



at 2. The ISO stated in that filing that the Amended and Restated Bylaws did not address the changes regarding the residency requirement or the ongoing role of the Oversight Board as requested by the Commission in its October 30, 1997 order (81 FERC ¶ 61,122 (1997)).

*August 31, 1998 Transmittal Letter*, at 2. The ISO stated that it was not in full compliance with the Commission's orders because it finds itself caught between conflicting state and federal directives – the California legislation mandating the current governance structure in the ISO's Bylaws and the Commission's orders to remove the residency requirement and ongoing role of the Oversight Board. *Id.* The ISO further stated that pending the D.C. Circuit appeal, the ISO was not able to make the changes to the Bylaws required by the Commission without acting beyond its corporate powers. Making the Bylaw changes required by the Commission would raise questions as to the legality of the ISO's governance under California corporate law and, consequently, of any future actions it takes while it is under that governance.

Nevertheless, to avoid an entire Board being selected under the current Bylaw provisions that the Commission has directed the ISO to change, the ISO Board of Governors again extended the terms of the Board members to coincide with the earlier of the resolution of the D.C. Circuit appeal on the governance issues or November 30, 1999. *Id.* at 3. In the March 4, 1998 order, the Commission recognized the ISO's precarious position, noting that by voting to extend the Board member terms (to November 1998 at that time), the ISO would not be faced with an imminent problem of conflicting state and federal problems regarding the selection of Governing Board members. 82 FERC ¶ 61,223, at 61,871 (1998).

## RESPONSE TO INTERVENTION/PROTEST

EPMI and WPTF have raised the same issues that have been previously raised by various parties and the Commission regarding the governance issues in this proceeding. The ISO has made the Commission aware of the precarious position in which the ISO finds itself with respect to these issues. The ISO does not want to repeat those arguments.<sup>2</sup> However, WPTF and EPMI have made several allegations to which the ISO would like to respond.

First, the ISO wants to emphasize that its failure to change its Bylaws in accordance with the Commission's orders is in no way a "flagrant violation" of the Commission's orders, nor has the ISO "stubbornly" continued to maintain the residency requirement and the continued role of the Oversight Board.<sup>3</sup> These statements incorrectly imply that the ISO has made a political or strategic decision not to comply. As previously explained, the ISO believes that it is beyond its corporate powers to take the action the Commission requests. The state law that created the governance structure that FERC finds objectionable is beyond the ISO's ability to change. The ISO has taken the only action it believes that it can take without going beyond its corporate powers – that is to seek appeal of the Commission's orders with the Court of Appeals for the D.C. Circuit.

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<sup>2</sup> See *August 31, 1998 Transmittal Letter*, at 3; ISO's *Answer to TURN Complaint*, filed July 31, 1998; *Response to Respondent Federal Energy Regulatory Commission's Motion to Dismiss*, U.S. Court of Appeals for the D.C. Circuit, Nos. 98-1225 and 98-1226, filed June 29, 1998.

<sup>3</sup> *Protest and Answer of Enron Power Marketing, Inc. to Deficient Filing and Request By ISO Not to Institute Enforcement Action*, Docket Nos. EC96-19-029 and ER96-1663-030, filed September 28, 1998, at 8 (*EPMI Protest*); *Motion to Intervene Out of Time and Comments of the Western Power Trading Forum on the August 31, 1998 Supplemental Compliance Filing of the California Independent System Operator Corporation*, filed September 28, 1998, at 4 (*WPTF Motion to Intervene*).

Second, EPMI's response refers to the Commission's November 26, 1996 order<sup>4</sup> in *Pacific Gas & Elec. Corp.*, which states that "preemption may result from federal agency action taken within the scope of its congressionally delegated authority."<sup>5</sup> The issue of whether the action taken by the Commission in its order requiring the ISO to amend its Bylaws falls within the scope of FERC's congressionally delegated authority is currently being challenged on appeal. In that proceeding, the ISO (and the Oversight Board) have raised issues regarding whether the FERC had the jurisdiction under the FPA to issue the November 1996 and October 30 orders relating to the governance structure. Specifically, those issues are:

1. Under the Federal Power Act, does the Federal Energy Regulatory Commission's (FERC's) jurisdiction extend to matters included in a state law that asserts jurisdiction over service reliability decisions affecting retail transactions subject to state jurisdiction where those same decisions also affect interstate transmission subject to FERC regulation?
2. Under the Federal Power Act does FERC have jurisdiction to change the governance of an entity created by the state legislature and charged with carrying out both federal and state regulated functions, including the regulation of service reliability to retail customers subject to the state's jurisdiction?<sup>6</sup>

Thus, the condition that allows a federal agency ruling to preempt a state law – whether the Commission acted within the scope of its congressionally delegated authority – is now pending on appeal in the D.C. Circuit. Moreover, EPMI has ignored the fact that the ISO's

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<sup>4</sup> *EPMI Protest* at 11.

<sup>5</sup> *Pacific Gas & Elec. Corp., et al.*, 77 FERC ¶ 61,204, at 61,818 (1996) (citing *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 368-369 (1986)).

<sup>6</sup> *California Independent System Operator Corp., et al.*, U.S. Court of Appeals for the D.C. Circuit, Docket Nos. 98-1225 and 98-1226, *Joint Statement of Issues*, filed June 3, 1998.

corporate powers – attained through its Bylaws and Articles of Incorporation – preclude it from making the changes FERC has ordered. Thus, due to the pending nature of these issues, the questions regarding the Commission’s preemption of state law and the ISO’s ability to comply with the Commission’s orders are not as easily resolved as EPMI indicates.

Third, EPMI and WPTF request that the Commission order the ISO to make the changes to its Bylaws within fifteen days of the Commission’s order in this docket. *EPMI Protest* at 13; *WPTF Motion to Intervene* at 7. EPMI requests a “forceful Commission rebuke” to show the ISO that it must follow the law. *EPMI Protest* at 8-9. This kind of enforcement action against the ISO is not necessary and not the most efficient way to alleviate EPMI’s and WPTF’s concerns regarding the independence of the ISO governance structure. The ISO has always been willing to facilitate a settlement or some other resolution to this issue and has on several occasions requested that the Commission schedule a public conference to discuss potential resolutions. There is no question that the Commission’s enforcement authority is highly discretionary in this type of situation:

The breadth of agency discretion is, if anything, at its zenith when the action assailed related primarily not to the issue of ascertaining whether conduct violates the statute, or regulations, but rather to the fashioning of policies, remedies and sanctions, including enforcement and voluntary compliance programs, in order to arrive at maximum effectuation of congressional objectives.

*See e.g., Ozark Gas Transmission Sys.*, 42 FERC ¶ 61,198 (1988) (*citing Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153 (D.C. Cir. 1967)).<sup>7</sup> The ISO believes that state and

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<sup>7</sup> *See also Applied Energy Services, Inc. v. Oklahoma Corp. Comm’n*, 31 FERC ¶ 61,313 (1985). In that case, the Commission declined to act on AES’s complaint requesting that the Commission take enforcement action against the Oklahoma Corporation Commission (OCC), for promulgating a rule that violated the Commission’s rules implementing PURPA. Commissioner Stalon, in a dissent to the Commission’s decision not to take any action on AES’ complaint, argued that the Commission should have issued a declaratory order stating that “[t]he spirit of comity between this Commission and State

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federal objectives will best be met with a public conference that will enable parties and the Commission to better understand the issues and work out solutions that satisfy the Commission's and parties' concerns on the governance issues. For example, such a conference would allow the Commission and parties to explore what might be an appropriate ongoing role for the Oversight Board as noted in the Commission's March 4, 1998 order. 82 FERC at 61,871.

Thus, pending the resolution of the D.C. Circuit appeal of the governance issues, the ISO respectfully requests that the Commission schedule a public conference so that the Commission and parties can discuss potential resolutions of these issues.

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Commissions that is important to the smooth working of what is, in effect, a regulatory partnership in implementing Section 210 [of PURPA] suggests that we should give State Commissions the opportunity to correct inconsistencies with our rules . . .“ *Id.* at 61,707.