

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

California Independent System) Dockets Nos. EC96-19-047
Operator Corporation) and ER96-1663-049

**MOTION FOR LEAVE TO FILE ANSWER AND
ANSWER TO PROTEST**

Pursuant to Rules 212 and 213 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. §§ 385.212, 385.213 (1997), the California Independent System Operator Corporation ("ISO") submits this Motion for Leave to File an Answer and Answer to the Protest of Enron Power Marketing, Inc. (“Enron”) filed in this docket.

I. BACKGROUND

Pacific Gas & Electric Company, San Diego Gas & Electric Company, and Southern California Edison Company first filed proposed Bylaws for the ISO with the Commission on April 29, 1996. The Commission conditionally approved the Bylaws, subject to modifications, on November 26, 1996, Pacific Gas & Electric Co., et al. 77 FERC ¶ 61,204 (1996). See also Pacific Gas and Electric Co., et al. 81 FERC ¶ 61,122 (October 30, 1997); and Pacific Gas and Electric Co., et al. 82 FERC ¶ 61,223 (March 4, 1998).

On August 31, 1998, the ISO requested that FERC delay enforcement of its prior orders requiring changes to the Bylaws (*i.e.*, the November 26, 1996, and October 30, 1997, orders), which are now on appeal in the U.S. Court of Appeals for the D.C. Circuit.¹ On November 24, 1998, the Commission refused the ISO's request. California Power Exchange, et al., 85 FERC ¶ 61,263 (1998). The Commission directed the ISO to file Amended and Restated Bylaws changing certain ISO governance provisions within 45 days of the date of the order. Specifically, the Commission ordered that the ISO remove the following provisions from the Bylaws: 1) the California residency requirement; 2) references to the California Electricity Oversight Board (California Oversight Board) in the process of appointing Governing Board members; 3) the requirement that the California Oversight Board approve certain changes to the ISO Bylaws; and 4) the authority of the California Oversight Board in hearing appeals of ISO Governing Board decisions, except with respect to state-jurisdictional matters or to mediate disputes between or among ISO Board members on a voluntary basis. 85 FERC ¶ 61,623 (1998).

On January 5, 1999, in open session following public and stakeholder comment, the Governing Board adopted Amended and Restated Bylaws to comply with the Commission's orders. The ISO filed the Amended and Restated

¹ The November 26, 1996, October 30, 1997 and March 4, 1998 orders are pending review in the U.S. Court of Appeals for the District of Columbia Circuit, Docket Nos. 98-1225, 98-1226 and 98-1384.

Bylaws with the Commission on January 8, 1999, which filing gives rise to the instant proceeding. Only one party, Enron, has protested the filing.

II. MOTION FOR LEAVE TO FILE ANSWER TO PROTEST OF ENRON POWER MARKETING

Notwithstanding Rule 213(a)(2), 18 C.F.R. § 385.213(a)(2), the Commission has accepted answers to protests that assist the Commission's understanding and resolution of the issues raised in a protest, Long Island Lighting Co., 82 FERC ¶ 61,216 (1998), clarify matters under consideration, Arizona Public Service Co., et al. 82 FERC ¶ 61,132 (1998); Tennessee Gas Pipeline Co., 82 FERC ¶ 61,045 (1998), or materially aid the Commission's disposition of a matter, El Paso Natural Gas Co., 82 FERC ¶ 61,052 (1998). In this instance, the Protest filed by Enron includes a number of assertions that are susceptible to erroneous inferences. The ISO's Answer will clarify matters under consideration, aid the Commission's understanding and resolution of the issues and help the Commission to achieve a more accurate and complete record, on which all parties are afforded the opportunity to respond to one another's concerns. Northern Border Pipeline Co., 81 FERC ¶ 61,402 (1997); Hopkinton LNG Corp., 81 FERC ¶ 61,291 (1997). The Commission should accordingly accept this Answer.

III. ANSWER

A. **The Bylaws Comply with the Commission's Directives Regarding the Role of the California Oversight Board in the Selection of Governing Board Members**

In its November 1998 Order, the Commission directed the ISO to eliminate references to the California Electricity Oversight Board (California Oversight Board) in the process of appointing Governing Board members. In accordance with this direction, the ISO has revised the Governing Board election procedures for all classes represented on the Governing Board, including the End-User at Large and Non-Market Participants classes. For all classes other than the End-User at Large and Non-Market Participants, the interested stakeholder groups will directly elect their representatives to the Governing Board. Upon the occurrence of a vacancy in one of the End-User at Large or Non-Market Participants classes, however, under the Amended and Restated Bylaws, the ISO will compile a list of nominees and forward it to the State Oversight Authority (which, at the current time, is the California Oversight Board). The State Oversight Authority will narrow the list to one more than the number of vacancies. Either the current End-User Governors or the entire ISO Governing Board will then appoint the Governor from that list to fill the vacancy.

Enron asserts that the Bylaws continue to provide the California Oversight Board with a substantial role in appointing the representatives of the End-User at Large and Non-Market Participants classes. Enron asserts, first, that the ISO will tailor the nomination list to coincide with the "known advance predilections" of the

California Oversight Board. Protest at 4. Second, Enron argues that the process by which the California Oversight Board recommends a list to the Board of Governors gives the California Oversight Board a veto power over the selection of the Governors in these classes.

Enron misunderstands the selection process in both these regards. First, the ISO's role in preparing a list of nominees is purely ministerial. The process begins with the ISO providing notice of the vacancy. This notice is widespread: it is posted on the ISO Home Page and sent by facsimile to all persons who have asked to be included on the ISO notice and information list. The ISO then collates the names of all nominees and forwards them to the California Oversight Board. The ISO does not "propose" candidates and exercises no discretion in the process. Indeed, the ISO has in the past forwarded names of candidates previously rejected by the California Oversight Board.

Second, the California Oversight Board is unable to exercise a veto because the ISO Governing Board is not confined to the initial list submitted to it by the California Oversight Board. As the ISO stated in its letter accompanying the filing of the Amended and Restated Bylaws, "The ISO Governors in end-user classes . . . may, at their discretion, choose not to appoint any such member and request additional recommendations from the State Oversight Board." Although the Bylaws require members to be selected from a list provided by the State Oversight Authority, they do not require the Governors to fill the vacancy from the first or any particular subsequent list. If the Governors wish, they may reject

all the submitted nominees, in which case the vacancy remains and the State Oversight Authority will be required to submit additional names. By this process, the State Oversight Authority provides an advisory role in the selection of Governors from the End-User at Large and the Non-Market Participants Classes, but exercises no control over their ultimate appointment.

B. It Is Necessary and Appropriate for the ISO to Maintain and Attempt to Follow Two Sets of Bylaws During the Pendency of Litigation.

As the Commission is aware, the ISO finds the authority for its existence in the electric restructuring legislation enacted in California, Assembly Bill 1890, as well as California law governing corporations. These laws – without which the ISO could not exist – set certain limits within which the ISO must operate. Among these limits is the requirement that amendments to corporate bylaws be approved as provided in the immediately preceding bylaws if those bylaws provide procedures therein. The ISO's Bylaws provide that amendments to certain articles must be approved by the California Oversight Board.

As a result, the ISO is confronted with two sets of operating imperatives, each claiming priority: the Amended and Restated Bylaws, adopted in accordance with the Commission's orders, and the original Bylaws, adopted according to procedures required by Assembly Bill 1890 and California law governing corporations. Although the Commission contends that its requirements are preemptive see 85 FERC at 62,064-66, the California Constitution requires state agencies, such as the California Oversight Board, to

follow state law until an appellate court upholds the Commission's preemption, Article III, Section 3.5. Because the ISO's Bylaws require Oversight Board approval of all amendments and the California Oversight Board cannot approve such amendments without an appellate court decision, the ISO faces a true dilemma. Under such circumstances, the ISO is pursuing the only prudent course of action while it awaits an appellate decision – it is attempting to operate in a manner that is consistent with both sets of requirements and offends neither.

Enron asserts that the ISO's course of action is impermissible. It states that "the provisions of the ISO's Bylaws providing for a role for the Oversight Board over FERC-jurisdictional matters are unlawful per se and of no force and effect." Protest at 7. Enron's argument, however, provides its own resolution. If these provisions of the original Bylaws are indeed null and void, then the ISO's mere "paper" perpetuation of these Bylaws, absent more, provides no offense to either the Commission or Enron. Only at such time as the ISO follows the original Bylaws in a manner that is inconsistent with the Amended and Restated Bylaws would the ISO be acting contrary to the Commission's orders. Until then, Enron's concerns are purely hypothetical.

Enron also argues that the ISO's effort to maintain two sets of Bylaws is unworkable because of conflicts between the Bylaws. The abstract existence of conflicts, however, does not affect the ISO's operations. The provisions of the Bylaws that conflict with the Amended and Restated Bylaws are simply not implicated in the ISO's daily operations. Indeed, the ISO does not foresee any

circumstance in the near future in which it will be called upon to act in a manner that conflicts with either set of Bylaws. The ISO knows of no imminent actions of the Governing Board that, under the original Bylaws, would entail involvement of the California Oversight Board in a manner contrary to the Commission's direction.

The ISO is hopeful that it can operate in a manner that complies with both Federal and California requirements until the resolution of pending litigation. Nonetheless, Enron asks the Commission to direct the ISO to take actions that conflict with California law. Such an order is not necessary to maintain the integrity of the Commission's jurisdiction, and there thus is no justification for forcing the ISO to take such action.

C. The Amended and Restated Bylaws Appropriately Provide for Review of Amendments by the State Jurisdictional Authority

In accordance with the Commission's November 1998 Order, the Amended and Restated Bylaws do not require approval by the State Oversight Authority of amendments to the Bylaws. Rather, they simply provide for notice of proposals to amend the Bylaws and for submittal of adopted amendments to the State Oversight Authority for its review.

Enron does not object to the submittal of amendments for review by the State Oversight Authority. Nonetheless, Enron cites "previous confusion" about the role of the California Oversight Board and protests that the requirement for review should be deleted because it might create "future confusion and possible

conflict” regarding the role of the California Oversight Board in the amendment process. Protest at 9.

The simple fact is, however, that the Amended and Restated Bylaws do not provide for a role by the State Oversight Authority in the amendment process. No previous “confusion” can provide a role that does not exist. Indeed, the ISO is at a loss to understand how a review after amendments have been approved can possibly be construed as entailing any sort of decision-making role.

Enron further objects to provisions providing the State Oversight Authority with notice of any vote on amending the Bylaws. Again, Enron does not object to the notice itself, but to the Bylaws’ requiring such notice – it fears that the notice will imply a role for the State Oversight Authority in approving the amendments. Such an implication would certainly be attenuated: the notice provided to the State Oversight Authority is simply the same notice provided to the public on the ISO Home Page and to the Governing Board.

The requirement that notice be provided to the State Oversight Authority is in this manner analogous to the Commission’s requirement that public utilities provide notice of certain rate filings directly to state public utility commissions, 18 C.F.R. § 25.2(b) (1998), even while more general notice is provided to the public at large, 18 C.F.R. § 35.8 (1998). Although this requirement recognizes the particular interest of the state commission, it provides the state commission

with no greater role in the proceeding than other intervenors and with no role at all in the decisional process.

The Amended and Restated Bylaws simply provide no role for the State Oversight Authority in the amendment of the Bylaws. Enron is asking the Commission to issue new orders, require the Governing Board to adopt new amendments, and direct additional filings (with perhaps additional protests regarding inferences to be drawn from the failure to adopt extraneous language) in order to address a hypothetical concern. The Commission should not follow that course.

D. The Amended and Restated Bylaws Clearly Set Forth the Appellate Jurisdiction of the State Oversight Authority.

Pursuant to the Commission's order, the Governing Board revised the Bylaws to limit the appellate jurisdiction of the State Oversight Authority to matters within the jurisdiction of the State Oversight Authority. Enron asserts that the appellate authority of the State Oversight Authority is unclear because the Amended and Restated Bylaws cite Section 339 of the California Public Utilities Code, the statutory provision that provides the Oversight Board with appellate jurisdiction authority and without which the Oversight Board would have no state appellate jurisdiction. Enron asserts that because the authority in Section 339 is not explicitly limited, the provision could be interpreted to provide the State Oversight Authority with plenary jurisdiction.

Despite Enron's concern, Section 13.4 of the Amended and Restated Bylaws is clear. It provides for appeals of decisions that "relate to matters within the jurisdictional authority of such State Oversight Authority, including procedural matters, the Corporation's responsibilities to ensure reliability of the ISO Controlled Grid, or the adoption, amendment, or enforcement of transmission maintenance standards." The reference to the state laws that authorize such appeals cannot be read to expand this explicit limitation on authority. Moreover, even if there were any ambiguity (which the ISO does not believe there is), the provisions must be interpreted in light of the Commission's orders that gave rise to the amendment. There is thus no reason for modification of the appellate provisions of the Amended and Restated Bylaws.

IV. CONCLUSION

The arguments presented by Enron in its Protest provide no reason to conclude that the ISO has in any manner failed to comply with the Commission's orders regarding its Bylaws. The Commission should approve the Amended and Restated Bylaws as filed.

Respectfully submitted,

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Dated: February 23, 1999

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the service list compiled by the Secretary in this proceeding.

Dated at Washington, DC, this 23rd day of February, 1999.

Michael E. Ward
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