

















































































































1 the bid-and-clear requirement they don't operate in the  
2 same way.

3 Parties can enter into a hedge agreement.

4 For --

5 JUSTICE KAGAN: No, but that's -- but  
6 that's -- when Mr. Clement said that there's a real  
7 difference here between voluntary agreements -- you  
8 know, if there's a contract for differences, fine, but  
9 that this is Maryland coming in and effectively forcing  
10 the LSCs to enter into such a contract, and by doing so,  
11 changing the wholesale rate.

12 MS. O'CONNELL: Well, I think the -- the  
13 problem that -- that FERC sees with this is the effect  
14 that it has on the auction. If this was just a  
15 bilateral contract occurring outside of the auction  
16 where Maryland was accepting the results of a  
17 competitive procurement and then submitting that  
18 bilateral contract to FERC for review, that's where FERC  
19 would review that contract.

20 The field that we're talking about here is  
21 the auction. And what FERC is concerned about here is  
22 the effects on the auction of a State program like the  
23 one here that ties a subsidy or -- or extra payments  
24 under the contract to a requirement that the -- the  
25 person receiving it bid into and clear the capacity in

1 the auction.

2 JUSTICE KAGAN: See, when we --

3 CHIEF JUSTICE ROBERTS: How far does your --  
4 how far do you think your authority reaches with  
5 respect to indirect effects on the auction?

6 I guess that was the point of my question on  
7 the subsidies. I mean, a lot of things are going to  
8 have an effect on the auction.

9 Is it only because of the legal mandate in  
10 this case?

11 MS. O'CONNELL: Yes. It's -- it's because  
12 the -- the -- the program in this case, by requiring the  
13 capacity to be bid into the auction and clear, it  
14 directly targets the auction. It has a direct effect on  
15 the auction.

16 We -- we recognize that, in the context of  
17 the Federal Power Act, the State has its sphere too.  
18 The State regulates retail rates. The State has control  
19 over generation. And it can do things within that  
20 sphere that have indirect effects on -- on FERC's field.

21 But in this case the problem is that,  
22 because of the bidding-and-clearing requirement, it's  
23 directly altering the incentives of the people in that  
24 market.

25 JUSTICE ALITO: Well, why doesn't the -- the

1 MOPR correct the problem?

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

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

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

23 And -- and, additionally, just the fact that  
24 FERC had to expand the MOPR to cover this program I  
25 think shows that there's been an intrusion onto FERC's

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

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

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

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

23 It's -- what -- what FERC is concerned about  
24 is the effects of the -- of the State program on the  
25 participants in its auction. In this particular -- the

1 way that these contracts are constructed, CPV is going  
2 to get the contract price regardless of whether the  
3 clearing price is lower or higher.

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

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

10 MS. O'CONNELL: Well --

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

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

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

23 MS. O'CONNELL: Right.

24 JUSTICE BREYER: What are the words?

25 MS. O'CONNELL: I think directly targeting

1 the auction to take some words from ONEOK would be a  
2 fine way to do it.

3 JUSTICE BREYER: I see targeting.

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

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

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

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



1 in.

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

6 CHIEF JUSTICE ROBERTS: Thank you, counsel.

7 Mr. Strauss, you have three minutes  
8 remaining.

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

11 MR. STRAUSS: Thank you, Your Honor.

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

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

19 That's all that happened here.

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

1                   We couldn't regulate the outcome of the  
2 auction because FERC regulates the outcome of the  
3 auction. They control every aspect of it.

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

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

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

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

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

24                   The only other point I would make,  
25 Your Honor, is that the rule that should be articulated

1 here is one that allows each of the parties to fulfill  
2 their responsibilities under the statute. Sellers get  
3 to set rates as an initial matter. FERC gets to review  
4 those rates, and States get to direct the procurement  
5 decisions of their retail utilities.

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

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

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

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

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Thank you, Your Honor.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Case is submitted.

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

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