

Attachment C



April 4, 2018

SUBMITTED VIA EMAIL ON APRIL 4, 2018.

FOIA Requester Service Center
1000 Independence Avenue, SW
Mail Stop MA-46
Washington, DC 20585

Re: Freedom of Information Act Request for Records Concerning Department of Energy's Federal Power Act Emergency Authority.

Dear National Freedom of Information Officer:

Environmental Defense Fund ("EDF") respectfully requests records, as that term is defined at 5 U.S.C. § 552(f)(2) of the Freedom of Information Act ("FOIA"), of the U.S. Department of Energy ("DOE" or "the Department"), concerning the Department's use of its emergency authority under the Federal Power Act.¹

Specifically, EDF requests that DOE search the records of specific individuals within the Department for any correspondence (external or internal) regarding DOE's potential use and consideration of its emergency authority to assist coal and nuclear plants. This request includes all external and internal correspondence sent from or received by the following individuals [hereinafter "custodians"]:

- Rick Perry, Secretary of Energy,
- Dan Brouillette, Deputy Secretary,
- Brian McCormack, Chief of Staff,
- Catherine Jereza, Principal Deputy Assistant Secretary, Office of Electricity Delivery and Energy Reliability,
- Patricia Hoffman, Deputy Assistant Secretary, Office of Electricity Delivery and Energy Reliability,
- Paul Dabbar, Under Secretary for Science and Energy,
- Bruce Walker, Assistant Secretary of Office of Electricity and Energy Reliability,
- Steve Winberg, Assistant Secretary of Fossil Energy, and

¹ See generally, DOE, *DOE's Use of Federal Power Act Emergency Authority*, <https://www.energy.gov/oe/services/electricity-policy-coordination-and-implementation/other-regulatory-efforts/does-use>; 16 U.S.C. § 824a(c).

- Travis Fisher, former Senior Advisor,

that contains any of the following terms:

- “section 202,” “sec. 202” “202(c),” or “202 (c),”
- “824a,”
- “emergency authority,” or “emergency order.”

Additionally, EDF requests *all* correspondence between the custodians and:

- any employee, contractor, or representative of FirstEnergy Solutions,
- any employee, contractor, or representative of Gibson, Dunn & Crutcher LLP,
- Jeff Miller,² and
- Corey Lewandowski.

“Correspondence” includes, but is not limited to, hard copy correspondence and electronic correspondence such as emails (and any attachments thereto), text messages, and correspondence transmitted through any other electronic platform such as messaging applications or storage of documents in commonly accessible locations. “Correspondence” includes transmissions where the individual whose records are searched is the sender or recipient, regardless of whether such individual is the sole, primary, or intended recipient.

If any of the above individuals are using personal email accounts to conduct DOE matters, EDF respectfully requests that DOE search those personal accounts, and produce responsive records found therein, in addition to searching and providing records from each individual’s official DOE email account.³

EDF respectfully requests that DOE search records created or transmitted from January 1, 2018, through the date when DOE conducts its search for responsive records.

If any of the records sought in this request are deemed by DOE to be properly withheld under a FOIA exemption, 5 U.S.C. § 552(b), please provide EDF with an explanation, for each such record or portion thereof, sufficient to identify the record and the particular exemption(s) claimed.

Request for Expedited Processing

Pursuant to 5 U.S.C. § 552(a)(6)(E) and 10 C.F.R. § 1004.5(d)(6), EDF respectfully seeks expedited processing based on the “compelling need” that EDF is “primarily engaged in disseminating information and there is an urgency to inform the public about actual or alleged

² Mr. Miller is a lobbyist for FirstEnergy, as described in Steven Mufson, *This Is a ‘Test Case’ for Whether Trump Is Really Serious About Saving Coal and Nuclear Plants*, Washington Post (Apr. 3, 2018), https://www.washingtonpost.com/business/economy/this-is-a-test-case-for-whether-trump-is-really-serious-about-saving-coal-and-nuclear-plants/2018/04/03/8db450a6-36a6-11e8-8fd2-49fe3c675a89_story.html.

³ See e.g., Email from Travis Fisher, Senior Advisor, DOE, to Ohio Representative Bill Seitz, (Apr. 16, 2017) (discussing potential areas for wholesale power market reform while using personal email account), available at <https://www.documentcloud.org/documents/4385284-Travis-Fisher-Emailed-Renewable-Energy-Opponents.html> (p. 6).

Federal Government activity.” In support of this request, I certify that the following statements are true and correct to the best of my knowledge and belief:

1. EDF engages in extensive, daily efforts to inform the public about matters affecting environmental and energy policy. For example, EDF has multiple channels for distributing information to the public, including through direct communication with its more than 2 million members, press releases, blog posts, active engagement on social media, and frequent appearances by staff in major media outlets.⁴
2. This request concerns a matter of current concern and exigency to the public. In February, DOE Assistant Secretary Bruce Walker stated that DOE “would never use” its emergency authority to assist uneconomic plants.⁵ On March 29, FirstEnergy Solutions filed an application with DOE requesting an emergency order to provide cost recovery to coal and nuclear plants in the PJM Interconnection, contending that market conditions in the region are a “threat to energy security and reliability.”⁶ Typically, power companies file these applications only after planning and coordinating with DOE and the White House, and there are indications that FirstEnergy has been in contact with DOE on this subject for several months.⁷ FirstEnergy’s application relies heavily upon a recent report authored by DOE’s National Energy Technology Laboratory⁸—publicized by DOE just two days before the application was filed⁹—to support its central contention that “immediate action is needed to ensure that traditional baseload generation receives

⁴ See, e.g., Steven Mufson, *This Is a ‘Test Case’ for Whether Trump Is Really Serious About Saving Coal and Nuclear Plants*, Washington Post (Apr. 3, 2018) (quoting Dick Munson, Director of Midwest Energy for EDF), https://www.washingtonpost.com/business/economy/this-is-a-test-case-for-whether-trump-is-really-serious-about-saving-coal-and-nuclear-plants/2018/04/03/8db450a6-36a6-11e8-8fd2-49fe3c675a89_story.html; Michael Panfil and Dick Munson, *FirstEnergy Shamelessly Begg DOE to Prop Up Uneconomic Coal and Nukes*, EDF Energy Exchange, (Mar. 30, 2018), <http://blogs.edf.org/energyexchange/2018/03/30/firstenergy-shamelessly-begs-doe-to-prop-up-uneconomic-coal-and-nukes/>; Jeff St. John, *Grid Operators Report to FERC on Grid Resilience*, Greentech Media (Mar. 9, 2018) (quoting Michael Panfil, Director of Federal Energy Policy at EDF), https://www.greentechmedia.com/articles/read/grid-operators-report-ferc-resilience#gs.jOD_LLI; Frank Andorka, *19th Century Grid Unsuitable To 21st Century Electricity Distribution*, Solar Wakeup (Mar. 12, 2018) (quoting Michael Panfil, Director of Federal Energy Policy at EDF), <http://www.solarwakeup.com/2018/03/12/19th-century-grid-unsuitable-to-21st-century-electricity-distribution/>.

⁵ Gavin Bade, *DOE Would Never Use Emergency Order for Uneconomic Plants, Walker Says*, Utility Dive (Feb. 20, 2018), <https://www.utilitydive.com/news/doe-would-never-use-emergency-order-for-uneconomic-plants-walker-says-1/517455/>.

⁶ Robert Walton and Gavin Bade, *FirstEnergy asks DOE for Emergency Action to Save PJM Coal, Nuke Plants*, Utility Dive (Mar. 29, 2018), <https://www.utilitydive.com/news/firstenergy-asks-doe-for-emergency-action-to-save-pjm-coal-nuke-plants/520280/>; see also FirstEnergy Solutions Corp., *Re: Request for Emergency Order Pursuant to Federal Power Act Section 202(c)* (Mar. 29, 2018), <https://statepowerproject.files.wordpress.com/2018/03/fes-202c-application.pdf> [hereinafter “FirstEnergy 202(c) Application”].

⁷ See, Rod Kuckro and Sam Mintz, *How FirstEnergy Used a DOE Lab Study to Boost Bid for Help*, E&E News (Apr. 2, 2018), <https://www.eenews.net/energywire/stories/1060077883>.

⁸ See Peter Balash et. al, *Reliability, Resilience, and the Oncoming Wave of Retiring Baseload Units Volume 1: The Critical Role of Thermal Units During Extreme Weather Events*, NETL (Mar. 13, 2018), https://www.netl.doe.gov/energy-analyses/temp/ReliabilityandtheOncomingWaveofRetiringBaseloadUnitsVolumeITheCriticalRoleofThermalUnits_031318.pdf.

⁹ DOE, Office of Fossil Energy, *NETL Study Highlights the Importance of Coal for Power Generation During “Bomb Cyclone” Power Demands* (Mar. 27, 2018), <https://www.energy.gov/fe/articles/netl-study-highlights-importance-coal-power-generation-during-bomb-cyclone-power-demands>.

compensation commensurate with the value it provides to the Nation and thus remains in service.”¹⁰

3. This request concerns Federal Government activity—specifically, the possibility that DOE will use section 202(c) of the Federal Power Act to issue economically and environmentally consequential orders affecting the power sector. Responsive records will inform the public about DOE’s approach to these critical issues, including the extent and content of communication between DOE and external entities active on those issues. In particular, the temporal proximity of DOE’s report and FirstEnergy’s petition raise questions of whether FirstEnergy is exercising private or disproportionate influence over DOE’s consideration of these issues. Expedited processing is critical so that these concerns may be confirmed or allayed.
4. Once a 202(c) emergency application is filed with DOE, the Secretary of Energy may grant that application within a few days.¹¹ Following FirstEnergy’s emergency application to DOE, a broad coalition of industry trade associations requested notice and opportunity to comment on FirstEnergy’s application.¹² The value of these records would be significantly enhanced if they are released before the Secretary has issued a determination on FirstEnergy’s petition. Withholding these records until after the petition’s disposition could thwart public advocacy on a matter of broad public impact and would heighten concerns about DOE’s independence and influences.

Request for Fee Waiver

As a non-partisan, non-profit organization that provides information that is in the public interest, EDF respectfully requests a waiver of fees associated with this request. In accordance with 5 U.S.C. § 552(a)(4)(A)(iii), we are not seeking information for any commercial purpose and the records received will contribute to a greater public understanding of an issue of considerable public interest: DOE’s analysis of potential use of its emergency authority to aid coal and nuclear plants in the wholesale power markets. EDF is well positioned to disseminate the records to the public, as we routinely issue press releases, action alerts, reports, analyses, and other public outreach materials. We are also well-qualified to present the records to the public in a manner that clearly conveys their value, and we fully intend to disseminate newsworthy information

¹⁰ See, e.g., First Energy 202(c) Application at 4 (noting that “the findings in the NETL Report fully support the Secretary determining that an emergency exists within the meaning of FPA Section 202(c)”); *id.* at 6; *id.* at 7 (“[A]s the NETL Report notes, this projection does not ‘adequately capture the risk’ of retirements.”); *id.* at 7-8 (citing the NETL record for the assertion that “[a]s more of these units retire, the ability of the system to respond to extreme events with reliance, let alone economically, deteriorates”); *id.* at 8 (noting that “[t]he NETL Report similarly summarized the problem: ‘Markets do not currently compensate resilience, and thus that capability is steadily diminishing due to competitive pressures of ongoing, baseload power plant early retirements’”); *id.* at 9 (citing the NETL report during discussion on the possibility of a fuel shortage event); *id.* at 18 (noting that the NETL Report “concluded that demand in PJM ‘could not have been met without coal’”).

¹¹ See e.g., DOE, Order No. 202-17-1 (Apr. 14, 2017) (granting emergency application filed on April 11), <https://www.energy.gov/sites/prod/files/2017/04/f34/Oklahoma.pdf>.

¹² See Letter from Joint Energy Industry Trade Associations to James Richard Perry, Secretary of Energy, *Re: Joint Request for Notice-and-Comment Procedures Regarding the March 29 Request of FirstEnergy Solutions*, (Mar. 30, 2018).

received in response to this request. Accordingly, we respectfully request that the documents be furnished without charge.

For ease of administration and to conserve resources, we will accept documents produced in a readily accessible electronic format. In the event EDF's request for a fee waiver is denied or if you have any questions about this request, please contact me immediately by telephone at (202) 572-3318 or by email at blevitan@edf.org.

Respectfully submitted,

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