LBP-00-13

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

DOCKETED 05/16/00
SERVED 05/16/00

In the Matter of

CABOT PERFORMANCE MATERIALS
(Reading, Pennsylvania)

Docket No. 40-9027-MLA

ASLBP No. 99-757-01-MLA

May 16, 2000

MEMORANDUM AND ORDER
(Denying a Hearing Request for
Lack of Standing)

Cabot Performance Materials (Licensee) is the possessor of a source material license entitling it to possess contaminated material (uranium and thorium) on two sites within the Commonwealth of Pennsylvania, one of those sites being located in the City of Reading. In 1998, the Licensee submitted a site decommissioning plan (SDP) for the contaminated material at the Reading site, which consists of slag and soil deposited on a slope.

The NRC Staff considered the submittal to constitute a license amendment application and, accordingly, published a Notice of Consideration in the Federal Register that included providing an opportunity for hearing. 63 Fed. Reg. 57,715

(October 28, 1998). As the Notice reflected, the SDP contained the conclusion that, at their current levels, the long-term doses from the contaminated material were such that, without additional decommissioning, the site could be released for unrestricted use consistent with NRC regulatory requirements. (In that connection, it appears from one of the NRC filings with me that the on-site buildings have been decontaminated and released.)

In response to the notice, two hearing requests were timely filed. One of them was presented by the City of Reading and the Redevelopment Authority of that City (the Reading request). The other was submitted by Jobert, Inc. (Jobert) and Metals Trucking, Inc. (MTI) (the Jobert/MTI request).

By virtue of the grant of a succession of uncontested motions filed by the Licensee to accommodate ongoing studies that might produce a resolution of the concerns of the hearing requestors, the time for the filing of its answer to the two hearing requests was several times extended -- ultimately to April 3, 2000. (As a consequence of the extensions granted the Licensee, the time for the filing of the NRC Staff's response to the hearing requests was automatically also extended.) On March 31, the Licensee filed an unopposed motion for a further enlargement to May 30, 2000, of the time within which to respond to the Reading request. Unlike the prior extension motions, however, that motion, granted on April 3, in terms did not apply as well to the Jobert/MTI request. Instead, on April 3 and

April 13, respectively, the Licensee and the NRC Staff filed their answers to the latter request. Both urged that it be denied on several independent grounds.

As authorized by me, the Jobert/MTI requestors supplemented their request in an April 14 filing to which the Licensee and Staff responded on May 1. (On the same date, also with my approval, the requestors tendered a one-page additional submission.) The May 1 filings brought the parties' submittals on the Jobert/MTI request to a conclusion and the viability of that request is now ripe for decision.

For the reasons that follow, I conclude that the Jobert/MTI requestors have not satisfied all of the conditions precedent for the grant of a hearing that are set forth in the Commission's Rules of Practice. Accordingly, their hearing request must be denied.

I. BACKGROUND

The Jobert/MTI request, filed on December 10, 1998, recited (at 1-2) that the slag pile on which the contaminated material is currently located was a part of a larger (10.48-acre) parcel of land containing several former industrial buildings that were then unused or underused (hereafter "property" or "site"). This property was said to be in an area providing many attractive redevelopment possibilities so long as, among other things, "the environmental conditions of the [p]roperty, including but not

limited to the [slag pile in question] are properly addressed." Id. at 2.

The request went on to state that MTI was the owner of the property. For its part, Jobert was a former owner that had sold the property to MTI in April 1998, taking in return as part of the transaction a purchase money mortgage. When it had been its owner, Jobert had in mind either developing the property or selling it to another entity that contemplated taking such action. As a consequence of its purchase of the property, the intent to pursue one of those courses had been transferred to MTI. The City of Reading and its Redevelopment Authority were identified in the request as among those who had previously expressed an interest in obtaining the property from MTI. Id. at 2-3.

As the request went on to make clear, the interest that MTI and Jobert sought to vindicate in a hearing on the acceptability of the submitted SDP was purely economic in nature. Specifically, pointing to its "obvious current property interest" stemming from ownership of the site, MTI stressed its desire to protect that interest. In this connection, it expressed concern that NRC action on the SDP might restrict the use or redevelopment of the property, adding that, even in the absence of NRC-imposed use restrictions, the slag pile's presence on the site might limit and reduce redevelopment alternatives and, thus, the attractiveness of the property to potential lenders. MTI also

made passing reference to concerns it had regarding the possible imposition of liability upon it because of the condition of the slag pile. As its basis for seeking a hearing, Jobert referred to a desire to protect its security interest in the property. Id. at 3-4.

In its April 3 answer to the request (at 3), the Licensee called attention to the fact that, on March 13, 2000, the Reading Redevelopment Authority had filed in the appropriate Pennsylvania state court a Declaration of Taking and Notice to Condemnee (i.e., MTI) that related to the entire site in issue. A copy of those documents was attached to the Licensee's answer as Exhibit A.

It appears from the Declaration (at 2) that the Authority was condemning the property "in fee simple title" for the stated purpose of "eliminating blight and redeveloping the area pursuant to the Redevelopment Plan". The Declaration also recited that, pursuant to a provision of the Pennsylvania Eminent Domain Code, the Authority had executed and attached to the Declaration as an exhibit its bond in an unlimited amount and without surety. The bond was said to have been made payable to the Commonwealth of Pennsylvania and was filed for the use of the owner or owners of the condemned property interests.

According to the Notice to Condemnee provided to it along with the Declaration of Taking, MTI had a period of thirty days in which to challenge the condemnation action by the filing of

Preliminary Objections to it. Absent such filing, any objections or defenses would be deemed waived.

As is not in dispute, MTI did not file objections within the prescribed thirty-day period. Consequently, the exercise of the Redevelopment Authority's eminent domain powers with respect to the property seemingly is now complete under Pennsylvania law, subject simply to the determination and payment of just compensation.

In taking note of the Declaration of Taking in their April 14 supplemental filing, the hearing requestors asserted, however, that the condemnation of the property by the Redevelopment Authority did not serve to destroy their interest in the outcome of the matter now at hand. On that score, they maintained (at 9) that the possibility existed that the amount of the compensation that MTI would be entitled to receive from the Authority (as representing fair market value) might be adversely affected as the result of the NRC's ultimate action on its review of the Licensee's SDP (which has now undergone revision).

In addition, in their concluding one-page May 1 submission, those entities asserted that, under the provisions of the relevant Pennsylvania statute, MTI retains the right of possession until such time as it receives its just compensation or a written offer of same. Moreover, I was told, under the governing statute MTI might recover title to the property were the Redevelopment Authority to relinquish the condemnation

within one year. I was also referred to a statutory provision to the effect that, should the Authority abandon the redevelopment project alluded to in the Declaration of Taking, "in certain conditions [MTI would retain] a right of first refusal for up to three years".

II. DISCUSSION

A. This matter is subject to the provisions of Subpart L of the Commission's Rules of Practice, which sets out the informal hearing procedures governing the adjudication of materials licensing proceedings. 10 C.F.R. § 2.1201 et seq. Section 2.1205(e) spells out the required content of a hearing request submitted in a Subpart L proceeding. The request must describe "in detail" (1) the interest of the requestor in the proceeding; (2) how that interest might be affected by the results of the proceeding, with particular reference to the factors set out in subparagraph (h) of the section; and (3) the requestor's areas of concern about the licensing activity that is the subject matter of the proceeding.

For its part, section 2.1205(h) of Subpart L charges the Presiding Officer with the duty of determining both that the areas of concern specified in the hearing request are germane to the subject matter of the proceeding and that the "judicial standards for standing" have been met by the hearing requestor. With respect to the standing requirement, that subsection goes on to stipulate that three factors, among others, must be

considered: (1) the nature of the requestor's right under the Atomic Energy Act to be made a party to the proceeding; (2) the nature and extent of the requestor's property, financial, or other interest in the proceeding; and (3) the possible effect of any order that may be entered in the proceeding upon the requestor's interest. In specifying these factors, the Commission likely had in mind that, as is now well-settled, the existence of judicial standing hinges upon a demonstration of a present or future injury-in-fact that is arguably within the zone of interests protected by the governing statute(s). See, e.g., Bennett v. Spear, 520 U.S. 154, 157 (1997); Georgia Power Company (Vogtle Electric Generating Plant, Units 1 and 2), CLI-93-16, 38 NRC 25, 32 (1993); Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit No. 1), CLI-83-25, 18 NRC 327, 332 (1983).

What constitutes an adequate showing of injury-in-fact has received considerable judicial attention. For present purposes, it suffices to point to the Supreme Court's observation in a related context some years ago:

> Of course, pleadings must be something more than an ingenious academic exercise in the conceivable. A plaintiff must allege that he has been or will in fact be perceptibly harmed by the challenged agency action, not that he can imagine circumstances in which he could be affected by the agency's action.

United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 688-89 (1973).

A like note has been struck many times in NRC adjudicatory decisions. As summarized by a Licensing Board some eight years ago following its scrutiny of numerous prior Supreme Court holdings on the point:

> Although variously described, the asserted injury must be "distinct and palpable" and "particular [and] concrete," as opposed to being "'conjectural...[,] hypothetical,'" or "abstract." The injury need not already have occurred but when future harm is asserted, it must be "threatened," "'certainly impending,'" and "'real and immediate.'"

Cleveland Electric Illuminating Company (Perry Nuclear Power Plant, Unit 1) LBP-92-4, 35 NRC 114, 121 (1992) (footnotes omitted), subsequently quoted in Babcock and Wilcox (Apollo, Pennyslvania Fuel Fabrication Facility), LBP-93-4, 37 NRC 72, 81 (1993).[1]

B. At the time of the 1998 filing of their hearing request, MTI owned the site on which the slag pile is located and former owner Jobert possessed a security interest in it. Had that state of affairs continued to the present time, there would have been several questions that I might have had to confront in determining whether the hearing request satisfied the requirements set forth in sections 1205(e) and (h) of the Commission's Rules of Practice. For one thing, the NRC Staff

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[1]While the Commission reversed the Licensing Board's determination in Perry that standing was lacking in the circumstances of that case, it did so on a ground that is inapplicable here and, moreover, did not manifest disagreement with the Board's summary quoted in the text. See CLI-93-21, 38 NRC 87 (1993).

maintains that the economic interest of an owner of real estate in redeveloping the property itself or, alternatively, selling the property to someone else for that purpose does not "arguably come within the zone of interests" protected by either the Atomic Energy Act of 1954 or the National Environmental Policy Act. For another, both the Staff and the Licensee insist that the hearing request, even as supplemented, did not set forth a cognizable area of concern regarding the licensing activity at hand.

As seen, however, a very significant change in circumstances recently occurred. Because of the condemnation action instituted by the Redevelopment Authority, an action that MTI concededly elected not to challenge within the period for doing so provided to it by state law, neither MTI nor Jobert continues to possess any legally-cognizable interest in the property. To the contrary, MTI does not dispute that, as of the date of the filing of the Declaration of Taking (March 13, 2000), fee simple title was transferred to the Redevelopment Authority. All that apparently remains to be accomplished with regard to the condemnation is the payment to MTI of the amount that is determined to be the property's fair market value and thus to constitute just compensation for the taking. While it may well be that, as it asserts, MTI can retain physical possession until it has at least received a just compensation offer from the

Authority, once payment has been made to it MTI's ties to the property will have been severed.

In light of the action taken by the Redevelopment Authority and its legal effect, it would seem beyond cavil that there is no longer any basis on which MTI and Jobert can meet the injury-in-fact requirement. In reaching this conclusion, I am not unmindful of their assertion that MTI might regain title to the property were the Redevopment Authority to relinquish the condemnation or to abandon its redevelopment project. The hearing requestors have assigned no reason, however, to believe that there is any degree of likelihood that the Authority might elect to pursue either of those options. To the contrary, on this record there is absolutely no basis for bringing into the slightest question the resolve of the Authority -- stated in the Declaration of Taking -- to undertake the redevelopment of the site itself under an apparently already existing Plan. In the words of SCRAP, supra, the speculation offered by the hearing requestors amounts to nothing more than an "exercise in the conceivable" and should be dismissed as such.

Nor does a better footing undergird MTI's professed fear that the action taken on the SDP might impact adversely the amount of the compensation it will receive or subject it to possible liability because of the condition of the slag pile. Once again, no cogent reasons are offered as to why either

of these concerns has a solid foundation. Indeed, as the Licensee has noted with a citation to the applicable Pennsylvania statutory provision (May 1 filing at 6), the amount of MTI's compensation will be determined by the fair market value of the property immediately prior to the taking. That being so, it is difficult to comprehend how any action later taken by the NRC with regard to the slag pile could influence the amount that MTI will receive from the Redevelopment Authority. In sum, on this score as well, MTI has indulged in what, at best, is unsubstantiated conjecture falling far short of the fulfillment of its burden to establish a "distinct and palpable" -- or as otherwise characterized "particular and concrete" -- present or threatened injury-in-fact. Perry, supra.

For the foregoing reasons, I determine that the Jobert/MTI hearing request must fail because it has not been adequately established, as mandated by the Commission's Rules of Practice, that action taken by the NRC on the license amendment sought in this matter might cause injury-in-fact to the requestors. Without reaching any other issues raised by the Licensee or NRC Staff in opposition to it, on that basis the request therefore must be, and hereby is, denied for want of standing.

If so inclined, the hearing requestors may appeal this order to the Commission within ten (10) days of its service in the manner prescribed in 10 C.F.R. § 2.1205(o).

It is so ORDERED.

BY THE PRESIDING OFFICER*

/RA/

Alan S. Rosenthal
ADMINISTRATIVE JUDGE

Rockville, Maryland

May 16, 2000

* Copies of this memorandum and order were sent this date by Internet e-mail transmission to representatives of the Licensee and the Petitioners, as well as counsel for the NRC Staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
CABOT PERFORMANCE MATERIALS	)	Docket No. 40-9027-MLA
	)	
(Request for Materials License Amendment)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (DENYING A HEARING REQUEST FOR LACK OF STANDING) (LBP-00-13) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

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[Original signed by Adria T. Byrdsong]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 16th day of May 2000