

RAS 6854

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED 09/22/03

BEFORE THE COMMISSION

In the Matter of

FANSTEEL, INC.
(Muskogee, Oklahoma Site)

)
)
)
)
)

Docket No. 40-7580-LT

NRC STAFF RESPONSE TO REQUEST FOR HEARING FILED
BY THE STATE OF OKLAHOMA REGARDING THE
REQUEST FOR APPROVAL OF A LICENSE TRANSFER

Lisa B. Clark
Counsel for NRC Staff

September 22, 2003

September 22, 2003

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)
) Docket No. 40-7580-LT
FANSTEEL, INC.)
(Muskogee, Oklahoma Site))
)

NRC STAFF RESPONSE TO REQUEST FOR HEARING FILED
BY THE STATE OF OKLAHOMA REGARDING THE
REQUEST FOR APPROVAL OF A LICENSE TRANSFER

INTRODUCTION

Pursuant to 10 C.F.R § 2.1316(c), the U.S. Nuclear Regulatory Commission Staff (Staff) hereby responds to "State of Oklahoma's Request for Hearing" regarding a request for NRC approval of the proposed transfer of the license currently held by Fansteel, Inc. ("Fansteel") to MRI, Inc. ("MRI"), a corporation intended to be created upon Fansteel's exit from bankruptcy. As set forth below, the Staff submits that although the State of Oklahoma ("State") has established standing to intervene, it has not raised an admissible contention as required by 10 C.F.R. § 2.1306 and the request for hearing should therefore be denied. Further, in the event that a hearing is granted, the Staff hereby states its desire to participate as a party to the adjudication.

BACKGROUND

Fansteel is the holder of Materials License No. SMB-911 which authorizes it to possess source material consisting of up to 400 tons of natural uranium and thorium in any form at its facility in Muskogee, OK pursuant to 10 C.F.R. Part 40. At the Muskogee site, Fansteel operated a rare metal extraction facility until 1989. As a result of those operations, the Muskogee site currently contains contaminated material 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 had 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") for the Muskogee site 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 bankruptcy 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 decommissioning 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). Following a request for hearing filed by the State of Oklahoma, Fansteel withdrew its DP. Letter to J. Shepherd from G. Tessitore, June 26, 2003 (ADAMS Accession No. ML032100546).

On July 24, 2003, Fansteel resubmitted the DP originally submitted on January 14, 2003, and requested that the NRC reinstate its review of the plan. Letter to D. Gillen from G. Tessitore, July 24, 2003 (ADAMS Accession No. ML032100530). Fansteel also requested that the NRC take the following licensing actions: (1) Amend the Muskogee license to reflect approval of the DP, (2) approve an alternate decommissioning schedule pursuant to 10 C.F.R. § 40.42(i), and (3) grant an exemption from the financial assurance requirements of 10 C.F.R. § 40.36(e). In Attachment 1 to the letter, Fansteel submitted a supplement to the DP outlining the means by which Fansteel proposed to provide financial assurance for decommissioning.

Concurrent with the DP, Fansteel submitted a request for approval for the proposed transfer of License SMB-911 from Fansteel to MRI. Letter to D. Gillen from G. Tessitore, July 24, 2003 (ADAMS Accession No. ML032100583). Included with the request was a description of the manner in which MRI would be funded to carry out decommissioning of the Muskogee site. As stated in the request, because Fansteel is operating as a debtor-in-possession under the jurisdiction of the Bankruptcy Court, the creation of MRI and its funding cannot occur until after approval of the Reorganization Plan by the Bankruptcy Court and Fansteel’s emergence from bankruptcy protection.¹ The transfer of the license from Fansteel to MRI is one step in the process outlined

¹On July 24, 2003, Fansteel submitted a proposed “Joint Reorganization Plan of Fansteel
(continued...) ”

in the Reorganization Plan which is currently before the Bankruptcy Court. Under that proposal, the Muskogee site, including the NRC license, is to be transferred to the subsidiary organization designated MRI which will assume all responsibility for decommissioning.

While the responsibility for decommissioning the Muskogee site would fall entirely to MRI under the proposal, funding of MRI would be provided from Fansteel as reorganized pursuant to the proposal before the Bankruptcy Court (“Reorganized Fansteel” or “RF”). Detailed information regarding the means to fund MRI are included in the proposed DP supplement and in the license transfer request. These include: (1) An unsecured Primary Note in the amount of \$30.6 million to cover remediation of the site as set forth in the approved DP with a maturity date of December 31, 2013, (2) an unsecured Secondary Note in the amount of \$4.2 million with a maturity date of December 31, 2023, to cover estimated costs of groundwater treatment and monitoring, (3) mandatory minimum semi-annual payments, (4) additional mandatory prepayments based on “Excess Available Cash”,² (5) insurance proceeds received by RF with respect to Muskogee claims, if any, (6) RF/RW³ asset sale proceeds, if any, and (7) a Contingent Note to address additional remediation of the site and groundwater, as needed, with a maturity date to reflect additional time, if any, required to remediate the site. In the event that RF is unable to timely and/or fully fund

¹(...continued)

Inc. and Subsidiaries” and “Disclosure Statement with Respect to Joint Reorganization of Fansteel, Inc. Et Al.” to the Bankruptcy Court (ADAMS Accession Nos. ML032190239 and ML032230033). Upon approval of the Disclosure Statement, Fansteel has stated that it will solicit votes from shareholders and creditors to approve the plan. The financial assurance mechanisms would be implemented when the Reorganization Plan becomes effective.

²“Excess Available Cash” is defined as the actual change in the year-end cash balance, exclusive of post-effective date subsidiaries and less certain specified amounts. The amount of excess available cash is to be determined by outside auditors within 90 days of the end of each fiscal year.

³Reorganized Wellman (“RW”) is an existing subsidiary of Fansteel with sand-alone value.

MRI's obligations for any year, MRI may draw upon the "LC Cash Reserve"⁴ of \$2 million on a revolving basis. Fansteel included estimates of the funds expected to be paid by RF to MRI through the year 2013, as well as the closure costs estimates for those years to demonstrate that sufficient funding would be provided for decommissioning.

Notice of Fansteel's request for NRC approval of the transfer was published in the *Federal Register* on August 21, 2003. 68 Fed. Reg. 50558. The State filed "The State of Oklahoma's Request for Hearing" ("Hearing Request") on September 10, 2003, requesting a hearing under Subpart M of Part 2 of the Commission's regulations on the license transfer. On the same date, the State filed "State of Oklahoma's Request for Hearing," requesting a hearing under Subpart L of Part 2 regarding the Licensee's request for approval of the revised DP for the Muskogee site.

DISCUSSION

In order to intervene in a license transfer proceeding, a petitioner must first establish that it has an interest which may be affected by the proceeding, *i.e.*, that it has standing. *Vermont Yankee Nuclear Power Corporation and Amergen Vermont, LLC* (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 162-63 (2000). In addition, the petitioner must raise at least one admissible issue pursuant to the provisions of 10 C.F.R. §2.1306. *Id.* As discussed below, while the State has demonstrated standing to request a hearing it has failed to set forth, with sufficient specificity, an admissible issue to be considered before the Commission.

I. The State has Established Standing to Intervene

For a petitioner to demonstrate standing in a Subpart M license transfer proceeding, the petitioner must:

- (1) identify an interest in the proceeding by

⁴The "LC Cash Reserve" is comprised of the money, plus accrued interest, currently held in a Standby Trust. The Standby Trust was established to accept and hold the funds which were originally guaranteed by letters of credit Fansteel had obtained to meet its financial assurance requirements for decommissioning under 10 C.F.R. § 40.36.

- (a) alleging a concrete and particularized injury (actual or threatened) that
 - (b) is fairly traceable to, and may be affected by, the challenged action (e.g., the grant of an application to approve a license transfer), and
 - (c) is likely to be redressed by a favorable decision, and
 - (d) lies arguably within the zone of interests protected by the governing statute(s);
- and

(2) specify facts pertaining to that interest.

See 10 C.F.R. §§ 2.1306, 2.1308; *Power Authority of the State of New York and Entergy Nuclear FitzPatrick LLC* (James A. FitzPatrick Nuclear Power Plant & Indian Point Nuclear Generating Unit No. 3) CLI-00-22, 52 NRC 266, 293 (2000).

Here, the State claims that its interests in the proceeding include the health and safety of its citizens, which are directly impacted by contamination of the State's groundwater, surface waters, air, land or other natural resources by operation of the Fansteel facility. See Hearing Request at 9-10. The State further alleges that the transfer of the license to MRI could adversely impact the remediation of the site if MRI is not provided sufficient funding to carry out the DP. In the view of the State, this interest would be addressed by not allowing the transfer of the license from Fansteel to MRI because Fansteel will have the economic resources to remediate the site while there is no assurance that MRI will be funded sufficiently to complete remediation. *Id.* at 12-13.

The State also claims an interest in the economic health of its citizens, alleging that their economic interests may be negatively impacted by a change in the area's tax base or the State's revenues due to a loss in tourism and a decrease in property values if the site is not properly remediated. *Id.* at 10. The State further claims a proprietary interest in protecting its air, land, water, wildlife, and natural resources, because the State owns the waters in the Arkansas River which borders the Facility and is connected to groundwater beneath the Facility, as well as the

wildlife in the State, and also manages and operates two wildlife refuges in close proximity to the Facility. *Id.* at 10-11.

Although the State claims additional grounds for obtaining standing, these reasons, coupled with the fact that the Commission has “long-recognized the benefits of participation in our proceedings by representatives of interested states. . . ”, are enough to obtain standing. *Niagara Mohawk Power Corp., New York State Electric & Gas Corp. and AmerGen Energy Comp.* (Nine Mile Point, Unites 1 & 2) CLI-99-30, 50 NRC 333, 344 (1999).

II. The State Fails to Set Forth an Admissible Contention

Demonstrating standing is not sufficient to intervene in a license transfer proceeding. The petitioner must also raise at least one admissible contention See 10 C.F.R. § 2.1306. To demonstrate that issues are admissible under Subpart M, a petitioner must:

- (1) set forth the issues (factual and/or legal) that petitioner seeks to raise,
- (2) demonstrate that those issues fall within the scope of the proceeding,
- (3) demonstrate that those issues are relevant and material to the findings necessary to a grant of the license transfer application,
- (4) show that a genuine dispute exists with the applicant regarding the issues, and
- (5) provide a concise statement of the alleged facts or expert opinions supporting petitioner’s position on such issues, together with references to the sources and documents on which petitioner intends to rely.

See 10 C.F.R. § 2.1308; *Nine Mile Point*, 50 NRC at 342. As the Commission has reiterated several times recently, these “standards do not allow mere ‘notice pleading’; the Commission will not accept ‘the filing of a vague, unparticularized’ issue, unsupported by alleged fact or expert opinion and documentary support.” *GPU Nuclear, Inc. Jersey Central Power & Light Comp., & AmerGen Energy Comp.* (Oyster Creek Nuclear Generating Station), CLI-00-06, 51 NRC 193, 203 (2000); *Vermont Yankee Nuclear Power Station*, 52 NRC at 164. General assertions or

conclusions will not suffice. *James A. FitzPatrick Nuclear Power Plant & Indian Point Nuclear Generating Unit No. 3*, 52 NRC at 295.

The State puts forth only one issue to be litigated: whether the lack of funding assurance of the proposed licensee constitutes an unreasonable risk to public health and safety. Hearing Request at 13-14. The State accurately points out that NRC regulations, specifically 10 C.F.R. § 40.36, require funding assurance for decommissioning. *Id.* at 14. The State's statement of alleged facts with supporting documentary evidence or expert opinion, however, does not fulfill Commission requirements. Instead, the State merely claims that: "If one analyzes the Disclosure Statement and Re-Organization Plan submitted by Fansteel in the United States Bankruptcy Court, one can clearly see that the promises for funding are unlikely to be fulfilled and present many opportunities to legitimately escape performance by MRI." *Id.* at 14. Such a statement does not fulfill the requirement of a "concise statement of alleged facts or expert opinions" in support of the State's claims, or any "references to the sources and documents" on which the State would rely in a hearing.

Indeed, the State entirely fails to provide any support for its claim that funding for the DP would be assured if the license is retained by RF, rather than transferred to MRI as proposed. Hearing Request at 13. Because Fansteel is currently in bankruptcy, there is no assurance that sufficient funding will be available for the DP regardless of whether the license is transferred or not.⁵ The current Reorganization Plan before the Bankruptcy Court is predicated on a number of conditions which must occur, including the transfer of the license from RF to MRI. If this is not

⁵Fansteel previously complied with the financial assurance requirements of 10 C.F.R. §40.36 by obtaining letters of credit based on a cost estimate of \$4.5 million for remediation based on a plan to process the contaminated material, extract and sell commercially valuable material, and dispose the residue offsite. After this process proved untenable, the cost estimate was adjusted to nearly \$42 million. Fansteel has represented that it cannot provide the financial assurance for this amount as required by 10 C.F.R. § 40.36, and has accordingly requested an exemption from that regulatory requirement. See, Letter from G. Tessitore to D. Gillen, July 24, 2003, Attachment 1, Table 15-11 (ADAMS Accession No. ML032100558).

approved by the NRC, it is uncertain what will become of Fansteel, including whether a reorganized Fansteel will even be created. Given the precarious nature of Fansteel's finances, adequate funding of the DP cannot be assured under any circumstances. The Reorganization Plan which has been presented before the Bankruptcy Court, after negotiation with the NRC Staff and other parties, is an effort to ensure that as much funding as possible is available to devote to remediation given the numerous other claims on Fansteel's assets. Thus, simply stating that the Reorganization Plan does not ensure that the DP will be fully funded if the license is transferred to MRI because there is no guarantee that RF will meet its funding obligations is not enough to raise a litigible issue. In order to initiate a hearing, the State must provide some factual support for the claim that denying the license transfer would provide greater financial assurance that site remediation will occur.

Similar arguments have been raised before the Commission recently. In *Oyster Creek Nuclear Generating Station, supra*, the petitioner raised doubts as to whether the company to whom the license would be transferred would be able to earn enough operating revenue to cover all its operating, maintenance and capital expenses. The Commission stated that when the petitioner, as here, "has offered no tangible information, no experts, no substantive affidavits," but instead only "bare assertions and speculation [t]his is not enough to trigger an adversary hearing". CLI-00-06, 51 NRC at 208. Thus, precedent demonstrates that the State here has not produced the necessary documentary evidence or opinion testimony to raise an admissible contention. The

one brief reference to the Disclosure Statement and Re-Organization Plan, with the conclusory statement that *if* one analyzes it one *could* clearly see that the promises for funding are *unlikely* to be fulfilled, does not provide the necessary documentation that the Commission requires.

CONCLUSION

For the reasons stated above, the State's hearing request should be denied.

Respectfully submitted,

/RA/

Lisa B. Clark
Counsel for NRC Staff

Dated at Rockville, Maryland
this 22nd day of September, 2003

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)
)
FANSTEEL, INC.) Docket No. 40-7580-LT
(Muskogee, Oklahoma Site))
)

NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney herewith enters an appearance in the above-captioned matter. In accordance with 10 C.F.R. § 2.713(a), the following information is provided:

Name: Lisa B. Clark
Address: Office of the General Counsel
U.S. Nuclear Regulatory Commission
Mail Stop: O 15-D21
Washington, D.C. 20555
Telephone: (301) 415-1571
Facsimile: (301) 415-3725
Internet Address: lbc@nrc.gov
Admissions: Court of Appeals for the
State of Maryland
Name of Party: NRC Staff

Respectfully Submitted,

/RA/

Lisa B. Clark
Counsel for NRC Staff

Dated at Rockville, Maryland
this 22nd day of September, 2003

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)
)
FANSTEEL, INC.) Docket No. 40-7580-LT
(Muskogee, Oklahoma Site))
)
)
)

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO REQUEST FOR HEARING FILED BY THE STATE OF OKLAHOMA REGARDING THE REQUEST FOR APPROVAL OF A LICENSE TRANSFER" and "NOTICE OF APPEARANCE" 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 22nd day of September, 2003.

Sarah E. Penn, Esquire**
Assistant Attorney General
Office of the Attorney General
Environmental Protection Unit
4545 N. Lincoln Blvd., Suite 260
Oklahoma City, Oklahoma 73105
E-mail: sara_penn@oag.state.ok.us

James. R. Curtis, Esq.**
Mark J. Wetterhahn, Esq.
Brooke D. Poole, Esq.
Winston & Strawn
1400 L Street, N.W.
Washington, D.C. 20005
E-mail: jcurtiss@winston.com
mwetterh@winston.com
bpoole@winston.com

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

Office of the Secretary*
ATTN: Rulemakings and Adjudications Staff
U.S. Nuclear Regulatory Commission
Mail Stop: O-16C1
Washington, D.C. 20555
E-mail: HEARINGDOCKET@nrc.gov

Gary L. Tessitore, Chairman**
President and Chief Executive Officer
Fansteel, Inc.
Number One Tantalum Place
North Chicago, Illinois 60064
E-mail: gtessitore@fansteel.com

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

/RA/

Lisa B. Clark
Counsel for NRC Staff