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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

SIERRA CLUB,)
)
and)
)
ENVIRONMENTAL DEFENSE FUND,)
)
Plaintiffs,)
)
vs.)
)
UNITED STATES DEPARTMENT OF)
ENERGY,)
)
Defendant.)

Civil No.
COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF
(Freedom of Information Act Case)

1 Plaintiffs Sierra Club and Environmental Defense Fund (“EDF”), through counsel, allege as
2 follows:

3 INTRODUCTION

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

7 2. Throughout the last decade, the nation’s power markets have driven investment in
8 the energy sector through competitive wholesale auctions. These power markets promote
9 affordable electricity rates by selecting the most economic sources of power. In recent years,
10 natural gas, wind, and solar resources have proven to be more economic than coal and other
11 resources. The Trump Administration has publicly worked to undermine these power markets
12 through repeated efforts to bail out or otherwise preference uneconomic coal power. These
13 efforts have been strongly supported and lobbied for, publicly and privately, by a small group of
14 coal producers and owners of coal-fired power generation.

15 3. Soon after President Trump took office, Secretary of Energy Rick Perry began
16 privately meeting with coal executives, including the Chief Executive Officer of Murray Energy
17 Corporation, Robert E. Murray, a prominent supporter of President Trump.¹ Mr. Murray
18 presented Secretary Perry with a confidential action plan “to assist in the survival of our
19 Country’s coal industry,” by eliminating numerous regulations affecting the industry.² Press
20 reports also reveal that other coal power interests have advocated for the Department to take
21 action to prevent the closure of uneconomic coal plants.³

22
23 ¹ See Eric Wolff, *Bob Murray Had Early Access to Rick Perry to Share Coal Plan*, POLITICO
(Dec. 7, 2017), <https://www.politico.com/story/2017/12/07/bob-murray-rick-perry-coal-meeting-photos-211954>.

24 ² See *id.*; Letter from Robert E. Murray to Sec’y Perry (Mar. 28, 2017), with attached *Action*
25 *Plan for Reliable and Low Cost Electricity in America and to Assist in the Survival of our*
26 *Country’s Coal Industry*, available starting on page 17 of documents made public by E&E News,
at https://www.eenews.net/assets/2018/06/07/document_gw_01.pdf [hereinafter *Action Plan*].

27 ³ Ari Natter, *How Coal Giant Peabody’s Ideas Ended Up in Trump’s Coal Study*, BLOOMBERG
28 (Nov. 8, 2017), <https://www.bloomberg.com/news/articles/2017-11-08/how-coal-giant-peabody->

1 4. Since his confirmation, Secretary Perry has expressed concern about the
2 retirement of coal facilities and an interest in bailing out struggling coal plants. Specifically,
3 Secretary Perry has claimed that the retirement of coal plants could threaten the “reliability and
4 resiliency of our nation’s grid.”⁴

5 5. The National Energy Technology Laboratory (“NETL”), a sub-unit of the
6 Department of Energy, published a report on March 13, 2018 asserting that coal-fired generation
7 had played a critical role during a winter storm.⁵ The Department did not publicize the report
8 until March 27, 2018,⁶ at which point the report’s methodology was widely criticized as arbitrary
9 and biased.⁷

10 6. On March 29, 2018, FirstEnergy Solutions Corporation, the owner of several coal
11 and nuclear plants, officially requested that the Department use its emergency authority under
12 Section 202(c) of the Federal Power Act (“FPA”), 16 U.S.C. § 824a(c). FirstEnergy Solutions
13 requested an order that would provide cost recovery plus return on equity to all merchant coal
14 and nuclear plants in the PJM Interconnection, which covers parts or all of thirteen states and the
15 District of Columbia. FPA Section 202(c) has not previously been used in the manner requested
16 by FirstEnergy Solutions, which would result in billions of dollars in revenue flowing to dozens

17 s-ideas-ended-up-in-trump-s-coal-study; Steve Eder et al., *A Courtside View of Scott Pruitt’s*
18 *Cozy Ties With a Billionaire Coal Baron*, N.Y. TIMES (June 2, 2018),
19 <https://www.nytimes.com/2018/06/02/us/scott-pruitt-coal-joseph-craft.html>.

20 ⁴ Letter from Sec’y Perry to Neil Chatterjee, Chairman, Fed. Energy Regulatory Comm’n, et al.
(Sept. 28, 2017), available at

21 <https://www.energy.gov/sites/prod/files/2017/09/f37/Secretary%20Rick%20Perry%27s%20Letter%20to%20the%20Federal%20Energy%20Regulatory%20Commission.pdf>.

22 ⁵ See Peter Balash et al., NETL, *Reliability, Resilience and the Oncoming Wave of Retiring*
23 *Baseload Units, Volume I: The Critical Role of Thermal Units During Extreme Weather Events*
(Mar. 13, 2018), https://www.netl.doe.gov/energy-analyses/temp/ReliabilityandtheOncomingWaveofRetiringBaseloadUnitsVolumeITheCriticalRoleofThermalUnits_031318.pdf.

24 ⁶ See U.S. Dep’t of Energy, Office of Fossil Energy, *NETL Study Highlights the Importance of*
25 *Coal for Power Generation During “Bomb Cyclone” Power Demands* (Mar. 27, 2018),
<https://www.energy.gov/fe/articles/netl-study-highlights-importance-coal-power-generation-during-bomb-cyclone-power-demands>.

26 ⁷ See, e.g., Michael Goggin, *Fossil Lab Misses Mark in Cold Weather “Resilience” Report*,
27 SUSTAINABLE FERC PROJECT (Mar. 28, 2018), <http://sustainableferc.org/fossil-lab-misses-mark-in-cold-weather-resilience-report/>.

1 of power plants based on vague references to fuel security concerns, rather than evidence or
2 analysis that customers will imminently lose power without the operation of a particular plant or
3 other power system infrastructure.

4 7. Efforts to bail out or otherwise preference uneconomic coal and nuclear power
5 have been opposed by a broad coalition of energy companies, free-market groups, environmental
6 advocates, State Attorneys General, and former federal regulators.⁸ These organizations and
7 individuals have emphasized, among other concerns, that interference with wholesale power
8 markets to preference coal and nuclear resources threatens the Federal Energy Regulatory
9 Commission's ("FERC's") statutory mandate of ensuring both just and reasonable rates and rates
10 that are not unduly discriminatory or preferential.⁹

11 8. On June 1, 2018, President Trump ordered Secretary Perry to "prepare immediate
12 steps" to halt the further closure of coal and nuclear plants.¹⁰ Additionally, a leaked Department
13 draft memorandum, dated May 29, 2018, showed that the Administration was considering
14 intervention in America's electricity markets premised on national security and emergency
15

16 ⁸ See Am. Petrol. Inst., *Broad Energy Coalition Condemns Action to Subsidize Failing Coal,*
17 *Nuclear Plants* (June 1, 2018), [https://www.api.org/news-policy-and-](https://www.api.org/news-policy-and-issues/news/2018/06/01/oil-wind-solar-condemn-action-to-subsidize-failing-coal-nuclear-plants)
18 [issues/news/2018/06/01/oil-wind-solar-condemn-action-to-subsidize-failing-coal-nuclear-plants](https://www.api.org/news-policy-and-issues/news/2018/06/01/oil-wind-solar-condemn-action-to-subsidize-failing-coal-nuclear-plants)
19 (quoting officials from American Petroleum Institute, Advanced Energy Economy, American
20 Council on Renewable Energy, American Wind Energy Association, Business Council for
21 Sustainable Energy, Electricity Consumers Resources Council, Electric Power Supply
22 Association, Energy Storage Association, Natural Gas Supply Association, and Solar Energy
23 Industries Association; Tom DiChristopher, "Economy Crippling" and "Third Grade" Work:
24 *Conservatives Pan Trump's Move to Save Failing Coal and Nuclear Plants*, CNBC (June 5,
25 2018), [https://www.cnbc.com/2018/06/05/conservative-groups-pan-trumps-move-to-bail-out-](https://www.cnbc.com/2018/06/05/conservative-groups-pan-trumps-move-to-bail-out-coal-nuclear-plants.html)
26 [coal-nuclear-plants.html](https://www.cnbc.com/2018/06/05/conservative-groups-pan-trumps-move-to-bail-out-coal-nuclear-plants.html); Comments of Ten State Attorneys General, *Objections to FirstEnergy*
27 *Solutions Corp.'s Request for Emergency Order Pursuant to Federal Power Act Section 202(c)*,
28 CNBC (May 9, 2018), [https://www.mass.gov/files/documents/2018/05/10/AGO%20Comments%20on%20DOE%20s20](https://www.mass.gov/files/documents/2018/05/10/AGO%20Comments%20on%20DOE%20s202(e)%20request%20(5.9.2018).pdf)
[2\(e\)%20request%20\(5.9.2018\).pdf](https://www.mass.gov/files/documents/2018/05/10/AGO%20Comments%20on%20DOE%20s202(e)%20request%20(5.9.2018).pdf); REUTERS, *Former Commissioners Urge U.S. FERC to Reject*
Coal, Nuclear Subsidies (Oct. 20, 2017), [https://www.reuters.com/article/usa-ferc-coal-](https://www.reuters.com/article/usa-ferc-coal-nuclear/former-commissioners-urge-u-s-ferc-to-reject-coal-nuclear-subsidies-idUSL2N1MV13G)
[nuclear/former-commissioners-urge-u-s-ferc-to-reject-coal-nuclear-subsidies-](https://www.reuters.com/article/usa-ferc-coal-nuclear/former-commissioners-urge-u-s-ferc-to-reject-coal-nuclear-subsidies-idUSL2N1MV13G)
[idUSL2N1MV13G](https://www.reuters.com/article/usa-ferc-coal-nuclear/former-commissioners-urge-u-s-ferc-to-reject-coal-nuclear-subsidies-idUSL2N1MV13G).

⁹ See, e.g., Comments of Ten State Attorneys General 3-7, *supra* note 8;

¹⁰ The White House, *Statement from the Press Secretary on Fuel-Secure Power Facilities* (June 1, 2018), [https://www.whitehouse.gov/briefings-statements/statement-press-secretary-fuel-](https://www.whitehouse.gov/briefings-statements/statement-press-secretary-fuel-secure-power-facilities/)
[secure-power-facilities/](https://www.whitehouse.gov/briefings-statements/statement-press-secretary-fuel-secure-power-facilities/).

1 declarations.¹¹ The memorandum included a discussion of potential actions that the
2 Administration might take pursuant to FPA Section 202(c).¹²

3 9. Sierra Club, the nation's oldest grassroots environmental organization and a
4 strong proponent of clean energy sources, sought to further its long-standing interest in
5 government accountability and transparency by filing two FOIA requests with the Department
6 beginning in March 2018.

7 10. On March 30, 2018, Sierra Club submitted a request to the Department for
8 internal and external communications regarding the March 13, 2018 NETL report, along with
9 calendars, meeting sign-in sheets, and other records that would reveal persons who had met with
10 staff at the Department and NETL regarding the NETL report (Attachment A).

11 11. On April 20, 2018, Sierra Club submitted a FOIA request for all records relating
12 to any request or proposal that the Department exercise its authority under FPA Section 202(c)
13 (Attachment B).

14 12. FOIA required the Department to make a determination on Sierra Club's requests
15 by April 27, 2018 and May 18, 2018, respectively, and to produce responsive documents shortly
16 thereafter. The Department has ignored the deadline required by FOIA and still has not made a
17 final determination on either of Sierra Club's two requests, as FOIA required it to do. The
18 Department has produced a subset of responsive documents relating to Sierra Club's first
19 request, but none in response to the second request. In doing so, the Department has violated the
20 law.

21 13. Environmental Defense Fund, a not-for-profit organization working toward a
22 clean, modern energy system that will better protect public health while providing economic
23

24 ¹¹ See Jennifer A. Dlouhy, *Trump Prepares Lifeline for Money-Losing Coal Plants*, BLOOMBERG
25 (May 31, 2018), <https://www.bloomberg.com/news/articles/2018-06-01/trump-said-to-grant-lifeline-to-money-losing-coal-power-plants-jhv94ghl>. The draft memorandum, styled as an
26 Addendum, is available at <https://www.documentcloud.org/documents/4491203-Grid-Memo.html> [hereinafter *May 29 Draft Memorandum*].

27 ¹² See *May 29 Draft Memorandum, supra*, § V.B.2.

1 prosperity, sought to further its long-standing interests in competitive power markets, clean
2 energy, and government accountability by filing two FOIA requests in April 2018.

3 14. On April 4, 2018, EDF submitted a FOIA request for records related to the
4 Department's possible use of emergency authority, including under FPA Section 202(c), as well
5 as correspondence between a select list of Department personnel and representatives of
6 FirstEnergy Solutions (Attachment C).

7 15. Also on April 4, 2018, EDF submitted a FOIA request for correspondence
8 between contributors to the NETL report and a short list of Department personnel and any
9 representatives of FirstEnergy (Attachment D).

10 16. FOIA required the Department to make a determination on EDF's requests by
11 May 2, 2018, and to produce responsive documents shortly thereafter. The Department ignored
12 the deadline required by FOIA and still has not made a determination on either of EDF's two
13 requests, nor produced any documents, as FOIA required it to do. In doing so, the Department
14 has violated the law.

15 17. Sierra Club and EDF thus bring this lawsuit to ensure the Department complies
16 with its obligations under FOIA, and respectfully request that the Court order the Department to
17 produce all non-exempt documents responsive to their four requests. These records are
18 imperative for the public to understand what information the Department is receiving concerning
19 electric system reliability, the alleged need for coal and nuclear units to support reliability, and
20 how the Department is conducting itself in investigating these issues.

21 18. Timely disclosure is imperative given the continued signs that the Department
22 will take action in the near future to support uneconomic coal and nuclear facilities, and the
23 substantial and detrimental impact that the Department's action could have on FERC's statutory
24 mandate to ensure just and reasonable rates that are not unduly discriminatory or preferential.
25 The documents sought, which would additionally shed light on the influence of industry
26 lobbyists on the Department's decisionmaking, relate to a matter of significant public interest
27 and concern with major implications for competitive power markets, public health, and the
28

1 environment.

2 **JURISDICTION, VENUE, AND INTRADISTRICT ASSIGNMENT**

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

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

7 21. For the same reason, intradistrict assignment is proper in the Oakland Division.
8 *See* N.D. Cal. L.R. 3-2.

9 **PARTIES**

10 22. Plaintiff Sierra Club is incorporated in the State of California as a Nonprofit
11 Public Benefit Corporation with headquarters in Oakland, California. Sierra Club is the nation's
12 oldest environmental grassroots organization and has more than 3.5 million members and
13 supporters nationwide. Sierra Club is dedicated to protecting and preserving the natural and
14 human environment, and its purpose is to explore, enjoy, and protect the wild places of the earth;
15 to practice and promote the responsible use of the earth's ecosystems and resources; and to
16 educate and enlist humanity to protect and restore the quality of the natural and human
17 environments. Sierra Club is a leading non-governmental organization seeking to educate and
18 mobilize the public on issues of climate change, fossil fuel energy, and clean energy. It conducts
19 multiple public campaigns around these issues, including its Beyond Coal Campaign and Dirty
20 Fuels Campaign. In support of those efforts and to further Sierra Club's long-standing interest in
21 government accountability and transparency, Sierra Club submitted to the Department the two
22 FOIA requests described above at paragraphs 10 and 11.

23 23. Plaintiff EDF is a not-for-profit membership organization incorporated in the
24 State of New York. With more than 2 million members and supporters nationwide, EDF's
25 mission is to preserve the natural systems on which all life depends. Guided by science and
26 economics, EDF finds practical and lasting solutions to the most serious environmental
27 problems. EDF advocates for turning the corner to a safe and stable climate by rapidly reducing
28

1 greenhouse gas emissions and accelerating the transition to a healthy, prosperous clean-energy
2 economy. In pursuit of a cleaner electric grid, EDF has engaged extensively in administrative
3 proceedings before FERC, the Environmental Protection Agency, and other forums; litigated in
4 venues across the country to promote and defend the transition toward clean energy and to
5 ensure a freely competitive wholesale electricity market; and facilitated advocacy by its members
6 in support of climate protections. In support of those efforts and to further its interest in
7 government accountability and transparency on topics related to its mission, EDF submitted to
8 the Department the two FOIA requests described above in paragraphs 14 and 15.

9 24. Plaintiffs bring this action on their own behalf and on behalf of their members.
10 Plaintiffs and their members have been and continue to be injured by Defendant’s failure to
11 provide requested records within the timeframes mandated by the FOIA. The requested relief
12 will redress these injuries.

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

STATUTORY FRAMEWORK

17
18 26. FOIA requires that federal agencies promptly release, upon request by a member
19 of the public, documents and records within the possession of the agency, unless a statutory
20 exemption applies. 5 U.S.C. § 552(a)-(b).

21 27. Within twenty business days of an agency’s receipt of a FOIA request, the agency
22 must “determine . . . whether to comply” with the request. 5 U.S.C. § 552(a)(6)(A)(i). The
23 agency must “immediately notify” the requester of “such determination and the reasons
24 therefor.” *Id.* If an agency determines that it will comply with the request, it must “promptly”
25 release responsive, non-exempt records to the requester. 5 U.S.C. § 552(a)(6)(C)(i).

26 28. If the agency fails to comply with the statutory time limits, the requester is
27 deemed to have exhausted her administrative remedies. *Id.* District courts may enjoin an agency
28

1 from withholding agency records and “order the production of any agency records improperly
2 withheld.” 5 U.S.C. § 552(a)(4)(B).

3 STATEMENT OF FACTS

4 29. The current Administration and Department have publicly and repeatedly focused
5 on undermining power markets through continued efforts to bail out or otherwise preference
6 uneconomic coal and nuclear power. These efforts have been strongly supported and lobbied
7 for, publicly and privately, by a small group of coal mine and coal power resource owners.

8 30. The Administration and Department’s consideration of a coal bailout dates back
9 to at least March 2017. At that time, the Department was in repeated contact with coal industry
10 interests, both in the form of e-mail correspondence and in-person meetings. During the same
11 month, Secretary Perry met with the CEO of Murray Energy Corporation, Robert E. Murray.
12 During the meeting, Mr. Murray gave Secretary Perry a four-page “action plan” for reviving the
13 country’s struggling coal industry.¹³ The document included a series of action items aimed at
14 increasing utilization of coal power by, among other things, eliminating regulations intended to
15 protect public health and issuing an “emergency directive” to forestall the retirement of most
16 coal-fired power plants for at least two years.¹⁴

17 31. On April 14, 2017, Secretary Perry issued a memorandum requesting a study on
18 the reliability of the electricity grid.¹⁵

19 32. On August 4, 2017, Mr. Murray wrote to White House special assistant John D.
20 McEntee II asserting that he and the FirstEnergy Solutions Corporation chief executive had
21 “personally” met with President Trump in Huntington, West Virginia, the previous evening.¹⁶

22
23 ¹³ See Steve Mufson, *An American Energy Plan Straight from Coal Country*, WASHINGTON POST
24 (Dec. 8, 2017), https://www.washingtonpost.com/business/economy/an-american-energy-plan-straight-from-coal-country/2017/12/08/1f207a26-d6ab-11e7-a986-d0a9770d9a3e_story.html; see also *Action Plan*, *supra* note 2.

25 ¹⁴ See *Action Plan*, *supra* note 2.

26 ¹⁵ Mem. from Rick Perry, Sec’y of Energy, to Chief of Staff, U.S. Dep’t of Energy, *Study*
27 *Examining Electricity Markets and Reliability* (Apr. 14, 2017).

28 ¹⁶ Letter from Robert E. Murray, Chairman, President and Chief Exec. Officer of Murray Energy Corp. to John D. McEntee III [sic], Special Assistant and Personal Aide to the President, at 1

1 According to Mr. Murray’s letter, during that encounter, President Trump “turned to [Mr.
 2 McEntee] and said ‘tell [National Economic Council director Gary] Cohn to do whatever these
 3 two want him to do.’”¹⁷ The letter also stated, “We are desperate for the President to . . . order
 4 Energy Secretary Perry to invoke Section 202(c) of the Federal Power Act for FirstEnergy’s
 5 merchant power plants” and that FirstEnergy Solutions was “on the verge of bankruptcy,” which
 6 would “force Murray Energy Corporation into immediate bankruptcy.”¹⁸

7 33. On August 28, 2017, the Department published the study requested in the
 8 Secretary’s April 14 memorandum.¹⁹ The study found the electric grid was and continues to be
 9 reliable and that coal plants were primarily closing due to economic considerations rather than
 10 regulatory pressure. However, Secretary Perry, in a cover letter to the study, asserted that further
 11 action is needed for a resilient and reliable electricity system.²⁰ The following month, the
 12 Department issued a proposal to FERC under Section 403 of the FPA.²¹ The proposal sought to
 13 provide coal and nuclear units throughout the eastern United States with guaranteed cost of
 14 service plus a return on equity. The Department’s proposal premised this relief upon a need to
 15 ensure grid “resilience.” On January 8, 2018, FERC unanimously rejected the Department’s
 16 proposal on the basis that it failed to identify a cognizable grid resilience concern and that the
 17 proposed action would not have met the requirements of the FPA.²²

18 34. On March 13, 2018, NETL published a report entitled “Reliability, Resilience,
 19

(Aug. 4, 2017), <https://www.documentcloud.org/documents/3936141-Murray-s-letters-to-Trump-administration.html>.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ U.S. Dep’t of Energy, *Staff Report to the Secretary on Electricity Markets and Reliability* (Aug. 2017),

https://www.energy.gov/sites/prod/files/2017/08/f36/Staff%20Report%20on%20Electricity%20Markets%20and%20Reliability_0.pdf.

²⁰ Rick Perry, Sec’y of Energy, Cover Letter to *Staff Report to the Secretary on Electricity Markets and Reliability* (Aug. 23, 2017),

<https://www.energy.gov/sites/prod/files/2017/08/f36/Secretary%20Perry%20Grid%20Study%20Cover%20Letter.pdf>.

²¹ *Grid Resiliency Pricing Rule*, 82 Fed. Reg. 46,940 (proposed Oct. 10, 2017) (signed Sept. 29, 2017).

²² *Grid Reliability and Resilience Pricing et al.*, 162 FERC ¶ 61,012 (Jan. 8, 2018).

1 and the Oncoming Wave of Retiring Baseload Units, Volume I: The Critical Role of Thermal
2 Units During Extreme Weather Events.” The report stated that coal was vital to grid resilience
3 during the winter freeze or “bomb cyclone” weather event in December 2017 and January 2018.
4 The Department publicized this report for the first time on March 27, 2018.²³

5 35. On March 29, 2018, FirstEnergy Solutions Corp. requested that the Department
6 use its authority under FPA Section 202(c) to provide full cost recovery plus a return on equity to
7 coal and nuclear plants in the PJM Interconnection, asserting that current market conditions are a
8 “threat to energy security and reliability.”²⁴ FirstEnergy Solutions Corp.’s request relied
9 substantially on the NETL report, publicized only two days earlier.

10 36. On May 31, 2018, the media obtained a draft Department memorandum
11 containing draft order language that would compel substantial payments to coal and nuclear
12 generators under FPA Section 202(c) and the Defense Production Act. 50 U.S.C. § 4511(a). The
13 draft Department memorandum asserts that these resources are necessary for grid resilience,
14 reliability, and national defense.

15 37. On June 1, 2018, President Trump ordered Secretary Perry to “prepare immediate
16 steps” to halt the further closure and nuclear plants.²⁵

17 Sierra Club Requests for Department Documents Pursuant to FOIA

18 38. Due to the enormous impact upon the public of continued operation of costly coal
19 and nuclear plants and a lack of evidence suggesting that those power plants are necessary to
20 energy resilience and reliability, Sierra Club submitted two FOIA requests related to the
21 Department’s efforts to support such plants.

22 39. On March 30, 2018, Sierra Club submitted a request to the Department for

23 ²³ See *U.S. Dep’t of Energy, supra* note 6.

24 ²⁴ FirstEnergy Solutions Corp., *Re: Request for Emergency Order Pursuant to Federal Power
25 Act Section 202(c)* (Mar. 29, 2018), [https://statepowerproject.files.wordpress.com/2018/03/fes-
202c-application.pdf](https://statepowerproject.files.wordpress.com/2018/03/fes-202c-application.pdf).

26 ²⁵ The White House, *Statement from the Press Secretary on Fuel-Secure Power Facilities* (June
27 1, 2018), [https://www.whitehouse.gov/briefings-statements/statement-press-secretary-fuel-
28 secure-power-facilities/](https://www.whitehouse.gov/briefings-statements/statement-press-secretary-fuel-secure-power-facilities/).

1 internal and external communications regarding the March 13, 2018 NETL report, along with
2 calendars, meeting sign-in sheets, and other records that would reveal persons who had met with
3 staff at the Department and NETL regarding the NETL report (Attachment A).

4 40. On April 20, 2018, Sierra Club submitted a FOIA request for all records relating
5 to any request or proposal that the Department exercise its authority under FPA Section 202(c)
6 (Attachment B).

7 41. Sierra Club submitted these requests as part of its ongoing national effort to
8 address the pressing problems of climate change, air pollution, and our national dependence on
9 dirty and expensive energy sources such as coal and to promote the use of clean energy sources.
10 Sierra Club's membership and the general public are very interested in how Secretary Perry and
11 others in the Department are conducting the government's work and how outside entities may
12 have influenced the Department's decisions.

13 42. After Sierra Club submitted the initial FOIA request on March 30, 2018, the
14 Department's Melissa Darr sent an e-mail on April 3, 2018 acknowledging that the request had
15 been received and assigning a request tracking number of HQ-2018-00883-F. Subsequently, on
16 April 16, 2018 Celta Rokebrand sent an e-mail accepting the fee waiver and assigning the
17 request to Ann Guy.

18 43. On April 20, 2018, Sierra Club sent an e-mail to Ms. Guy requesting an update on
19 the FOIA request. Ms. Guy explained that she would provide an update soon.

20 44. After not receiving an update, Sierra Club sent an e-mail on May 1, 2018 and
21 again on May 30, 2018 requesting an update. Ms. Darr called back on June 1, 2018 and
22 confirmed that the current estimate for the FOIA production was June 14, 2018.

23 45. On July 18, 2018, Sierra Club received a partial response to its March 30, 2018
24 request. In the letter conveying the partial response, the Department did not explain what
25 percentage of the total responsive records this partial response contained, nor provide any
26 estimate for when the remaining records would be provided, though it noted that its
27 comprehensive search for documents was ongoing.

28

1 46. FOIA required the Department to make a final determination upon Sierra Club's
2 first request within twenty working days of the request, which was April 27, 2018, and to
3 produce documents responsive to the request immediately thereafter. *See* 5 U.S.C. §
4 552(a)(6)(A)(i).

5 47. The Department's response to Sierra Club's April 20, 2018 request is as follows.
6 On April 24, 2018, Kyle Kemper sent an e-mail to Sierra Club to confirm that the request had
7 been received, and assigning tracking number HQ-2018-00985-F.

8 48. On June 12, 2018, Mr. Kemper sent an e-mail to request that Sierra Club agree to
9 waive production of all draft documents. The following day Sierra Club attorney Sanjay
10 Narayan agreed to waive, only as part of this request, preliminary drafts of otherwise available
11 final orders or decisions, except those shared outside of the agency, with assurance of a Vaughn
12 index for excluded documents.

13 49. On June 13, Mr. Kemper sent an e-mail to Sierra Club confirming that the
14 Department (1) will not exclude drafts shared with any person outside the federal agency, or any
15 documents drafted by someone other than agency employees; (2) will provide an index of
16 excluded drafts; (3) expects to have documents by the first week of July; and (4) that Sierra Club
17 may request unreleased drafts by subsequent FOIA request.

18 50. Sierra Club has still not received any documents in response to its April 20, 2018
19 request.

20 51. FOIA required the Department to make a final determination upon Sierra Club's
21 second request within twenty working days of the request, which was May 18, 2018 and to
22 produce documents responsive to the request immediately thereafter. *See* 5 U.S.C. §
23 552(a)(6)(A)(i).

24 52. The Department's failure to make a final determination in response to Sierra
25 Club's requests, or produce documents to the Sierra Club in response to its requests, by the
26 deadlines applicable to each request as stated in paragraphs 10-12, *supra*, is unlawful under
27 FOIA.

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1 53. Immediate access to the requested information is crucial to Sierra Club because it
2 directly relates to the credibility of the Department's decisions concerning grid reliability, and it
3 is relevant to Sierra Club's ability to engage effectively in, and provide public oversight of, the
4 Department's actions concerning fossil fuel-based energy generation. Moreover, on information
5 and belief, the requested documents will demonstrate the participation by lobbyists and
6 executives of the fossil fuel industry in helping to initiate use of the Department's research
7 capabilities and regulatory authorities, including FPA Section 202(c).

8 EDF Requests for Department Documents Pursuant to FOIA

9 54. Concerned that the Department would seek to use emergency authority under the
10 Federal Power Act or some other statute to increase the utilization or forestall the retirements of
11 high-polluting, uneconomic coal plants, on April 4, 2018, EDF submitted a request for
12 correspondence from nine record custodians at the Department containing specified search terms
13 related to the use of emergency authority (Attachment C). The FOIA request also sought all
14 correspondence between the record custodians and employees or representatives of FirstEnergy
15 Solutions and the law firm that submitted FirstEnergy Solutions' March 29 request to the
16 Department.

17 55. On April 16, 2018, the Department granted EDF's request for a fee waiver. By the
18 same letter, the Department informed EDF that it had assigned the FOIA request tracking
19 number HQ-2018-00900-F and directed EDF to contact Anjelica Ruda with any questions. In a
20 cover e-mail to the letter, Ms. Ruda asked "to discuss the search terms to use for the search of
21 outside entities and people."

22 56. On April 18, 2018, EDF's John Bullock and Benjamin Levitan discussed the
23 search terms with Ms. Ruda. Later that day, Mr. Bullock e-mailed Ms. Ruda more specific search
24 terms based on their discussion. This clarification provided specific email domains (e.g.,
25 "@firstenergycorp.com") to help identify employees or representatives of FirstEnergy Solutions.
26 The clarification also specifically named six individuals who should be included regardless of
27 which email address they were using.

1 57. On May 9, 2018, Mr. Bullock called Ms. Ruda, who informed him that the
2 Department would not complete its search for records for another month. On May 15, Ms. Ruda
3 informed Mr. Bullock by e-mail that she would no longer be managing this FOIA request and
4 indicated that the new contact person was Sheree DeBerry.

5 58. On May 24, 2018, after several unsuccessful attempts to reach Ms. DeBerry by
6 phone and email, Mr. Bullock again called Ms. DeBerry, but a different Department
7 representative answered the telephone and informed Mr. Bullock that the Department would
8 likely not complete its search for responsive records for another month.

9 59. More than five weeks later, on July 2, 2018, Ms. DeBerry called EDF to ask for
10 additional information about some of the individuals identified in EDF's April 18 clarification.
11 Mr. Bullock explained that EDF was requesting all correspondence between those individuals
12 and the Department officials enumerated in the original FOIA request, regardless of which email
13 addresses the individuals were using. Ms. DeBerry confirmed that the Department would
14 perform the search accordingly. On July 9, Ms. DeBerry provided a list of search terms that the
15 Department planned to use to identify the individuals in question. On July 17, Mr. Bullock
16 reiterated that EDF was requesting all correspondence between the enumerated Department
17 officials and those individuals, regardless of which search terms the Department utilized.

18 60. EDF has received no further correspondence from the Department about this
19 FOIA request.

20 61. Concerned about a perceived lack of objectivity in the NETL report, and that the
21 Department might try to use the report to justify harmful efforts to increase the utilization or
22 forestall the retirements of uneconomic coal plants, on April 4, 2018, EDF submitted a request
23 for correspondence between the authors of the NETL report and nine officials at the Department
24 headquarters, as well as representatives of FirstEnergy or the law firm that submitted
25 FirstEnergy's March 29 request to the Department. The request was limited to correspondence
26 that contained one or more of a short list of search terms related to the NETL report. EDF also
27 specifically requested the memorandum initiating the NETL report from Steve Winberg, the
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1 Department's Assistant Secretary of Fossil Energy, to Peter Balash, a member of NETL's
2 Energy Systems Analysis team.

3 62. On April 16, 2018, the Department granted EDF's request for a fee waiver. By the
4 same letter, the Department informed EDF that it had assigned the FOIA request tracking
5 number HQ-2018-00901-F and directed EDF to contact Melissa Darr with any questions.

6 63. On April 20, 2018, EDF's Benjamin Levitan left a voicemail for Ms. Darr seeking
7 information about this FOIA request and followed up with an e-mail. On April 27, having not
8 heard back, Mr. Levitan again called Ms. Darr, who stated that the search for records was still in
9 progress.

10 64. On May 23, 2018, Mr. Levitan called Ms. Darr, who indicated that she was still
11 waiting to receive the search results. She further indicated that a separate process of record
12 review was occurring within NETL and stated that she would seek an update from NETL and
13 relay that information to Mr. Levitan.

14 65. On June 1, 2018, Mr. Levitan e-mailed Ms. Darr, seeking any updates about the
15 progress of this request at Department headquarters and NETL.

16 66. On June 14, 2018, Mr. Levitan left a voicemail for Ms. Darr seeking any updates
17 about the progress of this request. On June 15, 2018, Mr. Levitan followed up with an e-mail.
18 Later that day, Ms. Darr responded by e-mail that she was still awaiting all of the search results.
19 She further stated that some of the records at both headquarters and NETL had been approved for
20 release by subject-matter experts but provided no estimate of when EDF would receive those
21 records.

22 67. The Department's deadline for issuing determinations on EDF's two FOIA
23 requests lapsed on May 2, 2018. To date, the Department has failed to issue such determinations
24 or produce any documents in response to these requests, in violation of FOIA.

25 68. Immediate access to the requested information is critical because of the urgency
26 with which the White House has demanded that the Department take action to increase the
27 utilization or forestall the retirements of uneconomic coal plants, which could have devastating
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1 consequences for public health, the environment, and freely competitive energy markets. It is
2 essential that the public have access to information about the motivations and justifications for
3 any such action.

4 **FIRST CAUSE OF ACTION**

5 **VIOLATION OF FOIA, 5 U.S.C. § 552**

6 69. Plaintiffs re-allege and incorporate by reference all the foregoing paragraphs in
7 this Complaint as though fully set forth herein.

8 70. First, upon its records request to the Department dated March 30, 2018, Sierra
9 Club became statutorily entitled under FOIA to receive from the Department all records
10 responsive to its request concerning the NETL report. At a minimum, FOIA required the
11 Department to provide Sierra Club with a final determination upon Sierra Club's request by
12 April 27, 2018, and to produce non-exempt records responsive to the request immediately
13 thereafter.

14 71. Second, upon its records request to the Department dated April 20, 2018, Sierra
15 Club became statutorily entitled under FOIA to receive from the Department all non-exempt
16 records responsive to its request concerning FPA Section 202(c). At a minimum, FOIA required
17 the Department to provide Sierra Club with a final determination upon Sierra Club's request by
18 May 18, 2018, and to produce non-exempt records responsive to the request immediately
19 thereafter.

20 72. Third, upon its records request to the Department dated April 4, 2018, EDF
21 became statutorily entitled under FOIA to receive from the Department all records responsive to
22 its request concerning the use of emergency authority. At a minimum, FOIA required the
23 Department to provide EDF with a final determination upon EDF's request by May 2, 2018, and
24 to produce non-exempt records responsive to the request immediately thereafter.

25 73. Fourth, upon its records request to the Department dated April 4, 2018, EDF
26 became statutorily entitled under FOIA to receive from the Department all non-exempt records
27 responsive to its request concerning the NETL report. At a minimum, FOIA required the
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1 Department to provide EDF with a final determination upon EDF's request by May 2, 2018, and
2 to produce non-exempt records responsive to the request immediately thereafter.

3 74. The Department has failed to provide Sierra Club and EDF with final
4 determinations upon their respective requests, and is thus in violation of FOIA.

5 75. The Department has failed to produce to Sierra Club and EDF any documents
6 responsive to three of their four respective requests, and to provide all non-exempt documents
7 responsive to a fourth request, and is thus in violation of FOIA.

8 **PRAYER FOR RELIEF**

9 WHEREFORE, Sierra Club and EDF respectfully request that this Court enter judgment
10 against the Department as follows:

11 1. Declaring that the Department has violated FOIA by failing to make a final
12 determination upon Plaintiffs' FOIA requests and by failing to produce all non-exempt records
13 responsive to Plaintiffs' FOIA requests by the statutory deadlines;

14 2. Ordering that the Department immediately produce the requested records to
15 Plaintiffs;

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

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

21 5. Awarding Sierra Club and EDF their costs and reasonable attorneys' fees; and

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

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1 Dated: August 6, 2018

By:

2 /s/ Casey Roberts

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