



SOLAR INDUSTRIES ASSOCIATION, Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION, Respondent

No. 21-1126, Decided February 14, 2023

U.S. Court of Appeals for the District of Columbia Circuit

Opinion Topic:

“*Chevron* maximalism”: Courts’ enduring preference for agency deference over the using venerable interpretive tools to find a statute’s best reading.

Opinion Summary:

Two public utilities petitioned the D.C. Circuit for review of a Federal Energy Regulatory Commission (FERC) order, contending that the agency exceeded its statutory authority when designating a solar-power facility as a “small power production facility.” FERC exempts these qualifying facilities from certain regulatory requirements and provides them a guaranteed market by forcing public utilities to purchase any power a qualifying facility generates. Agreeing with FERC that the statute failed to provide an unambiguous means of measuring a facility’s “power production capacity,” the court decided to defer to the agency’s interpretation under *Chevron*.

Judge Walker dissented from the majority’s *Chevron* holding. He chided the court for following the path of “*Chevron* maximalism,” under which courts use “the tools of statutory interpretation not to find the best reading of the text but instead to test whether the agency’s interpretation is ‘reasonable.’” Judge Walker noted that although recent U.S. Supreme Court precedent has rejected such maximalism, lower federal courts still needlessly default to *Chevron*. He then analyzed the statutory terms “facility” and “power production capacity” and concluded that the solar-power facility does not merit FERC’s designation.

Opinion Digest:

WALKER, *Circuit Judge*, dissenting in part:

The Public Utility Regulatory Policies Act gives lucrative benefits to small facilities that produce solar power. It defines them as facilities with a “power production capacity” of no more than 80 megawatts. 16 U.S.C. § 796(17) (A)(ii).

Broadview is a solar-power facility. At its peak, it can produce up to 130 megawatts of useful power. So it is not a “small facility.”

Because the Federal Energy Regulatory Commission concluded otherwise, I would grant the petitions for review and vacate FERC’s decision.

The **Honorable Justin R. Walker** serves on the U.S. Court of Appeals for the D.C. Circuit. *Judge Walker had no role in WLF’s selecting or editing this opinion for our CIRCULATING OPINION feature.*

I. Background

A. The Public Utility Regulatory Policies Act

The Public Utility Regulatory Policies Act encourages companies to produce renewable energy. *See* 16 U.S.C. § 824a-3(a); *see generally* *FERC v. Mississippi*, 456 U.S. 742, 745 (1982) (describing the Act’s history).

To achieve that goal, the Act gives extraordinary benefits to “small power production facilit[ies].” 16 U.S.C. § 796(17)(A). Those facilities produce electricity from “biomass, waste, renewable resources, [or] geothermal resources.” *Id.* § 796(17)(A)(i). The Act exempts them from several regulatory burdens. *Id.* § 824a-3(e)(1). And it guarantees them a viable market by forcing public utilities to buy power that small facilities produce. 16 U.S.C. § 824a-3(a)(2), (b).

Requiring public utilities to purchase all the power produced by small facilities is strong medicine. It can force them to buy power that they do not need or to buy power at an above-market price. That cost is passed on to consumers. *Powering America: Reevaluating the Public Utility Regulatory Policies Act’s Objectives and its Effects on Today’s Consumers: Hearing Before the H. Subcomm. on Energy & Commerce, 115th Cong. 84 (2017)* (testimony of Terry L. Kouba, Vice President, Alliant Energy).

Thus, the Act’s definition of “small facility” plays a key role in the statutory scheme: It keeps the mandatory-purchasing regime within bounds. The broader the definition of “small facility,” the greater the number of power plants that get special regulatory treatment under the Act.

The Act defines “small facility” as a “facility” with a “power production capacity” of no more than 80 megawatts. *Id.* § 796(17)(A)(ii).

B. Broadview’s Design

Broad Reach Power makes solar and wind energy in California, Montana, Texas, Utah, and Wyoming. Its complex in Yellowstone County, Montana cost at least \$2 billion to build. In 2019, the Montana Complex could deliver 620 megawatts of power. ***

In 2019, the Montana Complex contained four separate but similar solar-power projects. One of them is called Broadview I.

Broadview includes a solar array, a battery, and inverters. With 470,000 solar panels, its solar array produces up to 160 megawatts of direct-current power. The battery stores some of those megawatts. And the inverters convert up to 80 megawatts from DC power to alternating-current power. Because the electric grid accepts only AC power, inversion makes the power ready for the grid to receive it.

Depending on the time of day, Broadview’s components serve different purposes. During the day, the solar array sends 80 megawatts of power to the inverters and charges the battery. But at night, it can’t generate power. That’s when the battery matters most. At night, it sends stored power to the inverters and then on to the grid. With the battery, Broadview can deliver more power to the grid than it could without it.

C. FERC’s Decision

In 2019, Broadview asked FERC to certify it as a “small facility.” It argued that its “power production capacity” was not greater than 80 megawatts because its inverters can send only 80 megawatts to the grid at once. 16 U.S.C. § 796(17)(A)(ii).

FERC initially denied Broadview’s application, but it reversed course on rehearing. According to FERC, the Public Utility Act’s definition of “small facility” is ambiguous because the statute “neither defines the terms ‘facility’ and ‘power production capacity,’ nor explains how the Commission is supposed to ascertain the ‘power production capacity’ of any particular ‘facility.’ ” JA 200. FERC decided to interpret “power production capacity” to mean the “maximum output that the facility can produce for the electric [grid].” JA 201.

Two intervenors, Northwestern Energy and the Edison Electric Institute, petitioned for this Court’s review. If Broadview is a small facility, the Public Utility Act’s mandatory-purchasing rule will force Northwestern and some

of Edison's members to buy Broadview's power — even if they don't need it.

II. *Chevron*

The majority opinion captures the central issue: “The parties’ dispute in this case turns on the meanings of ‘facility’ and ‘power production capacity’ in 16 U.S.C. § 796(17)(A). [The Public Utility Act] does not define these terms. In plain language, a facility’s ‘power production capacity’ is the maximum amount of power that the facility can produce. But the statute does not state whether the relevant capacity is that of the individual subcomponent generating DC power, *i.e.*, the solar array, or of all the facility’s components working together to produce grid-usable AC power, which would include the inverters.” Majority Op. 1292.

I agree with that summary. The statute does not expressly state whether “power production capacity” includes “all the facility’s components working together.” But a lack of express language does not mean that the statute has no answer to the question presented. I would not so quickly conclude, as the Court’s next sentence does, that “Congress has not spoken to the issue” and so we “must defer to any reasonable agency interpretation” under *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Majority Op. 1292.

That is the path of “*Chevron* maximalism.” *Buffington v. McDonough*, 143 S. Ct. 14, (2022) (Gorsuch, J., concurring in denial of certiorari). When no express text makes the answer immediately obvious, some maximalists make a beeline to agency deference — before any inquiry into statutory structure, cross-references, context, precedents, dictionaries, or canons of construction. Then, they use the tools of statutory interpretation not to find the best reading of the text but instead to test whether the agency’s interpretation is “reasonable.” *Id.* at 20.

On the D.C. Circuit, *Chevron* maximalism is alive and well. *See, e.g., Loper Bright Enterprises, Inc. v. Raimondo*, 45 F.4th 359, 369 (D.C. Cir. 2022) (“some question” about the meaning of a statute is enough to trigger *Chevron* deference); *American Hospital Association v. Azar*, 967 F.3d 818 (D.C. Cir. 2020) (relying heavily on *Chevron*), *rev’d sub nom American Hospital Association v. Becerra*, 142 S. Ct. 1896 (2022) (not mentioning *Chevron*).

But the Supreme Court’s recent decisions repudiate maximalism. Indeed, the Court has not deferred to an agency under *Chevron* since 2016. *See, e.g., Becerra v. Empire Health Foundation*, 142 S. Ct. 2354 (2022) (not mentioning *Chevron*); *National Federation of Independent Business v. OSHA*, 142 S. Ct. 661 (2022) (same); *BNSF Railway Co. v. Loos*, 139 S. Ct. 893 (2019) (same). Instead, the Court has policed the limits of deference to agencies. *See, e.g., West Virginia v. EPA*, 142 S. Ct. 2587 (2022).

The most important limit is found in *Chevron* itself: “If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.” *Chevron*, 467 U.S. at 843 n.9. In other words, courts must try every tool of statutory construction *before* declaring the text ambiguous and proceeding to agency deference. If they do, they “will almost always reach a conclusion about the best interpretation” of the statute, thus resolving any ambiguity. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2448 (2019) (Kavanaugh, J., concurring); *see also SAS Institute Inc. v. Iancu*, 138 S. Ct. 1348, 1358 (2018). ***

True, Congress may leave “a gap for the agency to fill.” *Chevron*, 467 U.S. at 843. “For example, Congress might [direct] an agency to issue rules to prevent companies from dumping ‘unreasonable’ levels of certain pollutants. In such a case, what rises to the level of ‘unreasonable’ is a policy decision.” Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2152 (2016). Where an agency uses its expertise to fill such a gap, courts should not second guess the agency’s decision. *Id.*

But today’s case is different. The Public Utility Act does not invite FERC to fill a policy gap. Instead, as FERC recognizes, the meaning of the statute’s technical language “turns on legal principles of the sort that a court usually [applies] — *i.e.*, principles of statutory interpretation — and not determinations specifically entrusted to an agency’s expertise.” FERC Br. 40 n.9 (cleaned up). And courts should not defer when a statute’s meaning can be resolved using normal interpretive tools. “The judiciary is the final authority on issues of statutory construction.” *Chevron*, 467 U.S. at 843 n.9.

So here there is every reason to resist the temptation “habitua[lly] to defer to the interpretive views of [the] agenc[y].” *Valent v. Commissioner of Social Security*, 918 F.3d 516, 525 (6th Cir. 2019) (Kethledge, J., dissenting).

Instead, we can decide this case by applying, in FERC’s words, the “legal principles of the sort that a court usually [applies] — i.e., principles of statutory interpretation.” FERC Br. 40 n.9 (cleaned up). That approach follows the Supreme Court’s recent *Chevron* caselaw and avoids further entrenching a vertical split between how the Supreme Court and lower courts apply *Chevron*.*

III. Broadview Is Not a “Small Facility”

Applying the normal tools of statutory interpretation, Broadview is not a “small facility” under the Public Utility Act because its “power production capacity” is greater than 80 megawatts.

A. “Facility”

Start with the term “facility.” 16 U.S.C. § 796(17)(A). A facility is “something ... that is built, installed, or established to serve a particular purpose.” Facility (def. 4b), *Merriam-Webster* (2023). The statute’s focus on a “facility” suggests that we should assess the production capacity of a power plant *as a whole*, not the capacity of an individual component.

That rules out a few possibilities.

First, it tells us that we should not look only at the capacity of Broadview’s 160-megawatt solar array. That approach would ignore the facility’s other components — for instance, the inverters that limit the array’s output to the grid.

Second, it tells us that we should not exclude the power used to charge the facility’s battery. The battery is part of the facility. So refusing to count power that the solar array sends to the battery fails to give full meaning to the word “facility.”

FERC says we shouldn’t count power sent to the battery because it is “not useful to anybody.” See Oral Arg. Tr. 31. But a battery like Broadview’s lets a solar facility send power to the grid at times when it otherwise could not. By allowing the facility to deliver power at night, the battery “increase[s] [Broadview’s] ability to provide reliable and/or timely service to ... customers.” JA 54 (Pasley Affidavit).

The battery also makes Broadview more efficient. A solar-power facility without a battery sends to the grid “approximately 25 to 30 percent” of the maximum power its array could theoretically generate each day. *Id.* With the battery, Broadview sends “approximately 35 to 40 percent,” *id.*, because it is “capable of sustaining its maximum output for additional hours in the day,” JA 23. That increased efficiency makes the facility more profitable. See Christopher Cerny, *A Broad View of Broadview Solar: How FERC’s Whiplash-Inducing Orders Expand the Scope of PURPA*, 23 Minn. J.L. Sci. & Tech. 363, 406 (2022).

In short, the battery *is* useful. It lets Broadview make more money by prolonging its maximum output.

B. “Power Production Capacity”

1. “Power”. Power means “a source or means of supplying energy, especially[] electricity.” Power (def. 6), *Merriam-Webster* (2023). “Power” includes both DC power and AC power. See *Chemehuevi Tribe of Indians v. Federal Power Commission*, 489 F.2d 1207, 1217 (D.C. Cir. 1973) (discussing history of power transmission). So both the DC power used to charge the battery and the AC power sent directly to the grid count as “power.”

Yet FERC claims that only the 80 megawatts of AC power sent to the grid should count as Broadview’s power-production capacity. That adds an atextual limit that Congress didn’t adopt. The Public Utility Act says “power production capacity,” not “AC power production capacity.” And Congress is perfectly capable of saying “AC” when it wants to. See, e.g., 26 U.S.C. § 48E(a)(2)(A)(ii) (defining a “qualified facility” as one “with a maximum net output of less than 1 megawatt (*as measured in alternating current*)”) (emphasis added).

* Though the Supreme Court has given up on *Chevron* maximalism (and perhaps on *Chevron* altogether), lower courts have not. Between 2003 and 2013, lower courts applied *Chevron* in 74.8% of statutory interpretation cases involving agencies and reached step two 65.7% of the time. Kent H. Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 116 Mich. L. Rev. 1, 29, 33 (2017). That trend has continued since then. In 2020 and 2021, circuit courts applied *Chevron* 84.5% of the time and reached step two in 59.2% of those cases. See Brief of the Cato Institute and Liberty Justice Center as Amicus Curiae in Support of Petitioners at 21, *Loper Bright v. Raimondo*, No. 22-451 (2022) (supporting petition for certiorari).

2. “Production”. After “power” comes “production.” To “produce” something is to “create” it, or to “cause [it] to accrue.” Produce (defs. 6 & 7), *Merriam-Webster* (2023). Another apt synonym is to “generate.” See *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1171-72 (2021) (noting the “close[] connect[ion]” between the verb “produce” and the noun “generator”).

Power sent to a battery like Broadview’s is created and does accrue. Before the sun’s rays hit Broadview’s array, the battery is empty. It is charged when the facility converts solar energy into useful power. If Broadview did not “produce” the power used to charge the battery, what did?

Consider what happens when the battery charges. Broadview uses a lithium-ion battery. Charging that battery prompts a chemical reaction, causing lithium ions to move within the battery. *** Without power, that chemical reaction could not happen. So Broadview must “produce” the power used to charge the battery.

3. “Capacity”. In the statute’s context, “capacity” means “the maximum amount of power that the facility can produce.” Majority Op. 1292; see also Capacity (def. 5), *Merriam-Webster* (2023) (defining “capacity” as “maximum output”).

But here, FERC rewrites the statute. It says “capacity” includes only the power that a facility supplies to the electric grid. Yet that changes “power production capacity” to “power delivery capacity.” And the word “production” means something different from “delivery.” See Deliver (def. 5), *Merriam-Webster* (2023) (“[T]o send ... to an intended target or destination.”).

To its credit, FERC conceded at oral argument that “power production capacity” would likely include power never delivered to the grid if it is used “on site” for a “useful” purpose like powering an on-site factory. Oral Arg. Tr. 30. But that concession just highlights the problem with FERC’s approach: Charging a battery like Broadview’s is a useful purpose.

C. Broadview’s “Power Production Capacity”

Broadview has the capacity to produce 130 megawatts of power. It produces 80 megawatts of inverted AC power that is delivered to the grid *while* producing 50 megawatts of not-yet-inverted DC power to charge its battery.⁵ Because “power” includes AC and DC power, Broadview’s power production capacity is the sum of the two: 80 + 50 = 130

Consider an analogy. Every weekday, a lumberjack cuts down two trees and chops them into sellable timber. But he has a small truck and can take only one tree’s worth of timber to market daily. What is the lumberjack’s daily timber “production capacity”? Two trees. Every day he works, he can turn two trees into sellable timber. (Maybe he delivers some of the other trees on the weekends.)

Broadview is similar. When the sun is out, Broadview produces 80 megawatts of power for the inverters and 50 megawatts of power for the battery — the equivalent of the lumberjack’s two trees. Like the lumberjack’s second tree, the 50 megawatts of power sent to the battery is still produced even though it isn’t immediately delivered to the market for use on the grid. The key is that the 50 megawatts produced by the solar array and sent first to the battery is not wasted by the facility. Those 50 megawatts end up on the grid — just like the 80 megawatts sent from the solar array directly to the inverters.

That gives Broadview a power production capacity of 130 megawatts. And because the power production capacity of a “small facility” cannot exceed 80 megawatts, Broadview is not a “small facility.” 16 U.S.C. § 796(17)(A).

IV. Conclusion

***Because Broadview can produce 80 megawatts for its inverters while it simultaneously produces 50 megawatts for its battery, Broadview’s facility is capable of producing more than 80 megawatts of power. So it is too large to be a “small facility.”

For that reason, I would grant the petitions, vacate the rehearing orders, and remand to FERC for reconsideration.