

D.C. Circuit Upholds FERC's Broadview of PURPA

by Brian Bell and Zev Simpser

On February 14, 2023, the D.C. Circuit Court of Appeals upheld FERC's broad definition of qualifying facilities ("QF") under the Public Utility Regulatory Policies Act of 1978 ("PURPA").¹ In *Broadview Solar, LLC*, 174 FERC ¶ 61,199 (2021), FERC reiterated its expansive definition of "power production capacity." FERC interprets "power production capacity" to include facilities with a nameplate capacity above the PURPA QF limit of 80 megawatts ("MW") if the facility is unable to inject more than 80 MW of power past the point of interconnection at any time—commonly referred to as "send out" capacity.² In a divided panel opinion, the D.C. Circuit concluded that FERC's interpretation of PURPA is entitled to deference and that FERC did not act arbitrarily or capriciously in its interpretation.

The majority opinion specifically concluded that FERC's interpretations of "power production capacity" as the "facility's net output to the electric utility" and "facility" as all of the QF's "component parts as they work together as a whole" were "eminently reasonable."³ Since PURPA "was intended to encourage the development of . . . small power production" and alternative energy sources, FERC's interpretation expands the ability of intermittent, renewable power sources to meet the power-production-capacity limitation consistent with this goal.⁴ The court also noted that, because PURPA's mandatory purchase requirement only applies to "grid-useable power," tying capacity to the power available to the grid harmonized the two positions.⁵

In highlighting the unique nature of the facility in question—a 160 MW solar array with a battery energy storage system with 50 MW of capacity—the court noted that because the batteries only store DC power, they could not be considered a separate facility because the batteries "cannot deliver any useable power to the grid."⁶ The Court further emphasized that FERC's emphasis on instantaneous power output, and not net output, adhered to the statutory language.

Although the D.C. Circuit upheld FERC's broad view of "power production capacity," FERC's interpretation is not limitless. For example, FERC's rule, as upheld by the D.C.

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Circuit, would count any “grid-usable AC power” in the power production capacity. Under this rule, if the QF can send out more than 80 MW of usable power to the grid, it will not qualify as a QF. Additionally, in dissent, Judge Walker pointed out that FERC conceded at oral argument that “power production capacity” would also likely include “power never delivered to the grid” if it was used on site for “powering an on-site factory.”⁷ Although this admission may not have preclusive effect, it indicates that FERC may guard against attempts by QFs to use this ruling to further expand the definition of a QF under PURPA.

¹ *Solar Energy Indus. Assoc. v. FERC*, Docket No. 21-1126, ___ F.4th ___ (D.C. Cir. 2023).

² *Broadview Solar, LLC*, 174 FERC ¶ 61,199 (2021).

³ *Solar Energy Indus. Assoc.*, at 7.

⁴ *Id.* at 8.

⁵ *Id.*

⁶ *Id.* at 11.

⁷ *Id.* at 11 (Walker, J., concurring in part and dissenting in part).