IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SOUTHERN ALLIANCE FOR CLEAN ENERGY, Plaintiff, v. UNITED STATES DEPARTMENT OF ENERGY, Defendant.	Civil Action No. 10-1335 (RCL)

MEMORANDUM IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This is a case under the Freedom of Information Act, 5 U.S.C. § 552, ("FOIA") seeking disclosure of information unlawfully withheld from public release by the Department of Energy ("DOE"). Specifically, Plaintiff seeks disclosure of redacted portions of documents that contain the terms and conditions, including the credit subsidy fee, for obtaining federal loan guarantees for the construction and operation of two nuclear reactors at the Vogtle Electric Generating Plant in Burke County, Georgia. DOE alleges that the information within these documents is exempt from disclosure pursuant to FOIA Exemptions 4, 5, and 6. DOE's generalized statements are insufficient to meet the government's heavy burden of proving that the requested information was properly redacted under FOIA Exemption 4 or 5.[1] Even if DOE had provided sufficiently detailed statements, the requested information does not qualify for protection under either exemption. As a result, Plaintiff's Motion for Summary Judgment should be granted and Defendant should be ordered to release the withheld information.

[1] Plaintiff does not contest Defendant's FOIA Exemption 6 withholdings.

I. Factual and Procedural Background

On February 16, 2010, President Obama announced that DOE offered conditional commitments for loan guarantees totaling $8.33 billion for the Plant Vogtle project (the "Loan Guarantees"). *See* DOE's Announcement (Dkt No. 11-1). Shortly thereafter, on March 25, 2010, Plaintiff Southern Alliance for Clean Energy ("SACE") submitted a Freedom of Information Act ("FOIA") request to DOE seeking records pertaining to the Loan Guarantees. SACE FOIA Request (the "FOIA Request" [Dkt No. 11-2]). SACE wished to use the requested information to promote awareness of (1) the loan guarantee program and (2) the planned expansion of the Plant Vogtle site, and to encourage government accountability and transparency. *Id*. To this end, SACE focused its request on information regarding the terms and conditions underlying the Loan Guarantees, including the "credit subsidy fee," which represents the estimated long-term cost to the federal government of a direct loan or guarantee. *Id*.

On May 27, 2010, well past the twenty-day agency response deadline imposed by FOIA, SACE sent a letter to DOE's Office of Hearings and Appeals ("OHA"), requesting a response to its FOIA request. *See* Exhibit A. On June 1, 2010, OHA sent SACE a letter, explaining it did not have jurisdiction to address DOE's failure to respond. *See* Exhibit B. It was not until July 6, 2010, that DOE sent its first "partial response" to the FOIA request, consisting of three heavily redacted loan guarantee term sheets. DOE Partial Response (July 6, 2010) (DktDkt No. 11-4).

On July 16, 2010, SACE appealed this partial determination to OHA, challenging DOE's application of FOIA Exemption 4 to the term sheets. SACE Administrative Appeal (July 16, 2010) (Dkt No. 11-5). OHA granted the appeal on August 11, 2010, but did not order release of the withheld information. Rather, OHA remanded the matter to DOE's Loan Guarantee Program Office for further explanation. OHA Decision and Order (August 11, 2010) (Dkt 11-6).

Thereafter, DOE made several additional partial responses. On October 25, 2010, SACE filed its second administrative appeal to DOE's OHA concerning correspondence records released in a September 24, 2010 "partial response." *See* Exhibit C. OHA dismissed the appeal as premature, claiming that the Loan Program Office had not completed its search of correspondence records. *See* Exhibit D. Nine days *after* the dismissal, DOE sent a letter informing SACE that it was continuing its search for responsive correspondence records. *See* Exhibit E.

Over the course of the next year, DOE released and rereleased records pertaining to the Loan Guarantees. While DOE was ordered by this Court to make its "final" production on September 14, 2011 (Dkt 23), the last documents were actually released on December 8, 2011. *See* Supplemental Declaration of Wendy Pulliam ("Supp. Pulliam Decl." [Dkt 29-5]) ¶ 17.

SACE first brought suit against Defendant DOE to compel compliance with FOIA on August 9, 2010. SACE Initial Complaint (Dkt No. 1). On January 14, 2011, SACE amended its complaint to state a second cause of action regarding unlawful withholdings under FOIA. *See* SACE Amended Complaint (Dkt 10). The parties then jointly requested, and the Court ordered, briefing on DOE's response to paragraph 6 of the FOIA request regarding the Loan Guarantee term sheets. SACE claimed that DOE failed to meet its burden in justifying the withholding of information contained in the term sheets under Exemption 4. The parties have fully briefed the adequacy of DOE's response to paragraph 6 of the FOIA request. *See* Dkt Nos. 11-16, 19.

Regarding the remaining portion of the FOIA request, both parties agreed to narrow the outstanding issues to (1) DOE's application of Exemption 4 to letters to Georgia Power Company, Municipal Electric Authority of Georgia, and Oglethorpe Power Corporation (the "Applicants"), concerning the credit subsidy cost estimates relating to the Vogtle Project; and (2)

DOE's application of Exemptions 4, 5, and 6 to specific records and groups of records identified by SACE on November 16, 2011. On December 16, 2011, DOE filed a Motion for Summary Judgment, claiming that all responsive documents had been released and asserting that all redacted information was withheld pursuant to FOIA. DOE Motion for Summary Judgment ("DOE MSJ" [Dkt 29]).

II. Statutory Background

The Freedom of Information Act ("FOIA") was enacted by Congress "to facilitate public access to Government documents." *Dep't of State v. Ray*, 502 U.S. 164, 173 (1991). FOIA was designed "to pierce the veil of administrative secrecy and open agency action to the light of public scrutiny." *Dep't of the Air Force v. Rose*, 425 U.S. 352, 361 (1976)(internal citations omitted). To accomplish this goal, FOIA "mandates that an agency disclose records on request, unless they fall within one of nine exemptions." *Milner v. Dep't of the Navy*, 131 S. Ct. 1259, 1262 (U.S. 2011). It is well established that to serve the aims of FOIA, the exemptions "are to be narrowly construed." *FBI v. Abramson*, 456 U.S. 615, 630 (U.S. 1982). Due to the "strong presumption in favor of disclosure," the agency has the burden of proving that the requested information falls under a claimed narrow exception. *Ray*, 502 U.S. at 173.

Because the agency has almost exclusive knowledge of the contents of the requested materials, the requester must rely upon the agency's justifications and descriptions for "an understanding of the material sought to be protected." *King v. Dep't of Justice*, 830 F.2d 210, 218 (D.C. Cir. 1987). This information asymmetry "seriously distorts the traditional adversary nature of our legal system's form of dispute resolution." *Vaughn v. Rosen*, 484 F.2d 820, 824 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974). Thus, the trial court may, and often does, examine the document *in camera* to determine whether the agency has properly characterized the

information as exempt. *Id.* at 824-25. Where an agency fails to meet its burden of proving that an exemption applies to the withheld information, summary judgment should be entered for the FOIA requester. *Rose*, 425 U.S. at 361-62.

To ensure compliance with FOIA, courts may review an appeal *de novo* and "enjoin the agency from withholding agency records" and "order the production of any agency records improperly withheld." 5 U.S.C. § 552(a)(4)(B).

A. The Standards for Withholding Information Under Exemption 4

Exemption 4 limits an agency to withholding only information that is (a) "commercial or financial," (b) "obtained from a person," and (c) "privileged or confidential."[2] 5 U.S.C. § 552(b)(4); *see also Critical Mass Energy Project v. NRC*, 975 F.2d 871, 873 (D.C. Cir. 1992) (*en banc*) (citing *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974)("*Nat'l Parks I*").

Courts have consistently held that the terms "commercial" and "financial" should be attributed their ordinary meaning. *See Board of Trade v. Commodity Futures Trading Com.*, 627 F.2d 392, 403 (D.C. Cir. 1980). "[I]nformation is commercial if it relates to commerce, or it has been compiled in pursuit of profit." *Pub. Citizen Health Research Grp. v. FDA*, 704 F.2d 1280, 1290 (D.C. Cir 1983)(internal citations omitted). Courts have been equally as straightforward in defining "obtained from a person." Quite simply, any information generated by the government is not "obtained from a person." *Grumman Aircraft Eng'g Corp. v. Renegotiation Bd.*, 425 F.2d 578, 582 (D.C. Cir. 1970).

The definition of the third requirement, that the information be "privileged and

[2] Exemption 4 also allows for withholding of information that may be considered a "trade secret". 5 U.S.C. § 552(b)(4). DOE has not made any trade secret claims and thus trade secrets are not addressed in this Cross-Motion.

confidential," ties together these first two requirements: "confidential" information is any "*commercial or financial* matter" whose disclosure would likely "cause substantial harm to the competitive position of the *person from whom the information was obtained*." *Nat'l Parks I*, 498 F.2d at 770 (emphasis added). To demonstrate the likelihood of substantial competitive harm to the submitter the agency must (1) show that the submitter faces "*actual* competition", *Niagra Mohawk Power Corp. v. Dep't of Energy*, 169 F.3d 16, 19 (D.C. Cir. 1999), and (2) demonstrate, with specific and direct evidence, the likely consequences of disclosure. *See Nat'l Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673, 679 (D.C. Cir. 1976)("*Nat'l Parks II*"). The agency cannot rest on "conclusory and generalized allegations of substantial competitive harm." *Pub. Citizen*, 704 F.2d at 1291.

Additionally, "impairment of an agency's ability to carry out its statutory purpose is sufficient cause to justify a finding of confidentiality within the context of Exemption 4." *Judicial Watch, Inc. v. Export-Import Bank*, 108 F. Supp. 2d 19, 30 (D.D.C. 2000). Courts have recognized an agency's interest in the effectiveness of government programs. *See Public Citizen Health Research Group v. NIH*, 209 F. Supp. 2d 37, 51-52 (D.D.C. 2002). However, in *Niagra Mohawk Power Corp.*, the court emphasized that a claim that disclosure of information submitted under statutory compulsion would impair the government's ability to obtain similar information in the future is "inherently weak." 169 F.33d at 18. An agency must demonstrate that the impairment will be "significant," and that a "minor impairment" cannot overcome the disclosure mandate of the FOIA. *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 830 F.2d 278, 283 (D.C. Cir. 1987). The agency's claim of impairment must also be supported by a "detailed factual justification," not just generalized or conclusory affidavits. *Id.*

B. The Standards for Withholding Information Under Exemption 5

Information may be withheld under FOIA Exemption 5 if it pertains to "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). Specifically, the Exemption 5 deliberative process privilege protects advice, recommendations, and opinions which are part of the deliberative, consultative, decision-making processes of the government. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150-154 (1975). The ultimate purpose of this privilege is to prevent injury to the quality of agency decisions. *Id*.

The deliberative process privilege protects only predecisional documents. To come within Exemption 5 as predecisional, a document must make recommendations or express opinions on legal or policy matters to be decided by the agency. *Vaughn v. Rosen (II)*, 523 F.2d 1136, 1144 (D.C. Cir. 1975). And, the government must carry its burden of establishing the existence of a genuine predecisional process. *Id*. Factors to consider when determining if a document falls within the predecisional deliberative privilege include whether the document (1) is "so candid or personal in nature that public disclosure is likely in the future to stifle honest and frank communication within the agency"; (2) "is recommendatory in nature or is a draft"; (3) "weigh[s] the pros and cons of agency adoption of one view-point or another"; and (4) even if predecisional at the time it was prepared, has been "adopted, formally or informally, as the agency position on an issue or is used by the agency in its dealings with the public." *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980).

In construing the deliberative process privilege, the Supreme Court has also recognized a distinction between "materials reflecting *deliberative or policy-making processes* on the one hand, and purely factual, investigative matters on the other." *Id.* (emphasis added). Thus, though

portions of a document may be deemed deliberative, "the privilege applies only to the 'opinion' or 'recommendatory' portion . . . not to factual information which is contained in the document." *Coastal States*, 617 F.2d at 867. Generally, facts in a predecisional document must be segregated and disclosed unless they are "inextricably intertwined" with exempt portions. *Ryan v. Dep't of Justice*, 617 F.2d 781, 790 (D.C. Cir. 1980).

III. Argument: DOE's Witholding Violates the Act's Requirements

DOE has unlawfully withheld documents by failing to adhere to the requirements of the Freedom of Information Act and its exemptions. First, the agency has not adequately demonstrated that the information withheld satisfies the requirements of any FOIA exemption, and thus has not rebutted the heavy presumption in favor of disclosure. Second, the information sought in this case does not qualify for exclusion (1) under Exemption 4 because it is neither "obtained from a person" nor "confidential," or (2) under Exemption 5 because it is neither pre-decisional nor deliberative.

A. DOE Fails to Adequately Justify Withholding the Information

As noted above, FOIA's exemptions are to be narrowly construed, with all doubts resolved in favor of disclosure. *Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 478 (2nd Cir. 1999) (citing *Ethyl Corp. v. EPA*, 25 F.3d 1241, 1245 (4th Cir.1994)). Despite this strong preference for disclosure, DOE heavily redacted hundreds of pages of documents requested by SACE. *See Vaughn* Index. Then, to meet its substantial burden of justification, DOE simply references FOIA Exemptions 4 and 5, and: (1) provides vague, generalized, and conclusory allegations regarding the withheld information; and (2) fails altogether to explain why certain withheld information was obtained "from a person" and thus protected by FOIA Exemption 4.

The case law does not permit such a casual rejection of a FOIA request. DOE

impermissibly relies on conclusory and generalized allegations to justify hundreds of pages of redactions. *See National Parks II*, 547 F.2d at 680 (holding that an agency's burden cannot be sustained by mere "conclusory and generalized allegations" of confidentiality.) For example, in the *Vaughn* Index, every Exemption 4 withholding is justified by reference to the same seven-page document drafted by the Applicants. *Id.* at Appendix A. This document fails to discuss individual redactions or categories of redactions. *Id*. Rather, it uses broad terms to discuss the general nature of each Applicant's business, without ever meaningfully referencing the documents themselves.[3] *Id.* Such a uniform treatment of every redaction lacks the specificity mandated by FOIA. *See Judicial Watch* 108 F. Supp. 2d at 34, citing *Jones v. FBI*, 41 F.2d 238, 242 (6th Cir. 1994) (providing that, while a categorical indexing approach may be appropriate, the index must provide the requester and the trial judge a clear explanation of why each document or portion of a document withheld is putatively exempt from disclosure). DOE fails to provide declarations that either describe "the justifications for nondisclosure with reasonably specific detail" or "demonstrate that the information withheld logically falls within the claimed exemption." *Judicial Watch, Inc. v. U.S. Dept. of Treasury*, 796 F. Supp. 2d 13, 23 (D.D.C. 2011) (quoting *Larson v. Dep't of State*, 565 F.3d 857 (D.C.Cir. 2009)). Indeed, DOE fails to provide any clear explanation as to why each redaction was made. *See Vaughn* Index at Appendix A.

DOE's treatment of the Exemption 5 withholdings suffers the same flaws. DOE provides little information regarding each redaction. *See Vaughn* Index. According to the *Vaughn* Index,

[3] While the last paragraph of each Applicant's justification in Appendix A of the *Vaughn* Index lists the "types of commercial or financial information redacted" for each Applicant (*see* Appendix A at 3, 6, and 7), this list is of little use. Most of the subject matters listed are not mentioned anywhere else in the *Vaughn* Index or DOE's Motion for Summary Judgment. Without additional information, it is impossible to know how these topics relate to the terms and conditions of the loan.

all of the information withheld under Exemption 5 is "non-factual information prepared during the decision-making process." *Vaughn* Index at 3. This justification does not provide "reasonably specific detail." *See Judicial Watch* 796 F. Supp. 2d at 23. The justification also fails to address whether the agency had "adopted, formally or informally" the redacted terms as the agency position. *Horowitz v. Peace Corps*, 428 F.3d 271, 276 (D.C.Cir. 2005) (quoting *Coastal States Gas Corp.*, 617 F.2d at 866). Such a cursory treatment of the withheld information is insufficient to meet DOE's substantial burden.

Second, with respect to Exemption 4 withholdings, DOE fails to meaningfully discuss whether the information withheld was "obtained from a person." *See Vaughn* Index at Appendix A. Indeed, Appendix A of the *Vaughn* Index never reveals from whom the withheld information was obtained. While Georgia Power Company indicates, in connection with the credit subsidy fee, that it "devoted significant efforts to developing a financial model in the form requested by DOE for purposes of DOE's due diligence review in developing a credit subsidy cost estimate," (*Vaughn Index*, Appendix A at 3) this information is not material. It is the credit subsidy fee estimates, and not the underlying due diligence, that is at issue. Without explaining from whom the withheld information was obtained, DOE cannot meet its substantial burden.

Because DOE provides only conclusory and generalized assertions and fails to discuss a required element of Exemption 4, it has not met its heavy burden of justification. Therefore, the information must be released.

B. DOE Improperly Withheld Information Pursuant to Exemption 4.

DOE relies on Exemption 4 for many of its redactions, arguing that "the withheld information pertains to the rights, obligations, contractual arrangements with DOE and other third parties, estimated project costs, credit analyses and rating, equity commitment, and

reporting and other requirements related to the loan guarantee for the Vogtle Project." DOE MSJ at 16. Because DOE failed to provide an informative *Vaughn* Index, SACE is forced to speculate about whether the information withheld actually falls into these categories. *See Vaughn*, 484 F.2d at 823 – 824 (stating that "the party seeking disclosure cannot know the precise content of the documents sought" and that only the party opposing disclosure is "in a position confidently to make statements categorizing information"). SACE assumes that all the withheld information – including the credit subsidy fee itself – relates to the terms and conditions of the loan guarantees. *See e.g. Vaughn* Index, Appendix A at 1 ("The Confidential Commercial Information represents specific terms and conditions that were negotiated by the Companies and DOE.").

As noted above, under Exemption 4, an agency may withhold information only if it is (a) "commercial or financial," (b) "obtained from a person," and (c) "privileged or confidential." 5 U.S.C. § 552(b)(4). DOE's attempt to use the exemption to prevent disclosure of the credit subsidy cost estimates and other terms of the loan guarantee is an overly broad application of Exemption 4 and does not comport with the law or the facts. The credit subsidy cost estimates and loan guarantee terms fail to qualify under Exemption 4 because they are neither "obtained from a person," nor "privileged or confidential."

1. DOE Fails to Establish That the Credit Subsidy Cost Estimates Were Obtained from a Person.

If information was generated by the government, it cannot fall within Exemption 4. *Grumman*, 425 F.2d at 582. As outlined in the relevant statutory provisions of the loan guarantee program and the disclosed term sheets, the credit subsidy cost estimates originated with DOE and were subsequently reviewed and finalized by the Office of Management and Budget ("OMB"). The credit subsidy fee estimates were not obtained from the loan guarantee applicants (the "Applicants") themselves and therefore fall outside the exemption.

The law and procedure of the loan guarantee program, both as articulated in the statutes and as repeated on the "term sheets" issued to the Applicants, demonstrates that the process of generating credit subsidy cost estimates is a governmental function. The Federal Credit Reform Act of 1990 ("FCRA") governs federal credit programs, including the loan guarantee program. *See* OMB, Circular No. A-11, Section 185.1, 3 (2008); *see also* 2 U.S.C. § 661 (2006) ("outlining the purposes of the legislation"). The relationship between credit subsidy cost estimates and FCRA is clearly expressed in the Applicants' term sheets, which provide "[t]he credit subsidy cost for the DOE Guarantee is the 'cost of a loan guarantee,' as set forth in Section 502(5)(C) of [FCRA]." *See* Dkt 11-9, 10 and 11. The relevant language in FCRA defines the cost of a loan guarantee as

> "the net present value, at the time when the guaranteed loan is disbursed, of the following estimated cash flows: (i) payments by the Government to cover defaults and delinquencies, interest subsidies, or other payments; and (ii) payments to the Government including origination and other fees, penalties and recoveries; including the effects of changes in loan terms resulting from the exercise by the guaranteed lender of an option included in the loan guarantee contract, or by the borrower of an option included in the guaranteed loan contract."

2 U.S.C. § 661a(5)(C) (2006).

These FCRA provisions are implemented by DOE, which generates the credit subsidy cost estimates using the OMB Credit Subsidy Calculator 2. *See* OMB Circular No. A-11, Section 185.5, at 13-14; for a more detailed discussion of the variables in the calculation *see* Cong. Budget Off., Pub. No. 4195, *Federal Loan Guarantees for the Construction of Nuclear Power Plants* 5 (2011) (http://www.cbo.gov/doc.cfm?index=12238, visited January 27, 2012). The Applicants' term sheets reflect DOE's role: "[t]he final Credit Subsidy Cost amount shall be determined by DOE in its sole discretion . . . ." *See* Dkt 11-9, 10 and 11.

Before the credit subsidy cost estimates can be rendered by DOE, FCRA requires an additional step: the estimates must be reviewed and finalized by OMB. OMB Circular No. A-11, Section 185.5 at 13 ("Under section 503(a) of FCRA, OMB has the final responsibility of determining subsidy estimates, in consultation with the agencies."). FCRA specifically provides that "the Director [of OMB] shall be responsible for coordinating the estimates . . . [and] shall consult with the agencies that administer direct loan or loan guarantee programs." 2 U.S.C. § 661b(a) (2006). The term sheets issued to the Applicants also confirm that the credit subsidy cost estimates are ". . . subject to review and approval by the Office of Management and Budget prior to the Financial Closing Date." *See* Dkt 11-9, 10 and 11.

Thus, the government is unequivocally the source of the credit subsidy fees. Indeed, the Applicants admit as much in the *Vaughn* Index. Georgia Power Company states, "[t]he credit subsidy cost estimate provided to GPC was *developed* [by DOE] from the detailed due diligence information prepared by GPC and submitted to DOE." Vaughn Index Appendix A at 3 (emphasis added). Oglethorpe Power Corporation ("OPC") states, "[t]he Credit Subsidy Information provides sensitive information regarding *DOE's preliminary estimates* of one of the costs to OPC of receiving the DOE loan guarantee." Vaughn Index Appendix A at 5 (emphasis added). Municipal Electric Authority of Georgia ("MEAG") states, "[t]he Credit Subsidy Information provides sensitive information regarding *DOE's preliminary estimates* of one of the costs to OPC of receiving the DOE loan guarantee." Vaughn Index Appendix A at 7 (emphasis added).

DOE cannot make its credit subsidy fee estimates the property of the Applicants simply by characterizing them as summaries or reformulations. DOE MSJ at 18. While DOE is correct that the court in *Judicial Watch* held that documents containing "summaries or reformulations of information supplied by a source outside of the government" are protected under Exemption 4

(DOE MSJ at 18), this holding is immaterial. In *Judicial Watch*, the information supplied by the private party could be extrapolated from the information withheld by the government. *Judicial Watch v. Export-Import Bank*, 108 F. Supp. 2d 19, 29 (D.D.C. 2000) (providing that the information "could be used by someone with a knowledge of how the Bank computes its premiums to determine the dollar amount of the insured's overall transaction and/or individual shipments."); *see also Gulf & Western Industries, Inc. v. U.S.*, 615 F.2d 527, 529-30 (D.C. Cir. 1979) ("It is apparent that the [agency] deleted portions of the report which contained information supplied by [the applicant] *or from which information supplied by [the applicant] could be extrapolated*.")(emphasis added). The credit subsidy fee estimates offer no such opportunity,[4] as they are based upon a myriad of inputs. *See* OMB Circular No. A-11, Section 185.5 (providing that the credit subsidy cost estimates are percentages generated by DOE with the government's OMB Credit Subsidy Calculator 2 which reflect the government's risk of the loan guarantee by evaluating payments, defaults, delinquencies, and other measures related primarily to the loan guarantee rather than the Applicants' information) *and* 2 U.S.C § 661a (5)(C). While the Applicants may have provided certain underlying information used in the government's calculations, DOE makes no claim that this information can be extrapolated from a single credit subsidy fee estimate.

Thus, the credit subsidy fee is a product of government analysis – not reformulation – and is accordingly not protected by Exemption 4. *See Philadelphia Newspapers Inc.*, 69 F. Supp. 2d

[4] Moreover, the ability to extrapolate may not be sufficient to place information into the "summary or reformulation" category. *See Bloomberg L.P. v. Board of Governors of the Fed. Reserve Sys.*, 601 F.3d 143, 148 (2d Cir. 2010) (emphasis in original)("[t]he fact that information *about* an individual can sometimes be inferred from information *generated within an agency* does not mean that such information was *obtained from* that person within the meaning of FOIA.")

63, 67-68 (D.D.C. 1999)("An audit is not simply a summary or reformulation of information supplied by a source outside the government. It also involves analysis, and the analysis was prepared by the government."). Because DOE fails to establish that the credit subsidy fee estimates were obtained from a person, these estimates should be released.

2. DOE Fails to Establish That the Other Loan Guarantee Terms Were Obtained From a Person.

The other loan guarantee terms are likewise not entitled to protection under Exemption 4 as they were not obtained from a person, but rather were generated by DOE. *See Grumman,* 425 F.2d at 582 ("If information was generated by the government, it cannot fall within Exemption 4.").

In every case involving Exemption 4 (including those relied upon by DOE), agencies are required to provide a specific, factual basis establishing that redacted information was actually obtained from a person. *See, e.g., In Defense of Animals v. National Institutes of Health*, 543 F. Supp. 2d 83, 102-03 (D.D.C. 2008) (finding that information did not fall under FOIA Exemption 4 because "Defendants have nowhere demonstrated that the contractor was the source of the information in the first instance and not the agency."). With limited exceptions DOE does not attempt to show that the Applicants were the source of each redacted item. Instead, DOE offers only a blanket, conclusory assertion: "The withheld information has been provided to DOE by Georgia Power, Oglethorpe, and MEAG . . ." DOE MSJ at 17-18. DOE is required to do more. *See In Defense of Animals,* 543 F.Supp 2d at 102-3.

DOE also notes that "courts have held that documents containing summaries or reformulations of information supplied by a source outside the Government are protected under Exemption 4." DOE MSJ at 18 (internal quotations omitted). While true, DOE fails to explain the relevance of this claim. Although the Applicants submitted a large volume of commercial

and financial information to DOE during the application and negotiation process, DOE does not provide a factual basis for its assertion that the redacted items actually summarize or reformulate the Applicants' information. In the absence of specific facts showing that a redacted item is obtained from an Applicant, there is no basis to conclude that the withheld information contains anything other than the terms and conditions of the loan guarantee. *See Vaughn* Index Appendix A at 1 ("The Confidential Commercial Information represents specific terms and conditions that were negotiated by the Companies and DOE."). And, as Section 1703 of Title XVII of the Energy Policy Act of 2005 makes clear, it is the Secretary of Energy – not the Applicants – who makes loan guarantees for qualified projects "on such terms and conditions as the Secretary determines." 42 U.S.C. § 16512.

For the foregoing reasons, DOE failed to establish that the withheld information was "obtained from a person." Thus, the information should be released.

3. DOE Fails to Establish That the Credit Subsidy Cost Estimates And Other Loan Guarantee Terms Are Confidential.

As noted above, "confidential" information is any "commercial or financial matter" whose disclosure would likely "cause substantial harm to the competitive position of the person from whom the information was obtained." *Nat'l Parks I*, 498 F.2d at 770 (emphasis added). Additionally, "impairment of an agency's ability to carry out its statutory purpose is sufficient cause to justify a finding of confidentiality within the context of Exemption 4." *Judicial Watch, Inc. v. Export-Import Bank*, 108 F. Supp. 2d 19, 30 (D.D.C. 2000). DOE fails to meet its burden of showing that each redacted item is confidential within the meaning of Exemption 4.

a. DOE Fails to Establish That Disclosure of the Credit Subsidy Cost Estimates and other Loan Guarantee Terms Would Result in Competitive Harm to the Applicants.

DOE argues that competitive harm to the Applicants is likely to result from disclosure of the credit subsidy cost estimates and other loan guarantee terms. It is well established that the opponent of disclosure — not the requester — bears the burden of proving that substantial competitive harm is likely to result. *McDonnell Douglas Corp. v. U.S. Dept. of the Air Force* 375 F.3d 1182, 1195 (D.C. Cir. 2004). The opponent's burden is heightened, as courts "have viewed [Exemption 4] arguments with skepticism . . . ." *Ctr. for Pub. Integrity v. DOE*, 191 F. Supp. 2d 187, 194 (D.D.C. 2002). Thus, Exemption 4 does not apply where the damage as a result of the release of confidential information is only speculative, and opponents of disclosure must support their claims with "specific factual or evidentiary material," providing more than "mere conclusory opinion testimony." *Nat'l Parks II*, 547 F.2d at 679. DOE has failed to meet its burden.[5]

DOE argues generally that disclosure of the loan terms will harm the Applicants in four ways. First, DOE contends that if the loan guarantees "were to evaporate," the Applicants would compete for "alternative sources of financing" with "other parties seeking capital." DOE MSJ at 21-23. DOE speculates that disclosure of the loan guarantee terms and credit subsidy fee estimates would adversely affect the Applicants' ability to negotiate favorable financing terms in any alternative financing scenario. Second, DOE asserts that disclosure would allow Applicants' competitors to "better evaluate [their] financing alternatives. . . ." *Id.* at 21. Third, DOE argues that disclosure of the withheld information could "creat[e] confusion in the credit market and

[5] DOE's reliance on *Nat'l Parks II* for the proposition that it is "'virtually axiomatic' that disclosure of commercial and financial information is likely to cause competitive harm in light of the 'extremely detailed and comprehensive nature of the financial records requested.'" is misplaced. DOE MSJ at 20. The information determined to be exempt from disclosure in *National Parks II* was comprehensive and detailed financial information. The negotiated terms and conditions of the loan guarantees at issue here are qualitatively different from the extremely detailed and comprehensive nature of the financial records requested in *National Parks II*.

present[] difficulties . . . in future public debt offerings." *Id.* at 22. Last, DOE argues that disclosure of the credit subsidy cost estimates and loan guarantee terms would result in other lenders demanding restrictions and costs similar to those requested by the government. *Id.* at 22-23.

All of DOE's arguments fail to adequately consider the unique purpose of the federal loan guarantees: to encourage private financing for energy projects which otherwise would be difficult or impossible to obtain. *See* Cong. Budget Off., Pub. No. 4195, *Federal Loan Guarantees for the Construction of Nuclear Power Plants* 1 (2011) (http://www.cbo.gov/doc.cfm?index=12238, visited January 27, 2012) *and* DOE MSJ at 24 ("d]ue to the risks associated with high technology, such projects are typically unable to obtain conventional private financing . . ."). Each argument relies upon the presumption that alternative financing arrangements, apart from federal the loan guarantee program, exist. This is simply not the case.[6]

DOE's arguments also suffer additional flaws. The arguments that (1) the disclosure of the loan terms would significantly undermine the Applicants' negotiating position in an alternative financing transaction, and (2) the disclosure would allow Applicants' competitors to

[6] Even if alternative financing arrangements existed, disclosure of the credit subsidy fee does not place the Applicants at a competitive disadvantage. Instead, courts recognize that the disclosure of negotiated contract prices are the "cost of doing business with the government." *Racal-Milgo Govt. Syst., Inc. v. Small Bus. Admin.*, 559 F. Supp. 4, 6 (D.D.C.). This makes sense, as each of the Applicants acknowledges the great benefit that comes from receiving government loan guarantees. *See, e.g.,* Appendix A of Vaughn Index at 2 ("GPC has applied for federal loan guarantees for the construction of the Vogtle Units in order to obtain low borrowing costs and committed financing . . . . [even though] GPC found it necessary to agree to certain proposed terms in the CC that differ from the terms of . . . transactions in the private market.") *and* Appendix A of Vaughn Index at 7 ("MEAG agreed with the DOE to additional limitations on its ability to use proceeds that it would not provide to other lenders . . . as a result of the special qualities of the DOE Loan Guarantee Program."). Such a benefit must come at a cost.

better evaluate financing alternatives, have previously been raised by DOE in their Cross-Motion for Partial Summary Judgment in reference to the term sheets. *See* DOE Cross-Mot. (Dkt No. 12) at 14-21. These arguments continue to be impermissibly speculative and fail to reference specific factual or evidentiary material. *See* SACE Resp. and Reply (Dkt No. 11) at 11-18. As such, they cannot support the Exemption 4 withholdings.

For example, Georgia Power Company asserts that *in the event* it were forced to seek alternative financing, and "*in the event* [it] was forced to accept some or all of [the loan guarantee] provisions … [its] operation and financial flexibility would be negatively impacted *which, in turn, could* negatively impact GPC's cost of borrowing, financial position and liquidity." *Vaughn* Index Appendix A at 2 (emphasis added). Presumably, this would cause competitive harm to Georgia Power, but no less than three assumptions are required to make that conclusion. Courts are reluctant to recognize such remote harm that is not directly attributable to the disclosure of the information. *See Nat'l Parks II*, 547 F.2d at 679 (stating that Exemption 4 does not apply where damage resulting from the release of confidential information is only speculative). Conjecture, without "specific factual or evidentiary material," fails to meet DOE's burden of showing a likelihood of substantial competitive harm resulting from a competitor's use of the information.

Moreover, Georgia Power Company and the other Applicants claim that if the loan guarantee terms were disclosed, the information would allow competitors to better evaluate financing alternatives. *See* DOE MSJ at 21; *Vaughn* Index Appendix A at 2. But DOE provides no factual or evidentiary basis from which to conclude that a competitor could glean useful information from DOE's loan guarantee terms and conditions. *Id.* Even if a competitor could use such information to "better evaluate financing alternatives," this would not result in

"competitive harm" to the Applicants because competitors' mere benefit from disclosure is immaterial under Exemption 4. The relevant inquiry is whether the Applicants' competitors will affirmatively use the information to harm the Applicants' competitive position. *Gilda Indus. v. U.S. Cust. and Border Bureau*, 457 F. Supp. 2d 6, 9 (2006); *Pub. Citizen*, 704 F.2d at 1291 n.30 (explaining that the important question for determining competitive harm is whether the harm flows from a *competitors'* affirmative use of the information). This seems unlikely, especially with regard to the credit subsidy fee. As Georgia Power concedes, it probably "has the strongest credit profile of the entities seeking nuclear loan guarantees." *Vaughn* Index at 3. Its credit subsidy fee estimate cannot simply be adopted by its competitors with riskier credit profiles. DOE's argument is legally insufficient because it fails to cite to any "specific factual or evidentiary material" to show that competitors would affirmatively use the information to harm Applicants' competitive position. *Nat'l Parks II*, 547 F.2d at 679.

The argument that disclosure of the withheld information could "creat[e] confusion in the credit market and present[] difficulties . . . in future public debt offerings" is simply not relevant. As noted above, to justify Exemption 4 withholdings, courts look to whether the Applicants' competitors will affirmative use the information to harm the Applicants' competitive position. *See Gilda Indus.*, 457 F. Supp. 2d at 9; *Pub. Citizen*, 704 F.2d at 1291 n.30 (explaining that the important point for competitive harm is whether the harm flows from a *competitors'* affirmative use of the information). Confusion in the credit market plays no role in the inquiry.

Finally, the argument that disclosure of the credit subsidy cost estimates and loan guarantee terms would result in other lenders demanding restrictions and costs similar to those requested by the government is wholly unsupported. *See* DOE MSJ at 22-23. The credit subsidy fee estimate reflects the *government's* risk of the loan guarantee, as calculated pursuant to federal

regulations. *See* OMB Circular No. A-11, Section 185.5 and 2 U.S.C § 661a (5)(C). DOE offers no explanation as to why private lenders would base any loan terms on such a calculation. Indeed, it offers no basis for the theory that private lenders would extract any of the same concessions from the Applicants.

For all the above reasons, DOE has failed to meet its burden of proving that disclosure of the loan guarantee terms and credit subsidy fee estimates will cause competitive harm to the Applicants.

b. Disclosure of the Credit Subsidy Cost Estimates and Loan Guarantee Terms Will Not Impair the Government's Ability to Implement the Loan Guarantee Program

While not dispositive, the government's interest in the effectiveness of its programs is another factor considered when evaluating whether the disputed information is confidential. *See Pub. Citizen*, 209 F. Supp. 2d at 52. At the outset, SACE notes that DOE improperly assumes throughout its government impairment argument that the information sought is "confidential." DOE MSJ at 24-25. SACE does not concede, and DOE has not shown, that the information sought is "confidential."

DOE first claims that "in enacting the loan guarantee program, Congress envisioned a cooperative relationship between DOE and business." DOE MSJ at 24. DOE then speculates that disclosure of the withheld information *could* impair the Applicants' profitable execution of the Vogtle Project, which, in turn, *could* impair DOE's fulfillment of its mission to work with non-federal entities. To support these assumptions, DOE cites only to one paragraph in one declaration. *Id.* The agency's claim of impairment must be supported by a "detailed factual justification," not just generalized or conclusory affidavits. *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 830 F.2d 278, 283 (D.C. Cir. 1987). Indeed, even if this limited justification were sufficient, it still does not show significant harm to the loan program itself.

The postulated tangential harm to the Vogtle Project cannot overcome the pro-disclosure mandate of FOIA. *See Critical Mass*, 830 F.2d at 283.

Next, DOE makes the same arguments it made previously in its Cross-Motion for Partial Summary Judgment in reference to the term sheets (*see* DOE Cross-Motion [Dkt No. 12] at 21-23), namely that prospective applicants may be discouraged from participating in the federal loan guarantee program for fear of disclosure of the terms and conditions of the loan guarantees and possible complications with third party negotiations. In turn, this would allegedly handicap DOE's ability to carry out Congress' purpose in promoting clean energy projects. This argument is entirely speculative, in contradiction to this Court's requirement that impairment of government programs must be established with specific evidence, not conclusory or speculative assertions. *Comstock Int'l, Inc. v. Exp.-Imp. Bank*, 464 F. Supp. 804, 807 (D.D.C. 1979).

Beyond the speculative nature of its assertions, DOE's argument illogically asserts that disclosure would adversely impact the loan guarantee program because loan applicants are "typically unable to obtain conventional private financing" and are faced with a demanding and competitive application process. DOE MSJ at 24-25. On its face this argument makes little sense. The prevalent competition among loan-seekers and the lack of available alternative sources of funding lead to the obvious conclusion that loan-seekers will generally accede to whatever terms they must in order to raise capital from the government. Disclosure may be undesirable but it will not obstruct the purposes of the government program. *See, e.g., Buffalo Evening News, Inc. v. Small Business Administration*, 666 F. Supp. 467 (W.D.N.Y. 1987) (distinguishing the type of case in *Judicial Watch* and *Public Citizen*, where a loan entity is "one of many highly competitive government-supported credit unions, whose ability to effectively compete would be irreparably impaired if the loan status records were disclosed," and finding

that documents were not privileged or confidential for purposes of Exemption 4 because the agency was the only source for low cost debt financing, and thus prospective applicants had no equivalent alternative financing source.) It is highly unlikely that "companies will stop competing for Government contracts" if disclosure is mandated here. *See Racal-Milgo Govt. Syst. v. SBA*, 559 F. Supp. 4, 6 (D.D.C. 1981) (providing that disclosure of certain contract terms is the "cost of doing business" with the government.).

If the government wishes to establish a program wherein taxpayers support private nuclear development, it does so with the knowledge that FOIA exemptions are to be construed narrowly. *Dep't of the Air Force v. Rose*, 425 U.S. 352, 361 (1976). Against this legal backdrop, and in support of the public interest, disclosure of "[a]dequate information enables the public to evaluate the wisdom and efficiency of federal programs and expenditures." *Racal-Milgo*, 559 F. Supp. at 6.

For all the above reasons, DOE has failed to meet its burden of proving that disclosure of the loan guarantee terms and credit subsidy fee estimates will cause harm to DOE's ability to implement the loan guarantee program. Accordingly, the withheld information must be released.

C. DOE Improperly Withheld Information Pursuant to Exemption 5.

Exemption 5 protects inter-agency or intra-agency memoranda which are "both pre-decisional and deliberative." *Ancient Coin Collectors Guild v. U.S. Dept. of State*, 641 F.3d 504, 512 (D.C.Cir. 2011) (quoting *Mapother v. Dep't of Justice*, 3 F.3d 1533, 1537 (D.C.Cir 1993). Because DOE fails to provide reasonably specific justifications for withholding in its *Vaughn* Index, SACE must speculate as to whether the information withheld satisfies these two requirements. In general, the required narrow construction of the exemption establishes a presumption that the information was improperly withheld. *See Vaughn*, 484 F.2d at 824 (stating

that given that the requesting party cannot know the exact content of the information withheld, the best it "can do is argue the exception is very narrow and plead that the general nature of the documents sought make it unlikely that they will contain" information of the type that exemption protects.)

The requested information is not pre-decisional. Information loses the status of pre-decisional if it is "adopted, formally or informally, as the agency position on an issue[,] or is used by the agency in its dealings with the public." *Horowitz v. Peace Corps*, 428 F.3d 271, 276 (D.C.Cir. 2005) (quoting *Coastal States Gas Corp*., 617 F.2d at 866). The conditional commitment letters executed by the Applicants represent a formal agency adoption of policies relating to the terms and conditions of the loan guarantees. *See* 42 U.S.C. § 16512. To the extent that the redacted information reflects these adopted policies, it must be segregated and released.

Moreover, the requested information is not deliberative. Factual information "usually cannot be withheld under exemption 5" unless the information reflects "discretion and judgment calls." *American Coin Collectors Guild*, 641 F.3d at 513. The charts and analyses redacted pursuant to Exemption 5 likely contain facts. And, DOE never asserts that these facts reflect discretion and judgment. Therefore, to the extent the redacted documents contain facts segregable from the deliberative process, they must be released.

IV. Conclusion

The Department of Energy fails to comply with the requirements of FOIA by offering blanket assertions that do not adequately justify the agency's decision to withhold substantial amounts of information from the requested documents. Moreover, the agency has erroneously withheld this information because it does not fall within the proffered narrow FOIA exemptions.

For the foregoing reasons, DOE's Motion for Summary Judgment should be denied, SACE's Cross Motion for Summary Judgment should be granted, and DOE should be ordered to immediately release the requested information.

Dated: January 27, 2012

Respectfully submitted,

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