

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

July 24, 2003
DOCKETED
USNRC

August 1, 2003 (10:34AM)

BEFORE THE PRESIDING OFFICER

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of:)
Fansteel Inc.)
(Muskogee, Oklahoma Facility))

Docket No. 40-7580-MLA-2
ASLBP No. 03-813-04-MLA

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

INTRODUCTION

Pursuant to the Orders of the Presiding Officer dated July 9, 2003,¹ and July 16, 2003,² Fansteel Inc. ("Fansteel") herein responds to the "Objection and Show of Harm" filed by intervenor State of Oklahoma ("State") on July 17, 2003.³ As discussed below, at this time the Presiding Officer has no authority to "disapprove" withdrawal of Fansteel's decommissioning plan, or, in the alternative, to place conditions on its withdrawal. In this regard, the relief requested by the State cannot be granted. There is no need for such relief in any event, however, as Fansteel has re-submitted a supplemented decommissioning plan for approval by the Nuclear Regulatory Commission ("NRC"), together with associated requests for licensing action, including a request to amend Fansteel's NRC license to incorporate approval of the

¹ See *Fansteel Inc. (Muskogee, Oklahoma Facility)*, Show Cause Order (Dismissal of Proceeding), slip op. July 9, 2003.

² See *Fansteel Inc. (Muskogee, Oklahoma Facility)*, Order (Denying Request to Hold Proceeding in Abeyance), slip op. July 16, 2003.

³ See "The State of Oklahoma's Objection and Show of Harm to Fansteel Inc.'s Withdrawal of Decommissioning Plan," dated July 17, 2003 ("Objection").

decommissioning plan. The State, therefore, will have the opportunity to proffer its areas of concern with respect to the decommissioning plan in an NRC adjudicatory forum. Accordingly, the State's Objection should be dismissed as moot. While the previously filed Request for Hearing is also moot, in light of the re-submitted decommissioning plan and license amendment request, as a matter of efficiency (if it is not voluntarily withdrawn in light of actions taken by Fansteel to address the State's concerns in the context of the ongoing bankruptcy), the Request should be held for consideration by the Presiding Officer pending receipt of other petitions for leave to intervene and/or request for hearing, if any, following publication in the *Federal Register* of the license amendment request.

BACKGROUND

On January 15, 2002, Fansteel filed a petition for relief under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware ("Bankruptcy Court").⁴ On June 25, 2002, Fansteel submitted to the NRC, pursuant to Condition 21 of License SMB-911, an updated decommissioning cost estimate for the Muskogee site, which reflected a revised estimate of \$57 million for the total cost of remediating the site.⁵ Due to the bankruptcy, Fansteel at that time requested that the NRC postpone consideration of financial assurance until December 20, 2002. Thereafter, on August 27, 2002, Fansteel filed an application for renewal of License SMB-911.⁶ In response to both the June 25 letter and the August 27 application, on October 22, 2002, the NRC denied the license renewal application,

⁴ See Letter from G.L. Tessitore, Fansteel, to E.W. Merschoff, NRC, dated January 15, 2002.

⁵ See Letter from G.L. Tessitore, Fansteel, to L. Camper, NRC, dated June 25, 2002.

⁶ See Letter from A.F. Dohmann, Fansteel, to J.W. Hickey, NRC, "License Renewal Application," dated August 27, 2002.

primarily because Fansteel had not provided decommissioning financial assurance as required by 10 C.F.R. § 40.36.⁷ Accordingly, the NRC limited activities at the Muskogee site to those directly related to decommissioning and maintaining control of the site and licensed materials.

In light of the denial, Fansteel notified the NRC on December 20, 2002 of its intent to submit a decommissioning plan within 12 months, as required by 10 C.F.R. § 40.42(d).⁸ Fansteel subsequently submitted its Decommissioning Plan ("DP") on January 14, 2003.⁹ In a letter dated April 28, 2003, the NRC indicated that, while it did not object to the proposed approach to decommissioning the Muskogee site, the NRC Staff had concluded that the DP did not contain sufficient information to conduct a detailed review.¹⁰ Fansteel subsequently made additional submissions on May 8 and May 9, 2003, describing a four-phased approach to decommissioning the site that would advance the schedule set forth in the DP to the extent practicable.¹¹ In a letter dated May 9, 2003, the NRC accepted the DP for technical review in light of the additional submissions.¹²

⁷ See Letter from L.W. Camper, NRC, to G.L. Tessitore, Fansteel, "Response to Fansteel's License Renewal Application and Letter of June 25, 2002, Concerning Financial Assurance Information," dated October 22, 2002.

⁸ See Letter from A.F. Dohmann, Fansteel, to J. Shepherd, NRC, "NRC License Number SMB-911," dated December 20, 2002.

⁹ See Letter from G.L. Tessitore, Fansteel, to J. Shepherd, NRC, "Fansteel Inc., License No. SMB-911, Docket No. 40-7580," dated January 14, 2003. The January 14 DP did not include certain information related to financial assurance for decommissioning, because the terms and conditions of such financial assurance were still being negotiated in the bankruptcy context.

¹⁰ See Letter from D.M. Gillen, NRC, to G.L. Tessitore, Fansteel, "Results of Preliminary Review of Fansteel's Decommissioning Plan Dated January 2003," dated April 28, 2003.

¹¹ See Letter from G.L. Tessitore, Fansteel, to D.M. Gillen, NRC, dated May 8, 2003; Letter from R. M. McEntee, Fansteel, to NRC Document Control Desk, dated May 9, 2003. The May 9 submission included financial information that was withheld from the public

Thereafter, on June 16, 2003, the State filed its Request for Hearing currently pending before the Presiding Officer.¹³ On June 26, 2003, the day Fansteel was due to respond to the State Request in accordance with 10 C.F.R. § 2.1205(g), Fansteel learned, during a telephone call with NRC Staff that the Staff had on that date suspended its review of the DP because Fansteel had not submitted an associated license amendment request that, in the Staff's view, 10 C.F.R. Part 40 required.¹⁴ Upon learning of the Staff's decision, Fansteel withdrew the DP in order to evaluate its path forward with respect to resolution of issues surrounding the DP in light of the pending bankruptcy proceeding.¹⁵ Thereafter, in a letter dated July 8, 2003, the NRC Staff acknowledged Fansteel's withdrawal of the DP, but also indicated its willingness to proceed with its review of the DP "upon receipt of notification in writing that the proposed DP should again be considered for review" including submission of a request to amend License SMB-911.¹⁶ Thereafter, the State filed its Objection on July 17, 2003.

docket as proprietary. That information has since been submitted to the NRC without a proprietary designation, as discussed further below.

¹² See Letter from D.M. Gillen, NRC, to G.L. Tessitore, Fansteel, "Results of Preliminary Review of Fansteel's Decommissioning Plan dated January 2003," dated May 9, 2003 ("NRC May 9 Letter").

¹³ See "State of Oklahoma's Request for Hearing," dated June 16, 2003 ("State Request").

¹⁴ As noted above, Fansteel previously had been informed by the NRC that the information provided by Fansteel was sufficient for the NRC staff to proceed with a detailed technical review of the DP; on June 26, the NRC Staff apparently changed its position in this regard. See NRC May 9 Letter.

¹⁵ See Letter from G.L. Tessitore, Fansteel, to J. Shepherd, NRC, "Fansteel Inc., License No. SMB-911, Docket No. 40-7580," dated June 26, 2003.

¹⁶ See Letter from J.C. Shepherd, NRC, to G.L. Tessitore, Fansteel, "Response to Fansteel Submittal of June 26, 2003," dated July 8, 2003, at 2 ("NRC July 8 Letter").

DISCUSSION

The State fundamentally argues that the Presiding Officer should not permit the DP to be withdrawn on the basis that “there will be no financial assurance that [the Muskogee site] will be properly remediated according to NRC rules and regulations.” (Objection at 7.) In the alternative, the State contends that, if the DP “is allowed to be withdrawn,” then certain conditions should be imposed. (Objection at 9-10.) As an initial matter, the NRC Staff (through exercise of its authority delegated by the Commission), not the Presiding Officer, has jurisdiction over the withdrawal of the application. The Presiding Officer has no authority to grant the relief requested by the State. More importantly, however, supervening events have rendered the State’s Objection moot. Fansteel has re-submitted the DP, together with associated requests for approvals, and the State will, going forward, have the opportunity to proffer its areas of concern with respect to the proposed DP.

A. The Presiding Officer Lacks the Authority to Grant the Relief Requested by the State

10 C.F.R. § 2.107(a) provides (emphasis added):

The Commission may permit an applicant to withdraw an application prior to the issuance of a notice of hearing on such terms and conditions as it may prescribe, or may, on receiving a request for withdrawal of an application, deny the application or dismiss it with prejudice. Withdrawal of an application after the issuance of a notice of hearing shall be on such terms as the presiding officer may prescribe.

Section 2.107(a) distinguishes between withdrawals filed prior to and after issuance of a notice

of hearing.¹⁷ The Commission, in Section 2.107(a), has delegated to presiding officers only the authority to prescribe the terms of any withdrawal *after* issuance of a notice of hearing. The Commission retains the authority to permit withdrawals *prior to* issuance of a notice of hearing. *See GPU Nuclear Corp. (Oyster Creek Nuclear Generating Station)*, CLI-99-29, 50 NRC 331, 332 (1999). The Commission has delegated to the NRC Staff the authority to address withdrawals of applications prior to issuance of a notice of hearing. *See Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station)*, CLI-93-20, 38 NRC 83, 84-85 (1993); *see also* NRC Management Directive 9.26, "Organization and Functions, Office of Nuclear Material Safety and Safeguards," §§ 0124-03.031, 0124-03.032 (Oct. 1989).

Because there has been no notice of hearing in this proceeding, the NRC Staff, through its delegation of authority from the Commission, retains exclusive jurisdiction to address withdrawals of applications. In this case, the NRC Staff letter of July 8, 2003, acknowledged the withdrawal of the DP. Under these facts, where a hearing request has been referred to the Presiding Officer, but there has been no notice of hearing, the Presiding Officer is limited in his authority to terminating the case as moot. *Vermont Yankee*, CLI-93-20, 38 NRC at 85; *Arizona Pub. Serv. Co. (Palo Verde Nuclear Generating Station, Unit 1)*, LBP-02-26, 56 NRC 479, 480 (2002). Therefore, the Presiding Officer does not have the authority to "disallow" withdrawal of the DP. Moreover, the Presiding Officer may not, in terminating the proceeding, impose "conditions" such as those requested by the State. *See Pub. Serv. Co. of Ind. (Marble Hill*

¹⁷ A notice of hearing is issued in a Subpart G proceeding following the Atomic Safety and Licensing Board's consideration of one or more timely petitions to intervene and/or requests for hearing. *See* 10 C.F.R. § 2.105(e)(2). Although Subpart L contains no analogous provision, the Presiding Officer will publish in the *Federal Register* a notice of hearing following the grant of a hearing pursuant to 10 C.F.R. § 2.1205. *See, e.g., Sequoyah Fuels Corporation, Gore, OK Site; Decommissioning; Notice of Hearing*, 64

Nuclear Generating Station, Units 1 & 2), LBP-86-37, 24 NRC 719, 724 (1986) (where (1) a Licensing Board has been designated to rule on petitions for leave to intervene, to issue a notice of hearing on the application, and to preside over any hearing; (2) petitions to intervene have been filed but have not been granted by the Licensing Board; and (3) a notice of hearing has not been issued at the time the applicant moves to terminate the proceeding, the Licensing Board has no jurisdiction under Section 2.107(a) to set the terms on the withdrawal of an operating license application). Accordingly, the relief sought by the State cannot be granted by the Presiding Officer. As discussed below, however, the relief requested by the State is unnecessary, as its concerns have been rendered moot by Fansteel's re-submission of the DP and requests for associated approvals.

B. Supervening Events Render the State's Objection Moot

On July 24, 2003, following several months of discussions with numerous entities, including the NRC, Fansteel filed a proposed "Joint Reorganization Plan of Fansteel Inc. and Subsidiaries," ("Plan") together with the associated "Disclosure Statement With Respect to Joint Reorganization Plan of Fansteel Inc., *et al.*" ("Disclosure Statement"). Among other things, Fansteel seeks to fulfill its responsibility to remediate the Muskogee site pursuant to NRC requirements. The proposed Plan provides for transfer of the Muskogee site (including real property, equipment and improvements), the NRC license, and other valuable consideration, including Fansteel's rights under the Standby Trust¹⁸ established as NRC-mandated financial

Fed. Reg. 72,701 (Dec. 28, 1999); Atomic Safety and Licensing Board; Molycorp, Inc.; Site Decommissioning Plan; Notice of Hearing, 65 Fed. Reg. 59,472 (Oct. 5, 2000).

¹⁸ Fansteel has previously been in compliance with NRC financial assurance requirements pursuant to 10 C.F.R. § 40.36(e)(2) via the use of two letters of credit which assured the then-current decommissioning cost estimate of approximately \$4.5 million. Subsequent to Fansteel's Chapter 11 filing, the NRC drew upon the full value of the letters of credit

assurance for decommissioning, to a wholly-owned subsidiary of Reorganized Fansteel, MRI Inc. ("MRI"). As the NRC licensee, MRI will have as its sole purpose completion of site decommissioning pursuant to NRC regulations and the terms and conditions of the license. The funding for Muskogee site decommissioning will consist of one or more unsecured notes, and is discussed in detail in the Plan.

In order to implement Muskogee site decommissioning activities, Fansteel requires an NRC-approved decommissioning plan. To this end, on July 24, 2003, contemporaneously with submission of the proposed Plan and Disclosure Statement to the Bankruptcy Court, Fansteel requested that the NRC resume its review of the January 14, 2003 DP. As part of this request, Fansteel supplemented the DP with information concerning financial assurance for decommissioning, as set forth in the proposed Plan.¹⁹ In conjunction with its review of the DP, as supplemented, Fansteel also requested for the first time the following related approvals, thus initiating NRC procedures related to an opportunity for a hearing:

- certain amendments to the NRC license to reflect approval of the DP;
- approval of an alternate decommissioning schedule pursuant to 10 C.F.R. § 40.42(i);
- an exemption from the NRC's decommissioning financial assurance requirements at 10 C.F.R. § 40.36;²⁰ and
- consent for a transfer of License SMB-911 from Fansteel to MRI.²¹

on February 27, 2002, and March 2, 2002 and the funds were deposited in the NRC-approved Standby Trust established for that purpose.

¹⁹ This submission attached the cost estimate and statement of cash flow provided to the NRC as proprietary on May 9, 2003 for inclusion on the public docket. The cash flow statement submitted on July 24 was updated from the version submitted to the NRC on May 9.

²⁰ See Letter from G.L. Tessitore, Fansteel, to D.M. Gillen, NRC, "Requests for Licensing Actions in Connection with the Decommissioning Plan for the Muskogee, Oklahoma Site," dated July 24, 2003.

The NRC Staff has indicated that its practice is to notice receipt of the license amendment request in the *Federal Register*. See NRC July 8 Letter at 3. Such a notice will specify the opportunity to petition for leave to intervene and/or request a hearing.²² Accordingly, while the State's initial Request for Hearing was mooted by the withdrawal of the original decommissioning (and by the lack of a hearing notice), the State will now have the opportunity to raise areas of concern with respect to the re-submitted DP now under review by the NRC Staff (should it decide not to withdraw its Request in view of Fansteel's efforts in the ongoing bankruptcy proceeding to address matters of interest to the State). This resolves the State's concern that it will have not have a "meaningful opportunity" to object to the proposed decommissioning funding mechanism. (Objection at 6.)

The Presiding Officer has pending before him the State Request, to which Fansteel has not yet had an opportunity to respond. Ordinarily, as acknowledged by the State (Objection at 7), the Request would be dismissed as moot. The State would be required to re-file its Request based on the DP as submitted on July 24, 2003, and the hearing opportunity related to that DP. However, such an action seems inefficient and unnecessary in this case. Fansteel respectfully proposes that the Presiding Officer hold the State Request until such time as the

²¹ See Letter from G.L. Tessitore, Fansteel, to D.M. Gillen, NRC, "Request for Consent to License Transfer," dated July 24, 2003. Both of Fansteel's July 24 submissions are available to the public through the NRC Public Document Room.

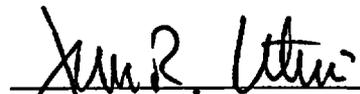
²² An opportunity for a hearing is available in connection with this license amendment request regardless publication of a *Federal Register* notice. However, as a practical matter, the NRC notices significant materials licensing actions where there is or may be significant public interest in the action. Such has been the case to date with respect to Fansteel's proposed decommissioning plans. See, e.g., Notice of Consideration of Amendment Request for Construction of a Containment Cell at Fansteel Facility in Muskogee, Oklahoma and Opportunity for Hearing, 64 Fed. Reg. 49,823 (Sept. 14, 1999). Although 10 C.F.R. Part 2, Subpart M, provides for an opportunity to request a hearing on an application for a material license transfer, it does not contemplate notice of such applications in the *Federal Register*. See 10 C.F.R. § 2.1301.

NRC notices the license amendment request in the *Federal Register*. Following expiration of the notice period, Fansteel would respond to the State Request (including any timely filed supplements thereto), as well as any other timely filed petitions for leave to intervene and/or requests for hearing, in a consolidated fashion, in accordance with the procedural requirements of Subpart L. See 10 C.F.R. § 2.1205(g).

CONCLUSION

For the reasons set forth above, the State's Objection should be dismissed as moot. First, the Presiding Officer has no authority to "disapprove" withdrawal of Fansteel's decommissioning plan, or, in the alternative, condition its withdrawal. There is, however, no need for such relief in any event, as Fansteel has re-submitted a supplemented DP for NRC approval, together with requests for associated licensing actions. Accordingly, the State will have the opportunity to proffer its areas of concern with respect to the re-submitted DP in an NRC forum. To that end, the State's pending Request for Hearing should be held for consideration by the Presiding Officer pending receipt of any other petitions for leave to intervene and/or requests for hearing following public notice of the license amendment request.

Respectfully submitted,



James R. Curtiss, Esq.
Mark J. Wetterhahn, Esq.
Brooke D. Poole, Esq.
WINSTON & STRAWN
1400 L Street, NW
Washington, D.C. 20005-3502
(202) 371-5700

ATTORNEYS FOR FANSTEEL INC.

Dated in Washington, D.C.
this 24th day of July 2003

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE PRESIDING OFFICER

In the Matter of:

Fansteel Inc.

(Muskogee, Oklahoma Facility)

)
)
)
)
)

Docket No. 40-7580-MLA-2

ASLBP No. 03-813-04-MLA

CERTIFICATE OF SERVICE

I hereby certify that copies of the "RESPONSE OF FANSTEEL INC. TO THE STATE OF OKLAHOMA'S OBJECTION AND SHOW OF HARM TO FANSTEEL INC.'S WITHDRAWAL OF DECOMMISSIONING PLAN" has been served as shown below by deposit in the U.S. mail, first class, this 24th day of July 2003. Additional service has also been made this same day by electronic mail, as shown by an asterisk (*) below.

G. Paul Bollwerk, III, Presiding Officer*
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mail Stop T-3F23
Washington, DC 20555-0001
e-mail: gpb@nrc.gov

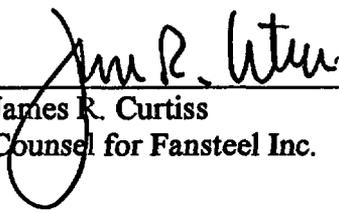
Office of Commission Appellate Adjudication
U.S. Nuclear Regulatory Commission
Mail Stop O-16C1
Washington, DC 20555-0001

Office of the Secretary*
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
Attn: Rulemakings and Adjudications Staff
(original + two copies)
e-mail: HEARINGDOCKET@nrc.gov

Marian L. Zabler, Esq.*
Office of the General Counsel
U.S. Nuclear Regulatory Commission
Mail Stop O-15D21
Washington, D.C. 20555-0001
e-mail: mlz@nrc.gov
OGCMailCenter@nrc.gov

Jeffrey S. Sabin, Esq.*
Schulte Roth & Zabel LLP
919 Third Avenue
New York, NY 10022
e-mail: Jeffrey.Sabin@srz.com

Sarah E. Penn, Esq.*
Assistant Attorney General
Office of the Attorney General
4545 North Lincoln Boulevard, Suite 260
Oklahoma City, OK 73105
e-mail: sarah_penn@oag.state.ok.us



James R. Curtiss
Counsel for Fansteel Inc.