

DC Circuit Charts Path On FERC Orders In Loper Bright Era

By **Faren Bartholomew, Boris Shkuta and Catherine McCarthy** (November 3, 2025, 5:23 PM EST)

On Sept. 9, the U.S. Court of Appeals for the District of Columbia Circuit issued a decision in *Solar Energy Industries Association v. Federal Energy Regulatory Commission* that, for the first time, applied the U.S. Supreme Court's new *Loper Bright* framework to a FERC order.[1]

Most directly, the D.C. Circuit upheld FERC's interpretation of how to measure a small power production facility's power production capacity for purposes of the Public Utility Regulatory Policies Act, or PURPA. The facility at issue was a colocated solar generation and battery energy storage renewable energy project.

The D.C. Circuit confirmed that the best reading of PURPA is that a facility's power production capacity is equal to the facility's maximum net output — i.e., the amount the facility can send out to the grid — rather than some other measure, such as installed capacity.

More broadly, the decision is meaningful because the D.C. Circuit indicated how courts may address issues of statutory interpretation presented in FERC appeals in the wake of the Supreme Court's 2024 decision in *Loper Bright Enterprises v. Raimondo*.

Post-*Loper Bright*, if a court decides to speak on the best reading of an ambiguous statutory phrase, this should limit FERC's ability to reinterpret the provision in the future, as such a reinterpretation may not be offered any deference on appeal.

It is also noteworthy that the D.C. Circuit did not rely on other forms of deference to the agency, such as *Skidmore* deference, even though the Supreme Court indicated in *Loper Bright* that such forms of deference remain available to courts even after that decision's elimination of *Chevron* deference.

As background, PURPA and FERC's implementing regulations limit the capacity of a small power production qualifying facility, or QF, to a power production capacity of 80 megawatts.[2]

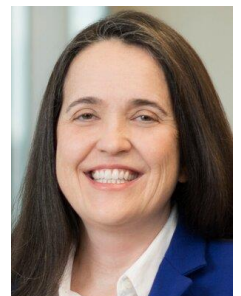
At the heart of the underlying dispute was whether, for PURPA capacity measurement purposes, FERC should consider a facility's maximum net output — the amount the facility can send out to the grid — or whether it should only consider the power production capacity of the facility's equipment.



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FERC has historically focused on the maximum net output of the facility, rather than the installed capacity of the equipment at the site.[3]

FERC's initial 2020 order in this years-long proceeding reversed its own long-standing precedent to conclude that the installed capacity of a QF should determine whether it satisfies PURPA's 80 MW size limitation and qualifies for QF status. That status provides a project owner with regulatory and economic benefits.

Under this 2020 FERC reading, developers and owners of intermittent resources seeking to benefit from QF status would be limited to developing and owning facilities with an installed capacity of 80 MW or less. This was so even though it could effectively limit, as a practical matter, a QF developer's ability to actually send out the full 80 MW of capacity into the grid at any given time, due to the nature of intermittent resources.

On rehearing in 2021, FERC reversed its 2020 order, and reverted to its previously long-standing understanding of "power production capacity" as being equal to a facility's "send-out" capacity. This 2021 FERC interpretation was the subject of the ensuing appeals in federal court.

In 2023, the D.C. Circuit, relying on Chevron deference, affirmed the 2021 FERC interpretation using a small power production QF's maximum net output when calculating its power production capacity.[4]

In July 2024, the Supreme Court granted certiorari, vacated the D.C. Circuit's decision in light of *Loper Bright* and remanded the case back to the D.C. Circuit.[5]

In its subsequent September decision, the D.C. Circuit held, employing traditional tools of statutory interpretation, that the best view of the statute is consistent with FERC's interpretation of power production capacity under PURPA.[6] In short, the D.C. Circuit again upheld FERC's 2021 order equating power production capacity with send-out capacity.

The most direct and practical consequence of the D.C. Circuit's decision is that owners of small power production QFs will continue to be able to build power generation facilities with a nameplate capacity exceeding 80 MW and remain eligible for QF status and corresponding benefits, provided that the QF does not inject more than 80 MW to the grid.

Owners of QFs may install equipment to limit the send-out capacity of the facility to 80 MW or lower.

This ruling, applying the *Loper Bright* framework, is also likely to have more permanence than an order issued based on Chevron deference. Because the D.C. Circuit directly establishes the best reading of the meaning of the term "power production capacity," this limits the ability of FERC to depart in the future from this D.C. Circuit-approved interpretation.

Under Chevron, courts would defer to well-reasoned agency statutory interpretations — which could change over time, provided the agency adequately explained itself. In the post-*Loper Bright* world, it now seems that the D.C. Circuit likely has had the final say on the meaning of the term "power production capacity" under PURPA.

It is also noteworthy that the D.C. Circuit did not rely on other forms of deference available to it, even after *Loper Bright* — such as Skidmore deference, which allows courts to defer to an agency's

interpretation in many contexts.

This indicates that when tasked with interpreting ambiguous statutory phrases — even highly technical ones, such as "power production capacity," that fall squarely within an agency's expertise — courts may rely on their own statutory interpretation expertise to reach a determination without deferring to the agency's position.

The bottom line under PURPA is that, unless Congress intervenes, it seems that FERC will apply the D.C. Circuit's interpretation of power production capacity for small power production QF size limitation moving forward.

More broadly, the decision suggests that the D.C. Circuit may choose to interpret statutes on its own, rather than apply another form of deference, such as Skidmore deference.

This type of appellate review likely limits the agency's ability to reinterpret its statutory authority. Once an issue of statutory interpretation is litigated, and a court reaches a determination on the best reading of the statute, the agency will likely apply this reading moving forward.

While issues of statutory interpretation are relatively uncommon at FERC, they can occasionally have broad-reaching implications. For example, FERC's landmark Order No. 1920 — which establishes rules for long-term transmission planning and cost allocation — is currently on appeal before the U.S. Court of Appeals for the Fourth Circuit, in *Appalachian Voices v. FERC*.

Order No. 1920 relies, in part, on FERC's interpretation of a vague statutory provision. The agency's interpretation of this same provision was previously upheld pursuant to Chevron deference.

Now, after *Loper Bright* and the D.C. Circuit's decision in *Solar Energy Industries Association*, FERC's interpretation will likely need to withstand the independent scrutiny and statutory interpretation of the Fourth Circuit in order to survive appeal — unless the Fourth Circuit chooses to rely on another form of deference, such as Skidmore deference.

The period for filing a petition for rehearing, or a petition for rehearing en banc, in the *Solar Energy Industries Association* proceeding expired on Oct. 24. No parties sought rehearing. Because the D.C. Circuit affirms FERC's order, the mandate will close the proceeding before the D.C. Circuit, and we expect no further rulings from either the courts or from FERC in this case.

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[1] *Solar Energy Indus. Ass'n v. FERC*, No. 21-1126, 2025 WL 2599488 (D.C. Cir. Sept. 9, 2025).

[2] 16 U.S.C. §§ 796(17), 824a-3; 18 C.F.R. § 292.204.

[3] Occidental Geothermal Inc., 17 FERC ¶ 61,231, at 61,445 (1981).

[4] Solar Energy Indus. Ass'n v. FERC, 59 F.4th 1287 (D.C. Cir. 2023).

[5] Supreme Court Order List, Certiorari — Summary Dispositions (July 2, 2024), https://www.supremecourt.gov/orders/courtorders/070224zor_2co3.pdf.

[6] Solar Energy Indus. Ass'n, 2025 WL 2599488 at *1.