



REQUEST UNDER THE FREEDOM OF INFORMATION ACT

June 23, 2014

Leonard Tao
Chief FOIA Officer
FERC
888 First Street, NE
Washington, DC 20426

BY ELECTRONIC MAIL: FOIA-CEII@ferc.gov

RE: FOIA Request — Commission records regarding FERC conditioning approval of Constellation Energy’s merger with Exelon Corporation upon settlement of a FERC enforcement action against Constellation Energy

Dear Mr. Tao or FERC Freedom of Information Officer,

On behalf of the Energy & Environment Legal Institute (EELI), and the Free Market Environmental Law Clinic (FMELC) as co-requester and EELI counsel, please consider this request pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq.* Both entities are non-profit public policy and/or legal institutes organized under section 501(c)3 of the tax code and with research, legal, investigative journalism and publication functions, as well as a transparency initiative seeking public records relating to environmental and energy policy and how policymakers use public resources, all of which include broad dissemination of public information obtained under open records and freedom of information laws.

Please provide us, within twenty working days,¹ **copies of all emails:**

1) sent or received by either Jon Wellinghoff, or Norman Bay of FERC's Office of Enforcement, 2) which use in either the Subject field or their body, a) "Constellation" or "Exelon", and b) in either the Subject field or their body, "approve", "merge" (which also includes "merger"), "consent", and/or "settle" (which also includes "settled" and "settlement").

Responsive records will be dated over the five-month period January 1, 2012 through May 31, 2012.

Background to the Request

On March 9, 2012, FERC settled its investigation into Constellation Energy with regard to the latter's trading in the New York Independent System Operator energy market. This settlement expressly created a nexus between FERC approving a proposed merger between Constellation and Exelon Corporation and Constellation's payment to FERC of a record settlement of \$245 million (\$135 million in civil fines, and disgorging \$110 million in profits).

That is, on its face, FERC conditioned approval of the Exelon-Constellation merger on this record payment. Despite the record sum involved and the remarkable orchestration of this nexus, when asked about his knowledge of the arrangement FERC's director of enforcement Norman Bay recently left the reasonable inference that he had little knowledge of the matter, if while largely sidestepping the question (*see* Answer to "Murkowski #5"²).

¹ *See Citizens for Responsible Ethics in Washington v. Federal Election Commission*, 711 F.3d 180, 186 (D.C. Cir. 2013), and discussion of same, *infra*.

² Testimony of Norman Bay to United States Senate Committee on Energy and Natural Resources, available at http://www.energy.senate.gov/public/index.cfm/files/serve?File_id=198f6249-394c-482d-9c7e-0d0ec80692cf

Paragraph 44 of this Stipulations and Consent Decree stated “The Effective Date of this Agreement shall be **the later of the date on which**: (a) the Commission issues an order approving this Agreement without material modification; **or** (b) the merger pursuant to the Agreement and Plan of Merger among Constellation Energy Group, Inc., Exelon Corporation, and Bolt Acquisition Corporation, dated April 28, 2011, **is consummated.**” This agreement was agreed to and signed by Norman Bay as head of FERC’s Enforcement Division. The Consent Decree was approved by FERC on March 9th, 2012. Also on March 9th, 2012 FERC approved the merger between Constellation and Exelon. It was the timing of these two events that raised sufficient concern that Mr. Bay faced questioning by the Senate Committee on Energy and Natural Resources about whether these two events were related.

This request seeks more information regarding that matter, clarifying an oblique response by Mr. Bay to an important question about this arrangement between FERC and Constellation, and how FERC approval of the Constellation-Exelon merger were in linked or related.

The importance of this information was further heightened by the Thursday, June 19, 2014 production of 154 pages of redacted records in *E&E Legal et al v. FERC* (14-cv-00502) (D.D.C.). In those records we see how important the Constellation settlement — expressly contingent upon a merger approval — was to FERC and specifically how FERC believed it was one of the most important aspects of Norman Bay’s enforcement tenure (*see e.g.*, February 6, 2013 email from Chairman Wellinghoff’s chief of staff James Pederson to various FERC staff (“Copying the Chairman”), FERC production pp. 45, 52, 58, 60, 65, 73, 81, 88, 99, 103, 109, 112, 135.

Please be advised we intend to fully protect our appellate rights in this matter, which is of particularly timely public interest for reasons including those noted, *supra*. We note a FERC pattern of presumptively improper withholding-in-full has made litigation necessary (see e.g., *EELI et al. v. FERC* (D.D.C. 14-502 (ABJ) (FERC request no. 14-01)) and *STS Energy Partners LP v. FERC* (D.D.C 14-591 (JDB) (requests 13-96, 14-08)), which impropriety of the withholdings FERC later affirmed by subsequent release but only after making requesters appeal and then file suit.

FOIA is identity- and motive-neutral, and no agency may discriminate among or disparately treat otherwise similarly situated requesting parties, or seek to protect employees or an agency outside of the statute's legitimate, prescribed exemptions.

It is well-settled that Congress, through FOIA, “sought ‘to open agency action to the light of public scrutiny.’” *DOJ v. Reporters Comm. for Freedom of Press*, 498 U.S. 749, 772 (1989) (quoting *Dep’t of Air Force v. Rose*, 425 U.S. 353, 372 (1976)). The legislative history is replete with reference to the “‘general philosophy of full agency disclosure’” that animates the statute. *Rose*, 425 U.S. at 360 (quoting S.Rep. No. 813, 89th Cong., 2nd Sess., 3 (1965)). The act is designed to “pierce the veil of administrative secrecy and to open agency action to the light of scrutiny.” *Department of the Air Force v. Rose*, 425 U.S. 352 (1976). It is a transparency-forcing law, consistent with “the basic policy that disclosure, not secrecy, is the dominant objective of the Act.” *Id.*

Withholding and Redaction

Please identify and inform us of all responsive or potentially responsive records within the statutorily prescribed time, and the basis of any claimed exemptions or privilege and to which specific responsive or potentially responsive record(s) such objection applies.

FERC must release “factual content”. As the D.C. Court of Appeals noted, an agency must “describe the factual content of the documents and disclose it or provide an adequate justification for concluding that it is not segregable from the exempt portions of the documents.” *King v. Department of Justice*, 830 F.2d 210, at 254 n.28 (D.C. Cir. 1987). As an example of how entire records should not be withheld when there is reasonably segregable information, we note that at bare minimum basic identifying information (who, what, when, e.g., To, From, Date, Subject) is not “deliberative”. As the courts have emphasized, “the deliberative process privilege directly protects advice and opinions and *does not permit the nondisclosure of underlying facts* unless they would indirectly reveal the advice, opinions, and evaluations circulated within the agency as part of its decision-making process.” *See Mead Data Central v. Department of the Air Force*, 566 F.2d 242, 254 fn.28 (D.C. Cir. 1977) (emphasis added).

Pursuant to high-profile and repeated promises and instructions from the president and attorney general (see, *infra*) we request FERC err on the side of disclosure and not delay production of this information of great public interest through lengthy review processes to deliberate which withholdings they may be able to justify. This is particularly true for any information that FERC seeks to claim as reflecting (the oft-abused, per even Attorney General

Holder) “deliberative process”, in the absence of any actual formal FERC deliberation being underway truly antecedent to the adoption of an agency policy on the relevant matters.

Indeed, requesters note that the nature of records that would be responsive to this request indicates they are highly unlikely to include any possible actual deliberative process as delineated by the courts (*see, e.g., Jordan v. DoJ*, 591 F.2d 753, 774 (D.C. Cir. 1978)).

Therefore, if FERC claims any records or portions thereof are exempt under *any* of FOIA’s discretionary exemptions we request you exercise that discretion and release them consistent with statements by the President and Attorney General, *inter alia*, that **“The old rules said that if there was a defensible argument for not disclosing something to the American people, then it should not be disclosed. That era is now over, starting today”** (President Barack Obama, January 21, 2009), and **“Under the Attorney General’s Guidelines, agencies are encouraged to make discretionary releases. Thus, even if an exemption would apply to a record, discretionary disclosures are encouraged.** Such releases are possible for records covered by a number of FOIA exemptions, including Exemptions 2, 5, 7, 8, and 9, but they will be most applicable under Exemption 5.” (Department of Justice, Office of Information Policy, OIP Guidance, “Creating a ‘New Era of Open Government’”).

Nonetheless, if your office takes the position that any portion of the requested records is exempt from disclosure, please inform us of the basis of any partial denials or redactions. In the event that some portions of the requested records are properly exempt from disclosure, please disclose any reasonably segregable, non-exempt portions of the requested records. *See* 5 U.S.C. §552(b).

If it is your position that a document contains non-exempt segments and that those non-exempt segments are so dispersed throughout the documents as to make segregation impossible, please state what portion of the document is non-exempt and how the material is dispersed through the document. *See Mead Data Central v. Department of the Air Force*, 455 F.2d at 261. Further, we request that you provide us with an index of those documents as required under *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1972), with sufficient specificity “to permit a reasoned judgment as to whether the material is actually exempt under FOIA” pursuant to *Founding Church of Scientology v. Bell*, 603 F.2d 945, 959 (D.C. Cir. 1979), and “describ[ing] each document or portion thereof withheld, and for each withholding it must discuss the consequences of supplying the sought-after information.” *King v. Department of Justice*, 830 F.2d at 223-24.

Claims of non-segregability must be made with the same practical detail as required for claims of exemption in a *Vaughn* index. If a request is denied in whole, please state specifically that it is not reasonable to segregate portions of the record for release.

Satisfying this Request contemplates providing copies of documents, in electronic format if you possess them as such, otherwise photocopies are acceptable.

Please provide responsive documents in complete form, without any deletions or other edits and with any appendices or attachments and related email, text or Instant message threads as the case may be.

Request for Fee Waiver

This discussion is lengthy solely due to our experience, and that of others³ with agencies improperly using denial of fee waivers to impose delay and require further expenditure of assets, representing an economic barrier to access and an improper means of delaying or otherwise denying access to public records, despite our plainly qualifying for fee waiver. To date, we acknowledge, FERC has recognized our right to fee waiver.

1) Requesters have no commercial interest, disclosure would substantially contribute to the public at large's understanding of governmental operations or activities, on a matter of demonstrable public interest

Requesters Have No Commercial Interest

As such and for the following reasons EELI and FMELC requests waiver or reduction of all costs pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) (“Documents shall be furnished without any charge...if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of government and is not primarily in the commercial interest of the requester”); *see also* 18 CFR § 388.109(c).

The information sought in this request is not sought for a commercial purpose.

Requesters are organized and recognized by the Internal Revenue Service as 501(c)3 educational

³ *See* February 21, 2012 letter from public interest or transparency groups to four federal agencies requesting records regarding a newly developed pattern of fee waiver denials and imposition of “exorbitant fees” under FOIA as a barrier to access, available at <http://images.politico.com/global/2012/03/acluefffeewvrfoialtr.pdf>; *see also* *National Security Counselors v. CIA* (CV: 12-cv-00284(BAH), filed D.D.C Feb. 22, 2012); *see also* “Groups Protest CIA’s Covert Attack on Public Access,” *OpenTheGovernment.org*, February 23, 2012, <http://www.openthegovernment.org/node/3372>.

organizations (not a “Religious...Charitable, Scientific, Literary, Testing for Public Safety, to Foster National or International Amateur Sports Competition, or Prevention of Cruelty to Children or Animals Organization[.]”). It does not charge for copies of its reports. Information provided to EELI and FMELC cannot result in any form of commercial gain to EELI and FMELC. With no possible commercial interest in these records, an assessment of that non-existent interest is not required in any balancing test with the public’s interest.

As non-commercial requesters, EELI and FMELC are entitled to liberal construction of the fee waiver standards. 5 U.S.C.S. § 552(a)(4)(A)(iii), *Perkins v. U.S. Department of Veterans Affairs*, 754 F. Supp. 2d 1 (D.D.C. Nov. 30, 2010). Specifically, the public interest fee waiver provision “is to be liberally construed in favor of waivers for noncommercial requesters.” *McClellan Ecological Seepage Situation v. Carlucci*, 835 F. 2d 1284, 2184 (9th Cir. 1987).

FOIA is aimed in large part at promoting active oversight roles of watchdog public advocacy groups. “The legislative history of the fee waiver provision reveals that it was added to FOIA ‘in an attempt to prevent government agencies from using high fees to discourage certain types of requesters, and requests,’ in particular those from journalists, scholars and nonprofit public interest groups.” *Better Government Ass'n v. State*, 780 F.2d 86, 88-89 (D.C. Cir. 1986) (fee waiver intended to benefit public interest watchdogs), citing to *Ettlinger v. FBI*, 596 F. Supp.

867, 872 (D.Mass. 1984); SEN. COMM. ON THE JUDICIARY, AMENDING THE FOIA, S. REP. NO. 854, 93rd Cong., 2d Sess. 11-12 (1974)).⁴

Congress enacted FOIA clearly intending that “fees should not be used for the purpose of discouraging requests for information or as obstacles to disclosure of requested information.”

Ettlinger v. FBI, citing Conf. Comm. Rep., H.R. Rep. No. 1380, 93d Cong., 2d Sess. 8 (1974) at

8. Improper refusal of fees as a means of withholding records from a FOIA requester constitutes improper withholding. *Ettlinger v. FBI*.

Given this, “insofar as ...[agency] guidelines and standards in question act to discourage FOIA requests and to impede access to information for precisely those groups Congress intended to aid by the fee waiver provision, they inflict a continuing hardship on the non-profit public interest groups who depend on FOIA to supply their lifeblood -- information.” *Better Gov’t v. State* (internal citations omitted). The courts therefore will not permit such application of FOIA requirements that “‘chill’ the ability and willingness of their organizations to engage in activity that is not only voluntary, but that Congress explicitly wished to encourage.” *Id.* As such, agency

⁴ This was grounded in the recognition that the two plaintiffs in that merged appeal were, like requesters, public interest non-profits that “rely heavily and frequently on FOIA and its fee waiver provision to conduct the investigations that are essential to the performance of certain of their primary institutional activities -- publicizing governmental choices and highlighting possible abuses that otherwise might go undisputed and thus unchallenged. These investigations are the necessary prerequisites to the fundamental publicizing and mobilizing functions of these organizations. Access to information through FOIA is vital to their organizational missions.” *Better Gov’t v. State*. They therefore, like requesters, “routinely make FOIA requests that potentially would not be made absent a fee waiver provision”, requiring the court to consider the “Congressional determination that such constraints should not impede the access to information for appellants such as these.” *Id.*

implementing regulations may not facially or in practice interpret FOIA's fee waiver provision in a way creating a fee barrier for requesters.

“This is in keeping with the statute’s purpose, which is ‘to remove the roadblocks and technicalities which have been used by . . . agencies to deny waivers.’” *Citizens for Responsibility & Ethics in Washington v. U.S. Dep’t of Educ.*, 593 F. Supp. 261, 268 (D.D.C. 2009), citing to *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987)(quoting 132 Cong. Rec. S16496 (Oct. 15, 1986) (statement of Sen. Leahy).

Requesters’ ability to utilize FOIA -- as well as many nonprofit organizations, educational institutions and news media who will benefit from disclosure -- depends on their ability to obtain fee waivers. For this reason, “Congress explicitly recognized the importance and the difficulty of access to governmental documents for such typically under-funded organizations and individuals when it enacted the ‘public benefit’ test for FOIA fee waivers. This waiver provision was added to FOIA ‘in an attempt to prevent government agencies from using high fees to discourage certain types of requesters and requests,’ in a clear reference to requests from journalists, scholars and, most importantly for our purposes, nonprofit public interest groups. Congress made clear its intent that fees should not be utilized to discourage requests or to place obstacles in the way of such disclosure, forbidding the use of fees as “‘toll gates” on the public access road to information.’” *Better Gov’t Ass’n v. Department of State*.

As the *Better Government* court also recognized, public interest groups employ FOIA for activities “essential to the performance of certain of their primary institutional activities -- publicizing governmental choices and highlighting possible abuses that otherwise might go

undisputed and thus unchallenged. These investigations are the necessary prerequisites to the fundamental publicizing and mobilizing functions of these organizations. Access to information through FOIA is vital to their organizational missions.” That is true in the instant matter as well.

Indeed, the undersigned groups are precisely the sort the courts have identified in establishing this precedent.

Courts have noted FOIA’s legislative history to find that a fee waiver request is likely to pass muster “if the information disclosed is new; supports public oversight of agency operations, including the quality of agency activities and the effects of agency policy or regulations on public health or safety; or, otherwise confirms or clarifies data on past or present operations of the government.” *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d at 1284-1286.

This information request meets that description, for reasons both obvious and specified. The information sought by EELI and FMELC in this FOIA request will be used to better the public’s understanding of FERC’s fidelity with its obligation to evenly and accurately apply FOIA regardless of requester or political sensitivity of the request’s subject matter.

These records are “agency records” under federal record-keeping and disclosure law, represent senior Agency officials’ communications.

The Requested Records are of Significant Public Interest

The records are of significant public interest for reasons including that the public deserve to review public records possibly shedding light whether the apparent and seemingly improper linkage was created between the settlement between FERC and Constellation and the

Constellation-Exelon merger, whether Norman Bay was aware of or participated in such a linkage which he indicates he was not despite his signature on critical documents, and the veracity of his answers to questions regarding this issue during his testimony to the Senate Energy and Natural Resources Committee.

We emphasize that **a requester need not demonstrate that the records would contain any particular evidence, such as of misconduct.** Instead, the question is whether the requested information is likely to contribute significantly to public understanding of the operations or activities of the government, period. *See Judicial Watch v. Rosotti*, 326 F. 3d 1309, 1314 (D.C. Cir. 2003).

The subject matter of the requested records specifically concerns identifiable operations or activities of the government. The requested correspondence, pertaining to an issue of key policy and legal importance for reasons already described, would contribute significantly to public understanding of the operations or activities of the government about which information there is no other information in the public domain.

As such, release of these records also directly relates to high-level promises by the President of the United States and the Attorney General to be “the most transparent administration, ever”. This transparency promise, in its serial incarnations, demanded and spawned widespread media coverage, and then of the reality of the administration’s transparency efforts, and numerous transparency-oriented groups reporting on this performance, prompting further media and public interest (see, *e.g.*, an internet search of “study Obama transparency”).

This request, when satisfied, will further inform the ongoing public discussions regarding the transparency and integrity of FERC, and whether during Norman Bay's tenure as Director of Enforcement it was properly enforcing section 203 of the Federal Power Act.

For the aforementioned reasons, potentially responsive records unquestionably reflect "identifiable operations or activities of the government" with a connection that is direct and clear, not remote.

The Department of Justice Freedom of Information Act Guide expressly concedes that this threshold is easily met. There can be no question that this is such a case.

Disparate treatment of requesting parties, as appears to be an ongoing practice at least one other agency (EPA) and which we are now exploring as public policy groups as well as media outlets (see, *infra*), is further in line with this ongoing public discussion.

Potentially responsive records reflecting agency practice in making efforts to segregate records as required -- particularly in the event the demonstrated resistance to doing so is unevenly applied in different contexts -- unquestionably reflect "identifiable operations or activities of the government." The Department of Justice Freedom of Information Act Guide expressly concedes that this threshold is easily met. There can be no question that this is such a case. Regardless, these records inescapably reflect how FERC treated all FOIA requesters over a recent period, a governmental operation and activity.

Disclosure is "likely to contribute" to an understanding of specific government operations or activities because the releasable material will be meaningfully informative in

relation to the subject matter of the request. The requested records have an informative value and are “likely to contribute to an understanding of Federal government operations or activities”; this issue is of significant public interest for reasons described, *supra*, and as affirmed by the described public, media and congressional interest.

However, **the Department of Justice’s Freedom of Information Act Guide makes it clear that, in the DoJ’s view, the “likely to contribute” determination hinges in substantial part on whether the requested documents provide information that is not already in the public domain.** There is no reasonable claim to deny that, to the extent the requested information is available to any parties, this is information held only by FERC and/or its correspondents.

It is clear that the requested records are “likely to contribute” to an understanding of your agency’s decisions because they are not otherwise accessible other than through a FOIA request.

The disclosure will contribute to the understanding of the public at large, as opposed to the understanding of the requesters or a narrow segment of interested persons.

EELI and FMELC intend to present these records for public scrutiny and otherwise to broadly disseminate the information it obtains under this request by the means described, herein. EELI and FMELC counsel have spent a great portion of their respective energies over the past two-plus years promoting the public interest advocating sensible policies to protect human health and the environment, including through obtaining information from federal agencies, routinely receiving fee waivers under FOIA for its ability to disseminate public information. These FOI or open-records efforts have also obtained substantial media coverage, including in local, state, national and international English-language outlets.

Further, as demonstrated herein and in the above litany of exemplars of newsworthy FOIA activity, requesters and particularly undersigned counsel have an established practice of utilizing FOIA to educate the public, lawmakers and news media about the government's

operations and, in particular, have brought to light important information about policies grounded in energy and environmental policies.⁵

⁵ Print examples, only, to the exclusion of dozens of national electronic media broadcasts, include, *e.g.*, Dawn Reeves, EPA Emails Reveal Push To End State Air Group's Contract Over Conflict, INSIDE EPA, Aug. 14, 2013. *See also* (E&E Legal) *e.g.*, Greg Pollowitz, ATI Law Center to UVA: Give us the Climategate E-mails, NATIONAL REVIEW ONLINE, May 16, 2011; Editorial, Public interest group sues EPA for FOIA delays, claims agency ordered officials to ignore requests, WASHINGTON EXAMINER, Jan. 28, 2013; Michal Conger, Emails show green group influence on EPA coal rule, WASHINGTON EXAMINER, Jan. 9, 2014; C.J. Ciaramella, Sierra Club Pressed EPA to Create Impossible Coal Standards, WASHINGTON FREE BEACON, Jan. 10, 2014; C.J. Ciaramella, Emails Show Extensive Collaboration Between EPA, Environmentalist Orgs, WASHINGTON FREE BEACON, Jan. 15, 2014; Stephanie Paige Ogburn, Climate scientists, facing skeptics' demands for personal [sic] emails, learn how to cope, E&E NEWS, Jan. 21, 2014; Anthony Watts, New FOIA emails show EPA in cahoots with enviro groups, giving them special access, WATTS UP WITH THAT, Jan. 15, 2014; Stephen Dinan, Obama energy nominee Ron Binz faces rocky confirmation hearing, WASHINGTON TIMES, Sept. 17, 2013; Stephen Dinan, Top Obama energy nominee Ron Binz asked oil company employees for confirmation help, WASHINGTON TIMES, Sept. 17, 2013; Vitter, Issa Investigate EPA's Transparency Problem, More Suspicious E-mail Accounts, WATTS UP WITH THAT, Jan. 29, 2013 ("It should also be noted that this has come to light thanks to the work of Chris Horner and ATI, who forced production of these documents by EPA in their FOI litigation."); Stephen Dinan, Obama energy nominee in danger of defeat, THE WASHINGTON TIMES, Sept. 18, 2013; Stephen Dinan, Greens, lobbyists and partisans helping Ron Binz, Obama's FERC pick, move through Senate, WASHINGTON TIMES, Sept. 12, 2013; Stephen Dinan, Energy nominee Ron Binz Loses voltage with contradictions, Obama coal rules, WASHINGTON TIMES, Sept. 22, 2013; Conn Carroll, FOIA reveals NASA's Hansen was a paid witness, WASHINGTON EXAMINER, Nov. 7, 2011; NASA Scientist accused of using celeb status among environmental groups to enrich himself, FOX NEWS, Jun. 22, 2011; Editorial, The EPA: A leftist agenda, PITTSBURGH TRIBUNE-REVIEW, Jan. 18, 2014; John Roberts, "Secret dealing"? Emails show cozy relationship between EPA, environmental groups, FOX NEWS, Jan. 22, 2014; Elana Schor, Proponents pounce on emails between EPA, enviros on pipeline, E&E NEWS, Jan. 23, 2014; Mike Bastasch, Analysis: Green Hypocrisy in Keystone XL pipeline opposition, DAILY CALLER, Feb. 6, 2014; Mark Tapscott, Emails expose close coordination between EPA, Sierra Club and other liberal environmental activist groups, WASHINGTON EXAMINER, Jan. 23, 2014; Bonner R. Cohen, Emails Reveal EPA Collaboration with Activist Groups, HEARTLANDER, Feb. 11, 2014; EnergyPolicy Center (Independence Institute), Emails Show EPA's Denver "Listening Tour" Stop A Collaboration Between Agency, Environmentalist Orgs, Jan. 15, 2014; Forest Policy, Elections Have Consequences: EPA Version, Jan. 16, 2014; Editorial, EPA has ties to radical environmentalists, DETROIT NEWS, Feb. 13, 2014; Editorial, EPA has ties to radical environmentalists, DETROIT NEWS, Feb. 13, 2014; Michael Bastasch, Report: EPA coal plant rule tainted by secretiveness, collusion with green groups, DAILY CALLER, Mar. 10, 2014; Jennifer G. Hickey, Legality of EPA Rules Questioned by Environmental Litigators, Newsmax, March 21, 2014; Michael Bastasch, Confidential document reveals the Sierra Club's plan to shut down the coal industry, DAILY CALLER, March 26, 2014; Michael Bastasch, Conservative group sues EPA over its 'IRS-like' tactics, DAILY CALLER April 1, 2014; Stephen Dinan, Conservative group sues EPA over open-records requests, WASHINGTON TIMES, April 1, 2014; FOX NEWS, EPA accused of stonewalling records requests from conservative groups, April 2, 2014; Michael Bastasch, Obama EPA nominee has troubled transparency record, DAILY CALLER, April 8, 2014; Michal Conger, Watchdog group sues EPA for text messages from top officials, WASHINGTON EXAMINER, April 10, 2014. (Regarding "ATI" references, the American Tradition Institute recently changed its name to the Energy & Environment Legal Institute to more accurately reflect its focus.)

Requesters also intend to disseminate the information gathered by this request via media appearances (the undersigned appears regularly to discuss his work, on national television and national and local radio shows, and regularly scheduled weekly radio appearances.

More importantly, with foundational, institutional interests in and reputations for playing leading roles in the relevant policy debates and expertise in the subject of transparency, energy- and environment-related regulatory policies, requesters unquestionably have the “specialized knowledge” and “ability and intention” to disseminate the information requested in the broad manner, and to do so in a manner that contributes to the understanding of the “public-at-large.”

The disclosure will contribute “significantly” to public understanding of government operations or activities. *We repeat and incorporate here by reference the arguments above from the discussion of how disclosure is “likely to contribute” to an understanding of specific government operations or activities.*

As already elaborated upon the public has no source of information on the subject matter at the center of this request, beyond the settlement agreement with FERC and Constellation, the approval of the Constellation-Exelon merger, and Norman Bay’s answers to the Senate Committee on Energy and Natural Resources. None of these explain or justify the questionable timing of events that gives rise to questions of whether these events were improperly linked. The EELI and FMELC inquiry into this question will provide an important window into this unstudied area of FERC’s operations. Because there is no such information currently available to the public, any increase in public understanding of this issue is a significant contribution to

this highly visible and politically important issue as regards the operation and function of government.

Because EELI and FMELC have no commercial interests of any kind, disclosure can only result in serving the needs of the public interest.

As such, the requesters have stated “with reasonable specificity that its request pertains to operations of the government,” and “the informative value of a request depends not on there being certainty of what the documents will reveal, but rather on the requesting party having explained with reasonable specificity how those documents would increase public knowledge of the functions of government.” *Citizens for Responsibility & Ethics in Washington v. U.S. Dep’t of Health and Human Services*, 481 F. Supp. 2d 99, 107-109 (D.D.C. 2006).

2) **Alternately, EELI and FMELC qualify as media organizations for purposes of fee waiver**

As authorized under FOIA, EPA must waive fees for representatives of the news media. *See*, 5 U.S.C. § 552(a)(4)(A)(ii)(II) and 40 C.F.R. §2.107 (c)(ii)&(iii). In the alternative, E&E Legal meets the criteria for a fee waiver as a representative of the news media; also, FME Law meets this test, and we repeat by reference here publication discussion from pp. 12-15, *supra*. A “representative of the news media” is defined as any person actively gathering information about current events or of current interest to the public ("news") for an entity that is organized and operated to publish or broadcast news to the public. 40 C.F.R. § 2.107(b)(6); OMB Guidelines, 52 Fed. Reg. 10012, 10018 (March 27, 1987).

The White House Office of Management and Budget (OMB) published guidance on its interpretation of the term “representative of the news media.” OMB includes in this category publishers of newsletters and similar periodicals, publishers of books, and radio and television broadcasting. However, “labels and titles alone do not govern; the organizations’ substantive activities control.” *Elec. Privacy Info. Ctr. v. DOD*, 241 F. Supp. 2d 5, 21 (D.C.D.C. 2003). Courts have affirmed that non-profit requesters like E&E Legal who are not traditional news media outlets can qualify as representatives of the new media for purposes of the FOIA. *See ACLU of Washington v. U.S. Dep’t of Justice*, No. C09-0642RSL, 2011, 2011 U.S. Dist. LEXIS 26047 at *32 (W.D. Wash. Mar. 10, 2011). *See also Serv. Women’s Action Network v. DOD*, 2012 U.S. Dist. Lexis 45292 (D. Conn., Mar. 30, 2012).

The courts use a three prong test of an organization’s activities. A representative of the news media is a person or entity that (1) gathers information of potential interest to a segment of the public; (2) uses its editorial skills to turn the raw materials into a distinct work; and (3) distributes that work to an audience. *Nat’l Sec. Archive v. U.S. Dep’t of Def.*, 880 F.2d 1381, 1387, 279 U.S. App. D.C. 308 (D.C. Cir. 1989). This reflects OMB’s regulatory preamble language indicating a representative of the news media must “perform an active rather than passive role in dissemination.” OMB Guidelines, 52 Fed. Reg. at 10015. Requester E&E Legal meets all three prongs.

A. E&E Legal and its staff gather information of potential interest to a broad segment of the population, at-large.

As discussed in the previous section, E&E Legal gathers information on how government activities can affect those looking for work in a job-starved environment and those

whose opportunities are limited by predatory regulatory biases in an agency formed to protect the public. And, E&E Legal has taken a leadership role in assessing how EPA has complied with the President's commitment to transparency. Evidence that this information is of potential interest to a segment of the public is manifest in the use of this information by other publication entities, lawmakers and the public, a point we make explicit in this request (*see e.g.*, FN 6 which indicates the extent of interest in requesters' typically related FOIA work). E&E Legal has an established practice of using FOIA to educate the public, lawmakers and news media about the government's operations and, in particular, has brought to light important information about policies grounded in energy and environmental policy, like EPA's.⁶

B. E&E Legal and its staff use their editorial skills to turn the raw materials into a distinct work.

E&E Legal Senior Counsel Christopher C. Horner uses editorial skills to turn raw materials into distinct work published under his name, as found in in the Washington Examiner, on Breitbart and on the premier electronic science daily publication *WattsUpWithThat*.⁷ E&E Legal's General Counsel David Schnare & Mr. Horner have each written and/or edited multiple books addressing environmental issues.⁸

⁶ This involves EPA and, e.g., FERC (request ## 13-075, 13-078, 14-001); DoL (725377 (2012)); DoE (2012-01448-F, 2012-01449-F); NSF (12-059, 12-099); NOAA (2012-00068, 2012-00084), Smithsonian Institute Nov. 21, 2011 and Nov. 21, 2011 requests (not assigned tracking numbers but which yielded several thousand pages of records).

⁷ See note 4, *supra* and, Christopher C. Horner, *EPA administrators invent excuses to avoid transparency*, WASHINGTON EXAMINER, Nov. 25, 2012, <http://washingtonexaminer.com/epa-administratorsinvent-excuses-to-avoid-transparency/article/2514301#.ULOaPYf7L9U>; see also Christopher C. Horner, *EPA Circles Wagons in 'Richard Windsor' Email Scandal*, BREITBART, Jan. 16, 2013, <http://www.breitbart.com/Big-Government/2013/01/16/What-s-in-a-Name-EPA-Goes-Full-Bunker-in-Richard-Windsor-EMail-Scandal>.

⁸ See, http://eelegal.org/?page_id=293.

Dr. Schnare has contributed works to the Thomas Jefferson Institute for Public Policy's Jefferson Journal. Thomas Tanton, E&E Senior Fellow, authored E&E Legal's report entitled "The Hidden Cost of Wind Energy." E&E Legal staff not only has a lengthy history of turning raw materials into distinct works, and specifically news articles, they have done so as staff to E&E Legal and for E&E Legal publications, and as discussed above, and plan on doing so again, using, in part, the documents received under this request.

C. E&E Legal distributes that work to an audience.

The key to "media" fee waiver is whether a group publishes, as E&E Legal most surely does. In *National Security Archive v. Department of Defense*, 880 F.2d 1381 (D.C. Cir. 1989), the D.C. Circuit wrote:

The relevant legislative history is simple to state: because one of the purposes of FOIA is to encourage the dissemination of information in Government files, as Senator Leahy (a sponsor) said: "It is critical that the phrase 'representative of the news media' be broadly interpreted if the act is to work as expected.... If fact, *any person or organization which regularly publishes or disseminates information to the public ... should qualify for waivers as a 'representative of the news media.'*" *Id.* at 1385-86 (emphasis in original).

As the court in *Electronic Privacy Information Center v. Department of Defense*, 241 F. Supp. 2d 5 (D.D.C. 2003) noted, this test is met not only by outlets in the business of publishing such as newspapers; instead, citing to the *National Security Archives* court, it noted one key fact is determinative, the "*plan to act, in essence, as a publisher*, both in print and

other media.” *EPIC v. DOD*, 241 F.Supp.2d at 10 (*emphases added*). “In short, the court of appeals in National Security Archive held that “[a] representative of the news media is, in essence, a person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience.”” *Id.* at 11. *See also, Media Access Project v. FCC*, 883 F.2d 1063, 1065 (D.C. Cir. 1989).

Specifically, E&E Legal is a publisher of books and reports that address matters associated with energy, the environment and federal bureaucratic pathologies.⁹ E&E Legal published Greg Walcher’s “Smoking Them Out – The Theft of the Environment and How to Take it Back.” It published seven reports on the true cost of renewable portfolio standards.¹⁰ FME Law and E&E Legal co-published Dr. Schnare’s legal treatise “Protecting Federalism and State Sovereignty through Anti-Commandeering Litigations.

In addition, E&E Legal publishes a quarterly newsletter entitled *E&E Legal Letters* in which General Counsel David Schnare, Senior Legal Fellow Horner, staff attorneys and guest experts author an informative and educational article on an aspect of the law that emerges as part of E&E Legal’s activities, including its transparency initiative.¹¹

⁹ Requesters point to their websites for examples of its reports and publications. *See e.g.*, http://eelegal.org/?page_id=2070.

¹⁰ *See*, True Cost of Renewable Portfolio Standards, http://eelegal.org/?page_id=1734.

¹¹ *See*, http://eelegal.org/?page_id=1798.

E&E Legal publishes materials based upon its research via print and electronic media, as well as in newsletters to legislators, education professionals, and other interested parties.¹² FME Law publishes scholarly works and contributes to non-scholarly media as experts on bureaucratic governmental practices.¹³ Those activities are in fulfillment of E&E Legal and FME Law's purposes and missions.

We intend to broadly disseminate the information gathered by this request to the public at large and at no cost through one or more of the following: (a) newsletters; (b) opinion pieces in newspapers or magazines; (c) E&E Legal and FME Law websites; (d) in-house publications for public dissemination; (e) scholarly articles prepared for publication in peer-reviewed law journals (f) other electronic journals, including blogs to which our professionals contribute; (g) local and syndicated radio programs dedicated to discussing public policy; (h) to the extent that Congress or states engaged in relevant oversight or related legislative or judicial activities find that which is received noteworthy, it will become part of the public record on deliberations of the legislative branches of the federal and state governments on the relevant issues. E&E Legal and FME Law staff also intend to disseminate the information gathered by this request via media appearances.

¹² See *EPIC v. DOD*, 241 F.Supp.2d 5 (D.D.C. 2003) (court ruled that the publisher of a bi-weekly electronic newsletter qualified as the media, entitling it to a waiver of fees on its FOIA request); *Forest Guardians v. U.S. Dept. of Interior*, 416 F.3d 1173, 1181-82 (10th Cir. 2005) (fee waiver granted for group that "aims to place the information on the Internet"; "Congress intended the courts to liberally construe the fee waiver requests of noncommercial entities").

¹³ See *e.g.*, FME Law Director service on a panel dealing with use of FOIA with respect to scientific endeavors, sponsored by the National Academy of Sciences and George Washington University (April 1, 2014, Washington D.C.), relevant findings of which scholarly research E&E Legal intends to continue publishing in its publications.

In fact, E&E Legal, with FME Law's assistance, is actively engaged in producing two extensive reports, one on collusion between EPA and environmentalist pressure groups in its "war on coal", and another on what our and similar groups' use of FOIA has revealed about EPA operations and activities, more broadly.

E&E Legal has conducted several studies on the operation of government, government ethics and the degree to which EPA follows its own rules and laws controlling its administrative activities. E&E Legal and FME Law are now engaged in an analysis of these relationships and EPA's transparency when it comes to groups with which EPA has demonstrably close relationships pursuing a shared regulatory agenda. EPA interactions with pressure groups dedicated in large part to influencing and/or generating support for Agency policy represents governmental operations or activities.

E&E Legal's publication of books, reports and newsletters far surpasses the publishing plan that was, standing alone, sufficient in *National Security Archive, v. Dep't of Defense*, 880 F.2d at 1386 (tax-exempt corporations achieve news media status through publication activities, including being a publisher of periodicals such as the E&E Legal Letter). *See also, Elec. Privacy Info. Ctr. v. DOD*, 241 F. Supp. 2d at 21-22 & 24-25 (tax-exempt corporations achieve news media status through publication activities, including being a publisher of periodicals such as the E&E Legal Letter); *and id* at 27 ("The fact that EPIC's newsletter is disseminated via the Internet to subscribers' e-mail addresses does not change the analysis."); *and see, Media Access Project v. FCC*, 883 F.2d 1063, 1070 (D.C. Cir. 1989) ("In the case *sub judice*, the Commission virtually concedes that petitioners [People for the American Way] and [Union of

Concerned Scientists] would qualify for preferred status as representatives of the news media” due to their “regular publication of a newsletter or periodical.”).

In addition to print publications E&E Legal requesting counsel Horner appears regularly, to discuss his work, on national television and national and local radio shows, including weekly on the radio shows “Garrison” on WIBC Indianapolis and the Alan Nathan Show, which is nationally syndicated on Salem Radio Network.

We conclude by noting, “In short, the court of appeals in National Security Archive held that ‘[a] representative of the news media is, in essence, a person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience.’” *EPIC*, 241 F.Supp. at 11.¹⁴

As already discussed with extensive supporting precedent, government information is of critical importance to the nonprofit policy advocacy groups engaged on these relevant issues, news media covering the issues, and others concerned with Agency activities in this controversial area or, as the Supreme Court once noted, what their government is up to.

For these reasons, requester E&E Legal qualifies as “representatives of the news media” under the statutory definition, because it routinely gathers information of interest to the public, uses editorial skills to turn it into distinct work, and distributes that work to the public. *See Electronic Privacy Information Center v. Department of Defense*, 241 F. Supp. 2d 5 (D.D.C.

¹⁴ *See also, Forest Guardians v. U.S. Dept. of Interior*, 416 F.3d 1173, 1181-82 (10th Cir. 2005) (fee waiver granted for group that “aims to place the information on the Internet”; “Congress intended the courts to liberally construe the fee waiver requests of noncommercial entities”).

2003)(non-profit organization that gathered information and published it in newsletters and otherwise for general distribution qualified as representative of news media for purpose of limiting fees). Courts have reaffirmed that non-profit requesters who are not traditional news media outlets can qualify as representatives of the new media for purposes of the FOIA, including after the 2007 amendments to FOIA. *See ACLU of Washington v. U.S. Dept of Justice*, No. C09-0642RSL, 2011, 2011 U.S. Dist. LEXIS 26047 at *32 (W.D. Wash. Mar. 10, 2011). *See also Serv. Women's Action Network v. DOD*, 2012 U.S. Dist. Lexis 45292 (D. Conn., Mar. 30, 2012).

Because E&E Legal meet each prong of the *Nat'l Sec. Archive* test, it qualifies as a representative of the news media and a fee waiver on that basis.

In similar measure, FME Law qualifies as an educational institution. Under OMB guidance, an institution of professional education or an institution of vocational education, which operate a program or programs of scholarly research qualifies for a fee waiver under FOIA.¹⁵

FME Law is the Free Market Environmental Law Clinic. It provides education to law students, its Director is an Adjunct Professor of Law at George Mason University School of Law, it provides continuing legal education to attorneys in Virginia (a vocational education function) and it conducts a program of research on bureaucratic pathologies and Constitutional restraints to federal government overreach. These facts reflect the exact formulation for qualification for fee waiver under 5 U.S.C. §552(a)(4)(A)(ii)(II) as explained by the White House Office of Management and Budget.

¹⁵ See, 52 Fed. Reg. 10014 (March 27, 1987).

Accordingly, any fees charged under this categorization must be limited to duplication costs. The records requested are available electronically and are requested in electronic format; as such, there are no duplication costs other than the cost of a compact disc(s).

FERC must address this alternate basis for fee waiver in the event it denies fee waiver on the basis of the public interest. Failure to do is *prima facie* arbitrary and capricious.

CONCLUSION

We expect the commission to release within the statutory period of time all segregable portions of responsive records containing properly exempt information, and to provide information that may be withheld under FOIA's discretionary provisions and otherwise proceed with a bias toward disclosure, consistent with the law's clear intent, judicial precedent affirming this bias, and President Obama's directive to all federal agencies on January 26, 2009. Memo to the Heads of Exec. Offices and Agencies, Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 26, 2009)(“The Freedom of Information Act should be administered with a clear presumption: in the face of doubt, openness prevails. The government should not keep information confidential merely because public officials might be embarrassed by disclosure, or because of speculative or abstract fears”).

We expect this all aspects of this request be processed free from any conflicts of interest.

We request the agency provide particularized assurance that it is reviewing some quantity of records with an eye toward production on some estimated schedule, so as to establish some

reasonable belief that it is processing our request. 5 U.S.C.A. § 552(a)(6)(A)(i). FERC must at least to inform us of the scope of potentially responsive records, including the scope of the records it plans to produce and the scope of documents that it plans to withhold under any FOIA exemptions; FOIA specifically requires FERC to immediately notify EELI and FMELC with a particularized and substantive determination, and of its determination and its reasoning, as well as requesters' rights to appeal; further, FOIA's unusual circumstances safety valve to extend time to make a determination, and its exceptional circumstances safety valve providing additional time for a diligent agency to complete its review of records, indicate that responsive documents must be collected, examined, and reviewed in order to constitute a determination. *See CREW v. FEC*, 711 F.3d 180, 186 (D.C. Cir. 2013). *See also; Muttitt v. U.S. Central Command*, 813 F. Supp. 2d 221; 2011 U.S. Dist. LEXIS 110396 at *14 (D.D.C. Sept. 28, 2011)(addressing “the statutory requirement that [agencies] provide estimated dates of completion”).

We request records be produced on a rolling basis, as they become available, preferably electronically.¹⁶We inform FERC of our intention to protect our appellate rights on this matter at the earliest date should FERC not comply with FOIA per, *e.g.*, *CREW v. FEC*.

¹⁶ For any hard-copy mailing that FERC finds necessary, we request you use 1489 Kinross Lane, Keswick, Virginia, 22947 Attn. Chris Horner.

If you have any questions please do not hesitate to contact us.

Respectfully submitted,



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