UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CONVERDYN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 1:14-cv-1012 RW
	)	
ERNEST J. MONIZ and UNITED STATES DEPARTMENT OF ENERGY,	)	
	)	
Defendants.	)	
	)	

OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

Introduction

Plaintiff's Motion for a Preliminary Injunction ("Motion") invites the Court to effectively shut down two critical Department of Energy ("DOE" or "Department") programs solely to prevent inherently speculative financial harm to plaintiff allegedly caused by DOE's long-standing policy of transferring excess uranium from its inventory. Plaintiff has alleged only an unspecified injury in the form of lost profits caused by these transfers, but has not submitted any financial information that would provide any factual basis for the Court to identify the scope and impact of those alleged losses. By comparison, the Secretary of Energy ("Secretary") has presented detailed declarations demonstrating that plaintiff's proposed injunction will effectively shut down two DOE programs essential to the national interest that are funded in whole or in part by these transfers.

Plaintiff has no likelihood of success on the merits of any of its four claims. The Secretary reasonably concluded that transfers of 2,705 metric tons of uranium ("MTU")

annually from DOE's inventories – which would amount to only 4.5% of total global supply – will not have an "adverse material impact" on the domestic uranium industries. *See* 42 U.S.C. 2297h-10(d). Plaintiff is also incorrect in its assertions that DOE lacks the legal authority to transfer uranium hexafluoride and that DOE has not received fair market value for the uranium it has transferred. Finally, DOE's Excess Uranium Inventory Management Plan is a policy statement, not a legislative rule, and so was promulgated lawfully.

Plaintiff cannot demonstrate irreparable injury. First, plaintiff has not provided sufficient financial data to support its claim of $ 69.5 million in potential lost profits due to the DOE transfers. Second, plaintiff is an affiliate of Honeywell International and its $ 69.5 million in alleged lost profits is miniscule compared to Honeywell's approximate annual earnings of $ 3 billion. Consequently, even if plaintiff will suffer lost profits, such losses are not sufficiently serious to rise to the level of irreparable injury.

Finally, the Court should deny plaintiff's motion because the balance of equities weighs strongly in the government's favor. The two DOE programs threated by plaintiff's motion -- the clean-up of the environmental contamination at the Portsmouth uranium enrichment plant and the program to down-blend, and so render safe, weapons grade uranium -- are largely funded from DOE's uranium transfers. Both programs will effectively come to a halt if the preliminary injunction is entered, causing significant harm to the public interest.

I. STATUTORY AND REGULATORY BACKGROUND

A. DOE's Authority to Transfer Uranium Under the Atomic Energy Act

The Atomic Energy Act of 1954, P.L. 83-703, ("AEA") recognized the importance of source, byproduct and special nuclear material, including uranium, *Id*. at § 2.c, 42 U.S.C. 2012(c), and granted the Atomic Energy Commission ("AEC") broad authority to control the acquisition, distribution and production of such material, *id*. at § 3c, 42 U.S.C. 2013(c), with a goal of, encouraging "widespread participation in the development and utilization of atomic energy for peaceful purposes to the maximum extent consistent with the common defense and security and with the health and safety of the public." *Id*. at § 3d, 42 U.S.C. 2013(d).

In 1974, Congress enacted the Energy Reorganization Act (Pub. L. No. 93-438 §§ 104, 201, 88 Stat. 1233, 1237-38, 1242-44, codified at 42 U.S.C. § 5801 *et seq*), which abolished the AEC and transferred its licensing and related regulatory functions to the Nuclear Regulatory Commission (NRC), 42 U.S.C. § 5841(f) and all other functions to the Energy Research and Development Administration ("ERDA"), 42 U.S.C. § 5814(c). *See Huffman v. Western Nuclear, Inc*., 486 U.S. 663, 664 (1988); *Pennsylvania v. Lockheed Martin Corp*., 684 F. Supp. 2d 564, 568 (M.D. Pa. 2010). In 1977, pursuant to the Department of Energy Organization Act, DOE assumed the responsibilities of the then-abolished ERDA. Pub. L. No. 95-91, 91 Stat. 565, 577-78, *codified at* 42 U.S.C. § 7151(a). This vested all non-licensing AEA authorities in DOE, including control over existing government facilities and inventories.

Section 63(a) of the AEA, 42 U.S.C. § 2093(a), authorizes the Department to "distribute source material within the United States to qualified applicants requesting

such material" for a wide variety of purposes, including "for any other use approved by the Commission[1] as an aid to science or industry." "Source material" is defined in 42 U.S.C. § 2014(z) as "uranium, thorium, or any other material which is determined by the Commission . . . to be source material" as well as "ores containing one or more of the foregoing materials."

Section 53(a) of the AEA, 42 U.S.C. § 2073(a), complements section 63 by authorizing the Secretary to "transfer [or] deliver . . . special nuclear material" for several purposes including "for such other uses as the [Department] determines to be appropriate to carry out the purposes of this chapter." "Special nuclear material" is defined in 42 U.S.C. § 2014(aa) as "plutonium, uranium enriched in the isotope 233 or in the isotope 235, and any other material which the Commission determines to be special nuclear material, but does not include source material . . ."

Thus, these two AEA sections authorize the Secretary of Energy to transfer all manner of nuclear material, including uranium, regardless of its form and degree, if any, of enrichment. These authorities are further buttressed by 42 U.S.C. § 2201(g) which gives the Secretary authority to "sell, lease, grant, and dispose of" real and personal property.

B. The Energy Policy Act of 1992 and the USEC Privatization Act

The Energy Policy Act of 1992 ("EPAct"), Pub. L. 102-486, *codified* at 42 U.S.C. §§ 2297, *et seq*., among other things, established a government corporation, the United States Enrichment Corporation ("Corporation"), to take over uranium enrichment and marketing activities formerly performed by DOE. 42 U.S.C. § 2297b-7(a).

[1] Commission originally referred to the AEC. Currently, Commission refers to either the NRC or DOE or both, depending on which agency received the authority originally granted the AEC.

The USEC Privatization Act ("Privatization Act"), 42 U.S.C. §§ 2297h, *et seq*, authorized the transfer of the interest of the United States in the Corporation to the private sector. 42 U.S.C. § 2297h-1(a). In addition, section 3112 of the Privatization Act, 42 U.S.C. § 2297h-10, affirmed the Department's existing AEA authorities to transfer and sell uranium, subject to requirements identified in subsections (b) – (f) for certain types of transfers or sales.

Section 3112(a) provides that the Secretary shall not "sell any uranium (including natural uranium concentrates, natural uranium hexafluoride, or enriched uranium in any form) to any person except as consistent with this section." Section 3112(d) then places restrictions on covered sales of natural and low-enriched uranium that function as an overlay on the Department's more general AEA authorities to transfer or sell that material. Specifically, section 3112(d)(2) requires that covered sales of natural or low-enriched uranium shall not be made unless:

> (A) The President determines that the material is not necessary for national security needs,
> (B) The Secretary determines that the sale of the material will not have an adverse material impact on the domestic uranium mining, conversion, or enrichment industry, taking into account the sales of uranium under the Russian HEU Agreement and the Suspension Agreement, and
> (C) The price paid to the Secretary will not be less than the fair market value of the material.

42 U.S.C. § 2297h-10(d).[2]

[2] The Department has considered the Presidential determination prong in section 3112(d)(2)(A) to be satisfied if the uranium in question is not included in the Nuclear Weapons Stockpile Plan, a document that is signed by the President and identifies inventories of uranium necessary for national security needs. The Nuclear Weapons Stockpile Plan is reviewed annually and updated as needed.

II. FACTUAL BACKGROUND

A. DOE's Policy for Management of its Inventory of Excess Uranium

The Department holds inventories of uranium in various forms and qualities, including highly enriched uranium (HEU), low-enriched uranium (LEU), natural uranium (NU), and depleted uranium that are currently held as excess and not dedicated to national security missions. Plaintiff's Exhibit ("Ex.") Ex. L at iv.[3] The Department's uranium comes from various sources including governmental weapons programs, from its own former enrichment activities, and from inventories of Russian-origin natural uranium as UF6 it was directed by Congress to purchase. *See* Ex. L at 8-12.

In March 2008, then-Secretary Bodman issued the "Secretary of Energy's Policy Statement on Management of the Department of Energy's Excess Uranium Inventory," (Policy Statement) which set forth "the general framework within which the Department prudently will manage its excess uranium inventory." Ex. D at A-1. The Policy Statement stated that the Department would, "[t]o the extent practicable . . . manage its excess uranium inventories in a manner that is consistent with and supportive of the

[3] The uranium fuel cycle contains several steps: (1) commercial uranium ore is mined and refined into yellow cake (U3O8); (2) U3O8 is converted into uranium hexafluoride via the fluorination of the yellow cake, which creates a gas that can then be enriched; (3) uranium hexafluoride is enriched by separating the uranium isotopes and creating a higher concentration of U235, the fissionable uranium isotope. Typical U308 and UF6 have a concentration, or assay, of U235 of 0.711%. Low-enriched uranium has an assay of between 3 and 5 percent U235. *See* www.energy.gov/ne/nuclear-fuel-cycle

Down-blending HEU is the process of diluting uranium product in any form to produce LEU. The resulting LEU can also produce usable commercial fuel. To down-blend HEU into LEU, HEU, typically in metal or oxide form, is converted into a liquid form called uranyl nitrate. The HEU is then mixed with a diluent of natural or depleted uranium to produce LEU at enrichment levels below 20 percent U-235. The down-blending process creates LEU, in the same uranyl nitrate form. The uranyl nitrate LEU is then fabricated into UO2 fuel pellets at a fuel fabrication facility such as WesDyne.

maintenance of a strong domestic nuclear industry." *Id.* at A-2. The Policy Statement further provided:

> Consistent with this principle, the Department believes that, as a general matter, the introduction into the domestic market of uranium from Departmental inventories in amounts that do not exceed ten percent of the total annual fuel requirements of all licensed nuclear power plants should not have an adverse material impact on the domestic uranium industry. The Department anticipates that it may introduce into the domestic market, in any given year, less than that amount, or, in some years for certain special purposes such as the provision of initial core loads for new reactors, more than that amount. Consistent with applicable law, the Department will conduct analyses of the impacts of particular sales or transfers on the market and the domestic uranium industry, prior to entering into particular sales or transfers.

Id.

In December of 2008, the Department released its Excess Uranium Management Plan (the 2008 Plan), which stated:

> The Plan addresses the disposition of DOE's excess uranium identified in this Plan through potential sales or transfers of uranium based on a combined annual quantity of no more than ten percent of the annual U.S. nuclear fuel requirements. The Department may exceed the ten percent in any given year for certain special purposes, such as initial core loads for new reactors. Uranium disposition decisions will be undertaken in a manner that is consistent with DOE's mission needs and the principles set forth in the Policy Statement.

Ex. D at ES-1.[4]

The 2008 Plan contemplated transfers of LEU for DOE's HEU down-blending program, sale of portions of its Russian-origin UF6 inventory or enrichment of the material for addition to DOE's inventory as LEU, sale of its off-specification non-UF6 natural uranium inventory, and the potential sale of higher assay portions of its depleted

[4] At the time of the 2008 Plan, ten percent of the domestic uranium demand was roughly 2000 MTU. Ex. D at 10 (domestic annual fuel requirements were roughly 50 million lbs.U3O8).

uranium inventory. Ex. D at 4-10. The sales were not expected to exceed the ten percent guideline. *Id*. DOE noted that it planned to update the Plan periodically to reflect new and evolving information, policies and programs. *Id*. at ES-2.

B. DOE Programs Currently Funded Through Inventory Transfers of Excess Uranium.

Two crucial DOE programs – the environmental clean-up of the gaseous diffusion plant ("GDP") at Portsmouth, Ohio and the down-blending of HEU to eliminate the weapon-grade HEU, which occurs at Erwin, Tennessee, are respectively funded in part or in whole through barter transactions whereby DOE transfers uranium from its inventory in exchange for the services provided by these two contractors at these two sites (Fluor-B&W Portsmouth ("FBP") at Portsmouth and WesDyne International LLC ("WesDyne") for the down-blending work that occurs at Erwin).

1. NNSA Down-Blending Contract

Pursuant to a 1993 Presidential Directive to eliminate weapon-grade nuclear material, DOE's National Nuclear Security Administration ("NNSA") transfers HEU that is no longer needed for national security to WesDyne (and its subcontractor Nuclear Fuel Services ("NFS")) for down-blending from HEU to LEU. *See* Declaration of Peter H.Hanlon ("Hanlon Decl."). NNSA has been down-blending HEU through its commercial partners since 2008, and continues this work today, with LEU resulting from the down-blending process transferred to its contractor in exchange for down-blending services.

2. Portsmouth Environmental Clean-Up Activity

Under the EPAct, DOE is responsible for clean-up of environmental contamination at DOE's three former Gaseous Diffusion Plants ("GDPs") – Oak Ridge, Tennessee; Paducah, Kentucky; and Portsmouth, Ohio. Declaration of James M. Owendoff ("Owendoff Decl.") ¶ 7. USEC, the former lessee of the DOE GDPs at Portsmouth and current lessee of the DOE GDP at Paducah, ceased enrichment operations at Portsmouth in 2001 and initiated the process to return the facilities to DOE. Owendoff Decl. ¶¶ 6 - 7. The Department contracted with USEC to place the facility in cold standby status and provide surveillance and maintenance ("S&M") until it was prepared to proceed with decontamination and decommissioning ("D&D") of the Portsmouth GDP. In 2009, in anticipation of awarding the D&D contract, DOE modified USEC's S&M contract to include accelerated cleanup services in exchange for uranium.

In 2010, DOE entered into a contract with FBP to clean-up the environmental contamination at the Portsmouth GDP following its return from USEC in 2011. Since the D&D contract was awarded to FBP, DOE has been making quarterly transfers of uranium in exchange for a portion of the services provided under the D&D contract. In the face of dwindling congressional appropriations for the D&D work, the transfers of UF6 in exchange for services increased.

C. Secretarial Determinations to Authorize Uranium Transfers Following the 2008 Policy and Plan

To assist the Secretary in making the determination under 42 U.S.C. § 2297h-10(d) as to whether a proposed transfers will have an adverse material impact on the domestic uranium mining, conversion, or enrichment industry, the Office of Nuclear Energy

("NE"), the DOE office in charge of coordinating Secretarial Determinations under 42 U.S.C. § 2297h(d), has contracted with Energy Resources International ("ERI") to prepare a market impact analysis analyzing the impact of proposed transfers. NE provides ERI with information regarding the planned transfers and ERI, taking into account prior DOE transfers and any deliveries under other agreements, provides DOE with a report analyzing the impact of the proposed transfers.[5]

Pursuant to an October 2008 Secretarial Determination that preceded the 2008 Plan, NNSA made transfers in support of down-blending that ranged from 134 MTU natural uranium equivalent to 294 MTU natural uranium equivalent in 2011. Ex. L at 17. Following the 2008 Plan, the Department issued a series of determinations by the Secretary supported by market impact analyses prepared by ERI.[6] In each of the Determinations following the 2008 Plan, the Department increased the amount of uranium it was planning to introduce into the market.

The first determination covering UF6 transfers to support the cleanup at the GDP, the November 2009 Secretarial Determination, covered UF6 transfers from the final quarter of calendar year 2009 through calendar year 2010 of no more than 300 MTU and no more than 1,125 per year. Ex. L at 5. In March 2011, a Secretarial Determination to support

[5] Over the last several years, DOE has had the benefit of several such ERI reports, provided in 2009, Ex. H, 2010, Ex. I and 2012, Ex. J – as well as the 2014 report supporting the Secretary's May 15, 2014 Determination, Ex. B.

[6] A 2010 Secretarial Determination covered transfers of up to 2,400 kgU of low enriched uranium at 19.75% U235, a level of enrichment no domestic enricher is licensed to produce. These transfers were for commercial research and isotope production reactors. Because there was no market participant capable of producing this product, DOE did not commission an ERI analysis for this determination but instead relied on an internal analysis.

cleanup at the Portsmouth site covered transfers of UF6 from the first quarter of calendar year 2011, through the third quarter of calendar year 2013 of no more than 450 MTU per quarter and no more than 1605 MTU per calendar year. Ex. F. In May 2012 a new determination, Ex. G., increased transfers for both the Portsmouth D&D and the HEU down-blending programs, covering transfers of up to 2,400 MTU per calendar year for cleanup, with no more than 600 MTU a quarter, and 400 MTU natural uranium equivalent per year in LEU transfers for the HEU down-blending program.[7] Because the 2012 Determination covered only two years, the Department needed to issue a new determination by May 2014 to continue to support the D&D work at the Portsmouth GDP and the NNSA HEU down-blending program. *See* Consolidated Appropriations Act, 2012, Pub. L. 112-74, §312(a), 125 Stat. 786; Consolidated Appropriations Act, 2014, Division D, section 306(a), Pub. L. 113-76.

D. The 2013 Inventory Management Plan

In 2013, the Department updated the 2008 Plan. The 2013 Excess Uranium Inventory Management Plan ("2013 Plan"), Ex. L, identified DOE uranium inventories that had entered the market since the 2008 Plan and transactions that were ongoing or being considered by DOE through 2018. The 2013 Plan's objectives included "providing current information and enhanced transparency to the general public and interested

[7] The 2012 Determination also included the analysis of the transfer of depleted uranium to Energy Northwest as part of the Depleted Uranium Enrichment Project, a series of interrelated transactions that was initiated by the Department's transfer of depleted uranium to Energy Northwest. Transfers of depleted uranium are not covered by section 3112(d) and therefore do not need to be preceded by Secretarial Determinations. Nevertheless, the market impact of the depleted uranium transfers was analyzed in the 2012 ERI report and the transfers were included in the 2012 determination to give a more complete picture of the DOE uranium transfers during the period covered by the determination.

stakeholders regarding the management of DOE's potentially marketable uranium." Ex. L at iv. The 2013 Plan's summary of its planned transfers through 2018 mirrored the 2012 Secretarial Determination. *Id*. at v.

The 2013 Plan also marked the Department's explicit departure from the ten percent guideline it set forth in the 2008 Policy Statement and the 2008 Plan. *Id.* at 2. Although the 2012 Determination had already made clear the Department intended to transfer uranium in levels above the 10 percent guideline, the Department explained its position in the 2013 Plan.

> The 2008 Plan included reference to a Departmental Guideline that, as a general matter, the introduction into the domestic market of uranium from Departmental inventories in amounts that do not exceed 10 percent of the total annual fuel requirements of all nuclear power plants should not have an adverse material impact on the domestic uranium mining, conversion or enrichment industry.
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> * * *
>
> 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 it can meet its statutory and policy objectives in regard to DOE uranium sales or transfers without an established guideline. In addition, as discussed below, decisions to introduce uranium into the market pursuant to section 3112(d) must be reviewed every two years.

Id. at 2. The 2013 Plan went on to state that the May 2012 Determination "effectively sets forth uranium transfers being considered during the time span of this Plan." *Id.* at 3.

E. The 2014 Secretarial Determination to Authorize Uranium Transfers

To continue the Portsmouth environmental clean-up and the NNSA down-blending activities, DOE needed to continue transferring uranium from its inventory to the contractors responsible for these activities. Thus, in late 2013 and early 2014, the

Department began the process of preparing a recommendation for a Secretarial Determination to authorize continued uranium sales, including requesting ERI to prepare an economic analysis of a proposal for authority to transfer up to 2,705 MTU annually from 2014 through 2016.

In addition, NE, for the first time in connection with a Secretarial Determination based upon an ERI report, prepared its own analysis that evaluated the information in the ERI report, other information it had received and included a recommendation for the Secretary. Ex. 1-A (Defendants' exhibits 1-A, 1-B and 1-C are attached to the Declaration of Ashley David Henderson, Attachment 1 hereto.) The additional information available to and considered by NE included presentations and information received in meetings from ConverDyn, Ex. O and P, the Uranium Producers of America (UPA),), and other industry participants and experts. In addition, NE reviewed letters from ConverDyn, Ex. O and P, and UPA, as well as a power point presentation by FBP, Ex. 1-B, which provided information on the uranium market the perspective of a recipient of the UF6 that DOE has been transferring.

The NE analysis and the 2014 ERI Report were submitted to the Secretary for his review under a Memorandum to the Secretary, presenting the matter for his consideration, Ex. 1-C. *See generally* Henderson Decl. After reviewing this information and recommendations, the Secretary signed the May 15, 2014 Secretarial Determination that the proposed transfers would not have an adverse material impact on the domestic uranium mining, conversion or enrichment industry. Ex. M. Plaintiff filed this lawsuit challenging the Secretary's Determination (and other actions by DOE) on June 13, 2014.

F. The Prices at Which DOE Transfers Uranium Constitute Fair Market Value

The requirement in section 3112(d)(2) that the Department must receive fair market value for the uranium transferred is satisfied differently by the Office of Environmental Management ("EM") which is responsible for overseeing the environmental clean-up of the GDP at Portsmouth, Ohio, and the NNSA, a semi-autonomous agency within the Department, which is responsible for the DOE HEU Disposition program that down-blends weapon-grade HEU to LEU.

The EM contract is funded through appropriated funds but allows for the transfer of uranium hexafluoride in exchange for services. Owendoff Decl. ¶ 11b. Accordingly, on a quarterly basis EM and its D&D contractor, FBP, negotiate modifications to the contract whereby FBP proposes a value of services that it will provide in exchange for the quantity of uranium hexafluoride that EM is prepared to transfer. Owendoff Decl. ¶ 12. EM evaluates the proposal based on recent spot market indices, and, if it considers the value of services offered to be equivalent to the fair market value of the material to be transferred, the parties execute a modification to the contract to permit the transfer. *Id.* These transactions are done as one-time modifications to the contract, and the value is set at the time of the transfers. EM is not obligated to transfer uranium under the contract; the transfers are at the discretion of the Department. Owendoff Decl. ¶ 11b.

NNSA's contract is funded in full by transfers of uranium. NNSA's compensation is set forth in a mathematical model set out in its contract with its supplier of down-blending services, WesDyne. Hanlon Decl. ¶ 17. WesDyne invoices NNSA periodically for services already performed, and the contract allows NNSA 30 days to approve

transfer of title to a quantity of the LEU resulting from the down-blending services, calculated based on the formula in the contract, to WesDyne in satisfaction of the invoice. Hanlon Decl. ¶ 18. Again, because these transfers are one-time transfers to a contractor, not transfers into the uranium market, the value of the uranium to be transferred is set at the time of the transfer. *Id*.

G. Schedule for Future Uranium Transfers

Currently, DOE anticipates making regular transfers of uranium over the next several months to the contractors for both the Portsmouth clean-up activity and the Erwin down-blending activity. Under the EM contract with FBP, EM anticipates transferring 300 MTU of UF6 to FBP on August 20, 2014 and another 300 MTU on September 22, 2014 to constitute the third quarter transfers. For its initial fourth quarter transfer, EM anticipates transferring a roughly equivalent amount on or about November 20, 2014. The total amount of uranium encompassed by these transfers is therefore roughly 850 MTU UF6, and consists of an estimated 1.1 percent of the annual global uranium supply.[8]

Under the NNSA contract with WesDyne, NNSA has notified Congress of an anticipated transfer of 9,203 kg LEU in the form of uranyl nitrate (76.8 MTU of natural uranium equivalent) to WesDyne in July, currently scheduled to occur on July 31, 2014, with additional expected monthly transfers thereafter. So far this calendar year, NNSA has transferred 302 MTU of natural uranium equivalent, and expects to transfer a remaining 348 MTU of natural uranium equivalent by the end of the year, so as not to

[8] In calculating the percentage of global supply, which includes production and secondary releases, the global annual supply is estimated to be 200 million lbs or 77,000 MTU. Ex. B at 50 (Figure 4.11).

exceed 650 MTU natural uranium equivalent for calendar year 2014. Hanlon Decl. ¶ 21. The total amount of natural uranium equivalent encompassed by these remaining transfers consists of roughly 0.41 percent of all uranium coming onto the global uranium market (from production and secondary sources) annually in 2014.

If DOE is enjoined from transferring uranium under these two contracts it would incur substantial economic and non-economic costs. *See generally* Declarations of Owendoff, Hanlon and Harrington (Attachment 4).

H. The Uranium Market

Over the past decade, the global uranium market has been exceptionally volatile. There was an enormous increase in the price of U3O8 in 2006 and 2007 (from $ 35/lb. to $ 135/lb.), after which the price fell to around $ 40/lb. by 2010. The price had risen to nearly $ 75/lb. in early 2011, but after the March 2011 disaster at the Japanese nuclear reactor at Fukushima, which led both Japan and German to suspend their nuclear energy programs, the price of U3O8 has fallen sharply to approximately $ 28/lb. currently. Ex. B at 5. Notwithstanding these price fluctuations, more uranium production continues to come onto the market, particularly from the Republic of Kazakhstan, which has increased its production to approximately 37 million lbs. of U3O8. Ex. B at 52-53. The DOE inventory transfer program, by contrast, introduces only 7 million lbs. of uranium annually onto the global market, (or 2,705 MTU if measured as UF6) which is only 4.5 percent of total annual global supply. Ex. 1-A at 11.

Plaintiff ConverDyn is the exclusive sales agency for conversion services at the Metropolis works facility owned and operated by Honeywell. Complaint ("Compl.") 20;

23. The Metropolis facility converts uranium oxide (commonly referred to as "yellowcake") into uranium hexafluoride gas (UF6). Compl. ¶ 21.

Standards for the Grant of a Preliminary Injunction

Preliminary injunctive relief "is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (emphasis in original). *Accord Sociedad Anonima Vine Santa Rita v. U.S. Dept of Treasury*, 193 F. Supp. 2d 6, 13 (D.D.C. 2001) (citation omitted). Because preliminary injunctive relief is "a drastic and unusual judicial measure," *see Marine Transp. Lines v. Lehman*, 623 F. Supp. 330, 334 (D.D.C. 1985), the power to issue such an injunction should be 'sparingly exercised,'" *Dorfmann v. Boozer*, 414 F.2d 1168, 1173 (D.C. Cir. 1968) (citations omitted).

A party seeking a preliminary injunction must establish four factors: (1) that it is likely to succeed on the merits, (2) that it is likely to suffer irreparable harm in the absence of the preliminary injunction, (3) that the balance of equities tips in its favor, and (4) that the public interest favors the injunction. *Winter v. Natural Res. Defense Council*, 555 U.S. 7, 20, 22, 27 (2008); *see also Aamer v. Obama*, 742 F.3d 1023, 1038 (D.C. Cir. 2014) ("We begin with the first and most important factor: whether petitioners have established a likelihood of success on the merits.").

In *Winter*, the Supreme Court held that a party must always demonstrate that irreparable harm is likely—not just possible—before a preliminary injunction may issue. 555 U.S. at 22. By so holding, the Court appears to have rejected the then-existing Ninth Circuit test, also used in this Circuit, by which the requisite degree of likelihood of

success and the degree of harm to the party seeking the injunction were balanced along a sort of sliding scale. *See Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843-844 (D.C. Cir. 1977) (if movant demonstrates that balance of equities tips sharply in its favor, it need only show a possibility of success on the merits and vice versa). Rather, post-*Winter*, it appears that parties seeking preliminary injunctions must now fully satisfy all four factors before a preliminary injunction may be entered.

The Court of Appeals, however, has specifically reserved the question of *Winter*'s effect on the *Holiday Tours* "sliding scale" test, finding in all cases post-*Winter* that the plaintiff was ineligible for a preliminary injunction even under the more lenient sliding scale approach. *See, e.g., Sherley v. Sebelius*, 644 F.3d 388, 392 - 93 (D.C. Cir. 2011). This includes *Davis v. PBGC*, 571 F.3d 1288, 1212 (D.C. Cir. 2009), cited by plaintiffs, Motion at 12, where the Court explained that "[w]e need not decide whether a stricter standard applies, because the pilots fail even under the sliding scale analysis of *Davenport*," *citing Davenport v. Int' Bhd. of Teamsters*, 166 F.3d 356, (D.C. Cir. 1999). Judge Kavanaugh's concurring opinion in *Davis* (joined by Judge Henderson), noted that "this Circuit's traditional sliding scale approach to preliminary injunctions may be difficult to square with" *Winter*. 571 F.3d at 1295. Judge Kavanaugh noted that under *Winter* "the movant always must show a likelihood of irreparable harm" *id.* at 1296, and further that "*Munaf* made clear that a likelihood of success is an independent, free-standing requirement for a preliminary injunction," *id.*, *citing Munaf v. Geren*, 553 U.S. 674, 690 (2008).[9]

[9] Two other cases cited by plaintiff in support of the sliding scale approach, *FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, (D.C. Cir. 2008), and *Ellipso, Inc. v. Mann*,

It is "well settled that economic loss does not, in and of itself, constitute irreparable harm." *Wisconsin Gas Co. v. Fed. Energy Regulatory Comm'n,* 758 F.2d 669, 674 (D.C. Cir. 1985) (per curiam). "To successfully shoehorn potential economic loss into the irreparable harm requirement, a plaintiff must establish that the economic harm is so severe as to 'cause extreme hardship to the business' or threaten its very existence." *Sandoz, Inc. v. FDA*, 439 F. Supp. 2d 26, 32 (D.D.C. 2006) aff'd sub nom. *Sandoz Inc. v. FDA*, 06-5204, 2006 WL 2591087 (D.C. Cir. Aug. 30, 2006).

"[T]the mere fact that economic losses may be unrecoverable does not, in and of itself, compel a finding of irreparable harm." *National Min. Ass'n v. Jackson*, 768 F.Supp. 2d 34, 53 (D.D.C. Jan. 14, 2011). To determine if a movant has satisfied its burden, "the focus of the Court's inquiry is on the magnitude of harm that will be suffered by the moving party, not the particular amount of economic damages that the plaintiff will suffer." *N. Air Cargo v. USPS*, 756 F. Supp. 2d, 116, 126 n.9 (D.D.C. 2010); *Sandoz, Inc. v. FDA*, *supra*, 439 F. Supp. 2d at 32. S*ee also LG Electronics U.S.A., Inc. v. Dep't of Energy*, 679 F. Supp. 2d 18, 35-36 (D.D.C. 2010)) (finding that plaintiff's projected monetary losses do not amount to irreparable harm because they "represent a miniscule portion of the company's worldwide revenues").

Furthermore, courts have refused to find irreparable harm in cases where a plaintiff has only put forth an amount of damages it anticipates it would suffer but failed to provide any further context. *See e.g., N. Air Cargo,supra*, 756 F. Supp. 2d at 125 ("While the Court is aware that each plaintiff stands to lose approximately $130,000 per

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280 F.3d 1153 (D.C. Cir. 2007), Motion at 12, both predate *Winter*. Plaintiff's sole remaining authority for the sliding scale approach, *Smoking Everywhere, Inc. v. F.D.A.*, 680 F. Supp. 2d 62 (D.D.C. 2010), does not even mention *Winter*.

month in anticipated revenue…the Court is unable to assess the magnitude of this loss without evidence of each [plaintiff's] projected annual gross revenue.").

Finally, while the D.C. Circuit "has neither adopted nor rejected a heightened burden as a doctrinal, . . . it is common practice among members of this court to proceed with extreme caution when that injunction would alter the status quo." *Paleteria La Michoacana, Inc. v. Productos Lacteos Tocumbo S.A. de C.V.*, 901 F. Supp.2d 54, 56 n.1 (D.D.C. 2012). Accordingly, this Court has advised that when "the requested relief would alter, not preserve, the status quo, the court must subject the plaintiff's claim to a somewhat higher standard." *Id*. at 56 (quotation marks and citation omitted). This factor is particularly important here, as the requested injunction does not preserve the status quo, but rather would effectively halt the ongoing operation of two critical DOE programs, which rely on DOE's multi-year practice of uranium inventory transfers. *See infra* at 40 - 43.

ARGUMENT

I. Plaintiff Has Failed to Demonstrate a Likelihood of Success on the Merits

A. Standard of Review Under the Administrative Procedure Act

A court exercising judicial review under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2) may not "substitute its judgment" for that of the agency. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). Instead, a reviewing court can only find agency action to be "arbitrary and capricious" if the agency "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that

runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). This deferential standard presumes the agency action to be valid, *Kisser v. Cisneros*, 14 F.2d 615, 618-19 (D.C. Cir. 1994), and the burden of showing that agency action violates the APA falls on the plaintiff, *Diplomat Lakewood Inc. v. Harris*, 613 F.2d 1009, 1018 (D.C. Cir. 1979).

The scope of review under the APA's "arbitrary and capricious" standard is "searching and careful," but "narrow." *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 378 (1989). The court's task is to determine whether the agency's decision is "within the bounds of reasoned decision making." *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council*, 462 U.S. 87, 105 (1983). To do this, the court must determine whether the agency has considered the relevant factors and articulated a rational connection between the facts found and the choice made. See *Bowman Transp., Inc., v. Arkansas-Best Freight Sys.*, 419 U.S. 281, 285-86 (1974).

The courts in this Circuit have consistently held that "[w]hen, as here, an agency is making 'predictive judgments about the likely economic effects of a rule,' we are particularly loath to second-guess its analysis." *Newspaper Association of America v. Postal Regulatory Commission*, 734 F.3d 1208, 1216 (D.C. Cir. 2013), *quoting Nat'l Tel. Coop. Ass'n v. FCC*, 563 F.3d 536, 541 (D.C. Cir. 2009). *See also Public Citizen, Inc. v. NHTSA*, 374 F.3d 1251, 1260 (D.C. Cir. 2004) (deferring to "NHTSA's prediction that manufacturers will not likely reduce the protectiveness of current air bags"); *Southern Pacific Transp. Co. v. ICC*, 871 F.2d 838, 842 (9th Cir. 1989) ("Such predictive

judgments, when based upon credible evidence, are best left to the expertise of the administrative agency familiar with the industry."). Predictive judgments about the impact of a rule inevitably involve an element of uncertainty, and "in the face of uncertainty, [an] agency must exercise it expertise to make tough choices . . . and to hazard a guess as to which is correct, even if . . . the estimate will be imprecise." *Chamber of Commerce v. SEC,* 412 F.3d 133, 143 (D.C. Cir. 2005) (citation and internal quotation marks omitted).

B. The Secretary Rationally Determined that the Transfer of up to 2,705 MTU Per Year from 2014 to 2016 Would Not Have an "Adverse Material Impact" on the Domestic Uranium Industry.

1. The Meaning of "Material"

The Privatization Act provides that covered sales of natural or low-enriched uranium shall not be made unless, *inter alia*, the "Secretary determines that the sale of the material will not have an adverse material impact on the domestic uranium mining, conversion, or enrichment industry. . ." 42 U.S.C. § 2297h-10(d)(2)(B). The term "material" is not defined in the Privatization Act or its legislative history. In the absence of a statutory definition, "words used in a statute are to be given their ordinary meaning." *Burns v. Alcala,* 420 U.S. 575, 580-81 (1975); *see also, Kungys v. United States,* 485 U.S. 759, 770 (1988) ("Where Congress uses terms that have accumulated settled meaning under either equity or the common law, a court must infer…that Congress means to incorporate the established meaning of these terms.").

As courts have repeatedly observed, the ordinary meaning of "material," is "being of real importance or great consequence." *E.g., Holder v. Humanitarian Law Project,* 561 U.S. 1, 57-58 (2010)) (citing *Webster's Third New International Dictionary* 1392

(1961)) (emphasis added). *See also Kungys, supra*, 485 U.S. at 786 (Stevens, J., concurring)) (quoting *Webster's Ninth New College Dictionary* 733 (1983)); *Doebereiner v. Sohio Oil Co.*, 893 F.2d 1275, 1276 (11th Cir. 1990)) (citation omitted).

"The term 'material' is used in many fields of law; for example, insurance law, bankruptcy, agency… [and] [t]he meaning of the word appears to be consistent in these various fields." *Weinstock v. United States*, 231 F.2d 699, 701 (D.C. Cir. 1956); *see e.g., TSC Indus., Inc., v. Northway, Inc.*, 426 U.S. 438, 439 (1976)) (in securities context "an omitted fact is 'material' if there is a substantial likelihood that a reasonable shareholder would consider it important"); *United States v. Lattimore*, 215 F.2d 847, 866-67 (D.C. Cir. 1954) (in perjury context "'material' means not only pertinent but also important in some substantial degree"); *America v. Mills*, 714 F.Supp.2d 88, 100 (D.D.C. 2010) (in contracts context "a breach is 'material' only if it relates to a matter of vital importance").

"Material" does not merely require something "more than de minimis" as plaintiff repeatedly suggests, *e.g.* Motion at 19, rather "material is substantially more than de minimis." *Cuyahoga Metro. Hous. Auth. v. United States*, 65 Fed. Cl. 534, 552 (Fed. Cl. 2005)) (quoting *Williams v. Port Authority of New York and New Jersey*, 175 N.J. 82, 90 (2003)))) (" 'Material degree' means a degree substantially greater than de minimis").

2. The Secretary's Determination is Rational

Based on the conclusions from the thorough 2014 market analysis of ERI,[10] the recommendations contained in the staff paper prepared by the Office of Nuclear Energy

[10] In prior ERI reports prepared to inform Secretarial determinations about inventory transfers, ERI offered its own opinion about the impact of the Department's proposed transfers. In 2014, however, NE, acknowledging that ERI's past analyses containing this conclusion led to an incorrect implication to stakeholders that DOE was

which analyzed the ERI report, Ex. 1-A, and the May 12, 2014 Memorandum, Ex. 1-C, the Secretary reasonably concluded that continuing to transfer approximately 2,700 MTU annually, as had occurred in 2013, would not have an adverse material impact on any component of the domestic nuclear industry. Ex. M. Plaintiff has not offered any reason to question the reasonableness of that conclusion or the analysis that informed it.

DOE recognized that the nuclear fuel market is a global market and that it is "in a weakened state due to many factors." Ex. 1-A at 11. The Fukushima disaster greatly reduced demand, as had other factors, while rapid expansion of production worldwide, with particularly pronounced expansion in Kazakhstan, put further downward pressure on prices. *Id*. Also relevant here is the inherently dynamic and unpredictable nature of the global uranium industry as reflected in price volatility in recent years. *See* Ex. B at 11-12. DOE's analysis was further informed by comments received from the domestic uranium industry (including ConverDyn and the Uranium Producers of America), which were addressed by DOE in the NE analysis. Ex. 1-A at 11 – 12. Notably, however, neither entity presented its own market analysis similar to that prepared by ERI.

DOE also had the benefit of other industry views, notably a presentation by FBP, its contractor at Portsmouth. Ex. 1-B at 2-4. FBP noted that the price paid for domestically-produced uranium over the past 20 years has been at its highest in the last five years after the inventory transfer program began. *Id*. at 4. FBP also noted that UF6

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merely adopting ERI's conclusions as its own, only asked ERI to provide an economic analysis of potential impacts, but not to offer an opinion on the ultimate issue of whether the proposed DOE transfers would have an "adverse material impact" on the domestic industry. *See* Ex. 1-C at 4. Contrary to plaintiff's assertion therefore, Motion at 18, there is nothing unusual about the fact that ERI limited its report to providing analytical data, leaving to the Secretary the responsibility of drawing a conclusion based on the data.

conversion prices are up 40 % to 45% over the same period and employment in the U.S. uranium industry has increased by a similar percentage. *Id*. at 22. FBP also noted that the market capitalization of U.S. uranium producers, a notable measure of industry health, was up significantly, with many approaching pre-Fukushima highs. *Id*. at 4.

In weighing all of this information and analysis, the fundamental issue for DOE was the need to determine whether the planned level of inventory transfers would have a "material" impact -- *i.e.* an impact on the domestic nuclear industry "being of real importance or great consequence." *Humanitarian Law Project, supra*, 561 U.S. at 57-58. The relatively small size of DOE's proposed transfer compared to global uranium supply was an important element of DOE's ultimate conclusion that the transfers would not have a "material" impact. Both the ERI analysis and the independent NE analysis recognized that the proposed DOR transfer would amount to only 4.5 percent of annual global uranium supply, 2,705 MTU out of global supply of approximately 77,000 MTU. Exhibit 1-A at 11, Ex. B at 53.[11] By comparison, the demand loss due to Fukushima was approximately 6,500 MTU (17 million lbs) per year and increased production from Kazakhstan was approximately 14,500 MTU (37 million lbs) per year MTU. Ex. B at 52 – 53.

ERI reinforced the significance of the minimal contribution of DOE's inventory sales at several points in its Report. At the outset, ERI noted that "there is no absolute

[11] The figures on pages 49 – 53 of the ERI report are reported in million pounds of U3O8 not MTU. However the conversion factor is 383 MTU as UF6 equals one million pounds of U3O8. So DOE's 2,705 MTU equates to approximately seven million pounds of U3O8.

measure of the isolated effect any one particular market factor or event, such as the DOE inventory material, has on market prices." Ex. B at 36. Nevertheless, in weighing all market factors, ERI concluded that "[a] key observation which can be drawn from these figures is that the increased supply from the DOE inventory does not appear to be a primary driver of current excess supply condition. (sic)" *Id*. at 53 (emphasis added).[12] ERI concluded that "DOE inventory can only be considered responsible for a portion of the decline in market prices." *Id.* at 53 – 54.

In light of this modest volume of DOE transfers compared to the global supply, and with the benefit of the ERI report and the NE analysis, the Secretary reasonably concluded that DOE's transfers would not have an "adverse material impact" on the domestic uranium industries. The Secretary accepted the Office of Nuclear Energy's recommendation, which concluded as follows:

> 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.

Exhibit 11 at 12 (emphasis added).

The Secretarial Determination is fully consistent with ERI's conclusion that "the predictability of DOE's inventory transfers into the commercial markets over time is very important to the orderly functioning of the nuclear fuels market." Ex. B at ES-10.

[12] ERI also recognized that the ConverDyn's estimated sales volume reduction of 7 % - 8% due to DOE transfers was far less significant than the 25% sales volume loss it experienced after Fukushima. *Id*. at 72.

Ultimately, DOE has attempted to be transparent and predictable in its inventory transfers in recent years, as ERI noted stating that "the inventory transfer levels that DOE specified for use in this 2014 market analysis are consistent with the May 2012 Determination through the year 2020." *Id*. DOE concluded that it can best assure predictability in its inventory transfer program by identifying the volume of uranium that it intends to transfer over a two year period and then implementing that projection over the ensuing two years.

Thus, based on the conclusions from the detailed report of ERI, and the recommendations contained in the staff paper prepared by NE, the Secretary reasonably concluded that continuing to transfer approximately 2,700 MTU annually from DOE inventories, as had been authorized for the three prior years, would not have an adverse material impact on any component of the domestic nuclear industry. DOE's "predictive judgment[] about the likely economic effects" of its action is entitled to particular deference by the Court. *See Newspaper Association of America, supra,* 734 F.3d at 1216.[13]

C. The Secretary Has Authority, both Under the Atomic Energy Act and the Privatization Act, to Transfer Uranium Hexafluoride.

Plaintiff's contention that the Privatization Act bars DOE from selling or transferring uranium hexafluoride, also referred to as UF6, Motion at 23 – 24, is wrong. The Secretary of Energy has broad authority under the Atomic Energy Act to transfer all

[13] Alternatively, the Secretary's determination could be considered an interpretation of the ambiguous word "material" in 42 U.S.C. § 2297h-10(d)(2)(B). Under the Secretary's interpretation, the term "material" does not encompass the transfer of 2,705 MTU annually from 2014 – 2016, and that legal conclusion is entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837, 843 (1984).

types of nuclear material, including all types of uranium. See 42 U.S.C. § 2073(a); 42 U.S.C. § 2093(a), 42 U.S.C. § 2201(g). The extensive transfer authorities of the AEA are not affected by 42 U.S.C. § 2297h-10. That provision of the Privatization Act does not repeal or otherwise eliminate the Secretary's broad authority under the AEA to transfer all types of uranium. Rather, the Privatization Act imposes requirements on certain transfers of uranium identified in that provision, including the requirements of 42 U.S.C. § 2297h-10(d) on transfers of natural uranium and low enriched uranium. Those requirements have been met here. *See* 20 - 25, *supra*.

Plaintiff's contention that DOE cannot transfer UF6 is also inconsistent with the structure of section 2297h(d). That section is designed to prevent any "adverse material impact" on the mining, conversion and enrichment components of the domestic industry. 42 U.S.C. § 2297h(d)(2)(B). If the Secretary did not have the authority to transfer all types of nuclear material, including UF6 – the principal product produced by the domestic conversion industry – the statutory requirement to consider the impact of such transfers on the domestic uranium conversion industry would be meaningless. *Id*.

Finally, plaintiff cannot seriously contend that the Privatization Act has repealed by implication the Secretary's transfer authorities contained in the AEA. It is a "cardinal rule that repeals by implication are not favored." *Morton v. Mancari*, 417 U.S. 535, 550 (1974)(*quoting Posadas v. Nat'l City Bank of New York*, 296 U.S. 497, 503 (1936)). A court "will not infer a statutory repeal 'unless the later statute "expressly contradict[s] the original act" ' or unless such a construction 'is absolutely necessary ... in order that [the] words [of the later statute] shall have any meaning at all.'" *Nat'l Ass'n of Home Builders*, 551 U.S. 644, 662 (2007) *quoting Traynor v. Turnage*, 485 U.S. 535, 548 (1988).

Nothing in the language or legislative history of the Privatization Act suggested that it repeals, *sub silencio*, DOE's core powers under the AEA.

D. Plaintiff Lacks Standing to Challenge the Department of Energy's Determination of What Price to Charge for the Uranium it Transfers.

Plaintiff's challenge to DOE's alleged failure to obtain fair market value for the uranium it transfers is a classic example of "generalized grievance," which is not justiciable. Federal courts may not entertain suits "claiming only harm to [plaintiffs] and every other citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573 – 74 (1992). Such claims do not constitute a "case or controversy," the necessary constitutional minimum for jurisdiction under Article III. *Lance v. Coffman*, 549 U.S. 437, 439 (2007)(*per curiam*).

Conceivably, plaintiff might allege 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. But plaintiff is not within the zone of interests intended to be protected by the fair market value mandate of 42 U.S.C. § 2297h-10(d)(2)(C), which is designed to protect the interest of the government generally and not particular participants in the market place. (By comparison, plaintiff certainly is within the zone of interests protected by the "adverse material impact" clause of 42 U.S.C. § 2297h-10(d)(2)(B).)

In *Lexmark International Inc. v. Static Control Components, Inc.*, 134 S.Ct. 1377 (2014) the Supreme Court clarified the law relating to so-called "prudential" and "zone of interests" standing. The Court concluded that in making such prudential, zone of

interests determinations, the courts were actually determining, as a matter of straightforward statutory interpretation, "the scope of the private remedy" created by Congress and the "class of persons" who can maintain a claim under the statute. *Id*. *citing Assoc. Gen. Contractors of Cal., Inc. v. Carpenters*, 459 U.S. 519, 529 (1983).

But the zone of interests determination is still relevant to the crucial issue of statutory interpretation. "[W]e presume that a statutory cause of action extends only to plaintiffs whose interests 'fall within the zone of interests protected by the law invoked.'" *Lexmark, supra,* 134 S.Ct. at 1388, *quoting Allen v. Wright*, 468 U.S. 737, 751 (1984). In the APA context, the zone of interests test "forecloses suit . . . when a plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that" Congress authorized the plaintiff to sue." *Lexmark, supra,* 134 S.Ct. at 1389, *quoting Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S.Ct. 2199, 2210 (2012) (emphasis added). Plaintiff's challenge to the alleged violation of the fair market value requirement 42 U.S.C. § 2297h-10(d)(2)(C) undeniably fails that test.

Courts consistently refuse to hold that competitive injury falls within the zone of interests of a statute that is intended to enable agencies to protect government revenue. *See Glass Packaging Inst. v. Regan*, 737 F.3d 1083, 1090 (D.C. Cir. 1984) (statute for "protection of tax revenue . . . is not a general mandate to monitor or protect the competitive status or financial health of the affected industry"); Tax *Analysts and Advocates v. Blumenthal*, 566 F.2d 130, 144 (D.C. Cir.1977) ("concepts of consequence and impact are not the proper guideposts to define the relevant zone of interests").

E. The Department of Energy Has in the Past Received, and Will Continue to Receive, "Fair Market Value" for the Uranium Transferred.

Even if plaintiff has standing to challenge the Secretary's determination that DOE will receive "fair market value" for the uranium being transferred, there is no merit to plaintiff's challenge that DOE is acting arbitrarily and capriciously in the valuation it receives for its uranium transfers. As explained in the Owendoff and Hanlon declarations, DOE's transfers of uranium to its two contractors, although market-based, are not exactly like ordinary sales of uranium in the term or spot markets. The NNSA and EM contracts contain different provisions for uranium transfers, but in both circumstances, DOE and its contractors agree to values for the material based on current spot market prices. The EM contractor provides services in an agreed-upon value based upon quarterly transfers that are at DOE's sole discretion. WesDyne, on the other hand, invoices NNSA for services already performed and specifies an amount of uranium to be provided in satisfaction of those invoices based upon a formula set out in that contract. Owendoff Decl. ¶¶ 11 - 12; Hanlon Decl. ¶¶ 17 - 18. Based upon these agreements, the appropriate amount of uranium is transferred to each contractor. *Id*.

Thus these transactions are most similar to spot market transactions in that they are based on prices negotiated for delivery of uranium on a monthly or quarterly basis. And, consequently, in receiving services whose value is close to spot market prices for the transferred uranium, DOE is undeniably receiving "fair market value" as required by 42 U.S.C. § 2297h-10(d)(2)(C). In reviewing action under the APA the court's role is not to determine if DOE obtained the "very best price possible" but rather only whether the agency's decision is "within the bounds of reasoned decision making." *Baltimore Gas & Elec. Co*, *supra*, 462 U.S. at 105.

F. The Department's July 2013 Excess Uranium Inventory Management Plan is Lawful.

1. The Excess Uranium Inventory Management Plan is an Agency Policy Statement, Not a Legislative Rule, and Hence Is Exempt from the Notice and Comment Requirements of 5 U.S.C. § 553.

Agency policy statements are not legislative rules and therefore are exempt from the notice and comment rulemaking requirements of 5 U.S.C. § 553(b)(A). This is because an agency policy statement does not seek to impose or elaborate a legal norm, but merely represents an agency position with respect to how it will treat the governing legal norm, *e.g.*, in a future enforcement action. *See Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 94 (D.C. Cir. 1997); *Pacific Gas & Electric Co. v. FPC*, 506 F.2d 33, 38 (D.C. Cir. 1974). Policy statements are only meant to structure or guide future agency action. *See Nat'l Mining Ass'n v. Sec'y of Labor*, 589 F.3d 1368, 1372 (11th Cir. 2009). Thus, "[a] binding policy is an oxymoron." *Vietnam Veterans of Am. v. Sec'y of the Navy*, 843 F.2d 528, 537 (D.C. Cir. 1988).

The 2008 Excess Uranium Management Plan, as well as the 2013 Plan that updated it, are both general statements of policy. As a preliminary matter, the Plans are specifically described as "policy statements." *See* Ex. D at A-1. As the Court noted in *Pacific Gas & Electric Co, supra* 506 F.2d at 39, "[o]ften the agency's own characterization of a particular order provides some indication of the nature of the announcement." Furthermore, the stated purpose of the 2008 Policy Statement is not to provide an inflexible, binding rule but rather to give advance notice of the Department's general policy regarding the amount of annual uranium transfers. *See* Ex. D at A-1 ("This Policy sets forth the general framework within which the Department prudently will manage its excess uranium inventory.") (emphasis added). *See Independent Bankers*

Ass'n of America v. Federal Home Loan Bank Board, 557 F. Supp. 23, 28 (D.D.C. 1982) (observing that by calling its statement a "*general* policy" "the Board created the possibility that exceptions to its 'general policy' might be made.").

Moreover, in adopting the ten percent guideline on uranium transfers, the 2008 Policy Statement itself is not specific or prescriptive enough to create rights or bind agency discretion:

> [T]he Department believes that, as a general matter, the introduction into the domestic market of uranium from Departmental inventories in amounts that do not exceed ten percent of the total annual fuel requirements of all licensed nuclear power plants should not have an adverse material impact… . The Department anticipates that it may introduce into the domestic market…in some years for certain special purposes such as the provision of initial core loads for new

Ex. D at A-2 (emphasis added). Thus, the Policy explicitly envisions the Department departing from the ten percent guideline**.** *See also Catawba City, N.C., v. EPA.* 571 F.3d 20, 34 (D.C. Cir. 2009) *(*"An agency pronouncement is not a deemed binding regulation merely because it may have some substantive impact, as long as it leave[s] the administrator free to exercise his informed discretion.") *quoting Panhandle Producers & Royalty Owners Ass'n v. Econ. Regulatory Admin.*, 822 F.2d 1105, 1110 (D.C. Cir. 1987).

And finally, the Department does not rely on the policy statement alone when it determines whether the transfer of a particular amount of uranium will not have a material adverse impact on the domestic market. *See* Ex. D at A-2 ("[T]he Department will conduct analyses of the impacts of particular sales or transfers on the market and the domestic uranium industry, prior to entering into particular sales or transfers."); Ex. L at 2 n. 2 ("Even with this [now withdrawn, ten percent] guideline, any transfer subject to section 3112(d) of the USEC Privatization Act still underwent a market impact analysis

to ensure there was no material adverse impact."). As the *Pacific Gas & Electric* Court noted, "[w]hen the agency applies the policy in a particular situation, it must be prepared to support the policy just as if the policy statement had never been issued." 506 F.2d at 38.

Even if the 2013 Plan were found to be a legislative rule, it would still be lawful because rules relating to government property and contracts, are exempt from notice and comment requirements pursuant to 5 U.S.C. §553(A)(2). *See, e.g.*, *Clipper Cruise Line, Inc. v. United States*, 855 F. Supp. 1, 3 (D.D.C. 1994) (National Park Service's alteration of its system of allocating permits for ships entering a national park relates to "public property" and is thus exempt from notice and comment); *see also Duke City Lumber Co. v. Butz*, 382 F. Supp. 362, 373 (D.D.C. 1974) *adopted in relevant part*, 539 F.2d 220 (D.C. Cir. 1976)("When the government is dealing with [public property or public contracts], Congress affords the government complete discretion to decide what, if any, public rulemaking procedures it should adopt and follow.") (citations omitted).

2. The Excess Uranium Inventory Management Plan Is Lawful

Plaintiff purports to frame its challenge to DOE's 2013 Excess Uranium Inventory Management Plan as a procedural one, alleging that the Plan constitutes a legislative rule which should have been adopted through notice and comment rulemaking under 5 U.S.C. 553. Motion at 25-30. However, intertwined with plaintiff's procedural arguments are challenges to the reasonableness of DOE's 2013 decision to eliminate the use of the ten percent guideline.

At the outset, and as noted above, plaintiff simply misreads the nature of the ten percent guideline articulated in the 2008 Plan. The ten percent limitation was never intended to be a binding, hard-and-fast limitation on the Secretary's authority to transfer

uranium from its inventory. The 2008 Plan is clear in noting that "the Department believes, as a general matter, the introduction into the domestic market of uranium . . . in amounts that do not exceed ten percent of the total annual [domestic] fuel requirements . . . should not have an adverse material impact." Ex. D at A-2 (emphasis added). Thus, the ten percent threshold in the 2008 Policy Statement was always designed to be a non-binding guideline which the Department could elect to exceed when appropriate and at its discretion.[14]

The thrust of plaintiff's criticism of DOE's determination to eliminate the ten percent guideline from the 2008 report is that DOE cannot possibly have obtained adequate information about the impact of transfers above ten percent to justify eliminating that guideline. Motion at 29. But, as explained in the 2013 Plan, DOE's conclusion was based on "experience gained since the issuance of the 2008 Plan, including in particular the market impact analysis that supported the May 15, 2012 Secretarial Determination." Ex. L at 2. Indeed, 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. *See* Exs. H, I and J.

Implicit in plaintiff's argument is the assumption that because the ten percent guideline affirmed that sales below that level would not cause an adverse material impact, sales above the level automatically would cause such an impact. But nothing in either the 2008 Policy Statement or Plan would support such an assumption, and the Department has always recognized that it would need to conduct a separate market assessment to

[14] Secretary Chu's mistaken statement in Congressional testimony to the effect that the 10% guideline was in fact a statutory mandate, *quoted in* Motion at 28, is irrelevant to the legal effect of the 2008 Policy.

support each Secretarial determination to transfer uranium, even transfers that fell within the ten percent guideline.

II. Plaintiff Has Not Demonstrated Irreparable Injury

Plaintiff has given this Court no basis to conclude that the Secretary's determination will do anything more than put a slight dent in its profits. Plaintiff has not come close to satisfying the demanding standard for a showing of "irreparable injury."

First, plaintiff's damages claims are unsupported by company financial data essential to establish a foundation to support ConverDyn's assertion that DOE's uranium transfers may cause it up to $ 69.5 M in lost profits over the next several years. Motion at 9. Plaintiff's Declaration of its President, Malcolm Critchley, Ex. C, as well as the ConverDyn's economic analysis of its alleged damages submitted under seal, Ex. P, both fail to explain how ConverDyn derived the lost sales and lost profits figures that it alleges. A plaintiff alleging irreparable injury under Rule 65 must explain with "specificity" the basis for its alleged irreparable injury. *National Min. Ass'n v. Jackson*, 768 F.Supp.2d 34, 52 (D.D.C. 2011). A mere "prediction," which is all that plaintiff has offered here, is insufficient. *Id*.

While defendants have not had time to retain an expert to analyze ConverDyn's assertions of financial harm, in order for plaintiff to establish lost profits due to the DOE sales, plaintiff would need to offer detailed and reliable evidence (in the form of ConverDyn financial and accounting records) of the precise impact that DOE's uranium transfers will have on its bottom line. This information would include, at a minimum: 1) its costs of production (over several years); 2) the prices ConverDyn received from its sales over this time period, including all sales terms and conditions; 3) changes in sales

volume, costs and in other factors affecting uranium pricing. *See e.g. N. Air Cargo, supra,* 756 F.Supp. 2d at 126 ("Court is unable to assess the magnitude of this loss without evidence of each airline's projected annual gross revenue."). Plaintiff has wholly failed to make this precise and detailed evidentiary showing, and hence all of its assertions of economic injury cannot form the basis for the "drastic" remedy of a preliminary injunction, particularly one that will alter rather than preserve the status quo.[15]

Second even "irreparable" injuries, in the form of lost profits as alleged here by plaintiff, can only be sufficient for Rule 65 purposes if also "serious in terms of effect on the plaintiff." *N. Air Cargo, supra,* 756 F. Supp2d at 125, *quoting Gulf Oil Corp. v. Dep't of Energy*, 514 F.Supp. 1019, 1026 (D.D.C. 1981). Even accepting plaintiff's unsupported claims that it will lose $ 69.5 million over the 2012-14 time period due to DOE transfers, plaintiff's loss – or, to be more accurate Honeywell's loss – does not constitute the necessary serious hardship to plaintiff's business required to establish irreparable injury. The real party in interest here is not ConverDyn, a sales agent, Compl. ¶ 20, but Honeywell International, Inc., a Fortune 500 corporation, Compl. ¶ 14. In 2012, Honeywell's total revenue was $ 37.665 billion, and its operating income was $ 3.875 billion. *See* www.Honeywell.com. In determining whether lost profits constitute irreparable injury, courts regularly look to the entire corporate structure of the plaintiff

[15] Specifically Mr. Critchley's declaration, Ex. C, asserts that ConverDyn will experience lost profits or sales at two points. *See* Ex. C at ¶ 15 ("approximately $ 40 million loss of profits between 2014 and 2016"); ¶ 20 ("reduce ConverDyn's profits by more than $ 10 million per year"). Defendant specifically objects to Mr. Critchley's assertions in these paragraphs under Federal Rule of Evidence 602 as lacking an adequate foundation.

entity. *See, e.g. LG Electronics U.S.A. v. Department of Energy*, 679 F. Supp.2d 18, 36 (D.C.C. 2010) (alleged damages "represent a minuscule portion of the company's world-wide revenues" of $ 45 billion); *Sandoz, supra*, 439 F.Supp.2d at 32 (loss of less than 1% of total sales not irreparable harm). Plaintiff has not demonstrated that Honeywell will suffer the "serious" harm necessary for an injunction from plaintiff's alleged lost profits.

Third, ConverDyn has also failed to provide the Court with a full picture of its uranium conversion business, including two significant, recent events that may have adversely affected its market position, future sales and profits. In May of 2012, inspectors of the Nuclear Regulatory Commission (NRC) conducted an inspection of ConverDyn's Metropolis Works facility and identified "significant" safety concerns. *See* 77 Fed. Reg. 64831 (October 23, 2012). The NRC found that one of the buildings at the facility "lack[ed] seismic restraints, supports and bracing that would assure process equipment integrity during a credible seismic event or tornado." *Id*. This problem resulted in an extended suspension of UF6 production of approximately a year while the problem was corrected. *See* http://pbadupws.nrc/gov/docs/ML1318/ML13183A430.pdf.

In addition, ConverDyn experienced an extended labor dispute from June 2010 through August 2011 with United Steelworkers Local 7-669, its employees' bargaining representative. ConverDyn evidently continued operations with replacement workers during the labor dispute. *See Nuclear Engineering International*, Sept. 18, 2012 at 26. Both of these problems could certainly have contributed to a reluctance of its customers to enter into long term contracts with ConverDyn – the precise harm plaintiff alleged was caused by DOE's sales, Ex. C, ¶¶ 27 - 28.

Fourth, defendants were recently provided with information about the pricing of UF6 in the global uranium market by Traxys North America LLC, the entity that, has a contractual relationship with FBP to sell all of the uranium transferred by DOE to FBP (roughly 80% of total annual DOE transfers). *See* Attachment 6, Declaration of Kevin P. Smith ("Smith Decl.") ConverDyn asserts that DOE is "flooding" the market with uranium, Motion at 15, resulting in DOE obtaining "fire sale" prices rather than fair market value, *id.* at 25. Mr. Smith's declaration questions whether plaintiff's claims are factually accurate. Smith Decl. ¶ 2. According to Mr. Smith's Declaration, "Traxys' marketing strategy for UF6 acquired from FBP at all times has been to sell the material in a market neutral . . . manner that minimizes the impact on the market." Smith Decl. ¶ 7. He further notes that "substantially all DOE-derived supply has already been sold by Traxys under forward delivery contracts and more than half is sold outside the U.S." Smith Decl. ¶ 3. Only 25 percent of Traxys' total conversion sales (*i.e.* sales of UF6) were sold in spot market transactions, with the balance sold under forward delivery contracts. Smith Decl. ¶ 12. While defendants have not verified Mr. Smith's assertions, they seriously call into question plaintiff's alleged harms from DOE allegedly "dumping" uranium into the spot market.

Finally, plaintiff seeks to enjoin the currently scheduled July 31, 2014 transfer of 76.8 metric tons of natural uranium equivalent to WesDyne. Hanlon Decl. ¶ 20. However this transfer will constitute only 0.1 percent of global annual uranium supply. *See* Ex. B at 50. Transfer into the market of such a trivial quantity of uranium can hardly have enough of a price impact as to cause plaintiff harm that is certain, great, actual and imminent, *Wisconsin Gas, supra*, 758 F.2d at 674. Indeed all of the transfers scheduled

through the end of September, a total of 795.2 MTU, Owendoff Decl. ¶ 14b, Hanlon Decl. ¶ 20, will only constitute 1% of annual global uranium production. *See* Ex. B at 50. Under plaintiff's theory, it will begin to experience market injury at some indefinite point, but that point is several months away, if at all.

III. The Grant of a Preliminary Injunction is Not in the Public Interest

The entry of a preliminary injunction, even one that only remains in effect for a few months, will effectively cripple two important DOE programs that are largely or entirely funded through the transfer of DOE uranium to the contractors operating these programs. It is notable that plaintiff does not seek a reduction in DOE's inventory transfers -- to ten percent of domestic requirements, the figure set in the prior DOE guideline – but rather the total termination of all transfers.[16] The public interest – as determined by Congress when it authorized these two important DOE activities – will be directly and substantially harmed by any such injunction.

A. Clean-Up of Environmental Contamination at the Portsmouth GDP

Under the Energy Policy Act of 1992, DOE is responsible for the clean-up of environmental contamination at three DOE Gaseous Diffusion Plants (Oak Ridge, Tennessee; Paducah, Kentucky; Portsmouth, Ohio) that were originally constructed in the 1950s to supply additional enriched uranium for the U.S. Government's (USG's) weapons programs and were operated by DOE for decades thereafter. Owendoff Decl. ¶ 7. EM is responsible for these clean-up projects and it has contracted with FBP for clean-up of the Portsmouth facility, where work has been ongoing for several years. Owendoff Decl. ¶¶ 4, 5, 11.

[16] Even an injunction that would limit, but not terminate, DOE's transfers of uranium would still cause enormous disruption and harm to these two DOE activities. *See* Hanlon Decl. ¶ 27; Owendoff Decl. ¶ 16.

Funds for this program were to come from the Uranium Enrichment Decontamination and Decommissioning Fund, but for a variety of reasons, Congressional appropriations for this activity have been steadily reduced. Owendoff Decl. ¶ 14. Consequently, DOE has elected to utilize transfers of uranium hexafluoride from DOE inventories to fund FBP for a significant portion of its work at Portsmouth. Owendoff Decl. ¶ 9. On a quarterly basis (with the next payment scheduled for August 20, 2014), EM negotiates with FBP for a value to place on DOE's uranium hexafluoride, based on the spot market price, and, after the parties reach agreement, transfers the agreed to amount of uranium to FBP. Owendoff Decl. ¶ 11. Since the contract began in 2010, the value of annual uranium transfers to FBP have ranged from approximately $107 million to $ 255 million. Owendoff Decl. ¶ 12c.

As explained in the Owendoff Declaration, and as confirmed by the Affidavit of Dennis Carr, FBP's Site Project Director, ("Carr Aff.") an injunction terminating DOE's inventory transfers will effectively bring work at the Portsmouth facility to a standstill. DOE would lose approximately $ 160 million a year in funding for the Portsmouth project, more than 50 percent of its funding. Owendoff Decl. ¶ 15a. Consequently, FBP would have to lay off the majority of its highly skilled and trained workforce – between 500 and 1250 in Fiscal Year 2014 and the balance in 2015. Owendoff Decl. ¶ 15b; Carr Aff. ¶ 9. These layoffs, and the associated loss of local procurement, would be a crushing blow to the local economy in Pike County, where the unemployment rate is over nine percent.. Carr Aff. ¶ 22.

Halting work in this manner would significantly increase the long term cost of the environmental clean-up work, estimated at $ 120 million for each year of delay due to project cost and schedule increases. Owendoff Decl. ¶ 15d. Without uranium transfer

funding, DOE will only be able to keep Portsmouth in a minimum safe operations state. Owendoff Decl. ¶ 15e.

B. High Enriched Uranium Down-Blending Program

The Office of Fissile Materials Disposition ("FMD") of NNSA is responsible for the U.S. HEU Disposition Program, a program for rendering highly enriched uranium, *i.e.* weapon-grade uranium, into low enriched material, *i.e.* usable only as a nuclear fuel source (this process is referred to as "down-blending"). Hanlon Decl. ¶¶ 9 - 12. Since 1993, it has been the policy of the United States, based on a Presidential Decision Directive, to "seek to eliminate, where possible, accumulations of stockpiles of highly enriched uranium or plutonium." Hanlon Decl. ¶ 6. Consequently, the mission of the FMD is to eliminate inventories of weapon-grade nuclear material.

To that end, NNSA has contracted for down-blending services with WesDyne, which in turn subcontracts with NFS, the only commercial entity in the United States that has the necessary capability and NRC licenses to down-blend uranium for use in commercial nuclear reactors. Hanlon Decl. ¶ 15. NNSA agreed to pay for those down-blending services through transfers of DOE surplus uranium, Hanlon Decl. ¶ 17, and it has done so over the past several years. *Id.*

Appropriated funds to pay for the down-blending activities are not available in sufficient quantity to maintain the program. Hanlon Decl. ¶ 23. Nor is it realistic for DOE to anticipate that it will obtain a supplemental appropriation to fund this program, or even obtain authority to reprogram its existing appropriations to replace any lost funding due to an injunction. *Id*. Consequently, if DOE is enjoined from continuing to

fund the HEU commercial down-blending program through bartering uranium, it would suffer a series of significant adverse actions.

First, DOE would immediately be in violation of its contract obligations with WesDyne, which would result in significant economic liability. Hanlon Decl. ¶¶ 25a; 25d. The ongoing HEU Disposition activity would cease and, if funding were not restored, the down-blending line at the NFS plant in Erwin, Tennessee would have to be shut down for decontamination and decommissioning. Hanlon Decl. ¶ 25e. NFS would have to lay off 50 of its highly skilled and trained employees and at least that many overhead employees. Hanlon Decl. ¶ 25d.

Furthermore, such a termination would significantly undercut the international nonproliferation commitments that the United States has made. The termination of down-blending of HEU by the United States would undercut calls by the United States at international conferences and summits for other countries to reduce their stocks of -weapon-grade nuclear material. *See* Declaration of Anne Harrington.

V. The Balance of Equities Does Not Tip in the Plaintiff's Favor

The balance of the equities here compels the conclusion that a preliminary injunction is not justified. Plaintiff may experience some unpredictable amount of financial harm due to the transfer of DOE inventory onto the global uranium market, but that harm is highly speculative given the volatile nature of the global uranium industry. Moreover, plaintiff has not provided sufficient financial information for the court to make an informed determination of whether ConverDyn's lost profits are a significant injury in light of its total revenue.

By contrast, the injury to DOE's programs, will be immediate and severe. As explained in the Owendoff and Hanlon declarations, both the Portsmouth clean-up program and NNSA's down-blending efforts will be effectively halted if DOE cannot continue transferring uranium to its contractors to fund these activities. Even if these programs are re-started after an extended hiatus, DOE will incur significant programmatic and financial costs.

VI. Plaintiff Should Be Required to Post a Bond in the Amount of $ 125,000,000.

No preliminary injunction is warranted, but if the Court determines to enter such an order, plaintiff should be required to post a bond sufficient to cover the government's anticipated losses, as supported by its declarations. Rule 65, Fed. R. Civil P. provides in pertinent part, that "No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant[.]" Fed. R. Civ. P. 65(c). "Rule 65(c) requires that every preliminary injunction be accompanied by security." *DRG Funding Corp. v. Sec'y of Hous. & Urban Dev.*, 1988 WL 93464, at *7 n.9 (D.D.C. Aug. 24, 1988); *see also Ellipso, Inc. v. Mann*, 2005 WL 5298646 (D.D.C. Nov. 2, 2005) *aff'd*, 480 F.3d 1153 (D.C. Cir. 2007).

Courts have "broad authority to determine the size of the bond." *DSE, Inc. v. United States*, 169 F.3d 21, 33 (D.C.Cir.1999) "Unlike the balance of harms inquiry undertaken by the Court in deciding whether to grant an injunction, Rule 65(c) looks only to damages and costs suffered and incurred 'by any party who is found to have been wrongfully enjoined or restrained."' *McGregor Printing Corp., v. Kemp.* 1992 WL 118794 (D.D.C. May 14, 1992)(quoting Fed. R. Civ. P. 65(c); *see also George Washington Univ. v. D.C.*, 148 F. Supp. 2d 15, 20 (D.D.C. 2001).

Generally, however, "[w]hen setting the amount of security, district courts should err on the high side." *Mead Johnson & Co. v. Abbott Laboratories*, 201 F.3d 883, 888

(7th Cir. 2000). *Accord* 13 *Moore's Federal Practice* § 65.50[1] at 65-98. An error in setting the bond too high is "not serious" since the fee for the bond is a tiny fraction of the mount of the bond. *Id*. But an error in setting the bond too low can cause irreparable injury for the non-moving party damages for an erroneous injunction cannot exceed the amount of the bond. *Id*.

As explained in the Hanlon and Owendoff Declarations, an injunction terminating DOE's inventory transfers will cause substantial and certain injury. If NNSA is enjoined from continuing to transfer uranium, it will be in breach of its contract with WesDyne. Hanlon Decl. ¶ 25a. NNSA would also be required to terminate its contract with WesDyne, requiring the payment of $25 million in contract termination costs. Hanlon Decl. ¶ 25d. The cost of restarting the NFS facility where down-blending occurs would be an additional $40 million. Hanlon Decl. ¶ 26. A delay in the Portsmouth clean-up of even six months will result in an increase in scheduled costs of $ 60 million. Owendoff Decl. ¶ 15d. Consequently, the Court should compel ConverDyn to issue a bond of $125 million before the issuance of a preliminary injunction.

CONCLUSION

Wherefore, plaintiff's motion for preliminary injunction should be denied.

Respectfully submitted,

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Certificate of Service

I hereby certify that on the 7th day of July, 2014, I caused the forgoing Opposition to Plaintiff's Motion for Preliminary Injunction to be served on counsel for plaintiff by filing with the Court's electronic case filing system.

/s/ Daniel Bensing

Daniel Bensing