

123 FERC ¶ 61,088
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

JPMorgan Chase & Co.
The Bear Stearns Companies Inc. and
its Public Utility Subsidiaries

Docket No. EC08-66-000

ORDER AUTHORIZING MERGER AND DISPOSITION
OF JURISDICTIONAL FACILITIES

(Issued April 28, 2008)

1. On March 31, 2008, as supplemented on April 10, 2008, JPMorgan Chase & Co. (JPMorgan Chase) and The Bear Stearns Companies Inc., on behalf of itself and its public utility subsidiaries (collectively, Bear Stearns) filed an application seeking authorization under section 203 of the Federal Power Act (FPA)¹ to purchase certain securities and merge facilities subject to the jurisdiction of the Commission (Transaction). In the Transaction, JPMorgan Chase will create a subsidiary to merge with Bear Stearns, resulting in Bear Stearns becoming a direct, wholly-owned subsidiary of JPMorgan Chase and each public utility subsidiary of Bear Stearns becoming an indirect, wholly-owned subsidiary of JPMorgan Chase. Applicants request expedited treatment, with approvals granted on or before April 30, 2008.

2. The Commission has reviewed the application under the Commission's Merger Policy Statement.² As discussed below, we will authorize the Transaction as consistent with the public interest.

¹ 16 U.S.C. § 824b (2000 & Supp. V 2005).

² See *Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, FERC Stats. & Regs. ¶ 31,044 (1996), *reconsideration denied*, Order No. 592-A, 79 FERC ¶ 61,321 (1997) (Merger Policy Statement). See also *FPA Section 203 Supplemental Policy Statement*, 72 Fed. Reg.

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I. Background

A. Description of the Parties

1. Bear Stearns

3. Bear Stearns is a publicly traded firm that engages in investment banking, securities, and derivatives trading, clearance, and brokerage. Customers of Bear Stearns include corporations, governments, and institutional and individual investors worldwide. Through indirect, wholly-owned subsidiaries, Bear Stearns has a number of energy affiliates that sell electric power at wholesale at market-based rates and that own various interests in electric generation facilities; certain of the affiliates make sales of reactive power at cost-based rates in the PJM Interconnection, L.L.C. (PJM) and Midwest Independent Transmission System Operator, Inc. (MISO) markets. None of Bear Stearns' energy affiliates is a traditional franchised utility with captive customers or owns any electric transmission or interstate natural gas pipeline facilities. The list of Bear Stearns' public utility subsidiary applicants are set out in Attachment 1 of the application and the energy affiliates and subsidiaries are set out in Exhibit B of the application.

4. As part of Bear Stearns' trading and investment activities, Bear Stearns and its affiliates and subsidiaries acquire passive or other non-controlling equity positions in unaffiliated companies that directly or indirectly own electric generation or transmission, have franchised service territories or provide inputs to generation in the United States. However, Bear Stearns and its affiliates and subsidiaries do not have a controlling interest over any Commission-jurisdictional facilities or activities.³

42,277 (Aug. 2, 2007), FERC Stats. & Regs. ¶ 31,253 (2007), *order on clarification and reconsideration*, 122 FERC ¶ 61,157 (2008). (Supplemental Policy Statement). *See also Revised Filing Requirements Under Part 33 of the Commission's Regulations*, Order No. 642, FERC Stats. & Regs. ¶ 31,111 (2000), *order on reh'g*, Order No. 642-A, 94 FERC ¶ 61,289 (2001). *See also Transactions Subject to FPA Section 203*, Order No. 669, FERC Stats. & Regs. ¶ 31,200 (2005), *order on reh'g*, Order No. 669-A, FERC Stats. & Regs. ¶ 31,214, *order on reh'g*, Order No. 669-B, FERC Stats. & Regs. ¶ 31,225 (2006).

³ *See Bear Energy LP*, Docket No. ER06-864-007, Notice of Change in Status (filed March 19, 2007) (notifying the Commission that Bear Energy has entered into an energy management agreement with Milford Power Company, LLC). For example, one Bear Stearns subsidiary – Bear Stearns & Co., Inc. – acquired non-controlling equity interests in a variety of distressed generation projects in the ordinary course of its trading business. But it does not have a controlling interest over any Commission-jurisdictional generation facilities or activities held or engaged in by these distressed projects or the ability to affect the dispatch of power from the generation assets as a result of such

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2. JPMorgan Chase

5. JPMorgan Chase is a publicly traded corporation and a financial holding company regulated by the Board of Governors of the Federal Reserve System. JPMorgan Chase is not primarily engaged in energy-related business activities and does not directly own or control any electric generation or transmission assets or generation output.

6. Subsidiaries of JPMorgan Chase may hold other debt and equity positions from time to time in energy companies in connection with their broker/dealer, financial trading, or banking activities. These are transitory, non-controlling interests that change frequently and are passive. Subsidiaries of JPMorgan Chase also may be engaged in the management of mutual funds and/or other collective investment vehicles as a fiduciary on behalf of persons who hold interests in such funds or other investment vehicles, and such funds or other investment vehicles may buy and sell securities of public utilities and other companies engaged in energy-related activities without exercising control over such public utilities or other companies.

7. JPMorgan Chase also has a number of other subsidiaries that own various interests in electric generation facilities. None of these energy affiliates is a traditional franchised utility or owns any electric transmission or interstate natural gas pipeline facilities. The list of JPMorgan Chase's energy affiliates and subsidiaries are set out in Exhibit B of the application.

B. Description of the Transaction

8. On March 16, 2008, JPMorgan Chase and Bear Stearns entered into an Agreement and Plan of Merger (Merger Agreement). Pursuant to the Merger Agreement, a wholly-owned subsidiary of JPMorgan Chase will be merged with and into Bear Stearns. Bear Stearns thereby will become a wholly-owned subsidiary of JPMorgan Chase. On March 24, 2008, JPMorgan Chase and Bear Stearns entered into Amendment No. 1, which amended the Merger Agreement. Also on March 24, 2008, JPMorgan Chase and Bear Stearns entered into the Share Exchange Agreement.

9. Under the terms of the Merger Agreement, as amended by Amendment No. 1, each share of Bear Stearns' common stock will be converted into the right to receive 0.21753 shares of JPMorgan Chase common stock, reflecting an implied value of approximately \$10 per share of Bear Stearns' common stock based on the closing price of JPMorgan Chase's common stock on the New York Stock Exchange on March 25, 2008.

interests. Bear Energy LP, a public utility affiliate of Bear Stearns, also provides energy management services. The owners of the generating projects for which Bear Energy is providing such services retain ultimate decision-making authority and control relating to the operation and sale of wholesale power from such facilities.

In addition, pursuant to the Share Exchange Agreement, Bear Stearns has agreed to issue to JPMorgan Chase 95 million shares of common stock, representing 39.5 percent of the outstanding common stock of Bear Stearns after giving effect to the issuance, in exchange for the issuance to Bear Stearns of 20,665,350 shares of JPMorgan Chase common stock. Upon closing of the Transaction, Bear Stearns will become a wholly-owned subsidiary of JPMorgan Chase and each public utility subsidiary of Bear Stearns will become an indirect, wholly-owned subsidiary of JPMorgan Chase.⁴

II. Notice of Filing and Responsive Pleadings

10. Notice of the application was published in the *Federal Register*, 73 Fed. Reg. 19,201 (2008), with interventions and protests due on or before April 14, 2008. On April 14, 2008, PJM filed a motion to intervene.

11. Notice of the supplemental information to the application was published in the *Federal Register*, 73 Fed. Reg. 21,341 (2008), and amended on April 14, 2008, 73 Fed. Reg., 21,343 (2008), with interventions and protests due on or before April 18, 2008. On April 18, 2008, Exelon Corporation and PSEG Power LLC and PSEG Energy Resources & Trade LLC filed motions to intervene.

III. Discussion

A. Procedural Matters

12. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2007), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

B. Standard of Review under Section 203

13. Under section 203(a)(1)(A) of the FPA, a public utility may not sell, lease, "or otherwise dispose of" its jurisdictional facilities of a value in excess of \$10 million without prior Commission approval. The Commission has interpreted a transfer of control of jurisdictional facilities through disposition of securities to fall within the "or otherwise dispose" language of section 203(a)(1)(A) and thus require prior Commission authorization. The Commission has also interpreted an indirect transfer of control of jurisdictional facilities by a public utility, as occurred in this case, to require section

⁴ In the event that Bear Stearns may in the future sell one or more of the tolling agreements or other interest in generation facilities currently held by a Bear Stearns subsidiary, the parties to that Transaction would seek any necessary Commission approvals. Notably, any such sale would reduce the energy-related assets involved in the combination of JPMorgan Chase and Bear Stearns.

203(a)(1)(A) approval.⁵ Section 203(a)(2) requires prior Commission authorization for certain holding companies to acquire certain securities with values in excess of \$10 million of transmitting utilities, electric utility companies or holding company systems containing such entities.

14. Section 203(a)(4) requires the Commission to approve a transaction if it determines that the transaction will be consistent with the public interest. The Commission's analysis of whether a transaction will be consistent with the public interest generally involves consideration of three factors: (1) the effect on competition; (2) the effect on rates; and (3) the effect on regulation.⁶ Section 203 also requires the Commission to find that the transaction "will not result in cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company, unless the Commission determines that the cross-subsidization, pledge, or encumbrance will be consistent with the public interest."⁷ The Commission's regulations establish verification and informational requirements for applicants that seek a determination that a Transaction will not result in inappropriate cross-subsidization or pledge or encumbrance of utility assets.⁸

C. Analysis under Section 203

1. Effect on Competition – Horizontal Market Power

a. Applicants' Analysis

15. Applicants submit that the combination of their assets does not raise any horizontal competition issues under Commissions standards. Further, they submit that no horizontal screen analysis is required because the extent of the incremental business transactions in the relevant markets that arise out of the Transaction is *de minimis*.⁹ To demonstrate that there are no horizontal market power concerns, Applicants present two different analyses using two different assumptions.¹⁰

⁵ *Phelps Dodge Corp.*, 121 FERC ¶ 61,251, at P 19 (2007).

⁶ *See* Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,111.

⁷ 16 U.S.C. § 824b(a)(4) (2000 & Supp. V 2005).

⁸ 18 C.F.R. § 33.2(j) (2007).

⁹ *See* 18 C.F.R. § 33.3(a)(2)(i) (2007).

¹⁰ The affidavit containing the competitive analyses of Applicants' consultant is attached as the application's Exhibit J.

16. The first step of Applicants' initial analysis considers Applicants' investment positions in MACH Gen, LLC (Mach Gen) to be passive and non-controlling so that that capacity is not relevant to the Transaction, but otherwise includes 100 percent of the capacity of each of the generation facilities in which Bear Stearns or JPMorgan Chase has an indirect ownership interest regardless of their ownership percentage of the generation facility, and whether their ownership interest gives them any control over the generation facility. This approach results in overlap in four markets: California Independent System Operator Corporation market (CAISO), the Public Service Company of Colorado balancing authority (PSCO), the MISO market, and the PJM market. In the second step of this analysis, Applicants next assume that they do not control the output of the generation facilities that has been sold to a third party under a long term contract. Under this approach, the combination of generation attributed to Bear Stearns and JPMorgan Chase in the overlapping markets yields the following results: zero generation in the CAISO market and the PSCO balancing authority, a fraction of one percent of the installed generation in the MISO market, and approximately one percent of the installed generation in the PJM market. Applicants argue that this analysis shows the horizontal overlap of generation due to the Transaction to be *de minimis*.

17. In the alternative approach, Applicants change only their assumption that Bear Stearns is the sole owner of interests in MACH Gen and controls all of its generating projects.¹¹ This change does not affect the CAISO or PJM markets or the PSCO balancing authority, but it does raise Applicants' market share in MISO to less than 2 percent. The change in assumption also adds the New York Independent System Operator (NYISO) and ISO New England (ISO-NE) to the list of markets in which the generation attributed to Bears Stearns and JPMorgan Chase overlap. Applicants' post-Transaction share of NYISO is less than 5 percent and the change in the Herfindahl-Hirschman Index (HHI)¹² due to the Transaction is 11 points. Applicants' post-

¹¹ Bear Stearns and JPMorgan Chase's indirect investment in projects owned and controlled by MACH Gen are approximately 7.528 and 1.43 percent, respectively.

¹² The HHI is a widely accepted measure of market concentration, calculated by squaring the market share of each firm competing in the market and summing the results. The HHI increases both as the number of firms in the market decreases and as the disparity in size between those firms increases. Markets in which the HHI is less than 1,000 points are considered unconcentrated; markets in which the HHI is greater than or equal to 1,000 but less than 1,800 points are considered moderately concentrated; and markets where the HHI is greater than or equal to 1,800 points are considered highly concentrated. The Commission has adopted the Federal Trade Commission/Department of Justice Horizontal Merger Guidelines, which state that in a horizontal merger, an increase of more than 50 HHI in a highly concentrated market or an increase of 100 HHI in a moderately concentrated market fails its screen and warrants further review. U.S.

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Transaction share of ISO-NE is less than 4 percent. Applicants argue that this analysis also shows that there are no horizontal competitive issues raised by the Transaction.

b. Commission Determination

18. We find that the Transaction does not raise horizontal market power concerns. Applicants have demonstrated that the effect of combining their operations in all relevant geographic markets is *de minimis*. Therefore, the Transaction will not eliminate a competitor or materially increase market concentration in the relevant markets.

2. Effect on Competition – Vertical Market Power

a. Applicants’ Analysis

19. Applicants assert that the Transaction does not raise any vertical market power concerns. Applicants state that neither Applicant is affiliated with an electric utility with a franchised service territory. Applicants also state that neither Applicant owns any transmission facilities other than those necessary to interconnect its generation to the transmission grid. Finally, Applicants state that neither Bear Stearns nor JPMorgan Chase owns or controls, directly or indirectly, any transmission or natural gas interstate pipeline assets in any relevant market¹³ or any other assets that would allow them to control the inputs to generation facilities and thereby use market power over these products to obtain an advantage in the wholesale power markets.

b. Commission Determination

20. In transactions combining electric generation assets with inputs to generating power (such as natural gas, transmission, or fuel), competition can be harmed if a transaction increases the merged firm’s ability or incentive to exercise vertical market power in wholesale electricity markets. For example, by denying rival firms access to inputs or by raising their input costs, a merged firm could impede entry of new competitors or inhibit existing competitors’ ability to undercut an attempted price increase in the downstream wholesale electricity market. Here, as discussed below, Applicants have shown that the Transaction does not raise any of these concerns.

Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines*, 57 Fed. Reg. 41,552 (1992), *revised*, 4 Trade Reg. Rep (CCH) ¶ 13,104 (April 8, 1997).

¹³ Applicants state that Bear Energy is in negotiations to acquire a position of up to 20 percent in the Ruby Pipeline. However, since JPMorgan Chase does not own or control any material amounts of generation in any market proximate to the pipeline route, Applicants argue that these assets do not raise any vertical competition issues in the context of this Transaction.

21. We agree with Applicants that they do not own or control assets that would allow them to exert vertical market power in wholesale power markets. We find that the Transaction does not raise vertical market power concerns.

3. Effect on Rates

a. Applicants' Analysis

22. Applicants state that the transaction will not have an adverse impact on transmission rates or on cost-based rates for long-term wholesale requirements customers. Applicants further state that they do not own any transmission facilities (other than interconnection facilities for owned or controlled generation) and therefore do not impose charges for the provision of transmission service. Further, all power sold by the Applicants is at market-based rates, with limited exceptions regarding certain cost-based sales of reactive power, and rates for market-based sales will not be impacted by the transaction. In addition, Applicants state that the Transaction will not have any effect on the inputs into reactive power rates, and therefore will not have any effect on the cost-based rates.

b. Commission Determination

23. The Commission has found that, where electricity is sold under market-based rates, the Transaction is unlikely to have an adverse impact on rates.¹⁴ Further, based on Applicants' commitment that the transaction will not have any effect on the inputs into cost-based reactive power rates, we find that the transaction will not have an adverse effect on rates.

4. Effect on Regulation

a. Applicants' Analysis

24. Applicants assert that no facilities will be removed from Commission jurisdiction as a result of the Transaction. After the Transaction is consummated, Applicants assert that the Commission will continue to have the same jurisdiction over Bear Stearns' public utility subsidiaries and all sales of electric energy by a Bear Stearns' public utility subsidiary as it had before the Transaction. Moreover, although no state approval of the Transaction is required, the Applicants' energy operations, even to the extent that they might be subject to state regulation, will not change as a result of the Transaction.

¹⁴ *Union Electric Co. d/b/a Ameren UE*, 114 FERC ¶ 61,255, at P 45 (2006).

b. Commission Determination

25. We find that neither state nor federal regulation will be impaired by the Transaction. The Commission's review of a transaction's effect on regulation is focused on ensuring that the transaction does not result in a regulatory gap at the federal or state level.¹⁵ We find that the transaction will not create a regulatory gap at the federal level, because the Commission will retain its regulatory authority over the merged companies. In the Merger Policy Statement, the Commission stated that it ordinarily will not set the issue of the effect of a transaction on state regulatory authority for a trial-type hearing where a state has authority to act on a transaction. However, if the state lacks this authority and raises concerns about the effect on regulation, the Commission stated that it may set the issue for hearing; and that it will address such circumstances on a case-by-case basis.¹⁶ We note that no party alleges that regulation would be impaired by the Transaction, and no state commission has requested that the Commission address the issue of the effect on state regulation.

5. Cross-subsidization

a. Applicants' Analysis

26. In the Supplemental Policy Statement, the Commission described several types of "safe harbor" transactions in which it is clear that no cross-subsidization issues arise and therefore no detailed showing is required.¹⁷ Applicants assert that this Transaction falls into the safe harbor where "a franchised public utility with captive customers is not involved." Because neither Bear Stearns nor JPMorgan Chase has any controlling interest in any franchised public utility with captive customers,¹⁸ Applicants contend that no cross-subsidization concerns are raised by the Transaction.

27. In addition, Applicants assert that the Transaction will not result in, at the time of the Transaction or in the future, cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company. Applicants state that the Transaction will not result in: (1) any transfer of facilities

¹⁵ Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,124.

¹⁶ *Id.* at 30,125.

¹⁷ Supplemental Policy Statement, FERC Stats. & Regs. ¶ 31,253, at P 17 (2007).

¹⁸ As of December 31, 2007, JPMorgan Chase owned non-voting preferred shares in Pacific Gas and Electric Company and Xcel Energy Inc. Applicants assert that, because those securities have non-voting status, JPMorgan Chase does not have a controlling interest in the utilities and there are no related cross-subsidization issues.

between a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, and an associate company; (2) any new issuance of securities by a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, for the benefit of an associate company; (3) any new pledge or encumbrance of assets of a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, for the benefit of an associate company; and (4) any new affiliate contract between a non-utility associate company and a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, other than non-power goods and services agreements subject to review under sections 205 and 206 of the FPA.¹⁹

b. Commission Determination

28. Based on the facts as presented in the application, we find that the Transaction will not result in cross-subsidization, or the pledge or encumbrance of utility assets for the benefit of an associate company. We note that no party has argued otherwise.

D. Conclusion

29. Applicants explain that from the date of the Merger Agreement, JPMorgan Chase agreed to guarantee the trading obligations of Bear Stearns and its subsidiaries as well as provide management oversight for Bear Stearns' operations, including in the energy business. Applicants further explain that due to these agreements, JPMorgan Chase might be deemed to exercise control over Bear Stearns as of March 16, 2008, the date of the Merger Agreement.

30. While Applicants acknowledge that as of March 16, 2008, Commission approval had not yet been obtained, nor had other necessary regulatory approvals, Applicants explain that the Merger Agreement and related documents were negotiated and agreed to on a highly expedited basis with \$30 billion in credit support from the Federal Reserve Bank of New York (New York Fed). Following execution of the Merger Agreement, in order to address continued instability and concerns that the Transaction might not be consummated, the credit arrangements between JPMorgan Chase, Bear Stearns, and the New York Fed, were modified to "promote orderly market functioning."²⁰ Applicants

¹⁹ See Applicants' Supplement to Application, Exhibit M (April 10, 2008).

²⁰ See Press Release, Federal Reserve Bank of New York, Statement on Financing Arrangement of JPMorgan Chase's Acquisition of Bear Stearns (March 24, 2008); see also Robin Sidel and Kate Kelly, "J.P. Morgan Quintuples Bid to Seal Bear Deal", *The* (continued...)

assert that the urgent need for quick action, in order to stabilize the financial markets, made it impossible to obtain prior approval from the Commission before execution of the Merger Agreement.²¹ The Applicants state that they filed, as soon as possible, for section 203 approval from the Commission for relevant aspects of the Transaction.

31. Applicants argue that the circumstances surrounding the Transaction underscore the extraordinary public interest considerations that support their request for retroactive authorization by the Commission. Moreover, the aspects of the Transaction that are subject to the Commission's jurisdiction are incidental to the Transaction as a whole, which was entered into to stabilize the financial markets. Because these circumstances are unprecedented, Applicants contend that the Commission can and should limit its grant of retroactive relief to the specific circumstances of this case. Applicants seek approval of the Transaction effective March 16, 2008. In light of the unique and extraordinary circumstances of this Transaction, the Commission approves the Transaction effective March 16, 2008.

The Commission orders:

- (A) The Transaction is hereby authorized, as discussed in the body of this order.

Wall Street Journal, March 25, 2008 at A-1 (quoting a Treasury Department spokeswoman, "An orderly transition of Bear Stearns is in the best interest of our financial markets. . . . The updated arrangements between Bear Stearns, J.P. Morgan and the Federal Reserve are consistent with that goal.").

²¹ On the day after the initial terms of the Transaction were agreed upon, the President stated in a press release, "One thing is for certain – we're in challenging times. But another thing is for certain – that we've taken strong and decisive action. The Federal Reserve has moved quickly to bring order to the financial markets. Secretary Paulson has been – is supportive of that action, as am I." Press Release, The White House, President Bush Discusses Economy (March 17, 2008). *See also*, Press Briefing, The White House, Press Secretary Dana Perino (March 17, 2008) ("These actions are intended, as I said earlier today, to minimize financial market disruptions. . . . And the Fed, what they did last night, is try to provide liquidity to the markets so it would stabilize, and we could have orderliness in the system. But I would also say that a major market disruption would have very damaging consequences and be very painful for everybody And the goal here is to prevent a major disruption in financial markets. And the Fed is taking decisive action when necessary, and that is what they saw last night.")

(B) Applicants must inform the Commission of any change in circumstances that would reflect a departure from the facts the Commission relied upon in granting the application.

(C) The foregoing authorization is without prejudice to the authority of the Commission or any other regulatory body with respect to rates, service, accounts, valuation, estimates or determinations of costs, or any other matter whatsoever now pending or which may come before the Commission.

(D) Nothing in this order shall be construed to imply acquiescence in any estimate or determination of cost or any valuation of property claimed or asserted.

(E) The Commission retains authority under sections 203(b) and 309 of the FPA to issue supplemental orders as appropriate.

(F) Applicants shall make any appropriate filings under section 205 of the FPA, as necessary, to implement the Transaction.

(G) Applicants shall notify the Commission within 10 days of the date that the Transaction has been consummated.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.