

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 STATEMENT OF FACTS**  
**IN SUPPORT OF ITS**  
**MOTION FOR SUMMARY JUDGMENT**

Plaintiff ConverDyn submits the following statement of facts in support of its Motion for Summary Judgment:

**I. CONVERDYN AND THE DOMESTIC URANIUM CONVERSION INDUSTRY**

1.) ConverDyn is the exclusive agent for uranium conversion service sales from the Metropolis Works (“MTW”) facility in Metropolis, Illinois. Compl., Dkt. No. 1 ¶ 20; Defs. Answer to Compl. (“Answer”), Dkt. No. 34, ¶ 20; App. DOE\_0113-14, 0412; Ex. 13, Decl. Of Malcolm Critchley in Support of Plf. ConverDyn’s Mot for Summ. Judg. (“Critchley Decl.”) ¶ 2.

2.) “Conversion” is the process of converting uranium oxide (U<sub>3</sub>O<sub>8</sub> or “yellowcake”) into uranium hexafluoride gas (“UF<sub>6</sub>”), and is a critical step in the process of producing the fuel used by nuclear power plants. Compl. ¶ 21; Answer ¶ 21; App. DOE\_0078, 0381; Ex. 13, Critchley Decl. ¶¶ 3-4.

3.) ConverDyn is the sole supplier of conversion services located in the U.S., providing about 25% of domestic conversion requirements, and MTW is the sole uranium conversion facility in the U.S. Compl. ¶ 22; Answer ¶ 22; App. DOE\_0113-14, 0265, 0412; Ex. 13, Critchley Decl. ¶ 2.

4.) ConverDyn is one of only four primary suppliers of uranium conversion services worldwide. App. DOE\_0210, 0212; Ex. 13, Critchley Decl. ¶ 2.

5.) Congress and DOE both have recognized the importance of maintaining a strong domestic conversion industry, which, at present, is limited to ConverDyn. Compl. ¶ 24; Answer ¶ 24; Conf. Rep. No. 106-907 (Sept. 27, 2000, discussing H.R. 4733, Energy & Water Development Appropriations for FY2001) (expressing “concern” for the “front end of the U.S. nuclear fuel cycle” and instructing DOE “to take timely measures to ensure that conversion capability is not lost in the United States”); Ex. 13, Critchley Decl. ¶ 6.

6.) In a December 2000 report to Congress, DOE addressed the question of “Why Is It Important for the United States to Maintain a Conversion Industry?” and noted, among other things, that a viable domestic conversion industry:

- Provides an integrated domestic supply source to meet U.S. utility nuclear fuel requirements.
- Avoids over reliance on foreign sources of nuclear fuel supply, helps to maintain fair pricing by foreign suppliers, and increases assurance of supply.
- Reduces fuel costs of U.S. nuclear utilities by facilitating exchanges of feed material that minimize transportation costs.

Department of Energy, Report to Congress on Maintenance of Viable Domestic Uranium, Conversion, and Enrichment Industries (Dec. 2000) (provided in response to the Fiscal Year 2001 Energy and Water Development Appropriations Conference Report, House Report 106-907).

7.) Uranium conversion is also a necessary part of the process to produce certain components for nuclear weapons, which for security, policy, and legal reasons, must be produced entirely in the United States. App. DOE\_0105; Ex. 13, Critchley Decl. ¶ 7.

## **II. DOE'S URANIUM INVENTORY AND URANIUM TRANSFERS**

8.) Over the years, DOE has accumulated a massive inventory of uranium, including in the form of UF<sub>6</sub> and low-enriched uranium. Compl. ¶ 26; Answer ¶ 26; App. DOE\_0056, 0063.

9.) To protect the domestic uranium industries from the risk that DOE would adversely impact the domestic uranium mining, conversion, and enrichment industries from sales and transfers of its uranium inventory, the USEC Privatization Act bars DOE from transferring or selling uranium unless: (1) the President determines that the uranium is not needed for national security purposes; (2) the Secretary of DOE determines that the transfers “will not have an adverse material impact on the domestic uranium mining, conversion, or enrichment industry;” and (3) DOE receives fair market value for the uranium. 42 U.S.C. § 2297h-10(a), (d).

10.) A Determination under section 2297h-10(d)(2)(B) by the Secretary that the sales or transfers will not have an adverse material impact on the domestic uranium mining, conversion, or enrichment industry is valid for only two years, after which the Secretary must make a new Determination before DOE may make further transfers. Consolidated Appropriations Act of 2014, P.L. 113-76, Div. D, Tit. 3 § 306(a).

11.) The Act limits sales and transfers to “natural and low-enriched uranium.” 42 U.S.C. § 2297h-10(d)(1).

12.) In 2008, DOE published the Secretary of Energy's Policy Statement on Management of the Department of Energy's Excess Uranium Inventory and the 2008 Excess

Uranium Inventory Management Plan (the “2008 Policy and Plan”) to govern future sales and transfers of uranium. Compl. ¶ 132; Answer ¶ 132; Ex. 1, 2008 Policy & Plan.

13.) Among other things, the 2008 Policy and Plan restricted DOE’s uranium sales and transfers in any one year to no more than 10% of the total annual domestic fuel requirements of all licensed nuclear power plants (the “10% Limit”) in order to avoid causing an adverse material impact on the domestic uranium mining, conversion, and enrichment industries. Ex. 1, 2008 Policy & Plan, at ES-1, 3, 10, A-2.

14.) The 2008 Policy and Plan states that “[a]ll 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.” Ex. 1, 2008 Policy and Plan, at 10 (emphasis added).

15.) The 2008 Policy and Plan explains that “[r]easonable 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.” Ex. 1, 2008 Policy and Plan, at 10.

16.) The 2008 Policy and Plan also explained that “uranium sales would be offered under both near and longer term contracts through a competitive bidding process, unless otherwise contractually committed.” Ex. 1, 2008 Policy and Plan, at 10.

17.) ConverDyn took into account and relied on the existence of the 10% Limit in conducting its business. Ex. 13, Critchley Decl. ¶ 9.

18.) The predictability of the 10% limit helped maintain prices for conversion services, provided a baseline against which ConverDyn could forecast future market conditions, and affected willingness to make capital investments in MTW’s conversion facility, while abolishing

the 10% limit greatly increases market uncertainty and increases ConverDyn's business risk, since the price and overall supply is subject to DOE's whims rather than fundamental market forces. Ex. 13, Critchley Decl. ¶ 9.

19.) DOE currently uses contractors to perform certain services at various DOE sites. Compl. ¶ 35; Answer ¶ 35; App. DOE\_0404, 0419.

20.) Congress has not appropriated funds to DOE to pay for these contractor services in full (or, in some cases, at all), or DOE has sought to spend more on the projects than Congress appropriated, and DOE has therefore begun paying for the contractors' services with large quantities of uranium products, including natural and low-enriched uranium in UF<sub>6</sub>, in lieu of monetary payments. Compl. ¶ 36; Answer ¶ 36; App. DOE\_0397, 0401-02, 0404.

21.) In a GAO Report covering DOE uranium transfers, DOE officials admitted that DOE "intentionally structured the disposition of federal assets to avoid payment of the proceeds for those assets into the federal Treasury." Ex. 12, GAO Report 11-846, at 39.

22.) Per GAO's Report, "DOE's acknowledged objectives were to accomplish the cleanup work and avoid using appropriated funds to do so." Ex. 12, GAO Report 11-846, at 39.

23.) In order to monetize their compensation from DOE, the contractors, or an intermediary, then sell the uranium, conversion, and, where included, enrichment on the open market in direct competition with ConverDyn's services. DOE\_0191-92, 0225-27.

24.) In some cases, these contractors, or an intermediary, sell the uranium and conversion components separately. App. DOE\_0157, 0227, 0263; Ex. 13, Critchley Decl. ¶¶ 23-24.

### **III. SECRETARIAL DETERMINATIONS OF NO ADVERSE IMPACT**

25.) In 2009, 2011, and 2012, the Secretary determined, pursuant to the USEC Privatization Act, that DOE's uranium transfers would not have an adverse material impact on

the domestic uranium mining, conversion, or enrichment industries (the “Determinations”). Ex. 2, 2009 Determination; Ex. 3, 2011 Determination; Ex. 4, 2012 Determination.

26.) For each of these prior Secretary’s Determinations, DOE contracted with Energy Resources International, Inc. (“ERI”) to prepare a report analyzing the impact of DOE’s transfers on the domestic uranium market (the “ERI Reports”). Compl. ¶ 40; Answer ¶ 40; Ex. 5, 2009 ERI Report; Ex. 6, 2010 ERI Report; Ex. 7, 2012 ERI Report.

27.) DOE commissioned the ERI reports to analyze, in accordance with the USEC Privatization Act, the expected impact of DOE uranium transfers on commercial markets and on individual segments of the United States’ domestic uranium industry. Compl. ¶ 40; Answer ¶ 40; Ex. 5, 2009 ERI Report, at 1; Ex. 6, 2010 ERI Report, at 1; Ex. 7, 2012 ERI Report, at 1.

28.) DOE hired ERI to prepare these analyses because DOE lacked the internal expertise to undertake such market studies and analysis itself. Ex. 8, GAO Report 14-291, at 46 (“DOE officials told [GAO] that they contracted with ERI to provide subject matter expertise that did not exist within DOE.”).

29.) The three prior ERI reports from 2009, 2010, and 2012 included quantitative analyses of the uranium market and modeled the effects of the proposed transfers. Ex. 5, 2009 ERI Report; Ex. 6, 2010 ERI Report; Ex. 7, 2012 ERI Report.

30.) The three prior ERI reports from 2009, 2010, and 2012 came to an express conclusion that the uranium transfers would not have an adverse material market impact. Ex. 5, 2009 ERI Report, at 33-34; Ex. 6, 2010 ERI Report, at 37; Ex. 7, 2012 ERI Report, at 50.

31.) However, the three prior ERI reports from 2009, 2010, and 2012 also expressly warned that, if DOE began transferring uranium in quantities beyond the 10% Limit, that could

have an adverse material impact. Ex. 5, 2009 ERI Report, at 34; Ex. 6, 2010 ERI Report, at 37-38; Ex. 7, 2012 ERI Report, at 50.

#### **IV. THE 2013 EXCESS URANIUM INVENTORY MANAGEMENT PLAN**

32.) In 2013, DOE issued a new Excess Uranium Inventory Management Plan (the “2013 Plan”), which unexpectedly abolished the 10% Limit. Compl. ¶¶ 61, 133; Answer ¶¶ 61, 133; App. DOE\_0061.

33.) Despite this change to established and relied-upon policy, DOE did not provide notice or an opportunity for comment on the change. Compl. ¶¶ 62, 134; Answer ¶¶ 62, 134.

34.) DOE did not conduct an assessment of the environmental impacts of changing the policy under the National Environmental Policy Act, as it had done when establishing the 10% Limit in the 2008 Policy and Plan. “Finding of No Significant Impact: Disposition of DOE Excess Depleted Uranium, Natural Uranium, and Low Enriched Uranium,” 74 Fed. Reg. 31,420 (July 1, 2009).

35.) DOE’s only stated explanation in the 2013 Plan for eliminating the 10% Limit was that:

Based on experience gained 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.

36.) DOE did not explain in the 2013 Plan how prior transfers, which were below 10% of the domestic requirement, gave it experience in handling transfers above 10% of the domestic requirement.

37.) DOE did not address in the 2013 Plan the explicit warnings in prior ERI reports—including in the 2012 ERI Report which DOE claimed provided part of the basis for abolishing

the 10% Limit—about maintaining the 10% Limit and the fact that increasing transfers above the 10% Limit could result in an adverse material impact on the domestic uranium industry.

38.) Other than a copy of the 2013 Plan itself, and a reference to the policy change in a DOE internal memorandum which uses substantially similar language to that in the 2013 Plan, the administrative record does not contain any other material explaining or analyzing DOE's decision to abandon the 10% Limit. App. DOE\_0061, 0405.

**V. THE 2014 DETERMINATION OF NO ADVERSE MATERIAL IMPACT AND THE 2014 ERI REPORT**

39.) The Secretary made his most recent “no adverse material impact” Determination on May 15, 2014 (the “2014 Determination”). Compl. ¶¶ 66, 69; Answer ¶¶ 66, 69; App. DOE\_0419.

40.) This one-page 2014 Determination ostensibly was supported by a new report from ERI. App. DOE\_0419, 0181-286.

41.) Unlike prior ERI reports, the 2014 ERI Report expressly *did not conclude* that the proposed transfers would have no adverse material impact on the domestic uranium industries. Compl. ¶ 84; Answer ¶ 84; App. DOE\_0284.

42.) The 2014 ERI Report found that DOE's proposed transfers would constitute 15% of domestic demand, a fifty percent increase over the former 10% Limit. App. DOE\_0234.

43.) The 2014 ERI Report noted that DOE's decision to no longer limit transfers to 10% of domestic demand “was interpreted by the U.S. industry and investment community as an indication that DOE will not act in a predictable manner,” and that this “may, in fact, have an adverse material impact on the domestic industry.” App. DOE\_0283.

44.) The 2014 ERI Report stated that the prior Determination of no material adverse market impact was made “[i]n the context of a much stronger price environment,” unlike “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\_284.

45.) The 2014 ERI Report made quantitative findings of significant adverse impacts from the proposed DOE transfers, both in absolute terms and in relation to the effects found from prior transfers:

	<b>2009 ERI Report</b>	<b>2010 ERI Report</b>	<b>2012 ERI Report</b>	<b>2014 ERI Report</b>
<b>Share of Demand Met by DOE</b>	9.6% of the U.S. market	10% of the U.S. market	10.3% to 10.8% of the U.S. market	15% of the U.S. market
<b>Conversion Price Impact</b>	-\$0.23/kgU	-\$0.20/kgU	-\$0.66 to -\$0.69/kgU	-\$0.90/kgU
<b>Spot Price Impact</b>	3.8% decline	1.6% decline	Unable to determine	11.8% decline
<b>Term Price Impact</b>	2.0% decline	1.3% decline	3.9% to 4.1% decline	5.5% decline

Ex. 5, 2009 ERI Report, at 26, 29; Ex. 6, 2010 ERI Report, at 25, 27, 29; Ex. 7, 2012 ERI Report, at 36, 40, 41, 46; App. DOE\_0234, 0239-41, 0407-08.

46.) The 2014 ERI Report further found that DOE’s planned transfers will cause a 7% to 8% decline in ConverDyn’s sales and a 6% to 8% increase in ConverDyn’s production costs. App. DOE\_0265-66, 0268, 0270, 0271, 0282, 0409.

47.) The 2014 ERI Report also determined that the transfers will likely contribute to job losses at the MTW facility and will cause an overall loss of employment in the domestic uranium industry of about 4% per year. App. DOE\_0270-71, 0280, 0282-83, 0408.

48.) Starting in 2012, ERI assessed the average impact of DOE's transfers over approximately the next twenty years, and the 2014 Report shows a large, and worsening, long-term impact from DOE transfers:

	<b>2012 ERI Report</b>	<b>2014 ERI Report</b>	<b>Change Between Reports</b>
<b>Share of Demand Met by DOE</b>	4.8% of the U.S. market	12% - 15% of the U.S. market	281% greater share
<b>Conversion Price Impact</b>	-\$0.30/kgU	-\$0.80/kgU	267% greater decline in price
<b>Spot Price Impact</b>	ERI was unable to determine	10.2% decline	-
<b>Term Price Impact</b>	1.8% decline	4.8% decline	267% greater decline in price

Ex. 7, 2012 ERI Report, at 36, 40, 41, 46; App. DOE\_0234, 0239-41.

## **VI. EFFECT OF THE CURRENT TRANSFERS ON CONVERDYN**

49.) On March 10, 2014, prior to issuance of the May 2014 Determination, ConverDyn sent the Secretary two letters concerning the proposed transfers: the first letter requested that the Secretary undertake a rigorous and transparent process in evaluating the market impact of the transfers, and the second letter provided a confidential analysis of the expected financial effects of DOE's transfers on ConverDyn's business. App. DOE\_0106, 0110.

50.) ConverDyn's analysis concluded that the planned DOE transfers would cause \$40.5 million in lost profits from lost sales and depressed prices, with the potential for an additional \$29 million in lost revenue over the same period due to changed customer habits caused by the market impacts from the transfers. App. DOE\_0116-20; Ex. 13, Critchley Decl. ¶¶ 11, 14.

51.) ConverDyn has had average annual revenues of \$100 million over the last five years. Ex. 13, Critchley Decl. ¶ 17.

52.) ConverDyn's March 10, 2014 letter to DOE explained that the expected losses to ConverDyn resulting from DOE's transfers were likely to cause ConverDyn to go from a profit to a loss in at least one of the next few years. App. DOE\_0113, 0116, 0120; Ex. 13, Critchley Decl. ¶ 18.

53.) The impacts described in ConverDyn's damage assessment letter to DOE were based on the findings from the 2012 ERI Report on impacts to the domestic conversion industry, as the 2014 ERI report had not yet been released at the time ConverDyn made its submission to DOE. App. DOE\_0118-19; Ex. 13, Critchley Decl. ¶ 13.

54.) ConverDyn's analysis based on the 2012 ERI Report is conservative and understates the current harms to ConverDyn, as the findings in the 2014 ERI Report showed even greater negative impacts to the domestic conversion industry than the 2012 ERI Report. Compare Ex. 7, 2012 ERI Report, at 36, 40, 41, 46, with App. DOE\_0234, 0239-41; see supra ¶¶ 45, 48.

## **VII. DOE'S INTERNAL REVIEW REGARDING THE 2014 DETERMINATION**

55.) DOE's Office of Nuclear Energy prepared a memorandum for the Secretary, dated May 12, 2014, advising the Secretary to approve the transfers (the "May 12 DOE Memo"), which was in turn based on and incorporated another analysis from the Office of Nuclear Energy dated May 8, 2014 (the "May 8 DOE Memo," collectively the "DOE Memoranda"). App. DOE\_0397, 0405.

56.) The May 8 DOE Memo noted that "[t]o ensure that this requested Secretarial Determination is fully informed, the Office of Nuclear Energy (NE) tasked Energy Resources International, Inc. (ERI), an experienced and well-regarded nuclear fuel consulting firm, to

assess the potential impact on the domestic uranium mining, conversion and enrichment industries from the transfers.” App. DOE\_0406.

57.) The May 8 DOE Memo further noted that “the current NE staff were not involved in the previous analyses and Secretarial Determinations.” App. DOE\_0406.

58.) The May 8 DOE Memo went on to note the findings and conclusions of the 2014 ERI Report, including acknowledging that:

- “The price impact attributed to DOE inventory entering the conversion market averages \$1 per kgU as UF<sub>6</sub> over the next ten years. This is equivalent to 12% of the current spot price and 6% of the current term price.” App. DOE\_0407.
- “[F]uture employment [in the domestic uranium industry] is reduced by approximately 4% on average as a result of the DOE inventory releases.” App. DOE\_0408.
- “If market prices remain at the current depressed levels for several years, which seems to be the consensus view of many in the industry, then more U.S. production will be impacted and may be put on standby, as existing longer term contracts at higher prices are completed and can only be replaced by new, lower-priced contracts.” App. DOE\_0409.
- “The introduction of DOE inventory into the conversion market results in . . . a 7% to 8% reduction in sales volume,” and “DOE inventory is projected to have a 7% to 8% impact on ConverDyn sales volume in 2014.” App. DOE\_0409.
- “[L]oss of sales volume associated with DOE the entry of DOE material in the conversion market . . . results in a production cost increase of 6% to 8%.” App. DOE\_0409.

59.) The May 8 DOE Memo noted that the 2014 ERI Report “provid[ed] a comprehensive analysis” and that “ERI’s analysis is considered complete and consistent with DOE’s tasking.” App. DOE\_0411-12.

60.) The May 8 DOE Memo noted that DOE officials had met with members of the domestic uranium industry, and DOE’s entire analysis of its meetings with ConverDyn and of ConverDyn’s two March 10, 2014 Letters states, *in full*, that

ConverDyn, the sales agent for conversion services from the only uranium conversion facility in the United States, also provided input to the Department on the condition of the market, the impact it believes DOE material is having on the market, and recommendations on how DOE could improve the way it conducts its analysis and uranium transactions. ConverDyn asserts that it is experiencing a “material adverse impact” due to DOE uranium transactions in the form of reduced sales, reduced production volumes, and depressed prices. ConverDyn says Fukushima-related volume lost over 2014-2016 projected to be [REDACTED] and that reduced sales volume from DOE uranium sales will be [REDACTED] over that same period.

App. DOE\_0412 (redactions on original).

61.) The May 8 DOE Memo does not mention ConverDyn’s more-detailed discussion in its submission of adverse impacts to the domestic conversion industry, including lost sales volume, reduced income, or changes in customer practices resulting from the availability of DOE material in the market, and does not mention the losses in dollar amounts that would result from the DOE transfers.

62.) The May 8 DOE Memo recognized that “it is clear that the nuclear fuel market (it is a global market) is in a weakened state due to many factors.” App. DOE\_0415.

63.) The May 8 DOE Memo’s entire analysis as to whether the foregoing showed that DOE’s transfers would have an adverse material impact states, *in full*, that

The Secretary, in determining whether DOE uranium sales would create an “adverse material impact,” must answer whether DOE uranium sales alone cause the uranium industry to change from its position in the market without DOE sales. The expert staff within the Office of Nuclear Energy believe that the uranium industry would be in the same position in the market with or without DOE sales due to the limited ability of the relatively small amount of material and services being displaced to significantly influence the domestic uranium mining, conversion, and enrichment industries. We believe that it is much more important for DOE to adhere to its stated plans and provide industry with a predictable supply on which they can base their business decisions.

App. DOE\_0416.

64.) The May 12 DOE Memo, which echoed much of what was said in the May 8 DOE Memo, noted that “ERI’s analysis of the existing market conditions found that, as the

Department was already aware, the uranium, conversion and enrichment industries are all challenged by market oversupply . . . . This oversupply has led to depressed prices in the three markets, which in turn have affected both employment and production levels.” App. DOE\_0398.

65.) The May 12 DOE Memo went on to determine that

The ERI analysis estimated that a decrease in the quantity of DOE transfers would do little to improve the market condition or reduce other impacts on the industry. ERI’s analysis supports a conclusion that although DOE’s actions will necessarily have some impact on the market, and that this impact is greater now than it was in 2012, DOE’s actions are not the driver of the current negative states on the domestic uranium production, conversion, or enrichment industries. NE agrees with this assessment and believes that the markets will adjust to the major drivers of the depressed markets over time and that the DOE transfers will not harm this adjustment.

App. DOE\_0399.

66.) Regarding the comments from members of the domestic uranium industry regarding the transfers, including ConverDyn, the May 12 DOE Memo states that while “[t]he nuclear fuel industries are concerned with the current state of the markets,” the “uranium production and conversion industry representatives generally provide anecdotal evidence that inaccurately represents the impact of the DOE transfers on these industries.” App. DOE\_0400.

67.) The May 12 DOE Memo does not explain what information provided by the domestic industry is merely “anecdotal,” nor does DOE identify any information provided by the domestic industry that is alleged to be “inaccurate.”

68.) DOE acknowledged receipt of ConverDyn’s March 10, 2014 letters, and never requested any clarification or any additional information from ConverDyn regarding ConverDyn’s submission or the detailed harms described therein. App. DOE\_0287; Ex. 13, Critchley Decl. ¶ 15.

69.) The impacts described in ConverDyn's damage assessment letter were based on the findings of the 2012 ERI Report with respect to impacts to the domestic conversion industry. App. DOE\_0118-19; Ex. 13, Critchley Decl. ¶ 13.

70.) The negative impacts to the domestic conversion industry described in the 2014 ERI Report are greater than those described in the 2012 ERI Report, such that ConverDyn's analysis based on the 2012 ERI Report actually understates the harm to ConverDyn. *Compare* Ex. 7, 2012 ERI Report, at 36, 40, 41, 46, *with* App. DOE\_0234, 0239-41; *see supra* ¶¶ 45, 48.

### **VIII. CHARACTERISTICS OF URANIUM TRANSFERRED BY DOE**

71.) DOE is transferring natural and low-enriched UF<sub>6</sub>. Compl. ¶ 36; Answer ¶ 36; App. DOE\_0419.

72.) Natural UF<sub>6</sub> is treated in the market as having two components: a natural uranium component and a conversion services component. Compl. ¶ 107; Answer ¶ 107; Ex. 13, Critchley Decl. ¶ 24.

73.) Low-enriched UF<sub>6</sub> is treated in the market as having three components: a low-enriched uranium component, a conversion services component, and an enrichment services component. Compl. ¶ 108; Answer ¶ 108; Ex. 13, Critchley Decl. ¶ 24.

74.) As a distinguishing characteristic of the uranium market, each of the components (uranium, conversion, and enrichment) has an independent value, and these individual components can be purchased and sold separately from the others on the market; the three components are essentially fungible. App. DOE\_0157, 0227, 0263, 0285; Ex. 13, Critchley Decl. ¶ 24.

75.) The UF<sub>6</sub> that DOE intends to transfer under the 2014 Determination contains a conversion service component. Compl. ¶¶ 107-108; Answer ¶¶ 107-108; App. DOE\_0114, 0116-17, 0201, 0262; Ex. 13, Critchley Decl. ¶¶ 23-24.

**IX. VALUATION OF URANIUM TRANSFERRED BY DOE**

76.) The “spot price” (or “spot market price”) for uranium typically refers to the price for uranium and related services that will be delivered within 12 months after the contract is signed. Compl. ¶ 45; Answer ¶ 45; App. DOE\_0286, 0312.

77.) The “term price” (or “long-term price” or “term market price”) for uranium typically refers to the price for uranium and related services which will be delivered more than one year after the contract is signed. Compl. ¶ 45; Answer ¶ 45; App. DOE\_0286, 0312.

78.) The spot price for uranium is currently lower than the term price for uranium, and the current spot price is at a historic low as compared to the term price for uranium, in part because DOE’s transfers at only spot prices continue to drive down the spot price relative to the term price. App. DOE\_0117, 0122-23, 0129, 0135, 0167; Ex. 13, Critchley Decl. ¶ 22.

79.) DOE values the UF6 it transfers at the spot price, which is generally the lowest price available in the market. App. DOE\_0119, 0415; Ex. 13, Critchley Decl. ¶ 22.

80.) The fair market value for uranium products takes into account a mixture of the prices available in the market, not just the lowest price. App. DOE\_0101, 0107, 0119; Ex. 13, Critchley Decl. ¶ 22.

81.) To “ensure that fair market value is received,” DOE’s 2008 Policy and Plan explained that “uranium sales would be offered under both near and longer term contracts through a competitive bidding process, unless otherwise contractually committed.” Ex. 1, 2008 Policy and Plan, at 10.

82.) The May 8 DOE Memorandum acknowledged that “it is better to seek to fill contracts in the long-term market instead of the spot market.” App. DOE\_0415.

83.) The May 8 DOE Memorandum does not contain any analysis of whether the transfers are for fair market value.

84.) The May 12 DOE memorandum stated in full, with respect to the fair market value requirement, that “[t]he programs have mechanisms in place to determine the value they receive for their transferred uranium, and both ensure that the Department receives a fair market value in services in exchange for the material transferred.” App. DOE\_0400.

85.) The administrative record does not contain any other information on how DOE determined the fair market value of the uranium transfers, does not explain the programs’ mechanisms to determine the value they receive for their transferred uranium, and does not include any other analysis evaluating the fair market value of the transfers.

#### **X. THE TRANSFERS HAVE STARTED AND ARE ONGOING**

86.) DOE started the first uranium transfers authorized under the Secretary’s May 2014 Determination for the NNSA downblending program on or around July 31, 2014 (pushed back from July 15, 2014), with an additional transfer on or around August 15, 2014, and with another transfer expected on or about September 15, 2014. Ex. 9, June 7, 2014 Letters from DOE to Congress.

87.) DOE expects to make the next three transfers for the NNSA downblending program on or about October 1, 2014, November 1, 2014, and December 1, 2014. Ex. 10, August 29, 2014 Letters from DOE to Congress.

88.) DOE started the first transfers authorized under the Secretary’s May 2014 Determination for the Portsmouth cleanup program on or around August 20, 2014, with a additional transfers expected to follow on or around September 22, 2014. Ex. 11, July 18, 2014 Letters from DOE to Congress.

**XI. INDEX OF ATTACHED EXHIBITS**

<b>EXHIBIT NO.</b>	<b>TITLE</b>
1	Secretary of Energy's Policy Statement on Management of the Department of Energy's Excess Uranium Inventory and the 2008 Excess Uranium Inventory Management Plan (the "2008 Policy and Plan") (Dec. 16, 2008)
2	Secretarial Determination Pursuant to the USEC Privatization Act for the Sale or Transfer of Natural Uranium (the "2009 Determination") (Nov. 10, 2009)
3	Secretarial Determination Pursuant to the USEC Privatization Act for the Sale or Transfer of Natural Uranium (the "2011 Determination") (March 1, 2011)
4	Secretarial Determination for the Sale or Transfer of Uranium (the "2012 Determination") (May 15, 2012)
5	Energy Resources International, Inc., Quantification of the Potential Impact on Commercial Markets of DOE's Transfer of Natural Uranium During the Period October 2009 Through December 2013 (the "2009 ERI Report") (Nov. 5, 2009)
6	Energy Resources International, Inc., Quantification of the Potential Impact on Commercial Markets of DOE's Transfer of Natural Uranium Hexafluoride During Calendar Years 2011, 2012, and 2013 (the "2010 ERI Report") (Dec. 2010)
7	Energy Resources International, Inc., Quantification of the Potential Impact on Commercial Markets of Introduction of DOE Excess Uranium Inventory in Various Forms and Quantities During Calendar Years 2012 through 2033 (the "2012 ERI Report") (April 23, 2012)
8	Government Accountability Office, Department of Energy – Enhanced Transparency Could Clarify Costs, Market Impact, Risk, and Legal Authority to Conduct Future Uranium Transactions, No. GAO-14-291 ("GAO Report 14-291") (May 2014)
9	June 7, 2014 Letters from DOE to Congress
10	August 29, 2014 Letters from DOE to Congress
11	July 18, 2014 Letters from DOE to Congress
12	Government Accountability Office, Excess Uranium Inventories – Clarifying DOE's Disposition Options Could Help Avoid Further Legal Violations, No. GAO-11-846 ("GAO Report 11-846") (Sept. 2011)
13	Declaration of Malcolm Critchley in Support of Plaintiff ConverDyn's Motion for Summary Judgment ("Critchley Decl.") (Sept. 11, 2014)

Dated: September 11, 2014

Respectfully submitted,

By: /s/ Gordon A. Coffee

Gordon A. Coffee\* #384613  
gcoffee@winston.com  
Brian M. Serafin\* #996019  
bserafin@winston.com  
Darani Reddick #492365  
dreddick@winston.com  
WINSTON & STRAWN LLP  
1700 K Street, N.W.  
Washington, D.C. 20006  
(202) 282-5000

Tyson R. Smith\* #495096  
trsmith@winston.com  
WINSTON & STRAWN LLP  
101 California Street  
San Francisco, CA 94111  
(415) 591-1000

\* Counsel of Record

Attorneys for Plaintiff ConverDyn

**CERTIFICATE OF SERVICE**

I hereby certify that on September 11, 2014, the foregoing document was filed electronically on CM/ECF, which will send a notice of electronic filing to:

Daniel E. Bensing, Esq.  
United States Department of Justice  
Civil Division, Federal Programs Branch  
20 Massachusetts Avenue, N.W.  
Room 6114  
Washington, D.C. 20530  
daniel.bensing@usdoj.gov  
***Counsel for Defendants Ernest J. Moniz  
and United States Department of Energy***

Dated: September 11, 2014

\_\_\_\_\_/s/ Brian M. Serafin\_\_\_\_\_

Brian M. Serafin