UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

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

INITIAL COMMENTS OF THE AMERICAN PUBLIC GAS ASSOCIATION

Pursuant to the Notice of Proposed Rulemaking (NOPR) issued by the Federal Energy Regulatory Commission (FERC or Commission) on July 28, 2022,[1] concerning the Duty of Candor, the American Public Gas Association (APGA) files these initial comments:

I. COMMUNICATIONS

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II. STATEMENT OF INTEREST

APGA is the trade association for more than 730 communities across the U.S. that own and operate their retail natural gas distribution entities. They include not-for-profit

[1] *Notice of Proposed Rulemaking Regarding Duty of Candor*, 180 FERC ¶ 61,052, 87 Fed. Reg. 49784 (2022) (NOPR).

gas distribution systems owned by municipalities and other local government entities, all locally accountable to the citizens they serve. Public gas systems provide safe, reliable, and affordable energy to their customers and support their communities by delivering fuel to be used for cooking, clothes drying, and space and water heating, as well as for various commercial and industrial applications, including electricity generation.[2]

A not-for-profit public gas system gives a community local control over how gas is provided to homes and businesses. Instead of being made in a distant city, decisions are made at the community-level through citizen participation by retail ratepayers who appreciate local issues. Public gas systems are regulated locally by elected or appointed governing boards, which are accountable to the citizen ratepayers.

To serve the communities that govern them, APGA members purchase interstate natural gas transportation services from pipelines at rates and under terms and conditions that are regulated by the Commission. Furthermore because of the broad nature of the proposed rule, which would apply to any entity (including individuals, companies, organizations, etc.) communicating with the Commission or related entity (including ISOs, RTOs, transmission or transportation providers, etc.) on any issue within the Commission's jurisdiction, APGA members and their employees are directly impacted by this rulemaking. Accordingly, APGA urges the Commission to carefully review the below comments as it evaluates the need for the NOPR.

[2] For more information, please visit www.apga.org.

III. COMMENTS

For the following reasons, APGA respectfully requests that the Commission withdraw the NOPR.

A. The Proposed Rule Is Unnecessary

The issue raised by the NOPR is whether the duty of candor that flows from the Commission's existing specific regulatory requirements and procedures should be augmented with a generally applicable duty of candor rule. From APGA's perspective, with members in the natural gas industry, the proposal for a general rule is a solution in search of a problem.

The Commission's definition of the problem to be solved seems to be simply the absence of a general standard. But to satisfy the "arbitrary and capricious" standard of the Administrative Procedure Act, the Commission must articulate the foundation for why that absence is a concern. The Commission does not articulate what communications are being made today under the Natural Gas Act (NGA) that lack candor and are not covered by existing requirements. Therefore, the NOPR lacks that "satisfactory explanation for [the] action including a "rational connection between the facts found and the choice made.'"[3]

APGA of course agrees that the Commission should be able to rely on communications that are accurate.[4] True verified facts are the foundation of just and

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[3] *Motor Vehicle Manufacturers Association v. State Farm Auto Mutual Insurance Co.,* 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).

[4] The Commission notes that "[r]eliance on inaccurate information inhibits the Commission's regulatory oversight and could lead to substantial harm." NOPR at 49785.

reasonable rates that APGA members rely on the Commission to enforce. APGA and its members provide accurate information to the Commission through pleadings and forms such as No. 552. Those members practice candor at home. As stewards of their communities, it is important for APGA members to communicate clearly and factually with not only with their local citizens but also their vendors and other industry partners. Communicating inaccurate information is not only bad for business, as natural gas utilities must plan carefully to ensure adequate supplies, but inaccuracy may adversely affect the safe operation of their distribution systems. When it comes to receiving regulated natural gas services, APGA members have every incentive to be accurate, clear, and persuasive before the Commission.

Concerning the Commission's jurisdiction over the natural gas industry, the existing statutes and regulations appear to be adequate. The Commission explains at length the duties of candor that currently exist in its relevant regulations.[5] APGA is unaware of any egregious instance of "false or misleading information" being presented to the Commission. APGA members routinely see misleading testimony in support of a rate increase where an interstate pipeline is less transparent than desired. Rather than being shocking, that is routine. Witnesses often exaggerate their "case." Such testimony, however, is submitted under oath when filed as confirmed orally at hearing under existing regulations (18 CFR 385.506(b)).[6] False statements under oath to the Commission can

[5] NOPR at 49786.

[6] The nature of the oath given by witnesses appearing before FERC administrative law judges is not stated in transcripts of the proceeding, which simply state that the witness was "duly sworn." Prefiled testimony need only be attested to as to its authenticity and not truthfulness (385.507(d)).

bring civil fines.[7] Most important, it is subject to discovery and cross examination. It is not uncommon in rate cases for the company's testimony to be called "misleading," as would be prohibited by the proposed rule.[8] Nor is it uncommon for FERC trial judges to determine that a regulated entity's testimony was "misleading."[9] The Commission has not explained how this may have been problematic for the thousands of rate filings submitted over time and whether such findings would lead to sanctions under the proposed rule. Absent such findings and guidance, implementation of the proposed rule would be problematic.

B. The Proposed Rule Is Likely to be Counterproductive

After reflection, APGA concludes that to the extent that the NOPR is a cure, it is worse than any general disease because it will chill communications within the industry and with the Commission. It would produce less communication rather than more. The breadth of the proposed duty of candor regulation will likely discourage entities from voluntary communications with the Commission and other organizations that are covered by the duty of candor in order to avoid being subject to enforcement actions. The Commission has an apt example of this behavior.

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[7] *See, e.g., City Power Marketing, LLC and K. Stephen Tsingas,* Docket No. IN15-5-000, Order Assessing Civil Penalties, 152 FERC ¶ 61,012 (2015).

[8] *See, e.g., El Paso Natural Gas Co.,* 139 FERC ¶ 63,020 at P 32 (2012)("Trial Staff challenges EPNG's risk analysis—including the claimed credit rating, average contract length and competitive/market positions—as inaccurate, incomplete or misleading.").

[9] *See, e.g., Panhandle Eastern Pipe Line Company, LP,* 174 FERC ¶ 63,026 at P 684 (2021)(" Panhandle's arguments here are misleading because the 2018 Audit Report did not reach any conclusion regarding undue discrimination or preferential treatment as to the Panhandle-Trunkline OBA.")

For years APGA has been commenting that more should be done to make natural gas price indices more robust and reliable. All stakeholders agree that the problem has been that too few buyers and sellers report transactions voluntarily. The record shows that this is because of a fear of regulatory entanglement and enforcement actions. Gas sellers in particular told the Commission that they did not report to avoid "subject[ing] the Seller to investigation or audit."[10] The Commission responded by revising its policy of a "safe harbor" to encourage more voluntary reporting to price index developers.[11] The lesson is clear: when faced with uncertainty and vague regulation, industry participants "clam up" in favor of candid communication with the Commission. The proposed rule would create similarly uncertainty that likely would lead to less candid communication rather than more. Worse, criminalizing a lack of candor would do little to deter truly bad actors.

APGA is concerned about emergency situations. APGA members and other market participants during emergencies take part in both voluntary and required communications made under rapidly changing circumstances. Such circumstances could lead to omissions or inaccurate factual information that are proscribed by the proposed rule. Confronted by potential liability, despite the Commission's due diligence safe

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[10] Initial Comments of EQT Energy, LLC, Docket No. RM20-7-000 at p. 2 (filed Mar. 23, 2001). *See also* Initial Comments of Argus Media, Inc., Docket No. RM20-7-000 (filed Mar. 23, 2001)(market participants "consistently have voiced concerns to Argus that federal authorities including the Commission may pursue enforcement actions because of inadvertent errors in reporting transactions to price index developers despite the existence of the Safe Harbor Policy.").

[11] *Actions Regarding the Commission's Policy on Price Index Formation & Transparency, & Indices Referenced in Nat, Gas & Elec. Tariffs*, 179 FERC ¶ 61,036 (2022). Currently, no defense is available to "fat fingered" errors, as the Commission has failed to finalize a safe-harbor rulemaking that was proposed in 2021. As a result, the price indices fail to appropriately capture sufficient data to capture a representative cost for natural gas, leaving APGA members, and ultimately their customers, vulnerable to price manipulation.

harbor, many entities may choose to withdraw from mutual assistance programs and reduce emergency non-mandatory communications during such events given that there is no time for sufficient due diligence. This obviously is counterproductive and not a desirable outcome. In instances like this, the Commission should be encouraging open communication. To avoid chilling of such important communications from an overly broad and burdensome rule, FERC should withdraw the NOPR.

C. The Proposed Rule Is Prejudicial to the Interests of Municipal Gas Systems

Municipalities that own their gas distribution systems participate in FERC proceedings in three ways: (1) through APGA (largely in rulemakings and policy setting matters); (2) through ad hoc customer coalitions and regional joint action agencies; and (3) individually. The proposed rule is potentially a high hurdle—or even a roadblock—to continued participation by these gas distributors.

For decades, the primary way that municipalities that own their gas distribution systems participated in NGA Section 4 and 7 proceedings to advocate their interests has been through ad hoc coalitions. This technique is usually the only path to making involvement economically feasible for smaller entities that are then able to share the costs of legal representation and expert consultation. This evolved into the formation of regional joint action entities that sometimes participate in that fashion, spreading the cost of advocacy among their members. This allowed smaller entities to join up with other similarly situated entities that had more regulatory experience and sophistication.

The proposed rule would exempt inaccurate communications if "the entity exercises due diligence to prevent such occurrences." This is a nightmare generally for

all FERC legal practitioners whose function is to advocate the interests of his or her client before the Commission, often under difficult deadlines. Section 4 of the NGA, for example, which requires Commission action on rate or tariff changes within thirty days, means that protests and comments by shipper are due just a few days after notice of the change is published by the Commission. The NOPR asserts that the statements of the practitioner bind the principal such that the principal has to vouch for the truthfulness of the statement. FERC states:

> if an entity relies upon a non-employee agent for the submission of a communication, the principal would not escape application of the regulation, absent a showing of due diligence.

This is a vague standard, but it suggests that every pleading must be read and vetted by a principal. That is often not possible under deadlines. Moreover, it is unfair to smaller entities that participate only in a coalition and do not follow administrative proceedings carefully. Smaller municipal entities effectively delegate FERC litigation to the larger coalition. They lack the resources to vet every communication to the Commission. In fact, the very reason principals engage an agent (an attorney) is to free the principal to attend to the primary tasks of running the entity. Further, often customer protests make allegations the detail of which are determined later. Those allegations sometimes are the basis for request for further Commission action. There is nothing simple about assuring certain beliefs on objectively complex facts when articulating them to the Commission. Just how precise does one have to be? The suggestion of the rule is that each principal is responsible for the content of a communication such that it must be read and signed off on. APGA members that participate in ad hoc groups should not be held to a standard requiring review of every submission. The suggestion in the NOPR

that a timeline is pertinent to a determination of due diligence—that participants can be less accurate if given less time—is both a vague subjective standard and a cold comfort to participants.

Vagueness is born of inconsistency. The text of footnote 48 of the NOPR illustrates how the due diligence standard is vague. On the one hand, the Commission offers that "due diligence for [outside] counsel in such circumstances likely will simply amount to ensuring that it has no reason to believe the falsity of the information provided." On the other hand, the footnote continues to state that the "responsible company would bear a greater burden to ensure the communication's accuracy." First, in-house counsel are left to wonder why their own legal ethical standards are not an adequate standard for their conduct. They may also wonder if the Commission is signaling that retention of outside counsel is the path to "getting away with" more. The inconsistency between two types of counsel is arbitrary and further demonstrates that there is no need for further regulation of their conduct beyond what the state bar requires.

D. The NOPR is not within the Commission's existing jurisdiction.

The Commission begins by noting that it is issuing this NOPR "[p]ursuant to sections 206, 215, 307, and 309 of the Federal Power Act (FPA), sections 5, 14, and 16 of the Natural Gas Act (NGA), sections 1(5)(a), 12(1)(a), 13, and 15 of the Interstate Commerce Act (ICA), sections 311(c) and 501(a) of the Natural Gas Policy Act of 1978 (NGPA), and sections 402(a)(2) and 402(h) of the Department of Energy Organization

Act."[12] It then goes on to discuss existing duties of candor relevant to FERC, some of which arise from the NGA, noting that "[i]n each instance, the controlling regulation was adopted as part of specific regulatory requirements or procedures rather than as a broad requirement applicable to all of the Commission's oversight responsibilities."[13] Finally, the NOPR briefly explains why 18 CFR 35.41(b), which arises from Section 206 of the FPA, provides a fair basis for a broader duty of candor.[14]

Aside from discussing how courts have held 18 CFR 35.41(b) as being an appropriate regulation arising from the FPA, the Commission fails to explain how any of the aforementioned statutes grant it authority to promulgate such a broad duty on all entities engaged in communications pertaining to the Commission's natural gas jurisdiction. It is not enough to rely on general administrative powers of the Commission under section 16 of the NGA. In its NOPR, the Commission notes that its existing duties of candor have arisen from very particular instances. Simply enumerating a long list of statutes and noting that they require a duty of candor in specific situations in no way demonstrates how they support authority for FERC to grant an overarching duty not explicitly authorized by statute.

The duty of candor followed by the Commodity Futures Trading Commission (CFTC) is instructive. Congress established the CFTC's duty of candor as follows:

> It shall be unlawful for any person to make any false or misleading statement of a material fact to the Commission, including in any registration application or any report filed with the Commission under this chapter, or

[12] NOPR at 49785 (internal footnotes omitted).

[13] *Id.* at 49786.

[14] *Id.* at 49789.

> any other information relating to a swap, or a contract of sale of a commodity, in interstate commerce, or for future delivery on or subject to the rules of any registered entity, or to omit to state in any such statement any material fact that is necessary to make any statement of a material fact made not misleading in any material respect, if the person knew, or reasonably should have known, the statement to be false or misleading.[15]

Thus, this duty of candor is explicitly laid out in its authorizing statute, the Commodity Exchange Act (CEA). Without comparable language in both the FPA and NGA, FERC should not issue a similarly broad duty of candor on entities that are communicating about matters subject to the Commission's jurisdiction.

Finally, it is important to note that APGA members are publicly- or municipally-owned natural gas utilities. The NGA grants FERC broad authority to regulate the transportation and sale of gas in interstate commerce. In other words, the NGA provides FERC jurisdiction over natural gas companies.[16] The Act defines "natural-gas company" as a "person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale" and further specifies that a "person" does not include municipalities.[17] In *City of Clarksville, Tenn. v. FERC*,[18] the Court found that municipalities are clearly excluded from the definition of "natural-gas company" based on the plain language of the law. Notably, the Court observed that NGA "Section 1(b) is not power-conferring or jurisdiction-creating and should not be read to say that FERC has jurisdiction over anything and everything related to the transportation and sale for resale

[15] 7 U.S.C. § 9(2), which codifies Section 6(c)(2) of the Commodity Exchange Act (CEA).

[16] *See* 15 US.C. § 717 (first section of NGA, entitled "Regulation of natural gas companies").

[17] NGA § 717a.

[18] No. 16-1244 D.C. Cir. (Apr. 24, 2018).

of natural gas in interstate commerce."[19] This is relevant to the proposed rule, as the NGA provisions FERC cites as supporting the NOPR are not sufficient to bring municipally-owned gas systems, like APGA members, under its jurisdiction for this rulemaking.

Because the FPA cannot be extended to regulate entities that are only within FERC's jurisdiction through the NGA, 35.41(b) is not an appropriate basis for establishing such a broad duty of candor that would impact entities that fall within the purview of the NGA. Similarly, no provision within the FPA or other statute is a legitimate basis establishing such a broad duty of candor, as each existing duty has narrowly arisen out of those statutes. Finally, as the Court declared in *Clarksville*, municipalities are clearly outside of the scope of the NGA and consequently outside of FERC's jurisdiction for such a rulemaking. Accordingly, the NOPR, especially as it applies to municipally-owned gas systems, is outside of FERC's jurisdiction and should be withdrawn.

E. The NOPR is void for vagueness.

The vagueness doctrine pertains to due process concerns and arises primarily from the Fifth Amendment of the U.S. Constitution. Under the doctrine, impermissibly vague laws are deemed to be unconstitutional. In *Grayned v. City of Rockford*,[20] the court laid out three reasons why an overly vague law is unconstitutional. First, laws must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly."[21] More plainly stated, laws must give a reasonable

[19] *Id.*

[20] 408 U.S. 104 (1972).

[21] *Id.* at 108.

person "fair warning" of what they prohibit, else be in violation of due process.[22] Second, to prevent "arbitrary and discriminatory enforcement," "laws must provide explicit standards for those who apply them." These tenets have also been upheld in more recent cases.[23] Finally, vague laws that impact freedom of speech granted by the First Amendment are of great concern as they may "operate to inhibit the exercise of [those] freedoms" by chilling communication between covered entities in order to avoid potential violations of the law.[24]

APGA does not believe that the proposed Duty of Candor provides a reasonable person fair warning of what types of communication are prohibited, let alone whether the person is intended to be covered by the overly broad rule. If finalized, the NOPR would apply to any communications – whether verbal or written, informal or formal, required or voluntary – from "any entity," which includes individuals and organizations, with "the Commission, Commission-approved market monitors, Commission-approved regional transmission or transportation providers, or the Electric Reliability Organization and its associated Regional Entities."[25] This far-reaching language means that APGA members can be encompassed by the scope of the NOPR, among many others, such landowners involved in a FERC-related dispute. It also covers communications between private

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[22] *Id.* at 109.

[23] *See, e.g., FCC v. Fox TV Stations, Inc.,* 567 U.S. 239, 253 (2012) ("[a] fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required"); *see also Freeman United Coal Mining Co. v. Fed. Mine Safety & Health Review Comm'n,* 108 F.3d 358, 362 (D.C. Cir. 1997) (a "reasonably prudent person, familiar with the conditions the regulations are meant to address and the objectives the regulations are meant to achieve, would have fair warning of what the regulations require").

[24] *Id.* (internal quotations and citations omitted).

[25] NOPR at 49791.

entities, as opposed to just communications between FERC-regulated entities and the Commission or other quasi-governmental agencies. Because of its breadth, a reasonable person cannot be expected to determine whether every communication it has with a covered entity is subject to the NOPR.

Furthermore, the NOPR fails to explain how FERC will avoid arbitrary and discriminatory enforcement. Not only will reasonable entities struggle to determine whether their communication is within the scope of the rule, but the NOPR also fails to outline what type of penalties any entity found in violation of the rule may face. The NOPR also notes that "[t]he Commission retains discretion not to pursue enforcement actions in such instances and will exercise that discretion, as appropriate, in implementing the proposed regulation."[26] In the plain language of the NOPR, FERC is demonstrating that it does not have explicit standards for applying this proposed duty of candor, which could lead to arbitrary and capricious enforcement. Accordingly, a reasonable entity may not know whether its communication is covered by the rule, nor will it know whether FERC will bring an enforcement action and, if so, what penalty of such an enforcement action may be.

Finally, as suggested in Commissioner Danly's dissent, the breadth of the proposed rule and vagueness accompanying it also raises First Amendment concerns. As discussed above, APGA is concerned about how the overly broad NOPR will chill communications between those engaged in activities under the Commission's jurisdiction, which are crucial to daily operations but even more so during emergency

[26] *Id.* at 49890.

situations. The scenario Commissioner Danly lays out where employees at one utility may hesitate to engage with counterparts at another utility without legal counsel, thus deterring collaboration amongst the industry,[27] is a real possibility under this proposed rule. Furthermore, for members of the public who wish to engage with the Commission or other covered entities, concerns about complying with this overly broad duty could also lead to chilling their engagement and consequently raises significant First Amendment protection concerns.

For the above reasons, the proposed rule is unconstitutionally vague and consequently void. Accordingly, FERC must withdraw the NOPR.

F. The NOPR is impermissibly and inappropriately broad.

The NOPR is so broad that is the Commission would be exceeding its jurisdiction to enforce the proposed rule. The NOPR notes "it is not the Commission's intention to investigate or penalize all potential violations of the proposed regulation."[28] Further, FERC "[a]s a general matter, … do[es] not intend to penalize inadvertent errors, especially those of limited scope and impact." This alone demonstrates that the NOPR is overly broad and is clearly missing a materiality requirement for all communications, not just omissions.

Looking back to the CFTC example, the language within the CEA is much more narrowly tailored than that in FERC's NOPR. For instance, CFTC's duty of candor only applies to material communications, a standard only afforded to omissions in FERC's

[27] NOPR at 4972.

[28] *Id.* at 49790.

NOPR. FERC also places all burden on a potentially offending entity to prove that due diligence was completed to raise a defense, with no consideration of the entity's intent in the communication. CFTC's duty, on the other hand, adds the important standard of "*scienter*" whether "the person knew, or reasonably should have known" the information was inaccurate.

Not only does FERC wish to regulate communications between entities and itself, but the NOPR also expands its reach to communications between two private parties, such as a pipeline operator and a locally owned distribution company (or, in the case of APGA members, a local government entity over which FERC has no jurisdiction). While FERC has long regulated communications between certain entities and quasi-governmental organizations (e.g., RTOs and ISOs) under the FPA through 35.41(b), no such authority has ever existed for natural gas counterparts. Furthermore, neither the FPA nor NGA has been used to govern communications between two private entities. The attempt to regulate such communications is an extreme overreach of FERC's powers and very clearly not granted to the Commission under the NGA, FPA, or any of the many statutes it cites in the NOPR.

Again, the provision of the CEA quoted above does not make such a broad reach but still provides CFTC with a path to enforcement: an entity that makes a material misstatement of fact to CME Group may be in violation of the exchange's rules of conduct, not necessarily CFTC's duty of candor. However, CFTC cannot bring an enforcement action against that entity for the misstatement, only CME Group can, unless of course that misstatement was done in an effort to manipulate markets, something for which

CFTC does have authority to bring an enforcement action. The same is currently true for FERC, further discounting the need for such a far-reaching duty of candor.

IV. CONCLUSION

APGA respectfully requests that the Commission consider the above comments and again asks the Commission to withdraw the NOPR so as to not unduly and inappropriately chill communication between market participants. If you have any questions regarding this submission, please do not hesitate to contact the undersigned.

Respectfully submitted,

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