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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

SIERRA CLUB,

Plaintiff,

vs.

UNITED STATES DEPARTMENT OF  
ENERGY,

Defendant.

Civil No.

**COMPLAINT FOR  
DECLARATORY AND  
INJUNCTIVE RELIEF**

1 Plaintiff Sierra Club, through counsel, alleges as follows:

2  
3 **INTRODUCTION**

4 1. Defendant U.S. Department of Energy (“DOE”) violated the Freedom of  
5 Information Act (“FOIA”), 5 U.S.C. § 552, by failing to produce documents in its possession  
6 following a lawful request by Sierra Club.

7 2. In April 2017, DOE began preparing a study of U.S. electricity markets and the  
8 reliability of the nation’s electrical grid, citing the accelerating retirement of so-called “baseload”  
9 energy resources as an alleged result of regulatory burdens and policies that provide tax  
10 incentives or other subsidies for non-baseload energy sources such as wind and solar generation.

11 3. It appears DOE has intended from the outset to release a biased study containing  
12 pre-determined conclusions that “baseload” plants utilizing fossil fuels are necessary for the  
13 reliability and resiliency of the grid, and that existing policies to encourage continued adoption  
14 of clean energy sources must be scaled back. DOE’s statement announcing the preparation of the  
15 study, the involvement of DOE personnel with strong ties to the traditional fossil fuel energy  
16 industry, and the apparent exclusion by DOE of well-known industry and government experts  
17 knowledgeable about the U.S. electrical grid, all suggest the study being prepared will be biased  
18 for the traditional fossil fuel industry and against emerging clean energy sources.

19 4. A flawed or biased study on this topic could influence upcoming decisions by  
20 DOE and myriad other federal and state entities relating to the energy sector. For instance, the  
21 study might be used to justify subsidies to retain fossil-fueled “baseload” units, new barriers to  
22 the development and dispatch of renewable energy resources, or withdrawal of public health  
23 protections that impose costs on fossil-fueled units. These policy changes, whether legislative or  
24 administrative, could be very hard to reverse, even if the findings in the study are eventually  
25 debunked.

26 5. Sierra Club, the nation’s oldest grassroots environmental organization and a  
27 strong supporter and proponent of clean energy sources, sought to further its long-standing  
28

1 interest in government accountability and transparency by filing a FOIA request with DOE on  
2 May 1, 2017 for documents showing communications regarding the study between DOE officials  
3 and third-party groups, including those allied with traditional fossil fuel industries.

4 6. FOIA required DOE to make a determination on Sierra Club's request by May 30,  
5 2017, and to produce responsive documents shortly thereafter. DOE ignored the deadline  
6 required by FOIA and still has not made a determination on Sierra Club's request, nor produced  
7 any documents, as FOIA required it to do. In doing so, DOE has violated the law.

8 7. Sierra Club thus brings this lawsuit to hold DOE accountable under the law and  
9 respectfully requests the Court order DOE to produce all documents showing DOE's  
10 communications with third parties concerning preparation of the study at issue.

11 8. Timely disclosure is imperative given that DOE's forthcoming study is a matter of  
12 significant public interest and concern. Based on DOE's study, policymakers at multiple levels  
13 of government may make substantial policy changes that impose enormous costs on consumers,  
14 stymie innovation, and reverse our nation's progress toward a cleaner energy sector. It is critical  
15 that these policymakers are able to immediately place the DOE study in proper context and  
16 understand how the agency was influenced in this work.

17  
18 **JURISDICTION, VENUE, AND INTRADISTRICT ASSIGNMENT**

19 9. This Court has jurisdiction over this matter pursuant to 5 U.S.C. § 552(a)(4)(B)  
20 and 28 U.S.C. § 1331.

21 10. Venue is proper in this Court under 5 U.S.C. § 552(a)(4)(B) because Plaintiff  
22 Sierra Club has its principal place of business in Oakland, California.

23 11. For the same reason, intradistrict assignment is proper in the Oakland Division.  
24 *See* N.D. Cal. L.R. 3-2.

25  
26 **PARTIES**

27 12. Plaintiff Sierra Club is incorporated in the State of California as a Nonprofit  
28

1 Public Benefit Corporation with headquarters in Oakland, California. Sierra Club is the nation's  
2 oldest environmental grassroots organization and has more than 2.9 million members and  
3 supporters nationwide. Sierra Club is dedicated to protecting and preserving the natural and  
4 human environment, and its purpose is to explore, enjoy, and protect the wild places of the earth;  
5 to practice and promote the responsible use of the earth's ecosystems and resources; and to  
6 educate and enlist humanity to protect and restore the quality of the natural and human  
7 environments. Sierra Club is a leading non-governmental organization seeking to educate and  
8 mobilize the public on issues of climate change, fossil fuel energy, and clean energy. It conducts  
9 multiple public campaigns around these issues, including its Beyond Coal Campaign and Dirty  
10 Fuels Campaign. In support of those efforts and to further Sierra Club's long-standing interest in  
11 government accountability and transparency, Sierra Club submitted to DOE the FOIA request at  
12 issue in this case.

13       13. Plaintiff brings this action on its own behalf and on behalf of its members.  
14 Plaintiff and its members have been and continue to be injured by Defendant's failure to provide  
15 requested records within the timeframes mandated by the FOIA. The requested relief will redress  
16 these injuries.

17       14. Defendant U.S. Department of Energy ("DOE") is an agency of the executive  
18 branch of the United States government within the meaning of 5 U.S.C. § 551(1). It has in its  
19 possession and control the records sought by Sierra Club, and as such, is subject to FOIA  
20 pursuant to 5 U.S.C. § 552(f).

### 21 22 **STATUTORY FRAMEWORK**

23       15. FOIA requires that federal agencies promptly release, upon request by a member  
24 of the public, documents and records within the possession of the agency, unless a statutory  
25 exemption applies. 5 U.S.C. § 552(a)-(b).

26       16. Within twenty business days of an agency's receipt of a FOIA request, the agency  
27 must "determine . . . whether to comply" with the request. 5 U.S.C. § 552(a)(6)(A)(i). The  
28

1 agency must “immediately notify” the requester of “such determination and the reasons  
2 therefor.” *Id.* If an agency determines that it will comply with the request, it must “promptly”  
3 release responsive, non-exempt records to the requester. 5 U.S.C. § 552(a)(6)(C)(i).

4 17. If the agency fails to comply with the statutory time limits, the requester is  
5 deemed to have exhausted her administrative remedies. *Id.* District courts may enjoin an agency  
6 from withholding agency records and “order the production of any agency records improperly  
7 withheld.” 5 U.S.C. § 552(a)(4)(B).

### 8 9 **STATEMENT OF FACTS**

#### 10 **DOE Commences Study Examining Electricity Markets and Reliability**

11 18. On April 14, 2017, the Secretary of the U.S. Department of Energy, Rick Perry,  
12 sent a memorandum to his Chief of Staff, Brian McCormack, directing him to prepare a study on  
13 wholesale markets and reliability by mid-June 2017. Although the memorandum frames three  
14 specific areas of inquiry using relatively neutral language, the prefatory language reveals the  
15 Secretary’s intention that the study conclude that baseload, fossil-fueled generating units are  
16 essential to the grid’s reliability and are being undermined by regulations mitigating the  
17 environmental impact of those sources and incentivizing development of clean energy resources.  
18 *See* Exhibit A.

19 19. The predetermined outcome of the DOE baseload study, as envisioned by  
20 Secretary Perry in his April 14 memorandum, is contrary to the conclusions of many grid experts  
21 that electric system reliability has remained strong despite the tremendous growth in clean  
22 energy generation in recent years, and that so-called “baseload” power is not necessary for  
23 reliability or resilience. Indeed, grid operators have made enormous progress integrating  
24 variable, clean energy resources and thereby allowing the nation to benefit from the lower costs  
25 and public health impacts associated with these resources.

26 20. The two DOE officials in charge of the study, Brian McCormack and Travis  
27 Fisher, share Secretary Perry’s apparent biases for fossil fuel energy sources and against clean  
28

1 energy sources. Before becoming Secretary Perry's Chief of Staff, Mr. McCormack was a  
2 highly-paid lobbyist for Edison Electric Institute (EEI), where he actively attacked policies  
3 promoting distributed clean energy, like rooftop solar power. EEI is a national trade association  
4 representing traditional fossil fuel-based electricity utilities, and it has played an active role in  
5 opposing the growth of clean energy sources, which EEI views as a threat to the profits of the  
6 traditional electrical utility industry.

7         21. Likewise, Mr. Fisher, who on information and belief is leading the study  
8 requested by Secretary Perry, is a Senior Adviser in the DOE's Office of Electricity Delivery and  
9 Energy Reliability division. He has previously written reports claiming clean energy policies are  
10 "the single greatest threat" to reliability of the U.S. electricity grid, above terrorism, severe  
11 weather, or operational error.

12         22. Secretary Perry's April 14 memorandum, the biases of those in charge of the  
13 study, and the current U.S. administration's previously stated support for the fossil fuel industry,  
14 strongly suggest DOE's study will contain pre-determined conclusions promoting fossil fuel  
15 energy generation and discouraging increased adoption of clean energy generation.

16         23. Moreover, media reports contemporaneous with Secretary Perry's request for the  
17 DOE study stated that DOE had apparently excluded well-known government and industry  
18 experts from participating in the study. On information and belief, DOE excluded those experts  
19 because their opinions would not coincide with the pre-determined conclusions that DOE intends  
20 to make in the study.

21         24. Although the DOE study was initially expected to be released by mid-June, it has  
22 been delayed, though release of a final study is believed to be imminent.

23         25. More recent media reports have also commented on a draft of the DOE study  
24 leaked to the media in mid-July. The draft study contained conclusions supportive of clean  
25 energy, including statements that the national electricity grid now is "more reliable today due to  
26 better planning, market discipline, and better operating rules and standards," and that although  
27 "[c]ostly environmental regulations and subsidized clean generation have exacerbated baseload  
28

1 power plant retirements . . . those factors played minor roles compared to the long-standing drop  
2 in electricity demand relative to previous expectation and years of low electric prices driven by  
3 high natural gas availability.”

4 26. Further suggesting that the final DOE study will contain pre-determined  
5 conclusions friendly to the fossil fuel industry, a DOE spokesman stated in response to the leak  
6 of the draft study that the statements above “as written are not in the current draft.”

7 27. The tone of the April 14 memorandum illustrated Secretary Perry’s biases (and  
8 the biases of the current U.S. administration) for fossil fuel energy sources and against clean  
9 energy sources, which has caused significant concern among those in the energy sector that the  
10 DOE report will upend the progress the nation is making toward cleaner, cheaper, and more  
11 reliable sources of electricity. A comprehensive study produced by DOE finding—wrongly—  
12 that retirement of baseload resources is a threat to the reliability of the nation’s grid could be  
13 used to justify a wide range of policy changes that would impede the growth of renewable energy  
14 resources and force consumers to pay to prop up baseload plants that basic economics would  
15 otherwise cause to retire.

16 Sierra Club Request for DOE Documents Pursuant to FOIA

17 28. Because of the widespread concern that DOE will issue a biased final study  
18 favoring the fossil fuel industry, Sierra Club—a strong supporter of clean energy efforts—  
19 submitted a FOIA request to DOE by e-mail on May 1, 2017, requesting:

20 All communications between officials at DOE, including but not limited to Secretary  
21 Perry, Brian McCormack, Travis Fisher, and any outside entity or individual, including  
22 but not limited to Edison Electric Institute, Institute for Energy Research, any  
23 representative of electric utility or generation industry, the Federal Energy Regulatory  
24 Commission, and any regional transmission organization or independent system operator  
concerning or related to the study ordered in Secretary Perry’s April 14, 2017  
Memorandum to the Chief of Staff, or any topics to be evaluated in that study.

25 *See Exhibit B.*

26 29. Sierra Club submitted its request as part of its ongoing national effort to address  
27 the pressing problems of climate change, air pollution, and our national dependence on dirty and  
28 expensive energy sources such as oil and coal and to promote the use of clean energy sources.

1           30.     On May 10, 2017, DOE replied to Sierra Club's request by e-mail with an  
2 "interim response," stating that DOE would conduct a search of its files for responsive  
3 documents, and upon completion of that search, DOE would provide a response to Sierra Club's  
4 request. *See* Exhibit C.

5           31.     FOIA required DOE to make a final determination upon Sierra Club's request  
6 within twenty working days of the request, which was May 30, 2017, and to produce documents  
7 responsive to the request immediately thereafter. *See* 5 U.S.C. § 552(a)(6)(A)(i).

8           32.     Various e-mail exchanges between Sierra Club and DOE occurred throughout  
9 May, June, July, and August 2017, with Sierra Club requesting status updates on DOE's  
10 compliance efforts at least four times. DOE first estimated that it would provide responsive  
11 documents in mid-July, a deadline which it failed to meet. DOE then estimated that it would  
12 produce document in early August, a deadline which it has also failed to meet. DOE's most  
13 recent estimated date for production of documents is now in late August. Given DOE's  
14 demonstrated pattern of failing to produce documents by the dates it has communicated to the  
15 FOIA requester, Sierra Club is far from certain that any documents, much less a comprehensive  
16 response to our request, will be provided in late August.

17           33.     DOE's failure to make a final determination in response to Sierra Club's request,  
18 or produce documents to the Sierra Club in response to its request, by the May 30, 2017  
19 deadline, is unlawful under FOIA.

20           34.     Immediate access to the requested information is crucial to Sierra Club because it  
21 directly relates to the credibility of the DOE study, and it is relevant to Sierra Club's ability to  
22 engage effectively in, and provide public oversight of, DOE's promotion of fossil fuel-based  
23 energy generation. Moreover, on information and belief, the requested documents will  
24 demonstrate the participation by lobbyists and executives of the fossil fuel industry in the  
25 preparation and conclusions of the DOE study.  
26  
27  
28



**FIRST CAUSE OF ACTION**

**VIOLATION OF FOIA, 5 U.S.C. § 552**

35. Plaintiff re-alleges and incorporates by reference all the foregoing paragraphs in this Complaint as though fully set forth herein.

36. Upon its records request to DOE dated May 1, 2017, Sierra Club became statutorily entitled under FOIA to receive from DOE all records responsive to its request.

37. At a minimum, FOIA required DOE to provide Sierra Club with a final determination upon Sierra Club's request by May 30, 2017, and to produce records responsive to the request immediately thereafter.

38. DOE has failed to provide Sierra Club with a final determination upon Sierra Club's request, and is thus in violation of FOIA.

39. DOE has failed to produce to Sierra Club any documents responsive to Sierra Club's request, and is thus in violation of FOIA.

**PRAYER FOR RELIEF**

WHEREFORE, Sierra Club respectfully requests that this Court enter judgment against DOE as follows:

1. Declaring that DOE has violated FOIA by failing to make a final determination upon Sierra Club's FOIA request and by failing to produce non-exempt records responsive to Sierra Club's FOIA request by the statutory deadlines;

2. Ordering that DOE immediately produce the requested records to Sierra Club;

3. Retaining jurisdiction over this matter to rule on any assertions by DOE that certain records are exempt from disclosure;

4. Ordering DOE to produce an index identifying any documents or parts thereof that it withholds and the basis for the withholdings, in the event that DOE determines that certain records are exempt from disclosure;

5. Awarding Sierra Club its costs and reasonable attorneys' fees; and

6. Granting such other and further relief as the Court deems just and proper.

Dated: August 14, 2017

By:



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# Exhibit A



## The Secretary of Energy

Washington, DC 20585

April 14, 2017

MEMORANDUM TO THE CHIEF OF STAFF

FROM:

RICK PERRY  
SECRETARY OF ENERGY

*RICK PERRY*

SUBJECT: STUDY EXAMINING ELECTRICITY MARKETS AND RELIABILITY

At the most recent G7 Energy Ministerial, my colleagues discussed the need for an energy transition utilizing greater efficiency and fuel diversity. There was also notable concern about how certain policies are affecting, and potentially putting at risk, energy security and reliability. It impressed upon me that the United States should take heed of the policy choices our allies have made, and take stock of their consequences.

A reliable and resilient electric system is essential to protecting public health and fostering economic growth and job creation. The U.S. electric system is the most sophisticated and technologically advanced in the world. Consumers utilize heating, air conditioning, computers, and appliances with few disruptions. Nonetheless, there are significant changes occurring within the electric system that could profoundly affect the economy and even national security, and as such, these changes require further study and investigation.

Baseload power is necessary to a well-functioning electric grid. We are blessed as a nation to have an abundance of domestic energy resources, such as coal, natural gas, nuclear, and hydroelectric, all of which provide affordable baseload power and contribute to a stable, reliable, and resilient grid. Over the last few years, however, grid experts have expressed concerns about the erosion of critical baseload resources.

Specifically, many have questioned the manner in which baseload power is dispatched and compensated. Still others have highlighted the diminishing diversity of our nation's electric generation mix, and what that could mean for baseload power and grid resilience. This has resulted in part from regulatory burdens introduced by previous administrations that were designed to decrease coal-fired power generation. Such policies have destroyed jobs and economic growth, and they threaten to undercut the performance of the grid well into the future. Finally, analysts have thoroughly documented the market-distorting effects of federal subsidies that boost one form of energy at the expense of others. Those subsidies create acute and chronic problems for maintaining adequate baseload generation and have impacted reliable generators of all types.

Each of these and other related issues must be rigorously studied and analyzed, and the Department of Energy is uniquely qualified for the task. The results of this analysis will help the federal government formulate sound policies to protect the nation's electric grid. In establishing these policies, the Trump Administration will be guided by the principles of reliability, resiliency, affordability, and fuel assurance—principles that underpin a thriving economy.

I am directing you today to initiate a study to explore critical issues central to protecting the long-term reliability of the electric grid, using the full resources and relationships available to the Department. By Wednesday, April 19, 2017, present to me an implementation plan to complete this study 60-days from that date, that will explore the following issues:

- The evolution of wholesale electricity markets, including the extent to which federal policy interventions and the changing nature of the electricity fuel mix are challenging the original policy assumptions that shaped the creation of those markets;
- Whether wholesale energy and capacity markets are adequately compensating attributes such as on-site fuel supply and other factors that strengthen grid resilience and, if not, the extent to which this could affect grid reliability and resilience in the future; and
- The extent to which continued regulatory burdens, as well as mandates and tax and subsidy policies, are responsible for forcing the premature retirement of baseload power plants.

I have committed to the President that this report will not only analyze problems but also provide concrete policy recommendations and solutions. I also committed to the President that I will do everything within my legal authority to ensure that we provide American families and businesses an electric power system that is technologically advanced, resilient, reliable, and second to none.

# Exhibit B





May 1, 2017

***Via Email***

FOIA Officer: Natalie Anderson  
Department of Energy  
1000 Independence Avenue, SW  
Washington, DC 20585  
Phone: 202-586-5955  
Facsimile: 202-586-0575  
Email: [natalie.anderson@hq.doe.gov](mailto:natalie.anderson@hq.doe.gov)

**RE: Freedom of Information Act request – DOE Communications: Energy Markets and Reliability**

Dear Ms. Anderson:

On behalf of the Sierra Club, I write to request that the United States Department of Energy (“DOE”) provide copies of the records described below pursuant to the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”), and the regulations of the Department of Energy set forth at 10 C.F.R. § 1004.

Sierra Club is the nation’s oldest grassroots organization. It has more than 2.9 million members and supporters nationwide. Sierra Club is dedicated to the protection and preservation of the natural and human environment. Sierra Club’s purpose is to explore, enjoy and protect the wild places of the earth; to practice and promote the responsible use of the earth’s ecosystems and resources; and to educate and enlist humanity to protect and restore the quality of the natural and human environments.

Sierra Club is a leading non-governmental organization seeking to educate and mobilize the public on issues of climate change, fossil fuel energy and clean energy. It has been conducting multiple public campaigns around these issues, including its Beyond Coal Campaign and Dirty Fuels Campaign. This request is made on behalf of those campaigns, as well as the organization’s long standing interest in government accountability and transparency.

**Sierra Club Requests the Following Records:<sup>1</sup>**

1. All communications between officials at DOE, including but not limited to Secretary Perry, Brian McCormack, Travis Fisher, and any outside entity or individual, including but not limited to Edison Electric Institute, Institute for Energy Research, any representative of electric utility or generation industry, the Federal Energy Regulatory Commission, and any regional transmission organization or independent system operator concerning or related to the study ordered in Secretary Perry's April 14, 2017 Memorandum to the Chief of Staff,<sup>2</sup> or any topics to be evaluated in that study.

**Exempt Records**

If you regard any of the requested records to be exempt from required disclosure under FOIA, I request that you disclose them nevertheless, as such disclosure would serve the public interest of educating citizens. *See* 10 C.F.R. § 1004.1 (authorizing disclosure of documents exempt from FOIA disclosure where such disclosure is in the public interest).

Should you decide to invoke a FOIA exemption, please include in your full or partial denial letter sufficient information for the Club to appeal the denial. To comport with legal requirements this information must include:

1. Basic factual material about each withheld item, including the originator, date, length, general subject matter, and location of each item; and
2. Explanations and justifications for denial, including the identification of the category within the governing statutory provision under which the document (or portion thereof) was withheld and a full explanation of how each exemption fits the withheld material.

If you determine that portions of the records requested are exempt from disclosure, please segregate the exempt portions and mail the remaining records within the statutory time limits after the exempted material has been redacted from the records the Club is seeking.

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<sup>1</sup> "Records" means information of any kind, including writings (handwritten, typed, electronic or otherwise produced, reproduced or stored), letters, memoranda, correspondence, notes, applications, completed forms, studies, reports, reviews, guidance documents, policies, telephone conversations, telefaxes, e-mails, documents, databases, drawings, graphs, charts, photographs, minutes of meetings, electronic and magnetic recordings of meetings, and any other compilation of data from which information can be obtained. Without limitation, the records requested include records relating to the topics described below at any stage of development, whether proposed, draft, pending, interim, final or otherwise. All of the foregoing are included in this request if they are in the possession of or otherwise under the control of Department of Energy and its underlying offices.

<sup>2</sup> *See* Memorandum to the Chief of Staff, From: Rick Perry, Secretary of Energy, Subject: Study Examining Electricity Markets and Reliability (April 14, 2017); *available at* [https://s3.amazonaws.com/dive\\_static/paychek/energy\\_memo.pdf](https://s3.amazonaws.com/dive_static/paychek/energy_memo.pdf). For further identification of study and issues, please see: "So far, Perry's solo grid study sidelines nation's experts", E & E News (April 21, 2017); *available at* <https://www.eenews.net/energywire/2017/04/21/stories/1060053382>.



### **Fee Waiver Request**

I respectfully request that you waive all fees in connection with this request as provided by 5 U.S.C. § 552(a)(4)(A)(iii) and 10 C.F.R. § 1004.9(a)(8). The Sierra Club has spent years promoting the public interest through the development of policies that protect human health and the environment, and has routinely received fee waivers under FOIA.

The Sierra Club is a national, nonprofit, environmental organization with no commercial interest in obtaining the requested information. Instead, the Sierra Club intends to maintain public websites containing the requested information, so the public can access this important information regarding pollution in their communities.

As explained below, this FOIA request satisfies the factors listed in DOE's governing regulations for waiver or reduction of fees, as well as the requirements of fee waiver under the FOIA statute – that “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 the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii), *see also* 10 C.F.R. § 1004.9(a)(8).

1. The subject matter of the requested records must specifically concern identifiable “operations and activities of the government.”

The requested records relate to DOE's evaluations of energy markets and reliability. These activities are unquestionably “identifiable operations or activities of the government.” The Department of Justice Freedom of Information Act Guide expressly concedes that “in most cases records possessed by a federal agency will meet this threshold” of identifiable operations or activities of the government.

2. The disclosure of the requested documents must have an informative value and be “likely to contribute to an understanding of Federal government operations or activities.”

The FOIA Guide makes it clear that, in the Department of Justice's view, the “likely to contribute” determination hinges in part on whether the requested documents provide information that is not already in the public domain. The requested records are “likely to contribute” to an understanding of your agency's activities and decisions related to DOE's evaluations of energy markets and reliability. This information will facilitate meaningful public participation in the decision-making process, therefore fulfilling the requirement that the documents requested be “meaningfully informative” and “likely to contribute” to an understanding of your agency.

3. The disclosure must contribute to the understanding of the public at large, as opposed to the individual understanding of the requester or a narrow segment of interested persons. Under this factor, the identity and qualifications of the requester—i.e., expertise in the subject area of the request and ability and intention to disseminate the information to the public—is examined.

The Sierra Club and its members have long-standing experience and expertise in the subject area of FOIA requests, specifically, issues related to the Clean Air Act, Clean Water Act, and the development and use of energy resources and protection of endangered species. Sierra Club also has a long standing interest in government accountability and transparency.

Sierra Club disseminates the information it receives through FOIA requests in a variety of ways, including, but not limited to: analysis and distribution to the media, distribution through publication and mailing, posting on the Club's website, emailing and list serve distribution to our members across the U.S., and via public meetings and events. Every year the Sierra Club website receives 40,730 unique visits and 100,381 page views; on average, the site gets 104 visits per day. Sierra Magazine, which is a quarterly magazine published by the Sierra Club, has a circulation of approximately 1,000,000. Sierra Club Insider, an electronic newsletter, is sent to over 850,000 people twice a month. In addition, Sierra Club disseminates information obtained by FOIA requests through comments to administrative agencies, and where necessary, through the judicial system. In the past, the Sierra Club has published, posted, and disseminated numerous stories on coal and coal power plants regarding their impacts on health, the environment and alternative energy. This includes information on our various webpages, such as our [Beyond Coal Campaign](#) portal, our [Clean Energies Solutions](#) portal and our press releases.<sup>3</sup> Sierra Club intends to share the information received from this FOIA request with the public.

Sierra Club unquestionably has the "specialized knowledge" and "ability and intention" to disseminate the information requested in the broad manner outlined above, and to do so in a manner that contributes to the understanding of the "public-at-large."

4. The disclosure must contribute "significantly" to public understanding of government operations or activities. The public's understanding must be likely to be enhanced by the disclosure to a significant extent.

The records requested will contribute to the public understanding of the DOE's "operations and activities," as the requested records relate to DOE's evaluations of energy markets and reliability. The disclosure of the requested records is essential to the public's understanding of DOE's operations and activities. After disclosure of these records, the public understanding of DOE's activities will be significantly enhanced. The requirement that disclosure must contribute "significantly" to the public understanding is therefore met.

5. Whether the requester has a commercial interest that would be furthered by the requested disclosure.

The Sierra Club has no commercial interest in the requested records. Nor does it have any intention to use these records in any manner that "furthers a commercial, trade, or profit interest" as those terms are commonly understood. The Sierra Club is a tax-exempt organization

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<sup>3</sup> For example, the Sierra Club sought information about coal export and permitting activities in Oregon via a state public records act request at the Port of Coos Bay. All correspondence is published online and has received extensive media attention from press releases on the subject. See <http://content.sierraclub.org/environmentallaw/lawsuit/2013/sierra-club-challenges-dirty-and-dangerous-fossil-fuel-exports-oregon>.

under sections 501(c)(3) and 501(c)(4) of the Internal Revenue Code, and as such has no commercial interest. The requested records will be used for the furtherance of the Sierra Club's mission to inform the public on matters of vital importance to the environment and public health.

6. Whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is "primarily in the commercial interest of the requester."

When a commercial interest is found to exist and that interest would be furthered by the requested disclosure, an agency must assess the magnitude of such interest in order to compare it to the "public interest" in disclosure. If no commercial interest exists, an assessment of that non-existent interest is not required.

As noted above, the Sierra Club has no commercial interest in the requested records. Disclosure of this information is not "primarily" in the Sierra Club's commercial interest. On the other hand, it is clear that the disclosure of the information requested is in the public interest. It will contribute significantly to public understanding of DOE's activities related to evaluations of energy markets and reliability.

The Sierra Club respectfully requests, because the public will be the primary beneficiary of this requested information, that DOE waive processing and copying fees pursuant to 5 U.S.C. § 552(a)(4)(A). In the event that your agency denies a fee waiver, please send a written explanation for the denial. Also, please continue to produce the records as expeditiously as possible, but in any event no later than the applicable FOIA deadlines.

### **Record Delivery**

We request that the DOE, in responding to this request, comply with all relevant deadlines and other obligations set forth in FOIA and the agency's regulations. 5 U.S.C. § 552, (a)(6)(A)(i); 10 C.F.R. § 1004. Please produce the records above in a timely manner by sending them to me at the address listed below. Please produce them on a rolling basis; at no point should the search for-or the deliberation concerning-certain records delay the production of others that the agency has already retrieved and elected to produce.

David Abell  
[david.abell@sierraclub.org](mailto:david.abell@sierraclub.org)

- or -

Sierra Club Environmental Law Program  
2101 Webster Street, Suite 1300  
Oakland, CA 9461  
415.977.5764

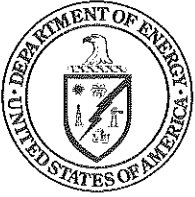
Thank you for your cooperation. If you find that this request is unclear in any way please do not hesitate to call me to see if I can clarify the request or otherwise expedite and simplify your efforts to comply. I can be reached at 415.977.5764 or by e-mail at [david.abell@sierraclub.org](mailto:david.abell@sierraclub.org).

Sincerely,

A handwritten signature in black ink, appearing to read 'David Abell', with a stylized, flowing script.

David Abell  
Senior Paralegal  
Sierra Club  
Environmental Law Program

# Exhibit C



**Department of Energy**  
Washington, DC 20585

MAY 13 2017

Mr. David Abell  
Sierra Club Environmental Law Program  
2101 Webster Street, Suite 1300  
Oakland, CA 94612

Via Email to: david.abell@sierraclub.org

Re: HQ-2017-00991-F

Dear Mr. Abell:

This is an interim response to the request for information that you sent to the Department of Energy (DOE) under the Freedom of Information Act (FOIA), 5 U.S.C. § 552. You requested the following:

All communications between officials at DOE, including but not limited to Secretary Perry, Brian McCormack, Travis Fisher, and any outside entity or individual, including but not limited to Edison Electric Institute, Institute for Energy Research, any representative of electric utility or generation industry, the Federal Energy Regulatory Commission, and any regional transmission organization or independent system operator concerning or related to the study ordered in Secretary Perry's April 14, 2017 Memorandum to the Chief of Staff, or any topics to be evaluated in that study.

I have assigned your request to DOE's Office of the Executive Secretariat (ES) to conduct a search of their files for responsive documents. Upon completion of the search and review of any records located, you will be provided a response.

In your letter, you requested a waiver of all fees associated with the processing of the request. For purposes of assessment of any fees, you have been categorized under the DOE regulation that implements the FOIA at Title 10, Code of Federal Regulations (CFR), Section 1004.9(b)(4), as an "other" requestor. Requesters in this category are entitled to two free hours of search time and 100 free pages

Pursuant to 10 CFR § 1004.9(8), I have reviewed the information you provided in the request to support your request for a fee waiver. I have determined that the information satisfies the criteria considered for a waiver of fees. A waiver, therefore, is appropriate for any fees that may be incurred because the subject of the request relates to a government activity, and information about the activity could lead to greater understanding by the public about the matter. You also have demonstrated the ability and intent of your organization to disseminate the information to the public in a form that can further understanding of the subject matter.




You may contact DOE's FOIA Public Liaison, Alexander Morris, FOIA Officer, Office of Public Information, at 202-586-5955 or by mail at MA-46/Forrestal Building 1000 Independence Avenue, S.W. Washington, D.C. 20585 for any further assistance and to discuss any aspect of your request. Additionally, you may contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, Maryland 20740-6001, e-mail at [ogis@nara.gov](mailto:ogis@nara.gov); telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769.

Please refer to the above referenced number in any communications about the request. If you have any questions about the processing of this request or this correspondence, you may contact Ms. Anjelica Ruda in this office at MA-46/Forrestal Building, 1000 Independence Avenue, SW, Washington, DC 20585, or at (202) 586-1355.

I appreciate the opportunity to assist you with this matter.

Sincerely,



Alexander C. Morris  
FOIA Officer  
Office of Public Information