

No. 22-1246

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IN THE  
**Supreme Court of the United States**

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EDISON ELECTRIC INSTITUTE; NORTHWESTERN  
CORPORATION D/B/A NORTHWESTERN ENERGY,  
*Petitioners,*

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.,  
*Respondents.*

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ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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**BRIEF IN OPPOSITION**

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**QUESTION PRESENTED**

Congress enacted the Public Utility Regulatory Policies Act of 1978 (“PURPA”) to encourage the creation of “qualifying small power production facilities” to supply the electric grid with energy generated from renewable energy sources that would be less susceptible to supply disruption than energy generated from oil and gas. To qualify as a “small power production facility” the “facility” cannot have a “power production capacity” of “greater than 80 megawatts.” 16 U.S.C. § 796(17)(A).

The question presented is whether “power production capacity,” as used in PURPA, refers to the maximum amount of power the facility as a whole can produce to supply power to the grid at any point in time, or does it instead refer to the maximum amount of power that one component of the facility can generate, even though the facility as a whole cannot produce a power output of that amount.

## CORPORATE DISCLOSURE STATEMENT

Respondents in this Court are Broadview Solar, LLC and New Sun Energy LLC, intervenor-appellees below, and Solar Energy Industries Association, petitioner below. Broadview Solar, LLC's parent companies are VK Clean Energy LLC, BRP Finance I Holdco LLC, BRP IntermediateCo I LLC, and its ultimate parent company is Broad Reach Power LLC. Broad Reach Power has six classes of ownership interests: Classes A-1, A-2, B, C, D, and E. Of these, only the Class A-1 and Class A-2 units are voting securities. ETF Broad Reach Holdings LLC owns all of the Class A-1 Units. AIOF II Electra Holdings, L.P. owns all of the Class A-2 units. EnCap Energy Transition Fund I-A, L.P and Yorktown Renewable Energy Fund, L.P. own ETF Broad Reach Holdings. Apollo Infrastructure Opportunities Fund II, L.P., indirectly owns the voting securities in AIOF II Electra Holdings. No publicly held company has a 10% or greater ownership interest.

NewSun Energy LLC has no parent companies, and no publicly held company has a 10% or greater ownership interest in it.

Respondent Solar Energy Industries Association has no parent companies, and no publicly held company has a 10% or greater ownership interest in it.

## TABLE OF CONTENTS

	<b>Page</b>
QUESTION PRESENTED .....	i
CORPORATE DISCLOSURE STATEMENT .....	ii
TABLE OF AUTHORITIES .....	v
INTRODUCTION .....	1
STATEMENT OF THE CASE.....	3
Congress Enacts PURPA To Encourage Renewable Energy Generation.....	3
The Commission Reads “Power Production Capacity” To Mean A Facility’s Capacity To Produce Power For Output To The Grid. ....	4
Solar Panels Generate DC Power, Which Inverters Must Convert To AC Power For A Facility To Produce Power For The Electric Grid.....	5
The Broadview Solar Facility Can Produce No More Than 80 Megawatts Of AC Power For The Grid. ....	7
The Commission Certifies The Broadview Facility As A Qualifying Small Power Production Facility Because It Has A Power Production Capacity Of No More Than 80 Megawatts. ....	9
The D.C. Circuit Affirms. ....	10
REASONS TO DENY CERTIORARI .....	13

I. Petitioners Present No Certworthy Question About The Meaning Of “Power Production Capacity.” .....	13
A. Petitioners identify no substantial basis to support the need for review of the statutory issue presented.....	13
B. PURPA’s text and structure unambiguously speaks to the “power production capacity” of the facility. ....	16
II. Petitioners’ Complaints About How <i>Chevron</i> Was Applied Do Not Warrant Review. ....	24
III. This Court Should Not Hold The Petition For <i>Loper Bright</i> . ....	28
CONCLUSION.....	29

## TABLE OF AUTHORITIES

	Page(s)
<b>Cases</b>	
<i>Bell Atl. Tel. Companies v. F.C.C.</i> , 131 F.3d 1044 (D.C. Cir. 1997).....	25
<i>Bloate v. U.S.</i> , 559 U.S. 196 (2010).....	21
<i>Cent. Iowa Power Co-op. v. FERC</i> , 606 F.2d 1156 (D.C. Cir. 1979).....	19
<i>Citizens for Resp. &amp; Ethics in Washington v. Fed. Election Comm’n</i> , 971 F.3d 340 (D.C. Cir. 2020).....	25
<i>Connecticut Dep’t of Pub. Util. Control v. FERC</i> , 569 F.3d 477 (D.C. Cir. 2009).....	18
<i>D.C. v. Dep’t of Labor</i> , 819 F.3d 444 (D.C. Cir. 2016).....	25
<i>Eagle Pharms., Inc. v. Azar</i> , 952 F.3d 323 (D.C. Cir. 2020).....	25
<i>FERC v. Mississippi</i> , 456 U.S. 742 (1982).....	3, 11
<i>GMS Mine Repair v. Fed. Mine Safety &amp; Health Rev. Comm’n</i> , 72 F.4th 1314 (D.C. Cir. 2023) .....	25

<i>Home Depot USA, Inc. v. Jackson</i> , 139 S. Ct. 1743 (2019).....	18
<i>Humane Soc’y of United States v. Zinke</i> , 865 F.3d 585 (D.C. Cir. 2017).....	25
<i>KeyspanRavenswood, LLC v. FERC</i> , 474 F.3d 804 (D.C. Cir. 2007).....	25
<i>Loper Bright Enterprises, Inc. v. Raimondo</i> , 45 F.4th 359 (D.C. Cir. 2022) .....	29
<i>New England Power Co. v. FERC</i> , 571 F.2d 1213 (D.C. Cir. 1977).....	23
<i>New England Power Generators Ass’n v. FERC</i> , 757 F.3d 283 (D.C. Cir. 2014).....	18
<i>Nw. Corp. v. FERC</i> , 884 F.3d 1176 (D.C. Cir. 2018).....	17
<i>Occidental Geothermal, Inc.</i> , 17 FERC ¶ 61,231 (1981).....	4
<i>Penntech Papers, Inc.</i> , 48 FERC ¶ 61,120 (1989).....	4
<i>SAS Inst., Inc. v. Iancu</i> , — U.S. —, 138 S. Ct. 1348 (2018).....	24
<i>Sierra Club v. Jackson</i> , 648 F.3d 848 (D.C. Cir. 2011).....	26



<i>Tyler v. Cain</i> , 533 U.S. 656 (2001).....	20, 21
<i>Van Buren v. United States</i> , 141 S. Ct. 1648 (2021).....	18

### **Statutes & Regulations**

#### Federal Power Act, Title 16 of the United States Code

16 U.S.C. § 796(17)(A) .....	1, 24
16 U.S.C. § 796(17)(A)(i).....	3, 22
16 U.S.C. § 796(17)(A)(ii).....	4, 9, 20
16 U.S.C. § 796(17)(C) .....	3, 16, 24, 26, 29
16 U.S.C. § 796(17)(E) .....	22
16 U.S.C. § 796(18)(A) .....	3
16 U.S.C. § 824.....	7
16 U.S.C. § 824a-3 .....	16
16 U.S.C. § 824a-3(a) .....	3, 20, 24, 27
16 U.S.C. § 824a-3(b) .....	3, 20, 24
16 U.S.C. § 824a-3(m).....	14
16 U.S.C. § 824a-3(m)(1)(A)(i) .....	19
16 U.S.C. § 824a-3(m)(1)(B)(i) .....	19

16 U.S.C. § 824a-3(m)(1)(C).....	19
16 U.S.C. § 824a-3(m)(6).....	19
16 U.S.C. § 824e.....	7
16 U.S.C. § 824j-1 .....	7
Magnuson-Stevens Act, 16 U.S.C.	
§ 1801 <i>et seq.</i>	
16 U.S.C. § 1821(h)(6)(A).....	29
16 U.S.C. § 1821(h)(6)(C).....	29
16 U.S.C. § 1854(d)(2)(B).....	29
16 U.S.C. § 1862(b)(2)(E).....	29
26 U.S.C. § 48E(a)(2)(A)(ii) .....	23
42 U.S.C. § 7171 .....	26
Pub. L. No. 95-617, 92 Stat. 3117 (1978) .....	23
18 C.F.R. § 292.203 .....	4
18 C.F.R. § 292.204 .....	4, 9
18 C.F.R. § 292.303 .....	4
18 C.F.R. § 292.309 .....	15

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- MERRIAM-WEBSTER, available at <https://www.merriam-webster.com/dictionary/production> .....17
- NorthWestern Energy, *Interconnection Procedures for Small Generator Facilities Other Than Qualifying Facilities*, <https://tinyurl.com/47zjzk4n> (last visited Aug. 23, 2023) .....17

*Qualifying Facility Rates and Requirements; Implementation Issues Under the Public Utility Regulatory Policies Act of 1978, Order No. 872, Docket Nos. AD16-16 & RM19-15, 172 FERC ¶ 61,041 (July 16, 2020)*.....15

A. Scalia & B. Garner, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012).....18, 21

U.S. Energy Info. Admin., *Capacity Factors for Utility Scale Generators Primarily Using Non-Fossil Fuels*, <https://tinyurl.com/mh2uv96t>.....8

U.S. Energy Info. Admin., *Electricity Explained, Data & Statistics*, <https://tinyurl.com/2p9dkcs9>.....5

Kathie Zipp, *Why Array Oversizing Makes Financial Sense, Solar Power World* (Feb. 12, 2018), <https://tinyurl.com/2p9f7emx> .....6

## INTRODUCTION

Congress enacted the Public Utility Regulatory Policies Act of 1978 (“PURPA”) in response to the 1970s energy crisis. With PURPA, Congress encouraged the creation of “qualifying small power production facilities” to supply the electric grid with energy generated from renewable energy sources that would be less susceptible to supply disruption than energy generated from oil and gas. Congress defined a “qualifying small power production facility,” as a “facility” that generates power from renewable energy sources and has a “power production capacity ... not greater than 80 megawatts.” 16 U.S.C. § 796(17)(A).

The Federal Energy Regulatory Commission (“Commission”) for over 40 years has read the statutory text “power production capacity” to mean the maximum amount of power that a facility as a whole can actually “send out” to the electric grid at any time, as opposed to the amount of power an individual component of the facility is theoretically capable of generating. The Commission’s interpretation is consistent with the plain language of the statute, which addresses the production capacity of the facility as a whole, and longstanding power industry practice, as well as the statutory focus on safeguarding electric consumers from disruptions arising from uncertain supplies of fossil fuels from foreign sources. The Commission applied that longstanding text-based approach here and determined that the Broadview facility fell within the 80-megawatt limit because it is impossible for the Broadview facility to ever send more than 80 megawatts of power to the grid at any point in time. The D.C. Circuit agreed.

Petitioners have presented no basis for further review. Petitioners tacitly concede that there is no circuit conflict as to the meaning of “power production capacity.” In fact, the Commission’s initial order in this case, which it overturned on rehearing, is the sole deviation from four decades of court and agency decisions equating the power production capacity of a qualifying facilities with the amount of power the facilities can produce to the grid. Further, Petitioners offer no sound reason why this Court’s review is warranted in the absence of a circuit conflict. Petitioners say the case is exceptionally important based on a tweet calling it “big time,” a quotation from an article that is not even about the meaning of “power production capacity,” and a bald assertion of “enormous impacts,” none of which distinguishes it from the mine run of petitions.

Here, Petitioners merely seek review of a case-specific application of established standards. Moreover, questions as to whether or how *Chevron* applies in this context are purely academic since the Commission’s reading of the text is not only “eminently reasonable”—as the court of appeals correctly found—it is the best and only sensible reading of the statutory text.

Thus, review by this Court is not warranted and the petition should be denied.

**STATEMENT OF THE CASE*****Congress Enacts PURPA To Encourage Renewable Energy Generation.***

Congress enacted PURPA “to combat the nationwide energy crisis” by reducing the amount of electricity “generated through use of oil and natural gas.” *FERC v. Mississippi*, 456 U.S. 742, 745 (1982). Part of Congress’s solution was to encourage the development of “small power production facilities” that produce electric power primarily from “biomass, waste, renewable resources, [or] geothermal resources.” 16 U.S.C. § 796(17)(A)(i).<sup>1</sup> But “traditional electricity utilities were reluctant to purchase power from, and to sell power to, the nontraditional facilities.” *Mississippi*, 456 U.S. at 750.

To remove that barrier, Congress directed the Commission to guarantee a market for electricity produced by “qualifying small power production facilities” by requiring utilities to purchase their power on terms that are “just and reasonable to the electric consumers of the electric utility and in the public interest” and that do “not discriminate against” the qualifying facilities. 16 U.S.C. § 824a-3(a)-(b); *id.* § 796(17)(C) (defining “qualifying small power production facility”). Congress capped the size of an eligible small power production facility to a “facility” with “a power production capacity ... not greater than

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<sup>1</sup> In addition to “small power production facilit[ies],” Congress also encouraged the development of “cogeneration facilit[ies],” which produce both electricity and steam that is used in industrial processes. 16 U.S.C. § 796(18)(A).

80 megawatts.” *Id.* § 796(17)(A)(ii); *see* 18 C.F.R. §§ 292.203-04 (implementing regulations).

***The Commission Reads “Power Production Capacity” To Mean A Facility’s Capacity To Produce Power For Output To The Grid.***

Since 1981, the Commission has read the statutory text addressing “power production capacity” of a “facility” to mean “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 Geothermal, Inc.*, 17 FERC ¶ 61,231, 61,445 (1981). The Commission has long understood that examining an individual component of the facility often will not provide an accurate assessment of the “facility’s power production.” *Id.* That is so because, for example, developers of power facilities can “find it most economic to employ ... components some of which have individual capabilities significantly exceeding the overall facility capabilities.” *Id.*

The Commission applies the same text-driven approach to quantify how much power a utility must purchase from a qualifying facility. A utility must purchase “any energy and capacity which is made available from a qualifying facility.” 18 C.F.R. § 292.303. But the amount of energy or capacity a qualifying facility may make available is limited to the facility’s certified “power production capacity,” which is its “net output rather than its gross output.” *Penntech Papers, Inc.*, 48 FERC ¶ 61,120, 61,423 (1989).



***Solar Panels Generate DC Power, Which Inverters Must Convert To AC Power For A Facility To Produce Power For The Electric Grid.***

To understand how these concepts apply to a solar facility, it helps to understand how electricity is used in a utility power grid. Electricity is a flow of charged particles called electrons. The amount of electricity flowing at any moment in time is measured in megawatts (MW). *See* U.S. Energy Info. Admin., *Electricity Explained, Data & Statistics*, <https://tinyurl.com/2p9dkcs9>. In contrast, the amount of electricity produced or consumed over a set period of time, say an hour, is measured in megawatt-hours (MWh).

Electrons can flow in two distinct ways. One type of flow is alternating current, known as AC power. Another type of flow is direct current, or DC power. Because of distinct advantages AC power provides, the U.S. electrical grid operates on AC power. *See* D.C. Cir. JA51-53. Accordingly, electric utilities require power generators to provide AC rather than DC power to the grid. Pet. App. 54a-55a (Second Rehearing Order).

While power sent from a solar facility to the grid must be AC power, solar panels generate DC power. *See* D.C. Cir JA51-53. Solar panels must convert the generated DC power to AC power before the power can be produced to and travel over the grid. Pet. App. 54a-55a (Second Rehearing Order). A device called an “inverter” performs this required conversion before the facility can output any power to the grid. Pet. App. 48a n.87. An inverter is the essential component for converting generated DC power to useable AC power

at any solar facility and, at all times, defines the maximum AC power that a solar facility can produce to the grid. *Id.*; Pet. App. 54a-55a.

Choosing the appropriate size inverter is an important aspect of designing a solar power facility. Because solar panels generate their maximum amount of DC power for only a brief period each day, it is generally most efficient to size the inverters to an amount of AC power production less than the maximum amount of DC energy the panels can generate. *See* D.C. Cir. JA156. Although the smaller inverter limits the AC power production to the inverter's maximum capacity, the smaller inverters can convert DC power more efficiently and produce more AC power over time. *Id.*; *see also* Mark Bolinger, et al., *Utility-Scale Solar Empirical Trends in Project Technology, Cost, Performance, and PPA Pricing in the United States*, Lawrence Berkeley Nat'l Lab. 16 & n.17 (2019 ed.), <https://tinyurl.com/42vy7r8e>; Kathie Zipp, *Why Array Oversizing Makes Financial Sense*, *Solar Power World* (Feb. 12, 2018), <https://tinyurl.com/2p9f7emx>.

This method of solar facility design is standard practice in the solar industry. *Id.* Because the amount of power a solar facility can send out is limited by the AC capacity of the inverter, and not the DC capacity of the panels, industry standard is to “report[] all electricity capacity data in terms of the systems’ AC capacity because electricity operations and sales in the United States are generally conducted on an AC basis.” D.C. Cir. JA157 (U.S. Energy Info. Admin.).

***The Broadview Solar Facility Can Produce No More Than 80 Megawatts Of AC Power For The Grid.***

It is undisputed that, from the perspective of what the “facility” can produce to the grid, the Broadview facility has a maximum power production capacity of 80 megawatts. In other words, it is technologically impossible for the Broadview facility to produce for the grid any more than 80 megawatts of power at any moment in time.<sup>2</sup> The Broadview facility contains solar panels “with a gross capacity of 160 MW of direct current (DC) electricity” and “20 inverters each capable of converting DC electricity into a maximum output of 4.127 MW alternating current (AC) electricity” for a “maximum output of 82.548 MW of AC electricity.” Pet. App. 31a-32a (Second Rehearing Order). The facility itself consumes or otherwise loses 2.548 megawatts of AC electricity, resulting in “a maximum net output” to the grid of “80 MW of AC electricity.” *Id.*

The facility also includes a battery energy storage component, which allows the facility to produce at or near the 80MW limit for more hours of the day. *Id.* DC power collected by the solar panels can be stored as DC power in the battery units. *Id.* The batteries can then discharge up to “50 MW of DC electricity for up to 4 hours” after the sun sets or on cloudy days. *Id.* Because the batteries, like the panels, discharge only

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<sup>2</sup> Petitioners do not dispute that megawatt rather than megawatt hour is the proper measure for purposes of determining qualifying facility status. Throughout the Federal Power Act Congress used “megawatt hour” when it intended to refer to output over time. *See, e.g.*, 16 U.S.C. §§ 824, 824e. 824j-1.

DC power, that power, before it is produced by the facility to the grid, must also be converted to AC power, through the same facility inverters that physically can produce at most only 80 MW of power. *See* D.C. Cir. JA52-53. As a result, while the battery component of the Broadview facility allows additional hours of power production to the grid, at no time can the *facility* ever produce more than 80 megawatts of power to the grid.<sup>3</sup>

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<sup>3</sup> The addition of a battery increases the facility’s “capacity factor” (i.e., the percentage of the day the facility can produce power), but not the facility’s power production capacity (i.e., the maximum amount of power the facility can produce to the grid at any time, measured in megawatts). Pet. App. 52a-53a (Second Rehearing Order). Notably, even with the use of the battery to extend the number of hours of power production, the Broadview facility still has a capacity factor of only 35% to 40%, meaning it can produce to the grid 80 MW of power only 35% to 40% percent of the time. That is substantially less than the capacity factor achieved by qualifying facilities powered by geothermal, waste, and biomass, which can potentially produce power continuously and achieve close to 100% capacity factor. *Id.*; *see* U.S. Energy Info. Admin., Capacity Factors for Utility Scale Generators Primarily Using Non-Fossil Fuels, <https://tinyurl.com/mh2uv96t>. Thus, in practice a utility will purchase substantially less power, i.e., fewer megawatt hours, from the Broadview facility than from a similarly sized biomass, geothermal, or waste PURPA qualifying facility, because of those facilities’ higher capacity factor.

***The Commission Certifies The Broadview Facility As A Qualifying Small Power Production Facility Because It Has A Power Production Capacity Of No More Than 80 Megawatts.***

In September 2019, Broadview requested that the Commission certify its solar facility as a qualifying small power production facility under 16 U.S.C. § 796(17)(A)(ii) and 18 C.F.R. § 292.204. *See* D.C. Cir. JA20-57, JA94-112. Departing from over 40 years of precedent reading “power production capacity” to mean the amount of power a facility as a whole can send out to the grid, the Commission initially denied Broadview’s request.<sup>4</sup> Pet. App. 127a-128a. On rehearing, however, the Commission concluded that it had “erred by departing from and overturning its longstanding precedent.” Pet. App. 78a. It accordingly reverted to its 40-year-old text-based reading of “power production capacity” based on the facility’s send-out capacity and granted Broadview’s application. *Id.*

In so ruling, the Commission explained that “the statute’s emphasis on the ‘power production capacity’ of the ‘facility’ supports” focusing on “what the facility can actually produce for sale to the interconnected electric utility.” Pet. App. 82a. The Commission also noted that word “capacity” in the statute “is generally equated to output.” Pet. App. 82a-83a. Finally, the

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<sup>4</sup> As a result of that decision, Respondent Solar Energy Industries Association (SEIA) sought leave to intervene due to the negative effects the ruling would have on solar energy production. Pet. App. 5. FERC denied SEIA’s motion for intervention *Id.*

Commission considered the “statutory structure” and concluded the best reading of the text is one that “aligns the 80-MW limitation with the mandatory obligations and interconnection rights that are the foundation of Congress’s efforts to ‘encourage’ [qualifying facility] development under PURPA.” Pet. App. 83a-84a.

Petitioners here, NorthWestern and EEI, then sought rehearing, which the Commission denied in a subsequent order. In the denial order, the Commission rejected their competing interpretation, which focuses on the capacity of a component of the facility—the solar panels rather than on what the facility as a whole can produce. The Commission stated that Petitioners’ proposed approach “fails to adequately give meaning to Congress’s application of the size limit to the ‘facility’ seeking certification” and the “overall statutory scheme.” Pet. App. 43a-44a (internal quotation omitted).

***The D.C. Circuit Affirms.***

Petitioners sought judicial review in the D.C. Circuit. Petitioners argued that “power production capacity” should be interpreted to mean the amount of power that can be generated by a component of a facility—here the solar panels—regardless of whether that power can be produced to the grid. Pet. App. 5a. Thus, Petitioners contended, the Commission should have determined the Broadview facility’s power production capacity by looking solely to its 160 MW solar panels because that component of the facility has the capability of generating 160 MW of DC power.

The D.C. Circuit denied the petition for review. Judge Sentelle, joined by Judge Pillard, first rejected Petitioners’ argument that the statute unambiguously provided that “the relevant capacity is that of the individual subcomponent generating DC power, i.e., the solar array,” as opposed to “the facility’s components working together to produce grid-usable AC power.” Pet. App. 6a. The Court then concluded that the Commission’s facility-based approach was “well-supported by the statute’s text, structure, purpose, and legislative history.” Pet. App. 7a, 10a. The Court explained that the facility-based reading was not only supported by the text, but also by the statutory context surrounding “power production capacity,” and “brings various provisions of PURPA into harmony”—namely, the “power production capacity” limit and the “mandatory purchasing requirement.” Pet. App. 7a-8a. The Court also held that the “focus on net output” was “consistent with the statutory purpose” of PURPA to “promote the use of alternative energy sources,” and that Petitioners’ interpretation “would be inconsistent with that goal.” Pet. App. 8a (citing *Mississippi*, 456 U.S. at 750) (internal quotations omitted).<sup>5</sup>

Judge Walker dissented, stating that “power production capacity” should be read to include the power produced to charge the battery and power produced for delivery to the grid. Pet. App. 22a-25a. Judge Walker made it very clear, however, that he did not adopt Petitioners’ component-based reading of the

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<sup>5</sup> The panel concluded that Respondent SEIA lacked standing because it did not suffer a concrete injury from the Order below. Pet. App. 13a-14a.

statute that “look[s] only at the capacity of Broadview’s 160-megawatt solar array.” Pet. App. 22a; *see also* Pet. App. 24a n.3. Instead, he expressly agreed with the Commission that “[t]he statute’s focus on a ‘facility’ suggests that we should assess the production capacity of a power plant as a whole, not the capacity of an individual component.” Pet. App. 22a.



## REASONS TO DENY CERTIORARI

### **I. Petitioners Present No Certworthy Question About The Meaning Of “Power Production Capacity.”**

Petitioners’ first question presented asks this Court to grant the writ of certiorari in order to determine whether the statutory phrase “power production capacity,” as used in PURPA, refers to a facility’s maximum net power production to the grid (as the Commission and court of appeals held), or, instead, whether it speaks to the amount of power that a component of the facility can generate regardless of whether that power can be produced to the grid. Pet. I. The Petition, however, fails to identify any substantial basis for this Court’s review of that statutory question. Moreover, the Commission’s long-standing text-based reading of the statute, affirmed by the D.C. Circuit, is correct.

#### **A. Petitioners identify no substantial basis to support the need for review of the statutory issue presented.**

There is no claimed circuit split requiring this Court’s intervention. Petitioners nowhere contend that the decision below conflicts with the decision of any other court of appeals. Indeed, Petitioners do not even attempt to identify another case where the statutory question presented has ever come up.

With no circuit conflict, Petitioners are left to argue that this Court’s intervention is required because the statutory question is “exceptionally important.”

Pet. 31-35. They cannot support that assertion. Petitioners first contend this case “implicates an extraordinary claim of regulatory power: the so-called ‘mandatory purchase obligation.’” Pet. 29. But Petitioners have not even challenged the lawfulness of this obligation—a statutory obligation that has been in place for 45 years.

Petitioners next argue that “the integration of renewable energy resources into the electric grid is among the most important technological and infrastructure-related developments facing the United States today.” Pet. 32. But the question of statutory construction presented here does not implicate those broad concerns. Rather, it presents a very narrow issue—namely, addressing how to assess the power production capacity of the particular configuration of the Broadview facility. Notably, the Petition can cite only two other projects in the entire country beyond the Broadview facility where this specific issue has made a difference. Pet. 32.

Moreover, Petitioners ignore that the 80-megawatt threshold for a qualifying facility at issue here has little relevance in many regions of the country. The statutory purchase obligation applies only where a qualifying small power production facility does not have “nondiscriminatory access to” “independently administered ... wholesale markets” or “transmission and interconnection services that are provided by a Commission-approved regional transmission entity.” 16 U.S.C. § 824a-3(m). The Commission presumes that qualifying facilities with a power production capacity of more than five megawatts have such nondiscriminatory access to markets in regions that serve a substantial percentage of the nation’s electric load.

See 18 C.F.R. § 292.309. This includes most of Texas, the Midwest, New England, and the Mid-Atlantic. See FERC, *Energy Primer*, pp. 39-40 (April 2020), available at [https://www.ferc.gov/sites/default/files/2020-06/energy-primer-2020\\_0.pdf](https://www.ferc.gov/sites/default/files/2020-06/energy-primer-2020_0.pdf) (depicting market boundaries). In those regions the 80-megawatt threshold is unlikely to matter. *Id.* at 39.

Petitioners attempt to puff up this case by claiming “enormous impacts,” but all they can muster in support is a citation to a single social media tweet and a law firm client alert that refers to “dramatic, nationwide consequences.” Pet. 33. As to the latter, the law firm was not even speaking to the Commission’s reading of “power production capacity,” but rather the generic question of how *Chevron* should apply, which this Court will address in *Loper Bright*.

Moreover, the Commission recently revamped its PURPA regulations in ways that may ameliorate many of the complained of impacts, including by creating updated rules for pricing power purchased from qualifying facilities. See *Qualifying Facility Rates and Requirements; Implementation Issues Under the Public Utility Regulatory Policies Act of 1978*, Order No. 872, Docket Nos. AD16-16 & RM19-15, 172 FERC ¶ 61,041 (July 16, 2020). Nothing precludes Petitioners or other utilities from seeking judicial review in a future case if the “enormous impacts” Petitioners warn of in fact materialize. Pet. 32.

Thus, the specific statutory issue presented simply raises no circuit conflict or issue of extraordinary importance warranting this Court’s review.

**B. PURPA’s text and structure unambiguously speaks to the “power production capacity” of the facility.**

1. Review is also unwarranted because the Commission correctly held that the statutory text, specifically the words “facility” and “capacity,” as well as the statutory structure and purposes, support adhering to its 40-year-old approach to determining a facility’s “power production capacity” by looking to the amount of power a facility, viewed as a whole, can send out or “produce” to the grid.

*Facility.* As even the dissenting D.C. Circuit judge agreed, Petitioners’ component approach to power production cannot be squared with the statutory text. Congress defined “small power production facility” in terms of whether the “facility” has “a power production capacity which ... is not greater than 80 megawatts” 16 U.S.C. § 796(17)(C). The language of this definition shows a clear focus on the power production of the facility as a whole. Pet. App. 82a (First Rehearing Order); Pet. App. 22a (panel dissent). And when Congress required utilities to “purchase electric energy from such facilities,” it also spoke in terms of the facility’s power production. See 16 U.S.C. § 824a-3. Congress’s focus was on the capacity of the *facility* as a whole to produce power for sale to the electric grid. Thus, the statute’s text is properly read to speak to the amount of power the facility as a whole can produce to the grid.

Indeed, outside the context of this litigation, NorthWestern itself ascribes the same significance to the statutory term “facility.” Its interconnection procedures—the instruction manual for the steps a

power generator needs to follow to “interconnect” with NorthWestern’s grid—require a generator to provide the “nameplate capacity of the facility,” which NorthWestern defines as “the sum of the Alternating Current (AC) output ratings of the inverters or generating units,” i.e., what the facility can send out to the grid. NorthWestern Energy, *Interconnection Procedures for Small Generator Facilities Other Than Qualifying Facilities*, <https://tinyurl.com/47zjzk4n> (last visited Aug. 23, 2023).<sup>6</sup> In accordance with these requirements, NorthWestern’s interconnection agreement with the Broadview facility provides that “the total size of the [p]roject will be 80 MW based on the max output of the inverters.” Pet. App. 90a-91a & n.92 (First Rehearing Order).

***Production and Capacity.*** The focus on the facility’s maximum net output to the grid is buttressed by the words “production” and “capacity” in the phrase “power production capacity.”

“Production” means “[t]he creation of utility especially: the making of goods available for use” as well as the “[t]otal output especially of a commodity or an industry.” Production, MERRIAM-WEBSTER, available at <https://www.merriam-webster.com/dictionary/production>. Power that can be output beyond the facility (which in this facility must pass through the inverters and is physically limited to 80 MW), is the power from the “facility” made “available for use” or “output.”

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<sup>6</sup> The “nameplate” capacity of a facility is the amount of power the facility is expected to produce based on design parameters. *See Nw. Corp. v. FERC*, 884 F.3d 1176, 1184 (D.C. Cir. 2018).

“Capacity” has a well-known and generally accepted meaning in the power industry context, which is the relevant meaning here. See *Van Buren v. United States*, 141 S. Ct. 1648, 1657 (2021) (“When interpreting statutes, courts take note of terms that carry ‘technical meaning[s].’” (quoting A. Scalia & B. Garner, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 73 (2012))); see also *Home Depot USA, Inc. v. Jackson*, 139 S. Ct. 1743, 1748 (2019) (“It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.”). As the Commission explained, “capacity” is “generally equated to ‘output.’” Pet. App. 82a-83a (First Rehearing Order). Specifically, the word “capacity” typically refers to the maximum amount of electricity that a generator can immediately produce for delivery to the grid in response to demand, also known as “system load.” See *Connecticut Dep’t of Pub. Util. Control v. FERC*, 569 F.3d 477, 479 (D.C. Cir. 2009) (“‘Capacity’ is not electricity itself but the ability to produce it when necessary.”); see also *New England Power Generators Ass’n v. FERC*, 757 F.3d 283, 285 (D.C. Cir. 2014) (“capacity” markets “dictate the amount of electricity available for production and transmission when needed.”); Capacity, PJM Glossary, <https://tinyurl.com/4vyacezy> (last visited Aug. 23, 2023) (nation’s largest grid operator defining “capacity” as “the total amount of electricity resources available to use if needed”); *supra* 16-17 (discussing NorthWestern’s same usage). Thus, the United States Energy Information Administration, the agency tasked with keeping reliable data about energy infrastructure, “reports all electricity capacity data in terms of the systems’ AC capacity,” i.e., the amount of power that can be

produced for delivery “because electricity operations and sales in the United States are generally conducted on an AC basis.” D.C. Cir. JA157.

Significantly, Congress was well aware of this well-established meaning of “capacity.” It used the term throughout PURPA to refer to the amount of power that can be sent to the grid. Congress enacted multiple provisions addressing “sales of capacity,” which, as just discussed, can mean only power capable of delivery to the grid. 16 U.S.C. § 824a-3(m)(1)(A)(i), (1)(B)(i), (1)(C), (6). Judicial decisions contemporaneous to PURPA’s enactment reflect the same usage. *See Cent. Iowa Power Co-op. v. FERC*, 606 F.2d 1156, 1164 (D.C. Cir. 1979) (discussing utility efforts to ensure “generation capacity ... *to satisfy ... system demand*”) (emphasis added).<sup>7</sup>

The Commission properly reasoned that this well-established meaning of “capacity” as focused on output makes clear that the text “power production capacity” of a “facility” speaks to the amount of power

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<sup>7</sup> The court of appeals did not address the significance of the word “capacity” in the statutory scheme because it found “the Commission raised for the first time the argument that ‘capacity’ has an industry-specific definition meaning the maximum amount of power that can be supplied to the power grid, i.e., for end-user demand.” Pet. App. 7a. But, as cited above, the Commission did consider the established meaning of the term, as further supporting its reading of the text. *See* Pet. App. 82a-84a. If this Court nonetheless agrees with the D.C. Circuit that the meaning of capacity is not properly considered in this case, that would make this case a poor vehicle for review as the Court will be unable to provide meaningful guidance on the proper reading of the statute.

the facility can produce for “output to the electric utility.” Pet. App. 82a-84a (First Rehearing Order).

***Statutory context and purpose.*** The Commission’s reading of the text is further supported by the statutory context and purpose. Reading “power production capacity” in terms of power produced to the grid is not only consistent with the plain text, it also creates statutory symmetry between the eligibility criteria and the guaranteed market incentive. Under PURPA, a utility can be required to purchase no more than 80 megawatts from a qualifying facility. *See* 16 U.S.C. §§ 796(17)(A)(ii), 824a-3(a)-(b). By reading the facility’s “power production capacity” to be the facility’s maximum net power output, the qualification criteria and purchase obligation are harmonized. The facility’s “power production capacity” is sensibly read to mean the same amount that the utility can be required to purchase under PURPA—80 megawatts.

That reading of the text also fully aligns the qualifying facility eligibility criteria with PURPA’s central purpose and the phrase’s “place in the overall statutory scheme.” *Tyler v. Cain*, 533 U.S. 656, 662 (2001). It is undisputed that Congress enacted PURPA to increase the amount of renewable electricity that could be supplied to the grid to make the grid more resilient. *Supra* 3-4. It thus makes sense that Congress would be focused on the amount of power the qualifying facility could actually produce for delivery to the grid in setting the 80-megawatt threshold. No other concept of power production capacity has any significance for the statutory scheme.

**2.** Petitioners’ counterarguments lack merit. Petitioners’ arguments fail because they disregard this



Court's repeated admonition not to "construe the meaning of statutory terms in a vacuum." *Tyler*, 533 U.S. at 662; *Bloate v. U.S.*, 559 U.S. 196, 206 n.9 (2010) ("The dissent's position, which rests upon a dictionary definition of two isolated words, does not account for the governing statutory context."). Instead, Petitioners advocate "a sterile literalism" that makes no sense in the context of the statutory scheme and in any event does not compel their preferred reading. A. Scalia & B. Garner, *READING LAW* 356 (2012).

Petitioners cherry-pick dictionary definitions of the separate words "power," "production," and "capacity," then argue that the combination of those words ("power production capacity") must mean "the maximum amount of power that can be created." Pet. 13-17. But even under this manufactured definition (which, as discussed above at 17-19, ignores the proper meaning of production and capacity), the Commission's long-standing reading of the statute would remain fully valid. Under that reading, upheld by the D.C. Circuit, "production" means "creation" of power; the Commission, consistent with the text and structure, looks at creation of power at a "facility level." And like Petitioner's proposed construction, the Commission reads the term "capacity" to refer to "the ability to produce." Again, consistent with both the text of this one provision and the broader statutory context, the Commission looks at "capacity" of the "facility" as a whole to produce power to the grid.

Petitioners try to prove their point through the example of a widget factory. Petitioners posit a factory that generates 160 widgets a day and places 50 into storage. Pet. 16-17. They say no one would suggest

that this factory’s production capacity was anything less than 160 widgets.

But for Petitioners’ widget example to resemble the realities of this case, the widget facility would need to be incapable of providing more than 80 widgets to customers each day, perhaps because the widgets need to undergo a necessary finishing step. The fact that earlier steps could produce more than 80 unfinished widgets would not change the reality that the facility, when viewed a whole, could never produce more than 80 finished widgets a day, ready for use by the customer. In such circumstances, the widget production capacity of the facility would be 80. No customer requiring a factory with a widget production capacity of 160 widgets per day would consider the widget factory to satisfy that requirement.

Petitioners’ artificial component-focused reading of the statute also makes no sense. They cannot explain why Congress would have been concerned with a facility’s internal components rather than the facility’s actual net power production output, in setting the “power production capacity” limit. Petitioners argue that Congress “repeatedly defined the term ‘production’ by reference to the phrase ‘use ... of [an] ... energy source” in the context of imposing a requirement that a qualified facility produce electricity “by the use” of a renewable resource. Pet. 17 (citing 16 U.S.C. § 796(17)(A)(i), (E)). But there is no inconsistency between Congress specifying the input into the production process—a renewable energy source—and intending the relevant output to be deliverable power.

Nor is there any merit to Petitioners' argument that Congress is more explicit when it intends the word "capacity" to signal a focus on output. Pet. 18. Petitioners point to the fact that other parts of PURPA refer to "transmission capacity" and suggest Congress would have used this phrase to signal a focus on output. *Id.* (citing Pub. L. No. 95-617 §§ 202, 203, 92 Stat. 3117, 3135-3138 (1978)). But transmission capacity is a distinct concept that refers to the amount of power that can be sent through a power line or over the grid. *New England Power Co. v. FERC*, 571 F.2d 1213, 1231 (D.C. Cir. 1977) (discussing "transmission capacity" "for the movement of ... [p]ower."). It would have made no sense for Congress to refer to transmission capacity here. By contrast, as explained above, ordinary 'capacity' is the term used to describe the amount of power a generation facility can supply to the grid. *Supra* 17-18.

Petitioners now raise a brand-new argument they did not present to the court of appeals. They point to a different statute, enacted over 40 years *after* PURPA, in which Congress distinguished between AC and DC power, to argue that Congress would have referred explicitly to AC power production capacity if it intended power production capacity to be a facility's output. Pet. 22-23 (citing 26 U.S.C. § 48E(a)(2)(A)(ii)). This argument is both too late and meritless.

Adding the term "AC" before power was not necessary to signal a focus on the facility's net output to the grid. As explained, the statutory language speaking to the facility's "power production capacity" already refers to the amount of power the facility as a whole can produce to the grid.

Finally, Petitioners turn to statutory purpose to try to prop up their unsupported construction of the statutory language. They contend that “Congress’s intent in enacting PURPA was to encourage only ‘*small*’ power production facilities,” and that, according to them, the Broadview facility is large not small. Pet. 19 (quoting 16 U.S.C. § 796(17)(C)); *see also* Pet. 24. Not so. Congress defined what it meant by “small”—a facility with a power production capacity of 80 megawatts. The Broadview facility meets that statutory definition.

Petitioners also contend that as a policy matter the Commission’s reading of the text frustrates Congress’s purpose to promote renewables because it is bad policy to guarantee a market for one class of renewables—qualifying facilities—and not others. Pet. 19. But PURPA says nothing about non-PURPA renewables. It is, however, crystal clear that Congress intended to encourage the development of all qualifying facilities with a power production capacity up to 80 megawatts. 16 U.S.C. §§ 796(17)(A), 824a-3(a)-(b). Thus, Petitioner’s purpose-based arguments provide no basis for rejecting the Commission’s sound textually supported reading of the statute upheld by the D.C. Circuit.

## **II. Petitioners’ Complaints About How *Chevron* Was Applied Do Not Warrant Review.**

Petitioners urge this Court to review “the D.C. Circuit’s application of *Chevron*,” Pet. I, 20, 25, contending that the court of appeals erred by concluding that the statute was ambiguous at *Chevron* Step 1 before fully exhausting the traditional tools of statutory

construction. Pet. 20-21, 25-28. They also argue that the court of appeals erred by affording deference when the Commission did not exercise any expertise. Pet. 28. At bottom, however, Petitioners are simply complaining about how established standards were applied in this particular case. That does not warrant this Court’s review. In any event, as discussed above, the best reading of the statute, applying all appropriate means of statutory construction, and no deference to the Commission, is the text-based reading adopted by the Commission and upheld by the D.C. Circuit.

1. As to what is required at *Chevron* Step One, there is nothing that warrants review here. The D.C. Circuit has repeatedly held, including in cases cited by the court of appeals here, that at *Chevron* Step One the court owes “no deference unless, after employing traditional tools of statutory construction, we find ourselves unable to discern Congress’s meaning.” *Citizens for Resp. & Ethics in Washington v. Fed. Election Comm’n*, 971 F.3d 340, 350 (D.C. Cir. 2020) (quoting *SAS Inst., Inc. v. Iancu*, — U.S. —, 138 S. Ct. 1348, 1358 (2018)); see also, e.g., *GMS Mine Repair v. Fed. Mine Safety & Health Rev. Comm’n*, 72 F.4th 1314, 1320 (D.C. Cir. 2023); *Eagle Pharms., Inc. v. Azar*, 952 F.3d 323, 330 (D.C. Cir. 2020); *Humane Soc’y of United States v. Zinke*, 865 F.3d 585, 595 (D.C. Cir. 2017); *D.C. v. Dep’t of Labor*, 819 F.3d 444, 454 (D.C. Cir. 2016); *Bell Atl. Tel. Companies v. F.C.C.*, 131 F.3d 1044, 1047 (D.C. Cir. 1997). Petitioners acknowledge that the D.C. Circuit has also held that it “cannot defer when the agency simply has not exercised its expertise.” Pet. 28 (quoting *Keyspan-Ravenswood, LLC v. FERC*, 474 F.3d 804, 812 (D.C. Cir. 2007)). The court of appeals here did not reject any of that established precedent. To the contrary, the

court cited and applied that established approach to *Chevron*.<sup>8</sup> Petitioners simply do not like how the standards were applied. But that case-specific application of established standards does not warrant this Court's intervention.

Petitioners argue that the court of appeals should have spilled more ink in explaining how the text and structure supported the Commission's reading. Pet. 21-23 (criticizing "scant reasoning," lack of dictionary discussion). But the fact that the majority opinion (authored by Judge Sentelle) treated this as an easy case is no reason for this Court to grant review, especially where, as discussed above, the Commission reading of the plan text at issue is well-supported by the statutory language and context, and where Petitioner's contrary myopic construction makes no sense. *Supra* \_.

2. Petitioners also argue that the *Chevron* Step Two should not apply at all here because the Government somehow conceded that it employs no expertise in this context. That contention is meritless. Congress created the expert Commission (42 U.S.C. § 7171) and expressly required it to "determine[], by rule," the "requirements" for a "qualifying small power production facility." 16 U.S.C. § 796(17)(C); *see also* 16 U.S.C.

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<sup>8</sup> And even if there was some tension with the D.C. Circuit's earlier articulations of the standard, the earlier cases adopting Petitioners' reading of *Chevron* Step One already control in the D.C. Circuit. *See Sierra Club v. Jackson*, 648 F.3d 848, 854 (D.C. Cir. 2011) ("[W]hen a decision of one panel is inconsistent with the decision of a prior panel, the norm is that the later decision, being in violation of that fixed law, cannot prevail."). Hence, there is no need to review this case, even if there had been some error regarding its application of *Chevron* in this particular case.

§ 824a-3(a) (“the Commission shall prescribe, and from time to time thereafter revise, such rules as it determines necessary to encourage cogeneration and small power production ... facilities of not more than 80 megawatts capacity”). And the Commission’s detailed decision plainly exercised that expertise in explaining the proper understanding of what power production of a facility means in the PURPA context. *See* Pet. App. 38a-55a.

The claimed concession cited by Petitioners about a lack of expertise was nothing of the sort. Rather, counsel for the Commission simply argued that the court of appeals, in considering the reasonableness of the Commission’s reading of the statutory text, was not prohibited from considering a particular textual argument that the Commission raised for the first time on appeal *See* D.C. Circuit Commission Br. 40 n.9. The brief on appeal explained that the court could do so because the correctness of *the textual argument* did not turn on agency expertise. *Id.*

3. Further review is also unwarranted because the court of appeals’ application of *Chevron* made no difference to the outcome of the appeal. As Petitioners concede, the court did deploy the traditional tools of statutory construction to parse the statute. Pet. 21 (acknowledging that the court did “discuss the statute’s text, purpose, and structure”). And when it did, the court found both that the Commission’s reading of the text was “eminently reasonable,” and Petitioners’ position was “inconsistent” with PURPA. Pet. App. 7a-8a. Given that finding, whether *Chevron* applied or not, the court of appeals would have reached the same conclusion and would have agreed with the Commission’s reading of the statute.

### III. This Court Should Not Hold The Petition For *Loper Bright*.

Finally, Petitioners' argument that that the Court should hold this petition pending disposition of *Loper Bright* is without merit.

First, the result of this case will be the same regardless of whether and how *Chevron* applies. As explained above, the Commission's reading of the statute is the best and only sensible reading of the statute. *Supra* 16-24. And the court of appeals expressly found the Petitioner's opposing construction of the statute—looking at component elements of the facility—to be “inconsistent” with PURPA. Pet App. 8a (“Excluding facilities from qualifying facility status because their component parts have individual production capacities over 80 MW, even though the overall facility cannot send out more than 80 MW to the grid, would be inconsistent with [PURPA's] goal.”).

Thus, the outcome of this case will not change if *Chevron* applies differently or not at all. A hold would only serve to delay final resolution of this case and prejudice Broadview who has been waiting over three years for legal certainty about whether its project is a qualifying facility under PURPA.

Second, this case is very different from *Loper Bright*. *Loper Bright* involved a situation where Congress expressly delegated to the agency a controversial power to exercise in specific and limited circumstances and the agency then assumed the power in broader circumstances. Specifically, the Magnuson-Stevens Act authorized the National Marine Fisheries Service to require foreign vessels to



compensate federal monitors assigned to their boats. See 16 U.S.C. §§ 1821(h)(6)(A), (C), 1854(d)(2)(B), 1862(b)(2)(E). But the Service then required domestic vessels to also compensate federal monitors and at more burdensome rates, which the statute nowhere authorized. See *Loper Bright Enterprises, Inc. v. Raimondo*, 45 F.4th 359, 364-65 (D.C. Cir. 2022).

This case, by contrast, falls within the traditional heart of *Chevron*. Congress established a framework under which the Commission would certify qualifying facilities and ensure those facilities equal access to power markets. It specified some criteria—that the qualifying facilities must generate power from renewable resources and have a power production capacity of less than 80 megawatts. And it expressly delegated to the Commission the power to fill in any gaps—it required the Commission to “determine[], by rule,” the “requirements” for a “qualifying small power production facility.” 16 U.S.C. § 796(17)(C).

That is exactly what the Commission did here. It determined that the 80-megawatt ceiling for a qualifying small power production facility is satisfied so long as the facility has a net output of 80 megawatts or less. Where, as here, Congress expressly delegated to the agency the power to establish requirements for qualifying facilities, there can be no doubt that Congress intended for the Commission to reasonably resolve any ambiguity about how a facility’s “power production capacity” should be determined.

## CONCLUSION

This Court should deny the petition.

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