November 10, 2022

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Chairman Richard Glick
Federal Energy Regulatory Commission
888 First Street, NE
Washington, DC 20426

Re: *Proposed Rulemaking – Duty of Candor*
Docket No. RM22-20-000

Dear Chairman Glick,

The New Civil Liberties Alliance ("NCLA") submits the following commentary in response to the *Duty of Candor*, 87 Fed. Reg. 49,784 (Aug. 12, 2022), which the Federal Energy Regulatory Commission ("Commission" or "FERC") has promulgated. NCLA strongly urges the Commission not to adopt the proposed rule, which, as written, raises significant constitutional concerns while failing to provide a legitimate reason to implement the rule in the first place.

Specifically, the proposed rule would impose a broad "duty of candor" on "all entities communicating with the Commission or other specified organizations related to a matter subject to the jurisdiction of the Commission." 87 Fed. Reg. at 49,784. The communicating entity—broadly defined to include all types of organizations and individuals—must "submit accurate and factual information and not submit false or misleading information or omit material information." *Id.* at 49,785. Further, an entity is only free from the risk of penalties for ostensibly violating the rule if the Commission determines that the entity "has exercised due diligence to prevent such occurrences." *Id.* at 49,784.

Notably, the proposed rule serves to expand an existing duty of candor, 18 C.F.R. § 35.41(b), that is substantively similar to the proposed rule, but applies only to sellers of wholesale electric power. The proposed rule, in contrast, would apply to *any* communication with FERC, its staff, or various other FERC-related entities from *any* individual or organization on *any* matter within the Commission's jurisdiction. However, in its Notice of Proposed Rule Making ("Notice"), the Commission declines to explain with specificity the need for such a sweeping expansion of the duty of candor already in existence, which is particularly concerning given the weighty First Amendment and due process concerns that the proposed rule raises but does not address. These concerns include: (i) the proposed rule's vagueness (for instance: what are the penalties for violating the rule? Given that the rule offers no standards of materiality or intent, are all communicating parties equally at risk of being penalized, regardless of size, sophistication, or scienter? How much due diligence must an entity conduct before it can communicate without violating the rule?); (ii) its overly broad regulation of

protected speech in the absence of a compelling state interest; and (iii) its chilling effect on parties who, rather than risk liability, might cease speaking freely about matters within FERC's jurisdiction.

I. Statement of Interest

NCLA is a nonpartisan, nonprofit civil rights organization founded for the purpose of protecting constitutional freedoms from violations by the administrative state. NCLA's original litigation, amicus curiae briefs, regulatory comments, and other means of advocacy strive to tame these agencies' unlawful exercise of administrative power. The "civil liberties" of the organization's name refer to rights at least as old as the U.S. Constitution itself, including freedom of speech and due process of law. Yet these selfsame rights are not invulnerable to governmental infringement and overstep because legislatures, administrative agencies, and even sometimes the courts have neglected them for far too long.

NCLA strives to defend civil liberties—primarily by asserting constitutional constraints on the administrative state. Where agencies are poised to act beyond their lawful powers, NCLA encourages them to curb the illegitimate exercise of such power by establishing meaningful limitations on administrative rulemaking, adjudication, and enforcement. The courts are not the only government bodies with the duty to attend to the law. Agencies and agency heads must examine whether their modes of rulemaking, adjudication, and enforcement comply with the Administrative Procedure Act ("APA"), the laws of Congress, and the Constitution. The Commission must do so here. Given the proposed rule's serious constitutional deficiencies, the Commission must either withdraw it altogether, or issue a new notice of proposed rulemaking (which would entail an additional opportunity for public comment) in order to address the numerous shortcomings that currently render the proposed rule unconstitutional. Should the Commission proceed undeterred with this untenable rule, NCLA may file suit to prevent its implementation.

II. Proposed Rule

The proposed duty of candor provides that:

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

87 Fed. Reg. at 49,791. Strikingly, the proposed rule does not require any showing that the communicating entity knowingly or intentionally submitted false or misleading information (or omitted material information). The rule also makes no mention of materiality regarding an erroneous statement, nor does it offer a safe harbor from liability for smaller or less sophisticated parties.

In its Notice, the Commission establishes that it intends to apply the proposed rule very broadly. For instance, the term "entity" will encompass "all types of organizations, as well as individuals," and will apply not only to the entity *making* the communication, but also to the "entity responsible for the communication," even one that "relies upon a non-employee agent for the

submission of a communication." *Id.* at 49,790. The Notice also states that the Commission "intend[s] to interpret the term 'communication' broadly, including informal and formal communications, verbal or written, and via any method that may be used for transmission." *Id.* As for the recipient of communicated information (either the Commission or other FERC-related entities specified in the proposed rule), the Commission once again intends to take a sweeping approach. The proposed rule will cover communications made to the Commission, the Commission staff, and any individuals employed by or acting on behalf of the other FERC-related entities, including the entities' agents and contractors. *Id.*

III. The Proposed Rule Is Unconstitutional

A. The Proposed Rule Violates the First Amendment

The proposed rule raises serious First Amendment concerns, which the Commission has failed to meaningfully address in its Notice. As noted above, the rule would apply to any speaker—whether an individual or organization and regardless of size or sophistication—and encompasses any communication regarding any topic that is within the Commission's jurisdiction so long as the communication is made to the Commission or to one of the listed FERC-related entities, including the entities' agents and contractors. The Notice purports to justify this sweeping regulation of protected speech with hypotheticals, contending that inaccurate information "*could* lead to substantial harm," that the omission of material information "*could* lead the Commission to make decisions it otherwise would not have made," or that misleading information "*could* lead the Commission or its staff to close an investigation that should continue." *Id.* at 49,785, 49,788 (emphasis added).

The Commission conjures up various hypothetical scenarios to support its rule but, notably, fails to identify any concrete issues, harms, or market aberrations that warrant the conclusion that any speaker communicating any FERC-related topic in any context must be regulated. Although complete accuracy from every potential speaker in every FERC-related communication might be desirable or more convenient for the Commission, the "First Amendment does not permit the State to sacrifice speech for efficiency." *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2376 (2018) (citation omitted). And when, as here, a government agency proposes a rule that restricts speech on the basis of its content, the rule is subject to strict scrutiny—meaning that it will be found unconstitutional unless the government demonstrates that it is "narrowly tailored to serve compelling state interests." *Id.* at 2371. The Commission has plainly failed to make such a showing. That a statement is deemed "false" or "misleading" does not, alone, deprive it of First Amendment protections. Even when considering speech in criminal contexts, the Supreme Court has been careful to instruct that falsity, by itself, does not place speech outside of the First Amendment. *See U.S. v. Alvarez,* 132 567 U.S. 709, 720 (2012) ("The criminal prohibition of a false statement made to Government officials, 18 U.S.C. § 1001 . . . do[es] not establish a principle that all proscriptions of false statements are exempt from exacting First Amendment scrutiny.").

The proposed rule's content-based speech restriction imposes a particularly heavy burden on the Commission to explain the compelling need to implement the rule. As written, the proposed rule would apply indiscriminately to communicating entities, regardless of a speaker's *mens rea—i.e.*, whether he acted knowingly or intentionally—or sophistication, and regardless of the materiality of the speech. Indeed, the rule offers no exceptions, safe harbors, or limitation on the circumstances in which "any entity" is required to "provide accurate and factual information and not submit false or misleading information, or omit material information." 87 Fed. Reg. at 49,791. Additionally, the proposed rule says nothing about the penalties or sanctions that will be imposed for this new class of

violation. Interested parties would be subject to great uncertainty about the consequences of the proposed regulation, which would only be compounded by the ambiguity of other key components of the rule, including the question of due diligence (how much will be deemed sufficient to avoid penalties?) and the Commission's highly discretionary powers of enforcement, as contemplated in the Notice.[1]

The rule is also problematic from a First Amendment perspective because it will chill speech. Adoption of the proposed duty of candor will inevitably result in the chilling of constitutionally protected speech—and, ironically, hamper the very communications that it purports to protect. As Commissioner Danly points out in his dissent, much of the work performed within the Commission's jurisdiction involves "matter[s] of political, social, or other concern to the community," or it is "a subject of general interest and of value and concern to the public." *Id.* at 49,792. Such "speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Snyder v. Phelps*, 562 U.S. 443, 452 (2011). Indeed, the Commission's jurisdiction encompasses numerous areas of public interest and debate, including, among others, the relative advantages of energy sources and their sustainability, fair electricity rates, energy policy, and related environmental matters. Many of these topics are highly contestable and widely contested.

The proposed rule, however, would grant the Commission discretionary power to police all communications within its jurisdiction, imposing a looming threat of enforcement and sanctions on all interested parties, who will be left to ascertain for themselves what due diligence is sufficient, or what information is material and cannot be omitted from their communications. The Commission's assurances that it does not *intend* to penalize all potential violations are unlikely to reduce the rule's chilling effect on protected speech. Regardless of the Commission's purported intentions, any interested party who reads the proposed rule's broad language is unlikely to rely on vague, unenforceable promises of that nature, which in no way assure leniency. If the Commission does not actually intend to penalize parties for "inadvertent errors" or for communications of "limited scope and impact," and if the size and sophistication of a speaking party really will determine whether, or how harshly, the party is penalized, that information needs to be explicitly reflected in the plain language of the rule.

The Commission's proposed rule extends far beyond what could be considered a reasonable attempt to deter theoretical falsehoods, and it will instead chill speech that the First Amendment protects.

B. The Proposed Rule Is Unconstitutionally Vague

The vagueness of the proposed regulation's plain language is another fatal shortcoming. Substantial uncertainty regarding the risks of FERC-related communications, potential penalties, and discretionary enforcement of the rule, as well as the sheer breadth of speakers and protected speech

[1] As Commissioner Danly notes in his dissent:

> [W]hen the Commission states that it "retains discretion" not to pursue enforcement actions, it necessarily means that the Commission also retains discretion to pursue enforcement actions. Assurances like these cannot save the proposed rule. For constitutional purposes, what matters is the text of the regulation. The Commission cannot grant itself sweeping discretionary powers and then tell the public to "trust us."

87 Fed. Reg. at 49,792.

that fall within the rule's ambit, all raise serious First Amendment and due process concerns, which the Commission has failed to adequately address.

Due process of law requires that legal prohibitions be clearly defined. *See Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Vague laws may trap the innocent by failing to provide fair warning and lead to arbitrary and discriminatory enforcement, delegating basic policy decisions to police, judges, and juries. *Id.* at 109. A law is vague if it does not "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited." *Id.* at 108; *see Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926) (due process clause requires a statute to be sufficiently clear so as not to cause persons "of common intelligence … [to] guess at its meaning and differ as to its application"). Vague laws are of particular concern in the First Amendment context because they "operate[] to inhibit the exercise of" First Amendment rights. *Grayned*, 408 U.S. at 109 (quoting *Cramp v. Bd. of Pub. Instruction*, 368 U.S. 278, 287 (1961)).

In a fruitless effort to salvage its unconstitutional rule, the Commission cites to *Kourouma v. FERC*, 723 F.3d 274 (D.C. Cir. 2013). There, the D.C. Circuit dismissed a vagueness challenge to the existing duty of candor (18 § CFR 35.41(b)), concluding that the rule did not require the communicating party to have an intent to make a false statement, but instead "reserves punishment for those who do not act with requisite care when submitting information to FERC." *Id.* at 278. *Kourouma*, however, is easily distinguishable, as it concerned § 35.41(b), which is much narrower in scope than the proposed duty of candor. Unlike the proposed rule, which covers *any* communicating individual or entity, § 35.41(b) places the onus only on sellers of wholesale electric power to comply with the duty of candor in FERC-related communications. However, while sellers are presumably relatively sophisticated actors that regularly operate within the Commission's jurisdiction, the same cannot be said of "any entity" (*i.e.*, any member of the public) that might find itself engaging in a FERC-related communication with any entity covered by the rule.

IV. The Proposed Rule Conflicts with Attorney-Client Privilege and the Model Rules

The proposed duty of candor directly conflicts with the Model Rules of Professional Conduct ("Model Rules") and, in particular, the attorney-client privilege. First, by requiring that "any entity" (including an entity's non-employee agent) not "omit material information" in "any communication with the Commission," the proposed rule implicitly requires lawyers to volunteer undefined "material information" in their communications with the Commission or one of the other FERC-related entities listed in the rule. 87 Fed. Reg. at 49,787. Because such material information could derive from confidential communications between attorneys and their clients, the proposed rule purports to impermissibly expand the Commission's regulatory oversight over privileged communications. The rule's broad requirements concerning accuracy and materiality—in addition to the absence of any exceptions or limiting circumstances—would place an attorney in a precarious position when communicating on a client's behalf on any matters falling within the Commission's jurisdiction. And given the shifting terrain of what an attorney, or an attorney's client, might consider "accurate" or "factual" at any given time, an attorney might hesitate to fully and effectively advocate on behalf of her client out of fear of potential sanctions for providing information later deemed to be "inaccurate" or "misleading," or for "omit[ting] material information" in FERC-related communications, whether in litigation or an informal call or email.

Given the above, the reverse is also foreseeable: the proposed rule would chill a client's communications with its counsel—particularly, if the client is one of the non-Commission entities specified in the rule, such as a transmission or transportation provider, to which all communications

are subject to the rule's broad disclosure and omission mandates.[2] Considering the uncertainty that the proposed rule raises, clients might doubt whether their counsel can be relied upon to speak candidly, render advice in the client's best interest, and protect privileged and confidential information from disclosure. Moreover, by inhibiting the free flow of communication between attorneys and FERC-related clients, the proposed rule would not only chill attorney-client communications, but also chill the functionality of the wholesale energy market, depriving it of well-informed participants who will instead operate on far less information, including advice from counsel, to guide their decisions.

Notably, the Commission recognizes in its Notice that many other rules imposing a duty of candor contain a "knowledge" or scienter requirement, such as the Federal Rules of Civil Procedure, the ABA Model Rules, and the Commission's Rules of Practice and Procedure. 87 Fed. Reg. at 49,786. The Model Rules also contain a "duty of candor," which is owed by an attorney to the tribunal before which it represents its client. MODEL RULES OF PRO. CONDUCT R. 3.3(a)(1)-(3) ("A lawyer shall not *knowingly*" make or fail to correct a false statement of law or fact, fail to disclose controlling or adverse legal authority, or offer evidence the lawyer knows to be false) (emphasis added). Moreover, the Commission recognizes that "numerous state bar rules are based" on the ABA's Model Rules. 87 Fed. Reg. at 49,786. In fact, all state rules concerning an attorney's duty of candor owed to the tribunal contain a knowledge qualifier. It is thus all the more unclear why no such requirement was deemed necessary for a broad duty of candor related to FERC-related matters, and the Commission offers no explanation for this glaring omission.

V. The Proposed Rule Violates the APA

Government agencies must comply with the APA's requirement that the public be given adequate notice of a new rule's substance so that it has a meaningful opportunity to comment on the agency's proposed plan. 5 U.S.C. § 553. To satisfy the APA's requirement, an agency's final rule must be a "logical outgrowth" of the proposed rule. *CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1079 (D.C. Cir. 2009). A final rule will fail the logical outgrowth test and thus violate the APA's notice requirement where "interested parties would have had to 'divine [the agency's] unspoken thoughts.'" *Id.* at 1080 (quoting *Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259-60 (D.C. Cir. 2005)).

No final rule of the Commission's proposed duty of candor could possibly satisfy the logical outgrowth test given that the proposed rule provides no discussion of certain key components of the regulation. Most conspicuously, the proposed rule makes no mention whatsoever of penalties, sanctions, or the procedures to be followed in the case of a rule violation. The complete absence of discussion of these consequences inhibits interested parties from meaningfully commenting or rationally assessing how newly regulated entities should respond. As the D.C. Circuit put it: "Something is not a logical outgrowth of nothing." *Kooritzky v. Reich*, 17 F.3d 1509, 1513 (D.C. Cir. 1994) (holding agency failed to comply with notice requirement because proposed rulemaking included no discussion or mention of significant element in final rule).

The proposed rule also lacks meaningful discussion of due diligence and materiality, leaving parties to speculate about what conduct is actually prohibited. At the same time, the Commission

[2] The Commission claims that the proposed rule does not impose a "duty of disclosure" because "a material omission in a communication could violate the rule," but "a lack of communication would not." 87 Fed. Reg. at 49,785, n. 6. This explanation provides only cold comfort, however, as interested parties will still be left to somehow ascertain what the Commission may or may not deem to be "material."

seeks to grant itself discretionary powers so broad that it would be permitted to "find" that any untrue form of communication, regardless of context, violates the duty of candor.

The Supreme Court has already expressly prevented the Commission from adopting interpretations of its own rules that would allow them to "assum[e] near-infinite breadth." *FERC v. Elec. Power Supply Ass'n*, 577 U.S. 260, 278 (2016). It appears that the Commission again attempts to skirt the APA's notice requirements in the hopes of finalizing a sufficiently broad and vague rule to serve as a blank check for the Commission to spend at its discretion. The Commission hardly attempts to justify its proposal and, in fact, even appears to concede in its Notice that any improvement in the accuracy of communications as a result of the proposed rule will either be minimal or non-existent because "almost all entities … regularly communicate with accuracy and honesty" and most "communications already regularly occur with due diligence exercised"—which leaves one to consider why a new rule was ever proposed in the first place. 87 Fed. Reg. at 49,791. It appears to be an ill-considered solution in search of a non-existent problem.

CONCLUSION

Given the proposed rule's infringement on core constitutional rights, including free speech and due process, the Commission has utterly failed to adequately justify the rule's implementation. NCLA urges the Commission to withdraw the proposed rulemaking altogether. At a bare minimum, FERC must reconsider and revise this proposal in light of the serious constitutional and practical problems that NCLA has identified. As noted above, in the unfortunate event that the Commission declines to withdraw or significantly revise the rule to address its numerous constitutional defects, NCLA is prepared to litigate to prevent the Commission from exceeding its statutory bounds and wielding power that violates core constitutional rights. The far better course of action would be for the Commission to desist from pursuing implementation of an unconstitutional rule in the first place.

Sincerely,

/s/ Casey Norman

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NEW CIVIL LIBERTIES ALLIANCE