

No. 22-1246

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**In the Supreme Court of the United States**

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EDISON ELECTRIC INSTITUTE, ET AL.,  
PETITIONERS,

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

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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 OF *AMICUS CURIAE*  
PACIFICORP D/B/A PACIFIC POWER AND  
ROCKY MOUNTAIN POWER SUPPORTING  
PETITIONERS**

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## QUESTIONS PRESENTED

1. Whether “power production capacity” refers to a facility’s maximum net output to the grid at any one time, or whether that term instead refers to the maximum amount of power that a facility can create.

2. Whether the Court should reconsider how and when *Chevron* should apply, or at least clarify that courts must exhaust normal statutory-interpretation tools before concluding that a statute is “ambiguous” at *Chevron* step one.

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## INTEREST OF *AMICUS CURIAE*<sup>1</sup>

*Amicus Curiae* PacifiCorp d/b/a Pacific Power and Rocky Mountain Power is a public utility serving customers in Washington, Oregon, California, Utah, Idaho, and Wyoming. As particularly relevant here, *Amicus* is required under the Public Utility Regulatory Policies Act of 1978's ("PURPA") mandatory purchase obligation to purchase power from many qualifying facilities and regularly receives requests from new qualifying facilities interested in selling their output to *Amicus*. *Amicus* will be legally required to purchase power from qualifying facilities that meet the eligibility requirements, as interpreted by the Federal Energy Regulatory Commission ("FERC" or the "Commission") and affirmed by the U.S. Court of Appeals for the D.C. Circuit in the opinion that is the subject of the Petition for a Writ of Certiorari. *Amicus* has previously filed an *amicus* brief supporting Petitioners. See Br. of *Amicus Curiae* PacifiCorp d/b/a Pacific Power and Rocky Mountain Power Supporting Petitioners Edison Electric Institute and Northwestern Corporation,

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<sup>1</sup> Pursuant to this Court's Rule 37.2, *Amicus* provided timely notice to all parties of its intent to file this *amicus* brief. Further, per this Court's Rule 37.6, *Amicus* affirms that no counsel for a party authored this brief in whole or in part, and that no party, counsel for a party, or any person other than *Amicus*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this *amicus* brief.

*Solar Energy Indus. Assoc. v. FERC*, No. 21-1126 (D.C. Cir. Apr. 12, 2022).

*Amicus* is committed to integrating renewable energy resources into the Nation's electric grid at the lowest reasonable cost for its customers. It has championed the development of innovative energy markets in the Western United States, in part to support the greater integration of renewable energy and decrease customer costs. As announced in its latest integrated resource plan, *Amicus* anticipates taking several more significant steps between now and 2042 to support the Western United States' growth toward a grid powered by clean energy, including by adding 9,111 megawatts of new wind resources and 7,855 megawatts of new solar resources. PacifiCorp, 2023 Integrated Resource Plan Volume I, at 2 (Mar. 31, 2023).<sup>2</sup>

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<sup>2</sup> Available at [https://www.pacificorp.com/content/dam/pcorp/documents/en/pacificorp/energy/integrated-resource-plan/2023-irp/2023\\_IRP\\_Volume\\_I.pdf](https://www.pacificorp.com/content/dam/pcorp/documents/en/pacificorp/energy/integrated-resource-plan/2023-irp/2023_IRP_Volume_I.pdf) (all websites last visited July 28, 2023).



## INTRODUCTION AND SUMMARY OF ARGUMENT

The D.C. Circuit’s decision upholding FERC’s reading of PURPA expands that statute’s mandatory purchase obligation far beyond its plain terms, allowing large, sophisticated electric generation facilities to obtain a substantial benefit that Congress never gave them, to the detriment of *Amicus* and its customers. Applying the *Chevron* deference doctrine—the continued viability of which this Court is currently considering—the D.C. Circuit deferred to FERC’s conclusion that PURPA’s mandatory purchase obligation applies to large generation facilities, so long as those facilities artificially limit to 80 megawatts or less the amount of power that they can send to the energy grid. That interpretation is inconsistent with PURPA’s plain text, context, and purpose. In limiting PURPA’s special privileges to “small” generation facilities, *see* 16 U.S.C. § 796(17)(A), Congress provided that only a specific subset of facilities benefit from the statute’s mandatory purchase obligation: namely, small facilities that Congress sought to exempt from having to compete in the energy marketplace. Broadview Solar (“Broadview”), which has a solar array capable of generating 160 megawatts of power, is plainly not entitled to, and does not require, this exemption.

If allowed to stand, the D.C. Circuit’s decision upholding FERC’s ruling will cause immediate and lasting harm to *Amicus* and its customers. Large

generation facilities like Broadview are not eligible for, and do not need, PURPA's special protections to compete in the robust renewable energy market. By allowing these facilities to exempt themselves through gamesmanship from the competitive market applicable to facilities with their actual size, FERC's ruling undermines competitive solicitations and utility planning. Utilities like *Amicus* will incur additional costs in interfacing with these large facilities, which often participate in both the competitive market and the qualifying facility queue. Energy consumers too will suffer, as they are saddled with the costs of mandatory purchases at above-market prices. This harms the Nation's energy grid, as FERC's ruling incentivizes large and sophisticated generation projects to prioritize their own interests over the needs of consumers.

This Court should grant the Petition.

## ARGUMENT

### **I. FERC's Interpretation Of The Phrase "Power Production Capacity" Is Inconsistent With PURPA's Clear Terms**

PURPA's mandatory purchase obligation applies only to "small" power production facilities capable of generating 80 megawatts or less of power. 16 U.S.C. § 796(17)(A)(ii); 18 C.F.R. § 292.204(a). In concluding that the phrase "power production capacity" is ambiguous under *Chevron* step one and that FERC's

approach was reasonable under *Chevron* step two, the D.C. Circuit got the law wrong. This Court should grant the Petition or, at minimum, hold the Petition pending the outcome of *Loper Bright Enterprises, Inc. v. Raimondo*, No. 22-451 (U.S. May 1, 2023). See Pet.5.

1. Properly interpreted, the phrase “power production capacity” refers to the maximum amount of power that a qualifying facility can create. 16 U.S.C. § 796(17)(A).

Congress enacted PURPA in 1978 to incentivize investment in renewable energy infrastructure. See *id.* § 2601. At the time, the 1973 oil embargo and its attendant energy security crisis were still fresh in mind. See Peter Maloney, *PURPA’s Puzzle: FERC Workshop Revisits 1978 Law, Embattled as Ever*, UtilityDive (July 28, 2016).<sup>3</sup> PURPA was a means of “reduc[ing] the country’s dependence on oil and natural gas,” Order No. 872, 172 FERC ¶ 61,041, at P 47 (2020) (“Order 872”), by, among other things, “improv[ing] the wholesale distribution of electric energy,” 16 U.S.C. § 2601(2). To that end, PURPA contains provisions “intended to spur the development of small renewable power plants” and diversify the nation’s energy grid. Maloney, *supra*;

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<sup>3</sup> Available at <https://www.utilitydive.com/news/purpas-puzzle-ferc-workshop-revisits-1978-law-embattled-as-ever/423005/>.

see Allison M. Kolberg, Comment, Bear Gulch Solar, LLC v. Montana Public Service Commission: *State Commissions and the Future of the PURPA Mandatory Purchase Requirement*, 44 Harv. Envtl. L. Rev. 279, 283 & n.20 (2020) (PURPA aims to support and increase the number of “alternative energy producers at cogeneration and small power production facilities”).

One of the most significant of PURPA’s provisions, and the one at issue here, is Section 210’s mandatory purchase obligation, which provides a substantial market advantage for certain “small” generation facilities with limited “power production capacity.” 16 U.S.C. § 824a-3(a)(2). Section 210 imposes on publicly regulated utilities a legal duty to purchase energy from these “small” facilities, or “qualifying facilities,” at the utility’s avoided cost. *Id.* § 796(17)(A); *id.* § 824a-3(a)(2). The statute thus gives qualifying facilities a guaranteed market for their generation, thereby insulating them from needing to compete in the marketplace. *See id.* § 824a-3(a)(2); Order No. 872 at PP 47–48 (2020). In this way, qualifying facilities obtain a statutorily conferred market advantage over their non-qualifying-facility competitors, so long as they satisfy PURPA’s strict size requirements. Specifically, a qualifying facility may not have a “power production capacity” that is “greater than 80 megawatts.” 16 U.S.C. § 796(17)(A)(ii); Order No. 872 at PP 11–12 (“[W]hile PURPA provided for the encouragement of small power production, PURPA also limited the

facilities which could be encouraged to those facilities with no more than 80 [megawatt] power production capacity at the same site.”).

The statutory text mandates the conclusion that “power production capacity” refers to the maximum amount of power that a generation facility can generate. *See* Pet.13–20. As Petitioners explain, “capacity” ordinarily means “the ability to produce; equivalent to ‘full capacity,’” or “the maximum or most efficient level of production.” Pet.15–16 (quoting Capacity, *The Oxford English Dictionary* 857 (2d ed. 1989), and Capacity, *The American Heritage School Dictionary* 135 (1977)). “[P]ower,” in turn, means “a source or means of supplying energy.” Pet.15 (quoting App.23a (Walker, J., dissenting)). And “production” refers to that which is “made” or “generate[d].” Pet.14 (alteration in original) (quoting Production, *Black’s Law Dictionary* 1089 (5th ed. 1979), and Produce, *Webster’s New Twentieth Century Dictionary of the English Language* 1436 (2d ed. 1978)). Put together, these terms refer to the full, or maximum, amount of power that a facility is able to generate or produce at any given time. Pet.13–17.

The statutory context and purpose lead to the same result. *See Jones v. Hendrix*, 143 S. Ct. 1857, 1869 (2023). PURPA defines a “small power production facility” as a facility that “*produces* electric energy solely *by the use*” of a “primary energy source.” 16 U.S.C. § 796(17)(E) (emphasis added). The term “produce” in this context refers to the energy that a

facility generates via an energy source, and thus supports a determination that “power production capacity” means the full amount of energy a facility is capable of generating. Pet.17–18. Where Congress wanted a different result, it used different terms; for instance, in other sections of PURPA, Congress uses the phrase “transmission capacity” to speak to a facility’s ability to deliver or transmit power. Pet.18 (citing Pub. L. No. 95-617 §§ 202, 203, 92 Stat. 3117, 3135–38 (1978)). And any other definition risks reading the word “small” out of the statute. 16 U.S.C. § 796(17)(E); *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (it is “a cardinal principle of statutory construction that we must give effect, if possible, to every clause and word of a statute” (citation omitted)); *see infra* p.9. That result is at odds with Congress’ goal in enacting PURPA: to encourage investment in small electric generation facilities and reduce the barriers those facilities then faced when competing in the open market. *See* Order No. 872 at P 11.

2. The alternative reading of “power production capacity” that FERC adopted—“net output” or “delivery capacity”—is contrary to PURPA’s terms and undermines Congress’ purposes. The D.C. Circuit incorrectly held that the statute is reasonably susceptible to this reading under *Chevron* step 2 (including because the Court should never have advanced beyond *Chevron* step 1, given that plain statutory text mandated Petitioners’ interpretation).

FERC's misreading of the phrase "power production capacity" violates PURPA's plain text and context. The statute provides that a qualifying facility may not have a "power production capacity" that is "greater than 80 megawatts," 16 U.S.C. § 796(17)(A)(ii), and does not modify the term "power" or seek to limit that term in any way. If Congress had wanted to define a qualifying facility's "power production capacity" in terms of how much power the facility actually sends to the grid—as opposed to how much power it is capable of producing as a general matter—it would have done so, as it has done in other contexts. Pet.23 (noting Congress' expanded tax credit for "qualified facilities" defined as those "with a maximum net output of less than 1 megawatt (*as measured in alternating current*)" (quoting 26 U.S.C. § 48E(a)(2)(A)(ii))). Further, under FERC's approach, the "size" of a facility, 16 U.S.C. § 796(17)(A), no longer matters: a facility of *any* size may qualify for PURPA's market benefits so long as the facility artificially limits the amount of power it instantaneously delivers to the grid. But Congress clearly intended the word "small" to have some effect. *See Williams*, 529 U.S. at 404 (every "word of a statute" should be given effect (citation omitted)). Indeed, PURPA requires purchases from both "qualifying small power production facilities" and "qualifying cogeneration facilities," and qualifying cogeneration facilities are not subject to the 80-megawatt size limit. 16 U.S.C. § 796(17)–(18).

FERC's effort to limit the term "power" in "power production capacity" only to "*grid-usable* power," App.7a (emphasis added), makes little sense under PURPA. FERC's definition of "power production capacity" is dependent not on the size of the generation facility itself, but rather on the size of its inverters, which convert the direct current energy generated by a facility's solar array to alternating energy. But inverters do not "produce[ ]" power, *see* App.7a, and are not by themselves capable of providing any power to a utility. Rather, it is the facility's solar array that produces power by harvesting solar energy. Because inverters do not "produce[ ]" power, *see* App.7a, but rather take power that has already been produced and convert it into grid-usable power, it is wrong to tie a facility's "power production capacity" to the size of its inverters as FERC and the D.C. Circuit did here. Indeed, it is undisputed that large facilities like Broadview are capable of "produc[ing]" significantly more "power" (albeit direct current, rather than alternating current, power) than they have chosen to deliver to the grid at any one point in time. *See* Pet.17.

FERC's approach also undermines PURPA's mandatory purchase obligation. That obligation provides "small power production facilities," 16 U.S.C. § 796(17)(A), a leg up in a market that was, at the time, inhospitable to renewable energy development, *see* Nat'l Assoc. of Regul. Util. Comm'rs, *Aligning PURPA with the Modern Energy Landscape*, A



Proposal to FERC 2–4 (Oct. 11, 2018);<sup>4</sup> Maloney, *supra*; Kolberg, *supra*, at 283. In including a size limit for small power production facilities, *see* 16 U.S.C. § 796(17), Congress provided that only those facilities that lacked the production capacity to compete successfully on the energy market benefit from PURPA’s market protection. Oversized facilities like Broadview that are capable of generating 160 megawatts of power do not require such a generous, statutorily conferred market benefit, and allowing such large facilities to partake in this benefit harms the currently robust market for renewable energy, as discussed below.

## **II. Whether Large Facilities May Enjoy The Significant Benefits PURPA Confers Is Such An Important Issue That This Court Should Grant Review Even If It Does Not Overturn *Chevron* Deference In *Loper***

The statutory issue here is important enough that this Court should grant review regardless of how it ultimately decides the question of the continued vitality of *Chevron* deference in *Loper*. Reversal of the D.C. Circuit’s erroneous decision is necessary to ensure the integrity of the energy market and prevent the harm to *Amicus* and its customers that results when large generation facilities gain an unfair

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<sup>4</sup> Available at <https://pubs.naruc.org/pub.cfm?id=E265148B-C5CF-206F-514B-1575A998A847>.

advantage over other developers under a PURPA provision not designed for them.

Congress did not design PURPA to help large facilities like Broadview gain unfair competitive benefits in the energy market. When Congress enacted PURPA's mandatory purchase obligation in 1978, its goal was to foster a more diverse and robust market for electric generation. Maloney, *supra*; Kolberg, *supra*, at 283. Today, there is good reason that PURPA still benefits only those "small" facilities that Congress intended it to benefit, and not oversized facilities like Broadview. 16 U.S.C. § 796(17)(A). "[T]he outlook for the development of alternatives to natural gas and oil-fired generation resources, such as renewable resources, has changed . . . dramatically" over the past several decades. Order No. 872 at P 52 (citation omitted). Due to a host of other legislative, regulatory, and market forces, renewable resources have matured as components of the resource mix and now account for a significant portion of U.S. energy generation. *See Powering America: Reevaluating PURPA's Objective and Its Effects on Today's Consumers: Hearing Before the Subcomm. on Energy of the H.R. Comm. on Energy & Commerce, 115th Cong. 2 (2017) (statement of Hon. Fred Upton) ("[R]enewable sources of energy, particularly wind and solar, have experienced exponential growth in recent years. Last year alone, capacity additions from utility scale renewable resources surpassed the net additions of all other fuel sources combined.")*. Large, sophisticated renewable

facilities like Broadview—which consists of more than 470,000 solar panels capable of producing up to 160 megawatts of power as well as a 50-megawatt battery energy storage system, Pet.7–8 (citing App.3a, 17a; C.A. App. JA21–22, JA24, JA102)—will surely be part of the nation’s energy future. But, under the extant law, they should be selected in competitive solicitations when purchasing utilities and their state regulators deem the purchase in the best interest of consumers, not because of a federal mandatory purchase obligation that does not apply to them.

In *Amicus*’ experience, large generation facilities like Broadview already participate successfully in the competitive power market outside of PURPA, just as Congress provided. *Amicus* is one of the largest purchasers of independent competitive renewable generation in the western United States, and regularly enters into long-term contracts with renewable projects to help meet its retail customers’ demands. Following a competitive solicitation issued in 2017, *Amicus* acquired 1,150 megawatts of power from new wind resources. (For general comparison, an average-sized coal-fired plant would produce roughly 500 megawatts.) Just a few years later, in 2020, *Amicus* issued a competitive solicitation for up to 6,000 megawatts of power from various renewable resources and received 55 bids for projects comprised of solar and solar with battery energy storage systems. Only 8 of those 55 facilities had a rated capacity for the associated solar resource larger than 160 megawatts. In other words, most of these

facilities have a rated capacity below the maximum amount of power Broadview can produce. Facilities of roughly Broadview's size (and smaller) compete successfully in the marketplace; indeed, *Amicus*' final selection of bids included 1,302 megawatts of new solar capacity, and 8 of the 10 bids that included solar generation had a smaller rated capacity than 160 megawatts.

Yet, the D.C. Circuit's decision allows large generation facilities developed by sophisticated parties such as Broadview to bypass—and thus undermine—this competitive marketplace, increasing costs for *Amicus*' customers and imposing potentially substantial burdens on the energy grid and utilities like *Amicus*. Given the robust market for renewable resources, qualifying facilities will often participate in the competitive market *and* seek a power purchase agreement pursuant to their qualifying facility status, relying upon the qualifying facility option as a backstop if the facility is not selected in the competitive solicitation and can obtain more favorable pricing under PURPA. Allowing large facilities like Broadview to game the system in this way imposes additional costs on utilities like *Amicus*, which must then spend time and money engaging with the facility on both fronts. By permitting FERC to expand PURPA to allow large utility-scale projects like Broadview to “masquerade as small power production” facilities and thus bypass the competitive market, Order No. 872-A, 173 FERC ¶ 61,158, at P 245 (2020), the D.C. Circuit's decision undermines

the market solicitations utilities like *Amicus* use to obtain power at the lowest price for utility consumers.

Relatedly, the D.C. Circuit's order also allows oversized qualifying facilities to rely upon PURPA's mandatory purchase obligation to bypass and undermine state utility planning processes, compelling utilities to purchase power from large qualifying facilities that their customers do not need. Indeed, "[f]or those states that have competitive solicitation requirements, the use of PURPA actually encourages developers to evade competitive avenues of resource selection if . . . a developer can simply trump that process through a PURPA claim." See Nat'l Assoc. of Regul. Util. Comm'rs, *supra*, at 5. This strategy, in turn, "renders the actual winning bidders a mere stalking horse and will ultimately undermine the integrity of the competitive solicitation." *Id.*

By evading the competitive market and utility planning processes, the long-term, fixed price, and often above-market qualifying facility contracts that *Amicus* will be forced to enter under FERC's misreading of PURPA will result in higher rates for *Amicus'* customers. Allowing large facilities like Broadview to take advantage of PURPA's mandatory purchase obligation can impose additional costs on publicly regulated utilities like *Amicus*, which costs are necessarily passed on to energy consumers.

*Amicus'* experience shows the potentially harmful impacts of FERC's expansion of PURPA to large

facilities like Broadview. Although the purchase price for a qualifying facility contract is *in theory* intended to reflect the purchasing utility's avoided cost, *in practice* long-term avoided cost estimates have persistently exceeded the price of available alternatives, thereby driving up consumer rates. See Order No. 872 at P 55 (“[W]e further identified evidence demonstrating that overestimations of avoided cost have not been balanced by underestimations, and that this trend may persist with the general decline in the cost of electricity.” (citation omitted)). Indeed, staff of the Public Utility Commission of Oregon recently testified that qualifying facility generation harms customers “because cheaper power is available on the market or via [utility]-owned generation.” *In re PacifiCorp, dba Pacific Power, Request for a General Rate Revision*, Or. Pub. Util. Comm’n, Docket No. UE 374, Staff’s Rebuttal Testimony and Exhibits of Scott Gibbens (Staff/2400, Gibbens/17) (July 24, 2020).<sup>5</sup> To take one historical example, on August 1, 2014, a 10-year fixed price contract at the Mid-Columbia wholesale power market trading hub was priced at \$45.87/MWh. Two years later, on June 30, 2016, that same contract was priced at \$30.22/MWh. This constituted roughly a 34% decline in under two years. But *Amicus* was nevertheless obligated to purchase 51.9 million MWhs over a period of several years under its PURPA

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<sup>5</sup> Available at <https://apps.puc.state.or.us/edockets/DocketNoLayout.asp?DocketID=22279>.

contract obligations at an average price of \$59.87/MWh. *See* Qualifying Facility Rates and Requirements; Implementation Issues Under the Public Utility Regulatory Policies Act of 1978, 84 Fed. Reg. 53246, 53255 n.101 (proposed Oct. 4, 2019).

By permitting FERC to expand the types of generation facilities that will qualify for PURPA's market protections beyond what the statutory text provides, the D.C. Circuit's decision also incentivizes unnecessary and economically inefficient generation projects. Because qualifying facilities are insulated from the competitive market, they have little incentive to site their locations competitively and can instead build in locations that offer little value to the energy grid. Thus, with PURPA's mandatory purchase obligation to rely upon, a facility may site its location in an area that already has sufficient generation to serve load. Allowing oversized utilities like Broadview to take advantage of PURPA's market purchase obligation, which Congress did not design for them, risks distorting the energy market in ways that Congress never envisioned or intended.

## CONCLUSION

This Court should grant the Petition.

Respectfully submitted,

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