

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE PRESIDING OFFICER

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| 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 STATE OF OKLAHOMA'S
OBJECTION TO ISSUANCE OF ENVIRONMENTAL ASSESSMENT
AND FINDING OF NO SIGNIFICANT IMPACT

INTRODUCTION

Pursuant to 10 C.F.R § 2.1205(g), the staff of the Nuclear Regulatory Commission Staff (Staff) hereby responds to "State of Oklahoma's Objection to Issuance of Environmental Assessment and Findings of No Significant Impact" (Objection) dated December 8, 2003. As discussed below, the State of Oklahoma's Objection should be considered as a late-filed supplement to its hearing request, providing additional areas of concern. As such, it is inexcusably late, and, therefore, its concerns should be dismissed and the requested relief should be denied.

BACKGROUND

The procedural background of this proceeding has been set forth in detail in other filings in this proceeding and need not be reiterated here. See NRC Staff Response to Request for Hearing Filed by the State of Oklahoma, October 14, 2003 (ADAMS Accession No. ML0328703851). 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. On January 14, 2003, Fansteel submitted a revised decommissioning plan ("DP") for the Muskogee site to NRC for review.¹ Letter to J. Shepherd from G. Tessitore, Jan. 14, 2003 (ADAMS Accession No. ML030280438). Following a request for hearing filed by the State of Oklahoma, Fansteel withdrew its DP. Letter to J. Shepherd from G. Tessitore, June 26, 2003 (ADAMS Accession No. ML032100546).

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

¹ Subsequently, 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).

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 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. On October 23 3003, the Commission dismissed the transfer proceeding. *Fansteel*, (Muskogee, Oklahoma Site), CLI-03-13, 57 __ NRC ____, slip op. (Oct. 23, 2003).

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 November 3, 2003, the Presiding Officer designated in this proceeding granted Oklahoma's hearing request. *Fansteel* (Muskogee, Oklahoma Facility), LBP-03-22, slip op. (Nov. 3, 2003). On November 7, 2003, the Staff published in the *Federal Register* a "Notice of Availability of Environmental Assessment and Finding of No Significant Impact for License Amendment for Fansteel, Inc. -- Muskogee, Oklahoma License No. SMB-911" ("EA Notice") 68 Fed. Reg. 63134 (2003). The EA Notice indicated that the EA and the documents related to the proposed action were available for inspection at the NRC's Public Electronic Reading Room and provided that ADAMS accession numbers for, among other things, the environmental assessment (EA) and finding of no significant impact (FONSI). *Id.* On December 4, 2003, the Staff approved Fansteel's request for a license amendment authorizing decommissioning of the Muskogee site.³ Letter to G. Tessitore from D. Gillen, December 4, 2003 (ADAMS, Accession No. ML033240018). On December 8, 2003, Oklahoma filed its Objection.⁴

³ Also on December 4, the Staff approved a transfer of the license from Fansteel to FMRI, a subsidiary of Reorganized Fansteel. Letter to G. Tessitore from D. Gillen, Dec. 4, 2003, (ADAMS Accession No. ML033240133).

⁴ According to the certificate of service attached to its filing, Oklahoma served Judge G. Paul Bollwerk, III, as the presiding officer. However, the Presiding Officer in this proceeding is Judge Alan S. Rosenthal and Judge Richard J. Cole is the Special Assistant. See Designation of Presiding Officer, 68 Fed. Reg. 58146 (2003). The Staff is serving this response with all three judges to ensure appropriate consideration of the issue.

DISCUSSION

Oklahoma describes its filing as an objection to the issuance of the EA and FONSI and requests that the FONSI be overturned. See Objection at 3. The State asserts that the Staff's decision to issue a FONSI was arbitrary and capricious. *Id.* The State argues that the Staff failed to consider three relevant factors. These factors are: 1) the failure to consider the impacts of the use of the industrial scenario in the decommissioning plan; 2) the failure to appropriately consider the non-radiological impacts; and 3) the failure to consider the financial assurance review. See Objection at 5-8. The Commission's regulations in Part 2, however, do not specifically permit the filing of an objection to an EA and Oklahoma does not cite to any regulation. The appropriate way to raise concerns regarding the findings in the EA is to submit an area of concern pursuant to 10 C.F.R. § 2.1205. Because the time in which to request a hearing has already passed, Oklahoma's Objection should be evaluated under the standards of 10 C.F.R. § 2.1205(l). See, e.g., *Babcock and Wilcox*, (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-92-24, 36 NRC 149, 154 (1992). Because Oklahoma's Objection is inexcusably late, it should be denied.

The notice of the opportunity to request a hearing on Fansteel's decommissioning plan was published in the *Federal Register* on August 11, 2003. 68 Fed. Reg. 47621. On September 10, 2003, the State timely filed a hearing request. See "State of Oklahoma's Request for Hearing" (Hearing Request). At the time of Oklahoma's Hearing Request, the Staff had not yet issued its EA. Thus, assuming that the EA contained new information, the State's areas of concern would not have been excusably late if such concerns arose from the new information and were timely

raised after the issuance of the EA and FONSI. However, the State did not timely raise its areas of concern after the issuance of the EA and FONSI. The EA and FONSI were made publically available on November 7, 2003, however, the State waited for 30 days to file its Objection. The EA and FONSI are not long or complex enough to justify the State waiting for 30 days to file its Objection.⁵ Accordingly, Oklahoma's areas of concern, as set forth in its Objection, should be dismissed.⁶

CONCLUSION

For the reasons set forth above, Oklahoma's Objection should be dismissed.

Respectfully submitted,

/RA/

Marian L. Zabler
Counsel for NRC Staff

Dated at Rockville, Maryland
this 18th day of December, 2003

⁵ In fact, the State fails to even address the factors in 2.1205(l) and does not attempt to justify why it waited 30 days to file its Objection.

⁶ In the event that the Presiding Officer finds Oklahoma's Objection timely, the areas of concern raised in the Objection should be considered as part of the State's written presentation, with the opportunity for the Staff and Fansteel respond.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO STATE OF OKLAHOMA'S OBJECTION TO ISSUANCE OF ENVIRONMENTAL ASSESSMENT AND FINDING OF NO SIGNIFICANT IMPACT" 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 18th day of December, 2003.

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