UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Duty of Candor	**Docket No. RM22-20**

COMMENTS OF THE STATE AGENCIES

Pursuant to the Federal Energy Regulatory Commission's ("Commission") notice of proposed rulemaking dated July 28, 2022, 180 FERC ¶ 61,052 ("NOPR"), and published at 87 Fed. Reg. 49,784 (Aug. 12, 2022), the below-defined signatory state parties (together, the "State Agencies") submit these comments on the Commission's proposal to impose a duty of candor on any entity communicating with the Commission or other specified organizations related to a Commission-jurisdictional matter.

The State Agencies

The Colorado Office of the Utility Consumer Advocate (UCA) is an advocacy agency that represents the public interest and specifically the interests of residential, small business, and agricultural energy and telecommunications consumers. In addition, the office gives due consideration to the state decarbonization goals, just transition, and environmental justice. UCA advocates for consumers by appearing before the Colorado Public Utilities Commission, the courts, and federal agencies.

The Connecticut Department of Energy and Environmental Protection (Connecticut Department) has statutory authority over the state's energy and environmental policies and

for ensuring that the state has adequate and reliable energy resources.[1] The Connecticut Department is tasked with interacting with the regional transmission operator in response to state and regional energy needs and policies.

The Connecticut Office of Consumer Counsel is the statutorily designated ratepayer advocate in all utility matters concerning the provision of electric, natural gas, water, and telecommunications services. The Office of Consumer Counsel is authorized by statute to intervene and appear in any federal or state judicial and administrative proceedings where the interests of utility ratepayers are implicated.

Karl A. Racine is the independently elected Attorney General for the District of Columbia (DC Attorney General) and is charged with conducting all law business on behalf of the District of Columbia (the District).[2] By common law and statute, the DC Attorney General is responsible for upholding the public interest, including initiating and intervening in lawsuits brought in the District's name to uphold the public interest.[3] In exercising the aforementioned duties, the DC Attorney General has participated in a number of proceedings before this Commission to protect the health and economic welfare of the District's residents, and to advance the District's clean energy laws and policies.[4]

The Office of the People's Counsel for the District of Columbia (DC OPC) is an independent agency of the District of Columbia (District) and the statutory advocate of District

[1] Conn. Gen. Stat. §§ 22a-2d; 16a-3a.

[2] D.C. Code § 1-301.81(a)(1).

[3] *Id*.

[4] Examples of FERC proceedings in which the DC Attorney General has recently participated include: RM20-10-000, *Electric Transmission Policy Under Section 219 of the Federal Power Act*; PL18-1, *Certification of New Interstate Gas Facilities*; RM19-15, *Qualifying Facility Rates and Requirements*; and AD16-16, *Implementation Issues Under the Public Utility Regulatory Policy Act of 1978.*

consumers and ratepayers. Pursuant to D.C. Code §34804(d), DC OPC may "represent and appeal for the people of the District of Columbia" in proceedings before FERC when those proceedings "involve the interests of users of the products of or services furnished by" the District's public utilities.

The Delaware Division of the Public Advocate is authorized by the General Assembly of the State of Delaware to, among other things, "appear on behalf of the interests of consumers in … federal courts and federal administrative and regulatory agencies and commissions in matters involving rates, service and practices of public utilities."[5]

The Maryland Office of People's Counsel is an independent state agency that represents the interests of residential consumers of the State of Maryland in utility cases. Pursuant to Maryland Public Utilities Code Annotated, §2-205(b)(2019), the People's Counsel "may appear before any federal or state unit to protect the interests of residential and non-commercial users [of gas, electricity or other regulated services]."

The Massachusetts Attorney General is the chief legal officer of the Commonwealth of Massachusetts and is authorized by both state common law and by statute to institute proceedings before state and federal courts, tribunals, and commissions as she may deem to be in the public interest. The Massachusetts Attorney General is further authorized expressly by statute to intervene on behalf of public utility ratepayers in proceedings before the Commission and has appeared frequently before the Commission.[6]

The Minnesota Attorney General is a public officer charged by common law and by statute with representing the State of Minnesota, the public interest, and Minnesota citizens,

[5] 29 Del. C. § 8716(e)(3).

[6] Mass. Gen. Laws ch. 12, § 11E.

including with respect to electric or gas industry matters that affect electric or gas consumers in Minnesota. The Minnesota Attorney General is specifically authorized by Minnesota Statutes section 8.33 to intervene in federal matters to further the interests of small business and residential utility consumers.

NJ Rate Counsel is the administrative agency charged under New Jersey Law with the general protection of the interests of utility ratepayers. N.J.S.A. § 52:27EE- 46 et seq. NJ Rate Counsel is explicitly empowered to represent the public interest in federal proceedings. N.J.S.A. § 52:27EE-55.

The Oregon Attorney General is the chief law officer for the state and is the head of the Oregon Department of Justice.[7] The Department of Justice has control of all legal proceedings in which the state may be interested.[8]

The Pennsylvania Office of Consumer Advocate is a statutorily created office authorized to represent the interest of consumers before the Pennsylvania Public Utility Commission and before any court or agency in connection with any matter involving regulation by the Commission or a corresponding regulatory agency of the United States, whether on appeal or otherwise.

The Rhode Island Attorney General is a public officer charged by common law and by statute with representing the State of Rhode Island, the public interest, and the people of the State. This includes representation with respect to energy matters affecting consumers in Rhode Island. In Rhode Island, "the Attorney General is entitled to act with a significant degree of autonomy, particularly since the Attorney General is a constitutional officer and is an

[7] Or. Rev. Stat. § 180.210.

[8] Or. Rev. Stat. § 180.220.

independent official elected by the people of Rhode Island."[9] Under the common law, he is the representative of the public, obligated to protect the public interest and empowered to bring actions to redress grievances suffered by the public as a whole.[10] The Attorney General, through his designated Environmental Advocate, and pursuant to the Environmental Rights Act, R.I. Gen. Laws § 10-20-1, *et seq*., also has a separate statutory right and obligation to "take all possible action" to protect the right of each Rhode Islander to "the protection, preservation, and enhancement of air, water, land, and other natural resources located within the state." *See* R.I. Gen. Laws § 10-20-1 and § 10-20-3(d)(5).

I. COMMENTS

The State Agencies recognize the Commission's need for accurate information to enable effective decisionmaking, and we appreciate the Commission's concern regarding the lack of an explicit requirement that communications to the Commission, and to other organizations upon which the Commission relies to carry out its responsibilities, be accurate and not include intentional misrepresentations.[11] As discussed below, however, the State Agencies are concerned that the proposed duty of candor requirement is unreasonably broad, and that it would chill public participation in Commission proceedings and other decisionmaking, impose unreasonable burdens on under-resourced public-interest and consumer advocates, and undermine the Commission's goal of increasing and diversifying public participation in its decisionmaking. Before proceeding any further in this rulemaking process, we urge the Commission to:

[9] *State v. Lead Indus., Ass'n, Inc.,* 951 A.2d 428, 474 (R.I. 2008).

[10] The Rhode Island Attorney General "'has a common law duty to protect the public interest.'" *Id.* at 471 (*quoting Newport Realty, Inc. v. Lynch*, 878 A.2d 1021, 1032 (R.I. 2005).

[11] *See* NOPR at P 3.

- conduct a technical conference and publish a post-conference report that identifies current regulatory gaps, past harms, and extant concerns giving rise to the need for new, more broadly applicable duty of candor requirements;
- work closely with the Commission's Office of Public Participation to solicit input on the NOPR from community representatives, environmental justice organizations, consumer advocates, and others that could be affected by the rule beyond market participants and other energy companies; and
- tailor any duty of candor requirements narrowly, drawing lessons from state-law analogs and considering the recommendations below.

A. The Proposed Duty of Candor Rule Is Unreasonably Broad and Would Chill Public Participation.

The scope of the Commission's proposed duty of candor rule is virtually unlimited. It would apply to "every entity," including individual members of the public, that makes "any communication . . . relate[d] to a matter subject to the Commission's jurisdiction" to the Commission, market monitors, regional transmission organization or independent system operators ("RTOs/ISOs"), transmission or transportation providers, or the Electric Reliability Organization and its regional affiliates.[12] Covered communications would include both "informal and formal" and "verbal or written" communications, however transmitted, and regardless of whether the communications are material or intended to deceive.[13] Those subject to the duty of candor "must provide accurate and factual information and not submit false or misleading information, or omit material information."[14] Anyone who fails to uphold the duty of

[12] *Id.* at PP 23-24.

[13] *Id.* at P 41.

[14] *Id.* at P 24.

candor could be subject to penalties "unless the entity exercises due diligence to prevent such occurrences."[15]

As discussed below, the NOPR fails to justify the extraordinary breadth of the proposed duty of candor rule. The nebulous due diligence standard and the Commission's exercise of enforcement discretion do not cure the unreasonable overbreadth of the rule. Such a sweeping rule would chill public participation before the Commission and impose unreasonable burdens on members of the public and public-interest and consumer advocates, who are already underrepresented in Commission proceedings.

1. The Record Does Not Support a Broad Duty of Candor Rule.

The duty of candor requirements proposed in the NOPR are "broadly applicable,"[16] "affecting all types of communications related to matters subject to the jurisdiction of the Commission."[17] But the Commission cites only one example of an instance where inaccurate or misleading information caused harm, and that example concerned market participants engaging in market manipulation. Absent further justification, the Commission's generalized statements about the need for accurate information are insufficient to support such a sweeping rule.

The Commission generally states that "[e]nsuring the accuracy of … communications will increase confidence in Commission-jurisdictional industries and markets and will improve the Commission's ability to meet its statutory responsibilities."[18] The State Agencies do not dispute this general assertion; but it does not follow from the Commission's premise that new,

[15] *Id*. The proposed rule fails to describe the types of sanctions that the Commission would impose for any violations.

[16] *Id.* at P 4.

[17] *Id.* at P 20.

[18] *Id.* at P 23.

broadly applicable requirements are reasonable and necessary to ensure accurate information, or that the benefits of such requirements outweigh potential harms.[19]

Notably, the NOPR does not specify types of inaccurate or misleading information the Commission has received in the past, nor does the NOPR specify types of entities the Commission fears may have provided, or may be providing, false or inaccurate information in the absence of a broad duty of candor requirement. Indeed, the Commission cites only one example where false communications resulted in harm: the "dishonest and abusive" market-manipulation practices following the Western Energy Crisis.[20] Those dishonest practices were by sellers of wholesale electric power: sophisticated corporate entities that sought authorization from the Commission to participate in jurisdictional markets, then engaged in market manipulation resulting in vast harms.[21] But the proposed duty of candor would extend far beyond wholesale power market participants and other regulated industries. The rule would apply, for instance, to *anyone* who communicates with the Commission or its affiliated entities—including unrepresented members of the public, landowners affected by energy infrastructure, consumer advocates, environmental justice organizations, and other community representatives.

[19] As discussed in the NOPR, there are several existing duties of candor that apply to certain communications. *See* NOPR at PP 8–15. These include, for example, requirements that certain submissions be made to the Commission under oath and penalty of perjury, *id*. at 9, the Commission Rule that "[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," *id.* at P 12 (citing 18 CFR 385.2101(c)), and rules of professional conduct applicable to attorneys. NOPR at P 12. The Commission also notes in the NOPR that "[w]e expect that almost all entities regularly communicate with the Commission and jurisdictional actors with accuracy and honesty." *Id.* at P 48. The State Agencies recognize the critical importance of accurate information to the Commission's decisionmaking but seek to better understand the specific gaps the Commission seeks to address with its proposed rule.

[20] NOPR at P 17; *see also generally* https://www.ferc.gov/industries-data/electric/general-information/addressing-2000-2001-western-energy-crisis.

[21] NOPR at P 71; *see also* 18 C.F.R. § 35.36(a)(1). Elsewhere in the NOPR, the Commission refers to the importance of honesty in "communications in markets," NOPR at P 27, and "market participant communications," *id.* at P 34, further suggesting that the proposed rule is motivated by concerns about communications by or related to market participants.

The Commission offers no evidence of past misconduct or potential harm to support imposing a new duty on such entities.

Furthermore, the proposed duty of candor would apply to *any* communications, including "in filings, during investigations, in procedural communications, and during uncontested proceedings,"[22] and regardless of whether those communications are harmful, material, or even intentional false statements. There is no rational relationship between the vast scope of the proposed rule and the meagre justification offered by the Commission.

The Commission generally notes the importance of accuracy in "important communications fundamental to the functioning of a market . . . 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."[23] Again, in each of those examples, the communications that are the subject of potential concern are made by sophisticated corporate actors who participate, often for financial profit, in Commission-jurisdictional markets or activities, and typically with the advice of legal counsel. These types of communications are a far cry from the comments, statements, and other communications made by members of the public, consumers, and their advocates to the Commission and its affiliates. For instance, unlike market participants, the public has no conceivable profit motive in making false statements to the Commission about interstate markets and often lacks access to confidential market data. Indeed, members of the general public who have limited information often will not be aware of material information and would likely omit

[22] NOPR at P 21.

[23] *Id.* at P 22.

such information in all innocence. Yet, the proposed duty of candor requirement would stretch far beyond market-fundamental communications and sweep in all entities, regardless of their sophistication, resources, motivations, or information asymmetries.

Simply put, the NOPR as currently proposed does not support a broadly applicable duty of candor requirement. Before proceeding any further with this rulemaking, the State Agencies urge the Commission to conduct a technical conference and provide a post-conference report identifying any current regulatory gaps, past harms, and extant concerns giving rise to the need for new duty of candor requirements. Additional information about particular concerns and prior harms would not only help provide a rational basis for new regulatory requirement but also assist stakeholders in offering recommendations to the Commission regarding how to appropriately tailor those requirements to address any critical concerns while mitigating unintended chilling effects.

The Commission should also engage in a robust evaluation of the relative costs and benefits of exposing various entities to potential penalties for failure to comply with the duty of candor. As currently drafted, the NOPR fails to meaningfully address the potential burdens of the rule, particularly on members of the public and public-interest and consumer advocates. Thus, the NOPR fails to establish that the anticipated benefits of the rule outweigh its potential harms. The absence of such an analysis would render any final rule arbitrary and capricious and unlawful.

2. The Proposed Due Diligence Standard and Other Purported Limits Cannot Cure the Rule's Overbreadth.

The Commission states that its proposed "due diligence" standard and its proposal to "limit[] the relevant communications to specific recipients related to matters subject to the jurisdiction of the Commission" will ensure that burdens imposed by the duty of candor

requirements "if any, would be minimal."[24] The Commission further assures that it will exercise its interpretive duties and enforcement discretion to ensure that any penalties imposed are appropriately circumscribed. But those purported limits are insufficient to prevent the overbroad rule from chilling public participation and imposing undue burdens on members of the public and consumer and public-interest advocates.

First, the due diligence standard is too nebulous and discretionary to provide a safe harbor—particularly for parties who communicate directly to the Commission and affiliated entities without the aid of legal counsel. The Commission asserts that "[t]he concept of due diligence is well developed" in Commission and judicial precedent; but all of the precedents cited by the Commission concern the exercise of diligence by market-participant companies that have resources to afford sophisticated legal representation and other expert technical support.[25] Companies seeking authority from the Commission to engage in regulated activities for profit are not on a level playing field with members of the public and public-interest advocates. Yet, the NOPR fails to make any distinction in the "communications" or capacities for diligence of these vastly different entities. The Commission does not explain how it intends to apply the due diligence standard in the myriad unprecedented circumstances that would be swept into the broad new rule, such as individuals submitting comments via the Commission's "eComment" tool, which are limited to only 6,000 characters;[26] affected landowners attending a stakeholder event hosted by a pipeline company; or community groups filing comments on draft policy statements or in rulemaking dockets. For non-regulated entities, many of whom already lack sufficient

[24] *Id*. at P 5.

[25] *Id*. at P 43 & n.49.

[26] *See* FERC Online, https://ferconline.ferc.gov/QuickComment.aspx.

resources to participate meaningfully in Commission decisionmaking, the threat of any penalties would be a Damoclean sword that could discourage further engagement with the Commission.

Second, the purported limit on the scope of the proposed rule to communications "related to matters subject to the jurisdiction of the Commission" does nothing to limit the potential chilling effect of the rule. Indeed, this language merely restates the scope of the Commission's authority, which could never extend to communications that are not related to Commission-jurisdictional matters in any event. Thus, this purported "limit" offers no meaningful restraint that could calm the anxieties of a potential participant worried about penalties.

Finally, the Commission's stated intentions regarding rule implementation cannot cure an overly broad and facially unreasonable rule. The Commission proposes an "Interpretive Guidance" section of the NOPR, which appears to be a set of nonbinding guidelines that the Commission intends to apply in implementing the duty of candor requirements.[27] The Commission states that in evaluating a due diligence defense, the Commission will consider, for instance, the "sophistication of the communicator(s), and the communication's effect on the marketplace."[28] The Commission also states that it "retains discretion not to pursue enforcement actions . . . and will exercise that discretion, as appropriate."[29] For instance, the Commission states that it does not generally intend to penalize "inadvertent errors."[30] But this nonbinding guidance would not prevent future Commissions from implementing the rule differently. Nor would it prevent well-resourced companies from seeking to weaponize the rule (whether

[27] NOPR § II.D.

[28] *Id*. at P 43.

[29] *Id*. at P 44.

[30] *Id*. at P 44.

justifiably or not) to chill participation in Commission proceedings by market competitors or by lesser-resourced consumer and public-interest advocates.[31]

3. The Commission Should Look to State-Level Duty of Candor and Truthfulness Requirements as a Model for a More Narrowly Tailored Federal Rule.

Some of our States impose duties of truthfulness and accuracy in certain communications to state public utilities commissions and other agencies that oversee market participants and other highly regulated industries. For example, Massachusetts' duty of candor law, which applies to entities communicating with the Department of Public Utilities, is limited to willful false reports; false testimony or affirmation to any material fact in a matter wherein an oath or affirmation is required or authorized; and false entries in company books, reports, papers, or statements with the intent to deceive, injure, or defraud. The duty extends to "any persons who with like intent aids or abets another in any violation."[32] A Minnesota administrative rule requires a "good faith belief" that representations made to the Public Utilities Commission are "true and correct." It applies to any person signing a pleading, motion, or similar filing, or appearing at a commission meeting. The rule also requires that the person have a "good faith belief" that "legal assertions are warranted by existing law or by a nonfrivolous argument for the extension or reversal of existing law."[33] These state laws are more limited in scope than the

[31] In addition to Commission proceedings, the NOPR, as currently written, would also appear to apply to communications made during stakeholder processes at Commission-jurisdictional RTOs and ISOs, which many state agencies and public interest organizations participate in as members or interested stakeholders. As the Commission knows, these RTO/ISO stakeholder processes are generally, by design, less formal, with a goal of collaboration and consensus-building to address regional issues. The proposed rule will likely have the unfortunate result of chilling participation in these critical forums as well.

[32] Mass. Gen. L. ch. 268, § 6.

[33] Minn. R. 7829.0250.

NOPR and may serve as a useful model for the Commission in further tailoring its duty of candor rule. [34]

4. The Commission Should Further Limit the Scope of the Proposed Duty of Candor Rule.

For the reasons discussed above, the State Agencies urge the Commission to tailor its proposed duty of candor rule more narrowly, considering, in particular, the potential chilling effect and undue burdens of the rule on participation by precisely those diverse voices the Commission's Office of Public Participation seeks to empower in its proceedings. There are multiple potential options available to the Commission to address the problems identified herein—any or all of which could be used in combination to narrow the scope of the proposed rule and limit its potential chilling effects.

- **Shift the language of the rule to focus on what conduct is prohibited rather than what conduct is required.** As a general matter, a rule that prohibits and penalizes specified conduct will be more tailored than a rule that attempts to define acceptable conduct for all entities that broadly engage with the Commission. For instance, instead of stating that "[a]ny entity must provide accurate and factual information…", the Commission could instead subject to penalties, *e.g.*, certain entities that provide inaccurate or misleading information under specified circumstances.
- **Limit the scope of "entities" subject to the rule.** The Commission, after carefully considering and identifying the actual harms that the proposed rule seeks to address, could appropriately narrow its application to specific types of entities, rather than all individuals or organizations that may communicate with the Commission and its

[34] In addition to these examples, the Commission should also ensure that any potential duty of candor rule does not conflict with existing state/federal professional responsibility requirements. *See* NOPR at P 12.

affiliated organizations. Such an approach would be consistent with the Commission's promulgation of 18 C.F.R. § 35.41(b) which only applies to sellers in electric markets.[35]

- **Limit the scope of "communication[s]" subject to the rule.** The Commission could narrow the applicability of the proposed rule to specific, enumerated types of communications—*e.g.*, communications that are fundamental to market functioning, otherwise solicited by the Commission, and/or provided under oath. Overall, the Commission should seek to distinguish, and shield from any penalties, communications from unrepresented members of the public, community groups, public-interest and consumer advocates, and other individuals who are not affiliated with regulated companies. Such entities are limited in their capacities for participation and diligence by extremely scarce resources and deep information asymmetries.
- **Impose a materiality limitation.** The rule could specify that penalties are limited, *e.g.*, to material false statements or omissions, or, even more specifically, to communications that are critical to market functioning.[36] A materiality limitation would ensure that harmless or innocuous false statements are not subject to penalties.
- **Impose an intent requirement instead of, or in addition to, a due diligence standard.** The Commission could limit prohibited conduct to false communications that are willful and/or made with an intent to deceive or defraud. An intent requirement would ensure that accidental or inadvertent false communications are not subject to penalties, regardless of how the Commission or courts might interpret "due diligence."

[35] "In the aftermath of the Western Energy Crisis, the Commission found that dishonest and abusive practices by [s]ellers with market-based rate authority led to unjust and unreasonable rates." NOPR at P 17.

[36] Indeed, when applying the proposed rule, the Commission indicates that it intends to consider, among other things, "the importance and materiality of the communication to the recipient." NOPR at P 43.

II. CONCLUSION

The State Agencies appreciate the Commission's solicitation of public input on the NOPR. We respectfully urge the Commission to consider the above comments and recommendations as it evaluates the potential expansion of existing duty of candor requirements.

Respectfully submitted,

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CERTIFICATE OF SERVICE

In accordance with 18 C.F.R. § 385.2010, I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated this 10th day of November 2022.

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