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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE COMMISSION

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of:)
)
Fansteel Inc.)
)
(Muskogee, Oklahoma Facility))

Docket No. . 40-7580

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

I. INTRODUCTION

On September 10, 2003, the Attorney General of the State of Oklahoma, on behalf of the State of Oklahoma ("State"), filed a Request for Hearing in which it identified its interest and set forth several areas of concern related to the site decommissioning plan at issue in this proceeding. In accordance with 10 C.F.R. § 2.1205(g), Fansteel Inc. ("Fansteel") herein responds to the State's Request for Hearing on the issue of admissibility of the identified areas of concern. As discussed further below, the State has failed to identify an admissible area of concern. Accordingly, the Request for Hearing should be denied.

II. BACKGROUND

A. Site History

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. Licensable quantities of uranium and thorium 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 removed processing equipment, conducted 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 \$83,500,000, 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.

B. Events Following Fansteel's Bankruptcy Filing and Institution of This Proceeding

On June 25, 2002, Fansteel submitted to the NRC, pursuant to Condition 21 of License SMB-911, an updated decommissioning cost estimate for the Muskogee site, which reflected the revised estimate of \$57 million for the total cost of remediating the site.¹ Due to the bankruptcy, Fansteel at that time requested that the NRC postpone consideration of financial assurance until December 20, 2002. Thereafter, on August 27, 2002, Fansteel filed an application for renewal of license SMB-911.² In response to both the June 25 letter and the license renewal application, on October 22, 2002, the NRC denied the license renewal application, primarily because Fansteel had not provided the financial assurance required by 10 C.F.R. § 40.36. Accordingly, the NRC limited activities at the Muskogee Site to those directly related to decommissioning and maintaining control of the site and licensed materials. However, with no approved decommissioning plan, the only expenditures Fansteel is permitted to make relate to maintaining control of the site and licensed materials.

In light of the denial of the license renewal application, on December 20, 2002, Fansteel notified the NRC of its intent to submit a decommissioning plan within 12 months.³

¹ See Letter from G.L. Tessitore, Fansteel, to L. Camper, NRC, dated June 25, 2002.

² See Letter from A.F. Dohmann, Fansteel, to J.W. Hickey, NRC, "License Renewal Application," dated August 27, 2002.

³ See Letter from A.F. Dohmann, Fansteel, to J. Shepherd, NRC, "NRC License Number SMB-911," dated December 20, 2002.

Fansteel subsequently submitted its Decommissioning Plan ("DP") on January 14, 2003.⁴ In a letter dated April 28, 2003, the NRC indicated that, while it did not object to the proposed approach to decommissioning the Muskogee Site, it had concluded that the DP did not contain sufficient information to conduct a detailed review.⁵ Following discussions in the context of settlement with the NRC and the U.S. Department of Justice ("DOJ") regarding the ongoing bankruptcy case, Fansteel made additional submissions on May 8 and May 9 describing a four-phased approach to decommissioning the site that would advance the schedule set forth in the DP.⁶ In a letter dated May 9, 2003, the NRC accepted the DP for technical review in light of the additional submissions.⁷

Thereafter, on June 16, 2003, the State filed a request for a hearing.⁸ On June 26, 2003, the day Fansteel was due to respond to the State Request in accordance with 10 C.F.R. § 2.1205(g), Fansteel learned, during a telephone call with NRC Staff that the Staff had on that

⁴ See Letter from G.L. Tessitore, Fansteel, to J. Shepherd, NRC, dated January 14, 2003. The letter did not include certain sections of Chapter 15 related to decommissioning funding assurance. At that time, the terms and conditions of such financial assurance were still being negotiated in the context of the bankruptcy proceeding. It should also be noted that in 1998 Fansteel submitted a DP contemplating restricted release and disposal of materials in an onsite disposal cell. Following the State of Oklahoma's objection to the proposed DP, based primarily on the proposed on-site stabilization of the contaminated materials, Fansteel withdrew that plan. See *Fansteel Inc. (Muskogee, Oklahoma Facility)*, LBP-01-2, 53 NRC 82 (2001) (terminating proceeding).

⁵ See Letter from D.M. Gillen, NRC, to G.L. Tessitore, Fansteel, "Results of Preliminary Review of Fansteel's Decommissioning Plan Dated January 2003," dated April 28, 2003 ("April 28 Letter").

⁶ See Letter from G.L. Tessitore, Fansteel, to D.M. Gillen, NRC, dated May 8, 2003; Letter from R.M. McEntee, Fansteel, to NRC Document Control Desk, dated May 9, 2003.

⁷ See Letter from D.M. Gillen, NRC, to G.L. Tessitore, Fansteel, "Results of Preliminary Review of Fansteel's Decommissioning Plan Dated January 2003," dated May 9, 2003.

⁸ See "State of Oklahoma's Request for Hearing," dated June 16, 2003.

date suspended its review of the DP because Fansteel had not submitted an associated license amendment request that, in the Staff's view, was required by 10 C.F.R. Part 40.⁹ Upon learning of the Staff's decision, Fansteel withdrew the DP in order to evaluate its path forward with respect to resolution of issues surrounding the DP in light of the pending bankruptcy proceeding.¹⁰ Thereafter, in a letter dated July 8, 2003, the NRC Staff acknowledged Fansteel's withdrawal of the DP, but also indicated its willingness to proceed with its review of the DP "upon receipt of notification in writing that the proposed DP should again be considered for review" including submission of a request to amend License SMB-911.¹¹

On July 9, 2003, a Presiding Officer was designated in that proceeding.¹² On the same date, the Presiding Officer issued a Show Cause Order, directing the State to show cause by July 17, 2003, why that proceeding should not be dismissed.¹³ On July 17, 2003, the State filed an Objection and Show of Harm opposing Fansteel's withdrawal of the DP.

On July 24, 2003, following several months of discussions with numerous entities, including the NRC and DOJ, Fansteel filed with the Bankruptcy Court a proposed "Joint Reorganization Plan of Fansteel Inc. and Subsidiaries," ("Plan") together with the associated

⁹ As noted above, Fansteel previously had been informed by the NRC that the information provided by Fansteel was sufficient for the NRC staff to proceed with a detailed technical review of the DP; on June 26, the NRC Staff apparently changed its position in this regard. *See* NRC May 9 Letter.

¹⁰ *See* Letter from G.L. Tessitore, Fansteel, to J. Shepherd, NRC, "Fansteel Inc., License No. SMB-911, Docket No. 40-7580," dated June 26, 2003.

¹¹ *See* Letter from J.C. Shepherd, NRC, to G.L. Tessitore, Fansteel, "Response to Fansteel Submittal of June 26, 2003," dated July 8, 2003, at 2 ("NRC July 8 Letter").

¹² *See* Fansteel Inc.; Designation of Presiding Officer, 68 Fed. Reg. 41,851 (July 15, 2003).

¹³ *See* Fansteel Inc. (Muskogee, Oklahoma Facility), Show Cause Order (Dismissal of Proceeding), slip op. July 9, 2003.

“Disclosure Statement With Respect to Joint Reorganization Plan of Fansteel Inc., *et al.*” (“Disclosure Statement”). Among other things, the proposed Plan provides for remediation of the Muskogee facility and transfer of the Muskogee 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”).¹⁴ As the NRC licensee, FMRI would have as its sole purpose completion of site decommissioning pursuant to NRC regulations and the terms and conditions of the license.

On July 24, 2003, contemporaneously with submission of the proposed Plan and Disclosure Statement to the Bankruptcy Court, Fansteel requested that the NRC resume its review of the January 14, 2003 DP. As part of this request, Fansteel supplemented the DP with information concerning financial assurance for decommissioning, as set forth in the proposed Plan.¹⁵ In conjunction with its review of the DP, as supplemented, Fansteel also requested for the first time related approvals, including a request for amendment of the NRC license to reflect approval of the DP.¹⁶ Fansteel informed the Presiding Officer and participants in that proceeding

¹⁴ 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 change is ministerial only, and does not modify the substance of the application in any way.

¹⁵ This submission attached the cost estimate and statement of cash flow provided to the NRC as proprietary information on May 9, 2003 for inclusion on the public docket. The cash flow statement submitted on July 24 was updated from the version submitted to the NRC on May 9.

¹⁶ See Letter from 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. In a separate submission, Fansteel also requested NRC consent to transfer the SMB-911 license to FMRI Inc. See Letter from G.L. Tessitore, Fansteel, to D.M. Gillen, NRC, “Request for Consent to License Transfer,” dated July 24,

of these developments on July 24, 2003.¹⁷ Subsequently, on July 29, 2003, the State requested leave to reply to Fansteel's and the NRC Staff's responses,¹⁸ and filed its response on August 7, 2003.¹⁹ Thereafter, on August 20, 2003, the Presiding Officer issued a Memorandum and Order dismissing the proceeding, finding, in the alternative, that he lacked jurisdiction over the State's June 16, 2003 hearing request, or that the proceeding was mooted by Fansteel's withdrawal of the DP on June 26.²⁰

A notice of opportunity for hearing related to Fansteel's July 24, 2003 license amendment request was published in the *Federal Register* on August 11, 2003.²¹ The State re-filed its request for hearing in substantively identical form on September 10, 2003.²²

2003. Notice of the proposed license transfer and an opportunity for a hearing thereon was published in the *Federal Register* on August 21, 2003. See Notice of Consideration of a License Amendment Requested 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).

¹⁷ See "Response of Fansteel Inc. to the State of Oklahoma's Objection and Show of Harm to Fansteel Inc.'s Withdrawal of Decommissioning Plan," dated July 24, 2003; "NRC Staff Response to the State of Oklahoma's Objection and Show of Harm to Fansteel Inc.'s Withdrawal of Decommissioning Plan," dated July 25, 2003.

¹⁸ See "State of Oklahoma's Motion for Leave to Reply to Fansteel and NRC Staff's Response," dated July 29, 2003. The Presiding Officer granted the State's request on July 31, 2003.

¹⁹ See "The State of Oklahoma's Reply to Fansteel and NRC Staff's Response," dated August 7, 2003.

²⁰ See *Fansteel Inc.* (Muskogee, Oklahoma Facility), LBP-03-13, 58 NRC __ (slip op. Aug. 20, 2003).

²¹ See Notice of Consideration of Amendment Request for Fansteel, Inc., to Authorize Decommissioning of Its Muskogee, Oklahoma Site, and Opportunity to Provide Comments and to Request a Hearing, 68 Fed. Reg. 47,621 (Aug. 11, 2003).

²² The September 10, 2003 Request for Hearing appears on its face not to acknowledge Fansteel's July 24, 2003 filing. In fact, in all material respects, the State's Request is

III. ARGUMENT

A. Standing

In a Subpart L proceeding, a petitioner's request for hearing must describe in detail (1) its interest in the proceeding; and (2) how its interests may be affected by the results of the proceeding. 10 C.F.R. § 2.1205(e)(1)-(2). To intervene as a matter of right, a petitioner must demonstrate that it meets the judicial standards for standing. The Presiding Officer will consider, among other factors:

- (1) The nature of the requestor's right under the [Atomic Energy Act] to be made a party to the proceeding.
- (2) The nature and extent of the requestor's property, financial, or other interest in the proceeding; and
- (3) The possible effect of any order that may be entered in the proceeding upon the requestor's interest.

10 C.F.R. § 2.1205(h). *See Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 413 (2001); *Int'l Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-01-18, 54 NRC 27, 30 (2001).

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 DP (Request at 12-13); 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

identical to its June 16, 2003 hearing request, notwithstanding several significant actions and developments that have occurred subsequent to the June 16 hearing request.

14); and its interest in “the correct application and enforcement of the laws, rules, and regulations governing NRC-licensed facilities in Oklahoma.” (Request at 15.)

The Commission has held that a state may participate in an NRC proceeding, either as a party or as an interested state pursuant to 10 C.F.R. § 2.715(c). To participate as a party, a state agency 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).

In other proceedings concerning proposed decommissioning plans – including an earlier proposed 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). 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”).²³

B. Areas of Concern

In addition to satisfying the requirements of standing, a request for a Subpart L hearing must “describe in detail . . . [t]he requestor’s areas of concern about the licensing activity that is the subject matter of the proceeding.” 10 C.F.R. § 2.1205(e)(3). The Presiding Officer must then determine that the “specified areas of concern are germane to the subject matter of the

²³ 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

proceeding.” An area of concern is “germane” if it is relevant to whether the sought license amendment should be denied or conditioned. *Sequoyah Fuels*, LBP-99-46, 50 NRC at 395.

While an “area of concern” need not meet the standard that governs admission of contentions in formal NRC proceedings under 10 C.F.R. Part 2, Subpart G, the statement of concern “must provide enough specificity to afford the Presiding Officer the ability to link the concern with the subject matter of the proceeding in order to make a decision to admit the statement for litigation.” *Fansteel*, LBP-99-47, 50 NRC at 414; citing *Sequoyah Fuels Corp.*, LBP-94-39, 40 NRC 314, 316 (1994).²⁴ Areas of concern must also be “rational.” *Babcock & Wilcox Co.* (Pennsylvania Nuclear Services Operations, Parks Township, Pennsylvania), LBP-94-12, 39 NRC 215, 217 (1994). Finally, an area of concern must have some basis. *See Molycorp, Inc.* (Washington, Pennsylvania), LBP-00-10, 51 NRC 163, 175 (2000)(“Prior to acceptance of an area of concern, there must at least be a reference to some authority giving rise to the concern. ‘Information and belief’ is patently inadequate.”). As discussed below, all of the State’s proposed areas of concern either lack the requisite specificity, authority, or are not germane to this proceeding and should be dismissed.²⁵

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.

²⁴ *See also* Final Rule, Informal Hearing Procedures for Materials Licensing Adjudications, 54 Fed. Reg. 8269, 8272 (Feb. 28, 1999) (“This statement of concerns need not be extensive, but it must be sufficient to establish that the issues the requester wants to raise regarding the licensing action fall generally within the range of matters that properly are subject to challenge in such a proceeding”).

²⁵ In addition, the State has submitted to the jurisdiction of the Bankruptcy Court in this matter. Some of the issues it seeks to raise are currently before the Bankruptcy Court.

1. *Site Characterization Incomplete*

The State claims that the site characterization provided in the DP does not meet the requirements of 10 C.F.R. § 40.42(g) because it “relies heavily on old data” without regard for several events that have occurred since the data was generated. (Request at 24.) Each area is discussed in turn below.

First, the State notes, without additional discussion, that a French drain system has been constructed at the site. (Request at 24.) This system was completed in April 1999, and began operations in May 1999, to mitigate the effects of groundwater contamination at the site pending remediation. Other than noting the presence of the drain system, the State has not articulated *at all* – let alone with any degree of specificity or authority – the manner in which construction of the French drain affected the site and rendered the existing site characterization inaccurate. This utter lack of specificity and basis in the State’s concern leaves open the question whether the concern is relevant to the proceeding. Accordingly, it cannot be admitted. *See Sequoyah Fuels Corp.*, LBP-94-9, 40 NRC 314, 316 (1994).

In its Request (at 25), the State lists as a concern “possible groundwater changes caused by the placement of a mound of soil under an impermeable plastic tarp.” It is unclear from this statement what “mound of soil” the State is referencing, but it is likely the State is referring to 7,000 cubic yards of contaminated soil removed during the excavation of the French drain, currently stored onsite in “storage pillows.” *See DP at § 2.3.5.* As correctly noted by the State, the soils are enclosed in *impermeable* “storage pillows”; that is, the soils are entirely encapsulated by a synthetic container which prevents any release of radioactive material. Apart from the issue of which soils are referenced, the State has not specified site characterization data which is now incorrect – or even which *may have* changed by virtue of the presence of that soil

on the site in its current location. This area of concern is too vague and unsupported to be considered germane. *Sequoyah Fuels*, LBP-99-46, 50 NRC at 401.

The State also alleges that “significant changes have occurred” on the site from “a major hydrofluoric acid release that resulted in the hospitalization of two workers.” (Request at 24.) This assertion fails to present a germane area of concern in that the State fails to state a logical basis for the assumption that this event caused site contamination involving NRC-licensed material. It also fails to present a regulatory basis for a conclusion that any relief could be granted in this NRC proceeding on radiological decommissioning.

As background, the State is referring to a February 12, 2000, “puff” release of hydrofluoric acid (in gaseous form) from the facility’s scrubber system. The release was caused by a failure in the scrubber which caused a backup, and subsequent pressurization of the scrubber’s vent line. The hydrofluoric acid gas was vented through an open tank over which two workers were standing, manually loading material. The tank contained no licensed material.²⁶ The two individuals were hospitalized and released on February 16, 2000. The NRC performed an inspection following the event, which resulted in an occupational – not radiological – hazard to workers.²⁷ Following consultation with the Occupational Safety and Health Administration (“OSHA”), the NRC reviewed Fansteel’s corrective actions and concluded in December 2000 that no violation of NRC requirements occurred.²⁸ The NRC’s inspection report did not address

²⁶ See NRC Inspection Report 040-07580/00-01 and Notice of Violation, dated May 2, 2000, Encl. 2 at 9.

²⁷ See NRC Inspection Report 040-07580/00-01. (The Notice of Violation (“NOV”) pertained to a matter unrelated to the release.)

²⁸ See Letter from D.D. Chamberlain, NRC, to M.J. Mocniak, Fansteel, “Unresolved Items from NRC Inspection Report 040-07580/00-01 and the February 12, 2000, Hydrofluoric Acid Release Incident,” dated December 5, 2000. The NRC’s two items concerned (1) lack of an approved procedure to load material into an open tank, and (2) the failure of an

site cleanup following the release, because there was no need to do so. The hydrofluoric acid gas was released into the air, and did not impact site soil, buildings equipment, or the safety of licensed radioactive material. The State's belief that such a release would cause relevant site contamination is not a rational one. Proffered areas of concern must be rational. *Babcock & Wilcox*, LBP-94-12, 39 NRC at 217. Accordingly, this area of concern should be denied.

The State next disputes Fansteel's discussion of a release of material in connection with a 1999 tornado that struck the site. Section 2.4.2 of the DP states, in relevant part:

The only release of radioactive material was contained on site. The damage to the Sodium Reduction Building allowed bagged Pond No. 5 material to fall out of the building and tear open. . . . Approximately 500 pounds of material were released to the ground surface within a 10-foot diameter area before being recovered and rebagged.

The State argues that, without further analysis, "it cannot be assumed that the release caused by this tornado was confined to a 10 foot diameter." (Request at 24-25.) Because this area of concern is merely speculation and not adequately supported, it should be dismissed.

Following the June 1, 1999, tornado, the NRC performed an inspection to assess Fansteel's response to and planned recovery from the damage. In an inspection report dated December 23, 1999, the NRC Staff determined that Fansteel had recovered from the tornado and had adequately addressed facility repairs, including cleanup of spilled material.²⁹ The State fails

individual to use a respirator during a plant emergency. *See also* Memorandum from J.B. Miles, OSHA, to D.D. Chamberlain, NRC, "OSHA at Fan Steel [sic] Corporation of Muskogee, Oklahoma," dated August 28, 2000. OSHA determined that OSHA standards could apply at the Fansteel facility, and that application of those standards would not result in a violation of those standards.

²⁹ *See* NRC Inspection Report 40-7580/99-02 and Notice of Violation, dated December 23, 1999. The NRC issued an NOV to Fansteel in connection with the tornado event with respect to the Fansteel's *reporting* of the event to the NRC, but did not take issue with any cleanup activities. It should be noted that NRC Staff inspectors determined that the

to explain why the Staff's prior evaluations of Fansteel's cleanup efforts are deficient. Accordingly, this area of concern lacks adequate support and should be rejected. *See Molycorp*, LBP-00-10, 51 NRC at 173.

The State also argues that the site characterization does not "address the radiological contamination of the northwest property which the licensee originally believed to be uncontaminated." (Request at 25.) License SMB-911 was amended in 1996 to remove that portion of the Fansteel property identified as the Northwest Property from the license for unrestricted use.³⁰ In so doing, the NRC determined that the site was adequately remediated.³¹ Since that time, the Northwest Property has not been subject to NRC jurisdiction, and is not encompassed by the proposed DP.³² An area of concern "must be sufficient to establish that the issues the requestor wants to raise regarding the licensing action fall generally within the range of matters *that properly are subject to challenge in such a proceeding.*" 54 Fed. Reg. at 8272; *see Chemetron Corp.* (Bert Avenue, Harvard Avenue, and McGean-Rohco Sites, Newburgh Heights and Cuyahoga Heights, Ohio), LBP-94-20, 40 NRC 17, 19 (1994) ("there exists the necessity for linking the concerns registered in [a] hearing petition to the matter under

spill covered approximately 2,000-3,000 square feet of property. *Id.*, Enc. 1 at 1; Encl. 2 at 17. Nonetheless, it did not determine that Fansteel's actions to clean up the spill were in any way inadequate.

³⁰ *See Letter from R.C. Pierson, NRC, to J.J. Hunter, Fansteel, "Release of the Northwest Property for Unrestricted Use," dated August 23, 1996. DP Section 2.3.1 improperly states this amendment was granted in 1999.*

³¹ *Id.*, Safety Evaluation Report: Release of Northwest Property, dated August 23, 1996, at 3-4.

³² The property was sold to the Port of Muskegon in 1999.

consideration”).³³ Because the Northwest Property has been previously remediated and released from NRC jurisdiction pursuant to a separate licensing action, it is not encompassed by the current license amendment request. The State’s area of concern is beyond the scope of this proceeding and beyond the jurisdiction of the Presiding Officer, and therefore cannot be accepted for hearing.³⁴

The State next makes the following assertion: “Plus potential sources of elevated subsurface contamination, e.g. [,] B-36 and MW-71S [citation omitted] are not discussed nor are Ponds 1/1S-1N and 4 [citation omitted].” (Request at 25.) Without more, this statement does not provide sufficient information to determine whether these concerns are anything more than mere speculation or are germane to the subject matter of the proceeding. The State does not specify how Fansteel’s site characterization effort with respect to “potential sources of elevated subsurface contamination” is insufficient, and, indeed, provides no basis at all as to its concerns regarding Ponds 1, 1S, 1N, and 4. Vague, unfounded statements such as these are utterly

³³ See also *Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Units 2 & 3), LBP-01-10, 53 NRC 273, 280 (2001) (“[A] contention is admissible only if it is within the scope of the proceeding outlined in the Commission’s hearing notice and referral order”), citing *Wisconsin Elec. Power Co.* (Point Beach Nuclear Plant, Units 1 & 2), ALAB-739, 18 NRC 335, 339 (1983).

³⁴ In addition, the State appears to have taken this area of concern directly from comments, analogous to requests for additional information (“RAIs”), made by the NRC on the DP. See April 28 Letter, Encl. 1, Comment 2.1 (“There is no discussion of activities that caused contamination that was identified during surveys of the northwest property that the licensee originally stated was not contaminated. This discussion should be included.”) It is well established that the issuance of RAIs “indicate[] nothing more than that the Staff requested further information and analysis from the Licensee.” *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, & 3), CLI-99-11, 49 NRC 328, 336-37 (1999). See Section III.B.5, *infra*.

insufficient to establish that a concern is germane to the proceeding. *See Sequoyah Fuels*, 40 NRC at 316.³⁵

In any event, there is no basis for the State's concerns regarding these ponds. Ponds 1/1N/1S and 4 were no longer in existence at the time the 1993 remedial assessment was performed, and the areas in which they were located were surveyed in conjunction with that assessment. The State has not identified any specific concern that the site assessment was deficient with respect to the areas in which the those ponds were located.

The State also argues that the site characterization "does not account for the probable movement of soluble isotopes and their impact on the groundwater." (Request at 25.) Here, the State merely parrots NRC Staff comments in the April 28 Letter. (See Encl. 1 at Comment 1.3.) The State did not posit any reason of its own to indicate that the DP is materially deficient in this regard. *Compare Oconee*, CLI-99-11, 49 NRC at 337 ("It is [the petitioner's] job to review the application and to identify *what* deficiencies exist and to explain *why* the deficiencies raise material safety concerns")(emphasis in original). In any event, Section 4.5.2 of the DP provides and discusses results of groundwater sampling and analysis performed during Spring 2002. The State has not even suggested any specific deficiency in that analysis. Accordingly, the concern should be denied as vague and unfounded.

Finally, the State argues that the site characterization of buildings and equipment, and areas between the onsite ponds and the process buildings contained in the DP "does not include effects of 'reprocessing' activities that occurred through November 2001." (Request at 25.) The State again repeats the NRC comments in the April 28 Letter. (See Encl. 1 at

³⁵ This concern merely restates, without additional support, comments of the NRC made in the April 28 Letter (*see* Encl. 1 at Comments 2.2 and 2.3), and should be denied on that basis. *Oconee*, CLI-99-11, 49 NRC at 336-37.

Comments 4.1, 4.2.) The State, however, did not specify how the DP is materially deficient in this regard or provide any authority for such a belief. For this reason, the concern should be denied. *See Oconee*, CLI-99-11, 49 NRC at 336-37.³⁶ In fact, the NRC performed periodic inspections during the pilot project activities that occurred from April 1, 1999, through October 2001. Numerous NRC inspections over the course of the pilot project operation did not identify any concerns regarding release of radioactivity which would impact site characterization.³⁷

At bottom, 10 C.F.R. § 40.42(g)(4)(i) requires “[a] description of the conditions of the site . . . sufficient to evaluate the acceptability of the plan.” The State’s vague and unsupported assertions are insufficient to establish that there is a germane area of concern as to whether Fansteel has complied with this requirement. For the reasons set forth above, the State’s areas of concern with respect to site characterization should not be accepted.

2. *Remediation of Groundwater for Radiological and Non-Radiological Contaminants*

The State’s second area of concern relates to remediation of contaminated groundwater at the Muskogee Site. This area encompasses several proposed concerns, each discussed in turn below.

First, the State takes issue with Fansteel’s decision not to include remediation of groundwater in the DP. (Request at 26.) The State argues that a plan to remediate groundwater

³⁶ With respect to buildings and equipment, Fansteel proposes, in the DP, to decontaminate buildings and equipment. *See, e.g.*, DP Section 8. Whether or not any impact to buildings and/or equipment occurred during reprocessing, these components will undergo decommissioning and decontamination to NRC-approved levels.

³⁷ *See* NRC Inspection Report 40-7580/99-01, dated July 7, 1999; NRC Inspection Report 40-7580/99-02 and Notice of Violation, dated December 23, 1999; NRC Inspection Report 040-7580/00-01 and Notice of Violation, dated May 2, 2000; NRC Inspection Report 40-7580/01-01, dated March 29, 2001; NRC Inspection Report 040-7580/01-02 and Notice of Violation, dated August 22, 2001; and NRC Inspection Report 040-07580/01-03, dated December 18, 2001.

must be submitted (*id.*), and argues that the DP “does not provide sufficient justification for not considering ground water [sic] pathways.” (Request at 28.) This concern does not raise a germane regulatory issue.

Initially, Fansteel will meet regulatory criteria for groundwater pathways resulting in offsite releases prior to license termination. Having said that, when performing dose modeling with regard to onsite doses, a licensee may modify the “default screening scenarios” (these are the “resident farmer” and “building occupancy” scenarios) and associated pathways and critical groups to take into account site-specific considerations. *See, e.g.*, NUREG-1727, App. C §§ 4.2., 4.3.2.1. A pathway such as groundwater may be eliminated for either physical or site-use reasons. *Id.* § 4.3.2. In the case of Fansteel, the groundwater pathway (ingestion of water or groundwater from an on-site well) was removed because the industrial use scenario does not require its consideration. Even though it would be possible to treat the groundwater for use, better sources of water are readily available through the municipality for this site. The elimination of consideration of this pathway for these reasons fully complies with relevant NRC guidance regarding compliance with the criteria in 10 C.F.R. Part 20, Subpart E. The State has ignored the regulatory guidance and the DP, itself. The concern that an “insufficient justification” has not been provided is conclusory and lacks any authority or regulatory basis. The concern should not be accepted. *See Babcock & Wilcox*, LBP-94-12, 39 NRC at 217-18.

The State also contends that the DP does not address “chemicals of concern, including ammonia, arsenic, cadmium, chromium, columbium-tantalum, fluoride and MIBK [methyl isobutyl ketone], in the outfalls and surface waters.” (Request at 26-27.) These non-radiological constituents do not fall within the scope of substantive NRC regulation, and, to the extent the State would have the NRC regulate levels of these chemicals at the Muskogee site, the

issue is beyond the scope of this proceeding and, accordingly, does not present a germane concern.

The State next argues that “the Remediation Assessment identified materials in Ponds 2 & 3 which characteristically exhibit hazardous concentrations of chromium yet the Decommissioning Plan discusses excavating the Ponds by screening only for gamma particles to determine what material is to be sent off site.” (Request at 27.) The State has not cited any authority for the proposition that the NRC has jurisdiction over issues of nonradiological chemical toxicity. Indeed, this concern does not present an issue germane to the proceeding because the NRC does not regulate the chemical constituents of chromium.³⁸

The State also contends that Fansteel has “failed to address the remediation of the groundwater with the Oklahoma Department of Environmental Quality.” (Request at 27.) To the extent that the State has jurisdiction over groundwater, Fansteel’s compliance with state environmental regulations is beyond the scope of the NRC’s jurisdiction in this proceeding. *Cf. Gen. Pub. Utils. Nuclear Corp. (Three Mile Island Nuclear Station, Unit 1), DD-94-3, 39 NRC 163, 178-79 (1994)*. Therefore, this is not a germane concern.

The State next alleges that Fansteel proposes to “improperly extend the time period for the groundwater remediation in violation of Regulatory Issue Summary [RIS] 2000-09, “Standard Review Plan for Licensee Requests to Extend the Time Period Established for Initiation of Decommissioning Activities.” This guidance, however, is not relevant to this proceeding. RIS 2000-09 pertains to a licensee who wishes to *delay the start* of decommissioning. *See* 10 C.F.R. § 40.42(d) (requiring that a licensee submit, within 60 days of

³⁸ Fansteel was only licensed to possess source material in the form of uranium and thorium. However, all of the materials in Ponds 2 and 3 will be removed and disposed

the occurrence of certain specified activities, provide notification in writing to the NRC and begin decommissioning the site or submit within 12 months of notification a decommissioning plan, and begin decommissioning upon approval of that plan if certain conditions have been met). In this case, Fansteel timely notified the NRC of its intent to submit a DP within 12 months on December 20, 2002, has submitted its proposed DP in a timely fashion, and will begin decommissioning immediately after approval of the DP. Fansteel has not requested a delay in the start of decommissioning. Accordingly, this concern is not germane to the proceeding and should be denied.

Finally, the State argues that “[t]he proposed deed restriction in the Decommissioning Plan is not capable of containing migration of radioactive and non-radioactive contamination within the groundwater and preventing its ultimate destination of the Arkansas River which is a fatal flaw.” (Request at 28.) However, Fansteel is not proposing a deed restriction with regard to assuring groundwater cleanup. Rather, it is the intent of Fansteel not to seek termination of the license (or alternate arrangements acceptable to the NRC) until groundwater is satisfactorily remediated.³⁹ Therefore, this unfounded assertion fails to identify a legitimate concern germane to the proposed DP and this proceeding.

3. *Sufficiency of Cost Estimates*

The State first broadly takes issue with Fansteel’s cost estimate for decommissioning. The State notes that Fansteel’s June 25, 2002, cost estimate was

offsite at facilities which are licensed to receive the radiological and chemical components of the material. *See* DP § 8.3.1.

³⁹ Fansteel has proposed to use an “industrial worker” scenario in calculating projected dose because of the contemplated uses for the site and its proximity to the Port of Muskogee. As discussed above, groundwater usage for potable water for the industrial worker scenario is not contemplated.

approximately \$57 million. In the DP, however, Fansteel lays out the costs of decommissioning in great detail in accordance with NRC Staff guidance in NUREG-1727.⁴⁰ Fansteel estimates that the cost to be financially assured in accordance with one of the methods set forth in 10 C.F.R. § 40.36(e) is approximately \$26.5 million. Based on this conclusion, the State argues that the DP “does not appear to support the calculated reduction in the cost of decommissioning.” (Request at 28.) This broad assertion is lacking in understanding of the DP and in authority, and therefore does not establish an area germane to the proceeding. The details of Fansteel’s cost estimate are laid out in the DP; the State does not provide a basis, other than its belief, that any element of the estimate is wrong.⁴¹ This concern fails for lack of basis.

The State next argues that a revised cost estimate should include additional characterization activities and the cost for remediation of all contamination, including groundwater and “any additional contamination” identified during site characterization. (Request at 29.) This is not an area of concern germane to this proceeding. As noted above, in its July 24, 2003, submission to the NRC, Fansteel provides detailed cost information showing total expected remediation costs (including costs for remediation not included in calculating NRC financial assurance requirements) to be approximately \$41.6 million. This cost estimate includes costs for completing additional site characterization during “Phase 3” of the DP, and allows for additional funding, pursuant to a Contingent Note, to remediate any additional contaminated soils discovered during the additional site characterization activities. In addition,

⁴⁰ See NUREG-1727, “NMSS Decommissioning Standard Review Plan,” Sept. 2000.

⁴¹ In its July 24, 2003, submission to the NRC, Fansteel provides detailed cost information showing expected remediation costs (including costs for remediation not included under the DP) to be approximately \$41.6 million, including the \$26.5 million for decommissioning activities under the NRC DP which are required to be financially assured. The State has not challenged any element of that cost estimate.

the cost estimate provides a projected yearly amount for remediation of groundwater through 2023. The State has not challenged these estimates. Accordingly, it has not proffered a germane concern.

Finally, the State takes issue with Fansteel's proposal to transfer the Muskogee site to FMRI Inc. (Request at 29.) This concern is not germane to the present proceeding. Fansteel's application to transfer its license to FMRI following its exit from bankruptcy was submitted via a separate application on July 24, 2003. Consideration of that application is beyond the scope of this proceeding concerning a limited Part 40 approval. *See* 68 Fed. Reg. 47,621. The State has the opportunity to participate in the license transfer proceeding pursuant to 10 C.F.R. Part 2, Subpart M, and has filed a request for hearing in that docket.⁴²

4. *Appropriateness of the Industrial Use Scenario*

In this area of concern the State contends that Fansteel has "tried to avoid demonstrating compliance" with NRC regulations by utilizing the industrial use scenario. (Request at 29.) The State argues that this scenario "is not appropriate for the Fansteel site" and "fails to demonstrate that radiation dose from soil, groundwater, lagoons and surface water will meet the standards in 10 C.F.R. Part 20 and will be as low as reasonably achievable," and that Fansteel must provide information regarding the dose effects of "alternate reasonable land use scenarios," such as recreational and agricultural uses. (Request at 29-30.) The State has not stated with any specificity how the industrial use scenario is improper for this site, or provided any authority for its allegation that Fansteel's analysis fails to meet Part 20 requirements.

The industrial use scenario represents the most probable future use of the Muskogee site. The Fansteel property is part of the Muskogee Port and Industrial Park and is

⁴² *See* "State of Oklahoma's Request for Hearing," dated September 10, 2003.

zoned for industrial use. The Muskogee City-County Port Authority ("Port") has, in its Master Plan of Development for the Muskogee Port and Industrial Park, plans to utilize certain of the areas to be remediated under the DP. To accomplish this, the Port has amended its Master Plan to change the status of these areas to "Land to be Appraised and Purchased." Accordingly, this area of concern should be denied.⁴³

5. *Insufficient and Inconsistent Data Preventing Evaluation of the DP*

The State proffers as an area of concern thirty-three comments made by the NRC in its April 28 Letter providing comments to Fansteel on the DP. (Request at 31-38.) At that time, the Staff concluded that the DP did not contain sufficient information to enable the Staff to conduct a detailed review. As a basis for this determination, the Staff cited, among other things, that the proposed plan was a "conceptual plan" and the need for additional radiological information. In addition to these determinative findings, the Staff presented several comments in an attachment to the letter. The Staff directed that, "if Fansteel elects to amend this DP, and resubmit it for review, it should address all of these comments." April 28 Letter at 1. Therefore, the comments are the equivalent of requests for additional information ("RAIs").

As discussed above, the Commission has emphasized that a petitioner in a Subpart G proceeding must do more than "rest on [the] mere existence" of RAIs as a basis for its contention. *Oconee*, CLI-99-11, 49 NRC at 336, citing *Baltimore Gas & Elec. Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 & 2), CLI-98-25, 48 NRC 325, 350 (1998). Similarly, in a Subpart L proceeding such as this, a petitioner should not be permitted to simply rely on NRC

⁴³ In the context of this area of concern, the State also argues that Fansteel "failed to consider all the sources, exposure routes, and pathways in conducting its does [sic] modeling contrary to NUREG-1549." (Request at 29.) NUREG-1549 was used in Fansteel's dose modeling evaluation, and the State has not demonstrated any basis for

comments. The hearing process – whether formal or informal – is not intended to duplicate the NRC Staff’s review. RAIs show only an ongoing dialogue with the NRC Staff and do not demonstrate that the DP is materially deficient. NRC Staff questions will be resolved in the ordinary course of the review (*e.g.*, based on the licensee’s clarifications, justifications, or other responses). *Oconee*, CLI-99-11, 49 NRC at 336. RAIs do not, as alleged by the State, demonstrate that the DP “does not comply with 10 C.F.R. § 40.42.” (Request at 31.) This area of concern should be denied for lack of any basis to suggest that the state has a specific, independent, and germane concern that the DP does not meet the regulations.

6. *Submission of Key Components of the DP*

In the September 10 Request, the State raises as its sixth area of concern an allegation that certain “key components” of the DP must be submitted in order to comply with NRC requirements. (Request at 38.) Each of these items is discussed in turn below.

The State argues that Fansteel must submit a request to amend its NRC license, and a request for alternate decommissioning schedule. Fansteel submitted both a license amendment request and a request for alternate decommissioning schedule on July 24, 2003.⁴⁴ Accordingly, these concerns have been rendered moot and should be dismissed.

The State next argues that the DP must include ALARA (“As Low As Reasonably Achievable”) analyses, and that Fansteel’s DP improperly contemplates future preparation of ALARA analyses. (Request at 39.) This concern does not present a litigable

this allegation or pointed to any part of the dose modeling in the DP which is inaccurate. This concern should fail for its utter lack of specificity.

⁴⁴ Approval of the alternate decommissioning schedule constitutes a separate approval from the license amendment to approve the DP. *See* 68 Fed. Reg. 47,621 (setting forth the scope of this proceeding). An prior opportunity for a hearing does not attach to the request for alternate decommissioning schedule under Section 189.a of the Atomic Energy Act of 1954, as amended.

issue. Fansteel will conduct ALARA analyses as necessary over the course of decommissioning activities as required by 10 C.F.R. § 20.1402. This is not a germane licensing issue.

The State next takes issue with Fansteel's statement that the DP is a "conceptual" plan that may differ in detail as additional submissions are made. (Request at 39.) This concern is merely a quibble over the choice of language used in the DP and does not raise a substantive concern that is relevant to this proceeding. The Fansteel DP meets NRC requirements as prepared. Remediation is, by its very nature, a process which requires a certain degree of flexibility. That a DP contains such flexibility does not affect its validity or conformance with NRC requirements.

Finally, the State argues that the NRC Staff should not agree not to prepare an Environmental Impact Statement ("EIS") in connection with approval of the DP, but must follow the process in 10 C.F.R. Part 51 and associated guidance to conduct an Environmental Assessment ("EA") and then determine whether an EIS is required. (Request at 38-39.) This concern is not germane to the proceeding, simply because Fansteel agrees that this is the process that will be followed by the NRC in this matter. In short, there is no dispute. *See Disclosure Statement at 58.*⁴⁵

The State also makes the following rather garbled assertion: "The not just an Environmental Assessment must be submitted because there is radiological groundwater contamination at the site." (Request at 38.) The most likely interpretation of this statement is that, as a matter of law, the State believes an EIS is required in connection with this approval, due to the existence of contaminated groundwater on the site. Such concern, however, would not

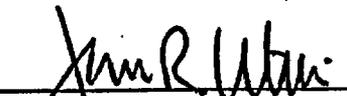
⁴⁵ The Disclosure Statement states, in pertinent part, "As part of its review process, the NRC will be preparing an [EA] in connection with the [DP]. The NRC may determine

be germane to this proceeding because there is no regulatory basis for the State's argument. NRC regulations do not require preparation of an EIS in connection with a request to approve a decommissioning plan which envisions unrestricted release of the site. See 10 C.F.R. § 51.20. Indeed, an EIS is normally not performed, even as a discretionary matter, for sites *with contaminated groundwater* to be decommissioned for unrestricted use. See, e.g., NUREG-1757, Vol. 1, "Consolidated NMSS Decommissioning Guidance: Decommissioning Process for Materials Licensees," Sept. 2002, at Table 15-3, "Decommissioning Groups and Associated NEPA Actions" (noting that, for a site with groundwater contamination, an EA is prepared, and, if a FONSI cannot be made, an EIS will be prepared).

IV. CONCLUSION

For the reasons set forth above, the State's proposed areas of concern should not be admitted. Its Request for Hearing should be denied.

Respectfully submitted,


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ATTORNEYS FOR FANSTEEL INC.

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

that it cannot make a Finding of No Significant Impact ("FONSI") and would then have to prepare an [EIS]."

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of:

Fansteel Inc.

(License No. SMB-911)

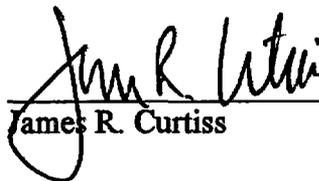
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Docket No. 40-7580

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 2.1215, the following information is provided:

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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

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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

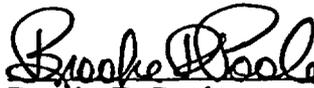
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Docket No. 40-7580

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 2.1215, the following information is provided:

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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.) Docket No. 40-7580
)
(Muskogee, Oklahoma Facility))
)

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.

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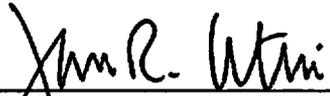
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