

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE PRESIDING OFFICER

In the Matter of)	
)	Docket No. 40-7580-MLA-3
FANSTEEL, INC.)	
(Gore, Oklahoma Site))	ASLBP No. 04-816-01-MLA
)	

NRC STAFF RESPONSE TO REQUEST FOR
HEARING FILED BY THE STATE OF OKLAHOMA

INTRODUCTION

Pursuant to 10 C.F.R § 2.1205(g), the U.S. Nuclear Regulatory Commission Staff (Staff) hereby responds to “State of Oklahoma’s Request for Hearing,” (Hearing Request) dated September 10, 2003 regarding a decommissioning plan submitted by Fansteel, Inc. on January 24, 2003, as supplemented. As set forth below, the State of Oklahoma has established standing to intervene and has proffered at least one area of concern germane to this proceeding. Accordingly, its request for hearing should be granted. Further, in the event that a hearing is granted, pursuant to 10 C.F.R. § 2.1213, the Staff desires 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 other 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 letters dated June 16, 1999, July 16, 1999, and November 9, 2000. License condition 27 contains specific remediation criteria.

On January 15, 2002, Fansteel 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. ML020290385). On January 14, 2003, Fansteel 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 Fansteel that the DP did not contain sufficient information to conduct a detailed review. Letter to G. Tessitore from D. Gillen, April 28, 2003 ("April 28, 2003 Letter")(ADAMS Accession No. ML031040079). Also attached to the letter were the Staff's detailed comments on the DP submittal. April 28, 2003 Letter, Enclosure 1, Comments on Fansteel Decommissioning Plan of January 2003 (ADAMS Accession No. ML031040081). Fansteel subsequently submitted additional information. Letter to D. Gillen from G. Tessitore, May 8, 2003("May 8, 2003 Letter")(ADAMS Accession No. ML031340606). 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 (“May 9, 2003 Letter”) (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).¹

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 (“July 24, 2003 Letter”) (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 .F.R. § 40.36(e). In Attachment 1 to the letter, Fansteel submitted a supplement to the DP which contained a detailed description of the financial assurance mechanism for the DP.²

¹ As explained in a July 8, 2003 letter, based on Fansteel’s submittal and the fact that Fansteel’s current license contains a condition addressing a previously approved DP, the Staff assumed that Fansteel’s May 8, 2003, letter evinced its desire to amend its license to approve the activities identified in its proposed DP. Letter to G. Tessitore from J. Shepherd, July 8, 2003 (ADAMS Accession No. ML031900014). However, following the request for hearing filed by Oklahoma, Fansteel informed the Staff that it should not consider submittal of the DP for review and approval as a result for a license amendment. *See id.* Accordingly, the Staff informed Fansteel that before it could complete its review of the DP, NRC licensing requirements in this situation required a license amendment request. *Id.*

² 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). In response to the *Federal Register* notice (68 Fed. Reg. 50558) offering the opportunity to request a hearing, the State requested a hearing concerning the license transfer as well as the request to approve the DP. “The State of
(continued...)”

Notice of the opportunity to request a hearing was published in the *Federal Register* on August 11, 2003. 68 Fed. Reg. 47621 (2003). On September 10, 2003, the State filed its Hearing Request. On September 22, 2003 Fansteel filed "Answer of Fansteel, Inc. to State of Oklahoma's Request for Hearing" (Fansteel Answer). Subsequently, on October 2, 2003, a Presiding Officer was designated. 68 Fed. Reg. 58146 (2003).

DISCUSSION

Pursuant to the Commission's regulations, in order to intervene in a proceeding under 10 C.F.R. Part 2, subpart L, a requestor must describe its interests in the proceeding and how those interests may be affected by the results in the hearing. 10 C.F.R. § 2.1205(e). A requestor must also identify the areas of concern about the licensing activity that is the subject matter of the proceeding. *Id.* In ruling on such requests, the presiding officer must determine whether the requestor meets the judicial standards for standing and whether the requestor's areas of concern are germane to the subject matter of the proceeding. 10 C.F.R. § 2.1205(h). As discussed below, Oklahoma has established standing to intervene and has articulated at least one area of concern germane to this proceeding.

A. Legal Standards for Standing

In order to establish standing to intervene under the informal licensing procedures of 10 C.F.R. Part 2, subpart L, a petitioner must allege (1) an actual or threatened, concrete and particularized injury that (2) is fairly traceable to the challenged action, (3) falls among the general interests protected by the Atomic Energy Act (or other applicable statute, such as the National Environmental Policy Act) and (4) is likely to be redressed by a favorable decision. *Sequoyah Fuels Corp.*, CLI-01-02, 53 NRC 9, 13 (2001). The Presiding Officer must consider, among others, the

²(...continued)

Oklahoma's Request for Hearing." The transfer proceeding is a separate proceeding governed by the procedural rules of 10 C.F.R. Part 2, subpart M.

(1) the nature of the requestor's right under the AEA to be made a party to the proceeding; (2) the nature and extent of the requestor's property, financial, or other interest in the proceeding; and (3) the possible effect of any order that may be entered in the proceeding upon the requestor's interest. 10 C.F.R. § 2.1205(h).

1. The State of Oklahoma Has Established Standing

Oklahoma states that it has "significant property, financial, and other interests" that will be affected by the results of this proceeding. Hearing Request at 9. Oklahoma also asserts that it has a duty to protect the health, safety, and welfare of its citizens, including protecting the groundwater and surface water used by its citizens. *Id.* at 10. It also asserts proprietary interests in the air, lands, waters, wildlife, and other natural resources as well as interests in roads and thoroughfares in close proximity to Fansteel facility. *Id.* at 11. Finally, Oklahoma claims that it has a duty to protect the "integrity" of its wildlife and natural resources. *Id.* at 12-13.

Oklahoma alleges that the clean-up level proposed by Fansteel in the DP will harm these interests. *See id.* at 15. It claims that the inadequate funding of the DP will result in continued contamination of the Fansteel property and the waters. *Id.* at 16. Oklahoma asserts that the injuries to its interests would be avoided if the DP were rejected. *Id.* at 20.

The Staff agrees that Oklahoma has established standing to intervene in this proceeding. The State has asserted an interest in protecting the water it owns, the wildlife it protects, and the roads it owns and maintains. The Staff also recognizes that the State has an interest in protecting the interests of its citizens. *See Carolina Power & Light Company* (Shearon Harris Nuclear Power Plant), LBP-99-25, 50 NRC 25, 29-30 (1999). The State has further alleged in sufficient detail potential injury to these interests that is concrete and particularized and is fairly traceable to the challenged action. These interests fall within the general interests protected by the Atomic Energy Act (or other applicable statute, such as the National Environmental Policy Act). Finally, the State's

alleged injuries are redressable by a favorable decision. Oklahoma, however, must still advance at least one issue germane to this proceeding.

B. Legal Standard Admissible Areas of Concern

As discussed above, a requestor must allege at least one area of concern germane to the subject matter of the proceeding. The statement of the area of concern must be sufficient to establish that the issues the requester is raising fall within the range of matters properly subject to challenge in such a proceeding. *Statements of Consideration*, "Informal Hearing Procedures for Materials Licensing Adjudications," 54 Fed. Reg. 8269, 8272 (Feb. 28, 1998). A petitioner need only "state his areas of concern with enough specificity so that the Presiding Officer may determine whether concerns are truly relevant--i.e., "germane" -- to the license amendment at issue." *Sequoyah Fuels*, CLI-01-02, 53 NRC at 16. This pleading burden is "modest." *Id.* The areas of concern are intended to provide the minimal information necessary to ensure that the hearing requester desires to litigate issues germane to the licensing proceeding and therefore should be allowed to take the additional step of making a full written presentation pursuant to 10 C.F.R. § 2.1233. 54 Fed. Reg. at 8273; *see also Sequoyah Fuels*, CLI-01-02, 53 NRC at 16.

1. Oklahoma's Areas of Concern

Oklahoma lists six areas of concern. First, Oklahoma states the "site characterization provided by Fansteel does not meet the requirements of 10 C.F.R. § 40.42(g)." Hearing Request at 22. Oklahoma claims that the DP relies on old data and that significant changes have occurred since that time. *Id.* Oklahoma goes on to describe why it believes the site characterization is out of date. *See id.* at 22-24. Fansteel argues that the State's concern is too vague and unsupported to establish that this area of concern is germane to the proceeding. Fansteel Answer at 17.

However the Staff believes that Oklahoma has provided enough information to establish that its concern is germane to this proceeding. This area of concern should be admitted.

Oklahoma's next area of concern raises several issues concerning whether the DP adequately addresses the remediation of groundwater for radiological and non-radiological contaminants. Hearing Request at 24. Fansteel asserts that Oklahoma's second area of concern lack specificity and bases. See Fansteel Answer at 11-17.

Because the Fansteel Facility contains groundwater contamination, the DP should address the cleanup of groundwater for radiological contamination. See NUREG-1757, Vol.1, Rev. 1, Section 12. Oklahoma raises concerns about the DP's discussion of groundwater cleanup in sufficient detail to determine that this area of concern is germane to the proceeding, as it relates to radiological contamination of the groundwater. Therefore, portions of this area of concern should be admitted.³

However, Oklahoma's concerns regarding non-radiological contamination and cleanup are not germane to this proceeding. Under the License Termination Rule, the NRC does not regulate the non-radiological material listed in Oklahoma's Hearing Request and has no role in implementing State regulation of groundwater. See Hearing Request at 25. Thus, Oklahoma's concern regarding non-radiological hazards is not germane to this proceeding. Furthermore, one other issue raised under this area of concern is not germane to this proceeding. Oklahoma asserts that Fansteel is in "violation" of Regulatory Issue Summary (RIS) 2000-09 by improperly proposing to extend the time period for groundwater remediation. *Id.* Presumably, Oklahoma is referring to Fansteel's plan to implement groundwater remediation and monitoring as the fourth stage of the DP. See July 24, 2003 Letter at 3. RIS 2000-09, however, does not apply in these circumstances as it only relates

³ Oklahoma raises the specific concern that the site characterization does not address the alleged radiological contamination of the "northwest property." Hearing Request at 23. This specific concern is not germane to the proceeding because the northwest property has previously been released for unrestricted use. Amendment 6 to License No. SMB-911, Aug. 23, 1996, (ADAMS Accession No. LL9608290059, Legacy Library, NUDOCs microfiche 89544: 029-044.

to extending the time for the initiation of decommissioning, not the completion of it. Thus, this issue is not germane to the proceeding and should not be admitted.

Oklahoma third area of concern challenges the cost estimates to remediate the facility.⁴ Hearing Request at 26. Oklahoma notes that the initial estimate to remediate the Fansteel Facility was 57 million dollars, but the revised estimate is less than half that amount. *Id.* at 26-27. Further, Oklahoma claims that the cost estimate should include the cost of additional characterization activities and the cost for remediation of all contamination. *Id.* at 27. Fansteel asserts that the details of its cost estimates are laid out in the DP and that Oklahoma fails to provide a basis for its belief that the estimate is wrong. Fansteel Answer at 21.

Oklahoma provides sufficient details to determine whether this area of concern is germane to the proceeding. Section 40.42(g)(4)(v) of Part 40 requires the submission of an updated detailed cost estimate for decommissioning. Whether Oklahoma's concern is supported should be addressed in the hearing. Accordingly, Oklahoma's concern regarding the adequacy of the cost estimate is germane to this proceeding and should be admitted.⁵

Fourth, Oklahoma asserts that the industrial use scenario is not appropriate for the Fansteel site. *Id.* at 27. In its DP, Fansteel proposed using the industrial use scenario for the purpose of assessing the TEDE to the average member of the critical group from residual radioactivity and to demonstrate compliance with Subpart E of 10 C.F.R. Part 20. See DP at 5-1. Oklahoma asserts that the industrial use scenario is not appropriate because it is conceivable that parts of the property

⁴ Specifically, this area of concern provides: "The Cost Estimates Are Not Sufficient Nor Supported by the Decommissioning Plan." *Id.*

⁵ Oklahoma also raises a concern regarding the transfer of Fansteel's license to MRI. *Id.* at 27. The transfer of Fansteel's license is the subject of a separate proceeding under Subpart M and Oklahoma has sought to intervene in that proceeding. Oklahoma's concern is, therefore, not germane to this proceeding. Oklahoma also states that Fansteel has not complied with the financial assurances of section 40.36. *Id.* However, Fansteel has requested an exemption from the financial assurance requirements of section 40.36(e). July 24, 2003, Letter.

may be used for recreational uses. Hearing Request at 28. Fansteel argues that the industrial use scenario is the most probable future use of the site. Fansteel Reply at 22. Whether this is true is the subject of the hearing. However, the appropriateness of using the industrial use scenario as a basis for demonstrating compliance with Part 20 is germane to this proceeding, and this area of concern should be admitted.

As its fifth area of concern Oklahoma asserts that the DP dated January 2003 contains insufficient and inconsistent data which prevents a proper evaluation of the DP.⁶ Hearing Request at 29. Oklahoma refers to a letter from the Staff to Fansteel, dated April 28, 2003, in which the Staff stated that the DP did not contain sufficient information to conduct a detailed review. *Id. citing* April 28, 2003 Letter. The April 28, 2003, Letter listed several areas in which more detail was required.⁷ Oklahoma incorporates, in part, this list in its Hearing Request. *See id.* at 29-35. Fansteel asserts that the issues raised in the April 28, 2003 Letter are similar to requests for additional information (RAI). Fansteel Reply at 23. As such, relying on Commission precedent in subpart G proceedings, Fansteel asserts that a petitioner in a subpart L proceeding should not be permitted to rely on RAIs as a basis for a hearing request. *Id.* at 23-24 *citing Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 336 (1999).

The April 28, 2003, Letter provided a list of issues the Staff initially raised with respect to the DP. Subsequently, after obtaining additional information, the Staff determined that it had sufficient information to proceed with the detailed technical review of the DP. May 9, 2003 Letter. The Staff's acceptance of the DP for technical review, however, does not indicate that the issues Oklahoma

⁶ This area of concern specifically asserts that "Insufficient and Inconsistent Data Does Not Allow for a Proper Evaluation of the Decommissioning Plan." *Id.*

⁷ Under the sixth and final area of concern, Oklahoma also states that the DP is not a final plan, referencing the "long list of deficiencies." *See* Hearing Request at 37-38. Accordingly, the Staff is treating Oklahoma's specific concerns about the completeness of the DP as part of the fifth area of concern.

raises are not germane to this proceeding.⁸ Moreover, although reliance on RAI's may not be sufficient to meet the high contention standards of a subpart G proceeding, Oklahoma provides sufficient information for the Presiding Officer to determine that these areas of concern are germane to the proceeding and should be admitted.⁹

Finally, Oklahoma asserts that several components of the DP have not been submitted and must be in order to comply with the rules for license termination.¹⁰ Hearing Request at 39. With one exception, this area of concern is not germane to this proceeding. Oklahoma's concerns regarding the failure to submit a license amendment request and an alternative decommissioning schedule are not germane. See *id.* In the July 24, 2003 submittal, Fansteel submitted both a license amendment request and a request for an alternative schedule. See July 24, 2003 Letter. Oklahoma also asserts that the NRC should follow its environmental regulations in 10 C.F.R. Part 51 and conduct an environmental assessment to determine whether an environmental impact statement is required. This area of concern is not germane to this proceeding because it raises a

⁸ Within the context of this list, however, Oklahoma raises a concern not raised by the Staff. Oklahoma asserts remediation for non-radiological contaminants in the groundwater must be addressed. Hearing Request at 31-32. As previously discussed, remediation of non-radiological contaminants is outside the scope of this proceeding. This issue, therefore, should not be admitted.

⁹ In *Oconee*, the Commission found that a petitioners' reliance on the mere existence of RAIs as a basis for their contention was insufficient. *Oconee*, CLI-99-10, 49 NRC at 336-337. The Commission held that "[t]o satisfy the Commission's contention rule. . .Petitioners must do more than 'rest on [the] mere existence' of RAIs as a basis for their contention." *Id. citing Baltimore Gas & Electric (Calvert Cliffs Nuclear Power Plant, Units 1 and 2)*, CLI-98-25, 48 NRC 325, 349 (1998). Although it is clear that the Commission held that mere reference to RAIs were not sufficient to meet the standards for an admissible contention under subpart G, there is no indication that the same would be true for the lower standard under subpart L.

¹⁰ Specifically, Oklahoma asserts "Key Components of the Decommissioning Plan Have Not Been Submitted." *Id.*

concern regarding the conduct of the Staff's review.¹¹ In any event, the Staff has stated it will prepare an EA to determine whether an EIS is necessary. See 68 Fed. Reg. at 47622.

Oklahoma does raise one area that is germane to this proceeding. Oklahoma asserts that the DP fails to demonstrate that the radiation doses will be as low as reasonably achievable (ALARA). Hearing Request at 37. Under NRC guidance and regulation, an ALARA analysis is necessary, and thus, this specific area of concern is germane to this proceeding and should be admitted. See 10 C.F.R. § 20.1402; NUREG-1757, Section 6.

In sum, Oklahoma's six areas of concern generally are germane to this proceeding. Certain aspects of these concerns are not germane, as discussed above. Oklahoma has established standing to intervene. Accordingly, Oklahoma's hearing request should be granted.

CONCLUSION

For the reasons set forth above, Oklahoma's request for a hearing should be granted.

Respectfully submitted,

/RA/

Marian L. Zabler
Counsel for NRC Staff

Dated at Rockville, Maryland
this 14th day of October, 2003

¹¹ The adequacy of this review may be germane to this proceeding, but Oklahoma should not be permitted to question how the Staff conducts the review.

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)	

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(b), the following information is provided:

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Respectfully submitted,

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Marian L. Zabler
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Dated at Rockville, Maryland
this 14th day of October, 2003

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NUCLEAR REGULATORY COMMISSION

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)	

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(b), the following information is provided:

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Name of Party:	NRC Staff

Respectfully Submitted,

/RA/

Lisa B. Clark
Counsel for NRC Staff

Dated at Rockville, Maryland
this 14th day of October, 2003

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NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO REQUEST FOR HEARING FILED BY THE STATE OF OKLAHOMA" and "NOTICE OF APPEARANCE" for Marian L. Zobler and Lisa B. Clark 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 14th day of October, 2003.

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/RA/

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