

jurisdictional issue with the merits and hear the full case on May 4, 1999. The ISO seeks a prompt disposition of the case because the ISO is currently subject to conflicting state and federal directives regarding its governance structure. The FERC orders on appeal in this proceeding require the ISO to make certain changes to its Bylaws regarding, among other things, the selection of Board of Governor members. Under its Bylaws and Articles of Incorporation, which were promulgated pursuant to the California Electric Restructuring Legislation, the ISO is precluded from making the FERC-ordered changes. The ISO previously explained that this conflict will be exacerbated if the appeal is not resolved by November 30, 1999, when the new ISO Board of Governors must be elected. *Motion to Consolidate* at 9. Moreover, on November 24, 1998 (the same day this pleading was filed), FERC issued an order denying the ISO's request to defer enforcement of the Bylaw orders and required the ISO to make the required Bylaw changes within 45 days of the order. *California Independent System Operator Corporation*, 85 FERC ¶ 61,263 (1998).

The ISO also requested leave to file a supplemental brief on the jurisdictional issue to give the Court a more complete basis on which to make a decision. The ISO filed its response to FERC's motion to dismiss on June 29, 1998. Subsequently, on August 20, 1998, the Court issued the order bifurcating the jurisdictional issue from the merits. The ISO explained in its motion for leave to file a supplemental brief that as a result of the bifurcation order, and because the jurisdictional issue is intertwined with a part of the merits of the appeal, the ISO would not otherwise have an opportunity to present the portion of its legal arguments that bear on the jurisdictional issue and that it would have addressed in its brief on the merits.

DISCUSSION

1. The ISO's Motion to Consolidate is Not a Belated Request for Rehearing or Reconsideration.

FERC argues that the ISO's motion is, in effect, a late request for rehearing for which there is no excuse because the ISO's concerns were evident at the time the Court's orders were issued. According to FERC, the need for prompt resolution could be avoided by extending the Board member terms again.² *FERC Opposition* at 7. Enron states that the ISO's motion to consolidate is, in effect, a belated request for reconsideration of the Motion Panel's August 20, 1998 bifurcation order and that the ISO has not made a showing that the Court's decision to bifurcate the appeal was erroneous. Enron also states that the ISO's arguments have been considered and rejected by the Court. Finally, Enron argues that bifurcation of the appeal will result in a more efficient use of the resources of the Court and the parties.

The ISO is not making a belated request for reconsideration or rehearing of the August 20, 1998 bifurcation order. The ISO requests that the appeal be consolidated and/or expedited because of the need for a prompt resolution of the appeal. FERC's statement that a prompt resolution of the appeal would be not necessary since the Board member terms could again be extended is particularly surprising to the ISO given FERC's November 24, 1998 order stating

² Remarkably, FERC also states that "the State of California could have eliminated the problem by effecting some temporary modification of the restructuring legislation between the time the Commission issued the 1996 Order and the time Petitioners came into existence." *FERC Opposition* at 7. The ISO, however, is not the State of California, and it cannot by itself bring about a change in the California restructuring law. Moreover, FERC's view of the law and the State of California's obligation to follow it is an issue that goes to the merits of the appeal in this case.

that it intends to initiate enforcement action on this matter.³ FERC's has by its own action eliminated the ISO's ability to implement FERC's recommendation.

FERC's argument that the ISO has no excuse for waiting 77 days to file the motion is equally without merit. It was the schedule for oral argument on May 4, 1999, not the bifurcation order itself, that caused the ISO concern. The long delay in the oral argument schedule was not evident at the time of the bifurcation order. In addition, on August 31, 1998, the ISO filed with FERC additional information related to its Bylaws, including the extension in the Board member terms to November 30, 1999. In that filing, the ISO requested that FERC take no enforcement action with respect to the governance issues until the appeal is resolved. *Motion to Consolidate* at 9, n.12. If FERC agreed not to take enforcement action until the appeal was resolved, there would be less need to expedite the appeal. However, on October 28, 1998, FERC issued an order on the ISO's Bylaw filing stating only that it would address the compliance issues in a future order. *California Independent System Operator Corporation*, 85 FERC ¶ 61,131 (1998).⁴ Contrary to Enron's assertions, the need for a prompt resolution of the appeal was not previously presented to the Motions Panel of the Court. The Motions Panel, therefore, could not have known about the ISO's need for prompt

³ The ISO stated in its Motion to Consolidate at 7-11, that the terms of the ISO's Board of Governors will expire on November 30, 1999 and, at that time, new governors will be elected according to the ISO Bylaws then in effect. Because the appeal involves the validity of the current Bylaws, which FERC has ordered the ISO to change, the ISO stated that it needed a prompt resolution of the appeal to avoid having to elect an entire new Board of Governors under the provisions of the current Bylaws. This reason for needing a prompt resolution of the appeal is overtaken by the more pressing concern that FERC intends to initiate enforcement action on this matter. *California Independent System Operator Corp.*, 85 FERC ¶ 61,263, slip op. at 13-14,

⁴ That future order was issued on November 24, 1998, in which the FERC denied the ISO's request to defer enforcement of the orders requiring changes to the Bylaws and requiring the ISO to make the Bylaw changes within 45 days. *California Independent System Operator Corporation*, 85 FERC ¶ 61,263 (1998).

resolution and could not have rejected it. The ISO is now advising the Court of this consideration and requests that, in order to expedite ultimate resolution of the appeal, either the jurisdictional issue be consolidated with the merits or that oral argument on the jurisdictional issue be expedited, if possible.

Finally, the ISO's interest is to have the appeal resolved as soon as possible. Because the ISO is caught between conflicting directives, it is in considerable need of this Court's decision, especially in light of FERC's intention to pursue enforcement action against the ISO, as stated in the November 24, 1998 order. With the current schedule, there is a large window of unused time between now and the May 4, 1999 oral argument. The ISO wants to use the time in the most productive manner to ensure a prompt resolution of the appeal. FERC's and Enron's argument – that briefing the issues on the merits before the jurisdictional issue has been decided will be a waste of resources – improperly assumes that they will prevail on the jurisdictional issue. If the issues are not consolidated, and if FERC and Enron do not prevail in dismissing the appeal, then ultimate resolution of the appeal will be unreasonably delayed.

2. The ISO's Filing of a Supplemental Brief on the Jurisdictional Issue is Not Unfair to the Parties.

FERC and Enron argue that a supplemental brief may only cite and discuss authorities issued since the filing of the party's last brief and that the ISO has made impermissible additional legal arguments. Enron adds that after the Reply Brief, no further briefs may be filed except with leave of the Court. Enron also argues that supplemental briefs are not routinely permitted by the Court and allowing the ISO to file a supplemental brief now would be unfair to the other parties.

FERC's and Enron's arguments have no merit. The ISO did not file its Supplemental Brief pursuant to Circuit Rule 28(g), which permits a party to cite and discuss only authorities issued since the filing of the party's last brief.⁵ The ISO properly sought leave of the Court to file the Supplemental Brief, as is permitted by Rule 28(c). Moreover, the ISO did not seek to prevent FERC and Enron from responding to the arguments raised therein, and thus allowing the ISO to file its Supplemental Brief on the jurisdictional issue would not be unfair to other parties.⁶

CONCLUSION

FERC's and Enron's arguments in opposition to the ISO's Motion to Consolidate (or Expedite Oral Argument) and to File a Supplemental Brief on Jurisdictional Issue have no merit. The ISO is the first of what may be many new entities established without a previous power pool to meet FERC policy to ensure open access to the nation's transmission grid. It is the only one to date with a stakeholder board. Notwithstanding petitions for rehearing, a motion for stay, and numerous unsuccessful requests that FERC convene a public conference to settle this matter, the ISO continues to stand in the cross-fire between conflicting directives of the State of California and FERC. All it seeks now is a timely resolution by a Court of Appeal, as required by the California Constitution.⁷ The Court should (1) grant the ISO's motion to consolidate the issues on the merits (Docket Nos. 98-1225 and 98-1226) with the

⁵ The Clerk's Office requested that the ISO's Supplemental Brief be filed with a yellow cover, which is the color required by Circuit Rule 28(g). However, the fact that a yellow cover usually is used for supplemental briefs under Rule 28(g) does not convert the ISO's submission into a Rule 28(g) brief.

⁶ FERC's motion to strike the ISO's supplemental brief from the record implies that the ISO violated a Court rule in attaching the brief to the ISO's motion for leave to file the brief. However, it does not violate any Court rule, and indeed it is common practice, to attach the pleading to a motion for leave to file that pleading.

Docket No. 98-1384

jurisdictional issue (Docket No. 98-1384) for argument on May 4, 1999 or, alternatively, expedite the jurisdictional oral argument, and (2) grant the ISO leave to file its Supplemental Brief on the jurisdictional issue.

Respectfully submitted,

N. Beth Emery
Vice President and General Counsel
California Independent System Operator
Corporation
151 Blue Ravine Road
Folsom, CA 95630
Tel: (916) 351-2334
Fax: (916) 351-2350

Stephen Angle
Jerrold J. Ganzfried
Linda L. Walsh
Howrey & Simon
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Tel: (202) 783-0800
Fax: (202) 383-6610

Counsel for the California Independent System Operator Corporation

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⁷ Article III, Section 3.5(c), Cal. Const. (West 1983).