

No. \_\_\_\_\_

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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.*

\_\_\_\_\_

***APPLICATION FOR AN EXTENSION OF TIME IN WHICH TO FILE  
A PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT***

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To the Honorable John G. Roberts, Jr., Chief Justice of the United States and  
Circuit Justice for the District of Columbia Circuit:

Pursuant to 28 U.S.C. § 2101(c) and Rules 13.5, 22, and 30.2 of this Court, the  
Edison Electric Institute (“EEI”) and NorthWestern Corporation d/b/a NorthWestern  
Energy (collectively, “Applicants”) respectfully request a 30-day extension of the time  
in which to file a petition for a writ of certiorari in this Court, to and including  
Wednesday, June 14, 2023. The U.S. Court of Appeals for the D.C. Circuit entered  
judgment in *Solar Energy Industries Association v. FERC* (Nos. 21-1126 et al.) on

February 14, 2023. A copy of the D.C. Circuit’s opinion is attached as Exhibit 1. See 59 F.4th 1287. No requests for rehearing were filed in the D.C. Circuit. This Court’s jurisdiction would be invoked under 28 U.S.C. § 1254(1). The time to file a petition for writ of certiorari in this Court will currently expire on Monday, May 15, 2023. This application is being filed more than 10 days before that date, and no prior application has been made in this case.

The Public Utility Regulatory Policies Act of 1978 (“PURPA”) created a class of electricity generators known as “qualifying facilities” that receive favorable regulatory and commercial treatment. Among the most important advantages granted to qualifying facilities is Congress’s instruction that electric utilities are legally required to purchase all of the electricity generated by qualifying facilities at the utility’s “incremental cost of alternative electric energy,” 16 U.S.C. § 824a-3(d)—known as the mandatory-purchase obligation. PURPA provides that a generator can be a qualifying facility only if its “power production capacity \* \* \* is not greater than 80 megawatts.” 16 U.S.C. § 796(17)(A). This case presents a substantial and recurring question of national importance concerning the meaning of PURPA: whether the term “power production capacity” refers to the maximum amount of power that can be created by the facility seeking preferential treatment, or whether that term instead refers to the amount of alternating current power that the facility can deliver to the electric grid at any one point in time.

Broadview Solar, LLC (“Broadview”) is developing a solar energy project in Yellowstone County, Montana. The Broadview Project (“Project”) will consist of two

primary components: (1) an array of more than 470,000 solar panels which together have a gross capacity of 160 megawatts (the “solar array”); and (2) a 50-megawatt battery energy storage system that Broadview intends to charge exclusively from the on-site solar array. Broadview applied to the Federal Energy Regulatory Commission (“FERC”) for a determination that its Project meets the statutory criteria for a qualifying facility. All parties agree that the Project’s solar array is capable of generating more than 80 megawatts of power but that, due to the use of inverters, the maximum output of the Project is limited to 80 megawatts at any one time.

EEI is a trade association that represents all U.S. investor-owned electric utilities. EEI intervened in the FERC proceeding and opposed Broadview’s application for qualifying facility status. NorthWestern Energy, an investor-owned utility and EEI member, is responsible for serving its roughly 753,600 customers in Montana, South Dakota, and Nebraska with safe, reliable, and affordable energy. Broadview has indicated that it intends to interconnect with the electricity transmission system owned by NorthWestern Energy and to sell the energy produced by the Broadview Project to NorthWestern Energy, under PURPA’s mandatory-purchase obligation. Facing potentially undue increased costs to its customers, NorthWestern Energy also intervened in the FERC proceeding and objected to Broadview’s application for qualifying facility status. EEI and NorthWestern Energy argued that the plain meaning of “power production capacity” is the maximum amount of power that can be created by the facility, which in Broadview’s case is

greater than the statutory limit of 80 megawatts. EEI and NorthWestern Energy therefore urged FERC to deny Broadview’s application for qualifying facility status.

FERC initially voted to deny Broadview’s application. It then voted 3-2 to grant rehearing and confer qualifying facility status, and sustained that approach in a second rehearing order. See *Broadview Solar, LLC*, 172 FERC ¶ 61,194 (2020), reh’g granted, 174 FERC ¶ 61,199 (2021), further reh’g denied, 175 FERC ¶ 61,228 (2021). EEI and NorthWestern Energy timely petitioned for review by the D.C. Circuit; Broadview and NewSun Energy, LLC intervened as respondents.

In denying EEI and NorthWestern Energy’s petitions for review, the D.C. Circuit concluded that PURPA is “ambiguous as to the proper measure of a facility’s ‘power production capacity’” and that FERC’s interpretation of that phrase, which “focus[ed] on the amount of [alternating current] power being sent out to the grid, is reasonable.” See *Solar Energy Indus. Ass’n*, 59 F.4th at 1291-1292. The panel therefore deferred to FERC’s interpretation of PURPA pursuant to *Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). See *id.* at 1292-1294. Judge Walker dissented, noting that this Court’s recent decisions “repudiate” the type of “*Chevron* maximalism” employed by the panel majority and observing that this “Court has not deferred to an agency under *Chevron* since 2016.” *Id.* at 1298 (Walker, J., dissenting). In Judge Walker’s view, FERC had “rewrit[ten] the statute,” because, under the plain language of PURPA, the Broadview Project has a “power production capacity” of more than 80 megawatts and therefore is not eligible for qualifying facility status. *Id.* at 1300-1301.

Undersigned counsel is working diligently, but respectfully submits that additional time is necessary for the Applicants to decide whether to file a petition for a writ of certiorari in this matter, and, if so, to complete preparation of that petition. EEI is continuing to assess the potential implications of the D.C. Circuit's opinion for its members, which include all investor-owned electric utilities in the United States, and how that opinion fits within a complex body of case law concerning PURPA. NorthWestern Energy is also continuing to analyze the D.C. Circuit's opinion and to assess its significance from a legal, commercial, and operational perspective, as the issue will recur. Moreover, both EEI and NorthWestern Energy are assessing this Court's May 1, 2023 order granting the petition for a writ of certiorari in *Loper Bright Enterprises v. Raimondo* (No. 22-451), and the extent to which this Court's forthcoming merits decision in that case might affect this matter. Additional time is necessary to allow further coordination between EEI, NorthWestern Energy, and their counsel on these issues.

Undersigned counsel has also faced numerous overlapping deadlines in other matters during the existing time for preparation of a petition for writ of certiorari in this case. Among other things, undersigned counsel presented oral argument on March 6, 2023 in a preliminary-injunction motions hearing in Texas federal district court; filed an intervenor brief on March 20, 2023, in D.C. Circuit case 22-1151; filed a certiorari-stage reply brief on April 4, 2023, in this Court's case 22-594; filed a supplemental brief in this Court's case 22-256 on April 19, 2023; presented oral

argument on April 20, 2023 in D.C. Circuit cases 22-1146 and 22-1147; and filed a brief in opposition on April 25, 2023 in this Court's case 22-805.

Wherefore, Applicants EEI and NorthWestern Energy respectfully request that an order be entered extending their time to file a petition for writ of certiorari up to and including Wednesday, June 14, 2023.

Respectfully submitted,



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May 3, 2023

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Applicants provide the following disclosures:

1. The Edison Electric Institute is an incorporated, not-for-profit trade association representing all U.S. investor-owned electric companies. The Edison Electric Institute has no parent corporation and no publicly held company has 10% or greater ownership in the Edison Electric Institute.

2. Based on a May 2, 2023, review of the most recent statements filed with the Securities and Exchange Commission pursuant to Sections 13(d), 13(f), and 13(g) of the Securities Exchange Act of 1934, two publicly held companies own 10% or more of NorthWestern Energy's stock: BlackRock Inc. and Vanguard Group Inc.

Respectfully submitted,



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May 3, 2023