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Docket No. RM22-20-000

Dear Chairman Glick:

I submit this comment in my individual capacity and have included my title only for purposes of affiliation. I write to comment on the inadvisability of the Federal Energy Regulatory Commission's proposed rule, Docket No. RM22-20-000, extending the duty of candor in 18 C.F.R. § 35.41(b) to any entity who communicates on a subject within the Commission's jurisdiction. By insisting without evidence that the current candor duties are inadequate, the Commission purports to address a doubtful problem. In so doing, the Commission proffers a solution exceeding its jurisdiction, unlikely to address its own concerns, but likely to create burdens and adverse consequences, which the Commission has not adequately considered. Given the shortcomings discussed below, adopting the proposed rule as written would be an arbitrary and capricious exercise of the Commission's regulatory authority.

The Commission Is Misusing Regulatory Authority to Address a Phantom Problem

In its Notice of Proposed Rule Making (the "Notice"), the Commission describes a problem of inaccurate communications affecting the energy markets, but the Commission offers nothing to substantiate its view that the problem is concrete. That is, the Commission gives no indication that the supposed gaps in the existing requirements of honesty, candor, etc., actually undermine the Commission's ability to discharge its regulatory mandate of ensuring that wholesale energy prices are "just and reasonable." The Notice contains not a single example of a currently unregulated communication introducing inaccuracy into the wholesale energy markets or the Commission's regulation thereof.

At various points, the Notice speaks in broad hypothetical terms about "inaccurate information inhibit[ing] the commission's oversight" which "could lead to substantial harm" or the possibility that the "omission of material information . . . could lead the Commission to make decisions it otherwise would not have made."[1] But the notice gives the impression that this harm is purely theoretical and that the Commission is not aware of, or has yet to identify, instances where inaccuracies in unregulated communications have come to the Commission's attention, let alone caused discernible market aberrations. In other words, the proposed rule is a solution in search of problem.

[1] NPRM ¶¶ 3, 8, 26.

This contrasts with the impetus for 18 C.F.R. § 35.41(b), also known as Market Behavior Rule 3, which the Commission invokes as the basis for the proposed extension of the duty of candor. When the Commission adopted Market Behavior Rule 3 in 2003, it did so in response to a specific, well-documented failure in the western states energy markets.[2] Then, as now, the Commission opined that the "integrity of the processes established by the Commission for open competitive markets rely on the openness and honesty of market participant communications." Yet, in response to a documented crisis in the western states, the Commission deemed it sufficient to impose explicit duties of candor only on sellers in the wholesale market.

Now, with no crisis apparent and no specific failures identified, the Commission has determined without a reasoned explanation that Market Rule 3, which is nearly two decades old, has suddenly become inadequate. The Commission acknowledges that, in addition to communications by sellers, existing duties of candor and oath requirements already cover filings with the Commission, periodic and annual reports, as well the submission of evidence, testimony and written statements in connection with commission investigations. The Commission then puzzlingly concludes that these duties are "limited" and goes on to malign the current network of requirements as a "patchwork." The existing duties are limited in the sense that they cover a smaller range of speakers than the Commission now proposes to regulate, but rather than seeing these duties as a "patchwork," they are better viewed as targeted toward those speakers and that speech most likely to affect the Commission's mandate. The fact that other speakers and other speech could be regulated does not mean that there is a reason for the Commission to do so. If the current candor duty is truly inadequate, then at some point in the nearly two-decade existence of § 35.41(b) one would expect to see evidence thereof, such as instances where inaccurate communications have manifested as actual market problems. The problem is that the Notice identifies none.

Accuracy in all communications "relat[ing] to a matter subject to the jurisdiction of the Commission" may be desirable, but the Commission is not authorized to pursue this without regard to the costs. "[N]o legislation pursues its purposes at all costs. . . . [I]t frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law."[3] To show that the proposal's benefits are worth its costs, the Commission must begin by identifying benefits of some sort, and that means identifying a problem the proposal would address. But here, "conclusory statements" that inaccurate communications by unregulated parties could inhibit the Commission's mandate "do not suffice to explain its decision."[4] The Commission is not entitled to rest its regulation on "unsupported speculation," but instead must provide some "factual basis for this belief" that speech or speakers outside the scope of the current candor rules realistically threaten its ability to ensure just and reasonable energy pricing.[5]

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[2] *See Investigation of Terms & Conditions of Pub. Util. Mkt.-Based Rate Authorizations*, 105 FERC ¶ 61,218, 62,142 (2003).
[3] *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (emphasis omitted).
[4] *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 224 (2016).
[5] *New York v. United States Dep't of Homeland Sec.*, 969 F.3d 42, 83 (2d Cir. 2020)

The Commission's failure to apprise the public of the scope or gravity of the problem posed by unregulated, inaccurate communications makes it impossible to evaluate the proportionality of the proposed rule and its attendant costs, which are discussed further below. It is the Commission's responsibility to show that its proposed rule would do more good than harm; the failure to do so is arbitrary and capricious.[6] Moreover, a regulation responding to a specific problem is "highly capricious if that problem does not exist."[7] Therefore, the Commission needs more than truisms about the value of accurate information to demonstrate that there is, in fact, a problem affecting energy rates at which this sweeping proposed rule is aimed.

The Proposed Rule Exceeds the Commission's Lawful Jurisdiction

The proposed candor rule extends the Commission's regulatory reach beyond the bounds of its jurisdiction. Although the Commission is authorized to "ensure the integrity and smooth functioning of the [energy] markets,"[8] that authority is limited "to rules or practices that *directly* affect the [wholesale] rate."[9] This limited authority is the basis for the existing duty of candor in § 35.41(b).[10] Given the demonstrated ability of Sellers' communications with the Commission to affect wholesale markets, as exemplified by the western states energy crisis, it was reasonable for the Commission to conclude that regulating these parties' communications was within its jurisdiction. Sellers are entrusted by the Commission with market-based rate authority, and no imagination is needed to appreciate how these entities affect wholesale market rates.

No similar justification exists for the proposed extension of the duty of candor, which would cover a varied host of new speakers. The Commission now proposes to regulate the communications of every "entity," including organizations and individuals as well as their employees, agents, and contractors so long as the communication "relates" to a matter within the Commission's jurisdiction.[11] Yet the Commission has given no apparent consideration to whether communications from these sources have any capacity to exert direct influence on the wholesale energy markets. Consequently, the Commission has failed to show that the proposed rule's scope would cover only (or mostly) communications that exert a direct influence over wholesale energy markets.

When the direct influence of communications on wholesale energy markets is considered, it becomes apparent that the existing candor rule is not artificially "limited" but intentionally "targeted" at actors in the wholesale markets with the power directly to affect those markets. While non-sellers may be able to exert influence in the wholesale markets, the likelihood of more attenuated actors being able to do so through their communications seems remote. Whatever

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[6] *Md. People's Counsel v. FERC*, 761 F.2d 768, 779 (D.C. Cir. 1985) (an agency's failure to show that "more good than harm will come of its action" is arbitrary and capricious).
[7] *Alltel Corp. v. FCC*, 838 F.2d 551, 561 (D.C. Cir. 1988).
[8] NPRM ¶ 36 (quoting *Kourouma v. FERC*, 723 F.3d 274, 276 (D.C. Cir. 2013)).
[9] *FERC v. Elec. Power Supply Ass'n*, 577 U.S. 260, 278 (2016).
[10] *FERC v. Coaltrain Energy, L.P.*, No. 2:16-CV-732, 2018 WL 7892222, at *23–24 (S.D. Ohio Mar. 30, 2018).
[11] NPRM ¶¶ 40-41.

effects these communications could produce on the wholesale energy market, they appear more likely to be "indirect or tangential impacts" which "fall outside FERC jurisdiction."[12]

The Commission nonetheless maintains that the "underlying rationale" of § 35.41(b) "applies more broadly" than to sellers.[13] Of course it does. But that is precisely why the Supreme Court prevented the Commission from adopting a "hyperliteral" reading of its governing statutes: to protect the public from the excesses of the Commission's unrestrained exercises in logic and to keep the Commission's regulatory mandate from "assuming near-infinite breadth."[14] While the proposed regulation is not infinite in scope, as written and interpreted, it is likely to cover a large number of communications that do not and cannot directly affect wholesale energy markets. Adopting a regulation that exceeds or disregards known limitations on the Commission's jurisdiction is arbitrary and capricious.

The Commission Has Failed to Consider the First Amendment Implications of Its Proposed Rule

The proposed rule raises weighty First Amendment concerns which are not adequately addressed by the Notice of Proposed Rule Making.

The proposed rule encompasses any communication relating to any matter subject to the Commission's jurisdiction so long as the communication is made to a one of the numerous listed entities. A literal interpretation of "relates to" could result in the Commission regulating a nearly unlimited number of subjects, provided some nexus can be found with the immediate subjects of the Commission's authority.[15] Even if the Commission gives a less capacious interpretation to the subjects falling under this rule, as Commissioner Danly's dissent notes, the Commission's core subject matter areas involve "matter of political, social, or other concern." This observation is confirmed by the fact that the Commission's jurisdiction covers interstate transmission of electricity and natural gas, including the reliability of both, as well as environmental matters related to natural gas. These matters intersect or overlap with important areas of policy and scientific debate concerning the relative merits of energy sources, their reliability, and their sustainability. Despite the Commission's authority to ensure fair and just rates in the wholesale market, it is not the Commission's job to police the boundaries of discussion on unsettled matters touching on energy policy or related environmental concerns. The shadow of broadened enforcement power cast by the proposed rule and its "flexible standard" of enforcement may chill discussion of these issues among actors in the wholesale energy markets particularly as those actors struggle to divine what information is material and cannot be omitted from their communications.

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[12] *Coal. for Competitive Elec., Dynegy Inc. v. Zibelman*, 272 F. Supp. 3d 554, 572 (S.D.N.Y. 2017).
[13] NPRM ¶ 33.
[14] *FERC v. Elec. Power Supply Ass'n*, 577 U.S. 260, 278 (2016).
[15] *See Elec. Power Supply Ass'n*, 577 U.S. at 278 ("As we have explained in addressing similar terms like 'relating to' or 'in connection with,' a non-hyperliteral reading is needed to prevent the statute from assuming near-infinite breadth.").

To these concerns, the Commission's citation to *Kourouma v. FERC* is no answer. There, an energy trader, Kourouma, *admitted* to filing false information with the Commission in an application for approval of his new energy trading firm. The court of appeals treated Kourouma as a seller, meaning that he was squarely within the Commission's jurisdiction over wholesale markets. The only challenge Kourouma asserted to § 35.41(b) was that it provided "no notice that FERC would read the Rule so broadly and might move against those who lacked intent to deceive FERC or regional transmission organizations."[16] The district court easily disposed of this intent-based challenge because the regulation's text made it clear that only those who had exercised diligence would be excused and because "Kourouma's actions were worse than careless."[17]

In short, *Kourouma* was not a close case. Because a seller conceded that he made false statements directly to the Commission, the court had no opportunity to consider whether such phrases as "omit material information," "relates to a matter subject to the jurisdiction of the Commission," or "exercises due diligence" give reasonable notice and whether they are overbroad especially as applied to the new range of regulated communications between customers and other market participants. Thus, *Kourouma* is not a prospective judicial blessing for the proposed rule, and the decision provides virtually no guidance to the host of newly regulated speakers who are not making patently false statements directly to the Commission.

In sum, the Notice evinces no serious consideration of the significant First Amendment concerns raised by the proposed rule. To the extent the Commission has failed to consider these concerns, that failure is arbitrary and capricious.

The Commission Has Failed to Consider Adequately the Costs Imposed by the Proposed Rule

The Commission opines that "the burden associated with the proposed regulation should be minimal" because "almost all entities . . . regularly communicate with accuracy and honesty" and that most such "communications already regularly occur with due diligence exercised."[18] The Commission seems to concede that the proposed regulation will not actually affect the behavior of wholesale marker actors meaning that any improvement in the accuracy of communications will either be minimal or non-existent, which begs the question: why adopt a new rule?

While the proposed rule is unlikely to produce a net positive effect on the accuracy of communications, the Commission has either ignored or discounted potentially considerable costs arising from its proposal. Extension of this broad duty of candor and the corresponding requirement of diligence creates considerable uncertainty for parties who are not accustomed to proving the rigorous accuracy of their communications. Due diligence is an affirmative defense, and thus, the burden falls on the speaker to come forward with evidence of its efforts.[19]

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[16] *Kourouma*, 723 F.3d at 279.
[17] *Id.* at 278.
[18] NPRM ¶ 48.
[19] *Coaltrain Energy, L.P.*, 501 F. Supp. 3d at 526.

Therefore, the issue is not necessarily that these parties' communications are untruthful, the issue is that it is now incumbent on parties to demonstrate that each communication was both factually accurate and properly contextualized or that the communication was formulated according to a process meant to ensure accuracy and guard against error. The limited number of judicial decisions on § 35.41(b) indicate that evidence of some such process is the bare minimum for proving due diligence. To the extent there is some lesser requirement for individuals or less sophisticated entities, the Commission provides no meaningful guidance on what that requirement is. Thus, the Commission foists the greatest degree of uncertainty onto the parties least able to bear the associated costs.

The extended duty of candor means that each communication touching on matters of Commission jurisdiction would entail a greater but still uncertain risk. That uncertainty is amplified by the amorphous nature of key concepts in the proposed regulation like materiality and due diligence combined with the Commission's highly discretionary approach to enforcement. Increased uncertainty about the risks of covered communications and the vagueness regarding penalties inhibits rational assessment of how newly regulated entities should respond.

Thus, two responses to the proposed rule, both costly, are likely. One is for entities to commit more resources than needed to compliance. Adopting or augmenting processes to ensure accuracy will inevitably entail compliance costs whether these are incurred on systems for document retention and storage, on compliance staff, on pre-communication internal reviews, on centralized monitoring of communications with other market participants, or on consultation with lawyers regarding risk assessments and questions of materiality or due diligence.

For those individuals and entities not willing or able to commit more resources to compliance, they are likely to curtail their communications at least as they relate to matters within the Commission's jurisdiction. This too comes at a cost. Rather than increasing the accuracy of information, the proposed rule may simply decrease the flow of information without meaningfully affecting the quality. By inhibiting the free flow of communication between market actors and from market actors to the Commission, the proposed rule will make the wholesale energy markets more opaque and thus less functional as participants will have less information to guide their decisions. This outcome is antithetical to the Commission's objective "to promote a free market in wholesale electricity" and to enhance competition."[20]

It is not evident from the Notice that the Commission has factored these costs into its assessment of whether the proposed rule is an advisable extension of existing duties. But failure to consider the likely negative consequences of the proposed rule would be an arbitrary and capricious failure of decision making.

Conclusion

As detailed above, the Commission's Notice suffers from multiple defects. The decision-making process behind the proposed rule is inadequate as demonstrated by the Commission's

[20] *Louisville Gas & Elec. Co. v. FERC*, 988 F.3d 841, 844 (6th Cir. 2021).

failure to substantiate that there is an actual problem to be addressed, by the Commission's failure to consider the limits of its jurisdiction, by the failure to account for the chilling effect of the proposal's overbreadth on the protected speech of market actors, and by the Commission's insupportably low assessment of the costs imposed by the proposed rule both on regulated entities and on the wholesale energy markets in general. The Commission has failed to acknowledge important facets of the problem the proposal addresses and the problems which the proposal creates. Because the Commission has failed to address an entire category of relevant considerations, I formally request that the Commission issue a supplemental notice of proposed rulemaking containing an assessment of costs and weighing those costs against the asserted benefits. That would necessitate another opportunity for public comment. Otherwise, the Commission must end its efforts to impose the new rule. Therefore, the Commission should announce a decision not to finalize the Notice, or it should issue a new notice addressing the deficiencies in the current Notice.

Sincerely,

/s/ John L. Fitzhenry
John L. Fitzhenry