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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

SERVED 11/03/03

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before Administrative Judges:

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
(Muskogee, Oklahoma Facility)	November 3, 2003

MEMORANDUM AND ORDER
(Granting Hearing Request)

In hand is the September 10, 2003, request of the State of Oklahoma for a hearing in connection with the application of Fansteel, Inc. (Licensee) for an amendment to its materials license (No. SMB-911). Issued under 10 C.F.R. Part 40, that license authorizes the possession at the Licensee's site near Muskogee, Oklahoma of source material consisting of up to 400 tons of natural uranium and thorium in any form. The sought amendment relates to a decommissioning plan for the Muskogee site that had been submitted by the Licensee last January and thereafter supplemented.

The hearing request was filed in response to a notice of opportunity for hearing published in the Federal Register on August 11, 2003. 68 Fed. Reg. 47,621. In submissions dated September 22 and October 14, respectively, the Licensee and the NRC Staff (Staff). have responded to the request. Additionally, as authorized by my October 14 order (unpublished), in an October 24 submission Oklahoma has replied to those filings to the extent that they opposed its position.

The adjudication of matters relating to materials licenses such as the one here in issue is governed by the informal hearing provisions set forth in Subpart L of the Commission's Rules of Practice, 10 C.F.R. § 2.1201 et seq. In a nutshell, the grant of a timely hearing request in a Subpart L proceeding is dependent upon a determination by the presiding officer that the requester has both (1) met the "judicial standards for standing" to raise the matters presented in the request; and (2) specified at least one area of concern "germane to the subject matter of the proceeding." See 10 C.F.R. §§ 2.1205(e) and (h).

There is no dispute among the parties that Oklahoma has satisfied the standing requirement. Rather, the disagreement is confined to whether the six areas of concern specified in the State's hearing request are germane to the subject matter of the proceeding. The Licensee maintains that none of them so qualify. Supporting the grant of the hearing request, the Staff concludes that, with limited exceptions, each of the expressed concerns satisfies that requirement.

For the reasons that follow, Judge Cole and I find ourselves in essential agreement with the Staff's analysis. Accordingly, the hearing request is granted and, in accord with 10 C.F.R. § 2.1231, the Staff will now be required to provide within thirty (30) days a hearing file to the presiding officer, the special assistant, and the other parties to the proceeding.

BACKGROUND

1. The materials license in question was issued in 1967 and, under its aegis, until 1989 the Licensee operated a rare metal extraction facility at its Muskogee site. As a result of those operations, the site apparently now contains contaminated material in the form of uranium, thorium, radium, and other decay-chain products in process equipment and buildings, soil, sludge, and groundwater.

Although the papers filed by the parties in connection with the hearing request provide a great deal of detail regarding events transpiring subsequent to the cessation of the operation of the facility in 1989, for present purposes most of those events are of no moment. It is enough here to refer to the salient recitations in the August 11, 2003, Federal Register notice that triggered Oklahoma's hearing request.

As stated in the notice (68 Fed. Reg. at 47,622), on July 24, 2003, the Licensee had submitted a request that its materials license be amended to approve a site decommissioning plan that had been presented to the Staff on January 14, 2003, and later amended by a May 8 letter. The plan called for the removal of the radiological contamination from buildings, equipment, soil, and groundwater so as to meet the unrestricted release requirements of the Radiological Criteria for License Termination rule found in 10 C.F.R. Part 20, Subpart E (62 Fed. Reg. 39,088 (1997)).

The Federal Register notice went on to state that, before issuance of the requested license amendment, the Staff would (a) make all of the findings required by the Atomic Energy Act of 1954, as amended, and applicable NRC regulations; and (b) document those findings in a Safety Evaluation Report, an Environmental Assessment, and in the license amendment itself. Finally, the notice provided both an opportunity to provide comments and the opportunity to request a hearing, of which Oklahoma has taken advantage. Ibid.

2. In the hearing request, Oklahoma bases its claim of judicial standing on several factors. Among other things, it points to its "duty to protect the general welfare of its citizens, and therefore [its] interest in protecting the health, safety, and welfare of its citizens, many of whom live, work, travel, or recreate at or near the Fansteel facility." Hearing Request at 10. In addition, Oklahoma asserts a "proprietary interest in its air, lands, waters, wildlife, and other natural resources, which it has the right to protect." Id. at 11.

Still further, according to the hearing request, Oklahoma will suffer injury-in-fact if the proposed site decommissioning plan is approved. On that score, several claims are advanced, including that the plan "wholly fails to adequately fund the remediation of the Fansteel Facility." As a consequence, the hearing request asserts, "contamination to the soil and groundwater [at the facility] will continue to contaminate the property and contaminate waters owned by Oklahoma whose citizens rely upon the Arkansas Rivers for recreational purposes, and as a source of water for consumption, irrigation, and livestock." Id. at 16-17 (footnote omitted).

Turning then to Oklahoma's areas of concern, the hearing request lists six separate ones. The first is that the site characterization provided by the Licensee is incomplete and fails to address current conditions and, therefore, does not meet the requirements of 10 C.F.R. § 40.42(g). In that connection, the request points to several specific site condition changes that purportedly are not taken into account by the proposed site decommissioning plan. Id. at 22-24.

Second, that plan is said to fail adequately to address the remediation of groundwater for radiological and non-radiological contaminants. In that regard, the hearing request maintains, inter alia, that the Licensee has not discussed the remediation of the groundwater with the State's Department of Environmental Quality, the instrumentality with jurisdiction over Oklahoma's waters. As Oklahoma sees it, "[n]o commitment has been made to [it] to assure that its waters will be remediated to allow for the consumption, irrigation or recreational uses in . . . this area considering the natural resources and topography as well as agricultural efforts in this vicinity." Id. at 24-25.

The third specified area of concern pertains to the cost estimates for remediation that have been furnished by the Licensee. The hearing request would have it that those estimates are both insufficient and not supported by the site decommissioning plan. Id. at 26-27.

Fourth, Oklahoma asserts that the Licensee has failed to establish that the criteria for unrestricted release set forth in 10 C.F.R. § 20.1402 will be met. More specifically, the Licensee is said to have improperly invoked an industrial use scenario in an endeavor to avoid the need to consider all the sources, exposure routes, and pathways in conducting its dose modeling. Oklahoma believes such a scenario is inapposite here because some recreational use of the area surrounding the site is to be expected. Id. at 27-29.

As a fifth area of concern, Oklahoma provides numerous examples of what it regards as insufficient or inconsistent data precluding a proper evaluation of the decommissioning plan. Id. at 29-36. And, finally, the hearing request claims that several key components of the plan have yet to be submitted. Id. at 36-38.

3. As previously stated, the Licensee acknowledges Oklahoma's standing[1] but maintains that none of the assigned areas of concern is germane to the subject matter of the proceeding, with the consequence that the hearing request should be denied. Although agreeing that Oklahoma has standing, the NRC Staff differs significantly with the Licensee on the matter of the sufficiency of the advanced areas of concern. In the Staff's view, all but portions of the second and sixth concerns meet the prescribed test for acceptance and, accordingly, the hearing request should be granted.

ANALYSIS

A. There is little room for doubt that, as recognized by the Licensee and Staff alike, Oklahoma has demonstrated the requisite standing to seek a hearing for the purpose of challenging aspects of the site decommissioning plan that has been put forth by the Licensee.

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[1] The acknowledgment is appropriately confined to any presented claims that come within the zone of State interests protected by either the Atomic Energy Act of 1954, as amended, or the National Environmental Policy Act of 1969. Answer at 9.

As the hearing request stresses, in its sovereign capacity the State has both the responsibility to protect the welfare of its citizenry and a proprietary interest in the natural resources within its boundaries. And the request sufficiently identifies the injury-in-fact that assertedly will be suffered by the interests that it has a duty to protect should the proposed plan receive NRC approval. It is thus not surprising that, as the Licensee notes (Answer at 9), Oklahoma has been found to have standing in other proceedings concerning proposed decommissioning plans, including an earlier proposed plan for this facility. See Sequoyah Fuels Corp. (Gore, Oklahoma Site Decommissioning), LBP-99-46, 50 NRC 386, 394-95 (1999), affirmed, CLI-01-02, 53 NRC 9 (2001); Fansteel, Inc. (Muskogee, Oklahoma Facility), LBP-99-47, 50 NRC 409, 413-14 (1999). See also, Fansteel, Inc. (Muskogee, Oklahoma, Site), CLI-03-13, 58 NRC __ , __ (October 23, 2003; slip op. at 7).

B. It follows that the grant of the Oklahoma hearing request hinges upon whether the request sets forth at least one area of concern that is "germane to the subject matter of the proceeding" within the meaning of 10 C.F.R. § 2.1205(h). Once again, it is on this question that the Licensee parts company with Oklahoma and the Staff.

1. As the Commission has recognized, the pleading burden imposed upon the hearing requester in a Subpart L proceeding is "modest." All that it need do is "state [its] 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 Corp., CLI-01-02, supra, 53 NRC at 16. See also, Statement of Considerations, "Informal Hearing Procedures for Materials Licensing Adjudications," 54 Fed. Reg. 8,269, 8,272 (1998). In short, as the Staff puts it, 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." Answer at 6, citing both CLI-01-02, 53 NRC at 16 and the Statement of Considerations, 54 Fed. Reg. at 8,723.

The very limited threshold obligation imposed upon the hearing requester in an "informal" Subpart L proceeding is to be contrasted with the much greater burden that must be assumed by one seeking to intervene in a reactor licensing proceeding subject to the provisions of Subpart G of the Rules of Practice, 10 C.F.R. § 2.700 et seq. The Subpart G petitioner for intervention is required to supplement the petition with a list of the contentions that are sought to be litigated. With respect to each such contention, the petitioner must illuminate the bases of the contention; disclose the alleged facts or expert opinion upon which the contention is founded with reference to the specific sources and documents relied upon; and provide sufficient information to show the existence of a genuine dispute on a material issue of law or fact. 10 C.F.R.§ 2.714(b)(2).

It is, of course, not difficult to apprehend the reason for this marked difference in respective obligations. In the case of the grant of a Subpart G intervention petition, the parties must then go through what might well prove to be extensive discovery followed by, in the absence of a grant of summary disposition on all issues to one party or another, a full evidentiary hearing including the examination and cross-examination of witnesses. In a Subpart L proceeding, however, discovery is explicitly proscribed. 10 C.F.R. § 2.1231(d). Further, the parties are left to make out their cases in written presentations, 10 C.F.R. § 2.1233. Whether those presentations are then followed by oral presentations (not involving party cross-examination) is entirely within the presiding officer's discretion. 10 C.F.R. § 2.1235. In short, there is a wide disparity between the nature of the two types of proceedings – and most particularly between the burdens placed upon other parties such as the applicant and Staff once an intervention petition or hearing request is granted. That disparity undoubtedly

undergirded the Commission's decision to make the threshold obligation in one considerably less than that in the other.[2]

2. Now turning to whether at least one of the areas of concern specified by Oklahoma meets the Section 2.705(h) relevancy test, Judge Cole and I are entirely persuaded that this question requires an affirmative answer. Indeed, it appears that, in large measure, the Licensee's contrary conclusion rests upon an attempt to impose a requirement that the hearing request provide a firm basis for each expressed concern – a requirement that, to repeat, is applicable to contentions advanced in Subpart G formal adjudicatory proceedings but has no role in informal materials licensing proceedings conducted under Subpart L.

This is clearly demonstrated by an examination of the Licensee's response to the first area of concern – the asserted failure of the site characterization in the decommissioning plan to meet regulatory requirements because it relies significantly on outdated data. On the face of it, there would appear to be little room for doubt that the concern has the necessary relevancy to the acceptability of the plan and, hence, to the outcome of the license amendment application based upon the plan. The Licensee insists, however, that the concern should be rejected because, as it sees it, Oklahoma has not provided a sufficient basis for its various ingredients.

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[2] See also the discussion in the very recent decision in CFC Logistics, Inc. (Materials License), LBP-03-20, 58 NRC _ , _ (October 29, 2003, slip op. 15-21).

It might additionally be noted that hearing requests filed in Subpart M proceedings involving license transfer applications likewise face a substantially greater initial burden than that imposed upon a Subpart L hearing request. See 10 C.F.R. § 2.1306. Indeed, this is made clear by the basis assigned by the Commission for its very recent rejection of Oklahoma's request (filed contemporaneously with the hearing request in issue here) seeking a hearing on the proposal to transfer materials license No. SMB-911 from this Licensee to another entity. See Fansteel, Inc, CLI-03-13, supra., 58 NRC at _ - _ (slip op. 7-11).

Thus, for example, Oklahoma had noted in presenting this concern that among the significant changes not reflected in the data employed in the site decommissioning plan were the "construction of the [F]rench drain system, a substantial pilot project to reprocess waste that may have incurred additional releases and, a major hydrofluoric acid release that resulted in the hospitalization of two workers." Hearing Request at 22. In response, the Licensee asserts, inter alia, that the State has failed to articulate "at all–let alone with any degree of specificity or authority–the manner in which construction of the French drain affected the site and rendered the existing site characterization inaccurate." Answer at 11 (emphasis in the original). Had the Licensee been addressing a contention submitted in a Subpart G proceeding, that objection might have been on target. It falls, however, far short of the mark in this proceeding. Under the scheme governing materials license adjudication, its written presentation will be the occasion for Oklahoma to provide the basis for its claim that the failure to account for the French drain in the site characterization constituted a fatal flaw in the decommissioning plan. If it fails to establish that the claim has substance, that will be the end of the matter.

3. In sum, Judge Cole and I concur in the Staff's conclusion (Answer at 6) that "Oklahoma has provided enough information to establish that its [first specified] concern is germane to this proceeding [and] should be admitted." Although the hearing request must therefore be granted, this is not the end of our task, however, because 10 C.F.R. § 2.1205(h) requires that the presiding officer nonetheless determine the acceptability for adjudication of the remaining assigned concerns.

There is little room for doubt that, as the Staff agrees, the relevancy test is satisfied with regard to the entirety of the first, third, fourth, and fifth assigned concerns. With respect to the second concern, however, the Staff correctly notes (Answer at 7) that the NRC does not regulate the non-radiological material to which that concern alludes. Accordingly, the Staff

maintains, that portion of the concern is beyond the scope of this proceeding. Ibid. We concur. In its rejoinder (Reply at 9), Oklahoma concedes the lack of Commission jurisdiction over the chemical contaminants present on the Muskogee site but points out that, because the site decommissioning plan "purports to simultaneously address [those] contaminants with the radiological ones," it "would be extremely difficult to neatly separate the jurisdictional responsibilities of the respective governmental regulatory agencies." That might well be so, but the fact remains that a concern that it is outside the bounds of the NRC's authority to address can scarcely be deemed of relevance in this adjudicatory proceeding.[3]

With respect to the sixth concern, the Staff might well to be correct in urging (Answer at 10-11) the exclusion of so much of the concern as calls upon it to conduct an environmental assessment to determine the necessity for the preparation of an environmental impact statement. This matter is, however, quite academic given the Staff's representation (ibid) that it will take that action.

CONCLUSION

For the reasons stated, Oklahoma's September 10, 2003 hearing request is hereby granted. As mandated by 10 C.F.R. § 2.1231(a), within thirty (30) days of the date of this order

[3] The Staff also attacks (Answer at 7) Oklahoma's claim in the second concern that the Licensee is in violation of a Regulatory Issue Summary (RIS) in proposing to extend the time period for groundwater remediation. According to the Staff, the cited RIS is inapplicable in the present circumstances. That, of course, goes to the merits of the concern, not its relevance. Should Oklahoma renew the claim in its written presentation, the Licensee and the Staff will then have ample opportunity to establish its lack of substance.

the Staff shall file a hearing file in the manner prescribed in that section.[4] Following the receipt of the hearing file, Judge Cole and I will conduct a telephone conference with the parties for the purpose of scheduling the filing and service of the written presentations called for by 10 C.F.R. § 2.1233.

If so inclined, within ten (10) days of the service of this order the Licensee may appeal to the Commission in accordance with the provisions of 10 C.F.R. § 2.1205(o). Other parties to the proceeding may respond to the appeal within fifteen (15) days of the service of the appeal brief. Unless the Commission should direct otherwise, the filing of an appeal shall have no effect upon the further progress of the proceeding.

It is so ORDERED.

BY THE PRESIDING OFFICER[5]

/RA/

Alan S. Rosenthal
ADMINISTRATIVE JUDGE

Rockville, Maryland
November 3, 2003

[4] The hearing file shall be chronologically arranged and prefaced with a numbered index of each item therein, which index shall reflect the name (or in lieu thereof a brief indication of the substance) and the date of each item. Each item in the hearing file shall be separated from the other hearing file items by a substantial colored sheet of paper, to which colored sheet shall be attached the numbered tab for the hearing file item that follows it. The hearing file shall be contained in binders that allow for ready inclusion of any supplements to the original material that might later be located. Any subsequent additions to the hearing file shall contain an index and be organized in the same manner as the original.

[5] 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 NRC Staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
FANSTEEL INC.	)	Docket No. 40-7580-MLA-3
MUSKOGEE, OKLAHOMA	)	
	)	
(Materials License Amendment)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (GRANTING HEARING REQUEST) (LBP-03-22) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

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Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 3rd day of November 2003