

167 FERC ¶ 61,153
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Cheryl A. LaFleur, Richard Glick,
and Bernard L. McNamee.

Enforcement of Statutes, Regulations, and Orders

Docket No. PL10-2-003

ORDER RESCINDING COMMISSION'S 2009 ORDER AUTHORIZING
SECRETARY TO ISSUE STAFF'S PRELIMINARY NOTICE OF VIOLATIONS

(Issued May 16, 2019)

1. In this order, we rescind the Commission's 2009 Order Authorizing Secretary to Issue Staff's Preliminary Notice of Violations, which introduced a policy of issuing Notices of Alleged Violations (NAVs) at the stage in an investigation after an investigative subject has had an opportunity to respond to Office of Enforcement (OE) staff's preliminary findings (NAV Policy).¹ In the NAV Order, the Commission weighed the importance of protecting investigative subjects' confidentiality against the benefits of added transparency, and found that the NAV Policy struck an appropriate balance between the two interests by maintaining subjects' confidentiality during earlier stages of investigations, while adding transparency during the latter, post-preliminary findings stage.²

2. Based on our monitoring and evaluation of the NAV Policy's implementation, we find that the anticipated effects and benefits of the policy generally have not materialized such that the balance has shifted. Accordingly, the Commission finds that the potential adverse consequences that NAVs pose for investigative subjects are no longer justified in light of the limited transparency NAVs have generated and the more effective, alternative means of adding transparency that the Commission has developed since the NAV Order.

¹ *Enforcement of Statutes, Regulations, and Orders*, 129 FERC ¶ 61,247, at P 6 (2009) (NAV Order), *order on reh'g*, 134 FERC ¶ 61,054 (2011) (NAV Rehearing Order).

² *Id.*

Background

3. Prior to issuance of the NAV Order in 2009, the Commission generally did not allow public notification of investigations or investigative subjects until an investigation was resolved through settlement or the Commission issued an order to show cause.³ The Commission based this practice on section 1b.9 of its regulations, which requires that information obtained in the course of an investigation remain nonpublic, subject to certain exceptions, including when “the Commission directs or authorizes the public disclosure of the investigation.”⁴ With the introduction of the NAV Policy, the Commission exercised its discretion under section 1b.9 and “modified this practice by authorizing disclosure at a slightly earlier stage in the proceedings.”⁵ Specifically, the NAV Order “direct[ed] the Secretary to issue Staff’s Notice of Preliminary Violations, upon direction of the Director of Enforcement, after the subject of the investigation has had the opportunity to respond to staff’s preliminary findings letter.”⁶

4. The Commission instituted this NAV Policy in order “to increase the transparency of staff’s nonpublic investigations conducted under Part 1b of our regulations.”⁷ The NAV Policy aimed to increase transparency in two principal ways. First, it provided a vehicle for market participants to bring to staff’s attention information related to an investigative subject’s conduct, whether inculpatory or exculpatory.⁸ Second, NAVs “allow[ed] other market participants to evaluate themselves and their own activities against what they know about the subject and conduct alleged in the [NAV].”⁹ In issuing the NAV Order, the Commission reasoned that these forms of public disclosure after the preliminary findings stage “balance[] the need to protect the subject’s confidentiality in

³ *Id.* P 3.

⁴ 18 C.F.R. § 1b.9 (2018).

⁵ NAV Rehearing Order, 134 FERC ¶ 61,054 at P 4.

⁶ NAV Order, 129 FERC ¶ 61,247 at P 6.

⁷ *Id.* P 1.

⁸ NAV Rehearing Order, 134 FERC ¶ 61,054 at P 15.

⁹ *Id.* P 16.

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the early stages of an investigation with the public interest of promoting additional transparency during investigations.”¹⁰

5. In striking this balance, however, the Commission emphasized that “we [did] not take . . . concerns regarding reputational harm [of subjects] lightly.”¹¹ The Commission recognized that both goals—preventing reputational harm of subjects and adding transparency to the investigative process—warranted significant consideration and, thus, vowed to “continue to monitor the [NAV] procedure and [remain] open to considering it again after staff has acquired some experience in its application.”¹²

Discussion

6. As the Commission committed to do in the NAV Rehearing Order, the Commission has monitored and evaluated the effectiveness of the NAV Policy since its implementation in 2011.¹³ Based on this evaluation, we now rescind the policy, for the reasons that follow.

7. As noted above, the intended transparency benefits of the NAV Policy have been limited. Specifically, since adopting the NAV Policy, NAVs have not been a significant source of information for OE staff’s investigations. Moreover, since adoption of the policy, the Commission has made substantial improvements to several other sources of information, which have greatly expanded the information and knowledge base for OE investigations. For example, the Commission has gained access to significantly more market data and data sets through various orders, agreements, and subscription services.¹⁴

¹⁰ NAV Order, 129 FERC ¶ 61,247 at P 6.

¹¹ NAV Rehearing Order, 134 FERC ¶ 61,054 at P 14.

¹² *Id.* P 22.

¹³ While the Commission issued the NAV Order in December 2009, the Commission did not implement it until 2011, after ruling on the requests for rehearing and clarification. The first NAVs were issued on January 25, 2011, the day after the NAV Rehearing Order issued. All NAVs that have issued are available on the Commission’s website at <https://www.ferc.gov/enforcement/alleged-violation/notices.asp>.

¹⁴ As just one example, in Order No. 760, the Commission directed Independent System Operators (ISOs) and Regional Transmission Organizations (RTOs) to provide

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The Commission uses these data sets and sophisticated algorithmic screens to detect potential manipulation, anticompetitive behavior, and other anomalous activities in the energy markets we oversee.

8. In addition to the limited information NAVs have generated for OE staff regarding investigations, NAVs also have not provided significant guidance to market participants. NAVs typically provide only limited information regarding the identity of the entities under investigation, the relevant conduct, the time and place of the relevant conduct, and the regulatory requirements and statutes that the entities allegedly violated. Moreover, just as we have seen more effective, alternative means of information-gathering since adopting the NAV Policy, the Commission and OE staff have developed more informative methods of providing transparency to industry about investigations and enforcement actions. For example, the Commission has provided significant guidance on investigations and enforcement matters in various orders, such as orders approving settlement agreements, Orders to Show Cause, and Orders Assessing Civil Penalties. Similarly, OE staff increasingly aims to provide guidance in numerous forms, such as its Annual Reports on Enforcement, presentations at industry conferences, and its 2016 White Papers on market manipulation and effective compliance practices. We therefore conclude that the anticipated transparency benefit from the NAV Policy was limited in scope and, over time, sources other than the NAV have provided a transparency benefit.

9. We continue to recognize that issuances of NAVs, even after the preliminary findings stage of an investigation, create a potential risk of reputational harm to subjects. The Commission recognized a potential reputational risk when we issued the NAV Order, but we reasoned, based on our experience at that time, that “once staff provides its preliminary conclusions to a subject, the existence of the investigation is likely to become public in any event, through a negotiated settlement, an order to show cause, or, in the case of a publicly traded company, a securities filing.”¹⁵ Our subsequent experience implementing the NAV Policy, however, shows that such public disclosure may not always occur. In one investigation, a NAV issued against a company and individual subjects, but subsequently no negotiated settlement with the individual subjects occurred. But for the issuance of the NAV in that investigation, one individual subject would not have been publicly identified as a subject in the context of a Commission investigation or subsequent proceeding.

market data to OE staff on an ongoing basis. *Enhancement of Electricity Market Surveillance and Analysis through Ongoing Electronic Delivery of Data from Regional Transmission Organizations and Independent System Operators*, Order No. 760, 39 FERC ¶ 61,053 (2012).

¹⁵ NAV Order, 129 FERC ¶ 61,247 at P 6.

10. Public disclosure before a settlement agreement, finding of violation, or decision to proceed with an enforcement action may expose investigative subjects to potential risk of reputational harm.

11. For the foregoing reasons, the Commission is rescinding the NAV Policy. The potential negative impacts on investigative subjects are no longer warranted in light of the limited transparency NAVs have generated and the alternative methods of adding transparency the Commission has developed since adopting the policy.

The Commission orders:

The Commission's 2009 Order Authorizing Secretary to Issue Staff's Preliminary Notice of Violations, *Enforcement of Statutes, Regulations, and Orders*, 129 FERC ¶ 61,247 (2009), *order on reh'g*, 134 FERC ¶ 61,054 (2011), is hereby rescinded.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.