

UNITED STATES OF AMERICA 82 ferc 61, 223
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: James J. Hoecker, Chairman;
Vicky A. Bailey, William L. Massey,
Linda Breathitt, and Curt Hebert, Jr.

Pacific Gas and Electric Company,) Docket Nos. EC96-19-009
San Diego Gas & Electric Company and) and ER96-1663-010
Southern California Edison Company)

ORDER ON MOTIONS FOR STAY AND REQUESTS
FOR REHEARING OF GOVERNANCE ISSUES

(Issued March 4, 1998)

In this order, we address several requests for rehearing and stay of the Commission's October 30, 1997 order in these proceedings, regarding governance issues raised in the proposals to restructure the California electricity market. 1/ As discussed below, we reaffirm our earlier finding that the prior requests for rehearing were untimely. We also reaffirm that reconsideration of our earlier determinations regarding the role of the California Electricity Oversight Board (Oversight Board) and the California residency requirement is not warranted. We also deny the motions for stay of our earlier orders.

Background

The initial phase of the California restructuring proceedings was filed by Pacific Gas and Electric Company, Southern California Edison Company, and San Diego Gas & Electric Company (the Companies), at the direction of the Public Utilities Commission of the State of California (California Commission). 2/ Subsequently, the California Legislature enacted legislation in large part codifying the California Commission's initiative, and

- 1/ Pacific Gas and Electric Company, San Diego Gas & Electric Company, and Southern California Edison Company, 81 FERC 61,122 (1997), reh'g pending (October 30, 1997 Order). All other issues raised on rehearing of the October 30, 1997 Order will be addressed at a later time.
- 2/ See California Commission Decision, D.95-12-063 (Dec. 20, 1995), modified by, D.96-01-009 (Jan. 10, 1996) and D.96-03-22 (Mar. 13, 1996), 166 P.U.R. 4th 1 (California Commission Decision).

prescribing additional requirements. 3/ In our November 26, 1996, order addressing the Companies' Phase I restructuring filing, the Commission determined that the proposal to limit participation on the California Independent System Operator Corporation (ISO) and California Power Exchange Corporation (PX) Governing Boards to California residents is unduly discriminatory, inconsistent with the Commission's goal of ensuring broad-based transmission, and will act to discourage participation in the ISO by out-of-state entities by denying them meaningful representation. 4/ The Commission also determined that it could not accept the permanent role of the Oversight Board in the governance or operations of the ISO and PX, or appellate review of ISO Board decisions because the Oversight Board's role was not limited to matters subject to the jurisdiction of the State of California and concerned matters within the Commission's exclusive jurisdiction. 5/ However, "[i]n an effort to assist in the advancement of the California restructuring process. . ." 6/ the Commission allowed the Oversight Board to perform an initial start-up function. 7/

- 3/ Assembly Bill 1890, signed by Governor Wilson on September 23, 1996 (Restructuring Legislation).
- 4/ Pacific Gas and Electric Company, San Diego Gas & Electric Company, and Southern California Edison Company, 77 FERC 61,204 at 61,819 (1996) (November 26, 1996 Order). When the Commission issued the November 26, 1996 Order, neither the Oversight Board, the ISO, nor the PX had been created. However, the Restructuring Legislation, which had been law for about two months, directed the creation of the Oversight Board, ISO and PX, and specified their general responsibilities. In addition, we note that the California Commission specifically requested the Commission, in its Phase I order and prior to the formation of the ISO and PX, to provide detailed guidance concerning the ISO and PX Governing Boards. See October 21, 1996 Comments of the California Commission at 4-5.
- 5/ 77 FERC at 61,818. As discussed below, we are clarifying that the Oversight Board can have a permanent role.
- 6/ Id. at 61,817.
- 7/ Id. at 61,818. The Commission required the ISO and PX to include in their Phase II Bylaws procedures to fulfill governance functions after the initial start-up. This requirement remains in effect.

Although no party sought rehearing of those determinations, 8/ the ISO and PX subsequently included in their Phase II proposals in these proceedings Bylaws provisions that directly conflicted with the Commission's directives in the November 26, 1996 Order; the Phase II proposals maintained the California residency requirement, afforded the Oversight Board a right to veto prospective Governors, and provided for Oversight Board review of Governing Board determinations upon appeal by a Governor. In conjunction with their Phase II filings, the ISO and PX sought reconsideration of the Commission's November 26, 1996 rulings. 9/ In response, in the October 30, 1997 Order, the Commission rejected the ISO's, PX's, and Oversight Board's requests to include these nonconforming provisions as untimely requests for rehearing, and provided additional guidance regarding its earlier determination to reject these provisions.

On November 28, 1997, the Oversight Board filed a request for rehearing of the governance determinations in the October 30, 1997 Order. On December 1, 1997, the ISO filed a request for rehearing, a motion for stay and a motion for clarification. Also on December 1, 1997, the PX filed a request for rehearing and a motion for stay of the October 30, 1997 Order. Also, the California Commission filed comments in support of the Oversight Board's position, and Avista Energy, Inc., CNG Power Services Corp., Enron Power Marketing, Inc., Mock Energy Services and Koch Energy Trading, Inc. (collectively, Marketers) filed an answer in opposition to the ISO's request for rehearing and motions for stay and clarification. On January 6, 1998, the ISO filed a Motion for Expedited Consideration of its Request for Rehearing and Motion for Stay, in which it notes that there is a proposed amendment to its Bylaws that would extend the terms of existing ISO Governors by one month.

The Parties' Arguments

The ISO, PX, and Oversight Board claim that the Commission's directive to amend the ISO's and PX's Bylaws with respect to the residency requirement and the Oversight Board creates a conflict

- 8/ Besides the California Commission, three other state agencies, the California Department of General Services, the California Energy Commission and the California Department of Water Resources, were granted party status and thus were able to seek rehearing to further any state interests aggrieved as a result of the November 26, 1996 Order.
- 9/ Several comments supporting and opposing the request for reconsideration were filed. The Oversight Board, which like the ISO and PX had been constituted in the interim, commented in support of the request for reconsideration.

with the provisions of the California Restructuring Legislation and the ISO and PX Articles of Incorporation. Moreover, they argue that under Article III, 3.5 of the California State Constitution, they must abide by California law until an appellate court rules that the state law is preempted by federal law or agency ruling. Therefore, they contend that compliance with the October 30, 1997 Order would raise significant legal issues.

The ISO, PX, and Oversight Board also contend that they never had an effective opportunity to appeal the November 26, 1996 Order, which was issued more than 30 days before they were formed. The Oversight Board requests that the October 30, 1997 Order be considered the final order, contending that the November 26, 1996 Order by its own terms provided that its guidance was interim.

In addition, the Oversight Board argues that its review of director appointments is intended to ensure that individual directors are seated based on public findings that they can competently and in good faith direct the ISO and PX in the public interest. Similarly, the Oversight Board contends that its appellate function is intended to ensure that the ISO operates in the public interest, consistent with its charter. The Oversight Board argues that these functions will ensure the performance and accountability of institutions that the State has created and charged with achieving and maintaining reliability. The Oversight Board also argues that these reservations by the State do not actually conflict with a Federal law because the Commission's jurisdiction does not include the authority to appoint individual directors of corporations engaged in Federal Power Act (FPA) jurisdictional activities, and because the Oversight Board's role in hearing appeals of Board actions is separate from, and not in lieu of, rights to seek relief from the Commission.

The ISO and PX each requests a stay of the Commission's governance rulings, asserting that the ISO and PX cannot comply with the Commission's directive to amend their respective Bylaws without violating their Articles of Incorporation and the California Restructuring Legislation. The ISO and PX argue that numerous Governors' terms expire on March 31, 1998, and that their Bylaws both require the nomination process to begin no later than January 30, 1998 (sixty days prior to the expiration of the current terms). At that time, the ISO and PX will be faced with a choice of complying with State law or the Commission's directive. The ISO and PX also claim that a stay is necessary for them to obtain permanent financing arrangements.

The Oversight Board also requests rehearing of the October 30, 1997 Order regarding the California residency requirement. The Oversight Board reiterates its argument that the residency requirement does not violate section 205 of the FPA, contending that the restriction is not analogous to a restriction on membership in power pooling arrangements, since "[t]he selection process in which market participant entities vote for designated governors is not geographically restricted." The Oversight Board also contends that the Commission's belief that a California-only Board is a less efficient avenue to achieve regionalization does not equate to a violation of the FPA.

Finally, the Oversight Board notes that the ISO and PX cannot unilaterally change their Bylaws, but that such changes must be effected through legislative amendment of their respective charters. Moreover, it argues, successful challenge to the underlying statutory provisions could call into question the validity of the ISO and PX incorporations.

California Commission President Conlon filed letters on November 26, 1997, and December 9, 1997, requesting that the Commission reconsider its rulings on the operation of the Oversight Board, and supporting the Oversight Board's rehearing request. The letters cite the importance of allowing California to exercise its traditional authority over reliability matters.

The Marketers oppose the requests for rehearing and stay, stating that the ISO "seeks to manufacture a far-fetched theory asserting that the November 26, Order was not final." The Marketers contend that the November 26, 1996 Order's rulings on the Oversight Board and the residency requirement were clear and definite by their own terms. The Marketers also contend that the stay should be denied, because irreparable harm has not been shown under Commission and judicial precedents. They argue that the allegations of harm in procuring permanent financing are speculative and are not accompanied by any proof, and that the ISO can obtain judicial review of the October 30, 1997 Order to avoid a conflict with state law.

Discussion

As an initial matter, we conclude that while the ISO's, PX's, and Oversight Board's filings purport to seek rehearing of our October 30, 1997 Order, these filings in fact seek rehearing of determinations that were made a year earlier in our November 26, 1996 Order. Therefore, they are untimely under the statutory requirement of section 313 of the FPA. The November 26, 1996 Order specifically ordered changes in the Oversight Board and rejected the residency requirement. 77 FERC at 61,817-819. In our October 30, 1997 Order we explained that

the November 26, 1996 rulings regarding governance were final. 10/ We reaffirm that determination today. Although the ISO, PX, and Oversight Boards were not yet in existence when rehearings of the November 26, 1996 Order were due, the interests of the State of California clearly were represented in the proceeding by several entities that could have sought rehearing on these issues. The California Commission, the California Department of Water Resources, the California Energy Commission, and the California Department of General Services have been active parties in this proceeding since the original filings were made early in 1996, and the Governor of California filed a letter expressing an active interest in the proceeding. In addition, California State Senator Pease, a "Principal coauthor" of the Restructuring Legislation, filed a letter with the Commission following the November 26, 1996 Order, but did not request rehearing. 11/ Accordingly, rehearing does not lie at this late date. Nevertheless, we believe it is appropriate to treat the filings as requests for reconsideration and, in light of the arguments raised, we will clarify our prior findings in certain limited respects.

Under Part II of the FPA, the Commission has the exclusive authority to establish the rates, terms and conditions of interstate transmission service by public utilities, as well as the rates, terms and conditions of interstate wholesale sales by public utilities. The Oversight Board cannot undertake our statutory responsibilities. However, the Commission does not object to efforts by the Oversight Board to mediate disputes between or among ISO Board members on a voluntary basis. 12/ We believe that the Oversight Board could be of assistance to the Commission if the Oversight Board could mediate such disputes. Thus, ISO Board members may voluntarily request the Oversight Board to perform a consultative role in resolving disputes

10/ October 30, 1997 Order, 81 FERC at 61,452.

11/ In addition, we note that it was in response to the California parties' requests for assurances that their proposals were on the right track to go forward with their Phase II filings in time for a then anticipated January 1, 1998 start-up date, mandated by the California Restructuring Legislation, that the Commission dedicated tremendous resources to addressing the Phase I filings as early as possible. November 26, 1996 Order, 77 FERC at 61,808, 61,816.

12/ We are not suggesting any modification to the ADR provisions already contained in the ISO and PX tariffs. Those tariff provisions pertain to disputes among or between ISO participants in ISO-related and PX-related transactions.

involving ISO Board decisions. This limited role as mediator would in no way interfere with the Commission's ability to address jurisdictional matters or to make timely decisions, since asking the Oversight Board to perform such a consultative role would be voluntary; jurisdictional matters referred to the Oversight Board ultimately would have to be accepted or approved by the Commission.

In addition, we recognize that the Board was created to oversee reliability matters. 13/ As the Oversight Board acknowledges however, "The purpose of [the Oversight Board's] functions is not to carry out a reliability activity directly, but rather to ensure the performance and accountability of institutions that the state has created and charged with achieving and maintaining reliability." 14/ The Oversight Board provides, as examples of functions that are not subject to exclusive FERC jurisdiction, reliability generally, the setting of state required reliability standards in particular, emergency response and coordination, system expansion, resource planning, and system failure and outage impact analysis. 15/ We recognize that the State may authorize a state agency to carry out any state-jurisdictional function, including many of the examples cited by the Oversight Board. For example, to the extent authorized by the California Legislature, the Oversight Board may carry out for the ISO and PX any regulatory function that the California Commission may lawfully carry out for any public utility. Thus, our orders do not address or preclude an Oversight Board role that is limited to traditional state areas of regulation, such as those carried out by the two existing California commissions.

As noted, the determination of rates, terms and conditions for transmission service, including unbundled retail transmission, and for sales of electric energy for resale, remain within the exclusive jurisdiction of this Commission. In carrying out this responsibility, the Commission will ensure non-discriminatory access to the transmission grid.

In response to the ISO's and PX's request for stay, we do not believe that justice requires a stay of our rulings pending ultimate resolution of the dispute on appeal. That process could take a long time, during which the serious flaws in the governance documents would not be addressed.

13/ See California Restructuring Legislation, section 334; October 30, 1997 Order, 81 FERC at 61,452.

14/ Oversight Board Request for Rehearing at 10-11.

15/ Id. at 12.

In addition, the ISO and PX Bylaws currently provide for Directors' terms to expire on March 31, 1998. However, the Commission notes that the ISO and PX Governing Boards have recently voted to extend the existing terms of office of their existing Governing Boards through November 30, 1998 and December 31, 1998, respectively. These Bylaws amendments were ratified by the Oversight Board, so the ISO and PX will not need to nominate new directors until September 30, 1998 and October 31, 1998, respectively. Therefore, they will not be faced with an imminent problem with respect to the conflict between the federal and state requirements regarding selection of Governing Board members.

The Commission orders:

(A) The requests for rehearing of the October 30, 1997 Order are hereby rejected.

(B) The ISO's and PX's request for a stay of the October 30, 1997 Order requiring amendment to their Bylaws is hereby denied.

By the Commission.

(S E A L)

Linwood A. Watson, Jr.,
Acting Secretary.