

April 2, 2004

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

April 8, 2004 (10:22AM)

BEFORE THE PRESIDING OFFICER

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of:

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)

Docket No. 40-7580-MLA-3

FMRI, Inc.

ASLBP No. 04-816-01-MLA

(Muskogee, Oklahoma Facility)

OPPOSITION OF FMRI, INC. TO REQUEST OF THE STATE OF OKLAHOMA
TO FILE ITS REBUTTAL PRESENTATION OUT OF TIME

In a November 3, 2003 Memorandum issued in this proceeding, the Presiding Officer indicated his intent to “move this proceeding forward as expeditiously as possible.”¹ In this vein, the Presiding Officer stated:

Moreover, once the schedule is established, applications for extensions of time will be disfavored and granted only upon a showing that, notwithstanding the exercise of diligence, an intervening and totally unforeseeable development precluded meeting the deadline in question.

Id., slip op. at 2. Flouting this directive, on April 1, 2004, the State of Oklahoma (“State”) filed its Rebuttal Presentation out of time – one day after the filing deadline of March 31, 2004.² As an excuse for its untimely filing, the State explained that, while the Rebuttal Presentation was complete on March 26, 2004, counsel of record for the State left her position on that date and filing instructions to the secretary “were mislaid.” The State’s lack of vigilance and failure to heed the clear, straightforward directives in this proceeding regarding schedule is completely

¹ *Fansteel Inc.* (Muskogee, Oklahoma Facility), Memorandum, slip op. Nov. 3, 2003, at 1.

² The State’s filing followed an e-mail inquiry from the Presiding Officer, as to whether a rebuttal presentation would be filed.

unacceptable, and the Presiding Officer should decline to accept its late-filed Rebuttal Presentation.³

This is not the first time the State has, through its own negligence, failed to meet NRC procedural requirements. In the ongoing *Sequoyah Fuels* proceeding, in denying the State's request for hearing as untimely, the Presiding Officer stated:

The simple fact is that . . . the explanations for the tardiness advanced by counsel well versed in NRC adjudicatory proceedings *falls so far short of the mark that their acceptance would make a mockery of the deadline that they failed to meet.*"

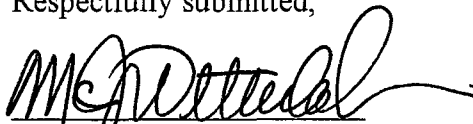
Sequoyah Fuels Corp. (Gore, Oklahoma Site), LBP-03-24, 58 NRC 383, 390 (2003) (emphasis added).

Counsel for the State concedes that the Rebuttal Presentation was ready for filing on March 26, five days before the set deadline. The State offers no explanation as to why the Presentation was not filed at that time. Such dereliction should not be countenanced by the Presiding Officer. The fact that the Presentation was filed only a day late is not material. As stated by the Presiding Officer in *Sequoyah Fuels*, "If such a consideration [the brevity of the tardiness] were deemed of itself to make the tardiness excusable, the deadline would be stripped of real meaning." *Id.* at 390 n.9.

³ In the absence of any cited authority for its Request by the State, FMRI is treating the Request as a motion pursuant to 10 C.F.R. § 2.1237.

Because the State has failed to demonstrate “an intervening and totally unforeseeable development” that precluded meeting the deadline in question, its request to file the Rebuttal Presentation out of time should be denied.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'McGurtiss', written over a horizontal line.

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ATTORNEYS FOR FMRI, INC.

Dated in Washington, D.C.
this 2nd day of April 2004

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE PRESIDING OFFICER

In the Matter of:)

FMRI, Inc.)

(Muskogee, Oklahoma Facility))

) Docket No. 40-7580-MLA-3

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "OPPOSITION OF FMRI, INC. TO REQUEST OF THE STATE OF OKLAHOMA TO FILE ITS REBUTTAL PRESENTATION OUT OF TIME" have been served as shown below by electronic mail, this 2nd day of April 2004. Conforming hard copies have been served by deposit in the U.S. mail, first class, this same date.

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A handwritten signature in black ink, appearing to read "Mark J. Wetterhahn", written over a horizontal line.

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