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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING BOARD PANEL

Before Administrative Judges:
Alan S. Rosenthal, Presiding Officer
Dr. Richard F. Cole, Special Assistant

In the Matter of	:	**Docket No. 40-9027-MLA**
CABOT PERFORMANCE MATERIALS, Reading, Pennsylvania	:	**Re: Site Decommissioning Plan**

LICENSEE'S ANSWER TO REQUEST FOR A HEARING OF JOBERT, INC. AND METALS TRUCKING, INC.

I. INTRODUCTION

On December 10, 1998, Jobert, Inc. ("Jobert") and Metals Trucking, Inc. ("MTI") filed a joint Request for a Hearing ("Request") pursuant to 10 CFR § 2.1205(d) in connection with the U.S. Nuclear Regulatory Commission's ("NRC") review of Cabot Performance Material's ("Cabot") Reading, Pennsylvania, Site Decommissioning Plan. Since that time, the NRC has granted several unopposed motions filed by Cabot to permit the parties to gather information and settle the matter outside of a hearing. The Presiding Officer granted the last extension by Memorandum and Order dated January 18, 2000, extending the deadline for submittal of Cabot's

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Answer to the Request until April 3, 2000. Since Jobert, MTI, and Cabot have been unable to reach a settlement, Cabot hereby files its Answer to Jobert's and MTI's Request.[1/]

As is demonstrated below, the Request does not meet the requirements of 10 CFR §§ 2.1205(e) and (h) because it fails to show an interest sufficient to meet applicable standards for standing and fails to identify an "area of concern" germane to the proceeding. Accordingly, the Request should be denied.

II. BACKGROUND

The NRC issued a Source Material License, No. SMC-1562 (the "License"), to Cabot to possess uranium and thorium at a site in Reading, Pennsylvania. This site is referred to by Jobert and MTI as the "American Chain and Cable" property. Request at ¶ 2. On August 28, 1998, Cabot filed with the NRC a site decommissioning plan ("SDP") for the Reading site. Notice of the SDP was published in the *Federal Register* on October 28, 1998. 63 Fed. Reg. at 57715-16. As noted in the *Federal Register*, the SDP concluded that the long-term doses from the contaminated material at current levels, without additional decommissioning, meet NRC's requirements for release of the site for unrestricted use. Id.

On December 10, 1998, Jobert and MTI filed their joint Request for a Hearing. Their allegations of injury-in-fact were based, at that time, upon MTI's ownership of the American

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1/ Cabot has made significant progress towards settlement with the Redevelopment Authority of the City of Reading and the City of Reading—the other parties who filed Requests for a Hearing in this proceeding. On March 31, 2000, Cabot filed an unopposed motion for an additional extension of time to complete the settlement between Cabot, the Redevelopment Authority, and the City. By Memorandum and Order dated April 3, 2000, the Presiding Officer granted that extension request.

Chain and Cable property and Jobert's "former" ownership and current "security interest" in the property. Request at ¶¶ 6, 12, 16.

On March 13, 2000, however, the Redevelopment Authority of the City of Reading filed a Declaration of Taking in the Court of Common Pleas of Berks County, Pennsylvania. (The Declaration of Taking and Notice to MTI of that filing are attached as Exhibit A.) The Declaration condemns the fee simple absolute title of the American Chain and Cable property, transferring title from MTI to the Redevelopment Authority, as of the date of its filing. Accordingly, MTI ceased to be owner of the property that is the subject of this proceeding as of March 13, 2000.

Finally, on March 21, 2000, Cabot filed with the NRC a revised Decommissioning Plan and a Radiological Assessment. These documents were requested by the NRC in a meeting held on December 15, 1999, between NRC Staff and Cabot. The revision confirms, based on additional dose analyses, that the potential radiation dose to a member of the public is less than 25 millirem per year ("mrem/y") and that no further decommissioning is required.

III. ARGUMENT

A hearing on an application for a license amendment approving an SDP is not mandatory. Rather, the NRC will only grant a hearing if one is requested by a party who can demonstrate, among other things, that it has standing in accordance with Section 189(a) of the Atomic Energy Act ("AEA"), 42 U.S.C. 2239(a), and 10 CFR §§ 2.1205. See In re Northeast Nuclear Energy Co. (Millstone Nuclear Power Station, Unit #3), LBP-98-22, 48 NRC 149 (September 2, 1998) aff'd NNECO, CLI-98-20, 48 NRC 183 (October 23, 1998); Babcock & Wilcox (Apollo,

Pennsylvania Fuel Fabrication Facility), LBP-93-4, 37 NRC 72, 80-81 (1993); Final Subpart L Rule, 54 Fed. Reg. 8269, 8272 (February 28, 1989) (to be codified at 10 CFR Part 2).

Under Subpart L, a party requesting a hearing has the burden to demonstrate that its request should be granted. Babcock & Wilcox (Pennsylvania Nuclear Services Operations, Parks Township, Pennsylvania), LBP-94-4, 39 NRC 47, 48 (1994). To meet that burden, 10 CFR § 2.1205(e) requires that a request for hearing describe "in detail": (1) the interest of the requestor in the proceeding; (2) how that interest may be affected by the results of the proceeding, including the reasons why the requestor should be permitted a hearing, with particular reference to the factors set out in § 2.1205(h); (3) the requestor's "areas of concern" about the licensing activity that is the subject matter of the proceeding; and (4) the circumstances establishing that the request for a hearing is timely in accordance with § 2.1205(d).[2/]

The Presiding Officer must review the Request to determine if the requestor meets the "judicial standards for standing," taking into consideration: (1) the nature of the requestor's rights under the AEA; (2) the nature and extent of the requestor's property, financial, or other interests in the proceedings; and (3) the possible effect of any order that may be entered in the proceeding upon the requestor's interest. 10 CFR § 2.1205(h). See also Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 6 (1996).

The "irreducible constitutional minimum" requirements for standing are that the litigant: (1) suffer an "injury-in-fact" within the "zone of interests" arguably protected by the governing statute that is "concrete and particularized and . . . actual or imminent, not conjectural or

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2/ These standards also were set out in the October 28, 1998 *Federal Register* notice. 63 Fed. Reg. at 57716.

hypothetical;" (2) that there is a causal connection between the alleged injury and the action complained of; and (3) that the injury will be redressed by a favorable decision. Bennett v. Spear, 520 U.S. 154, 167 (1997). See generally, Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). See also In re NNECO, LBP-98-22, 48 NRC 149; Yankee Atomic Electric Co. (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61, 68 (1996).

The Request filed by Jobert and MTI does not provide a basis for granting a hearing because it fails to demonstrate that they have standing. Both Jobert and MTI have failed to allege any particularized injury-in-fact, and have relied upon speculative and hypothetical future circumstances to support their Request. In addition, the Requestors have failed to identify areas of concern that are germane to the proceeding.

A. Metals Trucking, Inc.

1. Standing

a. Absence of Particularized Injury-In-Fact

MTI's assertions are not sufficiently particularized to provide a basis for standing. Under 10 CFR § 2.1205(e) and well established NRC precedent, a party requesting a hearing must describe its interest and how that interest may be adversely affected "in detail" and with particularization. MTI alleges that it has an "obvious current property interest," "desires to protect that interest in a hearing," and has "concerns over liability" associated with the slag pile. Request at ¶ 12. It asserts that any NRC action that would restrict the use or development of the property would "substantially and adversely affect [its] desires to redevelop the Property or sell it." Request at ¶ 13. It also states that the presence of the slag, "even if there were no current restrictions placed by the NRC on the future use of the Property" would limit its options for

redevelopment. Id. at ¶ 14. Finally, it states that it is the "proper entity to inform the NRC" of potential future uses of the property. Id. at ¶ 15.

Even if MTI retained its ownership interest, MTI's allegations fail to particularize any aspect of Cabot's SDP that is deficient or violates applicable NRC requirements. Nor does MTI make any claim whatsoever relating to health, safety or environmental impacts associated with the licensed material in question. MTI's unspecified assertions that its ability to use or redevelop the land could be adversely affected by Cabot's SDP, does not provide the level of specificity required to demonstrate standing.

Regardless of the particularity of MTI's assertions, those assertions are now moot. On March 13, 2000, the Redevelopment Authority filed a Declaration of Taking in the Court of Common Pleas of Berks County, Pennsylvania. See Exhibit A. The Declaration condemns the fee simple absolute title of the American Chain and Cable property, transferring title from MTI to the Redevelopment Authority, as of the date of its filing. See Pa. Stat. Ann. tit. 26, § 1-402(a) (West 1999). Accordingly, MTI ceased to be owner of the property that is the subject of this proceeding as of March 13, 2000.[3/] In addition, the Declaration of Taking states that the Redevelopment Authority, not MTI, plans to redevelop the area pursuant to a Redevelopment Plan. See Exhibit A, ¶ 3. Since MTI now lacks an "obvious current property interest," its "desires to protect that interest in a hearing" are moot.

3/ MTI's exclusive and limited remedy to challenge the taking is to file a preliminary objection within 30 days of March 13, 2000. The filing of a preliminary objection does not re-vest any property right in MTI.

In addition, MTI's suggestion that it is the "proper entity" to inform the NRC of potential future uses is misguided. MTI fails to recognize that the SDP itself contains a section entitled "Potential Future Uses of Site" describing not only historical uses, but also current redevelopment proposals. Those proposals indicate that the site will be designated for "industrial/commercial and related uses." SDP, Rev. 1, at p. 1-14. MTI has identified no error, discrepancy or concern with this portion of the SDP and has, therefore, failed to provide the requisite level of specificity.

b. Absence of Real and Immediate Injury-In-Fact

Even if MTI retained an ownership interest in the Reading site, its allegations of injury also are highly speculative. Where there is no current injury and a party relies on the threat of future injury, the fact that one can imagine circumstances where a party *could* be affected is not enough. "[P]leadings must be more than an ingenious exercise in the conceivable." In re Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-82-43A, 15 NRC 1423, 1444 (1982) (quoting United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669, 688 (1973)). When the alleged injury has not occurred and "future harm is asserted, it must be 'threatened,' 'certainly impending,' and 'real and immediate.'" Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Unit 1), LBP-92-4, 35 NRC 114,121 (1992). See also Advanced Medical Systems, Inc. (Cleveland, Ohio), LBP-95-3, 41 NRC 195, 197 (1995). MTI states, in particular, that it "has concerns over liability, if any, that it might have" and that unspecified restrictions imposed by the NRC (or the lack thereof) could jeopardize its ability to use or redevelop the property. Request at ¶ 12. MTI's exercise in the conceivable is legally insufficient, especially considering the fact that it no longer owns the site.

c. Areas of Concern

In addition to the requirement to demonstrate that the requestor has standing, a request for a hearing also must describe in detail "the requestor's areas of concern about the licensing activity that is the subject matter of the proceeding." 10 CFR § 2.1205(e)(3). In considering a request, the Presiding Officer is directed to "determine that the specified areas of concern are germane to the subject matter of the proceeding." 10 CFR § 2.1205(h).

In adopting these requirements, the Commission explained that:

> This statement of concerns need not be extensive, but it must be sufficient to establish that the issues the requestor wants to raise regarding the licensing action fall generally within the range of matters that properly are subject to challenge in such a proceeding.

54 Fed. Reg. at 8272.

MTI's Request does not satisfy this requirement. There are no issues specifically identified as "areas of concern" and the Request does not identify any matters that properly are subject to challenge in this proceeding. There are no questions raised concerning compliance of the SDP with NRC requirements, or the adequacy of the SDP dose assessment.

The Request states that "Metals Trucking has concerns over liability, if any, that it might have . . . ." Request at ¶12. It goes on to express concern about "any action by NRC on the SDP that would restrict the use or redevelopment of the Property" (Request at ¶13) and that even if there were no current restrictions, the existence of the slag pile would limit and reduce the redevelopment alternatives and attractiveness to potential lenders (Request at ¶14).

Such statements do not identify matters that are subject to challenge in this proceeding because the Commission already has determined, through rulemaking, that it will authorize

release of a property for unrestricted use if the projected dose from such use is less than 25 mrem/y. 10 CFR § 20.1402.

The SDP presents Cabot's basis for concluding that, without further decommissioning, the potential radiological dose to a member of the public will be consistent with Section 20.1402.[4/] If this conclusion is found to be correct, the NRC will not seek to impose any restrictions on the use of the site. The MTI Request does not allege, let alone provide any basis for concluding, that the resultant dose would fail to meet the requirements of Section 20.1402. To the extent that one infers from these vague statements an area of concern that the SDP, although in compliance with Section 20.1402, will not provide safe property conditions with respect to low levels of contamination, the Request must be viewed as a challenge to Section 20.1402, which may not be challenged in any adjudication subject to Subpart L, absent specific authorization from the Commission. 10 CFR § 2.1239.

For these reasons, the MTI Request does not identify an area of concern within the range of matters that properly are subject to challenge in this proceeding, and the MTI Request should be rejected.

4/ The SDP and Radiological Assessment ("RA") show that the potential radiation dose to a member of the public is less than 25 mrem/y. In fact, the RA conservatively calculates the maximum radiation dose from exposure to the on-site slag to be in the range of 1.2 to 4.4 mrem/y TEDE for workers and trespassers. RA at p. 5-1. A maximum dose of 15.4 mrem/y was calculated for a resident gardener. RA at p. 1-4.

B. Jobert, Inc.

1. Standing

Jobert fails to describe "in detail" its interests and how those interests might be adversely affected by the proceeding, contrary to 10 CFR § 2.1205(e), and alleges no injury whatsoever, let alone the particularized, concrete, and imminent injury required under established NRC precedent. Even before the recent land condemnation by the Redevelopment Authority, Jobert no longer owned the property in question but apparently held a "purchase money mortgage" in the property which it "desires to protect . . . during a hearing before the NRC." Request at ¶¶ 6, 16. This appears to be the only statement of Jobert's interest set forth in its Request.[5/] Thus, its pleading is wholly inadequate to demonstrate its right to participate in this proceeding.

2. Areas of Concern

The Request on behalf of Jobert is not clear concerning its areas of concern. Giving the Request its most liberal reading, Jobert states no more than the concerns of MTI. As discussed above with respect to the MTI Request, this does not fulfill the requirement of Section 2.1205 for a statement of an area of concern that is subject to challenge in the current proceeding. For this reason, the request of Jobert also should be rejected.

5/ Under Pennsylvania law, the condemnation of the Reading site extinguishes Jobert's property interest; the Redevelopment Authority's taking of the Reading site by eminent domain will result in an award of damages to MTI, and Jobert may look only to these condemnation proceeds and to the mortgagor (MTI) for satisfaction. See Pa. Stat. Ann. tit. 26, § 1-521 (West 1999). Should MTI file a preliminary objection, Jobert may seek to protect its monetary interest by intervening in the proceeding in the event that MTI fails to represent adequately Jobert's interests regarding appropriate compensation. See Pa. Stat. Ann. tit. 26, § 1-506(b) (West 1999).

IV. CONCLUSION

For the reasons set forth above, Jobert and MTI lack standing and have failed to identify areas of concern germane to the proceeding under 10 CFR §§ 2.1205(e) and (h). Consequently, their Request For A Hearing must be denied.

Respectfully submitted,

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Attorneys for Cabot Performance Materials

Dated: April 3, 2000

EXHIBIT A

CONDEMNATION OF PREMISES 450-454 AND 466-490 TULPEHOCKEN STREET, IN THE CITY OF READING, BERKS COUNTY, PENNSYLVANIA by the REDEVELOPMENT AUTHORITY OF THE CITY OF READING	:	IN THE COURT OF COMMON PLEAS OF BERKS COUNTY, PENNSYLVANIA NO. 2000- 2292
OWNER OR REPUTED OWNER: METALS TRUCKING, INC.	:	EMINENT DOMAIN PROCEEDING IN REM

PROTHONOTARY'S OFFICE

DECLARATION OF TAKING

The Redevelopment Authority of the City of Reading (hereinafter called the "Condemnor") does hereby respectfully represent that:

RECORDER OF DEEDS
BERKS COUNTY, PA
'00 MAR 13 PM 2 26

1. The Condemnor is the Redevelopment Authority of the City of Reading, a body corporate and politic with its office address of City of Reading, Community Development Department, 815 Washington Street, Reading, Berks County, Pennsylvania 19601-3690.

COPY

2. This condemnation is authorized by the provisions of Section 12.1 of the Urban Redevelopment Law, Act of May 24, 1945, P.L. 991, as amended and supplemented, 35 P.S. § 1712.1.

3. The purpose of this condemnation is to acquire parcels of real estate with structures thereon erected as described in Exhibit A, City of Reading, Berks County,

Pennsylvania (hereinafter called the "Property") for the purpose of eliminating blight and redeveloping the area pursuant to the Redevelopment Plan. A description of the Property is attached hereto as Exhibit A and made a part hereof.

4. The Resolution authorizing the condemnation is attached hereto, marked Exhibit "B", and made a part hereof.

5. Condemnor hereby condemns, in fee simple title, the real estate described in Exhibit "A", attached hereto and made a part hereof.

6. A notice containing the legal description of the subject condemned real estate and a plan is being contemporaneously filed in the Office of the Recorder of Deed in and for Berks County, in accordance with Section 404 of the Eminent Domain Code, Act of June 22, 1964, P.L. 84, as amended, 26 P.S. § 1-404. The Eminent Domain Code governs the procedure to be followed in this case.

7. The original of the aforesaid Resolution and a description of the condemned Property may be inspected at the above address of Condemnor.

8. Condemnor has executed and has attached as Exhibit C hereto its bond, in unlimited amount and without surety, pursuant to Section 403(a) of the Eminent Domain Code, 26 P.S. § 1-403(a).

9. Said bond is made payable to the Commonwealth of Pennsylvania as obligee and is being filed for the use of the owner or owners of the property interests condemned, and is conditioned only on the Condemnor paying such damages as shall be determined by law.

WHEREFORE THE REDEVELOPMENT AUTHORITY OF THE CITY OF READING, Condemnor, prays that Your Honorable Court accept its bond as security for the within condemnation and determine just compensation as determined by law.

REDEVELOPMENT AUTHORITY OF
THE CITY OF READING

By: _____
Chair

By: _____
Francis M. Mulligan, Esquire
Timothy G. Dietrich, Esquire
KOZLOFF STOUDT
Attorneys for Condemnor
501 Washington Street, The Berkshire
Sixth Floor, Box 877
Reading, PA 19603-0877

111868-0001-83836

CONDEMNATION OF PREMISES 450-454 AND 466-490 TULPEHOCKEN STREET, IN THE CITY OF READING, BERKS COUNTY, PENNSYLVANIA by the REDEVELOPMENT AUTHORITY OF THE CITY OF READING	:	IN THE COURT OF COMMON PLEAS OF BERKS COUNTY, PENNSYLVANIA NO. 2000- 2292
OWNER OR REPUTED OWNER: METALS TRUCKING, INC. P.O. Box 508 Honeybrook, PA 19344	:	EMINENT DOMAIN PROCEEDING IN REM

NOTICE TO CONDEMNEE

TO: Metals Trucking, Inc.
P.O. Box 508
Honeybrook, PA 19344

Attached hereto find a true and correct copy of the Declaration of Taking as it relates to you which has heretofore been filed on the date stated in the filing herein in the Office of the Prothonotary of the Court of Common Pleas of Berks County, Pennsylvania, as of the above-captioned term and number whereupon a fee simple condemnation described in the said Declaration of Taking (a Drawing/Plan of which showing the area condemned being attached hereto) was condemned by Redevelopment Authority of the City of Reading.

You are further notified that if you desire to present any objection or defense to the power or the right of Redevelopment Authority of the City of Reading to condemn the fee simple absolute title, the sufficiency of the security, the procedure followed by Redevelopment Authority of the City of Reading or the Declaration of Taking, you are required to file Preliminary Objections

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within thirty (30) days after service of this Notice. All defenses and objections not so presented are waived.

KOZLOFF STOUDT

By: _____

Francis M. Mulligan, Esquire
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Timothy G. Dietrich, Esquire
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Attorneys for Condemnor

Dated: 13 March, 2000

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING BOARD PANEL

Before Administrative Judges:
Alan S. Rosenthal, Presiding Officer
Dr. Richard F. Cole, Special Assistant

In the Matter of	:	**Docket No. 40-9027-MLA**
CABOT PERFORMANCE MATERIALS, Reading, Pennsylvania	:	**Re: Site Decommissioning Plan**

CERTIFICATE OF SERVICE

I hereby certify that on this date copies of **LICENSEE'S ANSWER TO REQUEST FOR A HEARING OF JOBERT, INC. AND METALS TRUCKING, INC.** were served upon the following persons by facsimile and deposit in the United States mail, first class, postage prepaid and properly addressed:

Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
ATTN: Rulemaking and Adjudication Staff
Fax #: 301-415-1672

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Dated: April 3, 2000