

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

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**NORTH AMERICAN ELECTRIC  
RELIABILITY CORPORATION**

**DOCKET No. NP09-26-000**

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**MOTION TO INTERVENE AND PROTEST OF  
TRI-STATE GENERATION AND TRANSMISSION ASSOCIATION, INC.**

Tri-State Generation and Transmission Association, Inc. (“Tri-State”) hereby moves to intervene and submits a protest in the above-captioned proceeding pursuant to Rules 211, 212 and 214 of the Federal Energy Regulatory Commission’s (“Commission” or “FERC”) Rules of Practice and Procedure, 18 C.F.R. §§ 385.211, 385.212, 385.214 (2009), and the Commission’s Notice of Filing issued in this proceeding on June 3, 2009. This proceeding concerns the North American Electric Reliability Corporation’s (“NERC” or “ERO”) Notice of Penalty regarding the U.S. Army Corps of Engineers—Tulsa District (“COE—Tulsa District”). In the Notice of Penalty, NERC requested that the Commission issue a decision clearly deciding the scope of NERC’s and the Commission’s jurisdiction under Section 215 of the Federal Power Act. Tri-State protests NERC’s filing and asks the Commission to determine that neither the Commission nor NERC may levy a monetary penalty against a Federal agency or other governmental entity. In support, Tri-State states as follows:

## **I. COMMUNICATIONS**

Please direct communications concerning this pleading to the following persons and place their names on the Commission's official service list.

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## **II. MOTION TO INTERVENE**

Tri-State is a cooperative corporation headquartered in Westminster, Colorado. Tri-State's primary functions involve the generation, transmission, transformation and sale of electricity at wholesale to its forty-four member distribution cooperatives within the states of Colorado, Nebraska, New Mexico and Wyoming. The member systems serve approximately 1.4 million consumers in the Western Interconnection. Tri-State has outstanding debt with the U.S. Department of Agriculture's Rural Utilities Service

and therefore is not a “public utility” as that term is defined in Section 201(e) of the Federal Power Act.

Tri-State purchases hydropower and transmission service from Federal agencies, including the Western Area Power Administration, to supply its members. NERC’s endeavor to assert penalty authority over a Federal agency that depends on Congressional appropriations to fund its activities could result in the pass through of the penalty to Tri-State and its members through the Federal agency’s rates. No other party can represent the interests of Tri-State and its members in this proceeding. Therefore, Tri-State requests that the Commission grant its motion to intervene in the proceeding.

### **III. PROTEST**

On June 24, 2009, NERC filed a Notice of Penalty regarding COE—Tulsa District in which NERC requested that the Commission issue a decision clearly deciding the scope of NERC’s and the Commission’s jurisdiction under Section 215 of the Federal Power Act. Throughout the NERC enforcement process, COE—Tulsa District has reiterated its belief that the Federal Power Act does not (1) authorize any regional entity to impose mandatory standards on a Federal agency or (2) permit a regional entity to assess penalties for a failure to adhere to those standards. This jurisdictional question raises a significant issue with respect to the reliability of the Bulk Electric System (“BES”).

**A. FEDERAL AGENCIES MUST COMPLY WITH NERC'S RELIABILITY STANDARDS.**

Both the Federal Power Act and public policy considerations compel the conclusion that Federal agencies must be subject to the standards adopted by NERC and approved by the Commission. Although Section 201(f) of the Federal Power Act provides that no provision of Part II of the Federal Power Act applies to the United States, Section 201(b)(2) of the Federal Power Act states that notwithstanding Section 201(f), the provisions of Section 215 of the Federal Power Act shall apply to the entities described in that section and such entities shall be subject to the jurisdiction of the Commission for purposes of carrying out the that section.<sup>1</sup> Section 215 contains no exemption for governmental entities, including the United States, from compliance with the reliability standards that NERC adopts and the Commission approves.<sup>2</sup> The broad scope of NERC's and the Commission's authority under Section 215 is consistent with public policy objectives. To protect and ensure the reliability of the BES, it is vital that all users, owners and operators of the BES, including Federal agencies, must obey the same mandatory reliability standards.

**B. FEDERAL AGENCIES SHOULD NOT BE SUBJECT TO MONETARY PENALTIES FOR VIOLATION OF RELIABILITY STANDARDS.**

While Federal agencies must comply with the reliability standards, there are significant legal reasons why Federal agencies should not be subject to monetary

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<sup>1</sup> 16 U.S.C. §§ 824(b)(2) and 824(f) (2006).

<sup>2</sup> 16 U.S.C. § 824o (2006).

penalties in the event they are found to have violated NERC reliability standards. As noted above, Section 201(f) exempts Federal agencies from the Commission's jurisdiction except to the extent provided in Section 201(b)(2).<sup>3</sup> Although Section 201(b)(2) provides that Federal agencies are subject to Section 215, Section 201(b)(2) does not provide that Federal agencies are subject to civil monetary penalties pursuant to Section 316A of the Federal Power Act.<sup>4</sup> Therefore, it does not appear that the Commission or NERC have the authority to impose civil penalties on Federal agencies.

Federal agencies rely on appropriated funds from the Treasury to finance their statutory obligations and generally do not have the authority to pay civil penalties because they have limited discretion in allocating these funds. In Order No. 890-A, the Commission responded to concerns expressed by the members of Regional Transmission Organizations ("RTO") and Independent System Operators ("ISO") that, as not-for-profit entities, RTOs and ISOs would have to rely on member funding to pay for any operational penalties assessed against the RTO or ISO. The Commission found that "[e]ach RTO and ISO has discretion to determine, as an organization, how to reallocate its funds" to pay a monetary penalty.<sup>5</sup> Federal agencies do not have similar budgetary discretion. As a general proposition, no authority exists for the Federal government to use appropriated funds to pay fines or penalties incurred as a result of its

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<sup>3</sup> 16 U.S.C. §§ 824(b)(2), 824(f) (2006).

<sup>4</sup> 16 U.S.C. § 824(b)(2) (2006); 16 U.S.C. § 825o-1 (2006).

<sup>5</sup> *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890-A, 121 FERC ¶ 61,297, at P 485 (2007).

activities or those of its employees.<sup>6</sup> For a Federal agency to pay a penalty, there must be appropriated funds available for that purpose. Even where a court has found a claim to be valid under the law, the claim may not be paid unless Congress has enacted an appropriation available for that purpose.<sup>7</sup> Thus, a Federal agency has little or no ability to reallocate its funds to pay a monetary penalty without first requesting and receiving permission and an appropriation from Congress.

Third, a Federal agency generally is unable to pay monetary penalties because it may not spend or obligate more capital than was appropriated through the congressional funding process for that particular purpose. The Anti-Deficiency Act prohibits making or authorizing an expenditure from, or creating or authorizing an obligation under, any appropriation or fund in excess of the amount available in the appropriation or fund unless authorized by law.<sup>8</sup> As a result, a Federal agency would be unable to authorize payment of a monetary penalty without authorization from Congress.

There are also policy reasons why Federal agencies should not be subject to monetary penalties. The assessment of a monetary penalty against a Federal agency will not provide the necessary incentive for that agency to abide by the mandatory

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<sup>6</sup> Gov't Accounting Office, *Principles of Federal Appropriations Law*, 4-140 (3rd ed. Vol. 1 revised 2009).

<sup>7</sup> *Office of Pers. Management v. Richmond*, 496 U.S. 414, 424-425 (1990); *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937) (citing *Reeside v. Walker*, 52 U.S. 272, 291 (1851)) (stating that "no money can be paid out of the Treasury unless it has been appropriated by an act of Congress").

<sup>8</sup> 31 U.S.C. § 1341(a)(1)(A) (2006).

reliability standards. The principal rationale behind imposing a monetary penalty is to deter the wrongdoer and others from engaging in the penalized behavior. In the case of a Federal agency, a monetary penalty will not serve this purpose because Federal agencies receive their funding predominantly from Congressional appropriations. In some instances, a Federal agency's budget may also derive from rates charged to customers for generation and transmission services. Consequently, the imposition of a monetary penalty on a Federal agency would result in, at best, an increase in the rates charged to the customers of that Federal agency and possibly an increase of the burden on taxpayers, but would not result in a greater incentive to comply with the reliability standards.

While it is clear that the Commission and the ERO must have access to adequate mechanisms to ensure compliance with reliability standards, it is not necessary that those mechanisms include the ability to impose monetary penalties on Federal agencies. NERC and the Commission have adequate mechanisms to obtain compliance with the standards, including the ability to audit or evaluate an entity's compliance with the standards and the authority to require an entity implement a Mitigation Plan to return to compliance with the standards. The existence of the standards combined with the Commission and NERC's ability to evaluate a Federal agency's compliance with the reliability standards and to demand the proper implementation of those standards should be sufficient to ensure that Federal agencies are held to the same standards of compliance as other owners, users and operators of the Bulk Electric System.

#### **IV. CONCLUSION**

WHEREFORE, Tri-State respectfully requests that the Commission grant its motion to intervene in this proceeding and that the Commission determine that neither the Commission nor NERC may levy a monetary penalty against a Federal agency or other governmental entity.

Respectfully submitted,

BRUDER, GENTILE & MARCOUX, L.L.P.

/s/ Jesse Y. Halpern

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