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May 7, 2018

Secretary Rick Perry
U.S. Department of Energy
1000 Independence Ave. SW
Washington, DC 20585
AskOE@hq.doe.gov

Dear Secretary Perry,

Pretty much anyone even tangentially connected to the electric power industry waits with bated breath for DOE's decision on the March 29 request by First Energy Solutions that the Department declare a national emergency under Section 202(c) of the Federal Power Act for *all* nuclear and coal power plants in PJM for a minimum of four years.¹ Such an action would be unprecedented, unjustified under the authorities in the statute, and would cost consumers tens of billions of dollars. That's why Public Citizen joins the diverse protest chorus of other groups that formally oppose First Energy's multi-billion dollar ratepayer bailout request, and, while we're all waiting on this monumental decision, we submit several requests designed to introduce transparency into this process.

All Submissions and Communications On First Energy's Request Must Be Part of Public Record

Given the enormous implications the DOE's decision will have on consumers, energy markets, the future of electricity policy—and the legal work load of dozens of trade associations, public interest groups and various companies, states and a whole slew of other entities too numerous to name—the DOE must treat this proceeding as it would a public docket, providing a comprehensive public record not only of submissions to DOE regarding First Energy's request, but all communications, records and other material reflecting DOE's information gathering with outside parties and other Federal agencies (including the White House) on the First Energy 202(c) request. First Energy's request is so unprecedented, and the consequences of granting such emergency authority so dire, that the public interest can only be satisfied with a complete and open public docket. Right now, the public is denied access to any comprehensive, official record of comments, submissions and other key documentation that the DOE could use to make a decision on First Energy's unprecedented request.

Our survey of publicly-available submissions to DOE on the First Energy request show unanimity in opposition to granting an emergency under 202(c). For example, on April 5 the PJM Industrial Customer Coalition submitted a formal Protest of First Energy's request², as did

¹ <https://statepowerproject.files.wordpress.com/2018/03/fes-202c-application.pdf>

² http://blogs.edf.org/energyexchange/files/2018/04/Protest-of-PJM-Consumer-Representatives_FES-Emergency-Order-Request-A6290222.pdf



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the American Public Power Association on April 9.³ The American Petroleum Institute (a formidable lobby shop that knows a thing or two about cutting through the flak and going straight to the top decision maker) bypassed DOE entirely in its request to the President of United States to reject First Energy’s request.⁴ On April 24, the Advanced Energy Economy submitted comments requesting the Department reject First Energy’s request.⁵

Opinions and Communications by and with White House Lawyers As Referenced in the August 4, 2017 Letter from Robert Murray Must Be Made Public As Part of This Proceeding

The inception of First Energy’s radical Section 202(c) request appears to originate with Robert Murray, Chairman, President and Chief Executive Officer of Murray Energy Corporation. An infamous memo dated August 4, 2017 signed by Mr. Murray, summarizes a series of meetings and communications the coal magnate had with a variety of Trump Administration officials—including the President of the United States—detailing Murray’s efforts a year ago to push the Administration to declare a national emergency for First Energy’s failing power plants under 202(c).⁶

It is important to note that *four days* after Mr. Murray authored this letter to the Trump Administration demanding action on declaring an emergency under 202(c), Murray Energy Corporation gave \$1 million to America First Action, Inc., a SuperPAC tied to promoting President Donald Trump and his Administration.⁷ Perhaps the \$1 million helped the President of the United States focus on the letter’s contents.

Murray writes in the letter that he “personally” spoke with President Trump at a July 25 rally in Youngstown, Ohio event requesting “that President Trump direct Energy Secretary Rick Perry to invoke Section 202(c) of the Federal Power Act declaring an emergency on the electric power grid.” [at Page 1]. Murray claims President Trump then “turned to Energy Secretary Rick Perry and said three times ‘I want this done’”. [at Page 1]

Murray’s letter continues: “It’s been 3 weeks since we last talked to you [about declaring an emergency under 202(c)] and there seems to be no resolution and no action . . . Our understanding is that White House lawyers have some concern regarding 202 C . . . While we are trying to reduce the level of concern of White House lawyers—and we think we are having some success, time is a luxury we do not have. We can understand why [White House] lawyers don’t want to risk losing . . . Even if we are wrong and this fails, at least we can tell our people

³ www.publicpower.org/periodical/article/association-urges-doe-reject-firstenergy-plea-emergency-order

⁴ www.api.org/~media/Files/News/Letters-Comments/2018/4-13-18-Ltr-to-the-President-Federal-Power-Act-Section-202c.pdf

⁵ www.aee.net/articles/aee-urges-doe-reject-emergency-support-of-coal-nuclear-plants

⁶ www.documentcloud.org/documents/3936141-Murray-s-letters-to-Trump-administration.html

⁷ <http://docquery.fec.gov/cgi-bin/forms/C00637512/1199534/sa/ALL>



you did everything possible and that you left no stone unturned . . . We need action. DOE must enact 202 C.” [Murray letter, at Page 3]

It is clear that First Energy’s request began not with its March 29, 2018 demand, but rather with Robert Murray’s formal initiative beginning on July 25, 2017. Therefore, records of all communications and meetings described in Robert Murray’s August 4, 2017 letter—including those describing the legal opinions of White House lawyers as described in the letter—must be made public as part of this proceeding.

Communications Regarding the Design, Development and Dissemination of a NETL Report That Was Publically Released 48 Hours Before First Energy’s Request Must Be Made Public As Part of this Record

The First Energy request prominently features a U.S. Department of Energy National Energy Technology Laboratory (NETL) study⁸ that purports to show that “coal was the most resilient form of power generation” during the 13-day cold snap that hit the East Coast beginning December 27, 2017. Although the NETL report is dated March 13, DOE did not publicly release it until March 27 (“The new report, released today...” reads the Office of Fossil Energy web site dated March 27, 2018).⁹

It seems an incredible coincidence that First Energy’s 202(c) request so prominently features a report that was not released to the public 48 hours before First Energy’s request.

But not really. Less than two months before First Energy’s request, Doug Matheney, special adviser to Energy Secretary Rick Perry, told the West Virginia Mining Symposium in Charleston, West Virginia on January 31, 2018 that he’s “here to help” the coal industry; that his “one purpose” for going to serve as Secretary Perry’s top advisor is to help the U.S. coal industry; that the DOE’s job is to give coal “a positive outlook”; and that DOE must “understand the importance of coal to the generation of electricity and to the reliability and resilience of the grid.”¹⁰ I believe Mr. Matheney—after all, prior to his current senior advisor position to Energy Secretary Perry, he ran the National Mining Association’s Count on Coal Initiative in Ohio.¹¹

⁸ *Reliability and the Oncoming Wave of Retiring Baseload Units, Volume I: The Critical Role of Thermal Units During Extreme Weather Events*, DOE/NETL-2018/1883, www.netl.doe.gov/research/energy-analysis/search-publications/vuedetails?id=2594

⁹ www.energy.gov/fe/articles/netl-study-highlights-importance-coal-power-generation-during-bomb-cyclone-power-demands

¹⁰ Taylor Kuykendall, Energy department adviser assures US coal industry he's 'here to help', *S&P Market Intelligence*, January 31, 2018,

<https://platform.mi.spglobal.com/web/client?auth=inherit#news/article?id=43381678&cdid=A-43381678-12327>

¹¹ Hannah Northey, “Political hires climb aboard,” *E&E News*, March 8, 2017



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To allay concerns that the DOE is using its Laboratories as advocacy tools for select private interests, all communications and records regarding the design, development and dissemination of the NETL report must be made public as part of this record.

Both First Energy’s 202(c) Request And Possible Action Under the 1950 Defense Production Act Must Be Rejected Because No Emergency Exists From The Company’s Bankruptcy

The Department’s regulations defining an “emergency” for the purposes of 202(c) appear to prohibit its use for the kind of economic issues faced by First Energy’s bankruptcy: “Situations where a shortage of electric energy is projected due solely to the failure of parties to agree to terms, conditions or other economic factors relating to service, generally will not be considered as emergencies unless the inability to supply electric service is imminent.”¹²

Indeed, PJM’s March 30 response to First Energy’s request concludes that “PJM can state without reservation there is no immediate threat to system reliability.”¹³ And a subsequent May 3 *Generation Deactivation Notification Update* concludes that the retirement of 4,000 MW identified in the First Energy request poses no reliability concern whatsoever.¹⁴ Similar conclusions were reached last year in Public Citizen’s congressional testimony¹⁵ and Public Citizen filings in Federal Energy Regulatory Commission Docket No. RM18-1.¹⁶ Indeed, FERC ruled 5-0 in its January 8, 2018 order rejecting the Department of Energy’s first attempt to bail out First Energy’s uneconomic power plants, concluding that “the extensive comments submitted by the RTOs/ISOs do not point to any past or planned generator retirements that may be a threat to grid resilience.”¹⁷

While First Energy has not publicly requested it, rumors are circulating that—given the uphill legal battle that taking action under 202(c) presents—the President will act using the *1950 Defense Production Act*.¹⁸ Bailing out First Energy’s power plants (or all nuclear and coal power plants in PJM, as First Energy has requested) utilizing the 1950 DPA is even more dubious than using 202(c). The 1950 DPA authorizes the federal government to inject cash into companies essential for national defense in order to protect domestic supplies of key products.

¹² 10 CFR § 205.371

¹³ At Page 1, <https://docs.house.gov/meetings/IF/IF03/20180412/108114/HHRG-115-IF03-20180412-SD050.pdf>

¹⁴ www.pjm.com/-/media/committees-groups/committees/teac/20180503/20180503-teac-generation-deactivation-notification.ashx

¹⁵ www.citizen.org/system/files/case_documents/testimony-tyson-slocum-energy-and-commerce-committee-october-2017_0.pdf

¹⁶ <https://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=14721747>

¹⁷ At 15, <https://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=14793020>

¹⁸ www.fema.gov/media-library-data/20130726-1650-20490-5258/final__defense_production_act_091030.pdf



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But the First Energy bankruptcy presents no energy supply emergency, and the eventual retirement of these power plants pose no threat to supplying energy for national defense, and no national security emergency exists as a result of the First Energy bankruptcy. Past uses of the 1950 DPA include the 2000-01 California Deregulation Crisis¹⁹ (power outages caused by one of the largest corporate market manipulation frauds in history), and more recently in 2012 to provide assistance to the biofuels industry to provide needed fuel supplies for military ships and aircraft. Utilizing the 1950 DPA to bail out failing nuclear and coal power plants would cost consumers and/or taxpayers billions of dollars—an amount far higher than Congress typically allocates for the 1950 DPA. Indeed, the Omnibus spending bill passed earlier this year allocated \$67.4 million for the 1950 DPA.²⁰

Finally, government action isn't needed because the power market has long adjusted to such bankruptcies: bondholders of secured debt on such bankrupt facilities often sell such assets for cheap to plenty of interested buyers. For example, the private equity owner of the National Basketball Association's Detroit Pistons just bought himself an 800 MW natural gas power plant in PJM from NRG's bankrupt GenOn subsidiary²¹. Perhaps First Energy's approach has been all wrong: instead of seeking handouts from consumers and taxpayers, instead owners of uneconomic power plants should be stroking the egos of the proprietors of various professional sports teams as prospective purchasers of generation assets. The power plants could have their own mascots, and maybe even additional revenues could be procured through naming rights.

Respectfully submitted,

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¹⁹ www.gpo.gov/fdsys/pkg/CHRG-107shrg76811/html/CHRG-107shrg76811.htm

²⁰ Public Law No. 115-141, www.congress.gov/115/bills/hr1625/BILLS-115hr1625enr.pdf

²¹ FERC Docket No. EC18-70.