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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 )  
 )  
CAROLINA POWER & LIGHT )  
COMPANY )  
(Shearon Harris Nuclear Power Plant) )

Docket No. 50-400-LA  
ASLBP No. 99-762-02-LA

**CAROLINA POWER & LIGHT COMPANY'S ANSWER OPPOSING  
COMMISSION REVIEW OF LBP-00-12, LBP-00-19, AND LBP-01-09**

Pursuant to the Commission's Order dated March 21, 2001,<sup>1</sup> Carolina Power & Light Company ("CP&L") submits its Answer Opposing the Board of Commissioners of Orange County's ("BCOC") Petition for Review of LBP-00-12, LBP-00-19, and LBP-01-09.<sup>2</sup> CP&L respectfully submits that the Commission should decline to review these decisions because: (1) the Licensing Board below fully complied with 10 C.F.R. Part 2, Subpart K, ("Subpart K") requirements; (2) BCOC failed to demonstrate a genuine and substantial dispute of fact which could only be resolved in an adjudicatory hearing; and (3) BCOC's petition raises no substantial question whether the Board's findings of fact are clearly erroneous.

The background of this proceeding is discussed in "Carolina Power & Light Company's Answer Opposing Orange County's Request for Emergency Stay of LBP-01-09," filed contemporaneously, and will not be repeated here.

<sup>1</sup> Order, Docket No. 50-400-LA (Mar. 21, 2001).

<sup>2</sup> Orange County's Petition for Review of LBP-00-12, LBP-00-19, and LBP-01-09 (Mar. 16, 2001) ("Petition").

## I. ARGUMENT

### A. Standard of Review

The Commission, in its discretion, may grant a petition for review “giving due weight to the existence of a substantial question” taking into account the following considerations:

- (i) A finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding;
- (ii) A necessary legal conclusion is without governing precedent or is a departure from or contrary to established law;
- (iii) A substantial and important question of law, policy or discretion has been raised;
- (iv) The conduct of the proceeding involved a prejudicial procedural error; or
- (v) Any other consideration which the Commission may deem to be in the public interest.<sup>3</sup>

Although the Commission has the “authority to reject or modify a licensing board’s factual findings, it will not do so lightly.”<sup>4</sup> Historically, the Commission has “attach[ed] significance to a licensing board’s evaluation of the evidence and to its disposition of the issues”<sup>5</sup> even if it “might have reached a different result.”<sup>6</sup> This is particu-

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<sup>3</sup> 10 C.F.R. §§ 2.786(b)(4)(i)-(v).

<sup>4</sup> Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 93 (1998) (internal citations omitted).

<sup>5</sup> Id. (quoting Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-355, 4 NRC 397, 404 (1976)).

<sup>6</sup> Id. (quoting General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 1), ALAB-881, 26 NRC 465, 473 (1987)).

larly true where, as here, “the record contains extensive and detailed arguments.”<sup>7</sup>

BCOC petitions for Commission review of the Licensing Board decisions asserting that “they raise substantial questions with respect to their reliance on legal errors and clear factual errors.”<sup>8</sup> CP&L demonstrates below, however, that BCOC has not made an adequate showing supporting its sweeping assertions.

**B. The Licensing Board Complied With the Requirements of Subpart K**

In the Nuclear Waste Policy Act of 1982,<sup>9</sup> Congress provided special expedited licensing procedures designed “to encourage utilities to expand storage capacity at reactor sites.”<sup>10</sup> Congress reasoned that by “scoping” the issues in this manner, the time and expense of adjudicatory hearings could be avoided unless the *factual* issues were truly significant and capable of accurate resolution only through full-blown adjudicatory proceedings.<sup>11</sup> The standards for an adjudicatory hearing are “extremely narrow,”<sup>12</sup> but nevertheless, were judged necessary for a “streamlined regulatory process” that would “insure predictable and timely measures necessary to keep America’s nuclear power plants in full operation without any threat of reduced operations or shutdown because of a failure by the Federal Government to provide for interim spent fuel management.”<sup>13</sup> The

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<sup>7</sup> Id.

<sup>8</sup> BCOC Petition at 5. BCOC also asserted that “substantial and important questions of law, discretion and policy” were involved, but never developed that argument.

<sup>9</sup> 42 U.S.C. § 10101 et seq. (2000).

<sup>10</sup> H.R. Rep. No. 97-785, at 39 (1982).

<sup>11</sup> Id. at 39, 82.

<sup>12</sup> 128 Cong. Rec. S15,644 (daily ed. Dec. 20, 1982) (statement of Sen. Mitchell).

<sup>13</sup> 128 Cong. Rec. S4155 (daily ed. Apr. 28, 1982) (statement of Sen. McClure).

Commission tracked the statutory language in implementing the new hearing procedures in a 1985 rulemaking that added Subpart K to the Commission's regulations.<sup>14</sup>

1. Subpart K Sets a High Threshold for Evidentiary Hearings

The Commission's regulations are exceedingly clear that the threshold for obtaining an evidentiary hearing in a Subpart K proceeding is uniquely high.

No issue of law or fact shall be designated for resolution in an adjudicatory hearing unless the presiding officer determines that:

- (1) There is a genuine and substantial dispute of fact which can only be resolved with sufficient accuracy by the introduction of evidence in an adjudicatory hearing; and
- (2) The decision of the Commission is likely to depend in whole or in part on the resolution of that dispute.<sup>15</sup>

Thus, the regulations establish "a two-part test for determining whether an evidentiary hearing is required for resolution of the issues" raised in the proceeding.<sup>16</sup> BCOC does not dispute that this is the proper test to determine whether an evidentiary hearing is required. Any issues not meeting this test are to be disposed of by the Licensing Board "promptly by written order" after the oral argument.<sup>17</sup> The Licensing Board below fully complied with these regulatory criteria.

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<sup>14</sup> 50 Fed. Reg. 41,662 (1985).

<sup>15</sup> 10 C.F.R. §§ 2.1115(b)(1)-(2).

<sup>16</sup> Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), LBP-01-09, slip op. at 11 (Mar. 1, 2001); see also Northeast Nuclear Energy Company (Millstone Nuclear Power Station, Unit No. 3), CLI-01-03, slip op. at 3-4 (2001); Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), LBP-00-12, 51 NRC 247, 254-55 (2000).

<sup>17</sup> 10 C.F.R. § 2.1115(a)(2). The proposed rule would have required the Licensing Board to "decide" all issues not designated for an adjudicatory hearing. 48 Fed. Reg. 54,499, 54,505 (1983). The final rule used the term "dispose," which can include both "decide" and "dismiss."

2. The Board Provided BCOC Every Opportunity to Show a Genuine Factual Dispute Existed

This proceeding is now well into its third year. The Board allowed BCOC every possible accommodation, including admission of a late-filed contention, weighing the declarations and reports of a “policy-oriented” expert, extensive discovery (including a number of detailed depositions submitted on the record), numerous supplemental briefs, and two oral arguments. BCOC, despite ample opportunity, has not established the bare minimum of a genuine and substantial dispute of fact requiring an evidentiary hearing to resolve.

3. The Board’s Determination of the Burden of Proof Favored BCOC

The Board found, and BCOC agreed, that BCOC “as the proponent of the need for an evidentiary hearing” in this proceeding “bears the burden of establishing that need.”<sup>18</sup> This finding is in complete agreement with the Commission’s ruling that “the proponent of the contention has the initial burden of coming forward with factual issues, not merely conclusory statements and vague allegations regarding the fears of its members.”<sup>19</sup> The Board committed no error here.

With regard to Contention EC-6, however, the Board reasoned, incorrectly CP&L submits, that it would be unfair to establish the “equivalent of the ‘burden to go forward’ that is normally ascribed to an intervenor challenging a license application” to a proponent in a Subpart K proceeding.<sup>20</sup> Although CP&L contended that Subpart K is not fairly read to require the NRC Staff and applicant to meet their ultimate burden as a part of the

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<sup>18</sup> Harris, LBP-01-09, slip op. at 12; see also BCOC Petition at 8.

<sup>19</sup> Millstone, CLI-01-03, slip op. at 5.

<sup>20</sup> Harris, LBP-01-09, slip op. at 13 n.3.

determination of the need for an evidentiary hearing, the Board's ruling clearly favored BCOC in that it significantly lowered the threshold for an evidentiary hearing.<sup>21</sup>

CP&L also respectfully disagrees with the Board's view that the NRC Staff and licensees are required to quantify the probability of an intervenor's beyond-design-basis postulated accident scenario to demonstrate that it is remote and speculative for NEPA purposes. However, because the Board directed the parties to do so, CP&L complied by preparing a high quality probabilistic risk assessment ("PRA"). This PRA, performed by CP&L and its consultant ERIN Engineering, Inc., demonstrated that the best-estimate, overall probability of the postulated scenario was less than 3 in one hundred million ( $2.65 \times 10^{-8}$ ) per year.<sup>22</sup> Although the Board subsequently expressed reservations about its request,<sup>23</sup> CP&L submits that few, if any, licensees would jeopardize a critical license amendment by relying on "existing materials available to it" that do not squarely address an admitted contention.<sup>24</sup> As if to illustrate this point, despite the Board's view that CP&L's analysis went too far, BCOC, unhappy with the results, still seeks more and different analyses.

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<sup>21</sup> CP&L submits that Subpart K and the Commission's decision in Millstone are properly read to require that only the proponent must meet its burden at the oral argument stage. The NRC Staff and the applicant are not required to meet their ultimate burden until, and unless, an evidentiary hearing is held. By requiring both sides to meet their respective burdens at oral argument, the advantages of the bifurcated Subpart K process are lost and the path forward if both, or neither, party satisfies its burden is unclear.

<sup>22</sup> See CP&L's Answer Opposing Orange County's Request for Emergency Stay of LBP-01-09 (Apr. 2, 2001) ("CP&L's Stay Answer") at 6-9.

<sup>23</sup> "In posing the first question, we did not ask, nor did we expect, that the parties would undertake an entirely new PRA for this contention." Harris, LBP-01-09, slip op. at 17.

<sup>24</sup> Id. Existing PRAs did not address all of the elements of BCOC's convoluted accident scenario, which initiates with a beyond-design-basis accident.

Taken together with the Board's view that the ultimate burden lies with the NRC Staff and applicant at the oral argument stage, this additional requirement drains all meaning from Subpart K's hybrid hearing process. In light of this decision, it now appears that an applicant must now perform a state-of-the-technology PRA to quantify that any postulated beyond-design-basis accident scenario in an admitted contention, no matter how improbable, is remote and speculative, or risk a lengthy and valueless evidentiary hearing.<sup>25</sup>

4. The Board Properly Declined to Find General Allegations Sufficient to Trigger a Subpart K Evidentiary Hearing

The Board properly considered the material submitted by the parties in making its Subpart K determinations. Subpart K requires "due consideration of the oral presentation and the written facts and data submitted by the parties and relied upon at the oral argument" before designating disputed issues of fact or law for resolution in an adjudicatory hearing.<sup>26</sup> BCOC claims legal error by the Board because it "entered the merits of the dispute, weighed the credibility of each side in the dispute, and chose for one of the parties."<sup>27</sup> Further, BCOC claims the Board violated Subpart K because its decisions were

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<sup>25</sup> This turns Subpart K's purpose to "encourage and expedite onsite expansion of spent nuclear fuel storage capacity" on its head. *Id.* § 2.1101. CP&L disagreed with admission of Contention EC-6 in the first instance because a rudimentary understanding of PRA and engineering judgment easily predicted how highly remote BCOC's accident scenario was at Harris. CP&L submits that the Board read too literally the Commission's decisions in Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), CLI-90-4, 31 NRC 333 (1990) and CLI-90-7, 32 NRC 129 (1990) suggesting quantification of beyond-design-basis accident scenarios.

<sup>26</sup> 10 C.F.R. § 2.1115(a).

<sup>27</sup> BCOC Petition at 8.

based on the “credibility, reasonableness, and persuasiveness of the parties positions.”<sup>28</sup>

CP&L submits that it is entirely proper, and consistent with Subpart K, for a Licensing Board to consider the credibility, reasonableness, and persuasiveness of the matters before it. BCOC would read Subpart K as requiring any intervenor’s unsupported, conclusory statement inconsistent with an NRC Staff or applicant position be admitted as a “genuine and substantial dispute of fact.” Indeed, BCOC’s position is that Subpart K effectively requires a Licensing Board to designate an evidentiary hearing if the intervenor presents any information to support its contention. This is an absurd result that turns the Congressional mandate for Subpart K on its head.

Licensing Board scrutiny of BCOC’s purported “facts” was particularly appropriate in this proceeding because of the demonstrated lack of expertise of its expert, Dr. Gordon Thompson. BCOC’s likelihood of success on the merits is inextricably tied to the expertise of its consultant and the NRC Staff and CP&L strongly questioned Dr. Thompson’s qualifications below.<sup>29</sup> Although the Board gave him the benefit of the doubt and did not strike his testimony,<sup>30</sup> Dr. Thompson’s patently ridiculous “scoping

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<sup>28</sup> *Id.* at 8 n.14 (internal citations omitted).

<sup>29</sup> *See, e.g.*, NRC Staff Brief and Summary of Relevant Facts, Data and Arguments Upon Which the Staff Proposes to Rely at Oral Argument on Technical Contentions 2 and 3 (Jan. 4, 2000) at 14-19; Summary of Facts, Data, and Arguments On Which Applicant Proposes to Rely at the Subpart K Oral Argument Regarding Contention EC-6 (Nov. 20, 2000) (“Applicant’s Summary”) at 19-28; NRC Staff Brief and Summary of Relevant Facts, Data and Arguments Upon Which The Staff Proposes To Rely At Oral Argument On Environmental Contention EC-6 (Nov. 20, 2000) (“Staff Summary”) at 21-24.

<sup>30</sup> The Licensing Board politely noted Dr. Thompson’s “expertise relative to reactor technical issues seems largely policy-oriented.” *Harris*, LBP-00-12, 51 NRC at 267 n.9.

calculations”<sup>31</sup> and contradictory “analysis” were considered by the Board sufficiently to establish what, if any, weight to give his opinions.<sup>32</sup> It is little wonder that the NRC Staff and CP&L results, achieved using widely recognized experts and industry standard methods, disagree with virtually every result reached by Dr. Thompson.

It is not enough, however, for BCOC to simply assert its “expert” has disagreements with the NRC Staff or an applicant. Subpart K requires a dispute of “factual issues, not merely conclusory statements and vague allegations” to proceed to an evidentiary hearing.<sup>33</sup> Further, “[f]actual allegations must be supported by experts or documents to demonstrate that an evidentiary hearing is warranted.”<sup>34</sup> An “applicant cannot be required to prove that uncertain future events could never happen.”<sup>35</sup> The Board properly found that BCOC, relying solely on Dr. Thompson, simply failed to carry its burden of establishing any genuine and substantial dispute of facts.<sup>36</sup> Any other result would be

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<sup>31</sup> *E.g.*, Dr. Thompson’s post-accident dose calculations requires assumptions that, *inter alia*, the wind blow in all directions simultaneously for over four days and carry superheated fuel particles over buildings higher than the release point in one direction, but cause immediate deposition in other directions and not carry any material beyond 200 meters from the release point. G. Thompson, “The Potential for a Large Atmospheric Release of Radioactive Material From Spent Fuel Pools at the Harris Nuclear Power Plant: The Case of a Pool Release Initiated by a Severe Reactor Accident,” D-3 – D-4 (2000). He also calculated that the temperature of steam exiting a partially covered spent fuel element in the Harris spent fuel pool would be one and a half times the temperature of the surface of the sun. G. Thompson, “Risks and Alternative Options Associated with Spent Fuel Storage at the Shearon Harris Nuclear Power Plant,” App. D, D-4 (1999).

<sup>32</sup> See CP&L’s Stay Answer at 8-9.

<sup>33</sup> Millstone, CLI-01-03, slip op. at 5.

<sup>34</sup> Id.

<sup>35</sup> Id.

<sup>36</sup> Harris, LBP-01-09, slip op. at 43.

surprising as Dr. Thompson also provided his “expert” opinion in the Millstone proceeding,<sup>37</sup> which the Commission found failed to “create a basis for calling on the applicant to satisfy the ultimate burden of proof.”<sup>38</sup> The Board committed no error in reaching a decision and its decision was entirely consistent with that of the Licensing Board and the Commission in Millstone.

5. BCOC Raises No Substantiated Question of Error

BCOC completely fails to substantiate its broad claims of clear error. The Commission “is generally disinclined to upset” a Licensing Board’s findings and conclusions “particularly on matters involving fact-specific issues or where the affidavits or submissions of experts must be weighed.”<sup>39</sup> The Commission also attaches significance to a Board’s “disposition of the issues” and does not “second guess [its] reasonable findings.”<sup>40</sup> Subpart K only requires that the presiding officer include “a brief statement of the reasons” for disposing of issues determined not designated for an evidentiary hearing.<sup>41</sup> The Board’s fact finding is well grounded in the extensive record below, extends well beyond the Subpart K requirement, and produced a detailed analysis, including numerous citations to the record, documenting the “due consideration” given each decision.

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<sup>37</sup> Indeed, the Millstone Licensing Board rejected a contention asserting the same scenario based on the same report prepared by Dr. Thompson for BCOC in this proceeding. See Northeast Nuclear Energy Co. (Millstone Nuclear Power Station, Unit 3), LBP-00-02, 51 NRC 25, 45 (2000).

<sup>38</sup> Millstone, CLI-01-03, slip op. at 5.

<sup>39</sup> Hydro Resources, Inc. (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-99-22, 50 NRC 3, 6 (1999).

<sup>40</sup> Hydro Resources, Inc. (P.O. Box 15910, Rio Rancho, NM 87174), CLI-00-12, 52 NRC 1, 3 (2000).

<sup>41</sup> 10 C.F.R. § 2.1115(a)(2).

BCOC asserts that the Board “made several legal errors in LBP-00-12,” including: an interpretation “of GDC 62 contrary to the plain language and regulatory history,” “ignoring a significant portion of Orange County’s evidentiary case on quality assurance issues,” and “refusing to consider” BCOC’s argument for a construction permit to complete work on the idled spent fuel pools.<sup>42</sup> With regard to GDC 62, the Board provided several bases for its interpretation and identified “the Staff’s nearly 20-year-old interpretation” as reinforcing its conclusion.<sup>43</sup> In any event, this matter is already before the Commission.<sup>44</sup> As to the construction permit issue, the Board did not “refuse” to consider BCOC’s construction permit claim, it determined quite properly that this after-the-fact claim simply “was not a part of the admitted contention.”<sup>45</sup>

Far from ignoring BCOC’s assertions regarding quality assurance, the Board dedicated nearly ten full pages of its opinion to finding, *inter alia*, that BCOC refused to amend its contention to cover the scope of equipment it wanted to challenge and BCOC

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<sup>42</sup> BCOC Petition at 5-6.

<sup>43</sup> Harris, LBP-00-12, 51 NRC at 260. Dr. Thompson has also demonstrated his inability to interpret criticality regulations. BCOC had originally contended that “GDC 62 prohibits the use of administrative measures.” Orange County’s Supplemental Petition to Intervene (Apr. 5, 1999) at 12. BCOC eventually was forced to admit that Dr. Thompson’s distinction between “physical” and “administrative” criticality controls does not even theoretically exist, because of “some overlap between physical measures and ongoing administrative measures.” Orange County’s Amicus Brief On Review of LBP-00-26 (Feb. 7, 2001) at 5; see also Transcript of January 21, 2000, Hearing Before the Licensing Board at 218-19.

<sup>44</sup> See Millstone, CLI-01-03.

<sup>45</sup> Harris, LBP-00-12, 51 NRC at 281-82.

“present[ed] no real evidence” to support its claims.<sup>46</sup> CP&L inspected by remote camera all fifteen of the embedded welds and associated piping, and even pressure washed and re-inspected a field weld with observed reddish-brown deposits.<sup>47</sup> The Board found that CP&L had satisfied the requirements for inspecting the welds and associated piping and it properly disposed of this contention because no dispute remained.<sup>48</sup>

BCOC also asserts legal error in LBP-00-19, because “the Board did not admit the broader issue of overall probability” of its postulated beyond design basis accident sequence and “arbitrarily excluded consideration of” some accident scenarios postulated as relevant by BCOC.<sup>49</sup> In LBP-0019, the Board struggled with whether to admit late-filed Contention EC-6, particularly because Dr. Thompson’s capability for “assistance in developing a sound record” did “not render this a compelling element” for admission.<sup>50</sup> In effect, BCOC is now challenging the Board’s decision to admit its own late-filed contention. The Board ultimately admitted the portions of the contentions that it found met the “specificity and basis requirements” of the Commission’s regulations. It is clearly not arbitrary to require compliance with regulations against overly broad contentions.

Finally, BCOC charges that “the Licensing Board committed both legal error and

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<sup>46</sup> Id. at 269-280. The Board specifically noted that David Lochbaum, BCOC’s sole expert on this contention, agreed that the identified system equipment was not at issue in the contention, which was limited to fifteen welds in the embedded piping. Id. at 270.

<sup>47</sup> Summary of Facts, Data, and Arguments on Which Applicant Proposes to Rely at the Subpart K Oral Argument (Jan. 4, 2001) at 91 n.223.

<sup>48</sup> Harris, LBP-00-12, 51 NRC at 271.

<sup>49</sup> BCOC Petition at 6-7.

<sup>50</sup> Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), LBP-00-19, 52 NRC 85, 93 (2000).

clear factual error” in “misapplying the standard” in Subpart K “for determining whether to order a hearing,” basing its ruling “on an arbitrary and capricious selection of facts” and without a reasoned explanation,” and basing its decision “on a critical assumption that is inconsistent with NEPA.”<sup>51</sup> CP&L shows in supra section I.B.1 how the Board applied the Subpart K standards in a manner that gave BCOC every opportunity to make its case. BCOC’s other allegations are clearly without merit because for each issue discussed in LBP-01-09, the Board provides a detailed recitation of the parties’ positions and its careful analysis.<sup>52</sup> The Board, quite appropriately, did not find BCOC’s arguments or expert persuasive, but provided a reasoned analysis supporting each determination.<sup>53</sup> Similarly, the Board stated it could find “no regulatory bar that prohibits” a 25 Rem personnel exposure limit during an accident, identified a regulation that “clearly allows” that dose,<sup>54</sup> and made no assumption of any sort in reaching its conclusion.

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<sup>51</sup> BCOC Petition at 9-10.

<sup>52</sup> See generally Harris, LBP-01-09 § II.

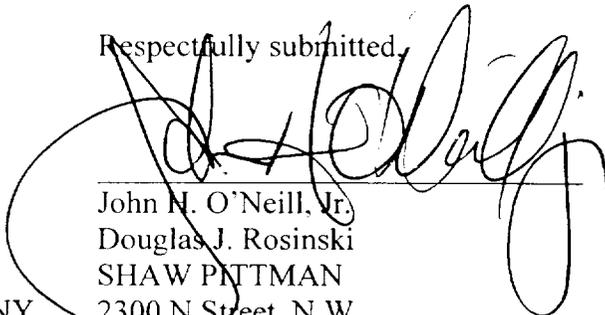
<sup>53</sup> *E.g.*, the Board stated that it “view[ed] BCOC’s analysis as too simplistic for several reasons” and described each reason supporting its conclusion. Id. at 21. Likewise, the Board stated that it was “seriously troubled by BCOC’s claim of certainty” in the probabilistic “calculations” underpinning the entire BCOC contention and explained the reasons for its position. Id. at 24.

<sup>54</sup> Id. at 31.

## II. CONCLUSION

For the reasons discussed above, the Commission should decline to review the Licensing Board decisions in LBP-00-12, LBP-00-19, or LBP-01-09.

Respectfully submitted,



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Dated: April 2, 2001

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

BEFORE THE COMMISSION

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COMPANY	)	ASLBP No. 99-762-02-LA
(Shearon Harris Nuclear Power Plant)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Carolina Power & Light Company's Answer Opposing Commission Review of LBP-00-12, LBP-00-19, and LBP-01-09" dated April 2, 2001, was served by electronic mail transmission and first class mail on this 2<sup>nd</sup> day of April, 2001, on the persons listed below.

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