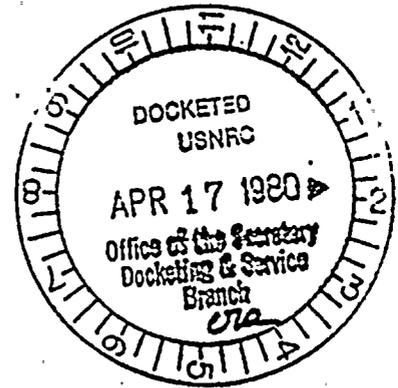


140/1

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

John F. Ahearne, Chairman
Victor Gilinsky
Richard T. Kennedy
Joseph M. Hendrie
Peter A. Bradford



In the Matter of
CAROLINA POWER & LIGHT CO.
(Shearon Harris Nuclear Power Plant,
Units 1, 2, 3, and 4)

Docket Nos. 50-400
50-401
50-402
50-403

MEMORANDUM AND ORDER

In September 1978, the Commission's attention was drawn by the Atomic Safety and Licensing Board in this proceeding, to serious concerns about the completeness of the administrative record on the issue of Carolina Power & Light Company's management qualifications with respect to the Shearon Harris facility. The Commission found that the Licensing Board raised a serious question regarding the integrity of the administrative process and remanded that issue "for a further hearing on the management capability of [the applicant] to construct and operate the proposed Shearon Harris facility without undue risk to the health and safety of the public." CLI-78-18, 8 NRC 293, 294 (1978). The Licensing Board has concluded hearings on the issue and approved the applicant's management capability to construct the facility properly. LBP-79-19, 10 NRC 37 (1979). The Atomic Safety and Licensing Appeal Board has affirmed the Licensing Board's determinations on the merits. ALAB-577, 11 NRC ____ (January 29, 1980). No party to the proceeding has

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disputed the correctness of that determination. The Commission likewise has no reason to disturb that conclusion.

The current dispute involves the question of what steps the NRC staff ought to take with respect to the management qualifications issue at the time the Harris operating license application is filed. The Licensing Board had sufficient residual doubt concerning applicant's management capability to operate the Harris facility that it ordered a hearing held at the operating license stage on that issue. LBP-79-19, supra, 10 NRC at 43, 98-99. The staff appealed, arguing that the Licensing Board lacked authority to order a hearing in the operating license proceeding.

The Appeal Board agreed with the staff, finding that the Licensing Board for that construction permit proceeding lacked the authority, in the regulations or in the Commission's delegation to it, to order a hearing at the operating license stage. Thus, the Appeal Board vacated the Licensing Board's condition on the construction permits which would have required an operating license hearing. However, the Appeal Board directed the staff to conduct a preliminary assessment on the management qualifications issue in the operating license application and provide the same to the Commission and include it in the Federal Register notice of opportunity for hearing. 10 CFR 2.105. ALAB-577, supra, slip op. at 35-36. The NRC staff petitioned for review, urging that the Commission upset the Appeal Board-imposed requirement because it has "manifestly unacceptable precedential implications ... in a procedural and jurisdictional sense." Staff Petition at 2 [emphasis in original]. The staff did not object to the substance of what the Appeal Board had ordered and suggested that the Commission itself provide similar directions to the staff.

For its part, the applicant moved the Appeal Board to reconsider its action, believing that it would delay processing of the operating license application. The Appeal Board disagreed and denied the motion. ALAB-581, 11 NRC ____ (February 20, 1980). The Commission consolidated its consideration of this decision with ALAB-577. Commission Order, extending time (February 21, 1980). The applicant petitioned for review of ALAB-581. In addition to advancing a position similar to staff's position in its petition on ALAB-577, the applicant argued that the Appeal Board's denial of its motion had a "dubious" basis.

The Commission appreciates the willingness of both adjudicatory boards which have considered this case to search for effective means to assure that the management capability issue receives appropriate scrutiny at the operating license stage. The Commission recognizes the importance of the substantive concerns as well as the serious attention given to designing a remedy to address them. Unfortunately, the Appeal Board's remedy, like the Licensing Board's solution, exceeds the authority the Commission has delegated to adjudicatory tribunals in this instance and must be vacated.

It is well-settled that Boards do not possess "the authority to direct the holding of hearings following the issuance of a construction permit." Florida Power and Light Co. (Turkey Point Nuclear Generating Station, Units 3 and 4), 4 AEC 9, 15-16 (AEC 1967). It is also clear that the Boards do not direct the staff in performance of their administrative functions. The Commission does have authority to do so, however, as part of its inherent supervisory authority, even over matters in adjudication. Niagara Mohawk Power Corp. (Nine Mile Point, Unit 2), CLI-73-28, 6 AEC 995 (1973). This

principle is clearly part of Appeal Board practice. Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Unit No. 2), ALAB-553, 10 NRC 12, 14 (1979). Accordingly, in these circumstances, Boards concerned about the conduct of the staff's administrative functions bring the matter to the Commission's attention as described in ALAB-553, supra, or certify a question to the Commission. See, e.g., 10 CFR 2.785(d). In this regard, the Commission expects that Boards will, when appropriate, suggest to it proposed guidance or instructions for the staff in the conduct of its administrative functions at the time Boards bring matters to the Commission's attention. The Commission here only concludes that Boards may not act beyond their delegated authority.

An important reason for this decision is that the Boards' jurisdiction over the management qualifications issue in the construction permit proceeding will end with this decision. 10 CFR 2.717(a). See Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4), CLI-79-5, 9 NRC 607, 610 (1979). The operating license proceeding starts with the notice of proposed action (10 CFR 2.105) and is separate from the prior proceeding. Boards have jurisdiction only in proceedings and the Appeal Board will have lost jurisdiction over the instant issue by the time the operating license notice is published. The Commission is not inclined to overrule or limit its case law that has narrowly construed "proceeding"^{*/} in order to expand the Board's delegation of authority to apply to this case. 10 CFR 2.785(a).

^{*/} See, e.g., Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-513, 8 NRC 694 (1978); Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4), ALAB-526, 9 NRC 122 (1979); Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-530, 9 NRC 261 (1979).

For these reasons, the Commission reverses the portions of ALAB-577 and ALAB-581 to the extent they purport to direct the staff in the performance of administrative tasks in a separate "proceeding." The Commission declines to review the other issues raised by the applicant's petition for review of ALAB-581. 10 CFR 2.786(b). Finally, pursuant to its supervisory authority, the Commission directs the staff to conduct the preliminary assessment and follow the other conditions described by the Appeal Board in ALAB-577, as part of the staff's review of the Harris operating license application acceptance review (10 CFR 2.101(a)), a condition precedent to publication of notice under 10 CFR 2.105 and adopts the Appeal Board's rationale for these conditions as its own.

Chairman Ahearne concurs in the decision that the Appeal Board lacked authority to direct the staff in this case, but dissents from the decision not to grant the applicant's petition to review ALAB-581. Chairman Ahearne would have preferred the approach outlined by the applicant in its motion.*

It is so ORDERED.

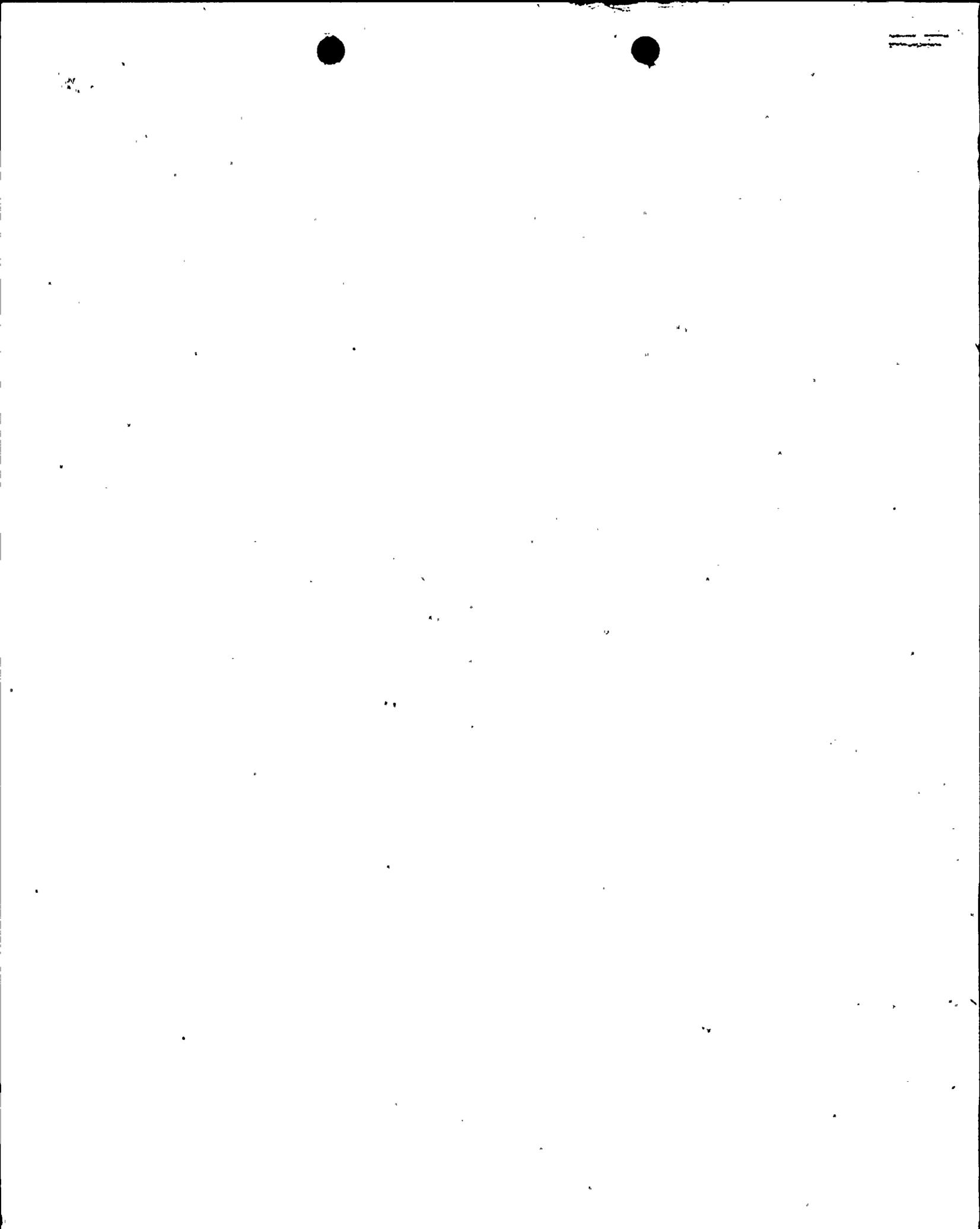
For the Commission



SAMUEL J. CHILK
Secretary of the Commission

Dated at Washington, DC,
this 17th day of April, 1980.

* Section 201 of the Energy Reorganization Act, 42 U.S.C. §5841 provides that action of the Commission shall be determined by a "majority vote of the members present." Commissioners Gilinsky and Bradford were not present when this item was affirmed. Had Commissioners Gilinsky and Bradford been present at the meeting they would have voted with the majority. Accordingly, the formal vote of the Commission on this matter was 2-1, with Chairman Ahearne dissenting in part.

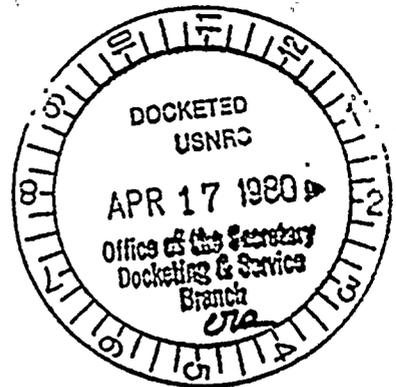


UNITED STATES OF AMERICA
 NUCLEAR REGULATORY COMMISSION

HO/1

COMMISSIONERS:

John F. Ahearne, Chairman
 Victor Gilinsky
 Richard T. Kennedy
 Joseph M. Hendrie
 Peter A. Bradford



In the Matter of

CAROLINA POWER & LIGHT CO.

(Shearon Harris Nuclear Power Plant,
 Units 1, 2, 3, and 4)

Docket Nos. 50-400
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disputed the correctness of that determination. The Commission likewise has no reason to disturb that conclusion.

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^{*/} See, e.g., Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-513, 8 NRC 694 (1978); Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4), ALAB-526, 9 NRC 122 (1979); Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-530, 9 NRC 261 (1979).

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Chairman Ahearne concurs in the decision that the Appeal Board lacked authority to direct the staff in this case, but dissents from the decision not to grant the applicant's petition to review ALAB-581. Chairman Ahearne would have preferred the approach outlined by the applicant in its motion.*

It is so ORDERED.

For the Commission



SAMUEL J. CHILK
Secretary of the Commission

Dated at Washington, DC,
this 17th day of April, 1980.

* Section 201 of the Energy Reorganization Act, 42 U.S.C. §5841 provides that action of the Commission shall be determined by a "majority vote of the members present." Commissioners Gilinsky and Bradford were not present when this item was affirmed. Had Commissioners Gilinsky and Bradford been present at the meeting they would have voted with the majority. Accordingly, the formal vote of the Commission on this matter was 2-1, with Chairman Ahearne dissenting in part.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)		
)		
CAROLINA POWER AND LIGHT COMPANY)	Docket No.(s)	50-400
)		50-401
(Shearon Harris Nuclear Power)		50-402
Plant, Units 1, 2, 3, and 4))		50-403
)		
)		
)		

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document(s) upon each person designated on the official service list compiled by the Office of the Secretary of the Commission in this proceeding in accordance with the requirements of Section 2.712 of 10 CFR Part 2 - Rules of Practice, of the Nuclear Regulatory Commission's Rules and Regulations.

Dated at Washington, D.C. this
17th day of April 1980.

Peggy T. Downing
Office of the Secretary of the Commission

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)	
)	
CAROLINA POWER AND LIGHT COMPANY)	Docket No. (s) 50-400
)	50-401
(Shearon-Harris Nuclear Power)	50-402
Plants, Units 1-4))	50-403
)	

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

John F. Ahearne, Chairman
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In the Matter of
CAROLINA POWER AND LIGHT CO.
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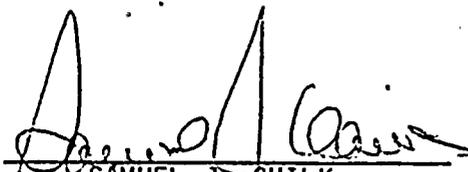
Docket Nos. 50-400
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ORDER

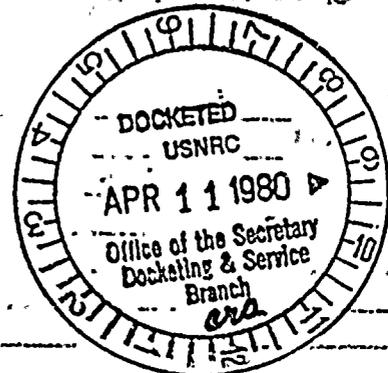
Pursuant to 10 CFR 2.772, the time within which the Commission may take action to review ALAB-577 and ALAB-581 is extended one week until April 18, 1980.

It is so ORDERED.

For the Commission


SAMUEL J. CHILK
Secretary of the Commission

Dated at Washington, DC,
this 11th day of April, 1980.



UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
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CAROLINA POWER AND LIGHT COMPANY) Docket No.(s) 50-400
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I hereby certify that I have this day served the foregoing document(s) upon each person designated on the official service list compiled by the Office of the Secretary of the Commission in this proceeding in accordance with the requirements of Section 2.712 of 10 CFR Part 2 - Rules of Practice, of the Nuclear Regulatory Commission's Rules and Regulations.

Dated at Washington, D.C. this
16th day of April 1980.

Dorothy R. Downing
Office of the Secretary of the Commission

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
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CAROLINA POWER AND LIGHT COMPANY) Docket No. (s) 50-400
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