

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE PRESIDING OFFICER

In the Matter of)	
)	Docket No. 40-7580-MLA-2
FANSTEEL, INC.)	
(Gore, Oklahoma Site))	ASLBP No. 04-7580-MLA
)	

NRC STAFF RESPONSE TO STATE OF OKLAHOMA'S MOTION
FOR LEAVE TO REPLY TO FANSTEEL AND NRC STAFF'S RESPONSES

INTRODUCTION

Pursuant to the an Order issued by the Presiding Officer in the above-captioned proceeding, the NRC Staff hereby responds to "State of Oklahoma's Motion for Leave to Reply to Fansteel and NRC Staff's Response," July 29, 2003 (Motion). See "Order (Schedule for Response to Request to File Reply), July 29, 2003. For the reasons set forth below, Oklahoma's Motion should be granted in part and denied in part.

BACKGROUND

The background of this proceeding was set forth in "NRC Staff Response to the State of Oklahoma's Objection and Show of Harm to Fansteel, Inc.'s Withdrawal of Decommissioning Plan," July 25, 2003, and need not be repeated in detail here. Fansteel, Inc. ("Fansteel" or "Licensee") is the holder of Materials License No. SMB-911 which authorizes it to posses contaminated material at its facility in Muskogee, OK pursuant to 10 C.F.R. Part 40. On January 14, the Licensee submitted a revised decommissioning plan (DP) to NRC for review. Letter to J. Shepherd from G. Tessitore, Jan. 14, 2003 (ADAMS Accession No. ML030280438). In a letter dated May 8, 2003, the Licensee submitted additional information, thereby resubmitting the new DP for review. Based on the information provided in the May 8, 2003, letter, the Staff determined that Fansteel had

submitted sufficient information to proceed with the detailed technical review of the DP. Letter to G. Tessitore from D. Gillen, May 9, 2003 (ADAMS Accession No. ML031290264).

In response to the Staff's May 9, 2003, letter, the State of Oklahoma filed a request for hearing on June 16, 2003. "State of Oklahoma's Request for Hearing," June 16, 2003. On June 26, 2003, Fansteel withdrew its DP. Letter to J. Shepherd from G. Tessitore, June 26, 2003. By letter dated July 8, 2003, the NRC formally acknowledged Fansteel's withdrawal of its DP. Letter to G. Tessitore from J. Shepherd, July 8, 2003 (ADAMS Accession No. ML030280438).

On July 9, 2003, the Presiding Officer issued "Show Cause Order (Dismissal of Proceeding)," ordering that the State should, by July 17, 2003, show cause why this proceeding should not be dismissed. On July 17, 2003, Oklahoma filed "The State of Oklahoma's Objection and Show of Harm to Fansteel Inc.'s Withdrawal of the Decommissioning Plan" ("Objection"). Subsequently, on July 24, 2003, Fansteel resubmitted the DP together with a request for a license amendment to approve the DP. Letter to D. Gillen from G. Tessitore, July 24, 2003. Also on July 24, 2003, Fansteel submitted "Response of Fansteel, Inc. to the State of Oklahoma's Objection and Show of Harm to Fansteel Inc.'s Withdrawal of Decommissioning Plan" (Fansteel Response). On July 25, 2003, the Staff filed "NRC Staff Response to the State of Oklahoma's Objection and Show of Harm to Fansteel, Inc.'s Withdrawal of Decommissioning Plan" (Staff Response). Following these filings, Oklahoma filed its Motion on July 29, 2003, requesting leave to file a reply to Fansteel's and the Staff's responses.

DISCUSSION

In its Motion Oklahoma requests leave from the Presiding Officer to file a reply to Fansteel's and the Staff's responses based on 1) that Fansteel took the position that the Presiding Officer had no authority to disapprove the withdrawal of Fansteel's DP and 2) that Fansteel and the Staff took the position that Fansteel's re-submittal of a supplemented DP rendered the State's Objection moot. Motion at 1. Because Oklahoma's Motion is based, in part, on new information (*i.e.*,

Fansteel's re-submission of a supplemented DP and its filings in Bankruptcy Court) it has demonstrated good cause to file a reply. *See cf. Pacific Gas and Elec. Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), Memorandum and Order (Initial Prehearing Order), Docket No. 72-26-ISFSI, slip op. at 5 (June 6, 2002) (Requiring good cause for filing a reply to a response to a motion filed pursuant to 10 C.F.R. § 2.730).*¹

Oklahoma argues that the resubmission of the DP to the NRC and the filing of a reorganization plan and disclosure statement in the United States Bankruptcy Court demonstrate that the proceeding is not moot. Motion at 4. Oklahoma appears to be taking this position because the DP submitted by Fansteel on July 24, 2003, was a revision to the previously submitted plan and not a new DP. *See id.* at 5. Because Oklahoma bases its Motion, in part, on the filing of these documents, which were filed after its Objection was submitted, the State should be permitted to explain its views on how the resubmission of the DP and the filings in the Bankruptcy Court establish that this proceeding is not moot. Oklahoma's reply should be limited to addressing only this issue.

In addition to requesting leave to reply, Oklahoma asks that it be allowed to have the opportunity to comment on the DP, that the public should have an opportunity to review and comment on the DP and that a Notice be published in the *Federal Register*. *Id.* As stated in the Staff's Response, the Staff intends to publish an opportunity for public comment, in accordance with 10 C.F.R. § 20.1405, and an opportunity for a hearing in the *Federal Register*.² Staff Response at 5. Thus, Oklahoma, as well as interested members of the public, will have an

¹ Oklahoma's first basis for its Motion, that Fansteel argued that the Presiding Officer did not have the authority to disapprove the withdrawal, should have been anticipated and addressed by Oklahoma in its Objection. The authority of the Presiding Officer concerning withdrawal of applications is set forth in the Commission's regulations. *See* 10 C.F.R. § 2.107(a). Thus, this first basis does not support the Motion and Oklahoma should not be permitted to reply to this argument.

² Notice with respect to the revised DP had not been previously published.

opportunity to comment on the DP and to request a hearing.³ Oklahoma's request is, therefore, moot.

CONCLUSION

For the reasons stated above, the Oklahoma's Motion should be granted in part. Oklahoma's reply should be limited to addressing the effect of the subsequent Fansteel filings before the NRC and the Bankruptcy Court has on whether this proceeding should be dismissed as moot.

Respectfully submitted

/RA/

Marian Zabler
Counsel for NRC Staff

Dated at Rockville, Maryland
this 31st day of July, 2003

³ Fansteel, in its Response, suggested that rather than requiring Oklahoma to file a new hearing request, the Presiding Officer hold Oklahoma's hearing request until the NRC notices the license amendment request in the *Federal Register*. Fansteel Response at 9-10. The Staff indicated in its Response that it would not have any objection to the Presiding Officer retaining jurisdiction. Staff Response at 6.

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FANSTEEL, INC.)	Docket No. 40-7580-MLA-2
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(Muskogee, Oklahoma))	ASLBP No. 03-813-04-MLA
)	
)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO STATE OF OKLAHOMA'S MOTION FOR LEAVE TO REPLY TO FANSTEEL AND NRC STAFF'S RESPONSES" in the above-captioned proceeding have been served on the following by deposit into the United States mail or through deposit in the Nuclear Regulatory Commission's internal mail system as indicated with a single asterisk, and/or by electronic mail where indicated with a double asterisk on this 31st day of July 2003.

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