

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

September 22, 2003  
DOCKETED  
USNRC

September 22, 2003 (4:33PM)

BEFORE THE COMMISSION

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

In the Matter of:

Fansteel Inc.

(Muskogee, Oklahoma Facility)

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Docket No. 40-7580

ANSWER OF FANSTEEL INC. TO STATE OF OKLAHOMA'S REQUEST FOR HEARING

I. INTRODUCTION

In accordance with 10 C.F.R. § 2.1307(a), Fansteel Inc. ("Fansteel") herein answers the Request for Hearing ("Request") filed on September 10, 2003, by the State of Oklahoma ("State"). The State's Request relates to Fansteel's application, pursuant to Section 184 of the Atomic Energy Act and 10 C.F.R. § 40.46, for Nuclear Regulatory Commission ("NRC" or "Commission") approval of a proposed transfer of license SMB-911 for Fansteel's Muskogee, Oklahoma site. As discussed below, the single concern proffered by the State has insufficient basis to establish a genuine dispute on a material issue of fact or law, and the Request should be dismissed.

II. BACKGROUND

A. The License Transfer Application

In an application dated July 24, 2003, Fansteel requested the NRC's approval of the transfer of the SMB-911 license currently held by Fansteel.<sup>1</sup> This request was made in

<sup>1</sup> See Letter from G.L. Tessitore, Fansteel, to D.M. Gillen, NRC, "Request for Consent to License Transfer," dated July 24, 2003 ("Application").

support of the pending reorganization and restructuring of the business and operations of Fansteel to allow Fansteel to emerge from bankruptcy.

Fansteel has been licensed by the NRC to possess and use source material at the Muskogee site since January 27, 1967. Specifically, the licensee was authorized to process ore concentrates and tin slags containing uranium and thorium in the production of refined tantalum products. Quantities of uranium and thorium requiring a license are present in the slags, ores, concentrates, and process residues, and are contaminants in soil and sediment on the site.

Operations ceased at the Muskogee site in December 1989. From 1989 through August 1996, Fansteel conducted processing equipment removal, limited site remediation, decommissioning of selected site areas, and completed a Remedial Assessment of the site. Fansteel decontaminated approximately 35 acres of the Muskogee site designated as the "Northwest Property," and the NRC released this area for unrestricted use in August 1996.

On January 25, 1995, Fansteel submitted an application to reprocess residues designated as "Work-In-Progress" ("WIP") material, which were generated as a result of the initial hydrofluoric acid digestion of the ore concentrates. The purpose of the reprocessing was to recover tantalum and niobium concentrate, scandium oxide and aluminum trifluoride from the "recycled" material. On March 25, 1997, the NRC granted a license amendment to allow reprocessing of the WIP residues.

In accordance with the amended license, pilot production from the plant began in late 1999; however, Fansteel encountered production problems which required significant additional capital to make improvements to the plant in order to achieve commercially viable production levels. After the additional expenditures were made, however, the market price of tantalum severely declined, and, as a consequence, Fansteel concluded that aggregate projected

revenues in the processing operation would be insufficient to recover operating costs and suspended commercial reprocessing efforts. Generally Accepted Accounting Principles then mandated that Fansteel take a pre-tax loss, in the third quarter of 2001, of \$83.5 million, representing a charge of \$31.5 million for construction, equipment and pilot production costs of the processing facility and a reserve of \$52 million representing the (then additional) estimated costs for offsite decommissioning of all contaminated residues and soils. The loss, charges and reserves resulted in defaults of various provisions of Fansteel's principal credit facility. Unable to obtain outside financing, Fansteel filed for bankruptcy protection under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware on January 15, 2002.

On July 24, 2003, following several months of discussions with numerous entities, including the NRC and the U.S. Department of Justice ("DOJ"), Fansteel filed a proposed "Joint Reorganization Plan of Fansteel Inc. and Subsidiaries," ("Plan") together with the associated "Disclosure Statement With Respect to Joint Reorganization Plan of Fansteel Inc., *et al.*" ("Disclosure Statement") with the Bankruptcy Court. Among other things, the proposed Plan provides for remediation of the Muskogee site and transfer of the site (including real property, equipment and improvements), the NRC license, and other valuable consideration, including Fansteel's rights under the Standby Trust established as NRC-mandated financial assurance for decommissioning, to a wholly-owned subsidiary of Reorganized Fansteel, FMRI Inc. ("FMRI").<sup>2</sup> As the NRC licensee, FMRI will have as its sole purpose completion of site decommissioning pursuant to NRC regulations and the terms and conditions of the license.

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<sup>2</sup> Recently, Fansteel determined that the name "MRI Inc." is not available. Accordingly, on September 17, 2003, Fansteel notified the NRC and requested that all references to "MRI Inc." or "MRI" be replaced with "FMRI Inc.," or "FMRI," as appropriate. This

Fansteel is proposing to provide financial assurance for the remediation of the Muskogee site, through FMRI, in the form of three unsecured notes: the Primary Note, Secondary Note and Contingent Note. Under the Primary Note, valued at \$30.6 million, Fansteel will deliver to FMRI, on the effective date of the Plan, a sum of \$250,000 as the first payment on the Primary Note. Thereafter, Fansteel will make minimum semi-annual payments of \$700,000 on the Primary Note, as well as additional payments deriving from Fansteel's "excess available cash" from the operations of its other subsidiaries, as well as certain insurance proceeds. The Secondary Note, valued at \$4.2 million, is for the purpose of groundwater remediation. The Secondary Note will be funded by annual payments of \$282,000, beginning in 2009.

In addition, following the completion of certain remediation activities under Fansteel's proposed decommissioning plan (also currently under review by the NRC Staff), Fansteel will conduct additional site characterization. If such additional characterization reveals a need for additional decommissioning activities, Fansteel will deliver the "Contingent Note" to FMRI, in an amount to be decided in concert with the NRC, which will be funded in a similar fashion, involving mandatory minimum semi-annual payments, accompanied by additional payments funded by Reorganized Fansteel's "excess available cash" and certain insurance proceeds. For a detailed discussion of the proposed notes, *see* Application at 3-9.<sup>3</sup> Because the

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change is ministerial only, and does not modify the substance of the application in any way.

<sup>3</sup> See Letter, G.L. Tessitore, Fansteel, to D.M. Gillen, NRC, "Supplementary Information in Support of Request for Consent to License Transfer and Request for Licensing Actions in Connection with the Decommissioning Plan for the Muskogee, Oklahoma Site," dated September 17, 2003 (submitting forms of notes).

proposed funding mechanism is not one recognized in 10 C.F.R. § 40.36(c), Fansteel is seeking an exemption from that requirement.<sup>4</sup>

Because the Plan involves the transfer of authority for License SMB-911 from Fansteel to FMRI, NRC approval under 10 C.F.R. § 40.46 is required in order to implement the Plan. Accordingly, on July 24, 2003, contemporaneously with submission of the proposed Plan and Disclosure Statement to the Bankruptcy Court, Fansteel submitted the Application to the NRC.

**B. The Limited Scope of Subpart M Proceedings**

On August 21, 2003, the NRC published a notice of consideration of approval of the license transfer and opportunity to request a hearing.<sup>5</sup> The State timely filed its Request on September 10, 2003.

The NRC amended its regulations in 1998 to provide streamlined hearing procedures for all NRC license transfer reviews. These procedures, located at 10 C.F.R. Part 2, Subpart M, were intended to provide a fair process to consider issues raised in connection with a license transfer and properly within the scope of an NRC license transfer review. The procedures also were expressly adopted to assure that license transfer proceedings are resolved in an expedited manner, recognizing the time-sensitivity that accompanies license transfer cases. *See* Final Rule, Streamlined Hearing Process for NRC Approval of License Transfers, 63 Fed.

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<sup>4</sup> Fansteel is seeking other approvals related to the Plan contemporaneously with the transfer application. *See* Letter, G.L. Tessitore, Fansteel, to D.M. Gillen, NRC, "Requests for Licensing Actions in Connection with the Decommissioning Plan for the Muskogee, Oklahoma Site," dated July 24, 2003. The State has also requested a hearing under Subpart L in connection with the license amendment to approve Fansteel's proposed decommissioning plan.

<sup>5</sup> Notice of Consideration of a License Amendment Request by Fansteel Inc., for Approval of Transfer of its Muskogee, OK Facility License, and Opportunity to Request a Hearing, 68 Fed. Reg. 50,558 (Aug. 21, 2003).

Reg. 66,721, 66,722 (Dec. 3, 1998). These purposes directly apply to the present case, where there can be no dispute that there is a strong public and NRC interest in Fansteel's timely exit from bankruptcy and prompt remediation of the Muskogee site.

To intervene as a matter of right in a Subpart M proceeding, a petitioner must first demonstrate that it has standing. *See* 10 C.F.R. §§ 2.1306, 2.1308; *Power Auth. of N.Y.* (James A. FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 293 (2000) ("Indian Point 3"); *see also GPU Nuclear, Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-06, 51 NRC 193, 202 (2000) ("Oyster Creek").

In addition, Subpart M establishes clear requirements for admissible issues. Under 10 C.F.R. § 2.1306(b)(2), 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.

*Consol. Edison Co. of N.Y.* (Indian Point, Units 1 and 2), CLI-01-19, 54 NRC 109, 133-34 (2001) ("Indian Point 2"); *see also Indian Point 3*, CLI-00-22, 52 NRC at 295; *Oyster Creek*, CLI-00-06, 51 NRC at 203. These standards do not allow "notice pleading." The Commission will not accept the filing of a "vague, unparticularized issue" unsupported by alleged fact or expert opinion and documentary support. *Indian Point 3*, CLI-00-22, 52 NRC at 295. Rather,

the rules expressly require a petitioner to state the facts or expert opinions supporting its position. *Indian Point*, CLI-01-19, 54 at 134.

Moreover, an issue sought to be admitted for consideration in a Subpart M proceeding must deal with subjects delineated by the NRC's hearing notice. Issues concerning matters that are not within that defined scope cannot be admitted. *Portland Gen. Elec. Co.* (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289 n.6 (1979); *see also Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Unit 3), LBP-98-28, 48 NRC 279, 283 (1998).

When addressing the admissibility of issues in a Subpart M proceeding, the Commission therefore must specifically consider whether the issues sought to be litigated are:

- (i) Within the scope of the proceeding;
- (ii) Relevant to the findings the Commission must make to act on the application for license transfer;
- (iii) Appropriate for litigation in the proceeding; and
- (iv) Adequately supported by the statements, allegations, and documentation required by 10 C.F.R. § 2.1306(b)(2)(iii) and (iv).

10 C.F.R. § 2.1308(a)(4). As discussed below, the State has failed to identify an issue within the scope of the proceeding that is adequately supported by either documentary evidence or expert opinion.

### III. THE STATE'S REQUEST

#### A. The State's Standing is Limited to Matters Within the Zone of Interests Protected by the NRC

On behalf of the State of Oklahoma, the Attorney General sets forth several interests in the proceeding, including: the "health, safety, and welfare of its citizens" (Request at 12); the "economic welfare of its citizens," namely, the state's tax base and tax revenues that could be harmed as a result of contamination allegedly "caused by" the "inability" of the NRC

and the State to hold Reorganized Fansteel “to its alleged financial commitment of funding” FMRI (Request at 13); the State’s “proprietary interests in its air, lands, waters, wildlife, and other natural resources” (Request at 13); the State’s state and federal environmental regulatory jurisdiction (Request at 15); and its interest in “the correct application and enforcement of the laws, rules, and regulations governing NRC-licensed facilities in Oklahoma.” (Request at 15-16.)

To participate as a party, a representative of an interested state must satisfy the same standards as an individual petitioner. *See N. States Power Co.* (Independent Spent Fuel Storage Installation), LBP-96-22, 44 NRC 138, 141 (1996); *see also* *Vt. Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), LBP-87-7, 25 NRC 116, 118 (1987).<sup>6</sup> Fansteel does not contest the State’s standing in this proceeding to the extent its interests relate to public health and safety or the protection of the environment within the zone of interests of the Atomic Energy Act of 1954, as amended (“AEA”) or the National Environmental Policy Act of 1969 (“NEPA”).<sup>7</sup>

**B. The State’s Proposed Issue Should be Denied for Lack of Basis**

The State proffers a single proposed issue for hearing: “whether the license transfer to an unfunded subsidiary constitutes unreasonable risk to the health and safety of the public.” (Request at 10.) The State argues that “[t]he transfer of a license to an unfunded, no-asset, non-revenue generating company, MRI, does not ensure that the company will be able to

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<sup>6</sup> In other NRC proceedings – including one for a proposed decommissioning plan for the Fansteel facility – presiding officers have found the State to have standing. *See Sequoyah Fuels Corp.* (Gore, Oklahoma Site Decommissioning), LBP-99-46, 50 NRC 386, 394-95 (1999), *aff’d*, CLI-01-02, 53 NRC 9 (2001); *Fansteel Inc.* (Muskogee, Oklahoma Facility), LBP-99-47, 50 NRC 409, 413-14 (1999).

<sup>7</sup> The State’s articulated interest in the correct application of NRC decommissioning regulations, to the extent they may be applied to *other* Oklahoma facilities, falls outside the scope of this proceeding. “Each licensing proceeding is confined to the application of governing rules to a particular facility.” *Sequoyah Fuels*, LBP-99-46, 50 NRC at 394.



provide adequate financial protection to the public nor will it be able to respond to any dangers posed by the contamination on site.” (Request at 11.) The State’s bare and speculative allegations fail to establish a genuine dispute with Fansteel on a material issue of law or fact. *See* 10 C.F.R. § 2.1306(b)(2)(iv). Accordingly, this issue should be denied.

As a basis for its argument, the State submits that it will rely on “Fansteel’s Re-Organization Plan and the extensive body of law interpreting contract law,” (Request at 11), noting that, “[i]f one analyzes the Disclosure Statement and Re-Organization Plan . . . , one can clearly see that the promises for funding are unlikely to be fulfilled and present many opportunities to legitimately escape performance by MRI.” (*Id.* at 18.) This is patently insufficient as a supporting basis for a contention in a Subpart M proceeding. In order for an issue to be admissible in a Subpart M proceeding, the petitioner’s assertions and conclusions *must be supported by alleged fact, expert opinion, or documentary support*. “Commission rules require articulation of detailed threshold issues to trigger an agency hearing. Vague, unparticularized issues are impermissible.” *Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-02-16, 55 NRC 317, 338 (2002), *appeal docketed*, No. 02-72735 (9th Cir. Aug. 23, 2002); citing *Indian Point 3*, CLI-00-22, 52 NRC at 295 (subpart M standards do not allow “mere ‘notice pleading’”). The State 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 Plan and Disclosure Statement) provide a basis for the contention. Merely “[a]ttaching a document in support of a contention without any explanation of its significance does not provide an adequate basis for a contention.” *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage

Installation), LBP-98-10, 47 NRC 288, 298 (1998), citing *La. Energy Servs., L.P.* (Claiborne Enrichment Center), LBP-91-41, 34 NRC 332, 338 (1991).

The State has not proffered a single fact, a single piece of documentary evidence, or a single expert opinion in support of its broad challenge to FMRI's financial qualifications to be a licensee. Nothing in the proposed contention or basis affirmatively supports the assertion that "an unfunded subsidiary represents an unreasonable risk" or that the Plan is inadequate in any more specific way. The State has failed to meet its "ironclad obligation to examine the publicly available documentary material pertaining to the facility in question with sufficient care to enable the petitioner to uncover any information that could serve as the foundation for a specific contention." *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2, Catawba Nuclear Station, Units 1 & 2), CLI-02-28, 56 NRC 373, 386 (2002), citing Final Rule, "Rules of Practice for Domestic Licensing Proceedings -- Procedural Changes in the Hearing Process," 54 Fed. Reg. 33,168, 33,170 (Aug. 11, 1989).<sup>8</sup>

As explained above in Section II.A, Fansteel proposes to fund FMRI for the sole purpose of decommissioning the Muskogee site. The gravamen of the State's complaint is that "[Fansteel's] promises" to fund the notes as described in the Application "are illusory at best and can be manipulated to ensure the notes do not get funded and still comply with the letter of the agreement." (Request at 11.) This assertion, standing alone, is not a valid basis for a contention. The State has not proffered any foundation whatsoever for an allegation that Fansteel will have

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<sup>8</sup> See also *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 422 (2001) ("A licensing board is not free to supply missing information or draw factual inferences on the petitioner's behalf."); *Diablo Canyon*, CLI-02-16, 55 NRC at 337 ("We cannot be expected to 'sift through the parties' pleadings to uncover and resolve arguments not advanced by the litigants themselves."), citing *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 & 2), CLI-99-4,

insufficient ability to fund the notes or that Fansteel will not otherwise fulfill its responsibilities under the notes. Indeed, the State does not even acknowledge, much less provide *any* specific challenge to, the detailed decommissioning funding assurance information provided in support of the transfer Application.<sup>9</sup> Absent such a specific challenge, the issue is inadmissible. *Diablo Canyon*, CLI-02-16, 55 NRC at 344.<sup>10</sup>

The State has not presented an issue supported by statements, allegations, and documentation required by 10 C.F.R. § 2.1306(b)(2)(iii) and (iv), that demonstrates any genuine dispute with Fansteel on a material issue of law or fact. Accordingly, the State's Request should be denied.

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49 NRC 185, 194 (1999), *pet. for review denied sub nom. Dienethal v. U.S. Nuclear Regulatory Comm'n*, 203 F.3d 52 (2000).

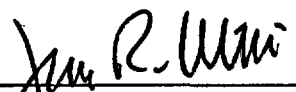
<sup>9</sup> The NRC has several tools at its disposal to enforce the notes in the event of nonpayment, notwithstanding the fact that Fansteel will no longer be an NRC licensee. As provided in the Application (at 8), (1) Fansteel will indemnify the NRC with respect to Fansteel's obligations to FMRI under the notes; (2) the NRC will have a perfected, first priority lien on all of the proceeds of the notes; and (3) as a third party beneficiary to the notes, the NRC will have standing to seek appropriate relief for any breach by Fansteel of its obligations under the notes. To the extent the State implies that Fansteel may be "unwilling" to fund the Notes, it does not raise any issue whatsoever. Fansteel has a *legally binding, contractual obligation* to fund the notes, and these tools serve as enforcement mechanisms for that obligation.

<sup>10</sup> To the extent that the State argues that *FMRI* will contravene NRC regulations or its license, there is similarly no basis for such an assertion. The NRC will not simply assume that a licensee will not meet NRC regulations or its license. *See, e.g., Indian Point*, CLI-00-22, 52 NRC at 313; *Curators of the Univ. of Mo.* CLI-95-8, 41 NRC 386, 400 (1995) (Commission declined to assume a licensee would violate a license condition); *Va. Elec. & Power Co.* (North Anna Power Station, Units 3 & 4), LBP-74-56, 8 AEC 126, 148 (1974) (Licensing Board assumed nuclear units would be operated in compliance with applicable laws and regulations).

IV. CONCLUSION

For the reasons set forth above, the State's request for hearing should be denied.

Respectfully submitted,

  
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James R. Curtiss, Esq.  
Mark J. Wetterhahn, Esq.  
Brooke D. Poole, Esq.  
WINSTON & STRAWN LLP  
1400 L Street, NW  
Washington, D.C. 20005-3502

ATTORNEYS FOR FANSTEEL INC.

Dated in Washington, D.C.  
this 22nd day of September 2003

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of:

Fansteel Inc.

(License No. SMB-911)

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Docket No. 40-7580

NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney herewith enters an appearance in the captioned matter. In accordance with 10 C.F.R. §§ 2.713(b) and 2.1324, the following information is provided:

Name:	James R. Curtiss
Address:	Winston & Strawn LLP 1400 L Street, N.W. Washington, DC 20005
E-Mail:	jcurtiss@winston.com
Telephone Number:	(202) 371-5751
Facsimile Number:	(202) 371-5950
Admissions:	District of Columbia Court of Appeals
Name of Party:	Fansteel Inc.

  
\_\_\_\_\_  
James R. Curtiss

Dated at Washington, District of Columbia  
this 22nd day of September, 2003

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of:

Fansteel Inc.

(License No. SMB-911)

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Docket No. 40-7580

NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney herewith enters an appearance in the captioned matter. In accordance with 10 C.F.R. §§ 2.713(b) and 2.1324, the following information is provided:

Name: Mark J. Wetterhahn

Address: Winston & Strawn LLP  
1400 L Street, N.W.  
Washington, DC 20005

E-Mail: mwetterh@winston.com

Telephone Number: (202) 371-5703

Facsimile Number: (202) 371-5950

Admissions: District of Columbia Court of Appeals  
Court of Appeals of Maryland

Name of Party: Fansteel Inc.

  
Mark J. Wetterhahn

Dated at Washington, District of Columbia  
this 22nd day of September, 2003

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of:

Fansteel Inc.

(License No. SMB-911


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Docket No. 40-7580

NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney herewith enters an appearance in the captioned matter. In accordance with 10 C.F.R. §§ 2.713(b) and 2.1324, the following information is provided:

Name:	Brooke D. Poole
Address:	Winston & Strawn LLP 1400 L Street, N.W. Washington, DC 20005
E-Mail:	bpoole@winston.com
Telephone Number:	(202) 371-5824
Facsimile Number:	(202) 371-5950
Admissions:	District of Columbia Court of Appeals Court of Appeals of Maryland
Name of Party:	Fansteel Inc.

  
\_\_\_\_\_  
Brooke D. Poole

Dated at Washington, District of Columbia  
this 22nd day of September, 2003

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of:

Fansteel Inc.

(Muskogee, Oklahoma Facility)

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Docket No. 40-7580

CERTIFICATE OF SERVICE

I hereby certify that copies of the "ANSWER OF FANSTEEL INC. TO STATE OF OKLAHOMA'S REQUEST FOR HEARING," as well as notices of appearance for James R. Curtiss, Mark J. Wetterhahn, and Brooke D. Poole have been served as shown below by deposit in the U.S. mail, first class, this 22nd day of September 2003. Additional service has also been made this same day by electronic mail, as shown by an asterisk (\*) below.

Nils J. Diaz, Chairman  
U.S. Nuclear Regulatory Commission  
Mail Stop O-16C1  
Washington, DC 20555-0001

Edward McGaffigan, Jr., Commissioner  
U.S. Nuclear Regulatory Commission  
Mail Stop O-16C1  
Washington, DC 20555-0001

Jeffrey S. Merrifield, Commissioner  
U.S. Nuclear Regulatory Commission  
Mail Stop O-16C1  
Washington, DC 20555-0001

Office of Commission Appellate Adjudication  
U.S. Nuclear Regulatory Commission  
Mail Stop O-16C1  
Washington, DC 20555-0001

G. Paul Bollwerk, III  
Chief Administrative Judge\*  
Atomic Safety and Licensing Board Panel  
U.S. Nuclear Regulatory Commission  
Mail Stop T-3F23  
Washington, DC 20555-0001  
e-mail: gpb@nrc.gov

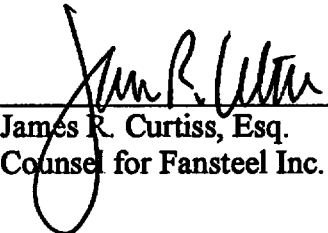
Sarah E. Penn, Esq.\*  
Assistant Attorney General  
Office of the Attorney General  
4545 North Lincoln Boulevard, Suite 260  
Oklahoma City, OK 73105  
e-mail: sarah\_penn@oag.state.ok.us

Office of the Secretary\*  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
Attn: Rulemakings and Adjudications Staff  
(original + two copies)  
e-mail: HEARINGDOCKET@nrc.gov

Marian L. Zobler, Esq.\*  
Office of the General Counsel  
U.S. Nuclear Regulatory Commission  
Mail Stop O-15D21  
Washington, D.C. 20555-0001  
e-mail: mlz@nrc.gov  
OGCMailCenter@nrc.gov



Jeffrey S. Sabin, Esq.\*  
Schulte Roth & Zabel LLP  
919 Third Avenue  
New York, NY 10022  
e-mail: Jeffrey.Sabin@srz.com



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James R. Curtiss, Esq.  
Counsel for Fansteel Inc.