

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE PRESIDING OFFICER

In the Matter of)	
)	Docket No. 40-7580-MLA-3
FANSTEEL, INC.)	
)	ASLBP No. 04-816-01-MLA
(Gore, Oklahoma Site))	

NRC STAFF RESPONSE TO PRESIDING OFFICER'S QUESTION

INTRODUCTION

Pursuant to an Order dated December 22, 2003, the staff of the Nuclear Regulatory Commission Staff (Staff) hereby responds to a question concerning in which forum the "State of Oklahoma's Objection to Issuance of Environmental Assessment and Findings of No Significant Impact" (Objection) dated December 8, 2003, should be considered. As discussed below, the Presiding Officer could reasonably assume that the matters raised by the State's Objection are before him rather than the Commission.

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 (Licensee) 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

¹ Subsequently, on January 15, 2002, Fansteel notified the NRC that it had filed a petition
(continued...)

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 reinitiate its review of the plan. Letter to D. Gillen from G. Tessitore, July 24, 2003 (ADAMS Accession No. ML032100530). 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. The Presiding Officer granted the State's hearing request on November 3, 2003. *Fansteel, Inc.* (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." 68 Fed. Reg. 63134 (2003). Subsequently, on December 4, 2003, the Staff approved Fansteel's request for a license amendment authorizing decommissioning of the Muskogee site.² Letter to G. Tessitore from D. Gillen, December 4, 2003 (ADAMS, Accession No. ML033240018). On December 8, 2003, Oklahoma filed its Objection. The Staff and Licensee responded to Oklahoma's Objection on December 18, 2003. "Answer of Fansteel Inc. to State of Oklahoma's Objection to Issuance of Environmental Assessment and Finding of No Significant Impact" (Fansteel Answer); "NRC Staff Response to State of Oklahoma's Objection to Issuance of Environmental Assessment and Finding

¹(...continued)

for bankruptcy pursuant to Chapter 11 of Title 11 of the United States Code. Letter to E. Merschhoff from G. Tessitore, Jan. 15, 2002 (ADAMS Accession No. ML020290385).

² 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).

of No Significant Impact” (Staff Response). On December 22, 2003, the Presiding Officer issued an Order permitting the State to reply to the Licensee’s and Staff’s responses. In addition, the Presiding Officer directed the Staff to address the question of “whether this matter should be deemed to be now before the presiding officer rather than the Commission.” Order at 1.

DISCUSSION

As noted by the Staff and the Licensee, it was unclear in which forum, the Commission or the Presiding Officer, the State intended to file its Objection. See Staff Response at 3-4; Fansteel Answer at 1-2. On its face Oklahoma’s submission does not indicate under which regulation it was filing its Objection and does not note in the caption whether the filing was before the Commission or the Presiding Officer. Adding to the confusion, Oklahoma indicated in its cover letter that it was filing its Objection in the license transfer proceeding³ although its Objection clearly addressed the DP license amendment proceeding.⁴

The Licensee believed that Oklahoma intended to file its Objection before the Commission and urged the Commission to resolve the matters raised by the State rather than referring the Objection to the Presiding Officer. See Fansteel Answer at 2, 5 citing *Private Fuel Storage, L.C.C.* (Independent Spent Fuel Storage Installation), CLI-03-16, slip op. (Nov. 13, 2002). The Staff believed that Oklahoma sought to file its Objection before the Presiding Officer (although noting that Oklahoma incorrectly served Judge G. Paul Bollwerk, III as the Presiding Officer⁵) and assumed that Oklahoma intended to raise late-filed areas of concern. See Staff Response

³ The license transfer proceeding was terminated by the Commission on October 23, 2003. See *Fansteel* (Muskogee, Oklahoma Site), CLI-03-13, slip op. (Oct. 23, 2003).

⁴ The Presiding Officer’s December 22, 2003 Order suggested that the State could clarify the matter in any reply it may choose to file in response to the Licensee’s and the Staff’s December 18, 2003 responses.

⁵ Judge Bollwerk had been the Presiding Officer in the prior *Fansteel* proceeding that was terminated as a result of the Licensee withdrawing its amendment application. See Show Cause Order (Dismissal of Proceeding), slip op. (July 9, 2003).

at 3-4 & n. 4. In light of the confusion noted above and the fact that the most appropriate way to raise concerns regarding the environmental assessment related to the DP is to file an area of concern in the pending proceeding, it would be reasonable for the Presiding Officer to conclude that Oklahoma intended to file before him and to consider the matters raised in Oklahoma's Objection. See Staff Response at 4.⁶

CONCLUSION

For the reasons set forth above, the matters raised by Oklahoma's Objection should be deemed to be before the Presiding Officer.

Respectfully submitted,

/RA/

Marian L. Zabler
Counsel for NRC Staff

Dated at Rockville, Maryland
this 8th day of January, 2004

⁶ If, as suggested by Licensee, Oklahoma intended to file before the Commission, there is no doubt that the Commission could consider Oklahoma's Objection as the Commission has plenary supervisory authority over its adjudications. See *Baltimore Gas & Elec. Co.*, (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-15, 48 NRC 45, 53 (1998). The Licensee argued that the Commission should rule on the State's Objections in the "interest of expeditious and disciplined resolution of the matters raised by Oklahoma's Objection." Fansteel Answer at 2 *citing Private Fuel Storage*, CLI-03-16, slip op. at 3. However, as the Commission noted in CLI-03-16, it generally disfavors interlocutory reviews absent special circumstances. See *Private Fuel Storage*, CLI-03-16, slip op. at 3. In this proceeding, unlike the *Private Fuel Storage* proceeding, there are no special circumstances warranting Commission review. Therefore, in the event that Oklahoma did intend to file before the Commission, the matter should be referred to the Presiding Officer.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO PRESIDING OFFICER'S QUESTION" 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 8th day of January, 2004.

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