ATTACHMENT AB

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107 FERC ¶ 61,087
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeen G. Kelly.

PJM Interconnection, L.L.C. Midwest Independent System Operator, Inc.	Docket Nos. ER04-375-002 ER04-521-001
PJM Interconnection, L.L.C. Commonwealth Edison Company	Docket No. ER04-718-000 (not consolidated)

ORDER ACCEPTING COMPLIANCE FILING, AND
CONDITIONALLY ACCEPTING SERVICE AGREEMENT FOR FILING,
SUSPENDING FILING, AND ESTABLISHING HEARING PROCEDURES

(Issued April 27, 2004)

1. This order addresses two April 6, 2004 filings concerning integration with PJM Interconnection, L.L.C (PJM). First, in Docket No. ER04-718-000, PJM and Commonwealth Edison Company (ComEd)[1] filed an unexecuted service agreement, under PJM's open access transmission tariff (OATT or tariff), to hold harmless utilities in Wisconsin and Michigan from the financial impacts resulting from ComEd's choice to integrate with PJM (Hold Harmless Service Agreement or Service Agreement). Second, in Docket Nos. ER04-521-001 and ER04-375-002,[2] PJM and the Midwest Independent System Operator, Inc. (Midwest ISO) complied with a Commission directive, and filed a report describing the review by the North American Electric Reliability Council (NERC) of their reliability plans, and included NERC's approval resolutions. PJM's plan

[1] Filing on ComEd's behalf was its parent company, Exelon Corporation (Exelon).

[2] These proceedings address, respectively, ComEd's integration with PJM, and PJM's and Midwest ISO's coordination of their operations and subsequent integration under a proposed joint operating agreement (JOA).

addressed integrating ComEd into the PJM market and joint congestion management procedures with Midwest ISO. Midwest ISO's reliability plan correspondingly addressed the joint congestion management procedures.[3]

2. We will accept and suspend the Hold Harmless Service Agreement, to become effective May 1, 2004, subject to refund and to the outcome of a hearing on the question of the appropriate compensation to utilities in Wisconsin and Michigan for any adverse impacts related to ComEd's decision to join PJM, and to the further conditions established in this order. We will also accept the filing that describes and includes the NERC resolutions. Thus, we will permit ComEd to integrate into PJM as of May 1, 2004, and will establish May 1, 2004 as the effective date for PJM and Midwest ISO to commence integration. This order benefits customers by promoting more effective competition in regional wholesale power markets, assuring non-discriminatory transmission service, and improving reliability.

Background

3. On December 31, 2003, the Commission received four filings relating to ComEd's proposed integration with PJM, requested to be effective May 1, 2004. Midwest ISO and PJM filed their proposed JOA, governing how the two regional transmission organizations (RTOs) would combine their operations, provide joint operational reliability, establish a joint and common market, and integrate ComEd and the operating companies of the American Electric Power Corporation (AEP)[4] and other utilities into PJM (Docket No. ER04-375-000). ComEd and AEP proposed a plan to hold utilities in Wisconsin and Michigan harmless from the financial and operational effects of ComEd and AEP integrating into PJM (ComEd-AEP Proposal), a prerequisite to Commission approval of such integration (Docket No. ER04-364-000). PJM proposed revisions to its OATT to integrate ComEd and to provide for single dispatch of the ComEd and PJM control areas through a 500 MW transmission pathway across AEP's system (Docket No. ER04-521-000). Lastly, PJM and ComEd proposed revisions to PJM's OATT concerning rates for the new ComEd zone and revisions to PJM's regional through and

[3] PJM and Midwest ISO made a third related filing, on April 2, 2004, in which they complied with the Commission's directive to file revisions to the JOA (Docket No. ER04-375-001). We will address those JOA revisions in a separate order.

[4] AEP anticipates joining PJM in October 2004. See Cover Letter in ComEd's and PJM's April 6, 2004 filing at 2; AEP's April 21, 2004 Motion to Intervene Late at 1.

out rates to include ComEd's revenue requirements so as to enable ComEd's integration into PJM (Docket Nos. ER04-367-000 and ER04-367-001).

4. On March 18, 2004, the Commission issued four orders addressing these filings. In Midwest Independent Transmission System Operator, Inc. and PJM Interconnection, L.L.C., 106 FERC ¶ 61,251 (2004) (JOA Order), addressing Docket No. ER04-375-000), the Commission conditionally accepted the JOA. Specific to the instant order, the Commission made its final approval of the JOA contingent upon NERC review and approval of PJM's and Midwest ISO's reliability plans. The Commission said that it would issue an order addressing this remaining condition and set an effective date for Phase 1 of the JOA after Midwest ISO and PJM made a filing describing the outcome of NERC's review of the reliability plans, including any conditions that NERC imposed and any resultant changes that Midwest ISO and PJM proposed to the JOA.[5]

5. In Commonwealth Edison Company and American Electric Power Service Corporation, 106 FERC ¶ 61,250 (2004) (Hold Harmless Order), addressing Docket No. ER04-364-000, the Commission rejected the ComEd-AEP Proposal because the plan did not substantially comply with the substantive and procedural conditions that the Commission's prior orders[6] had described and clarified. ComEd and AEP had not provided the analysis required to demonstrate that their proposal holds utilities in Wisconsin and Michigan harmless from all adverse impacts associated with loop flow or congestion that would result from their choosing to join PJM, nor had the filers provided the detailed analysis needed to support their assertion that energy flows and congestion would be unaffected because of their joining PJM. The Commission reviewed the record and determined that a trial-type evidentiary hearing would be the most appropriate way to address the issues of fact that had been raised. The hearing's purpose would be to determine what if any additional adverse impacts on utilities in Wisconsin and Michigan, other than compensation for the difference in loss methodologies, would result from ComEd's and AEP's RTO choices, consistent with the parameters for the hold harmless requirement established in the Commission's prior orders and the Hold Harmless Order.[7]

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[5] See 106 FERC ¶ 61,251 at P 95 and Ordering Paragraph (B).

[6] See Alliance Companies, 100 FERC ¶ 61,137 at P 53 (2002), order on clarification, 102 FERC ¶ 61,214 at P 10 (2003), order on reh'g and clarification, 103 FERC ¶ 61,274 at P 46-47 (2003), order denying reh'g and granting clarification, 105 FERC ¶ 61,215 at P 8-9 (2003).

[7] 106 FERC ¶ 61,250 at P 39, 42, & 46.

6. So as not to delay ComEd's integration into PJM, requested for May 1, 2004, the Commission stated that, were PJM, ComEd, and AEP to propose a service agreement adopting the ComEd-AEP Proposal, subject to the outcome of further proceedings, the Commission would allow the service agreement to take effect during the further proceedings. The Commission stated that the service agreement must necessarily provide an explicit contractual mechanism to ensure appropriate compensation to utilities in Wisconsin and Michigan for any adverse impacts during the entire period that the hold harmless condition is in effect, starting with the integration of ComEd into PJM. The service agreement would also have to explicitly permit increase of the compensation amount, based on the outcome of the hearing.[8] Additionally, the Commission said that the service agreement should take into account potential revenue losses experienced by utilities in Wisconsin and Michigan for the portion of revenues they would have received for point-to-point transmission service for transactions described in Appendix C of the Midwest ISO Agreement,[9] pertaining to flow-based distribution of revenues.[10]

7. In PJM Interconnection, LLC, 106 FERC ¶ 61,253 (2004), addressing Docket No. ER04-521-000, the Commission conditionally accepted, subject to a subsequent Commission order, PJM's tariff revisions enabling integration of ComEd into PJM via a 500 MW pathway between ComEd's Northern Illinois Control Area (NICA) and PJM (ComEd Integration Order). In PJM Interconnection, L.L.C. and Commonwealth Edison Company and Commonwealth Edison Company of Indiana, Inc., 106 FERC ¶ 61,252 (2004), addressing Docket Nos. ER04-367-000 and ER04-367-001, the Commission accepted and suspended, subject to refund and condition, PJM's and ComEd's proposed revisions to the PJM tariff to establish initial rates for the new ComEd zone in PJM, and proposed calculation of new regional through and out rates to reflect ComEd's integration into PJM.

8. Midwest ISO, PJM, and ComEd responded to the JOA Order's directive regarding NERC approval and to the Hold Harmless Order's guidance with the April 6, 2004 filings that commenced the instant two proceedings.

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[8] 106 FERC ¶ 61,250 at P 45.

[9] "Pricing and Revenue Distribution, Return of Start-up Costs, and Renegotiation Procedures for Grandfathered Agreements," Appendix C of the Agreement of Transmission Facilities Owners to Organize the Midwest Independent Transmission System Operator, Inc.

[10] 106 FERC ¶ 61,250 at P 53.

9. On April 13, 2004, PJM informed the Commission, by a filing in Docket No. ER04-521-001, that the capacity of the west to east pathway that will be used for the single dispatch of the combined ComEd and PJM region will be reduced from 500 MW to 300 MW, starting June 1, 2004, but that the east to west pathway capacity still remains 500 MW.

NERC Reliability Plans Filing

10. Midwest ISO and PJM point out that NERC approved their reliability plans without requiring any changes. They acknowledge that NERC imposed several post-integration conditions. For both RTOs' reliability plans, NERC requires certification to NERC, not later than June 30, 2004, that each RTO has fully implemented its plan that responds to NERC's February 20, 2004 resolution addressing the August 14, 2004 outage in the upper Midwest and eastern Canada. NERC also reserves the right to impose additional conditions and require changes in response to recommendations contained in the final report of the U.S.--Canada Power Outage Task Force.[11]

11. For Midwest ISO's reliability plan, NERC additionally conditioned its approval on Midwest ISO passing a readiness audit prior to commencing operation of its Locational Marginal Pricing Market (Phase 2 of the JOA).

12. For PJM's reliability plan, NERC additionally conditioned its approval on a follow-up audit of PJM's implementation of its reliability plan, within two months of ComEd's integration, and on a report to NERC, no later than June 30, 2004, of PJM's meetings with each neighboring reliability coordinator and control area to discuss expected summer conditions and communication protocols.

The Hold Harmless Filing

13. ComEd and PJM state that they are filing the Hold Harmless Service Agreement, under section 205 of the Federal Power Act (FPA), 16 U.S.C. § 824d (2000) (section 205), to meet the conditions stated in the Commission's earlier orders and the

[11] U.S.--Canada Power System Outage Task Force, "Final Report on the August 14, 2004 Blackout in the United States and Canada: Causes and Recommendations," April 2004.

Hold Harmless Order, recognizing that final determination of the financial hold harmless remedy will require further Commission proceedings. They ask the Commission to accept the filing effective as of May 1, 2004, thus permitting ComEd to join PJM as of that date.

14. ComEd and PJM state that the proposed Hold Harmless Service Agreement expressly makes ComEd subject to paying increased compensation in the event that a final order of the Commission finds that more compensation is due to hold harmless utilities in Wisconsin and Michigan from net financial impacts caused by loop flow resulting from ComEd's choice of PJM. They specify that only ComEd undertakes this obligation, which takes effect upon ComEd's integration into PJM.

15. ComEd and PJM anticipate that the Commission will set for hearing whether transactions and flows will remain significantly unchanged as a result of ComEd's choice of PJM. They state that ComEd will perform the necessary studies to provide the analysis sought by the Commission, and will present such evidence in this hearing. Lastly, they explain that the Hold Harmless Service Agreement does not include AEP because, until AEP's October 2004 integration into PJM, its choice has no impact on the Wisconsin and Michigan utilities.

16. The major changes in the Hold Harmless Service Agreement from the previous proposal are:

> (1) New Subsections 1.1 and 1.2 provide for ComEd to compensate the Wisconsin and Michigan utilities, after accounting for netting, for any adverse impacts during the entire period that the hold harmless condition is in effect, starting with ComEd's integration into PJM, and for increase of this compensation, retroactive to ComEd's integration into PJM, based on the outcome of a final Commission order.
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> (2) Section 2, Definitions, now divides the definition of Net Financial Harm into Net Financial Harm (Subsection 2.2) and Net Financial Harm For Real Power Losses (Subsection 2.3).
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> (3) Section 5, Accounting and Payment, now provides that compensation to Wisconsin and Michigan utilities for any adverse impacts is ascribed to ComEd. It explicitly covers the entire period during which the hold harmless condition is in effect. Compensation may be increased based on the outcome of a final Commission order in this proceeding. Within 90 days of the Hold Harmless Service Agreement's expiration, PJM will calculate and collect from ComEd the Net Financial Harm which it will pay to Midwest ISO for distribution to the Wisconsin and Michigan utilities

(Subsection 5.2).

Pathway Capacity Reduction

17. PJM states that reducing the capacity of the west to east pathway from 500 MW to 300 MW will have no impact on reliability, and only minimal impact on the joint dispatch of its and ComEd's systems. PJM states that the expected effect of a 300 MW firm transmission leg into PJM is to operate the pathway unconstrained west to east about 53% of total hours rather than the 59% of the hours, if it were 500 MW. PJM continues that during peak hours, the pathway is expected to operate west to east unconstrained in 89% of the hours, rather than 93% if it were 500 MW. PJM reports the PJM market monitor's position that market power in NICA is not affected when the pathway is constrained from east to west if there is no change in the firm 500 MW pathway from PJM to NICA. PJM adds that the market monitor will be providing additional information regarding market power in NICA.

Notices and Responsive Filings

Docket Nos. ER04-375-002 and ER04-521-000

18. Notice of PJM's and Midwest ISO's filing of NERC's resolutions approving their respective reliability plans was published in the Federal Register, 69 Fed. Reg. 20,002 (2004), with comments, protests, and interventions due on or before April 13, 2004. None was filed.

19. Notice of PJM's subsequent filing, in Docket No. ER04-521-001, of the June 1, 2004 reduction in west to east pathway capacity, was published in the Federal Register, 69 Fed. Reg. 21,827 (2004), with comments, protests, and interventions due on or before April 20, 2004. In response, DTE Energy Trading, Inc., (DTE Energy) and Midwest ISO each filed motions to intervene and comments. Entities filing comments are: Exelon, and Public Service Electric and Gas Company and PSEG Energy Resources & Trade LLC (collectively, PSEG). Edison Mission Energy, Edison Mission Marketing & Trading, Inc., and Midwest Generation EME, LLC (collectively, Edison) filed a protest. On April 22, 2004, PJM filed an answer to Midwest ISO's motion to intervene and comments, but did not oppose the intervention.

Docket No. ER04-718-000

20. Notice of ComEd's and PJM's filing of the Hold Harmless Service Agreement

was published in the Federal Register, 69 Fed. Reg. 21,096 (2004), with comments, protests, and interventions due on or before April 16, 2004. In response, the following parties filed notices or motions to intervene: American Transmission Company, LLC; Consumers Energy Company (Consumers Energy); Dairyland Power Cooperative (Dairyland Power); Detroit Edison Company (Detroit Edison); Edison; Edison; International Transmission Company (International Transmission); Madison Gas and Electric Company (Madison); the Michigan Public Power Agency and the Michigan South Central Power Agency; the Michigan Public Service Commission; Midwest ISO; Southeast Michigan Systems (comprising the City of Crosswell, Michigan, the Village of Sebewaing, Michigan, Thumb Electric Cooperative, and Nordic Marketing, L.L.C.) and Wisconsin Public Power (jointly, Southeast Michigan); the Public Service Commission of Wisconsin; Wisconsin Electric Power Company and Edison Sault Electric Company (collectively, Wisconsin Electric); and Wisconsin Public Service Corporation and Upper Peninsula Power Company (collectively, Wisconsin Public Service).

21. Entities filing comments are Midwest ISO and Southeast Michigan. Entities filing protests are: Consumers Energy; Dairyland Power; Detroit Edison; Edison; International Transmission; Madison; Southeast Michigan; Wisconsin Electric; and Wisconsin Public Service.

22. On behalf of ComEd, Exelon filed, on April 19, 2004, an answer to the issues and arguments raised by the protestors and commentors.

Discussion

Procedural Matters

23. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2003), the notices of intervention of the state commissions and the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Given the early stage of this proceeding, the absence of any undue prejudice or delay, and its interest in this proceeding, we will grant AEP's untimely motion to intervene.

24. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213 (a)(2) (2003), prohibits answers to protests unless otherwise ordered by the decisional authority. We will accept ComEd's April 19, 2004 answer in Docket No. ER04-718-000, and PJM's April 22, 2004 answer in Docket No. ER04-521-001, because the filings provide information that aids us in our decision-making process.

25. We will deny Wisconsin Electric's request that we consolidate this proceeding with Docket No. ER04-364-000 as inapplicable. In the Hold Harmless Order, addressing

that docket, the Commission rejected the ComEd-AEP Proposal, which ended viability of that proposal.[12] In the instant proceeding, the Commission issued notice of ComEd's and PJM's joint filing, and established a comment period during which all interested entities could intervene and comment upon or protest the Service Agreement.

Reliability Plans

26. We will accept PJM's filing describing NERC's resolutions approving PJM's and Midwest ISO's reliability plans as being in full compliance with our directive. PJM and Midwest ISO have already stated that they will make appropriate changes to their reliability plans as matters may arise in NERC's review of those plans.[13] To the extent that any changes in the NERC reliability requirements require changes to PJM's and Midwest ISO's tariffs, PJM and Midwest ISO must file those changes with the Commission before implementation.

Hold Harmless Service Agreement

A. Unexecuted Service Agreement

27. Consumers Energy, Dairyland Power, Detroit Edison, and Wisconsin Public Service reference the Commission's provision, in the Hold Harmless Order, that it would allow a service agreement based on the rejected Hold Harmless filing to take effect May 1, 2004, while further proceedings took place, upon the condition that the proposal "contain an explicit contractual mechanism to ensure that ComEd and AEP provide appropriate compensation to Wisconsin and Michigan utilities for any adverse impacts during the entire period that the hold harmless condition is in effect, starting with the integration of ComEd into PJM, including a provision that permits the compensation to be increased, based on the outcome of the hearing."[14] The protestors point out that because the Service Agreement is unexecuted, the required explicit contractual mechanism is missing; even ComEd, the filer, is not under a binding commitment to pay the Wisconsin and Michigan utilities the hold harmless compensation that the Commission determines. The protestors ask the Commission to direct the filing of an executed service agreement.

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[12] AEP's and ComEd's request for rehearing of the rejection does not request revival of the proposal.

[13] PJM's and Midwest ISO's February 4, 2004 filing in ER04-375-000 at 16.

[14] Hold Harmless Order, 106 FERC ¶ 61,250 at P 39 & 46.

28. ComEd recognizes, in its April 19, 2004 answer, that it would be bound by the unexecuted Hold Harmless Service Agreement because Section 15.3 of PJM's OATT provides that parties to an unexecuted service agreement agree, by filing, to be bound by whatever rate the Commission ultimately determines to be just and reasonable. Nevertheless, ComEd offers to execute the service agreement to relieve the concerns raised in the protests.[15]

29. The Commission will require ComEd to file an executed Hold Harmless Service Agreement prior to May 1, 2004 as the first condition of accepting the Hold Harmless Service Agreement, thus enabling a May 1, 2004 effective date for ComEd's joining PJM. Such a filing, however, will not entirely satisfy the Commission's requirement that, for a May 1, 2004 effective date, ComEd provide an explicit and unqualified contractual mechanism to ensure appropriate compensation during the entire period that the hold harmless condition is in effect.

30. ComEd and AEP have requested rehearing of the Hold Harmless Order, arguing, among other things, that the Commission exceeded its statutory authority in requiring a contractual commitment by AEP and ComEd to compensate Michigan and Wisconsin utilities retroactively should such compensation be found appropriate after an administrative hearing. ComEd states that it filed the Hold Harmless Service Agreement with this commitment in order to facilitate its integration into PJM in a timely manner, but that it did not thereby intend to waive its right to seek review of the merits and retroactivity of this condition in a U. S. Court of Appeals.[16]

31. In the Hold Harmless Order, the Commission considered but rejected the option of accepting the ComEd-AEP Proposal, subject to refund, and setting for hearing the question of just and reasonable compensation. It did so because that option would not protect the Wisconsin and Michigan utilities in case any compensation ultimately found to be due them is greater than the compensation provided in the ComEd-AEP Proposal. In order to ensure adequate protection to the Wisconsin and Michigan utilities, the Commission requires that a mechanism be in effect to ensure adequate compensation

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[15] ComEd's April 19, 2004 answer at 2.

[16] AEP's and ComEd's April 16, 2004 filing in Docket No. ER04-364-001 at P 2 & n.3.

from the commencement date of ComEd's or AEP's integration into the PJM market.[17]

The Commission realized that if it instituted a hearing, under section 206 of the FPA, 16 U.S.C. § 824e (2000) (section 206), to determine the just and reasonable compensation for the adverse effects of loop flow and congestion, this compensation and ComEd's integration into PJM would take effect only upon conclusion of the hearing and any resultant further proceedings, absent a commitment by ComEd and AEP providing otherwise.

32. For these reasons, and to permit the requested May 1, 2004 effective date for ComEd's integration into PJM, the Commission offered ComEd and AEP the option of filing a new service agreement, under the PJM tariff, that would incorporate the ComEd-AEP Proposal but also include an explicit contractual mechanism to ensure appropriate compensation to the Wisconsin and Michigan utilities during the entire period the hold harmless condition is in effect.[18] We remind ComEd that it has known about the hold harmless requirement for almost two years now. This offer, to allow ComEd to bind itself to compensate Wisconsin and Michigan utilities for the entire amount that the Commission finds just and reasonable under ComEd's Hold Harmless Service Agreement, is needed only to accommodate ComEd's request to integrate into PJM on May 1, 2004. It has been obvious for some time now that this issue is contentious, and would require careful, detailed, and serious consideration by the Commission, so that the potential for a hearing was high.

33. Therefore, if ComEd wishes to accept the Commission's option and have a May 1, 2004 effective date for its integration into PJM, its commitment to the Hold Harmless Service Agreement must be full, complete, and unqualified. ComEd must file to withdraw Section II.B of its rehearing request prior to May 1, 2004, in order to integrate on that date, and must voluntarily commit to the procedures it proposed in the Hold Harmless Service Agreement. Otherwise, ComEd must inform the Commission that it does not accept the condition and prefers to delay its integration until the completion of a hearing to determine the appropriate compensation for the adverse effects.

B. Omission of AEP as Party

34. All protestors reference the Commission's directive, in the Hold Harmless Order,[19]

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[17] Hold Harmless Order, 106 FERC ¶ 61,250 at P 43.

[18] Hold Harmless Order, 106 FERC ¶ 61,250 at P 45.

[19] See Hold Harmless Order, 106 FERC ¶ 61,250 at P 45.

and in previous orders, that AEP participate in the hold harmless proposal, and object that AEP is not a party to the Hold Harmless Service Agreement. The protestors argue that: separate hold harmless proposals by ComEd and AEP may not work together to completely and effectively hold harmless Wisconsin and Michigan utilities from loop flow and congestion caused by ComEd's and AEP's joining PJM instead of Midwest ISO; the harm to the Wisconsin and Michigan utilities during the period when only ComEd has joined PJM will not be caused solely by ComEd but by both ComEd and AEP; without involvement of AEP in the hold harmless mechanism, the Wisconsin and Michigan utilities will not receive compensation for loop flows generated as result of third-party transactions out of or through AEP's system, while, concurrently, AEP will receive transmission revenue related to power transfers from ComEd to PJM's eastern footprint, transfers that cause loop flow and congestion for the Wisconsin and Michigan utilities; and, AEP is a critical link in joining ComEd with PJM.

35. In response to these arguments, we point out that the Commission's previous statements and its requirement that AEP participate in a hold harmless mechanism are based on AEP joining PJM, rather than the contiguous Midwest ISO, where regional loop flows and congestion could be better internalized. Until AEP actually joins an RTO, be it PJM, Midwest ISO or another RTO, it has not changed the transmission situation vis-à-vis the utilities in Wisconsin and Michigan. Whether these utilities experience additional loop flows and congestion, caused by ComEd's flowing power through AEP's transmission lines after ComEd's integration into PJM, and the extent to which ComEd should be held financially responsible for any such additional adverse effects are matters that can be addressed in the forthcoming hearing concerning ComEd's responsibility for compensation.

36. The protestors argue also that unless AEP is required to pay hold harmless compensation, it will delay joining PJM or any RTO, and that resolving all issues concerning the hold harmless condition in one hearing, with both ComEd and AEP involved, will result in more efficient use of both the Commission's and the Wisconsin and Michigan utilities' resources. Since AEP is not joining PJM at this point, including AEP as part of the ComEd hold harmless proceedings would not be appropriate, nor would it be appropriate to prevent ComEd from integrating into PJM because of issues relating to AEP's integration. When appropriate, the Commission will address the hold harmless issues relating to AEP's integration into PJM and will establish whatever procedures are needed to most efficiently resolve the hold harmless issue.

C. Omission of Midwest ISO as Party

37. International Transmission and Consumers Energy are concerned that Midwest ISO is not a party to the Hold Harmless Service Agreement and did not participate in the design or submission of the Service Agreement.

38. We find that inclusion of Midwest ISO as a party to the Service Agreement is not vital. Although it may have been preferable if Midwest ISO had participated in designing the Service Agreement and become a signatory, these actions are not essential to permitting ComEd's integration into PJM to go forward. However, Midwest ISO committed to cooperate with and assist PJM in the modeling and financial calculations to allow appropriate compensation to be made to the utilities in Michigan and Wisconsin, and we expect it to do so. Additionally, Midwest ISO states that it does not object, with appropriate indemnification, to performing the calculations contemplated in the Service Agreement, and we expect it to do so. Since the Service Agreement is a contractual obligation of ComEd to hold utilities in Wisconsin and Michigan harmless from ComEd's decision to join PJM, Midwest ISO's participation in the design and submission of the Service Agreement, though welcome, is not required.

D. Midwest ISO's Obligations

39. Midwest ISO states that it does not oppose the Service Agreement, but that it seeks clarification of certain procedural issues. Midwest ISO suggests amendment of language in the Service Agreement so that ComEd will pay Wisconsin and Michigan utilities directly, instead of through Midwest ISO. In addition, certain sections of the Service Agreement obligate Midwest ISO to perform calculations relating to the hold harmless commitment. Midwest ISO does not object to performing these calculations, but it is concerned that it may become a respondent in the PJM dispute resolution process if ComEd or the Wisconsin or Michigan utilities elect to challenge these calculations. Midwest ISO asks for clarification that ComEd will hold harmless and indemnify PJM and Midwest ISO for funds allegedly owed to any other party arising from incorrect loss calculations or financial computations that are later corrected, adjusted, or trued-up.

40. We agree with Midwest ISO that ComEd should pay any applicable compensation under the Service Agreement directly to the Wisconsin and Michigan utilities, rather than through Midwest ISO. We direct that the final version of the Service Agreement be revised to make this change. We agree also that PJM and Midwest ISO should be indemnified for funds allegedly owed to any other party arising from incorrect loss calculations or financial computations that are later corrected, adjusted, or trued-up. We direct that the Service Agreement include appropriate indemnification language protecting Midwest ISO. We will require PJM and ComEd to make a compliance filing of the Service Agreement so revised within 30 days of the date of this order.

E. Further Commission Guidance

41. In its protest, Detroit Edison lays out questions that it believes the Commission must answer before this case proceeds to hearing. It states that the guidance provided by the Commission thus far, while necessary, is not sufficient, and suggests a technical conference to address outstanding issues.

42. Ever since imposing the hold harmless requirement, the Commission has tried to answer questions and give as much guidance as possible. At this point, we find that establishing an evidentiary hearing is the best and most efficient procedural vehicle for resolving this issue. Since we are setting this matter for hearing, we do not find that convening a technical conference is necessary. Within the bounds of our previous findings, the hearing will allow parties the opportunity to explore all the issues raised and to present evidence regarding any harm caused by ComEd's decision to join PJM and how best to address that harm.

F. Limits on Compensation

43. Some protesters are concerned that the language and definitions of the Hold Harmless Service Agreement restrict the relief that the Commission may find appropriate.

44. We disagree that the Service Agreement restricts the relief the Commission may find appropriate. Section 2.2 of the Service Agreement states:

> Net Financial Harm means the sum, accounting for netting, of the Net Financial Harm for Real Power Losses plus additional compensation, if any, that the Commission determines is just and reasonable based on any additional adverse impacts on Wisconsin and Michigan Utilities, that would result from ComEd's RTO choice consistent with the hold harmless requirement established by the Commission in its orders.

We read this provision to mean that any other language in the Service Agreement that parties believe might limit compensation due will not hinder the Commission's ability to assign additional compensation that the Commission may find just and reasonable, consistent, of course, with any prior Commission findings on the hold harmless issue.

G. Payment Schedule

45. International Transmission, Wisconsin Public Service, and Detroit Edison object to Section 5.2 of the Service Agreement, which states that any payment due will be made by ComEd within 90 days following the expiration of the term of the Service Agreement. They believe that payments should be made instead at regular intervals during the term of the Service Agreement.

46. We find that the proposal to make payment after expiration of the Service Agreement instead of at regular intervals is an appropriate method for properly compensating parties in this case. This is because, pursuant to our prior finding, any harm caused by ComEd's decision to join PJM at any time must be netted against any resulting benefits at an earlier or later point in time. Because of the need to net temporal effects, the total amount of compensation due will change over the period the Service Agreement is in effect. If we were to require payments to be made at regular intervals, we would open up the possibility that ComEd would pay compensation for one period, only to have compensation due to it during another period. However, no provisions in the Service Agreement provide for compensating ComEd for any overpayments it might make if it is required to make periodic payments.

47. Therefore, the only equitable way to modify the payment schedule, such that ComEd will make compensation payments at regular intervals, instead of at the end of the term, is for the Wisconsin and Michigan utilities to submit for filing with the Commission an agreement between them and ComEd that provides for reimbursement to ComEd in the event of overpayment. The Commission will allow such a revised payment schedule once the supplemental agreement addressing payments back to ComEd is accepted for filing. Without such agreement, the payment schedule should remain as is.

H. Service Agreement Termination

48. Various protesters[20] argue that Section 3.3[21] of the Service Agreement gives ComEd the discretion to terminate its hold harmless obligation, on December 31, 2006. through the filing of a simple termination notice. In addition, they point out that the Hold Harmless Order states that PJM and Midwest ISO would make a filing at the Commission which demonstrates that conditions have been met before the hold harmless commitment is terminated.[22] They therefore argue that only PJM and Midwest ISO can file with the Commission notice that the hold harmless obligation may be terminated. They request that the Commission require ComEd, AEP, and PJM to retain the hold harmless mechanism in place until after the Commission rules that it is no longer necessary and removes the provision from the Service Agreement.

49. Pursuant to Section 35.15 of the Commission's regulations, 18 C.F.R. § 35.15 (2003), "Notice of cancellation or termination," the party required to file the service agreement is required to notify the Commission prior to canceling or terminating the service agreement, and using the form provided at 18 C.F.R. §131.53 (2003). In addition, the filing must include a statement giving the reasons for the proposed termination, and a list of the affected parties to whom the notice has been mailed. Since the Commission directed that the hold harmless provision be in effect from the date of ComEd's integration into PJM until the date that PJM and Midwest ISO have a joint and common market,[23] the filing party would have to demonstrate why the proposed termination date is consistent with the Commission's directive. The termination would not be effective until the Commission acted upon it. Therefore, Section 3.3 does not allow ComEd to terminate the Service Agreement. Also required is a Commission order setting an effective date for the Service Agreement's termination, based on a finding that the

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[20] International Transmission, Dairyland Power, Wisconsin Public Service, Madison, Consumers Energy, and Detroit Edison.

[21] Section 3.3 states, "If by December 31, 2006, PJM and the Midwest ISO have not commenced a joint and common market, ComEd may file with the Commission to terminate this Service Agreement with respect to any or all Michigan and Wisconsin Utilities."

[22] 106 FERC ¶ 61,250 at P 10.

[23] Id. at P 40, P 45.

termination requirements established in its orders have been satisfied, or that the hold harmless requirement should otherwise terminate.

I. Section 205 Filing Rights

50. International Transmission states that the Service Agreement is unjust and unreasonable because: (1) Section 2.4 [24]grants ComEd the unilateral right to amend the Service Agreement without the Commission's approval in the event that Attachment M of Midwest ISO's OATT is amended; and (2) Sections 4.3.2[25] and 4.4[26] grant ComEd the authority to make filings under section 205 of the FPA while other Parties may only make filings under section 206 of the FPA. They state that a section 205 filing should be made to amend the Service Agreement, and that the Service Agreement should explicitly reflect this requirement. In addition, they state that any interested party, as defined in Section 2.1, should be permitted to make a section 205 filing or that no party have section 205 rights.

51. The Commission has addressed the question of section 205 rights in Pennsylvania-New Jersey-Maryland Interconnections, 103 FERC ¶ 61,170 at P 17 (2003). There, it recognized that both an RTO, which operates transmission facilities, and the RTO's transmission owner members are public utilities under the FPA. Therefore, both have section 205 rights. Since PJM is responsible for the operation of transmission facilities, and ComEd owns transmission facilities, both entities are public utilities under the FPA. As parties to the Service Agreement, PJM and ComEd, have allocated specific section 205 rights between them in this jurisdictional filing. Their proposed allocations of the filing rights is a voluntary proposal of the sort that has been found permissible under the

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[24] Section 2.4 states, "Attachment M means Attachment M to the Midwest ISO's Open Access Transmission Tariff as it exists on the day this Service Agreement is filed. If the Midwest ISO amends Attachment M ComEd reserve the right to amend this Service Agreement."

[25] Section 4.3.2 states, in part, "If there is no agreement within the Technical Group, 90 days prior to integration of AEP, ComEd may make such a filing with the Commission under § 205 of the Federal Power Act and any other entity may make a filing with the Commission under § 206 of the Federal Power Act."

[26] Section 4.4 states, in part, "If there is no agreement within the Technical Group, ComEd may make such a filing with the Commission under § 205 of the Federal Power Act and any other entity may make a filing with the Commission under § 206 of the Federal Power Act."

FPA.[27] That the contract gives ComEd the right to make a filing under section 205 does itself not render the contract unjust and unreasonable. The Commission will have to review any such filing to determine if the change is warranted by changed circumstances. Finally, individuals who are not parties to the contract or agreement, do not have section 205 rights, only section 206 rights.

J. Financial Transmission Rights

52. Various Protesters[28] argue that the Service Agreement's proposed hold harmless relief is inadequate. For example they state that the Service Agreement does not adequately address the potential harm to the Michigan and Wisconsin utilities involving the difficulty in receiving adequate Financial Transmission Rights (FTRs) to accompany the existing firm transmission rights for delivery of firm (uninterruptible) resources that the Michigan and Wisconsin utilities have on portions of ComEd's system that will be located in PJM. Consumers Energy Company argues that Docket No. ER04-653-000 illustrates that when allocating FTRs a higher priority is given to PJM network resource transactions than to point-to-point transactions sinking in Midwest ISO. The protesters request that the Commission require PJM to treat firm transmission crossing Midwest ISO/PJM seams into Wisconsin and Michigan on the same basis and priority that firm transmission internal to PJM is treated.

53. Since the Commission is currently addressing the question of FTR allocations in Docket Nos. ER04-653-000 and ER04-742-000, it will not address the issue of FTR allocations in this order.

K. Other Issues

54. Protesters in this case have raised certain other issues regarding the specifics of the hold harmless agreement. For example, International Transmission is concerned that the Service Agreement does not include compensation for lost flow-based revenue distribution; Wisconsin Public Service is concerned that compensation for losses is treated differently from other compensation; Wisconsin Public Service and Dairyland Power are concerned about the audit provisions of the Service Agreement; and several protestors are concerned that the transmittal letter attempts to restricts the scope of the hearing.

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[27] See Atlantic City Electric Company. v. FERC, 295 F.3d 1 (D.C. Cir. 2002).

[28] Wisconsin Public Service, Consumers Energy, Southeast Michigan, and Detroit Edison.

55. These issues are just the type of issues that should be addressed in hearing. We take this opportunity to clarify that the scope of the hearing on the hold harmless requirement is bound only by the specific determinations we have made in prior orders. Parties are free to include in the hearing issues that we have not specifically addressed, such as those mentioned above.

Hearing Procedures

56. ComEd's and PJM's proposed Hold Harmless Service Agreement raises issues of material fact that cannot be resolved on the record before us, and are more appropriately addressed in the hearing ordered below. Our preliminary analysis indicates that the Hold Harmless Service Agreement has not been shown to be just and reasonable, and may be unjust, unreasonable, unduly discriminatory or preferential or otherwise unlawful. Therefore, we will accept the Service Agreement for filing, suspend it for a nominal period, and set it for hearing. Upon ComEd's withdrawal of Section II.B of its rehearing request in Docket No. ER04-375-364-001, we will make the Service Agreement effective May 1, 2004, as requested, subject to refund.

Pathway Reduction Capacity

A. Parties' Positions

57. Exelon states, in its April 20, 2004 answer, that it is in process of securing an additional 200 MW of firm service into PJM for the months of June and July 2004, thus ensuring that there will be a bi-directional pathway of 500 MW through July 31, 2004. Exelon commits to continuing its efforts to secure firm capacity for August 2004 through October 1, 2004, when it expects AEP to integrate into PJM. Meanwhile, Exelon has agreed to turn over to PJM, for use in administering the market, the right to schedule on Exelon's non-firm network import reservation (secondary network service), and is turning over to PJM an additional 200 MW capacity, west to east, of firm point-to-point transmission reservations.

58. Midwest ISO points out that the Commission relied upon the existence of a 500 MW bi-directional pathway in the ComEd Integration Order. Midwest ISO reminds the Commission that market monitors expressed concern that even a 500 MW tether would be inadequate to achieve true market integration, and prevent gaming activities and market abuse. Midwest ISO is concerned that market participants may exercise unilateral control over the reduced capacity for their own benefit. It sees scant evidence that the status quo will be an interim measure of predictable termination, citing AEP's lack of inclination to resume its process of full integration into PJM.

59. Edison alleges that both ComEd and PJM must have known about the reduction in the pathway for over six months because, on October 1, 2003, PJM rejected, in part, Exelon's request for the full 500 MW bi-directional contract path. Edison accuses PJM of revealing the reduced capability of the claimed 500 MW pathway only after the Commission issued its ComEd Integration Order, accepting the "Pathway Agreement" and approving ComEd's stand-alone integration into PJM, even though both PJM and ComEd have known for more than six months that Exelon's transmission request had been, in part, rejected. Edison presents documentation and descriptions of conversations in support of its allegations.

60. Edison states that PJM has proposed to initiate a "root cause" investigation of the "communication breakdown" to determine why the reduction was not adequately communicated and addressed within PJM. However, Edison believes that the Commission should require Exelon to initiate a similar investigation and require both PJM and ComEd to submit their reports to the Commission. Edison believes also that the Commission should require PJM to provide its supporting analysis, including underlying data, related to the claimed $70 million benefit as the pathway reduction may affect it. Finally, Edison believes that the disclosure in PJM's April 13, 2004 filing undermines key Commission findings and, therefore, the Commission should not set a date for ComEd's stand-alone integration into PJM until: (1) the investigation reports are filed; (2) PJM has provided substantial evidentiary support for its assertions regarding the benefits of the proposed integration; and (3) the Commission and the parties have had the opportunity to evaluate the implications of this information.

61. DTE Energy argues that, as regional wholesale power markets develop, the potential exists that new seams will be created due to the varying business practices by interconnected transmission providers when determining and allocating firm transmission capacity under their respective OATTs. DTE Energy is concerned that ComEd's remaining 300 MW of firm transmission capacity over the pathway, despite being subject to ComEd's rollover rights, may be adversely affected by inconsistent or flawed practices and methodologies used to determine and allocate transmission capacity subject to rollover rights, thereby placing at risk the pathway's ability to link ComEd and PJM, and the integration. So as to prevent successful market-to-market integration from being vulnerable to seams issues arising from the use of varying business practices by interconnected transmission providers, DTE Energy asks the Commission to promulgate certain bedrock or core principles. DTE Energy recommends that these principles be designed to ensure that transmission providers, especially those with common borders and interconnections, determine and allocate transmission capacity, especially firm transmission capacity subject to rollover rights, in a fair and objective manner that facilitates competition and avoids arbitrary outcomes.

62. PSEG Companies state their belief that even the full the 500 MW Pathway is insufficient to address the physical separation between ComEd and PJM, that the reduction to 300 MW raises further concerns, and that the integration is proceeding with undue haste. PSEG Companies ask the Commission not to permit PJM to finalize the integration until completion of a prior thorough review of PJM's readiness to integrate.

63. In its April 22, 2004 answer to Midwest ISO's comments, PJM responds that the PJM and Midwest ISO market monitors jointly reported to the Commission, in July 2003, their optimism that protocols coordinating the two RTOs' market to non-market operations (in Phase 2 of the JOA) will minimize the potentials for inefficient locational prices and for gaming the differences between locational prices. PJM cites AEP's settlement, before the Kentucky Public Service Commission (Kentucky Commission), to transfer its Kentucky transmission assets to the functional control of PJM. PJM states that this settlement, if approved by the Commission and the Kentucky Commission, will completely resolve that state's review of AEP's integration into PJM.

B. Commission Response

64. In making decisions, the Commission relies heavily on the fact that information provided by parties is accurate and reliable.[29] Therefore, we are extremely troubled by PJM's and Com Ed's last-minute disclosure that the capacity on the pathway was not already acquired on the firm and reliable basis their filings intimated.

65. PJM is instructed to begin an investigation of this issue if it has not already done so. We will require that the results be filed here within ten days of being finalized. In addition, we order ComEd to conduct and file a similar investigation on how and why this misinformation was provided to the Commission. Further, we will require such investigations to consider mechanisms and procedures to prevent this from occurring in the future. We also have referred this matter to our Division of Enforcement for preliminary investigation. We further expect that any future information provided by these parties will be closely scrutinized, and appropriate caveats about claims will be included.

66. Nevertheless, we do not think that the change in circumstances is so great as to warrant not allowing ComEd to integrate into the PJM market on May 1, 2004. Even

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[29] See, e.g., 18 U.S.C.§ 1001 (2000) (making the willful submission of materially false representations to federal agencies subject to criminal penalties).

with the reduction in firm transmission capacity to 300 MW on the west to east direction of the pathway, which will not occur until August and will occur only if ComEd is unsuccessful in its efforts to acquire the additional capacity, we find that the justification for approving the integration prior to the summer cooling season still holds. There are still significant benefits to integrating ComEd into PJM as previously planned. The decrease in transmission capacity from west to east does not trigger our concern about the potential exercise of market power. There are still 500 MW of firm transmission capacity going from PJM, an established market, to ComEd, which has yet to develop a market. We have less concern about market power over the east to west capacity reduction to 300 MW, from ComEd to PJM, because PJM already has an established market that, for the most part, is competitive.

67. In deciding to permit ComEd's integration into PJM to continue, we have relied on the following factors. NERC approved Midwest ISO and PJM's reliability plans. There are still 500 MW of reserved firm transmission capacity going from PJM, through AEP into ComEd (east to west on the pathway), which will be for PJM's exclusive use to integrate ComEd into the PJM market. PJM and ComEd have confirmed that the 500 MW of firm transmission capacity will be maintained until AEP is able to integrate into the PJM market.

68. If these facts are not correct, or ComEd's or PJM's situation changes from that which has been presented to us, ComEd or PJM must notify the Commission immediately, and prior to ComEd's integration into PJM.

69. We note that Exelon has informed the Commission that it is in the process of entering into a Memorandum of Understanding (MOU) with a third party to secure an additional 200 MW of firm service into PJM (west to east on the pathway) for the months of June and July 2004, thus ensuring a bi-directional 500 MW pathway from May 1, 2004 through July 31, 2004. Further, Exelon commits to continuing its efforts to secure firm capacity into PJM for August through October 1, 2004, when Exelon expects AEP to integrate into PJM. In the meantime, Exelon has agreed to turn over to PJM, for use in administering the market, the right to schedule on Exelon's non-firm network import reservation (secondary network service) into PJM, and is turning over to PJM an additional 200 MW out of ComEd and through AEP (west to east) of firm point-to-point transmission reservations. ComEd has committed to continue to make every effort to find additional firm capacity that will fulfill its full 500 MW commitment. We fully expect Com Ed to acquire any available capacity on either a short-term or long-term basis. ComEd must file monthly reports updating us on its efforts to obtain additional capacity.

70. We do not share Midwest ISO's concern over gaming and market power problems caused by the capacity reduction. The existing PJM market is already relatively competitive and should not be greatly affected by the west to east reduction in capacity.[30] Transmission capacity flowing east to west, into ComEd's market, is unreduced. Therefore, the competitiveness of that market is unaffected by the capacity reduction.

71. We find that DTE Energy's concern that ComEd's rollover rights to the 300 MW of firm transmission capacity may be subject to inconsistent or flawed practices or methodologies, with risk to the pathway's ability to link ComEd and PJM is only speculative. Moreover, any refusal to honor ComEd's rollover rights would be subject to Commission review, under section 206 of the FPA. DTE Energy's request, that the Commission promulgate principles to be followed by interconnected transmission providers, is beyond the scope of the instant proceeding. Nevertheless, we share DTE's concern that, when markets integrate, transmission capacity be allocated to facilitate competition and avoid arbitrary outcomes.

72. We disagree with PSEG Companies on the need to conduct another study of PJM's readiness to finalize integration of ComEd. We have reviewed PJM's and Midwest ISO's April 9, 2004 informational filing, in Docket No. ER04-375-000, advising the Commission that they are ready to implement Phase I of their JOA on May 1, 2004, and that PJM is ready to commence integration of ComEd's transmission zone on that date. PSEG Companies have presented no facts nor any specific reasons, other than their general uneasiness over the sufficiency of the transmission pathway between ComEd and PJM. We will not delay integration of ComEd into PJM merely on this account.

The Commission orders:

(A) PJM's and Midwest ISO's April 6, 2004 compliance submittal in Docket Nos. ER04-375-002 and ER04-521-001 is hereby accepted for filing, as discussed in the body of this order.

(B) Phase 1 of the JOA is to become effective on the later of May 1, 2004, or the date on which the Hold Harmless Service Agreement becomes effective.

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[30] We acknowledge that the capacity reduction will certainly reduce the benefits to be obtained from the integration, since less, inexpensive power from Com Ed will flow to the PJM market.

(C) PJM's and ComEd's April 6, 2004 filing of a Service Agreement to the PJM OATT, in Docket No. ER04-718-000, is hereby accepted for filing and suspended for a nominal period, consistent with this order, to become effective May 1, 2004, subject to refund and additional payment, and conditioned on ComEd filing an executed Service Agreement and a withdrawal of Item II.B, of its and AEP's April 16, 2004 request for rehearing of the Commission's order, in Docket No. ER04-364-001.

(D) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy organization Act and by the Federal Power Act, particularly sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R., Chapter I), a public hearing shall be held concerning the justness and reasonableness of the Hold Harmless Service Agreement and whether significant changes will occur in transactions, energy flows and congestion as a result of ComEd's joining PJM.

(E) A presiding judge, to be designated by the Chief Judge, shall, within 15 days of the date of this order, convene a conference in these proceedings, in a hearing room of the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, DC 20426. Such conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates, and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.