

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Enforcement of Statutes, Regulations, and Orders

Docket No. PL10-2-002

(January 28, 2011)

Attached is the statement by Commissioner Spitzer dissenting to an order issued on January 24, 2011, in the above referenced proceeding. *Enforcement of Statutes, Regulations, and Orders*, 134 FERC ¶ 61,054 (2011).

Kimberly D. Bose,  
Secretary.

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SPITZER, Commissioner, *dissenting*:

On December 17, 2009, the Commission issued an Order authorizing the Secretary of the Commission to issue a Staff's Preliminary Notice of Violations (Preliminary Notice of Violation or Notice) upon direction from the Director of the Office of Enforcement.<sup>1</sup> On January 24, 2011, the majority denied rehearing of the December 17 Order, concluding that the Commission "struck the appropriate balance" of competing interests. I disagree. I found the requests for rehearing compelling. Therefore, upon review of the record, I conclude that the December 17 Order contains defects that impair the balancing of interests. For the foregoing reasons, I respectfully dissent.

To be clear, I agree with my colleagues that we should strive to achieve greater transparency in our enforcement program.<sup>2</sup> I continue to support the stated purpose of the December 17 Order – "to provide the public with notice of and information about enforcement activities."<sup>3</sup> The problem is that, although transparency is a virtue, we as a governmental agency must balance the benefits of greater transparency with the fundamental principle of due process.

I do not believe the December 17 Order complies with the Commission's obligations under the Administrative Procedure Act (APA).<sup>4</sup> Moreover, assuming *arguendo* that the December 17 Order complies with the APA, the goals of transparency and due process can be reconciled by allowing issuance of a Preliminary Notice of

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<sup>1</sup> *Enforcement of Statutes, Regulations, and Orders*, 129 FERC ¶ 61,247 (2009) (December 17 Order), *order on rehearing and clarification*, 134 FERC ¶ 61,054 (2011). For citation purposes, I refer to the January 24, 2011 rehearing order as the "Revised Order."

<sup>2</sup> *Tenaska Marketing Ventures, et al.*, 126 FERC ¶ 61,040 (2009) (Spitzer, *dissenting*); *Florida Blackout*, 129 FERC ¶ 61,016 (2009) (Spitzer, *concurring*).

<sup>3</sup> December 17 Order at P 1.

<sup>4</sup> 5 U.S.C. § 551 et seq. *See also* Revised Order at P 11-13.

Violation with the identity of the subject of an investigation masked. As one of the rehearing requests suggests, a Preliminary Notice of Violation masking the identity of the target “would [still] provide the regulated community with guidance to promote compliance, provide the public with information about the Commission’s enforcement activities and, at the same time, protect the reputation of the entity under investigation until the Commission has had an opportunity to consider the Staff’s views.”<sup>5</sup> The majority fails to meaningfully address why the transparency objective is frustrated by masking the identity of the subject of an investigation while disclosing the relevant facts surrounding alleged violations.

### I. Procedural Issues

As an initial matter, the December 17 Order raises procedural concerns. The majority asserts that the December 17 Order is a “policy statement” or alternatively, a “pronouncement of agency organization, procedure or practice,” and therefore unfettered by the requirements of the APA.<sup>6</sup> The majority makes this contention because: (1) a Preliminary Notice of Violation has “no substantive legal effect, and does not conclusively or otherwise affect the rights of the subject”; (2) the December 17 Order is nothing more than an exercise of discretion “to release certain non-public information pertaining to an investigation”; (3) the December 17 Order is merely “empowering the Director . . . to authorize the Secretary . . . to issue a Notice”; (4) the December 17 Order addresses the “manner and timing” of the issuance of such Notices; or (5) the December 17 Order only authorizes Notices after the investigation has progressed to a certain point.<sup>7</sup>

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<sup>5</sup> “Request of the Financial Institutions Energy Group for Rehearing, or Alternatively, Reconsideration, and Clarification of the Order Authorizing Secretary to Issue Staff’s Preliminary Notice of Violations,” at 3-4 (filed Jan. 19, 2010) (Financial Institutions’ Rehearing).

<sup>6</sup> The majority asserts that the question of APA compliance was not raised in the requests for rehearing. Revised Order at n.27. I disagree. *See* “Request for Rehearing and Clarification of the Edison Electric Institute, Electric Power Supply Association, American Gas Association, and Interstate Natural Gas Association of America” (filed Jan. 19, 2010) (Energy Associations’ Rehearing) at n.20 (“The December 17 order could be construed as a substantive rule . . . . Such a construction . . . would trigger a requirement” under the APA “that the Commission provide notice and an opportunity for comment before adopting the new procedure.”). In any case, notwithstanding the content of parties’ pleadings, the Commission has an independent duty to comply with its statutory obligations.

<sup>7</sup> Revised Order at P 11-13.

In reality, however, the December 17 Order goes further than the majority concedes. The December 17 Order creates an entirely new procedure, which does not exist today, to make public investigative proceedings prior to any finding of wrongdoing by the Commission. Moreover, the December 17 Order creates a new mechanism to allow third parties to play a role in investigative proceedings that Staff determines should go forward to the Commission, which also did not exist prior to the issuance of the December 17 Order. I am concerned, notwithstanding the majority's overly narrow characterization, that the December 17 Order, in reality, changes our regulation in a manner that cannot be accomplished via this type of issuance.

Section 1b.9 of our regulations states, in relevant part:

All information and documents obtained during the course of an investigation, whether or not obtained pursuant to subpoena, and all investigative proceedings shall be treated as nonpublic by the Commission and its staff except to the extent that (a) the Commission directs or authorizes the public disclosure of the investigation; . . . .<sup>8</sup>

Thus, before issuance of the December 17 Order, section 1b.9 of our regulations required that all investigative proceedings, and information derived therefrom, be non-public unless the Commission decided otherwise. Up to this point, the plain language of the regulation and the Commission's interpretation of section 1b.9 required confidential treatment of investigative proceedings except in very limited circumstances. By the December 17 Order, the majority flips that long-standing reading of section 1b.9 of our regulations so that now the Commission will allow Staff to make investigative proceedings that Staff presents to the Commission for settlement authority public prior to any finding of wrongdoing by the Commission.

A pronouncement crosses the line to require compliance with the APA's rulemaking requirements when the pronouncement has a binding effect on the public or on the agency itself.<sup>9</sup> And courts have made clear that "an agency pronouncement will be considered binding as a practical matter if it either *appears on its face* to be

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<sup>8</sup> 18 C.F.R. § 1b.9 (2010).

<sup>9</sup> *U.S. Telephone Ass'n v. FCC*, 28 F.3d 1232, 1234 (D.C. Cir. 1994) (*U.S. Telephone*) (whether an agency pronouncement must go through the notice-and-comment procedure "turns on an agency's intention to bind itself to a particular legal policy position").

binding . . . or is applied by the agency in a way that indicates it is binding. . . .”<sup>10</sup> By its own terms, the Revised Order leaves little, if any, discretion to Commission Staff in issuing the Preliminary Notice of Violation.<sup>11</sup>

The majority attempts to diminish concerns about the scope of the discretion given to the Director of Enforcement with respect to when and how a Notice will issue. In doing so, however, the majority muddles the roles of the Commission and the Director of Enforcement and only exacerbates the defects in December 17 Order. Specifically, on one hand, the majority indicates that it has “committed implementation of the Notice procedure to the discretion of the Director” of Enforcement and that Notices will issue upon his or her “authorization.”<sup>12</sup> Indeed, the majority goes as far to signal that “it anticipates that a Notice will issue in every investigation in which staff . . . decides to forward the matter to the Commission for settlement authority.”<sup>13</sup> Yet, elsewhere in the Revised Order, the majority states that the Commission will have an opportunity to review, stay, bar, or countermand the issuance of a Notice.<sup>14</sup> The majority never attempts to address these conflicting statements.<sup>15</sup> Further, these conflicting statements over when

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<sup>10</sup> *General Electric Co. v. EPA*, 290 F.3d 377, 383 (D.C. Cir. 2002) (emphasis added). See also *Panhandle Producers & Royalty Owners Ass’n v. Econ. Regulatory Admin.*, 822 F.2d 1105, 1110 (D.C. Cir. 1987) (*Panhandle*) (An agency pronouncement is not deemed a binding regulation “as long as it ‘leaves the administrator free to exercise his informed discretion’”).

<sup>11</sup> Revised Order at P 23.

<sup>12</sup> *Id.* P 28.

<sup>13</sup> *Id.* P 23 (emphasis added).

<sup>14</sup> *Id.* P 11 (“Therefore, the Commission’s decision to authorize issuance of Notices under certain specified circumstances is not substantive but procedural.”); n.32 (“The Director of the Office of Enforcement will notify the Commission prior to issuance of the Notice, thus giving the Commission the opportunity to countermand issuance if it deems it appropriate to do so.”); P 23 (“However, the Commission retains the discretion to stay or bar issuance of the Notice in any given matter. . . . [t]he proposed Notice will be provided to the Commission with the opportunity to review it. . . .”).

<sup>15</sup> The December 17 Order, as revised, now establishes the following policy: the Commission has delegated to its Staff the task of issuing Notices, except to the extent the Commission chooses not to delegate that task to its Staff. This does not appear to me to be a clear policy or standard, particularly given that the Commission has provided no explanation as to the basis on which it will apply the policy. It is hard to see how this approach furthers transparency.

and how a Notice will issue simply raise more questions about the majority's approach. For example, the approach raises fundamental questions as to what standard or procedures the Commission will use to determine whether issuance of a Notice is appropriate or not.

The answers to these questions are important because the courts have held that “[w]hen an agency promulgates a policy without the formalities required to make it a valid rule, it must, in subsequent rulemakings as in subsequent adjudications, ‘be prepared to support the policy just as if the policy statement had never been issued.’”<sup>16</sup> Consequently, a policy statement has no binding effect of its own. Indeed, as the Commission recently acknowledged in the Revised Policy Statement on Penalty Guidelines, the Commission must adhere to additional legal requirements each time it applies a policy statement: “This is a policy statement. Consistent with the [Administrative Procedure Act], when the Commission applies the Penalty Guidelines in orders, we will present why it is appropriate to apply the Penalty Guidelines and will justify their application in the particular circumstances at hand.”<sup>17</sup>

The problem here is that neither the December 17 Order nor the Revised Order address how *the Commission* will comport with the requirement that it satisfy its statutory obligations under the APA each time a Preliminary Notice of Violation is issued or countermanded.<sup>18</sup> The Commission's ability to claw back its delegation does not satisfy

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<sup>16</sup> *Simmons v. Interstate Commerce Comm'n*, 757 F.2d 296, 300 (D.C. Cir. 1985) (citing *Pacific Gas & Elec. v. Fed. Power Comm'n*, 506 F.2d 33, 38 (D.C. Cir. 1974) (*PG&E*)), see also *Panhandle*, 822 F.2d at 1111.

<sup>17</sup> *Enforcement of Statutes, Orders, Rules and Regulations*, 132 FERC ¶ 61,216, at P 211 and n.313 (2010) (citing *PG&E*, 506 F.2d at 38 (an agency “cannot apply or rely upon [the policy] as law because a general statement of policy only announces what the agency seeks to establishing as policy”); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970); *Am. Trucking Ass'n v. U.S.*, 642 F.2d 916, 920 (5th Cir. 1981) (court looks to see that the agency considered the relevant facts, avoided clear error, and had a rational connection between the facts and conclusions)). The Commission, however, is not required to “repeat itself incessantly” in subsequent application of the Policy Statement. *Bechtel v. FCC*, 10 F.3d 875, 878 (D.C. Cir. 1993).

<sup>18</sup> Finally, it is difficult to understand how the Commission does not run afoul of the APA if the majority explicitly “anticipates” that a Preliminary Notice of Violation will be issued in “every case” where relevant. *U.S. Telephone*, 28 F.3d 1232.

the requirements under the APA.<sup>19</sup>

In addition, as mentioned above, the December 17 Order does not simply provide for the issuance of Notices to inform the public of Commission concerns. In reality, the December 17 Order creates an entirely new “vehicle” for third parties to play a role in Commission investigative proceedings like never before. This new role for third parties is revealed in paragraph 15 of the Revised Order. There, the majority announces that the December 17 Order “provides a vehicle whereby market participants can bring to staff’s attention additional information relevant to the investigation.” The Revised Order goes on to state that “[b]y learning of the existence of an investigation and the identity of the subject under scrutiny, entities that may have been injured by the subject . . . can bring their concerns to staff before the matter has been resolved in a binding settlement.”<sup>20</sup> The Revised Order outlines the new role for third parties as follows: “[s]uch submittals will in general enable staff to consider any additional relevant factors of which it has not already been made aware, which will inform any future settlement negotiations or, if no settlement is reached, litigation with the subject.”<sup>21</sup>

Having created this new procedure for third parties as broadly as described in the preceding sentences, I doubt that Staff or the Commission would ignore any “additional information” or “additional relevant factors” submitted by third parties and will take some action on the new information.<sup>22</sup> Thus, in reality, the December 17 Order does far more than simply constitute an exercise of discretion to release certain non-public information or authorize Staff to issue a Preliminary Notice of Violation. For these reasons, I would have sought comment from the public consistent with the APA for this change.

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<sup>19</sup> On January 25, 2011, the Commission issued five Notices under the new policy. Those issuances validate my concerns. Though the policy statement was implemented, nowhere in those Notices did the Commission explain or justify the application of the policy statement as required by the APA and the courts.

<sup>20</sup> Revised Order at P 15.

<sup>21</sup> *Id.*

<sup>22</sup> The Revised Order states that the additional information could be exculpatory. The Revised Order indicates that exculpatory evidence submitted by a third party “may mitigate the amount of the penalty sought by staff or even cause staff to close the investigation.” *Id.* P 15. But by doing so, however, we would give the third party a role in our investigation contrary to other statements in the Revised Order and our regulations. I make this point not so that the Commission restricts the application of any possible exculpatory evidence it may receive, but to illustrate the flaw in the majority’s reasoning that the Commission is merely issuing notices or releasing information.



## II. Substantive Issues

Assuming arguendo that the December 17 Order complies with the APA and our regulations, there remain substantive issues that must be rectified. The majority fails to strike the proper balance between the need for transparency and the due process rights of entities under investigation. The majority's attempt to minimize the harm of the improperly struck balance is unpersuasive.

First, the majority asserts that disclosure of the identity of the investigated entity "prevents unwarranted suspicion from being cast on companies that are not under investigation."<sup>23</sup> The "unwarranted suspicion" defense is flatly contradicted by the record. In response to the Policy Statement, the nation's energy industry – producers, transmission providers, shippers, and end users – united to beseech the Commission not to disclose the identity of entities under investigation.<sup>24</sup> The record demonstrates that the very entities that could be harmed do not accept the majority's "unwarranted suspicion" reasoning. Rather, their concern is "unwarranted suspicion" arising from disclosure of an entity's identity prior to the Commission itself finding any wrongdoing.

Second, the majority argues that disclosure of a target's identity "will better educate the public as to the nature of violations under investigation by the Commission."<sup>25</sup> This contention is ill-founded because at the time of the disclosure *the Commission* has not yet made a finding of a violation. Nonetheless, even if the Preliminary Notice of Violation accurately describes the nature of an ultimately determined violation, the identity of the target is irrelevant. A masked Preliminary Notice of Violation will still "allow other market participants to evaluate themselves and their own activities against what they know about the subject and the conduct alleged in the Notice."<sup>26</sup> The masking fulfills the transparency objective without impugning an entity that has not even had its day in court.

Finally, the majority pays scant attention to concerns of "potentially serious negative consequences for [a target's] stock price and credit ratings, and consequently its

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<sup>23</sup> Revised Order at P 16.

<sup>24</sup> See Financial Institutions' Rehearing at 6-7; Energy Associations' Rehearing at 6-10; and "Letter of Independent Petroleum Association of America, Natural Gas Supply Association, Process Gas Consumers Group, American Forest & Paper Association" at 1-2 (filed Feb. 4, 2010).

<sup>25</sup> Revised Order at P 16.

<sup>26</sup> *Id.*

ability to attract capital and finance its operations at a reasonable cost.”<sup>27</sup> The majority dismisses the argument because it finds that some publicly traded targets currently disclose the existence of Commission investigations in their SEC filings and that “the Notice will generally not be the first public disclosure of the alleged misconduct.”<sup>28</sup> However, by the majority’s own calculation, fewer than half of the targets subject to SEC disclosure requirements included specific statements disclosing Staff’s investigation.<sup>29</sup> Moreover, the majority’s response ignores the potential negative consequences for privately held entities not subject to SEC disclosure requirements.

For these reasons, I respectfully dissent from this order.

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Marc Spitzer  
Commissioner

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<sup>27</sup> Energy Associations’ Rehearing at 8.

<sup>28</sup> Revised Order at P 18.

<sup>29</sup> *Id.* n.40.