



December 12, 2022

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

**Re: Notice of Proposed Rulemaking, Federal Energy Regulatory Commission; Duty of Candor;
87 Fed. Reg. 49784-49793 (August 12, 2022), Docket No. RM22-20-000**

Dear Secretary Bose:

The U.S. Chamber of Commerce's Global Energy Institute (the Chamber) appreciates the opportunity to reply to other parties' comments on the Federal Energy Regulatory Commission's (FERC or the Commission) July 28, 2022 Notice of Proposed Rulemaking titled "Duty of Candor," Docket No. RM22-20-000.¹ The Chamber and our members have a substantial interest in the lawful and appropriate exercise of FERC's rulemaking powers. We remain concerned that the finalization of this rulemaking would adversely impact public participation in FERC proceedings, impose a chilling effect upon communications relating to a broad range of topics of public importance, and fail to create any offsetting benefits supporting the fair and effective functioning of energy markets.

We agree with many of the significant concerns raised by parties in the Initial Comments to the NOPR. The Chamber and numerous other commenters observed that the proposed Duty of Candor exceeds the Commission's lawful powers defined by statute, encroaches upon a vast amount of private communications, lacks both a materiality element and an intent element, discourages transparent and voluntary communications with the Commission, encroaches on First Amendment rights, and raises due process concerns. The Chamber maintains that these fundamental flaws warrant withdrawal of the proposed rule.

Some commenters attempt to address these deficiencies, but rely on erroneous or misplaced grounds. For example, some claim that the proposed Duty of Candor is necessary to regulate certain derivative or financial trading activity not covered by FERC's Market Behavior Rules. However, their comments ignore the fact that these trades already are extensively regulated, and the NOPR either does not or is not needed to remedy their concerns. Other commenters take note of the absence of authority cited in the NOPR and seek to backfill this void with possible grounds for the broad exercise of powers not found in FERC's governing statutes. Their attempts to defend FERC's authority to promulgate a universal Duty of Candor are unavailing and misplaced. As explained more fully in the Chamber's Initial Comments, there is no statutory authorization to adopt the rule, and courts have emphatically rejected FERC's past attempts to expand its own authority beyond Congress's limited grants of authority. The

¹ *Duty of Candor*, 180 FERC ¶ 61,052 (2022) ("NOPR" or "Duty of Candor NOPR").

Chamber files limited Reply Comments to address these erroneous arguments offered by other commenters in support of the NOPR.

I. Commenters Support Needless and Counterproductive Regulations on Financial Transactions That Are Already Extensively Regulated

In their comments, certain Regional Transmission Organizations (RTOs) and Market Monitors argue that the proposed Duty of Candor is needed because the rule would cover certain categories of trading activities that currently do not fall within the scope of FERC's Market Behavior Rules.² According to these commenters, the Duty of Candor would expand FERC's regulatory oversight to encompass transactions involving congestion revenue rights (CRRs), convergence bidding, demand response services, financial transmission rights (FTR) trading, curtailment service, and other forms of financial or derivative trading by entities that do not currently possess Market-Based Rate authority.³

These commenters accurately identify types of trading activity that do not fall directly within FERC's Market Behavior Rules.⁴ Yet, that fact does not mean such activity is unregulated. Most, if not all, of the trading identified is authorized and monitored by the RTOs themselves. Moreover, the CFTC extensively and effectively regulates derivative trades. For example, there are several major CFTC-regulated exchanges that clear similar energy market products. Because commenters largely ignore the existing non-FERC regulatory landscape, they also do not justify why it would be preferable to multiply regulatory regimes by introducing new duties for these market participants. Moreover, FERC's adoption of the expansive proposed candor requirement may very well impede effective oversight of these transactions by creating overlapping jurisdictions, varying regulations and obligations across regulated entities, and frequent confusion.

A. There Are No Regulatory Gaps Justifying a Broad Duty of Candor

The commenters portray today's regulatory landscape as deficient, where traders of certain products can participate in FERC-jurisdictional energy markets without supervision.⁵ This portrayal is inaccurate. In reality, although certain categories of trading may not fall directly within the scope of FERC's Market Behavior Rules, there already exist several layers of oversight over these transactions:

CFTC Regulations. Many of the supposedly "unregulated" financial products identified by commenters, including FTRs, CRRs, and other swap products, also are subject to regulation by the CFTC. The CFTC's Anti-Fraud Rule and Anti-Manipulation Rule apply to trades of these products. In particular, CFTC Rule 180.1 is patterned after SEC Rule 10b-

² SPP Market Monitoring Unit Comments at 3; ISO New England Internal Market Monitor Comments at 6-7, 13-15; CAISO Comments at 3-4; CAISO Department of Market Monitoring Comments at 3-4; PJM Independent Market Monitor Comments at 3; ISO New England, MISO, PJM, and SPP Joint Comments at 2-5.

³ See, e.g., ISO New England, MISO, PJM, and SPP Joint Comments at 2-5.

⁴ 18 C.F.R. § 35.41.

⁵ See, e.g., ISO New England Internal Market Monitor Comments at 13-15 (describing a hypothetical scenario in which a market participant could manipulate FERC-jurisdictional markets to achieve monetary gains in other, non-FERC-jurisdictional markets, such as those subject to ICE and CME oversight).

5 and imposes a duty of candor on traders in communications related to contracts for sales of commodities in interstate commerce, which includes natural gas and power.⁶

Commodity Exchanges. Several energy derivative products are regularly traded through private commodity markets such as the Chicago Mercantile Exchange (CME), Intercontinental Exchange (ICE), and Nodal Exchange (Nodal). Market participants trading through these exchanges must comply with the exchanges' rules and regulations, which are subject to CFTC regulation. These exchanges maintain and enforce rules prohibiting the communication of false or misleading statements in connection with any product traded on their platforms.⁷

18 U.S.C. § 1001(a). Enforced by the Department of Justice, Section 1001(a) imposes criminal penalties upon individuals who make materially false, fictitious, or fraudulent statements or representations to any part of the U.S. Government. The statute applies to all federal agencies, and individuals have previously been prosecuted under this Section for making material misstatements to FERC.⁸

FERC Anti-Fraud Rule. Finally, it is important to recognize that the absence of a duty of candor has not prevented or impeded FERC Enforcement from pursuing investigations and enforcement actions against alleged violators for deception or lack of candor under the Commission's anti-fraud authority, including in matters involving FTRs, CRRs, and other products cited by various commenters.⁹

These oversight mechanisms have ample teeth to create extensive civil and criminal liability in the event that energy market participants make false or misleading statements in the course of

⁶ 17 C.F.R. §§ 180.1-180.2.

⁷ *Enforcement of Rules*, CME Rulebook, Section 432 (listing General Offenses for exchange participants, including "to create or report a false or fictitious trade," "to engage, or attempt to engage, in fraud or bad faith," "to engage in dishonest conduct," and "to make a verbal or written material misstatement to the Board, a committee, or Exchange employees."); *Trading Rules*, ICE Rulebook, Rule 4.05 ("It shall be a violation of the Rules for any Person to disseminate any false, misleading or knowingly inaccurate information, including reports concerning crop or market information or conditions that affect or tend to affect the price of any Commodity traded on the Exchange."); *Participant Code of Conduct*, Nodal Exchange Rulebook, Section 6.1.2 ("No Participant or Authorized Broker (or any of their Authorized Users) shall engage, or attempt to engage in any fraudulent act or engage in any scheme to defraud, deceive, trick or mislead in connection with or related to any Exchange or Clearing House activity."); *id.* at Section 6.2.9 ("No Participant or Authorized Broker shall make any knowing misstatement of a material fact to the Exchange, any Exchange Official, or any Board committee or Exchange panel. No Participant or Authorized Broker shall knowingly disseminate false or misleading reports regarding Transactions, the Exchange or related to any of the underlying markets of a Nodal Contract.").

⁸ *See, e.g., United States v. Valencia*, 2006 WL 3716657, at *7 (S.D. Tex. 2006).

⁹ *See, e.g., Kourouma v. FERC*, 723 F.3d 274, 276 (D.C. Cir. 2013) (rejecting challenge to penalty for false statements and material omissions in forms filed with the Commission and with a market operator regulated by the Commission); *Salem Harbor Power Development, LP*, 179 FERC ¶ 61,228 (2022) (approving Stipulation and Consent Agreement for failure to provide relevant information to an RTO following an investigation under 18 C.F.R. Part 1b); *sPower Dev. Co., LLC*, 179 FERC ¶ 61,220 (2022) (approving Stipulation and Consent Agreement for providing misstatements to an RTO following an investigation under 18 C.F.R. Part 1b); *GreenHat Energy, LLC et al.*, 180 FERC ¶ 61,108 (2022) (approving Stipulation and Consent Agreement for violations of the Commission's Anti-Manipulation Rule, 18 C.F.R. § 1c.2).

their trading activity. Further, FERC itself retains all of the voluminous tools in its existing enforcement toolkit¹⁰ to police misstatements made in the course of these trades. It is therefore erroneous to assert that the current regulatory paradigm contains “gaps” for financial or derivatives trades.

B. The Proposed Duty of Candor Would Create Overlapping Regulatory Regimes and Subject Entities to Burdensome and Confusing Duties

Starting from the flawed premise that large categories of trades in energy markets are unregulated, commenters conclude that the proposed Duty of Candor is necessary to fill the misperceived regulatory gaps. Because there are many existing regulations requiring candor for these trades, FERC’s proposed rule would be counter-productive and would create additional regulatory burdens for energy market participants who would need to comply with different, even conflicting, standards of care for the same transactions.¹¹

For instance, some market participants in the derivatives markets, such as Futures Commission Merchants and Swap Dealers, are simultaneously regulated by FERC and by the CFTC. As the Futures Industry Association (FIA) notes in its comments, these entities already must comply with CFTC rules, including its Anti-Fraud and Anti-Manipulation Rules, which critically contain intent and materiality elements.¹² To the extent FERC’s Duty of Candor would create overlapping compliance obligations, derivatives market participants could foreseeably behave in a manner conforming to the CFTC’s Anti-Fraud and Anti-Manipulation Rules, while simultaneously violating FERC’s Duty of Candor due to the absence of intent and materiality requirements in FERC’s proposal. This is not a tenable situation upon which regulated entities can build effective compliance programs and predictably structure their trading activity.

The NOPR does not offer concrete examples to illustrate how, in the Commission’s view, the existing regulatory regimes are inadequate. Accordingly, the proposed rule is not tailored to fill a real regulatory gap—certainly not with respect to derivatives traders. Because FERC’s proposed duty would apply much more broadly than do existing candor rules,¹³ FERC, the author of a brand-new regime, would bear prime responsibility for imposing unnecessary burdens and confusion on regulated entities and on other regulators. Especially because the proposed rule

¹⁰ Chamber Comments at 9 (“[T]here already exist no fewer than six different statutes and regulations that impose some form of a truthfulness requirement upon Commission-jurisdictional entities.”).

¹¹ FIA Comments at 6-7 (noting that proposed Duty of Candor would subject Designated Contract Markets and Derivatives Clearing Organizations to liability for statements made to FERC-jurisdictional facilities, even though the CFTC already regulates these entities); Nodal Exchange Comments at 2 (same).

¹² FIA Comments at 4, 7.

¹³ Niskanen Center Comments at 11-14. Multiple commenters noted that the CFTC’s Anti-Fraud Rule contains intent and materiality protections. FIA Comments at 4; Nodal Exchange Comments at 3. So too does Section 1001(a). 18 U.S.C. § 1001(a) (“Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully...makes any materially false, fictitious, or fraudulent statement or representation...shall be fined under this title, imprisoned not more than 5 years or...both.”). Even the SEC’s Rule 10b-5, cited favorably by the Niskanen Center as analogous to FERC’s proposed Duty of Candor, has intent and materiality requirements. 17 C.F.R. § 240.10b-5(b) (it is unlawful “[t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading.”).

omits the bedrock requirements of intent and materiality, FERC would create novel compliance burdens for trading entities subject to multiple regimes as well as unpredictable enforcement challenges due to overlapping agency jurisdictions.

II. Commenters' Attempts to Locate Statutory Authority for the Proposed Rule are Unpersuasive

Some commenters attempt to shore up the legal justification for the incredibly broad proposed rule by raising new arguments and elaborating on statutory authority only perfunctorily cited in the NOPR. These suggestions are unavailing and unpersuasive (and, in any event, the agency cannot rely on new arguments regarding its statutory authority that do not appear in the proposed rule and do not provide sufficient opportunity for comment). As many other commenters, including the Chamber, have explained, FERC lacks statutory authority to promulgate this breathtakingly broad NOPR.¹⁴

A. FERC's Generalized Consumer Protection Directives Cannot Justify a Rule of Such Breathtaking Scope

Certain commenters, for example, proffer provisions within FERC's governing statutes that bestow on the Commission a generalized authority to take actions necessary to ensure that rates remain just and reasonable.¹⁵ For example, commenters cite two Natural Gas Act (NGA) provisions for support: 15 U.S.C. §§ 717m(a) and 717o. These provisions do not supply FERC with authority to issue the Duty of Candor.

Both 717m(a) and 717o are more limited in scope than these commenters suggest. Section 717m(a) merely authorizes FERC to investigate "facts, conditions, practices, or matters" to determine whether someone has, or is about to, violate provisions of the NGA. It also gives FERC authority to permit—but not to require—any person to file written statements under oath as to facts and circumstances relating to potential and actual investigations.¹⁶ Similarly, Section 717o gives FERC general authority to create rules and regulations prescribing the form of "statements, declarations, applications, and reports to be filed with the Commission," along with the information that these documents shall contain.¹⁷

These NGA provisions do not authorize FERC to impose a duty of candor on all entities, involving all "jurisdictional" topics, for all communications of any form. Instead, these provisions serve a much more limited purpose, justifying FERC's ability to require candor and sworn oaths

¹⁴ Chamber Comments at 3-8 (discussing *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022); *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 468 (2001); *Am. Bar Ass'n v. Fed. Trade Comm'n*, 430 F.3d 457, 467 (D.C. Cir. 2005)); see also *Cal. Indep. Sys. Operator Corp. v. FERC*, 372 F.3d 395, 398 (D.C. Cir. 2004).

¹⁵ Niskanen Center Comments at 2 ("Among other provisions, 15 U.S.C. §§ 717l, m, o, s, t, t-1, and t-2 together give the Commission power to ensure that communications to it are true and correct, grant significant adjudicatory authority, ensure that all regulated entities understand the Commission's powers as a tribunal, and authorize the Commission to investigate the veracity of the information laid before it (or inappropriately withheld).").

¹⁶ 15 U.S.C. § 717m(a).

¹⁷ 15 U.S.C. § 717o.

for formal written statements *submitted directly to the Commission*. FERC already heavily regulates these types of statements.¹⁸

It is a vast overreach to rely on these NGA provisions as support for the proposed Duty of Candor, which would give FERC the authority to *sua sponte* monitor and sanction purely private communications alleged to contain false or misleading information. There is a stark difference between a targeted duty of candor based on these discrete provisions—*i.e.*, one that adheres only when parties file directly with the Commission—and a universal duty of candor that FERC can leverage at its unfettered discretion. FERC already has regulations governing its communications and its proceedings, but the Duty of Candor seeks to enable much more sweeping oversight without sufficient statutory support.

Further, the assertion that FERC possesses expansive authority to regulate any activities “affecting” jurisdictional rates¹⁹ clashes with federal court precedent. According to commenters, FERC’s authority to promote just and reasonable rates for consumers authorizes the Commission to exercise near-limitless power,²⁰ which (in their view) courts should welcome.²¹ Not so: that FERC’s responsibilities are important does not mean it has plenary authority to enact *any and all* regulations that could be cast to effectuate those responsibilities. The D.C. Circuit has correctly rejected FERC’s prior attempts to justify regulations unconnected to an explicit grant of power solely on the basis that the regulated conduct could possibly affect jurisdictional rates.²² The Commission does not have a freewheeling authority to “regulate anything done by or connected with a regulated utility.”²³ This is especially true where the proposed rule, like the Duty of Candor, is “breathhtaking in scope”²⁴ and not narrowly tailored.

B. The Market Behavior Rules Are Not Analogous to the Proposed Rule

Some commenters suggest that the NOPR’s Duty of Candor is a logical outgrowth of FERC’s existing Market Behavior Rules,²⁵ contending that the Duty of Candor is a “garden-variety”

¹⁸ NOPR at P 9 (explaining a multitude of contexts in which FERC may require submissions to be made under oath and penalty of perjury).

¹⁹ Niskanen Center Comments at 6-8.

²⁰ *Id.* at 5 (“Yet as FERC itself has recognized, the magnitude of its obligation to protect energy markets and consumers demands that it obtain accurate information—or at least that entities appearing before it tell the truth about matters squarely related to its jurisdiction.”).

²¹ *Id.* at 4.

²² *Cal. Indep. Sys. Operator Corp. v. FERC*, 372 F.3d 395 (D.C. Cir. 2004).

²³ *Id.* at 401.

²⁴ *Id.*; see also *Columbia Gas Transmission Corp. v. FERC*, 404 F.3d 459, 462 (D.C. Cir. 2005) (Garland, J., joined by Tatel and Roberts, JJ.) (vacating Commission orders for lack of jurisdiction, and rejecting Commission’s argument that it had the power to require company to install and pay for meters on gathering facilities) (“The breathtaking scope of FERC’s claim is made clear by its response to a hypothetical raised at oral argument. In the Commission’s view, if a filed tariff stated that its provisions ‘shall apply to the production or gathering of natural gas,’ FERC would have jurisdiction over those activities, notwithstanding that they are precisely the activities that the NGA excludes from FERC’s purview. FERC cites no case, and we cannot find one, in which a court has permitted the Commission to use the filed rate doctrine as such a jurisdictional boot-strap.”) (citations omitted).

²⁵ Niskanen Center Comments at 6-8; NOPR at PP 32-34.

ban on making false statements to regulators.²⁶ These arguments ignore meaningful differences between the existing Market Behavior Rules and the proposed Duty of Candor.

As the Chamber explained more fully in its Initial Comments, the Market Behavior Rules are much narrower, applying only to Sellers possessing Market-Based Rate authority granted by FERC.²⁷ The Market Behavior Rules were also developed in response to the California energy crisis: a discrete event during which untruthful statements from market participants possessing Market-Based Rate authority led to significant market disruptions. Indeed, the courts upheld the Market Behavior Rules in large part *because* their scope was clear and limited. According to the D.C. Circuit, the lawfulness of the Market Behavior Rules was predicated on “the Rule’s clear terms [that] provide sufficient notice to regulated parties of what conduct the Rule prohibits, and [] clear enforcement parameters [that] prevent FERC from engaging in unconstitutionally discriminatory enforcement.”²⁸

By contrast, the Duty of Candor NOPR does not feature any of these redeeming characteristics. The Chamber previously explained at length that the NOPR’s boundlessly broad language leaves regulated (and even unregulated) parties unable to decipher the forms of conduct that are actually prohibited by the proposed rule.²⁹ The Duty of Candor is completely silent on its enforcement parameters. Most worrisome, FERC anticipates, but does not attempt to remedy, the fundamental arbitrariness of its prosecutorial discretion based on the NOPR as proposed. The Commission promises that it “does not intend to penalize all potential violations,” yet it provides no further guidance to potentially targeted entities as to how the Commission will wield the proposed powers.³⁰ Consequently, nothing in the new rule would prevent an immaterial, innocent, or inadvertent misstatement from costing the speaker \$1,000,000 per violation per day.³¹ There can be no comparison between this unconstitutionally vague enforcement scheme and FERC’s narrow, delineated Market Behavior Rules.

III. Conclusion

The Chamber fully concurs with the commenters who demonstrated that the Duty of Candor NOPR is entirely unworkable in its current form. Meanwhile, the arguments raised by commenters supporting the NOPR rest upon incorrect factual and legal premises. Merely tinkering with the Duty of Candor will not save it from its various infirmities under the agency’s governing statutes, the Administrative Procedure Act, and the U.S. Constitution. The proposed rule should be withdrawn.

²⁶ *Kourouma v. FERC*, 723 F.3d 274, 278 (D.C. Cir. 2013).

²⁷ Chamber Comments at 5.

²⁸ *Kourouma v. FERC*, 723 F.3d 274, 278 (D.C. Cir. 2013).

²⁹ Chamber Comments at 16, 18-19.

³⁰ NOPR at P 44.

³¹ Chamber Comments at 19.

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

Sincerely,

A handwritten signature in black ink, appearing to read "Heath K. Knakmuhs". The signature is fluid and cursive, with a prominent initial "H" and a checkmark-like flourish at the end.

Heath K. Knakmuhs
Vice President and Policy Counsel
Global Energy Institute
U.S. Chamber of Commerce