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Chevron Still Has Power (For Now): The DC Circuit Defers to FERC in Recent Ruling

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The debate over when courts should defer to agency interpretations of federal statutes continues. The latest volley came last week in *Solar Energy Industries Association v. FERC*, where the U.S. Court of Appeals for the D.C. Circuit deferred to the Federal Energy Regulatory Commission's interpretation of a law benefitting small renewable power facilities—over one judge's vigorous dissent.

Solar Energy Industries is the most recent judicial battle over how to apply the U.S. Supreme Court's landmark decision in *Chevron U.S.A v. Natural Resources Defense Council*, 467 U.S. 837 (1984). *Chevron* held that courts should defer to a federal agency's reasonable interpretation of a statute when the statute is ambiguous or silent on an issue. *Chevron* also noted that, to decide whether the statute speaks to the issue (or instead is ambiguous or silent), courts should employ traditional tools of statutory construction.

Since then, courts have fiercely debated what *Chevron* requires. When, exactly, is a statute "ambiguous" on a topic? How thoroughly must a court exhaust statutory-interpretation tools before deciding a statute is ambiguous and deferring to the agency?

Answers to those questions have dramatic, nationwide consequences for major federal laws and regulated industries. *Solar Energy Industries* may offer the Supreme Court a chance to resolve them.

The 'Solar Energy Industries' Question

Solar Energy Industries involved the Public Utility Regulatory Policies Act. PURPA encourages the production of renewable and alternative energy by offering small power production facilities advantages in the market for their energy. A facility qualifies for those advantages only if its "power production capacity" is no more than 80 megawatts.

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The question in *Solar Energy Industries* was whether FERC properly held that a solar energy company, Broadview Solar LLC, did not exceed the 80-megawatt threshold. The parties debated how Broadview's "power production capacity" should be measured:

- If it was measured based on Broadview's "send-out" power—the alternating-current (AC) power Broadview could send to the electrical grid at any given time—then Broadview would qualify as a small facility because its

ability to send AC power to the grid was limited to 80 megawatts.

- If it was measured based on Broadview's total energy production at any given time—which included an additional 50 megawatts of direct-current (DC) power Broadview sent to a battery for later delivery to the grid—then Broadview would not qualify.

FERC concluded the best approach under PURPA was to count only the AC power a facility sends to the electrical grid, and that Broadview therefore qualified as a small facility.

Differing Approaches to Deference

The *Solar Energy Industries* majority and dissent took very different approaches to reviewing FERC's interpretation under *Chevron*.

The majority held that the statute was silent as to the proper way to measure power production capacity for a facility like Broadview. The majority then looked to typical statutory-interpretation tools—such as the statute's text, structure, purpose, and legislative history—to determine that FERC's interpretation was reasonable.

The dissent, by contrast, would have started and ended its analysis using "normal interpretive tools" to resolve the statute's meaning. After scouring the statute, dictionaries, and other authorities, the dissent concluded that "power production capacity" encompassed all useful power the facility could produce, including the 50 megawatts of DC power that Broadview sent to a battery for later deployment to the grid. That meant Broadview could not qualify as a small facility.

Those conflicting opinions exemplify the ongoing judicial debate over *Chevron* deference. Some judges, like the majority, readily find a statute silent or ambiguous when it does not expressly speak to the question at hand. Other judges, like the dissent, have criticized that approach as too quick to defer to agencies, preferring instead to scrutinize the statute for clues to its meaning—and rarely finding ambiguity as a result.

Chevron has also sparked a more fundamental controversy: Whether courts should *ever* defer to agencies' statutory interpretations. Deference is often justified based on agencies' expertise in technical matters. But many have criticized *Chevron* for allowing political agencies, rather than impartial courts, to decide what the law means. Others have responded that agencies' political accountability makes them better suited than lifetime-appointed federal judges to fill legislative gaps.

Why 'Solar Energy Industries' Matters

For years, the Supreme Court has sidestepped the question of *Chevron*'s continuing vitality. The court has not deferred to an agency under *Chevron* since 2016—and indeed has not even mentioned *Chevron* in recent cases raising agency-deference questions.

The Supreme Court might look at *Solar Energy Industries* next. If it does, more than just Broadview's status as a small power production facility will be at stake. At issue is *who gets to decide* what a statute means when it is ambiguous, and indeed what it means to be ambiguous in the first place. The Supreme Court could require judges to scrutinize every piece of evidence for statutory meaning before deferring to an agency's interpretation. Or it could rethink—or overrule—*Chevron* altogether.

Whenever the Supreme Court addresses *Chevron*, its decision will affect every area of modern life that federal agencies touch (which is to say, every area of modern life). Given the deepening disagreement among federal judges, that day may come sooner rather than later.

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