

**UNITED STATES OF AMERICA
DEPARTMENT OF COMMERCE
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION
NATIONAL MARINE FISHERIES SERVICE**

IN THE MATTER OF:

YADKIN-PEE DEE RIVER HYDROELECTRIC
PROJECT

(License Applicant Carolina Power and Light Co.
d/b/a/ Progress Energy, Inc.)

DOCKET NUMBER

2007-NMFS-0001

FERC PROJECT NUMBER

2206

ORDER RULING ON AGENCIES' MOTIONS TO DISMISS

This Order will be limited to addressing Motions to Dismiss. Other matters pending in this case will be addressed in separate Orders.

On August 14, 2007, the U.S. Fisheries and Wildlife Service ("FWS") filed four (4) separate Motions to Dismiss. The Agency seeks to have dismissed various issues Carolina Power and Light Co. ("Progress Energy") identified as disputed issues of material fact in its Request for a Trial-Type hearing before the FWS and National Marine Fishery Service ("NMFS"). In the first motion, the FWS sought dismissal of **FWS ISSUE 1** because it "seeks a policy and legal determination that is the exclusive province of the Secretary of Interior under § 18 of the Federal Power Act." The second motion seeks dismissal of **FWS ISSUES 2 AND 3** on the grounds that they each seek a determination of an issue that it is not "material" to the FWS preliminary fishway

prescription. In the alternative, the FWS argues that **FWS ISSUE 3** is also subject to dismissal because it impermissibly “attacks a policy or goal of FWS” rather than address any fact underlying the preliminary prescription. The third motion seeks dismissal of **FWS ISSUE 4** on the grounds that it “seeks a policy and legal determination that is the exclusive province of the Secretary of Interior under § 18 of the Federal Power Act.” The fourth motion seeks dismissal of **FWS ISSUE 5** on the grounds that it is not “material” to the FWS preliminary fishway prescription. In the alternative, the FWS argues that **FWS ISSUE 5** is also subject to dismissal because it impermissibly “attacks a policy or goal of FWS” rather than address any fact underlying the preliminary prescription.

On August 20, 2007, the NMFS also filed two (2) separate Motions to Dismiss. In the first motion, the NMFS seeks dismissal of **NMFS ISSUES 2, 3, 5, AND 7** because they are not “material.” In the alternative, the NMFS argues that **NMFS ISSUES 3, 5, AND 7** are subject to dismissal because they do not require a determination of any ascertainable “fact,” but seek a prediction from this judge as to what may occur in the future and represent an attempt by Progress Energy to create a dispute where none exists. The second motion seeks dismissal of **NMFS ISSUES 8, 9, AND 10** because there is no live dispute with respect to the individual issues.

On August 20, 2007, the Intervenor filed a separate Motion supporting the FWS and the NMFS Motions to Dismiss.

On August 20, 2007, Progress Energy filed a Brief in Opposition to Motions to Dismiss by U.S. Fish and Wildlife Service.

On August 21, 2007, an initial prehearing conference was held, at which time the NMFS made an oral Motion to Dismiss NMFS ISSUES 1, 4, AND 6. The NMFS incorporated the FWS arguments in support of the motion. During the Initial Prehearing Conference, Progress Energy made an oral motion to make an offer of proof for dismissed issues.

A. ALJ AUTHORITY IN THIS PROCEEDING

a. Generally

Scope is a critical factor in determining the validity of these Motions to Dismiss. The scope of the ALJ's authority in these proceedings is limited. Section 241 of the Energy Policy Act of 2005 ("EPAAct") makes clear that the "agency trial-type hearing" only concerns "disputed issues of material fact with respect to any agency's mandatory conditions or prescription." Pub. L. 109-58, § 241(a), 119 Stat. 594, 674 (Aug. 8, 2005). The regulations echo this limitation and further clarify that the ALJ's decision must not "contain conclusions as to whether any preliminary condition or prescription should be adopted, modified or rejected, or whether any proposed alternative should be adopted or rejected." See 50 C.F.R. § 221.31(i); 50 C.F.R. § 221.60(b)(3). These conclusions and recommendations are in the exclusive province of the resource agency. See 70 Fed. Reg. at 69,814.

In addition to limiting the scope of the ALJ's authority, the regulations also mandate items that must be included within said scope. Section 221.60(b) requires that the ALJ's decision contain "[f]indings of fact on all disputed issues of material fact; [c]onclusions of law necessary to make the findings of fact (such as rulings on materiality and on the admissibility of evidence); and [r]easons for the findings and conclusions."

See 50 C.F.R. § 221.60(b), published 70 Fed. Reg. 69,804 (Nov. 17, 2005) (to be codified in 7 C.F.R. Part 1, 43 C.F.R. Part 45, and 50 C.F.R. Part 221). The ALJ's decision must therefore include the above mentioned items, and nothing more.

b. Disputed Issue of Material Fact

A "dispute" is simply a conflict or controversy. See Black's Law Dictionary 472 (6th ed.1990). A "material fact" is a "fact that, if proved, may affect a Department's decision whether to affirm, modify, or withdraw any condition or prescription." See 50 C.F.R. § 221.2. Thus, if a fact could not affect a Department's decision even if that fact were proven, then it cannot be considered material. See Id. A "fact" is a not policy or law. See 70 Fed. Reg. at 69,814.

If an issue is all of the above, it will be considered a disputed issue of material fact and must therefore be adjudicated as an item within the scope of the ALJ's authority.

Logically, the above mentioned principles for inclusion can be translated into a test for determining what is not a disputed issue of material fact. As previously discussed, these issues must be excluded from this proceeding as falling outside the scope of the ALJ's authority. If the issue 1) is not a conflict or controversy; or 2) is not something that could affect a Department's decision whether to affirm, modify, or withdraw any condition or prescription even if proven; or 3) is policy or law, then it must follow that the issue is not within the scope of the ALJ's authority and must be dismissed.

B. DISCUSSION OF MOTIONS

The first section sets forth the basis for GRANTING Motions to Dismiss **FWS/NMFS ISSUES 1 AND 4** and **NMFS ISSUES 6**. The second section sets forth the basis for GRANTING Motions to Dismiss **NMFS ISSUE 10**. The third section discusses

reasons for DENYING Motions to Dismiss **FWS/NMFS ISSUES 2, 3, AND 5**, as well as **NMFS ISSUE 7**. The fourth section discusses reasons for DENYING Motions to Dismiss **FWS ISSUE 6, NMFS ISSUE 8, and FWS/NMFS ISSUE 9**. The fifth section discusses reasons for DENYING Progress Energy's Motion to make an offer of proof with respect to dismissed issues.

a. FWS and NMFS Motions to Dismiss FWS/NMFS ISSUES 1 AND 4 and NMFS ISSUES 6 are Granted

Progress Energy seeks to adjudicate in this Trial-Type Hearing the issue of whether "Fish passage at Blewett Falls Dam is necessary to maintain all life stages of American Shad in the Yadkin-Pee Dee River system." The agencies argue that this issue should be dismissed because it "seeks a policy and legal determination that is the exclusive province of the Secretary of Interior under § 18 of the Federal Power Act." **FWS/NMGS ISSUE 1** is the same as **FWS/NMFS ISSUE 4** and **NMFS ISSUE 6** except that these relate to American Eel and Blueback Herring respectively rather than to American Shad. In addition, all the supporting and opposing arguments by the respective parties are very similar for all of the above mentioned issues.¹ Therefore, the following analysis will apply to each of above mentioned three (3) issues equally.

With respect to the policy prong, the agencies argue that the FWS has made the policy decision as to what is "necessary" to maintain all life stages of American Shad in the Yadkin-Pee Dee River system. The agencies concede that perhaps in the world of true possibilities that there could be other ways to maintain all life stages of American

¹ Note that Progress Energy's Disputed Issue 10 appears quite similar to issues 1, 4, and 6 except that it pertains to Atlantic and Shortnose Sturgeon as opposed to the other species mentioned in those issues. This issue will be addressed separately in the next section for reasons discussed later.

Shad in the Yadkin-Pee Dee River system that do not involve fish passage. Inferable from their arguments, however, is that any alternative does not fit into the overall policy plans for maintain all life stages of American Shad in the Yadkin-Pee Dee River system. In that sense, the agencies are arguing that any alternative is not a possibility as they see it and that fish passage at the Blewett Falls Dam is a necessary cog in the workings of their overall policy plans.

Furthermore, in accordance with § 241(c) of the Energy Policy Act of 2005-and under 50 C.F.R. §§ 221.71-221.74, there exists a separate, unrelated process in which a party may raise alternative conditions before FWS or NMFS.

In support of their arguments, the agencies indicate that restoring the American Shad to their historic habitat above the dam through fish passage at the Blewett Falls Dam is the most preferable and achievable means of bringing their policy goals to fruition. They indicate that this is the Secretary's decision and is based on consideration and evaluation of what they refer to as "hundreds of discrete facts."

In Progress Energy's Brief in Opposition to Motions to Dismiss by U.S. Fisheries and Wildlife Service, it makes a number of counter-arguments indicating that this issue is a disputed issue of material fact and is not policy at all. Its argument turns on the definition of "necessary." Progress Energy construes the word necessary to relate to the world of possibilities. They argue for instance that fish passage is not "necessary" to maintain all life stages of American Shad in the Yadkin-Pee Dee River system because they can prove that there could be other ways to achieve this that do not involve fish passage.

The agencies arguments are well taken. The word “necessary” relates to a policy goal rather than what is necessary in the world of possibilities to maintain all life stages of American Shad in the Yadkin-Pee Dee River system. It is the agencies’ prerogative to determine what is and what is not necessary for this as it relates to their overall policy plans. To disprove what the agencies have determined is necessary based on hundreds of discrete facts would be disproving a policy determination and therefore not permissible in this proceeding.

The agencies argue in the alternative that adjudicating this issue would force the ALJ to determine the legal sufficiency of the FWS’s prescription. They argue for instance that it would require a legal determination of whether the prescription constitutes a “physical structure, facility, or device” and ultimately whether the prescription meets the legal standard for a “fishway.” This issue would necessitate legal determinations, which are outside the scope of the judge’s authority in this proceeding.

Issue 1 is one of policy and law and not one of fact. This issue is thus outside the scope of my authority in this proceeding and will be **DISMISSED** accordingly.

As previously discussed, issues 1, 4, and 6, are the same except that each pertains to a different species of fish. Furthermore, the respective parties’ supporting and opposing arguments are similar with respect to these issues. As such, the above analysis applies equally and thus issues 4 and 6 will likewise be **DISMISSED**.

b. FWS and NMFS Motions to Dismiss NMFS ISSUES 10 are Granted

Progress Energy seeks to adjudicate in this Trial-Type Hearing the issue of whether “Fish passage at Blewett Falls Dam is necessary to maintain all life stages of Atlantic and Shortnose Sturgeon in the Yadkin-Pee Dee River system.” In the NMFS’ Motion to Dismiss, it argues that this issue must be dismissed because there is no prescription with respect to this species. The NMFS indicates that it instead merely reserved the authority to prescribe upstream passage for this species and that at some point in the future it may do so. The agencies argument is well taken.

The expressed intent of the regulations is to allow a hearing on “mandatory prescriptions”. 50 C.F.R. § 221.1(a). Furthermore, the regulations provide for instances such as this where the agency has reserved its “authority to develop one or more prescriptions during the term on the license.” *Id.* at 221.1(c). They require the agencies to notify the license parties regarding how to initiate the hearing process and alternatives process if and when such prescription should arise. *Id.*

This issue is not a dispute ripe for a determination, and it must be **DISMISSED**, accordingly. There is nothing in this Order that should be construed to proscribe Progress Energy the opportunity to seek a determination as to whether this issue constitutes a disputed issue of material fact if and when the agency proscribes fish passage for this species. There is also nothing in this Order that should be construed to mean that this issue qualifies as such.

c. FWS and NMFS Motions to Dismiss FWS/NMFS ISSUES 2, 3, and 5, as well as NMFS ISSUE 7, are Denied

Both Federal agencies argue that **FWS/NMFS ISSUE 2, 3, AND 5** because they are not “material” to the preliminary § 18 fishway prescription; therefore, the issues are not appropriate for hearing and are subject to dismissal. The NMFS also sought dismissal of **NMFS ISSUE 7** because it is not properly within the scope of the trial-type hearing because they are not “material”. The relevant disputed issues read as follows:

FWS/NMFS ISSUE 2: Whether lack of fish passage at Blewett Falls Dam is suppressing the existing American shad population in the Yadkin-Pee Dee River system.

FWS/NMFS ISSUE 3: Whether fish passage at Blewett Falls Dam would increase the size of the American Shad population in the Yadkin-Pee Dee River system.

FWS/NMFS ISSUE 5: Whether fish passage at Blewett Falls Dam would increase the size of the American Eel population in the Yadkin-Pee Dee River system.

NMFS ISSUE 7: Whether fish passage at Blewett Falls Dam would increase the size of the Blueback Herring population in the Yadkin-Pee Dee River system

In support of their Motion to Dismiss, the Federal agencies argue that if a fact, even if proven, would not affect the respective agencies decision to affirm, modify, or withdraw a preliminary § 18 fishway prescription it is not “material” and should not be entertained in the EPAAct expedited hearing.

With respect to **FWS/NMFS ISSUE 2**, the FWS argues that the preliminary § 18 fishway prescription does not in any way rely on whether the lack of fish passage is suppressing the existing downstream population of American Shad in the Yadkin-Pee Dee River system. The Agency is concerned with suppression of the upstream population of American Shad that results from the impassable nature of Blewett Falls

Dam. The presence of historic habitat in that area that is suitable for spawning and rearing, are identified as additional reasons for the FWS exercise of authority under § 18 of the Federal Powers Act. The FWS does not dispute that there is a population of American Shad living in the river system below Blewett Falls Dam, but whether that population is suppressed, according to the FWS, is immaterial to the § 18 fishway prescription. The FWS further argues that even if assuming *arguendo* that an agreement is reached with Progress Energy with respect to this particular issue, the Agency would still prescribe fish passage.

The NMFS makes a similar argument in support of its Motion to Dismiss. However, at the initial prehearing conference, the NMFS acknowledges that in its preliminary prescription references are made throughout concerning population. (Prehearing Conference Transcript (PC Tr.) at 87). The Agency admits that it was something that was considered and it is not totally irrelevant, but the NMFS feels that it is not material because the decision would be the same. Id.

The question is whether “materiality” is a subjective standard or an objective standard. As stated earlier a “material fact” is a “fact that, if proved, may affect a Department’s decision whether to affirm, modify, or withdraw any condition or prescription.” See 50 C.F.R. § 221.2. The regulations further provide if a fact could not affect a Department’s decision even if that fact were proven, then it cannot be considered material. See Id. If the Federal agencies argument is accepted, then **FWS/NMFS ISSUE 2** is subject to dismissal based solely on the assertion that even if proved, the Federal agencies would still prescribe fishway prescription. In other words, the Federal agencies are asking for deference without an opportunity for a hearing on the facts.

Progress Energy argues that the test of “materiality” is an objective standard. PC Tr. at 85. According to Progress Energy, it is not sufficient for the Federal agency to say, “well it really wouldn’t matter whether or not we said it or not or whether or not it’s true, because we would come to the same decision.” Id. The test is whether there is a potential for the fact to affect an ultimate decision concerning the prescription. Id.

In ruling on this issue, the most compelling argument in support of the fact that **FWS/NMFS ISSUE 2** is material is the NMFS agency counsel’s own acknowledgements and the fishway prescription itself. The NMFS preliminary § 18 fishway prescription discusses, at length, the historical decline of diadromous fisheries, especially American Shad in the Yadkin Pee-Dee River system. See Comments, Recommended Terms and Conditions, and Preliminary Fish Passage Prescriptions for the Yadkin Pee Dee River Hydroelectric Project (P-2206), from Southeast Regional Office, National Oceanic and Atmospheric Administration to Secretary of Federal Energy Regulatory Commission dated May 11, 2007 (NMFS § 18 Preliminary Prescription), at 6-7. The NMFS recognizes that “[s]afe, timely, and effective fishways for these target species [i.e., American Shad, Blueback Herring, and American Eel] must be designed and constructed for Project facilities that **suppress** native fish populations.” Id. at 13. The NMFS further states “[f]ishways must be capable of supporting the life histories and historical distributions of target species.” Id. at 14. The NMFS then considered several alternatives prior to selecting fishway prescription. The NMFS recognized that if no action was taken, it would “perpetuate the continued decline or stabilize low population levels of diadromous species and not fulfill the restoration goals of the fishery agencies.” Id. at 14, 15.

Given the fact that population, was, indeed, one factor considered by the Federal agencies in selecting fishway prescription, one cannot conclude that the factor was not “material.” In so ruling, I concur with the statement in Idaho Power Co. Hells Canyon Complex, EAct Docket No. 06-0001, “Congress wanted to provide the parties an opportunity to develop facts that might prove material to the decision making of the Federal Energy Regulatory Commission, and enhance the review of the federal courts.” (FERC Project No. 1971 (Ruling Denying Motions to Dismiss Issues dated May 24, 2006). Section 241 of EAct was specifically enacted, in light of the economic and environmental consequences involved in licensing hydroelectric facilities, to afford interested parties an opportunity to raise concerns and restore fairness to the license proceedings. See Providing for Consideration of H.R. 6, Energy Policy Act of 2005, H.R. Rep. No. 109-49 (April 19, 2005); see also Energy Policy Act of 2005, Before the House Comm. on Energy and Commerce, FDCH Congressional Testimony (Feb. 10, 2005)(Testimony of Thomas R. Kuhn, President, Edison Electric Institute; Natural Gas Supply and Prices, Before the House Subcomm. on Interior, Environment and Related Agencies, FDCH Congressional Testimony (Nov. 9, 2005)(Testimony of P. Lynn Scarlett, Assistant Secretary, Depart of Interior).

In light of the above, **FWS/NMFS ISSUE 2** involves a ripe dispute of material fact. Accordingly the Federal agencies’ Motion to Dismiss is **DENIED**.

The Federal agencies’ Motion to Dismiss **FWS/NMFS ISSUE 3 and 5**, and the NMFS’ Motion to Dismiss **NMFS ISSUE 7** are also **DENIED**. All three issues concern “Whether fish passage at Blewett Falls Dam would increase the size of target species [i.e, American Shad, Blueback Herring, and American Eel] population.” The Agencies raise

similar arguments raised in support of **FWS/NMFS ISSUE 2**, which are not convincing. In the alternative, the NMFS argues that the **FWS/NMFS ISSUE 3 and 5**, and **NMFS ISSUE 7** do not embrace a provable fact; rather they embraces a prediction with respect to the fish population. According to the Federal agencies, it is an attempt on the part of Progress Energy to reach the agency's goals. At this juncture, dismissal of **NMFS ISSUE 3 and 5**, and **NMFS ISSUE 7** would be premature. It is noteworthy that the issues raised by Project Energy are akin to the issues raised and addressed by other judges. Those issues include:

- Whether operating the Project to maintain the summer Lake level causes significant increases in nutrient levels in the Lake, resulting in an increase in overall nutrient loading (eutrophication). See Avista Corp. v. Bureau of Indian Affairs, et. al., Docket No. DCHD-2007-01 (FERC Docket Nos. 2545, 12606) (Decision, Jan. 8, 2007).
- Whether Project operations to maintain the summer Lake level have adverse impacts on native fish in the Lake . . . Id.
- Whether operating the Project to maintain summer Lake level is a cause of the increase in growth of exotic and noxious aquatic weeds, including Eurasian watermilfoil, in the Lake. Id.
- Whether operating the Project to maintain the summer Lake level has impaired the function of the wetlands and riparian habitats on the Reservation within the Project boundary, . . . Id.

- Whether stocks of anadromous fish suitable to conditions above Iron Gate are available to use prescribed fishways. Klamath Hydroelectric Project, Docket No. 2006-NMFS-0001 (FERC Project No. 2082, Decision, Sept. 27, 2006).
- Whether the seasonally high flows will help to improve riparian conditions in the J.C. Boyle bypass reach; and if so, whether and to what extent such improved riparian conditions will affect native riparian-focal bird species. Id.
- Whether the seasonal high flow specified in BLM Conditions 4 A.1(c) will have a net adverse effect on redband trout spawning. Id.

Accordingly, the issues involve ripe disputes of material fact. The Federal agencies' Motions to Dismiss **NMFS ISSUE 3 and 5**, and **NMFS ISSUE 7** are **DENIED**.

d. FWS and NMFS Motions to Dismiss FWS ISSUE 6, NMFS ISSUE 8, and FWS/NMFS ISSUE 9 are Denied

By Motion and orally during the August 21, 2007 Prehearing Conference, both Federal agencies and the Intervenor argue that **FWS ISSUE 6** and **NMFS ISSUE 8** and **FWS/NMFS ISSUE 9** are not disputed issues of material fact. The essence of their arguments is that there is no dispute because the prescription is subject to modification and that these issues are better left for stipulations. For the reasons discussed below, the ALJ denied Motions to Dismiss these issues during the Prehearing Conference.

FWS ISSUE 6: "The upstream migration period for American Shad is February 15 through May 15." Progress Energy's Request for Hearing to FWS, at p. 16. In its Answer, the FWS agreed that this issue is material and disputed, although it noted that the prescription itself allowed for modification of the timeframe based upon monitoring and data collection. Similarly, the Intervenor parties agree that the period is subject to

the amendment or change in coordination with other parties. While there may be adjustments to the period in the future, the current preliminary prescription makes a material, factual and effective statement. Unless a stipulation specific to the issue is received, the issue will be heard.

NMFS ISSUE 8: “The upstream migration period for American Shad and Blueback Herring is February 15 through May 15.” Progress Energy’s Request for Hearing to NMFS, at p. 8. In its Answer and Motion to Dismiss, the NMFS contended that while the issue was material and factual, it was not in dispute since the time period would be subject to modification. The Intervening parties stated that while the issue was triable, it was appropriate for stipulation. They also noted that the time period would be subject to modification. While there may be adjustments to the period in the future, the current preliminary prescription makes a material, factual and effective statement. Unless a stipulation specific to the issue is received, the issue will be heard.

FWS ISSUE 9: “The downstream migration period for American Shad is year round.” Progress Energy’s Request for Hearing to FWS, at p. 17. In its Answer, the FWS states that while the issue is material and factual, it is not disputed. The FWS explained that the migration will be monitored, and the period modified based upon data received. The Intervening parties stated that while the issue is triable, it is appropriate for stipulation. Again, while there may be adjustments to the period in the future, the current preliminary prescription makes a material, factual and effective statement. Unless a stipulation specific to the issue is received, the issue will be heard.

NMFS ISSUE 9: “The downstream migration period for American Shad and Blueback Herring is year round.” Progress Energy’s Request for Hearing to NMFS, at p. 19. In its Answer and Motion to Dismiss, the NMFS contends that while material and factual the issue is premature and not triable. The Intervening parties recognize the issue as triable, but appropriate for stipulation. While there may be changes to the description of the migration period in the future, the current preliminary prescription makes a – material, factual and effective statement. Unless a stipulation to the specific issue is received, the issue will be heard.

Accordingly, the issues involve ripe disputes of material fact. The Federal agencies’ Motions to dismiss **FWS ISSUE 6** and **NMFS ISSUE 8** and **FWS/NMFS ISSUE 9** are **DENIED**.


e. Progress’s Motion to Make an Offer of Proof on Dismisses Issues is Denied

During the August 21, 2007 Initial Prehearing Conference, Progress Energy made an oral motion to make an offer of proof on dismissed issues. The regulations do not provide for such an offer of proof to be made. On the contrary, the ALJ only has authority to make findings of fact regarding disputed issues of material fact. See C.F.R. § 221.31, 221.60. It follows that offers of proof regarding issues dismissed as not being disputed issues of material fact would be irrelevant to this proceeding. Such offers of proof would further complicate and burden an already complex and expedited proceeding. In any case, Progress Energy has already submitted proof within their

Requests for a Trial-Type Hearing and various briefs. Progress Energy's Motion to make an offer of proof is **DENIED**.

SO ORDERED.

Done and dated August 23, 2007 at
Seattle, Washington


ANTHONY B. CANORRO
ADMINISTRATIVE LAW JUDGE²

² Pursuant to 15 U.S.C. § 1541, the United States Coast Guard may perform all adjudicatory functions required by Chapter 5 of Title 5 of the United States Code to be performed by an Administrative Law Judge for any marine resource conservation law or regulation administered by the Secretary of Commerce acting through the National Oceanic and Atmospheric Administration.

**UNITED STATES OF AMERICA
DEPARTMENT OF COMMERCE
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION
NATIONAL MARINE FISHERIES SERVICE**

IN THE MATTER OF:

YADKIN-PEE DEE RIVER HYDROELECTRIC
PROJECT

(License Applicant Carolina Power and Light Co.
d/b/a Progress Energy, Inc.)

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Declaration of Service

As agreed to by the parties at the Initial Prehearing Conference held on August 21, 2007, the following lead representatives are served by accepting service on behalf of their respective client entity or entities. The lead representative has agreed to then forward copies of documents served by the Administrative Law Judge office to other individuals within their client entity or entities.

I hereby declare that I have served (1) **INITIAL PREHEARING CONFERENCE ORDER** (2) **ORDER DENYING PROGRESS ENERGY'S MOTION FOR RETURN OF REFERRAL**; and (3) **ORDER RULING ON AGENCIES' MOTIONS TO DISMISS**, to the following parties (or designated representatives) at the addresses indicated below, by Federal Express – overnight, courier service:

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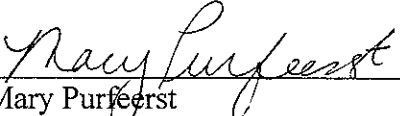
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Done and dated this 23rd day of August in
Seattle, Washington.