145 FERC ¶ 61,095
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
Cheryl A. LaFleur, and Tony Clark.

ISO New England Inc. and New England Power Pool — Docket No. ER13-2313-000

ORDER ON PROPOSED TARIFF REVISIONS

(Issued November 1, 2013)

1. On September 4, 2013, ISO New England, Inc. (ISO-NE) and the New England Power Pool (NEPOOL) Participants Committee jointly submitted, pursuant to section 205 of the Federal Power Act (FPA)[1] and section 11.1.5 of the Participants Agreement,[2] two alternative proposals[3] to revise ISO-NE's Transmission, Markets and Services Tariff (Tariff). Each proposal expands the definition of what constitutes a Shortage Event in the Forward Capacity Market (FCM) to include any deficiency of Thirty-Minute Operating Reserves for 30 or more minutes.[4] The proposals also contain

[1] 16 U.S.C. § 824d (2012).

[2] Section 11.1.5 of the Participants Agreement provides, in pertinent part, that if a Market Rule proposal that differs from that proposed by ISO-NE is approved by a Participants Committee vote of 60 percent or more, ISO-NE "shall, as part of any required Section 205 filing," describe the alternate Market Rule proposal in sufficient detail to permit reasonable review by the Commission and also explain its reasons for not adopting the alternate proposal and why it believes its own proposal is superior. Section 11.1.5 provides that the Commission may "adopt any or all of ISO[-NE]'s Market Rule proposal or the alternate Market Rule proposal as it finds…to be just and reasonable and preferable."

[3] These proposals will be referred to respectively as the ISO-NE Proposal and the NEPOOL Proposal.

[4] On September 18, 2013, NEPOOL submitted additional and clarifying information to its September 4, 2013 transmittal letter.

modifications to the Shortage Event trigger specific to import-constrained capacity zones. The main difference between the two proposals is the effective date for the changes: ISO-NE seeks an effective date of November 3, 2013, the 60th day from the date of filing; and NEPOOL seeks an effective date of June 1, 2017, the beginning of the Capacity Commitment Period associated with the next Forward Capacity Auction (FCA).[5] In this order, the Commission accepts for filing the ISO-NE Proposal, to become effective November 3, 2013, as requested.

I. Background

2. Under the existing Tariff, Shortage Events are defined as periods of reserve deficiency during which the performance of capacity resources (resources with Capacity Supply Obligations) is measured. If a capacity resource is partially or fully unavailable during a Shortage Event, the resource is assessed a penalty against its capacity payment. The current Tariff definition of a Shortage Event is "[a]ny period of thirty or more contiguous minutes of system-wide Reserve Constraint Penalty Factor activation, defined as being short of operating reserves."[6] ISO-NE interpreted and tied the phrase "being short of operating reserves" to the activation of the Reserve Constraint Penalty Factor for Ten-Minute Non-Spinning Reserves for at least 30 minutes. Since commencement of the first Capacity Commitment Period in June 2010, there have been no Shortage Events.

3. In order to remove ambiguity with the current Tariff definition of a Shortage Event, ISO-NE and NEPOOL propose to replace the phrase "defined as being short of operating reserves" with a more precise reference to "Reserve Constraint Penalty Factor activation for Ten-Minute Non-Spinning Reserves." Additionally, ISO-NE and NEPOOL propose to expand the definition of a Shortage Event to include a violation of the Thirty-Minute Operating Reserves requirement for 30 minutes or more in any capacity zone. ISO-NE and NEPOOL also propose to make clarifying revisions to the Shortage Event definition pertaining to import-constrained capacity zones and remove a provision that exempts export-constrained capacity zones from a Shortage Event under certain circumstances. ISO-NE and NEPOOL state that there have been extensive discussions among ISO-NE, market participants, and state regulators, and that there is

[5] Capacity Commitment Period is defined in the Tariff as the one-year period from June 1 through May 31 for which obligations are assumed and payments are made in the FCM.

[6] ISO-NE, Transmission, Markets and Services Tariff, § III.13.7.1.1.1(a) (27.0.0).

near unanimous stakeholder support for the initiative to revise the definition of a Shortage Event.

4. While ISO-NE and NEPOOL agree that revising the definition is necessary, they disagree on when the changes should become effective. For reasons discussed below, the ISO-NE Proposal would become effective November 3, 2013, the 60th day from the date of the filing, while the NEPOOL Proposal would become effective on June 1, 2017, which is the beginning of the Capacity Commitment Period associated with the next FCA (FCA 8).

II. Proposed Tariff Revisions

A. The ISO-NE Proposal

5. In support of its proposed effective date,[7] ISO-NE states that the current definition of Shortage Event is overly restrictive and has had little effect on incenting resource availability during reserve deficiencies. ISO-NE states that the lack of a Shortage Event since June 2010 is not reflective of true system conditions, explaining that there have been a few extended periods of 30-minute reserve shortages when the system was genuinely stressed.[8] Therefore, ISO-NE states that it is important to implement the revisions as soon as possible to help address reliability concerns in the near-term and help incent resource availability during reserve deficiencies.

6. ISO-NE notes that, on June 1, 2012, the Reserve Constraint Penalty Factor for Thirty-Minute Operating Reserves was raised from $100/MWh to $500/MWh which allows the unit dispatch system to automatically re-dispatch resources and avoid reserve deficiencies more frequently.[9] With this change in place, ISO-NE states that activation of

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[7] In support of its filing, ISO-NE submitted testimony from Robert G. Ethier and Andrew G. Gillespie (Ethier/Gillespie Testimony).

[8] ISO-NE estimates that, based on the proposed definition of a Shortage Event, there would have been three Shortage Events from June 2011 through the present.

[9] The Reserve Constraint Penalty Factor serves as a price cap for the real-time reserve price of each reserve product. Once the marginal cost for providing a reserve product exceeds the Reserve Constraint Penalty Factor, the unit dispatch system cannot acquire more of that reserve product. For example, when the Reserve Constraint Penalty Factor for Thirty-Minute Operating Reserves was set at $100/MWh, once the marginal

(continued…)

the Reserve Constraint Penalty Factor for Thirty-Minute Operating Reserves is now a reasonable indicator of a true shortage condition.

7. To further ensure that a true shortage condition exists, the ISO-NE Proposal also includes a temporary provision that would expire on June 1, 2017, which requires ISO-NE to dispatch demand response resources prior to triggering a Shortage Event; a Shortage Event would not be triggered based on a deficiency of Thirty-Minute Operating Reserves alone. ISO-NE explains that until June 1, 2017, when demand response resources are scheduled to be fully integrated into the energy market, a situation could appear to be a Shortage Event when really it is not, because demand response resources, that may be called upon outside of the normal dispatch process, have not yet been dispatched.[10] ISO-NE states that this provision is unnecessary after June 1, 2017 when demand response resources will be fully integrated into the energy market and dispatched along with generators.[11]

8. ISO-NE explains that, while the possibility of Shortage Events will be increased under the new Shortage Event definition, this definition is unlikely to create Shortage Events that are not indicative of a true shortage condition. Moreover, ISO-NE states that if the changes to the definition of Shortage Event are not applied until June 1, 2017, as proposed by NEPOOL, the FCM will continue to lack the intended means to incent resource availability as reserve shortages arise, frustrating the original design intent of the FCM.

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cost exceeded $100/MWh, the unit dispatch system could not acquire additional Thirty-Minute Operating Reserves, even though generators were available to provide operating reserves at prices above $100/MWh. Therefore, raising the Reserve Constraint Penalty Factor allows the unit dispatch system to automatically re-dispatch the system and avoid reserve deficiencies more frequently than a lower Reserve Constraint Penalty Factor.

[10] Existing Tariff processes (which remain unchanged by the ISO-NE Proposal) allow ISO-NE to take action during a capacity deficiency by calling upon demand response resources.

[11] This provision is not included in NEPOOL’s proposal because NEPOOL’s proposal would not go into effect until June 1, 2017 when demand response resources would be fully integrated.

B. The NEPOOL Proposal

9. The NEPOOL Proposal[12] largely reflects the same substantive provisions as the ISO-NE Proposal but it would take effect on June 1, 2017. NEPOOL explains that its proposal implements the new definition of Shortage Events, beginning with the next FCA (FCA 8), in order to affect only new commitments for Capacity Commitment Periods beginning on or after June 1, 2017. NEPOOL states that later implementation respects the settled expectations of market participants that have already entered into capacity transactions in FCAs 4-7, in reconfiguration auctions, and through bilateral agreements. Additionally, NEPOOL explains that the June 1, 2017 date was important to some market participants because that is when demand response resources would be available in system operations to reduce the potential occurrence of Shortage Events.

10. NEPOOL acknowledges that participants' understanding of the current definition of a Shortage Event (a 30-minute shortage of Ten-Minute Non-Spinning reserves) is reflected only in ISO-NE training materials which are not on file with the Commission.[13] However, NEPOOL states that market participants have nonetheless relied on that Shortage Event trigger language in configuring their bids into FCAs and reconfiguration auctions, and in determining the terms of purchase or sale in bilateral transactions for capacity obligations.

11. Attached to the NEPOOL Proposal is testimony stating, for example, that EquiPower Resources Corporation accepted a Capacity Supply Obligation for its fleet of generators, as well as a Capacity Supply Obligation in reconfiguration auctions under terms that were based, in part, on its expectation of Shortage Event penalties under the existing market rules; NRG Energy, Inc. relied on the existing Shortage Event structure in placing static and dynamic de-list bids; and NextEra Energy Resources, LLC took the risks associated with Shortage Events into account when selling capacity through reconfiguration auctions and on a bilateral basis. According to NEPOOL, if market participants were aware of the revised definition of Shortage Events, they would have adjusted their bids and other arrangements accordingly.

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[12] In support of its filing, NEPOOL submitted testimony of Fernando DaSilva (DaSilva Testimony), Shannon Davidson (Davidson Testimony), James A. Ginnetti (Ginnetti Testimony), and Judith Lagano (Lagano Testimony).

[13] NEPOOL Transmittal at 6-7.

12. NEPOOL states that the Commission has recognized the importance of stability and predictability in the markets, and has rejected market rule changes that undermine executed business transactions that relied upon settled expectations.[14] Similarly here, NEPOOL contends that market participants have relied on the current Shortage Event trigger mechanism and the associated risks and penalties in developing offers and bids (including de-list bids) in the FCM and in executing financial transaction concerning capacity commitments and resource acquisitions.

13. NEPOOL notes that the NEPOOL Proposal was approved by the NEPOOL Participants Committee with 77.90 percent in favor, while the ISO-NE Proposal failed with 30.99 percent in favor.[15]

III. Notice of Filing, Interventions, Comments, Protests, and Answers

14. Notice of the ISO-NE and NEPOOL Proposals was published in the *Federal Register*, 78 Fed. Reg. 55,693 (2013), with interventions and protests due on or before September 25, 2013.

15. HQ Energy Services (US) Inc; Exelon Corporation; and Northeast Utilities Service Company filed timely motions to intervene. PSEG Companies;[16] the New England States Committee on Electricity (NESCOE); Dominion Resources Services, Inc. (Dominion);[17] and the New England Power Generators Association, Inc. (NEPGA) filed timely motions to intervene and comments. Footprint Power Salem Harbor Operations LLC (Footprint

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[14] NEPOOL Transmittal at 12 (citing *ISO New England Inc. and New England Power Pool Participants Committee*, 132 FERC ¶ 61,136, at P 22 (2010) (rejecting revisions to formula used to calculate payments in Forward Reserve Market (FRM) as unnecessary and "upset[ting] at the eleventh hour" expectations that load-serving entities have had based on current Tariff provisions "without any demonstrated benefit.") (FRM Order).

[15] NEPOOL Transmittal at 10.

[16] PSEG Companies include PSEG Power LLC, PSEG Energy Resources & Trade LLC, and PSEG Power Connecticut LLC.

[17] Dominion Energy Marketing, Inc., Dominion Nuclear Connecticut, Inc., and Dominion Energy Manchester Street, Inc.

Power) filed a timely motion to intervene and limited protest. NRG Companies[18] filed a timely motion to intervene and protest. Brookfield Energy Marketing LP (Brookfield) filed an untimely motion to intervene. NextEra Energy Resources, LLC (NextEra) filed an untimely motion to intervene and protest. ISO-NE filed timely comments in opposition to the NEPOOL Proposal.

16. On October 10, 2013, ISO-NE, NEPOOL, NEPGA, and NextEra each filed an answer to the protests.

17. NEPGA, Dominion, NextEra, and NRG Companies (collectively, Protestors) argue that ISO-NE's proposed effective date imposes a risk on market participants that did not exist at the time they assumed their Capacity Supply Obligations for Capacity Commitment Periods prior to June 1, 2017. Protestors argue that this would violate the principle underlying the rule against retroactive ratemaking, namely, that predictable and stable market rules are vital to efficient markets and attracting investment in New England. Several of the Protestors also assert that economic incentives to perform are already in place, and additional penalties will not improve performance.[19]

18. PSEG Companies argue that even after demand response resources are fully integrated in the energy market in June 2017, it is unclear how their participation in the energy market will affect the reserve market for purposes of avoiding a deficiency of operating reserves and Shortage Events.[20] Moreover, because demand response resources cannot participate in the reserve market, those demand response resources would not be counted as reserves. As a result, the system could be considered short of Thirty-Minute Operating Reserves and Thirty-Minute Operating Reserve prices would reach the price cap (the $500/MWh Reserve Constraint Penalty Factor), even though undispatched demand response resources are standing ready to curtail load. PSEG Companies posit that if demand response resources were eligible to provide operating

[18] NRG Power Marketing LLC; GenOn Energy Management, LLC; Connecticut Jet Power LLC; Devon Power LLC; Middletown Power LLC; Montville Power LLC; Norwalk Power LLC; NRG Canal LLC; and NRG Kendall LLC.

[19] PSEG Comments at 9-10 and Dominion Comments at 4.

[20] PSEG Companies argue that, in the energy market, demand response resources will not be subject to the same mitigation rules as generators, so their energy offer prices may exceed prevailing energy prices.

reserves, they might reduce or eliminate an operating reserve shortage that would otherwise occur. PSEG Companies thus request that the Commission require a compliance filing from ISO-NE that allows for demand response resources to be eligible to provide operating reserves by June 1, 2017, or, in the alternative, to defer implementation of the revised Shortage Event definition until that result can be accomplished.[21]

19. NEPGA requests that the Commission direct the ISO-NE Internal Market Monitor to reassess the basis for the dynamic de-list bid threshold, given the revised definition of a Shortage Event. NEPGA explains that the dynamic de-list bid threshold for FCA 8 is $1.00/kW-month, which reflects the lowest market clearing price achieved in an annual reconfiguration auction. NEPGA states that this threshold should be increased to reflect the increased risk associated with the revised definition of a Shortage Event.

20. NESCOE supports the expansion of the definition of a Shortage Event and agrees with ISO-NE that the flaws inherent in the current rule are serious enough to warrant application of the revised definition as soon as possible, though it recognizes concerns that the earlier effective date alters the "deal" for capacity transactions that have already taken place.

21. Footprint Power requests a limited exemption if the Commission accepts the ISO-NE Proposal, because two of its units tried to de-list in FCA 4 but are being retained by ISO-NE until May 31, 2014, to maintain reliability. Footprint Power asserts that it would be unjust and unreasonable for it to incur any additional costs associated with the revised definition of Shortage Event, as its relevant units remain in operation solely to address ISO-NE's reliability concerns and the Commission-approved rate it is receiving does not reflect the added costs of the new Shortage Events definition.

22. In its timely comments to the NEPOOL Proposal, ISO-NE asserts that NEPOOL's arguments against the November 3, 2013 effective date are misguided and contradict NEPOOL's own actions in supporting recent FCM rule changes that favor generators. ISO-NE states that the Commission has previously accepted FCM rule changes with an

[21] PSEG Comments at 8-9.

effective date falling between the most recent FCA and the upcoming associated Capacity Commitment Period when a market rule was not functioning as intended.[22]

IV. Discussion

A. Procedural Issues

23. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2013), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

24. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2013), we will grant Brookfield's late-filed motion to intervene and NextEra's late-filed motion to intervene given their interests in this proceeding, the early stage of this proceeding, and the absence of undue prejudice or delay.

25. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2013), prohibits answers to answers and answers to protests unless otherwise order by the decisional authority. We are not persuaded to accept the answers, and will therefore reject the answers.

B. Commission Determination

26. The Commission is presented with competing proposals filed pursuant to section 11.1.5 of the Participants Agreement, both of which propose to modify the definition of a Shortage Event. After evaluating the proposals and with consideration given to benefits of earlier implementation, we accept the ISO-NE Proposal as just and reasonable,[23] to become effective on November 3, 2013, as requested.

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[22] ISO-NE Comments at 9-10 (citing *ISO New England Inc.*, 134 FERC ¶ 61,128 (2011) (accepting in part and rejecting in part proposed revisions to the Peak Energy Rent (PER) mechanism (PER Order))).

[23] Where alternative proposals are submitted pursuant to section 11.1.5 of the Participants Agreement, that section provides that the Commission may "adopt all or any of ISO[-NE]'s Market Rule proposal or the alternate Market Rule proposal as it finds…to be just and reasonable and preferable." *See ISO New England Inc.*, 130 FERC ¶ 61,105 (2010).

27. Both proposals expand the definition of a Shortage Event to include any deficiency of Thirty-Minute Operating Reserves for 30 or more contiguous minutes. Although no Shortage Events have been triggered to date, the record reflects that this is not indicative of true system conditions. As both ISO-NE and NEPOOL agree, the substantive revisions have the potential to incent better performance during periods of system stress, thus helping to ensure that reserve requirements are met and system reliability is protected.[24] We agree with ISO-NE that such benefits are critical and should be provided for immediately rather than several years in the future.

28. Contrary to the tenor of Protestors' arguments, the earlier effective date would not violate the principles underlying the rule against retroactive ratemaking. The changes would apply only prospectively and after notice. To the extent that the revisions might upset the expectations of market participants (which is distinguishable from retroactive ratemaking), we are not persuaded that their reliance on the current definition outweighs the benefits expected to result from the change, i.e., helping to ensure that reserve requirements are met and system reliability is protected.

29. While ISO-NE and NEPOOL rely on various Commission orders[25] as bearing upon the import of detrimental reliance in this case, our action here is wholly consistent with the analysis in those cases. Where protestors have asserted that proposed revisions would disrupt settled expectations mid-course and harm market participants who relied on the existing Tariff in calculating pricing and entering contracts, the Commission has considered a "balancing of interests"[26] or "balancing of equities"[27] in determining the appropriate outcome. Thus, the Commission has accepted revisions where the benefits outweighed any settled expectations, and it has rejected revisions where it found settled

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[24] ISO-NE is required to maintain reserves to cover 100 percent of the largest single contingency within 10 minutes and also to cover 50 percent of the second-largest single contingency within 30 minutes, both system-wide and in particular reserve zones.

[25] PER Order, 134 FERC ¶ 61,128 (2011) (accepting in part, rejecting in part proposed Tariff revisions); FRM Order, 132 FERC ¶ 61,136 (2010) (rejecting proposed Tariff revisions).

[26] PER Order, 134 FERC ¶ 61,128 at P 39.

[27] FRM Order, 132 FERC ¶ 61,136 at P 30.

expectations outweighed any benefits or where it found proposed revisions resulted in no benefit at all or were even discriminatory.[28]

30. Considering the important benefits expected to result here, this case is distinguishable from those where the Commission was reticent to disrupt settled expectations, i.e., where the proposed tariff revisions were "unnecessary" and "without any demonstrated benefit."[29] Here, NEPOOL supports the substance of the proposed tariff revisions as necessary and beneficial. Moreover, while resources might have taken into account a certain level of risk of a Shortage Event and a resulting penalty in formulating their bids, there is insufficient record evidence that such risk had a significant effect on final bid determinations, rising to the level of detrimental reliance.[30] Accordingly, we find it is appropriate to implement the revised definition of Shortage Event now rather than waiting until 2017.

31. We further note that the record here as well as the history of the FCM reflects that the proposed definition of a Shortage Event, as agreed to by both ISO-NE and NEPOOL, is consistent with the original intent of the FCM, and, therefore better reflects the meaning that all parties, including stakeholders, intended from the outset. In fact, both ISO-NE and NEPOOL agree that the very purpose of the proposed revisions is to fortify the FCM's primary enforcement mechanism and incent resource availability during reserve deficiencies. Indeed, in expert testimony, NEPOOL's own witness concedes that the original intent of the FCM was to tie the Shortage Event definition to the Reserve

[28] *Id.* P 28 ("[W]e find that the instant proposal appears to be discriminatory since it seeks to address perceived shortfalls for one select group while not addressing potential similarly-situated parties.").

[29] *See ISO New England, Inc. and New England Power Pool Participants Committee*, 132 FERC ¶ 61,136 (2010).

[30] *See, e.g., Garvey v. NTSB*, 190 F.3d 571, 584-85 (D.C. Cir. 1999); *Cassell v. FCC*, 154 F.3d 478, 484 (D.C. Cir.1998). Additionally, NEPOOL admits that its proposed later effective date may still impact some New Capacity Resources that previously agreed to a five-year Capacity Supply Obligation in the FCM for future Capacity Commitment Periods, or other Market Participants who have already submitted de-list bids in the FCA 8 qualification process. *See* NEPOOL Transmittal at 3. In other words, the later effective date would not sweep in all suppliers that might assert detrimental reliance, and therefore would not fully address NEPOOL's concern.

Constraint Penalty Factor for Thirty-Minute Operating Reserves.[31] Thus, to the extent parties argue that implementation should be delayed because the substance of the proposal is wholly new and unexpected, we find those arguments unconvincing.[32]

32. The Commission also rejects Footprint Power's proposition that, because ISO-NE rejected its de-list bid for reliability reasons, it should be exempt from complying with the revised definition of Shortage Event. As stated above, the ultimate goal of the revisions is to ensure that resources needed for reliability are available during reserve shortages to address reliability concerns. Footprint Power and other capacity resources are similarly situated with respect to application of a Shortage Event, and rejection of Footprint Power's de-list bid is not a persuasive reason for exempting it from the ISO-NE Proposal.

33. PSEG Companies raise a concern that, after June 1, 2017, a Shortage Event could be triggered without ISO-NE first dispatching all demand response resources. We are satisfied with ISO-NE's commitment to "work to develop market rules to allow demand response resources that participate in the energy market to participate in the reserve market . . . through the stakeholder process,"[33] and we hesitate to prematurely interfere with any efforts or progress in that regard. We also note ISO-NE's statement that, if such changes cannot be implemented on a timely basis, it will consider whether and how the Shortage Event provisions should be further revised.

34. We reject NEPGA's request that the Commission direct ISO-NE's Internal Market Monitor to reconsider the dynamic de-list bid threshold, in light of changes to the definition of a Shortage Event. Neither the ISO-NE Proposal nor the NEPOOL Proposal address the dynamic de-list bid threshold, which is a separate provision from the Shortage Event definition, and any change to the existing dynamic de-list bid threshold is beyond the scope of this section 205 proceeding.

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[31] *See* DaSilva Testimony at 3.

[32] It is not enough that resources may be harmed by a proposed tariff change; their reliance must also have been reasonable. *See, e.g.*, *Northern Natural Gas Co.*, 135 FERC ¶ 61,024, at P 24 (2011).

[33] ISO-NE Transmittal at 11-12.

The Commission orders:

The ISO-NE Proposal and associated proposed Tariff revisions are hereby accepted, effective November 3, 2013, as requested, as discussed in the body of the order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.