

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

California Independent System Operator Corporation))	
and California Electricity Oversight Board,))	
Petitioners))	
)	
v.))	Nos. 98-1225 and
)	98-1226
Federal Energy Regulatory Commission,))	(related Docket
Respondent))	No. 98-1384)

AFFIDAVIT OF RICHARD L. JACOBS

1. My name is Richard L. Jacobs and I am the Corporate Counsel for the California Independent System Operator Corporation (ISO). My business address is 151 Blue Ravine Road, Folsom, CA 95630.

2. On December 21, 1998, the California Electricity Oversight Board (Oversight Board) filed an application for a stay pending review of the Federal Energy Regulatory Commission's (FERC's) November 24, 1998 order. In that order, FERC directed the ISO to amend its Bylaws to remove provisions relating to 1) the Oversight Board's authority to appoint ISO Governing Board members; 2) the right of ISO Governing Board members to appeal majority decisions of the ISO Governing Board to the Oversight Board; 3) the requirement that ISO Governing Board members be California residents; and 4) the requirement that the Oversight Board approve certain amendments to the ISO Bylaws.

3. The ISO supports the Oversight Board's request for a stay of FERC's order. The purpose of this affidavit is to provide the factual support to show the irreparable injury that the ISO will suffer if FERC's November 24, 1998 order is not stayed.

4. As discussed in previous pleadings filed with this Court (*see, e.g.*, ISO's Motion to Consolidate, filed November 5, 1998 at 7-10), FERC's November 26, 1996 and

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October 30, 1997 orders require the ISO to make amendments to its Bylaws that are contrary to the State of California's electric restructuring legislation, AB 1890, now codified as part of the California Public Utilities Code (Cal. Pub. Util. Code §§ 330-397 (West 1998)). The November 24, 1998 order directs the enforcement of those orders by January 8, 1999.

5. As Corporate Counsel for the ISO, I had concerns that compliance with FERC's orders to amend the Bylaws would raise questions regarding the legality of the ISO's operations. Particularly, I had concerns that operating under the FERC-ordered Bylaws, which are contrary to state law, would invalidate actions the ISO undertakes in its day-to-day operations. As discussed below, the immediate impact of the November 24, 1998 order would be to adversely affect the ISO's proposed new credit refinancing.

6. At the November 1998 Board of Governors meeting, the Board approved the ISO's plan to refinance its bank loan and letter of credit (hereinafter collectively referred to as "line of credit") with Bank of America (BofA). The BofA bank loan was obtained before the ISO was incorporated to facilitate the ISO Restructuring Trust in purchasing the computer and communications facilities for the ISO's start of operations in 1998. The BofA bank loan was intended to be a temporary financing mechanism that would be phased out once the ISO was operating. The BofA letter of credit backs the tax-exempt bonds issued to refinance the bank loan and provide additional capital. Currently, use of most of the bond proceeds is restricted by BofA. The refinancing will remove those restrictions. In addition, because the BofA line of credit is guaranteed by the three investor-owned utilities in California, the credit line must be closed before the ISO is completely financially independent.

7. Refinancing the BofA line of credit will save the ISO more than \$100,000 per month in financing costs. The ISO is a nonprofit, public benefit corporation. As such it has

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no shareholders or equity financing. All of the ISO's operating costs must be collected from ISO's customers. All of the ISO's costs are eventually passed through to electricity ratepayers in California. Without the refinancing, electricity ratepayers will continue to incur more than \$100,000 per month in excess costs.

8. The General Counsel of the ISO requested the ISO's finance counsel, the law firm of Orrick, Herrington & Sutcliffe, LLP, to examine the potential effect of the November 24, 1998 order on the ISO's operations and the ISO's ability to execute financing agreements and other legally binding documents and agreements. Specifically, the General Counsel requested that they examine whether they could give the ISO a standard form of legal opinion attesting to the validity of ISO Governing Board actions when ISO Governing Board actions are undertaken pursuant to the FERC-ordered Bylaws pending resolution of the appeal. Such an opinion would be necessary for the ISO to refinance the BofA line of credit.

9. The attached letter from Orrick, Herrington & Sutcliffe shows that they would not be able to issue their standard form of legal opinion attesting to the validity of ISO Governing Board actions pending the resolution of the appeal, with one exception. *See* Attachment A. According to Orrick, if the ISO were to establish a dual-track governance structure, it might be possible for them to issue such an opinion. Under this dual track structure, the ISO would maintain two Boards: "Board A," consisting of members elected pursuant to the FERC-ordered Bylaws, and "Board B," consisting of members elected pursuant to the current state-mandated Bylaws. If a proposed action were approved by both Board A and Board B, it might be possible for Orrick to issue its standard form of legal opinion.

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10. Maintaining a dual-track governance structure, if it were possible, would be an inefficient and costly way for the ISO to operate. Given the requirement for two-thirds of sitting Governors for a quorum and a majority of the entire Board for Board action, even small differences between the membership of the two Boards could paralyze the ISO. One member of Board B could prevent Orrick from issuing a standard form of legal opinion. In addition, one Board could block the new financing proposal or any proposed action by the ISO. The ability of one Board to block actions would have the effect of crippling the ISO's operations. The ISO might be unable to enter into contracts or other agreements that are essential to the ISO's day-to-day operations.

11. In addition, maintaining a dual-track governance structure would add substantial administrative costs to the ISO's operations in terms of delays and board member expenses. Because the ISO is a nonprofit corporation, all such costs would eventually be passed through to electricity ratepayers in California.

I hereby declare that the foregoing is true and correct to the best of my knowledge and belief.

Dated: December 23, 1998

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