THE UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Duty of Candor) Docket No. RM22-20-000

JOINT COMMENTS OF ENERGY TRADE ASSOCIATIONS

On August 12, 2022, the Federal Energy Regulatory Commission ("Commission" or "FERC") issued a proposed rule that would greatly broaden the existing duty of candor under FERC regulations.[1] In response, the American Petroleum Institute ("API"), the Edison Electric Institute ("EEI"), The Electric Power Supply Association ("EPSA"), The Energy Trading Institute ("ETI"), the Interstate Natural Gas Pipeline Association of America ("INGAA"), the Natural Gas Supply Association ("NGSA"), the National Hydropower Association ("NHA"), and the PJM Power Providers Group ("P3") ("Energy Trade Associations") respectfully submit this joint comment.[2]

EXECUTIVE SUMMARY

The Energy Trade Associations and our members are committed to candor in our communications. All signatories acknowledge the importance of truthfulness in communications with the Commission and organizations that aid it in carrying out its statutory responsibilities. Accurate information helps agencies and markets to function effectively. While we support candor in communication, the Commission's proposed rule poses a number of practical problems and is vulnerable to legal challenge in multiple respects.

The proposed rule greatly broadens the existing candor rule. Unlike the current candor rule, it regulates the speech of all entities, including individuals—not just the limited regulatory

[1] *Duty of Candor*, 180 FERC ¶ 61,052 (2022) [hereinafter Notice].
[2] See the Appendix for a description of each Energy Trade Association submitting this joint comment.

category of "Sellers."[3] It expands the current candor rule by adding to the list of recipients of speech that trigger the rule's application. And by applying to any subject "related to" the Commission's jurisdiction, it sweeps extraordinarily broadly. This vast sweep is made all the more problematic by the fact that the proposed rule has no materiality or intent requirement and allows parties to raise due diligence only as an affirmative defense. It also subjects speakers to potentially significant monetary liability.

The proposed rule therefore presents a number of practical problems in its application and will chill a significant amount of beneficial speech. On its face, it would apply to predictions made to the Commission that turn out to be factually inaccurate. It could also be applied, for example, to statements made during negotiations with FERC staff and customers, settlement agreements, and pre-filing conferences with the Commission. The wide scope of the proposed rule will also tend to suppress communications with the Commission, which cannot be the goal as the Commission's work is enhanced when it receives information from a range of stakeholders.

The proposed rule is not just bad policy; it would also be vulnerable to a variety of legal challenges under the Administrative Procedure Act ("APA"). The proposed rule lacks a factual basis. Additionally, its lack of an intent requirement means that the proposed rule would both directly regulate protected speech and chill speech outside its already broad scope. Also, its unpredictable application renders the proposed rule arbitrary and capricious for failure to provide meaningful guidance to affected parties. Finally, there is no express language in any of the statutes the Commission cites that supports the rule. For other agencies, Congress has provided express authorization for candor rules, and those agencies responded with narrow regulations with intent and materiality elements. The proposed rule has neither, and in light of its serious constitutional

[3] 18 C.F.R. § 35.36(a)(1).

issues, if Congress intended the Commission to have the power to promulgate this proposed rule, it would have spoken clearly.

For these reasons, if the Commission continues to pursue a general duty of candor rule, it should not advance to a final rule on this proposal.

I. THE PROPOSED RULE SWEEPS EXTRAORDINARILY BROADLY AND PRESENTS MULTIPLE PRACTICAL DIFFICULTIES IN ITS APPLICATION.

While the signatories to this comment support candor in communication, they are concerned about possible unintended consequences and inordinate burdens of the proposed rule. It is extraordinarily broad. The breadth of conduct and actors it covers—including seemingly innocuous statements and parties who never would have thought they were open to potential enforcement action—makes it unlike anything the Commission has promulgated before. The effect of this unprecedented scope will be to chill communications with the Commission and its related entities.

A. The proposed rule sweeps far more broadly than the current duty of candor rule.

The proposed rule provides:

> 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.[4]

The proposed rule is broader than the current candor rule in three key respects: (1) it applies to more speakers, (2) it expands the list of covered recipients of speech, and (3) it expands the type of speech that the Commission undertakes to oversee.

[4] Notice at proposed § 1d.1.

First, the proposed rule imposes its duty of candor on "[a]ny entity." *Id.* That is broader than the current duty of candor, which imposes this obligation only on "Seller[s]."[5] "Seller" is a relatively discrete category, limited to "any person that has authorization to or seeks authorization to engage in sales for resale of electric energy, capacity or ancillary services at market-based rates under section 205 of the Federal Power Act."[6] The proposed rule, on the other hand, applies to anyone and everyone—including individuals.[7]

Second, the proposed rule applies to communications 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."[8] This expands considerably on the existing rule; speakers could now be penalized for inaccurate communications with, for instance, natural gas and oil pipelines, NERC, and regional entities.

Third, the proposed rule regulates any communication that "relates to a matter subject to the jurisdiction of the Commission."[9] Additionally, the Notice 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."[10] Taken together with the broad universe of speakers and recipients to which the proposed rule applies, these definitions give the proposed rule a breathtaking sweep. Any and all communications made by any company or individual about subjects that in any way relate to

[5] 18 C.F.R. § 35.41(b).
[6] *Id.* at § 35.36(a)(1).
[7] *See* Notice at P 40 ("The proposed regulation utilizes the term 'entity' because we believe that covered communications … from all types of organizations, as well as from individuals …, should reflect accurate and factual information.").
[8] *Id.* at proposed §1d.1.
[9] *Id.*
[10] *Id.* at P 41.

regulatory, policy, or business activities subject to the Commission's jurisdiction would now be fair game for an enforcement action.[11]

The proposed rule contains no principles limiting its application to that very broad set of communications; on its face, it applies to both inadvertent and immaterial inaccurate statements.[12] It requires materiality only if the speaker is accused of *omitting* information. And while the proposed rule provides that an entity will not be punished for submitting false or misleading information if "the entity exercises due diligence to prevent such occurrences," due diligence is only an affirmative defense.[13] Accordingly, if the defendant cannot carry his burden, the proposed rule would penalize a speaker who has never been shown to have intended falsehood. While the current rule shares these attributes, the new rule reaches much more speech and therefore greatly magnifies potential liability throughout the energy industry.

The proposed rule also does not say what penalties apply to noncompliant entities.[14] The applicable statutes allow the Commission to impose penalties of $1.3 million per day "for each day that such violation continues."[15] Those are substantial penalties. The Commission may intend to apply its penalty guidelines to any violations of the proposed rule. Those guidelines, however, do not apply to individuals, so it is unclear how the Commission will penalize individuals who are

[11] *Compare with Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations,* 105 FERC ¶ 61,218, at P 108 (2003) (assuring "sellers that the information sought or provided [under the current candor rule] will be directly related to the wholesale transactions for which they have received market-based rate authority").

[12] Notice (Danly, Comm'r, dissenting at P 1) ("Knowledge or intent does not matter. The materiality of the erroneous statement does not matter." (describing the proposed rule)).

[13] *Id.* at proposed § 1d.1; *see, e.g.*, *FERC v. Coaltrain Energy, L.P.*, 501 F. Supp. 3d 503, 526 (S.D. Ohio 2020).

[14] *See* Notice (Danly, Comm'r, dissenting at P 12).

[15] 16 U.S.C. § 825o-1(b) (providing for a civil penalty of "not more than $1,000,000 for each day that such violation continues"); 15 U.S.C. § 717t-1(a) (providing for a civil penalty of "not more than $1,000,000 per day per violation for as long as the violation continues"). "In 2015, Congress passed a law requiring federal agencies to adjust their civil penalties to account for inflation, so that those imposed by agencies today have approximately the same value as they did at the time the penalties were initially created by Congress." *NRDC v. NHTSA*, 894 F.3d 95, 100 (2d Cir. 2018). Accordingly, the Commission has adjusted the maximum civil penalty to be $1.3 million per day. *See* 18 C.F.R. § 385.1602.

found to violate the proposed rule.[16] This uncertainty exacerbates the potential chill on communications that fall within the proposed rule's expansive sweep.

B. The proposed rule has startling potential applications to landowner complaints, routine contract negotiations, stakeholder proceedings, and advice of counsel.

Lacking in limiting principles, the proposed rule could have a wide range of surprising and troubling applications. For example, as Commissioner Danly has observed, under the proposed rule, "if a landowner ('entity') exaggerates a complaint ('submit[s] … misleading information') in an email to the pipeline developer with a right-of-way on her land," she would be liable for any inaccuracy at all in that email.[17] If she says that she "'never heard such a racket'" but "in fact she had heard such a racket at a Poison concert in 1988," she would fall squarely within the letter of the proposed rule.[18]

Routine contract negotiations between shippers and pipelines also could be subject to liability under the proposed rule. For example, a shipper may inform a pipeline of its demand or supply estimates as part of commercial negotiations for new interconnects or expansion projects. However, in the event the shipper's forecast is inaccurate, that could be deemed a submission of "false … information" under the proposed rule.[19]

Any inaccuracy in RTO communications could also be a predicate for an enforcement action under the proposed rule. These communications are often made in time-pressured situations, including during high demand periods, when grid reliability is at issue, and in emergency situations. Any inaccuracy—even if attributable to haste—would not necessarily be within the "due diligence" exception. "[W]hether a communication had to be made without

[16] FERC Penalty Guidelines § 1A1.1 cmt. n.1.
[17] Notice (Danly, Comm'r, dissenting at P 5) (quoting proposed §1d.1).
[18] *Id.*
[19] Notice at proposed § 1d.1.

sufficient time for additional diligence to be undertaken" is only one of the factors provided by the Notice for assessing due diligence.[20]

The proposed rule would also apply to communications made by participants in RTO stakeholder proceedings—key forums where robust communications from a range of subject matter experts are essential to ironing out proposals to improve market rules. It is one thing to say that formal company submissions about generators' offer costs may be subject to liability, as is true under the current rule, but quite another to say that communications by individual employees in a stakeholder proceeding discussion can now lead to civil penalties.

The proposed rule would also apply to informal conversations between in-house or outside counsel with FERC staff. Given the lack of an intent or materiality requirement and the proposed rule's applicability to "[a]ny entity," a factual inaccuracy uttered during such a conversation is punishable under the proposed rule.[21] In this way, the proposed rule would impose far more stringent requirements on counsel than are imposed under the American Bar Association's Model Rules of Professional Conduct.[22] Furthermore, if the Commission investigated comments filed by outside counsel as potentially untrue, the outside counsel could be put to a choice between breaching attorney-client privilege in order to demonstrate "due diligence," or confronting the investigation with one hand tied behind her back.

The proposed rule would even cover a law or policy argument raised in a response to a proposed rulemaking. Such arguments are often a mix of opinion and fact. Similarly, predictions and projections—to the extent they are factually verifiable—fall within the proposed rule.

[20] *Id.* at P 43.
[21] *Id.* at proposed § 1d.1.
[22] *See id.* at P 12 (noting that "[t]he American Bar Association's Model Rules of Professional Conduct, upon which numerous state bar rules are based, provide, among other things, that 'a lawyer shall not *knowingly make a false statement of fact or law* to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer'" (emphasis added) (quoting Model Rules of Pro. Conduct r. 3.3(a)(1) (Am. Bar Ass'n 2018))).

These examples are not merely hypothetical; indeed, as the Commission knows, these types of communication happen every day and benefit both regulated entities and the Commission. To take just one recent example, within the past year, non-federal entities licensed to undertake hydroelectric projects have been reaching out to FERC Regional Engineers and the Division of Dam Safety and Inspections to confirm their compliance with the newly-revised Dam Safety Regulations in Part 12.[23] The revisions to the safety regulations were the culmination of years of solicited "expert opinions on the structure and implementation of the Commission's dam safety program."[24] These communications between licensees and FERC staff have enabled licensees to comply better with the Commission's new rules; they have also informed the Commission on the effects of its complex revisions to the safety regulations—some of which may not have been apparent at the time of promulgation. All of these communications would potentially expose licensees to liability under the proposed rule.

Similar voluntary communications happen all the time throughout the Commission's areas of oversight. Energy traders and their compliance staff actively communicate informally with FERC's Office of Enforcement about market developments, best practices, and issues affecting the trading community. Hydropower licensees are frequently in contact with FERC staff about a range of issues, including in discussions about when non-capacity related license amendments are required per 18 C.F.R. § 4.201(c) and about surrendering a license per 18 C.F.R. §§ 6.1 and 6.2. Such communications—and especially compliance-related discussions—enhance these entities' relationship with FERC staff and allow for interaction with the Commission outside of ongoing surveillance inquiries and investigations. These communications are valuable. But they could

[23] *Safety of Water Power Projects and Project Works*, 177 FERC ¶ 61,204 (2021).
[24] *Id.* at P 2.

also give rise to liability under the proposed rule based on a single immaterial, inadvertent factual misstep.

C. The proposed rule, if adopted, would chill communications with the Commission.

As noted above, the Energy Trade Associations support candor and recognize the importance of accurate information, particularly in matters central to the functioning of the energy sector. However, it is not reasonable to pursue a duty of candor across such a wide swath of communications without regard to how unimportant or unintentional a potentially false statement is. It is also not reasonable to enact a rule so lacking in limiting principles that regulated parties are left guessing when they might be subject to liability for their speech, how much diligence is enough, and whether the safest (and least burdensome) course is simply to stay silent. The proposed rule will come with a heavy price; it will chill informal communications that support well-functioning markets and robust industry dialogue around important issues.

First, the proposed rule's application to "[a]ny entity," rather than just Sellers, could discourage many speakers from voluntarily communicating with the Commission or its related entities at all.[25] To be sure, regulated companies with obligations to communicate information to RTOs or NERC will continue to do so when required. But individuals who are not required to communicate may now be reluctant to volunteer information to employees at FERC, RTOs, NERC and its regional entities, or pipelines, knowing that they can avoid liability by remaining silent but that if they offer a statement that turns out to be incorrect, they could find themselves subject to an investigation and civil penalties.

[25] Notice at proposed § 1d.1.

Second, the proposed rule's application to any communication that "relates to a matter subject to the jurisdiction of the Commission" will discourage speech.[26] The Commission is "charged primarily with regulating certain transactions in natural gas, oil, and electricity, and licensing certain projects involving these energy sources."[27] That alone is a broad category, but the proposed rule reaches to all communications that "relate[] to" such matters.[28] As the Supreme Court has explained, "[t]he ordinary meaning of these words is a broad one—'to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with.'"[29] The proposed rule does not attempt to put any limits on the words' "expansive sweep."[30] Regulated parties may decide to refrain from speaking altogether rather than guess at what speech the Commission will deem to fall within the scope of the rule.

Third, and perhaps of greatest concern, the proposed rule's lack of a materiality or intent requirement—in combination with its broad sweep—could hamper many communications that are useful to the Commission. In particular, the proposed rule could impede efforts to educate the Commission on market circumstances. Any such discussion could involve predictions that turn out to be factually incorrect. This infirmity will also diminish public dialogue with the Commission on matters related to Commission jurisdiction or action. After all, the proposed rule by its terms could potentially apply even to exchanges over social media platforms such as Twitter, assuming employees at FERC (or, for example, RTOs) are among the intended recipients. There would also be less incentive to voluntarily enter into discussions about market developments, energy prices, pre-filing meetings, or settlement discussions with the Commission.

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[26] *Id.*
[27] *In re: Take-Two Interactive Sec. Litig.*, 551 F. Supp. 2d 247, 287 (S.D.N.Y. 2008); *see also* 42 U.S.C. § 7172.
[28] Notice at proposed § 1d.1.
[29] *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383–84 (1992) (quoting Black's Law Dictionary 1158 (5th ed. 1979)).
[30] *Id.* (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 47 (1987)).

The due diligence defense does not cure the problems caused by the lack of materiality or intent limitations. *Any* inaccurate statement technically violates the proposed duty of candor rule and could be the basis for an investigation, with the speaker only able to avoid liability if she can prove due diligence. Even if the speaker reasonably believes she has a good due diligence defense, she still risks having to shoulder the burden of an investigation and carrying a burden of proof in an enforcement action.

Making such a vague due diligence defense the only "safe" harbor also increases the costs and burdens of compliance. In order to be prepared to ward off liability for every statement—material or immaterial—entities will have to implement additional, costly due diligence processes beyond those already in place. Because they will have to create a record for subsequent use in any enforcement proceeding or investigation under the proposed rule, such entities will take longer to respond to any requests for information—including in high demand periods when communications are already slow and, ironically, in emergency situations when speed is paramount. In other situations, entities simply may refuse to communicate with the Commission absent compulsory process rather than assume the risk of having to persuade the Commission later that it exercised due diligence.[31] These added compliance costs must be factored into ratemaking and are therefore likely to be passed on to consumers at the end of the day.[32]

[31] *Ashcroft v. ACLU*, 542 U.S. 656, 670–71 (2004) ("Where a prosecution is a likely possibility, yet only an affirmative defense is available, speakers may self-censor rather than risk the perils of trial. There is a potential for extraordinary harm and a serious chill upon protected speech.").

[32] *See Fed. Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591, 605 (1944) ("Rates which enable the company to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risks assumed certainly cannot be condemned as invalid."); *City of Charlottesville v. FERC*, 774 F.2d 1205, 1207 (D.C. Cir. 1985) (Scalia, J.) ("The Natural Gas Act requires the Commission to insure that the rates of pipelines subject to its jurisdiction are 'just and reasonable.' Under cost-of-service ratemaking principles, this means rates yielding sufficient revenue to cover all proper costs, including federal income taxes, plus a specified return on invested capital." (citation omitted)).

Finally, it is no answer to these concerns for the Commission to make assurances of its forbearance. The Commission states that it "recognize[s] that the best-intentioned entities may, and occasionally will, inadvertently provide inaccurate information."[33] Accordingly, "[a]s a general matter, [the Commission] do[es] not intend to penalize inadvertent errors, especially those of limited scope and impact."[34] Those assurances prove—rather than cure—the proposed rule's overreach. The Commission itself recognizes that, on its face, the proposed rule will sweep in routine communications that do not deserve punishment. That simply shows that the proposed rule covers far too much speech. At the same time, the Commission says only that it will refrain from penalizing inadvertent and immaterial errors "[a]s a general matter."[35] Does that mean the Commission intends to penalize such errors in some circumstances? The proposed rule offers no guidance as to how the Commission will pick and choose which inadvertent and immaterial errors to punish. The proposed rule's overbreadth thus leaves regulated entities only to guess.

Again, it is beyond dispute that communications with the Commission and regulated entities should be made in good faith. But, for the foregoing reasons, the proposed rule would likely impede, rather than enhance, the Commission's ability to "carry out its statutory responsibilities" and "make important policy and economic decisions affecting the fairness, competitiveness, and reliability of markets."[36] The proposed rule's chilling effect is not offset by whatever marginal benefit the Commission gets from the ability to penalize more speech—especially when the Commission does not intend to exercise much of that authority anyway and (as discussed below) the Commission has not made any showing that the absence of the proposed rule has caused any regulatory problems.

[33] Notice at P 44.
[34] *Id.*
[35] *Id.*
[36] Notice at P 26.

II. THE PROPOSED RULE IS VULNERABLE TO LEGAL CHALLENGE.

Not only would the proposed rule be a mistake from a policy perspective, it will also be susceptible to challenge in court. Under the APA, reviewing courts will "hold unlawful and set aside agency action, findings, and conclusions found to be … arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[37] In other words, agency action must "be reasonable and reasonably explained."[38] And such action must not be "contrary to constitutional right, power, privilege, or immunity"—including the First Amendment.[39] If the Commission were to promulgate the rule in its current form, it would likely face a variety of legal challenges based on these principles.

A. The proposed rule is open to challenge as arbitrary and capricious because it is unsupported by any factual evidence.

"An agency action is arbitrary and capricious if it rests upon a factual premise that is unsupported by substantial evidence."[40] The substantial evidence standard "requir[es] a court to ask whether a reasonable mind might accept a particular evidentiary record as adequate to support a conclusion."[41] When "there is nothing in the administrative record" to support the regulation, that regulation is arbitrary and capricious.[42]

There is no factual support for the proposed rule in the Notice. Instead, the Notice makes general statements about the importance of candor. For instance, the Notice says "[i]t is indisputable that communications related to matters subject to the jurisdiction of the Commission should be complete, honest, and accurate in order for the Commission to effectively carry out its

[37] 5 U.S.C. § 706(2).
[38] *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021); *see also Michigan v. EPA*, 576 U.S. 743, 750 (2015) ("Federal administrative agencies are required to engage in reasoned decisionmaking." (internal quotation marks omitted)).
[39] 5 U.S.C. § 706(2)(B).
[40] *Ctr. for Auto Safety v. FHA*, 956 F.2d 309, 314 (D.C. Cir. 1992).
[41] *Dickinson v. Zurko*, 527 U.S. 150, 162 (1999) (internal quotation marks omitted).
[42] *Bowen v. Am. Hosp. Ass'n*, 476 U.S. 610, 636 (1986) (plurality op.).

regulatory responsibilities"[43]; and that accuracy in communications "will increase confidence in Commission-jurisdictional industries and markets and will improve the Commission's ability to meet its statutory responsibilities."[44] But before it grants itself this sweeping new authority, the Commission must make a record establishing that communications have *not* been sufficiently "complete, honest, and accurate" and that there is a *lack* of confidence in the relevant markets. Even if the Commission could show that some communications have been faulty, it would still have to show that those communications affected its responsibilities. And even if the Commission could show all that, it would still have to show that the proposed rule is a reasonable response to the identified problem.

The agency's obligation is not fulfilled by coming up with hypothetical scenarios that—if true—could justify regulation. Inaccurate information, the Notice says, "*could* lead the Commission to reach decisions that it otherwise would not have made."[45] It "*could* inhibit the Commission's ability to ensure that the rates, terms, and conditions of service of natural gas and oil pipelines and public utilities are just and reasonable."[46] It "*could* lead the Commission or its staff to close an investigation that should continue, or to adopt policies that are ineffective."[47] It "*could* lead an ISO or RTO to make decisions that jeopardize competition, fairness, and reliability of electric markets."[48] And it "*could* … result in an interstate gas pipeline misallocating capacity."[49] But "[a]gency deference has not come so far that [courts] will uphold regulations whenever it is possible to 'conceive a basis' for administrative action."[50] There is no showing that

[43] Notice at P 26.
[44] *Id.* at P 23.
[45] *Id.* at P 26 (emphasis added).
[46] *Id.* (emphasis added).
[47] *Id.* (emphasis added).
[48] *Id.* (emphasis added).
[49] *Id.* (emphasis added).
[50] *Bowen*, 476 U.S. at 626 (plurality op.).

any of these negative outcomes has actually come about; nor that the current rule or other enforcement options are insufficient to address these claimed potential problems.

In contrast, the existing duty of candor rule was adopted after, and responded to, the Western Energy Crisis. "In the aftermath of the Western Energy Crisis, the Commission found that dishonest and abusive practices by Sellers with market-based rate authority led to unjust and unreasonable rates."[51] "As a remedy, the Commission approved a series of 'Market Behavior Rules' that prohibited such practices and permitted the Commission and the public to monitor market-based energy transactions more closely."[52] Thus, in adopting the Market Behavior Rule that eventually became § 35.41, the Commission limited the rule to "Sellers," and "assure[d] sellers that the information sought or provided hereunder will be directly related to the wholesale transactions for which they have received market-based rate authority."[53] No similar event has prompted the proposed rule.

B. The proposed rule is open to challenge as arbitrary and capricious because the rule's disadvantages outweigh its advantages.

Moreover, even if the Commission could point to some concrete evidence that inaccurate communications were affecting matters within its jurisdiction, it would still have to show that the proposed rule is a rational response to the problem. As the Supreme Court has noted, "reasonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions."[54] And though "[t]he law … does not demand an impossible predictability," it "does demand an articulation, in response to serious objections, of the Commission's reasons for believing that more good than harm will come of its action."[55]

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[51] Notice at P 17.
[52] *Colo. Off. of Consumer Couns. v. FERC*, 490 F.3d 954, 955 (D.C. Cir. 2007).
[53] 105 FERC ¶ 61,218, at P 108.
[54] *Michigan v. EPA*, 576 U.S. at 753.
[55] *Md. People's Couns. v. FERC*, 761 F.2d 768, 779 (D.C. Cir. 1985) (Scalia, J.).

The Commission must consider the downsides of the proposed rule. The proposed rule has weighty disadvantages. Entities may respond by tamping down on interactions generally. They might stifle negotiations with pipelines and utilities, reducing effective operations. They might reduce interactions in the market itself, reducing liquidity and increasing hedging costs for load. And they certainly will incur additional compliance costs—the price of having to be ready to demonstrate due diligence for every statement.

At this stage, there is no indication that the Commission considered *any* costs of the proposed rule, let alone balanced them against any putative benefits of the proposed rule. When it does so, it will find that the proposed rule—or any rule of similar scope—is simply not a rational response to whatever problems lack of candor is causing the Commission. Promulgating the proposed rule in such circumstances would be arbitrary and capricious under the APA.

C. The proposed rule is open to challenge as arbitrary and capricious because the agency has not provided a satisfactory explanation of the need for the proposed rule.

"One of the basic procedural requirements of administrative rulemaking is that an agency must give adequate reasons for its decisions."[56] That duty is the agency's alone. "It is not the role of the courts to speculate on reasons that might have supported an agency's decision," and courts "may not supply a reasoned basis for the agency's action that the agency itself has not given."[57] And not any explanation will do. There may not be a "disconnect between the decision made and the explanation given."[58]

The Notice's rationales do not justify the proposed rule's scope. The Commission says that "[s]ubmission of false or misleading information, or omission of material information—

[56] *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016).
[57] *Id.* at 224 (internal citation omitted).
[58] *DOC v. New York*, 139 S. Ct. 2551, 2575 (2019).

whether intentionally or reckless—could lead the Commission to reach decisions that it otherwise would not have made."[59] But even if the Commission could show instances where that happened, that would support punishing only intentional or reckless misstatements. It does not support what the proposed rule does, which is to penalize *all* misstatements, regardless of intent.

The other rationales the Commission has offered are similarly deficient. The Notice says that the proposed rule "will provide clarity that benefits the industries and markets the Commission regulates."[60] The proposed rule will not provide clarity. It provides no bright lines at all. Its terms *say* that materiality and intent are irrelevant, but then the Notice declares that "[a]s a general matter, we do not intend to penalize inadvertent errors, especially those of limited scope and impact."[61] Nor does the "due diligence" defense provide a reliable safe harbor, given the indeterminate nature of that inquiry; according to the Commission, it "include[s] all relevant facts related to whether reasonable steps were taken by the communicator(s) to ensure the accuracy and completeness of a communication in light of all of the circumstances."[62]

As noted, the Commission states in several places in the Notice that it does not actually intend to use the proposed rule in all of these cases,[63] which demonstrates that its goals do not justify the breadth of the proposed rule. But the proposed rule itself would permit such application without limitation. That is a demonstrated "disconnect between the decision made and the explanation given."[64]

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[59] Notice at P 26; *see also id.* at P 28 ("[C]onsistent with the need to exercise due diligence, it should be clear that intentional or reckless miscommunications are never permissible.").
[60] *Id.* at P 29.
[61] *Id.* at P 44.
[62] *Id.* at P 43.
[63] For example, the Commission explains that it does not believe that it is worth punishing every inaccurate statement if the speaker cannot carry a burden of due diligence. *See id.* at P 44. Neither does the Commission believe—as a "general matter"—that unintentional, immaterial factual errors are worth pursuing. *Id.*
[64] *DOC v. New York*, 139 S. Ct. at 2575.

D. The proposed rule is open to challenge as contrary to the First Amendment.

Under the APA, reviewing courts must "set aside agency action, findings, and conclusions found to be … contrary to constitutional right, power, privilege, or immunity."[65] The proposed rule governs a wide range of communications and gives the Commission the power to police their content without clear guidelines to channel its discretion. Accordingly, the proposed rule is susceptible to invalidation under the First Amendment.

1. The proposed rule's lack of a scienter requirement is a First Amendment problem.

"Strict liability is generally disfavored in criminal law, particularly with respect to cases that implicate the First Amendment."[66] That is because a strict liability scheme in an area touching on the First Amendment carries "potential for chilling speech."[67]

"[C]onstitutional violations may arise from the deterrent, or 'chilling,' effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights."[68] "[E]rroneous statement is inevitable in free debate, and it must be protected if the freedoms of expression are to have the breathing space that they need to survive."[69] For that reason, the Supreme Court struck down a state law that "provided that a candidate for public office forfeits his electoral victory if he errs in announcing that he will, if elected, serve at a reduced salary."[70] That statute was "absolute: [the candidate's] election victory must be voided even if the offending statement was made in good faith and was quickly repudiated."[71] And in the case before

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[65] 5 U.S.C. § 706(2)(B); *see also Ass'n of Data Processing Serv. Orgs., Inc. v. Bd. of Governors of Fed. Res. Sys.*, 745 F.2d 677, 683 (D.C. Cir. 1984) (Scalia, J.) ("The 'scope of review' provisions of the APA, 5 U.S.C. § 706(2), are cumulative." (footnote omitted)).
[66] *United States v. Sheehan*, 512 F.3d 621, 629 (D.C. Cir. 2008).
[67] *United States v. Nofziger*, 878 F.2d 442, 454 (D.C. Cir. 1989).
[68] *Laird v. Tatum*, 408 U.S. 1, 11 (1972).
[69] *Brown v. Hartlage*, 456 U.S. 45, 60 (1982) (internal quotation marks and alterations omitted) (quoting *N. Y. Times Co. v. Sullivan*, 376 U.S. 254, 271–72 (1964)).
[70] *Id.* at 61.
[71] *Id.*

the Court, "[t]here ha[d] been no showing … that petitioner made the disputed statement other than in good faith and without knowledge of its falsity, or that he made the statement with reckless disregard as to whether it was false or not," and "petitioner retracted the statement promptly after discovering that it might have been false."[72] According to the Court, "[t]he chilling effect of such absolute accountability for factual misstatements in the course of political debate is incompatible with the atmosphere of free discussion contemplated by the First Amendment in the context of political campaigns."[73]

Similarly here, the proposed rule expressly provides authority to punish speakers even where there is "no showing" that the speaker "made the disputed statement" with "knowledge of its falsity" or "with reckless disregard as to whether it was false or not."[74] It therefore runs afoul of these principles. And the due diligence defense does not save it. Putting the onus on a speaker to show his entitlement to protection under an amorphous due diligence test is likely to discourage speaking at all. In the criminal context, the Supreme Court has noted that "[t]he result … where the defendant is required to prove the critical fact in dispute[] is to increase further the likelihood of an erroneous … conviction."[75] The same principle applies here, where it would be the entities' duty to prove that they exercised due diligence in order to avoid massive fines.

2. Regulations targeting fraudulent speech must be appropriately tailored.

The Commission's aim of targeting misleading speech does not allow it to ignore First Amendment concerns. While the First Amendment allows regulation of fraudulent or misleading speech,[76] such regulations must be narrowly tailored—in other words, the government must

[72] *Id.* at 61–62.
[73] *Id.* at 61.
[74] *Id.*
[75] *Mullaney v. Wilbur*, 421 U.S. 684, 701 (1975).
[76] *See Matal v. Tam*, 137 S. Ct. 1744, 1765 (2017) (Kennedy, J., concurring); *SEC v. Pirate Investor LLC*, 580 F.3d 233, 255 (4th Cir. 2009).

"choose[] the least restrictive means to further the articulated interest."[77] "Laws that primarily prohibit fully protected speech along with potentially fraudulent speech often violate the First Amendment, even if the law's stated purpose is to prevent fraud; instead, more precise measures must be used."[78]

The presence of a scienter requirement is important to determining whether an anti-fraud regulation is sufficiently tailored to pass muster under the First Amendment. "Fraud is false speech in the purest sense, an *intentional* lie made to induce reliance."[79] In other words, mere inaccuracy is not enough; there is no "general exception to the First Amendment for false statements."[80] In *Commodity Trend Service v. CFTC*, for example, the Seventh Circuit held that a statutory provision that prohibited a commodity trading advisor "from employing 'any device, scheme, or artifice to defraud'" passed "constitutional muster" because it "require[d] scienter and d[id] no more than prohibit common law fraud in commodities transactions."[81]

Alternatively, a regulation that lacks a scienter requirement might be saved if it is otherwise limited to target a narrow category of harmful speech. In *Commodity Trend*, a provision without a scienter requirement only survived scrutiny because it targeted a limited subset of commercial communications that deceived customers. It was therefore "narrowly tailored" and "directly related to preventing fraud."[82]

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[77] *See Commodity Trend Serv. v. CFTC*, 233 F.3d 981, 992 (7th Cir. 2000); *Sable Commc'ns of Cal. v. FCC*, 492 U.S. 115, 126 (1989).
[78] *Commodity Trend*, 233 F.3d at 993; *cf. McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995) ("The State may, and does, punish fraud directly. But it cannot seek to punish fraud indirectly by indiscriminately outlawing a category of speech, based on its content, with no necessary relationship to the danger sought to be prevented.").
[79] *In re Grand Jury Matter, Gronowicz*, 764 F.2d 983, 988 (3d Cir. 1985) (emphasis added).
[80] *United States v. Alvarez*, 567 U.S. 709, 718 (2012) (plurality opinion).
[81] 233 F.3d at 993 (quoting 7 U.S.C. § 6o(1)(A)).
[82] *Id.*

The proposed rule does not have an intent element and is therefore not limited to prohibiting "actual fraud."[83] And for the reasons already stated, the Commission cannot show that the proposed rule is narrowly tailored. The proposed rule is clearly not "actually necessary to the solution."[84] The Commission itself says that it does "not intend to penalize inadvertent errors, especially those of limited scope and impact."[85] Accordingly, the Commission admits that the proposed rule covers speech unrelated to the rule's objectives.[86]

3. The First Amendment does not countenance unfettered administrative discretion to regulate speech.

The proposed rule is vulnerable to First Amendment challenge for another reason: it fails to set clear rules for enforcement. The First Amendment does not tolerate standardless discretion to regulate speech.[87] Courts will "not uphold an unconstitutional statute merely because the Government promised to use it responsibly."[88]

The proposed rule provides little clear guidance to regulated parties about what speech will subject them to enforcement. The Commission states that "[a]s a general matter"—but not always—"we do not intend to penalize inadvertent errors, especially those of limited scope and impact," and that it "retains discretion not to pursue enforcement actions in such instances."[89] There is no explanation for how the Commission will decide which inadvertent and immaterial errors are worth penalizing and which are worth ignoring.

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[83] *See Pirate Inv. LLC*, 580 F.3d at 255.
[84] *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 799 (2011).
[85] Notice at P 44.
[86] For similar reasons, the proposed rule would be vulnerable to challenge for violating the Petitions Clause of the First Amendment. *See Borough of Duryea v. Guarnieri*, 564 U.S. 379, 388 (2011) (noting that, although "[c]ourts should not presume there is always an essential equivalence in the two Clauses," that "the rights of speech and petition share substantial common ground").
[87] *See, e.g.*, *Thornhill v. Alabama*, 310 U.S. 88, 98 (1940) ("Where regulations of the liberty of free discussion are concerned, there are special reasons for observing the rule that it is the statute, and not the accusation or the evidence under it, which prescribes the limits of permissible conduct and warns against transgression.").
[88] *United States v. Stevens*, 559 U.S. 460, 480 (2010).
[89] Notice at P 44.

That "overly broad discretion" "creates an impermissible risk of suppression of ideas."[90] A regulation as "vague and broad" as the proposed rule "lends itself to selective enforcement against unpopular causes."[91] The proposed rule's dragnet approach to regulating speech gives the Commission complete discretion as to which countless immaterial and inadvertent inaccurate statements it intends to punish. In such circumstances, "[i]t makes no difference whether such … proceedings would actually be commenced."[92] "The question is not whether discriminatory enforcement occurred here, … but whether the Rule is so imprecise that discriminatory enforcement is a real possibility."[93]

4. The proposed rule raises more serious First Amendment concerns than did § 35.41.

Some of the foregoing analysis applies to § 35.41. Like the proposed rule, § 35.41 does not contain an intent or a materiality requirement. That the current candor rule may raise First Amendment concerns is not a reason to double down on those errors in a broader rule. But in any event, there are at least three key distinctions between the existing rule and the proposed rule.

First, 18 C.F.R. § 35.41 applies only if the speaker is a "Seller," defined as "any person that has authorization to or seeks authorization to engage in sales for resale of electric energy, capacity or ancillary services at market-based rates under" § 205 of the Federal Power Act.[94] Accordingly, those who are subject to § 35.41 are by choice already heavily regulated.[95]

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[90] *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 129-30 (1992).
[91] *NAACP v. Button*, 371 U.S. 415, 435 (1963); *see also Butcher v. Knudsen*, 38 F.4th 1163, 1169 (9th Cir. 2022) ("A vague law governing speech … poses heightened risks of arbitrary enforcement, inviting disparate treatment of less popular speakers or viewpoints.").
[92] *Button*, 371 U.S. at 435.
[93] *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1051 (1991).
[94] 18 C.F.R. § 35.36(a)(1).
[95] *See NLRB v. Int'l Ass'n of Bridge*, 941 F.3d 902, 906 (9th Cir. 2019) (holding it relevant to the First Amendment analysis that "this case involves communications addressed to neutral employees within the highly regulated contours of labor negotiations"); *cf. Stuart v. Camnitz*, 774 F.3d 238, 247-48 (4th Cir. 2014) ("[T]he power of government to regulate the professions is not lost whenever the practice of a profession entails speech. … When the First Amendment rights of a professional are at stake, the stringency of review thus slides along a continuum from

The same cannot be said for the proposed rule. As the dissent suggests, a landowner complaining in an email to a pipeline developer would be covered by the proposed rule.[96] Such entities have no intent to enter the regulated field, with all the concomitant benefits and detriments of doing so. The proposed rule would burden their First Amendment rights all the same.

Second, by applying only to Sellers, 18 C.F.R. § 35.41 has a closer nexus to commercial speech; and "[t]he Constitution … accords a lesser protection to commercial speech than to other constitutionally guaranteed expression."[97] One reason for that is "the commonsense distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech."[98] Another is that "commercial speech may be more durable than other kinds" of speech; because "advertising is the Sine qua non of commercial profits, there is little likelihood of its being chilled by proper regulation and foregone entirely."[99]

"Sellers" engage or seek to engage in "sales for resale of electric energy, capacity or ancillary services at market-based rates."[100] In fact, the Commission had previously "assure[d] sellers that the information sought or provided hereunder will be *directly related to the wholesale transactions for which they have received market-based rate authority*."[101] Additionally, 18 CFR

public dialogue on one end to regulation of professional *conduct* on the other." (internal quotation marks and alteration omitted)).

[96] Notice (Danly, Comm'r, dissenting at P 5).

[97] *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 562-63 (1980).

[98] *Id.* (internal quotation marks omitted) (quoting *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-56 (1978)).

[99] *Va. State Bd. of Pharm. v. Va. Citizens Consumer Council*, 425 U.S. 748, 771 n.24 (1976); *see also Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749, 762 (1985) ("In addition, the speech here, like advertising, is hardy and unlikely to be deterred by incidental state regulation. It is solely motivated by the desire for profit, which, we have noted, is a force less likely to be deterred than others." (citation omitted)).

[100] 18 C.F.R. § 35.36(b).

[101] 105 FERC ¶ 61,218, at P 108 (emphasis added).

§ 35.41 is titled "Market Behavior Rules." The entities subject to § 35.41 seek to engage in transactions, and accordingly are "less likely to be deterred" from speech than other speakers.[102]

Not so for the proposed rule. It is not limited to regulated entities that want to engage in a market transaction. As the dissent pointed out, members of the public who have not sought to participate as sellers in the marketplace, may be open to liability under this rule.[103] The same goes for individual company employees who might be inclined to volunteer information at stakeholder proceedings to improve market efficiency, or to NERC staff to provide input on enhancing the reliability of the electric grid, or to FERC staff on natural gas policy initiatives. To be clear, the signatories are also concerned about the proposed rule's application to commercial speech, given the lack of intent and materiality requirements and any guidelines to limit discretion in enforcement.[104] But the proposed rule raises additional problems by reaching far beyond the bounds of pure commercial speech.

Third, as a response to the Western Energy Crisis 18 C.F.R. § 35.41(b) is arguably on firmer constitutional ground than the proposed rule. For a content-based regulation of protected speech to pass strict scrutiny, "[t]he State must specifically identify an actual problem in need of solving and the curtailment of free speech must be actually necessary to the solution."[105] As already discussed, the current duty of candor rule *was* prompted by an actual problem. The Commission had "found that the implementation of this market behavior standard was made necessary, in part, by the lessons learned from the California energy crisis and [its] on-going

[102] *Cf. Dun & Bradstreet*, 472 U.S. at 762.
[103] Notice (Danly, Comm'r, dissenting at PP 1-17).
[104] *Va. State Bd. of Pharm. v. Va. Citizens Consumer Council*, 425 U.S. 748, 770 (1976) (concluding that "commercial speech, like other varieties [of speech], is protected").
[105] *Brown*, 564 U.S. at 799 (internal quotation marks and citation omitted).

investigation of that market in the California Refund Proceeding."[106] The proposed rule, on the other hand, does not identify any actual problem it purports to solve.[107]

E. The proposed rule can also be challenged as arbitrary and capricious because it fails to offer meaningful guidance to affected parties.

The principle of fair notice "has now been thoroughly incorporated into administrative law."[108] "Administrative action is arbitrary and capricious if it fails to articulate a comprehensible standard for assessing the applicability of a statutory category."[109] "If a purported standard is indiscriminate and offers no meaningful guidance to affected parties, it will fail the requirement of reasoned decisionmaking."[110]

As already set forth, the proposed rule provides no comprehensible standards for its application.[111] The Commission expressly disclaims intent to apply the rule broadly, but no principle to guide the Commission's application is contained in the rule itself. Again, the Commission "do[es] not intend to penalize inadvertent errors, especially those of limited scope and impact"—but it has not included any scienter requirement in the rule.[112] Worse, the Notice says that "[t]he Commission retains discretion not to pursue enforcement actions … and will exercise that discretion, as appropriate, in implementing the proposed regulation, as the Commission does with all other Commission regulations."[113] The Commission promises to use

[106] *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 103 FERC ¶ 61,349, at P 9 (2003).
[107] *United States v. Playboy Ent. Grp.*, 529 U.S. 803, 822 (2000); *see also supra* at Part II.A.
[108] *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995) (internal quotation marks omitted); *see also Satellite Broad. Co. v. FCC*, 824 F.2d 1, 3 (D.C. Cir. 1987).
[109] *ACA Int'l v. FCC*, 885 F.3d 687, 700 (D.C. Cir. 2018) (internal quotation marks and alteration omitted).
[110] *Id.* (internal quotation marks omitted).
[111] *See supra* at Parts I.C and II.D.3.
[112] Notice at P 44.
[113] *Id.*

the proposed rule responsibly.[114] That gives no guidance, however, to regulated entities, and it is not enough to bring the proposed rule within the bounds of due process.[115]

F. The proposed rule is invalid because it lacks a statutory basis.

Reviewing courts shall "hold unlawful and set aside agency action, findings, and conclusions found to be … in excess of statutory jurisdiction, authority, or limitations."[116] In determining whether an agency has exceeded its statutory authority in promulgating a regulation, courts apply "the familiar *Chevron* framework."[117]

The Commission refers to an assortment of statutory provisions which supposedly authorize its proposed rule. None of them supports the proposed rule; and given the serious constitutional questions it raises, Congress needed to speak much more clearly than it did for the Commission to claim such enhanced, broad, consequential authority. Even if those statutes were ambiguous, the Commission's interpretation of them is not reasonable.

1. The Commission's interpretation of its statutory authority fails under *Chevron*.

"If Congress has directly spoken to the precise question at issue, then the court must give effect to the unambiguously expressed intent of Congress; otherwise, the court defers to the agency's reasonable interpretation of a statute it administers."[118] The statutes upon which the Commission relies clearly do not authorize the proposed rule. Even if those statutes were ambiguous on that front, the Commission's interpretation is not reasonable.

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[114] *See Stevens*, 559 U.S. at 480.
[115] *See FCC v. Fox TV Stations,* 567 U.S. 239, 255 (2012) ("Just as in the First Amendment context, the due process protection against vague regulations does not leave regulated parties at the mercy of *noblesse oblige*." (internal quotation marks and alterations omitted)).
[116] 5 U.S.C. § 706(2)(C); *see also id.* § 706(2)(A) ("The reviewing court shall … hold unlawful and set aside agency action, findings, and conclusions found to be … not in accordance with law."); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress.").
[117] *Children's Hosp. Ass'n of Tex. v. Azar*, 933 F.3d 764, 769 (D.C. Cir. 2019).
[118] *Cal. Cmtys. Against Toxics v. EPA*, 928 F.3d 1041, 1053 (D.C. Cir. 2019) (internal quotation marks omitted).

a. The proposed rule clearly lacks a statutory basis.

"At *Chevron* step one, … the court considers whether Congress has directly spoken to the precise question at issue."[119] "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[120] To determine that intent, "the court exhausts the traditional tools of statutory construction, considering the provision's text, context, legislative history, and purpose."[121]

1. No provision in any of the governing statutes cited in the Notice even mentions authority to supervise communications to the Commission and regulated entities. That in and of itself is important from an administrative law perspective. Unlike cases where there is a potential mismatch between the scope of a regulation and the specific language in the statutory underpinning of that regulation, here there is no statutory language directly on point.

For example, the lack of statutory authority is apparent with respect to § 311 of the Natural Gas Policy Act, 15 U.S.C. § 3371, which simply provides that the Commission "may, by rule or order, authorize any intrastate pipeline to sell natural gas to" various entities. According to the Notice, subsection (c), which provides that "[a]ny authorization granted under this section shall be under such terms and conditions as the Commission may prescribe," should also be read to grant the Commission the authority to promulgate its duty of candor rule.[122] But that reading proves too much. A new, far-reaching, vastly expanded enforcement and civil penalty authority, with broad discretion and nearly unlimited scope, is not simply a "term and condition" of the limited

[119] *Cigar Ass'n of Am. v. U.S. FDA*, 5 F.4th 68, 77 (D.C. Cir. 2021) (internal quotation marks omitted).
[120] *Id.* (quoting *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842–43 (1984)).
[121] *Am. Fuel & Petrochemical Mfrs. v. EPA*, 3 F.4th 373, 380 (D.C. Cir. 2021) (internal quotation marks omitted).
[122] 15 U.S.C. § 3371.

transactional authority provided by this statute. It is implausible that Congress would grant such a far-reaching power in this way.[123]

The Notice also finds authorization in the grants of authority to the Commission to "determine the just and reasonable rate" for regulated services.[124] According to the Notice, "information in our markets must be accurate to ensure that wholesale rates, and rules or practices directly affecting such rates are just and reasonable."[125] But that is too thin a reed on which to hang the proposed rule. The Supreme Court has rejected that method of interpreting the Commission's authorizing statutes, "consistently [holding] that the use of the words 'public interest' in a regulatory statute is not a broad license to promote the general public welfare."[126] If the Supreme Court rejected finding a free floating authority in a term as broad as "public interest," courts certainly would reject finding such an authority in a direction to ensure "rates are just and reasonable."

In all events, there no plausible reading of the "just and reasonable" rates mandate that supports the proposed rule, which covers a vast number of situations in no way tied to ratemaking. "[I]nadvertent errors, especially those of limited scope and impact,"[127] definitionally cannot affect rates, yet the Commission expressly reserves the discretion to pursue enforcement actions in those instances. And the speech of many of the regulated entities will have nothing to do with "just and reasonable rates"—because the rule encompasses any and everything "relate[d] to" the Commission's jurisdiction.

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[123] *See Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1627 (2018) ("[C]ongress does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." (internal quotation marks omitted)).
[124] *See* 16 U.S.C. § 824e(a); 15 U.S.C. § 717d(a); 49 U.S.C. app. § 1(5)(a) ("All charges made for any service rendered or to be rendered … shall be just and reasonable."); *id.* § 15(1) ("[T]he Commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate.").
[125] Notice at P 37.
[126] *NAACP v. Fed. Power Comm'n*, 425 U.S. 662, 669 (1976).
[127] Notice at P 44.

Another statutory basis on which the Notice purports to rest is the Commission's investigatory power.[128] According to the Notice, "[g]iven the Commission's authority to obtain information, it follows that the Commission should be entitled to receive accurate information."[129] But that power under the Federal Power Act and the Natural Gas Act is to pursue investigations, and the proposed rule would apply even in the absence of an investigation—in fact, it would provide the grounds for one. Such circular authorization cannot provide a ground for the proposed rule. Further, the statutes governing the investigation process address how the Commission enforces its existing rules; they do not grant the Commission new substantive rulemaking authority or expand the type of conduct that is prohibited.

Finally, the Notice points to statutory provisions giving the Commission the "power to … prescribe, issue, make, amend, and rescind such … rules[] and regulations as it may find necessary or appropriate to carry out the provisions of this chapter."[130] That general, catch-all language cannot justify the broad proposed rule. A court does not "presume that an agency's promulgation of a rule is permissible because Congress did not expressly foreclose the possibility."[131] Yet that would be the effect of this interpretation. As noted above, none of the other statutory provisions can support the proposed rule; it cannot be that the proposed rule is "necessary or appropriate to carry out" those provisions.

Moreover, the Commission has had the "necessary or appropriate" power since 1935 but is only now seeking closely to regulate the speech of any entity who communicates with it. "[J]ust as established practice may shed light on the extent of power conveyed by general statutory

[128] *See* 16 U.S.C. § 825f; 15 U.S.C. § 717m; 49 U.S.C. app. § 12(1)(a).
[129] Notice at P 37.
[130] 16 U.S.C. § 825h; 15 U.S.C. § 717o (same); 15 U.S.C. § 3411(a); 42 U.S.C. § 7172(a)(1), (b); *see also* 49 U.S.C. app. § 12(1)(a).
[131] *N.Y. Stock Exch. LLC v. SEC*, 962 F.3d 541, 546 (D.C. Cir. 2020) (internal quotation marks and citations omitted).

language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred."[132]

The Commission's reliance on other federal agencies' duty of candor regulations as justification for its proposal is misguided and in fact demonstrates the lack of authority for its overbroad proposal. When Congress has authorized other agencies to police misstatements, it has done so expressly. Candor-type rules for the Commodity Futures Trading Commission ("CFTC"), U.S. Securities and Exchange Commission ("SEC"), and U.S. Department of Justice ("DOJ") are grounded in specific statutory authorizations.[133] And these are all carefully tailored. The candor rules for the CFTC, SEC, and DOJ require intent, materiality, or both.[134] To support the proposed rule, the Commission also points to a candor rule promulgated by the Nuclear Regulatory Commission.[135] Again, however, that regulation is significantly more limited than the proposed rule, applying only to "*licensees and applicants for licenses*."[136] That might bear some resemblance to the current rule (which only applies to sellers). It bears no resemblance to the proposed rule, which applies to everyone.

Congress knows how to grant agencies the authority to promulgate candor rules. When it does, it usually does so expressly—such as, for instance, the anti-manipulation authority Congress explicitly provided in the FPA and NGA.[137] That makes especially conspicuous the absence of any provision specifically authorizing the proposed rule. "It is a fundamental principle of statutory

[132] *FTC v. Bunte Brothers, Inc.*, 312 U.S. 349, 352 (1941).
[133] *See* 7 U.S.C. § 9(2) ("It shall be unlawful for any person to make any false or misleading statement of a material fact to the Commission."); 15 U.S.C. § 78j(b); 18 U.S.C. § 1001 (providing criminal penalties for "knowingly and willfully … mak[ing] any materially false, fictitious, or fraudulent statement or representation" in "any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States").
[134] *See, e.g.*, *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 319 (2007) ("To establish liability under § 10(b) and Rule 10b-5, a private plaintiff must prove that the defendant acted with scienter, a mental state embracing intent to deceive, manipulate, or defraud." (internal quotation marks omitted)).
[135] Notice at P 35 n.44 (citing *Completeness and Accuracy of Information*, 52 FR 49362, 49365 (Dec. 1987)).
[136] 52 FR at 49362 (emphasis added).
[137] Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005).

interpretation that absent provisions cannot be supplied by the courts" because "[t]o do so is not a construction of a statute, but, in effect, an enlargement of it."[138] The Commission is also duty-bound to follow Congress's commands,[139] and its inability to point to a single provision across multiple acts to defend its proposed rule shows a clear lack of statutory authority.[140] This demonstrates that Congress has not given the Commission the authority to promulgate the proposed rule.

The canon of constitutional avoidance further forecloses the Commission's interpretation of the supposed authorizing statutes for the proposed rule.[141] "Because the judiciary must rightly presume that Congress acts consistent with its duty to uphold the Constitution, courts make every effort to construe statutes so as to find their constitutional foundations and thus avoid needless constitutional confrontations."[142]

The Commission's interpretation assumes Congress has silently given it a roving power to punish speech. For all of the reasons previously set forth, that presents significant First Amendment problems. Given the constitutional infirmities of the proposed rule, we should expect Congress to speak clearly before we read these statutes to authorize the Commission to penalize

[138] *Rotkiske v. Klemm*, 140 S. Ct. 355, 360–61 (2019) (internal quotation marks and alteration omitted).
[139] *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1355 (2018) ("Where a statute's language carries a plain meaning, the duty of an administrative agency is to follow its commands as written, not to supplant those commands with others it may prefer.").
[140] In contrast, the existing rule is specifically grounded in the need to address a particular market failure and is focused on regulating specific types of market-based rate transactions that would not otherwise come to the Commission for approval. By its terms, the current rule applies to "Sellers" who have entered or seek to enter the market. *See also* 105 FERC ¶61,218, at P 108. The only federal circuit court decision to uphold an application of the existing rule was not asked to address whether the FPA or any other statute would support an expanded rule outside of this context. *See Kourouma v. FERC*, 723 F.3d 274, 276 (D.C. Cir. 2013). And there is reason to limit *Kourouma* to the subset of FPA activity addressed in the existing rule. Even as compared to the FPA, there is nothing in the NGA to support a rule in the natural gas context, where the Commission's jurisdiction is far more limited. "[T]he Wellhead Decontrol Act of 1989 completely removed federal controls on new natural gas, except sales for resale of domestic natural gas by interstate pipelines, LDCs or their affiliates." FERC, Energy Primer 14 (Apr. 2020), https://www.ferc.gov/sites/default/files/2020-06/energy-primer-2020_0.pdf.
[141] *See Arangure v. Whitaker*, 911 F.3d 333, 342 (6th Cir. 2018) (explaining that courts apply traditional canons of statutory construction, including constitutional avoidance, at *Chevron* step one to determine the meaning of the relevant statute).
[142] *Nat'l Mining Ass'n v. Kempthorne*, 512 F.3d 702, 711 (D.C. Cir. 2008).

speech without a scienter or materiality requirement and without meaningful guardrails on its discretion. And yet the statutes which the Commission points to as authority are silent on the issue at best. Under the constitutional avoidance canon, this silence forecloses the Commission's interpretation.

b. The Commission's interpretation of its authorizing statutes is arbitrary and capricious.

Even assuming the statutes do not foreclose the Commission's interpretation, it is unreasonable. At *Chevron* step two, the inquiry is "whether the agency's interpretation is arbitrary or capricious in substance, or manifestly contrary to the statute."[143] That inquiry "overlaps analytically with a court's task under the Administrative Procedure Act (APA) in determining whether agency action is arbitrary and capricious."[144]

And for all the reasons already noted in this comment, the proposed rule—which is so broad that the Commission does not even desire to apply it uniformly—is arbitrary and capricious.

III. IF THE COMMISSION INTENDS TO PURSUE A BROAD DUTY OF CANDOR RULE, IT SHOULD PROPOSE A NARROWER RULE IN A REVISED NOTICE OF PROPOSED RULEMAKING.

If the Commission continues to believe that it requires a broad duty of candor rule, despite the significant problems with the proposed rule noted above, its next step should not be to advance to a final rule, for two reasons.

First, a narrower final rule would not pass muster unless the industry has an opportunity to provide comments. "To satisfy the APA's notice requirement, the [Notice] and the final rule [must] be a logical outgrowth of its notice."[145] "A final rule qualifies as a logical outgrowth if

[143] *Nasdaq Stock Mkt. LLC v. SEC*, 38 F.4th 1126, 1136 (D.C. Cir. 2022) (internal quotations omitted).
[144] *Nat'l Ass'n of Regul. Util. Comm'rs v. ICC*, 41 F.3d 721, 726 (D.C. Cir. 1994).
[145] *CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1079 (D.C. Cir. 2009) (internal quotation marks and alteration omitted).

interested parties should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period."[146] As explained above, the proposed rule is too broad. But any narrower final rule will not qualify as a "logical outgrowth" because it is so difficult to discern what problem the Commission is trying to fix and what logic governs its proposed solution. Accordingly, the Commission will not be able to cure the deficiencies in the proposed rule by simply issuing a watered-down version without allowing interested parties to comment.

Second, issuing a narrower rule would not cure the APA problems with the current proposal. As discussed above, the Commission must provide "a proper evidentiary basis for agency action."[147] It must consider whether the benefits of the regulation outweighs the costs of penalizing speech, and must then reach a reasonable conclusion and provide an adequate explanation. It must either ensure that its new proposal is limited to the narrow categories of speech excluded from full First Amendment protection, or the Commission must show that its new proposed rule is narrowly tailored to a compelling governmental interest. And it must find a statutory basis for its new proposed rule, and be ready to explain how old statutory provisions can authorize what seems to be a very new power.

In other words, if the Commission still wants to issue an expanded duty of candor rule—despite the absence of any indication that one is needed or would even be useful—it has only one option: It must start over.

[146] *Id.* at 1079-80 (internal quotation marks omitted); *see also Clean Air Council v. Pruitt*, 862 F.3d 1, 10 (D.C. Cir. 2017) (internal quotation marks omitted).
[147] *Bowen v. Am. Hosp. Ass'n*, 476 U.S. 610, 643 (1986) (plurality opinion).

CONCLUSION

API, EEI, EPSA, ETI, INGAA, NGSA, NHA, and P3 respectfully request that the Commission consider the foregoing comments. The Energy Trade Associations (API, EEI, EPSA, ETI, INGAA, NGSA, NHA, and P3) urge the Commission to abandon the proposed rule.

Respectfully submitted,

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Description of Energy Trade Associations

API is a national trade association representing nearly 600 member companies involved in all aspects of the oil and natural gas industry. API's members include producers, refiners, suppliers, pipeline operators, and liquefied natural gas exporters, as well as service and supply companies that support all segments of the industry. API advances its policy priorities by collaborating with industry, government, and customer stakeholders to promote continued availability of our nation's abundant oil and natural gas resources for a more secure energy future.

EEI is the association that represents all investor-owned electric companies in the United States. Our members provide electricity for more than 235 million Americans and operate in all fifty states and the District of Columbia. As a whole, the electric power industry supports more than seven million jobs in communities across the United States. EEI members are united in their commitment to get the energy they provide as clean as they can, as fast as they can, while keeping reliability and affordability front and center, as always, for the customers and communities they serve.

EPSA is the national trade association representing competitive power suppliers in the U.S. EPSA members provide reliable and competitively priced electricity from environmentally responsible facilities using a diverse mix of fuels and technologies. EPSA seeks to bring the benefits of competition to all power customers. This pleading represents the position of EPSA as an organization, but not necessarily the views of any particular member with respect to any issue.

ETI represents a diverse group of energy market participants, all with substantial interests in wholesale electricity transactions in FERC-jurisdictional markets. ETI members provide important services to a wide variety of wholesale energy market participants. They act as intermediaries between producers and consumers of electric energy that have mismatched quantity, timing, and contract type needs. In addition, they provide liquidity by engaging in energy-related commercial transactions with a variety of market entities including, but not limited to, generation owners, project developers, load-serving entities, and investors. ETI members advocate for markets that are open, transparent, competitive and fair – all necessary attributes for markets ultimately to benefit electricity consumers.

INGAA is a trade association that advocates regulatory and legislative positions of importance to the interstate natural gas pipeline industry in the United States. INGAA's 26 members represent the majority of interstate natural gas transmission pipeline companies in the U.S. INGAA's members, which operate approximately 200,000 miles of interstate natural gas pipelines, serve as an indispensable link between natural gas producers and consumers. Its members' interstate natural gas pipelines are regulated by the Commission pursuant to the Natural Gas Act ("NGA").

Founded in 1965, **NGSA** represents integrated and independent energy companies that produce, ship and market domestic natural gas and is the only national trade association that solely focuses on producer-marketer issues related to the downstream natural gas industry. NGSA's members trade, transact and invest in the U.S. natural gas market in a range of different manners.

NGSA members ship and/or supply billions of cubic feet of natural gas per day on interstate pipelines. NGSA encourages the use of natural gas within a balanced national energy policy and supports the benefits of competitive markets. NGSA has consistently advocated for well-functioning natural gas markets, policies that support market transparency, efficient nomination and scheduling protocols, just and reasonable transportation rates, non-preferential terms and conditions of transportation services and the removal of barriers to developing needed natural gas infrastructure.

NHA is a non-profit national association dedicated to securing hydropower as a clean, carbon-free, renewable, and reliable energy source that serves the nation's environmental and energy objectives. Its membership consists of more than 300 organizations, including public and investor-owned utilities, independent power producers, equipment manufacturers, and professional organizations that provide legal, environmental, and engineering services to the hydropower industry. NHA promotes innovation and investment in all waterpower technologies, including conventional hydropower, marine and hydrokinetic power systems, and pumped storage hydropower.

P3 is a non-profit organization dedicated to advancing federal, state and regional policies that promote properly designed and well-functioning electricity markets in the PJM Interconnection, L.L.C. ("PJM") region. Combined, P3 members own over 67,000 MWs of generation assets and produce enough power to supply over 50 million homes in the PJM region covering 13 states and the District of Columbia. For more information on P3, visit www.p3powergroup.com. The comments contained in this filing represent the position of P3 as an organization, but not necessarily the views of any particular member with respect to any issue.

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