UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CONVERDYN,	)	
Plaintiff,	)	
v.	)	**Case No. 1:14-cv-1012-RBW**
ERNEST J. MONIZ, in his official capacity as Secretary of the United States Department of Energy,	)	
and	)	
UNITED STATES DEPARTMENT OF ENERGY,	)	
Defendants.	)	

PLAINTIFF CONVERDYN'S OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND REPLY IN SUPPORT OF CONVERDYN'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

In its motion for summary judgment, ConverDyn explained that the 2014 Secretarial Determination's finding that planned uranium transfers will have no "adverse material impact" is arbitrary and capricious in violation of the Administrative Procedure Act ("APA"). In a Memorandum Opinion issued shortly after ConverDyn filed its motion, this Court agreed that ConverDyn is likely to prevail on its claim. The Court explained that, even with the high degree of deference ordinarily accorded to agency action, the 2014 Secretarial Determination fails on multiple fronts:

- DOE does not explain why the losses described in ConverDyn's submission regarding the planned transfers do not constitute an "adverse material impact;"
- DOE fails to address why the 2014 ERI Report's conclusions regarding the effects of the Department's planned transfers on ConverDyn do not constitute an "adverse material impact;" and
- DOE relies on factors that Congress did not intend it to consider, such as whether the planned transfers are the primary cause of the current depressed state of the uranium market or whether altering transfer quantities would alleviate negative market conditions.

Memorandum Opinion ("Mem. Op."), Dkt. No. 42. Nothing in the Defendants' Motion for Summary Judgment and Opposition to ConverDyn's Motion for Summary Judgment, Dkt. No. 45 (the "Opposition") overcomes the Court's findings. Instead, DOE doubles-down on its flawed approach, relies on improper *post hoc* rationalizations and irrelevant facts, and continues to ignore contrary evidence, including the conclusions of its own consulting experts. All of DOE's arguments fail.

DOE also fails to refute ConverDyn's remaining arguments that DOE is not authorized to transfer the conversion services component of UF6, that DOE is not receiving fair market value

for the transfers, and that DOE improperly revoked its 10% limit on uranium transfers. ConverDyn is entitled to summary judgment on all of its claims.

ARGUMENT

I. THE SECRETARY'S DECISION AUTHORIZING URANIUM TRANSFERS IS ARBITRARY AND CAPRICIOUS

A. The Secretary Failed to Explain Why DOE's Own Expert Reports Did Not Establish That There Would Be An Adverse Material Impact

Among the shortcomings in the Determination identified by the Court was the Secretary's failure to address the 2014 ERI Report's conclusions on the effects of the Department's planned transfers on ConverDyn. Mem. Op. at 21. According to the 2014 ERI Report, the proposed transfers would result in a 12% and 6% decrease in spot and term market prices, leading to a 7-8% decrease in ConverDyn's sales and a corresponding increase in its production costs. *Id*. As noted by the Court, DOE never explained why this data does not show an adverse material impact. *Id.*

DOE attempted to downplay this data by analyzing "whether DOE uranium sales *alone* caused the uranium industry to change from its position in the market without DOE sales." App. DOE_0416 (emphasis added). The Court agreed, however, that the DOE Memoranda[1] applied the wrong standard in analyzing these numbers. The Court concluded that DOE "answer[ed] the wrong question" by using its own alternative, non-statutorily proscribed standards instead of the "adverse material impact" standard. Mem. Op. at 21; *see Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (agency action is "arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider").

[1] DOE prepared two memoranda analyzing the market impact of its transfers. One is dated May 8, 2014 (the "May 8 DOE Memo"), and it is referenced and incorporated into another dated May 12, 2014 (the "May 12 DOE Memo," collectively the "DOE Memoranda"). App. DOE_0397, 0405.

Unable to deny the accuracy of statistics showing the transfers' impact on ConverDyn and its own choice of words, DOE tries a different tack. First, it argues that the Court misunderstood the import of the word "alone" and that the agency tried to "identify the 'but-for' consequences of the transfers." Defs. Opp. at 21. DOE also suggests that the Court did not appreciate the sophistication of the agency's analysis, which it alleges is "necessarily complex" and "is just the sort of technical, nuanced judgment that calls for an agency's expertise." *Id.* at 21-22.[2] DOE's current efforts to distance itself from the test articulated in the DOE Memoranda is understandable but unavailing. The Court must consider the standard DOE actually used, not the one the agency wishes it had used. *See State Farm*, 463 U.S. at 50 (agency action may only "be upheld, if at all, on the basis articulated by the agency itself" at the time).

Moreover, nothing in the DOE Memoranda shows that DOE actually "isolate[d] the effects that would be attributable to DOE's transfers" in order to identify the "but-for" consequences of transfers. Defs. Opp. at 21. In fact, that "but for" analysis had already been done by ERI, which quantified how ConverDyn would fare if DOE went ahead with the transfers. DOE now claims that those "estimates" were merely the "first step in a two-step process" and that in the second step "DOE was able to conclude that the uranium industries would be in the same position with or without the DOE transfers." Defs. Opp. at 22. Notably absent from DOE's brief, however, was *any* citation to where DOE actually stated such a

[2] DOE never explains why its alleged expertise warrants deference, given the admission by DOE officials to GAO that DOE "contracted with ERI to provide subject matter expertise that did not exist within DOE" and DOE's acknowledgment that it contractually obligated itself to transfer uranium to pay for contractor services (or pay significant penalties for breach) *before* the Secretary had made his "no adverse material impact" Determination. *See, e.g.*, App. DOE_0406 (noting that "the current NE staff were not involved in the previous analyses and Secretarial Determinations"); Ex. 8, GAO Report 14-291, at 46; Plfs. Mot. at 22-25. Nor does DOE attempt to explain the professional experience of the unidentified individuals involved in drafting the DOE Memoranda underlying the Determination. The absence of any expertise lessens any deference an agency decision might otherwise warrant. *Cf. Cousins v. Sec'y of the U.S. Dept. of Transp.*, 880 F.2d 603, 610 (1st Cir. 1989) (affording less deference where agency is interpreting a statute in which it has no special expertise).

conclusion. In reality, the DOE Memoranda nowhere concluded that ConverDyn would be unaffected by the proposed transfers, and the 2014 ERI Report stated just the opposite.

Rather than acknowledge the ERI numbers, the DOE Memoranda tried to downplay the transfers' impact by arguing that ConverDyn already was suffering because of pre-existing market conditions. DOE repeatedly pointed to other market forces as the "driver" of current depressed conditions and asserted that a decrease in DOE's uranium transfers would "do little to improve" existing market conditions. App. DOE_399. But as the Court noted, whether market forces are the adverse impact's "driver" is not the inquiry Congress ordered DOE to undertake. Mem. Op. at 22. The truism that market conditions have changed in the past does not give DOE license to ignore the present.

Instead of comparing ConverDyn's situation if transfers were made to its situation if transfers were not made, the Secretary was urged by DOE Staff to make a different comparison—the benefits of transfers *to the government* against the adverse impact *to the domestic uranium industry*. Rather than defend this comparison, which is nowhere authorized in the statute, DOE responds that ConverDyn does not cite to the administrative record for this point. Defs. Opp. at. 27-28. In fact, while DOE staff, whose recommendation the Secretary adopted, recognized that the transfers "will necessarily" have a negative impact, App. DOE_0399, they recommended approving the transfers, notwithstanding the negative impact, because "it is much more important for DOE to adhere to its stated plans." App. DOE_0416; Plfs. Mot. at 7-8. These "stated plans" were the earlier explained need to increase transfers to fund other programs which DOE had locked itself into despite uncertain future funding. As the DOE Memoranda explained, "[t]he change in the programs' proposed quantities arises from the *requirement* in the NNSA down-blending contract that NNSA transfer LEU equivalent to the

invoiced monetary value for services, which results in higher quantities *needing* to be delivered to meet the same monetary values in a depressed market." App. DOE_0399 (emphasis added).

B. The Secretary Failed To Address ConverDyn's Projected Losses When Making A Finding Of No Adverse Material Impact

The Court recognized that another critical deficiency in the DOE Memoranda was the failure to address the information ConverDyn had submitted to DOE in advance of the Determination. Mem. Op. at 20. As the Court acknowledged, ConverDyn submitted a detailed report to DOE outlining the losses that it would suffer from the planned transfers. *Id.* In the DOE Memoranda, DOE acknowledged ConverDyn's submission, App. DOE_0412, but nowhere explained why the losses ConverDyn identified would not constitute an adverse material impact. As the Court noted, this is not reasoned decision making. Mem. Op. at 20; *see PPL Wallingford Energy LLC v. F.E.R.C.*, 419 F.3d 1194, 1198 (D.C. Cir. 2005) ("An agency's failure to respond meaningfully to objections raised by a party renders its decision arbitrary and capricious," because, "[u]nless the [agency] answers objections that on their face seem legitimate, its decision can hardly be classified as reasoned.") (quotation marks omitted).

Evidently stung by the Court's criticism, DOE has now chosen to offer a detailed critique of ConverDyn's submission. DOE devotes four pages of its Opposition to listing perceived defects with ConverDyn's submission, and ultimately alleges that these defects are so gross that DOE did not even need to consider ConverDyn's data. Defs. Opp. at 23-27. But, DOE sang a much different tune before this litigation. Far from criticizing the ConverDyn submission, DOE sent ConverDyn a letter stating that the submission was "helpful," "provide[d] a broader perspective to the Department," and "validate[d] perceived market influences." App. DOE_0287.

Nowhere did the letter characterize the submission as incomplete, inaccurate, or lacking supporting data.[3]

In short, DOE is offering a prohibited *post hoc* rationalization. "It is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *State Farm*, 463 U.S. at 50. "[C]ourts may not accept an agency's *post hoc* rationalizations for agency action." *Id.*; *McDonnell Douglas Corp. v. Air Force*, 375 F.3d 1182, 1188 (D.C. Cir. 2004) ("[Courts] do not rely on counsel's *post hoc* rationalization for upholding an agency's action."). Rejection of DOE's newly-crafted critique is even more warranted when it is at odds with the agency's earlier characterization of the ConverDyn submission as "helpful" and "validating perceived market influences."

DOE's *post hoc* rationalization is also wrong. For example, DOE is now claiming that the ConverDyn's submittals were "conclusory" and "provided little or no underlying data" that made it "impossible to incorporate them in any reasoned analysis." Defs. Opp. at 23 (arguing that ConverDyn failed to explain the causes or surrounding circumstances for its losses over the past ten years). But, ConverDyn never attributed its 10-years of losses to DOE transfers (though some of those losses undoubtedly can be). Instead, ConverDyn provided information to give DOE insight into the domestic conversion industry's current status, which is necessary for DOE to make an informed decision about the impacts of its transfers on ConverDyn. Moreover, contrary to DOE assertions that ConverDyn provided "no explanation of causes or surrounding

[3] To be sure, the DOE Memoranda assert that the submissions from members of the domestic uranium industry "generally provide anecdotal evidence that inaccurately represents the impact of the DOE transfers on these industries." App. DOE_0400. But this appeared to be directed at other submissions to the agency and is at odds with the letter the agency sent to ConverDyn. App. DOE_0287. And, DOE never supports this conclusory statement by explaining *why* it considers the submissions from domestic uranium industry to be "anecdotal" or "inaccurate."

circumstances," ConverDyn listed several factors affecting the conversion industry including that:

- MTW operates with a high ratio of fixed to variable costs, which makes profitability particularly sensitive to volume reductions;
- ConverDyn's sales have been affected substantially by recent industry events, including past DOE sales, Fukushima, shutdowns in Japan and Germany, and U.S. plant closures; and
- MTW is currently operating at less than full capacity. For the period under consideration for future DOE uranium sales (2014-2016), ConverDyn sales volume is forecast to remain significantly below current plant capacity.

App. DOE_0115. ConverDyn also provided specific data as to its Fukushima-related losses both historical (2011-2013) and future projected (2014-2016). App. DOE_0116.

DOE's Opposition also claims that "[a] comparison between ERI's discussion of the conversion market and ConverDyn's March 2014 submission illustrates why the submission merited no further discussion." Defs. Opp. at 23. DOE alleges that "ConverDyn's submission simply asserted that it will suffer an annual reduction of 933 MTU as a result of DOE's transfers." *Id*. (citing DOE_0116). But, ConverDyn did explain the basis for its estimate, noting that it *conservatively* assumed that the lost sales associated with DOE excess uranium transfers would be equally distributed among the three Western convertors (ConverDyn, AREVA, and Cameco) so that each converter suffers an annual volume reduction of 933tU. App. DOE_116. This approach was consistent with that used in ERI's market analysis, as the 2014 ERI Report shows that the three Western convertors have approximately equal market shares. App. DOE_214.

And, DOE's Opposition alleges that ConverDyn "asserted that the average per year impact to profits of lost volume is $10 million but didn't actually explain how this number is

calculated." Defs. Opp. at 24 (citing App. DOE_0116, 0117). In fact, ConverDyn explained that its calculation was based on the 2012 ERI Report:[4]

> Specifically, ERI concluded [in its 2012 Report] that its estimated impact range of 1.8%-5.8% on term market price was not an adverse material impact. In determining the impact from suppressed prices in Table 3, ConverDyn applied a 5.8% price impact to contracts awarded since the start of the DOE sales program in 2009, as well as to unhooked sales expected to be placed under any future secretarial determination for the period 2014-2016. The resulting impact on ConverDyn as a result of price suppression–as predicted by April 2012 ERI Analysis relied on by DOE–is presented in Table 3.

App. DOE_0119 (footnotes omitted).

Remarkably, DOE goes on to assert that "the ConverDyn assessment was particularly unreliable because it was premised on a fundamental factual inaccuracy." Defs. Opp. at 23. DOE faults ConverDyn for premising its analysis on a belief that "the majority of DOE sales are believed to have been made to U.S. customers, and this situation is likely to continue for future sales." *Id*. (citing App. DOE_116). In fact, ConverDyn's assessment aligns with the "well-reasoned" 2014 ERI Report, which explains: "Thus, out of the total of 3.02 million kgU of DOE inventory expected to enter the market in 2014, an estimated 2 million kgU, or 66% is expected to be sold into the U.S. market and 1.03 million kgU, or 34% is expected to be sold into the remaining world market." Defs. Opp. at 26; App. DOE_0196, 0263.[5]

DOE also attempts to justify its failure to consider ConverDyn's submission on the ground that it "had the benefit of other industry views, notably a presentation by FBP, its contractor at Portsmouth." Defs. Opp. at 17. Putting aside the fact that FBP is one of the contractors that is paid with DOE uranium and that therefore has a vested interest in a no adverse

[4] The 2014 ERI Report had not yet been released at the time of ConverDyn's submission.

[5] Further, as noted above, ConverDyn conservatively allocated displaced sales equally among Western converters and therefore did not take credit for its larger market share in the U.S.

material impact Determination, the original DOE Memoranda never explained why DOE considered FBP's input more credible than that from industry participants, nor did DOE attempt to reconcile FBP's rosy and optimistic market analysis with ERI and DOE's own recognition of the domestic uranium and conversion industries' weakened state. *See* App. DOE_0284 (noting the "the current weak state of the nuclear fuel markets, in which there is considerable oversupply, near-term demand is mostly discretionary, and long-term contracting has declined considerably over the past year"), App. DOE_0398 ("[t]he uranium, conversion and enrichment industries are all challenged by market oversupply . . . . This oversupply has led to depressed prices in the three markets.").

C. DOE Failed To Evaluate Separately The Impact On The Conversion Industry

As explained in ConverDyn's Motion, DOE failed to separately evaluate the adverse impacts to each of the three relevant industries (uranium mining, conversion, and enrichment). Plfs. Mot. at 10-11. In response, DOE argues that the Privatization Act only requires a single Determination. Defs. Opp. at 28. DOE misses the point. Whether DOE documents its Determination in a single document or in three different documents, the Secretary must separately assess the adverse impacts to each market segment in order to comply with the Privatization Act—a conclusion DOE does not dispute.[6] Yet, neither ConverDyn, the public, nor this Court have any information regarding how DOE applied the "adverse material impact" test to the detailed information developed by ERI and others for each industry segment. This makes it impossible to determine if DOE considered the impacts to each industry segment separately, as opposed to making one lump determination for all three. While ordinarily deferential, at a

[6] The transfers may "not have an adverse material impact on the domestic uranium mining, conversion, *or* enrichment industry." 42 U.S.C. § 2297h-10(d)(2)(B) (emphasis added). Use of the word "or" demonstrates that an adverse material impact to any one of the three is prohibited. *See* Plfs. Mot. at 10.

minimum the APA requires agencies to disclose the bases for their decisions so that courts can test them against the arbitrary and capricious standard. *See State Farm*, 463 U.S. at 43 (reviewing court must be able to determine that the agency "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action, including a rational connection between the facts found and the choice made") (quotation marks omitted). Having failed to do so, DOE's decision must be set aside.

DOE's claims that it independently assessed different segments of the domestic uranium industry are belied by the record. For example, DOE makes numerous references to increases in uranium *mining* production in both the DOE Memoranda and its Opposition in attempting to justify its no adverse material impact conclusion for the domestic *conversion* industry. *See, e.g.*, Defs. Opp. at 11, 17, 20, 21. But, DOE never explains how or why increased uranium mining production affects the domestic conversion industry. In fact, DOE repeatedly references the size of DOE's uranium transfers as a percentage of the global uranium market, Defs. Opp. at 1, 11, 19; App. DOE_0398, 0415, but never addresses the magnitude of its transfers on the global or domestic *conversion* market. The 2014 ERI Report states that DOE intends to transfer the equivalent of 3 million kgU of UF6. App. DOE_264. This represents 5% of worldwide conversion services demand, but 25% of U.S. conversion demand. App. DOE_271. And, when accounting for the fact that Chinese and Russian markets are not open to western converters such as ConverDyn, DOE transfers represent nearly 7% of global accessible conversion demand—a more than 50% increase beyond the 4.5% cited by DOE.[7] DOE's reliance on factors unique to the uranium mining industry to justify its conclusions for the domestic conversion industry and

[7] Table 4.5 of the ERI Report states that world demand minus Russia and China is 44.4 million kgU as UF6. 3 million kgU is 6.8% of 44.4 million kgU. App. DOE_0264.

its failure to disclose or accurately describe the quantities of its conversion transfers further undermine the Determination.

D. DOE Relies On Irrelevant Facts To Claim That The Record Evidence Supports Its Decision

Rather than acknowledge the Determination's shortcomings, DOE tries by bolster its finding of no adverse material impact by relying on irrelevant facts. For example, DOE repeatedly notes that the transfers account for 4.5% of the global uranium market. Defs. Opp. at 1, 11, 19; App. DOE_0398, 0415. Yet this is beside the point, as the Determination must turn on whether the planned transfers will have an adverse material impact on the domestic uranium industries, not on their percentage of the global market.[8] As the Court recognized, "transfers may have an adverse material impact on ConverDyn even if the transfers are not the primary cause of ConverDyn's total losses," such that "the defendants' emphasis on the relatively small size of the Department's proposed transfer compared to global uranium supply as the basis of the Department's conclusion similarly misses the mark." Mem. Op. at 22 (quotation marks and brackets omitted). Arguing that the transfers account for only 4.5% of the global market does not address the real issue of what *impact* that 4.5% globally will have on the domestic industry—where the transfers equate to 15% of domestic uranium requirements. App. DOE_0415. Small acts can have large consequences. As found by ERI, the market impacts to the domestic conversion industry include a 7% to 8% drop in ConverDyn sales, a 6% to 8% increase in ConverDyn production costs, an 11.8% drop in the conversion spot price, and a 5.5% drop in the

[8] If anything, this is another example of DOE distorting the statutory standard by basing its Determination on the relative size of its transfers as compared to other market factors, instead of focusing on whether its transfers would have an adverse material impact.

conversion term price.[9] DOE's failure to focus on these numbers in evaluating the impact of its planned uranium transfers on the domestic conversion industry is "most troubling," Mem. Op. at 21, and cannot be cured without a new Determination.

DOE also lays the blame for depressed conversion market conditions on an increase in uranium production from mines in Kazakhstan. Defs. Opp. at 11, 17, 20, 21. But, uranium production in Kazakhstan affects supply and price in the uranium *mining* industry and is unrelated to supply and price in the *conversion* industry. Kazakhstan does not provide any conversion services in connection with the uranium it mines. *See* App. DOE_0195, 0206, 0251-52, 0281 (ERI Report discusses Kazakhstan in sections related to uranium mining/production and not in connection with the conversion segment); App. DOE_0210 (Kazakhstan does not have a conversion services provider). DOE, it seems, will point to just about anything—no matter how irrelevant to conversion—to avoid complying with its duty to assess the impacts of its planned transfers on the domestic conversion industry.

DOE also attacks ConverDyn for distorting the adverse material impact standard. Defs. Opp. at 27. Yet, ConverDyn never argued that DOE must "refrain from making uranium transfers if uranium prices are depressed to some unspecified degree, regardless of whether DOE's transfers cause an 'adverse material impact' on prices." *Id*. (citing Plfs. Mot. 8). And, ConverDyn never argued that price, or even profitability, is the only factor that DOE should consider. Instead, ConverDyn has always maintained that DOE has an obligation to determine "whether the transfers have adverse material impacts on the domestic uranium industry, period."

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[9] DOE suggests that any change to the spot price is irrelevant for determining the material adverse impact on ConverDyn since ConverDyn sells in the term market, Defs. Opp. at 22 n.6, but this assertion ignores how changes in spot price affect term sales. As explained in ConverDyn's submission to DOE, where the spot price is driven down relative to the term price, customers will begin buying in the spot market in lieu of placing long-term contracts, which cuts into ConverDyn's sales. App. DOE_0117-18. The 2014 ERI Report also acknowledged this issue. App. DOE_0276.

Plfs. Mot. at 8. To make this determination, DOE must account for a number of factors affecting the industry, including the significant oversupply that presently exists in the conversion market. While current conditions make it more likely (not less) that additional transfers will harm the domestic conversion industry, DOE is not necessarily barred from making any transfers under such circumstances. But, DOE must limit its transfers to quantities that do not cause adverse material impacts or otherwise mitigate the harm from its transfers to comply with the Privatization Act.

DOE also wrongly describes ConverDyn as arguing that DOE has "an obligation [to] take all steps necessary to ensure the profitability of the domestic uranium industry." Defs. Opp. at 27. ConverDyn's brief says no such thing. Instead, ConverDyn contends that, if DOE's transfers will drive ConverDyn from profitability to a loss, that is a strong indicator that DOE's transfers are having an adverse material impact on the domestic industry. Plfs. Mot. at 18-19; App. DOE_0116. Thus, while it is not DOE's obligation to affirmatively take "all steps necessary" to ensure ConverDyn's profitability, it is undoubtedly DOE's statutory duty to ensure that its transfers do not cause material adverse impacts—a responsibility DOE has not satisfied.

II. DOE IS NOT AUTHORIZED TO TRANSFER CONVERSION SERVICES

DOE fails to show that the Privatization Act allows DOE to transfer the conversion component of UF6. The Privatization Act expressly states that the Secretary "shall not . . . transfer or sell any uranium (including natural uranium concentrates, natural uranium hexafluoride [(UF6)], or enriched uranium in any form) to any person" except as provided for in certain exceptions. 42 U.S.C. § 2297h-10(a). Even if the Atomic Energy Act ("AEA") at one

time gave DOE discretion to transfer any type of nuclear material,[10] Defs. Opp. at 29-30, the Privatization Act placed specific limits on DOE's discretion. DOE's transfers now must fall into at least one of the Privatization Act's exceptions. If DOE's supposedly broad authority under the AEA is allowed to override or ignore the specific, detailed provisions of the subsequently-passed Privatization Act, the Privatization Act's requirements would be meaningless and of no effect. DOE's over-broad interpretation of its AEA authority, Defs. Opp. at 29, would allow DOE to ignore not only the prohibition on transferring or selling "any uranium," including natural UF6, but also the "no adverse material impact" clause—an exception to the Privatization Act that would effectively swallow the rule. The AEA does not allow DOE to ignore the bar on conversion transfers imposed by the Privatization Act.

The Privatization Act starts with the admonition that the Secretary "shall not . . . transfer or sell *any uranium*" unless one of the exceptions applies. 42 U.S.C. § 2297h-10(a) (emphasis added). DOE relies on the exception in subsection 2997h-10(d) to make its transfers. That exception, however, does not allow DOE to transfer "any uranium;" it only allows transfer of the narrower category of "natural and low-enriched uranium." 42 U.S.C. § 2297h-10(d)(1). The exception therefore limits the types of uranium that DOE may transfer. DOE cannot transfer "uranium hexafluoride" or "the conversion component of uranium hexafluoride" unless they are "natural" or "low-enriched uranium." They are not. Viewing Section 2297h-10 as a whole, Congress took care to differentiate among different forms of uranium. When Congress meant to refer to a specific material—such as "natural uranium," "low enriched uranium," "uranium

[10] DOE's transfer authority is also not as clear as it would have the Court believe. DOE's references to 42 U.S.C. §§ 2073(a) and 2093(a) refer primarily to DOE's ability to issue licenses and in any event apply only to special nuclear material (enriched uranium), *id.* § 2073(a), and source material (natural uranium), *id.* § 2093(a). They do not address sales or transfers of conversion services. The other provision cited by DOE, 42 U.S.C. § 2201(g), is a general provision that has no specific applicability to conversion or UF6.

hexafluoride," or "the conversion component of such uranium hexafluoride"—it used precise terminology. "Natural and low-enriched uranium" does not mean "uranium hexafluoride" any more than "natural and low-enriched uranium" means "conversion." While Congress could define "low and enriched uranium" in an unexpected way, Congress would need say so, and there is no reason to think it was doing so here. Because the limited exception only authorizes DOE to transfer "natural and low enriched uranium," but not UF6 or conversion, DOE is barred from selling or transferring the conversion component of any UF6.[11]

DOE's response is to assert that the "different words" canon of construction does not apply here.[12] Defs. Opp. at 30-31. By DOE's reading then, many terms in the statute, such as "any uranium," "natural uranium," "low enriched uranium," "uranium hexafluoride," and "the conversion component of such uranium hexafluoride," all mean the same thing and encompass one another. Yet DOE provides no explanation as to why Congress might have engaged in such loose, confusing wordplay on this highly technical subject or as part of the Privatization Act's detailed statutory scheme.

DOE's only other point is to note that subsection 2297h-10(d), the exception under which DOE is making transfers, requires DOE to consider the transfers' impact on the domestic conversion industry. DOE presumes that it must be allowed to transfer UF6 because that is the conversion industry's product. Defs. Opp. at 29-30. The Court also acknowledged this point, Mem. Op. at 22. But, considering the transfers' impact on the domestic conversion industry does not mean that DOE is necessarily authorized to make transfers of conversion. For example, if

[11] This does not prevent DOE from transferring the "natural and low enriched uranium" in UF6, but it does prohibit DOE from selling the "conversion" component in UF6. As explained in ConverDyn's Motion, and not disputed by DOE, the different components of UF6 are fungible and can be sold independent of each other, such that DOE can transfer just the "natural or low enriched uranium" without selling the conversion component. Plfs. Mot. at 26-27.

[12] When Congress uses different words in a statute regarding "the same or related subject, the Congress must have intended them to have a different meaning." *United States v. Wilson*, 290 F.3d 347, 360 (D.C. Cir. 2002).

domestic uranium supplies were reduced, foreign customers might choose to convert uranium to UF6 at conversion facilities outside the U.S. in order to minimize transportation and U.S. licensing costs. A loss of domestic uranium suppliers might also make it more difficult for ConverDyn, as a standalone converter, to compete with integrated fuel suppliers outside the U.S. The effect of DOE transfers also must be considered in the context of the Privatization Act's overall statutory scheme, which expressly allows sales of UF6 and conversion as part of the exception related to the U.S.-Russia HEU Agreement, but not the exception DOE relies on here. *See, e.g.*, 42 U.S.C. § 2297h-10(b)(1) (authorizing transfer of the uranium hexafluoride equivalent of the natural uranium component of certain low-enriched uranium). At base, the statute ensures that transfers of the only material allowed to be transferred—natural and low-enriched uranium—will not adversely impact any segment of the domestic uranium industry, including the domestic conversion industry.

III. DOE DOES NOT RECEIVE FAIR MARKET VALUE FOR ITS URANIUM TRANSFERS

Beyond the absence of an explanation in the record as to how DOE determines fair market value, ConverDyn identified at least four distinct features of DOE's uranium transfers that show DOE receives less than fair market value: (1) prior below-market DOE sales that have artificially lowered the current spot market price; (2) impermissible consideration of avoided costs, such as the cost of storing uranium; (3) self-imposed limits on the types of uranium sales that DOE will consider (spot market only, not term market); and (4) non-discretionary contractual obligations to make transfers. Plfs. Mot. at 27-31. Rather than affirmatively show that it obtains fair market value or respond directly to ConverDyn's arguments, DOE challenges ConverDyn's standing to bring its claim. DOE's standing arguments are without merit, and DOE has failed to show that it received fair market value for its transfers.

A. ConverDyn Has Standing To Challenge The Value DOE Receives For Its Transfers

ConverDyn has standing to challenge DOE's failure to receive fair market value for its excess uranium because ConverDyn suffers a direct injury when DOE undervalues its uranium and weakens the market for ConverDyn's product. ConverDyn is not raising a "generalized grievance" as a taxpayer nor is ConverDyn alleging that DOE is being wasteful with public property as DOE claims. Defs. Opp. at 31. Instead, ConverDyn is raising a direct, tangible, and personal injury from DOE's transfers at less-than-fair market value. The undervalued transfers depress the market and harm ConverDyn's business.[13] *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014) (allegations of "lost sales and damage to its business" that are "fairly traceable to the challenged action of the defendant" satisfy the "injury in fact" requirement for Article III standing).

ConverDyn likewise falls within the "zone of interests" protected by the Privatization Act. The "zone of interests" test in APA cases is "not meant to be especially demanding." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2210 (2012). ConverDyn need only show that its claim is "arguably within the zone of interests to be protected or regulated by the statute." *Id.* ConverDyn falls within the Privatization Act's zone of interests unless its "interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed" to be authorized by Congress. *Lexmark*, 134 S. Ct. at 1389. Here, ConverDyn's interest in the damage to its business caused by DOE's below market sales falls squarely within the Privatization Act's purpose, which aims to

[13] DOE acknowledges that market-related damages, and not general taxpayer grievances, underpin ConverDyn's claims related to fair market value, as DOE admits that ConverDyn has "allege[d] that it is suffering harm in the marketplace since DOE's alleged failure to obtain fair market value causes downward pressure on the overall uranium market, including the conversion sector." Defs. Opp. at 31.

protect the domestic conversion industry, including ConverDyn, from DOE's excess uranium sales. The market-related injury to ConverDyn from DOE uranium sales is not excluded from the "zone of interests" simply because the statute also protects the government's coffers.[14] *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 590 (1991) (law may have multiple purposes).

B. DOE Arbitrarily Excludes Itself From Important Market Segments

The Court states that "ConverDyn appears to concede that the Department is receiving fair market value in the spot market." Mem. Op. at 22. ConverDyn respectfully asserts that this is not what ConverDyn intended. The fact that a price is *available* does not mean it is a *fair* price, otherwise any available price would automatically be deemed fair. For example "predatory" pricing involves setting a price at artificially low levels to gain market share or limit sales to competitors, yet predatory prices do not represent fair market value. Likewise, the "dumping" of products, defined as "[t]he act of selling in quantity at a very low price or practically regardless of the price," Black's Law Dictionary 502 (6th ed. 1990), also entails sales at less than fair market value.

There is no showing that DOE receives fair market value in the administrative record. The administrative record nowhere discusses how DOE calculated fair market value, why DOE considers the price it receives to be fair market value, or how DOE actually applied any calculations or mechanisms for determining what is a fair price. Plfs. Mot. at 27-28. While DOE purports to explain in its Opposition brief why the price it receives is fair, this is not "the basis articulated by the agency itself" at the time of the Determination. In fact, since there is no basis articulated by the agency in the record, the entirety of the explanation is improper *post hoc*

[14] DOE's cited cases, Defs. Opp. at 33, are distinguishable. *Glass Packaging Inst. v. Regan*, 737 F.2d 1083, 1090 (D.C. Cir. 1984), involved a narrower statute not meant to accommodate the plaintiff, and *Tax Analysts and Advocates v. Blumenthal*, 566 F.2d 130, 143 (D.C. Cir. 1997), had a plaintiff outside of the statute's "regulatory field of concern."

rationalization.[15] *State Farm*, 463 U.S. at 50. Regardless of whatever else DOE claims about the price it receives, "[a] fundamental requirement of administrative law is that an agency set forth its reasons for decision; an agency's failure to do so constitutes arbitrary and capricious agency action." *Tourus Records, Inc. v. Drug Enforcement Agency*, 259 F.3d 731, 737 (D.C. Cir. 2001) (quotation marks omitted). In any event, the only information available on regarding DOE's assessment of fair market values shows that DOE does not, in fact, receive fair market value, but instead receives value that is approximately five percent below the fair market value. In its most recent notice to Congress on the transfers to FBP, DOE estimates the transferred material's fair market value to be in the range of $18-$23 million, but DOE only expects to receive services worth approximately $17-$21 million. Ex. 14, Sept. 20, 2014 Letter from DOE to Congress.

DOE's use of a formula that only considers the spot price also demonstrates that DOE does not receive fair market value. The current spot price is historically low in both absolute and relative terms as compared with the term price, in large part because DOE's actions distort the spot price more than the term price and because of self-imposed limits on the types of sales DOE conducts. App. DOE_0239-41 (DOE's transfers will drive the term price down 5.5%, but will drive the spot price down 11.8%). Indeed, the DOE Memoranda even admit that with respect to whether DOE "should be selling in the long-term market instead of the spot market," "[w]e agree that, where we can, it is better to seek to fill contracts in the long-term." App. DOE_0415. Yet, DOE gives no explanation in the record as to why it treats this artificially-lowered price to be fair market value, especially as opposed to what it concedes is the "better" market in which to sell.

[15] The part of DOE's factual summary and the part of DOE's argument section regarding the fair market value issue do not contain a single cite to the administrative record. *See* Defs. Opp. at 12-13, 31-34.

DOE also never addresses documents showing that it only receives "reasonable value," not "fair market value," for its transfers. *See* Plfs. Mot. at 28-30; Ex. 1, 2008 Policy & Plan, at 10. In the 2008 Policy and Plan, DOE stated:

> All transactions involving excess uranium transfers or sales to non-U.S. Government entities must result in the Government's receipt of *reasonable value* for any uranium sold or transferred to such entities. Reasonable value takes into account market value, *as well as other factors such as the relationship of a particular transaction to overall DOE objectives and the extent to which costs to DOE have been or will be incurred or avoided*.

Id. (emphasis added). This shows that DOE accounts for not only the uranium's market value, but also costs that DOE will avoid, such as the cost of storing and maintaining uranium stocks.[16] DOE also considers the need for the transfers to meet "overall DOE objectives," such as its contractual obligations. Under this "reasonable" value formulation, DOE can accept less than market value if, for example, it judges that a transfer will reduce its long-term operating and maintenance costs, or serve what DOE views as important programmatic objectives.[17] DOE's elastic interpretation of "reasonable" value does not comport with the Privatization Act, which only allows transfers "for not less than fair market value."

DOE refuses to make transfers in the term market so that it can sidestep the Miscellaneous Receipts Statute and avoid Congressional appropriators.[18] As ConverDyn noted previously, fair market value "is the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both

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[16] *See also* Ex. 12, GAO Report 11-846, at 7 (discussing DOE deduction of "transaction costs" from value received by DOE for uranium transfers).

[17] The 2013 Plan does not indicate any change in DOE policy related to transfer valuations. In fact, the 2013 Plan contains no explanation of the methodology used by DOE to determine fair market value. However, DOE's recent notice to Congress regarding the transfers show that it still deducts transaction costs from the value it receives. Ex. 14, Sept. 20, 2014 Letter to Congress.

[18] DOE's Opposition does not dispute that it structures uranium transactions to bypass federal fiscal requirements and maintain discretion over transaction proceeds without being subject to Congressional appropriators.

having reasonable knowledge of relevant facts." *United States v. Cartwright*, 411 U.S. 546, 551 (1973). Here, the relevant facts include the availability of a better price in term markets, that DOE sales have depressed the spot price to historic lows, that these term sales would not harm ConverDyn as much, and DOE's non-discretionary contractual obligations to make transfers no matter the outcome of the Determination process. In light of DOE's failure to perform any analysis in the administrative record of the factors that affect fair market value, DOE's decision to only use the artificially-low spot price is arbitrary and capricious.

In the end, ConverDyn is not claiming that fair market value means the "the very best possible price," as the Court suggested. Mem. Op. at 22. Nor does ConverDyn suggest that DOE is obligated to enter into only long term contracts. Defs. Opp. at 33. But, just as the highest price is not necessarily the fair market value, neither is the (artificially) lowest price. DOE would have the Court conclude that the very lowest price available in the market is *per se* fair market value, despite the absence of any showing that this price is fair, the availability of better prices that would have less impact on ConverDyn, and the complete lack of justification for its pricing in the record. DOE's decision to artificially limit its market participation to spot sales and its refusal to even consider making transfers in the term market prevents DOE from receiving fair market value, contrary to the Privatization Act.

IV. DOE IMPROPERLY ABOLISHED THE 10% LIMIT ON URANIUM TRANSFERS

A. DOE Had To Comply With Notice And Comment Because Its Decision To Abolish the 10% Limit Is A Change In Policy

The Court noted in its Memorandum Opinion that general statements of policy are normally exempt from notice and comment and found that notice and comment were not required for DOE's decision to abolish the 10% Limit on transfers. Mem. Op. at 23. ConverDyn respectfully submits that this case involves a *change* in policy, and under D.C. Circuit precedent,

changes to agency policy—as opposed to policy statements made on a blank slate or where the new policy statement is a continuation of prior policy—are not exempt from notice and comment. ConverDyn therefore urges the Court to reverse its preliminary finding and hold that DOE violated the APA by failing to conduct notice and comment for its 2013 Policy and Plan.

The D.C. Circuit in *Am. Tort Reform Ass'n v. Occupational Safety & Health Admin.* stated that:

> Notice and comment rulemaking procedures are required under the APA when substantive rules are promulgated, modified, or revoked. Substantive or legislative rules are those that grant rights, impose obligations, or produce other significant effects on private interests, or which *effect a change in existing* law or *policy*. Interpretative rules and *policy statements* are expressly excluded from the requirements of notice and comment rulemaking under the APA.

738 F.3d 387, 406 (citations and quotation marks omitted, emphasis added). The D.C. Circuit's phrase "which effect a change in existing . . . policy"—and more specifically, express use of the word "policy"—shows there are circumstances where policy changes require notice and comment. The next line adds that "policy statements are expressly excluded" from notice and comment, indicating that "a change in existing . . . policy" is not the same thing as a "policy statement" for the notice and comment exemption. The D.C. Circuit reiterated this point recently in *Mendoza v. Perez*, explaining that "[a] legislative rule . . . is one that does more than simply . . . maintain a consistent agency policy," and that "[a] rule is legislative if it effects a substantive change in existing law or policy." 754 F.3d 1002, 1021 (D.C. Cir. 2014). DOE does not claim that abolishing the 10% Limit is not a "change," nor does DOE allege that its treatment of the 10% Limit is "consistent." And, as the D.C. Circuit made clear, the notice and comment exemption that might otherwise apply to a general policy statement does not apply to a policy change, such as the one at issue here.

Unable to deny the plain meaning of these cases, DOE is limited to arguing that ConverDyn is engaging in "wordplay," trying to take advantage of "loose language" in the D.C. Circuit precedent. Defs. Opp. 36. Yet, it is DOE that claims that the word "policy" does not mean "policy" in the D.C. Circuit's statement that notice and comment are requires for "a change in existing . . . policy." Further, the D.C. Circuit's pronouncement is not "loose language" found in just one case, but is a point the D.C. Circuit has made many times. *See, e.g., Am. Tort Reform*, 738 F.3d at 406; *Mendoza*, 754 F.3d at 1002; *Nat'l Family Plan. & Reproductive Health Ass'n, Inc. v. Sullivan*, 979 F.2d 227, 237 (1992). And, DOE fails to cite any cases stating that a *change* in policy does not require notice and comment.

B. The 2008 Policy and Plan Was A Substantive Rule That Can Only Be Changed Through Notice and Comment Procedures

ConverDyn maintains that, as an alternative basis for requiring notice and comment, the 2008 Policy and Plan was binding and obliged DOE to limit transfers to 10% of domestic uranium requirements. Plfs. Mot. at 34-36. The 2008 Policy and Plan is phrased in mandatory language, and while the 2008 Policy and Plan does say that it will "generally" not exceed the 10% Limit, the modifier refers only to the specific exception written into the policy ("certain special purposes such as the provision of initial core loads for new reactors"). Under the policy, this is the only exception to the 10% Limit, and DOE was not free to ignore the 10% Limit at whim. Considering that DOE notes that "often the agency's own characterization of a particular order provides some indication of the nature of the announcement," Defs. Opp. at 35 (quoting *Pacific Gas & Elec. Co. v. FPC*, 506 F.2d 33, 38 (D.C. Cir. 1974)), the pre-litigation statements from then-Secretary Steven Chu that the 10% Limit was mandatory would be a better indicator of DOE's intent than its self-serving claims made in this litigation. Plfs. Mot. at 36.

Notice and comment was also required due to the domestic uranium industry's reliance interest. *Paralyzed Veterans of America v. D.C. Arena L.P.*, 117 F.3d 579 (D.C. Cir. 1997). Plfs. Mot. at 33, 37-38. The Court found this argument unpersuasive on the basis that the 10% Limit was "insufficiently definitive to require notice and comment pursuant to" *Paralyzed Veterans* and its progeny. Mem. Op. at 23. ConverDyn respectfully contends that the 10% Limit is definitive—it is a bright line rule that provides a clear quantitative measure for the quantity of uranium that DOE can release into the market (10% of domestic requirements) with specific, limited exception for certain special purposes. It was also a limit that was developed and proposed by industry at DOE's urging.[19] It is DOE's new policy, which places no limits on DOE's transfers in terms of quantities, form, or timing, that is not definitive.

C. DOE's Purported Reasons For Abolishing The 10% Limit Are Arbitrary And Capricious

Regardless of whether notice and comment was required, DOE must provide a rational explanation for changing its policy. The Court did not reject ConverDyn's argument on this point in its Memorandum Opinion, but instead declined to decide it because it was "not sufficiently developed." Mem. Op. at 23. Between ConverDyn's expanded explanation of this

[19] As UPA explained in its amicus brief, Dkt. No. 43, in July 2007, DOE urged domestic fuel cycle companies and nuclear utilities to engage in discussions to achieve a consensus agreement with parameters that would allow government sales without adversely impacting nuclear fuel suppliers. The Consensus Agreement in October 2007 (1) included a gradual ramp-up of sales; (2) established a strategic reserve for emergency reactor fuel needs; and (3) provided for initial core sales of up to 20 million pounds. The consensus met industry and DOE needs and provided much needed predictability to the commercial uranium and conversion markets. In December 2008, the Department unveiled its Excess Uranium Inventory Management Plan. The Management Plan adopted many aspects of the industry Consensus Agreement, particularly the gradual ramp-up to a 10% Limit on transfers. Having invited industry participation and induced reliance on the 10% Limit that developed as a result of that participation, DOE cannot now claim the 10% Limit was merely a general guideline that can be discarded whenever DOE sees fit—a classic "bait and switch" that directly affects domestic uranium and conversion industries.

issue in its Motion for Summary Judgment, Plfs. Mot. at 36-37, and the additional clarification provided here, ConverDyn respectfully submits that the issue is now fully developed.[20]

An agency "may change its policy only if it provides a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored." *Mich. Pub. Power Agency v. F.E.R.C.*, 405 F.3d 8, 12 (D.C. Cir. 2005) (quotation marks omitted); *see also Greater Boston Tele. Corp. v. F.C.C.*, 444 F.2d 841, 852 (D.C. Cir. 1970) ("There was once a day when a court upheld the sensible judgment of [an agency] on the ground that they express an intuition of experience which outruns analysis. . . . [H]owever, the applicable doctrine that has evolved with the enormous growth and significance of administrative determination in the past forty or fifty years has insisted on reasoned decision-making.") (quotation marks omitted). An agency must "provide a more detailed justification than what would suffice for a new policy created on a blank slate" when "its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account." *F.C.C. v. Fox Television Studios, Inc.*, 556 U.S. 502, 515 (2009). "[A] reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Id.*; *see also Missouri Public Service Comm'n v. FERC*, 337 F.3d 1066, 1074 (D.C. Cir. 2003) (unexplained change in agency position is arbitrary and capricious).

The administrative record is devoid of *any explanation* of why DOE abolished the 10% Limit, save one sentence in the 2013 Policy and Plan stating that "[b]ased on experience gained

[20] DOE's assertion that this issue is not ripe since there has not been agency action is baseless. Defs. Opp. at 37. DOE has already begun transferring uranium pursuant to the new, improperly-promulgated policy in violation of the prior 10% Limit. ConverDyn is not challenging potential "*future* actions" which DOE might take related to the policy, but is challenging agency action taking place "at the present time." *Am. Trucking Ass'ns, Inc. v. I.C.C.*, 747 F.2d 787 (D.C. Cir. 1984) (emphasis in original).

since issuance of the 2008 Plan, including in particular the market impact analysis that supported the May 15, 2012 Secretarial Determination (the May 2012 Determination), the Department has determined that it can meet its statutory and policy objectives in regard to DOE uranium sales or transfers without an established guideline." App. DOE_0061. DOE's Opposition emphasizes the agency's reliance on the ERI Reports by stating that "as of the adoption of the 2013 Plan, the Secretary had received the benefit of no less than three separate market impact analyses by ERI, of increasingly greater sophistication." Defs. Opp. at 38. However, the only conclusion DOE could reasonably have drawn from the prior ERI Reports is that abolishing the 10% Limit would be a bad idea. All three ERI Reports warned that abolishing the 10% Limit could cause an adverse material impact. Ex. 5, 2009 ERI Report, at 34; Ex. 6, 2010 ERI Report, at 37; Ex. 7, 2012 ERI Report, at 50. At the very least, reasoned decision making would require DOE to explain why it disagreed with prior ERI reports and its basis for ignoring the warnings from its experts at ERI, especially since it decided to exceed the prior 10% Limit at its first opportunity. DOE instead provided nothing other than a single, self-contradicting, conclusory sentence.

DOE cites the 2014 ERI Report as justification for ignoring ERI's earlier warnings against abolishing the 10% Limit. Defs. Opp. at 39 (citing App. DOE_0283). This assertion is chronologically impossible. The 2013 Policy and Plan was released in July 2013, while the 2014 ERI Report was not released until April 2014. Consequently, DOE could not have relied on any statements in the 2014 ERI Report to justify its 2013 decision to abolish the 10% Limit. Exs. 5, 6, & 7; *see New Life Evangelistic Ctr. v. Sebelius*, 672 F. Supp. 2d 61, 71 (D.D.C. 2009) (judicial review is based on the material "before the agency at the time the decision was made"). This is another example of the *post hoc* rationalizations that pervade DOE's Opposition.

DOE's defense is that these statements earlier ERI reports are discussed in the context of concerns of industry participants. Defs. Opp. at 19. Beyond the fact that this would be another example of DOE ignoring industry concerns without explanation, as it did with ConverDyn's submission in advance of the 2014 Determination, the ERI Reports make clear that this is not just the opinion of industry participants but also of ERI itself. Ex. 5, 2009 ERI Report, at 34 ("*ERI expects* that domestic suppliers within each of these markets may become concerned" by certain of DOE's actions, and that these actions "could potentially have a material adverse effect on the markets") (emphasis added); Ex. 6, 2010 ERI Report, at 37 (same); Ex. 7, 2012 ERI Report, at 50 ("Unless DOE can demonstrate to the domestic fuel supply industry that its transfer of material during any year(s) in an amount that is substantially larger than 10% of U.S. annual requirements will not establish a precedence by which DOE may make future transfers without any regard for the 'maintenance of a strong domestic nuclear industry,' then DOE actions may, in fact, have an adverse material impact on the domestic industry.").

In the end, DOE's one-sentence rationale for eliminating the 10% Limit and endowing itself with unfettered discretion is expressly contradicted by the documents that DOE claims support its decision. DOE therefore failed to provide a "reasoned explanation" for "disregard[ing] facts and circumstances that underlay or were engendered by the prior policy," rendering the policy change arbitrary and capricious. *Fox Television*, 556 U.S. at 515.

V. CONVERDYN APPROPRIATELY FILED A STATEMENT OF FACTS

Defendants state in their Response to ConverDyn's Statement of Facts, Dkt. No. 46, that ConverDyn should not have filed a separate statement of facts. Local Rule 7(h)(1) requires "a statement of material facts as to which . . . there is no genuine issue" for traditional summary judgment motions, and Local Rule 7(h)(2) calls for a "statement of facts with references to the administrative record" in cases where summary judgment is based on an administrative record.

Both rules require a statement of facts, which ConverDyn provided. As comments accompanying the rules explain, the difference between 7(h)(1) and 7(h)(2) reflects the fact "that in cases where review is based on an administrative record the court is not called upon to determine whether there is a genuine issue of material fact, but rather to test the agency action against the administrative record." Neither the local rules nor the comment preclude filing a separate statement of facts or suggest that the change in language is meant to affect formatting.

Nevertheless, to resolve Defendants' concern, ConverDyn incorporates by reference its 17-page Statement of Facts into this combined opposition and reply brief. Local Rule 7(e) provides 45 pages for ConverDyn's Opposition to Defendant's Motion for Summary Judgment. This combined opposition and reply brief is 28 pages long, and incorporating the 17-page Statement of Facts brings the total to 45 pages—within the page limit provided for in the Local Rules.

CONCLUSION

For the foregoing reasons, and for those in ConverDyn's Motion for Summary Judgment, ConverDyn respectfully requests that the Court grant ConverDyn's Motion for Summary Judgment and deny the Defendants' Motion for Summary Judgment.

Dated: October 9, 2014

Respectfully submitted,

By: /s/ Gordon A. Coffee

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CERTIFICATE OF SERVICE

I hereby certify that on October 9, 2014, the foregoing document was filed electronically on CM/ECF, which will send a notice of electronic filing to:

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Dated: October 9, 2014

/s/ Brian M. Serafin
Brian M. Serafin

EXHIBIT 14

ConverDyn v. Moniz
Case No. 1:14-cv-1012-RBW

Exhibit to Plaintiff ConverDyn's Opposition to Defendants' Motion for Summary Judgment and Reply in Support of ConverDyn's Motion for Summary Judgment

The Secretary of Energy
Washington, DC 20585

September 20, 2014

The Honorable Harold Rogers
Chairman, Committee on Appropriations
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

As required by section 306(b) of the Consolidated Appropriations Act, 2014 (Public Law 113-76), the Department of Energy is notifying your Committee about an upcoming uranium transfer to support cleanup work at the Portsmouth Gaseous Diffusion Plant in Piketon, Ohio.

During the fourth quarter of this calendar year, on or around October 20, 2014, the Department intends to make a transfer of approximately 255 metric tons of natural uranium equivalent to Fluor-B&W Portsmouth LLC (FBP) in exchange for cleanup services under FBP's contract with the Department, consistent with applicable law and subject to any decision of the court in pending litigation challenging the Department's conduct of such transfers.[1] FBP is responsible for the decontamination/decommissioning and environmental cleanup of the Portsmouth Gaseous Diffusion Plant facilities.

The Department estimates the material's gross fair market value (which the Department assumes to be the same as gross market value) to be in the range of $18-$23 million, based on the expected market conditions during this period. As with prior transfers, the Department estimates FBP will offer services with a value approximately five percent below the gross market value (approximately $17-$21 million) in exchange for the uranium. The transfer and transactional costs for FBP account for the difference between the gross market value and the value of the services that the Department expects to receive for the uranium.

The Department appreciates the continued support of Congress in achieving its vital cleanup mission. We look forward to working with you as we continue our cleanup program in Ohio.

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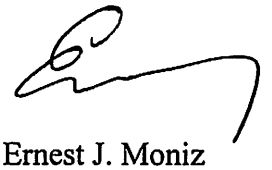
[1] On June 13, 2014, ConverDyn filed suit in U.S. District Court for the District of Columbia (Case No. 1:14-cv-1012) alleging that the Department failed to comply with the requirements of the USEC Privatization Act and the Administrative Procedure Act in regard to certain uranium transfers, including those addressed in this letter. Shortly thereafter, on June 23rd, ConverDyn filed a motion for preliminary injunction to stop the Department's planned uranium transfers while the lawsuit is pending. The Department of Justice is vigorously defending against the lawsuit on behalf of the Department. The court denied the preliminary injunction motion on July 29th. In denying the motion, the court further indicated that it "will endeavor to resolve this case expeditiously."

If you have any questions, please contact me or Mr. Joseph Levin, Associate Director for External Coordination, Office of the Chief Financial Officer, at (202) 586-3098.

Sincerely,



Ernest J. Moniz

cc: The Honorable Nita M. Lowey
Ranking Member