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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

ATOMIC SAFETY AND LICENSING BOARD PANEL

BEFORE THE PRESIDING OFFICER:

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

In the Matter of

FANSTEEL INC.

(Muskogee, Oklahoma Facility)

Docket No. 40-7580-MLA-3

ASLBP No. 04-816-01-MLA

January 8, 2004

STATE OF OKLAHOMA'S RESPONSE TO THE NRC STAFF AND FANSTEEL, INC. RESPONSES TO STATE OF OKLAHOMA'S OBJECTION TO ISSUANCE OF ENVIRONMENTAL ASSESSMENT AND FINDING OF NO SIGNIFICANT IMPACT

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THE STATE OF OKLAHOMA'S REPLY TO NRC STAFF AND FANSTEEL, INC'S RESPONSES TO THE STATE OF OKLAHOMA'S OBJECTION TO THE ISSUANCE OF ENVIRONMENTAL ASSESSMENT AND FINDING OF NO SIGNIFICANT IMPACT

The Attorney General of the State of Oklahoma, W.A. Drew Edmondson, by and through the undersigned, Sarah E. Penn, Assistant Attorney General, on behalf of the State of Oklahoma ("State"), hereby submits its Reply to NRC Staff ("Staff") and Fansteel, Inc. ("Fansteel") responses to Oklahoma's Objection to the Issuance of Environmental Assessment and Finding of No Significant Impact ("Objection to FONSI") pursuant to the Order issued December 22, 2003, by the Presiding Officer Alan S. Rosenthal.

BACKGROUND

Although the factual and procedural background in this case are well documented, it is obvious that certain aspects of both need to be repeated in order to demonstrate why it is important that the laws of the U.S. Nuclear Regulatory Commission ("NRC") are followed

by Staff and by Fansteel and to recognize the State's complete involvement throughout this proceeding.

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. 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. EARTH SCIENCES CONSULTANTS, INC., REMEDIATION ASSESSMENT, FANSTEEL, INC. - MUSKOGEE, OKLAHOMA 1-2 (1993). 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. *Id.* 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. U.S. NUCLEAR REGULATORY COMMISSION, ENVIRONMENTAL ASSESSMENT-LICENSE AMENDMENT FOR MATERIAL LICENSE No. SMB-911, 1-1 (December 1997).

As a result of 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, ammonia, arsenic, chromium, metals, cadmium, ammonia, methyl isobutyl ketone (MIBK), and fluoride. EARTH SCIENCES CONSULTANTS, INC., REMEDIATION ASSESSMENT, FANSTEEL, INC. - MUSKOGEE, OKLAHOMA 1-2 (1993).

PROCEDURAL HISTORY

On July 6, 1998, Fansteel submitted its proposed Decommissioning Plan for the Fansteel Facility, therein requesting an amendment to Source Materials License SMB-911 to decommission the Fansteel Facility. Fansteel thereafter supplemented the Proposed Decommissioning Plan on December 4, 1998. On September 14, 1999, 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"), relating to the Restricted Release Decommissioning Plan. In response, on October 14, 1999, the Oklahoma Attorney General filed a Request for Hearing Pursuant to 10 C.F.R. § 2.1205. Fansteel filed its Response to the Request for Hearing on October 29, 1999, and NRC Staff filed its response on November 5, 1999.

In a Memorandum and Order, dated December 29, 1999, the Presiding Officer Granted the Oklahoma Attorney General's Request for Hearing based on the finding that Oklahoma had the requisite standing to participate as a party and that Oklahoma specified areas of concern germane to the Proceeding.

On January 13, 2000 Fansteel, Inc's appealed from the Presiding Officer's Decision to Grant a Hearing to Oklahoma. On February 2, 2000, NRC Staff responded to Fansteel's appeal to the Presiding Officer's decision, stating that Oklahoma was properly granted a hearing, as it successfully demonstrated both standing and injury-in-fact, as well as areas of concern germane to the proceeding. Oklahoma filed its Counter-Statement in Opposition to Fansteel Inc.'s Appeal on February 2, 2000.

On May 9, 2000 Fansteel, Inc. requested that the NRC staff discontinue review of Fansteel's Restricted Release Decommissioning Plan and on July 25, 2000, the NRC staff agreed to discontinue review of Docket No. 40-7580-MLA, ASLBP No. 00-772-01-MLA. Pursuant to the agreement of NRC staff to discontinue review of the Restricted Release Decommissioning Plan, Fansteel, Inc., Oklahoma and the NRC staff filed a joint motion to dismiss on January 2, 2001. On January 31, 2001, the Presiding Officer determined Fansteel Inc.'s appeal moot and accordingly, dismissed the case.

On January 14, 2003, Fansteel submitted a new DP to terminate the License No. SMB-911 for unrestricted use in accordance with 10 C.F.R. §20.1402. On January 15, 2003 Fansteel, Inc., filed for Chapter 11 bankruptcy protection.

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. The letter stated that NRC 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.

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 NRC and

Fansteel regarding the licensee's bankruptcy. This letter outlined, in one page, a four-phased approach (hereinafter described) 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 NRC staff had now reviewed Fansteel's one page submittal of May 8, 2003, and concluded that Fansteel had now submitted sufficient information to proceed with the detailed technical review of the DP.

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, Decommissioning Plan ("DP"). Thereafter, Gary Tessitore, CEO of Fansteel, indicated the withdrawal of Fansteel's DP due to NRC Staff's ("Staff") suspension of review in Fansteel's letter of June 26, 2003. The reasons for Staff's suspension of review are stated in a July 8, 2003, letter to Tessitore.

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, 2003, 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, stating 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. To which the State responded to Staff and Fansteel's Responses on November 3, 2003. Later that day, the State's Request for Hearing was granted by the Presiding Officer.

ARGUMENT

The first point addresses the timeliness of the filing of the State's Objection to FONSI. Staff indicates that there is no actual procedure to filing an objection to the Environmental Assessment ("EA") and goes on to indicate that the proper procedure to follow would have been to submit an area of concern pursuant to 10 C.F.R. § 2.1205. See Staff Response @ 4. This section clearly references the filing timeline for matters relating to an application for a licensing action. That timeline is 30 days after the publication of a notice in the Federal Register. Pursuant to 10 C.F.R. § 2.710, thirty (30) days has been calculated as December 8, 2003. Without clear guidance, the application of the 30 days is a reasonable interpretation of the regulations, more so than any alternative filing time.

Staff states that this should have been in the form of an area of concern and a supplement to the State's Request for Hearing. Indeed the State did raise this as an area of concern in its Request for Hearing. See State's Request for Hearing @ 36-37 The State raised as an *area of concern* the issue of the Staff's inappropriate pre-determination that an Environmental Impact Statement ("EIS") would not be done. It is apparent that such a concern includes an objection to the performance of the EA only and a subsequent issuance of the FONSI. Therefore, although perhaps not properly couched, the State's Objection does supplement the areas of concern raised in its Request for Hearing. In light of the vagueness of the NRC regulations on this subject, leeway should be given and form should not take precedence over substance thereby allowing the State to be granted an additional area of

concern in its Request for Hearing.

Finally, Staff's only argument for being untimely is based on the simplicity of the EA. This issue may be simple to Staff and to Fansteel since the details have apparently already been worked out as demonstrated by the correspondence April 28, 2003 and May 8, 2003 exchanged between Fansteel and the Staff in violation of 10 C.F.R. Pt. 51 and the Guidance in JUREG 1748. See letter from Gillen to Tessitore, April 28, 2003 and letter from Tessitore to Gillen, May 8, 2003. However, the State does not have the luxury of having multiple law firms with multiple attorneys working on this case. Instead it has one lawyer working to ensure that the both the company and Staff follow the rules despite the efforts of both to confound them. As for citing to a regulation, nowhere in the rules was there any reference to when simple matters should be responded to by interested parties.

The State has filed, and filed and filed documents in this case as demonstrated in the procedural history. In addition to participation at the NRC level, the State has also actively participated in the bankruptcy proceedings of this company during November as the company is well aware. Therefore the statements of the State "sitting on its hands" and "taking another bite of the apple" in Fansteel's brief are not only ludicrous, they are offensive and really deserve no further comment.

As for the second issue of which forum the State's Objection to the FONSI should be considered, the State intended and expects the matter to come before the Presiding Officer for consideration. The State has no desire, at this moment, to go before the Commission as opined by Fansteel. The Presiding Officer has conducted these proceedings in a fair and

reasonable manner and the State sees no reason to by-pass him for consideration of this issue. However, the attorney for the State wishes to apologize for the confusion regarding the issue of which forum is appropriate. My secretary and I both had the flu at the time of the brief writing and I can only blame fever and cold medicine for the lack of an adequate review of my work.

CONCLUSION

The State's Objection to the Environmental Assessment and the Issuance of the FONSI was timely filed and should be considered as a supplement to its previously raised area of concern. The State's Objection should therefore be granted and the FONSI should be rejected.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 8th day of January, 2004, a true and correct copy of the foregoing, State of Oklahoma's Response to the NRC Staff and Fansteel, Inc. Responses to State of Oklahoma's Objection to Issuance of Environmental Assessment and Findings of No Significant Impact, 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.

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** Original and 3 copies



OFFICE OF ATTORNEY GENERAL
STATE OF OKLAHOMA

January 8, 2004

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., State of Oklahoma's Response to NRC Staff and Fansteel Inc. Responses, U.S. Nuclear Regulatory Commission, Docket No. 40-7580-MLA-3**

Sir or Madam:

Enclosed please find an original of the State of Oklahoma's Response to the NRC Staff and Fansteel, Inc. Responses to State of Oklahoma's Objection to Issuance of Environmental Assessment and Findings of No Significant Impact, 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 Response 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 black ink, appearing to read "Sarah E. Penn".

SARAH E. PENN
ASSISTANT ATTORNEY GENERAL

SEP/jb
Enclosures