

**UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION**

**Duty of Candor**

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**RM22-20-000**

**COMMENTS OF THE  
NATURAL GAS SUPPLY ASSOCIATION**

Pursuant to the Notice of Proposed Rulemaking issued July 28, 2022 (“NOPR” or “Proposed Rule”), in the captioned proceeding,<sup>1</sup> the Natural Gas Supply Association (“NGSA”) respectfully submits the following comments. NGSA values the importance of truthful and accurate communications with the Commission and market participants, and believes it is integral to a well-functioning, competitive market. However, the Commission has neither provided justification to expand its current requirements and policies to encompass the sweeping regulation contemplated by the Proposed Rule, nor has it stated a problem the Proposed Rule would fix. Moreover, the Proposed Rule would do considerable harm by chilling routine communications that ensure reliable service and create economic efficiencies, thereby creating uncertainty for industry participants that daily engage in routine scheduling, trading and negotiating activities and could now be subject to potential prosecution. The Proposed Rule is arbitrary and capricious, insofar as it imposes heavy burdens on industry participants, encourages behavior detrimental to the orderly functioning of markets, and evinces no recognition of these detriments. Particularly when weighed against the non-existent proposed benefits, the Proposed Rule does not constitute reasoned decision-making.

Accordingly, the Commission should terminate the NOPR, or at a minimum, before

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<sup>1</sup> *Duty of Candor*, FERC Docket No. RM22-20-000, 87 *Fed.Reg.* 49784 (August 12, 2022).

proceeding should establish a Notice of Inquiry or technical conference to determine whether there is a need for modification to the Commission's existing regulations governing candor in communications, and whether the proposed rule if adopted would harm the industry and consumers. If, however, the Commission proceeds with this rulemaking, the Commission must clarify the proposed rule. Among other things, the Commission must add substance to the due diligence requirement, to enable affected individuals and entities to ensure that they have in place adequate processes to avoid prosecution by the Commission for inadvertent and unintentional communications errors.

## I. INTERESTS OF NGSA

Founded in 1965, NGSA represents integrated and independent energy companies that produce and market domestic natural gas. NGSA is the only national trade association that solely focuses on producer-marketer issues related to the downstream natural gas industry. NGSA encourages the use of natural gas within a balanced national energy policy<sup>2</sup> and has a long-established commitment to promoting a public policy environment that fosters a growing, competitive market for natural gas. NGSA has consistently advocated for policies that foster transparency, accuracy and integrity in the factual information provided by regulated gas industry participants to foster trust and confidence in the natural gas industry by regulators and the public.

As suppliers, members of the NGSA are active participants in the gas industry in a variety of roles, including production, marketing and sales of substantial quantities of natural gas, both for domestic consumption and export. The transportation of natural gas in interstate commerce

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<sup>2</sup> The "fundamental purpose of the Natural Gas Act is to assure an adequate and reliable supply of gas at reasonable prices." *California v. Southland Royalty Co.*, 436 U.S. 519, 523 (1978); *Sunray Mid-Continent Oil Co. v. FPC*, 364 U.S. 137, 147, 151-154 (1960); *Atlantic Refining Co. v. Public Serv. Comm'n of New York*, 360 U.S. 378, 388 (1959); *see also, NAACP v. FPC*, 425 U.S. 662, 670 (1976) (the purpose of the NGA is to "encourage the orderly development of plentiful supplies of natural gas . . . at reasonable prices.").

through the interstate pipeline system under thousands of transportation contracts involves daily, even hourly interactions between numerous parties, including producers, pipelines, storage operators, marketers, distribution customers, power generators, industrial consumers, asset managers and others. All of these interactions involve some form of communication. Consequently, the members of NGSAs have a direct and substantial interest in the Proposed Rule, which would impose a duty of candor that all entities communicating with the Commission or other specified organizations related to a matter subject to the jurisdiction of the Commission submit accurate and factual information and not submit false or misleading information or omit material information.

The NOPR also would impose the proposed new duty of candor on communications with Commission-approved market monitors, regional transmission organizations (“RTOs”) and independent system operators (“ISOs”) as well as jurisdictional transmission providers, and the Electric Reliability Organization and its associated Regional Entities. Gas suppliers and marketers such as NGSAs members communicate with these entities in the ordinary course of business. Consequently, placing new additional burdens on such communications could threaten to disrupt reliable grid operations.

## **II. BACKGROUND**

The Commission issued the NOPR on July 28, 2022, proposing to expand its current duty of candor requirements. The NOPR was not preceded by any Notice of Inquiry or technical conference. It does not purport to implement any new statutory enactment or changed circumstances within the industry. The Commission notes that its current regulations impose a duty of candor for specific types of communications that were adopted as part of specific regulatory requirements. It does not cite any specific incident or finding that information

submitted to the Commission under the existing standard was inaccurate or misleading. Instead, the Commission expresses a general concern that these individuals or entities “may” fail to ensure that the Commission can make decisions based on “accurate” information.<sup>3</sup> The NOPR proposes to add a new part 1d to title 18 of the Code of Federal Regulations to require that any entity communicating with the Commission or other specified organizations (as identified below) related to a matter subject to the jurisdiction of the Commission submit accurate and factual information and not submit false or misleading information, or omit material information.

The text of the proposed new 18 C.F.R. § 1d.1, Accuracy of communications, would state as follows:

**§ 1d.1 Accuracy of communications.**

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

In the NOPR, the Commission cites as a model for the proposed rule current Section 35.41(b) of the regulations, which by its terms applies to regulation of electricity transmission providers. The NOPR seeks comment on all aspects of the proposed rule, including specifically the following issues:

- (1) the need for a broad duty of candor rule;
- (2) whether 18 CFR 35.41(b) provides a reasonable foundation for the proposed expanded duty of candor rule;
- (3) the Commission’s authority for the proposed rule;

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<sup>3</sup> NOPR, at P 8.

- (4) whether there are categories of entities or individuals that should be exempted from the duty of candor;
- (5) the scope of the communications covered by the rule; and
- (6) whether the regulation properly identifies all organizations who assist the Commission to carry out its statutory obligations and communications to whom should be subject to a duty of candor.

### **III. EXECUTIVE SUMMARY**

- The Commission has not shown any regulatory need for the Proposed Rule to expand its current duty of candor policy. Before the Commission can adopt the proposal in the NOPR, with the attendant burdens on industry stakeholders and the orderly functioning of the regulated industries, the Commission must be able to demonstrate that it is addressing more than a vague, theoretical concern. The proposed duty of candor will impose new burdens and uncertainty on industry stakeholders. The Commission is obligated to demonstrate that these burdens can be justified; its theoretical concerns are insufficient.
- The NOPR is premature, and the Commission should withdraw the proposed rulemaking. Instead, the Commission should first issue a Notice of Inquiry, then convene a technical conference with the option for post-technical conference comments and reply comments, to determine whether there is in fact a need for the broad duty of candor, including a review of the Commission's existing regulations requiring truthfulness and accuracy in industry submissions and communications; the activities and communications to which the Duty can and should apply; and whether adoption of such a new duty of candor necessitates the modification or elimination of existing regulations to ensure consistency in compliance and enforcement.

- Section 35.41(b) does not provide a foundation for a duty of candor applicable to natural gas entities, in particular suppliers engaged in deregulated first sales of natural gas. This regulation applies to electric suppliers and entities that have been permitted by the Commission to make wholesale sales for resale of electric power at market-based rates. In contrast, Congress deregulated first sales of natural gas in 1993. The remaining jurisdictional sales for resale are authorized pursuant to a blanket certificate that provides a Code of Conduct for those sales.
- If the Commission determines to proceed with this rulemaking, the Commission must address NGSA's concerns and clarify the application of the duty of candor in several fundamental respects.

### **III. COMMENTS**

NGSA submits these comments to provide the perspective of natural gas industry suppliers and marketers on the proposed rule. As stated above, NGSA has long advocated for policies favoring transparency, accuracy and integrity, as essential for the establishment of competitive markets. NGSA members rely on the accuracy of information submitted to the Commission and between market participants. NGSA submits, however, that the proposed rule, while possibly well-intentioned, is not structured to ensure greater accuracy or integrity in communications. In part, this is because there has been no demonstration that the current regulations are insufficient in this regard.

More fundamentally, the entities and individuals that would be subject to this rule already understand the importance of accuracy and truthfulness in communications without the prospect of a new, largely undefined, coercive prohibition imposed by the Commission. The issue presented by the NOPR is not whether industry participants should communicate accurately and in good

faith; of course they should. Instead, the issue presented by the NOPR is whether any basis exists to justify Commission imposition of a sweeping regulatory duty of candor for a broad and undefined scope of communications, backed up with the threat of investigation and prosecution for perceived failures, based on after-the-fact determinations of the applicable level of due diligence.

Fundamentally, the NOPR proposes regulations that raise the prospect of prosecution for inaccurate communications even in instances in which due diligence was exercised, with the burden on the entity to demonstrate due diligence under a hopelessly vague standard. The NOPR's assurances that the Commission will exercise its discretion in a reasonable manner offers no comfort in this regard. The Commission should reconsider this NOPR, which threatens to be highly detrimental to necessary communications in the gas industry, as well as between gas and electric entities.

**A. The Commission Has Not Shown Any Need for the Proposed Rule as Applied to the Gas Industry.**

In determining whether to adopt the NOPR, the Commission must weigh the need for the Proposed Rule against the potential detriments and additional burdens imposed by the Rule. The NOPR says little regarding the need for the Rule beyond a general pronouncement that communications with the Commission should be candid and accurate. The Commission contends that its current "patchwork" of requirements is insufficient to encompass all situations in which it must be assured it is receiving accurate communications. However, as the Commission acknowledges, it already imposes numerous requirements that information filed with it is truthful and accurate. It does not explain how layering a broad general requirement on top of those current requirements will provide the unspecified assurance. Nor does it explain how the proposed new duty of candor would interact with the existing accuracy requirements cited in the NOPR.

The Commission does not point to more than a theoretical concern to justify the Proposed Rule.<sup>4</sup> However, as the courts have reaffirmed with regard to Commission rulemakings, a theoretical concern is an insufficient basis for establishment of a regulatory requirement as sweeping as the proposed duty of candor.

In *National Fuel*, the court vacated the Order No. 2004 marketing affiliate regulations insofar as they applied to the natural gas industry. In Order No. 2004, the Commission significantly revised and extended the then-existing Affiliate Standards of Conduct, which had originally been adopted in the late 1980s,<sup>5</sup> to apply to interstate pipelines' relationships not only with marketing affiliates but also with other entities in the industry (such as producers, gatherers, processors, and traders) that are affiliated with pipelines. The court found that “[i]n vastly expanding the reach of the Standards, [the Commission] again relied on both a claimed theoretical threat-this time, of pipelines granting undue preferences to those non-marketing affiliates-and record evidence that, according to FERC, indicated that abuse by pipelines and non-marketing affiliates was a real problem in the industry.”<sup>6</sup> The court concluded, however, that “FERC’s asserted factual premises do not withstand scrutiny and that the Order does not reflect the reasoned

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<sup>4</sup> *National Fuel Gas Supply Corporation v. FERC*, 468 F.3d 831, 839 (D.C.Cir. 2006) (“*National Fuel*”) (“Normally, an agency rule would be arbitrary and capricious if the agency has . . . offered an explanation for its decision that runs counter to the evidence before the agency.” *Id.* The APA “establishes a scheme of ‘reasoned decisionmaking.’” *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998)(quoting *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983)).

<sup>5</sup> *Inquiry Into Alleged Anticompetitive Practices Related to Marketing Affiliates of Interstate Pipelines*, Order No. 497, 53 FR 22139 (1988), FERC Stats. & Regs., Regulations Preambles 1986-1990 ¶ 30,820 (1988); Order No. 497-A, *order on reh’g*, 54 FR 52781 (1989), FERC Stats & Regs., Regulations Preambles 1986-1990 ¶ 30,868 (1989); Order No. 497-B, *order extending sunset date*, 55 FR 53291 (1990), FERC Stats. & Regs., Regulations Preambles 1986-1990 ¶ 30,908 (1990); Order No. 497-C, *order extending sunset date*, 57 FR 9 (1992), FERC Stats. & Regs., Regulations Preambles 1991-1996 ¶ 30,934 (1991), *reh’g denied*, 57 FR 5815 (1992), 58 FERC ¶ 61,139 (1992); *aff’d in part and remanded in part sub nom. Tenneco Gas v. FERC*, 969 F.2d 1187 (D.C. Cir. 1992).

<sup>6</sup> 468 F.3d 833.



decision-making required by the Administrative Procedure Act.”<sup>7</sup>

At least insofar as applied to the Commission’s regulation of the natural gas industry, the same infirmity applies to the vast expansion of the Commission’s regulations proposed in the duty of candor NOPR.

**B. Section 35.41(b) Does Not Provide a Foundation for a Duty of Candor Applicable to Natural Gas Entities.**

In the NOPR, the Commission acknowledges that the legal basis for imposing a duty of candor is 18 CFR § 35.41(b), which applies only to “Sellers” in electric markets, defined as a person who has either obtained or applied for market-based rate authority under the auspices of the FPA. The Commission’s Natural Gas Act regulations contain no provision that corresponds to 18 C.F.R. In the gas industry, however, entities that sell natural gas for resale in interstate commerce, such as producers and marketers, are not subject to a market-based rate authority showing. The Natural Gas Policy Act of 1978 (“NGPA”),<sup>8</sup> and the Natural Gas Wellhead Decontrol Act of 1989<sup>9</sup> “generally removed first sales of gas from the Commission's jurisdiction.”<sup>10</sup>

Remaining jurisdictional sales for resale in interstate commerce by entities other than interstate pipelines are authorized pursuant to Subpart L of Part 284.<sup>11</sup> Those regulations already impose a code of conduct that includes a requirement that sellers “must provide accurate and factual information, and not knowingly submit false or misleading information or omit material information to any such publisher, by reporting its transactions in a manner consistent with the procedures set forth in the *Policy Statement on Natural Gas and Electric Price Indices*, issued by

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<sup>7</sup> 468 F.3d 834.

<sup>8</sup> 15 U.S.C. §§ 3301 *et seq*

<sup>9</sup> Pub. L. No. 101-60, 103 Stat. 157 (1989).

<sup>10</sup> *Hadson Gas Systems, Inc. v. FERC*, 75 F.3d 680, (D.C.Cir. 1995).

<sup>11</sup> 18 C.F.R. §§ 284.401-284.403.

the Commission in Docket No. PL03-3-000 and any clarifications thereto.”<sup>12</sup>

The proposed regulatory text suggests that the Commission has conceived of this proposal rule largely, if not exclusively, in the context of regulation of the electric industry under the Federal Power Act.<sup>13</sup> Thus, the duty of candor would apply to any communication with the Commission, “Commission-approved market monitors, Commission-approved regional transmission organizations, Commission-approved independent system operators, jurisdictional transmission or transportation providers, or the Electric Reliability Organization and its associated Regional Entities.” Of this list, only the reference to “transportation providers” applies to entities subject to the Commission’s regulation under the NGA.

Further, there are key distinctions between the gas industry and power industry that must be considered. In the power industry, market participants are required to make certain representations: (1) when outside an RTO and having to buy transmission, have to have rights to capacity (steel in the ground); (2) transmission providers must fulfill the requirements for network service; (3) generators need to stand ready to perform when they bid in the capacity market; and (4) cannot overstate load. Thus, expanding 18 CFR § 35.41(b) to natural gas market participants is not the natural fit the Commission relies on in the Proposed Rule.

### **C. The Commission Has Not Shown That Its Existing Requirements are Inadequate.**

The NOPR describes what the Commission characterizes as a “patchwork” of regulations governing submissions to the Commission that is in fact quite extensive.<sup>14</sup> For example, the

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<sup>12</sup> 18 C.F.R. § 284.403.

<sup>13</sup> 16 U.S.C. §§ 791 *et seq.*

<sup>14</sup> NOPR, at PP 9 (18 C.F.R. § 385.1907), 10 (18 C.F.R. § 157.5), 11 (Market Behavior Rules, 18 C.F.R. § 284.288(a), 284.403(a)) and 12 (Rules of Practice and Procedure) and 13 (18 C.F.R. § 1c.2(a)(2) and 14 (18 U.S.C. § 1001(a)). The proposed Duty of Candor rulemaking would not eliminate or modify any of these existing requirements and their associated standards, but would presumably be layered over them, thus becoming another basis on which the Commission could prosecute and penalize the same conduct.

Commission's Rules of Practice and Procedure require that any filing with the Commission must be signed and that a signature constitutes a certificate that the signer knows the contents are true to the best of his/her knowledge and belief.<sup>15</sup> Testimony and evidence in proceedings set for hearing before Administrative Law Judges must be submitted under oath.<sup>16</sup> The Commission's existing regulations and market rules appear to have been effective in ensuring the accuracy, honesty and forthrightness of communications with the Commission and its Staff, as well as between industry stakeholders. These regulations currently impose burdens on stakeholders to ensure that their communications are compliant, burdens that would be added to and potentially complicated by an additional, broad, over-arching duty of candor.

A NOPR is premature; before moving forward, the Commission must first examine whether a general duty of candor is needed based on evidence, how the duty would operate in conjunction with the broad regulatory requirements already imposed by the Commission, and whether any of the many existing regulations governing accuracy and honesty in communications need to be repealed or modified in light of the adoption of the broad new duty.

**D. Scope of the Proposed Rule: Application to Entities Providing Information to Entities Other than the Commission.**

The proposed duty of candor would apply not only to communications to the Commission, but also "any" communication with "Commission-approved market monitors, Commission-approved regional transmission organizations, Commission-approved independent system operators, jurisdictional transmission or transportation providers, or the Electric Reliability

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<sup>15</sup> 18 CFR § 385.2005(a); NOPR, at P 11.

<sup>16</sup> 18 CFR §§ 385.506(b) and 385.507(d).

Organization and its associated Regional Entities.”<sup>17</sup> Gas suppliers and marketers communicate<sup>18</sup> continuously with jurisdictional transportation providers, ISOs, RTOs and other entities. As discussed above, it is well understood by stakeholders that communications should be accurate and forthright to allow for orderly functioning of the complex transportation and transmission entities that, in conjunction with suppliers and marketers, provide energy to consumers.

The issue presented by the Commission’s proposal to expand the duty of candor is whether it will place undue burdens on these necessary communications, thereby disrupting the orderly operation of the energy industry. The Commission must demonstrate not only that it has authority to impose the proposed duty of candor broadly on entities and persons engaged in such communications. It must also demonstrate that it has weighed the purported benefits of the proposed rule against the potential harms and found that the benefits outweigh the harms.<sup>19</sup> In the absence of any showing of need for the proposed duty of candor, the burden of justifying the harms caused by the burdens and uncertainties created by the proposed rule are heavy, and cannot be met on this record.

**E. The Commission Must Address Uncertainty That Would Be Created by Adoption of the Duty of Candor Rule.**

If the Commission decides to proceed on its present track, it must at a minimum clarify and

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<sup>17</sup> NOPR, Section 1(d).1.

<sup>18</sup> As discussed below, the Commission must define and clarify the applicability of the term communication.

<sup>19</sup> *Union Oil Co. v. Fed. Power Com.*, 542 F.2d 1036, 1045 (9th Cir. 1976) (“Here, however, the Commission has adopted a rule for the potentially damaging disclosure of information which fails to consider the degree of harm such disclosure would cause to the reporting companies, whether or not the data revealed in fact played any part in an agency decision, or whether or not the data could satisfy the public's need to know if presented in an alternative form which avoided any harm to the industry. We are not told why aggregate data which do not identify individual producers or specific reserve information of individual producers could not satisfy the public's need. In short, the Commission makes data available to the public without any regard for the harm that this would cause or the need that would be served. Such a rule is without any rational basis and must be found to be arbitrary and capricious.”)

define the regulatory requirements the duty of candor would impose and address the impacts of the rule on the orderly operations of the energy industry and stakeholders.

**1. The Scope of Communications Subject to the Proposed Rule is Undefined, Overbroad, and Could Interfere with the Functioning of Transportation Services and Markets.**

The NOPR requests comments on the scope of communications subject to the Proposed Rule, but the regulatory text itself does not provide a definition of “communications.” The text focuses exclusively on the entities engaged in the communications, not the form or substance of the communications themselves. The Commission proposes to apply the new duty of candor regulation not only with respect to submissions entities to the Commission, but to certain other specified organizations that administer, participate in, or operate markets and facilities subject to the Commission’s jurisdiction, including “jurisdictional transmission or transportation providers.” It thus appears that the duty of candor would apply to communications with and between interstate pipelines.

The Commission must clarify the scope of communications covered by the Proposed Rule. For example, shippers on interstate pipelines submit nominations for transportation service; would each nomination constitute a “communication?” If a shipper submitted a nomination for capacity that ultimately doesn’t precisely align with confirmed or scheduled volumes, would such a nomination run afoul of the proposed rule, given the variability of conditions throughout a gas day and despite the absence of any indication that any harm occurred (or could occur)? As another example, if a shipper enters into negotiations for a long-term negotiated rate with a pipeline, and does not immediately reveal its “bottom line” position (i.e., states a lower rate that it would in fact be willing to pay), would an initial request for a lower rate be considered “false and misleading information” or an “omission of material information?” What if the shipper does not reveal that

it is also negotiating with another pipeline at the same time? Applying the proposed duty of candor in these manners and others would seem absurd on its face yet could be supported by a literal reading of proposed Section 1d.1.

Numerous other examples of similar communications could be offered. If the proposed rule is promulgated, the duty of candor must be expressly limited to statements regarding facts. As currently drafted, it arguably could extend to statements (e.g., about law, policy) upon which reasonable minds may differ. The Commission's statement in the NOPR that it does not intend to investigate or penalize all potential violations of the proposed regulation"<sup>20</sup> does not provide clear, adequate guidance as to the communications that would not be investigated and penalized. The gas industry relies on the ability to engage in frequent, routine, communications to ensure the orderly functioning of the interstate pipeline grid. The Proposed Rule threatens the operation of the grid, by requiring entities and individuals to determine whether they can document each communication under the "due diligence" requirement. Moreover, and as discussed immediately below, the due diligence standard itself is so vague as to make each attempt to establish compliance nearly impossible.

## **2. The Commission Must Provide Guidance Regarding the Due Diligence Standards it will apply in Duty of Candor Investigations and Prosecutions.**

In the NOPR, the Commission states that "no entity should be penalized or otherwise sanctioned for inaccurate communications where due diligence has been exercised to ensure the communications' accuracy."<sup>21</sup> However, the NOPR undermines this facile assurance by providing

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<sup>20</sup> NOPR, at P 44. As discussed above, this rather limited assurance will be of cold comfort to an entity if it is required to devote substantial resources to securing termination of an investigation, and seeking to remedy reputational damage.

<sup>21</sup> NOPR at P 28. Of course, if an individual or company is made the subject of a Commission show cause order or Office of Enforcement investigation prior to establishing to the satisfaction of the agency that it exercised due diligence, it may already have paid a substantial penalty in terms of lost resources and reputational damage.

no meaningful guidance as to what the Commission will consider due diligence in future investigations and prosecutions, beyond a general statement regarding the “concept” of due diligence and a reference to precedent, citing two court opinions.<sup>22</sup> Neither opinion sets forth in concrete terms the compliance requirement for “due diligence.” *Coaltrain* states that the company must show that “it conducted a reasonable investigation to make sure it produced the relevant and material information and followed a process to ensure the accuracy of its responses.”<sup>23</sup>

The proposed rule’s “due diligence” defense raises due process concerns. To the extent the Commission intends to extend the proposed rule to communications made by in-house or outside counsel in reliance on communications from external or in-house clients, the rule appears to require waiver of the attorney-client privilege or work product immunity to deploy the defense, which itself is largely undefined in the rule, in response to allegations of “untruthful conduct” which are similarly vague and undefined.

A conviction or punishment fails to comply with due process if regulation under which it “fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.”<sup>24</sup> “[A] regulation is not vague because it may at times be difficult to prove an incriminating fact but rather because it is unclear as to what fact must be proved.”<sup>25</sup> Accordingly, the Commission must as a matter of basic fairness provide specific, useful guidance to the industry as to how the “due diligence” requirement will be defined and applied, rather than determining it case-by-case after-

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<sup>22</sup> *FERC v. Coaltrain*, 501 F. Supp. 3d 503, 526 (S.D. Ohio 2020); *Kourouma v. FERC*, 723 F.3d 274, 278 (D.C. Cir. 2013)(finding a violation of Market Behavior Rule 3 under the FPA regulations (the predecessor to Section 35.41(b)) where a trader admitted in an affidavit that he falsified materials filed with the Commission, and omitted material information).

<sup>23</sup> 501 F. Supp. 3d 503, 527.

<sup>24</sup> *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) (citation omitted).

<sup>25</sup> *Id.*, citing *Libertarian Party of Ohio v. Husted*, 751 F.3d 403, 421 (6th Cir. 2014) (citation omitted).

the-fact. Further, the Commission should clarify that the term “entity” should not apply to the entity making the communication if that entity is not responsible for the inaccurate or omitted information.

**3. The Commission must address the lack of any requirement that the communications subject to the Duty of Candor must be material and that the inaccuracy must have been intentional.**

NGSA is concerned with the lack of an intent and materiality requirement within such a sweeping proposed regulation. The Commission recognizes in the NOPR that “the best-intentioned entities may, and occasionally will, inadvertently provide inaccurate information,” adding that “[e]ven where due diligence cannot be demonstrated, it is not the Commission’s intention to investigate or penalize all potential violations of the proposed regulation.”<sup>26</sup> The Commission also states “we do not intend to penalize inadvertent errors, especially those of limited scope and impact.”<sup>27</sup> The wording of this sentence, in particular the use of the word “especially,” suggests that the Commission is reserving the discretion to penalize *some* inadvertent errors that have a greater scope and impact.<sup>28</sup> The Commission must provide guidance to the industry regarding the role, if any, of the intent of the person or entity engaged in the communication in determining whether the proposed duty of candor has been violated, and whether the purported inaccuracy or omission must be material in the context of the subject matter. If the Commission continues to consider the adoption of the proposed duty of candor, consistent with its intent not to penalize inadvertent errors, the Commission should establish a threshold standard of “materiality”

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<sup>26</sup> NOPR, at P 44. As discussed above, this rather limited assurance will be of cold comfort to an entity if it is required to devote substantial resources to securing termination of an investigation, and seeking to remedy reputational damage.

<sup>27</sup> NOPR, at P 44.

<sup>28</sup> Even this interpretation would still leave the question of what constitutes a “limited scope and impact,” however.



to apply to purported violations of the duty. For example, if the inaccuracy was not “material” in that it did not or would not have caused the entity receiving the communication to incur any harm to itself or others, the inaccuracy should not give rise to a duty of candor violation. The Commission must develop a proposed standard of materiality to distinguish inadvertent or immaterial errors in communications and provide participants with an opportunity to comment on the proposed standard.<sup>29</sup>

**4. The Commission must address communications and documentation preservation concerns.**

The NOPR does not address the potential impact of the NOPR on the need of industry participants to document or record routine communications that previously had not been recorded, or the process by which such communications would be reviewed and stored. As discussed above, the Proposed Rule would apply broadly to “communications,” without definition. Industry participants communicate using different technology, not all of which records every communication. Depending on the circumstances, some communications regarding a specific circumstance may be recorded while others are not. Without a complete picture of all of the communications, it is possible that the recorded communications may present an incomplete and inaccurate picture of the communications. The NOPR does not address how or whether parties subject to the duty of candor would preserve communications such as unrecorded telephone conversations, to ensure that the subject of a future investigation or prosecution could protect itself against a contention that it violated the proposed duty of candor.

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<sup>29</sup> As noted by Commissioner Danly’s Dissent, “[k]nowledge or intent does not matter. The materiality of the erroneous statement does not matter.” We urge FERC to propose a standard or threshold on materiality and intent to incorporate these significant issues into any final rule.

**5. The Commission must address the application and scope of potential penalties for Duty of Candor violations.**

NGSA is concerned that the NOPR does not address the potential penalties for violation of the proposed duty of candor. This is a matter of particular concern when the Commission is proposing to layer the duty of candor on top of numerous other regulations requiring accuracy and good-faith communications. As discussed above, the Commission's stated intent is not to penalize inadvertent errors, especially those of limited scope and impact. The Commission has clarified in the past that in cases of multiple violations it will (1) determine the appropriate penalty on a case-by-case basis, and for multiple violations related to the same conduct or event, it will apply the Penalty Guidelines based on the conduct as a whole.<sup>30</sup> In other contexts, the Commission has dismissed concerns regarding "double penalties" in which an entity is penalized twice for the same conduct, as "entirely hypothetical."<sup>31</sup> However, as discussed above, the duty of candor would be added to pre-existing regulations imposing requirements that information communicated to the Commission and others be truthful and accurate.

**6. The Proposed Duty of Candor Could Hinder Operational Safety and Reliability Communications, to the Detriment of the Orderly Operation of the Pipeline Grid and Coordination between Gas and Electric Entities.**

NGSA is concerned the proposal will chill informal communications that support well-functioning markets and robust industry dialogue around important issues. As discussed above, the lack of definition of the term "communications" in the NOPR conceivably sweeps into the scope of the Proposed Rule communications that occur daily and hourly between industry personnel. These communications are essential to the orderly operation of the pipeline grid, and

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<sup>30</sup> *Enforcement of Statutes, Orders, Rules and Regulations*, 132 FERC ¶ 61,216 (2010) at P 182 (addressing violations that fall within section 2A1.1, guideline for violations of the Reliability Standards).

<sup>31</sup> *Id.*, 132 FERC ¶ 61,216 P 84 (addressing double penalties imposed by the Commission and North American Electric Reliability Corporation for the same violation of the Reliability Standards).

thus the delivery of gas supplies to consumers in constantly fluctuating conditions. If, in order to engage in communications with pipelines and other entities, suppliers and shippers must “vet” these communications through a documented “due diligence” process or risk a later investigation or prosecution for having violated the duty of candor, this essential flow of communication could be dramatically disrupted.

The burdens the Proposed Rule would place on operational communications could be particularly problematic in the context of emergency disruptions to transportation service. The Proposed Rule could thus have a chilling effect on communications between stakeholders during critical events such as hurricanes or cold weather events when timely communication and coordination are of the essence but under significant time constraints. Suppliers may be deterred from communications with pipelines regarding supply issues in high stakes circumstances if they risk the possibility that an individual or entity would lodge a duty of candor complaint with the Commission or Enforcement Staff until they have done their due diligence with counsel. Indeed, it is precisely when such conditions exist that the risk of extreme penalties would be greatest.

Further, a sweeping duty of candor rule could hurt valuable informal conversations between industry and FERC. While many stakeholders are willing to engage in robust industry dialogue, including in technical conferences and other industry forums, the risk of Enforcement action related to any unvetted statements, feedback or conversations is too great. Many stakeholders will feel limited to prepared, written communications to ensure the due diligence requirement is satisfied.

#### **IV. CONCLUSION**

For the reasons discussed above, the Commission should withdraw the NOPR. If this Commission wishes to proceed with this rulemaking, the Commission should issue a Notice of

Inquiry, followed by a technical conference, to determine whether there is in fact a need for the broad duty of candor, including a review of the Commission's existing regulations requiring truthfulness and accuracy in industry submissions and communications; the activities and communications to which the duty of candor can and should apply; and whether adoption of such a new duty of candor necessitates the modification or elimination of existing regulations to ensure consistency in compliance and enforcement. If the Commission decides instead to proceed on its present track, it must address the concerns discussed in these Comments concerning the justification, scope, clarity and guidance issues raised by the proposed rule.

Respectfully submitted,

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