The Free Market Environmental Law Clinic

REQUEST UNDER THE FREEDOM OF INFORMATION ACT

August 2, 2013

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

BY ELECTRONIC MAIL: FOIA-CEII@ferc.gov

RE: FOIA Request – Certain Commission e-communications (to/from/referencing Binz)

Dear Mr. Tao or FERC Freedom of Information Officer,

On behalf of the Independence Institute (II), and the Free Market Environmental Law Clinic (ELC) as a separate co-requester and also II 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 1) all **emails, text messages, or instant messages** (and any attachments thereto), 2) which were sent **to or from** any employee in FERC's Office of External Affairs, and/or Office of the Chairman (all including also as cc: or bcc:), 3) on their FERC-provided account(s) and/or any account used for work-related correspondence, 4) **to, from or referencing** Ron or Ronald Binz.

These include but are in no way limited to records relating to or referencing the dozens of meetings FERC recently arranged for Mr. Binz at NARUC.

This request is not limited to e-communications sent to or from those official corporate accounts.

Responsive records will be dated over the, at present, approximately five-month period from March 1, 2013 <u>through the date you process this request</u>, inclusive (within FERC's window for complying with its FOIA obligations, this period could legitimately extend to as long as six months; in the event it does not, please be advised we intend to fully protect our appellate rights in this matter, which is of particularly timely public interest due to a pending nomination of the individual whose Senate confirmation the above-cited private interests are now engaged to promote).

<u>Background to the Request Illustrating Public Interest, Governmental Operations/Activities</u>

Related to this request we note a story stating, in pertinent part, "Clean energy advocates have hired a Washington, D.C.-based public relations firm to advocate for President Obama's pick to head the Federal Energy Regulatory Commission and thwart increasing attacks from Colorado's coal industry and free market groups. Green Tech Action Fund, a San Francisco group that

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[1] *See Citizens for Responsible Ethics in Washington v. Federal Election Commission*, 711 F.3d 180, 186 (D.C. Cir. 2013), and discussion at page 21, *infra*.

describes itself as a nonpartisan grant-making organization, has hired VennSquared Communications to advocate for Ron Binz as the next chairman of FERC." (Northey, Hannah, "Clean energy group taps PR firm to advocate for Binz amid mounting attacks", *Energy & Environment Daily*, July 23, 2013).

This represents a private organization engaging public advocacy for hire to influence a confirmation process for a senior position in the federal government, apparently because of possible opposition due to the nominee's controversial record. Rumors of this engagement emerged even before the nominee was publicly announced, hence the time period covered by this request. The principals of this private firm have longstanding ties to the Senate Majority Leader. This and other indications reflect a possible effort to politicize what had been a non-political independent agency (similar to the effort at the National Labor Relations Board which has proved to be of great public, media, congressional and judicial interest).

As such, this matter is inherently of public interest and responsive records will significantly inform the public on the same.

Further, we are informed that FERC arranged and/or otherwise facilitated and/or participated in dozens of meetings for Mr. Binz with various third parties at the July NARUC conference in Denver. This is somewhat unique and appears to be another element in this campaign to obtain support for the controversial nominee's confirmation, possibly in collaboration with the above-described campaign by privately financed political operatives.

All of this, and correspondence reflecting the relationship with Mr. Binz, pre-nomination, relates to our concern over apparent politicization of a heretofore largely non-ideological independent agency whose decisions carry significant economic impacts.

FERC Owes II and ELC a Reasonable, Non-Conflicted Search

FOIA requires an agency to make a reasonable search of records, judged by the specific facts surrounding each request. *See, e.g., Itrurralde v. Comptroller of the Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003); *Steinberg v. DOJ*, 23 F.3d 548, 551 (D.C. Cir. 1994).

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*.

A search must be "reasonably calculated to uncover all relevant documents." *See, e.g., Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995). In determining whether or not a search is "reasonable," courts have been mindful of the purpose of FOIA to bring about the broadest possible disclosure. *See Campbell v. DOJ*, 164 F.3d 20, 27 (D.C. Cir. 1999) ("reasonableness" is assessed "consistent with congressional intent tilting the scale in favor of disclosure").

The reasonableness of the search activity is determined ad hoc but there are rules, including that the search must be conducted free from conflict of interest. (In searching for relevant documents, agencies have a duty "to ensure that abuse and conflicts of interest do not occur."

Cuban v. S.E.C., 744 F.Supp.2d 60, 72 (D.D.C. 2010). See also *Kempker-Cloyd v. Department of Justice*, No. 97-cv-253, 1999 U.S. Dist. LEXIS 4813, at *12, *24 (W.D. Mich. Mar. 12, 1999) (holding that the purpose of FOIA is defeated if employees can simply assert that records are personal without agency review; faulting Department of Justice for the fact that it "was aware that employee had withheld records as 'personal' but did not require that 'he submit those records for review' by the Department.)).

For these reasons II and ELC expect this search be conducted free from conflict of interest, *including* in its choice of who conducts the search of relevant accounts and initial review for potentially responsive records.

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.

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. It is also true for correspondence which may be embarrassing for the activism or close personal

relationships with, *e.g.*, environmental activists, it reveals but which embarrassment -- as precedent makes abundantly clear -- does not qualify a record as "personal".

Indeed, requesters note that the nature of records that would be responsive to this request indicates they are far more likely to involve commission and/or other executive branch political appointees expressing or discussing political or strategic-political commentary on a topic of public and political interest more than any possible actual deliberative process as implicated as delineated by the courts in, e.g., *Jordan v. DoJ*, 591 F.2d 753, 774 (D.C. Cir. 1978). In fact, the likelihood of this is near zero.

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).

We remind FERC it cannot withhold entire documents rather than producing their "factual content", redacting the confidential advice and opinions. As the D.C. Court of Appeals noted, the 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) 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 n.28 (D.C. Cir. 1977) (emphasis added).

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 V*aughn 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 others[2] 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.

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[2] *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/aclufffeewvrfoialtr.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.

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 II and ELC request 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 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[]"). Neither group charges for copies of its reports. Information provided to II and ELC cannot result in any form of commercial gain to II or ELC. 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, II and ELC 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)).[3]

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

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[3] This was grounded in the recognition that the two plaintiffs in that merged appeal were, like Requester, 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 Requester, "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*.

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

"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).

Requester's ability to utilize FOIA -- as well as many nonprofit organizations, educational institutions and news media who will benefit from disclosure -- depends on its 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 II and ELC in this FOIA request will be used to better the public's understanding of political involvement in the nomination process for a controversial individual to assume an important, senior office of the federal government. Particularly, responsive records should directly or indirectly reflect discussions about this topic among or including FERC staff with other senior political officials, as well possibly as with or about other parties both inside and outside government about this topic some of whom have been hired, or have hired others, to promote a political nomination to a previously apolitical agency. These include pressure groups, particular industry participants, campaign contributors or investors.

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 the importance of energy policy decisions on major domestic industries and the larger economy, with direct impacts on our sources of electricity, and employment of many tens of thousands both directly and indirectly. Given the record of the nominee at issue in the instant request, which includes aggressive advocacy of intermittent, unreliable sources of energy at the expense of reliable, abundant traditional energy sources, it relates as well to policies that the president has acknowledged would lead to "bankrupt[ing]" the coal industry's customers if they sought to expand use of certain the industry's product for electricity generation. That is a key but by no means the only element of what has widely been described as the administration's "war on coal".[4]

We also note other emails obtained by congressional investigators, the rest of which we expect should come out eventually, reflect a debate about this very agenda raging among a near-identical community as those involved in promoting the nomination to an otherwise non-political agency. Those discussions involve administration officials and green pressure groups, as well as certain very political industry leaders (some who had previously helped underwrite public affairs activities in pursuit of their shared policy agenda, a practice also at issue in the present request).

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[4] In addition to stating an intention to use policy to reverse what it called the U.S.'s supposed "overproduction" of oil and gas, the current administration has targeted the coal industry for decline, our nation's largest source of electricity production and an industry employing many thousands and supporting hundreds of communities, in a fashion widely described as its "war on coal". That campaign extends to the point of promoting policies that the president has acknowledged would lead to "bankrupt[ing]" the industry's customers if they sought to expand use of certain the industry's product for electricity generation.

It is our position that the public deserve to review public records possibly shedding light on what if any public records exist reflecting private financial interests and/or political influence being exerted in this process.

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 economic importance, 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").

Particularly after undersigned counsel's recent discoveries using FOIA, related publicizing of certain federal agency record-management and electronic communication practices and related other efforts to disseminate the information, the public, media and

congressional oversight bodies are very interested in how widespread are the violations of this pledge of unprecedented transparency and, particularly, in the issue central to the present request.

This request, when satisfied, will further inform this ongoing public discussion.

Further, II and ELC have conducted several studies on the operation of government, particularly regulatory agendas against politically deselected (and government's intervention in favor of politically selected) energy sources. On its face, therefore, information shedding light on this relationship satisfies FOIA's test.

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.

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 media attention to the nomination, the hiring by a private entity of a public relations firm to influence the nomination, and coverage of the "clean energy economy" and how that agenda played out in the countries the president used to cite as his models for this agenda.

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 requester or a narrow segment of interested persons. II and ELC 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. II and ELC 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]

Requesters also intend to disseminate the information gathered by this request via media appearances (II's Amy Oliver hosts a regional radio program; the undersigned counsel Horner appears regularly, to discuss his work, on national television and national and local radio shows, and weekly on the radio shows "Garrison" on WIBC Indianapolis and the nationally syndicated "Battle Line with Alan Nathan").

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, the undersigned 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."

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[5] This involves EPA (*see*, *e.g.,* http://washingtonexaminer.com/epa-refuses-to-talk-about-think-tank-suit-demanding-docs-on-officials-using-secret-emails/article/2509608#.UH7MRo50Ha4, referencing revelations in a memo obtained under FOIA; *Horner et al. (CEI) v. EPA* (CV-00-535 D.D.C., settled 2004)), *see also* see also requests by the undersigned on behalf of a similarly situated party, the Competitive Enterprise Institute (CEI) requests of the Departments of Treasury (s*ee, e.g*., http://www.cbsnews.com/8301-504383_162-5314040-504383.html, http://www.cbsnews.com/8301-504383_162-5322108-504383.html) and Energy (see, e.g., http://www.foxnews.com/scitech/2011/12/16/complicit-in-climategate-doe-under-fire/, http://news.investors.com/ibd-editorials/031210-527214-the-big-wind-power-cover-up.htm?p=2), NOAA (*see, e.g*., http://wattsupwiththat.com/2012/10/04/the-secret-ipcc-stocker-wg1-memo-found/, http://wattsupwiththat.com/2012/08/21/noaa-releases-tranche-of-foia-documents-2-years-later/), and NASA (*see, e.g*., http://legaltimes.typepad.com/blt/2010/11/global-warming-foia-suit-against-nasa-heats-up-again.html, which FOIA request and suit produced thousands of pages of emails reflecting agency resources used to run a third-party activist website, and revealing its data management practices; *see also* http://wattsupwiththat.com/2012/10/04/the-cyber-bonfire-of-gisss-vanities/), among numerous others discussion of most of which is available online.

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 previously explained, the public has no source of information on what discussions involving this private effort to promote a controversial nominees to chair a previously non-political agency the policies of which carry tremendous national economic impacts. The II-ELC inquiry and any related study will provide on this unstudied area of government operations. Because there is no such analysis currently existent, 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 II and ELC 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, II and ELC qualify as media organizations for purposes of fee waiver**

The provisions for determining whether a requesting party is a representative of the news media, and the "significant public interest" provision, are not mutually exclusive. Again, as II and ELC

are non-commercial requesters, and 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*. Alternately and only in the event FERC deviates from prior practice on similar requests and refuses to waive our fees under the "significant public interest" test, which we will then appeal while requesting FERC proceed with processing on the grounds that we are a media organization, we request a waiver or limitation of processing fees pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)("fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by.... a representative of the news media...") and 18 CFR § 388.109(b)(iv); see also 388.109(b)(2)(ii).

However, we note that as documents are requested and likely are by their very nature available electronically, there should be no copying costs.

Requesters repeat by reference the discussion as to their publishing practices, reach and intentions to broadly disseminate, all in fulfillment of II and ELC's mission, from pages 16-17, *supra*.

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, requesters qualify 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 pubic. *See Electronic Privacy Information Center v. Department of Defense*, 241 F. Supp. 2d 5 (D.D.C. 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. 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).

Accordingly, any fees charged 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).

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 conflict 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 II and ELC with a particularized and substantive determination, and of its determination and its reasoning, as well as II and ELC's right 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,[6] but *as necessary* in hard copy to my attention at the address below. We 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*.

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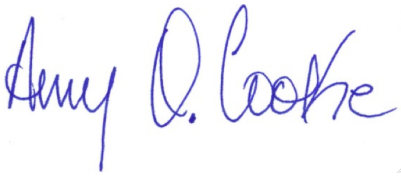
[6] For any hard-copy mailing that FERC finds necessary, we request you use 1489 Kinross Lane, Keswick, Virginia, 22947 Attn. Chris Horner.

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

Respectfully submitted,



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