

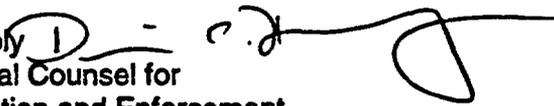


OFFICE OF THE
GENERAL COUNSEL

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

November 3, 2003

MEMORANDUM TO: Martin J. Virgilio, Director
Office of Nuclear Material Safety and Safeguards

FROM: Dennis C. Damby 
Assistant General Counsel for
Materials Litigation and Enforcement

SUBJECT: COMMISSION DECISION DENYING HEARING REQUEST BY
OKLAHOMA REGARDING APPLICATION BY FANSTEEL TO
TRANSFER ITS LICENSE PURSUANT TO A BANKRUPTCY
PROCEEDING

On October 23, 2003, the Commission issued *Fansteel, Inc. (Muskogee, Oklahoma, Site)*, CLI-03-13, attached, denying a hearing request from the State of Oklahoma regarding an application filed by Fansteel to transfer its license. Fansteel is the holder of a license issued under Part 40 to possess natural uranium and thorium at a site in Muskogee, Oklahoma, where Fansteel operated a rare metal extraction facility until December 1989, and which is currently contaminated by material in the form of uranium, thorium, radium and their decay-chain products.

In January 2002, Fansteel notified the Commission that it had filed a petition for bankruptcy under Chapter 11 of the U.S. Bankruptcy Code. Thereafter, Fansteel filed a decommissioning plan for approval by the NRC and a reorganization plan before the Bankruptcy Court. In those documents, Fansteel proposed to transfer its NRC license and all responsibility for remediating the site to a subsidiary corporation, named FMRI, to be created when Fansteel emerges from bankruptcy. FMRI would be funded entirely by Fansteel, as reorganized pursuant to the bankruptcy. In order to effectuate this plan, Fansteel also submitted a request for NRC approval of the license transfer. The State of Oklahoma filed a hearing request regarding the license transfer request in accordance with Subpart M of the regulations which provide that license transfer proceedings are held before the Commission. The State based its hearing request on a concern that Fansteel would not adequately fund FMRI to carry out remediation of the site.

The Commission reviewed Oklahoma's request in light of the applicable standards for Subpart M hearing requests which require that (1) the petitioner demonstrate standing, *i.e.*, that it has an interest that may be affected by the proceeding, and (2) the petitioner set forth the issues it wishes to raise along with a statement of facts or expert opinion it intends to rely on in the proceeding. In this case, the Commission agreed with the Staff and the licensee that while the State had standing to contest the license transfer, it had not provided any substantive

M. Virgilio

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October , 2003

support for its claim that funding of FMRI was not adequately ensured under the bankruptcy plan and therefore failed to meet the second requirement. Accordingly, the Commission denied the hearing request and terminated the proceeding.

If you have any questions regarding this matter, please contact Lisa Clark at 415-1571.

Attachment: As stated

cc w/att: W. Travers, EDO
L. Chandler, OGC
B. Mallett, RIV
S. Burns, OGC
K Smith, RIV

Clark

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

October 23, 2003 (10:13AM)

COMMISSIONERS

Nils J. Diaz, Chairman
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

SERVED October 23, 2003

In the Matter of

FANSTEEL, INC.
(Muskogee, Oklahoma, Site)

Docket No. 40-7580-LT

CLI-03-13

MEMORANDUM AND ORDER

This proceeding involves Fansteel, Inc.'s July 24, 2003, application to transfer the materials license (No. SMB-911) for its facility in Muskogee Oklahoma. Fansteel, pursuant to the Reorganization Plan¹ that it recently filed with the United States Bankruptcy Court in the District of Delaware, seeks our consent under 10 C.F.R. § 40.46 to transfer this license to FMRI, Inc., a subsidiary which Fansteel intends to create after it emerges from bankruptcy.² According to Fansteel, FMRI would be the sole holder of the license and would have as its only business purpose the remediation of the Muskogee site.

On August 21, 2003, the Commission published a notice that the Commission was considering Fansteel's application and invited both comments and requests for hearing,

¹ "Joint Reorganization Plan of Fansteel Inc. and Subsidiaries," submitted July 24, 2003, in the United States Bankruptcy Court for the District of Delaware.

² The early pleadings in this proceeding referred to the subsidiary as "MRI, Inc." Fansteel, however, informed the Commission on September 22, 2003, that the name "MRI, Inc." was unavailable and that Fansteel was therefore replacing the name with "FMRI, Inc." See Fansteel's Answer to the State of Oklahoma's Request for Hearing, dated Sept. 22, 2003, at 3 n.2. To avoid confusion, the Commission is using only the new name throughout this order, including our quotations from early pleadings where parties referred to "MRI, Inc. or "MRI."

pursuant to our procedural regulations governing license transfer proceedings (10 C.F.R. Part 2, Subpart M).³ In response, the State of Oklahoma submitted a hearing request on September 10th.⁴ Oklahoma's hearing request presents only one issue: "whether the license transfer to an unfunded subsidiary constitutes [an] unreasonable risk to the public health and safety."⁵ In sum, Oklahoma asserts that Fansteel has failed to satisfy its obligation under 10 C.F.R. § 40.36 to demonstrate financial assurance for decommissioning the Muskogee site.

Both Fansteel and the NRC Staff respond that, while Oklahoma has established standing to intervene, it has not raised an admissible issue as required by 10 C.F.R. § 2.1306. Accordingly, they urge the Commission to deny Oklahoma's hearing request.⁶ We agree with Fansteel and the Staff that Oklahoma has failed to present an admissible issue and we therefore deny its request for hearing and terminate this adjudicatory proceeding.⁷

³ See 68 Fed. Reg. 50,588.

⁴ On the same date, Oklahoma also filed a hearing request regarding Fansteel's request for approval of the revised Decommissioning Plan for the Muskogee site. The Commission's Atomic Safety and Licensing Board is currently considering that matter separately under Docket No. 40-7580-MLA-2. Due to the interrelated nature of the two proceedings, the Commission hereby takes official notice of all documents submitted in that docket. See generally 10 C.F.R. § 2.743(i). We describe *infra* both the interrelationship of the proceedings and the nature of the revision.

⁵ Oklahoma's Hearing Request at 7.

⁶ See NRC Staff's Response to Oklahoma's Request for Hearing, dated Sept. 22, 2003, at 7-10; Fansteel's Response to Oklahoma's Request for Hearing, dated Sept. 22, 2003, at 8-11.

⁷ To avoid any confusion, we stress that this order terminates only the adjudication, not the NRC Staff's parallel administrative review of Fansteel's License Transfer Application. See generally *Power Auth'y of the State of NY* (James A. FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-01-14, 53 NRC 488, 508 (2001) (referring to the Staff's "administrative action that ran parallel to the instant adjudication"); *Duquesne Light Co.* (Beaver Valley Power Station, Units 1 and 2), CLI-99-25, 50 NRC 224, 226 (1999) (distinguishing between the Staff's "administrative" review of comments and the Commission's "adjudicatory" review of a request for hearing).

I. BACKGROUND

The Commission issued License No. SMB-911 to Fansteel under 10 C.F.R. Part 40. Under this license, Fansteel is authorized to possess source material consisting of up to 400 tons of natural uranium and thorium in any form at its Muskogee site, where Fansteel operated a rare metal extraction facility until December 1989. As a result of those operations, the site currently contains contaminated material in the form of uranium, thorium, radium, and their decay-chain products. This contamination is located in process equipment and buildings, soil, sludge, and groundwater.⁸ Fansteel is responsible for decontaminating the Muskogee site by conducting remediation and decommissioning activities in accordance with both Fansteel's Decommissioning Plan and certain supplemental correspondence with the NRC Staff relating to that Plan.

In January 2002, Fansteel notified the Commission that Fansteel had filed a petition for bankruptcy pursuant to Chapter 11 of the U.S. Bankruptcy Code. One year later, in January 2003, Fansteel submitted to the NRC Staff a revised Decommissioning Plan for the Muskogee site. In this plan, 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 rules (10 C.F.R. Part 20, Subpart E). Fansteel stated that the amount and type of financial assurance to be provided in connection with the Decommissioning Plan would be set forth in a Reorganization Plan that Fansteel intended to file with the Bankruptcy Court. In addition, to support the terms and conditions of the Reorganization Plan, Fansteel indicated its intent to file both an alternative schedule for completion of decommissioning and a request for exemption from the regulatory funding requirements in 10 C.F.R. § 40.36(d) and (e).

⁸ See 68 Fed. Reg. 50,588.

In May 2003, Fansteel informed the NRC Staff that, once it had emerged from Chapter 11 bankruptcy, its subsidiary FMRI would undertake a four-phased approach to decommissioning the Muskogee site. Fansteel, however, withdrew its Decommissioning Plan on June 26th. On July 24th, Fansteel resubmitted the Decommissioning Plan that it had originally submitted in January 2003, and requested that the NRC reinstate its review of the plan. In addition, Fansteel requested that the NRC amend the license to reflect approval of the Decommissioning Plan, approve an alternate decommissioning schedule pursuant to 10 C.F.R. § 40.42(i), and grant an exemption from the financial assurance requirements of 10 C.F.R. § 40.36(e). Finally, as part of its resubmittal, Fansteel filed a supplement to the Decommissioning Plan outlining the means by which Fansteel proposed to provide financial assurance for decommissioning -- an assurance which Oklahoma questions in both the decommissioning-related license amendment proceeding (*see note 4, supra*) and the instant license transfer proceeding.

II. THE LICENSE TRANSFER APPLICATION

Concurrently with filing its most recent Decommissioning Plan, Fansteel submitted the instant application seeking our consent to the proposed license transfer. Like Fansteel's Decommissioning Plan supplement, the license transfer request included a detailed description of how Fansteel intended to fund FMRI's decommissioning of the Muskogee site. Fansteel explained that, under its proposed Reorganization Plan, it intends to transfer both the Muskogee site and the NRC license to FMRI, which will then assume all decommissioning responsibility. However, because Fansteel is operating as a debtor-in-possession under the jurisdiction of the Bankruptcy Court, both the creation of FMRI and the initiation of its decommissioning activities can occur only after the Bankruptcy Court's approval of the Reorganization Plan and Fansteel's consequent emergence from bankruptcy protection. The

decommissioning financial assurance mechanisms (summarized below) would thus be implemented if and when the Reorganization Plan becomes effective.

While the responsibility for decommissioning the Muskogee site would fall entirely to FMRI under the proposal, the newly reorganized Fansteel would provide FMRI's funding pursuant to the proposal before the Bankruptcy Court. Both Fansteel's proposed Decommissioning Plan supplement and License Transfer Application set forth detailed information regarding the ways Fansteel intends to fund FMRI's decommissioning activities.

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 Decommissioning Plan, with a maturity date of December 31, 2013, and with the NRC named as a third-party beneficiary and first-priority lien-holder;
- (2) an initial payment on the Primary Note of \$250,000, payable on the effective date of the Reorganization Plan;
- (3) minimum mandatory semi-annual payments on the Primary Note of \$700,000;
- (4) additional mandatory prepayments on the Primary Note of up to \$4 million, based on "Excess Available Cash";⁹
- (5) insurance proceeds (if any) that are received by the Reorganized Fansteel with respect to Muskogee claims, all of which proceeds would be applied to the Primary Note;
- (6) Reorganized Fansteel / Reorganized Wellman¹⁰ asset sale proceeds, if any, to be applied to the Primary Note;
- (7) an unsecured Secondary Note in the amount of \$4.2 million, issued on the effective date of the Reorganization Plan and with a maturity date of December 31, 2023, to cover estimated costs of groundwater treatment and monitoring, and with the NRC named as a third-party beneficiary and first-priority lien-holder;

⁹ "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.

¹⁰ Reorganized Wellman is an existing subsidiary of Fansteel with stand-alone value.

(8) annual payments of \$282,000 on the Secondary Note, beginning in 2013;¹¹

(9) an unsecured Contingent Note to address additional remediation of the site and groundwater, as needed, in an as-yet-undetermined amount, with a maturity date to reflect additional time, if any, required to remediate the site, and with the NRC as a first-priority lien-holder;¹²

(10) mandatory minimum semi-annual payments on the Contingent Note (but commencing only after the Primary Note is paid in full);

(11) payments on the Contingent Note, funded by Reorganized Fansteel's "excess available cash" (but commencing only after the Primary Note is paid in full); and

(12) payments on the Contingent Note, funded by certain insurance proceeds.¹³

In the event that the Reorganized Fansteel cannot timely and/or fully fund FMRI's obligations for any year, then FMRI may draw upon the "LC Cash Reserve"¹⁴ of \$2 million on a revolving basis. As part of its effort to demonstrate the availability of sufficient decommissioning funding, Fansteel offered estimates of the funds it expects to pay FMRI through the year 2013, as well as the closure costs estimates for those years.¹⁵

¹¹ Fansteel's License Transfer Application (at 8 n.9) indicates that these payments will begin in 2013. However, its Response to Oklahoma's Request for Hearing (at 4) sets the date at 2009. We consider the Application to be controlling.

¹² Fansteel would deliver this Contingent Note to FMRI if, after completing additional site characterization during Phase 3 of the Decommissioning Plan, Fansteel concluded that FMRI needed additional funds (over and above the Primary and Secondary Notes) to complete the decommissioning of the Muskogee site. The NRC, Fansteel and FMRI would jointly agree to the amount of both the Contingent Note and the minimum repayments. See Application at 5-6.

¹³ The information above on the twelve decommissioning funding sources was compiled from NRC Staff's Response at 4, Fansteel's Response at 4, and Fansteel's License Transfer Application, dated July 24, 2003, at 3-8.

¹⁴ The "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 that Fansteel had obtained to meet its financial assurance requirements for decommissioning under 10 C.F.R. § 40.36.

¹⁵ See NRC Staff's Response at 4-5.

III. DISCUSSION

To intervene as of right in a licensing proceeding, a petitioner must demonstrate standing; *i.e.*, that its "interest may be affected by the proceeding." *See* AEA § 189a, 42 U.S.C. § 2239(a). In addition, in a license transfer proceeding, the petition to intervene must raise at least one admissible issue. *See* 10 C.F.R. § 2.1306. As discussed below, Oklahoma has demonstrated standing but has raised no admissible issue.

A. Standing

Neither Fansteel nor the NRC Staff contests Oklahoma's standing. Given the state's clear interest in protecting the people and property within its boundaries, we agree that Oklahoma has standing to contest Fansteel's license transfer application. This conclusion is further supported by our longstanding recognition of "the benefits of participation in our proceedings by representatives of interested states."¹⁶

B. Admissibility of Issues

Our rules specify that, to demonstrate that issues are admissible in a Subpart M proceeding, 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 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.¹⁷

¹⁶ *Niagara Mohawk Power Corp.* (Nine Mile Point Nuclear Station, Units 1 and 2), CLI-99-30, 50 NRC 333, 344 (1999).

¹⁷ *See* 10 C.F.R. § 2.1306; *Power Auth'y of the State of NY* (James A. FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 295 (2000), and references cited therein.

Mere "notice pleading" is insufficient under these standards. A petitioner's issue will be ruled inadmissible if the petitioner "has offered no tangible information, no experts, no substantive affidavits," but instead only "bare assertions and speculation."¹⁸ On the other hand, our requirement for specificity and factual support is not intended to prevent intervention when material and concrete issues exist.¹⁹ For instance, if a license transfer application itself lacks necessary detail, a petitioner may meet its pleading burden by providing "plausible and adequately supported" claims that the data are either inaccurate or insufficient.²⁰ "[I]f the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief" would constitute sufficient information to show that a genuine dispute exists (under 10 C.F.R. § 2.714(b)(2)(iii), the Subpart G analogue of 10 C.F.R. § 2.1306). With these admissibility standards in mind, we turn now to Oklahoma's "decommissioning funding assurance" issue.

As noted above, Oklahoma questions "whether the license transfer to an unfunded subsidiary constitutes [an] unreasonable risk to the public health and safety."²¹ Oklahoma is concerned that "an unfunded, no asset, non-revenue generating company [can neither] ensure ... adequate financial protection to the public [nor] respond to any dangers posed by the contamination on site."²² Oklahoma is skeptical of Fansteel's promises to fund FMRI's

¹⁸ *GPU Nuclear, Inc. (Oyster Creek Nuclear Generating Station)*, CLI-00-06, 51 NRC 193, 208 (2000).

¹⁹ See *Indian Point 3*, CLI-00-22, 52 NRC at 295.

²⁰ See *Oyster Creek*, CLI-00-06, 51 NRC at 207 .

²¹ Oklahoma's Hearing Request at 7.

²² *Id.* at 8.

decommissioning of the site with excess available cash and insurance proceeds.²³ According to Oklahoma, these promises are “illusory at best and can be manipulated,” with the result that the Muskogee site would not be remediated, would continue to contaminate Oklahoma’s land and water, and would thus continue to pose an unreasonable risk to the public health and safety.²⁴ Oklahoma further claims that “[i]f one analyzes the Disclosure Statement^[25] and Re-Organization [sic] 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 FMRI.”²⁶ Oklahoma indicates that it will rely on Fansteel’s Reorganization Plan and contract law to support these arguments.²⁷ In sum, Oklahoma questions whether Fansteel has satisfied the “financial assurance for decommissioning” criteria set forth in 10 C.F.R. § 40.36. And, as a remedy, Oklahoma seeks denial of the application and retention of the *status quo*, on the ground that funding for the Decommissioning Plan would be assured if the license is retained by the post-bankruptcy Fansteel rather than transferred to FMRI as proposed.²⁸

Although we agree with the basic premise underlying Oklahoma’s issue, *i.e.*, that “decommissioning funding assurance” is relevant to this proceeding, we nonetheless conclude that Oklahoma has failed to produce the necessary documentary evidence or expert opinion testimony to render its financial qualifications issue admissible. As the NRC Staff correctly

²³ *See id.*

²⁴ *Id.*

²⁵ “Disclosure Statement with Respect to Joint Reorganization Plan of Fansteel Inc. Et Al.,” submitted July 24, 2003, in the United States Bankruptcy Court for the District of Delaware.

²⁶ *See* Oklahoma’s Hearing Request at 14.

²⁷ *See id.* at 8.

²⁸ *See id.* at 13.

points out, the Commission's specificity requirements demand more from Oklahoma than its "one brief reference to Fansteel's Disclosure Statement and Reorganization Plan, with the conclusory statement that *if* one analyzes it one *could* clearly see that the promises for funding are *unlikely* to be fulfilled."²⁹ Moreover, as Fansteel explains in its Response to Oklahoma's Request for Hearing, Oklahoma "has the obligation not just to refer generally to voluminous documents (here totaling several hundred pages), but to provide analysis and supporting evidence as to why particular sections of those documents (here, the [Reorganization] Plan and Disclosure Statement) provide a basis for the contention."³⁰ And even after both Fansteel and the NRC Staff pointed out the lack of specificity in Oklahoma's petition, Oklahoma made no effort to elaborate or explain its concerns in a Reply Brief, which it was authorized to file under 10 C.F.R. § 2.1307(b).³¹

A similar and even more basic omission is Oklahoma's failure to challenge the decommissioning funding assurance information contained in the Application itself. If Oklahoma believed that Fansteel's License Transfer Application lacks necessary detail, Oklahoma could have met its pleading burden by providing plausible and adequately supported claims that the data are either inaccurate or insufficient, *i.e.*, by specifically identifying each

²⁹ NRC Staff's Response at 10 (emphasis in original).

³⁰ Fansteel's Response at 9.

³¹ We have, in earlier license transfer proceedings, expressed our disapproval of petitioners who, despite being informed of the shortcomings of their petitions to Intervene, nonetheless fail to correct them in a Reply Brief. See *Oyster Creek*, CLI-00-6, 51 NRC at 201-02 ("When the transfer Applicants' answer pointed out these defects [immateriality or conclusory presentation], NIRS filed no reply, although Subpart M authorized it to do so.... NIRS's unelaborated petition is plainly deficient under the detailed issue-pleading requirements of Subpart M"). See also *Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Units 1, 2, and 3), CLI-00-18, 52 NRC 129, 132 (2000) (after noting the lack of specificity and documentation in a petition for review, we observed with disapproval that "[p]etitioners also did not take advantage of our rule, 10 C.F.R. § 2.1307(b), permitting them to reply to the transfer applicants' opposition to standing").

failure and explaining why the data are flawed.³² Oklahoma has not, however, even come close to meeting this burden.

Also, as noted above, Oklahoma seeks retention of the *status quo* on the ground that funding for the Decommissioning Plan would be assured if the license is retained by the post-bankruptcy Fansteel rather than transferred to FMRI as proposed.³³ Oklahoma, however, offers no support for its conclusion that Fansteel's retention of the license would provide any greater funding guarantee than the license's transfer to FMRI.

Oklahoma has provided no basis, in short, to proceed with a Subpart M hearing. Our decision to terminate the adjudicatory phase of this proceeding does not, however, equate to approval of Fansteel's license transfer application. As noted above, the adjudicatory and staff reviews are parallel, but separate, aspects of our license transfer reviews.³⁴

³² See page 8 *supra*.

³³ See Oklahoma's Hearing Request at 13.

³⁴ See note 7, *supra*.

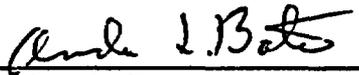
IV. CONCLUSION

For all these reasons, we *deny* Oklahoma's request for hearing and *terminate* the proceeding.

IT IS SO ORDERED.



For the Commission



Andrew L. Bates
Acting Secretary of the Commission

Dated at Rockville, Maryland,
this 23rd day of October, 2003

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of
FANSTEEL INC.

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Docket No. 40-7580-LT

(Muskogee, Oklahoma Site)

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMMISSION MEMORANDUM AND ORDER (CLI-03-13) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution with copies by electronic mail as indicated.

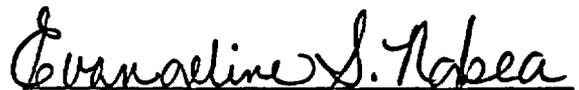
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Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 23rd day of October 2003