

143 FERC ¶ 61,024
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
Cheryl A. LaFleur, and Tony Clark.

Barclays Bank PLC

Docket No. IN08-8-000

ORDER DENYING MOTION

(Issued April 5, 2013)

1. On December 10, 2012, Barclays Bank PLC (Barclays) filed a motion (Motion) to quash a subpoena (Subpoena) issued by the Commission's Office of Enforcement non-decisional staff (Enforcement Staff). As discussed below, we deny the Motion.

I. Background

2. In 2007, Enforcement Staff initiated an investigation of allegations that Barclays and some of its individual traders manipulated the electricity markets in and around California beginning in November 2006. The Commission issued a non-public order of formal investigation on October 2, 2008, authorizing Enforcement Staff to administer oaths and affirmations, subpoena witnesses, compel their attendance and testimony, take evidence, compel the filing of special reports and responses to interrogatories, gather information, and require the production of any books, papers, correspondence, memoranda, contracts, agreements, or other records.¹ The Commission issued a notice of alleged violations (Notice of Alleged Violations) on April 5, 2012.

3. Enforcement Staff issued the Subpoena on June 29, 2012.² The Subpoena required Barclays to produce materials responsive to two data requests sent by Enforcement Staff: a data request dating back to August 14, 2009 and a new data request, dated June 18, 2012 (2012 Data Request).³ Barclays challenged the validity of the

¹ *Investigation Into Allegations of Market Manipulation of the Electric Energy Markets in the West*, Docket No. IN08-8-000 (Oct. 2, 2008) (non-public order).

² Barclays Motion at 3, Appendix A; Enforcement Staff Answer at 3.

³ Enforcement Staff Answer at 3.

Subpoena, asserting that the Commission's investigative authority terminated upon the issuance of the Notice of Alleged Violations. Barclays and Enforcement Staff subsequently agreed to narrow the scope of the materials at issue, though Barclays reserved the right to object.

4. Barclays proceeded to submit a number of rolling productions in response to the Subpoena prior to the issuance by the Commission of an order to show cause⁴ and notice of proposed penalties on October 31, 2012.⁵ On November 19, 2012, however, Barclays informed Enforcement Staff that Barclays would no longer voluntarily produce documents in response to the Subpoena.⁶ Enforcement Staff, in turn, notified Barclays of its intention to enforce the Subpoena in federal court and requested that Barclays inform Enforcement Staff whether Barclays intended to comply with the Subpoena.⁷ Barclays filed this Motion to quash the Subpoena on December 10, 2012.

II. Motion

5. Barclays first argues that the Commission's policy and precedent requires Enforcement Staff to complete its investigation before a notice of alleged violations is issued, and thus the Commission's policy and precedent dictate that the Commission quash the Subpoena.⁸ Barclays states that, in initially authorizing the Secretary to issue notices of alleged violations, the Commission weighed the subject's interest in maintaining confidentiality against the public's interest in promoting additional

⁴ *Barclays Bank PLC*, 141 FERC ¶ 61,084 (2012) (Order to Show Cause).

⁵ Barclays Motion at 3; Enforcement Staff Answer at 5.

⁶ Barclays Motion at 4; Enforcement Staff Answer at 6.

⁷ Barclays Motion at 4; Enforcement Staff Answer at 6.

⁸ Barclays Motion at 8-12. Barclays additionally sought confidential, non-public treatment of the Motion, any response filed by Enforcement Staff, as well as any order issued by the Commission addressing the Motion and the subsequent responses. On February 12, 2013, Commission staff informed Barclays and Enforcement Staff of the Commission's intent to disclose the existence and content of several documents filed with the Commission pursuant to sections 388.112(e) and 1b.20 of the Commission's regulations. 18 C.F.R. §§ 1b.20, 388.112(e) (2012).

transparency with respect to the Commission's investigation.⁹ Barclays points out that, in response to various requests for rehearing and clarification, the Commission stated:

The Secretary will not issue [notices of alleged violations] until after all of the following have occurred: (1) staff has completed its fact-finding; (2) staff has presented the subject of the investigations with its preliminary findings; (3) the subject has had the chance to respond in writing to the facts and arguments in staff's preliminary findings; and (4) staff has had a full opportunity to review and analyze the subject's response. As a result, the subject's identity, and indeed the very existence of an investigation, will continue to remain confidential throughout the investigative process, with the [notice of alleged violations] issuing only after the investigation is completed.^{10]}

Barclays thus concludes that a subpoena enforcement action, in this case, would be inconsistent with the Clarification Order because the Notice of Alleged Violations as well as the Order to Show Cause have already been issued. Furthermore, Barclays posits that Enforcement Staff is using the subpoena to prepare for trial, but that the Clarification Order does not provide an exception to allow Enforcement Staff to prepare for trial.¹¹ According to Barclays, any other interpretation of the Clarification Order would not meet the requirements of reasoned decision-making and would call the fairness of the Commission's investigation into question.¹²

6. Starting with the premise that the Commission's authority to issue subpoenas is analogous to that of a grand jury and subject to the same restrictions, Barclays contends that the Subpoena is not enforceable in federal court.¹³ Recalling a previous statement by Enforcement Staff that the Subpoena was issued to prepare for trial, Barclays states that

⁹ *Id.* at 9 (citing *Enforcement of Statutes, Regulations, & Orders*, 129 FERC ¶ 61,247 (2009) (Preliminary Notice Order), *order on reh'g*, 134 FERC ¶ 61,054 (2011) (Clarification Order)).

¹⁰ *Id.* (quoting Clarification Order, 134 FERC ¶ 61,054 at P 17 (footnote omitted)).

¹¹ *Id.* at 11. Barclays also states that the Federal Rules of Civil Procedure do not permit "pre-complaint discovery," except in rare circumstances not present here. *Id.* (citing Fed. R. Civ. P. 27(a)).

¹² *Id.*

¹³ *Id.* at 13 (citing *United States v. Powell*, 379 U.S. 48, 57 (1964)).

federal courts have rejected the use of grand juries for such purposes.¹⁴ Consequently, Barclays argues that “the Subpoena should not be enforced.”¹⁵

7. Barclays additionally contends that Enforcement Staff must not be permitted to alter the facts and analyses presented in the Staff Report without providing notice to Barclays or the Commission.¹⁶ Barclays notes that section 554 of the Administrative Procedure Act (APA) entitles Barclays to timely notice of the matters and facts underlying the Commission’s allegations.¹⁷ Furthermore, Barclays asserts that adequate notice of the allegations and underlying record is necessary to protect Barclays’ due process rights.¹⁸ Thus, to the extent that Enforcement Staff intends to rely on the factual record depicted in the Staff Report and Order to Show Cause, Barclays argues that the Commission should grant the Motion because the Subpoena is intended to serve the improper purpose of seeking pre-trial discovery that is irrelevant at this stage of the proceedings.¹⁹

8. Barclays also argues that the Subpoena contravenes the Federal Power Act (FPA).²⁰ Barclays explains that, pursuant to FPA section 31(d)(3), it has elected an immediate penalty assessment so that it may have this case adjudicated *de novo* by a federal district court.²¹ Relying on this election, Barclays posits that Enforcement Staff’s

¹⁴ *Id.* (citing *United States v. Leung*, 40 F.3d 577, 581 (2d Cir. 1994); *Resolution Trust Corp. v. Grant Thornton*, 41 F.3d 1539, 1545-47 (D.C. Cir. 1994)). Barclays adds that “post-investigative subpoenas” are only permitted under limited circumstances, such as to investigate other individuals or other claims beyond those already investigated. *Id.* (citing *United States v. Vanwort*, 887 F.2d 375, 387 (2d Cir. 1989)).

¹⁵ *Id.*

¹⁶ *Id.* at 14.

¹⁷ *Id.* (citing 5 U.S.C. § 554 (2006)).

¹⁸ *Id.* (citing *Mathews v. Eldridge*, 424 U.S. 319, 333-34 (1976); *Amoco Prod. Co. v. Fry*, 118 F.3d 812, 819 (D.C. Cir. 1997); *Yellow Freight Sys., Inc. v. Martin*, 954 F.2d 353 (6th Cir. 1992); *NLRB v. Homemaker Shops, Inc.*, 724 F.2d 535, 544 (6th Cir. 1984)).

¹⁹ *Id.* Alternatively, if Enforcement Staff intends to buttress the evidentiary record presented in the Staff Report and the Order to Show Cause for the Commission’s consideration, Barclays submits that the Order to Show Cause should be rescinded. *Id.*

²⁰ *Id.* at 15-16 (citing 16 U.S.C. § 823b(d)(3) (2006)).

²¹ *Id.* at 7, 15.

next available forum in which to seek discovery is in federal court and that the Subpoena, therefore, contravenes the procedures established by the FPA.²²

9. Barclays further suggests that enforcement of the Subpoena would serve no proper purpose.²³ Specifically, Barclays argues that this proceeding involves no ongoing activity and that Barclays has already implemented proper document preservation protocols, thereby ensuring that there is no risk that documents will be lost or destroyed prior to the Commission's initiation of a proceeding in federal district court pursuant to section 31(d)(3). Given the purported lack of a proper purpose for enforcement of the Subpoena, Barclays alleges that only improper purposes remain, such as an attempt to garner additional publicity for the Commission's enforcement activities.²⁴

III. Responsive Pleadings

10. On December 26, 2012 Enforcement Staff filed its answer in response to the Motion (Enforcement Staff Answer). On December 31, 2012, Barclays filed an answer in response to the Enforcement Staff Answer (December 31 Barclays Answer). Enforcement Staff in turn filed an opposition to the December 31 Barclays Answer (Enforcement Staff Opposition).

11. On January 28, 2013, Enforcement Staff filed a Notice of Supplemental Authority (Enforcement Staff Supplement) informing the Commission of a recent development in federal district court litigation. On January 31, 2013, Barclays filed an answer to the Enforcement Staff Supplement (January 31 Barclays Answer). Barclays amended the January 31 Barclays Answer on February 6, 2013, to which Enforcement Staff filed an answer on February 11, 2013 (Enforcement Staff February 11 Answer).

A. Enforcement Staff Answer

12. Enforcement Staff raises three principal arguments in opposition to the Motion. First, Enforcement Staff argues that the Commission should deny the Motion because Barclays has failed to comply with the Subpoena, subject to the limitations and modifications previously negotiated by Barclays and Enforcement Staff.²⁵

²² *Id.* at 16.

²³ *Id.* at 16-17.

²⁴ *Id.* at 17.

²⁵ Enforcement Staff Answer at 6-9.

13. Second, Enforcement Staff argues that the FPA authorizes enforcement of the Subpoena.²⁶ Specifically, Enforcement Staff argues that section 307 of the FPA²⁷ authorizes the Commission to conduct investigations, and the issuance of neither the Notice of Alleged Violations nor the Order to Show Cause terminates that authority.²⁸ Enforcement Staff additionally contends that Barclays' election pursuant to section 31(d)(3) of the FPA in no way limits the Commission's investigative authority under FPA section 307.²⁹

14. Enforcement Staff also responds to Barclays' contention that section 554 of the APA precludes enforcement of the Subpoena.³⁰ Enforcement Staff states that section 554 only applies where adjudication is required by statute to be determined on the record after an opportunity for hearing before an agency.³¹ Enforcement Staff points out that because Barclays elected the procedures under section 31(d)(3) of the FPA, pursuant to which the Commission will assess a civil penalty (provided it finds a violation has occurred) subject to the review of a federal district court, the Commission is not statutorily required to conduct a hearing governed by section 554. Moreover, Enforcement Staff submits that, even assuming section 554 applies, Barclays received the requisite notice because the Order to Show Cause and the Staff Report detail the allegations against Barclays.³² To the extent that Enforcement Staff discovers new information relating to additional wrongdoing by Barclays not addressed in the Order to Show Cause, Enforcement Staff commits to act on such information in a manner consistent with the FPA, as well as the Commission's rules and regulations.

²⁶ *Id.* at 10-12.

²⁷ 16 U.S.C. § 825f (2006)

²⁸ Enforcement Staff Answer at 10. Enforcement Staff additionally notes that its issuance of the Subpoena comports to the authority delegated to it by the Commission. *Id.*

²⁹ *Id.* at 11-12.

³⁰ *Id.* at 12-13.

³¹ *Id.* at 12.

³² *Id.* at 13.

15. Enforcement Staff also argues that the issuance of the Notice of Alleged Violations does not and should not terminate the Commission's investigative authority.³³ Rather, Enforcement Staff points out that, in the Clarification Order, the Commission observed that notices of alleged violations like this have "no substantive legal effect, and [do] not conclusively or otherwise affect the rights of the [investigative] subject."³⁴ Enforcement Staff further notes that the Clarification Order contemplates that continued investigation may be necessary after issuance of a notice of alleged violations.³⁵ Enforcement Staff also points out that a notice of alleged violations is intended to, among other things, prompt market participants to bring additional information to staff's attention that might be relevant to the investigation. Consequently, Enforcement Staff reasons that the policy suggested by Barclays would undermine one of the Commission's stated goals in authorizing the issuance of such notices of alleged violations in the first place.

16. Enforcement Staff also contends the policy promoted by the Motion would reduce regulatory efficiency by substantially delaying the settlement of investigations.³⁶ Specifically, prohibiting Enforcement Staff from enforcing subpoenas after a notice of alleged violations has been issued would discourage Enforcement Staff from conducting settlement discussions until every aspect of investigative discovery is exhausted. Enforcement Staff states that this would have a particularly adverse effect on smaller entities with more limited financial resources.

17. Third, Enforcement Staff asserts that the Subpoena is enforceable under federal law.³⁷ Enforcement Staff states that an administrative subpoena must be enforced by a federal court if: (i) the information sought is within the authority of the agency; (ii) the demand is not too indefinite; and (iii) the information sought is reasonably relevant.³⁸ To that end, Enforcement Staff reiterates its position that its investigation of Barclays' trading activities is within the Commission's statutory authority to conduct

³³ *Id.* at 13-16.

³⁴ *Id.* at 14-15 (quoting Clarification Order, 134 FERC ¶ 61,054 at P 11).

³⁵ *Id.* (quoting Clarification Order, 134 FERC ¶ 61,054 at PP 15, 19).

³⁶ *Id.* at 15.

³⁷ *Id.* at 16-19.

³⁸ *Id.* at 17 (quoting *Resolution Trust Corp. v. Walde*, 18 F.3d 943, 946 (D.C. Cir. 1994) (*Walde*)).

investigations.³⁹ Moreover, Enforcement Staff maintains that the scope of the materials sought by the Subpoena is both relevant and reasonable.⁴⁰

B. Enforcement Staff Supplement and January 31 Barclays Answer

18. In the Enforcement Staff Supplement, Enforcement Staff highlights a magistrate judge's (Magistrate) recent decision in a related subpoena enforcement action by Enforcement Staff against one of Barclays' traders, Mr. Ryan Smith. The Magistrate's report rejected many of the same arguments that are raised in the Motion and recommended that the investigative subject's motion to quash the subpoena be denied and that the subpoena be enforced.⁴¹

19. In the January 31 Barclays Answer, Barclays argues that the Magistrate's report submitted as part of the Enforcement Staff Supplement should not influence the Commission's decision on the Motion. In particular, Barclays notes that the Magistrate's recommendation is not final and is subject to review by a district court,⁴² and asserts that the Commission should not adopt the recommendation of the Magistrate. Barclays also asserts that Enforcement Staff has insufficient evidence to demonstrate the allegations detailed in the Staff Report, and urges the Commission not to allow Enforcement Staff to conduct additional discovery at this time.⁴³ Finally, Barclays takes issue with the merits of the Magistrate's recommendation.⁴⁴

³⁹ *Id.* Enforcement Staff adds that courts have routinely held that the initiation of civil proceedings will not moot an administrative subpoena. *Id.* (citing *Walde*, 18 F.3d at 950). Furthermore, to the extent that Barclays suggests that Enforcement Staff has sought to bypass federal discovery rules, Enforcement Staff states that Barclays must raise that argument before the federal court overseeing discovery—not the Commission or a federal court addressing a subpoena enforcement action. *Id.* at 17-18.

⁴⁰ *Id.* at 18-19.

⁴¹ See Enforcement Staff Supplement, Att. 1 (submitting Mag. Report-Recommendation and Order *FERC v. Smith*, No. 12-MC-74 (N.D.N.Y. Jan. 25, 2013), ECF No. 23.

⁴² January 31 Barclays Answer at 2.

⁴³ *Id.* at 3-4.

⁴⁴ *Id.* at 4-5.

IV. Discussion

A. Procedural Matters

20. We consider the Enforcement Staff Supplement to constitute a motion to lodge a judicial opinion. Motions to lodge information from other proceedings may be appropriate in some instances to supplement the Commission's record.⁴⁵ We grant Enforcement Staff's motion to lodge because it has provided information that has assisted us in our decision-making process.⁴⁶

21. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2012), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We are not persuaded to accept the December 31 Barclays Answer, the Enforcement Staff Opposition, or the Enforcement Staff February 11 Answer and will, therefore, reject them. However, as noted above, we view the Enforcement Staff Supplement as a motion to lodge, to which Rule 213(a)(2) does not prohibit an answer. Thus, we will accept the January 31 Barclays Answer, as amended.

B. Substantive Matters

22. As discussed below, we deny the Motion because none of the authorities cited by Barclays restrict the authority to conduct investigations granted to the Commission in section 307 of the FPA.⁴⁷

23. Courts have consistently found that, unless the enabling statute requires otherwise, an agency's investigative authority survives even the commencement of related action in district court—a circumstance well beyond the discovery dispute at issue in this proceeding.⁴⁸ Thus, administrative agencies such as the Commission have authority to

⁴⁵ See, e.g., *Cal. Indep. Sys. Operator Corp.*, 139 FERC ¶ 61,072, at P 8 (2012).

⁴⁶ See, e.g., *ITC Midwest, LLC v. Am. Transmission Co., LLC*, 142 FERC ¶ 61,096, at P 36 (2013).

⁴⁷ Additionally, we note that Barclays has requested, and we deny, oral argument addressing the Motion. Oral arguments in this case are unnecessary because ample information is provided in the parties' pleadings to facilitate our decision in this matter.

⁴⁸ See *Walde*, 18 F.3d 943 at 950 ("the initiation of civil proceedings will not moot an administrative subpoena"); accord *McVane v. FDIC*, 44 F.3d 1127, 1141 (2d Cir. 1995) (observing that the initiation of a civil proceeding does not moot an administrative subpoena); *Linde Thomson Langworthy Kohn & Van Dyke v. Resolution Trust Corp.*, 5 F.3d 1508 (D.C. Cir. 1993) (affirming enforcement of administrative subpoenas after
(continued...)

conduct investigations pursuant to their statutory mandates, with no inherent limitation proscribing the pursuit of investigations that overlap with civil or criminal proceedings.

24. The enabling statute in this case—the FPA—broadly authorizes the Commission to investigate any facts and practices that it finds necessary or proper to determine whether a party has violated any provision of the FPA or any rule, regulation or order thereunder.⁴⁹ Section 307 of the FPA provides:

(a) The Commission may investigate any facts, conditions, practices, or matters which it may find necessary or proper in order to determine whether any person, electric utility, transmitting utility, or other entity has violated or is about to violate any provision of this Act or any rule, regulation, or order thereunder

(b) For the purpose of any investigation or any other proceeding under this Act, any member of the Commission, or any officer designated by it, is empowered to . . . [subpoena] witnesses

(c) In [the] case of contumacy by, or refusal to obey a [subpoena] issued to, any person, the Commission may invoke the aid of any court of the United States⁵⁰

civil proceedings are filed where “the investigative powers authorized by statute are unrestricted”); *United States v. Frowein*, 727 F.2d 227, 231-32 (2d Cir. 1984) (affirming enforceability of an administrative subpoena after the agency had assessed a penalty and referred the penalty claim to the Department of Justice for district court litigation); *SEC v. Dresser Indus.*, 628 F.2d 1368 (D.C. Cir. 1980) (en banc) (permitting enforcement of a subpoena despite a simultaneous criminal action pertaining to the same activity was underway); *FTC v. Browning*, 435 F.2d 96, 102-04 (D.C. Cir. 1970) (upholding a post-complaint subpoena issued by the Federal Trade Commission); *Sutro Bros. v. SEC*, 199 F.Supp. 438 (S.D.N.Y. 1961) (upholding a subpoena issued during the pendency of civil proceedings).

⁴⁹ 16 U.S.C. § 825f.

⁵⁰ *Id.*

Thus, on its face, section 307 empowers the Commission and its designees to issue subpoenas for investigative purposes.⁵¹ Where a party refuses to comply with such a subpoena, section 307 and the Commission's regulations permit the Commission to seek enforcement of that subpoena in federal court.⁵² Notably, the statute does not indicate that the Commission's authority to issue or enforce subpoenas expires upon the issuance of either a notice of alleged violations or an order to show cause, as Barclays suggests. Here, consistent with precedent⁵³ and with the statutory language's imposing no such limitation, we hold that the Commission's investigative authority does not terminate upon the issuance of either a notice of alleged violations or an order to show cause.

25. Contrary to Barclays' assertion, Enforcement Staff's issuance and enforcement (or potential enforcement) of the Subpoena does not contravene section 31(d)(3) of the FPA. Upon the election by a respondent against whom the Commission has proposed a civil penalty, section 31(d)(3) requires the Commission to promptly assess the penalty and, in the event that the respondent fails to satisfy the assessment, to "institute an action in the appropriate district court . . . for an order affirming the assessment of the civil penalty."⁵⁴ Section 31(d)(3) does not, however, address the Commission's authority to conduct investigations, nor does it limit the authority to issue or enforce subpoenas. Moreover, section 307 does not limit the period during which Enforcement Staff may issue or enforce a subpoena.

26. Barclays' reliance on the Clarification Order for the proposition that the Commission previously committed not to exercise its authority under section 307 to conduct investigations following the issuance of a notice of alleged violations is

⁵¹ *Id.* This authority is also set forth in section 1b.13 of the Commission's regulations, which authorizes any "Investigating Officer" to subpoena witnesses and to require the production of records that are relevant or material to the investigation. 18 C.F.R. § 1b.13 (2012). The Commission's regulations define an "Investigating Officer" as "the individual(s) designated by the Commission in an Order of Investigation as Officer(s) of the Commission." 18 C.F.R. § 1b.1 (2012).

⁵² 16 U.S.C. § 825f(c); 18 C.F.R. § 1b.15 (2012).

⁵³ *See, e.g., Walde*, 18 F.3d at 950.

⁵⁴ 16 U.S.C. § 823b(d)(3)(A)-(C) (2006).

misplaced.⁵⁵ As set forth below, we find that Barclays' interpretation of the Commission's orders is incorrect, and that the issuance of a notice of alleged violations or order to show cause does not signal the end of the authority to conduct investigations.

27. In the Preliminary Notice Order, the Commission held that a notice of alleged violations is intended to offer greater transparency with respect to non-public investigations conducted under Part 1b of the Commission's regulations.⁵⁶ In so doing, the Commission explicitly weighed the need to ensure a subject's anonymity in the "*early stages* of an investigation" against the public interest of promoting additional transparency "*during* investigations."⁵⁷ Therefore, the Preliminary Notice Order contemplated that an investigation could continue following the issuance of a notice of alleged violations.

28. Moreover, the Clarification Order did not significantly amend the Preliminary Notice Order in this respect. Indeed, in the Clarification Order the Commission denied requests for rehearing of the underlying Preliminary Notice Order on both procedural and substantive grounds, and observed that the issuance of a notice of alleged violations was procedural in nature and "has no substantive legal effect, and does not conclusively or otherwise affect the rights of the subject."⁵⁸ In contrast, Barclays' proffered reading—that an investigation must end with the issuance of a notice of alleged violations—would attribute a "substantive legal effect" to the issuance of such a notice in direct contravention of both orders.

29. Although the Motion accurately recites certain language from the Clarification Order, Barclays isolates that language in support of its position. The specific language in the Clarification Order on which Barclays relies, taken in isolation, could be read to support Barclays' position; however, when that language is viewed in its full and proper context, the interpretation advanced by Barclays contradicts the Commission's intent and

⁵⁵ While the Magistrate addressing Enforcement Staff's subpoena enforcement action concerning Mr. Smith was presented with the issue of whether the Commission had satisfied the standard for judicial enforcement of an administrative subpoena, *see FERC v. Smith*, No. 12-MC-74 at 9, in reaching that issue the Magistrate also explained his view of the Commission's authority to conduct investigations. The Magistrate's conclusion that the issuance of a notice does not terminate the Commission's investigation is consistent with our reading of our regulations and policies.

⁵⁶ *See* Preliminary Notice Order, 129 FERC ¶ 61,247 at P 1.

⁵⁷ *Id.* P 6 (emphasis added).

⁵⁸ Clarification Order, 134 FERC ¶ 61,054 at P 11.

purposes.⁵⁹ The Clarification Order explained that the purpose of issuing a notice of alleged violations in the “early stages” of the investigation was to achieve the proper balance between the public interest in transparency and the risk of reputational harm to the subject;⁶⁰ a notice of alleged violations would issue after Enforcement Staff’s fact finding had reached a stage where the risk to reputational harm in issuing a notice of alleged violations was outweighed by the public interest in transparency. Moreover, as the order explained, disclosure of a subject’s identity would provide “a vehicle whereby market participants could bring to staff’s attention additional information relevant to the investigation.”⁶¹ The Commission notably described this feature as one of the salutary effects of issuing a notice of alleged violations.⁶² In contrast, reading the Clarification Order to preclude further investigation once a notice of alleged violations has issued, as Barclays suggests, would effectively nullify that purpose. As such, the Clarification Order cannot reasonably be read as Barclays suggests to limit the Commission’s statutory investigative authority.

30. Additionally, allowing Enforcement Staff to issue and enforce subpoenas at this stage of the investigation does not deny Barclays of its right under the APA to be properly notified of any allegations against the company. As a threshold matter, section 554(b) of the APA does not govern the instant proceeding.⁶³ Barclays’ election under section 31(d)(3) of the FPA ensures that Barclays’ challenge to any penalty assessment will not be heard by a Commission administrative law judge. Thus, section 554—which applies only where adjudication is statutorily required to be determined “on the record and after opportunity for an agency hearing”—is inapplicable here.⁶⁴

31. Furthermore, Barclays has received sufficient notice of the allegations raised by Enforcement Staff to date. Among other things, the allegations against Barclays were publicized in the Notice of Alleged Violations, and were subsequently further described

⁵⁹ *Id.*

⁶⁰ *Id.* PP 14-17.

⁶¹ *Id.* P 15. In doing so, the Commission further took account of the possibility that entities may call to Enforcement Staff’s attention not only evidence supporting the allegations highlighted in the Notice, but also evidence of “similar conduct,” which would presumably require additional investigation. *Id.*

⁶² *Id.* P 25.

⁶³ 5 U.S.C. § 554(b) (2006).

⁶⁴ 5 U.S.C. § 554(a); *see* 16 U.S.C. § 823b(d)(3).

in the Order to Show Cause.⁶⁵ Nevertheless, if Enforcement Staff discovers information “relating to additional wrongdoings by Barclays not addressed in the Order to Show Cause” as a result of its ongoing investigation that it believes should be submitted to the Commission, we accept Enforcement Staff’s commitment to call such information to our attention in a manner consistent with the FPA and the Commission’s rules and regulations.⁶⁶ In such circumstances, Barclays likewise would have the opportunity to respond to the supplemented record, consistent with applicable requirements.

32. Additionally, prudential considerations reinforce the conclusion that the Commission’s authority to investigate under section 307 does not terminate upon the issuance of a notice of alleged violations or an order to show cause. For instance, under Barclays’ proposed reading of the pertinent legal authorities, the Commission and its staff would be precluded from taking into consideration new information that comes to light after the issuance of a notice of alleged violations or an order to show cause. That proposition that would render superfluous regulations authorizing the Commission to “compromise, modify or remit” civil penalties even during the pendency of civil litigation.⁶⁷

33. Based on this analysis and as noted above, we hold that the Commission’s investigative authority does not terminate upon the issuance of either a notice of alleged violations or an order to show cause. In reaching this conclusion, we do not minimize the importance of those actions. We recognize, for example, that an order to show cause is a key milestone in an investigation, as marked by a vote of the Commission. An order to show cause is issued in the late stages of an investigation, after the Commission finds that a sufficient case has been made by Enforcement Staff such that a public answer to the allegations is warranted. Nonetheless, an order to show cause does not reflect definitive Commission findings as to the matter under investigation, and it does not mark the end of

⁶⁵ We also note that Enforcement Staff indicated in the Staff Report to the Commission that its investigation was ongoing; thus, when the Commission decided to issue the Order to Show Cause, it was aware that Enforcement Staff was continuing to investigate the activities at issue. *See* Staff Report at 35 (noting that “staff is continuing to analyze the data to determine the price impact of Barclays’ loss-generating cash-against-index trading on index settlements,” and “will continue to refine [its] estimate as this case proceeds”); *id.* at 63 (describing Enforcement Staff’s economic model as “preliminary” and describing its results as a “current estimate”); *id.* at 63 n.235 (stating that “Staff’s estimate of disgorgement and pecuniary losses . . . does not include PV peak, a point which staff is continuing to model.”).

⁶⁶ *See* Enforcement Staff Answer at 13.

⁶⁷ 18 C.F.R. § 385.1510 (2012).

an investigation. There is no legal requirement that Enforcement Staff cease its investigative activities at that time—and the Commission declines to impose such a requirement now.

34. With respect to Barclays' claims respecting Enforcement Staff's allegedly improper purposes in pursuing the Subpoena, we have consistently observed that bare assertions are insufficient to warrant Commission action.⁶⁸ These unsupported assertions provide no grounds for prohibiting any efforts that Enforcement Staff may take to enforce the Subpoena.

The Commission orders:

The Motion is hereby denied, as discussed in the body of this order.

By the Commission. Commissioner LaFleur is dissenting with a separate statement attached.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

⁶⁸ See, e.g., *Entergy Arkansas, Inc.* 141 FERC ¶ 61,269, at P 30 (2012) (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 131 FERC ¶ 61,173, at P 93 (2010); *Midwest Indep. Transmission Sys. Operator, Inc.*, 117 FERC ¶ 61,108, at P 14 (2006)); *Californians for Renewable Energy, Inc. v. National Grid*, 137 FERC ¶ 61,113, at P 36 (2011); *UNITIL Power Corp. v. Public Service Co. of New Hampshire*, 62 FERC ¶ 61,055, at 61,287 (1993); *Houlton Water Co. v. Maine Public Service Co.*, 55 FERC ¶ 61,037, at 61,110 (1991).

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Barclays Bank PLC

Docket No. IN08-8-000

(Issued April 5, 2013)

LaFLEUR, Commissioner, *dissenting*:

Section 31(d) of the Federal Power Act sets forth certain rules that the Commission must adhere to before assessing a civil penalty. One of these rules requires the Commission to “promptly assess” a civil penalty when the respondent, after receiving notice of the proposed penalty, elects to forgo a hearing before an administrative law judge. Following an investigation into its trading activities, respondent Barclays received notice of a proposed civil penalty and elected an immediate penalty assessment. A week later, Enforcement Staff indicated that it would enforce an outstanding subpoena related to the conduct alleged in the notice. Barclays now seeks to quash the subpoena. Because I believe that Barclays’ election of an immediate penalty assessment as contemplated under the statute forecloses further investigation into the conduct alleged in the notice, I would grant the motion to quash. Therefore, I respectfully dissent.

Before the Commission can assess a civil penalty, it is required by section 31(d)(1) of the Federal Power Act to give notice of the proposed penalty to the entity affected.¹ In most cases, the required notice must inform the entity of its right to forgo a hearing before an administrative law judge and elect instead to receive a penalty from the Commission.² If an entity chooses to forgo a hearing, the Commission is required by section 31(d)(3)(A) to “promptly assess” a civil penalty.³ If the entity does not pay the penalty within 60 days, the

¹ 16 U.S.C. § 823b(d)(1) (2006) (“Before issuing an order assessing a civil penalty against any person under this section, the Commission shall provide to such person notice of the proposed penalty. Such notice shall, except in [cases involving violations of Commission issued permits and licenses], inform such person of his opportunity to elect in writing within 30 days after the date of receipt of such notice to have the procedures of paragraph (3) (in lieu of those of paragraph (2)) apply with respect to such assessment.”).

² *Id.*

³ *Id.* § 823b(d)(3)(A) (“In the case of any civil penalty with respect to which the procedures of this paragraph have been elected, the Commission shall *promptly assess* such penalty, by order, after the date of the receipt of the notice under paragraph (1) of the proposed penalty.”)[emphasis added].

Commission must institute an action in federal district court to affirm the penalty. In such a case, the court is to review the facts and law underlying the penalty *de novo*.⁴

On October 31, 2012, the Commission issued an order directing Barclays and several of its traders to show cause why they should not be assessed civil penalties for manipulating the electricity markets in and around California from November 2006 to December 2008 (Show Cause Order).⁵ The order informed the respondents that it constituted the notice of proposed penalty required by section 31(d)(1):

Based on the allegations contained in the [Enforcement] Staff Report, the Commission orders Barclays and the individual traders to respond to this order as set forth above. *This order also is the notice of proposed penalty required pursuant to section 31 of the FPA.* In the answers to this order, Barclays and the individual traders have the option to choose between either (a) an administrative hearing before an Administrative Law Judge . . . under section 31(d)(2), or (b) *an immediate penalty assessment* by the Commission under section 31(d)(3)(A).⁶

After it received the Show Cause Order, Barclays informed Enforcement Staff that it would no longer produce documents under an outstanding subpoena.⁷ Barclays then informed the Commission that it elected to forgo a hearing and chose instead to receive an immediate penalty assessment.⁸ One week later, Enforcement Staff informed Barclays that it intended to enforce the subpoena in court.⁹ Barclays motion to quash followed.

In its motion, Barclays first argues that Enforcement Staff should have ceased its investigation when the Commission Secretary issued the Notice of Alleged Violation publicly disclosing that Enforcement Staff was reviewing Barclays' trading. I disagree, and support the majority's reasons for finding that Enforcement Staff's investigative authority does not terminate with a Notice of Alleged Violation.

⁴ *Id.* § 823b(d)(3)(B).

⁵ *Barclays Bank PLC*, 141 FERC ¶ 61,084 (2012) (Show Cause Order).

⁶ *Id.* P 3 (footnotes and citations omitted) [emphasis added].

⁷ Barclays Motion at 4, Appendix H. Barclays had been producing documents according to a schedule negotiated with and accepted by Enforcement Staff.

⁸ *Id.* at 4; Notice of Election of Barclays Bank PLC, Docket No. IN08-8-000 (filed November 29, 2012).

⁹ Barclays Motion at 4, Appendix I.

Barclays next argues that allowing further investigation after it has received notice of a proposed penalty pursuant to section 31(d)(1), and after it has in turn invoked its statutory right to have the Commission “promptly assess” a penalty, violates the Federal Power Act. I agree. The statutory directive to the Commission to “promptly assess” a civil penalty when a respondent has received notice and elected to forgo a hearing before an administrative law judge cannot be reconciled with further investigation into the conduct alleged in the notice.

Once the Commission chooses to invoke section 31(d)(1) and give notice of a proposed penalty, it triggers a process under the statute that allows the respondent to choose its own procedural path: it can either submit to a hearing before an administrative law judge or force the Commission to “promptly assess” a civil penalty and litigate the matter in district court. When the respondent chooses to accept a penalty from the Commission, the plain meaning of “promptly” would seem to foreclose the possibility of further investigation into the conduct alleged in the notice. An action that is done “promptly” is done “at once or without delay.”¹⁰ Therefore, the requirement to “promptly assess” a civil penalty does not admit of time for further depositions or subpoenas, or for enforcement of subpoenas issued before the Commission became obliged to take immediate action.¹¹ While reasonable people can disagree over how immediate a prompt assessment must be, there can be no disagreement that a prompt assessment is an assessment of an immediate nature.

In addition to the plain meaning of “promptly assess,” the sequence of events under the statute further supports the conclusion that Enforcement Staff must cease its investigation into the conduct alleged in a notice of proposed penalty once the respondent elects to forgo a hearing before an administrative law judge. Once the Commission gives notice of a proposed penalty, the respondent is empowered to choose where to litigate the case, but it must choose within 30 days. In other words, respondents have 30 days to decide whether to make the Commission “promptly assess” a penalty. This statutory arrangement suggests speed, particularly for respondents that choose to receive a penalty from the Commission, and implies that the statute contemplates notice coming at the end of an investigation.

¹⁰ Dictionary.com, *Definition of Promptly*, <http://dictionary.reference.com/browse/promptly>. See also Black’s Law Dictionary (9th ed. 2009) (defining “thereupon” as “[i]mmediately; without delay; *promptly*.”)[emphasis added]. The Commission also appears to have recognized this definition of “promptly” in the Show Cause Order, where it characterized the right to a prompt assessment as a right to “an immediate penalty assessment.” Show Cause Order, 141 FERC ¶ 61,084 at P 3.

¹¹ If Enforcement Staff passively received information relevant to the conduct alleged in the notice, say, from a late whistleblower, it would have to determine whether the information was so significant that it should recommend to the Commission to rescind the notice of proposed penalty to allow for further investigation. That is a different case from Enforcement Staff actively continuing its investigation once the Commission has issued notice.

At bottom, providing notice pursuant to section 31(d)(1) is a consequential act that the Commission undertakes at a time entirely of its own choosing.¹² It is under no obligation to act before Enforcement Staff concludes its investigation. But when it does provide notice, it launches a process under the statute that invests respondents with rights that assume the investigation is concluded.¹³

Here, the Commission issued the Show Cause Order specifically informing Barclays that it constituted notice of a proposed civil penalty pursuant to section 31(d). In accordance with sections 31(d)(1) and (d)(3), Barclays elected to forgo a hearing before an administrative law judge and receive a prompt penalty assessment from the Commission. The Commission must now “promptly assesses” the penalty. Therefore, further investigation into the conduct alleged in the notice must cease.

Accordingly, I respectfully dissent.

Cheryl A. LaFleur
Commissioner

¹² The majority concedes that the Federal Power Act, as the Commission’s enabling statute, controls the disposition of this case. *Barclays Bank PLC*, 143 ¶ 61,024 at P 23 (2013). However, it makes no attempt to reconcile its decision to deny Barclays’ motion with the requirement in section 31(d)(3)(A) of the Federal Power Act to “promptly assess” a penalty once a respondent elects to forego a hearing before an administrative law judge.

¹³ That is not to say that Enforcement Staff is prohibited from investigating new or different allegations against the same entity that may lead to a future civil penalty. Enforcement Staff can launch a new investigation at any time. But, under the terms of the statute, it cannot continue to investigate the conduct alleged in the notice.