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In Solar Energy Industries Association v. Federal Energy Regulatory Commission ("Solar Energy"),¹ the court grappled with a complex web of regulatory and environmental considerations. The overall dispute was the promulgation and implementation of Order 872, a directive issued by the Federal Energy Regulatory Commission ("FERC" or "Commission"), and its alignment with the Public Utility Regulatory Policies Act of 1978 ("PURPA") and the Administrative Procedure Act ("APA"). The dispute in Solar Energy is about FERC’s interpretation and application of PURPA in managing qualifying facilities ("QFs"). The crux of the contention was whether FERC’s 2020 rule revisions set forth in Order 872 were proper and whether FERC had sidestepped environmental safeguards stipulated by the National Environmental Policy Act ("NEPA") by neglecting to prepare an environmental assessment or environmental impact statement.

The case holds significant importance due to its potential environmental impact. If, as FERC predicts, there is an increase of small power production facilities, there would be an increase in renewable energy. In turn, leading to a substantial decrease in our dependence on fossil fuels, which would have the dual benefit of reducing greenhouse gas emissions and improving air quality.² Furthermore, the shift towards renewable energy could stimulate economic growth by creating new jobs in the renewable energy sector.³ However, if as petitioners assert, the rule disincentivizes QF status or disqualifies more facilities than the prior rule, it could potentially lead to a decrease in renewable energy generation and an increase in greenhouse gas emissions, which would have negative environmental impacts. In essence, this ruling could have far-reaching impacts, shaping the future of renewable energy in the United States.⁴

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* Brandy Keesee, J.D. and MPA Candidate, December 2024.

The following note will explore the what led to the FERC’s 2020 rule revisions, explain the arguments presented by both sides, and analyze the court’s application of precedent in its decision to decline the vacatur of Order 872.

II. LEGAL AND PROCEDURAL BACKGROUND

In the 1970s, the United States was confronted with a unique combination of events that drastically changed the energy landscape more rapidly than the United States could adapt. The country turned to oil for electricity generation due to the higher costs of coal and natural gas. When the Organization of Petroleum Exporting Countries initiated the oil embargo in 1973, it set off a chain reaction. The swift escalation in the cost of petroleum-based fuel sources inevitably led to an increase in the prices of non-petroleum fuel sources. This, in turn, predictably resulted in higher electricity rates and economic inflation. In response to this developing energy crisis, Congress decided to act. Congress identified two main barriers to the development of alternative energy sources: (1) traditional electric utilities are reluctant to purchase from and sell power to non-traditional facilities, and (2) financial burdens imposed upon alternative energy sources by state and federal utility authorities. Congress hoped addressing these issues would offset the global reduction of crude oil and subsequent shortages and price spikes.

A. Public Utility Regulatory Policies Act of 1978: FERC Interpretations and Implementations

Congress enacted PURPA to address the identified barriers, promote energy conservation, improve energy efficiency, lower consumer costs, and decrease reliance on foreign oil. In 1978, Congress implemented sections 201 and 210 of PURPA to establish a class of non-utility power producers called QFs and create favorable conditions for these QFs to sell their power to utilities. The three main benefits certified QFs enjoy are (1) the right to sell energy or capacity to a utility, (2) the right to purchase certain services from utilities, and (3) relief from certain

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6. Id.
7. Id.
8. Id.
10. Cerny, supra, at note 5.
13. Id. § 210.
regulatory burdens.\textsuperscript{14} Through PURPA, Congress directed the FERC to prescribe, and occasionally revise, rules as FERC determines necessary to encourage the development of QFs.\textsuperscript{15} Congress hoped by encouraging QFs, it would adequately address the energy crisis, often referred to as the second oil shock.\textsuperscript{16}

In 1980, FERC exercised its powers afforded to them under PURPA to issue Orders 69 and 70.\textsuperscript{17} These orders defined the criteria for “small power production facilities,” established rates for energy purchased from QFs,\textsuperscript{18} and presented QFs with two methods for rate calculation.\textsuperscript{19}

Orders 69 and 70 categorized QFs into two types.\textsuperscript{20} The first type includes small power production facilities that utilize alternative energy sources such as solar or wind. These facilities are restricted because their power production capacity, combined with any other facilities at the same site, cannot exceed 80 megawatts.\textsuperscript{21} The second type of QFs is congregation facilities. Unlike small power production facilities, cogeneration facilities use fossil fuels to generate both electric and thermal energies.\textsuperscript{22} This dual production process is more efficient than producing each type of energy separately.\textsuperscript{23}

The rate Orders 69 and 70 set for utilities to pay was to be equal to its full avoided cost.\textsuperscript{24} Avoided cost rates represent the costs utilities avoid by not having to generate their own energy.\textsuperscript{25} Under Orders 69 and 70, QFs could choose between two methods of calculating avoided costs.\textsuperscript{26} The first method is for QFs to charge “the utility’s avoided cost calculated at the time of delivery.”\textsuperscript{27} The second method is for QFs to charge “a rate calculated and fixed based on an estimate of the utility’s avoided costs over the life of the contract.”\textsuperscript{28}

\begin{thebibliography}{9}
\bibitem{PURPA} PURPA Qualifying Facilities, FEDERAL ENERGY REGULATORY COMMISSION (Apr. 10, 2023), https://www.ferc.gov/qf.
\bibitem{Cogeneration} Cogeneration and Small Power Production, 16 U.S.C. § 824a-3(a) (Nov. 9, 1978).
\bibitem{Lifset} See Richard D. Lifset, A New Understanding of the American Energy Crisis of the 1970s, 39 HIST. SOC. RSCH. 22, 37-38 (2014) (explaining that the United States encountered three separate energy market events that coincided to create a large-scale energy crisis in the 1970s).
\end{thebibliography}
In 2005, Congress enacted the Energy Policy Act, acknowledging “that QFs no longer faced the same barriers that prompted PURPA." The Energy Policy Act amended PURPA’s mandatory-purchase requirements to no longer require utilities to purchase energy from QFs if FERC finds that the QFs have “nondiscriminatory access” to one of several specified energy markets. Following the enactment of the Energy Policy Act, FERC issued Order 688 in 2006 and Order 688-A in 2007, establishing a rebuttable presumption that small facilities lack non-discriminatory market access and large facilities have adequate market access.

In 2016, FERC began the process of revising the PURPA regulations again – explaining that it “was appropriate considering the dramatic changes that have reshaped the energy industry since the Commission first issued its regulations in 1980.” The examples of these changes provided by FERC include technological advancements and reduced development costs for facilities. Energy markets have become more competitive and efficient as a result of new market structures and the emergence of competitive independent power facilities. Recognizing these shifts, FERC concluded that revised regulations would better align with PURPA’s statutory requirements.

B. FERC’s 2020 Rule Revisions

In accordance with PURPA’s mandate to periodically revise regulations, “a divided Commission” issued Orders 872 and 872-A in 2020. Order 872 altered which facilities qualify for benefits under PURPA and how those facilities are compensated in part through four revisions to its implementation of sections 201 and 210 of PURPA. The four revisions are what the court in Solar Energy referred to as: (1) the modified site rule (“2020 Site Rule”), (2) the modified fixed-rate rule (“Fixed-Rate Rule”), (3) the creation of the Locational Marginal Price (“LMP”)
rebuttable presumption, and (4) the revised market-access presumption.\textsuperscript{38} FERC issued its final rule approving these revisions in July 2020, implementing Order 872.\textsuperscript{39} Timely requests for rehearing were made in September 2020.\textsuperscript{40} Rather than responding to the requests for rehearing, FERC addressed concerns in Order 872-A, issued in December 2020, largely reaffirming the revisions set forth in Order 872 (Orders 872 and 872-A now collectively, “Order 872”).\textsuperscript{41} Following the December 2020 order, the Solar Energy Industries Association and a group of environmental organizations (collectively, “petitioners”) sought a review of Order 872 from the Ninth Circuit Court of Appeals.\textsuperscript{42}

The petitioners contended that, in addition to their individual grievances with FERC’s 2020 rule revisions, Order 872 collectively contradicted PURPA’s mandate for FERC to promote the development of QFs, thereby breaching the statute.\textsuperscript{43} Petitioners argued that “Order 872 rescinded longstanding policies that had enabled the development of [QFs], replacing them with new policies” that offer less support to QFs “than the status quo under the 1980 Rules—discouraging them relative to that baseline.”\textsuperscript{44}

FERC, in support of Order 872, argued that it continued to encourage QFs as required by PURPA. FERC maintained that while Order 872 may encourage QF development differently from the current PURPA Regulations, it still promoted QF development.\textsuperscript{45} A key point in FERC’s argument is that the revised PURPA regulations under Order 872 continue to require that QF rates be set at full avoided costs, a provision that FERC believes provide a maximum incentive for the development of cogeneration and small power production.\textsuperscript{46} FERC also noted that Order 872 retains many supportive elements of the 1980 Rules, such as the requirement for utilities to provide interconnection and introduces new ways to support QFs, including competitive-solicitation rules suggested by renewable resource developers like the Solar Association.\textsuperscript{47}

The court was tasked with determining whether the new rules established by FERC were in line with PURPA and met the standards of

\textsuperscript{38} Solar Energy, 80 F.4th at 976.
\textsuperscript{39} Qualifying Facility Rates & Requirements, 18 CFR § 292 (2020)
\textsuperscript{40} Solar Energy, 80 F.4th at 972.
\textsuperscript{42} Solar Energy, 80 F.4th at 974.
\textsuperscript{43} Solar Energy, 80 F.4th at 975.
\textsuperscript{44} Id. (internal quotations omitted).
\textsuperscript{45} Id.
\textsuperscript{46} Id. at 976.
\textsuperscript{47} Id.
the APA. The court examined both individual rule revisions and whether the implementation of Order 872 was proper. Additionally, the court had to decide if FERC breached NEPA by not preparing an environmental assessment or environmental impact statement.

III. HOLDING

The court held that FERC’s promulgation of Order 872 was proper. The new rules established in Order 872 were within the statutory authority granted under PURPA and met the standards of the APA. Despite finding no fundamental flaws in Order 872, the court mandated that FERC should have conducted an environmental assessment and must do so on remand. The court acknowledged that deference would be given to FERC’s understanding of its own modeling capability, even if it reaches the same conclusions about its forecasting limitations. Therefore, the court partially granted the petition for review and remanded the case without vacating the rules. The following section will address the court’s holding regarding the individual rule revisions and the court’s NEPA analysis.

A. FERC’s 2020 Rule Revisions

Prior to analyzing the individual components of Order 872, the court applied the test from *Chevron, U.S.A., Inc., v. NRDC, Inc.*, to address whether “the order as a whole was inconsistent with PURPA’s directive that FERC ‘encourage’ the development of QFs.” Under *Chevron*, a regulation created by an agency based on a statute it is responsible for enforcing will be granted deference by the court “if the statute is ambiguous and if the agency’s interpretation is reasonable.” Here, the court held that under the first step of *Chevron*, PURPA neither required the Commission to prescribe rules solely encouraging the development of QFs nor did PURPA “impose a ratchet under which every FERC rule must encourage QFs to a greater extent than the rule that came before it.” The court found that PURPA gives the Commission broad discretion to “evaluate which rules are necessary to encourage QFs and

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49. *Id.*
50. *Id.*
51. *Id.*
53. *Id.*
54. *Id.* at 998.
56. *Solar Energy*, 80 F.4th at 975 (internal citations omitted).
57. *Id* at 975, (citing Encino Motorcars, LLC v. Navarro, 579 U.S. 211, 220 (2016)).
58. *Id.* at 975.
which are not.” Under *Chevron*, the court held that the Commission’s interpretation of PURPA was not unreasonable because FERC determined its regulations as a whole still encouraged QFs. The courts holding regarding the four individual rules at issue in this case are discussed in the following sections.

**1. The 2020 Site Rule, Part I**

The first challenge was to the 2020 Site Rule, which modifies the 1980 Site Rule. The 2020 rule established “an irrebuttable presumption of separateness only when affiliated facilities using the same energy resource are located ten miles or more apart.” The rule provides for a rebuttable presumption that affiliated facilities “using the same energy resource are located more than one mile but less than ten miles apart are located at separate sites.” Petitioners contested the 2020 Site Rule on several grounds. Pertinent to this analysis is their contention that FERC’s implementation of Order 872 contravenes the APA, consequently leading to the disqualification of more facilities. FERC rebutted this argument, asserting that it has “broad discretion to define the meaning of the phrase ‘located at the same site...’” and that this new rule prevented larger facilities from disaggregating “into smaller facilities and strategically spacing themselves [...] to qualify as separate small power production facilities.” FERC found that the 2020 Site Rule struck “an appropriate balance between the need to address improper circumvention and the need to avoid unduly burdening small power production QFs.”

The petitioners underscored that the 2020 Site Rule leads to the disqualification of more facilities compared to the previous rule. This highlights the numerous environmental trade-offs that need to be considered in relation to the scale of energy generation. In the early stages of renewable energy development, plants like cogeneration facilities were typically small, reflecting the nascent state of the technologies and markets. To promote these smaller producers specifically, PURPA initially set a size limit of 30 megawatts for QFs to specifically promote these smaller producers. PURPA underlined the positive environmental impacts and economic stimulation associated with transitioning toward small-scale generation.

The court found that FERC’s 2020 Site Rule increases the likelihood that two facilities will be deemed to be at the same site and,
accordingly, that their production capacity will exceed the 80-megawatt threshold, making them ineligible for QF status.\textsuperscript{68} The court found none of the petitioners’ challenges persuasive and held, in part, that FERC’s explanation – that the 2020 Site Rule ensured PURPA benefits flow only to small facilities outweighed the costs of potential administrative burdens, litigation risks, and disincentives for qualification for QFs – satisfied the APA.\textsuperscript{69}

2. The Fixed-Rate Rule, Part 1

The second challenge was to the Fixed-Rate Rule. This rule generally maintains the necessity for QFs to be compensated at a rate equivalent to the full avoided costs of the utility.\textsuperscript{70} The proposed rule revision provides States with the flexibility to abolish the Fixed-Rate Rule.\textsuperscript{71} In such cases, QFs would be required to have their avoided energy cost component fluctuate according to the as-available rate determined at the time of delivery.\textsuperscript{72}

Under the modified rule, States can choose to make “the avoided energy cost portion of a QF’s contract vary based on the as-available rate calculated at the time of delivery.”\textsuperscript{73} The capacity rates serve as compensation to a QF because its presence relieves the utility from specific fixed costs, such as constructing and financing its own power plants.\textsuperscript{74} Petitioners contended that in states where fixed rates have been abolished, QFs are now subjected to variable and uncertain rates while utilities are assured of long-term cost recovery and a return on investment, even when their costs surpass short-term energy prices.\textsuperscript{75} Petitioners argued that the consequence of this rule includes financial risks to QFs that utilities do not face, thus violating PURPA’s non-discrimination requirement.\textsuperscript{76} FERC disagreed and argued that this new rule better comports with the principles of PURPA’s avoided-cost approach.\textsuperscript{77}

The court asserted that PURPA’s non-discrimination provision does not align with the petitioners’ interpretation.\textsuperscript{78} The statute merely necessitates that rates remain non-discriminatory towards QFs without imposing an obligation for those rates to be structured in a manner that compensates for any other disadvantages QFs might encounter in the market.\textsuperscript{79} Overall, the court upheld this rule, finding that Order 872

\begin{thebibliography}{99}
\bibitem{68} Solar Energy, 80 F.4th at 976.
\bibitem{69} Id. at 979-80.
\bibitem{70} Id. at 973.
\bibitem{71} Id.
\bibitem{72} Id.
\bibitem{73} Id. at 973.
\bibitem{74} Solar Energy, 80 F.4th at 973.
\bibitem{75} Id. at 983.
\bibitem{76} Id.
\bibitem{77} Id.
\bibitem{78} Id.
\bibitem{79} Id.
\end{thebibliography}
satisfies the non-discrimination requirement under PURPA because QFs receive a rate equal to full avoided costs.\textsuperscript{80}

3. The Rule Creating the LMP Rebuttable Presumption, Part 1

The third rule challenged by petitioners “provides States additional flexibility to use various market prices when calculating a utility’s avoided costs.”\textsuperscript{81} This revision allows “States to adopt a rebuttable presumption that, for utilities located within certain organized energy markets, the ‘LMP’ reflects the purchasing utility’s avoided costs.”\textsuperscript{82} The Commission concluded that LMP defines the real-time price of electricity at specific points within the transmission system and these prices serve as benchmark signals for buyers and sellers in electricity markets even though LMP occasionally deviates from actual avoided costs.\textsuperscript{83} LMP fluctuates hourly based on various factors and can vary significantly between locations.\textsuperscript{84} The rule change diverged from the initial Commission consideration in Order 872, which would have permitted States to use LMP as a per se measure of avoided costs.\textsuperscript{85} Now, States can instead adopt a rebuttable presumption that LMP aligns with a utility’s avoided costs.\textsuperscript{86} Petitioners asserted that the LMP rebuttable presumption is arbitrary and capricious because the LMP presumption does not pass the test established in \textit{Cablevision Sys. Corp. v. FCC.}\textsuperscript{87} The \textit{Cablevision} test “permits an agency to adopt an evidentiary presumption only if the presumption (1) is ‘rational,’ and (2) ‘shifts the burden of production and not the burden of persuasion.’”\textsuperscript{88} The petitioners put forth the argument that the avoided costs for electric utilities buying from QFs could potentially surpass the LMP.\textsuperscript{89} FERC refuted the petitioners’ assertions by explaining the rebuttable presumption approach builds flexibility into the rule, alleviating the obligation on States if it determines that LMP is not reflective of actual avoided costs.\textsuperscript{90}

The court agreed that LMP does not always describe avoided costs but found there was a “sound and rational” connection between the LMP presumption and a utility’s avoided costs.\textsuperscript{91} Therefore, the court held that

\begin{thebibliography}{99}
\bibitem{81} \textit{Solar Energy}, 80 F.4th at 984.
\bibitem{82} \textit{Id.}
\bibitem{83} Order 872, 85 Fed. Reg. at 54, 660-61.
\bibitem{84} Sacramento Mun. Util. Dist. v. FERC, 616 F.3d 520, 524 (D.C. Cir. 2010).
\bibitem{85} \textit{Solar Energy}, 80 F.4th at 984, 973-74.
\bibitem{86} \textit{Id.}
\bibitem{87} \textit{Id.} (citing \textit{Cablevision Sys. Corp. v. FCC}, 649 F.3d 695 (D.C. Cir. 2011)).
\bibitem{88} \textit{Solar Energy}, 80 F.4th at 984, 973-74 (citing \textit{Cablevision Sys. Corp. v. FCC}, 649 F.3d 695 (D.C. Cir. 2011)).
\bibitem{89} \textit{Solar Energy}, 80 F.4th at 984.
\bibitem{90} \textit{Id.} at 987.
\bibitem{91} \textit{Id.} at 986.
\end{thebibliography}
Order 872 satisfied the first *Cablevision* element. In relation to the second *Cablevision* element, the court determined that the FERC did not transfer the burden of persuasion. This conclusion was based on the premise that once a state establishes a rate, it can be contested before a state regulatory authority, and subsequently before the Commission or in federal court. Thus, the court found the rule permitting States to adopt a rebuttable presumption that LMP represents a utility’s avoided costs to be within FERC’s powers.

4. The Revised Market-Access Presumption, Part 1

The final rule challenged by petitioners adjusts the market-access presumption for QFs from 20-megawatts to 5-megawatts. Under Order 688, small QFs with a net power capacity of less than or equal to 20 megawatts are no longer presumed to have non-discriminatory market access. Consequently, electric utilities are no longer obligated to purchase from QFs with a net power capacity equal to or greater than 20 megawatts. In contrast, Order 872 designates QFs with a net power production capacity at or below 5-megawatts as ‘small’ QFs. These smaller facilities will be presumed not to have non-discriminatory access to markets, diverging from the 20-megawatts QFs established in Order 688. The petitioners claim that FERC’s decision to change the market-access presumption from twenty megawatts down to five megawatts was arbitrary and capricious. FERC countered that since it issued Order 688, it saw an increase “of small power production facilities under twenty megawatts participating in energy markets.” Therefore, FERC deems it reasonable to presume that access to the regional markets has improved, justifying the update to the presumption for smaller production facilities.

The court held that FERC provided a “reasonable explanation” for revising the rebuttable presumption when the Commission determined that market conditions have improved considerably for small facilities since its issuance of Order 688. Therefore, FERC’s decision as it relates to Rule 4, survived review under the APA.

92. *Id.*
93. *Id.* at 987.
94. *Id.*
96. *Id.* at 973-74.
97. *Id.* at 987.
98. *Id.* at 988.
101. *Id.*
B. NEPA Violation

According to NEPA, an agency is obligated to prepare an environmental assessment for a major agency action unless the proposed action is one that typically does not have a significant effect on the human environment and therefore falls within a categorical exclusion. If the proposed action does not unequivocally necessitate the creation of an environmental impact statement, then the agency is obligated to prepare an environmental assessment to ascertain if the action will significantly impact the environment. The court found that “the most significant environmental impact of Order 872 is the possible effect on greenhouse-gas emissions, which does not require any location- or project-specific analysis” because the impact of greenhouse gases is cumulative and depends on global concentrations in the atmosphere. This makes the environmental impact of greenhouse gas emissions from a specific project or location difficult to quantify in isolation. The court held that although the greenhouse-gas emissions may be difficult to measure or too imprecise to influence Order 782, that determination can only be made after the preparation of at least an environmental assessment. Therefore the court found FERC’s actions did not comply with NEPA and ruled that FERC must conduct an environmental assessment on remand.

IV. ANALYSIS

To determine whether the court should vacate Order 872, it applied the two-part balancing test outlined in Allied-Signal, Inc v. United States Nuclear Regulatory Commission (“Allied-Signal”), which required the court to weigh the seriousness of the agency’s errors with “the disruptive consequences of an interim change that may itself be changed.” The court’s finding that vacatur would have significant consequences is poorly reasoned because the precedent the court relied on is factually dissimilar to the facts in Solar Energy. This analysis will focus on the second part of the Allied-Signal test. Under Pollinator Stewardship

102. Id. at 993 (citing Klamath Siskiyou Wildlands Ctr. v. Boody, 468 F.3d 549, 562 (9th Cir. 2006)).
103. Id. at 993-94 (citing Kern v. Bureau of Land Mgmt., 284 F.3d 1062, 1066 (9th Cir. 2002)).
104. Solar Energy, 80 F.4th at 994.
106. Solar Energy, 80 F.4th at 995 (citing California Wilderness Coal. v. United States Dep’t of Energy, 631 F.3d 1072, 1103 (9th Cir. 2011)).
Council v. EPA (“Pollinator”).

to determine whether disruptive consequences exist, the court must consider three factors. First, whether the agency could provide better reasoning for the rule, second, whether the agency could adopt the same rule on remand by complying with procedural rules, and third, whether fundamental flaws in the agency’s decision make it unlikely that the same rule would be adopted on remand.

First, the court incorrectly analogized cited cases regarding the disruptive consequences of vacating Order 872. The disruptive consequences referenced in the cited cases relate to potential negative environmental impacts that could arise resulting from vacatur. Under a more comprehensive analysis of the cited case facts, the second part of the Allied-Signal balancing test was clearly developed to ensure the disruptive impacts of vacatur would not result in possible environmental harm. Also, while the Pollinator analysis is disjunctive, the court only evaluates whether Order 872 contains fundamental flaws that make it unlikely the same rules could be adopted on remand. Further, the court does not apply the facts in Solar Energy the same way the Ninth Circuit has in the past in answering the questions offered in Pollinator.

Second, the environmental consequences of Order 872 do not outweigh the procedural frustrations FERC purports it will face if its rules are vacated. Following the analysis of the court’s misapplication of cited cases, this note will explore the environmental consequences of each of the 2020 rule revisions.

A. Vacatur is Intended as a Remedy to Prevent Negative Environmental Consequences

The Ninth Circuit Court of Appeals only orders “remand without vacatur in limited circumstances.” The Solar Energy court reasoned that “the investments that States and the regulated community have made in complying with the rules could not easily be undone,” qualify as disruptive consequences. The cases the Solar Energy court relied on to determine whether vacatur would constitute disruptive consequences are California Cmtys. Against Toxics v. EPA (“California Cmtys.”), Center for Food

110. Pollinator Stewardship Council v. EPA, 806 F.3d 520 (9th Cir. 2015).
111. Center for Food Safety, 56 F.4th at 663.
112. Pollinator, 806 F.3d at 532.
114. Center for Food Safety v. Regan, 56 F.4th 648, 663 (9th Cir. 2022);
See also California Cmtys. Against Toxics v. EPA, 688 F.3d 989, 992 (9th Cir. 2012), Pollinator Stewardship Council v. EPA, 806 F.3d 520, 532 (9th. Cir. 2015)).
115. Solar Energy, 80 F.4th at 997
117. Solar Energy, 80 F.4th at 998.
Safety v. Regan ("Center for Food Safety"),\(^{119}\) and American Great Lakes Ports Ass’n v. Schultz ("Schultz").\(^{120}\)

1. Declining Vacatur to Prevent Blackouts is Better than Vacating to Prevent Short-Term Air Pollution

The court relied on California Cmtys. to purport that any “delay and trouble vacatur would cause” is severe.\(^{121}\) In California Cmtys., California passed Assembly Bill 1318, requiring the South Coast Air Quality Management District to transfer excess emission reductions to a “soon-to-be completed power plant named Sentinel.”\(^{122}\) Here, the administrative burden States and regulated parties may face is far less significant than the disruptive consequences vacatur would have caused in California Cmtys. The California Cmtys. decision does not support declining vacatur in Solar Energy for three key reasons.

First, the California Cmtys. court delivered its decision in July 2012 and Sentinel was scheduled to come online in November.\(^{123}\) The 2012 court found that vacatur could delay Sentinel’s construction and without Sentinel “the region might not have enough power next summer, resulting in blackouts.”\(^{124}\) Unlike in California Cmtys., where Sentinel was approximately four months away from being completed and vacatur would delay its completion, States and regulated parties in Solar Energy are only in the beginning stages of implementing Order 872.\(^{125}\) The court neither provides any examples of States being beyond initial proceeding to modify their PURPA rules nor any examples of the first three rules being relied upon by States or utilities.\(^{126}\) The only rule the court acknowledges as having been relied upon is the revised market-access presumption rule, asserting that that several utilities have used the rule to apply for and receive “relief from their mandatory-purchase obligations when dealing with facilities between five and 20 megawatts in size.”\(^{127}\)

Second, relieving utilities from their mandatory-purchase obligations cause negative environmental impacts, unlike California Cmtys., where declining vacatur potentially causes short-term environmental impacts, ultimately decreases pollution caused by blackouts, which\(^{128}\) “necessitate the use of diesel generators that pollute the air, the very danger the Clean Air Act aims to prevent.”\(^{129}\)

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\(^{119}\) Center for Food Safety, 56 F.4th at 663.


\(^{121}\) Id. (quoting California Cmtys. Against Toxics v. EPA, 688 F.3d 989, 993 (9th Cir. 2012)).

\(^{122}\) California Cmtys., 688 F.3d at 991-92.

\(^{123}\) Id. at 993.

\(^{124}\) Id. at 993-94.

\(^{125}\) Solar Energy, 80 F.4th at 998.

\(^{126}\) Id.

\(^{127}\) Id.

\(^{128}\) California Cmtys., 688 F.3d at 993-94.

\(^{129}\) Id. at 994 (citing Clean Air Act, 42 U.S.C. § 7401(b)(1)).
Energy the assertion is that Order 872 violates PURPA, which “was intended to encourage conservation of energy and efficient use of energy resources in the generation of electricity”\textsuperscript{130} by encouraging utilities to purchase and sell power from QFs and decrease financial burdens states and federal agencies impose on QFs.\textsuperscript{131} The “mandatory purchase requirement is a legally enforceable mechanism to drive investment in renewable energy.”\textsuperscript{132} States that have released utilities from their mandatory-purchase obligations, or have allowed shorter-term contracts, are increasing financial burdens on QFs and diminishing growth in renewable energy – outcomes that PURPA was explicitly enacted to prevent.\textsuperscript{133}

Third, the California Cmtys. court highlighted that the California Energy Commission investigated the potential air pollution caused by Sentinel’s construction and found the harms unrelated to the rule at issue and insignificant with mitigation.\textsuperscript{134} Here, FERC did not make “any effort whatsoever to assess [Order 872’s] effects.”\textsuperscript{135} The harms identified by the court and the environmental organizations are directly associated with FERC’s 2020 rule revisions. FERC did not offer any mitigation strategies that lessen the impacts of the rule revisions.\textsuperscript{136}

2. The Bees May Still Be Saved on Remand

In Center for Food Safety petitioners challenged the Environmental Protection Agency’s (“EPA”) decision to unconditionally approve new uses of sulfoxaflor, a pesticide that threatened honeybee populations. Primarily, the Center for Food Safety court reluctantly remanded without vacatur to preserve "the enhanced protection of the environmental values” as sulfoxaflor has a more favorable toxicological profile compared to alternatives.\textsuperscript{137} Unlike FERC in Solar Energy, the EPA did not completely disregard the potential harm of unconditionally approving sulfoxaflor.\textsuperscript{138} The EPA conducted an ecological risk assessment based on new data and a hazard comparison between six most used pesticides. Thus, the court found the EPA was likely able to adopt the

\begin{itemize}
  \item \textsuperscript{130} Earle H. O'Donnell & Laurel W. Glassman, Industrial Opportunities to Engage in Direct Purchase of Electricity: The Purchaser's Perspective, 7 J. ENERGY & NAT. RESOURCES L. 101 (1989).
  \item \textsuperscript{131} Independent Energy Producers Ass’n, Inc. v. California Pub. Utils. Comm’n., 36 F.3d 848, 850 (9th Cir. 1994).
  \item \textsuperscript{132} Kolberg, A. M., Bear gulch solar, LLC v. Montana public service commission: state commissions and the future of the PURPA mandatory purchase requirement, 44(1) HARVARD ENVIRONMENTAL LAW REVIEW, 279-298, 279-80 (2020).
  \item \textsuperscript{133} \textit{Id.} at 287.
  \item \textsuperscript{134} \textit{California Cmtys.}, 688 F.3d at 994.
  \item \textsuperscript{135} \textit{Solar Energy}, 80 F.4th at 996 (quoting Order 872-A, 85 Fed. Reg. at 86,753 (Glick, Comm’r dissenting in part)).
  \item \textsuperscript{136} \textit{Solar Energy}, 80 F.4th at 996-98.
  \item \textsuperscript{137} Center for Food Safety, 56 F.4th at 668.
  \item \textsuperscript{138} \textit{Id.} at 664.
\end{itemize}
same rule upon remand. In adopting Order 872, “FERC did not produce a single sentence of environmental analysis before issuing sweeping changes to its PURPA regulations. Nor did FERC attempt—in even the most rudimentary or non-quantitative manner—to predict the environmental consequences of Order 872.” The court acknowledged in its analysis that the public had substantial questions about Order 872’s potential environmental impacts, specifically the largely undisputed consequence of Order 872 reducing incentives provided to QFs. Additionally, court found “that there is at least a ‘reasonable probability’ that FERC’s alleged NEPA violation will lead to concrete harm to the Organizations’ members.” Despite acknowledging FERC’s extreme lack of environmental considerations, the court still held that FERC could adopt the same rules on remand if, after conducting an EA, FERC determined “that the effects of the order are difficult to forecast and subject to considerable uncertainty,” all but giving the Commission the blueprint to avoid any obligations to remedy the negative effects of Order 872.

3. Frustrating Agencies May Be Disruptive Enough to Decline Vacatur if the Remedy Sought is Impossible to Provide

In Schultz, the disruptive consequence, while also being an administrative consequence, was far more severe than those States and utilities would face if Order 872 were vacated. In Schultz, the court held that vacatur would require the Coast Guard and the Shippers to attempt to recoup and redistribute every payment made in 2016 – funds that are now undeterminable and that have changed hands in numerous separate transactions. In Solar Energy, the court reasoned “that a reduction in the incentives provided to QFs could, in turn, alter the mix of energy production, shifting production away from renewable production and toward fossil-fuel production.” It is unclear whether FERC may or may not be able to reverse applications and benefits already received by utilities. However, vacatur would prevent any more QFs from losing their mandatory-purchase agreements with utilities while FERC conducted an EA.

Further, the defendants in Schultz did not dispute the seriousness of their errors. In contrast, in Solar Energy, FERC does. “Remand without vacatur sometimes invites agency indifference,” and in Solar

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139. Id.
141. Solar Energy, 80 F.4th at 995 (citing Cal. Ex rel. Lockyer v. USDA, 575 F.3d 999, 1018 (9th Cir. 2009)).
142. Id. at 997-98.
144. Id.
146. American Great Lakes Ports Ass'n, 962 F.3d at 519 (quoting In re Core Commc'ns, Inc., 531 F.3d 849, 862, 382 U.S. App. D.C. 120 (D.C. Cir. 2008) (Griffith, J., concurring)).
Energy FERC disregarded its own regulations that state “an ‘environmental assessment will normally be prepared’ for regulations not covered by a categorical exclusion.” When considering the negative environmental consequences each rule poses, as discussed below, the court’s decision to trust FERC to cure any deficiencies on remand is misguided.

B. The Environmental Impacts of the 2020 Rule Revisions

1. The 2020 Site Rule, Part 2

In analyzing this rule, the court relied on several cases to ultimately determine that the 2020 Site Rule does not defy the plain meaning of PURPA. The court upheld the precedent that an “explicit grant of definitional authority” indicates Congress’ intent for the agency to have broad discretion. Furthermore, if Congress has “not unambiguously foreclosed an agency’s interpretation,” it binds them to that agency’s interpretation, subject to its reasonableness. Here, the court was correct to rely on precedent and uphold the Commission’s interpretation of the word “site.” However, the court did not consider the environmental impacts associated with disqualifying more facilities than this rule did prior to revision.

Small, decentralized facilities like cogeneration plants, wind turbines, dams, and solar panel fields often utilize renewable fuels available on-site. This not only mitigates the risks associated with the extraction and transportation of fossil fuels but also significantly reduces the emission of pollutants. However, these small, decentralized, renewable-fueled plants can also have negative local consequences. For instance, small hydropower projects on untouched rivers can cause flooding and habitat destruction, acres of photovoltaic panels can shade desert ecosystems, and large pieces of processing equipment at geothermal sites can be visually intrusive. Furthermore, wind turbines can be problematic in many communities due to safety issues for humans and wildlife.

On the other hand, large-scale generation, such as utility plants, generate electricity from coal which perpetuates local effects from mining, emissions from transporting the coal, and emissions from the power plant

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147. Solar Energy, 80 F.4th at 994.
148. Solar Energy, 80 F.4th at 977 (citing Chevron, 467 U.S. at 843 (holding that deference is given to an agency decision if Congress does not “directly address the precise question” of how an agency should interpret the statutory text)).
151. Dunlop, supra note 100.
152. Id.
153. Id.
Similarly, oil drilling, particularly offshore, can cause significant local environmental damage because as natural gas is extracted, some of it escapes into the atmosphere. Over time, these local pollutants can accumulate and contribute to regional and global problems. However, the sources of pollution such as resource extraction, transportation, and generation are more straightforward ways to identify and regulate emissions compared to numerous small, decentralized plants.

Since the 2020 Site Rule prevents larger facilities from disaggregating into smaller facilities to qualify as separate small power production facilities, the results could include a more accurate representation of energy production and consumption, which is crucial for effective energy planning and management. The 2020 Site Rule could lead to an increase in renewable energy generation and a decrease in reliance on fossil fuels. The significance of this lies in the fact that renewable energy sources such as wind, solar, and hydro-power do not emit greenhouse gases during operation, making them a cleaner alternative to fossil fuels.

However, the most significant potential negative impact is if the rule disqualifies more facilities than the prior rule, as the petitioners asserted. This could potentially lead to a decrease in renewable energy generation due to an increase in facilities losing qualifying status, potentially resulting in an increased reliance on fossil fuels and consequently leading to higher greenhouse gas emissions. The establishment of new facilities, particularly if they are located in previously undeveloped areas, could potentially impact local ecosystems and biodiversity. Such development could result in the loss and fragmentation of habitats, posing a threat to wildlife populations and causing disruption to ecological processes. The court should have reserved ruling on this issue until after FERC conducted an environmental assessment.

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154. Id.
155. Id.
156. Id.
157. Id.
158. Id.
2. The Fixed-Rate Rule, Part 2

The second rule modification under Order 872 maintains the requirement from the 1980 Rules that QFs receive a rate equivalent to the utility’s full avoided costs. However, it now allows States the flexibility to eliminate the Fixed-Rate Rule and take the decision of determining avoided costs away from QFs. In determining whether this rule reflects a misreading of PURPA, the court again relied on whether FERC’s explanation of the modification was reasonable. Because PURPA did not expressly address the question of how avoided costs be calculated, FERC is properly granted authority to revise the 1980 rule.

Under an initial key principle of PURPA, power companies are mandated to purchase electricity from small power manufacturers at rates equivalent to the avoided cost. Historically, these rates were insufficient to sustain minor power manufacturers, as they inherently lacked the cost advantages that power companies gain from large-scale electricity production. Many of these minor manufacturers were at the forefront of developing renewable energy technologies. These emerging technologies have only recently been able to generate electricity at costs comparable to those achievable by power companies. Now, under the new rules, fewer facilities are considered to have non-discriminatory market access and are not subject to the mandatory purchasing requirement.

This provision upends the traditional practice where power companies procured non-utility power at rates significantly below their own production costs. The significance of this provision lies in its potential to level the playing field for small power manufacturers, thereby promoting competition and encouraging the development of diverse and renewable energy sources. If petitioners are correct in their assertions, QFs are now subject to uncertain rates, which could potentially discourage facilities with over five megawatts of power production from continuing to use sustainable energy methods.

3. The Rule Creating the LMP Rebuttable Presumption, Part 2

While the court was correct in finding that LMP presumption is not arbitrary and capricious, the court did not fully parse out the impacts of its decision.

163. Solar Energy, 80 F.4th at 973.
164. Id. at 984.
166. See, Paul Davies, et. al., Large-scale Electricity Storage, THE ROYAL SOCIETY, 45-51 (Sept. 2023).
167. Id.
169. Dunlop, supra note 100.
The rebuttable presumption approach may offer advantages such as providing flexibility for states to tailor their approach based on local conditions and allowing states to adopt LMP as a starting point, but allows for case-by-case rebuttal if specific circumstances warrant. However, there are challenges such as requiring a robust process for evaluating and challenging the presumption which may lead to disputes between utilities, QFs, and regulators over the validity of LMP as a cost measure. There may be concerns about market efficiency under the rebuttable presumption approach, as it allows for more market-responsive pricing, considering both LMP and specific circumstances. However, this concern is alleviated by allowing states to decide whether to adopt the rebuttable presumption. This option allows states to tailor their energy policies to their specific needs and circumstances, thereby potentially mitigating any negative impacts on market efficiency.

Using LMP as a per se measure provides clarity and consistency across states, simplifies the calculation process by using a fixed measure, and avoids needing individual rebuttals. The challenges associated with the per se measure include ignoring potential variations in local conditions and utility-specific factors, it may not accurately reflect actual avoided costs in all situations, and could lead to inequitable compensation for QFs if LMP significantly diverges from true avoided costs. These challenges can be overcome by developing more dynamic models that consider a broader range of variables and factors. This would ensure a more equitable and accurate compensation for QFs. The results of these challenges include potential inequities in compensation and misaligned incentives for QFs, which could impact the overall efficiency and effectiveness of energy markets.

In conclusion, while the per se measure offers a standardized approach, its limitations underscore the need for more nuanced models that can adapt to varied local conditions and utility-specific factors. This would ensure fair compensation and promote efficient market behaviors, thereby fostering a more sustainable and equitable energy sector. This sets the stage for further discussion on the evolution of energy market regulations and their impact on renewable energy generation.

4. The Revised Market-Access Presumption, Part 2

Here, the court relied on FERC’s factual finding that as the energy market has matured since it issued Order 688, smaller facilities’ participation in these markets has increased. Because precedent has long been upheld and has not yet been overturned, there is no need for further analysis beyond that the court was correct to give deference to FERC based on it providing the court with a detailed justification for the change.
to Order 688.\textsuperscript{176} However, the court again did not address any specific environmental concerns associated with this rule.

While the rule revision may have a positive impact, such as encouraging smaller renewable energy facilities to participate in energy markets, the negative consequences seem to outweigh these benefits. The development and initiation of production are more challenging for smaller facilities compared to larger ones. Although FERC suggested that regional markets have improved, the revision means that fewer facilities will now qualify for QF status than those that qualified prior to the revision. Consequently, as an issue with the three previous rules addressed, fewer facilities could reap the benefits that FERC claims Order 872 will provide.

In contrast, petitioners argued that FERC’s Order 872 could cause concrete harm to their members.\textsuperscript{177} They contended that the order will reduce incentives for QFs, many of which use renewable energy sources, which may encourage a shift in power generation in the U.S. from renewable to fossil-fuel generation, harming both the economic and environmental interests of the organizations’ members.\textsuperscript{178} The economic interests of the members could be affected as the profitability and viability of renewable energy projects could be undermined. This could lead to job losses in the renewable energy sector and hinder the growth of green businesses.\textsuperscript{179} From an environmental perspective, a shift towards fossil fuel-based power generation could increase greenhouse gas emissions, contributing to climate change. This could have far-reaching effects on wildlife, ecosystems, and weather patterns.

Another concern of the environmental organizations is the physical welfare of its members, many of whom live near fossil fuel-burning facilities and would suffer from increased air pollution if those facilities burned more fossil fuels.\textsuperscript{180} Exposure to such pollution could have serious health implications for these individuals, including respiratory issues and other pollution-related illnesses.

V. CONCLUSION

The case of Solar Energy is significant in that upholding FERC’s 2020 regulations may have substantial environmental impacts regarding the future of renewable energy in the United States. Without mention of the potential negative environmental outcomes over time, the court declined to vacate FERC’s rule revisions based on factually dissimilar precedent. The court declined vacatur because “of the extraordinary


\textsuperscript{177} Id.

\textsuperscript{178} Id.


\textsuperscript{180} Id.
disruptive consequences that would accompany vacatur”181 but did not acknowledge that vacatur is an exceptional remedy used primarily to protect the environment rather than protect the agencies from administrative frustration. Although the court mandates FERC to conduct an environmental assessment on remand, its decision to uphold FERC’s revised rules under Order 872 underscores the complex interplay between adhering to precedent and considering environmental protections.

The case highlights the importance of PURPA’s goal to promote renewable energy and reduce reliance on fossil fuels but allows the Commission to implement and enforce individual revisions that do not adhere to that purpose. There is a strong need for courts to hold agencies accountable for decisions made before conducting environmental assessment. As highlighted in this note, courts rarely prioritize the disruptive consequences associated with vacatur over the potential environmental impacts at stake.

In conclusion, the impacts of allowing the FERC to rescind longstanding policies may be significant. Already, FERC has exercised this power again by revising its 1999 Certificate Policy Statement to increase the role environmental analysis and policy, including environmental justice, have in determining whether FERC should approve new natural gas transportation facilities.182 While this revision may have positive environmental impacts, the revision appears to severely limit applicants’ abilities to appeal decisions due to cost and severe uncertainty.183 If consistently given this level of deference, stakeholders may not have the ability to preemptively protest forthcoming rule revisions that may have negative environmental impacts.

As we forge ahead, FERC’s role in maintaining State flexibility regarding QFs will be pivotal. It is currently unclear how the implications of this flexibility may significantly shape the evolution of small power production facilities and the growth of renewable energy generation. However, environmental groups will pay close attention as data becomes available. This case stands as a testament to the intricate balance of challenges and opportunities we encounter in our steadfast pursuit of a more sustainable and clean energy future.

181. Solar Energy, 80 F.4th at 969.