LBP-09-08

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Paul B. Abramson, Chairman
Dr. William E. Kastenberg
Dr. Michael F. Kennedy

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| In the Matter of<br><br>PROGRESS ENERGY CAROLINAS, INC.<br><br>(Shearon Harris Nuclear Power Plant, Units 2 and 3) | Docket Nos. 52-022-COL & 52-023-COL<br><br>ASLBP No. 08-868-04-COL-BD01<br><br>June 30, 2009 |

MEMORANDUM AND ORDER
(Ruling on Admissibility of Contention TC-1
in Response to the Commission's Remand in CLI-09-08)

In LBP-08-21, we ruled upon standing and admissibility of contentions regarding Progress Energy's (Progress or Applicant) application to the Nuclear Regulatory Commission (NRC) for a combined license (COL) under 10 C.F.R. Part 52.[1] If granted, this COL would authorize Progress to construct and operate two new units employing the Westinghouse Electric Corporation's AP1000 advanced pressurized water power reactor certified design on its existing Shearon Harris site, located in Wake County, North Carolina. In particular, in LBP-08-21, we found one contention, designated TC-1, submitted by petitioner North Carolina Waste Awareness and Reduction Network (NC-WARN or Petitioner) admissible, and referred it to the NRC Staff (Staff) for consideration in the rulemaking proceeding on the AP1000 design certification, holding any hearing on the merits in abeyance.[2] In CLI-09-08, issued May 18, 2009 (hereinafter referred to as the Remand), the Commission, in response to appeals by Staff and Applicant of our admission of that contention, remanded the case to this Board for

[1] See LBP-08-21, 68 NRC __ (slip op.) (Oct. 30, 2008).
[2] Id. at __-__ (slip op. at 5-9).

reassessment of the admissibility of Contention TC-1.[3] Underlying the Commission's remand order was their finding that this Board had not made an appropriate admissibility determination on Contention TC-1.[4]

## II. ANALYSIS

### A. Contention Admissibility Standards

Contention admissibility is governed by 10 C.F.R. § 2.309(f)(1), which specifies a set of strict requirements all of which must be satisfied for a contention to be admissible. For a contention to be admissible under those provisions, it must provide: (1) a specific statement of the legal or factual issue sought to be raised; (2) a brief explanation of its basis; (3) a concise statement of the alleged facts or expert opinions, including references to specific sources and documents, that support the petitioner's position and upon which the petitioner intends to rely at hearing; and (4) sufficient information demonstrating that a genuine dispute exists in regard to a material issue of law or fact, including references to specific portions of the application that the petitioner disputes, or in the case when the application is alleged to be deficient, the identification of such deficiencies and supporting reasons for this belief. See 10 C.F.R. § 2.309(f)(1)(i), (ii), (v), and (vi). The petitioner must also demonstrate that the issue raised in the contention is both "within the scope of the proceeding" and "material to the findings the NRC must make to support the action that is involved in the proceeding." Id. § 2.309(f)(1)(iii), (iv).

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[3] See CLI-09-08, 69 NRC __ (slip op.) (May 18, 2009).

[4] Id. at __ (slip op. at 8). Indeed, as we now understand it, the Commission's view, expressed by the combined effect of CLI-08-15 and CLI-09-08, is quite simply that if a board finds a contention would be admissible but for the fact that it challenges a design undergoing certification rulemaking (which would make it inadmissible as outside the scope of a licensing board hearing), the board should refer such a contention to the Commission staff for consideration in that rulemaking, holding the contention in abeyance until the rulemaking is completed. See id.; CLI-08-15, 68 NRC __, __-__ (slip op. at 3-4) (July 23, 2008).

B. Contention TC-1 (AP1000 Certification)

As originally phrased by NC-WARN, Contention TC-1 read:

> The COLA is incomplete because many of the major safety components and procedures at proposed Harris reactors are only conditional at this time. The COLA adopts by reference a design and operational procedures that have not been certified by the NRC or accepted by the applicant. Modifications to the design or operational procedures for the AP1000 Revision 16 would require changes in Progress Energy's application, the final design and operational procedures. Regardless whether the components are certified or not, the COLA cannot be reviewed without the full disclosure of all designs and operational procedures.[5]

In our decision set forth in LBP-08-21, we determined that Contention TC-1 was a contention of omission, because, among other assertions, (1) the contention begins with the explicit assertion that "[t]he COLA is incomplete because . . ."[6] and (2) the "support for contention" offered by NC-WARN commences with the statement that "[t]he most significant elements . . . are lacking in the COLA."[7] On its face and in plain language, this contention asserted specific omissions from the application itself, not flaws with the design certification or the process related thereto.[8] Nonetheless, because of the general and vague nature of this contention, in admitting and referring to the Staff for consideration in rulemaking, we limited Contention TC-1 to the following nine explicit assertions regarding omissions from the COLA.

> Specifically at the proposed Harris reactors, the application does not contain the following:
>
> a. The final design of the reactor containment.
> b. The control room set up and operator decision-making procedures.
> c. Seismic qualifications for various components of the AP1000 reactors.
> d. The establishment of fire protection areas.
> e. Technology requirements for heat removal.

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[5] See Petition for Intervention and Request for Hearing by [NC-WARN] at 13 (Aug. 4, 2008) [hereinafter Intervention Petition].
[6] Id.
[7] Id.
[8] The Remand characterizes this decision as the Board having "recast NC-WARN's contention as a 'contention of omission,'" CLI-09-08 at 9, but as we see it, the principal focus of the Remand is the Commission's view that we had erroneously interpreted CLI-08-15 to direct us to refer the contention to the Staff for resolution during the design certification rulemaking "before deciding whether the contention was admissible." Id.

f. Human factors engineering design throughout the plant.
g. Plant personnel requirements.
h. Alarm systems throughout the plant.
i. Plant-wide requirements for pipes and conduits.[9]

Our ruling in LBP-08-21 was founded on the Commission's statement in CLI-08-15 that if the petitioners believe that "the Application is incomplete in some way, they may file a contention to that effect."[10] That is, if some design information has been omitted from a COL, "licensing boards 'should refer such a contention to the staff for consideration in the design certification rulemaking, and hold that contention in abeyance, if it is otherwise admissible.'"[11] In CLI-09-08, the Commission clarified the foregoing, calling to our attention the import of the phrase "otherwise admissible," i.e., such contentions are to be so admitted, referred to the staff and held in abeyance only if they are "otherwise admissible."[12] In the following, we review and analyze all of the assertions and supporting information provided by NC-WARN regarding Contention TC-1 for satisfaction of the relevant "other" requirements of 10 C.F.R. § 2.309(f)(1).[13]

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[9] LBP-08-21, 68 NRC at __ (slip op. at 7).
[10] CLI-08-15, 68 NRC at __ (slip op. at 2).
[11] Id. at __ (slip op. at 4) (quoting Conduct of New Reactor Licensing Proceedings; Final Policy Statement, 73 Fed. Reg. 20,963, 20,972 (Apr. 17, 2008). While CLI-08-15 did not address the disposition of a contention asserting errors in a design undergoing certification rulemaking, it seems to this Board that the policy being expressed by the Commission in CLI-08-15 and CLI-09-08 is that all assertions regarding a design undergoing certification rulemaking that qualify as an admissible contention (but for the fact that they challenge that design) should be admitted and referred to the rulemaking proceeding so that such matters receive appropriate scrutiny during the rulemaking design review. See generally CLI-08-15, 68 NRC __ (slip op.) and CLI-09-08, 69 NRC __ (slip op.).
[12] See CLI-09-08, 69 NRC at __, __ (slip op. at 5, 8).
[13] Any contention directed at a design undergoing rulemaking review fails on its face to satisfy the requirements of 10 C.F.R. § 2.309(f)(1)(iii) – because all matters subject of a rulemaking are outside the scope of our licensing proceedings. "[A] contention that attacks a Commission rule, or which seeks to litigate a matter that is, or clearly is about to become, the subject of a rulemaking, is inadmissible." See Exelon Generation Co., LLC (Early Site Permit for Clinton ESP Site), LBP-04-17, 60 NRC 229, 241 (Aug. 6, 2004) (citing Potomac Elec. Power Co. (Douglas Point Nuclear Generating Station, Units 1 & 2), ALAB-218, 8 AEC 79, 85, 89 (1974); see also Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC 207, 218 (2003). An applicant for a COL is expressly authorized by NRC's regulations to incorporate by reference a certified design such as the AP1000. See, e.g., 10 C.F.R. § 52.73(a). Appendix D to Part 52 contains the design certification rule for the AP1000 design including Rev. 15. The certification of the AP1000 design (as it would be amended by proposed revisions to the certified design such as Rev. 16) is the subject of current Commission

Our focus, in accord with the Remand, is upon each of the nine specifically asserted omissions to determine whether or not the requirements of 10 C.F.R. § 2.309(f)(1) are satisfied for each such asserted omission.[14]

On appeal, Progress asserted that each of these nine asserted omissions are "a paraphrase of items listed in a table that is part of the AP1000 design certification rule."[15] The Commission agreed with Progress that these nine items are not omitted from the application because "a COL incorporates both the design certification rule and the amendment application."[16] Progress further asserted upon appeal that the actual arguments made by NC-WARN raise site-specific matters belonging in this proceeding.[17] The Commission noted that NC-WARN's own arguments in support of the contention at issue here support the view that the contention is directed at site-specific matters, not the generic design certification so that "resolution in rulemaking is not appropriate."[18]

Thus, the Commission directed that we first assess whether or not the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1) are satisfied with respect to Contention TC-1, and, if we find that they are, then assess "whether all or part of the contention is appropriate for resolution in the AP1000 design certification amendment rulemaking."[19]

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rulemaking. In addressing challenges to the AP1000 design (as already certified through Rev. 15 and as being considered in rulemaking through Rev. 16), the Commission noted that it had "discussed this very situation in its Final Policy Statement on the Conduct of New Reactor Licensing Proceedings . . . . [and] stated that issues concerning a design certification application should be resolved in the design certification rulemaking and not in a COL proceeding." CLI-08-15, 68 NRC at __ (slip op. at 3). Thus we consider only the "other" requirements of 10 C.F.R. § 2.309(f)(1). We believe that this is the substantive effect of the expression "otherwise admissible" that is used in CLI-09-08 which itself is rooted in the Commission's Policy Statement on the Conduct of New Reactor Licensing Proceedings. See 73 Fed. Reg. 20,963.

[14] CLI-09-08, 69 NRC at __ (slip op. at 12).

[15] Id. at 10.

[16] Id.

[17] Id. at 11.

[18] Id. at 11-12.

[19] Id. at 12.

For completeness, in assessing the nine specific asserted omissions, we analyzed each relevant assertion made by NC-WARN in Contention TC-1 (whether in its initial specification of the contention or in its asserted support therefore). The results of this assessment are presented below.

Petitioner begins its asserted support with the statement that "[t]he most significant elements of the proposed reactors, i.e., the design and operational practices, are lacking in the COLA."[20] Petitioner goes on to discuss the recently submitted revision of the AP1000 design, which is currently undergoing design certification review.[21] The Petitioner asserted that "[i]t is impossible to conduct a meaningful technical and safety review of the COLA without knowing the final design of the reactors as they would be constructed by Progress Energy."[22] By these statements Petitioner is, in effect, asserting a deficiency in the COLA regarding safety analysis, but doing so through an assertion that the design to be incorporated into the COLA is itself incomplete. However, safety matters are addressed at length in the AP1000 design (which is fully certified through Rev. 15 and permissibly referenced and incorporated into the subject COLA)[23] and NC-WARN fails to identify, let alone discuss any specific flaws in, those portions of the COLA wherein the safety reviews are set forth. Thus, as this portion of Contention TC-1 erroneously asserts an omission from the application, it is inadmissible because no such omission exists and it therefore fails to satisfy the requirements of 10 C.F.R. § 2.309(f)(1)(vi). Furthermore, had we interpreted these statements to assert errors in the application, they would fail to satisfy the requirements of 10 C.F.R. § 2.309(f)(1)(vi) by failing to refer to specific portions of the application which they dispute. Finally, to the extent this portion of the contention asserts that there will be changes to the certified design as a result of the Staff's consideration of the content of Rev. 16 (or for that matter any other future submitted amendments to the AP1000

[20] Intervention Petition at 13.
[21] Id. at 13-14.
[22] Id. at 13.
[23] See 10 C.F.R. Part 52 App.D.III.A.

certified design), it impermissibly challenges the design certification rulemaking process and is not admissible.[24]

Next, NC-WARN asserts that, "[o]n its face, the DCD is incomplete [because] . . . there remain a number of serious safety inadequacies in the AP1000 revision 16 design that have not been satisfactorily addressed."[25] NC-WARN then refers to a list of items which are discussed in correspondence between Westinghouse and the Staff and notes that there remain a number of components whose final design, it believes, remains unresolved.[26] NC-WARN then asserts that these unresolved design issues which include the incomplete recirculation screen design will "ultimately impact the safety of the facility."[27] Following a further listing of components whose design will be affected by the design certification process, NC-WARN makes the observation that "[d]uring the certification process, any or all of these [non-certified components] may be modified by the Commission, and as a result, require the applicant to modify its application."[28] NC-WARN asserts that "it is impossible to conduct the probabilistic risk assessment ('PRA') for the proposed Harris reactors without a final design and operations procedures."[29] We find that this portion of NC-WARN's contention fails to; (1) indicate that any of the components it references are not examined or discussed in the application (or in the certified design, through Rev. 15, to which it refers), thereby failing to satisfy the requirements of 10 C.F.R. § 2.309(f)(1)(vi) to provide support for the proposition that there is an omission from the application, or (2) identify any error in any specific part of the application as well as to present sufficient information to show the existence of a genuine dispute with the applicant, thereby also failing to satisfy the requirements of 10 C.F.R. § 2.309(f)(1)(vi). Thus, this portion of Contention TC-1 does not present an admissible contention.

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[24] See 10 C.F.R. § 2.335(a).
[25] Intervention Petition at 13.
[26] Id. at 14-15.
[27] Id. at 14.
[28] Id. at 15.
[29] Id.

Petitioner's assertions are then followed by a series of general observations regarding the AP1000 Rev. 16 reactor design. These include general statements that the AP1000 design is "experimental in nature and has never been constructed even on a demonstration scale,"[30] the passive design "has less redundancy in safety systems and lower tolerance for equipment failures"[31] and "with advanced technologies, risks of failure are usually higher during the break-in phase."[32] However, NC-WARN fails to relate these statements to any asserted specific flaw in or omission from the application, thus failing to satisfy the requirements of 10 C.F.R. § 2.309(f)(1)(i), (iv), (v), and (vi). NC-WARN provides no support for these statements nor does it provide any information as to why these statements are material to the decision the NRC must make in this proceeding.[33]

Next, NC-WARN asserts "the COLA is incomplete . . . . [and] [s]pecifically . . . the application does not contain the following:

a. The final design of the reactor containment.
b. The control room set up and operator decision-making procedures.
c. Seismic qualifications for various components of the AP1000 reactors.
d. The establishment of fire protection areas.
e. Technology requirements for heat removal.
f. Human factors engineering design throughout the plant.
g. Plant personnel requirements.
h. Alarm systems throughout the plant.
i. Plant-wide requirements for pipes and conduits."[34]

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[30] Id.
[31] Id.
[32] Id.
[33] NC-WARN refers in general to the Union of Concerned Scientists' study, "Nuclear Power in a Warming World: Assessing Risks, Addressing the Challenges." See id. at 15 n.24. However, this study appears to be the source for the general statements about the reduction in the number of active safety systems and NC-WARN does not attempt to use this study to controvert the Progress application.
[34] Id. at 16. We note that, in its answer to Contention TC-1, Applicant simply referred to this as a "laundry list of nine general categories of components and procedures that are in the AP1000 DC Rule and only incorporated by reference into the application." [Applicant's] Answer Opposing the [Intervention Petition] at 16 (Aug. 29, 2008) (hereinafter Applicant Answer). If the Applicant had made the effort to address these asserted omissions, as could easily have been done by calling to our attention where and explicitly how these items are indeed part of the application (as has been done by other applicants in subsequent proceedings – see, e.g., the Virgil C. Summer COL proceeding), the result of LBP-08-21 might well have been materially different. Further, we note that Staff's reply did not address this list at all.

As has now been made clear to us, largely through the filings upon appeal of LBP-08-21,[35] these matters are indeed part of the existing design certification rule for the AP1000, incorporated by reference into the application, and therefore such information is not omitted from the application. Thus this erroneous assertion of an omission fails to satisfy the requirements of 10 C.F.R. § 2.309(f)(1)(vi), and none of the items on this list presents an admissible contention of omission. Further, since NC-WARN neither controverts any specific portion of the application, nor identifies any error in the application relating to these specific matters, and provides no support whatsoever for the proposition that there is any potential error, it fails to present an admissible contention because it does not satisfy the requirements of 10 C.F.R. § 2.309(f)(v) and (vi).

As a further part of this portion of Contention TC-1, NC-WARN also asserts that some of the basic component designs have not been completed such as for the steam generators and pressurizer.[36] Further, NC-WARN expressed that it has no confidence that "several of the fundamental issues will be resolved."[37] However, these matters are already, like the other matters raised by NC-WARN, part and parcel of the existing certified design, and therefore these challenges, to the extent they assert an omission, are in error, and to the extent they assert an error, fail to take issue with any specific portion of the application (which incorporates the certified design), thereby failing to satisfy the requirements of 10 C.F.R. § 2.309(f)(v) and (vi). Finally, to the extent these amount to challenges to the process of design certification, as opposed to asserting an omission from or error in the design being certified, it is an

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[35] The Commission noted in their decision on the appeals of the Board decision that "according to Progress Energy, all nine items are explicitly part of the AP1000 design certification rule. Further, because a COL incorporates both the design certification rule and the amendment application, the Board erred in concluding that these nine items were omitted from the application." CLI-09-08, 69 NRC at __ (slip op. at 10) (internal footnote omitted). In its answer to the NC-WARN petition, the Applicant asserted that NC-WARN provided a "laundry list of nine general categories of components and procedures that are in the AP1000 DC Rule and only incorporated by reference into the Application." Applicant Answer at 16. See also supra note 34.

[36] Intervention Petition at 17.

[37] Id.

impermissible challenge to NRC regulations.[38] Thus, these portions fail to raise an admissible contention.

Finally, NC-WARN asserts that "[a]n assessment of the risk is required for a COLA review, and that depends on the ultimate design of the reactor and how all of the components interact with each other."[39] Further, NC-WARN asserts that the severe accident mitigation alternatives (SAMAs) and risk assessment cannot be determined without having the current configuration, design and operating procedures.[40] The first statement raises no contention at all, and the latter generalized assertion fails to challenge the severe accident mitigation design alternatives (SAMDA) analysis actually set out in the application[41] or to suggest, let alone provide, the requisite support for the proposition that there is any error therein, thereby failing to satisfy the requirements of 10 C.F.R. § 2.309(f)(1)(v) and (vi).[42]

C. Ruling on Contention TC-1

Having examined, in accordance with the Remand, the nine specific asserted omissions as well as the assertions as set out in Contention TC-1 by NC-WARN, we find that NC-WARN has failed to present an "otherwise admissible contention," independent of whether or not the matters asserted are directed at the application or at the design certification rulemaking.

> As noted in the Virgil C. Summer COL proceeding, and as we have indicated above,
>
> > an applicant is permitted to incorporate by reference the certified design into the COLA, but changes proposed to the certified design are to be addressed in the design certification rulemaking and are not within the scope of this proceeding. Nonetheless, along the way, and certainly once a final design is certified, each COL applicant will have to determine whether it will adopt in toto the certified design, or whether it will take exemptions thereto and/or departures therefrom.

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[38] 10 C.F.R. § 2.335(a).
[39] Intervention Petition at 17.
[40] Id.
[41] See Progress Energy Carolinas, Inc. (Shearon Harris Nuclear Site, Units 2 & 3 COL Application), Environmental Report § 7.3.
[42] While NC-WARN plainly asserts that SAMDA analysis cannot be performed until there is a final design, there is indeed a SAMDA analysis in the current application, and NC-WARN does not assert that it is omitted nor does NC-WARN take issue with any specific portion thereof, thereby failing to satisfy the requirements of 10 C.F.R. § 2.309(f)(1)(vi), and failing to present an admissible contention.

> An applicant will also have to demonstrate that the site-specific parameters are bounded by the parameters developed for the certified design. The process for taking such exemptions and departures is set forth in 10 C.F.R. Part 52 App. D.VIII. and we note that there are provisions in both subsections A.4 and B.4 thereof that describe the process for hearings and litigation on any such departures and exemptions. Thus, at the appropriate point in the overall COLA/DCD process, an interested party will have the opportunity to petition for intervention to raise matters that are material to the decision the NRC must make.[43]

This process is at the heart of resolving NC-WARN's objections that the design continues to change, creating potentially new safety and environmental concerns. NC-WARN will have an opportunity to file new contentions related to material new information regarding site-specific plant design issues. The generic (i.e., non site-specific issues) are to be resolved as part of the design certification rulemaking process, and any concerns related to those issues must be addressed in the rulemaking and not within the scope of this proceeding.[44]

For the foregoing reasons, Contention TC-1 is inadmissible, and NC-WARN's petition to intervene is denied for lack of an admissible contention.

Finally, since no portion of Contention TC-1 raised matters that present an admissible contention, we need not determine whether the proffered contention "is appropriate for resolution in the AP1000 design certification amendment rulemaking."[45]

## III. CONCLUSION

Therefore, although, as we have previously determined, NC-WARN has standing to participate, we now find, upon reassessment of whether the single contention, which we had referred to the Staff for consideration in the on-going rulemaking regarding the proposed revision to the AP1000 certified design, satisfies the explicit requirements of 10 C.F.R. § 2.309(f)(1), that it does not do so, and therefore NC-WARN has failed to present an otherwise admissible contention. Thus, the hearing petition of NC-WARN is now denied. As a

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[43] LBP-09-02, 69 NRC __, __-__ (slip op. at 12-13) (Feb. 18, 2009) (internal footnotes omitted).
[44] See, e.g., 10 C.F.R. § 52.55(c); 73 Fed. Reg. 20,963; CLI-08-15, 68 NRC at __-__, (slip op. at 3-4).
[45] CLI-09-08, 69 NRC at __ (slip op. at 12).

consequence, the grant of standing to the South Carolina Office of Regulatory Staff (SC ORS) and the North Carolina Utilities Commission (NCUC) to participate in the hearing as interested governmental entities under 10 C.F.R. § 2.315(c) that we made in our initial order is now denied as moot.

## IV. ORDER

For the foregoing reasons, it is this 30th day of June 2009, ORDERED that:

1. NC-WARN Contention TC-1 is inadmissible.
2. The Petition to Intervene of NC-WARN is denied and the proceeding is terminated.
3. The requests of SC ORS and NCUC to participate in any hearing as interested governmental entities under 10 C.F.R. § 2.315(c) are denied as moot.
4. In accordance with the provisions of 10 C.F.R. § 2.311, any appeal to the Commission of the outcome of this Memorandum and Order shall be taken within ten (10) days of the date it is served.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/
Paul B. Abramson, Chairman
ADMINISTRATIVE JUDGE

/RA/
Dr. William E. Kastenberg
ADMINISTRATIVE JUDGE

/RA/
Dr. Michael F. Kennedy
ADMINISTRATIVE JUDGE

Rockville, Maryland
June 30, 2009

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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| In the Matter of | ) | |
| | ) | |
| PROGRESS ENERGY CAROLINAS, INC. | ) | Docket Nos. 52-022 and 52-023-COL |
| | ) | |
| (Shearon Harris, Units 2 and 3) | ) | |
| | ) | |
| (Combined Operating License) | ) | |

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (RULING ON ADMISSIBILITY OF CONTENTION TC-1 IN RESPONSE TO THE COMMISSION'S REMAND IN CLI-09-08) (LBP-09-08) have been served upon the following persons by Electronic Information Exchange.

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[Original signed by Evangeline S. Ngbea ]
Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 30th day of June 2009