

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

San Diego Gas & Electric Company,
Complainant,

v.

Sellers of Energy and Ancillary Services
Into Markets Operated by the California
Independent System Operator and the
California Power Exchange,
Respondents.

Docket Nos. EL00-95-000
EL00-95-002
EL00-95-003

Investigation of Practices of the California
Independent System Operator and the
California Power Exchange

Docket Nos. EL00-98-000
EL00-98-002
EL00-98-003

Public Meeting in San Diego, California

Docket No. EL00-107-000

Reliant Energy Power Generation, Inc.,
Dynergy Power Marketing, Inc.,
and Southern Energy California, L.L.C.,
Complainants,

v.

California Independent System Operator
Corporation,
Respondent.

Docket No. EL00-97-000

California Electricity Oversight Board,
Complainant,

v.

All Sellers of Energy and Ancillary Services
Into the Energy and Ancillary Services Markets
Operated by the California Independent System
Operator and the California Power Exchange,
Respondents.

Docket No. EL00-104-000

Docket No. EL00-95-000, et al.

California Municipal Utilities Association,
Complainant,

v.

All Jurisdictional Sellers of Energy and Ancillary
Services Into Markets Operated by the California
Independent System Operator and the
California Power Exchange,
Respondents.

Docket No. EL01-1-000

Californians for Renewable Energy, Inc. (CARE),
Complainant,

v.

Independent Energy Producers, Inc., and all
Sellers of Energy and Ancillary Services Into
Markets Operated by the California Independent
System Operator and the California Power
Exchange; All Scheduling Coordinators Acting
on Behalf of the Above Sellers; California
Independent System Operator Corporation; and
California Power Exchange Corporation,
Respondents.

Docket No. EL01-2-000

Puget Sound Energy, Inc.,
Complainant,

v.

All Jurisdictional Sellers of Energy and/or Capacity
at Wholesale Into Electric Energy and/or Capacity
Markets in the Pacific Northwest, Including
Parties to the Western Systems Power Pool
Agreement,
Respondents.

Docket No. EL01-10-000

**PETITION FOR PARTIAL REHEARING ON GOVERNANCE ISSUES
AND MOTION FOR PARTIAL STAY OF THE
CALIFORNIA INDEPENDENT SYSTEM OPERATOR CORPORATION**

Pursuant to Rules 212 and 713 of the Commission's Rules of Practice and
Procedure, 18 C.F.R. § 385.212, 713, the California Independent System
Operator Corporation ("ISO") submits this Petition for Partial Rehearing on
Governance Issues, and Motion For Partial Stay of the order issued by the

Commission in the above-captioned dockets on December 15, 2000 (the “December 15 Order”).¹ By this filing, the ISO requests that the Commission grant rehearing of its Order that the ISO Governing Board surrender decision-making and operational authority to ISO management by January 29, 2001, before the date by which a new Board will be appointed. Because the Commission may not be able to act on the Petition for Rehearing by January 29, 2001, the ISO requests that the Commission stay that aspect of its Order until April 27, 2001.

In its December 15 Order, the Commission directed that the ISO Governing Board, currently organized as a stakeholder Board, be replaced by an independent, non-stakeholder Board. The Commission also established a procedure involving consultation with State authorities to achieve an independent, non-stakeholder board by April 27, 2001. The ISO has no quarrel with the conclusion that the current Board structure should be replaced with an independent, non-stakeholder Board, and supports State-Federal consultation as the preferred procedure for attaining this goal. The ISO also believes that this can be achieved by April 27, 2001.

However, there is one aspect of the transition process established by the December 15 Order that could cause significant disruption. Under that Order, the current Governing Board members, on January 29, 2001, “must turn over decision-making power and operating control to the management of the ISO,” although “they will be permitted to continue functioning as members of a stakeholder advisory committee.” December 15 Order, slip op. at 62. This

¹ *San Diego Gas & Electric Company, et al.*, 93 FERC ¶ 61,294 (2000).

requirement creates the potential for severe problems, because compliance with it may place the ISO and current members of its Board of Governors in violation of California law. California Senate Bill 96, as incorporated into the California Public Utilities Code, specifically "freezes" the composition of the ISO Board as it existed on July 1, 1999 until another state joins the ISO or further California legislative action.² Further, the ISO was established and continues to operate pursuant to California corporate law. Section 3210 of the California Corporations Code states that "the activities and affairs of a corporation shall be conducted and all corporate powers shall be exercised by or under the direction of the Board. The Board may delegate the management of the activities of the corporation . . . provided that the activities and affairs of the corporation shall be managed and all corporate powers shall be exercised under the ultimate direction of the Board."³

The uncertainties created by the apparent conflict between the December 15 Order and California law create a potential for severe problems. During the January 27, 2001 through April 27, 2001 period, the ISO is likely to be required to enter into numerous material transactions, including substantial capital expenditures for which it needs up to \$110 million of third party financing requiring Board approval. As described in the attached affidavit of William Regan, the ISO's Chief Financial Officer, the ISO does not expect to be able to

² Cal. Public Utilities Code, § 337.

³ In addition, Section 5231 of the California Corporations Code imposes a duty of care on each of the ISO's directors and Section 5226 limits the ability of a director to resign if the corporation would then be left without a duly elected director or directors in charge of its affairs. Any attempt by an ISO director to implement the FERC order to turn over all decision-making power to management may create risks that a director would be violating a state law duty to the corporation.

negotiate the terms of a financing package to present to the Board prior to January 29. At least until the present uncertainties are resolved, the ISO anticipates that lenders will insist on Board approval. As described in the affidavit of Mr. Regan, the proposed ISO financing includes funds for a new EMS system and for implementation of the initial phases of the FERC-mandated Congestion Management Reform.

Moreover, significant uncertainty concerning the ability of the ISO lawfully to meet its financial commitments could also affect the ISO's cost of financing its current debt. As described in the affidavit of Mr. Regan, the ISO presently has outstanding approximately \$300 million in "variable rate demand obligations." The variable rate is recalculated weekly by the remarketing agents (a group of investment banking firms), who attempt to keep the rate at a level that maintains these obligations at par value. In addition, the holders of the variable rate demand obligations have a right to put these obligations to the ISO, in which case the ISO has back-up bank financing, but at a higher rate. Thus, significant uncertainties affecting the financial community's assessment of the ISO may affect not only the ISO's ability to obtain new financing, but also the cost of servicing its current debt.

Regardless of whether the December 15 Order might be read as preempting requirements of California law for Board approval, or whether under the Order such requirements would be met by the Board's delegation of its authority to management, or whether the Order might be construed to allow the Board to continue to give approvals required by California law, a "cloud" would

remain over the ISO's corporate authority. Absent conclusive resolution of these issues, it is probable that lenders will insist on Board approval for any major financing package. Moreover, as long as any questions of legal competence remain, the uncertainty could affect the cost to the ISO of servicing its current debt.

In addition, as Mr. Regan's affidavit states, the ISO is likely to be required to enter into material contracts during the January 29, 2001 through April 27, 2001 period. Uncertainty concerning the legal standing of the ISO under California law likely will increase the difficulty of consummating these agreements, and could result in potential business partners choosing not to do business with the ISO during this period. The ISO expects to enter into numerous agreements during this interim period, including but not limited to Summer 2001 Demand Relief Program agreements, contracts for out-of-market or forward-purchased energy, Summer 2001 Peaking Generation contracts, and routine consulting and other business agreements.

For these reasons, we are requesting rehearing, on an expedited basis, of that portion of the December 15 Order that requires current Board members to turn over decision-making power and operating control to the management of the ISO before April 27, 2001. Alternatively, we are requesting a stay until April 27, 2001, of that portion of the December 15 Order that requires the current Board members to turn over decision-making power and operating control to the management of the ISO prior to appointment of an independent, non-stakeholder Board.

The present situation meets the traditional standards for a stay. The Commission may stay its action “when justice so requires.” 5 U.S.C. § 705. In deciding whether a stay would be appropriate in a particular case, the Commission generally considers several factors: (1) whether the moving party will suffer irreparable injury without a stay; (2) whether issuing a stay will not substantially harm other parties; and (3) whether a stay is in the public interest. *CMS Midland, Inc. v. Midland Cogeneration Venture Limited Partnership*, 56 FERC ¶ 61,177, at p. 61,631, *aff’d sub nom. Michigan Municipal Cooperative Group v. FERC*, 990 F.2d 1377 (D.C. Cir.), *cert. denied*, 510 U.S. 990 (1993). The ISO and the public it serves will be irreparably injured if the ISO is unable to consummate material contracts, including obtaining necessary financing to consummate certain of those agreements. In addition, the ISO and the market participants who ultimately are responsible for payment of the costs incurred by the ISO would suffer irreparable injury if the cost of its current financing rises. These costs could be significant, and the loss suffered during any period of uncertainty would be permanent.

Further, the public interest will be served by moving forward with the projects, including a new EMS system and implementation of the Commission-mandated Congestion Management Reform (subject to final Commission approval of the terms of that reform project), that require additional financing. These concerns outweigh the disadvantage of continuing the present stakeholder Board for another 90 days.

It should be understood that a stay would not delay in any way the Commission's schedule for on-the-record discussions with State authorities toward an agreed-upon governance structure for the ISO. We seek only a partial stay for the transition period contemplated in the December 15 Order. We have a high degree of confidence that through the State-Federal consultative process envisioned by the Commission's December 15 Order, it will be possible to have an independent, non-stakeholder Board in place by April 27, 2001, and therefore seek a stay only until that date.

Respectfully submitted,

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