

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

INTRODUCTION

Pursuant to the July 9, 2003, Show Cause Order issued by the Presiding Officer in the above-captioned proceeding, the staff of the Nuclear Regulatory Commission (Staff), hereby responds to the "State of Oklahoma's Objection and Show of Harm to Fansteel Inc.'s Withdrawal of Decommissioning Plan" (Objection). See Show Cause Order (Dismissal of Proceeding), July 9, 2003. As discussed below Oklahoma's Objection has become moot.

BACKGROUND

Fansteel, Inc. ("Fansteel" or "Licensee") is the holder of Materials License No. SMB-911 which authorizes it to possess contaminated material at its facility in Muskogee, OK pursuant to 10 C.F.R. Part 40. The license authorizes Fansteel to possess up to 400 tons of natural uranium and thorium in any form. The contaminated material at the Muskogee site is in the form of uranium, thorium, radium, and decay-chain products in process equipment and buildings, soil, sludge, and groundwater. Condition 26 of the license provides that remediation and decommissioning activities at the Muskogee facility shall be performed in accordance with the

decommissioning plan and supplemental correspondence submitted by letter dated June 16, 1999, July 16, 1999, and November 9, 2000.

On January 15, 2002, the Licensee notified the NRC that it filed a petition for bankruptcy pursuant to Chapter 11 of Title 11 of the United States Code. Letter to E. Merschoff from G. Tessitore, Jan. 15, 2002 (ADAMS Accession No. ML 020290385). On January 14, 2003, 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). Fansteel proposed to remove the contaminated materials in the soil and groundwater to meet the unrestricted release requirements of the Radiological Criteria for License Termination rule (10 C.F.R. Part 20, Subpart E). Fansteel stated in the January 14, 2003, letter that the amount and type of financial assurance to be provided in connection with the DP would be set forth in a plan of reorganization that it intended to file with the Bankruptcy Court. In addition, Fansteel indicated that it would be filing an alternative schedule for completion of decommissioning as well as a request for exemption from the regulatory funding requirements in 10 C.F.R. § 40.36(d) and (e) to support the terms and conditions of the reorganization plan.

By letter dated April 28, 2003, the Staff informed the Licensee that the DP did not contain sufficient information to conduct a detailed review. Letter to G. Tessitore from D. Gillen, April 28, 2003 (ADAMS Accession No. ML031040079). Also, attached to the letter were the Staff's detailed comments on the DP submittal. April 26, 2003 Letter, Enclosure 1, Comments on Fansteel Decommissioning Plan of January 2003 (ADAMS Accession No. ML 031040081).

In a letter dated May 8, 2003, the Licensee submitted additional information, thereby resubmitting the new DP for review. In the May 8, 2003, letter, Fansteel indicated that upon emergence from Chapter 11 and in accordance with the terms and conditions of a confirmed plan of reorganization (which would include the transfer of the license to a new wholly-owned subsidiary of the "revised" Fansteel, "MRI"), MRI will undertake a four-phased approach to decommission the

Muskogee site. *Id.* 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 ("State" or "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.¹ Letter to G. Tessitore from J. Shepherd, July 8, 2003 (ADAMS Accession No. ML030280438).

On July 9, a presiding officer was designated in this proceeding. "Fansteel, Inc.; Designation of Presiding Officer," 68 Fed. Reg. 41851 (July 15, 2003). Also on July 9, the Presiding Officer issued its Show Cause Order, ordering that the State should by July 17, 2003, show cause why this proceeding should not be dismissed.² On July 17, 2003, Oklahoma filed "The

¹ In the July 8, 2003, letter, the Staff indicated it assumed that Fansteel's May 8, 2003 letter evinced its desire to amend its license to approve the DP. July 8, 2003 Letter at 1. Fansteel, however, informed the Staff that it should not consider the submittal of the DP for review and approval as a request for a license amendment. *Id.* The Staff informed Fansteel that under the circumstances, NRC licensing requirements required a license amendment request. *Id.* Fansteel subsequently withdrew its DP. *Id.* The Staff, however, indicated in the July 8, 2003, Letter that it was 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 and that Fansteel file a request for a license amendment. *Id.* at 2.

² On July 15, 2003, Fansteel filed "Notification of Fansteel Inc. In Connection with Show Cause Order," in which Fansteel requested the Presiding Officer hold the proceeding in abeyance pending further notification of its planned actions with respect to the DP. Also on July 15, the State of Oklahoma filed its objections to Fansteel's request. "State of Oklahoma's Objection to Notification of Fansteel, Inc., In Connection with Show Cause Order," July 15, 2003. On July 16, 2003, the Staff filed its response, indicating it did not oppose Fansteel's request and also indicating its desire to participate as a party to the proceeding. NRC Staff Response to Notification of Fansteel, Inc. In Connection with Show Cause Order," July 16, 2003. On July 16, 2003, the Presiding Officer issued an order denying Fansteel's request. Order (Denying Request to Hold
(continued...)

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 ("July 24, 2003 Submittal"). Thus, as discussed below, the State's Objection should be dismissed as moot.

DISCUSSION

The State, in its Objection, argues that Fansteel should not be permitted to withdraw the DP submitted for Staff review in April 2003, and again with additional information in May, 2003. As the basis for its Objection, the State argues that it will be denied the opportunity to participate in a meaningful hearing on issues regarding financial assurance if a reorganization plan is approved by the Bankruptcy Court before these issues are considered by the NRC. Objection at 6. In the view of the State, Fansteel is attempting to limit its ability to adequately fund the DP through its reorganization plan, thereby limiting the opportunity of the State or any other party to challenge any proposed funding in an NRC adjudicatory hearing. *Id.* at 8.

To remedy this situation, the State asks that the Presiding Officer deny Fansteel's withdrawal of the DP and instruct the Staff to proceed with its review of the DP. Alternatively, the State requests that if withdrawal is permitted, conditions be placed on the withdrawal³ to (1) ensure that Fansteel provides adequate funding to complete an NRC approved DP, (2) require that Fansteel evaluate the site, contain contamination and ensure that there is adequate funding to remove non-radiological waste contaminating the natural resources in the area, and (3) ensure that

²(...continued)
Hearing in Abeyance), July 16, 2003.

³ 10 C.F.R. § 2.107(a) provides that withdrawal of an application after the issuance of a notice of hearing shall be on such terms as the presiding officer may prescribe. However, the Staff has the authority to permit the withdrawal on such terms and conditions it may prescribe before the issuance of a notice of hearing. *Id.* No notice of hearing has been issued in this proceeding.

there is implementation of a groundwater treatment plan and assurance that adequate funding for the plan be provided. *Id.* at 9-11.

While the State may have set forth genuine concerns regarding Fansteel's financial situation and its impact on the decommissioning of this site, these are not matters that can be addressed in this forum at this point in the proceeding. It is well settled that adjudicatory boards do not have the authority to direct the Staff in the performance of its responsibilities. See *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1263 (1984), *rev'd in part on other grounds*, CLI-85-2, 21 NRC 282 (1985). In particular, the docketing and review activities of the Staff do not fall under the supervision of the adjudicatory boards; only in the most unusual circumstances should the review activities of the Staff be interfered with. *Philadelphia Electric Company* (Fulton Generating Station, Units 1 and 2) LBP-79-23, 10 NRC 220, 223-24 (1979).

In any event, Fansteel has recently resubmitted the DP originally filed on January 14, 2003, together with an associated request for a license amendment. July 24, 2003 Submittal at 1. Fansteel also provided a supplement to DP Chapter 15 concerning financial assurance for decommissioning of the Muskogee site. *Id.* at 2. The Staff intends to publish a *Federal Register* notice which will provide for the opportunity to request a hearing on Fansteel's submittal. Thus, the State will have the opportunity to request a hearing on the revised DP. If such a hearing is granted,

the State will have the opportunity to litigate its concerns regarding Fansteel's DP, including any concerns it may have regarding Fansteel's financial situation. Accordingly, Oklahoma's Objection is moot. However, the Staff would have no objection to the Presiding Officer retaining jurisdiction.

CONCLUSION

For the reasons stated above, the Oklahoma's Objection is moot.

Respectfully submitted

/RA/

Marian Zabler
Counsel for NRC Staff

Dated at Rockville, Maryland
this 25th day of July, 2003

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE PRESIDING OFFICER

In the Matter of)
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FANSTEEL, INC.) Docket No. 40-7580-MLA-2
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(Muskogee, Oklahoma)) ASLBP No. 03-813-04-MLA
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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO THE STATE OF OKLAHOMA'S OBJECTION AND SHOW OF HARM TO FANSTEEL, INC.'S WITHDRAWAL OF DECOMMISSIONING PLAN" 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 25th day of July 2003.

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