

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Energy Harbor Corp. on behalf of certain
public utility subsidiaries

Vistra Corp. on behalf of certain public
utility subsidiaries

Docket No. EC23-74-000

**COMMENT OF
UNITED STATES DEPARTMENT OF JUSTICE
ANTITRUST DIVISION**

The United States Department of Justice’s Antitrust Division submits this comment to help the Commission in its review of Vistra Corporation’s \$6.3 billion asset purchase from Energy Harbor Corporation. It is possible that the combination of Vistra’s and Energy Harbor’s nuclear and fossil-fuel plants in Ohio and Pennsylvania may substantially lessen competition and increase wholesale electricity prices. Accordingly, the Department urges the Commission to review the transaction carefully to ensure it will not threaten competition and serves the public interest.

Reliable and affordable electricity is essential to modern American life—whether in homes, manufacturing plants, schools, hospitals, sporting events, or concerts. Depending on consumers’ needs, demand for electricity varies by time of day, day of week, or month of the year. That demand must be continuously balanced by supply from electric power plants. To maintain that balance, plants adjust the output from individual electricity generating units (such as gas-fired turbines or coal-fired units) to meet demand. The electricity generated by these units is sold wholesale to electric utilities, which transmit it to their customers, who ultimately pay for it through their electric bills.

Vistra and Energy Harbor currently compete in auctions run by PJM Interconnection, a regional transmission organization that manages the electricity grid for more than 65 million consumers.¹ In PJM’s auctions, market prices are determined by the prices offered by competing generators, including Vistra and Energy Harbor. The proposed acquisition would combine different generating units with different cost structures under the control of Vistra. This combination may enable Vistra to profitably withhold electricity from some of its generating units to raise market prices. After the transaction, Vistra would supply the same customers with

¹ Unless otherwise noted, all descriptions of Vistra and Energy Harbor’s operations and supply of electricity within PJM are based on publicly available information, including the Independent Market Monitor’s report.

electricity from nuclear plants, whose generating units usually offer low prices in the auctions, and natural gas plants, whose generating units usually offer higher prices. To increase the wholesale price it receives on the low-cost nuclear plants it acquires from Energy Harbor, it is possible that Vistra could withhold output from its higher-cost natural gas generating units. By combining these generating units, the transaction may therefore increase Vistra's incentive or ability to raise electricity prices profitably.

The Department recommends that the Commission undertake a detailed assessment to determine if the transaction may substantially lessen competition and raise prices for consumers by increasing wholesale electricity prices.² In particular, the Commission should examine Vistra's and Energy Harbor's relative supply positions for wholesale electricity. For wholesale electricity markets, this sort of supply curve analysis provides crucial insights and may, in circumstances such as these, illuminate the potential competitive effects from a merger better than simply relying on market shares.

I. The Department's Interest in Vistra's Proposed Acquisition of Energy Harbor Assets

Recognizing that a "fair, open, and competitive marketplace has long been a cornerstone of the American economy," President Biden's Executive Order on Promoting Competition in the American Economy asks that executive branch agencies take a whole-of-government approach to protecting competition.³ Protecting competition is especially important in wholesale electricity markets. American consumers and businesses count on reliable and affordable access to energy for essential daily needs. The Department has considerable expertise in examining competition in wholesale electricity markets, including bringing enforcement actions focused on stopping

² The Department has not reached any conclusion about whether the proposed transaction violates the antitrust laws.

³ Exec. Order No. 14036, 86 Fed. Reg. 36987 (July 9, 2021).

anticompetitive mergers and conduct and evaluating the impact of regulations on competition in wholesale electricity markets and transmission development.⁴

The Commission, too, plays an important role in protecting competition in these markets. The Federal Power Act generally proscribes the “disposition, consolidation, acquisition, or change in control” of an entity that “owns or operates facilities” under the Commission’s jurisdiction unless the Commission finds that the transaction “will be consistent with the public interest.” 16 U.S.C. § 824b(a)(4); *see* 16 U.S.C. § 824(e) (defining a “public utility”). Under this public-interest standard, the Commission considers “the preservation of economic competition ... and the various policies reflected in the statutes specific to energy regulation”—most importantly, “the orderly development of plentiful supplies of electricity ... at reasonable prices.” *Kentucky Mun. Energy Agency v. FERC*, 45 F.4th 162, 166 (D.C. Cir. 2022) (quoting *Wabash Valley Power Ass’n, Inc. v. FERC*, 268 F.3d 1105, 1115 (D.C. Cir. 2001)). Indeed, the

⁴ *See, e.g.*, Comment of U.S. Dep’t of Justice & Fed. Trade Comm’n, *Building for the Future Through Electric Regional Transmission Planning and Cost Allocation and Generator Interconnection* (FERC Dkt. No. RM21-17-000) (2022), <https://www.justice.gov/media/1237951/dl?inline>; Competitive Impact Statement, *United States v. Morgan Stanley*, 881 F. Supp. 2d 563, (S.D.N.Y. Sept. 30, 2011) (No. 11-cv-6875), <https://www.justice.gov/atr/case-document/file/505056/download> (alleging that the agreement between Morgan Stanley and KeySpan violated Section 1 of the Sherman Act and may enable KeySpan to withhold substantial output from the New York City electricity generating capacity market resulting in a likely increase in capacity prices for retail electricity suppliers and consumers); Competitive Impact Statement, *United States v. KeySpan Corp.*, 763 F. Supp. 2d 633 (S.D.N.Y. Feb. 23, 2011) (No. 10-cv-1415), <https://www.justice.gov/atr/case-document/file/500576/download> (alleging that the agreement between KeySpan and Astoria violated Section 1 of the Sherman Act and may enable KeySpan to withhold substantial output from the New York City generating capacity market resulting in a likely increase in capacity prices for retail electricity suppliers and consumers); Competitive Impact Statement, *United States v. Exelon Corp.*, No. 1:06-cv-1138 (D.D.C. Aug. 10, 2006), <https://www.justice.gov/atr/case-document/file/495451/download> (alleging that the merger of Exelon Corporation and Public Service Enterprise Group Inc. violated Section 7 of the Clayton Act and may lessen competition for wholesale electricity in PJM East and PJM Central/East); Competitive Impact Statement, *United States v. Enova Corp.*, 107 F. Supp. 2d 10 (D.D.C. June 8, 1998) (No. 98-cv-583), <https://www.justice.gov/atr/case-document/file/495196/download> (alleging that the merger of Pacific Enterprises and Enova Corporation violated Section 7 of the Clayton Act and may lessen competition in the electricity market in California).

President's Executive Order specifically highlights the Commission's role in ensuring electricity markets remain competitive.⁵

Courts have recognized the importance of competition law principles to the Commission's regulatory responsibilities, including the Commission's review of energy mergers and acquisitions. As the Supreme Court stated, "The [Federal Power] Act did not render antitrust policy irrelevant to the Commission's regulation of the electric power industry." *Gulf States Util. Co. v. Fed. Power Comm'n*, 411 U.S. 747, 759 (1973). "FERC's authority generally rests on the public interest in constraining exercises of market power." *Nat'l Ass'n of Reg. Util. Comm'rs v. FERC*, 475 F.3d 1277, 1280 (D.C. Cir. 2007).

II. Vistra and Energy Harbor's Role in Providing Electricity in PJM and Their Proposed Transaction

Both Vistra and Energy Harbor are large power generators within PJM, the regional transmission organization that manages the electricity grid across 13 states and the District of Columbia. Vistra is one of the largest electric power generators in the United States. Of its 37,000-MW fleet, Vistra owns approximately 9,200 MWs of fossil fuel-fired electric generation throughout PJM's service area, including in Ohio and Pennsylvania. For its part, Energy Harbor owns about 4,000 MWs in PJM's service area, mostly from three nuclear plants located in Ohio and Pennsylvania.

On March 6, 2023, Vistra agreed to pay approximately \$6.3 billion for Energy Harbor's nuclear fleet, Energy Harbor's rights to the output of coal-fired plants, and its retail electricity business.⁶ Vistra intends to combine the nuclear and retail businesses of both companies, as well

⁵ Exec. Order No. 14036 at § 2(e) (noting that the agencies charged with protecting conditions of fair competition include the Commission).

⁶ Energy Harbor's fossil fuel-fired fleet is being sold separately to third parties.

as Vistra Zero renewables and storage projects, under a newly formed subsidiary holding company, referred to generally as “Vistra Vision.”⁷

III. The Commission Should Consider Whether Vistra’s Acquisition of Energy Harbor’s Nuclear Plants May Substantially Lessen Competition in Parts of PJM’s Service Area

Competition analysis of mergers is principally an exercise in risk assessment that requires the reviewing agency to understand how competition presents itself in the markets potentially affected by the merger.⁸ To assess whether a merger may substantially lessen competition, merger analysis should begin by considering how the merging parties compete and the market realities in which they operate. As this comment explains: (1) Vistra and Energy Harbor compete today in wholesale auctions that may be susceptible to unilateral exercises of market power; (2) analyses of wholesale electricity market supply curves may illuminate potential harms to competition not revealed by traditional market concentration measures; (3) the Commission should consider whether Vistra’s acquisition of Energy Harbor assets leaves it with the ability and incentive to raise prices in PJM auctions; and (4) there may be multiple additional relevant areas smaller than all of PJM for considering the possible competitive effects of the proposed transaction.

1. PJM’s Wholesale Electricity Auctions May Be Susceptible to Exercises of Market Power by Generators Controlling Multiple Plants

Vistra and Energy Harbor compete in PJM’s wholesale electricity auctions. In these auctions, electrical plant owners place offers indicating the price at which they are willing to sell electricity from each generating unit. The market price is then set by the highest-price generating

⁷ *Vistra Announces Acquisition of Energy Harbor*, Vistra Corp., (Mar. 9, 2023), <https://hub.vistracorp.com/vistra-announces-acquisition-of-energy-harbor>.

⁸ U.S. Dep’t of Justice & Fed. Trade Comm’n, Merger Guidelines at 2 (draft July 19, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/p859910draftmergerguidelines2023.pdf.

unit needed to provide enough electricity to fulfill all demand. That price is then paid to every generating unit needed to meet demand, even if those units originally offered at lower prices. Thus, if a generating unit that is necessary to meet demand is not available (or is withheld), an even higher-price unit would take its place resulting in a higher price across the wholesale market.

A single generator's decision to withhold supply may successfully increase prices even when there are many suppliers and low levels of concentration. *First*, demand does not respond significantly to changes in price. Thus, a small reduction in output by one or more generators can yield a large price increase. *Second*, in the short-term, new electric generation units rarely enter the wholesale market due to changes in price because of the significant time needed to site, permit, and build power plants. *Finally*, transmission constraints sometimes limit the generating units that can supply electricity wholesale to any given area, which curb the ability of existing generation outside a constrained area to sell into that area.

2. *Examination of Wholesale Electricity Market Supply Curves May Better Illuminate Potential Harms to Competition from the Merger than Traditional Market Concentration Measures*

The Commission historically has focused its merger analysis under the Federal Power Act on market shares and supplier concentration. While such tools can identify some mergers that threaten competition, they may overlook other mergers that also raise concerns. For this reason, the Department encourages the Commission to assess the transaction's potential for competitive effects by conducting a "supply curve analysis" within various PJM service areas.

A supply curve analysis considers information about the market supply curve (which reflects, among other things, individual generating units' costs) to determine whether a firm has

the *ability* and *incentive* to raise the price of electricity by withholding output.⁹ Such an analysis is particularly useful for assessing the competitive effects of a merger in wholesale electricity markets because it can help identify mergers that may increase a firm's ability or incentive to raise prices even when traditional concentration screens fail to capture the potential for a merger to lessen competition.¹⁰

An electricity generator may be able to profitably increase prices in wholesale electricity markets by withholding output from generating units that would otherwise generate relatively low profits. Withholding output requires regional transmission organizations like PJM to use production from more expensive units to meet demand. This will in turn typically raise the market price of electricity. A generator will have an incentive to use this strategy to raise prices if it is able to offset lost profits from the withheld output with the higher profits on the output it continues to offer (*i.e.*, the "inframarginal" output). This trade-off is most likely to be profitable if the withheld output is near the market-clearing price and thus generates relatively low profits (*i.e.*, the output is "marginal" or near marginal). Thus, to effectively employ this strategy, a generator must have (1) the *ability* to affect market prices by controlling marginal or near-marginal output that can be withheld, and (2) the *incentive* to do so, in the form of profits from inframarginal output that will benefit from the higher prices and more than offset the profit sacrificed by the withheld marginal or near-marginal output.

⁹ See, e.g., U.S. Dep't of Justice and Fed. Trade Comm'n, Horizontal Merger Guidelines § 6.3 at Example 20 (revised Aug. 19, 2010) <https://www.justice.gov/sites/default/files/atr/legacy/2010/08/19/hmg-2010.pdf> (noting that in a merger of two firms producing an industrial commodity with inelastic demand, adding high-cost plants to a market leader creates an incentive for the merged firm to reduce output at high-cost plants to increase the price on the rest of its output); U.S. Dep't of Justice & Fed. Trade Comm'n, Merger Guidelines App. 2.D (draft July 19, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/p859910draftmergerguidelines2023.pdf (identifying conditions when competition is greater between merging firms, including commodity products, low elasticity of demand, and lost margins on suppressed output are relatively low).

¹⁰ See, e.g., Competitive Impact Statement at 8–11, *United States v. Exelon Corp.*, No. 1:06CV01138 (D.D.C. Aug. 10, 2006), <https://www.justice.gov/atr/case-document/competitive-impact-statement-98> (discussing evidence of electric power merger's competitive effects, including market structure and supply curve analysis).

Whether a transaction increases a firm's propensity to withhold output from generating units depends on that company's overall portfolio of generating assets before and after the proposed merger. Those portfolios determine whether the transaction may enhance the ability or the incentive of the newly merged firm to exercise unilateral market power. Consider the example of a merger between two companies that each own power plants serving the same area of PJM. One company only owns incentive (or inframarginal) generating units. The second company only owns ability (or marginal) generating units. Before the merger, neither company would be able to profitably withhold output by trading off the lost profits from one set of generating units for higher profits from another set of units. But post-merger the combined company will be able to make this tradeoff profitably; that is, it will have both the ability and incentive to raise prices (*i.e.*, exercise unilateral market power).¹¹

A key insight from this kind of supply curve analysis is that market shares and market concentration alone may not accurately predict the competition lost through their merger. The acquisition of a small marginal generating unit, for example, will change concentration by a small amount. Yet such an acquisition nonetheless may provide the acquiring company with the ability and incentive to raise prices during particular periods, especially if the generating units that would be called on to replace the withheld output are significantly higher priced.

3. The Commission Should Consider Whether Vistra's Richland Plant May Provide the "Ability" to Profitably Withhold Power When Combined with Energy Harbor's Nuclear Fleet

Vistra's purchase of Energy Harbor assets raises competition concerns that the Commission should examine because it would combine Vistra's higher-marginal-cost, fossil fuel-fired generating units, which give Vistra the ability to withhold power with relatively little

¹¹ The Appendix to this Comment provides a simple graphical illustration of the exercise of market power unilaterally through withholding.

loss in profits (its “ability” units), with Energy Harbor’s lower-marginal-cost nuclear plants, which would benefit from higher prices and therefore increase Vistra’s incentive to withhold power (its “incentive” units). This combination potentially gives Vistra the ability and incentive to reduce output and raise wholesale electricity prices during certain periods.

In particular, the Department recommends that the Commission focus on the impact of combining Vistra’s Richland plant with Energy Harbor’s nuclear fleet. Vistra’s Richland plant is a 369 MW gas-fired combustion turbine plant in Defiance, Ohio, which includes six generating units.¹² Units 4, 5, and 6 are natural gas-fired combustion turbines; each can generate 112 MWs,¹³ but these units run only 10-15 percent of the time in a calendar year.

When the Vistra Richland generating units produce electricity, they are often offered near the market-clearing price. This makes them Vistra’s *ability* assets. The Energy Harbor nuclear plant generating units have low marginal costs and are difficult to turn on and off, so they almost always produce electricity. This would make them Vistra’s *incentive* assets. The combination of these *ability* and *incentive* assets into a single portfolio raises concerns that Vistra could withhold the Richland 4, 5, and 6 generating units during certain hours to raise wholesale energy prices to increase its profits from the nuclear generating units newly purchased from Energy Harbor (as well as across the entire market).

PJM’s Independent Market Monitor, Monitoring Analytics, described similar concerns in its filing with the Commission. The Independent Market Monitor concluded that, in local energy markets, narrower than all of PJM, the “Energy Harbor nuclear units would add MW to the Vistra fleet that benefit from existing Vistra local market power.”¹⁴ Thus, adding the Energy

¹² Richland has a nameplate capacity of 450 MW and a summer capacity of 369 MW.

¹³ The units have a nameplate capacity of 135 MW and a summer capacity of 112 MW.

¹⁴ Comment of the Independent Market Monitor for PJM, FERC Docket No. EC23-74-000, at 4 (June 23, 2023) (public version) (hereinafter “IMM Comment”).

Harbor nuclear generation to Vistra’s fleet would “increase the incentive to exercise market power.”¹⁵ In other words, “[o]wnership of the Energy Harbor nuclear units would increase the incentive for Vistra to exercise its market power to increase prices above the competitive level because the nuclear units would benefit directly and significantly.”¹⁶

In response, Vistra and Energy Harbor simply claim that the entirety of PJM is the only relevant geographic market at all times.¹⁷ But, as discussed further below, the relevant geographic market may be narrower, including during the 10-15 percent of the time in which Richland 4, 5, 6 generating units actually operate. Failure to consider the transaction’s effects in those narrower markets risks overlooking significant harm to competition and consumers. Consistent with this approach, the deficiency letter issued by the Commission seeks additional information that may be helpful in evaluating such narrower geographic markets.¹⁸

4. *There May Be Multiple Relevant Areas for Considering the Possible Competitive Effects of Vistra’s Acquisition of Energy Harbor Assets*

Because power plants may not always be able to serve all areas of PJM, the potential competitive effects of the transaction may vary within PJM’s area. Transmission lines become constrained when demand pushes those lines to their capacity. These constraints prevent the free flow of electricity, isolating power plants and creating pockets of demand within smaller areas of PJM. The ebb and flow of those constraints, driven by fluctuations in demand for electricity in

¹⁵ *Id.* at 1.

¹⁶ *Id.* at 18.

¹⁷ In particular, Vistra and Energy Harbor’s expert relies on the fact that “price correlations between Ohio and far eastern PJM . . . are still high (above 0.80)” to maintain the position that the relevant geographic market is all of PJM at all times. Motion for Leave to Answer and Answer of Applicants, FERC Docket No. EC23-74-000, at Exhibit 1, ¶ 41 (July 10, 2023) (public version) (hereinafter “Applicants’ Answer”). But, even assuming price correlations across PJM are “above 0.80,” that still leaves plenty of hours when a difference exists; it is in such a window that units such as Richland 4, 5, 6 (operational during only 10–15 percent of the total hours annually) might be withheld, resulting in consumer harm.

¹⁸ See generally Deficiency Letter, FERC Docket No. EC23-74-000 (Aug. 17, 2023) (public version) (hereinafter “Deficiency Letter”).

different areas, means that the relevant geographic markets for assessing competition among generating units that compete within PJM auctions may vary at different times.

Overlooking these transmission constraints may obscure the transaction's potential to harm competition and electricity consumers. Analyses that ignore constraints and define geographic markets too broadly may understate the concentration of electrical generators in areas of PJM and the transaction's potential harm. Specifically, an overly broad geographic market could lead to an erroneous conclusion that more distant suppliers can constrain a firm's post-merger attempt to raise wholesale electric prices in particular areas of PJM.

In other merger investigations, the Antitrust Division has described how competition could be limited to smaller geographic markets within PJM. For example, in its 2006 review of Exelon Corporation's proposed acquisition of Public Service Enterprise Group Incorporated, the Antitrust Division concluded that "PJM East," defined by the Eastern Interface, and "PJM Central/East," defined by the 5004 and 5005 transmission lines, were appropriate geographic markets for wholesale electricity.¹⁹ When the transmission lines in these areas became constrained, purchasers of electricity had limited ability to purchase electricity from generators outside those areas.²⁰ At such times, PJM often required additional, more expensive electric generating units within the narrower geographic market to operate to meet demand, resulting in higher prices in these geographic markets than would have existed absent the transmission constraints.²¹ We encourage the Commission to consider whether the same holds true here.

Our recommendations here accord with the approach taken by the Independent Market Monitor described above. In its submission to the Commission, the Independent Market Monitor

¹⁹ Competitive Impact Statement at 6–7, *United States v. Exelon Corp.*, No. 1:06CV01138 (D.D.C. Aug. 10, 2006), <https://www.justice.gov/atr/case-document/competitive-impact-statement-98>.

²⁰ *Id.* at 8.

²¹ *Id.* at 6.

analyzed PJM’s energy market using geographic markets narrower than all of PJM, defined by transmission constraints.²² The Independent Market Monitor noted that Vistra has market power in PJM’s energy market even without Energy Harbor, “especially in local markets defined by frequently binding constraints.”²³

Vistra and Energy Harbor’s attempts to dismiss the Independent Market Monitor’s analysis and insist that the only relevant market is all of PJM are unpersuasive.²⁴ Both antitrust law and economic theory recognize that, during certain periods of high demand, a geographic market narrower than all of PJM may be appropriate to assess a proposed merger’s impact on competition, even if at other times all of PJM might be appropriate. Such a dynamic assessment of geographic market definition reflects the market realities of electricity generation and transmission.

Accordingly, the Department encourages the Commission to analyze whether at certain times transmission constraints separate Vistra and Energy Harbor generating units from power plants elsewhere in PJM. Identifying the appropriate geographic markets and the times during which those markets exist allows for a more accurate assessment of the transaction’s potential impact on competition.

²² IMM Comment at 8–9.

²³ *Id.* at 3.

²⁴ See Applicants’ Answer at 38 (describing the monitor’s approach to smaller geographic markets as “unusual”); *id.* at Exhibit 1, ¶ 41 (expert declaration insisting that the relevant geographic market is all of PJM with only limited affirmative supporting analysis).

IV. Conclusion

The Department urges the Commission to carefully review Vistra's proposed acquisition of Energy Harbor assets and to focus particularly on whether it could give Vistra the incentive and ability to withhold generating units from PJM's wholesale electricity market. The Commission should determine for itself whether geographic markets narrower than all of PJM exist during certain periods and conduct a supply curve analysis across the appropriate geographic areas of effective competition. Such an analysis would allow the Commission to reach its own decision as to whether the proposed transaction is in the "public interest."

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Respectfully submitted,

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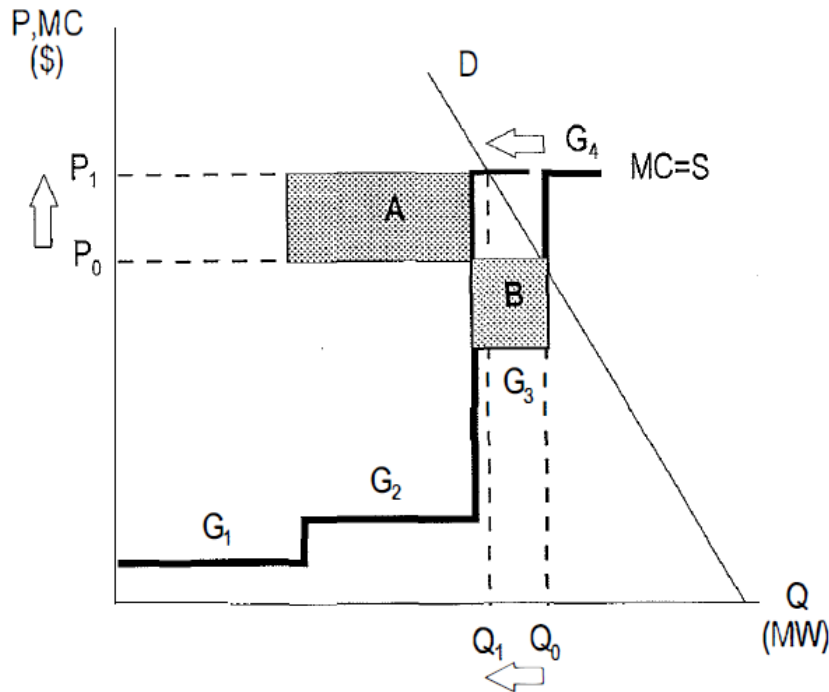
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APPENDIX**Illustration of Supply Curve Analysis**

The graph above shows a supply curve (S) and a demand curve (D), whose intersection determines the market price, which initially is P_0 , absent withholding. The marginal costs of generating units available to serve the market trace out the supply curve (hence $MC=S$). Each step in the supply curve is the marginal cost for each generating unit. Assume that Firm X owns unit G_1 , and Firm Y owns units G_2 , G_3 , and G_4 . Absent withholding, G_3 is the marginal unit, setting the market price, P_0 ; unit G_4 is idle because its costs are greater than the market price; and units G_1 and G_2 are inframarginal. Firm Y is considering whether to increase prices through a withholding strategy.

Firm Y owns the marginal unit, G_3 , with costs close to the market price, which makes the unit a good “ability” asset. Withholding G_3 , however, is not costless: Firm Y will lose the profit it otherwise would have earned on sales from G_3 . The area B represents this lost profit, *i.e.*, it is the cost to Firm Y of withholding. The area A represents the benefit of withholding. When G_3 is withheld, the supply curve shifts to the left and the market clearing price increases from P_0 to P_1 , with G_4 becoming the new marginal unit. Output from unit G_2 continues to be sold but at the new higher price, P_1 , which increases the profit earned by Firm Y by the area A. That is, the inframarginal, low-cost unit, G_2 , creates an “incentive” (area A) to withhold output. When the benefits of withholding (area A) exceed the costs of withholding (area B), Firm Y will find it profitable to withhold, *i.e.*, profitable to exercise market power.

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