

RAS 6653

DOCKETED  
USNRC

July 24, 2003 (10:33AM)

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before Administrative Judge:

G. Paul Bollwerk, III, Presiding Officer

In the Matter of:

FANSTEEL, INC.

(Muskogee, Oklahoma Facility)

Docket No. 40-7580-MLA-2

ASLBP No. 03-813-04-MLA

July 17, 2003

**THE STATE OF OKLAHOMA'S OBJECTION AND SHOW OF HARM TO  
FANSTEEL INC.'S WITHDRAWAL OF DECOMMISSIONING PLAN**

**OFFICE OF THE OKLAHOMA ATTORNEY GENERAL**

**SARAH E. PENN**

**ASSISTANT ATTORNEY GENERAL  
ENVIRONMENTAL PROTECTION UNIT**

4545 North Lincoln Boulevard, Suite 260

Oklahoma City, Oklahoma 73105-3498

Telephone: (405) 521-4274

Telefax: (405) 528-1867

E-mail: [sarah\\_penn@oag.state.ok.us](mailto:sarah_penn@oag.state.ok.us)

July 17, 2003

Template=SECY-041

SECY-02

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

**ATOMIC SAFETY AND LICENSING BOARD PANEL**

Before Administrative Judge:

G. Paul Bollwerk, III, Presiding Officer

In the Matter of:

FANSTEEL, INC.

(Muskogee, Oklahoma Facility)

Docket No. 40-7580-MLA-2

ASLBP No. 03-813-04-MLA

July 17, 2003

**THE STATE OF OKLAHOMA'S OBJECTION AND SHOW OF HARM TO  
FANSTEEL INC.'S WITHDRAWAL OF DECOMMISSIONING PLAN**

The Attorney General of the State of Oklahoma, W.A. Drew Edmondson, by and through the undersigned, Sarah E. Penn, Assistant Attorney General, on behalf of the State of Oklahoma ("State") hereby submits its Objection and Show of Harm to Fansteel Inc.'s ("Fansteel") Withdrawal of Decommissioning Plan pursuant to the Show Cause Order (Dismissal of Proceeding) issued by the Presiding Officer in the above styled cause. Herein, the State proves why the withdrawal of Fansteel's Decommissioning Plan (DP) will cause legal harm and should therefore be denied.

## **BACKGROUND**

### **A. FACTUAL HISTORY**

The Fansteel Facility is located on 110 acres of land located directly on the western bank of the Arkansas River (Webbers Falls Reservoir) in eastern Oklahoma near the City of Muskogee. It is bounded on the west by State Highway 165 (a/k/a the Muskogee Turnpike) and on the south by U.S. Highway 62. From 1958 until 1989, the Fansteel Facility was a rare metal extraction operation, producing tantalum and columbium metals from raw and beneficiated ores, and tin slag feedstock. EARTH SCIENCES CONSULTANTS, INC., REMEDIATION ASSESSMENT, FANSTEEL, INC. - MUSKOGEE, OKLAHOMA 1-2 (1993). The raw materials used for tantalum and columbium production contained uranium and thorium as naturally occurring trace constituents in such concentrations that Fansteel was required to obtain an NRC license. Id. The Fansteel Facility was licensed by NRC in 1967 to process ore concentrates and tin slags in the production of refined tantalum and niobium products. U.S. NUCLEAR REGULATORY COMMISSION, ENVIRONMENTAL ASSESSMENT-LICENSE AMENDMENT FOR MATERIAL LICENSE NO. SMB-911, 1-1 (December 1997). Processing operations at the Fansteel Facility substantially ceased in December of 1989. Id.

As a result of operations and various accidents and releases, the Fansteel Facility, including its soils, groundwater, and surface waters, have been and continue to be contaminated by uranium, thorium, ammonia, arsenic, chromium, metals, cadmium, ammonia, methyl isobutyl ketone (MIBK), and fluoride. EARTH SCIENCES CONSULTANTS,

INC., REMEDIATION ASSESSMENT, FANSTEEL, INC. - MUSKOGEE, OKLAHOMA 1-2 (1993).

**B. PROCEDURAL**

On June 16, 2003, the State filed a Request for Hearing in connection with Fansteel's January 14, 2003, Decommissioning Plan ("DP"). Thereafter, Gary Tessitore, CEO of Fansteel, indicated the withdrawal of Fansteel's DP due to NRC Staff's ("Staff") suspension of review in Fansteel's letter of June 26, 2003. (Exhibit A). The reasons for Staff's suspension of review are stated in a July 8, 2003, letter to Tessitore. (Exhibit B).

On July 9, 2003, a Presiding Officer was designated to rule on, inter alia, petitions for leave to intervene and/or requests for hearing in this proceeding. Also on July 9, the Presiding Officer issued an Order directing the State of Oklahoma to show cause, in light of Fansteel's withdrawal of its DP, why this proceeding should not be dismissed.

On July 15, 2003, Fansteel filed a Notification to request the Presiding Officer to suspend the show cause schedule to allow Fansteel until July 25, 2003, to decide whether it would resubmit its DP for NRC consideration. The State objected on the same day to Fansteel's request for abeyance. Staff filed a response on July 16, 2003, stating it did not object to the request for abeyance.

On July 16, 2003, the Presiding Officer denied Fansteel's request for abeyance indicating that the schedule established in the Presiding Officer's July 9, 2003, Order to Show Cause would remain in effect.

**C. ARGUMENT**

**1. State Will Have No Meaningful Opportunity to Respond if a Withdrawal is Permitted and Will Therefore Suffer Legal Harm**

The common law rule supporting the withdrawal regulations reflects that the applicant has an unqualified right to have an action dismissed *unless* the dismissal would legally prejudice other parties in a way other than by instituting a future proceeding of the same kind. Jones v. Securities and Exchange Commission, 298 U.S. 1, 19-21 (1935) (emphasis added). Although Fansteel may suggest that by contemplating re-submission of the decommissioning plan to the NRC that the State is not deprived of its opportunity for a future proceeding of this kind, nothing could be further from the truth<sup>1</sup>. The company filed for a Chapter 11 bankruptcy on January 15, 2002. Following extensive, comprehensive settlement negotiations<sup>2</sup>, Fansteel has again expressed its intention to submit its re-organization plan to the Bankruptcy Court during the month of July, 2003. Should the re-organization plan be approved by the Bankruptcy Court without consideration of the proper financial assurances required by 10 C.F.R. §40.36 and the scope of remediation to be accomplished, the NRC would be waiving the financial assurance requirements without allowing the State a meaningful opportunity to object to the funding constraints placed upon

---

<sup>1</sup> See "Notification of Fansteel Inc. In connection with Show Cause Order," dated July 15, 2003.

<sup>2</sup> With respect to the State of Oklahoma, these negotiations have been neither extensive nor comprehensive.

the DP. The scope of work contemplated by the DP will be forever determined by the Bankruptcy Court's pronouncement on the settlement of Fansteel's financial obligations. If this withdrawal is allowed to occur, there will be no financial assurance that Fansteel's Muskogee site will be properly remediated according to NRC rules and regulations. The State would thereby suffer irreparable harm which would be contrary to the public interest and detrimental to human health and the environment. Philadelphia Electric Co. 14 N.R.C. 967, 974.

**2. Permitting a Withdrawal Facilitates Fansteel's Delay Tactics**

Pursuant to 10 C.F.R.40.42(d), Fansteel must submit a DP no later than December 22, 2003. Although it is conceivable that Fansteel could resubmit another DP that would be acceptable to State, based on the history, it is highly unlikely that a newly submitted plan could be found acceptable in less than five months. Therefore, it seems more prudent to correct the deficiencies in the existing DP rather than further delay the remediation of the Muskogee site. Even if Fansteel re-submits a DP and the State has another opportunity to make a Request for Hearing on the newly submitted DP, the State will have suffered legal harm because the financial terms of the DP will have already been pre-determined by the resolution of the financial issues in the Bankruptcy Court. Therefore, the withdrawal of the DP should not be allowed.

It appears that Fansteel, being faced with a hearing on its DP, chose to fall back on a technicality to avoid the requirements of Section 189(a) of the Atomic Energy Act (42 USCA §2239 (a)(1)(A)). In Staff's July 8, 2003, letter to CEO Gary Tessitore, Staff reveals

that it advised Fansteel that any licensing action requires a 30-day period for public comment and an opportunity for a request for hearing. (Exhibit B) However, following the State's Request for Hearing, Fansteel informed the NRC that it should *not* consider submittal of the DP for review and approval as a request for a license amendment despite all other indications to the contrary.<sup>3</sup> Fansteel would instead file its re-organization plan in the Bankruptcy Court, limit its ability to adequately fund the DP then file its request for a license amendment thereby rendering public comment on the adequacy of the DP funding absolutely meaningless. The withdrawal letter and the failure to technically comply with the license amendment request are nothing more than smokescreens used by Fansteel at the expense of the State.

**3. If a Withdrawal is Permitted, Conditions Should be Imposed**

The power to grant a withdrawal on prescribed terms and conditions under 10 C.F.R. §2.107(a) involves discretionary judgment, and is reviewable for any abuse. The Commission rule is similar to Rule 41 (a)(2) of the Federal Rules of Civil Procedure.

---

<sup>3</sup> Although Fansteel has not technically submitted a request for a license amendment, Staff's letter of July 8, 2003 to Fansteel states: "the NRC Staff assumed that Fansteel's May 8, 2003, letter evinced its desire to amend its license to approve the activities identified in its proposed Decommissioning Plan." The letter goes on to say that the NRC proceeded on that basis and undertook a preliminary review of the proposed DP and planned to prepare the required safety evaluation and environmental assessment and make a determination regarding the request for approval of the new DP by October 31.

Fansteel negotiated the DP review completion date with Staff yet claims that no license amendment was ever submitted. This is a disingenuous argument and should not be permitted to benefit Fansteel at the expense of State.

LeCompte v. Mr. Chip, 528 F.2d 601, 604 (1976). The purpose of the rule to dismiss proceedings on conditions is “primarily to prevent voluntary dismissals which unfairly affect the other side, and to permit the imposition of curative conditions. Alamance Industries, Inc. v. Filene’s, 291 F.2d 142, 146 (1961). The State requests that the Presiding Officer exercise his discretion under 10 C.F.R. § 2.107 to prevent an unfair result to the State.

Even though such a withdrawal would generally have the effect of mootng the issues between the parties, it is the discretionary responsibility of the presiding officer to consider imposing conditions if such a withdrawal is permitted. The performance of that duty must be exercised with due regard to the legitimate interests of all parties in the proceeding. LeCompte, 528 F.2d 604. American Cyanamid Co. v. McGhee, 317 F. 2d 295, 298 (5<sup>th</sup> Cir. 1963). If Fansteel is allowed to withdraw its DP, it must do so with conditions attached to protect State’s legitimate interests and protect it from legal harm.

The first and most important condition which must be imposed is the assurance that Fansteel provide adequate funding to complete an NRC approved DP. The regulations, 10 C.F.R. §40.42(c)(2)(I) and (iii)(D) call for the submittal of decommissioning cost estimates and a plan for ensuring adequate funds to complete decommissioning. Although Fansteel has submitted decommissioning cost estimates, the company has not provided any plan to ensure that even these amounts will be adequately addressed. Because of Fansteel’s imminent filing with the Bankruptcy Court, now is the time to consider the complex details and extent of the decommissioning financing rather than after all options for funding assurance have been exhausted by the resolution of Fansteel’s bankruptcy case.



The second condition is that Fansteel must be required to evaluate the Muskogee site, contain the contamination so that it does not migrate off site and ensure there is adequate funding to remove non-radiological waste contaminating the natural resources in the area. In addition to the radiological contaminants, metals such as arsenic, cadmium, chromium and fluoride have been found in the groundwater monitoring wells which of course suggests that those particular contaminants are leaching into the groundwater from the soil. The containment of these non-radiological wastes is important to the ultimate remediation of the Muskogee site. Failure to properly address the funding for the clean up of these contaminants jeopardizes the State's natural resources and thereby its economic interests.

The third condition is there must be implementation of a groundwater treatment plan and the requisite assurance that adequate funding will be provided. A groundwater treatment plan should demonstrate compliance with the radiological criteria in 10 C.F.R. Part 20. The plan must clean up the groundwater to a level necessary to protect public health and ensure its safety from radiological dose and chemical toxicity. This is especially important considering the fact that the groundwater is hydrologically connected to the Arkansas River, a major economic and agricultural resource to the State.

#### **D. CONCLUSION**

The State will suffer legal harm if the license amendment and the DP are permitted to be withdrawn. If the DP is allowed to be withdrawn, the conditions requested by the State must be imposed. These conditions meet the test of bearing a relationship to the conduct and legal harm at which they are aimed and are documented in the record. LeCompte at 604-5.

**Relief Requested**

The State respectfully requests that the withdrawal of Fansteel's Decommissioning Plan be denied and that the NRC staff be instructed to proceed with its review of the DP pursuant to Fansteel's license amendment request. In the alternative, the State requests that if a withdrawal is permitted, the conditions stated herein be placed upon the withdrawal.

Respectfully submitted,

**W.A. DREW EDMONDSON  
ATTORNEY GENERAL OF OKLAHOMA**



Sarah E. Penn, Esq.  
Assistant Attorney General  
Environmental Protection Unit  
4545 N. Lincoln Blvd., Suite 260  
Oklahoma City, OK 73105  
Telephone: (405) 522-4413  
Telefax: (405) 528-1867

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 17th day of July, 2003, a true and correct copy of the foregoing, State of Oklahoma's Objection and Show of Harm to Fansteel, Inc.'s Withdrawal of Decommissioning Plan, was served upon the persons listed below by U.S. mail, first class, postage prepaid, and by electronic mail where indicated with a single asterisk. A copy was also sent by facsimile transmission to the Office of the Secretary.

G. Paul Bollwerk, III\*  
Administrative Judge  
Presiding Officer  
Atomic Safety and Licensing Board Panel  
U.S. Nuclear Regulatory Commission  
Mail Stop: T-3F23  
Washington, D.C. 20555-0001  
E-mail: [gpb@nrc.gov](mailto:gpb@nrc.gov)

Office of Commission Appellate  
Adjudication  
Mail Stop: O-16C1  
U.S. Nuclear Regulatory  
Washington, D.C. 20555-0001

Gary L. Tessitore, Chairman, President\*  
and Chief Executive Officer  
Fansteel, Inc.  
Number One Tantalum Place  
North Chicago, IL 60064  
E-mail: [gtessitore@fansteel.com](mailto:gtessitore@fansteel.com)

Jeffrey S. Sabin, Esq.\*  
Schulte, Roth & Zabel, LLP  
919 Third Avenue  
New York, NY 10022  
E-mail: [jeffrey.sabin@srz.com](mailto:jeffrey.sabin@srz.com)

Office of the Secretary\*, \*\*  
Attn: Rulemaking & Adjudications Staff  
U.S. Nuclear Regulatory Commission  
Mail Stop: O-16C1  
Washington, D.C. 20555-0001  
E-mail: [hearingdocket@nrc.gov](mailto:hearingdocket@nrc.gov)  
Telefax: (301) 415-1101

Marian L. Zobler, Esq.\*  
Office of the General Counsel\*  
U.S. Nuclear Regulatory Commission  
Mail Stop: O-15D21  
Washington, D.C. 20555-0001  
E-mail: [ogcmailcenter@nrc.gov](mailto:ogcmailcenter@nrc.gov)  
E-mail: [mlz@nrc.com](mailto:mlz@nrc.com)

James R. Curtiss, Esquire\*  
Mark J. Wetterhahn, Esquire\*  
Brooke D. Poole\*  
Winston & Strawn  
1400 L Street, NW  
Washington, D.C. 20005  
E-mail: [jcurtis@winston.com](mailto:jcurtis@winston.com)  
E-mail: [mwetterh@winston.com](mailto:mwetterh@winston.com)  
E-mail: [bpooles@winston.com](mailto:bpooles@winston.com)

  
SARAH E. PENN

\*\* Original and 3 copies

A

Gary L. Tessitore

**Fansteel**

Chairman, President and  
Chief Executive Officer

June 26, 2003

**VIA ELECTRONIC MAIL**

U.S. Nuclear Regulatory Commission  
Mr. James Shepherd, Project Manager  
Decommissioning Branch  
Division of Waste Management  
Office of Nuclear Material Safety and Safeguards  
Two White Flint North  
11545 Rockville Pike  
Rockville, Maryland 20852-2738

Re: **Fansteel Inc.**  
**License No. SMB-911, Docket No. 40-7580**

Dear Mr. Shepherd:

On January 14, 2003, I transmitted to you for filing in a timely manner Fansteel Inc.'s ("Fansteel") proposed Decommissioning Plan for its Muskogee, Oklahoma site. Thereafter, Fansteel, the NRC, and numerous other creditors and parties in interest entered into negotiations resulting in the execution by counsel of a "Summary of Principal Terms of Joint Reorganization Plan" (the "Term Sheet"), dated May 23, 2003. Notwithstanding the requirement in the Term Sheet for the "good faith efforts of all parties to work together to finalize all necessary definitive documents contemplated by the Term sheet," recent positions taken by the NRC relative to the resolution of several key issues central to the review of the Decommissioning Plan, the timely decommissioning of the site, and the successful exit from bankruptcy, including NRC's decision today to suspend its review of the Decommissioning Plan, are wholly unwarranted, without legal basis, and inconsistent with, *inter alia* the express terms of the Term Sheet, as well as the letter of May 9, 2003 from Daniel M. Gillen to me.

In addition, the recent actions and public pronouncements by the State of Oklahoma, including its June 16, 2003, Request for Hearing concerning the Decommissioning Plan, are wholly without merit, inaccurate in their characterization of Fansteel's motivations, and would lead to prolonged and expensive litigation to the detriment of the value of the estate and its creditors.

313748.1

Accordingly, effective immediately, Fansteel is hereby withdrawing the Decommissioning Plan and reserving all of its rights. This action also moots all issues raised in the "State of Oklahoma's Hearing Request", dated June 16, 2003.

Sincerely

Gary L. Tessitore

cc: The Honorable Nils J. Diaz  
The Honorable Edward McGaffigan

W

July 8, 2003

Mr. Gary L. Tessitore  
Chief Executive Officer  
Fansteel Inc.  
Number One Tantalum Place  
North Chicago, Illinois 60064

**SUBJECT: RESPONSE TO FANSTEEL SUBMITTAL OF JUNE 26, 2003**

Dear Mr. Tessitore:

This is to acknowledge your letter of June 26, 2003, in which Fansteel withdrew its proposed decommissioning plan (DP) of January 16, 2003, supplemented by additional information submitted by letter dated May 8, 2003, in accordance with 10 CFR §§ 40.42(d) and (g). Based on Fansteel's submittal and the fact that Fansteel's current license contains a license condition addressing a previously approved DP (i.e., License Condition 26), the NRC Staff (staff) assumed that Fansteel's May 8, 2003, letter evinced its desire to amend its license to approve the activities identified in its proposed DP.

As you are aware, the staff undertook a preliminary review of the proposed DP and by letter dated April 28, 2003, informed Fansteel that the January submittal lacked certain information that was necessary for staff acceptance for an in-depth review, including an explicit license amendment request. After additional discussions, by letter dated May 8, 2003, Fansteel stated that it intended "to undertake a four-phased remediation of the Muskogee site." The staff, in a letter dated May 9, 2003, responded that it had sufficient information to proceed with a detailed technical review; however, the four-phased approach is not one that was previously approved in Fansteel's existing License Condition 26. Therefore, the staff treated the submittal as a request for licensing action. Also in the letter of May 9, 2003, the staff stated it planned to prepare the required safety evaluation report and environmental assessment and make a determination regarding the request for approval of the new decommissioning plan by October 31, 2003. The staff also advised you that any licensing action requires a 30-day period for public comment and an opportunity for a request for hearing.

Following a request for hearing by the State of Oklahoma, Fansteel informed NRC that it should not consider submittal of the DP for review and approval as a request for a license amendment. Staff informed Fansteel that before it could complete its review of the DP, NRC licensing requirements in this situation require a license amendment request. By letter of June 26, 2003, Fansteel formally withdrew the DP.

Mr. G. Tessitore

2

Notwithstanding Fansteel's June 26, withdrawal of the DP, the NRC staff is prepared to proceed with its review of the DP, upon receipt of notification in writing that the proposed DP should again be considered for review. Fansteel also must file a request for license amendment according to 10 CFR 40.44. Upon receipt of such a notice and filing, staff will recommence the review process. The staff is concerned about meeting the October 31, 2003, target date in light of Fansteel's withdrawal of the proposed DP. Fansteel should promptly reinstate its proposed DP and make an explicit request for a license amendment and should provide complete responses to any RAIs in a timely manner thereafter in order not to prejudice meeting the October 31, 2003, target date.

It should be noted that in accordance with 10 CFR 2.1205(m), the filing or granting of a request for a hearing or petition for leave to intervene will not delay staff action on the application. Further, the staff intends that when the decision or action on the application is made it shall be effective pending any decision by a Presiding Officer, although in accordance with 10 CFR 2.1263, a stay may be sought from the Presiding Officer at the time a request for a hearing or petition to intervene is filed or within 10 days of the staff's action, whichever is later. In addition, when Fansteel requests to transfer its license to another entity, the staff intends to process such a request as an application for transfer of an NRC license under 10 CFR Part 2, Subpart M. If a hearing is granted on such application, pursuant to Subpart M of Part 2, the staff intends to promptly issue approval or denial of the license transfer request, in accordance with 10 CFR 2.1316. Again, the staff intends that when such decision or action is made, it shall be effective pending any decision by a Presiding Officer, although in accordance with 10 CFR 2.1327, a stay may be sought from the Presiding Officer within 5 days of the issuance of the notice of staff action pursuant to § 2.1316(a).

The staff is aware that Fansteel is currently in bankruptcy under Chapter 11. Notwithstanding that fact, Fansteel is subject to the regulatory requirements of 10 CFR Part 40. Unless Fansteel requests an alternate schedule, as provided for in 10 CFR 40.42 (g)(2), pursuant to 10 CFR 40.42(d), Fansteel must submit a DP no later than December 22, 2003, and commence decommissioning of the Muskogee site upon NRC approval of the DP. In addition, because Fansteel's current license contains a license condition addressing a previously approved DP (i.e., License Condition 26), Fansteel must also submit a license amendment request. Section 40.42(h)(2) states that decommissioning should be completed within twenty-four months of initiation. If Fansteel is not able to meet the 24 month decommissioning schedule, it may request Commission approval for an alternate schedule for completion of decommissioning addressing the criteria set forth in Section 40.42(h)(2)(i).

Section 40.36(d) requires licensees to submit a decommissioning funding plan that contains a cost estimate and a method of assuring decommissioning funds as described in Section 40.36(e). If Fansteel is not able to meet these requirements, it may submit a request for an exemption from this requirement, setting out the basis for such a request.



Mr. G. Tessitore

3

In compliance with Section 40.31(c), applications for amendment of your license are made available to the public; therefore, if you wish certain material withheld from the public, it must be accompanied with a request pursuant to 10 CFR 2.790. If NRC determines the information does not meet criteria for withholding the information from the public, you may withdraw it. Information that is withdrawn does not meet the submittal requirements of Sections 40.36 and 40.42, discussed above. In addition, staff practice is to issue a notice of receipt of your license amendment request in the *Federal Register*, at which time an opportunity to request a hearing will be provided.

If you have any questions on this matter, please contact me at (301) 415-6712 or [ics2@nrc.gov](mailto:ics2@nrc.gov).

Sincerely,

*/RA/*

J. C. Shepherd, Project Engineer  
Section B  
Decommissioning Branch  
Division of Waste Management  
Office of Nuclear Material Safety and Safeguards

Docket No.: 40-7580  
License: SMB-911

cc: Walter Beckham  
Pamela Bishop  
Mike Broderick  
George Brozowski  
James Curtiss, Esq.  
A. F. Dohmann  
Phillip Fielder  
Richard Gladstein, Esq.  
Timothy Hartsfield  
Sarah Penn, Esq  
Quang Pham  
Kevin Sampson  
Susan Webster