

180 FERC ¶ 61,052
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

18 CFR Part 1d

[Docket No. RM22-20-000]

Duty of Candor

(July 28, 2022)

AGENCY: Federal Energy Regulatory Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Federal Energy Regulatory Commission (Commission) proposes to add a requirement that all entities communicating with the Commission or other specified organizations related to a matter subject to the jurisdiction of the Commission submit accurate and factual information and not submit false or misleading information or omit material information. An entity is shielded from violation of the regulation if it has exercised due diligence to prevent such occurrences.

DATES: Comments are due **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: Comments, identified by docket number, may be filed in the following ways. Electronic filing through <https://www.ferc.gov>, is preferred.

- Electronic Filing: Documents must be filed in acceptable native applications and print-to-PDF, but not in scanned or picture format.

- For those unable to file electronically, comments may be filed by U.S. Postal Service mail or by hand (including courier) delivery.
 - Mail via U.S. Postal Service only: Addressed to: Federal Energy Regulatory Commission, Office of the Secretary, 888 First Street NE, Washington, DC 20426.
 - For delivery via any other carrier (including courier): Deliver to: Federal Energy Regulatory Commission, Office of the Secretary, 12225 Wilkins Avenue, Rockville, MD 20852.

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SUPPLEMENTARY INFORMATION:

UNITED STATES OF AMERICA
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NOTICE OF PROPOSED RULEMAKING

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1. Pursuant to sections 206, 215, 307, and 309 of the Federal Power Act (FPA),¹ sections 5, 14, and 16 of the Natural Gas Act (NGA),² sections 1(5)(a), 12(1)(a), 13, and 15 of the Interstate Commerce Act (ICA),³ sections 311(c) and 501(a) of the Natural Gas Policy Act of 1978 (NGPA),⁴ and sections 402(a)(2) and 402(h) of the Department of Energy Organization Act,⁵ the Commission proposes to add a new section to 18 CFR part 1 to require that any entity communicating with the Commission or other specified organizations (as identified below) related to a matter subject to the jurisdiction of the Commission submit accurate and factual information and not submit false or misleading information, or omit material information.⁶ However, the Commission proposes that

¹ 16 U.S.C. 824e, 824o, 825f, 825h.

² 15 U.S.C. 717d, 717m, 717o.

³ 49 U.S.C. app. 1(5)(a), 12(1)(a), 13, 15.

⁴ 15 U.S.C. 3371(c), 3411(a).

⁵ 42 U.S.C. 7172(a)(2), (h).

⁶ The dissent argues that the rule applies to a “lack of communication,” which is not accurate. While a material omission in a communication could violate the rule, a lack of communication would not. As the NOPR explains, this proposed rule does not impose a duty of disclosure.

exercising due diligence to prevent such occurrences would be an affirmative defense to violations of the requirement.

2. A variety of current Commission regulations prohibit, in defined circumstances, inaccurate communications to the Commission and other organizations upon which the Commission relies to carry out its statutory obligations in the Commission-jurisdictional electric, natural gas, and oil industries and markets. However, these existing requirements cover only certain communications and impose a patchwork of different standards of care for such communications.

3. The Commission relies extensively upon the accuracy of information provided to it and to other organizations for effective decision making. Reliance on inaccurate information inhibits the Commission's regulatory oversight and could lead to substantial harm, whether it is communicated to the Commission or to the other organizations upon which the Commission relies to assist it to carry out its regulatory responsibilities. We are concerned that the Commission has no explicit requirement that communications related to a matter subject to the jurisdiction of the Commission be accurate or even that they not include intentional misrepresentations.

4. We believe that a broadly applicable duty of candor will improve the Commission's ability to effectively oversee jurisdictional markets by ensuring the Commission and organizations upon which the Commission relies base decisions on accurate information. Effective Commission oversight depends on entities' use of due diligence to reduce the possibility that false or inaccurate information is communicated to the Commission and

other organizations upon which it relies. Further, intentional or reckless communication of false or inaccurate information is always unacceptable.

5. All persons appearing before the Commission and entities communicating with organizations regulated by the Commission should know that truthfulness is expected and required, that communications should be made following due diligence, and that communications should never be intentionally or recklessly misleading. However, we understand that there is a balance between ensuring accurate communications and the burden required to ensure that accuracy. By adopting a flexible standard, “due diligence,” and limiting the relevant communications to specific recipients related to matters subject to the jurisdiction of the Commission, we expect that such additional burdens, if any, would be minimal.

6. We seek comment on all aspects of the proposed rule, including specifically the following: the need for a broad duty of candor rule; whether 18 CFR 35.41(b) provides a reasonable foundation for the proposed expanded duty of candor rule; the Commission’s authority for the proposed rule; whether there are categories of entities or individuals that should be exempted from the duty of candor; the scope of the communications covered by the rule; and whether the regulation properly identifies all organizations who assist the Commission to carry out its statutory obligations and communications to whom should be subject to a duty of candor.

I. Background

7. Among the existing patchwork of Commission requirements imposing a duty of candor applicable to some Commission-regulated entities and markets is 18 CFR 35.41(b),

which applies only to “Sellers” in electric markets, defined as a person who has either obtained or applied for market-based rate authority under the auspices of the FPA.⁷ The Commission proposes here to adopt a broader regulation based upon our significant experience with § 35.41(b). By way of background, we first discuss some of the other duties of candor applicable to entities within the Commission’s jurisdiction. Then, we discuss 18 CFR 35.41(b) and its history in greater detail. Then, we turn to the limitations of these requirements.

A. Existing Duties of Candor

8. The Commission has adopted various regulations imposing a duty of candor for specific types of communications, and the vast majority of these regulations involve communications to the Commission or Commission staff. In each instance, the controlling regulation was adopted as part of specific regulatory requirements or procedures rather than as a broad requirement applicable to all of the Commission’s oversight responsibilities, including areas where the Commission relies on other organizations to assist it in exercising its authorities. This history, discussed in the paragraphs to follow, has resulted in a limited set of requirements that may fail to ensure that the Commission can make decisions based on accurate information.

9. For many decades, the Commission’s governing statutes and adopted regulations have required that certain submissions to it be made under oath and penalty of perjury.

⁷ A “Seller” is “any person that has authorization to or seeks authorization to engage in sales for resale of electric energy, capacity or ancillary services at market-based rates under section 205 of the Federal Power Act.” 18 CFR 35.36(a)(1).

For example, FPA 304 requires that entities submit periodic or annual reports under oath,⁸ FPA 307(a) requires that written statements in investigations be under oath,⁹ and FPA 4(b) allows the Commission to require certain hydroelectric-related filings to be submitted under oath.¹⁰ The NGA allows submissions under oath in investigations,¹¹ periodic forms must be provided under oath,¹² and 18 CFR 385.1907 requires compliance reports to be under oath as well. The provision in 18 CFR 385.2005 (Rule 2005 of the Commission's Rules of Practice and Procedure) requires that any filing with the Commission must be signed and that a signature constitutes a certificate that the signer knows the contents are true to the best of his/her knowledge and belief.¹³ Testimony and evidence submitted in proceedings before Commission Administrative Law Judges must be submitted under oath.¹⁴

10. While the authorities referenced above require submissions to be made under oath, other regulations impose differing obligations for communications. For example, the Commission has interpreted 18 CFR 157.5 to require applicants under NGA 7 seeking pipeline certificates of public convenience and necessity to disclose "fully and forthrightly

⁸ 16 U.S.C. 825c.

⁹ 16 U.S.C. 825f(a).

¹⁰ 16 U.S.C. 797(b).

¹¹ 15 U.S.C. 717m(a).

¹² 15 U.S.C. 717i(a).

¹³ 18 CFR 385.2005(a).

¹⁴ *See, e.g.*, 18 CFR 385.506(b), 385.507(d).

. . . all information relevant to the application.”¹⁵ NGA 7(d) requires that applications for certificates shall be made in writing to the Commission, be verified under oath, and “shall be in such form, contain such information, and notice thereof shall be served upon such interested parties and in such manner as the Commissions shall, by regulation, require.”¹⁶ ICA 20(7)(b) prohibits the knowing and willful filing of any “false entry” in any annual or other report required to be filed under this section.¹⁷

11. The Commission also has adopted amendments to blanket sales certificates “to ensure the integrity of the natural gas market.”¹⁸ Citing staff’s findings in its Final Report on the Western Energy Crisis,¹⁹ the Commission expressed concerns about attempted manipulation in the natural gas industry such as “reporting . . . false data” and as a result agreed with staff’s recommendation to “condition natural gas companies’ blanket certificates on providing accurate and honest information to entities that publish price indices.”²⁰ Acting under NGA 7, the Commission also promulgated Market Behavior Rules, including rules specifically requiring Sellers that report their trades to index publishers to “provide accurate and factual information and not knowingly submit false or

¹⁵ See *Black Marlin Pipeline Co.*, 4 FERC ¶ 61,039, at 61,088 (1978).

¹⁶ 15 U.S.C. 717f(d).

¹⁷ 49 U.S.C. App. 20(7)(b).

¹⁸ *Amendments to Blanket Sales Certificates*, Order No. 644, 68 FR 66323 (Nov. 26, 2003), 105 FERC ¶ 61,217, at P 109 (2003).

¹⁹ *Final Report on Price Manipulation in Western Markets: Fact-Finding Investigation of Potential Manipulation of Electric and Gas Prices*, Docket No. PA02-2-000 (Mar. 2003).

²⁰ Order No. 644, 105 FERC ¶ 61,217 at P 13.

misleading information or omit material information to any such publisher.”²¹ As the Commission stated, the candor requirement in the amendments to natural gas blanket sales certificates was simply to “be honest and forthright with the Commission and the institutions it has established to implement open-access transportation and entities publishing indices for the purpose of price transparency.”²² These rules remain in place today.²³

12. For individuals, the Commission’s Rules of Practice and Procedure impose a duty of candor on those appearing before it: “A person appearing before the Commission or the presiding officer must conform to the standards of ethical conduct required of practitioners before the Courts of the United States.”²⁴ The minimum such standard is found in Rule 11 of the Federal Rules of Civil Procedure, which provides that any submission to the court impliedly certifies that factual or legal representations made therein have a reasonable basis in fact or law “to the best of the person’s knowledge,

²¹ *Id.* P 70.

²² *Id.* P 44.

²³ *See* 18 CFR 284.288(a), 284.403(a). These provisions were originally adopted as 18 CFR 284.288(b) and 284.403(b), but were re-ordered following revisions to those sections arising from the Commission’s implementation of specific anti-manipulation authority granted by the Energy Policy Act of 2005’s creation of new NGA section 4A. *See Amends. to Codes of Conduct for Unbundled Sales Serv. & for Persons Holding Blanket Mktg. Certificates*, Notice of Proposed Rulemaking, 70 FR 72090, (Dec. 1, 2005), 113 FERC ¶ 61,189 (2005); *Amends. to Codes of Conduct for Unbundled Sales Serv. & for Persons Holding Blanket Mktg. Certificates*, Order No. 673, 71 FR 9709 (Feb. 27, 2006), 114 FERC ¶ 61,166 (2006).

²⁴ 18 CFR 385.2101(c). “Person” in this context is not confined to attorneys, as non-attorneys may also appear before the Commission. 18 CFR 385.2101(a).

information, and belief, formed after an inquiry reasonable under the circumstances.”²⁵

Practitioners before the Courts of the United States are also bound by the ethical rules of any bar of which they are a member. The American Bar Association’s Model Rules of Professional Conduct, upon which numerous state bar rules are based, provide, among other things, that “a lawyer shall not knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.”²⁶ In addition to the explicit prohibition against “knowingly” making false statements, the official comments that accompany the Model Rules make clear that the lawyer is required to exercise due diligence to ensure, under certain circumstances, that the information provided is not false or misleading.²⁷

13. Under 18 CFR 1c.1(a)(2) and 1c.2(a)(2), it is unlawful, in connection with jurisdictional natural gas and electric transactions, “[t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading.”²⁸ Order No. 670 explained that these regulations did not adopt a general affirmative duty of

²⁵ Fed. R. Civ. P. 11(b).

²⁶ MODEL RULES OF PROF’L CONDUCT R. 3.3(a)(1).

²⁷ MODEL RULES OF PROF’L CONDUCT R. 3.3 cmt. 3 (“an assertion purporting to be on the lawyer’s own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation.”).

²⁸ 18 CFR 1c.1(a)(2), 1c.2(a)(2).

disclosure, but applied to communications whether they are voluntary or required.²⁹

Moreover, false statements by themselves are not actionable under the regulation. Rather, there is a violation only “if all of the other elements of a violation are present” (including scienter).³⁰

14. Federal law, in fact, contemplates criminal sanctions for intentionally false statements made to any branch of the United States Government, including the Commission. Under 18 U.S.C. 1001(a), individuals who “in any matter within the jurisdiction of the Government . . . make any materially false, fictitious, or fraudulent statement or representation” can be fined or imprisoned for up to five years. However, the Commission has no authority to prosecute such violations.

15. Taken as a whole, these statutory and regulatory provisions create obligations for candor in various communications made to or before the Commission in a variety of circumstances. But these obligations are individually limited.

B. 18 CFR 35.41(b)

16. We believe that existing § 35.41(b) can form the basis for a broader rule that applies to a wider range of communications in the Commission’s regulation of the electric, natural gas, and oil industries and markets.³¹ Section 35.41(b) of the Commission’s

²⁹ *Prohibition of Energy Mkt. Manipulation*, Order No. 670, 71 FR 4244 (Jan. 26, 2006), 114 FERC ¶ 61,047, at PP 35-37, 41-42 (2006).

³⁰ *Id.* P 41.

³¹ In 2016, the Commission proposed a new rule requiring virtual traders and financial transmission rights (FTR) traders to report certain information about their legal and financial connections to other entities (i.e., connected entity information). The Commission also

regulations prohibits false statements made by entities who have sought or obtained electric market-based rate authority. The provision currently provides that a Seller must provide accurate and factual information and not submit false or misleading information, or omit material information, in any communication with the Commission, with Commission-approved market monitors, with Commission-approved regional transmission organizations, with Commission-approved independent system operators, or with jurisdictional transmission providers, unless the Seller exercises due diligence to prevent such occurrences.

17. In the aftermath of the Western Energy Crisis, the Commission found that dishonest and abusive practices by Sellers with market-based rate authority led to unjust and unreasonable rates.³² It also found that market-based rate Sellers were under an

proposed to extend the § 35.41(b) duty of candor to these traders. *See Data Collection for Analytics & Surveillance & Mkt.-Based Rate Purposes*, Notice of Proposed Rulemaking, 81 FR 51726 (Aug. 4, 2016), 156 FERC ¶ 61,045, at PP 44-48 (2016). The Commission ultimately declined to adopt this part of the rule. *See Data Collection for Analytics & Surveillance & Mkt.-Based Rate Purposes*, Order No. 860, 84 FR 36390 (July 26, 2019), 168 FERC ¶ 61,039, at P 4 & Glick dissenting at n.6 (2019). However, the Commission transferred the record to Docket No. AD19-17-000 for possible additional consideration in the future of a requirement to provide connected entity information to the Commission. *Id.* P 184.

³² *See San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs.*, 65 FR 67040 (Nov. 8, 2000), 93 FERC ¶ 61,121, at 61,349 (2000) (finding “that the electric market structure and market rules . . . are seriously flawed and that these structures and rules . . . have caused, and continue to have the potential to cause, unjust and unreasonable rates . . .”); *Ord. Establishing Refund Effective Date and Proposing to Revise Mrkt.-Based Rate Tariffs & Authorizations*, 66 FR 59241 (Nov. 27, 2001), 97 FERC ¶ 61,220, at 61,974 (2001) (instituting a proceeding under FPA section 206 “to investigate the justness and reasonableness of the terms and conditions of market-based rate tariffs and authorizations” in the wake of market abuses); *Investigation of Terms &*

implicit duty not to engage in fraudulent or deceptive conduct.³³ When it instituted Market Behavior Rule 3 (later codified as 18 CFR 35.41(b)), the Commission explained that “[t]he integrity of the processes established by the Commission for open competitive markets rely on the openness and honesty of market participant communications.”³⁴ The Commission adopted the Market Behavior Rules for Sellers with market-based rate authority through its ratemaking authority under FPA 206.³⁵ The Commission found that Sellers’ existing tariffs and authorizations, without clearly-delineated rules of the road to govern market participant conduct, were unjust and unreasonable. Without such behavioral prohibitions, the Commission found that it would not be able to ensure that rates are the product of competitive forces and thus would remain within a zone of reasonableness. It further found that its Market Behavior Rules “will help ensure that rates are the product of competitive forces and thus remain just and reasonable.”³⁶

Conditions of Pub. Util. Mkt.-Based Rate Authorizations, 68 FR 40924 (July 9, 2003), 103 FERC ¶ 61,349, at P 5 (2003) (proposing to amend the requirements of market-based rate authority “to provide clearly-delineated ‘rules of the road’ to market-based rate sellers while, at the same time, not impairing the Commission’s ability to provide remedies for market abuses whose precise form and nature cannot be envisioned today”); *Ord. Amending Mkt.-Based Rate Tariffs & Authorizations*, 68 FR 65902 (Nov. 24, 2003), 105 FERC ¶ 61,218 (2003) (amending requirements for market-based rate authority by adding Market Behavior Rules after notice and comment).

³³ *Enron Power Mktg. Inc.*, 102 FERC ¶ 61,316, at P 8.

³⁴ *Ord. Amending Mkt.-Based Rate Tariffs & Authorizations*, 105 FERC ¶ 61,218 at P 107.

³⁵ 16 U.S.C. 824e.

³⁶ *Ord. Amending Pub. Util. Mkt.-Based Rate Tariffs & Authorizations*, 68 FR 65902 (Nov. 24, 2003), 105 FERC ¶ 61,218, at P 3.

18. The duty of candor adopted in 18 CFR 35.41(b) has been upheld by the courts. For example, in *Kourouma*, the D.C. Circuit upheld the provision's constitutionality against a challenge based on alleged vagueness and lack of fair notice.³⁷ In *Coaltrain*, the U.S. District Court for the Southern District of Ohio upheld the Commission's authority to promulgate § 35.41(b) under FPA section 206 and found that the Commission properly applied § 35.41(b) to statements made in investigations.³⁸ The court also rejected the argument that, in adding section 221 to the FPA related to false reports to index publishers, Congress "intended to narrowly circumscribe FERC's authority [to prohibit false statements], limiting it to highly specific statements in the price reporting area."³⁹

19. Although § 35.41(b) has been an effective tool to ensure the accuracy of communications by Sellers (i.e., persons which have sought or obtained Commission-approved market-based rate authority pursuant to FPA 205), there are a number of limitations that constrict its application and highlight the inconsistent levels of accuracy required of various entities in connection with different activities subject to the jurisdiction of the Commission.

³⁷ *Kourouma v. FERC*, 723 F.3d 274, 278-79 (D.C. Cir. 2013). *Kourouma* also confirmed that the regulation did not require that the communicating entity have an intent to make a false statement. *Id.*

³⁸ *FERC v. Coaltrain Energy, L.P.*, No. 2:16-cv-732, 2018 WL 7892222, at *24-27 (S.D. Ohio Mar. 30, 2018).

³⁹ *Id.* at *26 (citation and quotation marks omitted).

C. Limitations of the Existing Duty of Candor Rules

20. As the above discussion demonstrates, the Commission has adopted a variety of duties of candor regarding communications made to it as well as to other entities, but it has not adopted a standardized requirement affecting all types of communications related to matters subject to the jurisdiction of the Commission.

21. Moreover, for many communications made to the Commission, and organizations upon which the Commission relies in carrying out its statutory responsibilities, there is no explicit requirement that such communications be accurate. For example, the truth of statements made in most filings to the Commission are limited to the signing attorney's knowledge – not the underlying truth of the statements made, or the care with which they were determined to be truthful. In many circumstances, there is no requirement that care be taken that communications to the Commission or its staff are indeed truthful (*e.g.*, in filings, during investigations, in procedural communications, and during uncontested proceedings).

22. Similarly, absent a restriction contained in a tariff provision, there may be no explicit requirement of candor for various important communications fundamental to the functioning of a market that produces just and reasonable rates: for example, communications from shippers to interstate pipelines, from transmission customers to transmission utilities, from transmission utilities to independent system operators (ISOs) or regional transmission organizations (RTOs), and from wholesale demand response participants to ISOs, RTOs, or transmission providers. Even intentional miscommunications may not be explicitly prohibited by our regulations, unless made

pursuant to a violation of the Commission's Anti-Manipulation Rule under Part 1c of the Commission's regulations.

II. Discussion

23. The Commission proposes to adopt a new section within 18 CFR part 1 to require that entities ensure the accuracy of communications related to a matter subject to the Commission's jurisdiction when communicating with the following entities: the Commission, Commission-approved market monitors, Commission-approved RTOs, Commission-approved ISOs, jurisdictional transmission or transportation providers, or the Electric Reliability Organization and its associated Regional Entities. Ensuring the accuracy of such communications will increase confidence in Commission-jurisdictional industries and markets and will improve the Commission's ability to meet its statutory responsibilities. The integrity and effectiveness of the Commission's regulatory oversight and decisionmaking authority rely on and require accuracy in communications to each of these entities.

24. To this end, the Commission proposes to adopt a requirement that every entity must provide accurate and factual information and not submit false or misleading information, or omit material information, in any communication with the Commission or with a range of other organizations including Commission-approved market monitors, Commission-approved RTOs and ISOs, as well as jurisdictional transmission or transportation providers, or the Electric Reliability Organization and its associated Regional Entities, where such communication relates to a matter subject to the jurisdiction of the Commission, unless the entity exercises due diligence to prevent such occurrences.

25. In the following sections, we discuss: (A) why a broad duty of candor requirement is needed to protect Commission-jurisdictional industries and markets; (B) the Commission's, Sellers', and the courts' favorable experience with application of 18 CFR 35.41(b); (C) the statutory authorities supporting the proposed rule; and (D) interpretive guidance for the proposed rule and how it will be applied.

A. The Need for a Broad Duty of Candor

26. It is indisputable that communications related to matters subject to the jurisdiction of the Commission should be complete, honest, and accurate in order for the Commission to effectively carry out its regulatory responsibilities. The Commission, and equally the organizations upon which the Commission relies to carry out its statutory responsibilities, need complete, honest, and accurate information to make important policy and economic decisions affecting the fairness, competitiveness, and reliability of markets. Submission of false or misleading information, or omission of material information – whether intentionally or reckless – could lead the Commission to reach decisions that it otherwise would not have made, such as erroneously approving or denying (1) requests to construct and operate infrastructure projects, (2) applications for merger or consolidation of jurisdictional electric facilities, (3) applications for market-based rate authority, or (4) requests to revise tariff provisions. Likewise, submission of false or misleading information, or omission of material information could inhibit the Commission's ability to ensure that the rates, terms, and conditions of service of natural gas and oil pipelines and public utilities are just and reasonable and not unduly discriminatory or preferential. Similarly, it could lead the Commission or its staff to close an investigation that should continue, or to adopt policies

that are ineffective. The submission of false or misleading information, or omission of material information could lead an ISO or RTO to make decisions that jeopardize competition, fairness, and reliability of electric markets, and that potentially harm market participants and cause them to lose confidence that markets are working fairly and producing results consistent with market rules and fundamentals. False information could also result in an interstate gas pipeline misallocating capacity.

27. We recognize that communications in markets as large, complex, and active as those the Commission regulates will sometimes include inadvertent errors or oversights. Identifying and punishing all mistaken communications, or expending undue resources to prevent every error, is both impractical and unnecessary.

28. We believe, therefore, that a balance must be struck between the need for accurate information and the burden of ensuring the accuracy of that information. Based on the Commission's experience with its existing regulations (especially 18 CFR 35.41(b)), we believe that a duty of candor should apply to: (1) all entities, including both organizations and individuals; (2) communications to the Commission and to certain other specified organizations that administer, participate in, or operate markets and facilities subject to the Commission's jurisdiction; and (3) communications related to a matter subject to the jurisdiction of the Commission. However, no entity should be penalized or otherwise sanctioned for inaccurate communications where due diligence has been exercised to

ensure the communications' accuracy.⁴⁰ In addition, consistent with the need to exercise due diligence, it should be clear that intentional or reckless miscommunications are never permissible.

29. We believe that the duty of candor rule proposed herein will provide clarity that benefits the industries and markets the Commission regulates. If an entity communicates with the Commission or one of the other specified organizations identified in the regulation, it will know or be on notice that it must exercise due diligence in all its communications related to a matter subject to the jurisdiction of the Commission.

30. Notwithstanding the potential adoption of this proposed regulation, we are not proposing to remove other duties of candor from our existing regulations. Those duties of candor and that proposed here are not inconsistent. Further, we note that the proposed rule, if adopted, would not impose a general affirmative duty of disclosure, but would apply to communications whether they are voluntary or required.⁴¹

31. Providing inaccurate information to entities not named in the proposed regulation is also potentially problematic and may be actionable under other statutes and regulations in certain circumstances (*e.g.*, intentional misrepresentations may form the basis for

⁴⁰ It is the Commission's expectation that any entity providing inaccurate information would, upon discovery, provide corrections as expeditiously as possible, whether due diligence had been previously exercised or not. However, in the event such initiative were not exercised, the Commission could require that corrective actions be undertaken irrespective of whether it also pursues sanctions for a duty of candor violation.

⁴¹ This clarification is similar to the clarification the Commission adopted for the candor requirements discussed in Order No. 670. *See* Order No. 670, 114 FERC ¶ 61,047 at PP 35-37, 41-42.

enforcement action under 18 CFR part 1c). We welcome comment on whether the scope of communications subject to the proposed duty of candor is adequate or should be expanded.

B. 18 CFR 35.41(b) Provides a Fair Basis for a Broader Duty of Candor

32. We propose to adopt a duty of candor rule that is based upon the existing duty of candor rule in 18 CFR 35.41(b). Since adoption of the Market Behavior Rules twenty years ago, the accuracy of communications by Sellers has improved substantially. While § 35.41(b) is likely not the only reason for this improvement, we believe that Sellers understand the regulation and generally attempt to comply with it. The Commission now has an abundance of experience and precedent applying § 35.41(b), which has been upheld in court as described above. We intend for this experience to inform the application of this proposed new rule, which is substantially similar in form and function, albeit broader in application.

33. Although the Commission's focus in adopting § 35.41(b) was Sellers with market-based rate authority, we find that the rule's underlying rationale – that the Commission cannot rely on market mechanisms to generate just and reasonable outcomes if those mechanisms have been undermined by inaccurate information – applies more broadly.

34. In fact, implicit in any Commission order is the presumption that representations made to the Commission and others are complete, accurate, and free of fraud, deception, or misrepresentation. Similarly, actions taken by market participants are taken with the understanding that the underlying information provided to them is accurate. One court described § 35.41 as aimed at “ensur[ing] the integrity and smooth functioning of the

markets.”⁴² A broader requirement imposing a duty of candor will serve the same purpose across more of our regulated industries and markets. The Commission has explained that “[t]he integrity of the processes established by the Commission for open competitive markets rely on the openness and honesty of market participant communications.”⁴³ The Commission cannot exercise its regulatory authority effectively and appropriately if entities can provide the Commission, or other organizations upon which the Commission relies, with inaccurate information with impunity.

C. Authority for the Proposed Rule

35. The Commission has broad statutory authority, described below, to issue rules and regulations to allow it to effectively perform its regulatory functions. This authority includes the power to require accurate communications from those who choose to engage in Commission-jurisdictional markets or who communicate to the Commission about those markets. The Commission has previously implemented specific duty of candor regulations under this broad authority and it similarly has the authority to adopt a more generally applicable duty of candor.⁴⁴

⁴² *Kourouma*, 723 F.3d at 276.

⁴³ *Ord. Amending Mkt.-Based Rate Tariffs & Authorizations*, 105 FERC ¶ 61,218 at P 107.

⁴⁴ If an agency can require communications or if it acts as a gatekeeper to participation in matters subject to the agency’s jurisdiction, it can require candor in communications related to those matters. *See, e.g., SEC v. Jensen*, 835 F.3d 1100, 1112-1113 (9th Cir. 2016) (rule under Sarbanes-Oxley Act requiring corporate officers to certify financial statements includes implicit truthfulness requirement; SEC may bring enforcement action for certifying false financial statements); *U.S. v. Bilzerian*, 926 F.2d 1285, 1298 (2d Cir. 1991) (requirement under section 13(d)(1) of Securities Exchange Act

36. The Commission has the statutory obligation under such statutes as the FPA, NGA, ICA, NGPA, and the Administrative Procedure Act to ensure that wholesale rates, and rules or practices directly affecting such rates, are just and reasonable,⁴⁵ and that its own actions are based on reasoned decisionmaking. Introducing incorrect or inaccurate information into the Commission's decisionmaking process can lead to uneconomic, unfair, unjust, unreasonable, or even dangerous outcomes regarding many areas within the Commission's jurisdictional authority, including transmission and transportation decisions, hydroelectric licensing and operations, pipeline approval and operations, electric reliability, and enforcement actions. The current patchwork of requirements is insufficient to encompass all the situations in which the Commission must be assured that it is receiving accurate communications that are necessary for it to adequately conduct its regulatory oversight.

37. The following authorities support the Commission's issuance of the proposed regulation:

- FPA 206, NGA 5, and ICA 13 and 15. As was the case with our adoption of 18 CFR 35.41, we believe that FPA 206 and the parallel provisions in the NGA and ICA provide a basis for adoption of the proposed regulation because information in our markets must be accurate to ensure that wholesale rates, and rules or practices directly affecting such rates are just and reasonable.

of 1934 to file form disclosing stock ownership creates duty to file truthfully and completely; criminal penalties may be imposed for violating duty); *Completeness and Accuracy of Information*, 52 FR 49362 at 49365 (Dec. 1987) (Nuclear Regulatory Commission stating “[i]t is inconceivable that Congress would have established the broad regulatory authority in the Atomic Energy Act, which is considered unique, and not granted sufficient authority for the Commission to require communications, regardless of the format, to be complete and accurate.” (citation omitted)).

⁴⁵ *Elec. Power Supply Ass'n v. FERC*, 577 U.S. 260, 277-78 (2016).

- FPA 307, NGA 14, and ICA 12(1)(a). Section 307 of the FPA and parallel section 14 of the NGA permit the Commission to obtain information needed to conduct investigations. Section 12(1)(a) of the ICA similarly permits the Commission to obtain information about the management and business of oil pipelines. Given the Commission's authority to obtain information, it follows that the Commission should be entitled to receive accurate information.
- FPA 309, NGA 16, NGPA 501(a), and Department of Energy Organization Act 402(a)(2) and 402(h). These sections give broad authority to the Commission to adopt regulations that are necessary or proper to effectuate its regulatory obligations. The Commission and the markets it regulates cannot function properly without the submission of accurate information.
- FPA 215. Section 215 conveys to the Commission, the Electric Reliability Organization, and Regional Entities the duties to obtain information and act upon that information. These obligations cannot be fulfilled without communication of accurate information.⁴⁶
- NGPA 311(c). Section 311(c) permits the Commission to prescribe terms and conditions to transportation authorizations under NGPA 311. One such condition can be to require that section 311 pipelines provide accurate information in their submissions to the Commission.
- ICA 1(5)(a). Transportation charges must be just and reasonable and charges based upon incorrect information are not just and reasonable.

38. We welcome comments on the Commission's authority to implement the proposed regulation.

⁴⁶ See *Rules Concerning Certification of the Elec. Reliability Org. & Procs. for the Establishment, Approval, & Enforcement of Elec. Reliability Standards*, Order No. 672, 71 FR 8662 (Feb. 17, 2006), 114 FERC ¶ 61,104, at P 114, *order on reh'g*, Order No. 672-A, 71 FR 19814 (Apr. 18, 2006), 114 FERC ¶ 61,328 (2006) ("to fulfill its obligations under this Final Rule, the ERO or a Regional Entity will need access to certain data from users, owners and operators of the Bulk-Power System. Further, the Commission will need access to such information as is necessary to fulfill its oversight and enforcement roles under the statute"); 18 CFR 39.2(d) ("[e]ach user, owner or operator of the Bulk-Power System within the United States . . . shall provide the Commission, the Electric Reliability Organization and the applicable Regional Entity such information as is necessary to implement section 215 of the Federal Power Act").

D. Interpretive Guidance and Application of the Proposed Rule

39. To facilitate comment on the proposed regulation, we provide the following clarifications and expand upon some aspects of the proposed regulation. We welcome comments and requests for further clarification, as needed, on these points.⁴⁷

40. The proposed regulation utilizes the term “entity” because we believe that covered communications (i.e., those that relate to a matter subject to the jurisdiction of the Commission) from all types of organizations, as well as from individuals (or, where appropriate, concurrently from both), should reflect accurate and factual information, and should not reflect false or misleading information or omit material information. The term “entity” applies to both the entity making the communication as well as the entity responsible for the communication. Thus, if an entity relies upon a non-employee agent for the submission of a communication, the principal would not escape application of the regulation, absent a showing of due diligence.⁴⁸ Although the rule as proposed applies to

⁴⁷ We note that the dissent calls for comments on multiple aspects of the proposed rule. We also encourage such comments. We believe that our consideration of the proposed rule, like all notice and comment rulemakings, will be enhanced by robust comments from a wide variety of interested parties.

⁴⁸ A common example occurs in communications to the Commission where a company submits a document through its outside counsel. In such a circumstance, both the company and counsel should exercise “due diligence” to ensure the accuracy. Of course, due diligence for counsel in such circumstances likely will simply amount to ensuring that it has no reason to believe the falsity of the information provided. The responsible company would bear a greater burden to ensure the communication’s accuracy.

all entities, we seek comment on whether there are specific types of organizations or individuals who should be exempted from the proposed regulation.

41. Further, we intend to interpret the term “communication” broadly, including informal and formal communications, verbal or written, and via any method that may be used for transmission. We also intend to interpret the term “Commission” under this provision to include communications to Commission staff. Communications to the other listed entities include communications to individuals employed or acting on behalf of those entities, including agents and contractors of the covered entities.

42. The proposed regulation applies to communications that relate to a matter subject to the jurisdiction of the Commission. Communications that are tangential or unrelated to matters subject to the jurisdiction of the Commission are not covered by the proposed regulation. For example, the proposed regulation typically would not apply to communications about contracts for general services with jurisdictional entities or employee/employer disputes within a jurisdictional entity.

43. The exercise of due diligence would be a defense to an alleged violation of the proposed regulation. The concept of due diligence is well developed in the context of duties of candor and the Commission and courts have precedent applying this defense.⁴⁹ We

⁴⁹ See, e.g., *FERC v. Coaltrain*, 501 F. Supp. 3d 503, 526 (S.D. Ohio 2020) (“A Seller can avoid liability for a violation if it shows it had a process to ensure the accuracy of its responses.” (citation omitted)); *id.* at 527 (“Coaltrain can avoid liability if it shows that it conducted a reasonable investigation to make sure it produced the relevant and material information and followed a process to ensure the accuracy of its responses.”); *Kourouma*, 723 F.3d at 278 (“Contrary to Kourouma’s assertion, so read, Market Behavior Rule 3 does not subject filers like Kourouma to strict liability, but reserves

intend for due diligence to include all relevant facts related to whether reasonable steps were taken by the communicator(s) to ensure the accuracy and completeness of a communication in light of all of the circumstances. Many facts will bear upon consideration of a due diligence defense including, but not limited to, whether a communication had to be made without sufficient time for additional diligence to be undertaken, the importance and materiality of the communication to the recipient, the duration and consistency of the communication at issue, whether the communication was voluntary or required, whether the communication was in response to a specific request for information or was unsolicited, the size and sophistication of the communicator(s), and the communication's effect on the marketplace or the Commission's regulatory responsibilities.

44. We recognize that the best-intentioned entities may, and occasionally will, inadvertently provide inaccurate information. Even where due diligence cannot be demonstrated, it is not the Commission's intention to investigate or penalize all potential violations of the proposed regulation. As a general matter, we do not intend to penalize inadvertent errors, especially those of limited scope and impact. The Commission retains discretion not to pursue enforcement actions in such instances and will exercise that

punishment for those who do not act with requisite care when submitting information to FERC."); *Kourouma*, 135 FERC ¶ 61,245, at P 21 (2011) ("submission of false or incomplete information on behalf of a seller by an individual that did not personally know it to be false or incomplete in the absence of a process to insure data accuracy and sufficiency will not excuse the seller's conduct under the rule." (internal citations and quotations omitted)).

discretion, as appropriate, in implementing the proposed regulation, as the Commission does with all other Commission regulations.

III. Information Collection Statement

45. Regulations of the Office and Management and Budget (OMB) implementing the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 through 3520) require federal agencies to obtain approval from the OMB before conducting or sponsoring certain collections of information requirements imposed by agency rule.⁵⁰ This proposed rule would not impose any new or modified information collections. Moreover, the substance of the communications that would be affected by the proposed rule has been approved by OMB. Therefore, OMB review of this proposed rule under the PRA is not required.

IV. Environmental Analysis

46. The Commission is required to prepare an Environmental Assessment or an Environmental Impact Statement for any action that may have a significant adverse effect on the human environment.⁵¹ The Commission has categorically excluded certain actions from this requirement as not having a significant effect on the human environment. Included in the exclusion are rules that include information collection or that are clarifying, corrective, or procedural or that do not substantially change the effect of the

⁵⁰ See 5 CFR 1320.3(c)(4)(i).

⁵¹ *Reguls. Implementing the Nat'l Env. Pol'y Act of 1969*, Order No. 486, 52 FR 47897 (Dec. 17, 1987), FERC Stats. & Regs. ¶ 30,783 (1987) (cross-referenced at 41 FERC ¶ 61,284).

regulations being amended.⁵² The actions proposed herein fall within these categorical exclusions in the Commission's regulations.

V. Regulatory Flexibility Act Analysis

47. The Regulatory Flexibility Act of 1980 (RFA)⁵³ generally requires a description and analysis of proposed rules that will have significant economic impact on a substantial number of small entities. The Commission intends to pose the least possible burden on all entities both large and small.

48. Although this NOPR applies to many types of entities, including small entities, the burden associated with proposed regulation should be minimal. We expect that almost all entities regularly communicate with the Commission and jurisdictional actors with accuracy and honesty. We also believe that such communications already regularly occur with due diligence exercised and, thus, there should be no new burdens associated with the proposed rule on small entities. Further, due diligence for a small entity will often be different than for an entity with more resources and the proposed regulation accommodates these differences in resources. Therefore, the proposed regulation does not appear to pose a significant change to small entities.

VI. Comment Procedures

49. The Commission invites interested persons to submit comments on the matters and issues proposed in this notice to be adopted, including any related matters or alternative

⁵² 18 CFR 380.4(a)(5) and (a)(2)(ii).

⁵³ 5 U.S.C. 601-12.

proposals that commenters may wish to discuss. Comments are due **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

Comments must refer to Docket No. RM22-20-000, and must include the commenter's name, the organization they represent, if applicable, and address in their comments. All comments will be placed in the Commission's public files and may be viewed, printed, or downloaded remotely as described in the Document Availability section below.

Commenters on this proposal are not required to serve copies of their comments on other commenters.

50. The Commission encourages comments to be filed electronically via the eFiling link on the Commission's website at <https://www.ferc.gov>. The Commission accepts most standard word processing formats. Documents created electronically using word processing software must be filed in native applications or print-to-PDF format and not in a scanned format. Commenters filing electronically do not need to make a paper filing.

51. Commenters that are not able to file comments electronically may file an original of their comment by USPS mail or by courier-or other delivery services. For submission sent via USPS only, filings should be mailed to: Federal Energy Regulatory Commission, Office of the Secretary, 888 First Street, NE, Washington, DC 20426. Submission of filings other than by USPS should be delivered to: Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, MD 20852.

VII. Document Availability

52. In addition to publishing the full text of this document in the Federal Register, the Commission provides all interested persons an opportunity to view and/or print the

contents of this document via the Internet through the Commission's Home Page (<https://www.ferc.gov>). At this time, the Commission has suspended access to the Commission's Public Reference Room due to the President's March 13, 2020 proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID-19).

53. From the Commission's Home Page on the Internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

User assistance is available for eLibrary and the Commission's website during normal business hours from the Commission's Online Support at 202-502-6652 (toll free at 1-866-208-3676) or email at ferconlinesupport@ferc.gov, or the Public Reference Room at (202) 502-8371, TTY (202)502-8659. E-mail the Public Reference Room at public.referenceroom@ferc.gov.

List of Subjects in 18 CFR Part 1

Administrative practice and procedure

By direction of the Commission. Commissioner Danly is dissenting with a separate statement attached.

(S E A L)

Debbie-Anne A. Reese,
Deputy Secretary.

In consideration of the foregoing, the Commission proposes to add part 1d to title 18 of the *Code of Federal Regulations*, as follows:

PART 1d – Duty of Candor

Sec.

1d. 1 Accuracy of communications.

Authority: 42 U.S.C. 7101-7352; E.O. 12009, 3 CFR 142 (1978); 5 U.S.C. Ch. 5.

§ 1d.1 Accuracy of communications.

Any entity must provide accurate and factual information and not submit false or misleading information, or omit material information, in any communication with the Commission, Commission-approved market monitors, Commission-approved regional transmission organizations, Commission-approved independent system operators, jurisdictional transmission or transportation providers, or the Electric Reliability Organization and its associated Regional Entities, where such communication relates to a matter subject to the jurisdiction of the Commission, unless the entity exercises due diligence to prevent such occurrences.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Duty of Candor

Docket No. RM22-20-000

(Issued July 28, 2022)

DANLY, Commissioner, *dissenting*:

1. I dissent from this notice of proposed rulemaking seeking to extend the duty of candor—which currently applies to “Sellers” in electric markets¹—to “any entity” in “any communication”—or lack of communication—associated with any “matter subject to the jurisdiction of the Commission.”² This expands the duty of candor well beyond current Commission practices.³ Knowledge or intent does not matter. The materiality of the erroneous statement does not matter. The powers we propose to grant ourselves in this rulemaking are so broad and the standards so vague that, if finalized, it would be a simple proposition for the Commission to “find” that any factually untrue statement, regardless of context, violates the duty of candor, exposing the speaker to sanctions. And rather than establish guard rails or explicit limits to our powers, we instead say “just trust us.” This proposal is chillingly broad in its scope and, by its plain terms, would encompass constitutionally protected speech.

2. Much of what the Commission and our jurisdictional entities routinely do involves “‘matter[s] of political, social, or other concern to the community’ or . . . ‘is a subject of general interest and of value and concern to the public.’”⁴ Speech on such matters “‘occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.’”⁵ Precisely because of the public import of the matters subject to its jurisdiction, the Commission, at the direction of Congress, is encouraging greater public participation in its proceedings. Unwary members of the public, taking up our offer to engage the Commission (or the listed jurisdictional entities) in a manner they would doubtless believe is civically virtuous, could—by the plain language of this rulemaking—be subject to liability. The very *possibility* of such sanctions goes well beyond a

¹ 18 C.F.R. § 35.41(b).

² *Duty of Candor*, 180 FERC ¶ 61,052, at proposed §1d.1 (2022) (NOPR).

³ See *Prohibition of Energy Mkt. Manipulation*, Order No. 670, 114 FERC ¶ 61,047, at P 49, *reh’g denied*, 114 FERC ¶ 61,300 (2006).

⁴ *Snyder v. Phelps*, 562 U.S. 443, 453 (2011) (quoting *Connick v. Myers*, 461 U.S. 138, 146 (1983); *San Diego v. Roe*, 543 U.S. 77, 83-84 (2004)).

⁵ *Id.* at 452 (quoting *Connick v. Myers*, 461 U.S. at 145).

reasonable attempt to deter falsehoods and will instead chill speech at the core of the First Amendment's protections.

3. The obvious question in response is what is the harm in simply extending the existing duty of candor? Would it not seem to make sense that people should tell the truth when conducting Commission-related activities? Is it not true that no court has held the existing duty of candor unlawful?⁶ The answer is that the proposed rule encompasses a far greater range of activities by a far greater number of speakers than the existing duty of candor and does so without standards of materiality or intent, or a clearly defined safe harbor to protect the unwary from liability.

4. The proposed duty of candor provides that:

Any entity must provide accurate and factual information and not submit false or misleading information, or omit material information, in any communication with the Commission, Commission-approved market monitors, Commission-approved regional transmission organizations, Commission-approved independent system operators, jurisdictional transmission or transportation providers, or the Electric Reliability Organization and its associated Regional Entities, where such communication relates to a matter subject to the jurisdiction of the Commission, unless the entity exercises due diligence to prevent such occurrences.⁷

5. So, for example, under the plain language of this provision, the Commission could find a violation of the duty of candor if a landowner ("entity") exaggerates a complaint ("submit[s] . . . misleading information") in an email to the pipeline developer with a right-of-way on her land ("in any communication with . . . jurisdictional transmission or transportation providers"). What if the landowner is angry about construction noise and

⁶ In *Kourouma v. FERC*, the court dismissed a vagueness challenge to Market Behavior Rule 3, which the court characterizes as "reserv[ing] punishment for those who do not act with requisite care when submitting information to FERC." 723 F.3d 274, 278 (D.C. Cir. 2013). The current rule, however, is distinguishable because of its much broader scope. It applies to "any entity," *i.e.* any member of the public who engages in a FERC-related communication with a covered entity, and not just "sellers," who could be presumed to be relatively sophisticated actors, and applies far beyond the scope of sharing information with FERC in required filings. It is at least reasonable to put the onus on sellers to engage in "due diligence," when communicating with the Commission. The Commission cannot, therefore, assume a similar result should this rule, as broadly drafted as it is, be reviewed in the courts.

⁷ NOPR, 180 FERC ¶ 61,052 at proposed § 1d.1.

says something like “I’ve never heard such a racket,” but in fact she had heard such a racket at a Poison concert in 1988? Absurd? Yes. Duty of candor violation? Also, yes.

6. In a recent generic proceeding, a commenter called claims made in a petition for rulemaking “largely defamatory.”⁸ Were they? Does the Commission propose to police such accusations as enforcement matters when political opponents or, even, competitors file complaints against each other?

7. Commission enforcement of such violations may be unlikely, but the language the majority uses to reassure the public is quite alarming and amounts to “just trust us”:
[I]t is not the Commission’s *intention* to investigate or penalize all potential violations of the proposed regulation. *As a general matter*, we do not intend to penalize inadvertent errors, especially those of limited scope and impact. The Commission *retains discretion* not to pursue enforcement actions in such instances and will exercise that discretion, as appropriate, in implementing the proposed regulation, as we do with all other Commission regulations.⁹

So, are we to understand that it is the Commission’s intention to penalize *not all* potential violations? *Not all* leaves a lot of potential violations. The Commission promises as a *general matter* not to prosecute inadvertent errors, but intent should be an essential element of the claim. And, when the Commission states that it “retains discretion” not to pursue enforcement actions, it necessarily means that the Commission also retains discretion to pursue enforcement actions. Assurances like these cannot save the proposed rule. For constitutional purposes, what matters is the text of the regulation. The Commission cannot grant itself sweeping discretionary powers and then tell the public to “trust us.” As the Supreme Court has put it, “the First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*.”¹⁰

8. In his concurrence in *Alvarez*, Justice Breyer describes the danger inherent in an unbounded authority to police false statements:

[T]he pervasiveness of false statements, made for better or for worse motives, made thoughtlessly or deliberately, made with or without accompanying harm, provides a weapon to a government broadly empowered to prosecute falsity without

⁸ American Gas Association, Protest, Docket No. RM21-15-000, at 9 (Apr. 26, 2021).

⁹ NOPR, 180 FERC ¶ 61,052 at P 44 (emphasis added).

¹⁰ *United States v. Stevens*, 559 U.S. 460, 480 (2010).

more. And those who are unpopular may fear that the government will use that weapon selectively¹¹

9. Given the absence of limiting principles, this “duty of candor” risks “broadly empowering” the Commission to turn itself into a Ministry of Truth, policing the truth or falsity of an enormous sweep of communications. The rule is drafted so broadly that enforcement staff are likely subject to it. I am sure the subjects of investigations will appreciate this commitment to integrity.

10. Experience with the existing duty of candor suggests that promises of prosecutorial discretion are in the eye of the beholder, or in this case, the prosecutor. In practice, the Office of Enforcement frequently finds duty of candor violations when it finds any manipulative act or tariff violation. If a company is charged with violating an RTO tariff, duty of candor allegations appear almost automatic.¹²

11. There is a sad irony to this rulemaking. The actual “candor” of communications within the industry will suffer. Employees at one utility (“transmission organization”) will hesitate to call or email counterparts at another utility (“transmission organization”) without first seeking the advice of counsel to make sure they have done their “due diligence” before engaging in “any communication.” This will deter cooperation within the industry and is not likely to be good for anyone.

12. There remain a few obvious questions: What about penalties? The NOPR says nothing about what sanctions the Commission plans to impose for this new class of violation. Presumably, it will be left to the Commission’s discretion under its penalty guidelines¹³ or on a “case-by-case” basis as it often is with the existing duty of candor, at least when other violations are involved.¹⁴

13. As usual, I strongly encourage anyone with the inclination or an interest in this proceeding to comment on the issues it raises.

¹¹ *United States v. Alvarez*, 567 U.S. 709, 734 (2012) (Breyer, J., concurring in the judgement).

¹² *See, e.g., NRG Power Mktg. LLC*, 174 FERC ¶ 61,016 (2021) (finding tariff violation and duty of candor violation arising out of same bidding behavior); *see also id.* (Daly, Comm’r, dissenting) (opposing settlement in circumstances where target company has little leverage or likelihood of success against the Office of Enforcement in FERC-administered proceedings).

¹³ *See Enforcement of Statutes, Orders, Rules, & Regs.*, 132 FERC ¶ 61,216 (2010); *Enforcement of Statutes, Regs. & Orders*, 123 FERC ¶ 61,156 (2008).

¹⁴ *See, e.g., Coaltrain Energy, L.P.*, 155 FERC ¶ 61,204, at P 292 (2016).

14. In particular, I ask for comments on the fundamental question whether the proposed duty of candor creates Constitutional due process concerns because it is impermissibly vague. What conduct, exactly, is prohibited? Is there any way to cure the void-for-vagueness concerns?

15. How would a “due diligence” safe harbor work for members of the public, like the concert-going landowner who, in her communications with one of the listed entities, may be “prone to hyperbole”? Will the proposal chill public engagement with FERC and the listed jurisdictional entities? Should the Office of Public Participation offer sessions on how to qualify for the safe harbor when members of the public engage with RTOs and Utilities? I particularly encourage consumer advocates to comment on what the implications of this rule might be.

16. Further, does the Commission have the statutory authority to extend the duty of candor as far as proposed? Does the Commission’s interest in protecting the integrity of its proceedings really extend to “any entity” in “any communication” “relate[d] to a matter subject to the jurisdiction of the Commission” with the rule’s range of listed entities?

17. It may be possible to narrow the proposed duty of candor so that it would not grant the Commission such sweeping enforcement powers. I solicit comment on whether an intent or materiality requirement would allay concerns that the rule will impermissibly encompass core First Amendment protected speech.

18. Another irony: the Commission may be unlikely to get much candor from the regulated community in response to this NOPR. Most companies will be reticent to file comments in opposition to a proposed rule of candor. But voicing opposition to an impermissibly vague and broad rule that exposes a company to sweeping liability does not mean that the company supports lying to the Commission. They should not be hesitant. I strongly encourage industry comments and would be particularly interested in any experience with the application of the current duty of candor to the extent any entity is at liberty to discuss them. I also welcome a thorough analysis of our existing caselaw to fully judge how the existing duty of candor has been applied.

19. I look forward to reviewing the full record. My hope is that it will be sufficient to persuade the majority not to finalize this rule. We do not need rules for everything, especially when they are as problematically vague and broad as the proposal here.

For these reasons, I respectfully dissent.

James P. Danly
Commissioner