

December 18, 2003
DOCKETED
USNRC

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

December 22, 2003 (3:45PM)

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 OBJECTION
TO ISSUANCE OF ENVIRONMENTAL ASSESSMENT AND
FINDING OF NO SIGNIFICANT IMPACT

I. INTRODUCTION

Fansteel Inc. ("Fansteel") hereby responds to the Objection filed by the State of Oklahoma ("State") on December 8, 2003, in connection with an Environmental Assessment ("EA") and Finding of No Significant Impact ("FONSI") related to Fansteel's application for an amendment to License SMB-911 to approve a Decommissioning Plan ("DP") for Fansteel's Muskogee, Oklahoma site.¹ At first blush, the State's desired relief and forum are not entirely clear. The cover letter transmitting the Objection references the license transfer request, and notes that one "Request for Hearing" is being transmitted. However, the proceeding before the Commission regarding Fansteel's July 24, 2003, license transfer application has been terminated. See *Fansteel Inc. (Muskogee, Oklahoma Facility)*, CLI-03-13, 58 NRC __ (slip op. Oct. 23, 2003). Clearly, any request for relief in that docket is improper. In the Objection itself, the State

¹ See "State of Oklahoma's Objection to Issuance of Environmental Assessment and Finding of No Significant Impact," dated December 8, 2003. There is a 10 C.F.R. Part 2, Subpart L proceeding currently pending before a Presiding Officer and Special Assistant with regard to the DP approval. However, it appears the State has lodged its Objection before the Commission itself; Fansteel is responding accordingly. As the Objection does not fall squarely under a particular procedural regulation, Fansteel is treating it as a motion, and is responding within the time period prescribed in Section 2.730(c).

requests that the Commission reject as "arbitrary and capricious" the EA and FONSI published by the Nuclear Regulatory Commission ("NRC") Staff on November 7, 2003, and instead mandate that the Staff prepare an Environmental Impact Statement ("EIS") in connection with the DP. Assuming that this is what is intended by the filing of this Objection, Fansteel's answer is set forth herein.

As discussed below, the State's arguments are impermissibly untimely. Indeed, the State offers no explanation in its Objection for the lateness of its filing, nor for its failure to raise this concern on two earlier occasions when it had the opportunity to do so. Moreover, the State seeks to invoke the Commission's plenary jurisdiction without any showing that these issues are properly brought before the Commission at this juncture. Finally, the State merely repeats baseless allegations already made either in the context of Fansteel's pending Subpart L proceeding or in the now-terminated Subpart M proceeding. In the absence of new information, it appears the State is merely attempting to introduce delay and confusion into the pending Subpart L proceeding and re-open settled issues.

While the Commission could refer the Objection to the Presiding Officer in the Subpart L proceeding, the interests of expeditious and disciplined resolution of the matters raised by the State would best be served by Commission disposition of the Objection. *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-03-16, 58 NRC __ (slip op. Nov. 13, 2003); *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2, Catawba Nuclear Station, Units 1 & 2), CLI-03-11, 58 NRC 130, 131 (2003) ("Faced with limited adjudicatory resources, the Commission cannot overemphasize the need to avoid unnecessary delay in our adjudicatory process"). Accordingly, the Commission should exercise its plenary jurisdiction and dismiss the Objection for the reasons set forth below.

II. BACKGROUND

A detailed history of the events leading to this adjudicatory proceeding is set forth in Fansteel's Answer to the State's request for hearing, dated September 22, 2003, and need not be repeated here.² Briefly, on January 14, 2003, Fansteel submitted a proposed decommissioning plan to the NRC for review. In a letter to Fansteel dated May 9, 2003, on which the State was copied, the State was put on notice that "the [S]taff plans to write the safety evaluation report *and environmental assessment*" to support the completion of its review of the proposed DP by October 31, 2003.³ On July 24, 2003, Fansteel requested an amendment to its NRC license to reflect approval of the DP. Thereafter, on August 11, 2003, the NRC published in the *Federal Register* a notice that provided, in accordance with 10 C.F.R. § 20.1405, an opportunity for individuals to comment on the "decommissioning proposal and its associated environmental impacts." The notice also provided an opportunity for interested persons to request a hearing on the amendment application.⁴

In response to this notice, the State submitted a request for hearing on September 10, 2003,⁵ but did not specifically provide comments related to the proposed EA. Fansteel and

² See "Answer of Fansteel Inc. to State of Oklahoma's Request for Hearing" in the Subpart L proceeding, dated September 22, 2003.

³ 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 (emphasis added) (Hearing File Tab 4).

⁴ 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).

⁵ See "State of Oklahoma's Request for Hearing," dated September 10, 2003 ("Hearing Request").

the NRC Staff responded to this filing.⁶ A Presiding Officer was designated in the proceeding on October 2, 2003.⁷ On November 3, 2003, the Presiding Officer granted the State's hearing request.⁸ Shortly thereafter, on November 7, 2003, the NRC published in the *Federal Register* a notice of availability of the EA and FONSI.⁹ Most recently, on December 4, 2003, the NRC Staff approved the license amendment request.¹⁰ On December 8, 2003, the State filed the Objection here at issue.

III. DISCUSSION

The State specifically argues that the decision of the NRC to issue a FONSI was "arbitrary and capricious" and "should be rejected." (Objection at 7.) The State bases its Objection on three points. First, the State disagrees with the use of the industrial worker scenario for this site. (*Id.* at 3-4.) Second, the State contends that a review of Fansteel's financial assurance for decommissioning "is a relevant factor and should be considered [in the EA]." (*Id.* at 6.) Third, the State alleges that the NRC Staff failed to properly consult with the State with respect to non-radiological contamination on the site. The relief sought by the State is the preparation of an EIS in connection with the project. (*Id.* at 7.)

⁶ See "Answer of Fansteel Inc. to State of Oklahoma's Request for Hearing," dated September 22, 2003; "NRC Staff Response to Request for Hearing Filed by the State of Oklahoma," dated October 14, 2003.

⁷ See Fansteel Inc.; Designation of Presiding Officer, 68 Fed. Reg. 58,146 (Oct. 8, 2003).

⁸ See *Fansteel Inc.* (Muskogee, Oklahoma Facility), LBP-03-22, 58 NRC __ (slip op. Nov. 3, 2003).

⁹ See 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. 63,134 (Nov. 7, 2003).

¹⁰ In a separate approval also dated December 4, the NRC approved Fansteel's request to transfer the SMB-911 license to FMRI Inc. ("FMRI"), a subsidiary of Reorganized Fansteel.

As discussed further below, the State's Objection raises issues in connection with the DP license amendment proceeding that are not only delinquently filed, but are fundamentally without merit. Having first been apprised on May 9, 2003 of the Staff's intent to prepare an EA on the proposed licensing action, the State's concerns could – and should – have been raised when the NRC, on August 11, 2003, formally announced its intention to prepare an EA in connection with the license amendment request or, at the latest, upon the November 7, 2003, publication of notice of availability of the EA and FONSI. Indeed, having failed to explain its reason for not timely raising these concerns at either of these two earlier junctures, the State has not set forth *any* basis for raising these issues at this late date directly with the Commission. To the extent certain of the issues can be cast as late-filed concerns, not only have they been lodged in the wrong forum, but the State is impermissibly late in raising these concerns more than a month following notice in the *Federal Register* of the availability of the EA and nearly four months after the first formal opportunity afforded by the Staff to provide comments on the very issues the State now seeks to raise. In any event, the State's underlying issues either repeat matters already raised in the ongoing Subpart L proceeding, or are not litigable in that proceeding.

As stated above, the State has not explained its rationale for filing its Objection before the Commission at this time. As in any proceeding, however, the Commission here “retains its inherent supervisory authority over the proceeding to provide additional guidance to the Licensing Board and participants and to resolve any matter in controversy itself.” *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-01-20, 54 NRC 211, 217 (2001). Accordingly, the Commission can, and should, disposition the Objection for the reasons set forth below.

A. The State's Objection Is Fatally Out of Time

As stated above, on *August 11, 2003*, in accordance with 10 C.F.R. § 20.1405, the NRC published in the *Federal Register* a notice of a 30-day period to provide comments “concerning this decommissioning proposal *and its associated environmental impacts.*” See 68 Fed. Reg. at 47,622 col.1 (emphasis added).¹¹ By virtue of that *Federal Register* notice, the State was at that time put on notice that the NRC was accepting comments in relation to its environmental review. That comment period was the State’s opportunity to provide its concerns for the Staff’s consideration. All three of these concerns, as they relate to review by the NRC Staff of the environmental impacts of the proposed licensing action, could have been brought to the Staff’s attention at that time. It is not now appropriate to reward the State for its delinquency with a “second bite at the apple” by entertaining the substance of this Objection when the State sat on its rights in the first instance. As the Objection amounts simply to comments on the Staff’s EA – where the State had two earlier opportunities to raise these issues as the Staff proceeded with its environmental review of the proposed action – the Objection should be dismissed as untimely.

B. The State's Issues Are Not Litigable, in that They Are Either Fatally Out of Time or Merely Rehash Old Arguments Raised or Resolved in Other Forums.

If this Objection was intended to constitute a late-filed area of concern, it is well established that a petitioner in a Subpart L proceeding does not have the right to amend or supplement an otherwise timely hearing request once the deadline specified in 10 C.F.R. §

¹¹ See also *id.* at 47,622 col. 1 (“Before the issuance of the amendment, NRC will have made findings required by the Atomic Energy Act of 1954, as amended, and NRC’s regulations. These findings will be documented in a Safety Evaluation Report, *an*

2.1205(d) for submitting hearing requests has passed. Subpart L does not contain "late-filed contention" rules analogous to those in 10 C.F.R. Part 2, Subpart G. *Babcock & Wilcox* (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-92-24, 36 NRC 149, 152 (1992). Rather, a petitioner may amend or supplement its hearing request *only as permitted by the Presiding Officer* pursuant to his discretionary authority under the general powers granted by 10 C.F.R. § 2.1209 to regulate the course and conduct of a Subpart L proceeding. *Id.* If the Presiding Officer grants a request to submit late-filed areas of concern, such a request must satisfy the factors for a late-filed hearing request pursuant to 10 C.F.R. § 2.1205(l)(1) and (2).¹² See *Molycorp, Inc.* (Washington, Pennsylvania), LBP-00-10, 51 NRC 163, 175 (2000); *Babcock & Wilcox Co.* (Pennsylvania Nuclear Services Operations, Parks Township, Pennsylvania), LBP-95-1, 41 NRC 1, 5 (1995), quoting *Babcock & Wilcox Co.* (Pennsylvania Nuclear Services Operations, Parks Township, Pennsylvania), LBP-94-4, 39 NRC 47, 53 n.8 (1994).

The State is effectively attempting to sidestep these late-filing requirements. The State's default in addressing those requirements alone warrants outright rejection of the concern. *Baltimore Gas & Elec. Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 & 2), CLI-98-25, 48

Environmental Assessment, and in an amendment to License No. SMB-911.") (emphasis added).

¹² This provision states, in pertinent part:

- (1) A request for hearing or a petition for leave to intervene found by the presiding officer to be untimely . . . will be entertained only upon determination by the Commission or the presiding officer that the requestor or petitioner has established that (i) [t]he delay in filing the request for a hearing or the petition for leave to intervene was excusable; and (ii) [t]he grant of the request for a hearing or the petition for leave to intervene will not result in undue prejudice or undue injury to any other participant in the proceeding, including the applicant and the NRC staff . . .

NRC 325, 347 (1998). *See also Tex. Utils. Elec. Co.* (Comanche Peak Steam Electric Station, Unit 2), CLI-93-11, 37 NRC 251, 255 (1993); *Boston Edison Co.* (Pilgrim Nuclear Power Station), ALAB-816, 22 NRC 461, 465-66 (1985).

For the foregoing reasons, the Commission can resolve this matter solely on the basis of the fatally untimely effort by the State to raise these issues at this late date. Additionally, as discussed below, the State presents no new substantive issues that have not already been raised and addressed in other contexts.

1. The Industrial Worker Scenario

First, the State disputes the use of the industrial worker scenario for this site. Specifically, noting the presence of recreational lakes and wildlife refuges in the vicinity of the site, the State alleges that future uses of the site should take into account the use of the “area surrounding the Fansteel Facility” for tourism and recreation. In particular, the State argues that the EA “does not consider the significant impacts and the use of the industrial scenario in the DP will have significant impact on the quality of the human environment” [sic]. (Objection at 3.) This issue merely echoes an area of concern *already raised and admitted for hearing* by the Presiding Officer in the pending Subpart L proceeding.¹³ The State appears to be attempting to submit additional evidence in support of its area of concern. Information of this type is appropriately proffered not here, but in the State’s written presentation in the Subpart L proceeding pursuant to 10 C.F.R. § 2.1233.¹⁴ To the extent that it attempts to expand the admitted area of concern, its efforts are fatally out of time.

¹³ See Hearing Request at 29-30; LBP-03-22, slip op. at 5, 9.

¹⁴ As a general matter, Fansteel does not concede that the information proffered by the State supports its position. For example, the State notes that “numerous recreational lakes,” including Fort Gibson and Lake Eufala surround the area. Fort Gibson is 6 miles north-northeast of the site, and Lake Eufala is located about 26 miles southwest of the site. The

As for the State's concern that the NRC's EA should address other land use scenarios, the Presiding Officer in the Subpart L proceeding has the authority, should the State prevail on its area of concern pertaining to the industrial worker scenario, to make findings different from those in the current EA. The EA would then be deemed modified by that decision. *Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Unit 3), CLI-01-3, 53 NRC 22, 53 (2001); *Allied-General Nuclear Servs.* (Barnwell Nuclear Fuel Plant Separations Facility), ALAB-296, 2 NRC 671 (1975). For these reasons, this issue should be dismissed by the Commission.

2. *Financial Assurance*

The State also contends that a review of Fansteel's financial assurance for decommissioning "is a relevant factor and should be considered [in the EA]." (Objection at 6.) In this vein, the State argues that "[t]he inadequate budget proposed by Fansteel in the Decommissioning Plan will continue this contamination process by not providing any realistic amount of money for remediation of soil and groundwater contamination." (*Id.*) This issue relates exclusively to Fansteel's proposal to transfer the Muskogee site to FMRI Inc., and is therefore is not germane to the pending Subpart L proceeding.¹⁵ Inasmuch as the license transfer

State also states that the Robert S. Kerr Unit of the McLellan-Kerr Wildlife Refuge and the Cherokee Gruber Wildlife Refuge are "a testament to the special character of the areas immediately surrounding" the site. The Kerr Unit is located approximately 22 miles southwest of the site, and the Cherokee Gruber Refuge is approximately 6 miles northeast of the site. The State has provided no basis for the implication that use of the industrial worker scenario at the Muskogee site would – or even could – impact any offsite areas – let alone those that are miles away from the site.

¹⁵ 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 the pending proceeding concerning a limited Part 40 approval. *See* 68 Fed. Reg. 47,621 (setting forth scope of Subpart L license amendment proceeding); 68 Fed. Reg. 50,558 (setting forth scope of Subpart M license transfer proceeding). Under longstanding Commission precedent, proposed contentions or areas

accepted FMRI as the NRC licensee and the financial relationship between FMRI and Reorganized Fansteel, issues with regard to the financial relationship are part of the license transfer.

The State had the opportunity to participate in the license transfer proceeding conducted pursuant to 10 C.F.R. Part 2, Subpart M, and indeed filed a request for hearing on that docket.¹⁶ The State's sole contention, set forth in a September 10, 2003, request for hearing, was "whether the license transfer to an unfunded subsidiary [FMRI] constitutes unreasonable risk to the health and safety of the public." This contention challenged the decommissioning financial assurance mechanism proposed by Fansteel for the Muskogee site. Indeed, as the State acknowledged in the Subpart M proceeding, "The issue to be raised is whether the license transfer to an unfunded subsidiary constitutes unreasonable risk to the health and safety of the public. *This question falls directly with [sic] the scope of the proceeding on the license transfer application.*"¹⁷ As stated above, the Commission denied the State's request for failure to proffer an admissible issue and terminated the proceeding. *See Fansteel Inc. (Muskogee, Oklahoma Facility), CLI-03-13, 58 NRC __ (slip op. Oct. 23, 2003).* The financial assurance issue is not only beyond the scope of the pending Subpart L proceeding, but also already has been dismissed in the proper forum.¹⁸ Having correctly argued that this issue fell within the scope of the Subpart

of concern must fall within the scope of the issues set forth in the notice of hearing. *See Vt. Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-90-6, 31 NRC 85, 91 (1990) (citing Pub. Serv. Co. of Ind., Inc. (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-316, 3 NRC 167, 170 (1976).*

¹⁶ See "State of Oklahoma's Request for Hearing," dated September 10, 2003.

¹⁷ *Id.* at 7 (emphasis added).

¹⁸ The State argues (at 6), "Fansteel [] originally estimated 57 million dollars would be necessary to remediate the site, yet the estimate is now 26.4 million and the site has incurred probable additional contamination and none of the original contamination has

M license transfer proceeding, the State should not now have a second opportunity to litigate the issue in the context of the pending Subpart L proceeding. Accordingly, this concern should be dismissed.

3. *"Failure" to Consult with the State*

Third, the State takes issue once again with the consideration of non-radiological contamination on the site, arguing that the NRC Staff failed to properly consult with the State with respect to such contamination.¹⁹ Specifically, the State alleges, "The NRC did not follow its usual practice of submitting a draft EA to the Oklahoma Department of Environmental Quality ("ODEQ") for comments, it merely asked if the State intended to exercise jurisdiction [over remediation of chemical contamination on the site]." (Objection at 5.) To the extent that

been remedied." This statement is factually incorrect, and the State persists in turning a blind eye to the record in this proceeding. In its July 24, 2003, submission to the NRC, Fansteel provided detailed cost information showing expected remediation costs (including costs for remediation not included under the DP) to be approximately \$41.6 million. Moreover, the cost estimate was the subject of a specific NRC request for information, to which Fansteel provided a detailed response. See Letter from G.L. Tessitore, Fansteel, to D.M. Gillen, NRC, "Response to September 16, 2003 Request for Additional Information Regarding Financial Assurance," dated September 24, 2003 (Hearing File Tab 20). In any event, however, to the extent the State again raises its dispute with Fansteel as to the viability of Fansteel's cost estimate, this issue merely rehashes an issue already *raised and admitted for hearing* in the pending Subpart L proceeding. See Hearing Request at 28-29, LBP-03-22, slip op. at 4, 9. This issue will be resolved in that forum, and should not now be taken up by the Commission.

¹⁹ To the extent the State challenges the Presiding Officer's determination excluding the State's area of concern as it relates to non-radiological contaminants, such an interlocutory appeal is prohibited. Under 10 C.F.R. § 2.1205, parties generally may not take interlocutory appeals. *Sequoyah Fuels Corp.* (Gore, Oklahoma Site Decommissioning), CLI-01-02, 53 NRC 9, 17 (2001). A party may seek an interlocutory appeal "only where the decision will cause the adversely affected party to suffer serious, immediate and irreparable harm or will have a 'pervasive and unusual' effect on the proceedings below." *Id.* at 18, quoting *Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-98-8, 47 NRC 314, 320 (1998) (incorporating into a Subpart L proceeding the standard for interlocutory review found at 10 C.F.R. § 2.786(g)).

this is a “new” area of concern, it is grossly out of time. As noted above, in order for a late-filed area of concern to be admissible, the delay must be “excusable.” No such finding can be made here, as the State was on notice that the NRC Staff would perform an environmental assessment in connection with the DP as early as May 2003. Moreover, the NRC Staff has been aware of the State’s concerns since June 2003. The State has not explained how, given these facts, it was harmed by the lack of opportunity to comment on a draft EA.

On April 28, 2003, the NRC Staff sent a letter to Fansteel, with a copy to, among others, counsel for the State, in which it made a number of comments regarding the DP.²⁰ The NRC commented at that time that “an [environmental impact statement] may be necessary.” In a subsequent letter dated May 8, 2003, which was also placed on the NRC’s public docket, Fansteel expressed its understanding that an EA would be prepared in connection with approval of the DP.²¹ The State’s initial June 16, 2003, Request for Hearing acknowledged both of these letters, and the fact that an environmental review was ongoing.²² Shortly thereafter, on June 20, 2003, representatives of the State, the Oklahoma Department of Environmental Quality (“ODEQ”), Fansteel and the NRC Staff (the latter participating via telephone) met in the context of settlement in Oklahoma City, Oklahoma. At that time, a number of the State’s concerns with

²⁰ 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 (Hearing File Tab 2).

²¹ See Letter, G.L. Tessitore, Fansteel, to D.M. Gillen, NRC, dated May 8, 2003 (Hearing File Tab 3). The Staff’s letter to Fansteel dated May 9, 2003, which copied counsel for the State, also stated the Staff’s intent to prepare an EA. See Letter, 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 (Hearing File Tab 4).

²² See June 16 Hearing Request at 39.

the DP were discussed, including use of the industrial worker scenario and remediation of non-radiological constituents on the site.

With this background in mind, as stated above, on August 11, 2003, the NRC published in the *Federal Register* a notice of a 30-day period to provide comments “concerning this decommissioning proposal *and its associated environmental impacts.*” See 68 Fed. Reg. at 47,622 col.1 (emphasis added).²³ This notice presented the State with the opportunity to present its issues to the NRC Staff. If this were not sufficient to put the State on notice with regard to the opportunity to raise its concerns at that time, on August 28, 2003, the NRC Staff wrote directly to ODEQ, with a copy to counsel for the State, requesting that ODEQ verify the classification of the groundwater aquifer underlying the site, in connection with the revised DP.²⁴ Finally, on October 24, 2003, as noted by the State (Objection at 5), the NRC Staff contacted counsel for the State by telephone to determine whether the State would exercise jurisdiction over remediation of chemical contamination at the site following termination of the NRC license.²⁵ The State was plainly and undeniably on notice that the NRC was preparing an EA. Given its numerous opportunities, the State does not now even purport to address how its delay in acting could be “excusable.” Indeed, the State’s repeated failure to act in a timely manner is inexplicable and

²³ See also *id.* at 47,622 col. 1 (“Before the issuance of the amendment, NRC will have made findings required by the Atomic Energy Act of 1954, as amended, and NRC’s regulations. These findings will be documented in a Safety Evaluation Report, *an Environmental Assessment*, and in an amendment to License No. SMB-911.”)(emphasis added).

²⁴ See Letter from J.C. Shepherd, NRC, to M. Broderick, ODEQ, “Classification of Ground Water Underlying the Fansteel Site Near Muskogee, Oklahoma,” dated August 28, 2003 (NRC accession number ML032410048).

²⁵ See Nuclear Regulatory Commission, Fansteel Inc., License Number SMB-911, Muskogee, OK, Environmental Assessment, Finding of No Significant Impact, at §§ 3.1.2, 9.

should not now be rewarded by allowing it yet another “bite at the apple.” For these reasons, this issue fails to qualify as an admissible late-filed area of concern.

Also with respect to this issue, the State cites to an Oklahoma State statute requiring ODEQ approval of site assessment and remediation plans relating to groundwater, noting that Fansteel has not obtained such an approval. (Objection at 5.) For this reason, the State alleges that the NRC’s decision to issue a FONSI “fails to consider relevant agency’s [sic] expertise” and should be rejected. *Id.* This is the first mention of this argument. This issue undoubtedly could have been raised at the time the State initially proffered its area of concern. The State’s complete failure to address its justification for raising this issue at this late date suffices to warrant dismissal of the concern. *See Calvert Cliffs*, CLI-98-25, 48 NRC at 347. Lateness aside, however, this issue must be dismissed as a matter of law.

10 C.F.R. § 20.2007 provides:

Nothing in this subpart relieves the licensee from complying with other applicable Federal, State, and local regulations governing any other toxic or hazardous properties of materials that may be disposed of under this subpart.

The Commission has interpreted this provision in the context of a Subpart L proceeding and dismissed an area of concern presenting a substantively similar issue, on the basis that “[w]hether non-NRC permits are required is the responsibility of bodies that issue such permits, such as . . . state and local authorities. To find otherwise would result in duplicate regulation as both the NRC and the permitting authority would be resolving the same question, *i.e.*, whether a permit is required.” *Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-98-16, 48 NRC 119, 120 (1998). Rather, the language of Section 20.2007 “suggests only that an applicant may not rely on its license from the NRC as a waiver of its obligation to obtain permits required by other agencies.” *Id.* at 121. Moreover, resolution of the Oklahoma

State permitting issue is not necessary for the NRC to meet its statutory responsibilities.²⁶ *Id.* at 122. This area of concern must be dismissed as a matter of law.

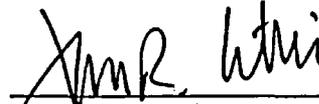
In summary, to permit this issue to be litigated would reward the State for sitting on its hands. For these reasons, this issue should be dismissed.

²⁶ Clearly, to the extent the State would seek to control radioactive material regulated by the Nuclear Regulatory Commission pursuant to the Atomic Energy Act of 1954, it is preempted from doing so. *See Pac. Gas & Elect. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190 (1983); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984). *See also N. States Power Co. v. Minnesota*, 447 F.2d 1143, 1148-49 (8th Cir. 1971); *Brown v. Kerr McGee Chemical Corp.*, 767 F.2d 1234 (7th Cir. 1985).

IV. CONCLUSION

For the reasons set forth above, the State's Objection to the Staff's review of the environmental impacts of the proposed action as "arbitrary and capricious" should be dismissed by the Commission as untimely filed. In the alternative, the Commission should find, for the reasons discussed, that the issues raised by the State are barred from consideration, and, on this basis, dismiss the State's Objection.

Respectfully submitted,



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ATTORNEYS FOR FANSTEEL INC.

Dated in Washington, D.C.
this 18th day of December 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 OBJECTION TO ISSUANCE OF ENVIRONMENTAL ASSESSMENT AND FINDING OF NO SIGNIFICANT IMPACT" have been served as shown below by deposit in the U.S. mail, first class, this 18th day of December 2003. Additional service has also been made this same day by electronic mail, as shown by an asterisk (*) below.

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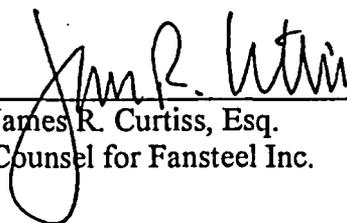
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