

RAS 6999

DOCKETED
USNRC

November 3, 2003 (10:13AM)

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD PANEL

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

Before Administrative Law Judge:

Alan S. Rosenthal, Presiding Officer
Richard F. Cole, Special Assistant

In the Matter of:

FANSTEEL, INC.

(Request to Amend Source Materials,
License No. SMB 911)

Docket No. 40-7580-MLA-3

ASLBP No. 03-813-04-MLA

THE STATE OF OKLAHOMA'S RESPONSE TO FANSTEEL AND
NRC STAFF RESPONSES REGARDING STATE OF OKLAHOMA'S
REQUEST FOR HEARING

OFFICE OF THE OKLAHOMA ATTORNEY GENERAL
SARAH E. PENN

ASSISTANT ATTORNEY GENERAL
ENVIRONMENTAL PROTECTION UNIT

4545 North Lincoln Boulevard, Suite 260

Oklahoma City, Oklahoma 73105-3498

Telephone: (405) 521-4274

Telefax: (405) 528-1867

E-mail: sarah_penn@oag.state.ok.us

October 24, 2003

Template=SECY-037

SECY-02

**UNITED STATES
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD PANEL**

Before Administrative Law Judge:

Alan S. Rosenthal, Presiding Officer
Richard F. Cole, Special Assistant

In the Matter of)	Docket No. 40-7580-MLA-3
)	
FANSTEEL, INC.,)	ASLBP No. 04-816-01-MLA
)	
(Request to Amend Source Materials)	
License No. SMB-911))	

**STATE OF OKLAHOMA RESPONSE TO FANSTEEL AND NRC STAFF
RESPONSES REGARDING STATE OF OKLAHOMA'S REQUEST FOR HEARING**

INTRODUCTION

Pursuant to the October 14, 2003 Order issued by the Presiding Officer in this proceeding the Attorney General of the State of Oklahoma, on behalf of the State of Oklahoma ("State") is filing a response to Fansteel, Inc.'s ("Fansteel") Opposition to the State's Request for Hearing and NRC Staff's ("Staff") Response to the State's Request for Hearing.

As set forth in the State's Request for Hearing, standing to intervene has been established and areas of concern germane to the proceeding have also been established. Accordingly, the State's Request for Hearing should be granted.

I. BACKGROUND

A. Factual

The Fansteel Facility is located on 110 acres of land located directly on the

western bank of the Arkansas River (Webbers Falls Reservoir) in eastern Oklahoma near the City of Muskogee. It is bounded on the west by State Highway 165 (a/k/a the Muskogee Turnpike) and on the south by U.S. Highway 62. From 1958 until 1989, the Fansteel Facility was a rare metal extraction operation, producing tantalum and columbium metals from raw and beneficiated ores, and tin slag feedstock. The raw materials used for tantalum and columbium production contained uranium and thorium as naturally occurring trace constituents in such concentrations that Fansteel was required to obtain an NRC license. The Fansteel Facility was licensed by NRC in 1967 to process ore concentrates and tin slags in the production of refined tantalum and niobium products. As a result of Fansteel's operations and various accidents and releases, the Fansteel Facility, including its soils, groundwater, and surface waters have been and continue to be contaminated by uranium, thorium, and other chemical contaminants such as ammonia, arsenic, chromium, metals, cadmium, ammonia, and methyl isobutyl ketone (MIBK).

B. Procedural

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 Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware.

On January 14, 2003, Fansteel submitted a revised Decommissioning Plan ("DP") to NRC to terminate the License No. SMB-911 for unrestricted use in accordance with 10 C.F.R. §20.1402. Letter to J. Shepherd from G. Tessitore, Jan. 14, 2003 2003 (ADAMS Accession No. ML030280438) On April 28, 2003 NRC staff member Daniel

M. Gillen, (Gillen) Chief, Decommissioning Branch, Division of Waste Management sent a letter to Gary Tessitore, (Tessitore) Chief Executive Officer, Fansteel, Inc. indicating the Results of Preliminary Review of Fansteel's Decommissioning Plan dated January 2003. Letter to G. Tessitore from D. Gillen, April 28, 2003 (ADAMS Accession No. ML03040079). The letter and the accompanying Staff comments stated that Staff had concluded that the DP did not contain sufficient information to conduct a detailed review at this time, and further added that many sections, chapters were conceptual only and that the radiological status of the site was incomplete, nor did the DP demonstrate how the estimated cost of remediation was reduced to less than half of the previous estimate of Fansteel's bankruptcy filing. April 28, 2003 Letter, Staff Comments on Fansteel DP for January 2003 (ADAMS Accession No. ML03040081).

On May 8, 2003 Tessitore sent a letter to Gillen which stated it was a follow-up to the April 28, 2003 letter, as well as the discussions and meeting held between the Staff and Fansteel regarding the licensee's bankruptcy. Letter to D. Gillen from G. Tessitore, May 8, 2003 ("May 8, 2003 letter") ADAMS Accession NO. ML031340606). This letter outlined, in two pages, a four-phased approach to decommissioning the Fansteel Facility, Muskogee site by a new entity MRI (a wholly-owned subsidiary of Reorganized Fansteel). On May 9, 2003, Gillen responded to Tessitore's letter of May 8, 2003, stating that NRC staff had reviewed Fansteel's two page submittal of May 8, 2003 and concluded Fansteel had now submitted sufficient information to proceed with the detailed technical review of the DP. Letter G. Tessitore from D. Gillen, May 9, 2003 ("May 9,

2003 letter”) (ADAMS Accession No. ML031290264).

On May 15, 2003, Oklahoma received the May 9, 2003 letter indicating acceptance of the Fansteel DP for Technical Review.

On June 16, 2003, the State filed a Request for Hearing in connection with Fansteel’s January 14, 2003, DP. Staff suspended review of Fansteel’s DP are stated in a July 8, 2003, letter to Tessitore. Thereafter, Gary Tessitore, CEO of Fansteel, indicated the withdrawal of Fansteel’s DP because Staff had suspended review of the DP due to inadequacies of Fansteel. Letter to J. Shepherd from G. Tessitore, June 26, 2003 (ADAMS Accession No. ML032100546). On July 9, 2003, a Presiding Officer was designated to rule on, inter alia, petitions for leave to intervene and/or requests for hearing in this proceeding. Also on July 9, the Presiding Officer issued an Order directing the State of Oklahoma to show cause, in light of Fansteel’s withdrawal of its DP, why this proceeding should not be dismissed.

On July 15, 2003, Fansteel filed a Notification to request the Presiding Officer to suspend the show cause schedule to allow Fansteel until July 25, 2003, to decide whether it would resubmit its DP for NRC consideration. The State objected on the same day to Fansteel’s request for abeyance. Staff filed a response on July 16, 2003, indicating it did not object to the request for abeyance.

On July 16, 2003, the Presiding Officer denied Fansteel’s request for abeyance indicating that the schedule established in the Presiding Officer’s July 9, 2003, Order to Show Cause would remain in effect. On July 17, 2003 the State filed its Objection and

Show of Harm to Fansteel Inc.'s Withdrawal of Decommissioning Plan. On July 24 and 25, 2003, Fansteel and Staff filed a Response. Also, on July 24, 2003, Fansteel submitted a Request for License Amendment to approve the site DP submitted on January 14, 2003, as amended by letter dated May 8, 2003. In addition to Fansteel's NRC filing, on July 24, 2003, Fansteel filed its Re-Organization Plan and Disclosure Statement with the United States Bankruptcy Court in the District of Delaware. The State filed a Motion for Leave to Reply based on the resubmission of the DP and its supplements and the filings in the Bankruptcy Court. Leave to file a reply was granted by the Presiding Officer on July 31, 2003. The State filed its Reply on August 7, 2003.

On August 11, 2003, NRC caused to be published in the Federal Register its Notice of Consideration of an Amendment Request for the Fansteel Facility in Muskogee, Oklahoma and Opportunity for a Hearing (the "Notice"). On September 10, 2003, the State filed its Request for Hearing. On September 22, 2003, Fansteel filed "Answer of Fansteel, Inc. to State of Oklahoma's Request for Hearing" ("Fansteel Answer"). On October 2, 2003, a Presiding Officer was designated. 68 Fed. Reg. 58146 (2003). On October 14, 2003 NRC filed its "Response to Request for Hearing Filed by the State of Oklahoma. ("Staff Answer")

II. ARGUMENT

A. Areas of Concern

The State has listed six areas of concern in its Request for Hearing regarding the DP submitted by Fansteel, Inc. on January 24, 2003. Although Fansteel has argued that

none of the State's areas of concern satisfy the requirements necessary to be germane to the proceeding, Fansteel fails to recognize that under subpart L, the intervenor's pleading burden is modest. The intervenor must only state his areas of concern with enough specificity so that the Presiding Officer may determine whether the concerns are truly relevant- i.e. 'germane' to the license amendment at issue. 53 N.R.C. 9, 2001 WL 86080 (N.R.C.). Staff on the other hand, recognizes most of the State's areas of concern as germane and that the State should therefore be granted a hearing.

The concern for the inadequate site characterization describes several events which would lead the State to believe that more site characterization is necessary in order to properly evaluate the Fansteel site. Associated with the inadequate site characterization is the insufficient and the inconsistent data contained the DP. Both areas of concern relate directly to understanding the full extent of the contamination at the site and the remediation required to remove the radiological and non-radiological contamination. As such, it is important to have complete and accurate data in order to properly evaluate the contamination at the site and properly evaluate the adequacy of the DP. Fansteel has not provided the requisite information. These areas of concern are therefore germane to the proceeding and should be admitted.

As for the failure of Fansteel to include a groundwater remediation plan in its DP, Staff accurately states that NUREG 1757, Vol. 1, Rev. 1, Section 12 requires that cleanup of groundwater for radiological contamination should be addressed. Since Fansteel's only reference to groundwater cleanup is contained in the May 8, 2003 letter, which in relevant

part states “The fourth and final phase will involve groundwater monitoring and remediation.” “It is the intent of MRI not to seek termination of the license until groundwater is satisfactorily remediated.” Letter to D. Gillen from G. Tessitore, May 8, 2003 (“May 8, 2003 Letter”)(ADAMS Accession No. ML031340606), it would be difficult for the State to express anything more vague in its areas of concern. Fansteel argues that the industrial scenario does not require the consideration of the groundwater pathway, however, the issue of the proper scenario and ultimate use at the Muskogee site has not yet been decided. Therefore, in order to properly establish the appropriate groundwater clean-up plan, the proper scenario must be decided and because there is an issue as to which scenario is proper, a genuine and germane issue of concern exists. As set forth in the case law the statement of concerns “need not be extensive, but... sufficient to establish that the issues the requester wants to raise regarding the licensing action fall generally within the range of matters that properly are subject to challenge in such a proceeding.” 55 N.R.C 251, 2002 WL 530191 (N.R.C.). Both areas of concern fall within the range of matters properly subject to challenge in this proceeding and should be admitted.

The concern of the non-radiological clean-up, although not within the jurisdiction of the NRC, is relevant to the proceedings because the DP purports to simultaneously address the chemical contaminants with the radiological ones. As a result, it would be extremely difficult to neatly separate the jurisdictional responsibilities of the respective government regulatory agencies. A common effort on behalf of the Staff and the State to

resolve the extent of chemical contamination and its clean-up would seem in the best interests of Fansteel, the Staff and the State. However, regardless of the decision by the Presiding Officer on this issue, the State intends to exert its full jurisdictional authority over Fansteel, Inc. to ensure the Fansteel, Muskogee site is remediated to the proper standards as required by the State.

Finally, to suggest that the State's concern over the revised cost estimate is not germane to the proceeding borders on the insulting. Fansteel has failed to satisfy the financial assurance mechanism as required by 10 C.F.R. §40.36, has, through its bankruptcy case in the U.S. Bankruptcy Court, District of Delaware submitted a financial plan to pay for the remediation of the site which under contract law promises next to nothing and has miraculously cut its expenses to remediate the site almost in half. If anything can be said to be relevant to this proceeding it is the amount of money needed to be spent to properly remediate this site and whether Fansteel will actually perform its responsibilities. In any event, "we stress that the burden to show that an area of concern is germane— and thus trigger a hearing — is a relatively light one" 2003 WL 2232409. This issue of concern should be granted and be considered at the hearing on this issue.

B. Standing

The issue of standing is not in contention. Fansteel does not contest the State's standing in this proceeding. Fansteel Answer at 9. The Staff agrees that Oklahoma has established standing to intervene in this proceeding. Staff Answer at 5. Therefore the State should be granted standing to intervene in this case based on its significant property,

financial interests as well the health and safety of its citizens and the welfare of the environment.

III. CONCLUSION

Each area of concern provides the Presiding Officer with the minimal information needed to ensure that the State's issues are germane to the proceeding and therefore the State should be allowed to take the additional step of making a full presentation under 10C.F.R. §2.1233.

Therefore, the Attorney General of Oklahoma, W.A. Drew Edmondson, by and through the undersigned, Sarah E. Penn, Assistant Attorney General, on behalf of the State of Oklahoma, hereby prays that its Request for Hearing be granted and that the State's issues of concern be admitted.

Respectfully Submitted,

**W.A. DREW EDMONDSON
ATTORNEY GENERAL OF OKLAHOMA**



**SARAH E. PENN
ASSISTANT ATTORNEY GENERAL
ENVIRONMENTAL PROTECTION UNIT
4545 N. Lincoln Blvd., Suite 260
Oklahoma City, Oklahoma 73105
Telephone: (405) 522-4413
Telefax: (405) 528-1867**

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 24th day of October, 2003, a true and correct copy of the foregoing, State of Oklahoma's Response to Fansteel and NRC Staff Responses, was served upon the persons listed below by U.S. mail, first class, postage prepaid, and by electronic mail where indicated with a single asterisk. A copy was also sent by facsimile transmission to the Office of the Secretary.

Alan S. Rosenthal*
Administrative Judge
Presiding Officer
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mail Stop: T-3F23
Washington, D.C. 20555-0001
E-mail: rsnthl@comcast.net

Richard F. Cole, Special Assistant
Administrative Judge
Mail Stop: T-3F23
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
E-mail: RFC1@nrc.gov

Gary L. Tessitore, Chairman, President*
and Chief Executive Officer
Fansteel, Inc.
Number One Tantalum Place
North Chicago, IL 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@srz.com

Office of the Secretary*, **
Attn: Rulemaking & Adjudications Staff
U.S. Nuclear Regulatory Commission
Mail Stop: O-16C1
Washington, D.C. 20555-0001
E-mail: hearingdocket@nrc.gov
Telefax: (301) 415-1101

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

James R. Curtiss, Esquire*
Mark J. Wetterhahn, Esquire*
Brooke D. Poole*
Winston & Strawn
1400 L Street, NW
Washington, D.C. 20005
E-mail: jcurtis@winston.com
E-mail: mwetterh@winston.com
E-mail: bpoole@winston.com

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

** Original and 3 copies


SARAH E. PENN



OFFICE OF ATTORNEY GENERAL
STATE OF OKLAHOMA

October 24, 2003

Via Facsimile and U.S. Mail First Class

Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
Attention: Rulemakings and Adjudications Staff

Re: In the Matter of Fansteel, Inc., Request to Transfer Source Materials
License No. SMB-911, U.S. Nuclear Regulatory Commission, Docket
No. 40-7580-MLA-3

Sir or Madam:

Enclosed please find an original State of Oklahoma Response to Fansteel and NRC Staff Responses Regarding State of Oklahoma's Request for Hearing, and three conformed copies thereof, prepared for filing with the U.S. Nuclear Regulatory Commission in the referenced matter. Pursuant to 10 C.F.R. 2.708(f) (2002), only one Request for Hearing is being transmitted by facsimile as the original and three conformed copies will be transmitted by certified U.S. mail.

Upon receipt, please return the remaining file-stamped copies of the enclosed to this office in the self-addressed, stamped envelope enclosed for that purpose.

Thank you in advance for your assistance in this matter. Should you have any questions, please do not hesitate to call.

Sincerely,

A handwritten signature in cursive script that reads "Sarah E. Penn".

SARAH E. PENN
ASSISTANT ATTORNEY GENERAL

SEP/jb
Enclosures