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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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 RESPONSE TO JOBERT, INC.'S AND METALS TRUCKING, INC.'S RESPONSE TO LICENSEE'S AND NRC STAFF'S ANSWERS TO REQUEST FOR A HEARING

I. INTRODUCTION

By Order dated April 20, 2000, the Presiding Officer authorized Cabot Performance Materials ("Licensee") to file a response to the April 14, 2000 submission of hearing requestors Metals Trucking, Inc. ("MTI") and Jobert, Inc. ("Jobert"). MTI and Jobert's April 14 submission ("Supplemental Response") supplements its previous Request for Hearing. MTI and Jobert assert that they have legal standing to obtain a hearing on Licensee's Decommissioning Plan for the Reading, Pennsylvania site and that they have adequately identified "areas of concern" to be litigated.

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SECY-02

For the reasons discussed below, Licensee continues to believe that MTI and Jobert lack standing and have not properly identified areas of concern. Accordingly, their Request for Hearing, as supplemented, should be denied.

II. MTI AND JOBERT LACK STANDING

MTI and Jobert have made clear that their exclusive basis for asserting standing in this proceeding is their prior ownership and security interests, respectively, in the subject property and the economic harm that they allege will arise out of Licensee's proposed Decommissioning Plan. Throughout their Supplemental Response, MTI and Jobert repeatedly refer to their "economic interests"; possible effects on the "range of uses" of the property; "impending injury to the value" of the property; "unconsidered environmental harm that would limit the economic benefit" that could be secured "through alienation"; and the impacts on the "fair market value" of the property. Supplemental Response at 7. While these consequences are alleged to occur as a result of the proposed continued presence of the radioactive material on the site, MTI and Jobert do not allege that their safety and health, or the environment will be adversely affected in any way.

A. The Condemnation of the Property Has Not been Challenged by MTI or Jobert and the Title to the Property Is Not in a "State of Flux"

Licensee previously advised the Presiding Officer of the condemnation of the property in question by the Redevelopment Authority of the City of Reading ("Redevelopment Authority"),[1/]

1/ *See* Licensee's Motion for Extension of Time to Respond to the Request for a Hearing of Redevelopment Authority of the City of Reading (March 31, 2000) and Licensee's (continued...)

and stated that, as a result, MTI and Jobert's assertions of injury "are now moot." Licensee's Answer at 6. Licensee noted that, as of the date of the condemnation, legal title to the property transferred to the Redevelopment Authority. *Id.* at 6.

In their Supplemental Response, MTI and Jobert stated that "[t]itle to the Property is currently in a state of flux," that MTI has 30 days from the date of service of the Declaration of Taking to file preliminary objections, and that such objections were under consideration. Supplemental Response at 3. Because the "available remedies for an improper condemnation include revesting of title in the former owner . . ." MTI and Jobert concluded that the "issue of title . . . remains far from settled. *Id.* at 7.

Licensee has been advised by counsel for the Redevelopment Authority that the date of service of the Declaration of Taking was March 25, 2000. The 30-day period for filing preliminary objections therefore expired on April 24, 2000. Licensee also has been advised by counsel for the Redevelopment Authority that no such objections were filed. By statute, the exclusive manner in which a condemnee may challenge the Declaration of Taking is by filing preliminary objections within thirty (30) days of being served with notice of the condemnation. Pa. Stat. Ann. tit. 26 § 1-406(a)[2/]. Since no such filing was made on or before April 24, 2000, a challenge to the taking is now foreclosed, and MTI and Jobert have relinquished any rights that they may have had to contest the validity or propriety of the taking.

1/(...continued)
Answer to Request for a Hearing of Jobert, Inc. And Metals Trucking, Inc. (Licensee's Answer).

2/ Licensee's Answer incorrectly stated that the 30 day period began to run on March 13, the date of the Notice to Condemnee of the Declaration of Taking.

In addition, even if MTI or Jobert has a right to file preliminary objections, they would have no property rights that might provide a basis for a claim of standing to request a hearing. By statute, when the Redevelopment Authority filed the Declaration of Taking, title to the property passed to the condemnor. MTI ("condemnee") and Jobert ceased to have any legally cognizable interest in the property. Pa. Stat. Ann. tit. 26, § 1-402(a).[3/] In a case of governing authority, *Van Cure v. Hartford Fire Insurance Co.*, 253 A.2d 663 (Pa. 1969), the Pennsylvania Supreme Court held that a condemnee had no further interest in the property beyond the date on which the declaration and bond had been filed and that condemnee's sole continuing interest was limited to payment. *Id.* at 666. The *Van Cure* court rejected condemnee's argument that a condemnee continued to have an interest in the preservation of the property or that condemnee possessed interests so legally enforceable as to support an insurable interest. *Id.* Notwithstanding that the property might be revested in the condemnee and that the condemnee was in possession of the property at the time fire destroyed the premises, the Court denied the condemnee fire insurance proceeds because all risk of loss had passed, together with all property rights, to the condemnor. *Id.* at 667-68. Similarly, Pennsylvania's Commonwealth Court held that a condemnee had been divested of title by a taking and that a condemnee had insufficient interest to sustain standing to pursue a challenge to an agency decision in a land use appeal involving the

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3/ As mortgagee, Jobert is not a condemnee or a party to condemnation proceedings and may only intervene if it satisfies the court that its interests are not adequately represented by MTI. Pa. Stat. Ann. tit. 26, §§ 1-201(2), 1-506(b). Jobert's sole remedy is to look to MTI, whose obligation is to distribute damages to lienholders. Pa. Stat. Ann. tit. 26, § 1-521.

condemned property. *Gwynedd Properties Inc. v. Board of Supervisors*, 635 A.2d 714, 716 (Pa. Commw. Ct. 1993).

Since neither MTI nor Jobert hold any further legal interest in the property, they lack standing to challenge Licensee's Decommissioning Plan.

B. The NRC's Approval of Licensee's Decommissioning Plan Will Have No Effect on the Economic Interests of Requestors

MTI and Jobert also allege that "[c]ondemnation, even if it is successful, [which it now certainly is] does not insulate [them] from . . . injury, but rather increases the likelihood that [they] will suffer an injury in the immediate future." Supplemental Response at 7-8. They also state that the "fair market value of the Property may be decreased if the potential uses of the Property are limited, decreasing the amount the condemnor will be obligated to pay . . . ." *Id.* at 9.

MTI and Jobert have misstated the law in critically important respects. As discussed below, under Pennsylvania law, the fair market value to be paid by the condemnor is set as of the date of the condemnation and is not affected by subsequent events. Thus, any action taken by the NRC on Cabot's Decommissioning Plan will have no effect whatsoever on the fair market value determination in the condemnation proceeding.

MTI and Jobert premise their claims on their notion that their economic interests are at stake in these proceedings because purported environmental harms might affect a range of uses that might impact the future fair market value of the property. In Pennsylvania, however, it is fundamental that the fair market value of MTI's property interests will be calculated without regard to any event that occurs after the Declaration. Accordingly, Pennsylvania courts have

denied condemnees compensation for damages due to lost speculative economic opportunities, *Commonwealth v. Epley Land Co.*, 328 A.2d 913 (Pa. Commw. Ct. 1974) (condemnee who regained title to land was denied damages for post declaration increase in speculative construction costs) and *In Re: Right of Way for Legislative Route 1021*, 709 A.2d 939 (Pa. Commw. Ct. 1998) (condemnee who regained title denied damages for lost rents and for lost economic advantages in tenants' proposed but canceled improvements), for damages due to diminution of market values, *Pothos v. Redevelopment Authority*, 374 A.2d 96 (Pa. Commw. Ct. 1977) (condemnee who regained title denied damages for decreased market value), and for damages due to destruction of the premises after title passed, *Van Cure, supra* (condemnee in possession could not collect fire insurance proceeds on occurrence of fire loss to structure). Indeed, improvements that a condemnee chooses to make that increase the value of the property after a taking are irrelevant to the issue of taking. *Redevelopment Authority of Oil City v. Woodring*, 445 A.2d 724 (Pa. 1982). Since the only measure of damage is the fair market value of the property immediately before the taking, there is no event subsequent to March 13, 2000 that can affect MTI's or Jobert's current interests.

MTI is now entitled to, and limited to, just compensation for the taking of its property. Pa. Stat. Ann. tit. 26, § 1-601. Pennsylvania's Eminent Domain Code establishes the measure of just compensation as the difference between the fair market value of MTI's property interests immediately before the condemnation and the fair market value of MTI's property interests remaining immediately after the condemnation. Pa. Stat. Ann. tit. 26, § 1-602(a). Since the Redevelopment Authority took complete title, MTI will be compensated on the basis of the fair market value of the property immediately prior to the taking.

Based on the above, it is clear that MTI and Jobert will not incur any injury in fact arising out of NRC action on Licensee's Decommissioning Plan. The only interest identified by MTI and Jobert was their former interest as title and mortgage holders on the property. Given the condemnation, the failure of those two parties to challenge its validity, and the fact that the fair market value of the property is to be determined as of the date of the taking, no action the NRC may take on Licensee's Decommissioning Plan can adversely affect their interests. Thus, not only is there no injury in fact, but there is no way in which MTI's or Jobert's interests can be affected by the results of this proceeding. Neither approval, modification, nor rejection of Licensee's Decommissioning Plan will have any effect on their interests. Similarly, any alleged injury that might occur would not be redressable, in any fashion, by the NRC.

Accordingly, MTI and Jobert lack standing to request a hearing on Licensee's Decommissioning Plan and their Request for Hearing should be denied on that basis.

III. MTI AND JOBERT HAVE FAILED TO ADEQUATELY IDENTIFY AREAS OF CONCERN

As discussed in previous pleadings, a request for hearing 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 request[e]r wants to raise

> regarding the licensing action fall generally within the range of matters that properly are subject to challenge in such a proceeding.

Informal Hearing Procedures for Materials Licensing Adjudications, 54 Fed. Reg. 8269, 8272 (1989). MTI and Jobert's Supplemental Response does not meet even this minimal standard. Rather than identify areas of concern, the Supplemental Response states that if MTI and Jobert are granted a hearing, they "may" contest the sufficiency of Licensee's Decommissioning Plan and Radiological Assessment. Supplemental Response at 4. Two aspects of the Radiological Assessment are cited, but neither establishes that the issue the requestors "may" raise falls generally within the range of matters that are properly subject to challenge in this proceeding.

A. Consideration of Future Excavation/Movement of the Slag

The first area identified by MTI and Jobert is that "[t]he environmental condition of the Property may worsen if the radioactive slag is moved about the Property and left uncovered, therefore effecting [sic] the range of uses the Property may be put to and in turn affecting Metal Trucking and Jobert's interest in the property." Supplemental Response at 5. They state that this "represents the true realistic 'worst case' scenario that a proper SDP and Assessment should evaluate." Id. These statements do not suggest that the requestors seek a hearing on whether the SDP complies with applicable NRC requirements, and do not provide any basis for conducting a hearing.

There is no assertion that this so called "worst case" would result in a radiological dose that exceeds applicable NRC limits, and no basis is cited for concluding that there is a requirement to assess the "worst case" scenario. The applicable requirement is that "the residual radioactivity that is distinguishable from background radiation results in a TEDE to an average

member of the critical group that does not exceed 25 mrem (0.25 mSv) per year." 10 CFR § 20.1402. This does not call for an analysis of the alleged "worst case" scenario. To the contrary, the Commission has stated that compliance with the 25 mrem standard is to be calculated "based on prudently conservative exposure assumptions and parameter values." *Final Rule, Radiological Criteria for License Termination*, 62 Fed. Reg. 39058, 39068 (July 21, 1997). The Supplemental Response does not claim that a "prudently conservative" assumption would be that someone would move the slag. Neither does it provide any basis for its suggestion that moving the slag "may" increase the potential radiological dose.

MTI and Jobert state that "all of the exposure scenarios [alleged by Licensee] assume that the radioactive slag . . . will remain in place . . . ." Supplemental Response at 5. While this is literally true, it is also misleading. Licensee specifically considered the likelihood and potential consequences of both onsite and offsite movement of the slag. These subjects are specifically addressed in Section 3.4 of the Radiological Assessment (Revision 1), which explains that moving the material would result in a reduced average concentration of radiological constituents and lower potential doses. After a detailed evaluation, the Radiological Assessment concludes that:

> - Offsite relocation of the slag is very unlikely and would result in reduced exposure, concentration, and potential dose[; and]
>
> - On-site redistribution of slag would result in reduced exposure, concentration, and potential dose.
>
> Consequently, exposure scenarios appropriate for evaluation of this Site are confined to those that assume the material remains in place.

Radiological Assessment, Rev. 1, p. 3-8. Nothing MTI and Jobert assert provides any basis for believing that a hearing should be held to determine if the "environmental condition . . . may worsen if the radioactive slag is moved." Supplemental Response at 5. Consequently, this portion of the Supplemental Response does not establish that the issues MTI and Jobert want to raise fall within the range of matters that properly are subject to challenge in this proceeding.

B. Alleged Deficiencies in the ALARA Analysis

The other area of concern MTI and Jobert identify involves the Licensee's ALARA analysis. They state that it: (1) "does not assess an appropriate scope of potential future uses of the property"; (2) "does not assess viable and economically feasible alternatives to leaving a pile of radioactive slag on property owned by a third party or transporting the . . . slag . . . to nearby property owned by Cabot";[4/] and (3) "does not consider the equity of how any proposed alternative plans would impact the other parties with an interest in the property." Supplemental Response at 5 - 6.

MTI and Jobert misunderstand the nature of an ALARA analysis. ALARA analyses involve comparison of the costs of reducing radiation levels to the potential benefits. *See* 10 CFR § 20.1003. MTI and Jobert do not identify any alternative remediation method alleged to be reasonably achievable or any future uses that were not considered. Such general assertions are simply too vague to establish that MTI and Jobert seek to litigate any issue within the scope of this proceeding.

4/ The closest property to the Reading site owned by Licensee is its Boyertown facility located approximately 20-25 driving miles away. Licensee owns no property adjacent to the Reading site.

MTI and Jobert's assertions that "the equity of how any proposed alternative plans would impact the other parties" and that "the plan only evaluates cost effectiveness from Cabot's perspective" are not appropriate areas of concern for this proceeding. ALARA analysis has nothing to do with who pays for the planned remedial action. The ALARA calculation would be the same if Cabot owned the Reading site or if any other party was the licensee. The NRC Staff has identified a method for conducting ALARA analyses in Draft Regulatory Guide DG-4006, issued for interim use. *Supplemental Information on the Implementation of the Final Rule on Radiological Criteria for License Termination*, 63 Fed. Reg. 64132 (Nov. 18, 1998). Section 3.1 compares the cost of remedial measures to the monetary value of reduced radiological dose to the public, as established in NUREG/BR-0058, Revision 2, November 1995 and NUREG-1530, December 1995. The Commission cited these same references in the Statements of Consideration accompanying adoption of the Radiological Criteria for License Termination. 62 Fed. Reg. at 39065. MTI and Jobert do not assert any failure to meet this guidance.

Licensee's conclusion that the SDP meets the ALARA requirement is consistent with the Commission's observation in the Statements of Consideration for 10 CFR § 20.1402 that "removal of soil to achieve dose levels below the 25 mrem/y dose criterion is generally unlikely to be cost-effective." 62 Fed. Reg. at 39066. In fact, Licensee conducted such a site-specific ALARA analysis and determined that the dollar value of the population dose due to the residual radioactivity is $2,200. *See* Radiological Assessment, Rev. 1, pp. 6-3, 6-4. Licensee concluded that "no remedial action could result in a significant dose reduction for a cost as little as $2,200." *Id.* at 6-4. MTI and Jobert have not established that they seek to raise any issue regarding this conclusion.

In short, neither of the purported areas of concern mentioned by MTI and Jobert establishes that they seek to raise any issue within the range of matters that properly are subject to challenge in this proceeding.

IV. CONCLUSION

MTI and Jobert no longer have a property interest in the Reading site. Any remedy for their concerns about the fair market value and the value of their investment in the site, is, and has always has been solely within the purview of the Pennsylvania courts. Moreover, MTI and Jobert's supplemental requests for "worst case" and other analyses to determine the economic feasibility of removing the radioactive portion of the slag pile go beyond NRC regulations. These requests do not concern issues that are subject to challenge in this proceeding. Consequently, MTI and Jobert lack standing and have failed to identify any area of concern germane to the proceeding under 10 CFR §§ 2.1205(e) and (h). Consequently, their Request For A Hearing, as supplemented, must be denied.

Respectfully submitted,

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UNITED STATES OF AMERICA
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Before Administrative Judges:
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CERTIFICATE OF SERVICE

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

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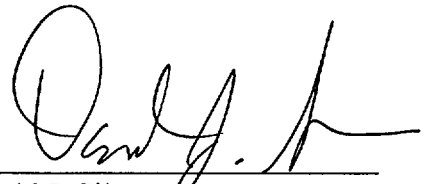

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