

UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION

Eric C. Woychik, The Utility Reform Network,	)	
Utility Consumers Action Network, and	)	
Consumers Union,	)	Docket No. EL98-51-000
	)	
Complainants	)	
	)	
v.	)	
	)	
California Independent System Operator and	)	
California Electricity Oversight Board,	)	
	)	
Respondents	)	

**ANSWER AND MOTION TO DISMISS OF THE  
CALIFORNIA INDEPENDENT SYSTEM  
OPERATOR CORPORATION**

Pursuant to Rule 213 of the Commission Rules of Practice and Procedure, 18 C.F.R. § 385.213, the California Independent System Operator Corporation (“ISO”) files its answer to and motion to dismiss the complaint filed on June 3, 1998 by Eric C. Woychik, The Utility Reform Network (“TURN”), Utility Consumers Action Network (“UCAN”), and Consumers Union (“CU”) (collectively, “Complainants”) on June 3, 1998. The ISO moves to dismiss the complaint because it involves resolution of the same issues that are now pending before the Court of Appeals for the D.C. Circuit and the Complainants have not shown that they will suffer irreparable harm during the appeal process. At a minimum, the ISO requests that the Commission defer ruling on the complaint until the appeal proceeding has been resolved.

**BACKGROUND**

On April 29, 1996, Pacific Gas and Electric Company, San Diego Gas and Electric Company, and Southern California Edison Company filed a joint application with the Commission requesting, among other things, authorization to transfer operational control over their jurisdictional transmission facilities to the ISO. The April 29 filings (“Phase I filings”)

were submitted at the direction of the Public Utilities Commission of the State of California (“CPUC”),<sup>1</sup> and implemented Phase I of the state’s electric industry restructuring. The California restructuring legislation, AB 1890,<sup>2</sup> requires that the ISO and the PX be incorporated and governed by separate Governing Boards whose participation is limited to California residents. AB 1890 also required that an Oversight Board be established to oversee certain aspects of the governance and operations of the ISO and the PX. It is undisputed that at the time of the Phase I filings, neither the ISO nor the Oversight Board was yet in existence; nor had the California Legislature enacted the statute that now mandates the corporate form of the ISO and the PX, establishes the residency requirement, and establishes the Oversight Board as a state agency.

On November 26, 1996, the Commission conditionally authorized the establishment of the ISO and the PX, and conditionally authorized the transfer of the jurisdictional transmission facilities to the ISO. *Pacific Gas & Elec. Co.*, 77 FERC ¶ 61,204, at 61,837 (1996) (“November 26, 1996 order”). In that order, the Commission rejected the proposal that all members of the ISO and PX Governing Boards be residents of the State of California. *Id.* In addition, the Commission held that, once the ISO and the PX were established, the Oversight Board’s continued participation in the ISO and PX governance and operations would conflict with the Commission’s statutory responsibilities, and that the Oversight Board would only be allowed to serve in a start-up capacity. *Id.* The Commission stated that the subsequent Phase II filing should not limit membership in the ISO and PX Governing Boards

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<sup>1</sup> CPUC Decision D. 95-12-065 (Dec. 20, 1995), *modified* D. 96-01-009 (Jan. 10, 1996) and D. 96-03-22, 166 P.U.R. 4th 1.

<sup>2</sup> Assembly Bill 1890, signed by Governor Wilson on Sept. 23, 1996, codified as Cal. Public Utilities Code §§ 337 and 339 (West 1998).

to California residents, and should provide for governance and dispute resolution procedures that do not involve the Oversight Board. *Id.*

The Commission's November 26, 1996 order stated that "the judgments we render and the guidance we provide herein are necessarily interim in nature" (*id.* at 61,808) and that it "defer[s] ruling on the final structure until the bylaws governing the selection and/or election of the Governing Board members, the CEO, and the committee members have been filed in Phase II." *Id.* at 61,816. The Commission also emphasized that the Phase II filing should be made by an independent ISO and PX, rather than by the three investor-owned utilities. *Id.* at 61,816.

At the time that the Commission issued its November 26, 1996 order, neither the ISO nor the Oversight Board was yet in existence. The ISO was incorporated on May 5, 1997. The Oversight Board, which was not formed until the California restructuring law took effect on January 1, 1997, had no members until appointments were made in February 1997. Thus, neither entity was in existence during the 30-day time period for seeking rehearing of the November 26, 1996 order. This is not disputed. *See Pacific Gas & Elec. Co.*, 81 FERC ¶ 61,122, at 61,437 n.9 ("October 30, 1997 order"); *Pacific Gas & Elec. Co.*, 82 FERC ¶ 61,223, at 61,870 (1998) ("March 4, 1998 order"); Motion of Respondent Federal Energy Regulatory Commission to Dismiss Petition for Review for Lack of Jurisdiction, U.S. Court of Appeals for the D.C. Circuit, Nos. 98-1225 and 98-1226, at 7, filed on June 18, 1998.

In accordance with the California State Legislature's directive in the restructuring legislation, the Phase II filings carried forward the California residency requirement for members of the respective Governing Boards, and included provisions implementing the legislation's mandate of an ongoing role of the Oversight Board. The Phase II filings

requested that the Commission reconsider the determination it made in its November 26, 1996 order with regard to the residency requirement and the Oversight Board provisions.

In its October 30, 1997 order, the Commission again rejected the proposed residency requirement and the governance provisions for the Oversight Board. The Commission concluded that these provisions were inconsistent with its November 26, 1996 order. 81 FERC at 61,451. In addition, the Commission concluded that no party had filed a request for rehearing of its rejection of these provisions within thirty days following the issuance of the November 26, 1996 order. *Id.* While the Commission rejected the filing as an untimely request for rehearing, it added that it would “address the arguments raised on reconsideration in the interests of comity and to provide guidance to other states considering restructuring activities.” *Id.* The Commission then declined to modify its position on the residency requirement and the ongoing role of the Oversight Board. *Id.* at 61,452.

The ISO filed a timely request for rehearing of the Commission’s October 30, 1997 order – the first order issued by the Commission on the governance issues after the ISO and the Oversight Board came into existence. The ISO sought rehearing both as to the procedural matters of the October 30, 1997 order (*i.e.*, the Commission’s rejection of rehearing) as well as to the substance of the Commission’s findings in the October 30, 1997 order (*i.e.*, the rejection of the residency requirement and the ongoing governance provisions). The ISO argued that rehearing of the Commission’s October 30, 1997 order was appropriate because neither the ISO nor the Oversight Board had been formed at the time of the November 26, 1996 order.

On March 4, 1998, the Commission issued its order on the requests for rehearing. The Commission reaffirmed its earlier determination that the prior requests for rehearing in the

Phase II filings were not timely because no party had requested rehearing of the November 26, 1996 Order. 82 FERC at 61,868. The Commission also adhered to its rejection of the residency requirement and the ongoing Oversight Board governance provisions. *Id.*

On April 30, 1998, the ISO and the Oversight Board filed petitions for judicial review in the U.S. Court of Appeals for the D.C. Circuit, seeking review of both the Commission's denial of the rehearing requests and its rejection of the California residency requirement and the ongoing role of the Oversight Board. On June 18, 1998, the Commission filed a motion to dismiss the ISO's and Oversight Board's petitions for lack of jurisdiction. The ISO and the Oversight Board filed a response to that motion on June 29, 1998. The ISO's response to the Commission's motion to dismiss is attached hereto. Petitioner California Independent System Operator Corporation's Response to Respondent's Motion to Dismiss (Attachment 1).

### **SERVICE**

All communications relating to this proceeding should be served on the following individuals:

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## MOTION TO DISMISS

### **1. The Complaint Involves The Same Governance Issues That Are Pending Before The Court Of Appeals For The D.C. Circuit.**

The Commission's March 4, 1998 and October 30, 1997 orders rejected certain aspects of the proposed governance structure of the ISO, including the ongoing role of the Oversight Board. The orders require that the ISO and the Oversight Board amend the ISO's corporate Bylaws. Here, the Complainants essentially have asked the Commission to again order the ISO to amend its Bylaws. Specifically, the Complainants ask the Commission for an order providing the following relief:

- 1) directing the ISO to seat Eric C. Woychik as a member of the ISO Board representing the class of residential end-users;
- 2) requiring the ISO to file within 45 days amendments to the governance provisions of its bylaws consistent with the Commission's prior orders; and
- 3) enjoining the ISO from complying with any order of the Oversight Board that is inconsistent with the Commission's prior orders

Complaint at 2, 14.

These are issues already being litigated in another forum – in a proceeding that must conclude to resolve the conflict of federal and state law the ISO now faces. For that reason, the Commission should dismiss this complaint or defer action, as more fully described below.

#### **a. The ISO May Not Effectively Amend Its Bylaws Absent an Order of a Court of Appeals.**

A prerequisite to each of these requested forms of relief is that the ISO must amend its Bylaws, and that the amendments be determined by the Commission to meet the ISO principles. In addition, for Mr. Woychik to be seated, his nomination would need to be made under such new Bylaw provisions and confirmed by whatever action would be necessary to

seat him as a governor. The Commission has already directed the ISO to amend the Bylaws. And, as a result, the ISO is subject to conflicting directives – the Commission’s orders to amend the Bylaws and the California Restructuring Legislation that applies to the ISO as a corporation organized and existing under the laws of the State of California. Among those laws applicable to the ISO are provisions mandating the very sections of the Bylaws to which the Commission objects.

Under California law and its own corporate documents, the ISO may not make the changes the Commission demands without (1) Oversight Board approval and (2) a change in (or established preemption to) the statute regarding Oversight Board review and residency requirements. Under Article III, Section 3.5, of the California State Constitution, when conflicting directives exist, the Oversight Board must follow California law until an appellate court rules that the state law is preempted by the agency ruling.<sup>3</sup> The Oversight Board thus cannot approve any changes to the ISO Bylaws if those changes would contradict the California Restructuring Legislation until the D.C. Circuit rules on this issue.<sup>4</sup> The ISO and the Oversight Board have filed Petitions for Review of the Commission’s orders in the U.S. Court of Appeals for the D.C. Circuit in an attempt to resolve this conflict.

The relief requested by the Complainants – which requires the amendment of the Bylaws – involves the resolution of the same issues already decided by the Commission and currently pending in the court of appeals. Complainants admit “the issues raised in this

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<sup>3</sup> The ISO has argued on appeal to the D.C. Circuit that, by denying rehearing as untimely, the Commission has denied the ISO any effective opportunity to appeal its decision on the governance issues and, as a result, the ISO is being denied its day in court. Attachment 1 at 10.

<sup>4</sup> Article IX, Section 3(b) of the Bylaws provides that any change to the appointment section of the Bylaws requires Oversight Board approval. (See Attachment 2).

complaint have already been before this Commission in the context of *three prior decisions*.” Complaint at 13 (emphasis added).

**b. Commission Precedent Supports Dismissal or Deferral of the Complaint**

Where issues raised in a complaint proceeding are currently being litigated (or have been resolved) in another proceeding, the complaint should be dismissed as to those issues. *See, e.g., Conoco, Inc. v. Trans Alaska Pipeline System*, 72 FERC ¶ 61,007, at 61,013 (1995) (dismissing complaint because the merits of the complaint were previously addressed in a final Commission order that was on appeal); *Connecticut Muni. Elec. Energy Coop. v. Connecticut Light and Power Co.*, 40 FERC ¶ 61,133, at 61,389 (1987) (dismissing complaint to extent that issues raised in the complaint were already pending in a rate proceeding, and, therefore, no additional relief was available in the complaint proceeding); *Texaco Refining and Marketing Inc. v. SFPP, Inc.*, 75 FERC ¶ 61,292, at 61,939 (1996) (dismissing portion of a complaint where the issues raised were litigated in another proceeding).

There is no need for the Commission to address these same issues in the context of this complaint while the appeal proceeding is already underway. Duplicative proceedings would be a drain on the Commission’s and the ISO’s resources and would not resolve the ISO’s conflict with federal/state directives. Moreover, as discussed below, Complainants have not shown that they will suffer irreparable harm during the appeal process. At a minimum, if the Commission does not dismiss the complaint, it should defer ruling until the issues before the D.C. Circuit are resolved.

**2. Complainants Have Not Been Deprived of Representation**

The Complainants allege that they are being “deprived . . . of representation on the Cal ISO Governing Board by the elected representative of their choosing” (complaint at 2) and



that “critical issues are being decided by the ISO board in the interim, without full residential end-user representation in its deliberations.” Complaint at 14.

The Complainants have not been deprived of representation by the ISO or the Oversight Board. The Bylaws provide that if the Oversight Board fails to appoint a designee, the class can simply choose another designee. Bylaws, Article III, Section 4(a). The Complainants have not presented the Oversight Board with another candidate for appointment despite the fact that over four months have passed since the Oversight Board rejected Mr. Woychik’s nomination. Thus, the harm the Complainants allege they have suffered in not having a representative on the board is easily remedied by selecting another representative. For example, when Mr. Woychik was selected, there were two candidates who had support from the residential end-user class – Mr. Woychik and Ms. Karen Johanson.<sup>5</sup> Complainants have not alleged nor could they demonstrate that there are no qualified candidates, aside from Mr. Woychik, that can represent the class, even if only on an interim basis, until the issues are resolved.

For all of the foregoing reasons, the complaint should be dismissed, or at a minimum deferred, because the issues underlying the complaint are currently pending in the D.C.

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<sup>5</sup> Ms. Johanson, from the League of Women Voters, has since been appointed as the board member for the End-User at Large class. Appointment of a board members in the End-user at Large class are made by the Oversight Board from a list of nominees and does not require the support of any particular class. With respect to Complainants’ arguments here, despite the fact that one Residential End-user board member seat is open (of a total of two), the Residential End-user class nevertheless has two individuals on the board who had received support from the Residential End-user class (the current Residential End-user board member and one of the current End-user at Large board members). If the Complainants had not neglected to elect another designee for Oversight Board consideration, they potentially could have had three board members with Residential End-user support on the governing board. Thus, Complainants’ claims that the ISO or the Oversight Board caused them to have inadequate representation on the board are unfounded.

Circuit appeal proceeding. It would be an inefficient use of the Commission's and the parties' resources to revisit the very same issues that the Commission has decided and are currently on appeal. Finally, the Complainants have not shown that they will suffer irreparable harm by not having Mr. Woychik as a board member representing their class, at least during the time the appeal is pending. Complainants may nominate an alternative representative, whose term would in any event expire in November.

### **ANSWER**

Pursuant to Rule 213(c)(2), the ISO hereby answers the allegations in the complaint as follows:<sup>6</sup>

**Page 1, first paragraph (continued on page 2):**

The ISO admits that it has not revised its Bylaws. The ISO has insufficient knowledge with which to admit or deny the allegations regarding the actions of the Oversight Board. The ISO denies the remainder of the allegations in that paragraph.

**Page 2, first full paragraph:**

The ISO admits that it has not revised its Bylaws. The ISO admits to allegations in this paragraph to the extent they are statements contained in the Commission's orders. The ISO denies the remainder of the allegations in this paragraph.

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<sup>6</sup> Because the allegations in the complaint are not contained in numbered paragraphs, the ISO has answered the allegations by referencing the paragraph location on each page of the complaint.

**Page 3, first full paragraph:**

The ISO has insufficient knowledge to admit or deny that the Complainants are non-profit consumer organizations. The ISO admits the remainder of this paragraph.

**Page 3, third paragraph (continued on page 4):**

The ISO admits the allegations in this paragraph, except to clarify that the ISO is a California *not-for-profit public benefit corporation* and not a “nonprofit corporation.”

**Page 4, first full paragraph:**

This paragraph contains allegations regarding the actions of the Oversight Board. The ISO does not have sufficient knowledge to admit or deny these allegations.

**Page 4, second full paragraph:**

The ISO admits that the name and address of the ISO’s Vice President and General Counsel are correct.

**Page 4, last paragraph (continued on page 5):**

To the extent that the allegations in this paragraph have been adopted by the Commission or the CPUC or the California Legislature, the ISO admits them. The ISO denies all other allegations in this paragraph.

**Page 5, first paragraph (continued on page 6):**

To the extent that the allegations in this paragraph represent statements by the Commission, the ISO admits them. The ISO denies all other allegations in this paragraph.

**Page 6, first full paragraph:**

The ISO admits that it has not revised its Bylaws. The ISO denies the remaining allegations in this paragraph., noting specifically that the Trustee, not the Oversight Board Chief Counsel, drafted the ISO Bylaws. The bylaws were adopted as an act of the incorporator to facilitate prompt organization of the ISO. The role of the Oversight Board in the Bylaws simply reflects compliance with AB 1890.

**Page 6, second paragraph (continued on page 7):**

The ISO admits that in its March 31, 1997 filing it asked the Commission to reconsider its November 26, 1996 order. With respect to the remainder of this paragraph, the ISO admits the allegations to the extent they represent statements by the Commission and denies all other allegations.

**Page 7, second paragraph (continued on page 8):**

The ISO admits that it has not changed its Bylaws. The ISO admits that it requested rehearing of the October 30, 1997 order. The ISO admits allegations in this paragraph regarding the ISO's request for a stay to the extent that such allegations have been adopted by the Commission. The ISO denies the remaining allegations in this paragraph, noting that it has taken more than "even a step" in seeking to comply with the Commission's order. Until the institution of Complainants' action, ISO officers were in settlement discussions with the State of California and the Commission to seek a resolution to the conflict of laws so that the appeal could be dismissed. Complainants' action has precluded further settlement discussions. Notwithstanding that, the ISO Governance Committee has

already had two public meetings and has two additional public meetings scheduled to discuss Bylaw amendments that would address the conflict of laws. Moreover, the ISO has sought an on-the-record settlement conference with the Commission staff and the Oversight Board in an effort to settle this dispute and avoid both the time and expense to all parties of the appeal.

**Page 8, first full paragraph:**

The ISO admits the allegations to the extent such allegations represent statements by the Commission.

**Page 8, second paragraph:**

The ISO admits that a board member resigned before that member's November 30, 1998 term had expired.

**Page 8, third paragraph:**

The ISO admits that it filed a Petition for Review in the U.S. Court of Appeals for the D.C. Circuit. The ISO denies the remainder of this paragraph.

**Page 9, first paragraph:**

The ISO admits that Mr. William Ahern submitted his resignation from the ISO Board. The ISO has insufficient knowledge to admit or deny the allegations regarding the reason for his resignation. The ISO admits that it oversaw the process of providing a nominee to fill Mr. Ahern's seat by calling a meeting of the entities entitled to vote on the nomination – which at that time were only four – UCAN, TURN, CU, and the League of Women Voters.<sup>7</sup> All four entities were represented

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<sup>7</sup> A fifth entity, the Office of Ratepayer Advocates of the California Public Utilities Commission, had not registered at that time, but was represented at the meeting.

at the meeting, held February 19. Two nominations were made and Mr. Woychik was elected by a majority of the four residential end-user organizations in attendance. The ISO denies the remainder of this paragraph.

**Page 9, second paragraph (continued on page 10):**

The ISO has insufficient knowledge to admit or deny the allegations in this paragraph regarding the actions of the Oversight Board.

**Page 10, first paragraph:**

The ISO admits that a public notice was issued stating that the ISO would be considering potential amendments to its Bylaws at the April 23, 1998 board meeting. The ISO admits that the item was removed from the board's agenda without action but objects to the inference that the ISO was not taking action. The ISO deferred action pending settlement discussions with the Commission. The ISO admits that on June 1, 1997 it submitted a compliance filing. The ISO admits that its Bylaws contained in the filing have not been revised. The ISO denies the remainder of this paragraph.

The ISO interprets the remainder of the complaint (pages 10-15) to be legal argument and thus does not specifically respond to each statement made there.

### **AFFIRMATIVE DEFENSE**

As Complainants recognize, the ISO is "caught between a rock and a hard place" with respect to the conflicting state and federal directives regarding the governance structure of the ISO. Complaint at 14. This, of course, is the reason the ISO has not yet amended its Bylaws

in accordance with the Commission's orders. As a practical matter, if the ISO were to amend its Bylaws there are genuine questions as to whether (1) the appointment would have legal effect in California<sup>8</sup> and (2) what the amended Bylaws' process for nomination and election would say. The key, however, is that absent a court of appeals order, any decisions made by the Governing Board, and subsequent actions by the ISO pursuant to such Governing Board decisions in violation of AB 1890, may be tainted by a potential illegality in the composition of the Governing Board members.

In the March 4, 1998 order, the Commission declined to stay its previous orders on the governance issues in part because the Governing Board voted to extend the terms of the existing Governing Board members to November 30, 1998, and thus "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." 82 FERC ¶ 61,223, at 61,871. However, since the March 4, 1998 order was issued, several board members have submitted early resignations. Thus, the circumstances have changed and the ISO is "faced with the imminent problem" of conflicting state and federal requirements.

The ISO cannot change its governance structure absent Oversight Board approval and amendment (or established federal preemption) of AB 1890. The Bylaws currently require that all appointments to the Governing Board be made by the Oversight Board. Bylaws, Article III, Section 4(a). In addition, any changes to the appointment section of the Bylaws require Oversight Board approval. Bylaws, Article IX, Section 3(b). The Oversight Board

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<sup>8</sup> The ISO, according to its Bylaws, can only act through its Board of Governors. Bylaws, Article III, Section 1.

cannot approve the requested changes in the ISO's governance structure without violating AB 1890, which it must recognize until a court of appeals confirms a valid federal preemption.

Specifically, the Oversight Board itself is governed by Section 334, *et seq.*, of the California Public Utilities Code. In particular, Sections 335(c) and 339 state that the Oversight Board is to serve as an appeal board for major decisions of the ISO Governing Board. Cal. Public Utilities Code, §§ 335(c) and 339, (West 1998). Sections 335(b) and 337 establish the Oversight Board as the appointing body for ISO Governing Board members. Cal. Public Utilities Code, §§ 335(b) and 337, (West 1998). As discussed above, the ISO's Bylaws reflect these specific provisions. Because the Oversight Board's powers and duties are codified as law in the State of California, the Oversight Board cannot make (or approve) the changes requested by the Commission (*e.g.*, remove the Oversight Board appointment authority) without acting in violation of the California Public Utilities Code. As discussed above, the California Constitution requires the Oversight Board to follow state law until an appeals court upholds the federal preemption. The Oversight Board thus has a reasonable basis for not approving any proposed amendments to the Bylaws *absent an order of the Court of Appeals, which the ISO is seeking.*

In addition, the ISO cannot make the Commission's requested changes because it does not have the corporate authority to do so. Under its Bylaws, the ISO currently has neither the authority to appoint Governing Board members nor the authority to change its Bylaws without Oversight Board approval. In addition, Section VII of the ISO's Articles of Incorporation state that "[a]ny bylaws of this corporation shall be adopted, and amended as necessary, so as to conform to requirements of the Statute [AB 1890] and to written decisions of the Oversight Board made pursuant to the Statute." The Commission's order requiring the ISO to change



the governance structure would require the ISO to act beyond its corporate powers as set forth in its Articles and Bylaws. Thus, the ISO has a reasonable basis for not amending its Bylaws in accordance with the Commission's orders, *absent an order of the Court of Appeals, which the ISO is seeking*.

### CONCLUSION

For the foregoing reasons, the ISO requests that the Commission dismiss the complaint or, at a minimum, defer ruling on the complaint until the Court of Appeals for the D.C. Circuit proceeding is resolved. The ISO also requests that the Commission set a date for a public settlement conference among all interested parties to discuss whether there are ways, consistent with the Commission's March 4 Order on Rehearing, to revise the ISO's governance structure in ways that do not "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."<sup>9</sup>

Respectfully submitted,

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Dated: July 31, 1998

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<sup>9</sup> *Pacific Gas and Electric Company*, 82 FERC ¶ 61,223, at 61,871 (1998).