

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Unidentified Registered Entity

)

Docket No. ER11-2798-000

**NOTICE OF INTERVENTION AND PROTEST OF
THE ORGANIZATION OF MISO STATES, INC.**

Pursuant to Rules 211 and 214(a)(2) of the Federal Energy Regulatory Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.211 and § 385.214(a)(2), the Organization of MISO States ("OMS") files its Notice of Intervention and protest of the January 28, 2011, filing by an Unidentified Registered Entity ("URE") in the above-captioned proceeding. ("January 28 Filing")

Service of all pleadings, documents, and communications in this matter should be made on the following:

William H. Smith, Jr.
Executive Director
Organization of MISO States
100 Court Avenue, Suite 315
Des Moines, Iowa 50309
(515) 243-0742

The January 28 Filing seeks the Commission's approval to recover the costs associated with a penalty resulting from an Abbreviated Notice of Penalty ("NOP") filed by the North American Electric Reliability Corporation ("NERC") on December 22, 2010, in Docket No. NP11-59-000. To remit payment of the penalty amount to the ReliabilityFirst Corporation ("ReliabilityFirst") in a timely manner, the URE requests that the Commission provide expedited treatment of its requests and make the filing effective on the date either that the Commission approves the NOP filed in Docket No. NP11-59-000, or that such NOP becomes effective by operation of law.¹

¹ January 28 Filing, at 8

The OMS notes that the January 28 Filing is posted on the “FERC Filings” portion of the Midwest ISO’s website. Given that the filing is posted on the Midwest ISO’s website, it is reasonable to assume that the Midwest ISO is either responsible for the NERC penalty or is attempting to collect the NERC penalty on behalf of one of its members. However, because of the heavy redacting of the January 28 Filing, the OMS is forced to file this protest out of an abundance of caution. Indeed, the OMS has no ability to determine if real interest is involved.

The OMS protests the January 28 Filing for two reasons. From a procedural prospective, the January 28 Filing is excessively redacted – to the point where it is impossible to determine the identity of the filing entity and the rate schedule to be changed. This is problematic in that the January 28 Filing therefore fails to satisfy the requirement of Section 205 of the Federal Power Act that tariff changes can be made only with notice to affected customers. The OMS notes that entities may attempt to circumvent this requirement by including tariff language intended to serve as advanced notice of such a filing. For example, Schedule 34 of the Midwest ISO’s tariff states that the purpose of the schedule is to provide notice to all tariff customers and members that they may potentially be responsible for such penalty costs assessed against the Midwest ISO. However, such notice is not sufficient to comply with the Federal Power Act and also fails to provide affected customers with due notice of any proposed change to a rate schedule. Indeed, no customer can determine if it is affected by the change because of the filing’s silence on these critical elements.

While the OMS is sensitive to the URE’s desire to avoid public disclosure of a NERC penalty, this anonymity cannot be maintained while asking customers to bear the expense of that penalty.

The OMS is also concerned with the policy aspects of a not-for-profit entity’s efforts to pass-through the costs of a penalty. The policy question requires consideration of the compliance and enforcement incentives invoked in any particular violation situation. If the Midwest ISO is responsible for the NERC penalty, then the OMS’ concerns regarding a not-for-profit attempting to pass-through the costs of a penalty are real and need to be addressed by the Commission. The Commission expressed similar

concerns in its *Order Providing Guidance on Recovery of Reliability Penalty Costs*.²

Specifically, that:

If an RTO or ISO knows it could simply pass through the costs of those penalties, the incentive to comply with the Reliability Standards would be reduced. On the other hand, the Commission is mindful of the fact that some RTOs and ISOs operate as not-for-profit organizations, which may well find payment of substantial penalties difficult if not impossible to make.

This case calls for inquiry into the Commission's concerns in the context of a particular penalty situation. The OMS therefore asks the Commission to reject this filing or to set it for hearing or other appropriate procedural analysis.

Respectfully Submitted,
William H. Smith, Jr.
William H. Smith, Jr.
Executive Director
Organization of MISO States
100 Court Avenue, Suite 315
Des Moines, Iowa 50309
E-mail: bill@misostates.org
Tel: 515-243-0742

Dated: February 10, 2011

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.
Dated at Des Moines, Iowa, this 10th day of February, 2011.

William H. Smith, Jr.

² *Order Providing Guidance on Recovery of Reliability Penalty Costs*, 122 FERC ¶61,247 (2008), at P 26-27.