

RAS 6730

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

LBP-03-13

ATOMIC SAFETY AND LICENSING BOARD PANEL
DOCKETED 08/20/03

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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

August 20, 2003

MEMORANDUM AND ORDER
(Dismissal of Proceeding)

Pending before the Presiding Officer is a June 16, 2003 request by petitioner State of Oklahoma (State) for a hearing regarding a January 14, 2003 decommissioning plan submitted by Fansteel Inc. (Fansteel). The plan outlines Fansteel's program for decommissioning its former rare metal extraction facility near Muskogee, Oklahoma, at which, under its existing 10 C.F.R. Part 40 source materials license, Fansteel is authorized to possess natural uranium and thorium in any form. Also pending, however, is a July 9, 2003 show cause order directed to the State in which the Presiding Officer posed the question whether this proceeding should be dismissed in light of a June 26, 2003 Fansteel letter to the NRC staff indicating it was withdrawing its January 2003 decommissioning plan.

As detailed below, the Presiding Officer now finds that he lacks jurisdiction or that this proceeding is moot, either of which requires that this cause must be dismissed.

I. BACKGROUND

Although it filed in January 2002 for bankruptcy under Chapter 11 of the United States Bankruptcy Code, in August 2002 Fansteel sought renewal of its 10 C.F.R. Part 40 source materials license. See Letter from Gary L. Tessitore, Fansteel Chief Executive Officer (CEO), to Ellis W. Merschoff, NRC Region IV Regional Administrator 1 (Jan. 15, 2002); Letter from A. Fred Dohmann, Fansteel General Manager, to John W. Hickey, NRC Office of Nuclear Material Safety and Safeguards (NMSS) 1 (Aug. 27, 2002). In an October 22, 2002 letter, the NRC staff denied the Fansteel renewal application and required that Fansteel proceed to decommission its Muskogee facility. See Letter from Larry W. Camper, NRC Office of Nuclear Materials Safety and Safeguards (NMSS), to Gary L. Tessitore, Fansteel CEO 2 (Oct. 22, 2002). As a consequence, on January 14, 2003, Fansteel submitted a decommissioning plan.¹ See Letter from Gary L. Tessitore, Fansteel CEO, to James C. Shepard, NRC NMSS, attach. (Jan. 14, 2003). Thereafter, on April 28, 2003, the staff advised Fansteel that further information would be required to conduct a proper review of the plan, which resulted in Fansteel submitting a May 8, 2003 letter that outlined a four-phased approach to decommissioning the site. See Letter from Daniel M. Gillen, NRC NMSS, to Gary L. Tessitore, Fansteel CEO 1-2 (Apr. 28, 2003); Letter from Gary L. Tessitore, Fansteel CEO, to Daniel M. Gillen, NRC NMSS 1-2 (May 8, 2003).

¹ It should be noted this is not the first decommissioning plan Fansteel has proffered to the agency. In July 1998, some eight years after processing operations ceased at its Muskogee facility, Fansteel submitted a decommissioning plan that was the subject of an October 1999 State hearing request. See LBP-99-47, 50 NRC 409, 410-11 (1999). Although the State's hearing request was granted in that proceeding, the case ultimately was dismissed because Fansteel abandoned its license amendment application relating to that decommissioning plan. See LBP-01-2, 53 NRC 82, 82-83 (2001).

When the staff responded with a May 9, 2003 letter indicating it had received sufficient information to proceed with a technical review of the Fansteel plan, the State filed its pending June 16, 2003 hearing request in which it presented its concerns regarding the January 2003 decommissioning plan. See Letter from Daniel M. Gillen, NRC NMSS, to Gary L. Tessitore, Fansteel CEO 1 (May 9, 2003); [State] Request for Hearing (June 16, 2003) at 21-40. In a June 26, 2003 letter to the staff, however, citing the staff's determination that day to suspend its review of the decommissioning plan and the State's pending hearing request, Fansteel declared it was withdrawing its January 2003 decommissioning plan. See Letter from Gary L. Tessitore, Fansteel CEO, to James C. Shepherd, NRC NMSS 1 (June 26, 2003). The staff acknowledged this withdrawal in a July 8, 2003 letter in which it noted that (1) Fansteel's current Part 40 license containing a license condition (No. 26) addressing a previously approved decommissioning plan that was not the four-phased approach suggested by the May 8 Fansteel letter; and (2) Fansteel had advised the staff following submission of the State's hearing request that the staff should not consider Fansteel's submittal of its decommissioning plan as a request for a license amendment. As a consequence, the staff indicated, a license amendment application would be required from Fansteel to obtain approval of its decommissioning plan. See Letter from James C. Shepherd, NRC NMSS, to Gary L. Tessitore, Fansteel CEO 1 (July 8, 2003).

It was at this juncture that the Presiding Officer was designated to preside over this proceeding and, previously having been served by Fansteel with a copy of its June 26 withdrawal letter, ordered the State to show cause why the proceeding should not be dismissed. See 68 Fed. Reg. 41,851 (July 15, 2003); Presiding Officer Show Cause Order (Dismissal of Proceeding) (July 9, 2003) at 1. In an initial response, Fansteel asked that the proceeding be held in abeyance pending notification of its planned actions with respect to the

decommissioning plan, a request that the State, but not the staff, opposed. See Notification of [Fansteel] in Connection with Show Cause Order (July 15, 2003) at 1; [State] Objection to Notification of [Fansteel] in Connection with Show Cause Order (July 15, 2003) at 1-2; NRC Staff Response to Notification of [Fansteel] in Connection with Show Cause Order (July 16, 2003) at 1. When the Presiding Officer denied this Fansteel request, see Presiding Officer Order (Denying Request to Hold Proceeding in Abeyance) (July 16, 2003) at 1; see also Presiding Officer Memorandum (Acknowledging NRC Staff Response) (July 16, 2003) at 1, the State filed its answer to the Presiding Officer's show cause order on July 17, 2003, asserting that Fansteel's withdrawal of its decommissioning plan would cause legal harm and thus should be denied or, alternatively, conditioned on Fansteel (1) providing adequate funding to complete an agency approved decommissioning; (2) evaluating the Muskogee site and containing any contamination migration under an adequately funded clean-up regime; and (3) implementing and adequately funding a groundwater treatment plan. See [State] Objection and Show of Harm to [Fansteel] Withdrawal of Decommissioning Plan (July 17, 2003) at 4-9.

In its July 25, 2003 response to this State submission, observing that it was that day resubmitting its decommissioning plan with a license amendment request, Fansteel declared that while the State's hearing request could be dismissed as moot, it had no objection to the Presiding Officer holding that request pending the receipt of any other hearing requests filed in the wake of an anticipated staff Federal Register hearing opportunity notice. See Response of [Fansteel] to the [State] Objection and Show of Harm to [Fansteel] Withdrawal of Decommissioning Plan (July 24, 2003) at 1-2. For its part, the staff likewise asserted that the State's hearing petition was moot; however, noting its intention to publish a hearing opportunity in the near future, the staff indicated it had no objection to the Presiding Officer retaining jurisdiction over the State's submission. See NRC Staff Response to the [State] Objection and Show of Harm to [Fansteel] Withdrawal of Decommissioning Plan (July 25, 2003) at 5-6.

Finally, after obtaining permission from the Presiding Officer, on August 7, 2003, the State filed a reply to the Fansteel and NRC responses asserting that the proceeding is not moot because the Presiding Officer has jurisdiction over the proceeding, including any supplemented Fansteel decommissioning plan, and that dismissal would be inappropriate in any event because it would cause unnecessary delay to the ultimate remediation of the Fansteel site that would be detrimental to the State. See [State] Reply to Fansteel and NRC Staff's Response (Aug. 7, 2003) at 9.

In accordance with the representations in its July 24 filing, Fansteel has resubmitted the decommissioning plan, with new supplemental material, which is accompanied by a license amendment application (NRC Form 313). See Letter from Gary L. Tessitore, Fansteel CEO, to Daniel M. Gillen, NRC NMSS 1 (July 24, 2003). Thereafter, the staff published a Federal Register notice indicating it was considering the July 24 Fansteel license amendment request and that interested persons could timely request a 10 C.F.R. Part 2, Subpart L hearing on that request on or before September 10, 2003. See 68 Fed. Reg. 47,621, 47,622 (Aug. 11, 2003).

II. DISCUSSION

It is well-established in this agency's jurisprudence that a presiding officer has the authority to rule in the first instance on questions regarding the existence and scope of his or her jurisdiction. See, e.g., Duke Power Co. (Perkins Nuclear Station, Units 1, 2, and 3), ALAB-591, 11 NRC 741, 742 (1980). Further, it is clear that a presiding officer generally has only the jurisdiction and power that he or she is delegated by the Commission and that such a delegation generally is made by the Commission's hearing or hearing opportunity notice. See, e.g., Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-825, 22 NRC 785, 790 (1985). In applying these principles here, it seems apparent that while the Presiding Officer had the authority to raise the issue of his jurisdiction over the State's hearing request, a critical component in making that determination -- a hearing opportunity notice -- did not exist in

connection with the State hearing request when it was submitted in mid-June 2003.² As a consequence, answering the question whether presiding officer jurisdiction exists in this instance devolves to an analysis of what authority to conduct hearings is provided to the presiding officer by other statutory or regulatory dictates.

As it is pertinent here, the agency's organic statute, the Atomic Energy Act of 1954 (AEA), as amended, makes clear in section 189a that interested persons may request a hearing relative to "any proceeding under this Act, for the granting, suspending, revoking, or amending of any license or construction permit." 42 U.S.C. § 2239(a)(1)(A). Likewise, in the context of 10 C.F.R. Part 2, Subpart L, the procedural construct that was invoked in the Commission's referral of the State's hearing request to the Licensing Board Panel for appointment of a presiding officer, see 68 Fed. Reg. at 41,851, the hearing requests that are subject to consideration are those regarding "[t]he grant, renewal, or licensee-initiated amendment of a materials license subject to part[] . . . 40." 10 C.F.R. § 2.1201(a)(1). Thus, absent some special delegation to the presiding officer from the Commission, which was not present in this instance,³ the presiding officer's authority pursuant to such a referral would be to consider a hearing request relating to an amendment request by a licensee, such as Fansteel.

As has been observed elsewhere, to what extent a requested staff action is, or is not, a licensing action subject to a hearing request is not necessarily easy to discern. See Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Unit 1), CLI-96-13, 44 NRC 315, 326-27

² Of course, as 10 C.F.R. Part 2, Subpart L recognizes, it is not necessary that a hearing request regarding a proposed materials licensing action await the issuance of a hearing notice. See 10 C.F.R. § 2.1205(d)(2). Nonetheless, the absence of such a notice does not create jurisdiction in the presiding officer.

³ The Commission did perform the ministerial act of referring the State's request to the Atomic Safety and Licensing Board Panel for the appointment of a presiding officer. See 68 Fed. Reg. at 41,851. Absent a specific Commission directive regarding jurisdiction, however, this referral would not, in and of itself, constitute any finding that would preclude the presiding officer from exercising the previously referenced general authority to determine the presiding officer's authority over the proceeding.

(1996). Nonetheless, as the staff concluded in this instance (and Fansteel apparently agreed), the decommissioning plan, in and of itself, was not a request for a license amendment.⁴ Indeed, it was not until late July 2003 that Fansteel proffered such a request along with a revised version of its decommissioning plan. See 10 C.F.R. § 40.44 (requiring amendment application to be on NRC Form 313, in accordance with 10 C.F.R. § 40.31). As a consequence, whether under the AEA or Subpart L, the presiding officer lacked jurisdiction over the State's June 2003 hearing request attempting to challenge the validity of the January 2003 Fansteel decommissioning plan. Moreover, the various participants' suggestions that it would be more "efficient" if the presiding officer "retained" jurisdiction over this matter fail to recognize that, as a jurisdictional matter, a presiding officer cannot, for whatever reason, retain authority over a proceeding when the presiding officer lacked such jurisdiction ab initio. Thus, the Presiding Officer having been without jurisdiction over this proceeding in the first instance, this case must be dismissed.

It is also worth noting, however, that there is an alternative, equally sound basis for dismissing this action. As was noted previously, in late June 2003 Fansteel voluntarily withdrew its decommissioning plan from further agency consideration. As the agency's regulatory scheme and adjudicatory precedent make apparent: (1) in the absence of a hearing notice, a participant generally is free to withdraw a request for a licensing action without presiding officer approval or conditions; and (2) such an action effectively moots the proceeding. See 10 C.F.R. § 2.107(a); Niagra Mohawk Power Corp. (Nine Mile Point Nuclear Station, Units 1 & 2), CLI-00-9, 51 NRC 293, 294 (2000); Public Service Co. of Indiana, Inc. (Marble Hill Nuclear

⁴ This lack of any pending Fansteel license amendment application distinguishes this situation from cases like U.S. Army (Jefferson Proving Ground Site), LBP-01-32, 54 NRC 283, 287-89 (2001), in which a presiding officer has retained jurisdiction over a Subpart L proceeding in the face of significant applicant revisions to the decommissioning plan underlying a pending license amendment request.

Generating Station, Units 1 and 2), LBP-86-37, 24 NRC 719, 724 (1986). In line with this authority, Fansteel's action withdrawing its decommissioning plan from further agency consideration prior to the issuance of a notice of hearing effectively mooted this cause, so as to warrant its dismissal.⁵

Finally, although dismissal of this proceeding will require that the State file a new hearing request if it wishes to challenge Fansteel's late-July 2003 license amendment application and the accompanying decommissioning plan, the prejudice to the State is not untoward given that, up to this point, it has submitted only one substantive pleading regarding the Fansteel decommissioning plan -- its June 2003 hearing request -- that it should have ample time to reformulate and submit under the terms of the staff's recently-issued hearing opportunity notice.

III. CONCLUSION

Fansteel's January 2003 decommissioning plan having been merely a plan of action, not a formal application for a license amendment as required by 10 C.F.R. § 40.44, the Presiding Officer lacked jurisdiction over the State's June 2003 hearing request seeking to challenge that plan in a 10 C.F.R. Part 2, Subpart L proceeding. Alternatively, because Fansteel withdrew that plan as the subject of further agency consideration prior to the issuance of notice of hearing, this proceeding is now moot. In either instance, the State's hearing request must be denied and this case dismissed.

⁵ This is at least the second time that Fansteel has submitted and then taken actions to discontinue staff review of, and a State challenge to, a decommissioning plan for its Muskogee facility. If this should occur again relative to the pending July 2003 license amendment application in a context in which presiding officer consideration was appropriate, this sequence of events seemingly would be a factor to be weighed in determining whether to condition, or even permit, the application's withdrawal. See Duke Power Co. (Perkins Nuclear Station, Units 1, 2, and 3), LBP-82-81, 16 NRC 1128, 1134-35 (1982).

For the foregoing reasons, it is this twentieth day of August 2003, ORDERED, that:

1. The State of Oklahoma's June 16, 2003 request for hearing regarding Fansteel's January 14, 2003 decommissioning plan is denied and this proceeding is dismissed and terminated;

2. In accordance with 10 C.F.R. § 2.1205(o), this action by the Presiding Officer denying the State's hearing request in its entirety is appealable to the Commission within ten (10) days of service of this memorandum and order. An appeal may be taken by filing and serving upon the Commission and all participants a statement that succinctly sets out, with supporting argument, the errors alleged. The appeal may be supported or opposed by any participant by filing a counter-statement within fifteen (15) days of the service of the appeal brief.

BY THE PRESIDING OFFICER⁶

/RA/

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

Rockville, Maryland

August 20, 2003

⁶ Copies of this memorandum and order were sent this date by Internet e-mail transmission to counsel for (1) Fansteel; (2) the State; and (3) the staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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FANSTEEL, INC.) Docket No. 40-7580-MLA-2
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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (DISMISSAL OF PROCEEDING) (LBP-03-13) 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 Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 20th day of August 2003