IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

California Independent System Operator Corporation, Petitioner	)	
v.	)	No. 98-1225
Federal Energy Regulatory Commission, Respondent	)	
California Electricity Oversight Board, Petitioner	)	No. 98-1226
v.	)	(Consolidated Cases)
Federal Energy Regulatory Commission Respondent	)	

PETITIONER CALIFORNIA INDEPENDENT SYSTEM OPERATOR CORPORATION'S RESPONSE TO RESPONDENT'S MOTION TO DISMISS

Pursuant to Rule 27(a) of the Federal Rule of Appellate Procedure, the California Independent System Operator Corporation ("ISO"), Petitioner, files this response to the Motion of Respondent Federal Energy Regulatory Commission ("Commission") To Dismiss Petition For Lack Of Jurisdiction, And To Suspend The Filing Of The Certified Index To The Record And Circuit Rule 28(a) Certificate ("motion to dismiss"), filed June 18, 1998. The Commission's motion should be denied because this Court has jurisdiction over the Petitions for Review filed by the ISO and the Electricity Oversight Board ("Oversight Board) pursuant to Section 313 of the Federal Power Act ("FPA"), 16 U.S.C. § 825l (1994). At a minimum, because the issue of the Court's jurisdiction is intertwined with the merits of the petition, the motion should be deferred until after full briefing and argument on the merits.

BACKGROUND

The ISO filed its Petition for Review of the Commission's rejection of (and subsequent refusal to rehear) certain aspects of the ISO's governance structure in connection with the electric restructuring in the State of California. The ISO was created as an independent non-governmental entity incorporated under the not-for-profit public benefit corporation laws to control and operate the transmission facilities in a single state-wide transmission grid. The transfer of the transmission facilities to an independent system operator was designed to ensure open, non-discriminatory transmission access to all market participants.

On April 29, 1996, the three investor owned utilities – Pacific Gas and Electric ("PG&E"), San Diego Gas and Electric Company ("SDG&E"), and Southern California Edison Company ("SCE") – filed a joint application with the Commission requesting, among other things, authorization to transfer operational control over their jurisdictional transmission facilities to the ISO, and to sell power at market-based rates through a newly proposed power exchange ("PX"). The April 29 filings ("Phase I filings") were submitted at the direction of the Public Utilities Commission of the State of California ("CPUC"),[1] and implemented Phase I of the electric industry restructuring. The CPUC's initiative, subsequently codified by the California Legislature,[2] required that the ISO and the PX be incorporated and governed by separate Governing Boards whose participation is limited to California residents. The CPUC initiative also required that an Oversight Board be established to oversee certain aspects of the

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1 CPUC Decision D. 95-12-065 (Dec. 20, 1995), *modified* D. 96-01-009 (Jan. 10, 1996) and D. 96-03-22, 166 P.U.R. 4th 1.

2 Assembly Bill 1890, signed by Governor Wilson on Sept. 23, 1996, codified as Cal. Public Utilities Code §§ 337 and 339 (West 1998).

governance and operations of the ISO and the PX. These provisions were incorporated in the April 29, 1996 filings. It is undisputed that at the time of the Phase I filings, neither the ISO nor the Oversight Board was yet in existence; nor had the California legislature enacted the statute that now mandates the corporate form of the ISO and PX, establishes the residency requirement, and establishes the Oversight Board as a state agency.

On November 26, 1996, the Commission conditionally authorized the establishment of the ISO and the PX, and conditionally authorized the transfer of the jurisdictional transmission facilities to the ISO. *Pacific Gas & Elec. Co.*, 77 FERC ¶ 61,204, at 61,837 (1996) ("November 26, 1996 order"). In that order, the Commission rejected the proposal made in the Phase I filing that all members of the ISO and PX Governing Boards be residents of the State of California. *Id*. In addition, the Commission held that, once the ISO and the PX were established, the Oversight Board's continued participation in the ISO and PX governance and operations would conflict with the Commission's statutory responsibilities, and that the Oversight Board would only be allowed to serve in a start-up capacity. *Id*. The Commission stated that the subsequent Phase II filing should not limit membership in the ISO and PX Governing Boards to California residents, and should provide for governance and dispute resolution procedures that do not involve the Oversight Board. *Id*.

The Commission's order made clear that it was granting authorizations on "a preliminary basis" and was "providing preliminary guidance" on the information it would require for the Phase II filing. 77 FERC at 61,793, 61,808. The Commission "emphasize[d] that the judgments we render and the guidance we provide herein are necessarily interim in nature" (*id.* at 61,808) and that it "defer[s] ruling on the final structure until the bylaws governing the selection and/or election of the Governing Board members, the CEO, and the

committee members have been filed in Phase II." *Id.* at 61,816. Thus, the "Commission order[ed] . . . . [that] [t]he Companies' applications for authorization . . . are hereby conditionally granted on a preliminary basis, as discussed herein." *Id.* at 61,837. The Commission also emphasized that the Phase II filing should be made by an independent ISO and PX, rather than by the three investor-owned utilities. *Id.* at 61,816.

At the time that the Commission issued its November 26, 1996 order, neither the ISO nor the Oversight Board was yet in existence. The ISO was incorporated on May 5, 1997. The Oversight Board, which was not formed until the California restructuring law took effect on January 1, 1997, had no members until appointments were made in February 1997. Thus, neither entity was in existence during the 30-day time period for seeking rehearing of the November 26, 1996 order. **Significantly, the Commission has acknowledged both in the proceedings below and in this Court that the ISO and the Oversight Board could not themselves have sought a timely rehearing because they did not exist**. *See Pacific Gas & Elec. Co.*, 81 FERC ¶ 61,122, at 61,437 n.9 ("October 30, 1997 order"); *Pacific Gas & Elec. Co.*, 82 FERC ¶ 61,223, at 61,870 (1998) ("March 4, 1998 order"); motion to dismiss at 7.

In accordance with the California State Legislature's directive in the restructuring legislation, the Phase II filings carried forward the California residency requirement for members of the respective Governing Boards, and included provisions implementing the legislation's mandate of an ongoing role of the Oversight Board. The Phase II filings requested that the Commission reconsider the determination it made in its November 26, 1996 order with regard to the residency requirement and the Oversight Board provisions.

In its October 30, 1997 order, the Commission once again rejected the proposed residency requirement and the governance provisions for the Oversight Board. The

Commission concluded that these provisions were inconsistent with its November 26, 1996 order. 81 FERC at 61,451. In addition, the Commission concluded that no party had filed a request for rehearing of its rejection of these provisions within thirty days following the issuance of the November 26, 1996 order. *Id.* While the Commission rejected the filing as an untimely request for rehearing, it added that it would "address the arguments raised on reconsideration in the interests of comity and to provide guidance to other states considering restructuring activities." *Id.* The Commission then declined to modify its position on the residency requirement and the ongoing role of the Oversight Board. *Id*. at 61,452.

The ISO filed a timely request for rehearing of the Commission's October 30, 1997 order – **the first order issued by the Commission on the governance issues after either entity came into existence**. The ISO sought rehearing both as to the procedural matters of the October 30, 1997 order (*i.e.*, the Commission's rejection of rehearing) as well as to the substance of the Commission's findings in the October 30, 1997 order (*i.e.*, the rejection of the residency requirement and the ongoing governance provisions). The ISO argued that rehearing of the Commission's October 30, 1997 order was appropriate because neither the ISO nor the Oversight Board had been formed at the time of the November 26, 1996 order.

On March 4, 1998, the Commission issued its order on the requests for rehearing. The Commission reaffirmed its earlier determination that the prior requests for rehearing in the Phase II filings were not timely because no party had requested rehearing of the November 26, 1996 order. 82 FERC at 61,868. The Commission also adhered to its rejection of the residency requirement and the ongoing Oversight Board governance provisions. *Id.*

On April 30, 1998, the ISO and the Oversight Board filed petitions for judicial review in this Court, seeking review of both the Commission's denial of the rehearing requests and

its rejection of the California residency requirement and the ongoing role of the Oversight Board. On June 18, 1998, the Commission filed a motion to dismiss the ISO's and Oversight Board's petitions for lack of jurisdiction and to suspend the filing of the certified index to the record pending resolution of its motion. The ISO files this response in opposition to that motion.

ARGUMENT

I. SECTION 313 OF THE FEDERAL POWER ACT DOES NOT PRECLUDE THE ISO'S APPEAL ON THE GROUND THAT THE ISO DID NOT SEEK REHEARING OF A PRIOR ORDER THAT WAS ISSUED WHEN THE ISO DID NOT EXIST.

A. The Federal Power Act Does Not Preclude Review.

The Commission argues that the ISO is precluded under Sections 313(a) and (b) of the FPA from seeking review of the Commission's orders because the ISO failed to seek timely rehearing of the November 26, 1996 order. As the Commission concedes, however, the ISO did not exist at the time of the November 26, 1996 order, and therefore the ISO was not a *party* to the proceeding under 313(a) and could not have filed a timely petition for rehearing of that order.

The express language of Section 313(a) establishes this conclusion:

> Any ***person***, State, municipality, or State Commission ***aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person,*** State, municipality, or State commission ***is a party*** may apply for a rehearing within thirty days after the issuance of such order. . . No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon.

16 U.S.C. § 825l(a) (1994) (emphasis added). Under the plain meaning of Section 313(a), only a "party" to a "proceeding" may seek rehearing before the Commission, and neither the

ISO nor the Oversight Board was a party to the proceeding when the November 26, 1996 order was issued. Indeed, neither the ISO nor the Oversight Board was even in existence at the time the November 26, 1996 order was issued.

The Commission's motion to dismiss refers only to the second sentence of the above quotation, implying that "any person" has the broadest interpretation. Motion to dismiss at 8. The word "person," however, when taken in context of Section 313(a) as a whole, is limited to *a person who is a party to the proceeding in which the order was issued*. This section of the FPA should not be construed, as the Commission has argued, to define "any person" in the second sentence so as to include persons who were not parties to the proceeding. In particular, "any person" should not be construed to include entities that were not yet in existence. Such an interpretation would prevent the ISO from seeking review of the Commission's later orders by which it is aggrieved and from which it timely filed for rehearing.

The Commission's argument would impose an impossible condition on the right of the ISO and the Oversight Board to seek judicial review of orders that apply to and adversely affect them on an ongoing basis. Simply put, because they did not exist at the time of the November 26, 1996 order, the ISO and Oversight Board could not have complied with what the Commission now argues is the precondition to this Court's jurisdiction over their petitions for review. In the circumstances presented here, the Commission's argument renders its rulings unreviewable and thus runs afoul of the settled principle that judicial review is presumptively available absent a clear and compelling showing to the contrary. *Barlow v. Collins*, 397 U.S. 159, 166 (1970) ([P]reclusion of judicial review of administrative action "is not lightly to be inferred"); *Dunlop v. Bachowski*, 421 U.S. 560, 567 (1975) ("[O]nly upon a

showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review.") (citation omitted); *Natural Resources Defense Council, Inc. v. SEC*, 606 F.2d 1031, 1043 (D.C. Cir. 1979) ("[S]ection [10 of the APA] creates a strong presumption of reviewability that can be rebutted only by a clear showing that judicial review would be inappropriate"). Such an unreasonable and unfair reading of Section 313 should be rejected. *United States v. Carroll*, 105 F.3d 740, 744 (1st Cir. 1997) ("Wherever possible, statutes should be construed in a commonsense manner, honoring plain meaning, and avoiding absurd or counter-intuitive results." (citations omitted)), *cert. denied*, 117 S. Ct. 2424 (1997); *Petitioning Creditors of Melon Produce, Inc. v. Braunstein*, 112 F.3d 1232, 1237 (1st Cir. 1997)("[S]tatutory language must be accorded its ordinary meaning.").

Indeed, the Commission's argument is particularly unfair and unreasonable here. The Commission's October 30, 1997 order, among other things, required the ISO to change its governance structure by amending its Bylaws. The ISO's existing governance structure is mandated by the California State Legislature in the state's restructuring legislation.[3] The ISO is a corporation whose existence arises under and is dependent on being duly organized and in good standing under state corporate law. It is therefore presently caught between two conflicting directives – one from the State of California mandating the current governance structure in the Bylaws and the other from an order of the Commission directing that the ISO amend its Bylaws to change the governance structure. If the ISO is not allowed to seek review of the October 30, 1997 order, the ISO – through no fault of its own – will have no opportunity to seek review of an order that has important consequences on the ISO's

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3 Cal. Public Utilities Code §§ 337 and 339 (West 1998).

governance structure and places the ISO in the middle of conflicting state and federal directives.

Furthermore, there is considerable doubt as to whether the ISO, or any party, could have sought judicial review of the November 26, 1996 order. In that order, the Commission stated "we are in this order providing preliminary guidance with respect to policy issues . . . and offer what guidance we can in order to facilitate the orderly restructuring of the California market" (77 FERC at 61,808) and that it would "defer ruling on the final structure until the bylaws . . . have been filed in Phase II. *Id.* at 61,816.[4]

In interpreting the FPA, the Supreme Court has stated that Section 313(b) contemplates review by the Circuit Courts of Appeals only of "orders of a definitive character." *FPC v. Metropolitan Edison Co.*, 304 U.S. 375, 384 (1938) (holding that Section 313(b) requires that in order to be subject to judicial review, the Commission's findings are to be "conclusive"). The Commission itself has stated that "an action is not subject to review if its [sic] concerns *preliminary* or procedural matters." *Sheep Creek Irrigation Co.*, 23 FERC ¶ 61,351, at 61,761 (1983) (emphasis added) (citing *FPC v. Metropolitan Edison*). Thus, contrary to the premise of the Commission's argument, it is far from clear that the November 26, 1996 order was ripe for appeal given the preliminary and interim nature of the Commission's authorization.

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4 In the March 4, 1998 order on rehearing and the October 30, 1997 Phase I order, the Commission stated that it considered its November 26, 1996 ruling on the governance issues to be final. March 4, 1998 Order, 82 FERC at 61,870; October 30, 1997 Order, 81 FERC at 61,452. The November 26, 1996 order did not make that finding. Instead, the whole order is described as preliminary. 77 FERC at 61,793.

B. The Rights Of The ISO And The Oversight Board Cannot Be Determined By The Actions Of Other Entities With Respect To The November 26, 1996 Order To Which The ISO And The Oversight Board Were Not Parties.

Apparently recognizing the fatal fault in its argument that the ISO and the Oversight Board relinquished their right to judicial review by failing to take an action that they could not have taken at a time when they did not exist, the Commission asserts that the ISO and the Oversight Board have no right to judicial review here because other entities that were parties to the November 26, 1996 order did not seek rehearing. However, absent well-delineated and narrowly defined circumstances that clearly do not exist here (such as class actions or privity), the rights of one entity are not determined or foreclosed by a proceeding involving a different entity. According to the Supreme Court, "[t]his rule is part of our 'deep-rooted historic tradition that everyone should have his own day in court.'" *Richards v. Jefferson County, Ala.*, 517 U.S. 793, 798 (1996) (citing 18 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 4449, at 417 (1981) and *Martin v. Wilks*, 490 U.S. 755, 761-62 (1989))("A judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings."); *see also Blonder-Tongue Lab., Inc. v. University of Ill. Foundation*, 402 U.S. 313, 329 (1971). This principle of allowing parties "an adequate opportunity to litigate" is fully applicable to the decisions of administrative agencies. *See United States v. Utah Constr. Mining Co.*, 384 U.S. 394, 422 (1966)(*superceded on other grounds by statute, Essex Electro Engineers, Inc. v. United States*, 702 F.2d 998, 1002 (Fed. Cir. 1983)); *see also Fairmont Aluminum Co. v. Commissioner of Internal. Rev.*, 222 F.2d 622 (4th Cir.), *cert denied*, 350 U.S. 838 (1955). Indeed, to bind the ISO and the Oversight Board through proceedings to which they were not parties, as the Commission suggests, would violate due process. *Richards v. Jefferson County,*

Ala., 517 U.S. 793, 794 (1996) (stating that it is a violation of due process to bind litigants to a judgment rendered in an earlier proceeding to which they were not parties and in which they were not adequately represented)(*citing Hansberry v. Lee*, 311 U.S. 32, 37 (1940)). Under basic principles of statutory interpretation, Section 313 of the FPA should be construed, contrary to the Commission's assertions, to avoid such constitutional questions. *Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc*. 501 U.S. 252, 269 (1991) (stating that statutes should be interpreted to avoid constitutional difficulties); *see also Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

The Commission's position is particularly unreasonable in the circumstances presented here. The Commission stated that four California agencies which were parties to the proceeding – the California Public Utilities Commission ("CPUC"), the California Energy Commission ("CEC"), the California Department of Water Resources ("CDWR") and the California Department of General Services ("CDGS") – made the same arguments the ISO has made and could have filed a petition for rehearing of the November 26, 1996 order. 82 FERC at 61,870; Motion to dismiss at 7-8.

The four cited agencies exist for wholly different purposes than, and have wholly different legal rights and interests from, the ISO and thus could not have adequately represented the ISO's interests. In brief, these are agencies of the State of California. While FERC might argue that an California agency can be construed as the "State" for purposes of Section 313, it would be manifestly unfair to hold that action or inaction of a state agency is equivalent to giving a non-governmental entity – a corporation – its day in court. More specifically, the ISO is a non-profit public benefit corporation that controls and operates the

transmission facilities of California's investor-owned utilities. It is not a state agency and its functions are very different from the CEC, CPUC, CDGS and CDWR. The CEC is the state agency charged with reviewing the social, economic, and environmental implications of energy usage in the state, and has the authority to ensure a reliable supply of energy in California. Motion to Intervene of California Energy Commission, Docket No. EC96-19, June 6, 1997, at 2. Unlike the specific responsibilities of the CEC, the CPUC has broader regulatory authorities over the state's electric consumers and electric corporations. Notice of Intervention of the Public Utilities Commission of the State of California, Docket No. EC96-19, November 21, 1997, at 1. The CDGS represents state agencies as electric consumers in California (which collectively represent the largest utility customer in the state). Motion to Intervene of the California Department of General Services, Docket No. EC96-19-000, June 13, 1998. The CDWR is a state agency created to ensure adequate water supplies in the state. CDWR is a large user of transmission services and has intervened and has indeed protested many of the ISO's subsequent filings at the Commission. Motion to Intervene and Protest of the California Department of Water Resources, Docket No. ER98-210-000, November 7, 1997. In light of such differences, these entities did not and could not have adequately represented the ISO's interests in the November 26, 1996 proceeding. In fact, in the November 26, 1996 order, the Commission itself recognized the need for the ISO to make its own filings as an independent entity. 77 FERC at 61,816.

In addition, other than the Oversight Board, the other petitioner in this case, no other California agency is in the precarious position of being subject to conflicting state and federal directives – one from the State of California mandating the current governance structure in the Bylaws and the other from an order of the Commission directing that the ISO amend its

Bylaws to change the governance structure. Thus, none of the above-mentioned agencies had the same incentives to adequately represent the ISO's interests.

C. The Commission's Reliance On *Bluestone Energy Design* Is Misplaced.

The Commission's heavy reliance on *Bluestone Energy Design, Inc. v. FERC*, 74 F.3d 1288, 1293-94 (D.C. Cir. 1996), is misplaced for several reasons. In *Bluestone*, the Commission issued a letter order finding that Bluestone had violated the Commission's regulations. Bluestone did not file for rehearing of the findings in the letter order. The Commission later assessed penalties against Bluestone for the violations included in the letter order. Bluestone sought rehearing of the penalty assessment under Section 31(d)(2)(B)[5] of the FPA and also challenged the Commission's findings in the letter order that Bluestone had violated the Commission's regulations. This Court held that it would not allow Bluestone to use the penalty review provisions of Section 31(d)(2)(B) of the FPA to collaterally attack the Commission's findings in the prior letter order, which Bluestone could have but did not challenge in a petition for rehearing under Section 313(a) of the FPA. This Court found that because Bluestone had failed to file a petition for rehearing of the Commission's letter order finding Bluestone in violation of Commission regulations, Bluestone was precluded from later relying on Section 31(d)(2)(B) (allowing review of the penalty assessment) to file an untimely attack on the Commission' letter order findings.

Bluestone thus stands for the proposition that a party must file a timely request for rehearing before it can challenge a Commission order. That principle is not disputed. Here,

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5 Section 31(d)(2)(B) of the FPA provides that "[a]ny person against whom a penalty is assessed under this paragraph may, within 60 calendar days after the date of the order of the Commission assessing such penalty, institute an action in the United States court of appeals for the appropriate judicial circuit for judicial review of such order in accordance with chapter 7 of title 5, United States Code." 16 U.S.C. § 823b.

however, in contrast to *Bluestone*, the ISO did not exist at the time the earlier order was issued and was not a party to that proceeding. Thus, unlike Bluestone, the ISO could not have filed a timely request for rehearing. Moreover, the ISO is not attempting to circumvent the Section 313(a) requirement to timely file for rehearing by using another, inapplicable section of the FPA. Thus, this Court's decision in *Bluestone* does not preclude the ISO from seeking review in this case.

II. THIS COURT HAS JURISDICTION TO DETERMINE WHETHER IT HAS JURISDICTION IN THIS APPEAL AND SHOULD DENY THE COMMISSION'S MOTION TO DISMISS BECAUSE THE JURISDICTIONAL ISSUES ARE INEXTRICABLY INTERTWINED WITH THE MERITS OF THE APPEAL

It is well established that "a court always has the jurisdiction to determine its own jurisdiction." *Rosado v. Wyman*, 397 U.S. 397, 403 n.3 (1970). This Court has noted that it is a "'general principle that a federal court may determine its own jurisdiction.'" *A&S Council Oil Co. v. Lader*, 56 F.3d 234, 239 (D.C. Cir. 1995) (*quoting Vietnam Veterans of America v. Secretary of the Navy*, 843 F.2d 528, 533-34 (D.C. Cir. 1988)). Because the issue of the Commission's jurisdiction is intertwined with the merits, this Court has jurisdiction over the petitions for review. Accordingly, the Commission's motion to dismiss should be denied.

If the question whether a court has jurisdiction "is dependent on the same statute which provides the substantive claim in the case, the jurisdictional claim and the merits are considered to be intertwined." *Wheeler v. Hurdman*, 825 F.2d 257, 259 (10th Cir.)(citation omitted), *cert. denied*, 484 U.S. 986 (1987). In this proceeding, the question as to whether this Court has jurisdiction is dependent on the application of Section 313 of the FPA, which requires that any party filing for judicial review of a Commission order must have filed with the Commission an application for rehearing of that order within thirty days of the issuance of

the order. One of the issues on appeal is whether the Commission properly denied rehearing based on its determination that the ISO and the Oversight Board did not timely seek rehearing of the governance issues in the November 26, 1996 order. The substance of the ISO's and Oversight Board's claim is that neither petitioner was in existence at the time the Commission issued the November 26, 1996 order, and therefore neither petitioner could have sought rehearing of the Commission's order pursuant to Section 313. Because the jurisdictional issue is inextricably intertwined with the merits of the dispute, this Court should deny the Commission's motion to dismiss the appeal for lack of jurisdiction.

III. AT A MINIMUM, THIS COURT SHOULD DEFER ITS DECISION ON THE COMMISSION'S MOTION TO DISMISS UNTIL IT CONSIDERS THE MERITS OF THE CASE BECAUSE THIS COURT'S JURISDICTION IS INEXTRICABLY INTERTWINED WITH THE MERITS OF THE ISSUES ON APPEAL.

It is axiomatic that where the merits and jurisdictional issues "are completely intermeshed the jurisdictional issues should be referred to the merits, for it is impossible to decide one without the other." *McBeath v. Inter Am. Citizens for Decency Comm.*, 374 F.2d 359, 363, *citing Land v. Dollar*, 330 U.S. 731 (1947), *cert. denied*, 389 U.S. 896 (1967). When jurisdictional questions are "inextricably intertwined" with the merits of a case, the court should defer its decision regarding jurisdiction until it hears the merits. *See Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir. 1990) (citation omitted); *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982).

As described in the preceding section, it is clear that the jurisdictional question is "inextricably intertwined" with the merits of this appeal; both the question of jurisdiction and the resolution of the merits involve the legal issue of whether, in the circumstances of this case, the ISO and the Oversight Board lost their rights to seek rehearing before the

Commission (as the Commission concluded in its October 30, 1997 and March 4, 1998 orders) and judicial review in this Court (as the Commission now asserts). Therefore, if the Court does not outright deny the Commission's motion to dismiss for lack of jurisdiction, it should, at a minimum, reserve judgment on the jurisdictional aspects of the appeal until it has had the opportunity to review the merits after full briefing and argument.

CONCLUSION

The Commission's motion to dismiss this appeal for lack of jurisdiction should be rejected. In the alternative, and at a minimum, this Court should defer its decision on the motion until it considers the merits of this appeal.

Respectfully submitted,

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