

1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   W. KEVIN HUGHES, CHAIRMAN,                   :

4   MARYLAND PUBLIC SERVICE                   :

5   COMMISSION, ET AL.,                   :

6                   Petitioners                   :   No. 14-614

7                   v.                   :

8   TALEN ENERGY MARKETING,                   :

9   LLC, FKA PPL ENERGYPLUS,                   :

10   LLC, ET AL.                   :

11   - - - - - x

12   and

13   - - - - - x

14   CPV MARYLAND, LLC,                   :

15                   Petitioner                   :   No. 14-623

16                   v.                   :

17   TALEN ENERGY MARKETING,                   :

18   LLC, FKA PPL ENERGYPLUS,                   :

19   LLC, ET AL.                   :

20   - - - - - x

21                                   Washington, D.C.

22                                   Wednesday, February 24, 2016

23

24                   The above-entitled matter came on for oral

25   argument before the Supreme Court of the United States

1 at 10:04 a.m.

2 APPEARANCES:

3 SCOTT H. STRAUSS, ESQ., Washington, D.C.; on behalf  
4 of Petitioners in No. 14-614.

5 CLIFTON S. ELGARTEN, ESQ., Washington, D.C.; on behalf  
6 of Petitioner in No. 14-623.

7 PAUL D. CLEMENT, ESQ., Washington, D.C.; on behalf of  
8 Respondents.

9 ANN O'CONNELL, ESQ., Assistant to the Solicitor General,  
10 Department of Justice, Washington, D.C.; for United  
11 States, as amicus curiae, supporting Respondents.

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1 P R O C E E D I N G S

2 (10:04 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear  
4 argument this morning in Case No. 14-614, Hughes,  
5 Chairman of the Maryland Public Service Commission, v.  
6 Talen Energy Marketing and the consolidated case.

7 Mr. Strauss.

8 ORAL ARGUMENT OF SCOTT H. STRAUSS

9 ON BEHALF OF THE NO. 14-614 PETITIONERS

10 MR. STRAUSS: Mr. Chief Justice, and may it  
11 please the Court:

12 Maryland determined that new generation was  
13 needed for local reliability, so it directed its retail  
14 utilities to sign 20-year contracts with a competitively  
15 selected project developer.

16 Maryland's action did not intrude on Federal  
17 authority, primarily for two reasons.

18 The first reason is that Maryland's new  
19 resource did not distort the wholesale capacity auction.  
20 FERC revised its auction bidding rules to require the  
21 Maryland resource to bid on the basis of its cost,  
22 backing out any State contract revenue. The developer  
23 bid in accordance with the rules and cleared the  
24 auction.

25 FERC says that means that the resource is

1 economic, needed, competitive, and does not suppress  
2 prices, any State revenue notwithstanding.

3 The second reason is --

4 CHIEF JUSTICE ROBERTS: Well, if it doesn't  
5 suppress prices, why did Maryland do it?

6 MR. STRAUSS: Maryland did it, Your Honor,  
7 because they saw a need for generation going forward.  
8 As is clear in the generation order, Maryland perceived  
9 a problem. It had large coal units that it believed  
10 were going to retire in the coming years, and it needed  
11 to have resources in place to be able to meet that need.  
12 So it undertook to have those resources built pursuant  
13 to the contract mechanism before you.

14 JUSTICE KENNEDY: But if that hadn't  
15 happened, prices would have been higher. So it was to  
16 suppress prices.

17 MR. STRAUSS: No, it was not to suppress  
18 prices, and, frankly, Your Honor, could not have  
19 suppressed prices.

20 FERC revised the rules in 2011 to be clear  
21 that the resource had to bid on the basis of its costs  
22 without regard to the State revenue. So there was no  
23 way for it to suppress prices. If the costs had been  
24 too high for the resource, it would never have cleared.  
25 It wouldn't have been in the market at all. It was only

1 in the market because it was able to clear on the basis  
2 of its cost, which showed it was efficient.

3 And FERC made that finding. FERC found it  
4 needed, competitive, and not suppressive of prices  
5 notwithstanding the subsidy.

6 JUSTICE GINSBURG: Well, why was this done  
7 through stepping on FERC's turf at all? I mean, could  
8 it have been done by requiring long-term contracts with  
9 the new generator?

10 MR. STRAUSS: It was done through long-term  
11 contracts, Your Honor, but the question of getting  
12 involved with FERC's turf is as follows:

13 FERC has -- has set up the capacity auction  
14 in PJM, and when under that auction, PJM procures three  
15 years in advance for a one-year period all the capacity  
16 the region needs, and then it allocates the cost of that  
17 capacity among all the utilities. But it tells the  
18 utilities that you have a way to hedge against those  
19 costs. If you have long-term resources, resources that  
20 you bought or procured through contract, you can bid  
21 them in, and if they clear, they will offset the cost.

22 Maryland's concern was this: It wanted and  
23 needed the resource, but it was concerned that the  
24 resource clear so that it hedge against the cost and  
25 customers not pay twice for the same resource.

1           So in order to do that, it entered into the  
2 contract for differences. And the way it did that was  
3 it did a competitive procurement and found a developer  
4 who was willing to undertake the risk of nonclearance.

5           And that was the issue. The contract for  
6 differences assigns and allocates that risk to the  
7 developer, not the State, and that enabled the resource  
8 to go forward in a way that would not result in any  
9 possibility of a double charge.

10           The contract developer -- the developer  
11 receives the contract price. The utilities paid the  
12 contract price and no more than that, received the  
13 market price. That is exactly the way this would have  
14 worked if we had simply done it as a bilateral, with one  
15 key difference. The difference is that the risk of  
16 nonclearance is with the developer, not the --

17           JUSTICE ALITO: Well, there's another key  
18 difference. If you had done it directly with -- if CPV  
19 had contracted directly with the distribution utilities,  
20 that would have been subject to regulation by FERC,  
21 would it not?

22           MR. STRAUSS: Yes. This contract was as  
23 well.

24           JUSTICE ALITO: Only after you lost in the  
25 Fourth Circuit did you concede that, isn't that correct,

1 on the very day of the Fourth Circuit's decision?

2 MR. STRAUSS: No, Your Honor.

3 JUSTICE ALITO: No.

4 MR. STRAUSS: In the district -- let me  
5 explain why. In the district court, during the district  
6 court litigation, CPV obtained market-based rate  
7 authority from the FERC and filed a motion with the  
8 court telling the court that the case should be  
9 dismissed because the contract was being entered into  
10 pursuant to that authority. And that made it a FERC  
11 contract that could be reviewed at FERC. So any party  
12 could have filed the complaint.

13 JUSTICE ALITO: But your initial position  
14 was that it did not have to be reviewed by FERC; wasn't  
15 that -- isn't that right?

16 MR. STRAUSS: That's -- that's correct. The  
17 position below was that it was either of two things,  
18 Your Honor. Either it was a non-jurisdictional  
19 financing arrangement or it was a FERC-jurisdictional  
20 contract. But either way it was not preempted, and that  
21 was the question. It was either subject to FERC's  
22 jurisdiction or outside it. But the question of whether  
23 it was preempted would not have been -- the answer would  
24 have been the same regardless. The district court  
25 decided that it would deal with that motion in its



1 order, and decided in its opinion that while it probably  
2 was a FERC-jurisdictional contract, the judge went ahead  
3 and found what Maryland had done unconstitutional.

4 JUSTICE KAGAN: I'm not sure why it is that  
5 when you say it was subject to FERC's jurisdiction, that  
6 doesn't end the case right there against you, because if  
7 it's subject to FERC's jurisdiction, that means it's a  
8 wholesale sale. And that's for FERC to do is to set the  
9 rates and other terms of wholesale sales, and that's not  
10 for the States to do. So that means you're preempted.

11 MR. STRAUSS: No, that's -- no, no. No, it  
12 does not. You're exactly right, Your Honor. Wholesale  
13 sale is for FERC to review.

14 But the way the statute works, sellers under  
15 the statute are permitted to set rates as an initial  
16 matter by contract or tariff. FERC superintends that  
17 process, as this Court decided in the NRG case a number  
18 of years ago. In this case, the developer, the seller  
19 set the rate through a contract entered into with the  
20 State utility. That contract would be subjected to FERC  
21 review. That's just another day on --

22 JUSTICE KAGAN: Are you saying that Maryland  
23 didn't set the rates just because they use an auction?  
24 Is that what you're saying?

25 MR. STRAUSS: Maryland did not set the rate

1     because Maryland did not select the price. The price  
2     was selected by the seller.

3                 JUSTICE KAGAN: That's true of FERC itself.  
4     FERC doesn't set rates anymore, either. It allows an  
5     auction to set rates, but we would never say that that  
6     doesn't mean that they are FERC rates, that they are  
7     FERC-approved rates. And so here, the fact that  
8     Maryland decided not to set rates directly but to allow  
9     an auction to do it, I mean, that's just a mechanism  
10    that Maryland chose. They are still Maryland's rates.

11                MR. STRAUSS: The -- the auction -- the  
12    auction that FERC designed, the wholesale auction,  
13    permits, if not incentivizes, exactly what was done  
14    here. FERC has made that very clear. The purpose of  
15    the auction is to -- in part, to provide information to  
16    the market about what kinds of long-term contracting  
17    is -- are needed, what is needed.

18                JUSTICE KENNEDY: But you used the auction  
19    dynamic, the auction mechanism to go outside of the --  
20    of that dynamic.

21                MR. STRAUSS: What we did was perfect --  
22    yes, Your Honor, but that's perfectly permissible.  
23    Remember, the --

24                JUSTICE KENNEDY: That -- that's -- I --

25                MR. STRAUSS: Let me explain.

1 JUSTICE KENNEDY: I'm -- I'm sure that  
2 that's one of the issues in the case.

3 MR. STRAUSS: Yes, Your Honor. The auction  
4 dynamic allows for parties, and indeed encourages  
5 parties, to enter into long-term contracts for capacity  
6 resources and bid them into the auction. But they can't  
7 clear the auction. They don't become auction resources  
8 unless they are able to do so. And in this case, FERC  
9 had in front of it exactly what Maryland and a related  
10 program in New Jersey were about at the time they  
11 revised the rules.

12 What FERC sought to do was to reconcile the  
13 issue of the State programs and how they would interact  
14 with the auction, and FERC did that. It set a different  
15 bidding process, and Maryland followed that bidding  
16 process. The CPV resource bid in accordance with it and  
17 cleared on that basis.

18 JUSTICE ALITO: But the -- as originally set  
19 up, CPV had no incentive to -- to bid anything other  
20 than zero; isn't that right? All it was interested in  
21 was clearing the market.

22 MR. STRAUSS: That is -- that is correct.

23 JUSTICE ALITO: And that affects the dynamic  
24 of the -- of the PJM auction, does it not?

25 MR. STRAUSS: Yes. Yes, Justice Alito, it

1 does. And that's why in 2011, FERC, when it became  
2 aware that this had happened, changed the rules.  
3 Remember, originally, when FERC approved the auction in  
4 2006, it said that State resources that were being built  
5 for reliability, which is exactly what this resource is,  
6 could bid in at zero, a zero price, and clear  
7 automatically in order to ensure that States could meet  
8 their responsibilities to ensure of a liability.

9 In 2011, when FERC became aware of the  
10 Maryland and New Jersey programs, it revised the rules.  
11 But it didn't prohibit those resources; it didn't  
12 preclude them. It changed the rules so that they could  
13 continue to bid, but they had to bid on a cost basis.

14 JUSTICE SOTOMAYOR: But -- but I have to say  
15 that they also looked at a long-term contract -- FERC  
16 did, and PJM -- in the PJM Interconnection order, and it  
17 determined that a seven-year lock-in period for a new  
18 generator was unfair, unjust and unreasonable. It's  
19 something it can do.

20 Why didn't that end what you're doing?  
21 You're arguing that you're not affecting price. FERC  
22 disagrees, because you have no incentive to bid anything  
23 other than zero. I don't understand why this case is  
24 not ended by FERC's determination that locked-in  
25 contracts are unjust and unreasonable.

1                   MR. STRAUSS: FERC determined that under the  
2                   auction it would not allow a guarantee of more than  
3                   three years. But FERC did not at that time say that  
4                   long-term contracts outside the auction were prohibited.  
5                   Long-term contracts are a staple of this industry, as  
6                   this Court knows, and FERC was not trying to prohibit  
7                   them. What FERC was doing there was, the three-year  
8                   lock-in, which I think is what you're alluding to,  
9                   Justice Sotomayor --

10                  JUSTICE SOTOMAYOR: How is it different than  
11                  your contract?

12                  MR. STRAUSS: It's different in that this is  
13                  a 20-year agreement.

14                  JUSTICE SOTOMAYOR: I know the years are  
15                  different, but I'm talking about the mechanics.

16                  MR. STRAUSS: The mechanics of it are that  
17                  it operates outside the auction, but bids into the  
18                  auction. The -- the new entry price adjustment to which  
19                  you refer functions within the auction and for a very  
20                  specific purpose. It's designed to address the  
21                  situation in which you have a relatively small  
22                  geographic zone and a relatively large plant that's  
23                  built. The concern is that when you build that resource  
24                  and put it in the market, it creates a glut, and prices  
25                  will crater. And the concern was because of that, no

1 one will ever build such a resource. So the auction  
2 allows you to lock those prices in for three years, but  
3 that's simply in that particular circumstance.

4 What FERC said when asked to make it longer  
5 was that's not the purpose of the auction. The auction  
6 is not intended to ensure revenue certainty. It's  
7 intended to provide information, information that the  
8 market can use in making contracting decisions. And  
9 that is exactly what happened here.

10 Maryland looked at the -- at the auction  
11 results, came up with a program to have a resource built  
12 outside the auction, which would then bid into the  
13 auction, but it had to do it in accordance with FERC  
14 rules. FERC is the gatekeeper of the auction. Maryland  
15 couldn't insert itself into the auction in a way that  
16 FERC didn't allow, even if it wanted to.

17 JUSTICE KAGAN: Mr. Strauss --

18 JUSTICE BREYER: I didn't -- I -- I  
19 didn't -- I have to admit for myself, in this kind of  
20 brief, it would have been much, much easier if people  
21 had used simplified examples with real numbers. I have  
22 a hard time thinking in terms of simply abstract words.  
23 But as far as I understand it, my law clerk says that  
24 this cost-based system of FERC is that the minimum-offer  
25 price has to be set, that is, they have to set a price

1 at 90 percent of the cost of new entry for a combustion  
2 turbine generator or a combined cycle generator. That's  
3 as they calculated -- PJM, or if it's neither of those  
4 two kinds of generators, it's at 70 percent; is that  
5 correct?

6 MR. STRAUSS: I believe that is, Your Honor.

7 JUSTICE BREYER: If that's correct, then if  
8 I have a generator up somewhere in the hills of -- of  
9 surrounding their hills in Maryland, and it's more  
10 expensive to get coal up into those hills or oil or  
11 natural gas, and so I have a generator that I can --  
12 that's 500 megawatts, and it allows me, based on cost,  
13 to charge, if I were to charge the full cost, and that  
14 depends on the banks and loans and so forth, it allows  
15 me to charge \$220 a megawatt-day. Okay?

16 MR. STRAUSS: Okay.

17 JUSTICE BREYER: Does that? I can go to  
18 FERC, and I can say 70 percent of that is what I am  
19 going to put into the pool, 'cause I know that Maryland  
20 will give me the rest. And this is not one of those two  
21 kinds. And 70 percent of 220 is around -- I don't know,  
22 my math isn't too good -- 180.

23 So they get awarded the contract 'cause it's  
24 180, but there's some other firms that are more  
25 expensive over here, and those other firms don't get

1 into it at all because we used up all the generating  
2 capacity that we needed for the next five years with  
3 your firm and a few others. And that changes rather  
4 dramatically who supplies the contract, and it also  
5 changes the price at which retailers across PJM will pay  
6 for the electricity they are getting from the pool.

7 Now, is that right? That's either right or  
8 wrong.

9 MR. STRAUSS: Well, Your Honor --

10 JUSTICE BREYER: If it's right, it seems  
11 like the end of the matter. If it's wrong, then you  
12 explain to me why.

13 MR. STRAUSS: Here's what's going on, Your  
14 Honor. If the cost of the generator is below the  
15 default price, that 90 or 70 percent price that you  
16 described, the generator is -- that is its offer floor,  
17 and the generator is permitted --

18 JUSTICE BREYER: Now, I'm assuming that the  
19 cost is higher than the 70 percent.

20 MR. STRAUSS: That -- that might -- that  
21 might be a problem, but I have two answers to that, Your  
22 Honor.

23 First of all, that was not this case. In  
24 this case, the -- the resource bid on the basis of its  
25 cost, and its cost base number was below the default



1 price. So there was no issue of a -- of what you've  
2 described as a resource with a cost above the default  
3 price that gets to bid the default.

4 JUSTICE BREYER: So you're asking only for  
5 the case where it's below. You're not interested in the  
6 case where it's above. And this whole case has been  
7 argued only in the case where it's below.

8 MR. STRAUSS: Well, that is actually what  
9 happens, Your Honor.

10 JUSTICE BREYER: I'm not saying what  
11 happens. I'm saying we have to decide a legal issue.  
12 Is my legal issue to include my example or is it not?

13 MR. STRAUSS: I think it does not include  
14 your example, Your Honor. That is a different kind of  
15 distortion. The Solicitor General mentions it in its  
16 brief. And if FERC -- FERC, in 2011, when they revised  
17 the minimum-offer rule, did not find reason to adjust  
18 the offer level higher, which might have limited that --  
19 that problem. If FERC now believes that that distortion  
20 exists --

21 JUSTICE BREYER: I don't want to use up all  
22 your time.

23 MR. STRAUSS: I'd like to reserve the  
24 balance for rebuttal. Thank you.

25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

1 Mr. Elgarten.

2 ORAL ARGUMENT OF CLIFTON S. ELGARTEN

3 ON BEHALF OF THE NO. 14-623 PETITIONER

4 MR. ELGARTEN: Mr. Chief Justice, and may it  
5 please the Court:

6 Let me respond first to Justice Kagan's  
7 comment. The way the Federal Power Act works is States  
8 have the power and the authority, recognized by FERC, on  
9 the purchasing end of any contract to direct their local  
10 utilities to enter into any contract they want.

11 When they direct a purchaser to do so, that  
12 gives rise to a contract that is certainly within FERC's  
13 jurisdiction to review. They review the rates charged  
14 on the other side of the contract, the seller side of  
15 the contract, and they review the ultimate contract  
16 itself. But the notion that you are setting the rate by  
17 engaging in a contract with a seller is completely  
18 inconsistent with what has always been -- and I can only  
19 say always been the rule -- and that's how the Federal  
20 Power Act is written as set forth in our reply brief.

21 The Federal Power Act supplies jurisdiction  
22 on the seller side of those rates.

23 JUSTICE KAGAN: If I understand what you  
24 just said, you're not relying on Mr. Strauss's argument.  
25 Mr. Strauss said that this wasn't a -- setting a

1 wholesale rate because Maryland did it by auction.

2 But you're saying that's irrelevant; that  
3 Maryland could have just picked a price, and -- and that  
4 that would have been fine so long as at some point FERC  
5 had the power to review and veto it. Is that what  
6 you're saying?

7 MR. ELGARTEN: No. It's -- it's a fair  
8 point, but no, Maryland could not have picked a price.  
9 It could not impose that price on the seller.

10 JUSTICE KAGAN: Well --

11 MR. ELGARTEN: The -- the long-standing rule  
12 of FERC has been if it's competitively set by the  
13 seller, leaving the seller free to respond to the -- to  
14 the bid of the purchaser, then it is subject to FERC,  
15 and that review process is there. And it is not  
16 inconsistent with Mr. Strauss's position.

17 In the specific circumstance of an auction,  
18 what we had here --

19 JUSTICE KAGAN: I guess I --

20 MR. ELGARTEN: Yes.

21 JUSTICE KAGAN: -- I don't understand that.  
22 I mean, just take a hypothetical case where -- where  
23 Maryland said to all its utilities, this is the price  
24 and this is the only price that you will pay for  
25 electricity.

1 MR. ELGARTEN: Crosses the line.

2 JUSTICE KAGAN: Are you -- are you saying  
3 that --

4 MR. ELGARTEN: I believe that would --

5 JUSTICE KAGAN: -- Maryland could do that?

6 MR. ELGARTEN: I believe -- there's a case  
7 from -- from the Commission, says that would cross the  
8 line. I am imposing a price that all my utilities would  
9 sell. That crosses the line.

10 JUSTICE KAGAN: Okay. Then you are saying  
11 that everything's dependent on the difference between  
12 picking a price and letting an auction pick a price.  
13 But I guess I -- I'll repeat the question that I made  
14 to -- to Mr. Strauss.

15 I mean, we know that one of the ways that  
16 you pick a price is by letting an auction determine that  
17 price. That's exactly what FERC does.

18 MR. ELGARTEN: We -- we had a competitive  
19 bid to bid -- build a power plant. That's what was set  
20 up here. We were talking -- in answering your first  
21 question, I was answering the conceptual question of  
22 what it is FERC regulates. FERC regulates the seller  
23 side of -- of every transaction.

24 In the auction context, things get a little  
25 more complicated, as you just discussed in the -- in the

1     EPSA case. This case, however, was a procurement to  
2     build a power plant.

3                     CPV bid to build this power plant. It  
4     looked at the costs it would take to build a power plant  
5     in this locale, how much turbines cost, how much it  
6     would cost to run the plant and to bid into the market  
7     and make it available to the market. Of course, it then  
8     divided the price over the 20 years. You have 240  
9     monthly payments. That's exactly what we bid.

10                    We understood that for Maryland to pay for  
11    us to build a power plant and to keep all the profits  
12    from our sales in -- in the markets, both the energy  
13    sales and capacity sales, both were involved -- that  
14    would be unfair. They didn't want the ratepayers to  
15    both finance our power plant construction, which is what  
16    Maryland was after, and keep all the revenues.

17                    So the contract reads -- and this is on  
18    page 17 of the reply brief -- the contract reads: "We  
19    turn over all the revenues for 20 years, and we build  
20    the power plant." They pay us to build the power plant.  
21    We turn over the revenues. It is correct enough that  
22    the net of that is the difference between the revenues  
23    and the price. But the purchase here was to build the  
24    power plant.

25                    Now, how did it impact the auction? How

1     does it impact the auction? The auction was always set  
2     up by FERC on the understanding that States have the  
3     inherent power, and I mean the reserve power under the  
4     Federal Power Act itself to direct these kinds of  
5     long-term contracts, to direct capacity purchases  
6     outside because they control the purchasing decisions of  
7     their local utilities every single day. They review  
8     them and they control them. And they understood that  
9     States would be using long-term contracts to support new  
10    generation.

11                 So FERC didn't, just as an act of grace,  
12    allow constant sales of capacity outside the auction.  
13    They constructed the auction against the existing  
14    authority of the States to do exactly what was done  
15    here.

16                 JUSTICE KENNEDY: Would it be correct or  
17    incorrect to say that under Maryland law, you entered --  
18    you entered the auction, and as a result, you altered  
19    the consequences of that auction in a way that was  
20    inconsistent with FERC's policy. Is that a fair or an  
21    unfair statement?

22                 MR. ELGARTEN: No, it is not fair, because  
23    FERC's policy, it was expressed. They said when States  
24    do exactly what was done here, before they even set up  
25    the auction -- and then in -- in fact they said, if

1 States do what we do here, we have a mechanism in our  
2 auction not to correct it, to adjust the auction so the  
3 auction still functions. And that was the point  
4 Mr. Strauss was making.

5 The minimum-offer price rule, which has two  
6 formats, is acceptable to FERC because FERC says if you  
7 comply with that rule, it does not artificially suppress  
8 prices. That was FERC's judgment, whether it was a  
9 70 percent or 80 percent situation of how you bid.

10 FERC has determined that is competitive,  
11 economic -- these are quotes -- does not -- does not  
12 artificially suppress prices because FERC wants those  
13 bids in. You're a competitive resource.

14 In our case, however, we didn't even use  
15 that default price. We used a pure cost-based price.  
16 So the concern the government expresses that there's a  
17 possibility of an exception which they say they haven't  
18 corrected -- I think FERC did it on purpose and said it  
19 doesn't suppress prices -- the possibility of that  
20 exception is eliminated. We were -- we, in our case,  
21 because we bid a pure cost-based bid.

22 And when you bid a pure cost-based bid, does  
23 it affect the market? Of course. The addition of  
24 supply affects the market. FERC doesn't think that's a  
25 bad thing. FERC thinks that's a wonderful thing.

1 JUSTICE BREYER: Why? That's another  
2 problem I have here. I -- don't spend more than a  
3 minute on this, but I don't understand the procedural  
4 posture of this case. That is, it seemed to me it  
5 started out by saying that there was a -- a Supremacy  
6 Clause private right of action or something, which I  
7 think there isn't, in my opinion.

8 MR. ELGARTEN: Uh-huh.

9 JUSTICE BREYER: And then -- and then it  
10 seemed to go we don't have FERC's opinion. We only have  
11 it through the SG. I thought there was a doctrine  
12 called primary jurisdiction where if the agency  
13 really -- their views is really relevant on that, you  
14 got their views directly, what happened to all that?

15 MR. ELGARTEN: We want to be in front of --  
16 of the Commission. We believe the Commission should  
17 decide these issues. We think the Commission would  
18 decide these issues favorably to us because they have  
19 done so in connection with this very case. When the  
20 issue arose of this offer --

21 JUSTICE ALITO: Of course.

22 MR. ELGARTEN: -- being presented --

23 JUSTICE ALITO: Well, I don't understand  
24 your position. You're -- you're arguing that FERC does  
25 not think that this adversely affects the auction? Is



1     that what you're saying?

2                   MR. ELGARTEN:  Adversely affects the  
3     auction.  In fact --

4                   JUSTICE ALITO:  Why --

5                   MR. ELGARTEN:  -- the auction --

6                   JUSTICE ALITO:  Why has FERC filed a brief  
7     arguing the opposite?  I --

8                   MR. ELGARTEN:  I -- if you read --

9                   JUSTICE ALITO:  You're arguing as if they're  
10    not even here.

11                  MR. ELGARTEN:  If you -- if you read the  
12    FERC's decisions that we've cited, the 135 and 137  
13    FERC -- that's how it's numbered in the briefs -- if you  
14    read that and you read the quotes that are included in  
15    the Joint Appendix, you will see that FERC has  
16    determined that these bids are competitive if they are  
17    submitted in this way.  Why --

18                  JUSTICE KENNEDY:  So you're saying that  
19    FERC -- FERC doesn't understand its own order?

20                  MR. ELGARTEN:  I'm saying FERC's -- as  
21    happened in the Morgan Stanley case, there is a little  
22    bit of changing of -- of tunes that's at issue here.  If  
23    this issue was presented to the Commission -- which is  
24    exactly who should decide these issues of energy policy,  
25    not this Court, whether something artificially

1 suppresses. These kinds of issues of energy policy and  
2 how the auctions should work should be decided by FERC.

3 Under this Court's case, Northwest Central,  
4 it says if the issue between the State's authority and  
5 the Federal authority can be reconciled -- and they were  
6 reconciled with these specific contracts in front of us.  
7 FERC modified the rules to allow exactly this bid and  
8 determined that it did not artificially suppress prices.

9 Does it affect prices? Of course. New  
10 supply affects prices.

11 JUSTICE SOTOMAYOR: I'm sorry. How would  
12 this --

13 MR. ELGARTEN: Does it artificially do that?

14 JUSTICE SOTOMAYOR: How would this work  
15 normally? Meaning forget that a lawsuit was started.  
16 You enter into this contract. Do you have to submit the  
17 contract to FERC?

18 MR. ELGARTEN: No. Because we have what's  
19 called market-based rate authority. It's been discussed  
20 in your cases. So we notify them.

21 Anyone can protest to FERC, yes. Anyone --

22 JUSTICE SOTOMAYOR: Can somebody protest  
23 here?

24 MR. ELGARTEN: They didn't. They -- well,  
25 they -- we thought they did. They raised an objection.

1 They said this is adversely affecting the auction. FERC  
2 resolved their objection.

3 FERC had in front of it the very complaints  
4 we have here. The complaints about -- excuse me -- the  
5 RFPs and the solicitations from New Jersey and Maryland,  
6 and they presented this to FERC.

7 FERC said, ah, we take care of this in our  
8 auction -- we've always known how -- with the  
9 minimum-offer price rule. They said the minimum-offer  
10 price rule, when it is applied, will result in not  
11 artificially suppressing prices.

12 That is how this was presented to FERC.  
13 With these specific contracts, they are in -- they are  
14 in Volume III of the Fourth -- Fourth Circuit appendix.  
15 These specific contracts.

16 Now, if they want to protest it again and  
17 say these have rates, or the rates that affect the  
18 jurisdiction, they are free to protest it yet again.  
19 And I am -- I believe FERC would come up with the same  
20 conclusion again and say this is perfectly appropriate  
21 to bid into the auction in this way.

22 Now, if somebody wants to petition, let's  
23 close this what they are calling the "loophole," the one  
24 that Justice Breyer suggested, because it doesn't  
25 require a bid at exactly a cost-based price. They can

1 go to FERC and close that loophole. It wouldn't have  
2 affected our case at all because we bid a cost-based,  
3 but they can go to FERC on every one.

4 All of the conflict preemption issues should  
5 be addressed to FERC. They are not really for this  
6 Court, which is obviously having some trouble  
7 conceptualizing how this all works, to resolve. Those  
8 conflict preemption on the Northwest Central issues go  
9 to FERC.

10 JUSTICE GINSBURG: You wouldn't --

11 MR. ELGARTEN: They should not --

12 JUSTICE GINSBURG: -- get to conflict  
13 preemption if field preemption applies.

14 MR. ELGARTEN: That's absolutely correct.  
15 And so on the issue of field preemption, have we  
16 exercised an authority that belongs to FERC? No. By  
17 setting -- by directing a contract or competitively  
18 soliciting, we are not setting the rate. If we did, the  
19 hypothetical from Justice Alito, we -- if we said  
20 everybody in the State must pay that rate, FERC has  
21 dealt with that issue. That crosses the line.  
22 Competitive solicitations do not.

23 When -- the purpose --

24 JUSTICE GINSBURG: What is your explanation  
25 for why FERC is on the other side now, when you're

1 saying it was in your corner earlier?

2 MR. ELGARTEN: FERC -- FERC, as the  
3 Commission through its rulings and orders based on  
4 evidence and appeal, as reflected in the New Jersey  
5 appeal, the NJBPU, appeal of that order, they were on  
6 our side. When they were asked to join this case, the  
7 Third Circuit said get in; they had two weeks. I think  
8 they took an ill-advised position, but it's certainly  
9 not a position that was done on the record subject to an  
10 order.

11 And that's what's decisive here. If the --  
12 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
13 Mr. Clement.

14 ORAL ARGUMENT OF PAUL D. CLEMENT

15 ON BEHALF OF THE RESPONDENTS

16 MR. CLEMENT: Mr. Chief Justice, and may it  
17 please the Court:

18 Maryland's effort to dictate what CPV  
19 receives in connection with its wholesale sales to the  
20 wholesale market operator is plainly preempted.

21 Maryland's targeting of the Federal market  
22 was direct in this case. CPV gets nothing unless it  
23 bids and clears the PJM auction. Once it does, it must  
24 sell all of its output, all of its energy and capacity  
25 to PJM.

1                   If those things happen, then CPV receives,  
2   thanks to the State of Maryland and its State action,  
3   payment streams in conjunction -- in connection with  
4   those sales to PJM that are different from and far more  
5   stable than the prevailing price on the PJM auction.  
6   And --

7                   JUSTICE BREYER:   Why?   The -- the way that  
8   they've described it to me -- I'll try this once more.  
9   Because truer words were never spoke, than I am not  
10   quite on top of how this thing works.

11                   But the -- the -- the way he described is,  
12   what are they bidding into the PJM is their real cost.  
13   And when they are bidding their real cost, Maryland  
14   isn't going to pay them a dime.   If they are an  
15   inframarginal unit, which I assume they would be, the  
16   cost for PJM is going to be higher, not lower.   And  
17   there will be extra money.   So what they are going to do  
18   is they are going to be paying Maryland.

19                   Now, what they said is, we're going to be  
20   paying you.

21                   Oh, he's shaking his head.   So I haven't got  
22   that right, either.

23                   (Laughter.)

24                   JUSTICE BREYER:   No?   No, I have got it  
25   right?   I don't know.   I'm guessing at getting it right.

1 Maybe not.

2 Anyway, I -- well, you see my problem --

3 MR. CLEMENT: Well, I --

4 JUSTICE BREYER: -- which is understanding  
5 this.

6 MR. CLEMENT: Well, I guess I can see your  
7 problem, which is, I think, first, there's a factual  
8 premise there --

9 JUSTICE BREYER: Yes.

10 MR. CLEMENT: -- which is -- I think it's  
11 pretty much conceded that, at least in the first couple  
12 of years of this, the expectation is that CPV is going  
13 to be receiving an additional payment, a forced payment,  
14 from the LSC, the loading serving entity, to PJM. So  
15 that's just a factual premise for you.

16 JUSTICE BREYER: But are they bidding their  
17 true cost into PJM?

18 MR. CLEMENT: Well, they sure didn't start  
19 that way.

20 And let me start here. I mean, they had, as  
21 I think Justice Alito alluded to, a completely different  
22 incentive in bidding their costs into PJM than would a  
23 private generator with new capacity.

24 A private generator with new capacity is  
25 going to build its actual -- bid in its actual costs

1     because they don't want to clear at the expense of  
2     having an unprofitable generator.

3             It's a completely different dynamic for  
4     somebody like CPV, because the bidding clear requirement  
5     for them is just an obstacle to get to the pot of gold  
6     at the end of the rainbow, which is all these guaranteed  
7     payments for 20 years. So they have every incentive to  
8     understate their cost.

9             That incentive was realized here. They  
10    talked about bidding in their costs. When they first  
11    bid in their costs, they bid in their costs at less than  
12    \$14 a megawatt-day. Okay?

13            Now, when PJM took a look at that, they  
14    ended up upping the figure sevenfold to about \$96. So  
15    that's a great measure of their incentive to distort  
16    their costs for FERC.

17            Now, what they will say is, ah, but  
18    Mr. Clement, the \$96 bid cleared, and that's all that  
19    matters.

20            Well, with all due respect, that's wrong.  
21    FERC says it's wrong. A bid like this can still have a  
22    price effect -- suppressive effect. And you can see  
23    that in a couple of ways.

24            I want to say one thing, though, is FERC is  
25    here on our side in part because they are on its record



1 as saying this MOPR -- the minimum-offer price rule.  
2 The MOPR is not some sort of cure-all that is designed  
3 to ward off any price-suppressive bid. It is a default  
4 rule. It is a coarse screen to deal with the most  
5 egregious cost-reducing bids. It also depends on an  
6 estimate of cost. And here's why it doesn't really work  
7 for a bid like this.

8 One of the most important costs is your cost  
9 of capital. Well, what was CPV's cost of capital  
10 without this program? They told you. They told  
11 Maryland, without the 20-year guarantee, we can't get  
12 any financing for this project. We can't do it.

13 At the bench trial, they told the district  
14 court, our ability to bid this project depends entirely  
15 on the --

16 JUSTICE BREYER: Well, that's another way of  
17 saying that the bid that -- that -- that FERC says that  
18 they have to make is not their actual costs --

19 MR. CLEMENT: What --

20 JUSTICE BREYER: -- because if in fact it's  
21 based on a cost of capital that is lower than what the  
22 cost of capital really is, that is a misstatement of  
23 their cost or a -- an -- a lower-than-actual cost, just  
24 as much as if the steel were in fact less expensive than  
25 what they actually have to pay.

1                   MR. CLEMENT: Absolutely. And of course,  
2 another component of cost is going to be future fuel  
3 costs. And anybody who's been to the pump lately knows  
4 that we can all have a lot of variance as to what we  
5 think are going to be future fuel costs, but if I could  
6 return to the capital cost and just finish this point,  
7 it's even worse that it's misstated, because ultimately,  
8 because they are getting a 20-year guarantee and no one  
9 else is, everybody else is calculating their cost of a  
10 new generation financing based on the three-year price  
11 signal that the -- that the -- that the capacity market  
12 is settling, it destroys the ability to do an  
13 apples-to-apples comparison. And then the one thing we  
14 know for certain here is that this project ended up  
15 displacing a project that actually could be built based  
16 on the three-year forward price and without a 20-year  
17 contract.

18                   CHIEF JUSTICE ROBERTS: But you'd have --  
19 you'd have no objection if Maryland just decided to  
20 subsidize the construction of the plant, would you?

21                   MR. CLEMENT: We would, Your Honor. I think  
22 it might be a harder case, but particularly if the  
23 subsidy was conditioned on a bid-and-clear requirement,  
24 I would be here making a preemption argument. You might  
25 not think it's as good of a preemption argument, and I

1 think that the only difference is because the statutory  
2 text of the Federal Power Act, it seems to me to make  
3 our position clearly correct, is the provision that says  
4 that FERC has the authority to dictate what a seller  
5 receives in connection with a wholesale sale.

6 JUSTICE KENNEDY: How do you define the  
7 field that's preempted?

8 MR. CLEMENT: Well, I think the field that  
9 is preempted is the ability of a government actor to set  
10 wholesale rates for wholesale sales. And so if you have  
11 State action that sets rates for wholesale sales -- and  
12 "rates" in this context is defined by the statute as  
13 including what a seller receives for wholesale sales --  
14 we think that's preempted.

15 JUSTICE KENNEDY: Are they -- are they  
16 setting rates by having ended the auction?

17 MR. CLEMENT: We certainly think so, and  
18 more importantly, I think, for purposes of this case, so  
19 did the district court. I mean, it's kind of odd for me  
20 to hear my friends on the other side, as I heard them in  
21 the colloquy with Justice Kagan, they essentially  
22 conceded they lose if Maryland sets the rates, and that  
23 would be an odd concession in any case, but particularly  
24 where at footnote 48 at the district court's opinion,  
25 the district court finds -- as a matter of fact, I'll

1     concede it's a mixed question of fact and law and all,  
2     but still there it is. The district court --

3                 JUSTICE KENNEDY: In a sense, I guess all of  
4     the bidders in the conventional auction in effect set  
5     their rates by their bid.

6                 MR. CLEMENT: Sure. And I think what  
7     Justice Kagan alluded to is if Maryland --

8                 JUSTICE KENNEDY: So why is this -- why is  
9     this different?

10                MR. CLEMENT: Well, it's -- it's not,  
11     because I -- I think the point is, if Maryland is not  
12     setting the rates here, than FERC's not setting any  
13     wholesale rates, and that's not right. And so just  
14     because you use an auction mechanism to set the rate,  
15     that doesn't mean that it's not the State setting the  
16     rate. And if you look at footnote 48, it's -- it goes  
17     beyond that because, based on particular findings, based  
18     on the testimony of the chairman of the Maryland PSC,  
19     the district court said that actually because there was  
20     back and forth between Maryland and CPV, this was  
21     Maryland setting the rate.

22                CHIEF JUSTICE ROBERTS: So is Maryland  
23     setting the rates when it subsidizes the construction of  
24     a power plant?

25                MR. CLEMENT: Well, if -- Mr. Chief Justice,

1     suppose they decided to -- I mean, potentially they  
2     could. Not all subsidies are created equal. If they  
3     had a subsidy that was measured, a dollar-for-dollar  
4     subsidy based on sales to PJM, I would think that would  
5     actually be setting the rate. Again, you might disagree  
6     with me, but I would say that in that case, you would  
7     have a very similar situation. I think this case is  
8     that much clearer because these payments from the LSC is  
9     directly conditioned on selling to PJM.

10                 JUSTICE SOTOMAYOR: Mr. Clement, can you  
11     tell me how I write this opinion? And I'll ask you why.

12                 MR. CLEMENT: Okay.

13                 JUSTICE SOTOMAYOR: As I look at the  
14     relevant statutory provisions, what it says is that FERC  
15     has the power to ensure that rates that are set are  
16     fair, are just and reasonable. So it doesn't say it  
17     gets to set the rates. It says it can do rules and  
18     regulation that control how the rates are set so that  
19     I'm not sure how this is field preemption. At best, I  
20     think it might be conflict preemption. And so if I  
21     think it's conflict preemption, that something about  
22     Maryland's plan conflicts with the system that FERC has  
23     set in place, how do I articulate the rule in this case?  
24     What is it that conflicts with FERC's rules and  
25     regulations with respect to setting -- participating in

1 the market -- in the auction?

2 MR. CLEMENT: Sure.

3 JUSTICE SOTOMAYOR: Because as I understand  
4 it, and I don't think you -- you've told me any  
5 differently, that the people who are auctioning in the  
6 market can and do enter into contracts with States on a  
7 regular basis.

8 MR. CLEMENT: Oh, not with contracts with  
9 the States. That's not what my friends on the other  
10 side were saying. They enter into voluntary bilateral  
11 contracts off of the market.

12 JUSTICE SOTOMAYOR: Exactly.

13 MR. CLEMENT: And that is not what's  
14 happened here.

15 JUSTICE SOTOMAYOR: All right. Voluntary  
16 contracts outside the market.

17 MR. CLEMENT: Right.

18 JUSTICE SOTOMAYOR: Why is this involuntary?  
19 Because of the State --

20 MR. CLEMENT: Because the State told the  
21 load-serving entities that they had to make these  
22 payments to CPV.

23 JUSTICE SOTOMAYOR: All right. So is that  
24 what conflicts? I'm -- I'm trying to articulate the  
25 preemption rule in some simplified way. I'm a little

1 bit like Justice Breyer on this. I'm not quite sure how  
2 everything is working, but I don't think it can be field  
3 preemption, because you have to explain what field we're  
4 talking about and what rule we're setting in the future.  
5 I think it's conflict preemption.

6 MR. CLEMENT: I think it's both, Your Honor.  
7 I think part of the reason this is difficult is because  
8 it's like an overdetermined equation. There is both  
9 field preemption here, but there's also conflict  
10 preemption, and there are multiple evidences of conflict  
11 preemption, because nobody's tried to do anything like  
12 this before --

13 JUSTICE SOTOMAYOR: So give me a simple --  
14 sir, when I write this opinion --

15 MR. CLEMENT: Sure -- right.

16 JUSTICE SOTOMAYOR: -- give me -- give me  
17 the first paragraph. This conflicts with what?

18 MR. CLEMENT: This conflicts with FERC's  
19 determination that the PJM rates for the PJM auctions  
20 are just and reasonable. As you said, the starting  
21 premise here is the statute gives FERC the authority to  
22 determine whether wholesale rates are just and  
23 reasonable. FERC has done that effectively ex ante with  
24 respect to the PJM markets by its regulations of PJM.  
25 FERC has said that the auction clearing rate for sales

1 to PJM is just and reasonable.

2 Now, the authority of FERC extends not just  
3 to what the nominal rate is in the auction but to what  
4 the supplier receives in connection with that sale. So  
5 if a State, through State action, says, it's all very  
6 well CPV that you've sold that to PJM and PJM has given  
7 you a hundred, this is your lucky day, we're going to  
8 give you another 50, that is clearly preempted because a  
9 State is having the supplier receive something in  
10 connection with a wholesale sale to PJM that is  
11 different from the rate that FERC has determined is  
12 reasonable.

13 JUSTICE BREYER: Let me try that with the  
14 example. Five thousand new megawatts of capacity is  
15 needed. Existing suppliers can't supply more than four.  
16 So FERC is trying to get an extra thousand. The people  
17 whom it will choose to give it and will allow to bid are  
18 those who are the new people who have the lowest cost.  
19 All of those people in a rising market will have higher  
20 costs than the existing people.

21 So if in fact FERC looks to the existing  
22 people and says, which can bid? And says, you have to  
23 use your real costs. And if they really implement that,  
24 what you just said is going to have no effect on the  
25 market, because they will be in the market whether they



1 are given a subsidy or whether they are not given a  
2 subsidy.

3 And indeed, it won't affect the price  
4 because the price is affected only by the marginal  
5 units, who, by definition, have higher costs than  
6 anything that FERC will look to to see what these  
7 people's costs are. Therefore, it is without impact,  
8 and they add to that.

9 We would like to make this argument to FERC  
10 where they have to focus on it and not just say in  
11 general to the SG, this is how we think, because by the  
12 time we're finished, we'll be able to modify present  
13 rules so that they will see that they are not hurt at  
14 all in the actual world by our costs.

15 I did get something like that out of what  
16 they said. Maybe I'm wrong in what they think. Maybe  
17 they'll just agree because they think I'm agreeing with  
18 them at the moment, but I would like to know some  
19 response to that.

20 MR. CLEMENT: Here's your response, Justice  
21 Breyer, and it comes in two parts, because there's at  
22 least two parts to that question.

23 First, I take issue with the premise because  
24 it may be that some new generation will come in, in your  
25 hypothetical, but it won't necessarily be this one. And

1 in fact here we know, as a matter of fact, that it  
2 wouldn't be this one, except for the 20-year guarantee,  
3 and so they displaced somebody.

4 But please don't just shrug your  
5 shoulders --

6 JUSTICE BREYER: No, no, I am agreeing with  
7 you. I am.

8 (Laughter.)

9 MR. CLEMENT: That is a huge --

10 JUSTICE BREYER: I'm not shrugging my  
11 shoulders.

12 MR. CLEMENT: That is a huge difference,  
13 because this -- the message this all sends to my clients  
14 is don't take FERC's direction that you should be  
15 competing based on market forces and efficiency. We  
16 should stop competing efficiently on the PJM and try to  
17 put the best bid together based on the three-year  
18 advanced auction. We should start competing for  
19 subsidies, and we should start competing for guarantees.

20 The second part of your question, what about  
21 FERC primary jurisdiction. This is all a bit rich  
22 coming from my friends on the other side because, as  
23 Justice Alito alluded to, when this all started, their  
24 position was this has nothing to do with FERC at all.  
25 This is a financial arrangement that FERC can't even

1 look at.

2           Then my friend talks about how, well, they  
3 eventually got market-based rate authority from FERC in  
4 a submission. Well, I -- I'd ask you to take a look at  
5 what they said on Joint Appendix page 142 of that  
6 submission. What they said about the contract is they  
7 said, quote, "CPV Maryland also notes that it included  
8 the CFD in this application solely for informational  
9 purposes and is not requesting that the Commission  
10 address or discuss Commission jurisdiction over the CFD  
11 in its decision on CPV's Maryland's request for  
12 market-based rate."

13           Don't look what's behind that curtain,  
14 Mr. FERC. We don't want you to do anything with that.  
15 We're just here to try to get market-based rate  
16 authority.

17           For them now to come in, not having raised  
18 any objection to the Supremacy Clause cause of action --  
19 and by the way, there was a Commerce Clause cause of  
20 action there as well, which is maybe why the parties  
21 overlooked it, and I do think that's not jurisdictional,  
22 so I think we're past that.

23           So for them to come in now and say, oh, this  
24 has to go to FERC, I'm sorry; it's a bit rich. And I  
25 understood why they were making the MOPR argument at the

1 early stages of this litigation before FERC filed the  
2 brief. But I am a little mystified why, at this late  
3 stage of the game, after FERC has filed three briefs  
4 saying that the MOPR is not sufficient to eliminate  
5 price-suppressive bids, that they're still saying we win  
6 because FERC's on our side.

7 I mean, that is a bit mystifying. And I  
8 think FERC is absolutely right on this for the reasons  
9 that we've already talked about. I mean, you can't  
10 really even apply the MOPR in an apples-to-apples way if  
11 you have this kind of 20-year guarantee, because the  
12 cost of capitals are completely out of whack. And of  
13 course, they do have the problem that their own  
14 testimony is they wouldn't be on the market at all if  
15 they didn't have this 20-year guarantee.

16 So in the first capacity auction that we had  
17 to deal with, the price was suppressed. In every energy  
18 auction since then, the price was suppressed. And  
19 that's why I think FERC -- you know, they never tried to  
20 design the MOPR as this perfect thing.

21 You talked about the 90 percent and the 70  
22 percent? Way back in one of those proceedings, my  
23 client said, FERC, why isn't it a hundred percent? If  
24 you think about the economics of this, it should be a  
25 hundred percent. And FERC's response was, eh, close

1 counts, this isn't perfect, we don't pretend it's  
2 perfect so we think 90 percent is a rough compromise.  
3 Fair enough. Probably not arbitrary and capricious, but  
4 it doesn't mean that this is something that the MOPR is  
5 some perfect solution.

6 I also don't think there's anything terribly  
7 anomalous about the procedural posture of this case. I  
8 think it's exact procedural posture you had in front of  
9 you in the Schneidewind case. That was a district court  
10 action, declaratory judgment for preemption.

11 What I think makes this a preemption case,  
12 and what completely distinguishes voluntary bilateral  
13 contracts, is State action. It's the State action  
14 forcing the LSCs to make these payments, and essentially  
15 conditioning CPV's participation on the PJM market on  
16 the bid-and-clear requirement. That's State action  
17 that's preempted.

18 In the typical voluntary bilateral contract,  
19 you don't have State action. The parties make their  
20 agreement. They eventually submit it to FERC, or if  
21 it's a market-based rate, somebody can object. And the  
22 only time you really get State action at that point is  
23 at the very end of the process when the State's doing  
24 retail rate regulation, and that's the point where  
25 Mississippi Power & Light and Nantahala come in and say

1 if at that late stage when there's finally State action  
2 that the State has to take FERC's wholesale rate  
3 determinations as a given; they can't second guess them  
4 at late stage. But here you got the State action right  
5 up front, and the State action is preempted.

6 JUSTICE KAGAN: Mr. Clement, it -- it does  
7 seem to me important what the kind of State action is.  
8 And this goes back to the question that the Chief  
9 Justice raised with you.

10 If the State had just said we need another  
11 power plant and had delivered a load of money to CPV and  
12 said go build a power plant, you're not saying that that  
13 would be preempted, are you? If it's not at all, it --  
14 it -- you know, that's going to have an effect on the  
15 kind of bids that CPV is going to make. But the State  
16 is not itself changing the outcomes of the auction  
17 process. You wouldn't say that's preempted, would you?

18 MR. CLEMENT: It would depend. I mean, the  
19 way you just described it, I would say -- especially  
20 because I think it's a helpful answer -- of course not,  
21 not preempted.

22 (Laughter.)

23 MR. CLEMENT: But if they conditioned all of  
24 that money on a bid-and-clear requirement, I would be  
25 saying that that was preempted. I think it's a harder

1 case, but I'd hate to lose that case here because there  
2 are cases like that that are being litigated in the  
3 lower court.

4 Thank you, Your Honor.

5 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
6 Ms. O'Connell.

7 ORAL ARGUMENT OF ANN O'CONNELL

8 FOR UNITED STATES, AS AMICUS CURIAE,

9 SUPPORTING THE RESPONDENTS

10 MS. O'CONNELL: Mr. Chief Justice, and may  
11 it please the Court:

12 In the government's view, the Maryland  
13 Generation Order is preempted because by requiring the  
14 State-selected generator to bid into and clear the PJM  
15 capacity auction in order to receive the guaranteed  
16 payments provided in the contract, the Maryland program  
17 directly intrudes on the Federal auction, and it also  
18 interferes with the free market mechanism that FERC has  
19 approved for setting capacity prices in that auction.

20 CHIEF JUSTICE ROBERTS: Do you have a  
21 position on the question that Mr. Clement avoided, about  
22 what if the State -- what if the State subsidized the  
23 power plant? Is that good or bad?

24 MS. O'CONNELL: I -- I agree with  
25 Mr. Clement's answer. If the State just --

1 CHIEF JUSTICE ROBERTS: What -- what was  
2 Mr. Clement's answer?

3 (Laughter.)

4 MS. O'CONNELL: If the State -- if the State  
5 just paid to build a power plant, that's not directly  
6 targeting what's happening in the PJM auction. Sure,  
7 it's adding supply to the market. But as long as the  
8 State is staying within its sphere under the Federal  
9 Power Act, that's fine.

10 But I also agree with the second part of his  
11 answer, which is that if there was some kind of a  
12 bid-and-clear requirement in the auction attached to it;  
13 for example, if the State paid to build the power plant  
14 and turned it over to CPV, but then they said, okay, we  
15 want to get some money back for this power plant that we  
16 built, so you're going to bid the capacity of this plant  
17 into the auction. And unless you clear, we're taking  
18 the plant away from you, or something like that. That  
19 changes the incentives of the participants in FERC's  
20 auction.

21 And that's what -- what is the key --

22 JUSTICE SOTOMAYOR: So that's the conflict?

23 MS. O'CONNELL: Yes. Yes.

24 JUSTICE SOTOMAYOR: That's -- that's  
25 because -- you're articulating it as -- and correct me



1 if I'm wrong -- that the conflict is in affecting the  
2 bid price in any way. Requiring it, affecting it, or --

3 MS. O'CONNELL: Yes. It's --

4 JUSTICE SOTOMAYOR: -- determining it.

5 MS. O'CONNELL: It's in creating a conflict,  
6 changing the incentives of the people in the market in a  
7 way that conflicts with the market mechanism that FERC  
8 has set up. We think that shows both field and conflict  
9 preemption.

10 JUSTICE KAGAN: Ms. O'Connell, you -- you  
11 have both arguments field and conflict. If -- if you  
12 were to win this case, would you rather win it on field  
13 or conflict?

14 (Laughter.)

15 JUSTICE KAGAN: And why?

16 MS. O'CONNELL: I mean, I think that field  
17 preemption is probably a better way to decide the case,  
18 and it would -- it would be a broader ruling. In such  
19 a -- in such a ruling, I think the -- the Court would  
20 say that when the State does something that alters the  
21 incentives of the people that are participating in  
22 FERC's market, that is intruding on the Federal field.

23 JUSTICE SOTOMAYOR: But for -- that -- that  
24 answers the earlier question: No, they can't give money  
25 to build a generator because that changes the

1 incentives. The generator's cost by definition change  
2 if it's receiving subsidies for free.

3 MS. O'CONNELL: If -- if the State is just  
4 acting completely outside of the auction with no  
5 requirement to bid into and clear in the auction, then  
6 that is not something that changes the incentives of the  
7 folks that are participating in the auction, which is  
8 what happened here.

9 The -- the cost --

10 JUSTICE KAGAN: Well, why do you even need  
11 the sort of change-in-incentives language? Why isn't  
12 the field preemption argument more that this -- this --  
13 this scheme essentially takes the rate that the auction  
14 produces and changes that rate for CPV and for all the  
15 utilities in Maryland?

16 MS. O'CONNELL: I think -- Justice Kagan,  
17 the -- the reason why we don't agree with that broader  
18 interpretation is because we -- FERC does not think that  
19 just receiving extra money in -- in connection with  
20 capacity that's being sold into the auction is  
21 necessarily preempted, and let me explain why.

22 There's something that happens in this  
23 industry, a widespread practice called contracts for  
24 differences. The contracts in this case are sometimes  
25 referred to as contracts for differences, but because of

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.

1 Thank you, Your Honor.

2 CHIEF JUSTICE ROBERTS: Thank you, counsel.

3 Case is submitted.

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

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