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June 22, 2018

Freedom of Information Officer
U.S. Nuclear Regulatory Commission
Mail Stop T-2 F43
Washington, DC 20555-0001
*Via email only to FOIA.Resource@nrc.gov and to
Margo Stevens, margo.stevens@nrc.gov*

RE: FOIA Request #NRC-2018-000563 (Appeal of initial FOIA decision not to expedite)

Dear FOIA Officer:

By this letter, I hereby appeal the determination rendered in the captioned FOIA request on June 20, 2018 which denied expedited process to the groups Beyond Nuclear (BN), Don't Waste Michigan (DWM), Sierra Club, and Public Citizen (collectively referred to as "Requesting Parties"), on the ground that there is no compelling need for the information.

The Requesting Parties seek access to minutes, notes, slideshows and other records exchanged between NRC and FERC during both the public and non-public portions of the Joint Meeting held on June 7, 2018, as well as any draft records prepared for or exchanged during the non-public portion of the meeting,

In her June 20, 2018 "acknowledgment letter" to me as counsel for the Requesting Parties, Ms. Stephanie Blaney stated as follows:

A request for expedited processing can be granted only when the requester shows a "compelling need" based on meeting either of two conditions: when failure to obtain the records quickly "could reasonably be expected to pose an imminent threat to the life or physical safety of an individual;" or, if the requester is a person "primarily engaged in disseminating information," by demonstrating that an "urgency to inform the public about the actual or alleged Federal Government activity" exists.

Your stated reason for requesting expedited processing does not meet the above criteria. Your stated reason for requesting expedited processing does not meet the above criteria pertaining to an imminent threat to life or physical safety of an individual. Therefore, you have not demonstrated a compelling need and your request for expedited processing cannot be granted.

We agree that the Requesting Parties made no case that the underlying NRC-FERC meeting posed an imminent threat to the life or physical safety of an individual. However, we suggest that an error was made and the FOIA Office did not properly analyze the request under the second prong, *i.e.*, that the Requesting Parties are primarily engaged in disseminating information, and that there is an urgency to inform the public.

Specifically, the Requesting Parties were quite clear that they sought information about ongoing discussions between NRC and FERC as to how safety procedures and oversight at commercial nuclear power plants might be undermined as a conscious part of the Trump administration's proposed economic bailout scheme for nuclear and coal plants. In our letter (copy attached), we said:

DOE, NRC and FERC have stated that the provision of economic bailouts to nuclear and coal utility companies, and a need to relax safety regulation of nuclear power plants, are matters of grave national concern and might even constitute a "national emergency." The Requesting Parties accordingly intend to make all information retrieved pursuant to FOIA freely available to the public, without charge, through bulletins to their members and the public to cause informed participation in the administrative and legislative processes to follow. *DWM, Beyond Nuclear, Public Citizen and the Sierra Club are all nonprofit corporations engaged in environmental advocacy and communication, as well as providing information to citizens interested in participating in decisionmaking processes.* They have no commercial interest in this FOIA request.

(Emphasis added).

The Freedom of Information Act is the source of authorization for an agency to expedite its handling of a FOIA request if the request likely demonstrates an "urgency to inform the public concerning actual or alleged Federal Government activity." 5 U.S.C. § 552(a)(6)(E)(v). This portion of the FOIA statute finds resonance in NRC regulations.¹ In evaluating whether this criterion has been satisfied, courts weigh three main factors: "(1) whether the request concerns a matter of current exigency to the American public; (2) whether the consequences of delaying a response would compromise a significant recognized interest; and (3) whether the request concerns federal government activity." *Al-Fayed v. CIA*, 254 F.3d 300, 310 (D.C. Cir. 2001).

There is no dispute that the Requesting Parties' requests relate to federal government activity. But do the requests touch on "a matter of current exigency to the American public," and would "delaying a response . . . compromise a significant recognized interest," *Al-Fayed*, 254

¹10 C.F.R. § 9.,25(e) states:

"Expedited processing. (1) NRC may place a person's request at the front of the queue for the appropriate track for that request upon receipt of a written request that clearly demonstrates a compelling need for expedited processing. For purposes of determining whether to grant expedited processing, the term compelling need means—

(I) That a failure to obtain requested records on an expedited basis could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or

(ii) With respect to a request made by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal Government activity."

F.3d at 310? The Requesting Parties submit that the answer to both questions is “yes.”

Regarding nationwide “exigency,” the Requesting Parties made these representations in their letter as to the national implications of the bailout controversy:

It is important that this information be disclosed for the public to gain a better understanding of any federal economic assistance and/or changes in nuclear power plant safety regulations, and/or any other regulatory practices under consideration relative to nuclear and/or coal-fired electric power plants.

Provision of the requested items to the public will promote the public interest in preserving due process in possible administrative or other legal proceedings, and enhance the safety and environmental protection aims of the Atomic Energy Act and NRC regulations and procedures. The information further will enhance the Requesting Parties’ and their members’ understandings of proposed subsidies under § 202© of the Federal Power Act and FERC’s powers thereunder; subsidy actions taken under the 1950 Defense Production Act (DPA) and in the requisite Congressional appropriations process; and the needed legislative or administrative steps for provision of utility subsidies under the Fixing America's Surface Transportation (FAST) Act.

If this information is not made available pursuant to FOIA, the Requesting Parties and their members, and members of the public, will be disadvantaged from participating fully in the making of several obviously important national decisions.

DOE, NRC and FERC have stated that the provision of economic bailouts to nuclear and coal utility companies, and a need to relax safety regulation of nuclear power plants, are matters of grave national concern and might even constitute a “national emergency.”

The information requested is essential for the Requesting Parties to undertake investigations, make the information publicly available, and to decide whether to prepare to litigate the administrative or legislative outcomes of economic bailout subsidies.

The justification for these statements is ample and echoed in media coverage throughout May and June 2018. The New York Times reported that:

“This intervention could potentially ‘blow up’ the markets and result in significant rate increases without any corresponding reliability, resilience, or cybersecurity benefits,” warned Robert F. Powelson, one of Mr. Trump’s own appointees on the Federal Energy Regulatory Commission, which oversees electricity markets, at a Senate hearing on

Tuesday.²

The Hill reported that the “bailout policy would roil U.S. power markets while alienating a growing number of conservatives and costing consumers billions. . .” and “would keep coal, the dirtiest available electricity source, on life support.”³

And Salon magazine noted that a central justification for the bailout being advanced by the Trump administration—the need for a “robust civilian nuclear power industry to support the entire U.S. nuclear enterprise and U.S. nuclear leadership abroad”—refers to nuclear weapons, naval propulsion, and nonproliferation efforts, and thus raises “a long-term issue that deserves serious consideration, beginning with the question of whether, even though we already subsidize nuclear plants to the tune of billions of dollars every year, we will have to permanently prop some number of them up even further in order to ensure the safety of America’s nuclear weapons, our ability to maintain a nuclear navy, and to continue global nuclear nonproliferation efforts.”⁴

There is little doubt that “the subject matter of the request[s] [is] central to a pressing issue of the day.” *Wadelton v. Dep’t of State*, 941 F. Supp. 2d 120, 123 (D.D.C. 2013). It is further likely that a significant delay in processing the Requesting Parties’ requests would “compromise a significant recognized interest.” *Al-Fayed*, 254 F.3d at 310. In particular, if production is unduly delayed, both the Requesting Parties’ members and the public at large will be “precluded . . . from obtaining in a timely fashion information vital to the current and ongoing debate surrounding the legality of” a high-profile government action, *Elec. Privacy Info. Ctr. v. Dep’t of Justice*, 416 F. Supp. 2d 30, 41 (D.D.C. 2006). Being closed off from such a debate is itself a harm in an open democracy. See *Elec. Frontier Found. v. Office of Dir. of Nat. Intelligence*, 2007 WL 4208311, at *7 (N.D. Cal. Nov. 27, 2007) (“[O]ngoing public and congressional debates about issues of vital national importance cannot be restarted or wound back.”) (internal quotations omitted). If there are protracted delays in providing information under FOIA, and given debate over the very legality of a minimum two-year multibillion dollar economic bailout, considerable economic harm might befall the U.S. economy, in which case “stale information is of little value.” *Payne Enterprises, Inc. v. United States*, 837 F.2d 486, 494 (D.C. Cir. 1988).

Conclusion

In its ruling that there has been no justification provided for expedited consideration of

²“Trump Wants to Bail Out Coal and Nuclear. Here’s Why. . . .”
<https://www.nytimes.com/interactive/2018/06/13/climate/coal-nuclear-bailout.html>

³<http://thehill.com/opinion/energy-environment/393038-lots-of-conservatives-hate-trumps-coal-and-nuclear-bailout-thats-a>

⁴“Trump’s Coal and Nuclear Bailout Is Lawless, Reckless and Dangerous and Nobody Noticed,”
<https://www.salon.com/2018/06/15/trumps-coal-and-nuclear-bailout-is-lawless-reckless-and-dangerous-and-nobody-noticed/>

the Requesting Parties' FOIA requests, the NRC FOIA Office failed entirely to consider whether the Requesting Parties, who are indisputably primarily engaged in disseminating information, have demonstrated urgency to inform the public concerning actual or alleged Federal Government activity. The foregoing discussion should prompt a finding that there is genuine urgency underlying the Requesting Parties access to the information being sought.

Moreover, retrieval and provision of the documents and things transmitted between the NRC and FOIA about the bailout proposal are recently created and presumably capable of being provided to the Requesting Parties. Hence the NRC cannot reasonably argue that it cannot timely meet an expedited request.

The Requesting Parties' requests should be expedited.

Thank you very much.

Very truly yours,

/s/ Terry J. Lodge
Terry J. Lodge
Counsel for Requesting Parties