

1 MS. O'CONNELL: The MOPR corrects it to some
2 extent because the MOPR is choosing what -- what FERC
3 thinks is a fair price for a new generator to bid in at.
4 The MOPR isn't a complete solution because, as we've
5 described in our brief, if somebody bids in at the
6 minimum-offer price rule but its costs are actually
7 higher, it is necessarily going to knock somebody out of
8 the auction that would have cleared otherwise, and the
9 price of the auction will go down.

10 But -- and I -- I think, as Mr. Clement
11 correctly pointed out, the MOPR is not a -- a perfect
12 solution to this. In -- in this particular case, I
13 think the incentives of what -- what were -- was
14 happening under the State program is demonstrated by the
15 fact that CPV tried to bid in so low even when it tried
16 to cost-justify their bids. And the market monitor in
17 PJM, when trying to actually reconstruct CPV's costs,
18 came to different numbers on what those costs would be.

19 So it's not a perfect way to try to screen
20 out offers that are not actually based on cost or that
21 should not be coming in.

22 And -- and, additionally, just the fact that
23 FERC had to expand the MOPR to cover this program I
24 think shows that there's been an intrusion onto FERC's
25 field. FERC has tried to correct what's happening in

1 these programs through extending the minimum-price offer
2 rule to these bids, but I think that -- that just shows
3 that's what's happening here is that the State programs
4 are changing the incentives of the -- the people in the
5 field.

6 JUSTICE KAGAN: Well, but I don't see how
7 that could be true. If FERC could, in fact, get rid of
8 the problem, then it leaves you with no conflict.

9 MS. O'CONNELL: I don't think that's right.
10 I think the conflict is still with the -- the market
11 mechanism that FERC set up in order to determine
12 wholesale capacity rates in the auction. When you have
13 a program that has this bid-and-clear requirement, it
14 alters those incentives. Even if there's not an actual
15 price-suppressive effect, the -- the -- the possibility
16 for a conflict or the imminent possibility of a conflict
17 still calls for field preemption.

18 The -- the Court of appeals cited
19 Schneidewind and Northern Natural Gas on page 21a of
20 the -- of the Petition Appendix showing that -- that's
21 still field preemption.

22 It's -- what -- what FERC is concerned about
23 is the effects of the -- of the State program on the
24 participants in its auction. In this particular -- the
25 way that these contracts are constructed, CPV is going

1 to get the contract price regardless of whether the
2 clearing price is lower or higher.

3 JUSTICE BREYER: I can see it. But what are
4 the words of the field preemption thing that puts
5 outside the preemption the thing that's worrying the
6 Chief Justice?

7 See, I -- I -- I mean, you -- you want to
8 say the field is so defined --

9 MS. O'CONNELL: Well --

10 JUSTICE BREYER: -- as, and -- and now,
11 look, billions of actions of States affect the cost of
12 the generator and thereby affect the bid price into the
13 PJM auction.

14 Now, 99.99999 percent we want the State to
15 do. They're perfectly free to do. But you want this
16 1 percent no. And -- and -- and I want the words that
17 are going to define that field.

18 That's what Justice Sotomayor was asking for
19 before. It's something to do with the rule here in
20 Maryland that forces them not just to have these
21 artificial costs but to put it on the -- the auction.

22 MS. O'CONNELL: Right.

23 JUSTICE BREYER: What are the words?

24 MS. O'CONNELL: I think directly targeting
25 the auction to take some words from ONEOK would be a

1 fine way to do it.

2 JUSTICE BREYER: I see targeting.

3 MS. O'CONNELL: The -- the -- the field that
4 we're talking about is the PJM auction. And any -- a
5 State program that directly targets the auction and the
6 incentives of the participants in that auction by the
7 bid-and-clear requirement is -- would be preempted under
8 a field-preemption theory. We think also under a
9 conflict-preemption theory.

10 I -- I could distinguish just a -- just a
11 little bit the contracts for differences that are not
12 tied to a bid-and-clear requirement in the auction.

13 States -- or the parties in this context
14 will sometimes enter into a hedge agreement where they
15 agree on a price. Like a hundred dollars, if the
16 auction clearing price is below that, say it's 80, then
17 the person that the generator has contracted with, like
18 Merrill Lynch or something, owes the generator \$20
19 regardless of what -- what else happens. That
20 transaction will always take place.

21 The generator then has to make a separate
22 decision of whether it wants to bid into the auction.
23 If it's -- if the auction price is 80 and its costs are
24 90, it's not going to. If its costs are 70, it will bid
25 in.

1 That sort of a contract for differences is
2 not preempted here. It's just when there's a
3 bidding-and-clearing requirement that the subsidy is
4 tied to.

5 CHIEF JUSTICE ROBERTS: Thank you, counsel.
6 Mr. Strauss, you have three minutes
7 remaining.

8 REBUTTAL ARGUMENT OF SCOTT H. STRAUSS
9 ON BEHALF OF THE NO. 14-614 PETITIONERS

10 MR. STRAUSS: Thank you, Your Honor.

11 We did not -- Maryland did not require CPV
12 to bid into the auction. CPV agreed to do so in
13 response to a competitive procurement.

14 FERC has no issue with competitive
15 procurements, and that can be found in the Joint
16 Appendix. At page 909, there is a regulation in which
17 FERC essentially says so.

18 That's all that happened here.

19 The question of whether we targeted the
20 auction: We did not regulate the auction. We could not
21 regulate the auction. We could not regulate CPV,
22 either. They're a wholesale generator. They make their
23 own choices, and they made their own agreement here to
24 enter into this contract.

25 We couldn't regulate the outcome of the

1 auction because FERC regulates the outcome of the
2 auction. They control every aspect of it.

3 And in this case, what FERC found was a rule
4 change was needed to address this very contract. The
5 change was made. The resource bid in accordance with
6 the rule change and cleared.

7 FERC said its rule change would reconcile
8 the tensions between State policy and auction integrity.
9 FERC said that this resource was economic, needed,
10 competitive, and did not suppress prices.

11 There was no undue price suppression or no
12 artificial price suppression from this resource. FERC
13 said that and -- and said it more than once. Even with
14 the State subsidy.

15 And the reason is very clear: Because the
16 bid was a cost-based bid without regard to the contract
17 revenue.

18 And keep in mind, there's been a lot of talk
19 about a subsidy here. Maryland concluded that, over the
20 life of this contract, this was going to be a better
21 deal for ratepayers than for the generator. And that is
22 in the generation order.

23 The only other point I would make,
24 Your Honor, is that the rule that should be articulated
25 here is one that allows each of the parties to fulfill

1 their responsibilities under the statute. Sellers get
2 to set rates as an initial matter. FERC gets to review
3 those rates, and States get to direct the procurement
4 decisions of their retail utilities.

5 Been a lot of talk here about what the
6 retail utilities were forced to do. The subject is
7 State regulation. State courts have affirmed what
8 Maryland did here with respect to retail utilities.
9 There should be no question about that. States can take
10 actions where necessary to develop new power plants.

11 And as we move forward into an era of a new
12 generation portfolio in this country, the last thing the
13 Court should be considering is trying to limit State
14 options. It's very important to keep them open,
15 especially in a case here, where FERC has reviewed this
16 precise contract.

17 If you look on page 6 of our reply brief,
18 there is a quote from the FERC rehearing order in
19 November of 2011 in which FERC describes an acceptable
20 arrangement and describes this arrangement: one in
21 which local utilities contract with a generator and the
22 generator bids the unit into the market.

23 That is exactly what happened under this
24 contract. FERC speaks approvingly of it.

25 Thank you, Your Honor.

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.
2 Case is submitted.

3 (Whereupon, at 11:06 a.m., the case in the
4 above-entitled matter was submitted.)

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