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FERC Proposes Expansion of Duty of Candor Obligations¹

On July 28, 2022, the Federal Energy Regulatory Commission (“FERC” or the “Commission”) issued a Notice of Proposed Rulemaking (the “Notice”) in Docket No. RM22-20-000 to expand the scope of the duty of candor to all entities making communications on matters subject to the jurisdiction of the Commission.²

Through the Notice, the Commission explains that it intends to fill in a “patchwork” of existing rules and regulations concerning a regulated entity’s obligation to provide accurate and truthful information to the Commission. For example, the Commission’s current rules require that a variety of submissions to FERC, such as periodic or annual reports, written statements in investigations, filings, and testimony and evidence, be submitted under oath.³ Similarly, Commission precedent imposes a requirement on pipeline applicants seeking certificates of public convenience and necessity under Section 7 of the Natural Gas Act (“NGA”) to disclose “fully and forthrightly...all information relevant to the application.”⁴ In addition, in any filing with the Commission, the signature required for each filing constitutes a certification that “[t]he contents are true as stated, to the best knowledge and belief of the signer.”⁵

Current 18 CFR § 35.41(b) imposes a broad duty of candor on *communications* by entities who have sought or obtained electric market-based rate authority to sell or resell electric energy, capacity, or ancillary services (“Seller”). That rule requires that Sellers must submit truthful and accurate information in any communication with the Commission, Commission-approved market monitors, Commission-approved regional transmission organizations, Commission-approved independent system operators, or with jurisdictional transmission providers, unless the Seller exercises due diligence to prevent such an occurrence.

However, these rules have limits. For example, the duty of candor for communications under section 35.41(b) does not apply to non-Sellers and other entities otherwise subject to the jurisdiction of the Commission. In the Notice, the Commission also emphasized various “gaps” in other FERC regulations, which allegedly allow for the submission of false statements influencing the Commission to reach decisions it otherwise would not have made.⁶

1. The views expressed in this publication are those of the authors only and do not necessarily reflect the views of the law firm of Blank Rome LLP or any entity represented by the firm.

2. *Duty of Candor*, Notice of Proposed Rulemaking, 180 FERC ¶ 61,052 (2022).

3. Notice at PP 8-10.

4. *Black Marlin Pipeline Co.*, 4 FERC ¶ 61,039, at 61,088 (1978).

5. 18 C.F.R. §385.2005(a)(2)(ii) (2022).

6. Notice at PP 21-22.

Accordingly, the Commission proposed that the following rule be added at 18 CFR part 1d:

§ 1d.1 Accuracy of communications.

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.⁷

The breadth of the proposed rule is significant. First, the proposed rule requires that all entities (*i.e.*, organizations or individuals) owe a duty of candor for communications on matters subject to the jurisdiction of the Commission. Consequently, the proposed rule imposes a duty of candor on communications between market participants, such as pipelines and shippers, on matters subject to FERC's jurisdiction. Further, the proposed rule allows for an affirmative defense where an entity is accused of providing false information or communications but nonetheless exercised due diligence to ensure the communication's accuracy.⁸ The Commission explained that the due diligence inquiry would include "all facts related to whether reasonable steps were taken by the communicator(s) to ensure the accuracy and completeness of a communication" including "whether a communication had to be made without sufficient time for additional diligence to be undertaken, the importance and materiality of the communication to the recipient, the duration and consistency of the communication at issue, whether the communication was voluntary or required, whether the communication was in response to a specific request for information or was unsolicited, the size and

sophistication of the communicator(s), and the communication's effect on the marketplace or the Commission's regulatory responsibilities."⁹ The Commission assured that the proposed rule was meant to supplement, and not supersede its existing rules and regulations that require truthfulness before the Commission.¹⁰

The Commission rationalized the proposed rule as being a natural extension of the duty of candor required by Sellers under section 35.41(b), which was upheld by the courts in *Kourouma v. FERC*, 723 F.3d 274 (D.C. Cir. 2013) and *FERC v. Coaltrain Energy, L.P.*, No. 2:16-cv-732, 2018 WL 7892222 (S.D. Ohio March 30, 2018). Moreover, the Commission emphasized that the proposed rule is necessary for FERC to carry out its statutory obligations to ensure wholesale rates, and rules or practices directly affecting such rates, are just and reasonable. The Commission reasoned that the existing requirements do not encompass all situations where FERC should be assured that it is receiving accurate information in the course of regulatory oversight.¹¹

The Commission's Notice also provided interpretive guidance for the proposed rule. For instance, the Notice provides that the Commission interprets "entity" as including individuals and businesses, and the duty applies to both the entity making the communication as well as the entity responsible for the communication.¹² Further, "communications" include "informal and formal communications, verbal or written, and via any method that may be used for transmission."¹³ Finally, the proposed rule would apply to communications relating to matters subject to FERC's jurisdiction. Thus, communications that are tangential or unrelated to matters subject to the jurisdiction of the Commission, such as employer/employee disputes within a jurisdictional entity, or contracts between jurisdictional entities for general services, are not covered by the proposed rule. FERC also notes that the proposed rule "would not impose a general affirmative duty of disclosure, but would apply to communications whether they are voluntary or required."¹⁴

7. Notice at p. 29.

8. *Id.* at P 43.

9. *Id.* at P 43.

10. *Id.* at P 30.

11. *Id.* at PP 35-37.

12. *Id.* at P 40.

13. *Id.* at P 41. The Notice interprets the term "Commission" under this provision to encompass communications with Commission staff. The duty of candor as it relates to other covered entities would extend to communications with individuals employed or acting on behalf of those entities.

14. *Id.* at P 30.

Despite the sweeping language of the proposed rule, the Notice cautioned that the Commission does not intend to investigate or penalize all potential violations of the proposed rule and retains discretion not to pursue enforcement actions in all instances of a violation.¹⁵ The Notice itself also does not provide if there will be a new penalty for a violation of the proposed rule.

Commissioner Danly dissented from the proposed rule. In his dissenting opinion, Commissioner Danly argued that the proposed rule is “chillingly broad in its scope” with the potential of deterring cooperation and communication in the industry, and could infringe on constitutionally protected speech.¹⁶ Danly highlighted that the proposed rule does not have a materiality standard and does not distinguish any “knowledge or intent” associated with a potential violation.¹⁷ Danly disagreed with the Commission’s use of “discretion” when determining whether to investigate a potential violation of the proposed rule and asserted that the proposed rule creates a constitutional due process concern as being void for vagueness.¹⁸ Danly invited comments on ways to narrow the duty of candor to avoid giving “sweeping enforcement powers” to the Commission, and whether an intent or materiality requirement would avoid concerns of the proposed rule infringing on First Amendment protected speech.¹⁹

ANALYSIS

The new duty of candor imposed on all regulated entities opens the door for increased liability, with few express limits. While the proposed rule is silent on what penalties should be expected from a violation, Commissioner Danly suspects that the Commission would retain discretion to

penalize a violation under its existing penalty guidelines or on a case-by-case basis.²⁰ Several modifications to the proposed rule could taper its broad impacts. First, the rule should expressly be limited to statements regarding facts. As drafted, it is not. Parties appearing before the Commission frequently disagree on the application of law or policy to facts. As written, the rule provides an opportunity to sanction disagreements regarding the application of law and policy to facts, raising similar concerns to those expressed in Commissioner Danly’s dissenting opinion. Second, adoption of a materiality standard is crucial to the effective implementation of the new rule. Third, an intent requirement seems warranted if the new rule is to provide a basis for future enforcement actions.

Comments on the proposed rule will be due 60 days from the date the Notice is published in the Federal Register. The Commission specifically invited comments from the public on whether the scope of communications subject to the proposed rule is adequate or should be expanded,²¹ the Commission’s authority to implement the proposed rule,²² and additional comments or requests for clarification on the interpretive guidance and application provided in the Notice.²³

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15. For example, the Notice indicates that “[e]ven where due diligence cannot be demonstrated, it is not the Commission’s intention to investigate or penalize all potential violations of the proposed regulation. As a general matter, we do not intend to penalize inadvertent errors, especially those of limited scope and impact.” *Id.* at P 44.

16. Notice, Danley Dissent at P 1.

17. *Id.*

18. *Id.* at PP 7, 14.

19. *Id.* at P 17.

20. *Id.* at 12.

21. Notice at P 31.

22. *Id.* at P 38.

23. *Id.* at PP 39-43.