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FERC Reverses Broadview on Rehearing; Reinstates Focus on Output in Evaluating 80 MW Cap for QFs

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On March 19, 2020, the Federal Energy Regulatory Commission ("FERC" or "Commission") issued an Order Addressing Arguments Raised on Rehearing and Setting Aside Prior Order in *Broadview Solar, LLC*, 174 FERC ¶ 61,199 (2021) ("***Broadview 2021***"). The order, which is highly favorable to the renewable energy industry, reversed FERC's September 1, 2020 holdings in *Broadview Solar, LLC*, 172 FERC ¶ 61,194 (2020) ("***Broadview 2020***") that the evaluation of whether a project complies with the 80 MW limit on the power production capacity of a small power production qualifying facility ("QF") under the Public Utility Regulatory Policies Act of 1978, as amended ("PURPA") should focus on the installed capacity of the facility. *Broadview 2020* prevented some projects from satisfying PURPA's size requirements, leaving them unable to qualify for PURPA benefits. Many renewable energy industry participants considered *Broadview 2020* to be an unexpected and significant departure from FERC precedent detrimental to the renewable energy industry. In addition to reinstating FERC precedent favorable to developers and owners of small power production QFs, in *Broadview 2021* the Commission applies its size measurement criteria to renewable energy projects beneficially for owners and developers of renewable energy projects with collocated energy storage. *Broadview 2021* also includes some useful discussion of FERC's QF form – FERC Form No. 556. FERC characterizes the form as a "flexible tool" with a design that "may not be suitable for all instances."***[1]***

The underlying facts for both *Broadview 2020* and *Broadview 2021* involve a solar array collocated with a battery storage facility owned by Broadview Solar, LLC consisting of a 160 MW solar array and a 50 MW battery storage system that would connect to 82.5 MW DC-to-AC invertors. Because any energy produced by the solar array and battery storage system would need to be converted from DC power to AC power prior to the injection in to the grid, the maximum achievable output from the facility in a given hour was 82.5 MW (*i.e.*, the facility included 82.5 MW DC-to-AC invertors).

As background, PURPA and the Commission's implementing regulations limit a small power production QF's capacity to a "power production capacity" of 80 MW.***[2]*** When evaluating whether a facility complied with this requirement, the Commission historically focused on the "maximum net output of the facility that can be safely and reliably achieved under the most favorable operating conditions likely to occur over a period of several years."***[3]*** In practice, the Commission's focus on the maximum net output of the facility—rather than the installed capacity of the equipment at the site—has meant that developers have been able to qualify for QF status by voluntarily installing control systems or taking other steps to limit the sustainable

net output of the generation facility in any given hour to 80 MW or less, even if the installed generation capacity of the facility exceeded the 80-MW cap.

Broadview 2021 reinstates FERC's net power production capacity standard for measuring PURPA's 80-MW cap for small power production facilities, including wind generation and solar generation facilities. FERC will no longer use the approach it first adopted in *Broadview 2020* – adding up the separate components of a generation project in order to evaluate power production capacity for purposes of the 80-MW cap. Instead, FERC returned to its long-standing approach of evaluating the size of small power production facilities based on the sustainable maximum net output the facility can produce after accounting for all the constituent parts that make up the facility, including for a solar generation facility, for example, its inverters.***[4]*** FERC noted that by relying on the maximum net output of the facility, it would consider "all components of a particular structure as a whole, not any of its individual parts."***[5]*** FERC concluded that the "best interpretation" of the 80-MW cap is "as a limit on the facility's net output to the electric utility (*i.e.*, at the point of interconnection), taking into account all components necessary to produce electric energy in a form useful to an interconnected entity." ***[6]***

Broadview 2020 reached no conclusion on how to measure the underlying project's solar array and associated battery storage facilities on a combined basis for purposes of the PURPA 80-MW cap after concluding that the solar array alone exceeded the 80-MW cap. On rehearing, in *Broadview 2021*, FERC does discuss the collocated battery storage directly but does not include detailed analysis of how battery storage may be treated for QF purposes more generally.***[7]*** FERC instead makes the narrow conclusion that the presence of the battery system does not change the measure of the facility's "power production capacity" for purposes of applying the 80-MW cap due to the limits of the DC-to-AC invertors: "any solar-PV QF can produce power for delivery to the purchasing utility only to the extent enabled by the inverters because the grid operates predominantly using AC power."***[8]*** *Broadview 2021* does acknowledge that the collocated battery storage increased the overall project's capacity factor but makes clear that FERC did not consider that to change the analysis:

Although Broadview's configuration allows it to more consistently deliver a higher share of the 80 MW power production capacity, that configuration does not change the fact that the Broadview facility is not actually capable of providing more than 80 MW at any one point in time at its point of interconnection with NorthWestern [Corporation]. On reconsideration, we find that while this effectively increases the Broadview facility's capacity factor, it does not change the Broadview facility's 'power production capacity' or call into question our longstanding reliance on the 'send out' analysis to measure power production capacity.***[9]***

In a number of other proceedings, companies developing renewable resources combined with battery storage have taken the position that the capacity of a battery storage system should not be included when calculating the net capacity of the facility; in those cases, however, the QF certification application was withdrawn before FERC made a substantive determination on the issue.***[10]*** Developers have presented several reasons to support a FERC conclusion not to include the addition of the battery storage facilities in the net capacity figures of existing QFs. For one thing, they argue, battery storage does not provide any additional independent power generation and merely allows the facility to shift the time of production. *Broadview 2021* does not resolve these issues.

Commissioners James P. Danly and Mark C. Christie both dissented, with Commissioner Danly providing a lengthy separate statement focused on statutory construction. While the FERC's order in *Broadview 2021* concludes that the underlying statutory provisions are ambiguous in the context of measuring the 80-MW cap, Commissioner Danly's dissent argues that power "production" unambiguously means the production of power rather than the delivery of power [11] and that the statute does not mention either interconnection or sales rights.[12] As to the collocated battery, Commissioner Danly's dissent emphasizes: "Broadview does not discharge the surplus electricity into the ground or the air.... Later, the electricity stored in the battery storage system is discharged, converted by inverters, and delivered to the purchasing utility. Therefore, the Facility is capable of delivering the entire 160 MWh generated by the solar panels to the purchasing utility."[13] Commissioner Danly's dissent also notes that, "[t]he only real change effectuated by today's Order is that some of the 160 MW of power produced by the Facility is delivered at a different time than if all 160 MW were delivered as it was produced."[14]

If NorthWestern Corporation requests rehearing of or appeals this order, we expect a high level of interest in the appellate proceeding. If these issues are not appealed in this proceeding, the roadmap for an appeal included in Commissioner Danly's dissent may be folded into arguments regarding similar issues in other QF proceedings.

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[1] *Broadview 2021*, at PP 36 and 39 (footnote omitted).

[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] *See Broadview 2021* at P 23.

[5] *Id.* at P 24 (footnote omitted).

[6] *Id.* at P 26.

[7] In a separate proceeding, FERC recognized that a stand-alone battery storage facility could be eligible for QF status in its own right if the facility is otherwise eligible and conforms to PURPA's energy input requirements. *See Luz Development and Finance Corp.*, 51 FERC ¶ 61,078 (1990).

[8] *Broadview 2021* at P 33 (footnote omitted).

[9] *Id.* at P 32 (footnote omitted).

[10] *See, e.g.*, *NorthWestern Corp.*, 168 FERC ¶ 61,049 (2019).

[11] *Broadview 2021*, at P 13 (Comm'r Danly, Dissenting).

[12] *Id.* at PP 22 and 37.

[13] *Id.* at P 36.

[14] *Id.* at P 38.