

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

RAS 7566

DOCKETED 04/07/04

ATOMIC SAFETY AND LICENSING BOARD PANEL

SERVED 04/07/04

Before Administrative Judge:

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

In the Matter of

FMRI, INC. [formerly FANSTEEL, INC.]

(Muskogee, Oklahoma Facility)

Docket No. 40-7580-MLA-3

ASLBP No. 04-816-01-MLA

April 7, 2004

MEMORANDUM AND ORDER

Under a schedule previously established by Judge Cole and this presiding officer, the State of Oklahoma was to file by March 31, 2004 its rebuttal presentation in this materials license amendment proceeding involving the decommissioning of Licensee FMRI, Inc.'s Muskogee, Oklahoma site.¹ In fact, the rebuttal presentation was filed on April 1, one-day late. By way of explanation, Oklahoma counsel represented in a letter that accompanied the tardy submission that she had completed the presentation by March 26, 2004, which was both five days before the filing deadline and the day upon which she left the Office of the Oklahoma Attorney General to join the staff of another State agency. Apparently, the filing instructions that upon her departure she had left with a secretary were mislaid. The fact that the presentation had not been filed by the due date seemingly did not come to her attention until, at my direction, a Licensing Board Panel staff member made an electronic mail inquiry on April 1

¹At the time the proceeding was instituted, the materials license in question (SMB-911) was possessed by Fansteel, Inc. and all prior orders in this matter referred to that entity as the Licensee. Effective January 23, 2004, the license and "all equipment, real property, improvements, and all other assets of Fansteel comprising the Muskogee facility were transferred to FMRI, a subsidiary of Reorganized Fansteel" Written Presentation of FMRI Inc. in Opposition to the Written Presentation of the State of Oklahoma (March 4, 2004) at 12. A January 29, 2004 letter from Licensee's counsel referring to this development is being treated as a request to substitute FRMI for Fansteel as a party to the proceeding. That request is granted and, thus, the caption of the proceeding now bears the name of the substituted party.

to determine whether Oklahoma had elected not to avail itself of the opportunity to respond to the written presentations of the Licensee and NRC Staff.

Although disposed upon its receipt simply to accept the late filing summarily in a one-sentence order, we are now confronted with the Licensee's April 2, 2004 insistence that the rebuttal presentation be rejected because of its one-day tardiness. Although without a shred of merit, given the basis assigned for it that insistence warrants a brief response.

In support of its draconian position, the Licensee points to certain language in my decision late last year in Sequoyah Fuels Corporation (Gore, Oklahoma Site), LBP-03-24, 58 NRC 383 (2003) in which, *inter alia*, I denied as untimely an Oklahoma hearing request that had not been filed by the deadline prescribed in the notice of opportunity published in the Federal Register. The Licensee would apparently have it that I there manifested a belief that, in all circumstances and with respect to all deadlines no matter where and by whom imposed, as much as a one-day tardiness requires rejection of a filing should it appear that neglect was a cause of the delay.

We have never established such a rigid and manifestly unreasonable principle and, moreover, there is nothing in Sequoyah Fuels to support the Licensee's reading of it. Once again, although the Licensee makes no mention of that fact, there involved was the failure to comply with a deadline imposed in a Federal Register notice. The observations regarding the significance of Oklahoma's tardiness necessarily were in that context.

Although justifiably expecting that deadlines that presiding officers might impose be accorded due respect, they scarcely can be regarded as possessing the same degree of gravity as attaches to deadlines for the filing of hearing requests published by the Commission in the Federal Register. In that connection, it is highly relevant that the Commission's Rules of

Practice in effect at the time of the Sequoyah Fuels ruling permitted a presiding officer to accept an untimely hearing request only upon a determination that, among other things, the tardiness had been established by the requester to be excusable. See 10 C.F.R. §2.1205(l)(1). There is no comparable limitation with respect to the authority of a presiding officer to accept a filing that failed to meet a deadline imposed by him or her. Rather, such acceptance is left entirely to the presiding officer's discretion.

Putting the matter in its simplest terms, Judge Cole and I manifestly have considerably more latitude to excuse the failure to meet a deadline where that deadline was imposed by us rather than by the Commission in a Federal Register notice. And it would be the last word in arbitrariness were we to exercise our authority in that respect in the inelastic fashion that the Licensee calls upon us to do here based upon its wrenching of words in another decision out of their context.²

No doubt Oklahoma counsel might and should have taken steps to ensure that, notwithstanding her departure for another State agency, the already completed rebuttal presentation was filed by the prescribed deadline. That she did not do so provides, however, inadequate reason not to accept the presentation one-day late. This is especially so given both the seeming importance of the issues addressed in the document in question and the possible

²The Licensee also points to the fact that, in a November 3, 2003 memorandum, the parties to the proceeding were advised that motions for an extension of the time to file their written presentations were disfavored and would not be granted absent a showing that, notwithstanding the exercise of diligence, intervening and totally unforeseeable developments precluded the filing of the document by the prescribed deadline. That admonition, however, hardly has any relevance here. On its face, it was designed to encourage the parties to take all necessary measures to ensure the completion of the written presentations in time to enable their filing without the need for an extension. In this case, that admonition apparently was observed by Oklahoma— its rebuttal presentation was completed several days before the prescribed deadline for its filing and thus no extension was either required or sought. The reason for the one-day filing delay thus had nothing to do with diligence in the preparation of the document; rather the delay was occasioned by a circumstance wholly unrelated to the admonition.

assistance that the document might provide in reaching a decision on those issues. Moreover, there is an absence of any conceivable (or for that matter claimed) prejudice to the Licensee stemming from its receipt of the Oklahoma filing on April 1 rather than March 31.

The April 1, 2004 Oklahoma rebuttal written presentation is hereby accepted for filing. It is so ORDERED.

BY THE PRESIDING OFFICER³

/RA/

Alan S. Rosenthal
ADMINISTRATIVE JUDGE

Rockville, MD
April 7, 2004

³ Copies of this memorandum and order were sent this date by Internet electronic mail transmission to the counsel for Oklahoma, the Licensee and the NRC Staff.

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NUCLEAR REGULATORY COMMISSION

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FMRI, INC. [formerly FANSTEEL, INC.]) Docket No. 40-7580-MLA-3
MUSKOGEE, OKLAHOMA)
)
(Materials License Amendment))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER DATED APRIL 7, 2004 have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Administrative Judge
Alan S. Rosenthal, Presiding Officer
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Administrative Judge
Richard F. Cole, Special Assistant
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

W. A. Drew Edmondson, Esquire
Attorney General of Oklahoma
Kelly Hunter Burch, Esquire
Assistant Attorney General
Environmental Protection Unit
4545 N. Lincoln Blvd., Suite 260
Oklahoma City, OK 73105

Lisa B. Clark, Esquire
John T. Hull, Esquire
Office of the General Counsel
Mail Stop - O-15 D21
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Gary L. Tessitore
Chairman, President and
Chief Executive Officer
Fansteel, Inc.
Number One Tantalum Place
North Chicago, IL 60064

James R. Curtiss, Esquire
Mark J. Wetterhahn, Esquire
Brooke D. Poole, Esquire
Winston & Strawn LLP
1400 L Street, NW
Washington, D.C. 20005

[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 7th day of April 2004