



April 6, 2015

Mr. David Henderson
Office of Nuclear Energy
U.S. Department of Energy
Mailstop NE-52
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VIA E-MAIL

Subject: Department of Energy – Excess Uranium Management: Effects of DOE Transfers of Excess Uranium on Domestic Uranium Mining, Conversion, and Enrichment Industries; Notice of Issues for Public Comment – 80 Fed. Reg. 14107 (March 18, 2015)

Dear Mr. Henderson:

ConverDyn appreciates the opportunity to provide our comments in the attached response to the U.S. Department of Energy (“DOE”) Notice of Issues for Public Comment, dated March 18, 2015, regarding the effects of DOE’s transfers of excess uranium on the domestic uranium conversion industry. As you know, ConverDyn is the exclusive marketing agent for sales of uranium hexafluoride (“UF₆”) produced at the Metropolis Works (“MTW”) facility, the sole UF₆ production facility in the United States, and one of only four major producers worldwide.

The domestic conversion industry’s continued existence is threatened by DOE’s ongoing excess uranium sales, including through reduced sales, suppressed prices, higher production costs, and detrimental changes in customer practices. The 2015 ERI Report, as well as earlier reports, clearly demonstrates that there will be an impact to the domestic conversion industry that is more than *de minimis*. There is no dispute on that point. Moreover, the adverse impacts associated with DOE transfers at the quantities contemplated in Scenarios 1 and 2 are in fact material to ConverDyn and the domestic conversion industry. Further DOE transfers at this time of extreme market weakness and uncertainty would exacerbate an already tenuous situation for the domestic conversion industry. DOE therefore must adopt Scenario 3 in its forthcoming Secretarial Determination.

ConverDyn also reaffirms the point made in its January 22, 2015 letter and at other times that the USEC Privatization Act does not allow DOE to transfer the conversion services component in UF₆ or enriched uranium, a point which DOE did not address in the Notice.

Please do not hesitate to contact me if you have any questions.

Sincerely,

A handwritten signature in blue ink, appearing to read "M. Critchley", with a stylized flourish at the end.

Malcolm Critchley
ConverDyn
President & CEO

Enclosure:

**CONVERDYN RESPONSE TO DOE
NOTICE OF ISSUES FOR PUBLIC COMMENT**

**Excess Uranium Management: Effects of DOE Transfers of Excess Uranium on Domestic
Uranium Mining, Conversion, and Enrichment Industries**

80 Fed. Reg. 14107 (March 18, 2015)

Introduction

ConverDyn has previously commented on DOE's excess uranium management plans and related Secretarial Determinations, including in two letters in March 2014 and in response to a DOE request for information in January 2015.¹ This response addresses the issues raised in the Notice of Issues for Public Comment, including the meaning of an "adverse material impact" on the domestic conversion industry under the USEC Privatization Act, the factors DOE intends to consider in making the Determination, and DOE's consideration of information received in response to the December 8, 2014 request for information.

Process Concerns

ConverDyn notes a few generally applicable issues that affect its ability to respond to this notice. First, DOE was unwilling to extend the time for parties to respond to the Notice. The domestic uranium market is a complex subject, and DOE's refusal to grant additional time to respond limits commenters' ability to address all issues.

Second, DOE has not actually identified a specific transfer level it intends to proceed with under any new Determination, which prevents ConverDyn from addressing DOE's actual plans and the actual numerical indicators regarding their impact on domestic industry.

Third, ConverDyn continues to have concerns regarding the model and data used in the 2015 ERI Report. ERI again relies upon the same model as in prior reports. This model still has not been subject to peer review despite this concern being raised many times. ERI also did not consult with industry in the creation of the report, as it had in years past, thereby calling into question the quality and relevance of the data used in the report.

Finally, at several points throughout the Notice, DOE suggests that ConverDyn did not submit sufficient financial information or documentation to support statements it made in various communications with DOE. Yet, DOE does not identify what other materials or information it would purportedly need. And ConverDyn based its comments and discussion on analyses specifically prepared for DOE by ERI. Further, it is not clear whether DOE requires this

¹ Letter from M. Critchley to P. Lyons, "Adverse Material Impacts of Department of Energy Sales of Excess Uranium on Domestic Conversion Industry" (Proprietary Enclosure) (March 10, 2014); Letter from M. Critchley to P. Lyons, "Guiding Principles for the Secretarial Determination Process" (March 10, 2014); Letter from M. Critchley to D. Henderson, "ConverDyn Response to DOE Request for Information" (January 22, 2015). As much of the information in those submissions is still applicable today, ConverDyn incorporates those prior comments into this response by reference.

unidentified quantum of information from all commenters, or just some, such as ConverDyn. If DOE is going to discount comments due to a supposed lack of supporting information, it should set a policy describing what type or level of information and documentation it seeks, and then should consistently apply this standard to all commenters.

Defining an “Adverse Material Impact”

DOE’s discussion of how it intends to define an “adverse material impact” raises several serious questions and concerns.

First, DOE asserts that “the *meaning* of the phrase is likely to depend in part on the factual context in which it is to be applied.” 80 Fed. Reg. at 14109 (emphasis added). While it is apparent that the eventual determination of whether certain transfers will have an adverse material impact depends on the surrounding factual circumstances at that time, there is no support for the proposition that the very definition of the phrase itself changes. Put another way, if there is no defined meaning for the phrase, then it is possible that two different transfers that will have identical effects on domestic industry could nevertheless be treated differently by using a different standard for what constitutes an adverse material effect. Suggesting that a term means whatever DOE says it means whenever DOE says it renders the term meaningless altogether.

Second, while DOE makes the reasonable point that it will determine the impact by comparing what would happen if the transfers go through versus what would happen if there were no transfers, it then illogically adds that “not every difference in predicted outcomes will necessarily count as an impact of the transfer.” *Id.* By definition, if the only changing variable in evaluating the market is whether or not the transfers occur, then any resulting differences are part of the impacts of the transfers. DOE gives the example that “if DOE transfers would be the final contribution after independent causes have pushed an industry to a given adverse state, DOE might not regard the full scope of the adversity as attributable to the transfers.” *Id.* Yet, this would be the *most critical* situation for taking account of the full impact of the transfers and for DOE to halt transfers. If the domestic conversion industry were on the cusp of economic viability and the DOE transfers would push it into non-viability, then DOE cannot ignore the consequences of its actions.

As ConverDyn has noted in previous submittals to DOE regarding uranium transfers, DOE has misapplied the statutory “adverse material impact” standard, which is not a relative standard (*i.e.*, whether the impact of the transfers would have a greater or lesser adverse impact compared to other market factors). The United States District Court for the District of Columbia criticized DOE on this very point:

The Department’s analysis on this point may be correct, but it is the answer to the wrong question. Rather than assessing the evidence to determine whether the planned transfers would have an adverse material impact on the domestic uranium production, conversion, or enrichment industries as directed by [42 U.S.C.] Section 2297h-10(d), the Department instead reviewed the evidence to determine whether the planned transfers are the primary cause of the current depressed state of the uranium market

or whether altering the amount of the transfers would alleviate negative market conditions. And whether the Department's transfers are "the driver" of market conditions is not the inquiry set forth in Section 2297h-10(d). The Department's transfers may have an adverse material impact on ConverDyn even if the transfers are not the primary cause of ConverDyn's total losses.²

Despite the plain language of the USEC Privatization Act and the admonition of the court, DOE continues to indicate that it will impermissibly base the Determination on the comparative impact of the transfers versus other market factors. DOE should revise its assessment of adverse material impacts to satisfy the language and intent of the USEC Privatization Act.

Third, DOE attempts to define the concept of "material" by stating that it will view "material adverse impacts as referring to impacts that go beyond normal market fluctuations, such as those that threaten the viability of an industry." *Id.* While the standard of whether the impact of the transfers "go[es] beyond normal market fluctuations" may be part of an appropriate metric, DOE's indication that an adverse material impact will only exist if the transfers "threaten the viability of an industry" is too extreme. Rendering an industry non-viable is a worst-case adverse impact of the transfers. Harms that do not quite rise to the level of destroying the domestic industry can still be adverse material impacts (*e.g.*, elimination or erosion of profits, loss of long term sales, etc.). DOE cannot discount these circumstances or write them out of the statutory standard. DOE also ignores the point that an adverse material impact can even occur no matter the status of the market—the test is not whether the market remains in a strong or in a weak state with the transfers, but whether the transfers themselves materially impact the domestic conversion industry.

Fourth, DOE states that it will consider the volume of deliveries under the Russian HEU Agreement as a benchmark for what is an adverse material impact. *Id.* But linking the numbers in the Russian HEU Agreement to the adverse material impact determination has no statutory basis, and compares "apples to oranges." Congress chose to use two different approaches for regulating transfers under the Russian HEU Agreement provisions and for DOE inventory sales/transfers. Transfers made under the Russian HEU Agreement are not subject to an "adverse material impact" requirement, and can proceed based on the numerical limits in the statute regardless of any adverse impact. In contrast, the limitation on adverse material impacts in the USEC Privatization Act applies to all other inventory transfers to ensure that they do not *further* destabilize the domestic industries that were significantly harmed by the Russian HEU Agreement. It was well understood by Congress that the HEU Agreement would harm the domestic uranium and conversion industries. But, Congress elected to proceed *with the added protection that DOE would not transfer additional material if the transfers would have an adverse material impact.* It is inconceivable that DOE could now use those same HEU Agreement transfer volumes—which very nearly destroyed the domestic conversion industry—to justify further transfers.

² *ConverDyn v. Moniz*, Civil Action No. 14-1012 (RBW), slip. op. at 21-22 (D.C. Sept. 12, 2014).

In any event, the same policies do not underlie both sections of the statute. The Russian HEU Agreement provisions are meant to execute obligations under an international agreement, while the inventory transfers are used by DOE to generate extra discretionary funds, outside the appropriations process. In addition, the numerical caps on transfers in the Russian HEU Agreement section were chosen almost twenty years ago and under an entirely different set of market and industry conditions. In contrast, the Secretary's Determination with respect to inventory sales is to be made based on current market and industry conditions.

In addition, following the end of the HEU Agreement, TENEX was granted a quota to allow the complete replacement of HEU supply with EUP from commercial sources. TENEX recently reported that they have sold almost 100% of this quota. As a result, the equivalent volume of the HEU material is still present in the market. While DOE appears to assume that HEU material is no longer present in the market and that the effects of DOE transfers are at least no worse than those from the HEU Agreement, the impact is in fact cumulative since the same quantities of Russian material as under the HEU Agreement are still in the market. For all these reasons, there is simply no reasonable basis for assessing the materiality of adverse impacts by using the Russian HEU Agreement quantities.

Overall, the meaning of the phrase "adverse material impact" in section 2297h-10(d)(2)(b) is simple and straightforward. Looking first to dictionaries, "adverse" means "opposed to one's interests" or "unfavorable to one's interests," Merriam-Webster Online Dictionary; Collins English Dictionary (10th ed. 2009), and "material" means "having real importance or great consequences" or "of great import or consequence." Merriam-Webster Online Dictionary; Collins English Dictionary (10th ed. 2009); *see also Doeberiner v. Sohio Oil Co.*, 880 F.2d 329, 334 (11th Cir. 1989) (material means of "real importance or great consequence"). Courts have further explained materiality in terms of what it is not: a material impact is one that is more than "*de minimis*." *See Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792 (1989) ("material alteration" to policy means more than "purely technical or *de minimis*"); *Hilling v. Rumsfeld*, 381 F.3d 1028, 1033 (10th Cir. 2004) (materially adverse act means an act "that does more than *de minimis* harm"). "Adverse material impact" is therefore an unfavorable impact of real, or more than *de minimis*, importance or consequence. Nothing in that definition suggests that "material impacts" are limited to exceptionally grave circumstances, such as those that threaten the viability of an industry (though that would certainly be an example of an adverse material impact)

Other statutes addressing material harm are illuminating. The Tariff Act, which covers dumping in international trade, contains a "material injury" to "domestic industry" standard that is conceptually similar to the USEC Privatization Act's "adverse material impact" to the "domestic uranium . . . industry." "Material injury" in the Tariff Act is defined as "harm which is not inconsequential, immaterial, or unimportant." 19 U.S.C. § 1677(7). In considering material injuries to domestic industry, the Tariff Act considers factors such as "actual and potential decline in output, sales, market share, profits, productivity, return on investments, and utilization of capacity," the effect on "prices," and "actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment." *Id.* at § 1677(7)(C)(iii). Like the USEC Privatization Act, the Tariff Act does not limit the definition of

material adverse impacts to only the most severe adverse impacts, such as those that threaten the viability of an industry.

For all these reasons, ConverDyn believes that DOE has not articulated an appropriate definition of adverse material impact. DOE is perpetuating a standard that a court has previously judged to likely be inadequate, and fails to fully recognize the various ways in which DOE transfers cause adverse material impacts to the domestic conversion industry. DOE should instead interpret the term “adverse material impact” in the usual way: an unfavorable impact of real, or more than *de minimis*, importance or consequence.

Understanding “Market” Prices and Sales

While DOE acknowledges that the volume of uncovered requirements may be relevant to the overall assessment, it does not appropriately acknowledge the manner in which the transferred material is in fact accommodated by the market. The assertion that 90% of the DOE barter materials have been sold forward has little meaning without an understanding of the proper context and definition of the “Term” market. 80 Fed. Reg. at 14111 n.11; 2015 ERI Report at 24. The implication of DOE’s reference to forward sales is that, because the material is sold “forward,” it has no effect with respect to the adverse impact evaluation. However, this is too simplistic of an approach and misses the actual impacts of these “forward” sales on future sales and market prices.

A Term contract in the traditional sense is defined by the industry to be an arrangement whereby a supplier makes a multiyear commitment to guarantee supply to a customer. The associated price will reflect the full cost of production, delivery, and any required investment to maintain the facilities feeding the contract. As such, the price must include all cost of operations, capital recovery, and a return on investment. Currently in both the uranium and conversion markets, there is a significant premium of published Term to Spot prices. The majority of uranium and conversion sales fall into the Term category.

However, with the availability of secondary supply material (with little or no cost basis, like the DOE materials) in conjunction with the near zero interest rate environment initiated by the Federal Reserve in 2008, a new marketplace has emerged—the “Buy and Hold” or “Carry Trade” market. This market should not be confused with the “Term” market and associated pricing. Such transactions are more appropriately characterized as an extension of the Spot market to approximately a 3-year term. These transactions therefore have the effect of deferring purchases under true Term agreements. Because these sales only reflect the spot acquisition cost and low financing rates, and not the full cost of production, delivery, and any required investment, they exacerbate the adverse market impact by destroying the early part of the formerly Term marketplace.

Secondary materials and services available at spot prices are acquired and sold forward using externally available low cost financing. Such rates can extend for 2 to 3 years and are significantly lower than utility internal cost of money rates, making them very attractive to buyers. Utilities wanting to purchase low cost materials and services may be hampered by cash needs and/or relatively high internal cost of money (typically defined by opportunity cost,

weighted average cost of capital, or equity). The Carry Trade is a viable alternative for them as it is in effect a Buy and Hold at very low cost yielding a much lower realized cost than purchasing materials under a typical term contract.

ERI and DOE do not differentiate such transactions from the traditional “Term” definition. In fact, such transactions displace and/or delay true Term contracting, which has significant adverse impacts to the primary industry. Moreover, these transactions have a delivery profile that overlaps the multiple DOE barter horizons and thus come back into play during the same period. For example, secondary materials available in 2014 will come back into play in the 2016 to 2017 period and further depress and/or delay Term contracting. Indeed, such materials may not even be consumed at that time and may then be re-sold, which would continue to depress the forward market. These dynamics have the effect of magnifying and compounding the influence and size of the Spot market and, because the conditions have been in place for some time, have likely affected a fundamental change in customer buying behavior.

To properly assess the market impact, DOE must consider such transactions in their evaluation and disclose additional information regarding the “90% forward sale” statement to properly assess the characterization. DOE should also consider the potential benefits to taxpayers from true long-term contracts, as well as the additional income that could accrue to DOE should it delay the transfer program for successive years (as under Scenario 3).

Factors for Consideration

DOE sets out six factors that it will consider in making the adverse material impact determination: 1) market prices; 2) realized prices of current operators; 3) production at existing facilities; 4) employment levels in the industry; 5) changes in capital improvement plans and development of future facilities; and 6) long-term viability and health of the industry. This list of factors raise several issues.

First and most importantly, displaced sales is one of the clearest indicators of the effects of DOE’s transfers, and DOE should consider this as a separate category. The ERI Reports which DOE relies on go into great detail about lost sales as an indicator of the market impact of DOE transfers, yet DOE does not consider this as a standalone factor. In ConverDyn’s case, lost sales due to the DOE transfers will be the greatest source of lost revenue, and DOE should give this issue the full weight it deserves. In fact, there is an obvious benefit in waiting until the market is under-supplied until DOE makes sales and an obvious harm in DOE making additional transfers (of essentially “no cost” conversion) when the market is oversupplied. As ERI notes (at 13), total world conversion supply exceeds projected requirements for conversion services at least until after 2025. The supply excess averages 6 million kgU as UF6 annually over the next 10 years and is equivalent to nearly 10% of requirements. Available supply has exceeded requirements by an average of 11 million kgU as UF6 annually over the past two years—more than the annual production of UF6 at MTW. This excess of conversion supply has an oversized impact on primary producers, like ConverDyn, who must account for the costs of raw materials and production in making sales, and gives a market advantage to secondary suppliers, like DOE, which has essentially no costs to recoup and therefore no lower price below which it would not

make transfers. These circumstances serve to magnify the harm to ConverDyn beyond the simple pricing effects considered by ERI.

Second, within a number of categories, DOE notes the different figures calculated by ERI and other commenters regarding such issues as changes in price, sales, and production costs. However, in light of DOE's vague and unfixed definition of what constitutes an "adverse material impact," DOE's decision to not identify the specific transfer quantities and forms it intends to use, and its unwillingness to commit to any strategies to mitigate the harms from the transfers or to lessen their impact, combined with the fact-specific nature of this determination, makes it nearly impossible to address every possible permutation of potential DOE actions. DOE should publicly identify the actual steps it plans to take so that ConverDyn and other commenters can concretely comment on the specific circumstances of the transfers as opposed to speaking in generalities.

Third, DOE appears to be giving double the weight to prices by considering both the "market price" and the "realized price." Quite simply, the market price is a function of the realized price, so there is no reason to treat them as separate categories (indeed, ERI does not discuss these as separate issues). Likewise, whether the term price has remained at similar levels over the last few years is irrelevant, since as found by ERI, and as accepted by DOE, the transfers will suppress prices and displace sales. Especially in this weak market, if prices would have risen but for DOE's actions, that is a harmful impact which DOE must account for. In addition and as discussed above, the existence of substantial quantities of DOE materials in secondary markets, the large difference between spot and term prices, and the low interest rate environment has created a Carry Trade that displaces or significantly delays true Term contracting. The Carry Trade is effectively setting the price of conversion in the market. Neither DOE nor ERI appear to have grappled with these market dynamics, which to some extent were caused by prior DOE transfers.

Fourth, with respect to "production at existing facilities," DOE notes that MTW, the only conversion facility in the United States, is operating below capacity. This shows that there is available capacity for ConverDyn to increase production to fill the market share captured by DOE's transfers. This is not a situation where ConverDyn would be unable to produce or sell more conversion services if DOE goes forward with the transfers. To the contrary, DOE transfers cannibalize both ConverDyn conversion sales and MTW production volume. This results in lost sales proceeds, underutilization of MTW, and increased unit production costs—all material adverse impacts from DOE transfers.

Fifth, with respect to "changes in capital improvement plans and development of future facilities," DOE asserts that certain foreign companies may be planning large scale conversion projects. However, as the emphasis under the USEC Privatization Act is the *domestic* market, the actions of companies abroad are immaterial. DOE also notes that Honeywell has been spending about \$17-18 million per year as capital improvements on MTW. 80 Fed. Reg. at 14121. These are necessary investments in order to maintain the plant's operations and production in compliance with regulatory requirements. MTW has no plans to expand the plant or build a new facility. Likewise, despite the fact that there is only one conversion facility in the U.S., no one else is planning on building a new conversion facility, highlighting that current

investments in domestic conversion are only at the minimum required level and long-term development plans are non-existent.

Sixth, with respect to the “long-term viability and health of the industry,” this factor should be of minimal weight as presently articulated by DOE. The Secretarial Determinations are only valid for two years before they need to be reevaluated, such that long-term prospects are not as relevant as the current effects. Further, even if the industry may grow in the long term, that does not mean the market would not still be stronger absent DOE’s actions, and the difference between where it would be and where it could be may constitute an adverse material impact. The fact that DOE’s actions will not completely suppress future growth is not sufficient to show that there will not be an adverse material impact. That said, there is one aspect of this factor that DOE has not addressed in the Notice. Neither DOE nor ERI mentioned the potential impacts to domestic capability to produce material critical to our national defense that can only come from U.S. sources. DOE has consistently argued that the American Centrifuge Project is necessary to provide non-obligated EUP for defense purposes. Enrichment also requires non-obligated uranium and conversion. We understand that DOE has to date sold Russian obligated UF6 that resulted from the HEU program, but going forward will be transferring non-obligated UF6. DOE should expressly consider the risk that its transfers will result in the demise of the domestic conversion industry, such that the U.S. would lack the capability to produce material that DOE has stated is critical to the U.S. defense program and which cannot come from any other source.

Mitigation

Based on its assessment of impacts on each segment of the domestic uranium industry, DOE may need to reduce or mitigate impacts to one sector, but not necessarily another, in order to comply with the Act. Because DOE has not articulated a specific proposal regarding future transfers or a definition of material adverse impact, ConverDyn is unable to provide detailed information on potential mitigation measures that DOE could take to eliminate adverse material impacts.

As noted in our response to DOE’s Request for Information, DOE could (1) establish price bands such that if the price of conversion services fall below a certain amount, DOE would halt transfers; (2) obtain fair market value; (3) cease transferring conversion services; (4) reinstate the annual cap on transfers; or (5) undertake other measures that mitigate the adverse impacts to the domestic conversion industry from DOE’s transfers. ConverDyn is willing to explore structures or other arrangements that would eliminate or mitigate the adverse material impacts of DOE transfers on the domestic conversion industry.

Scenarios Evaluated by ERI

The ERI report evaluated three scenarios regarding potential DOE transfer plans. Scenario 1 maintained current levels, Scenario 2 involved a slight decrease in transfers, and Scenario 3 involved an almost complete halt to transfers.

As an initial matter, DOE used a “backwards” approach in asking ERI to consider just the three scenarios. Instead of coming in with preconceived notions of transfers quantities that it intends to make *before* having seen any impact analysis, DOE should have asked ERI to evaluate the optimal conditions for transfers, including how to minimize the adverse impact of the transfers on domestic industry while also maximizing the benefit to DOE. This approach would have provided a baseline against which DOE could have measured any other potential transfer scenarios instead of just the three scenarios. An approach designed to minimize harm and maximize benefits is the reasonable commercial approach and the only approach consistent with the limitations in the USEC Privatization Act.

With respect to the three limited scenarios considered by ERI, the effects of these transfers on ConverDyn are:

	2014 ERI Report	2015 ERI Report		
		Scenario 1	Scenario 2	Scenario 3
Demand Share Met by DOE	15% of the U.S. market	16% of the U.S. market	11% of the U.S. market	1% of the U.S. market
Conversion Price Impact	-\$0.90/kgU	-\$0.90/kgU	-\$0.70/kgU	-\$0.10/kgU
Spot Price Impact	11.8% decline	11.1% decline	8.0% decline	1.2% decline
Term Price Impact	5.5% decline	5.9% decline	4.2% decline	0.6% decline
Lost Sales	7-8% decline in sales	8% decline in sales	6% decline in sales	1% decline in sales
Increased Prod. Costs	6-8% increased costs	6-7% increased costs	5-6% increased costs	1% increased costs

The 2015 ERI Report clearly demonstrates that there will be an impact to the conversion industry that is more than *de minimis* under either Scenario 1 or Scenario 2.³ Under a plain reading of the term adverse material impact, transfers at levels considered in Scenario 1 and Scenario 2 are prohibited by the USEC Privatization Act. Scenario 1 is almost identical to the previously projected harms in the 2014 ERI Report. For the same reasons and based on the same economic analyses presented previously by ConverDyn, Scenario 1 will have an adverse material impact on the domestic conversion industry. Scenario 2 is only minimally better and does not reduce the adverse impacts of DOE transfers to levels that could be considered immaterial. Transfers under Scenario 2 would still damage the already-fragile domestic conversion market

³ If DOE is attempting to make the case that there is not a large difference between the adverse impacts of Scenarios 1 and 2 and that therefore it would be acceptable to choose either scenario, such an approach would be contrary to the USEC Privatization Act. The statute imposes an absolute prohibition—that is, is there an adverse impact and, if so, is it material? The relative impacts among scenarios is not relevant, only the overall determination as to whether an adverse impact is material.

by displacing sales, depressing prices, increasing costs, and eliminating jobs. As a result, both Scenarios 1 and 2 will result in material adverse impacts to the domestic conversion industry, particularly in light of the current weak market. That ConverDyn's projected losses are "material" is reinforced by the findings of the United States District Court for the District of Columbia. The Court evaluated ConverDyn's projected losses over the next two years due to DOE's uranium transfers and agreed that "ConverDyn's projected losses are quite significant."⁴ That the losses are "quite significant" is consistent with a definition of materiality as "having real importance or great consequences." Only Scenario 3 projects no material adverse impacts, and of the three scenarios is the one DOE should pursue.

In the end, the ERI analysis does not demonstrate compliance with the USEC Privatization Act. DOE should direct ERI to evaluate the optimal conditions for transfers, including how to minimize the adverse impact of the transfers on domestic industry while also maximizing the benefit to DOE. This approach would provide a baseline against which DOE can measure any other potential transfer scenarios instead of just the three scenarios. DOE also should expand the scope of the ERI study to determine the additional value that can be obtained by delaying the program by successive years. If DOE decides to forgo the potential increased income from taking a longer-term view, it should provide a justification. Otherwise, DOE will have failed to meet the USEC Privatization Act's requirement to obtain fair market value for its excess uranium.

Conclusions

The domestic conversion industry's continued existence is threatened by DOE's ongoing excess uranium sales, including through reduced sales, suppressed prices, higher production costs, and detrimental changes in customer practices. The 2015 ERI Report, as well as earlier reports, clearly demonstrates that there will be an impact to the domestic conversion industry that is more than *de minimis*. There is no dispute on that point. Moreover, the adverse impacts associated with DOE transfers at the quantities contemplated in Scenarios 1 and 2 are in fact material to ConverDyn and the domestic conversion industry. Further DOE transfers at this time of extreme market weakness and uncertainty would exacerbate an already tenuous situation for the domestic conversion industry. DOE therefore must adopt Scenario 3 in its forthcoming Secretarial Determination.

⁴ ConverDyn v. Moniz, Civil Action No. 14-1012 (RBW), slip. op. at 15 (D.C. Sept. 12, 2014).