 U.S.C. 825*l*(b)], whether any of the benefits referred to in paragraph (1) should be available for such facilities and whether applications for preliminary permits (or licenses where no preliminary permit has been issued) for such small power production facilities utilizing new dams or diversions should be accepted by the Commission after the moratorium period specified in subsection (e). The report shall include such other administrative and legislative recommendations as the Commission deems appropriate.

''(6) If the study under this subsection has not been completed within 18 months after its initiation, the Commission shall notify the Committees referred to in paragraph (4) of the reasons for the delay and specify a

date when it will be completed and a report submitted.''

MORATORIUM ON APPLICATION OF THIS SECTION TO NEW DAMS

Pub. L. 99–495, § 8(e), Oct. 16, 1986, 100 Stat. 1251, provided that: ''Notwithstanding the amendments made by subsection (a) of this section [amending section 824a–3 of this title], in the case of a project for which a license or exemption is issued after the enactment of this Act [Oct. 16, 1986], section 210 of the Public Utility Regulatory Policies Act of 1978 [16 U.S.C. 824a–3] shall not apply during the moratorium period if the project utilizes a new dam or diversion (as defined in section 210(k) of such Act) unless the project is either—

''(1) a project located at a Government dam (as defined in section 3(10) of the Federal Power Act [16 U.S.C. 796(10)]) at which non-Federal hydroelectric development is permissible, or

''(2) a project described in paragraphs (2), (3), or (4) of subsection (b) [set out as a note above].

For purposes of this subsection, the term 'moratorium period' means the period beginning on the date of the enactment of this Act and ending at the expiration of the first full session of Congress after the session during which the report under subsection (d) [set out as a note above] has been submitted to the Congress.''

DEFINITIONS

For definitions of terms used in this section, see section 2602 of this title.

§ 824a–4. Seasonal diversity electricity exchange

(a) Authority

The Secretary may acquire rights-of-way by purchase, including eminent domain, through North Dakota, South Dakota, and Nebraska for transmission facilities for the seasonal diversity exchange of electric power to and from Canada if he determines—

(1) after opportunity for public hearing—

(A) that the exchange is in the public interest and would further the purposes referred to in section 2611(1) and (2) of this title and that the acquisition of such rights-of-way and the construction and operation of such transmission facilities for such purposes is otherwise in the public interest,

(B) that a permit has been issued in accordance with subsection (b) for such construction, operation, maintenance, and connection of the facilities at the border for the transmission of electric energy between the United States and Canada as is necessary for such exchange of electric power, and

(C) that each affected State has approved the portion of the transmission route located in each State in accordance with applicable State law, or if there is no such applicable State law in such State, the Governor has approved such portion; and

(2) after consultation with the Secretary of the Interior and the heads of other affected Federal agencies, that the Secretary of the Interior and the heads of such,[1] other agencies concur in writing in the location of such portion of the transmission facilities as crosses Federal land under the jurisdiction of such Secretary or such other Federal agency, as the case may be.

The Secretary shall provide to any State such cooperation and technical assistance as the State may request and as he determines appropriate in the selection of a transmission route. If the transmission route approved by any State does not appear to be feasible and in the public interest, the Secretary shall encourage such State to review such route and to develop a route that is feasible and in the public interest. Any exercise by the Secretary of the power of eminent domain under this section shall be in accordance with other applicable provisions of Federal law. The Secretary shall provide public notice of his intention to acquire any right-of-way before exercising such power of eminent domain with respect to such right-of-way.

(b) Permit

Notwithstanding any transfer of functions under the first sentence of section 301(b) of the Department of Energy Organization Act [42 U.S.C. 7151(b)], no permit referred to in subsection (a)(1)(B) may be issued unless the Commission has conducted hearings and made the findings required under section 202(e) of the Federal Power Act [16 U.S.C. 824a(e)] and under the applicable execution order respecting the construction, operation, maintenance, or connection at the borders of the United States of facilities for the transmission of electric energy between the United States and a foreign country. Any finding of the Commission under an applicable executive order referred to in this subsection shall be treated for purposes of judicial review as an order issued under section 202(e) of the Federal Power Act.

(c) Timely acquisition by other means

The Secretary may not acquire any rights-of-day[2] under this section unless he determines that the holder or holders of a permit referred to in subsection (a)(1)(B) are unable to acquire such rights-of-way under State condemnation authority, or after reasonable opportunity for negotiation, without unreasonably delaying construction, taking into consideration the impact of such delay on completion of the facilities in a timely fashion.

(d) Payments by permittees

(1) The property interest acquired by the Secretary under this section (whether by eminent domain or other purchase) shall be transferred by the Secretary to the holder of a permit referred to in subsection (b) if such holder has made payment to the Secretary of the entire costs of the acquisition of such property interest, including administrative costs. The Secretary may accept, and expend, for purposes of such acquisition, amounts from any such person before acquiring a property interest to be transferred to such person under this section.

(2) If no payment is made by a permit holder under paragraph (1), within a reasonable time, the Secretary shall offer such rights-of-way to the original owner for reacquisition at the original price paid by the Secretary. If such original owner refuses to reacquire such property after a reasonable period, the Secretary shall dispose of such property in accordance with applicable provisions of law governing disposal of property of the United States.

[1] So in original. The comma probably should not appear.

[2] So in original. Probably should be ''rights-of-way''.

cost of agency consultation, environmental studies, and engineering studies conducted pursuant to §4.38 of this chapter, and the Commission's requirements for filing an application for license exemption.

(s) *Sequential use* of energy means:

(1) For a topping-cycle cogeneration facility, the use of reject heat from a power production process in sufficient amounts in a thermal application or process to conform to the requirements of the operating standard; or

(2) For a bottoming-cycle cogeneration facility, the use of reject heat from a thermal application or process, at least some of which is then used for power production.

(t) *Electrical generating equipment* means all boilers, heat recovery steam generators, prime movers (any mechanical equipment driving an electric generator), electrical generators, photovoltaic solar panels, inverters, fuel cell equipment and/or other primary power generation equipment used in the facility, excluding equipment for gathering energy to be used in the facility.

(Energy Security Act, Pub. L. 96-294, 94 Stat. 611 (1980) Public Utility Regulatory Policies Act of 1978, 16 U.S.C. 2601, *et seq.*, Energy Supply and Environmental Coordination Act, 15 U.S.C. 791 *et seq.*, Federal Power Act, as amended, 16 U.S.C. 792 *et seq.*, Department of Energy Organization Act, 42 U.S.C. 7101 *et seq.*, E.O. 12009, 42 FR 46267)

[45 FR 17972, Mar. 20, 1980, as amended at 45 FR 33958, May 21, 1980; 45 FR 66789, Oct. 8, 1980; Order 135, 46 FR 19231, Mar. 30, 1981; 46 FR 32239, June 22, 1981; Order 499, 53 FR 27002, July 18, 1988; Order 575, 60 FR 4857, Jan. 25, 1995; Order 872, 85 FR 54732, Sept. 2, 2020]

EFFECTIVE DATE NOTE: At 86 FR 8140, Feb. 4, 2021, §292.202 was amended by revising paragraphs (h)(2) and (3) and adding paragraph (h)(4), effective Apr. 5, 2021. For the convenience of the user, the added and revised text is set forth as follows:

§292.202 Definitions.

* * * * *

(h) * * *:

(2) That is used in a heating application (e.g., space heating, domestic hot water heating);

(3) That is used in a space cooling application (*i.e.*, thermal energy used by an absorption chiller); or

(4) That is used by a fuel cell system with an integrated steam hydrocarbon reformation process for production of fuel for electricity generation.

* * * * *

§292.203 General requirements for qualification.

(a) *Small power production facilities.* Except as provided in paragraph (c) of this section, a small power production facility is a qualifying facility if it:

(1) Meets the maximum size criteria specified in §292.204(a);

(2) Meets the fuel use criteria specified in §292.204(b); and

(3) Unless exempted by paragraph (d), has filed with the Commission a notice of self-certification, pursuant to §292.207(a); or has filed with the Commission an application for Commission certification, pursuant to §292.207(b)(1), that has been granted.

(b) *Cogeneration facilities.* A cogeneration facility, including any diesel and dual-fuel cogeneration facility, is a qualifying facility if it:

(1) Meets any applicable standards and criteria specified in §§292.205(a), (b) and (d); and

(2) Unless exempted by paragraph (d), has filed with the Commission a notice of self-certification, pursuant to §292.207(a); or has filed with the Commission an application for Commission certification, pursuant to §292.207(b)(1), that has been granted.

(c) *Hydroelectric small power production facilities located at a new dam or diversion.* (1) A hydroelectric small power production facility that impounds or diverts the water of a natural watercourse by means of a new dam or diversion (as that term is defined in §292.202(p)) is a qualifying facility if it meets the requirements of:

(i) Paragraph (a) of this section; and

(ii) Section 292.208.

(2) [Reserved]

(d) *Exemptions and waivers from filing requirement.* (1) Any facility with a net power production capacity of 1 MW or less is exempt from the filing requirements of paragraphs (a)(3) and (b)(2) of this section.

(2) The Commission may waive the requirement of paragraphs (a)(3) and (b)(2) of this section for good cause. Any applicant seeking waiver of paragraphs (a)(3) and (b)(2) of this section

must file a petition for declaratory order describing in detail the reasons waiver is being sought.

[Order 732, 75 FR 15965, Mar. 30, 2010]

§ 292.204 Criteria for qualifying small power production facilities.

(a) *Size of the facility*—(1) *Maximum size.* Except as provided in paragraph (a)(4) of this section, the power production capacity of a facility for which qualification is sought, together with the power production capacity of any other small power production qualifying facilities that use the same energy resource, are owned by the same person(s) or its affiliates, and are located at the same site, may not exceed 80 megawatts.

(2) *Method of calculation.* (i)(A) For purposes of this paragraph (a)(2), there is an irrebuttable presumption that affiliated small power production qualifying facilities that use the same energy resource and are located one mile or less from the facility for which qualification or recertification is sought are located at the same site as the facility for which qualification or recertification is sought.

(B) For purposes of this paragraph (a)(2), for facilities for which qualification or recertification is filed on or after December 31, 2020 there is an irrebuttable presumption that affiliated small power production qualifying facilities that use the same energy resource and are located 10 miles or more from the facility for which qualification or recertification is sought are located at separate sites from the facility for which qualification or recertification is sought.

(C) For purposes of this paragraph (a)(2), for facilities for which qualification or recertification is filed on or after December 31, 2020, there is a rebuttable presumption that affiliated small power production qualifying facilities that use the same energy resource and are located more than one mile and less than 10 miles from the facility for which qualification or recertification is sought are located at separate sites from the facility for which qualification or recertification is sought.

(D) For hydroelectric facilities, facilities are considered to be located at the same site as the facility for which qualification or recertification is sought if they are located within one mile of the facility for which qualification or recertification is sought and use water from the same impoundment for power generation.

(ii) For purposes of making the determinations in paragraph (a)(2)(i), the distance between two facilities shall be measured from the edge of the closest electrical generating equipment for which qualification or recertification is sought to the edge of the nearest electrical generating equipment of the other affiliated small power production qualifying facility using the same energy resource.

(3) *Waiver.* The Commission may modify the application of paragraph (a)(2) of this section, for good cause.

(4) *Exception.* Facilities meeting the criteria in section 3(17)(E) of the Federal Power Act (16 U.S.C. 796(17)(E)) have no maximum size, and the power production capacity of such facilities shall be excluded from consideration when determining the size of other small power production facilities less than 10 miles from such facilities.

(b) *Fuel use.* (1)(i) The primary energy source of the facility must be biomass, waste, renewable resources, geothermal resources, or any combination thereof, and 75 percent or more of the total energy input must be from these sources.

(ii) Any primary energy source which, on the basis of its energy content, is 50 percent or more biomass shall be considered biomass.

(2) Use of oil, natural gas and coal by a facility, under section 3(17)(B) of the Federal Power Act, is limited to the minimum amounts of fuel required for ignition, startup, testing, flame stabilization, and control uses, and the minimum amounts of fuel required to alleviate or prevent unanticipated equipment outages, and emergencies, directly affecting the public health, safety, or welfare, which would result from electric power outages. Such fuel use may not, in the aggregate, exceed 25 percent of the total energy input of the facility during the 12-month period beginning with the date the facility first produces electric energy and any calendar year subsequent to the year in

which the facility first produces electric energy.

(Energy Security Act, Pub. L. 96–294, 94 Stat. 611 (1980) Public Utility Regulatory Policies Act of 1978, 16 U.S.C. 2601, *et seq.*, Energy Supply and Environmental Coordination Act, 15, U.S.C. 791, *et seq.*, Federal Power Act, as amended, 16 U.S.C. 792 *et seq.*, Department of Energy Organization Act, 42 U.S.C. 7101, *et seq.;* E.O. 12009, 42 FR 46267)

[45 FR 17972, Mar. 20, 1980, as amended by Order 135, 46 FR 19231, Mar. 30, 1981; Order 575, 60 FR 4857, Jan. 25, 1995; Order 732, 75 FR 15966, Mar. 30, 2010; Order 872, 85 FR 54732, Sept. 2, 2020]

§ 292.205 Criteria for qualifying cogeneration facilities.

(a) *Operating and efficiency standards for topping-cycle facilities*—(1) *Operating standard.* For any topping-cycle cogeneration facility, the useful thermal energy output of the facility must be no less than 5 percent of the total energy output during the 12-month period beginning with the date the facility first produces electric energy, and any calendar year subsequent to the year in which the facility first produces electric energy.

(2) *Efficiency standard.* (i) For any topping-cycle cogeneration facility for which any of the energy input is natural gas or oil, and the installation of which began on or after March 13, 1980, the useful power output of the facility plus one-half the useful thermal energy output, during the 12-month period beginning with the date the facility first produces electric energy, and any calendar year subsequent to the year in which the facility first produces electric energy, must:

(A) Subject to paragraph (a)(2)(i)(B) of this section be no less than 42.5 percent of the total energy input of natural gas and oil to the facility; or

(B) If the useful thermal energy output is less than 15 percent of the total energy output of the facility, be no less than 45 percent of the total energy input of natural gas and oil to the facility.

(ii) For any topping-cycle cogeneration facility not subject to paragraph (a)(2)(i) of this section there is no efficiency standard.

(b) *Efficiency standards for bottoming-cycle facilities.* (1) For any bottoming-cycle cogeneration facility for which any of the energy input as supplementary firing is natural gas or oil, and the installation of which began on or after March 13, 1980, the useful power output of the facility during the 12-month period beginning with the date the facility first produces electric energy, and any calendar year subsequent to the year in which the facility first produces electric energy must be no less than 45 percent of the energy input of natural gas and oil for supplementary firing.

(2) For any bottoming-cycle cogeneration facility not covered by paragraph (b)(1) of this section, there is no efficiency standard.

(c) *Waiver.* The Commission may waive any of the requirements of paragraphs (a) and (b) of this section upon a showing that the facility will produce significant energy savings.

(d) *Criteria for new cogeneration facilities.* Notwithstanding paragraphs (a) and (b) of this section, any cogeneration facility that was either not a qualifying cogeneration facility on or before August 8, 2005, or that had not filed a notice of self-certification or an application for Commission certification as a qualifying cogeneration facility under § 292.207 of this chapter prior to February 2, 2006, and which is seeking to sell electric energy pursuant to section 210 of the Public Utility Regulatory Policies Act of 1978, 16 U.S.C. 824a–1, must also show:

(1) The thermal energy output of the cogeneration facility is used in a productive and beneficial manner; and

(2) The electrical, thermal, chemical and mechanical output of the cogeneration facility is used fundamentally for industrial, commercial, residential or institutional purposes and is not intended fundamentality for sale to an electric utility, taking into account technological, efficiency, economic, and variable thermal energy requirements, as well as state laws applicable to sales of electric energy from a qualifying facility to its host facility.

(3) Fundamental use test. For the purpose of satisfying paragraph (d)(2) of this section, the electrical, thermal, chemical and mechanical output of the cogeneration facility will be considered used fundamentally for industrial, commercial, or institutional purposes,

and not intended fundamentally for sale to an electric utility if at least 50 percent of the aggregate of such output, on an annual basis, is used for industrial, commercial, residential or institutional purposes. In addition, applicants for facilities that do not meet this safe harbor standard may present evidence to the Commission that the facilities should nevertheless be certified given state laws applicable to sales of electric energy or unique technological, efficiency, economic, and variable thermal energy requirements.

(4) For purposes of paragraphs (d)(1) and (2) of this section, a new cogeneration facility of 5 MW or smaller will be presumed to satisfy the requirements of those paragraphs.

(5) For purposes of paragraph (d)(1) of this section, where a thermal host existed prior to the development of a new cogeneration facility whose thermal output will supplant the thermal source previously in use by the thermal host, the thermal output of such new cogeneration facility will be presumed to satisfy the requirements of paragraph (d)(1).

[45 FR 17972, Mar. 20, 1980, as amended by Order 478, 52 FR 28467, July 30, 1987; Order 575, 60 FR 4857, Jan. 25, 1995; Order 671, 71 FR 7868, Feb. 15, 2006; Order 732, 75 FR 15966, Mar. 30, 2010; 76 FR 50663, Aug. 16, 2011]

§ 292.207 Procedures for obtaining qualifying status.

(a) *Self-certification*—(1) *FERC Form No. 556.* The qualifying facility status of an existing or a proposed facility that meets the requirements of § 292.203 may be self-certified by the owner or operator of the facility or its representative by properly completing a FERC Form No. 556 and filing that form with the Commission, pursuant to § 131.80 of this chapter, and complying with paragraph (e) of this section.

(2) *Factors.* For small power production facilities pursuant to § 292.204, the owner or operator of the facility or its representative may, when completing the FERC Form No. 556, provide information asserting factors showing that the facility for which qualification or recertification is sought is at a separate site from other facilities using the same energy resource and owned by the same person(s) or its affiliates.

(3) *Commission action.* Self-certification and self-recertification are effective upon filing. If no protests to a self-certification or self-recertification are timely filed pursuant to paragraph (c) of this section, no further action by the Commission is required for a self-certification or self-recertification to be effective. If protests to a self-certification or self-recertification are timely filed pursuant to paragraph (c) of this section, a self-certification or self-recertification will remain effective until the Commission issues an order revoking QF certification. The Commission will act on the protest within 90 days from the date the protest is filed; provided that, if the Commission requests more information from the protester, the entity seeking qualification or recertification, or both, the time for the Commission to act will be extended to 60 days from the filing of a complete answer to the information request. In addition to any extension resulting from a request for information, the Commission also may toll the 90-day period for one additional 60-day period if so required to rule on a protest. Authority to toll the 90-day period for this purpose is delegated to the Secretary or the Secretary's designee. Absent Commission action before the expiration of the tolling period, a protest will be deemed denied, and the self-certification or self-recertification will remain effective.

(b) *Optional procedure—Commission certification*—(1) *Application for Commission certification.* In lieu of the self-certification procedures in paragraph (a) of this section, an owner or operator of an existing or a proposed facility, or its representative, may file with the Commission an application for Commission certification that the facility is a qualifying facility. The application must be accompanied by the fee prescribed by part 381 of this chapter, and the applicant for Commission certification must comply with paragraph (c) of this section.

(2) *General contents of application.* The application must include a properly completed FERC Form No. 556 pursuant to § 131.80 of this chapter. For small power production facilities pursuant to § 292.204, the owner or operator of the facility or its representative may,

when completing the FERC Form No. 556, provide information asserting factors showing that the facility for which qualification is sought is at a separate site from other facilities using the same energy resource and owned by the same person(s) or its affiliates.

(3) *Commission action.* (i) Within 90 days of the later of the filing of an application or the filing of a supplement, amendment or other change to the application, the Commission will either: Inform the applicant that the application is deficient; or issue an order granting or denying the application; or toll the time for issuance of an order. Any order denying certification shall identify the specific requirements which were not met. If the Commission does not act within 90 days of the date of the latest filing, the application shall be deemed to have been granted.

(ii) For purposes of paragraph (b) of this section, the date an application is filed is the date by which the Office of the Secretary has received all of the information and the appropriate filing fee necessary to comply with the requirements of this Part.

(c) *Protests and Interventions*—(1) *Filing a Protest.* Any person, as defined in § 385.102(d) of this chapter, who opposes either a self-certification or self-recertification making substantive changes to the existing certification filed pursuant to paragraph (a) of this section or an application for Commission certification or Commission recertification making substantive changes to the existing certification filed pursuant to paragraph (b) of this section for which qualification or recertification is filed on or after December 31, 2020, may file a protest with the Commission. Any protest to and any intervention in a self-certification or self-recertification must be filed in accordance with §§ 385.211 and 385.214 of this chapter, on or before 30 days from the date the self-certification or self-recertification is filed. Any protestor must concurrently serve a copy of such filing pursuant to § 385.211 of this chapter. Any protest must be adequately supported, and provide any supporting documents, contracts, or affidavits to substantiate the claims in the protest.

(2) *Limitations on protest.* Protests may be filed to any initial self-certification or application for Commission certification filed on or after the effective date of this final rule, and to any self-recertification or application for Commission recertification that are filed on or after December 31, 2020 that makes substantive changes to the existing certification. Once the Commission has certified an applicant's qualifying facility status either in response to a protest opposing a self-certification or self-recertification, or in response to an application for Commission certification or Commission recertification, any later protest to a self-recertification or application for Commission recertification making substantive changes to a qualifying facility's certification must demonstrate changed circumstances that call into question the continued validity of the certification.

(d) *Response to protests.* Any response to a protest must be filed on or before 30 days from the date of filing of that protest and will be allowed under § 385.213(a)(2) of this chapter.

(e) *Notice requirements*—(1) *General.* An applicant filing a self-certification, self-recertification, application for Commission certification or application for Commission recertification of the qualifying status of its facility must concurrently serve a copy of such filing on each electric utility with which it expects to interconnect, transmit or sell electric energy to, or purchase supplementary, standby, back-up or maintenance power from, and the State regulatory authority of each state where the facility and each affected electric utility is located. The Commission will publish a notice in the FEDERAL REGISTER for each application for Commission certification and for each self-certification of a cogeneration facility that is subject to the requirements of § 292.205(d).

(2) Facilities of 500 kW or more. An electric utility is not required to purchase electric energy from a facility with a net power production capacity of 500 kW or more until 90 days after the facility notifies the facility that it is a qualifying facility or 90 days after the utility meets the notice requirements in paragraph (c)(1) of this section.

(f) *Revocation of qualifying status.* (1)(i) If a qualifying facility fails to conform with any material facts or representations presented by the cogenerator or small power producer in its submittals to the Commission, the notice of self-certification or Commission order certifying the qualifying status of the facility may no longer be relied upon. At that point, if the facility continues to conform to the Commission's qualifying criteria under this part, the cogenerator or small power producer may file either a notice of self-recertification of qualifying status pursuant to the requirements of paragraph (a) of this section, or an application for Commission recertification pursuant to the requirements of paragraph (b) of this section, as appropriate.

(ii) The Commission may, on its own motion or on the motion of any person, revoke the qualifying status of a facility that has been certified under paragraph (b) of this section, if the facility fails to conform to any of the Commission's qualifying facility criteria under this part.

(iii) The Commission may, on its own motion or on the motion of any person, revoke the qualifying status of a self-certified or self-recertified qualifying facility if it finds that the self-certified or self-recertified qualifying facility does not meet the applicable requirements for qualifying facilities.

(2) Prior to undertaking any substantial alteration or modification of a qualifying facility which has been certified under paragraph (b) of this section, a small power producer or cogenerator may apply to the Commission for a determination that the proposed alteration or modification will not result in a revocation of qualifying status. This application for Commission recertification of qualifying status should be submitted in accordance with paragraph (b) of this section.

[45 FR 17972, Mar. 20, 1980]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 292.207, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at *www.govinfo.gov*.

§ 292.208 Special requirements for hydroelectric small power production facilities located at a new dam or diversion.

(a) A hydroelectric small power production facility that impounds or diverts the water of a natural watercourse by means of a new dam or diversion (as that term is defined in § 292.202(p)) is a qualifying facility only if it meets the requirements of:

(1) Paragraph (b) of this section;

(2) Section 292.203(c); and

(3) Part 4 of this chapter.

(b) A hydroelectric small power production described in paragraph (a) is a qualifying facility only if:

(1) The Commission finds, at the time it issues the license or exemption, that the project will not have a substantial adverse effect on the environment (as that term is defined in § 292.202(q)), including recreation and water quality;

(2) The Commission finds, at the time the application for the license or exemption is accepted for filing under § 4.32 of this chapter, that the project is not located on any segment of a natural watercourse which:

(i) Is included, or designated for potential inclusion in, a State or National wild and scenic river system; or

(ii) The State has determined, in accordance with applicable State law, to possess unique natural, recreational, cultural or scenic attributes which would be adversely affected by hydroelectric development; and

(3) The project meets the terms and conditions set by the appropriate fish and wildlife agencies under the same procedures as provided for under section 30(c) of the Federal Power Act.

(c) For the Commission to make the findings in paragraph (b) of this section an applicant must:

(1) Comply with the applicable hydroelectric licensing requirements in Part 4 of this chapter, including:

(i) Completing the pre-filing consultation process under § 4.38 of this chapter, including performing any environmental studies which may be required under §§ 4.38(b)(2)(i)(D) through (F) of this chapter; and

(ii) Submitting with its application an environmental report that meets the requirements of § 4.41(f) of this chapter, regardless of project size;

(i) Admit or deny, specifically and in detail, each material allegation of the pleading answered; and

(ii) Set forth every defense relied on.

(3) General denials of facts referred to in any order to show cause, unsupported by the specific facts upon which the respondent relies, do not comply with paragraph (a)(1) of this section and may be a basis for summary disposition under Rule 217, unless otherwise required by statute.

(4) An answer to a complaint must include documents that support the facts in the answer in possession of, or otherwise attainable by, the respondent, including, but not limited to, contracts and affidavits. An answer is also required to describe the formal or consensual process it proposes for resolving the complaint.

(5) When submitting with its answer any request for privileged treatment of documents and information in accordance with this chapter, a respondent must provide a public version of its answer without the information for which privileged treatment is claimed and its proposed form of protective agreement to each entity that has either been served pursuant to §385.206(c) or whose name is on the official service list for the proceeding compiled by the Secretary.

(d) *Time limitations.* (1) Any answer to a motion or to an amendment to a motion must be made within 15 days after the motion or amendment is filed, except as described below or unless otherwise ordered.

(i) If a motion requests an extension of time or a shortened time period for action, then answers to the motion to extend or shorten the time period shall be made within 5 days after the motion is filed, unless otherwise ordered.

(ii) [Reserved]

(2) Any answer to a pleading or amendment to a pleading, other than a complaint or an answer to a motion under paragraph (d)(1) of this section, must be made:

(i) If notice of the pleading or amendment is published in the FEDERAL REGISTER, not later than 30 days after such publication, unless otherwise ordered; or

(ii) If notice of the pleading or amendment is not published in the FEDERAL REGISTER, not later than 30 days after the filing of the pleading or amendment, unless otherwise ordered.

(e) *Failure to answer.* (1) Any person failing to answer a complaint may be considered in default, and all relevant facts stated in such complaint may be deemed admitted.

(2) Failure to answer an order to show cause will be treated as a general denial to which paragraph (c)(3) of this section applies.

[Order 225, 47 FR 19022, May 3, 1982; 48 FR 786, Jan. 7, 1983, as amended by Order 376, 49 FR 21705, May 23, 1984; Order 602, 64 FR 17099, Apr. 8, 1999; Order 602–A, 64 FR 43608, Aug. 11, 1999; Order 769, 77 FR 65476, Oct. 29, 2012]

§385.214 Intervention (Rule 214).

(a) *Filing.* (1) The Secretary of Energy is a party to any proceeding upon filing a notice of intervention in that proceeding. If the Secretary's notice is not filed within the period prescribed under Rule 210(b), the notice must state the position of the Secretary on the issues in the proceeding.

(2) Any State Commission, the Advisory Council on Historic Preservation, the U.S. Departments of Agriculture, Commerce, and the Interior, any state fish and wildlife, water quality certification, or water rights agency; or Indian tribe with authority to issue a water quality certification is a party to any proceeding upon filing a notice of intervention in that proceeding, if the notice is filed within the period established under Rule 210(b). If the period for filing notice has expired, each entity identified in this paragraph must comply with the rules for motions to intervene applicable to any person under paragraph (a)(3) of this section including the content requirements of paragraph (b) of this section.

(3) Any person seeking to intervene to become a party, other than the entities specified in paragraphs (a)(1) and (a)(2) of this section, must file a motion to intervene.

(4) No person, including entities listed in paragraphs (a)(1) and (a)(2) of this section, may intervene as a matter of right in a proceeding arising from an investigation pursuant to Part 1b of this chapter.

(b) *Contents of motion.* (1) Any motion to intervene must state, to the extent

known, the position taken by the movant and the basis in fact and law for that position.

(2) A motion to intervene must also state the movant's interest in sufficient factual detail to demonstrate that:

(i) The movant has a right to participate which is expressly conferred by statute or by Commission rule, order, or other action;

(ii) The movant has or represents an interest which may be directly affected by the outcome of the proceeding, including any interest as a:

(A) Consumer,

(B) Customer,

(C) Competitor, or

(D) Security holder of a party; or

(iii) The movant's participation is in the public interest.

(3) If a motion to intervene is filed after the end of any time period established under Rule 210, such a motion must, in addition to complying with paragraph (b)(1) of this section, show good cause why the time limitation should be waived.

(c) *Grant of party status.* (1) If no answer in opposition to a timely motion to intervene is filed within 15 days after the motion to intervene is filed, the movant becomes a party at the end of the 15 day period.

(2) If an answer in opposition to a timely motion to intervene is filed not later than 15 days after the motion to intervene is filed or, if the motion is not timely, the movant becomes a party only when the motion is expressly granted.

(d) *Grant of late intervention.* (1) In acting on any motion to intervene filed after the period prescribed under Rule 210, the decisional authority may consider whether:

(i) The movant had good cause for failing to file the motion within the time prescribed;

(ii) Any disruption of the proceeding might result from permitting intervention;

(iii) The movant's interest is not adequately represented by other parties in the proceeding;

(iv) Any prejudice to, or additional burdens upon, the existing parties might result from permitting the intervention; and

(v) The motion conforms to the requirements of paragraph (b) of this section.

(2) Except as otherwise ordered, a grant of an untimely motion to intervene must not be a basis for delaying or deferring any procedural schedule established prior to the grant of that motion.

(3)(i) The decisional authority may impose limitations on the participation of a late intervener to avoid delay and prejudice to the other participants.

(ii) Except as otherwise ordered, a late intervener must accept the record of the proceeding as the record was developed prior to the late intervention.

(4) If the presiding officer orally grants a motion for late intervention, the officer will promptly issue a written order confirming the oral order.

[Order 225, 47 FR 19022, May 3, 1982; 48 FR 786, Jan. 7, 1983, as amended by Order 376, 49 FR 21705, May 23, 1984; Order 2002, 68 FR 51142, Aug. 25, 2003; Order 718, 73 FR 62886, Oct. 22, 2008]

§ 385.215 Amendment of pleadings and tariff or rate filings (Rule 215).

(a) *General rules.* (1) Any participant, or any person who has filed a timely motion to intervene which has not been denied, may seek to modify its pleading by filing an amendment which conforms to the requirements applicable to the pleading to be amended.

(2) A tariff or rate filing may be amended or modified only as provided in the regulations under this chapter. A tariff or rate filing may not be amended, except as allowed by statute. The procedures provided in this section do not apply to amendment of tariff or rate filings.

(3)(i) If a written amendment is filed in a proceeding, or part of a proceeding, that is not set for hearing under subpart E, the amendment becomes effective as an amendment on the date filed.

(ii) If a written amendment is filed in a proceeding, or part of a proceeding, which is set for hearing under subpart E, that amendment is effective on the date filed only if the amendment is filed more than five days before the earlier of either the first prehearing conference or the first day of evidentiary hearings.

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, DC

OMB Control # 1902-0075
Expiration 11/30/2022

Form 556 Certification of Qualifying Facility (QF) Status for a Small Power Production or Cogeneration Facility

General

Questions about completing this form should be sent to Form556@ferc.gov. Information about the Commission's QF program, answers to frequently asked questions about QF requirements or completing this form, and contact information for QF program staff are available at the Commission's QF website, www.ferc.gov/QF. The Commission's QF website also provides links to the Commission's QF regulations (18 C.F.R. § 131.80 and Part 292), as well as other statutes and orders pertaining to the Commission's QF program.

Title 18, U.S.C. 1001 makes it a crime for any person knowingly and willingly to make to any Agency or Department of the United States any false, fictitious or fraudulent statements as to any matter within its jurisdiction.

Who Must File

Certification:

Any applicant seeking QF status for a generating facility that has a net power production capacity (as determined in lines 7a through 7g below) greater than 1 MW must file a self-certification or an application for Commission certification of QF status, which includes a properly completed Form 556. Any applicant seeking QF status for a generating facility with a net power production capacity 1 MW or less is exempt from the certification requirement and is therefore not required to complete or file a Form 556. *See* 18 C.F.R. § 292.203. This includes any applicant seeking small power production QF status for a generating facility that, together with any affiliated small power production QFs that use the same energy resource and are within one mile of the filing facility, has a net power production capacity 1 MW or less.

Recertification:

A QF must file a recertification whenever the qualifying facility "fails to conform with any material facts or representations presented … in its submittals to the Commission." 18 C.F.R. § 292.207(f).

Among other possible changes in material facts that would necessitate recertification, a small power production QF is required to recertify to update item 8a due to a change at an affiliated facility(ies) one mile or less from its electrical generating equipment. A small power production QF is *not* required to recertify due to a change at an affiliated facility(ies) listed in item 8a that is more than one mile but less than 10 miles away from its electrical generating equipment, unless that change also impacts any other entries on the Form 556.

How to Complete the Form 556

This form is intended to be completed by responding to the items in the order they are presented, according to the instructions given. If you need to back-track, you may need to clear certain responses before you will be allowed to change other responses made previously in the form. If you experience problems, click on the nearest help button ( ) for assistance, or contact Commission staff at Form556@ferc.gov.

Certain lines in this form will be automatically calculated based on responses to previous lines, with the relevant formulas shown. You must respond to all of the previous lines within a section before the results of an automatically calculated field will be displayed. If you disagree with the results of any automatic calculation on this form, contact Commission staff at Form556@ferc.gov to discuss the discrepancy before filing.

You must complete all lines in this form unless instructed otherwise. Do not alter this form or save this form in a different format. Incomplete or altered forms, or forms saved in formats other than PDF, will be rejected.

How to File a Completed Form 556

Applicants are required to file their Form 556 electronically through the Commission's eFiling website (see instructions on page 3). By filing electronically, you will reduce your filing burden, save paper resources, save postage or courier charges, help keep Commission expenses to a minimum, and receive a much faster confirmation (via an email containing the docket number assigned to your facility) that the Commission has received your filing.

If you are simultaneously filing both a waiver request and a Form 556 as part of an application for Commission certification, see the "Waiver Requests" section on page 4 for more information on how to file.

Paperwork Reduction Act Notice

This form is approved by the Office of Management and Budget. Compliance with the information requirements established by the FERC Form 556 is required to obtain or maintain status as a QF. *See* 18 C.F.R. § 131.80 and Part 292. An agency may not penalize a person for not complying with a collection of information unless it displays a currently valid OMB control number.

The estimated total burden for completing the FERC Form 556, including gathering and reporting information, is as follows: 1.5 hours for self-certifications of facilities of 1 MW or less; 1.5 hours for self-certifications of a cogeneration facility over 1 MW; 50 hours for applications for Commission certification of a cogeneration facility; 3.5 hours for self-certifications of small power producers over 1 MW and less than a mile or more than 10 miles from affiliated small power production QFs that use the same energy resource; 56 hours for an application for Commission certification of a small power production facility over 1 MW and less than a mile or more than 10 miles from affiliated small power production QFs that use the same energy resource; 9.5 hours for self-certifications of small power producers over 1 MW with affiliated small power production QFs more than one but less than 10 miles that use the same energy resource; 62 hours for an application for Commission certification of a small power production facility over 1 MW with affiliated small power production QFs more than one but less than 10 miles that use the same energy resource.

Send comments regarding this burden estimate or any aspect of this collection of information, including suggestions for reducing this burden, to the following: Information Clearance Officer, Office of the Executive Director (ED-32), Federal Energy Regulatory Commission, 888 First Street N.E., Washington, DC 20426 (DataClearance@ferc.gov); and Desk Officer for FERC, Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503 through www.reginfo.gov/public/do/PRAMain. Include FERC-556 and the Control No. 1902-0075 in any correspondence.

Filing Fee

No filing fee is required if you are submitting a self-certification or self-recertification of your facility as a QF pursuant to 18 C.F.R. § 292.207(a).

A filing fee is required if you are filing either of the following:

(1) an application for Commission certification or recertification of your facility as a QF pursuant to 18 C.F.R. § 292.207(b), or
(2) a petition for declaratory order granting waiver pursuant to 18 C.F.R. §§ 292.204(a)(3) and/or 292.205(c).

The current fees for applications for Commission certifications and petitions for declaratory order can be found by visiting the Commission's QF website at www.ferc.gov/QF and clicking the Filing Fees link.

You will be prompted to submit your filing fee, if applicable, during the electronic filing process described on page 3.

Electronic Filing (eFiling)

To electronically file your Form 556, visit the Commission's QF website at www.ferc.gov/QF and click the eFiling link.

If you are eFiling your first document, you will need to register with your name, email address, mailing address, and phone number. If you are registering on behalf of an employer, then you will also need to provide the employer name, alternate contact name, alternate contact phone number and and alternate contact email.

Once you are registered, log in to eFiling with your registered email address and the password that you created at registration. Follow the instructions. When prompted, select one of the following QF-related filing types, as appropriate, from the Electric or General filing category.

Filing category	Filing Type as listed in eFiling	Description
Electric	(Fee) Application for Commission Cert. as Cogeneration QF	Use to submit an application for Commission certification or Commission recertification of a cogeneration facility as a QF.
	(Fee) Application for Commission Cert. as Small Power QF	Use to submit an application for Commission certification or Commission recertification of a small power production facility as a QF.
	Self-Certification Notice (QF, EG, FC)	Use to submit a notice of self-certification of your facility (cogeneration or small power production) as a QF.
	Self-Recertification of Qualifying Facility (QF)	Use to submit a notice of self-recertification of your facility (cogeneration or small power production) as a QF.
	Self-Recertification of Qualifying Facility (QF) (Supplement or Correction)	Use to correct or supplement a Form 556 that was submitted with errors or omissions, or for which Commission staff has requested additional information. Do *not* use this filing type to report new changes to a facility or its ownership; rather, use a self-recertification or Commission recertification to report such changes.
General	(Fee) Petition for Declaratory Order (not under FPA Part 1)	Use to submit a petition for declaratory order granting a waiver of Commission QF regulations pursuant to 18 C.F.R. §§ 292.204(a)(3) and/or 292.205(c). A Form 556 is not required for a petition for declaratory order unless Commission recertification is being requested as part of the petition.

You will be prompted to submit your filing fee, if applicable, during the electronic submission process. Filing fees can be paid by check or money order via ACH Credit transfer, wire payment, courier, or mail.

During the eFiling process, you will be prompted to select your file(s) for upload from your computer.

Required Notice to Utilities and State Regulatory Authorities

Pursuant to 18 C.F.R. § 292.207(a)(ii), you must provide a copy of your self-certification or request for Commission certification to the utilities with which the facility will interconnect and/or transact, as well as to the State regulatory authorities of the states in which your facility and those utilities reside. Links to information about the regulatory authorities in various states can be found by visiting the Commission's QF website at www.ferc.gov/QF and clicking the Notice Requirements link.

What to Expect From the Commission After You File

An applicant filing a Form 556 electronically will receive an email message acknowledging receipt of the filing and showing the docket number assigned to the filing. Such email is typically sent within one business day, but may be delayed pending confirmation by the Secretary of the Commission of the contents of the filing.

An applicant submitting a self-certification of QF status should expect to receive no documents from the Commission, other than the electronic acknowledgement of receipt described above. Consistent with its name, a self-certification is a certification *by the applicant itself* that the facility meets the relevant requirements for QF status, and does not involve a determination by the Commission as to the status of the facility. An acknowledgement of receipt of a self-certification, in particular, does not represent a determination by the Commission with regard to the QF status of the facility. An applicant self-certifying may, however, receive a rejection, revocation or deficiency letter if its application is found, during periodic compliance reviews, not to comply with the relevant requirements.

An applicant submitting a request for Commission certification will receive an order either granting or denying certification of QF status, or a letter requesting additional information or rejecting the application. Pursuant to 18 C.F.R. § 292.207(b)(3), the Commission must act on an application for Commission certification within 90 days of the later of the filing date of the application or the filing date of a supplement, amendment or other change to the application.

Protests to the Filing

Pursuant to 18 C.F.R. § 292.207, an interested party has 30 days from the date of the filing of a self-certification or self-recertification to intervene or file a protest. Protests may be made to an initial certification (both self-certification and application for Commission certification) filed on or after December 31, 2020, but only to a recertification (both self-recertification and application for Commission recertification) that makes substantive changes to the existing certification and that is filed on or after December 31, 2020, as described in Order No. 872 (accessible from the Commission's QF website at www.ferc.gov/QF). Substantive changes that may be subject to a protest may include, for example, a change in electrical generating equipment that increases power production capacity by the greater of 1 MW or 5% of the previously certified capacity of the QF, or a change in ownership in which an owner increases its equity interest by at least 10% from the equity interest previously reported. The protestor must concurrently serve a copy of such filing pursuant to 18 C.F.R. § 385.2011. Any response to a protest must be filed on or before 30 days from the date of filing of that protest.

Waiver Requests

18 C.F.R. § 292.204(a)(3) allows an applicant to request a waiver to modify the method of calculation pursuant to 18 C.F.R. § 292.204(a)(2) to determine if two facilities are considered to be located at the same site, for good cause. 18 C.F.R. § 292.205(c) allows an applicant to request waiver of the requirements of 18 C.F.R. §§ 292.205(a) and (b) for operating and efficiency upon a showing that the facility will produce significant energy savings. A request for waiver of these requirements must be submitted as a petition for declaratory order, with the appropriate filing fee for a petition for declaratory order. Applicants requesting Commission recertification as part of a request for waiver of one of these requirements should electronically submit their completed Form 556 along with their petition for declaratory order, rather than filing their Form 556 as a separate request for Commission recertification. Only the filing fee for the petition for declaratory order must be paid to cover both the waiver request and the request for recertification *if such requests are made simultaneously*.

18 C.F.R. § 292.203(d)(2) allows an applicant to request a waiver of the Form 556 filing requirements, for good cause. Applicants filing a petition for declaratory order requesting a waiver under 18 C.F.R. § 292.203(d)(2) do not need to complete or submit a Form 556 with their petition.

Geographic Coordinates

Items 3c and 8a of the Form 556 require you to report your facility's (and certain neighboring facilities') geographic coordinates (latitude and longitude). Geographic coordinates may be obtained from several different sources. You can find links to online services that show latitude and longitude coordinates on online maps by visiting the Commission's QF webpage at www.ferc.gov/QF. You may also be able to obtain your geographic coordinates from a GPS device, Google Earth (available free at http://earth.google.com), a property survey, various engineering or construction drawings, a property deed, or a municipal or county map showing property lines.

Filing Privileged Data or Critical Energy Infrastructure Information in a Form 556

The Commission's regulations provide procedures for applicants to either (1) request that any information submitted with a Form 556 be given privileged treatment because the information is exempt from the mandatory public disclosure requirements of the Freedom of Information Act, 5 U.S.C. § 552, and should be withheld from public disclosure; or (2) identify any documents containing critical energy infrastructure information (CEII) as defined in 18 C.F.R. § 388.113 that should not be made public.

If you are seeking privileged treatment or CEII status for any data in your Form 556, then you must follow the procedures in 18 C.F.R. § 388.112. See www.ferc.gov/help/filing-guide/file-ceii.asp for more information.

Among other things (see 18 C.F.R. § 388.112 for other requirements), applicants seeking privileged treatment or CEII status for data submitted in a Form 556 must prepare and file both (1) a complete version of the Form 556 (containing the privileged and/or CEII data), and (2) a public version of the Form 556 (with the privileged and/or CEII data redacted). Applicants preparing and filing these different versions of their Form 556 must indicate below the security designation of this version of their document. If you are *not* seeking privileged treatment or CEII status for any of your Form 556 data, then you should not respond to any of the items on this page.

☐ **Non-Public**: Applicant is seeking privileged treatment and/or CEII status for data contained in the Form 556 lines indicated below. This non-public version of the applicant's Form 556 contains all data, including the data that is redacted in the (separate) public version of the applicant's Form 556.
☐ **Public (redacted)**: Applicant is seeking privileged treatment and/or CEII status for data contained in the Form 556 lines indicated below. This public version of the applicants's Form 556 contains all data except for data from the lines indicated below, which has been redacted.
Privileged: Indicate below which lines of your form contain data for which you are seeking privileged treatment
Critical Energy Infrastructure Information (CEII): Indicate below which lines of your form contain data for which you are seeking CEII status

The eFiling process described on page 3 will allow you to identify which versions of the electronic documents you submit are public, privileged and/or CEII. The filenames for such documents should begin with "Public", "Priv", or "CEII", as applicable, to clearly indicate the security designation of the file. Both versions of the Form 556 should be unaltered PDF copies of the Form 556, as available for download from www.ferc.gov/QF. To redact data from the public copy of the submittal, simply omit the relevant data from the Form. For numerical fields, leave the redacted fields blank. For text fields, complete as much of the field as possible, and replace the redacted portions of the field with the word "REDACTED" in brackets. Be sure to identify above all fields which contain data for which you are seeking non-public status.

The Commission is not responsible for detecting or correcting filer errors, including those errors related to security designation. If your documents contain sensitive information, make sure they are filed using the proper security designation.

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, DC

OMB Control # 1902-0075
Expiration 11/30/2022

Form 556

Certification of Qualifying Facility (QF) Status for a Small Power Production or Cogeneration Facility

Application Information

1a Full name of applicant (legal entity on whose behalf qualifying facility status is sought for this facility)
Broadview Solar LLC

1b Applicant street address
333 Clay Street, Suite 2800

1c City
Houston

1d State/province
TX

1e Postal code
77002

1f Country (if not United States)

1g Telephone number
832-304-7860

1h Has the instant facility ever previously been certified as a QF? Yes ☒ No ☐

1i If yes, provide the docket number of the last known QF filing pertaining to this facility: QF 17 - 454 - 005

1j Under which certification process is the applicant making this filing?

☒ Notice of self-certification (see note below)

☐ Application for Commission certification (requires filing fee; see "Filing Fee" section on page 2)

Note: a notice of self-certification is a notice by the applicant itself that its facility complies with the requirements for QF status. A notice of self-certification does not establish a proceeding, and the Commission does not review a notice of self-certification to verify compliance. See the "What to Expect From the Commission After You File" section on page 4 for more information.

1k What type(s) of QF status is the applicant seeking for its facility? (check all that apply)

☒ Qualifying small power production facility status ☐ Qualifying cogeneration facility status

1l What is the purpose and expected effective date(s) of this filing?

☐ Original certification; facility expected to be installed by _____ and to begin operation on _____

☒ Change(s) to a previously certified facility to be effective on 7/27/21

(identify type(s) of change(s) below, and describe change(s) in the Miscellaneous section starting on page 24)

☒ Name change and/or other administrative change(s)

☒ Change in ownership

☐ Change(s) affecting plant equipment, fuel use, power production capacity and/or cogeneration thermal output

☐ Supplement or correction to a previous filing submitted on _____

(describe the supplement or correction in the Miscellaneous section starting on page 24)

1m If any of the following three statements is true, check the box(es) that describe your situation and complete the form to the extent possible, explaining any special circumstances in the Miscellaneous section starting on page 24.

☐ The instant facility complies with the Commission's QF requirements by virtue of a waiver of certain regulations previously granted by the Commission in an order dated _____ (specify any other relevant waiver orders in the Miscellaneous section starting on page 24)

☐ The instant facility would comply with the Commission's QF requirements if a petition for waiver submitted concurrently with this application is granted

☒ The instant facility complies with the Commission's regulations, but has special circumstances, such as the employment of unique or innovative technologies not contemplated by the structure of this form, that make the demonstration of compliance via this form difficult or impossible (describe in Misc. section starting on p. 24)

Contact Information

2a Name of contact person: Steve Vavrik

2b Telephone number: 832-304-7860

2c Which of the following describes the contact person's relationship to the applicant? (check one)

- ☐ Applicant (self)
- ☐ Employee, owner or partner of applicant authorized to represent the applicant
- ☒ Employee of a company affiliated with the applicant authorized to represent the applicant on this matter
- ☐ Lawyer, consultant, or other representative authorized to represent the applicant on this matter

2d Company or organization name (if applicant is an individual, check here and skip to line 2e) ☐

Broadview Solar LLC

2e Street address (if same as Applicant, check here and skip to line 3a) ☒

2f City

2g State/province

2h Postal code

2i Country (if not United States)

Facility Identification and Location

3a Facility name: Broadview Solar LLC

3b Street address (if a street address does not exist for the facility, check here and skip to line 3c) ☒

3c Geographic coordinates: Specify the latitude and longitude coordinates of the facility in degrees (to three decimal places). Use the following formula to convert to decimal degrees from degrees, minutes and seconds: decimal degrees = degrees + (minutes/60) + (seconds/3600). See the "Geographic Coordinates" section on page 5 for help.

Latitude 46.047 degrees North (+) Longitude 108.852 degrees West (-)

3d City (if unincorporated, check here and enter nearest city) ☐

Broadview

3e State/province: Montana

3f County (or check here for independent city) ☐

Yellowstone

3g Country (if not United States)

Transacting Utilities

Identify the electric utilities that are contemplated to transact with the facility.

4a Identify utility interconnecting with the facility

NorthWestern Energy

4b Identify utilities providing wheeling service or check here if none ☒

4c Identify utilities purchasing the useful electric power output or check here if none ☐

NorthWestern Energy

4d Identify utilities providing supplementary power, backup power, maintenance power, and/or interruptible power service or check here if none ☐

NorthWestern Energy

Ownership and Operation

5a Direct ownership as of effective date or operation date: Identify all direct owners of the facility holding at least 10 percent equity interest. For each identified owner, also (1) indicate whether that owner is an electric utility, as defined in section 3(22) of the Federal Power Act (16 U.S.C. 796(22)), or a holding company, as defined in section 1262(8) of the Public Utility Holding Company Act of 2005 (42 U.S.C. 16451(8)), and (2) for owners which are electric utilities or holding companies, provide the percentage of equity interest in the facility held by that owner. If no direct owners hold at least 10 percent equity interest in the facility, then provide the required information for the two direct owners with the largest equity interest in the facility.

	Full legal names of direct owners	Electric utility or holding company	If Yes, % equity interest
1)	Broadview Solar LLC	Yes ☒ No ☐	100 %
2)		Yes ☐ No ☐	%
3)		Yes ☐ No ☐	%
4)		Yes ☐ No ☐	%
5)		Yes ☐ No ☐	%
6)		Yes ☐ No ☐	%
7)		Yes ☐ No ☐	%
8)		Yes ☐ No ☐	%
9)		Yes ☐ No ☐	%
10)		Yes ☐ No ☐	%

☐ Check here and continue in the Miscellaneous section starting on page 24 if additional space is needed

5b Upstream (i.e., indirect) ownership as of effective date or operation date: Identify all upstream (i.e., indirect) owners of the facility that both (1) hold at least 10 percent equity interest in the facility, and (2) are electric utilities, as defined in section 3(22) of the Federal Power Act (16 U.S.C. 796(22)), or holding companies, as defined in section 1262(8) of the Public Utility Holding Company Act of 2005 (42 U.S.C. 16451(8)). Also provide the percentage of equity interest in the facility held by such owners. (Note that, because upstream owners may be subsidiaries of one another, total percent equity interest reported may exceed 100 percent.)

Check here if no such upstream owners exist. ☐

	Full legal names of electric utility or holding company upstream owners	% equity interest
1)	VK Clean Energy LLC	100 %
2)	BRP Finance I Holdco LLC	100 %
3)	Broad Reach Power LLC	100 %
4)	ETF Broad Reach Holdings LLC ("ETF")	100 %
5)	EnCap Energy Transition Fund I-A, L.P. (87.5% of ETF)	87.5 %
6)	Yorktown Renewable Energy Infrastructure Fund, L.P. (12.5% of ETF)	12.5 %
7)		%
8)		%
9)		%
10)		%

☐ Check here and continue in the Miscellaneous section starting on page 24 if additional space is needed

5c Identify the facility operator

Broadview Solar LLC

Energy Input

6a Describe the primary energy input: (check one main category and, if applicable, one subcategory)

- ☐ Biomass (specify)
  - ☐ Landfill gas
  - ☐ Manure digester gas
  - ☐ Municipal solid waste
  - ☐ Sewage digester gas
  - ☐ Wood
  - ☐ Other biomass (describe on page 24)
- ☐ Waste (specify type below in line 6b)
- ☒ Renewable resources (specify)
  - ☐ Hydro power - river
  - ☐ Hydro power - tidal
  - ☐ Hydro power - wave
  - ☒ Solar - photovoltaic
  - ☐ Solar - thermal
  - ☐ Wind
  - ☐ Other renewable resource (describe on page 24)
- ☐ Geothermal
- ☐ Fossil fuel (specify)
  - ☐ Coal (not waste)
  - ☐ Fuel oil/diesel
  - ☐ Natural gas (not waste)
  - ☐ Other fossil fuel (describe on page 24)
- ☐ Other (describe on page 24)

6b If you specified "waste" as the primary energy input in line 6a, indicate the type of waste fuel used: (check one)

☐ Waste fuel listed in 18 C.F.R. § 292.202(b) (specify one of the following)

- ☐ Anthracite culm produced prior to July 23, 1985
- ☐ Anthracite refuse that has an average heat content of 6,000 Btu or less per pound and has an average ash content of 45 percent or more
- ☐ Bituminous coal refuse that has an average heat content of 9,500 Btu per pound or less and has an average ash content of 25 percent or more
- ☐ Top or bottom subbituminous coal produced on Federal lands or on Indian lands that has been determined to be waste by the United States Department of the Interior's Bureau of Land Management (BLM) or that is located on non-Federal or non-Indian lands outside of BLM's jurisdiction, provided that the applicant shows that the latter coal is an extension of that determined by BLM to be waste
- ☐ Coal refuse produced on Federal lands or on Indian lands that has been determined to be waste by the BLM or that is located on non- Federal or non-Indian lands outside of BLM's jurisdiction, provided that applicant shows that the latter is an extension of that determined by BLM to be waste
- ☐ Lignite produced in association with the production of montan wax and lignite that becomes exposed as a result of such a mining operation
- ☐ Gaseous fuels (except natural gas and synthetic gas from coal) (describe on page 24)
- ☐ Waste natural gas from gas or oil wells (describe on page 24 how the gas meets the requirements of 18 C.F.R. § 2.400 for waste natural gas; include with your filing any materials necessary to demonstrate compliance with 18 C.F.R. § 2.400)
- ☐ Materials that a government agency has certified for disposal by combustion (describe on page 24)
- ☐ Heat from exothermic reactions (describe on page 24) ☐ Residual heat (describe on page 24)
- ☐ Used rubber tires ☐ Plastic materials ☐ Refinery off-gas ☐ Petroleum coke

☐ Other waste energy input that has little or no commercial value and exists in the absence of the qualifying facility industry (describe in the Miscellaneous section starting on page 24; include a discussion of the fuel's lack of commercial value and existence in the absence of the qualifying facility industry)

6c Provide the average energy input, calculated on a calendar year basis, in terms of Btu/h for the following fossil fuel energy inputs, and provide the related percentage of the total average annual energy input to the facility (18 C.F.R. § 292.202(j)). For any oil or natural gas fuel, use lower heating value (18 C.F.R. § 292.202(m)).

Fuel	Annual average energy input for specified fuel	Percentage of total annual energy input
Natural gas	0 Btu/h	0 %
Oil-based fuels	0 Btu/h	0 %
Coal	0 Btu/h	0 %

Technical Facility Information

Indicate the maximum gross and maximum net electric power production capacity of the facility at the point(s) of delivery by completing the worksheet below. Respond to all items. If any of the parasitic loads and/or losses identified in lines 7b through 7e are negligible, enter zero for those lines.

7a The maximum gross power production capacity at the terminals of the individual generator(s) under the most favorable anticipated design conditions	82,548 kW
7b Parasitic station power used at the facility to run equipment which is necessary and integral to the power production process (boiler feed pumps, fans/blowers, office or maintenance buildings directly related to the operation of the power generating facility, etc.). If this facility includes non-power production processes (for instance, power consumed by a cogeneration facility's thermal host) , do not include any power consumed by the non-power production activities in your reported parasitic station power.	1,245 kW
7c Electrical losses in interconnection transformers	800 kW
7d Electrical losses in AC/DC conversion equipment, if any	0 kW
7e Other interconnection losses in power lines or facilities (other than transformers and AC/DC conversion equipment) between the terminals of the generator(s) and the point of interconnection with the utility	503 kW
7f Total deductions from gross power production capacity = 7b + 7c + 7d + 7e	2,548.0 kW
7g Maximum net power production capacity = 7a - 7f	80,000.0 kW

7h Description of facility and primary components: Describe the facility and its operation. Identify all boilers, heat recovery steam generators, prime movers (any mechanical equipment driving an electric generator), electrical generators, photovoltaic solar equipment, fuel cell equipment and/or other primary power generation equipment used in the facility. Descriptions of components should include (as applicable) specifications of the nominal capacities for mechanical output, electrical output, or steam generation of the identified equipment. For each piece of equipment identified, clearly indicate how many pieces of that type of equipment are included in the plant, and which components are normally operating or normally in standby mode. Provide a description of how the components operate as a system. Applicants for cogeneration facilities do not need to describe operations of systems that are clearly depicted on and easily understandable from a cogeneration facility's attached mass and heat balance diagram; however, such applicants should provide any necessary description needed to understand the sequential operation of the facility depicted in their mass and heat balance diagram. If additional space is needed, continue in the Miscellaneous section starting on page 24.

The Facility will be comprised of a DC coupled solar PV array of 160 MWDC, a 4-hour 50MWDC battery energy storage system (200 MWh) that will be charged entirely with DC power produced by the solar PV array. The solar array and battery energy storage system will reside completely on the DC side of twenty (20) 4MW DC to AC inverters, which limit the total power delivered to point of interconnection under the interconnection agreement with Northwestern Energy to no more than 80 MWAC.
The Solar Facility consists of Single Axis tracking PV Modules.
Likely use of equipment below (the components may change in the future).
471,323 Multi-c-Si Hanwha Q-Cells L-G4.2 340
Total capacity of Solar Facility (not accounting for limitation based on solar inverters): 160.0 MW
DC Degradation: 0%
BESS - Lithium ion energy storage of 50 MWDC with 4-hour storage capability (not accounting for limitation based on solar inverters)
Inverters
20 GE 1500V 4MVA
Unit capacity: 4000 AC kW
Input voltage: 1500 DC V
Total Facility capacity: 80.0 MWAC

Information Required for Small Power Production Facility

If you indicated in line 1k that you are seeking qualifying small power production facility status for your facility, then you must respond to the items on this page. Otherwise, skip pages 11 through 15.

Certification of Compliance with Size Limitations

Pursuant to 18 C.F.R. § 292.204(a), the power production capacity of any small power production facility, together with the power production capacity of any other small power production facilities that use the same energy resource, are owned by the same person(s) or its affiliates, and are located at the same site, may not exceed 80 megawatts. To demonstrate compliance with this size limitation, or to demonstrate that your facility is exempt from this size limitation under the Solar, Wind, Waste, and Geothermal Power Production Incentives Act of 1990 (Pub. L. 101-575, 104 Stat. 2834 (1990) *as amended by* Pub. L. 102-46, 105 Stat. 249 (1991)), respond to lines 8a through 8f below (as applicable).

Electric Generating Equipment

Electrical generating equipment will refer to all boilers, heat recovery steam generators, prime movers (any mechanical equipment driving an electric generator), electrical generators, photovoltaic solar panels, inverters, fuel cell equipment and/or other primary power generation equipment used in the facility, excluding equipment for gathering energy to be used in the facility. Each wind turbine on a wind farm and each solar panel in a solar facility is considered electrical generating equipment because each wind turbine and each solar panel is independently capable of producing electric energy.

Distance

The distance between two facilities is to be measured from the edge of the closest electrical generating equipment for which qualification or recertification is sought to the edge of the nearest electrical generating equipment of the other affiliated small power production qualifying facility using the same energy resource. An affiliated small power production QF located one mile or less from the instant facility is irrebuttably presumed to be at the same site. An affiliated small power production QF located more than one mile and less than 10 miles from the instant facility is rebuttably presumed to be at a separate site. An affiliated small power production QF located 10 miles or more from the instant facility is irrebuttably presumed to be located at a separate site.

8a Identify affiliated small power production QFs located less than 10 miles from the electrical generating equipment of the instant facility that use the same energy resource and are held (with at least a 5 percent equity interest) by any of the entities identified in lines 5a or 5b or their affiliates. Specify the latitude and longitude coordinates for both the applicant and the affiliate small power production QF based on the nearest electrical generating equipment for each facility. Report coordinates in degrees (to three decimal places) as a positive number for east and north or a negative number for west and south. Use the following formula to convert to decimal degrees from degrees, minutes and seconds: decimal degrees = degrees + (minutes/60) + (seconds/3600). See the "Geographic Coordinates" section on page 5 for help obtaining coordinates. The distances for each facility listed below will be automatically calculated from the reported coordinates. See **www.ferc.gov/QF** for more information on how this form calculates distance.

Check here if no such facilities exist. ☒

	Facility location (city or county, state)	Root docket # (if any)	Maximum net power production capacity	Common owner(s)
1)		QF -	kW	

Coordinates (in degrees) and Distance (miles):

Closest electrical generating equipment for applicant's facility:

Latitude Choose +/- Longitude Choose +/-

Closest electrical generating equipment for affiliate's facility:

Latitude Choose +/- Longitude Choose +/-

Distance: 0 miles

Certification of Compliance with Size Limitations (continued)

8a Continued

2)

Facility location (city or county, state)	Root docket # (if any)	Maximum net power production capacity	Common owner(s)
	QF -	kW	

Coordinates (in degrees) and Distance (miles):

Closest electrical generating equipment for applicant's facility:

Latitude Choose +/- Longitude Choose +/-

Closest electrical generating equipment for affiliate's facility:

Latitude Choose +/- Longitude Choose +/-

Distance: 0 miles

3)

Facility location (city or county, state)	Root docket # (if any)	Maximum net power production capacity	Common owner(s)
	QF -	kW	

Coordinates (in degrees) and Distance (miles):

Closest electrical generating equipment for applicant's facility:

Latitude Choose +/- Longitude Choose +/-

Closest electrical generating equipment for affiliate's facility:

Latitude Choose +/- Longitude Choose +/-

Distance: 0 miles

4)

Facility location (city or county, state)	Root docket # (if any)	Maximum net power production capacity	Common owner(s)
	QF -	kW	

Coordinates (in degrees) and Distance (miles):

Closest electrical generating equipment for applicant's facility:

Latitude Choose +/- Longitude Choose +/-

Closest electrical generating equipment for affiliate's facility:

Latitude Choose +/- Longitude Choose +/-

Distance: 0 miles

5)

Facility location (city or county, state)	Root docket # (if any)	Maximum net power production capacity	Common owner(s)
	QF -	kW	

Coordinates (in degrees) and Distance (miles):

Closest electrical generating equipment for applicant's facility:

Latitude Choose +/- Longitude Choose +/-

Closest electrical generating equipment for affiliate's facility:

Latitude Choose +/- Longitude Choose +/-

Distance: 0 miles

Certification of Compliance with Size Limitations (continued)

8a Continued

6)

Facility location (city or county, state) | Root docket # (if any) | Maximum net power production capacity | Common owner(s)

QF - kW

Coordinates (in degrees) and Distance (miles):

Closest electrical generating equipment for applicant's facility:

Latitude Choose +/- Longitude Choose +/-

Closest electrical generating equipment for affiliate's facility:

Latitude Choose +/- Longitude Choose +/- Distance 0 miles

7)

Facility location (city or county, state) | Root docket # (if any) | Maximum net power production capacity | Common owner(s)

QF - kW

Coordinates (in degrees) and Distance (miles):

Closest electrical generating equipment for applicant's facility:

Latitude Choose +/- Longitude Choose +/-

Closest electrical generating equipment for affiliate's facility:

Latitude Choose +/- Longitude Choose +/- Distance 0 miles

8)

Facility location (city or county, state) | Root docket # (if any) | Maximum net power production capacity | Common owner(s)

QF - kW

Coordinates (in degrees) and Distance (miles):

Closest electrical generating equipment for applicant's facility:

Latitude Choose +/- Longitude Choose +/-

Closest electrical generating equipment for affiliate's facility:

Latitude Choose +/- Longitude Choose +/- Distance 0 miles

9)

Facility location (city or county, state) | Root docket # (if any) | Maximum net power production capacity | Common owner(s)

QF - kW

Coordinates (in degrees) and Distance (miles):

Closest electrical generating equipment for applicant's facility:

Latitude Choose +/- Longitude Choose +/-

Closest electrical generating equipment for affiliate's facility:

Latitude Choose +/- Longitude Choose +/- Distance 0 miles

Certification of Compliance with Size Limitations (continued)

8a Continued

10)

Facility location (city or county, state)	Root docket # (if any)	Maximum net power production capacity	Common owner(s)
	QF -	kW	

Coordinates (in degrees) and Distance (miles):

Closest electrical generating equipment for applicant's facility:

Latitude Choose +/- Longitude Choose +/-

Closest electrical generating equipment for affiliate's facility:

Latitude Choose +/- Longitude Choose +/- Distance 0 miles

☐ Check here and continue in the Miscellaneous section starting on page 24 if additional space is needed. Use the calculator below below to calculate distances based on facility coordinates.

Distance Calculator Specify the latitude and longitude coordinates for both the applicant and the affiliate small power production QF based on the nearest electrical generating equipment for each facility. Report coordinates in degrees (to three decimal places) as a positive number for east and north or a negative number for west and south. Use the following formula to convert to decimal degrees from degrees, minutes and seconds: decimal degrees = degrees + (minutes/60) + (seconds/3600). See the "Geographic Coordinates" section on page 5 for help obtaining coordinates. The distances for each facility listed below will be automatically calculated from the reported coordinates. See **www.ferc.gov/QF** for more information on how this form calculates distance.

Closest electrical generating equipment for applicant's facility (degrees):

Latitude Choose +/- Longitude Choose +/-

Closest electrical generating equipment for affiliate's facility (degrees): Distance

Latitude Choose +/- Longitude Choose +/- 0 miles

8b You have the option below to assert preemptively that your facility is at a separate site from affiliated small power production QFs using the same energy resource more than one mile but less than 10 miles from your facility. If additional space is needed, continue in the Miscellaneous section starting on page 24.

Pursuant to 18 C.F.R. § 292.204(a)(2)(i)(C), if affiliated small power producer qualifying facilities are more than one mile but less than 10 miles apart there is a rebuttable presumption that they are at separate sites. The factors listed below are examples of the factors that the Commission may consider in deciding whether small power production facilities that are owned by the same person(s) or its affiliates are located "at the same site": (1) *physical characteristics*, including such common characteristics as: infrastructure, property ownership, property leases, control facilities, access and easements, interconnection agreements, interconnection facilities up to the point of interconnection to the distribution or transmission system, collector systems or facilities, points of interconnection, motive force or fuel source, off-take arrangements, connections to the electrical grid, evidence of shared control systems, common permitting and land leasing, and shared step-up transformers; and (2) *ownership/other characteristics*, including such characteristics as whether the facilities in question are: owned or controlled by the same person(s) or affiliated persons(s), operated and maintained by the same or affiliated entity(ies), selling to the same electric utility, using common debt or equity financing, constructed by the same entity within 12 months, managing a power sales agreement executed within 12 months of a similar and affiliated small power production qualifying facility (continued next page)...

Certification of Compliance with Size Limitations (continued)

8b Continued

... (continued from previous page) in the same location, placed into service within 12 months of an affiliated small power production QF project's commercial operation date as specified in the power sales agreement, or sharing engineering or procurement contracts.

8c The Solar, Wind, Waste, and Geothermal Power Production Incentives Act of 1990 (Incentives Act) provides exemption from the size limitations in 18 C.F.R. § 292.204(a) for certain facilities that were certified prior to 1995. Are you seeking exemption from the size limitations in 18 C.F.R. § 292.204(a) by virtue of the Incentives Act?

☐ Yes (continue at line 8d below) ☒ No (skip lines 8d through 8f)

8d Was the original notice of self-certification or application for Commission certification of the facility filed on or before December 31, 1994? Yes ☐ No ☐

8e Did construction of the facility commence on or before December 31, 1999? Yes ☐ No ☐

8f If you answered No in line 8e, indicate whether reasonable diligence was exercised toward the completion of the facility, taking into account all factors relevant to construction? Yes ☐ No ☐

If you answered Yes, provide a brief narrative explanation in the Miscellaneous section starting on page 24 of the construction timeline (in particular, describe why construction started so long after the facility was certified) and the diligence exercised toward completion of the facility.

Certification of Compliance with Fuel Use Requirements

Pursuant to 18 C.F.R. § 292.204(b), qualifying small power production facilities may use fossil fuels, in minimal amounts, for only the following purposes: ignition; start-up; testing; flame stabilization; control use; alleviation or prevention of unanticipated equipment outages; and alleviation or prevention of emergencies, directly affecting the public health, safety, or welfare, which would result from electric power outages. The amount of fossil fuels used for these purposes may not exceed 25 percent of the total energy input of the facility during the 12-month period beginning with the date the facility first produces electric energy or any calendar year thereafter.

9a Certification of compliance with 18 C.F.R. § 292.204(b) with respect to uses of fossil fuel:

☒ Applicant certifies that the facility will use fossil fuels *exclusively* for the purposes listed above.

9b Certification of compliance with 18 C.F.R. § 292.204(b) with respect to amount of fossil fuel used annually:

☒ Applicant certifies that the amount of fossil fuel used at the facility will not, in aggregate, exceed 25 percent of the total energy input of the facility during the 12-month period beginning with the date the facility first produces electric energy or any calendar year thereafter.

Information Required for Cogeneration Facility

If you indicated in line 1k that you are seeking qualifying cogeneration facility status for your facility, then you must respond to the items on pages 16 through 18. Otherwise, skip pages 16 through 18.

General Cogeneration Information

Pursuant to 18 C.F.R. § 292.202(c), a cogeneration facility produces electric energy and forms of useful thermal energy (such as heat or steam) used for industrial, commercial, heating, or cooling purposes, through the sequential use of energy. Pursuant to 18 C.F.R. § 292.202(s), "sequential use" of energy means the following: (1) for a topping-cycle cogeneration facility, the use of reject heat from a power production process in sufficient amounts in a thermal application or process to conform to the requirements of the operating standard contained in 18 C.F.R. § 292.205(a); or (2) for a bottoming-cycle cogeneration facility, the use of at least some reject heat from a thermal application or process for power production.

10a What type(s) of cogeneration technology does the facility represent? (check all that apply)

☐ Topping-cycle cogeneration ☐ Bottoming-cycle cogeneration

10b To help demonstrate the sequential operation of the cogeneration process, and to support compliance with other requirements such as the operating and efficiency standards, include with your filing a mass and heat balance diagram depicting average annual operating conditions. This diagram must include certain items and meet certain requirements, as described below. You must check next to the description of each requirement below to certify that you have complied with these requirements.

Check to certify compliance with indicated requirement	Requirement
☐	Diagram must show orientation within system piping and/or ducts of all prime movers, heat recovery steam generators, boilers, electric generators, and condensers (as applicable), as well as any other primary equipment relevant to the cogeneration process.
☐	Any average annual values required to be reported in lines 10b, 12a, 13a, 13b, 13d, 13f, 14a, 15b, 15d and/or 15f must be computed over the anticipated hours of operation.
☐	Diagram must specify all fuel inputs by fuel type and average annual rate in Btu/h. Fuel for supplementary firing should be specified separately and clearly labeled. All specifications of fuel inputs should use lower heating values.
☐	Diagram must specify average gross electric output in kW or MW for each generator.
☐	Diagram must specify average mechanical output (that is, any mechanical energy taken off of the shaft of the prime movers for purposes not directly related to electric power generation) in horsepower, if any. Typically, a cogeneration facility has no mechanical output.
☐	At each point for which working fluid flow conditions are required to be specified (see below), such flow condition data must include mass flow rate (in lb/h or kg/s), temperature (in °F, R, °C or K), absolute pressure (in psia or kPa) and enthalpy (in Btu/lb or kJ/kg). Exception: For systems where the working fluid is *liquid only* (no vapor at any point in the cycle) and where the type of liquid and specific heat of that liquid are clearly indicated on the diagram or in the Miscellaneous section starting on page 24, only mass flow rate and temperature (not pressure and enthalpy) need be specified. For reference, specific heat at standard conditions for pure liquid water is approximately 1.002 Btu/(lb*R) or 4.195 kJ/(kg*K).
☐	Diagram must specify working fluid flow conditions at input to and output from each steam turbine or other expansion turbine or back-pressure turbine.
☐	Diagram must specify working fluid flow conditions at delivery to and return from each thermal application.
☐	Diagram must specify working fluid flow conditions at make-up water inputs.

EPAct 2005 Requirements for Fundamental Use of Energy Output from Cogeneration Facilities

EPAct 2005 cogeneration facilities: The Energy Policy Act of 2005 (EPAct 2005) established a new section 210(n) of the Public Utility Regulatory Policies Act of 1978 (PURPA), 16 USC 824a-3(n), with additional requirements for any qualifying cogeneration facility that (1) is seeking to sell electric energy pursuant to section 210 of PURPA and (2) was either not a cogeneration facility on August 8, 2005, or had not filed a self-certification or application for Commission certification of QF status on or before February 1, 2006. These requirements were implemented by the Commission in 18 C.F.R. § 292.205(d). Complete the lines below, carefully following the instructions, to demonstrate whether these additional requirements apply to your cogeneration facility and, if so, whether your facility complies with such requirements.

11a Was your facility operating as a qualifying cogeneration facility on or before August 8, 2005? Yes ☐ No ☐

11b Was the initial filing seeking certification of your facility (whether a notice of self-certification or an application for Commission certification) filed on or before February 1, 2006? Yes ☐ No ☐

If the answer to either line 11a or 11b is Yes, then continue at line 11c below. Otherwise, if the answers to both lines 11a and 11b are No, skip to line 11e below.

11c With respect to the design and operation of the facility, have any changes been implemented on or after February 2, 2006 that affect general plant operation, affect use of thermal output, and/or increase net power production capacity from the plant's capacity on February 1, 2006?

☐ Yes (continue at line 11d below)

☐ No. Your facility is not subject to the requirements of 18 C.F.R. § 292.205(d) at this time. However, it may be subject to to these requirements in the future if changes are made to the facility. At such time, the applicant would need to recertify the facility to determine eligibility. Skip lines 11d through 11j.

11d Does the applicant contend that the changes identified in line 11c are not so significant as to make the facility a "new" cogeneration facility that would be subject to the 18 C.F.R. § 292.205(d) cogeneration requirements?

☐ Yes. Provide in the Miscellaneous section starting on page 24 a description of any relevant changes made to the facility (including the purpose of the changes) and a discussion of why the facility should not be considered a "new" cogeneration facility in light of these changes. Skip lines 11e through 11j.

☐ No. Applicant stipulates to the fact that it is a "new" cogeneration facility (for purposes of determining the applicability of the requirements of 18 C.F.R. § 292.205(d)) by virtue of modifications to the facility that were initiated on or after February 2, 2006. Continue below at line 11e.

11e Will electric energy from the facility be sold pursuant to section 210 of PURPA?

☐ Yes. The facility is an EPAct 2005 cogeneration facility. You must demonstrate compliance with 18 C.F.R. § 292.205(d)(2) by continuing at line 11f below.

☐ No. Applicant certifies that energy will *not* be sold pursuant to section 210 of PURPA. Applicant also certifies its understanding that it must recertify its facility in order to determine compliance with the requirements of 18 C.F.R. § 292.205(d) *before* selling energy pursuant to section 210 of PURPA in the future. Skip lines 11f through 11j.

11f Is the net power production capacity of your cogeneration facility, as indicated in line 7g above, less than or equal to 5,000 kW?

☐ Yes, the net power production capacity is less than or equal to 5,000 kW. 18 C.F.R. § 292.205(d)(4) provides a rebuttable presumption that cogeneration facilities of 5,000 kW and smaller capacity comply with the requirements for fundamental use of the facility's energy output in 18 C.F.R. § 292.205(d)(2). Applicant certifies its understanding that, should the power production capacity of the facility increase above 5,000 kW, then the facility must be recertified to (among other things) demonstrate compliance with 18 C.F.R. § 292.205(d)(2). Skip lines 11g through 11j.

☐ No, the net power production capacity is greater than 5,000 kW. Demonstrate compliance with the requirements for fundamental use of the facility's energy output in 18 C.F.R. § 292.205(d)(2) by continuing on the next page at line 11g.

EPAct 2005 Requirements for Fundamental Use of Energy Output from Cogeneration Facilities (continued)

Lines 11g through 11k below guide the applicant through the process of demonstrating compliance with the requirements for "fundamental use" of the facility's energy output. 18 C.F.R. § 292.205(d)(2). Only respond to the lines on this page if the instructions on the previous page direct you to do so. Otherwise, skip this page.

18 C.F.R. § 292.205(d)(2) requires that the electrical, thermal, chemical and mechanical output of an EPAct 2005 cogeneration facility is used fundamentally for industrial, commercial, residential or institutional purposes and is not intended fundamentally for sale to an electric utility, taking into account technological, efficiency, economic, and variable thermal energy requirements, as well as state laws applicable to sales of electric energy from a qualifying facility to its host facility. If you were directed on the previous page to respond to the items on this page, then your facility is an EPAct 2005 cogeneration facility that is subject to this "fundamental use" requirement.

The Commission's regulations provide a two-pronged approach to demonstrating compliance with the requirements for fundamental use of the facility's energy output. First, the Commission has established in 18 C.F.R. § 292.205(d)(3) a "fundamental use test" that can be used to demonstrate compliance with 18 C.F.R. § 292.205(d)(2). Under the fundamental use test, a facility is considered to comply with 18 C.F.R. § 292.205(d)(2) if at least 50 percent of the facility's total annual energy output (including electrical, thermal, chemical and mechanical energy output) is used for industrial, commercial, residential or institutional purposes.

Second, an applicant for a facility that does not pass the fundamental use test may provide a narrative explanation of and support for its contention that the facility nonetheless meets the requirement that the electrical, thermal, chemical and mechanical output of an EPAct 2005 cogeneration facility is used fundamentally for industrial, commercial, residential or institutional purposes and is not intended fundamentally for sale to an electric utility, taking into account technological, efficiency, economic, and variable thermal energy requirements, as well as state laws applicable to sales of electric energy from a qualifying facility to its host facility.

Complete lines 11g through 11j below to determine compliance with the fundamental use test in 18 C.F.R. § 292.205(d)(3). Complete lines 11g through 11j *even if you do not intend to rely upon the fundamental use test to demonstrate compliance with 18 C.F.R. § 292.205(d)(2)*.

11g Amount of electrical, thermal, chemical and mechanical energy output (net of internal generation plant losses and parasitic loads) expected to be used annually for industrial, commercial, residential or institutional purposes and not sold to an electric utility	MWh
11h Total amount of electrical, thermal, chemical and mechanical energy expected to be sold to an electric utility	MWh
11i Percentage of total annual energy output expected to be used for industrial, commercial, residential or institutional purposes and not sold to a utility = 100 * 11g /(11g + 11h)	0 %

11j Is the response in line 11i greater than or equal to 50 percent?

☐ Yes. Your facility complies with 18 C.F.R. § 292.205(d)(2) by virtue of passing the fundamental use test provided in 18 C.F.R. § 292.205(d)(3). Applicant certifies its understanding that, if it is to rely upon passing the fundamental use test as a basis for complying with 18 C.F.R. § 292.205(d)(2), then the facility must comply with the fundamental use test both in the 12-month period beginning with the date the facility first produces electric energy, and in all subsequent calendar years.

☐ No. Your facility does not pass the fundamental use test. Instead, you must provide in the Miscellaneous section starting on page 24 a narrative explanation of and support for why your facility meets the requirement that the electrical, thermal, chemical and mechanical output of an EPAct 2005 cogeneration facility is used fundamentally for industrial, commercial, residential or institutional purposes and is not intended fundamentally for sale to an electric utility, taking into account technological, efficiency, economic, and variable thermal energy requirements, as well as state laws applicable to sales of electric energy from a QF to its host facility. Applicants providing a narrative explanation of why their facility should be found to comply with 18 C.F.R. § 292.205(d)(2) in spite of non-compliance with the fundamental use test may want to review paragraphs 47 through 61 of Order No. 671 (accessible from the Commission's QF website at www.ferc.gov/QF), which provide discussion of the facts and circumstances that may support their explanation. Applicant should also note that the percentage reported above will establish the standard that that facility must comply with, both for the 12-month period beginning with the date the facility first produces electric energy, and in all subsequent calendar years. *See* Order No. 671 at paragraph 51. As such, the applicant should make sure that it reports appropriate values on lines 11g and 11h above to serve as the relevant annual standard, taking into account expected variations in production conditions.

Information Required for Topping-Cycle Cogeneration Facility

If you indicated in line 10a that your facility represents topping-cycle cogeneration technology, then you must respond to the items on pages 19 and 20. Otherwise, skip pages 19 and 20.

Usefulness of Topping-Cycle Thermal Output

The thermal energy output of a topping-cycle cogeneration facility is the net energy made available to an industrial or commercial process or used in a heating or cooling application. Pursuant to sections 292.202(c), (d) and (h) of the Commission's regulations (18 C.F.R. §§ 292.202(c), (d) and (h)), the thermal energy output of a qualifying topping-cycle cogeneration facility must be useful. In connection with this requirement, describe the thermal output of the topping-cycle cogeneration facility by responding to lines 12a and 12b below.

12a Identify and describe each thermal host, and specify the annual average rate of thermal output made available to each host for each use. For hosts with multiple uses of thermal output, provide the data for each use *in separate rows*.

	Name of entity (thermal host) taking thermal output	Thermal host's relationship to facility; Thermal host's use of thermal output	Average annual rate of thermal output attributable to use (net of heat contained in process return or make-up water)
1)		Select thermal host's relationship to facility Select thermal host's use of thermal output	Btu/h
2)		Select thermal host's relationship to facility Select thermal host's use of thermal output	Btu/h
3)		Select thermal host's relationship to facility Select thermal host's use of thermal output	Btu/h
4)		Select thermal host's relationship to facility Select thermal host's use of thermal output	Btu/h
5)		Select thermal host's relationship to facility Select thermal host's use of thermal output	Btu/h
6)		Select thermal host's relationship to facility Select thermal host's use of thermal output	Btu/h

☐ Check here and continue in the Miscellaneous section starting on page 24 if additional space is needed

12b Demonstration of usefulness of thermal output: At a minimum, provide a brief description of each use of the thermal output identified above. In some cases, this brief description is sufficient to demonstrate usefulness. However, if your facility's use of thermal output is not common, and/or if the usefulness of such thermal output is not reasonably clear, then you must provide additional details as necessary to demonstrate usefulness. Your application may be rejected and/or additional information may be required if an insufficient showing of usefulness is made. (Exception: If you have previously received a Commission certification approving a specific use of thermal output related to the instant facility, then you need only provide a brief description of that use and a reference by date and docket number to the order certifying your facility with the indicated use. Such exemption may not be used if any change creates a material deviation from the previously authorized use.) If additional space is needed, continue in the Miscellaneous section starting on page 24.

Topping-Cycle Operating and Efficiency Value Calculation

Applicants for facilities representing topping-cycle technology must demonstrate compliance with the topping-cycle operating standard and, if applicable, efficiency standard. Section 292.205(a)(1) of the Commission's regulations (18 C.F.R. § 292.205(a)(1)) establishes the operating standard for topping-cycle cogeneration facilities: the useful thermal energy output must be no less than 5 percent of the total energy output. Section 292.205(a)(2) (18 C.F.R. § 292.205(a)(2)) establishes the efficiency standard for topping-cycle cogeneration facilities for which installation commenced on or after March 13, 1980: the useful power output of the facility plus one-half the useful thermal energy output must (A) be no less than 42.5 percent of the total energy input of natural gas and oil to the facility; and (B) if the useful thermal energy output is less than 15 percent of the total energy output of the facility, be no less than 45 percent of the total energy input of natural gas and oil to the facility. To demonstrate compliance with the topping-cycle operating and/or efficiency standards, or to demonstrate that your facility is exempt from the efficiency standard based on the date that installation commenced, respond to lines 13a through 13l below.

If you indicated in line 10a that your facility represents *both* topping-cycle and bottoming-cycle cogeneration technology, then respond to lines 13a through 13l below considering only the energy inputs and outputs attributable to the topping-cycle portion of your facility. Your mass and heat balance diagram must make clear which mass and energy flow values and system components are for which portion (topping or bottoming) of the cogeneration system.

13a Indicate the annual average rate of useful thermal energy output made available to the host(s), net of any heat contained in condensate return or make-up water	Btu/h
13b Indicate the annual average rate of net electrical energy output	kW
13c Multiply line 13b by 3,412 to convert from kW to Btu/h	0 Btu/h
13d Indicate the annual average rate of mechanical energy output taken directly off of the shaft of a prime mover for purposes not directly related to power production (this value is usually zero)	hp
13e Multiply line 13d by 2,544 to convert from hp to Btu/h	0 Btu/h
13f Indicate the annual average rate of energy input from natural gas and oil	Btu/h
13g Topping-cycle operating value = 100 * 13a / (13a + 13c + 13e)	0 %
13h Topping-cycle efficiency value = 100 * (0.5*13a + 13c + 13e) / 13f	0 %

13i Compliance with operating standard: Is the operating value shown in line 13g greater than or equal to 5%?

☐ Yes (complies with operating standard) ☐ No (does not comply with operating standard)

13j Did installation of the facility in its current form commence on or after March 13, 1980?

☐ Yes. Your facility is subject to the efficiency requirements of 18 C.F.R. § 292.205(a)(2). Demonstrate compliance with the efficiency requirement by responding to line 13k or 13l, as applicable, below.

☐ No. Your facility is exempt from the efficiency standard. Skip lines 13k and 13l.

13k Compliance with efficiency standard (for low operating value): If the operating value shown in line 13g is less than 15%, then indicate below whether the efficiency value shown in line 13h greater than or equal to 45%:

☐ Yes (complies with efficiency standard) ☐ No (does not comply with efficiency standard)

13l Compliance with efficiency standard (for high operating value): If the operating value shown in line 13g is greater than or equal to 15%, then indicate below whether the efficiency value shown in line 13h is greater than or equal to 42.5%:

☐ Yes (complies with efficiency standard) ☐ No (does not comply with efficiency standard)

Information Required for Bottoming-Cycle Cogeneration Facility

If you indicated in line 10a that your facility represents bottoming-cycle cogeneration technology, then you must respond to the items on pages 21 and 22. Otherwise, skip pages 21 and 22.

Usefulness of Bottoming-Cycle Thermal Output

The thermal energy output of a bottoming-cycle cogeneration facility is the energy related to the process(es) from which at least some of the reject heat is then used for power production. Pursuant to sections 292.202(c) and (e) of the Commission's regulations (18 C.F.R. § 292.202(c) and (e)) , the thermal energy output of a qualifying bottoming-cycle cogeneration facility must be useful. In connection with this requirement, describe the process(es) from which at least some of the reject heat is used for power production by responding to lines 14a and 14b below.

14a Identify and describe each thermal host and each bottoming-cycle cogeneration process engaged in by each host. For hosts with multiple bottoming-cycle cogeneration processes, provide the data for each process *in separate rows*.

	Name of entity (thermal host) performing the process from which at least some of the reject heat is used for power production	Thermal host's relationship to facility; Thermal host's process type	Has the energy input to the thermal host been augmented for purposes of increasing power production capacity? (if Yes, describe on p. 24)
1)		Select thermal host's relationship to facility Select thermal host's process type	Yes ☐ No ☐
2)		Select thermal host's relationship to facility Select thermal host's process type	Yes ☐ No ☐
3)		Select thermal host's relationship to facility Select thermal host's process type	Yes ☐ No ☐

☐ Check here and continue in the Miscellaneous section starting on page 24 if additional space is needed

14b Demonstration of usefulness of thermal output: At a minimum, provide a brief description of each process identified above. In some cases, this brief description is sufficient to demonstrate usefulness. However, if your facility's process is not common, and/or if the usefulness of such thermal output is not reasonably clear, then you must provide additional details as necessary to demonstrate usefulness. Your application may be rejected and/or additional information may be required if an insufficient showing of usefulness is made. (Exception: If you have previously received a Commission certification approving a specific bottoming-cycle process related to the instant facility, then you need only provide a brief description of that process and a reference by date and docket number to the order certifying your facility with the indicated process. Such exemption may not be used if any material changes to the process have been made.) If additional space is needed, continue in the Miscellaneous section starting on page 24.

Bottoming-Cycle Operating and Efficiency Value Calculation

Applicants for facilities representing bottoming-cycle technology and for which installation commenced on or after March 13, 1990 must demonstrate compliance with the bottoming-cycle efficiency standards. Section 292.205(b) of the Commission's regulations (18 C.F.R. § 292.205(b)) establishes the efficiency standard for bottoming-cycle cogeneration facilities: the useful power output of the facility must be no less than 45 percent of the energy input of natural gas and oil for supplementary firing. To demonstrate compliance with the bottoming-cycle efficiency standard (if applicable), or to demonstrate that your facility is exempt from this standard based on the date that installation of the facility began, respond to lines 15a through 15h below.

If you indicated in line 10a that your facility represents *both* topping-cycle and bottoming-cycle cogeneration technology, then respond to lines 15a through 15h below considering only the energy inputs and outputs attributable to the bottoming-cycle portion of your facility. Your mass and heat balance diagram must make clear which mass and energy flow values and system components are for which portion of the cogeneration system (topping or bottoming).

15a Did installation of the facility in its current form commence on or after March 13, 1980?

☐ Yes. Your facility is subject to the efficiency requirement of 18 C.F.R. § 292.205(b). Demonstrate compliance with the efficiency requirement by responding to lines 15b through 15h below.

☐ No. Your facility is exempt from the efficiency standard. Skip the rest of page 22.

15b Indicate the annual average rate of net electrical energy output	kW
15c Multiply line 15b by 3,412 to convert from kW to Btu/h	0 Btu/h
15d Indicate the annual average rate of mechanical energy output taken directly off of the shaft of a prime mover for purposes not directly related to power production (this value is usually zero)	hp
15e Multiply line 15d by 2,544 to convert from hp to Btu/h	0 Btu/h
15f Indicate the annual average rate of supplementary energy input from natural gas or oil	Btu/h
15g Bottoming-cycle efficiency value = 100 * (15c + 15e) / 15f	0 %

15h Compliance with efficiency standard: Indicate below whether the efficiency value shown in line 15g is greater than or equal to 45%:

☐ Yes (complies with efficiency standard) ☐ No (does not comply with efficiency standard)

Certificate of Completeness, Accuracy and Authority

Applicant must certify compliance with and understanding of filing requirements by checking next to each item below and signing at the bottom of this section. Forms with incomplete Certificates of Completeness, Accuracy and Authority will be rejected by the Secretary of the Commission.

Signer identified below certifies the following: (check all items and applicable subitems)

☒ He or she has read the filing, including any information contained in any attached documents, such as cogeneration mass and heat balance diagrams, and any information contained in the Miscellaneous section starting on page 24, and knows its contents.

☒ He or she has provided all of the required information for certification, and the provided information is true as stated, to the best of his or her knowledge and belief.

☒ He or she possess full power and authority to sign the filing; as required by Rule 2005(a)(3) of the Commission's Rules of Practice and Procedure (18 C.F.R. § 385.2005(a)(3)), he or she is one of the following: (check one)

- ☐ The person on whose behalf the filing is made
- ☒ An officer of the corporation, trust, association, or other organized group on behalf of which the filing is made
- ☐ An officer, agent, or employe of the governmental authority, agency, or instrumentality on behalf of which the filing is made
- ☐ A representative qualified to practice before the Commission under Rule 2101 of the Commission's Rules of Practice and Procedure (18 C.F.R. § 385.2101) and who possesses authority to sign

☒ He or she has reviewed all automatic calculations and agrees with their results, unless otherwise noted in the Miscellaneous section starting on page 24.

☒ He or she has provided a copy of this Form 556 and all attachments to the utilities with which the facility will interconnect and transact (see lines 4a through 4d), as well as to the regulatory authorities of the states in which the facility and those utilities reside. See the Required Notice to Public Utilities and State Regulatory Authorities section on page 4 for more information.

Provide your signature, address and signature date below. Rule 2005(c) of the Commission's Rules of Practice and Procedure (18 C.F.R. § 385.2005(c)) provides that persons filing their documents electronically may use typed characters representing his or her name to sign the filed documents. A person filing this document electronically should sign (by typing his or her name) in the space provided below.

Your Signature	Your address	Date
Steve Vavrik	333 Clay Street, Suite 2800 Houston, TX 77002	7/27/2021

Audit Notes

Commission Staff Use Only:	☐

Miscellaneous

Use this space to provide any information for which there was not sufficient space in the previous sections of the form to provide. For each such item of information *clearly identify the line number that the information belongs to.* You may also use this space to provide any additional information you believe is relevant to the certification of your facility.

Your response below is not limited to one page. Additional page(s) will automatically be inserted into this form if the length of your response exceeds the space on this page. Use as many pages as you require.

Line 1l:
The purpose of this filing is to report changes in line 4c - utility purchasing the useful electric power output, and line 5b - upstream ownership.

Line 1m:
The instant facility complies with the Commission's regulations, but has special circumstances, such as the employment of unique or innovative technologies not contemplated by the structure of this form, that make the demonstration of compliance via this form difficult or impossible. As described in line 7h above, the facility is comprised of a DC coupled solar PV array of 160 MWDC, a 4-hour 50 MWDC battery energy storage system (200 MWh) that will be charged entirely with DC power produced by the solar PV array. The solar array and battery energy storage system reside completely on the DC side of twenty (20) 4MW DC to AC inverters which limit the total power delivered to point of interconnection under the interconnection agreement to no more than 80 MWAC. Consistent with the Commission's ruling in Broadview Solar, LLC, 174 FERC ¶ 61,199, order on reh'g, 175 FERC ¶ 61,228 (2021), the Broadview Solar project qualifies for QF status because its net power production capacity, as measured at the point of interconnection, will not exceed 80 MW.

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, DC 20426

OFFICE OF ENERGY MARKET REGULATION

In Reply Refer To:
Broadview Solar II LLC
Docket No. QF17-455-000

August 2, 2017

Broadview Solar II LLC
1612 E Bainbridge Road
Sandy, UT 84092

Attention: Ros Rocco Vrba

Reference: Form No. 556

Dear Mr. Vrba:

On December 16, 2016, Broadview Solar II LLC (Broadview Solar) electronically submitted a Form No. 556 for Certification of Qualifying Facility (QF) Status for Small Power Production or Cogeneration Facility. Broadview Solar's Form No. 556 is for a solar photovoltaic generator with a net power production capacity of 300 MW located in Broadview, Montana (the Facility). Broadview Solar's submittal does not comply with section 292.204(a) of the Commission's regulations[1] because the Facility exceeds the maximum allowable net power production capacity of 80 MW for small power production facilities.[2] Through email communications with Commission staff on June 13 and 22, 2017, you indicated that this submittal was mistakenly made for a 300 MW project that does not qualify for QF status.

Accordingly, because your submittal does not comply with the requirements of

[1] 18 C.F.R. § 292.204(a) (2016).

[2] There are limited exceptions to the 80 MW size limit for small power production facilities that apply to certain facilities certified prior to 1995; however, your submittal does not claim these exceptions. *See* 18 C.F.R. § 292.204(a)(4) (2016).

section 292.207(a) of the Commission's regulations,[3] which references section 292.203 and, in turn, section 292.204(a),[4] it is rejected pursuant to the authority delegated to the Director, Division of Electric Power Regulation under section 375.307(a)(6)(ii) of the Commission's regulations.[5] This rejection is without prejudice to Broadview Solar submitting a future self-certification should the Facility meet all applicable Commission regulations for obtaining QF status.

Sincerely,

Penny S. Murrell, Director
Division of Electric Power Regulation – Central

[3] 18 C.F.R. § 292.207(a) (2016).

[4] 18 C.F.R. §§ 292.203, 292.204(a) (2016).

[5] 18 C.F.R. § 375.307(a)(6)(ii) (2016).

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system on April 12, 2022. Participants in the case will be served by the appellate CM/ECF system.

/s/ Jared B. Fish
Jared B. Fish
Attorney

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E-mail: Jared.Fish@ferc.gov