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FERC Urges Justices To Decide Chevron Before Solar Fight

By **Peter McGuire**

Law360 (September 28, 2023, 3:29 PM EDT) -- Federal energy regulators told U.S. justices to hold off on taking up a challenge to their decision granting market benefits for a solar energy project in Montana pending a highly anticipated high court ruling on judicial deference to regulatory agencies in ambiguous statutory matters.

The Federal Energy Regulatory Commission said it rightly granted Broadview Solar LLC small producer status guaranteeing buyers for its power, based on the maximum electricity the solar array and battery storage complex could send to the grid at a time, in a Wednesday brief to the U.S. Supreme Court.

But since a D.C. Circuit panel **decision in the agency's favor** depended on so-called Chevron deference, the justices should wait to **consider an appeal** from utility NorthWestern Corp. and Edison Electric Institute trade group for an upcoming opinion in [Loper Bright Enterprises et al. v. Gina Raimondo et al.](#) , widely regarded as a challenge to the decades-old Chevron precedent, according to the brief.

It "would be appropriate to hold the petition in this case pending the court's decision in Loper Bright and then dispose of the petition as appropriate in the light of that decision," FERC said.

But Broadview, joined by the Solar Energy Industries Association and NewSun Energy LLC, said the justices didn't have to wait to deal with the case. FERC's interpretation of the Public Utilities Regulatory Policies Act, which **qualified Broadview as a small power production facility**, was "the best and only sensible reading of the statute," the companies said.

Moreover, as opposed to Loper Bright, which deals with whether **federal regulators overstepped their authority** when requiring the fishing industry to pay for on-board monitors, in the Broadview matter Congress expressly delegated FERC to determine how to qualify small power-producing facilities under PURPA, according to the Wednesday brief.

"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," the companies said.

A divided D.C. Circuit panel said in February that FERC correctly decided Broadview's solar array was a small producer that utilities were required to buy power from at favorable rates. Even though Broadview's plant could produce up to 160 megawatts of directed current power and its battery could discharge up to 50 megawatts, its inverters throttled how much alternating current it could supply to a power utility such as NorthWestern, FERC said.

Since Broadview's inverters could only supply 80 megawatts of power to the grid at a time, it met the threshold to qualify as a small power facility, according to the agency's interpretation. The FERC decision in 2021 reversed the commission's earlier denial of Broadview's small producer application.

Opponents, including EEI and PacifiCorp, claimed PURPA demanded regulators to calculate renewable energy facilities based on their overall generation capacity, not how much electricity they could supply at once.

FERC, in its brief, however, said it started using its "send-out" interpretation of power capacity more than four decades ago and has adhered to it ever since, except in an initial order in the Broadview case.

"Petitioners fail to demonstrate any error in that reasoning, let alone any error that would warrant further review by the court," FERC said.

Broadview, SEIA and NewSun, meanwhile, said there was no reason for the justices to take up opponents' petition. Despite their claims, there was no circuit split over FERC's decision in the Broadview matter, the agency's interpretation of PURPA aligned with longstanding practice and its decision had no relevance in most of the U.S., the advocates said.

The commission's initial order against Broadview "is the sole deviation from four decades of court and agency decisions equating the power production capacity of a qualifying facility with the amount of power the facility can produce to the grid," the companies said.

A representative for Broadview declined to comment Thursday. Representatives for FERC and petitioners did not immediately respond to requests for comment.

FERC is represented in-house by Matthew R. Christiansen, Robert H. Solomon and Jared B. Fish and Elizabeth B. Prelogar of the U.S. Department of Justice.

NewSun Energy is represented by Janet M. Schroer of Hart Wagner LLP and Gregory M. Adams of Richardson Adams PLLC.

Broadview Solar is represented by Robert M. Loeb, Adam Wenner and Jeremy R. Peterman of Orrick Herrington & Sutcliffe LLP.

Solar Energy Industries Association is represented by Fred A. Rowley Jr. and John B. Kenney of Wilson Sonsini Goodrich & Rosati PC.

EI and Northwestern Corp. are represented by Jeremy C. Marwell and James T. Dawson of Vinson & Elkins LLP.

Northwestern Corp. is additionally represented in-house by Shannon M. Heim, Sarah N. Norcal and Mitchell L. WerBell V.

EI is additionally represented in-house by Emily S. Fisher.

Pacificorp is represented by Misha Tseytlin, Kaitlin L. O'Donnell, Christopher R. Jones and Antonia M. Douglas of Troutman Pepper.

The case is Edison Electric Institute et al. v. Federal Regulatory Commission et al., case number 22-1246, in the Supreme Court of the United States.

--Additional reporting by Katie Buehler, Kelly Lienhard and Keith Goldberg. Editing by Caitlin Wolper.