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November 10, 2022

Ms. Kimberly Bose
Secretary
Federal Energy Regulatory Commission
888 First Street NE
Washington, DC 20426

Re: Notice of Proposed Rulemaking, Federal Energy Regulatory Commission; Duty of Candor (87 Fed. Reg. 49,784-49,793, August 12, 2022), Docket No. RM22-20-000

Dear Secretary Bose:

The U.S. Chamber of Commerce's Global Energy Institute ("the Chamber") welcomes the opportunity to comment on the Federal Energy Regulatory Commission's ("FERC's" or "the Commission's") Notice of Proposed Rulemaking titled "Duty of Candor" in Docket No. RM22-20-000 issued on July 28, 2022.[1] The Chamber is concerned that FERC's proposal is beyond the agency's authority, is unnecessary to address any real problem, and ultimately would undermine the broad stakeholder participation that FERC needs and relies upon in the exercise of its regulatory mission.

The Chamber and its members have a substantial interest in the lawful and appropriate exercise of FERC's rulemaking powers, which can help energy markets function fairly and effectively. While the Chamber believes the proposed rule expresses a noble aim,[2] it does so in a way that would exceed FERC's statutory authority, violate the Administrative Procedure Act ("APA"), and raise serious constitutional questions. The notion that FERC can police the veracity of statements made not just to the Commission itself, but also to nearly any wholesale energy market participant, cannot be found in any statutory grant of authority. Congress has carefully delimited agency authority to enforce duties of candor on regulated entities and individuals, but the rule would upset that balance.

Moreover, the rule as proposed is not supported by sufficient evidence and justification to survive APA review. Missing from the NOPR is any real-life instance where FERC was unable to enforce its existing candor requirements due to limitations within the current regulatory framework. Nor does FERC provide examples of instances where the

[1] *Duty of Candor*, 180 FERC ¶ 61,052 (2022) ("NOPR" or "Duty of Candor NOPR").
[2] Duty of Candor NOPR at P 34 ("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.'" (quoting 105 FERC ¶ 61,218 at P 107)).

application of its existing candor requirements has been inadequate to prevent consequential untrue statements.

Because of its breadth, vagueness, and potential to curtail significant amounts of constitutionally protected speech, the NOPR also raises serious constitutional concerns. The First Amendment does not permit a government agency to be the arbiter of truth for such an incredible swath of speakers ("all entities") and speech ("communications related to matter subject to [FERC's] jurisdiction"). It requires no stretch of the imagination to envision that the Duty of Candor rule could apply to speech regarding energy policy or other political topics, which receive the highest degree of constitutional protection. Beyond the free speech problems, the rule's breadth and vagueness also pose due process concerns. Rather than assuage affected entities, the Commission's admission that it would not "investigate or penalize all potential violations," but instead would "exercise [] discretion, as appropriate," only heightens the likelihood of selective and arbitrary enforcement of the rule.[3]

In addition to suffering these legal infirmities, the Duty of Candor NOPR is likely to open a Pandora's box of unintended consequences and backfire by chilling communications to the Commission and among energy industry participants. In a wide range of contexts, FERC relies heavily on regulated entities' voluntary reporting and active participation in rulemaking discussions and related policy debates. An all-encompassing duty of candor as described in the NOPR—especially one lacking any kind of *scienter* requirement—would deter many voluntary communications of this kind and would drive up compliance costs for those who must communicate with the Commission. It also would overly burden communication in the industry among entities identified in the NOPR.

In short, the Duty of Candor NOPR proposes a rule that would be both unlawful and unwise, and the Chamber urges the Commission to withdraw it.

I. FERC Lacks Statutory Authority to Promulgate a Universal Rule of Candor of the Kind Described in the Proposed Rule

Congress knows how to empower the government to regulate the truthfulness of private communications. Congress has not so empowered FERC, especially not with the breadth and scope of authority the agency seeks here. With the Duty of Candor NOPR, FERC proposes to reach well beyond existing duties, which have a defined scope and are grounded in specific statutory authority, and to broadly regulate every communication with not just the Commission, but also among other energy industry participants. As explained in detail herein, the Duty of Candor NOPR falls well outside of the authority that Congress has delegated to FERC.

[3] Duty of Candor NOPR at P 44.

A. FERC Fails to Identify a Source of Statutory Authority for the Proposed Rule

"Agencies have only those powers given to them by Congress."[4] The default presumption is that if a power is not expressly delegated to an agency, the agency lacks that power.[5] This is true even if another agency has that power: When Congress expressly delegates certain authority to one agency but not to another, the latter may not simply arrogate to itself the same new power on the ground that some other agency within the Executive Branch has such power.[6] Nor may an agency lawfully strain to read significant, novel enforcement powers into minor or ambiguous statutory provisions. In other words, Congress does not "hide elephants in mouseholes."[7] These rules apply to FERC just as much as to other agencies. As the D.C. Circuit stated: "[I]f there is no statute conferring authority, FERC has none. . . . It is therefore incumbent upon FERC to demonstrate that some statute confers upon it the power it purported to exercise[.]"[8]

Thus, any FERC-proposed rule, including the proposed Duty of Candor, must lie within the scope of an identifiable legislative grant of authority. Yet FERC's NOPR seeks to impose a uniform and sweeping duty of candor, the basis for which cannot be located among the Commission's governing statutes. Indeed, the Commission essentially admits that it crafted the rule out of whole cloth, stating that "the Commission has *no explicit requirement*

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[4] *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022); *see also Michigan v. EPA*, 576 U.S. 743, 750 (2015); *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998); *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin*., 142 S. Ct. 661, 665 (2022) (per curiam) ("*NFIB v. OSHA*").

[5] *West Virginia*, 142 S. Ct. at 2609; *see also, e.g., Railway Labor Executives' Ass'n v. Nat'l Mediation Bd*., 29 F.3d 655, 670-71 (D.C. Cir. 1994) (en banc), *amended*, 38 F.3d 1224 ("Unable to link its assertion of authority to any statutory provision, the Board's position in this case amounts to the bare suggestion that it possesses *plenary* authority to act within a given area simply because Congress has endowed it with *some* authority to act in that area. We categorically reject that suggestion. … To suggest, as the Board effectively does, that *Chevron* step two is implicated any time a statute does not expressly *negate* the existence of a claimed administrative power (i.e. when the statute is not written in 'thou shalt not' terms), is both flatly unfaithful to the principles of administrative law outlined above, and refuted by precedent. Were courts to *presume* a delegation of power absent an express *withholding* of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well.") (citation omitted); *Gulf Fishermens Ass'n v. Nat'l Marine Fisheries Serv.*, 968 F.3d 454, 460-62 (5th Cir. 2020), as revised (Aug. 4, 2020) ("We usually start with the text, but more telling here is the Act's lack of text. …Instead of identifying any intent to delegate authority here, the agency can claim only that Congress did not withhold the power the agency now wishes to wield. Once again, this is the argument that presumes power given if not excluded. We have resisted that siren song before, and we again decline to be seduced.") (citation omitted).

[6] *West Virginia*, 142 S. Ct. at 2612-13 ("'When an agency has no comparative expertise' in making certain policy judgments, we have said, 'Congress presumably would not' task it with doing so.'" (quoting *Kisor v. Wilkie*, 139 S. Ct. 2400, 2417 (2019))); *NFIB v. OSHA*, 142 S. Ct. at 665 (holding that agency likely lacked authority to regulate "outside [its] sphere of expertise").

[7] *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001); *see also Am. Bar Ass'n v. Fed. Trade Comm'n*, 430 F.3d 457, 467 (D.C. Cir. 2005) (citing *Whitman* in course of rejecting Federal Trade Commission's contention that Gramm–Leach–Bliley Act, which contains extensive privacy protection provisions that apply to "financial institutions," thereby authorized FTC to regulate attorneys engaged in the practice of law); *Cal. Indep. Sys. Operator Corp. v. FERC*, 372 F.3d 395, 398 (D.C. Cir. 2004) (applying this proposition to FERC in course of invalidating FERC order for lack of statutory authority) (cleaned up) ("*CAISO v. FERC*").

[8] *CAISO v. FERC*, 372 F.3d at 398.

that communications related to a matter subject to the jurisdiction of the Commission be accurate."[9] Instead, the Commission justifies the new duty of candor through perfunctory references to only tangentially relevant statutory provisions, most of which merely authorize the Commission to set rates and obtain information in furtherance of ratemaking.[10] The Chamber believes that the Commission should view the absence of a broad candor requirement in its governing statutes as a sign that Congress has not authorized the Commission to create and enforce such a rule.

That inference is all the stronger because Congress has enacted several statutes that allow agencies, including FERC, to regulate in specific ways to promote the truthfulness of communications.[11] FERC enumerates some of these provisions in the NOPR. They include provisions regarding submissions to FERC[12] and government-wide prohibitions on false statements to the government.[13]

Nor has FERC languished without congressional attention. Quite the contrary, Congress has had no shortage of opportunities to empower FERC to police speech more broadly. The Energy Policy Act of 2005 ("EPAct") granted to FERC tremendous authority to impose new and enhanced civil penalties for violations of the FPA, NGPA, and NGA, as well as violations of rules, regulations, and orders issued pursuant to those statutes.[14] Notably absent from FERC's new, more muscular oversight and enforcement authorities was the power asserted by the agency today: to police all "communications related to a matter subject to the jurisdiction of the Commission."[15]

In other words, Congress has already set forth the way it wants FERC to balance the promotion of industry communications that are "accurate and factual," neither false nor misleading, and inclusive of all "material information," with other agency goals, by giving FERC real but limited authority to regulate private speech in this area. By empowering FERC to regulate the energy industry, Congress recognized that FERC requires stakeholder input to perform its job well. Congress also recognized that this input must be policed to some degree, and it provided FERC with the authority to develop proper tools, *i.e.*, the existing, limited duties of candor.

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[9] Duty of Candor NOPR at P 3 (emphasis added).
[10] *Id.* P 37.
[11] *See Am. Bar Ass'n*, 430 F.3d at 469 ("When we examine a scheme of the length, detail, and intricacy of the one before us, we find it difficult to believe that Congress, by any remaining ambiguity, intended to undertake the regulation of the profession of law – a profession never before regulated by 'federal functional regulators'— and never mentioned in the statute. To find this interpretation deference-worthy, we would have to conclude that Congress not only had hidden a rather large elephant in a rather obscure mousehole, but had buried the ambiguity in which the pachyderm lurks beneath an incredibly deep mound of specificity, none of which bears the footprints of the beast or any indication that Congress even suspected its presence."); *see also id.* at 469-70 (discussing *CAISO v. FERC*, 372 F.3d 395 (D.C. Cir. 2004), in which court had set aside FERC order purporting to replace governing board of nonprofit corporation).
[12] 16 U.S.C. § 824u.
[13] 18 U.S.C. § 1001(a).
[14] Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005).
[15] Duty of Candor NOPR at P 3.

Certain past actions of the Commission have reflected an understanding of this important statutory balance. For example, FERC's Market Behavior Rules, first adopted in the aftermath of the California Energy Crisis, apply only to communications made by "Sellers," a defined set of regulated entities,[16] to "the Commission, Commission-approved market monitors, Commission-approved [RTOs], Commission-approved, [ISOs], or jurisdictional transmission providers."[17] That duty of candor, the Commission recognized, was targeted to solve a particular problem of real-life misconduct. After adopting the Market Behavior Rules and upon rejecting a request for rehearing, the Commission emphasized "the careful balance struck by [its] rules—between the rights of the individual seller, on the one hand, and the needs of market participants and the marketplace as a whole, on the other."[18] In a reversal from its more delicate and measured approach in promulgating the Market Behavior Rules, FERC's new proposal contravenes Congress's choice and sharply departs from the existing balance by markedly expanding the categories of both the entities and the types of communications that would be subject to regulation.

The suggestion that FERC is proposing to exceed its lawful powers is no idle concern. Courts have rejected FERC's past attempts to inflate the delineated authority granted by the Commission's statutes. For example, in *CAISO v. FERC*, the D.C. Circuit held that FERC exceeded its statutory authority when it ordered a public utility to replace its governing board. FERC asserted that such authority could be derived from Sections 205 and 206 of the Federal Power Act, reasoning that well-functioning public utility boards are one of the "infinitude of practices affecting rates and service."[19] Balking at the "breathtaking scope" of FERC's asserted authority, the D.C. Circuit determined that FERC's general ratemaking provisions did not have "anything to do with the authority claimed by FERC to discharge and replace the governing board of a utility."[20]

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[16] 18 C.F.R. § 35.36(a)(1) ("***Seller*** means 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." (emphasis in original)).

[17] 18 CFR § 35.41(b).

[18] *Investigation of Terms & Conditions of Pub. Util. Mkt.-Based Rate Authorizations*, 107 FERC ¶ 61,175, 61,703 (2004).

[19] *CAISO v. FERC*, 372 F.3d at 401.

[20] *Id.*; *see also Columbia Gas Transmission Corp. v. FERC*, 404 F.3d 459, 462 (D.C. Cir. 2005) (Garland, J., joined by Tatel and Roberts, JJ.) (vacating Commission orders for lack of jurisdiction, and rejecting Commission's argument that it had the power to require company to install and pay for meters on gathering facilities) ("The breathtaking scope of FERC's claim is made clear by its response to a hypothetical raised at oral argument. In the Commission's view, if a filed tariff stated that its provisions 'shall apply to the production or gathering of natural gas,' FERC would have jurisdiction over those activities, notwithstanding that they are precisely the activities that the NGA excludes from FERC's purview. FERC cites no case, and we cannot find one, in which a court has permitted the Commission to use the filed rate doctrine as such a jurisdictional boot-strap.") (citations omitted); *Texas Pipeline Ass'n v. FERC*, 661 F.3d 258, 264 (5th Cir. 2011) (vacating orders that "unambiguously exceed the authority granted to FERC under the NGA").

B. The Breadth of the Proposed Rule and Lack of Meaningful Safeguards Confirm That the Proposal Would Exceed FERC's Authority

The contrast between the breadth of FERC's proposal and the penumbra of statutory provisions it cites further reinforces its lack of statutory authority. FERC arrogates to itself immense authority to regulate not only every communication made with the Commission and its Staff, but also most communications made between purely private energy industry participants.

FERC grants itself sweeping authority by way of impermissibly broad definitions afforded to certain key terms. First, as currently written, the duty of candor would apply to communications made by any "entity." Entities include "all types of organizations," in addition to individuals. The NOPR contemplates that the term "entity" also would impose vicarious liability on principals for statements made by their agents, even if the principal reasonably relies upon a non-employee agent for submission of a communication.[21] Second, the term "communication" is defined no less broadly, encompassing informal and formal communications, verbal or written, made to the Commission, Commission staff, other jurisdictional industry participants, and even to agents and contractors of these participants. Third, the rule strikingly contains no *scienter* requirement—*i.e.*, no limitation that penalties would attach only to falsehoods or material omissions that are (for instance) intentional or knowing.[22] And although the proposed rule would provide that only material *omissions* trigger penalties, the proposed rule has no materiality requirement for false or misleading *statements*. As FERC concedes, its broad rule would authorize penalties for even "inadvertent errors . . . of limited scope and impact."[23] It provides little solace that at this time, the Commission "does not intend" to pursue such penalties.[24]

It is difficult to imagine how the Commission could have cast a broader jurisdictional net. If the proposed duty of candor were adopted, the Commission could impose liability for purely private communications falling far afield from FERC's statutory authority. Moreover, FERC would be on the receiving end of countless unadministrable claims from third parties that another "entity" violated the duty of candor, even if the third parties' differing policy preferences are the foundation of such claims. Consider the following examples:

- A homeowner writes an email to her FERC-jurisdictional local utility complaining about the price of a mid-summer electric bill. In the course of demanding a discount, the homeowner asserts that this is the highest bill she has ever seen. In reality, the homeowner had seen one higher electric bill at her parents' house during a historic heatwave in the 1980s. The statement arguably fails the NOPR's requirement that all communications with such entities be "accurate," not "false," not "misleading," and inclusive of all "material information." Should the

[21] Duty of Candor NOPR at P 40.
[22] *Id.* P 24; *see also id.* (Danly, Comm'r, *dissenting*) P 1.
[23] Duty of Candor NOPR at P 44.
[24] *Id.*

homeowner be liable for her hyperbole? If not, what standard determines whether she is to be exempted from sanction?

- A renewable generator that receives state production tax credits bids into the market at a negative price because such bid remains economic in light of such credits. Such strategic bidding, or statements related to it, could be construed as a series of falsehoods. Should the bidder be liable for making an offer it never intended to be accepted, or for making statements related to it that could be construed as falsely or misleadingly conveying the impression that the bidder intended the offer to be accepted? If not, why not?

- A lawyer in a Rule 602 settlement proceeding tells counterparties that her client will not settle for anything lower than 9.3% return-on-equity, though the lawyer knows client's management has some wiggle room in what it can accept. Has the lawyer's negotiation maneuver exposed her to liability? If not, why not?

If Congress had intended FERC to possess this kind of sweeping authority, it would have granted it explicitly in one or more of the Commission's governing statutes.

Indeed, when Congress has empowered FERC regarding the promotion of veracity and the affirmative disclosure of relevant information, Congress has specifically provided more limited authority, requiring key elements like *scienter*. For example, when the EPAct empowered FERC to oversee and penalize market manipulation,[25] Congress imported significant safeguards to protect against unknowing violations of law by modeling its legislation on Section 10(b) of the Securities Exchange Act and Securities and Exchange Commission ("SEC") rule 10b-5. One of these safeguards developed through decades of legislative, regulatory, and judicial refinement of the securities laws is the requirement that fraud must be intentional or at least knowing. By contrast, FERC's Duty of Candor NOPR proposes no such limitation, creating a new ground for issuing civil penalties well beyond the restraints Congress imposed on other areas within FERC's jurisdiction.

Congress continues to view FERC's role as primarily one of economic regulation. At its core, FERC is a financial regulator whose mission is to promote functioning energy markets,[26] a mission reflected in FERC's governing statutes. Under the Federal Power Act, FERC is delegated the authority to regulate "the transmission of electric energy in interstate commerce and . . . the sale of electric energy at wholesale in interstate commerce."[27] FERC primarily exercises its statutory rate-regulation functions by requiring electric sellers to file tariffs, whose terms are regulated in accordance with decades of precedential orders and doctrines.[28] There is no direct link between policing the veracity and comprehensiveness of

[25] 15 U.S.C. 717c-1.
[26] *New York v. FERC*, 783 F.3d 946, 950 (2d Cir. 2015).
[27] 16 U.S.C. § 824(b).
[28] FERC derives its authority to regulate rates from Section 205, which gives FERC the power to prohibit unreasonable rates and undue discrimination within its jurisdiction. 16 U.S.C. § 824d. Relatedly, Section 206 authorizes FERC to issue orders establishing just and reasonable replacement rates if it finds a Section 205

private communications and the Commission's statutory objective to maintain just, reasonable, and not unduly discriminatory electric rates.

The Commission's remaining attempts to justify its proposal are unavailing. The NOPR cites *SEC v. Jensen*, in which the Ninth Circuit considered a rule adopted by the SEC that required principal executives and principal financial officers to sign a certification as to the accuracy of Form 10-Q and 10-K financial reports.[29] Far from justifying the proposed rule, *Jensen* is distinguishable in several ways that, in fact, illuminate the problems with the NOPR here. First, the SEC regulations have a built-in *scienter* element because "signing officers are required to certify [] '*based on the officer's knowledge*. . . .'"[30] Under the statute, signing officers were required to "establish[] and maintain[] internal controls" such that "material information . . . is made *known* to such officers."[31] Although the panel in *Jensen* ultimately left open the proper mental state required for a violation, it held that "by definition, one cannot certify a fact about which one is ignorant or which one *knows* is false,"[32] so (at a minimum) a knowing falsehood would effectively negate the officer's certification. Thus, the Ninth Circuit held that the SEC could require that officers have a "sufficient basis to believe that the certification is accurate,"[33] not, as FERC's rule would have it, that agencies can hold speakers strictly liable for any mistaken misstatement.[34] Second, the SEC regulations had a materiality requirement: "signing officers are also required to certify that . . . the report does not contain any untrue statement of a *material* fact or omit to state a *material* fact."[35] Consequently, the Ninth Circuit did not have an opportunity to pass upon the question of whether it would be reasonable to interpret a certification requirement to create liability for any misstatement or omission, no matter how trivial. Third, the Ninth Circuit panel relied upon the text of the Sarbanes-Oxley Act, which *requires* certification, *i.e.*, an attestation that the documents and information contained therein are truthful. Of course, there is no analogous provision that any communication to a FERC-jurisdictional entity must be certified. Fourth, *Jensen* concerned communications *to* the administrative agency. The Chamber does not dispute that communications to the government may be subject to heightened requirements in some contexts; that obligation is wholly distinct from the NOPR's new duties that anyone communicating with any FERC-jurisdictional entity or its agent must speak as if speaking to the government or risk federal penalties. Similarly, the NOPR's citation to *United States v. Bilzerian*, 926 F.2d 1285, 1298 (2d Cir. 1991), does not

violation. *See* 16 U.S.C. § 824e. The Natural Gas Act extends similar regulatory authority to the Commission with respect "to the transportation of natural gas in interstate commerce, [and] to the sale in interstate commerce of natural gas for resale for ultimate public consumption." 15 U.S.C. § 717(b).

[29] 835 F.3d 1100, 1112-13 (9th Cir. 2016).

[30] *Id.* at 1112 (quoting 15 U.S.C. § 7241(a)(2) (emphasis added)).

[31] *Id.* at 1112 (emphasis added).

[32] *Id.* at 1113 (emphasis added).

[33] *Id.* at 1113.

[34] *Cf. Indiana Elec. Workers' Pension Tr. Fund IBEW v. Shaw Grp., Inc.*, 537 F.3d 527, 545 (5th Cir. 2008) (holding that a Sarbanes–Oxley certification is probative of scienter only under certain circumstances); *Garfield v. NDC Health Corp.*, 466 F.3d 1255, 1266 (11th Cir. 2006) (similar).

[35] *Id.* at 1112 (quoting 15 U.S.C. § 7241(a)(2) (emphasis added)).

justify the Duty of Candor because that case involved statutorily mandated disclosure to the government.

In sum, the Commission has not persuasively shown that it has the authority to promulgate the proposed rule, which would be sweeping in its reach.

II. The Proposed Rule Would Violate the Administrative Procedure Act

A. The Proposal Is Arbitrary and Capricious

Agencies must give adequate reasons for their decisions to satisfy judicial review under the APA.[36] The agency must "examine the relevant data and articulate a satisfactory explanation for its action," which includes a "rational connection between the facts found and the choice made."[37] FERC's proposal is arbitrary and capricious because it fails to identify a real problem to be solved, it fails to draw a connection between the problem and the proposed regulation, and it fails to consider, let alone properly weigh, the drawbacks to the proposed regulation.

1. The Proposal Fails to Identify a Deficiency in Existing Law that Warrants New Rulemaking

As an initial matter, the Commission has not offered a plausible explanation as to why a new duty of candor is needed in the first place. The premise of the NOPR is that the Commission relies on the accuracy of information provided to it and other organizations in order to oversee jurisdictional markets effectively.[38] But Congress and the Commission have long understood the need for candor. To that end, there already exist no fewer than six different statutes and regulations that impose some form of a truthfulness requirement upon Commission-jurisdictional entities.[39] In light of these existing duties of candor, each of which helps facilitate a particular oversight and enforcement function of the agency, a new, far broader duty of candor appears unwarranted.

The Commission attempts to identify an exigency for its new rule by describing as a "limitation" the fact that the current regime lacks a "standardized requirement affecting all types of communications related to [all] matters subject to [FERC's] jurisdiction."[40] But that rationale is circular; it merely describes the non-existence of the new rule under consideration as sole justification for the imposition of the proposed duty of candor. To the extent the Commission needs a very broad duty of candor (for some reason not disclosed in the NOPR), such a duty already exists—under 18 U.S.C. § 1001(a), criminal penalties may be

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[36] *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016).
[37] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("*State Farm*") ("Normally, an agency rule would be arbitrary and capricious if the agency . . . entirely failed to consider an important aspect of the problem."); *Lakeland Bus Lines, Inc. v. NLRB*, 347 F.3d 955, 962 (D.C. Cir. 2003).
[38] Duty of Candor NOPR at P 3.
[39] *Id.* PP 9-14.
[40] *Id.* P 20.

imposed upon individuals who make materially false, fictitious, or fraudulent statements or representations to any part of the U.S. Government, including to FERC.[41]

The Commission then asserts that statements in many filings to the Commission require "knowledge" but no attestation as to the "truth" of those statements.[42] At best, this is a theoretical problem. In most if not all cases, a claim that one "knows" something implies that the knowledge is accurate knowledge. And even if the agency could point to a recurring pattern of filings known to be true but actually false, that would not justify the proposed duty of candor, which reaches far beyond any such particular filings.

Moreover, to the extent the proposed rule would apply to situations where filers claim knowledge of something that turns out in hindsight to be false, the proposed rule creates two severe problems. First, this incredible and unpredictable scope would exacerbate the rule's lack of a *scienter* requirement. No one who knows some information expects to be liable for massive civil penalties simply for making a mistake or for reciting information believed to be truthful. Second, penalizing mistakes by requiring every communication to entities within FERC's jurisdiction to be *true* (which, as proposed in the NOPR, would mean not only "accurate and factual," but non-misleading, and inclusive of all information deemed in hindsight to be "material") would have a grave chilling effect on free and open communication within the industry, especially between participants and regulators. In fact, in many policy and rulemaking proceedings, one entity's view of what is "truth" (*i.e.*, what is accurate, factual, non-misleading, and inclusive of all material information) is often opposed by others. These are "important aspect[s]" of issues relevant to the rule that the agency failed to address.[43]

Tellingly, the Commission's NOPR does not provide concrete examples of the purported shortcomings of the current regulatory regime.[44] The NOPR does not identify any occasion when a misstatement had a material effect, *i.e.*, somehow led FERC to issue an erroneous order, finding, or policy determination that could have been avoided. In particular, FERC does not provide any evidence that unintentional misstatements have materially undercut FERC's ability to do its job. Absent evidence to the contrary, the presumption should be that existing enforcement mechanisms—of which there are many—are adequate to deter and to prosecute material misstatements. The agency's rulemaking

[41] The Commission claims that this statute is insufficient because the Commission cannot prosecute violations thereunder. *See* Duty of Candor NOPR at P 14. But there is no reason offered that every agency can and should create its own cause of action for false statements, especially when the existing enforcement regime has enabled prosecution for misstatements to FERC. *See, e.g.*, *United States v. Valencia*, 2006 WL 3716657, at *7 (S.D. Tex. 2006). The Department of Justice, not the Commission, enforces criminal statutes such as 18 U.S.C. § 1001, and for good reason; Congress's decision not to grant such broad authority to the Commission should be respected.

[42] Duty of Candor NOPR at P 21.

[43] *State Farm*, 463 U.S. at 43.

[44] To be sure, the NOPR cites a 2019 dissenting statement in which Commissioner Glick provided one example where he thought it would have aided FERC enforcement to expand the existing duties of candor. *See* Duty of Candor NOPR at P 16 n.31. But the NOPR itself does not explore this example or explain how it would justify the rule under consideration, which is even broader than what Commissioner Glick had advocated in his dissent.

must be based on *some* evidentiary record, not mere speculation that someone could circumvent the law as it stands today. This is a fatal deficiency that cannot be remedied by public comment or revisions to the rule. The Commission is in the best position to know how existing duties of candor are heeded or avoided, yet the rule is premised on a dearth of evidence. Put simply, this NOPR is a flawed solution in search of a problem.

2. The Proposal Fails to Identify and Weigh the Likely Consequences of the Proposed Rule, Including Costs and Adverse Impacts on Transparency, Open Communication, and Public Participation

The Commission also fails to consider the many drawbacks to its proposal. First, the proposed Duty of Candor rule seems very likely to backfire by chilling future communications between the Commission and regulated entities, between regulated entities and each other, and even between ordinary citizens and regulated entities. For example, a utility employee may hesitate to respond to questions from an RTO or market monitor, even when time is of the essence, because the employee is not sure of the answer or has not performed the proper due diligence. FERC also relies heavily on voluntary self-reporting in order to effectuate its regulations—both in the context of enforcement and in the course of FERC's ordinary operations.[45] For entities that engage in regular, open dialogue and communication with FERC, the Commission should recognize that it is impractical to expect entities to exercise due diligence with every statement made by any of their employees or agents. Open communication among regulated entities is a valuable tool for the agency and is essential to reliable and safe interconnected operations, a tool that is greatly blunted if regulated entities must consult with counsel—or conduct a paralyzing amount of due diligence—before making any outward-facing statement of material or immaterial fact. Yet the NOPR would do just that. As explained here and elsewhere in these comments, the NOPR as proposed would impose significant costs and burdens on regulated parties; yet the NOPR baldly asserts that the "additional burdens, if any," of the proposed duty of candor, including the proposed "flexible" due diligence standard, "would be minimal."[46] That assertion is unreasonable and arbitrary.

Moreover, because the rule would apply to nearly all speech on matters within FERC's jurisdiction, it would likely deter speech on important public policy issues related to these industries. Unfortunately, if the rule were adopted, individuals and entities are likely to choose to self-censor when discussing important matters of public concern. For example, a company involved in natural gas production may elect not to speak publicly on issues related to the policy implications of the greenhouse gas emissions attributed to certain projects or policies and regulations thereof. Beliefs, predictions, or opinions concerning such topics could involve questions of fact on which FERC disagrees,[47] giving rise to the non-trivial risk

[45] The Commission encourages stakeholder input for every rulemaking proceeding. FERC also relies heavily on voluntary participation in areas where it typically implements light-handed rate regulation, such as formulaic transmission rates.

[46] Duty of Candor NOPR at P 5.

[47] *Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews*, 178 FERC ¶ 61,108 (2022).

of liability under the new rule. The NOPR fails to appreciate concerns that the proposed rule could interfere with healthy public discourse and policy debate. As discussed below, such concerns also underscore the First Amendment and due process problems with the NOPR.

The unintended chilling effect of the proposed rule also could work to undermine FERC's dispute resolution processes. FERC has a longstanding policy favoring settlement of regulated entities' disputes whenever possible. In fact, the vast majority of parties' disputes are resolved via informal negotiations that are never brought before FERC. In the course of negotiation, parties are rightfully inclined to engage in advocacy to advance their interests. The duty of candor as proposed would not only shroud these informal interactions with the threat of agency enforcement, but it could also impose liability for any bargaining tactics or purely subjective statements uttered in the course of dispute resolution. This would greatly hinder parties' ability not only to take "negotiating positions" that differ from "bottom line" positions, but to reconsider and depart from such positions in the course of the negotiating process. FERC does not appear to have considered and weighed these possible adverse effects on dispute resolution.

Second, the NOPR does not adequately consider the inherent tension between enforcement of the proposed duty of candor and the agency's initiatives for greater public participation at FERC. The Commission recently made concerted efforts to expand outreach to the general public, culminating in the establishment of the Office of Public Participation in 2021. The Commission understandably desires that its outreach initiatives will increase public comments and other means of participation in agency actions and proceedings. The proposed duty of candor, however, would seriously undermine FERC's public participation goals. Members of the public who learn that a wide range of communications to the Commission and other covered entities could lead to civil penalties might understandably decline to participate. This risk is aggravated by the possibility that someone could be penalized for an innocent mistake (due to the lack of adequate materiality or *scienter* safeguards in the rule). As unknowing, unintentional falsehoods could lead to liability, public participation at the agency would be significantly chilled.

At the same time as high-quality public participation may be chilled, low-quality complaints could proliferate at the agency due to the low bar for a violation of the proposed duty of candor. The Office of Public Participation may be flooded with a deluge of claims that allege a past misrepresentation or falsehood. If the duty of candor is adopted as proposed, the Commission's public outreach initiatives might be frustrated and ultimately unmanageable.

3. The Proposal Fails to Provide Essential Safeguards to Potential Violators or Principled Limitations on the Agency's Discretion

Traditionally, causes of action stemming from a lack of candor or truthfulness, such as common-law fraud, have guardrails against overzealous enforcement and safeguards for

speakers.[48] Two essential protections for would-be violators are the elements of a culpable mental state and materiality. For example, a common law action for fraud could be imposed only if some *scienter* requirement is met and only if the alleged fraud actually had a material effect on the recipient of the communication. Inexplicably, the Commission's proposed rule contains neither a *scienter* requirement nor a materiality requirement.[49]

By omitting a *scienter* requirement, the Commission's proposal is tantamount to strict liability for "entities" that unknowingly make false or misleading statements. FERC would impose strict liability on private individuals, speaking in good faith, who may not even know their speech is regulated. Not only is this result unfair, but the risks of overcorrection and over-deterrence would impose substantial costs on the industry.[50] The government should be required to show some culpable mental state before issuing potentially massive penalties for innovative, productive, and creative business activities that lie within the "gray zone of socially acceptable and economically justifiable" conduct.[51]

Just as troubling is the absence of a materiality requirement, which vests in FERC limitless discretion over how and when to prosecute inconsequential statements later deemed to violate some aspect of the proposed duty of candor. The NOPR attempts to assuage concerns over the lack of a materiality requirement by representing that the Commission does not intend to "investigate or penalize all potential violations of the proposed regulation."[52] But an unsubstantiated promise of prosecutorial discretion only highlights the concern that the proposed rule is incurably and unlawfully vague.

Due diligence is the sole safe harbor proposed for speakers communicating (what the Commission later determines to be) false or misleading information. But the safe harbor does nothing for individuals or entities unaware of their obligation to conduct that due diligence. The fact that the recipient of one's speech is FERC-regulated does not necessarily give reason to know the speaker has regulatory duties or incurs potential liability for each and every communication.

In addition, as to the substance of "due diligence," the NOPR offers little clarity, stating that speakers should take "reasonable steps . . . to ensure the accuracy and completeness of a communication in light of all of the circumstances."[53] The NOPR then offers an assortment

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[48] *See, e.g.*, 7 U.S.C. § 6b(a)(2).

[49] *See also* Duty of Candor NOPR (Danly, Comm'r, *dissenting*) at P 3.

[50] *See generally United States v. U.S. Gypsum Co.*, 438 U.S. 422, 439-41 (1978) (explaining that statutes imposing liability without an intent element risk over-deterrence, curtailing desirable business practices); *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 500 (2008) (stating that it is "desirable" for civil damages "to reach a generally accepted optimal level of penalty and deterrence").

[51] *Gypsum*, 438 U.S. at 440-41; *see also Garrison v. Louisiana*, 379 U.S. 64, 74 (1964) (holding in the context of defamation law that "only those false statements made with the high degree of awareness of their probable falsity . . . may be the subject of either civil or criminal sanctions"); Richard A. Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. Chi. L. Rev. 263, 280-81 (1982) (While "overdeterrence is the characteristic vice of broad [statutory] construction," it can "be reduced by careful specification of . . . statutory limits").

[52] Duty of Candor NOPR at P 44.

[53] *Id.* P 43.

of factors the Commission may or may not consider, including the amount of time the speaker had to conduct additional diligence, the importance and materiality of the communication to the recipient, and others. This totality-of-circumstances approach—untethered to any existing body of law—is once again too vague for speakers to know how much diligence they must conduct to avoid liability, including organizational speakers or other principals who would need to know what diligence is sufficient to avoid being held liable for false or misleading statements made by their employees or other agents. In addition, the NOPR raises troubling questions for attorneys and other professionals representing and advising clients that may be covered by the proposed rule.[54] Speakers cannot seek refuge in a safe harbor of uncertain dimensions.

The NOPR also does not address the possibility that the agency might use the proposed rule as a fallback option when it cannot build a plausible case of market manipulation. Process violations such as making a false statement are "common pretextual vehicles for investigators seeking to ensnare otherwise elusive targets."[55] For example, in recent years, FERC Enforcement Staff has brought fraud and manipulation investigations and ultimately issued civil money penalties premised in part on the respondent's false statements to FERC or to an RTO.[56] In some cases, Staff has contended that actual orders, even ones that resulted in consummated trades, were false or injected false information into the market. In these circumstances, the proposed duty of candor would become an easier-to-prove, lesser-included offense, thereby greatly incentivizing Enforcement Staff to investigate and assert lack of candor and due diligence as a companion to manipulation or fraud.[57] This new, broader duty of candor then becomes a means of circumventing the more stringent requirements to establish a case of fraud or manipulation under 16 U.S.C. § 824v.

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[54] For example: To satisfy "due diligence" requirements, how much, and in what way, would attorneys need to "vet" information provided by their clients in order to provide legal advice on client statements, or to make statements themselves as attorneys, that would be subject to the NOPR? How would such vetting work in connection with trivial and other immaterial statements that could be later deemed false or misleading, or statements or omissions that lack any culpable scienter? Further, in order to demonstrate that due diligence was exercised, could the attorney or client be asked to divulge privileged communications? And if not, how else could the attorney or client show the exercise of due diligence? In this regard, the NOPR states that "where a company submits a document through its outside counsel," both client and lawyer must exercise due diligence, but goes on to say that for the attorney, due diligence "*likely* will simply amount to ensuring that [counsel] has no reason to believe the falsity of the information provided," and that "[t]he responsible company would bear a *greater* burden" than the attorney "to ensure the communication's accuracy." Duty of Candor NOPR at P 40 n.48 (emphasis added). These statements do not resolve, but rather highlight, the questions raised herein concerning the scope of the proposed duties, their implications for core privilege protections, and attendant liability risks for attorneys and their clients. Confidentiality and competence obligations for other professionals would also be implicated.

[55] Erin Murphy, *Manufacturing Crime: Process, Pretext, and Criminal Justice*, 97 GEO. L. J. 1435, 1463 (2009) (discussing 18 U.S.C. § 1001 and state analogues).

[56] *See, e.g.*, *Entergy Nuclear Power Marketing, LLC*, 164 FERC ¶ 61,051 (imposing penalties for a violation of 18 C.F.R. § 35.41(b) after finding insufficient evidence of market manipulation).

[57] FERC already employs a similar tactic when it brings market manipulation actions that include a lesser penalty for violating 18 C.F.R. § 35.41(b) based on the same course of conduct. *See, e.g.*, *FERC v. Coaltrain Energy*, 501 F. Supp. 3d 503 (S.D. Ohio 2020) (granting FERC's motion for partial summary judgment as to violations of 35.41(b) while finding a genuine dispute of material fact as to whether the elements of market manipulation were satisfied).

It also becomes a tool to force settlements in manipulation investigations. That possibility would contravene congressional design by permitting FERC to create for itself a new cause of action more potent than those authorized by statute.

FERC's omission of key safeguards against vagueness and overreach is even more troubling because the Commission has inadequately explained the mechanisms by which it would enforce such a broad duty of candor. Given that FERC can assess up to $1,000,000 per day per violation of its rules and regulations,[58] it is cold comfort when FERC promises that it does not "intend to penalize" "all potential violations of the regulation," especially "inadvertent errors . . . of limited impact."[59] But on its face, the rule would fully apply to completely innocent, completely immaterial violations of *de minimis* impact.[60] Accordingly, the Commission should withdraw the rule.

B. The Proposal Is Procedurally Deficient

The NOPR runs afoul of several procedural requirements. As an initial matter, the Duty of Candor NOPR is itself deficient for failing to provide "reference to the legal authority under which the rule is proposed,"[61] a bedrock principle of administrative law that is core to the APA's notice and comment requirements. The NOPR does not identify legal authority justifying a sweeping new rule of candor. Rather, it cites only the authorities that support the existing duties of candor, which it calls an "insufficient" "patchwork."[62] To the extent that existing duties have formed a patchwork, that patchwork is what is authorized by the various, limited statutory authorities cited within the NOPR.[63] In proposing a universal rule, the NOPR does not explain what source of authority enables the agency to go above and beyond existing authorities and instead welcomes comment supportive of the Commission's newfound authority. That tack—propose rulemaking in hopes that the public will provide a compelling statutory basis—is unacceptable. FERC must make at least a *prima facie* case that

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[58] Although the Duty of Candor NOPR does not identify how FERC would enforce the duty or penalize infractions, presumably the agency would invoke its broad civil penalty powers. *See* 16 U.S.C. § 825o–1; 15 U.S.C. § 717t–1; *see also Revised Policy Statement on Penalty Guidelines*, 132 FERC ¶ 61,216, at P 104 (2010). If FERC contemplates some other means of penalty enforcement, those mechanisms and procedures should have been made known in the NOPR. *See infra*, § II.B.

[59] Duty of Candor NOPR at P 44; *see also id.* (Danly, Comm'r, *dissenting*) at P 7.

[60] *Id.* P 1 ("[R]ather than establish guard rails or explicit limits to our powers, we instead say 'just trust us.'").

[61] 5 U.S.C. § 553(b)(2).

[62] Duty of Candor NOPR at PP 36-37.

[63] *See, e.g.*, *Sierra Club v. EPA*, 332 F.3d 718, 726 (D.C. Cir. 2003) (declining to interpret a statute to avoid "an unnecessary patchwork" where "[i]t was thus Congress that created the patchwork" (internal quotation marks omitted)); *see also Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 327 (2014) ("[A]gencies . . . [may exercise the] authority and responsibility to resolve some questions left open by Congress that arise during the law's administration. But [that] does not include a power to revise clear statutory terms that turn out not to work in practice."); *NFIB v. OSHA*, 142 S. Ct. at 666 ("[A] 'lack of historical precedent,' coupled with the breadth of authority that the [agency] now claims, is a 'telling indication' that the [agency action] extends beyond the agency's legitimate reach." (quoting *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 561 U.S. 477, 505 (2010))).

the rule falls within its ambit so as to then allow commenters to provide meaningful comment.[64]

The proposed rule also runs afoul of the APA's notice and comment requirements in other respects as well, given its vague yet sweeping breadth.[65] The Supreme Court has understood the APA to require "fair notice."[66] The "essential inquiry is whether the commenters have had a fair opportunity to present their views on the contents of [a] final plan."[67] Here, the rule as drafted would be so unworkably broad that it is difficult if not impossible for commenters to envision how it would be applied and enforced. The Commission certainly lacks the capacity to investigate and to enforce all communications by any "entity" "that relate to a matter subject to [its] jurisdiction,"[68] so the significant question lurking in the proposed rule is how FERC would exercise its prosecutorial discretion. In part because the NOPR provides no concrete examples illustrating the need for the rule, the Chamber and other commenters lack clarity as to which entities and which communications the Commission envisions targeting with its newly proposed, yet uncertainly grounded, authority. Indeed, the Commission itself admits that it would have to exercise its discretion, but does not say how it would do so.

Finally, the Regulatory Flexibility Act (RFA) attaches further requirements to NOPRs, and the NOPR in this case does not comply with these requirements. One of the RFA's stated purposes is to facilitate the "achieve[ment of] statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public,"[69] largely to protect small businesses in commerce. The RFA requires agencies to analyze in their rulemakings, *inter alia*, the legal basis for the rule, the economic impacts of proposed rules on small entities, and the number of small entities impacted. The NOPR's Section V analysis falls short of RFA Section 602 analysis requirements in brushing aside *any* economic impacts on small entities as *de minimis*, and suggesting that "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." Yet, as provided in more detail above—the amorphous due diligence standard suggested offers no practical safeguards and accordingly offers no basis to conclude anything about the NOPR's economic impacts, other than that these impacts seem likely to be significant.

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[64] *See generally Georgetown Univ. Hosp. v. Bowen*, 821 F.2d 750, 759 (D.C. Cir. 1987), *aff'd*, 488 U.S. 204 (1988); *Koretoff v. Vilsack*, 707 F.3d 394, 398 (D.C. Cir. 2013) ("[Appellants] argue that the Secretary was 'obligated under the APA to address [his] statutory authority *sua sponte* . . . .' It is certainly true that agencies are required to ensure that they have authority to issue a particular regulation." (citing 5 U.S.C. § 553(b)(2)).

[65] 5 U.S.C. § 553(b)(3).

[66] *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007).

[67] *United States v. Whitlow*, 714 F.3d 41, 47 (1st Cir. 2013) (quoting *Natural Res. Def. Council, Inc. v. EPA*, 824 F.2d 1258, 1283 (1st Cir. 1987)).

[68] Duty of Candor NOPR at P 40.

[69] Regulatory Flexibility Act, Pub. L. No. 96-354, § 2, 94 Stat. 1164 (1980).

III. The NOPR Raises Serious Constitutional Questions

By proposing a duty of candor so broad in scope and ambiguous in application, the Commission's NOPR raises multiple major constitutional problems. Although the NOPR does not consider or address such questions, we are of the view that on its face, a final rule along the lines proposed would violate the First Amendment and deprive regulated entities of due process. For constitutional avoidance reasons alone, the Commission should withdraw the rule.[70]

First, the Duty of Candor NOPR raises serious free speech concerns because it would empower FERC to police the adequacy of nearly any statement made by or to a regulated entity in the energy industry. It is possible to create limited, appropriately targeted duties of candor that effectively and constitutionally satisfy the government's need for accurate information (during investigation or enforcement) while respecting speakers' freedom of expression. But the NOPR, by contrast, proposes a rule that applies to an unforeseeable swath of speakers speaking on nearly any topic related to energy or even non-energy issues tangential to FERC-regulated activities. Its vagueness alone would chill the speech of energy industry participants, rendering credible an overbreadth challenge under the First Amendment.

Moreover, the proposed rule is so broad that it would reach debate regarding important policy issues among energy market participants. Where the government seeks to regulate such "core political speech," First Amendment protection is at its zenith.[71] A robust body of Supreme Court precedent holds that content-based government regulations of political speech face an even higher bar than strict scrutiny; indeed, such content-based regulations are "presumptively unconstitutional."[72] Here, the notion of a seemingly innocuous requirement to tell the truth, as proposed, would become an avenue for the Commission to judge in hindsight the factual underpinnings of nearly any word uttered within the FERC-regulated energy industry if the recipient of that communication is among the covered entities enumerated in the proposed rule. Many of these words constitute political speech; indeed, the Commission's work routinely addresses some of the most pressing issues facing America today. Speakers are constitutionally entitled to broad latitude to express opinions on these pressing topics without the threat of an enforcement action.

It is also no defense to say the proposed duty of candor would apply only to false statements (though on its face, the NOPR appears to mandate affirmative disclosures of information in a wide range of cases). For one, well-meaning speech regulations are often found unconstitutional because of their potential chilling effects on wholly legitimate and

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[70] *See, e.g.*, *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 507 (1979) (absent a clear expression of Congress's intent to the contrary, declining to construe National Labor Relations Act "in a manner that could in turn call upon the Court to resolve difficult and sensitive [First Amendment] questions"); *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 749-50 (1961) (construing statute to avoid First Amendment problem); *Zadvydas v, Davis*, 533 U.S. 678, 689-90, 692-94, 699 (2001) (construing statute to avoid due process problem).

[71] *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 186-87 (1999).

[72] *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015).

valuable speech.[73] More importantly, the NOPR's lack of an intent requirement, coupled with its overall lack of a materiality requirement, invites heightened scrutiny. If the duty of candor covered only knowingly false, material statements made to the Commission, the rule would be less likely to raise serious First Amendment issues because willful fraud is often considered by courts to be unprotected speech. Nonetheless, as written, the NOPR would unlawfully seek to regulate a vast swath (*i.e.* not a narrowly tailored subset) of constitutionally protected speech based on its content.[74]

Second, the NOPR raises serious due process concerns because it would enable the Commission to wield highly discretionary authority to enforce a candor requirement containing unclear parameters. The Supreme Court has expressed that "clarity in regulation is essential to the protections provided by the Due Process Clause of the Fifth Amendment."[75] Under contemporary constitutional jurisprudence, impermissibly vague laws must be invalidated for two reasons. First, regulated entities should know what is required of them so that they can structure their affairs accordingly. Second, the law must be sufficiently precise so that those enforcing the law do not act in an arbitrary or discriminatory way.[76]

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[73] *See United States v. Alvarez*, 567 U.S. 709, 718 (2012) (Kennedy, J., for four Justices) (noting "the general understanding that some false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation, expression the First Amendment seeks to guarantee"); *id.* at 721-22 ("This opinion . . . rejects the notion that false speech should be in a general category that is presumptively unprotected."); *see also id.* at 723 ("Permitting the government to decree this speech to be a criminal offense, whether shouted from the rooftops or made in a barely audible whisper, would endorse government authority to compile a list of subjects about which false statements are punishable. That governmental power has no clear limiting principle. Our constitutional tradition stands against the idea that we need Oceania's Ministry of Truth. *See* G. Orwell, Nineteen Eighty–Four (1949) (Centennial ed. 2003). Were this law to be sustained, there could be an endless list of subjects the National Government or the States could single out."); *id.* at 733-34 (Breyer, J., concurring in the judgment) ("False factual statements can serve useful human objectives . . . . [A]s the Court has often said, the threat of criminal prosecution for making a false statement can inhibit the speaker from making true statements, thereby 'chilling' a kind of speech that lies at the First Amendment's heart. Further, the 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 more."); *id.* at 751-52 (Alito, J., dissenting) ("[T]here are broad areas in which any attempt by the state to penalize purportedly false speech would present a grave and unacceptable danger of suppressing truthful speech. Laws restricting false statements about . . . matters of public concern would present such a threat. [I]t is perilous to permit the state to be the arbiter of truth.").

[74] *See* Duty of Candor NOPR (Danly, Comm'r, *dissenting*) at P 2; *Alvarez*, 567 U.S. at 723 (opinion of Kennedy, J.) ("Were the Court to hold that the interest in truthful discourse alone is sufficient to sustain a ban on speech, absent any evidence that the speech was used to gain a material advantage, it would give government a broad censorial power unprecedented in this Court's cases or in our constitutional tradition."); *id.* at 732 (Breyer, J., concurring in the judgment) (reading statute as "criminalizing only false factual statements made with knowledge of their falsity and with the intent that they be taken as true . . . diminishes the extent to which the statute endangers First Amendment values, [but] does not eliminate the threat"); *id.* at 734-35 ("Statutes forbidding lying to a government official (not under oath) are typically limited to circumstances where a lie is likely to work particular and specific harm by interfering with the functioning of a government department, and those statutes also require a showing of materiality"); *Garrison*, 379 U.S. at 74.

[75] *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012).

[76] *Id.* (citing *Grayned v. City of Rockford,* 408 U.S. 104, 108-09 (1972)).

The proposed duty of candor raises both kinds of due process issues. Entities falling within the proposed rule cannot reasonably know what is required of them to avoid facing liability. On the surface, it may look simple—just tell the truth, or at least exercise due diligence. But the rule truly extends to *any* communication made with *any* jurisdictional entity. Due to the proposed rule's vague terminology, any individual or entity within its ambit must play a guessing game: What kinds of statements are required to make a statement both non-misleading and inclusive of all information that might later be deemed material by the Commission? What does due diligence actually look like? How eager would the Commission be to bring actions against unknowing misstatements? What about immaterial misstatements? What type of misstatement is of such "limited scope and impact" that the Commission might ignore it? Would the Commission allow a defense of innocent mistake? Would it go after an entity for its political beliefs or predictions that, in the agency's view, involve some falsehood? The risks of selective enforcement, as well as accusations of selective enforcement that would distract the Commission and its professional staff from their core mission, are very real here.

The Commission offers no or few answers to these questions. And while it acknowledges some of the problems, it does not craft the rule to mitigate them. Instead, the Commission offers a recipe for arbitrary enforcement when it unconvincingly states that it "does not intend to penalize all potential violations," "retains discretion not to pursue enforcement actions," and "will exercise that discretion, as appropriate."[77] It would be reasonable for entities to be worried about how FERC might exercise that discretion, especially because, while the NOPR does not speak to penalties directly, the agency by default can levy civil penalties of up to $1,000,000 per violation per day. With such weighty enforcement authority and so few guiding principles, the Commission risks turning the proposed duty of candor into a duty of silence.

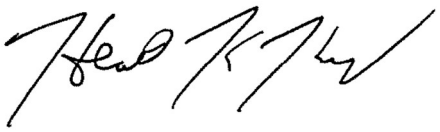
IV. Conclusion

The proposed rule is counterproductive and raises a broad array of statutory, procedural, and constitutional concerns. Without the requisite statutory authority, FERC proposes a set of requirements that would cover a breathtakingly broad scope of energy industry participants and even the general public. The proposed rule is also poorly defined, inadequately justified, and vests almost limitless enforcement discretion that the Commission would struggle to carry out in an intelligible or consistent way. Beyond these practical issues, the NOPR unnecessarily wades into constitutionally fraught waters, and as a matter of policy, may chill the very system of self-reporting that FERC relies upon to execute its statutory mandates. The Chamber therefore suggests that no new rule is necessary, and that FERC should withdraw the proposed rule.

[77] Duty of Candor NOPR at P 44.

The Chamber appreciates the opportunity to comment on the Duty of Candor NOPR. If you have any questions or need additional information, please contact me at hknakmuhs@uschamber.com or (202) 463-5874.

Sincerely,



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