No. 22-1246

In the Supreme Court of the United States

EDISON ELECTRIC INSTITUTE, ET AL., PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENT

MATTHEW R. CHRISTIANSEN
General Counsel
ROBERT H. SOLOMON
Solicitor
JARED B. FISH
Attorney
Federal Energy Regulatory Commission
Washington, D.C. 20426

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

To stimulate domestic production of electricity from renewable sources like wind and solar power, the Public Utility Regulatory Policies Act of 1978 (PURPA), Pub. L. No. 95-617, 92 Stat. 3144, authorizes the Federal Energy Regulatory Commission (Commission) to provide favorable regulatory treatment to qualifying "small power production facilities." 16 U.S.C. 824a-3(a). To be eligible, a facility must satisfy certain statutory criteria, including that the "facility * * * has a power production capacity which * * * is not greater than 80 megawatts." 16 U.S.C. 796(17)(A)(ii). The Commission determined in this case that a solar-power facility developed by respondent Broadview Solar, LLC qualifies as an eligible small power production facility where the facility will be capable of outputting no more than 80 megawatts to the power grid. The question presented is as follows:

Whether the court of appeals correctly held that the Commission's interpretation of the 80-megawatt condition in the definition of "small power production facility," 16 U.S.C. 796(17)(A), is reasonable and therefore entitled to deference under *Chevron U.S.A Inc.* v. *NRDC, Inc.*, 467 U.S. 837 (1984).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes, regulations, and rule:

Statutes, regulations, and rule—Continued: Page

Miscellaneous:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 59 F.4th 1287. The orders of the Federal Energy Regulatory Commission (Pet. App. 29a-60a, 63a-124a, 127a-154a) are reported at 175 F.E.R.C. ¶ 61,228, 174 F.E.R.C. ¶ 61,199, and 172 F.E.R.C. ¶ 61,194, respectively.

JURISDICTION

The judgment of the court of appeals was entered on February 14, 2023. On May 5, 2023, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including June 14, 2023, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Public Utility Regulatory Policies Act of 1978 (PURPA), Pub. L. No. 95-617, 92

Stat. 3117, to reduce the Nation's dependence on fossil fuels and "encourage the development of * * * small power production facilities" that rely on alternative sources of energy. *American Paper Inst., Inc.* v. *American Elec. Power Serv. Corp.*, 461 U.S. 402, 404-405 (1983). Congress "recognized that electric utilities had traditionally been 'reluctant to purchase power from, and to sell power to, [such] nontraditional facilities." *Id.* at 405 (quoting *FERC* v. *Mississippi*, 456 U.S. 742, 750 (1982)). To address that problem, Congress authorized the Federal Energy Regulatory Commission (Commission or FERC) to provide certain regulatory benefits to "small power production facilities." 16 U.S.C. 824a-3.

In particular, PURPA directs FERC to prescribe rules "to encourage * * * small power production" by mandating that electric utilities buy power from qualifying "small power production facilities" at favorable rates. 16 U.S.C. 824a-3(a); see 16 U.S.C. 824a-3(a)(2), (b), and (d); *Portland Gen. Elec. Co.* v. *FERC*, 854 F.3d 692, 694 (D.C. Cir. 2017). FERC complied with that directive and issued rules in 1980 to implement PURPA's favorable treatment for small power production facilities. See 45 Fed. Reg. 12,214, 12,233-12,237 (Feb. 25, 1980) (codified as amended at 18 C.F.R. Part 292). FERC's rules generally require electric utilities to buy power from qualifying small power production facilities at the utilities' "avoided cost[]" rate and to interconnect with small power production facilities in order to do so. 18 C.F.R. 292.304(b)(2); see 18 C.F.R. 292.303(a) and (c). A purchasing utility's avoided-cost rate is calculated as "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 or purchasing it from another source.

Portland Gen. Elec., 854 F.3d at 695 (brackets and citation omitted); see 18 C.F.R. 292.101(b)(6).

To qualify for those regulatory benefits, a power-generating facility must satisfy the definition of a "small power production facility" in the Federal Power Act, 16 U.S.C. 791a *et seq.*, as amended by PURPA § 201, 92 Stat. 3134. The Federal Power Act defines a "small power production facility" to mean

> a facility which is an eligible solar, wind, water, 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). The Commission's regulations permit facilities to self-certify as eligible in some conditions, but otherwise the Commission certifies a facility's eligibility and adjudicates any disputes about eligibility. 18 C.F.R. 292.207.

In 1981, the Commission first interpreted the statutory condition under which a small power production facility must have a "power production capacity" of "not greater than 80 megawatts." 16 U.S.C. 796(17)(A)(ii). The Commission interpreted the phrase "'power production capacity'" to refer to "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 F.E.R.C. ¶ 61,231, at 61,445 (1981).

That has come to be known as the "send out" approach to calculating power production capacity, because it is based on how much usable power the facility can "send out" to the interconnected power grid—for example, after netting out power consumed within the facility as part of the generating process, or losses due to interconnection equipment. *Ibid.*; see *Malacha Power Project, Inc.*, 41 F.E.R.C. ¶ 61,350, at 3 (1987). The net power that a qualifying facility sends out to the grid is also the amount of power that is "capable of being avoided on the [purchasing utility's] system," *i.e.*, the amount of power that the purchasing utility need not get from elsewhere. *Penntech Papers*, 48 F.E.R.C. ¶ 61,120, at 61,423 (1989).

2. This case concerns a solar-power facility being developed in Montana by respondent Broadview Solar, LLC. Pet. App. 31a. The Broadview facility includes a solar array, which generates power, and an on-site battery, which can store power generated by the solar array. *Id.* at 65a-67a. When operational, the facility will interconnect with and sell power to a utility, petitioner NorthWestern Energy. *Id.* at 3a.

The Broadview facility's solar array can generate a maximum of 160 megawatts of power and its battery can discharge up to 50 megawatts of stored power for a four-hour period. Pet. App. 3a, 66a. But the electricity generated by the solar array and stored in the battery is in the form of direct current (DC). *Id.* at 3a. To be supplied to an interconnecting utility like NorthWestern, the power must be converted into alternating current (AC). *Ibid.* Thus, the Broadview facility, like other solar facilities, includes a bank of inverters that convert direct current into alternating current. *Ibid.* The Broadview facility's inverters have a total send-out capacity of 80

megawatts, meaning that the facility as a whole can supply no more than 80 megawatts of "grid-usable AC power" to NorthWestern's grid at any one time. *Ibid.*; see *id.* at 66a, 91a-92a.

Broadview's solar array and battery are upstream of the bank of inverters, and the amount of direct current power that each component sends to the inverters varies with the operating conditions. Pet. App. 56a-57a. During optimal sunny conditions, the facility is designed so that the solar array can supply enough power to the inverters to send out 80 megawatts to the grid, while also supplying excess power for storage in the battery. *Id.* at 8a. During cloudy conditions or at night, the battery can then release stored power to the inverters to account for the drop-off of power from the solar array. *Ibid.* The battery does not permit the facility to supply more than 80 megawatts to the grid at any time. But the array-and-battery design does mean that the Broadview facility can more consistently deliver 80 megawatts of power to the grid than the facility would be able to deliver using only a 160-megawatt solar array with the same inverters.

3. In 2019, Broadview applied to the Commission for certification that its Montana facility qualifies as a small power production facility under PURPA. Pet. App. 3a. Broadview maintained that, under the approach the Commission had first adopted in *Occidental Geothermal* in 1981, the Broadview facility's "power production capacity" is "not greater than 80 megawatts" and therefore satisfies the 80-megawatt condition for eligibility, 16 U.S.C. 796(17)(A)(ii), because the facility's inverters limit the maximum net send-out power of the facility to 80 megawatts. See Pet. App. 129a-131a. NorthWestern intervened in the agency proceedings to oppose the cer-

tification, as did petitioner Edison Electric Institute (a trade association). *Id.* at 133a.

The Commission initially denied Broadview's application, Pet. App. 127a-154a, but later granted the application upon rehearing in a pair of orders issued in March and June 2021, *id.* at 29a-60a, 63a-124a.

In its initial order denying Broadview's application, the Commission stated that after "[r]e-examining *Occidental*," it had concluded that its prior approach "improperly focused on 'output' and 'send out,'" which it stated that it no longer viewed as necessarily equivalent to a facility's "'power production capacity.'" Pet. App. 142-143a (citations omitted). The Commission then determined that the Broadview facility's "'power production capacity'" should be regarded as 160 megawatts—the generation capacity of the solar array—less certain "loads and losses that occur independent of the output limiting function of inverters." *Id.* at 143a-144a & n.60. To prevent "industry disruption," the Commission stated that it would apply its new approach only prospectively. *Id.* at 145a. Commissioner Glick dissented, stating that he would have adhered to the Commission's prior interpretation and expressing concern that "casually upending settled precedent creates unnecessary uncertainty." *Id.* at 154a; see *id.* at 148a-154a.

Broadview sought rehearing, which the Commission granted. Pet. App. 64a-65a. On rehearing, the Commission issued a pair of orders reinstating its prior "send out" approach, determining that the Broadview facility has a power production capacity of no greater than the 80 megawatts it can send out to the grid, and certifying the facility as a small power production facility for PURPA. See *id.* at 34a, 41a-42a, 80a-82a, 100a. The Commission observed that the statute is susceptible of

"multiple interpretations." *Id.* at 81a. On one approach, the Commission "could * * * look only to generating subcomponents when evaluating power production capacity." *Id.* at 80a-81a. Alternatively, the Commission "could, as it has for nearly forty years, look to the maximum output that the facility can produce for the electric utility after accounting for all the constituent parts that make up the facility, which in this case includes the inverters." *Id.* at 81a (footnotes omitted). The Commission determined that the statute was "ambiguous" but that "the latter approach is the best reading." *Id.* at 81a-82a. Among other things, the Commission emphasized that its send-out interpretation focuses on "what the facility can actually produce for sale to the interconnected power grid" and accords with the "commonly understood meaning of the term facility," rather than focusing unduly on the output of "individual parts" within the facility. *Id.* at 82a.

Commission Danly dissented from the Commission's initial order on rehearing, Pet. App. 102a-124a, and concurred in part and dissented in part from its further order on rehearing, *id.* at 58a-60a. He would have determined that the relevant power production capacity of the Broadview facility is the maximum generating capacity of its solar array, rather than the amount of usable power the facility can deliver to the interconnected utility. See *id.* at 58a.

4. The court of appeals affirmed, with Judge Walker dissenting in part. Pet. App. 1a-28a. As relevant here, the court stated that its analysis was "governed by the two-step framework set out in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)." *Id.* at 6a. And the court agreed with the Commission that Congress has not "directly spoken to the

precise question at issue." *Ibid.* (citation omitted). The court observed that, as applied to an array-and-battery facility like Broadview's, the statutory definition of a "small power production facility," 16 U.S.C. 796(17)(A), does not clearly specify "whether the relevant [power production] capacity is that of the individual subcomponents generating DC power, *i.e.*, the solar array, or of all of the facility's components working together to produce grid-usable AC power, which would include the inverters." Pet. App. 6a.

The court of appeals therefore "move[d] to step two" of *Chevron*, Pet. App. 6a, and determined that the Commission's interpretation was "reasonable and well-supported by the statute's text, structure, purpose, and legislative history," *id.* at 10a. Indeed, the court found that the Commission's approach of focusing on the net power output of the entire facility, including how its "'component parts * * * work together as a whole,'" was "eminently reasonable." *Id.* at 7a (citation omitted). Like the Commission, the court emphasized that the "only grid-usable 'power' that Broadview produces is AC power," and that the facility's inverters are "an integral component in producing that power." *Ibid.* The court also observed that the Commission's approach works in harmony with the "mandatory purchasing requirement" that is a chief benefit of qualifying as a small power production facility, because that requirement applies only to "grid-usable power." *Id.* at 7a-8a.

Judge Walker concurred in part and dissented in part. Pet. App. 15a-28a. He agreed with the Commission that the definition of "small power production facility," 16 U.S.C. 796(17)(A), is best read as applied here to require looking at the production capacity of both the solar array and "the facility's other components," including

"the inverters that limit the array's output to the grid." Pet. App. 22a. But he would have treated the facility's overall power production capacity as the sum of the grid-usable AC power that can be delivered through the inverters (80 megawatts) plus the DC power that the array can simultaneously deliver for storage in the on-site battery (which he assumed to be 50 megawatts, the battery's output), for a total of 130 megawatts. *Id.* at 26a; see *id.* at 26a n.5.

DISCUSSION

The court of appeals correctly upheld the Commission's determination that the Broadview facility qualifies as a "small power production facility" as defined in 16 U.S.C. 796(17)(A). The definition requires that the "facility" have a "power production capacity" of no greater than 80 megawatts. 16 U.S.C. 796(17)(A)(ii). Since shortly after PURPA was enacted in 1978, the Commission has interpreted that provision to refer to the amount of grid-usable power that a facility is capable of sending out to an interconnected utility, and the Commission reasonably adhered to that interpretation on rehearing here. The Commission found its longstanding approach to be the "best interpretation." Pet. App. 84a. The court of appeals agreed that the Commission's interpretation is, at a minimum, "reasonable," *id.* at 10a, and upheld the agency's interpretation under *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837 (1984).

The decision below is correct and does not conflict with any decision of this Court or another court of appeals. Nor do petitioners identify any other sound basis for plenary review. On May 1, 2023, however, this Court granted a petition for a writ of certiorari in *Loper Bright Enterprises* v. *Raimondo*, 143 S. Ct. 2429 (No. 22-415), to consider whether to overrule *Chevron* or

modify it in certain respects. Because the court of appeals relied on *Chevron* here, it would be appropriate to hold the petition in this case pending the Court's decision in *Loper Bright* and then to dispose of the petition as appropriate in light of that decision.

1. Petitioners do not identify any sound basis for further review of the decision below. Petitioners principally contend (Pet. 13-17) that the statutory language compels the Commission to treat the 160-megawatt generating capacity of the Broadview facility's solar array as the facility's "power production capacity," 16 U.S.C. 796(17)(A)(ii), notwithstanding that the facility can supply no more than 80 megawatts of grid-usable AC power at any one time. But the dictionary definitions of "power," "production," and "capacity" that petitioners invoke (Pet. 13-15) do not speak to the key point on which the Commission and the court of appeals found the statute ambiguous—namely, whether the relevant power production capacity is that of the facility as a whole or instead only of some of its component parts. See Pet. App. 6a, 42a, 81a. The Commission determined that the best reading of the statute is that the "power production capacity" of a facility refers to the maximum net output of power that the facility can send out to interconnected utilities, consistent with how the term "capacity" is commonly understood when used in the specialized context of power generation. See Gov't C.A. Br. 40-41 (citing "industry-relevant definition[s]" of "'capacity'").

As applied here, the Commission's interpretation treats the relevant "facility" as comprising both the solar array that generates power and the inverters, which are necessary to convert that power into the only form of electrical current that is usable on the power grid. The Commission adopted its send-out interpretation of

the statutory language in 1981, shortly after the enactment of PURPA, and it has adhered to that interpretation ever since (with the exception of its initial order in this case). See pp. 3-7, *supra*.

Petitioners contend (Pet. 16 n.9) that "[a] limitation on the amount of power a facility can 'send out'" to the grid "does not change how much power the facility can produce" internally. But in ordinary English, it is perfectly natural to think of the "power production capacity" of the facility as the power that the facility as a whole has the capacity to produce to the grid, *i.e.*, to send out. At a minimum, the text is reasonably susceptible of that interpretation, as the court of appeals concluded. Pet. App. 10a.*

The statutory structure, purpose, and history all further support the Commission's longstanding view, as the court of appeals recognized. Pet. App. 7a-10a. With respect to the statutory structure, the court explained that the Commission's interpretation "brings various provisions of PURPA into harmony." *Id.* at 7a. PURPA and its implementing regulations require utilities to buy power from small power production facilities on terms that are favorable to those facilities. See pp. 2-3, *supra*. But utilities are required to purchase only the power that a small power production facility actually sends out to the grid (*i.e.*, its "net output"). Pet. App. 8a. Accordingly, interpreting the 80-megawatt eligibility condition as referring to a facility's net output to the grid aligns

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* Notably, the interpretation that petitioners advance in this Court is one that no judge endorsed below. Petitioners do not defend Judge Walker's alternative theory that the Broadview facility's power production capacity is the sum total of the amount of power that the facility can send out to the grid *and* to its on-site battery at any one time. See Pet. App. 26a-27a.

the eligibility condition with the corresponding obligation that PURPA imposes on utilities to purchase the power that such a facility sends out. See *id.* at 45a (Commission's order on rehearing). The court of appeals also determined that the Commission's interpretation furthers PURPA's purpose of "encourag[ing] the development of . . . small power production facilities," *ibid.* (citation omitted), and thereby reducing domestic reliance on fossil fuels to generate electricity. The court noted that petitioners' reading, by contrast, would discourage such development by rendering facilities like the one at issue here ineligible for PURPA's benefits merely because "their component parts have individual production capacities over 80 [megawatts], even though the overall facility cannot send out more than 80 [megawatts] to the grid." *Ibid.* Petitioners fail to demonstrate any error in that reasoning, let alone any error that would warrant further review by this Court.

Petitioners' reliance (Pet. 17) on the language of an adjacent provision in the definition of "small power production facility," 16 U.S.C. 796(17)(A), is misplaced. The adjacent provision states that, to qualify as a small power production facility, a facility must "produce[] electric energy solely by the use, as a primary energy source, of biomass, waste, renewable resources, geothermal resources, or any combination thereof." 16 U.S.C. 796(17)(A)(i). Petitioners contend that the quoted language demonstrates that Congress linked together the "produc[tion]" of energy with "us[ing]" a source to generate it, which (in their view) in turn supports treating the production capacity of the Broadview facility as how much energy the solar array can generate using solar power. *Ibid.* But the provision that petitioners emphasize speaks to how a facility generates power, not how

much power the facility produces to the grid. And in the provision that actually addresses the latter, 16 U.S.C. 796(17)(A)(ii), Congress used meaningfully different language. Congress could have, but did not, make eligibility under Section 796(17)(A)(ii) turn on the power production capacity of the facility's internal "primary energy source." Pet. 17 (citation omitted). Congress instead referred to the production capacity of the "facility" as a whole. See 16 U.S.C. 796(17)(A)(ii) ("a facility which * * * has a power production capacity which * * * is not greater than 80 megawatts").

Petitioners also err in contending that the Commission's interpretation is at odds with PURPA's purpose of benefitting "'small'" power production facilities, because "ever larger projects" could qualify for favorable treatment under the statute merely by installing equipment to limit the power they are capable of sending out to the grid to no more than 80 megawatts. Pet. 18-19 (citation omitted). Congress did not leave courts or the Commission to guess about what makes a facility "small" in the relevant way. The statute defines the term "small power production facility," 16 U.S.C. 796(17)(A), and the Commission reasonably interpreted the relevant language of the definition to refer to the facility's net output to the grid. Petitioners are therefore mistaken to suggest that the statute requires the Commission to look beyond a facility's net output to the grid and perform some unspecified assessment of the facility's size.

Petitioners point to FERC's observation in a prior order that PURPA was not designed to benefit "large power production facilities that masquerade as small power production." Pet. 18-19 (quoting *Qualifying Facility Rates & Requirements: Implementation Issues Under the Public Utility Regulatory Policies Act of*

1978, 173 F.E.R.C. ¶ 61,158, at 61,993 (2020)). But the Commission was addressing a different problem in that order—namely, developers breaking down what is in effect a single facility into multiple affiliated small facilities sited close together, with no single one exceeding the 80-megawatt limitation. In the order petitioners cite, the Commission was explaining certain revisions to its regulations about proximity between affiliated facilities that the Commission made in 2020 to discourage such strategic efforts to circumvent the 80-megawatt limitation. 173 F.E.R.C. ¶ 61,158, at 61,993-61,994; see 18 C.F.R. 292.204(a)(2)(i). Disaggregating a single large facility into multiple putatively discrete facilities could result in an interconnected utility being forced to purchase more than 80 megawatts of power from the aggregate group of affiliated facilities. Here, by contrast, there is no dispute that NorthWestern will never be required to purchase more than 80 megawatts from the Broadview facility.

Finally, nothing in the Commission's orders (or the court of appeals' decision affirming them) would require treating petitioners' hypothetical 529-megawatt solar facility (Pet. 24) as a "small power production facility" as long at the facility installed inverters to send out only 80 megawatts of alternating current to the power grid. The Commission treated the Broadview facility's bank of inverters as an integral part of the facility in part because both the solar array and the on-site battery are upstream of the inverters. See Pet. App. 56a-57a. In other words, all of the power produced by the solar array or released by the battery flows through the inverters and is limited by their maximum total output capacity of 80 megawatts of grid-usable AC power. The Commission could reasonably reach a different conclusion

for other facility designs that involve sending out some power to the grid but also sending out usable AC power elsewhere on-site for "behind-the-meter" purposes (Pet. 24), such as to run an on-site industrial plant. At the very least, such a facility would raise distinct issues not controlled by the Commission's decision in this case or the court of appeals' upholding of that decision.

2. Petitioners' remaining arguments (Pet. 20-29) focus on how the court of appeals applied *Chevron*. For example, petitioners criticize (Pet. 20) the court of appeals for supposedly limiting its "analysis of [the] statutory text" at step one of the *Chevron* framework to "three sentences spanning less than one paragraph." But the court went on to discuss the statutory text, context, purpose, and history extensively in evaluating the reasonableness of the agency's interpretation. See Pet. App. 7a-10a. The court thus applied the traditional tools of statutory interpretation, without deference to the agency, before concluding that the Commission's longstanding interpretation is, at a minimum, reasonable. Cf. *Entergy Corp.* v. *Riverkeeper, Inc.*, 556 U.S. 208, 218 & n.4 (2009). And at all events, the court's case-specific application of *Chevron* to these circumstances does not warrant further review. This Court does not ordinarily grant certiorari when the "asserted error consists of * * * the misapplication of a properly stated rule of law." Sup. Ct. R. 10.

However, after the court of appeals entered its judgment, this Court granted a petition for a writ of certiorari in *Loper Bright Enterprises* v. *Raimondo*, *supra*, to consider "[w]hether the Court should overrule *Chevron* or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity

requiring deference to the agency." Pet. at i-ii, *Loper Bright*, *supra* (No. 22-451) (Question 2); see *Loper Bright*, 143 S. Ct. at 2429 (granting review "limited to Question 2 presented by the petition"). Because the court of appeals relied on *Chevron* to uphold the Commission's interpretation as reasonable and therefore "entitled to deference," Pet. App. 2a, it would be appropriate for the Court to hold the petition in this case pending its decision in *Loper Bright* and then to dispose of the petition as appropriate in light of that decision.

CONCLUSION

The petition for a writ of certiorari should be held pending the Court's decision in *Loper Bright Enterprises* v. *Raimondo*, No. 22-451, and then disposed of as appropriate in light of that decision.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General

MATTHEW R. CHRISTIANSEN
General Counsel
ROBERT H. SOLOMON
Solicitor
JARED B. FISH
Attorney
Federal Energy Regulatory Commission

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