

March 7, 2022

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Before the Commission

In the Matter of)	
)	
Constellation Energy Generation, LLC)	Docket Nos. 50-277-SLR
(f/k/a Exelon Generation Company, LLC))	50-278-SLR
)	
Peach Bottom Atomic Power Station,)	
Units 2 and 3)	

Petition for Partial Reconsideration of CLI-22-04

Pursuant to 10 C.F.R. § 2.341(d) and 10 C.F.R. § 2.323(e), Constellation Energy Generation, LLC (“Constellation,” formerly known as Exelon Generation Company, LLC) hereby requests reconsideration of the portion of the Commission’s decision in CLI-22-04, Memorandum and Order (February 24, 2022) directing the Nuclear Regulatory Commission (“NRC”) Staff to amend the expiration dates in the subsequent renewed licenses for the Peach Bottom Atomic Power Station (“Peach Bottom”), Units 2 and 3.¹ Constellation requests that the Commission entertain this petition because the Commission’s order directing the license amendments constitutes a clear and material error that: (1) Constellation could not have reasonably anticipated as the Commission gave no notice that it was reconsidering the applicability of its environmental rules and its generic environmental impact statement on license renewal (“GEIS”)² to subsequent license renewal proceedings, and (2) as discussed below, renders the decision to amend the license expiration dates invalid.

¹ CLI-22-04, slip op. at 3.

² NUREG-1437, Revision 1, Generic Environmental Impact Statement for License Renewal of Nuclear Plants (June 2013).

The Commission’s decision directing the amendment of the expiration dates in the Peach Bottom licenses is arbitrary and capricious, and an abuse of discretion, because it is not supported by an adequate explanation or reasoned analysis of the effects of this partial vacatur of the Peach Bottom licenses. As discussed below, the Commission should apply the standards in *Oglala Sioux Tribe v. NRC*, 896 F.3d 520 (D.C. Cir. 2018), and *Allied-Signal, Inc. v. NRC*, 988 F.2d 146 (D.C. Cir. 1993). The Commission’s decision is also arbitrary and capricious, and an abuse of discretion, because it is inconsistent with the timely renewal provisions in the Administrative Procedure Act, which give Constellation an absolute statutory right to continue to operate the Peach Bottom units until its subsequent license renewal application has been finally determined by the agency.³ Consequently, shortening the expiration date in the licenses is contrary to law, serves absolutely no purpose, and among other potentially disruptive effects discussed below, sows confusion with the public and other stakeholders.⁴ And unfortunately, the

³ 5 U.S.C. § 558(c) (“When the licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency.”). See also 10 C.F.R. § 2.109(b) (“If the licensee of a nuclear power plant licensed under 10 CFR 50.21(b) or 50.22 files a sufficient application for renewal of either an operating license or a combined license at least 5 years before the expiration of the existing license, the existing license will not be deemed to have expired until the application has been finally determined.”). The application for subsequent license renewal of the Peach Bottom units was determined by the NRC Staff to be sufficient before docketing. Letter from G. Wilson, NRC, to M. Gallagher, Exelon, Peach Bottom Atomic Power Station, Units 2 and 3, Determination of Acceptability and Sufficiency for Docketing, Proposed Review Schedule, and Opportunity for a Hearing Regarding Exelon Generation Company LLC Application for Subsequent License Renewal (Aug. 27, 2018) (ADAMS Accession No. ML18191B085); see also 83 Fed. Reg. 45,285 (Sept. 6, 2018) (“By letter dated August 28, 2018, ... the NRC Staff determined that Exelon had submitted sufficient information in accordance with 10 CFR 54.19, 54.21, 54.22, 54.23, 51.45, and 51.53(c), to enable the staff to undertake review of the application, and that the application is therefore acceptable for docketing.”).

⁴ Leaving the subsequent renewed licenses for the Peach Bottom units in place with the license expiration dates unchanged is the best approach for recognizing and allowing their operation under the timely renewal doctrine. While reinstating the previous Peach Bottom licenses would also preserve Constellation’s rights under the timely renewal doctrine, that approach would eliminate the license conditions that were imposed as part of subsequent license renewal, which adopt the Updated Final Safety Analysis Report Supplement developed for subsequent license renewal and require compliance with the subsequent license renewal commitments (including enhancement to aging management programs) that must be completed prior to the second period of extended operation. Peach Bottom Atomic Power Station, Unit 2 – Subsequent Renewed Facility Operating License (ADAMS Accession No. ML052720266), License Condition 2.C(19); Peach Bottom Atomic Power Station, Unit 3 – Subsequent Renewed Facility Operating License (ADAMS Accession No. ML052720269), License Condition

Commission’s failure to consider the disruptive effects of its decision comes at this unique moment in time when our country must take urgent action to address the climate crisis and energy security. The current Russian-Ukraine conflict and the uncertain state of geopolitics make clear, now more than ever, the importance of our nation’s largest source of non-fossil fuel electric generation. Our nation’s existing nuclear fleet, by its very nature, is needed to keep America on a path toward energy independence and to help protect against the adverse effects on all Americans of fossil fuel supply disruptions and soaring energy prices.

In *Oglala Sioux*, the U.S. Court of Appeals for the District of Columbia Circuit applied the standard in *Allied-Signal* in determining whether a license should be vacated following a finding that the environmental review under the National Environmental Policy Act (“NEPA”) supporting issuance of the license was deficient.⁵ On remand, the Commission then relied on this same analysis in determining that the license at issue should remain in effect.⁶ Moreover, the Commission stated:

[W]e expect that the principles discussed in this order, and in the court’s *Oglala Sioux Tribe* opinion, will help to frame and inform consideration of any future questions regarding remedy that may arise in those limited categories of NRC hearings for which post-license-issuance hearings are permissible under § 2.1202(a).⁷

These same principles appear equally applicable regarding remedy arising from post-license-issuance decisions on Commission review.

2.C(19). In short, reinstating the prior license would accomplish nothing other than to eliminate beneficial license conditions supporting the second period of extended operation.

⁵ *Oglala Sioux*, 896 F.3d at 536-38.

⁶ *Powertech (USA), Inc. (Dewey Burdock In Situ Uranium Recovery Facility)*, CLI-19-01, 89 N.R.C. 1, 8 (2019) (“[T]he court’s choice of remedy suggests to us that vacating Powertech’s license will continue to remain inappropriate unless there is some material change in the circumstances the court considered under its *Allied-Signal* analysis.”).

⁷ *Id.* at 11. While Commissioner Baran dissented regarding the Commission’s decision not to perform its own equitable analysis *de novo*, his dissent recognized the need for “the Commission to weigh the equities at stake and make a fact-based decision about whether to leave the license in place prior to the NRC Staff’s completion of an adequate NEPA analysis.” *Id.* at 13.

Under the standards set forth in *Oglala Sioux* and *Allied-Signal*, a decision to vacate a license to remedy a perceived deficiency in the NEPA review should consider (1) the seriousness of the deficiency in the NRC Staff’s review “and thus the extent of doubt whether the agency chose correctly,” and (2) “the disruptive consequences of an interim change that may itself be changed.”⁸ “More important” (as the Court stated in *Oglala Sioux*), the decision should consider whether any harm—irreparable or otherwise—would occur from a disposition that leaves the license in effect for now.⁹ An analysis under these standards weighs strongly in favor of keeping the subsequent renewed licenses in place without modifying the expiration dates to eliminate the subsequent period of operation, since eliminating the second period of extended operation will only cause significant uncertainty and harm to Constellation without benefitting any NEPA interests.

First, with respect to the seriousness of the NEPA deficiency perceived by the Commission, there is nothing in the current record showing that the NRC Staff’s evaluation of the impacts from any Category 1 issue in the Supplement to the GEIS for Peach Bottom is incorrect or will need to be changed.¹⁰ There is nothing in the record of the Peach Bottom proceeding indicating that the environmental effects of a Category 1 issue might not be the same in a second period of extended operation as in the first. In fact, the Commission acknowledged in CLI-22-02 that the Staff may have intended the 2013 GEIS to address subsequent license

⁸ *Oglala Sioux*, 896 F.3d at 538 (quoting *Allied-Signal*, 988 F.2d at 150-51).

⁹ *Oglala Sioux*, 896 F.3d at 538.

¹⁰ The only issue that remained before the Commission in this proceeding was whether the discussion of the environmental impacts of design-basis accidents in Draft Supplement 10 to Generic Environmental Impact Statement for Subsequent License Renewal of Peach Bottom Operating License was adequate. *See* Beyond Nuclear, Inc.’s Motion to Reopen the Record for Purposes of Considering and Admitting a New Contention Based on Draft Supplement 10 to Generic Environmental Impact Statement for Subsequent License Renewal of Peach Bottom Operating License and Request for Consideration of Some Elements of the Motion Out of Time (Sept. 23, 2019) at 1. There is nothing in the record establishing that these impacts are anything other than small.

renewal.¹¹ Further, both Constellation and the NRC Staff considered whether there was any new and significant information affecting the applicability of the Category 1 findings to Peach Bottom. Consequently, when the NRC Staff performs its revision to the GEIS, it may well be the case that all the analyses of Category 1 issues in the 2013 GEIS are found to be applicable to Peach Bottom in the second period of extended operation. Thus, whether any of the environmental findings currently supporting such operation will need to be changed is in doubt.

Second, amending the expiration dates in the subsequent renewed licenses for the Peach Bottom units will have disruptive consequences. First, amending the expiration dates creates confusion (and misleads the public and other stakeholders) regarding Constellation’s statutory right and authority to operate those units under the timely renewal provision in the Administrative Procedure Act while the Staff is performing additional environmental review, regardless of whether that review and any further hearings are completed by 2033-2034.¹² Other disruptive effects that could occur if the Commission proceeds with the license amendments include, but are not limited to: (i) accelerated depreciation expense (estimated to be tens of millions of dollars per year for Constellation’s 50% share of Peach Bottom), affecting the income statement for the parent company, (ii) an increase in the asset retirement obligation (“ARO”) attributable to the change in license expiration dates, which results in a larger liability

¹¹ CLI-22-02, slip op. at 10.

¹² See, e.g., Robert Bryce, Forbes “NRC Rescinds License Extensions, Creates More Uncertainty For Investment In Nuclear Sector” (Feb. 28, 2022) (“[G]iving a license extension and then a couple of years later snatching it back on what appears to be little more than a whim - adds yet more uncertainty to an industry that desperately needs stability and a clear regulatory framework.”); The Guggenheim Daily Transmission, Power & Utilities (Mar. 1, 2022) (“The truncating of two existing SLRs and overturning of the prior framework is somewhat perplexing, with the Chair himself noting that it was not a ‘light’ decision. We do not see this as a technical issue – but rather a legal one, with extensions still possible after the current expirations. Stay tuned.”); Vertical Research Partners, Utilities & Power (Feb. 27, 2022) (“The NRC directed staff to change the Peach Bottom license expiration dates back to 2033 and 2034 until completion of further NEPA analysis. How this plays out remains unclear, although shortening the licenses, even temporarily, could require re-working depreciation schedules and trigger non-cash charges.”).

on the balance sheet (estimated to range from tens of millions to over a hundred million dollars for Constellation's 50% share of Peach Bottom), and (iii) delays in beneficial capital projects that can no longer be justified when licensed plant life is shortened and the resultant impact on union labor that performs these capital projects in Pennsylvania. In addition, the increase in the ARO may well have a real impact on consumers, as the ratepayers of PECO Electric Company would likely experience an increase in their continued decommissioning funding obligations associated with PECO's prior 50% ownership in Peach Bottom.

Finally, because Constellation has the statutory right under the Administrative Procedure Act to continue to operate the Peach Bottom units until its subsequent renewed license application is finally determined, there is no harm to any person from leaving the expiration dates in the subsequent renewed licenses unchanged.¹³ In short, amending the expiration date serves absolutely no purpose. Further, because the second period of extended operation will not commence for over a decade, no environmental effects related to subsequent license renewal will occur until then, and there is plenty of time for the NRC Staff to perform the additional NEPA review and take any further actions that might result before the second period of extended operation. Indeed, as the Commission has stated, it expects "that the Staff will be able to evaluate the environmental impacts [and cure the NEPA deficiency] prior to [Constellation] entering the subsequent license renewal period."¹⁴

For all these reasons, the Commission should reconsider its order directing amendment of the expiration dates in the subsequent renewed licenses for Peach Bottom Units 2 and 3. Further, to avoid any precipitous action by the NRC Staff while this petition is being considered,

¹³ The lack of harm is underscored by the Commission having left unchanged the license expiration dates in the subsequent renewed licenses for the Surry Power Station.

¹⁴ CLI-22-04, slip op. at 4.

Constellation requests that the Commission direct the NRC Staff to defer any action on amending the license expiration date pending further order from the Commission.

Counsel for Constellation spoke with counsel for Beyond Nuclear and counsel for the NRC Staff in an effort to resolve the issues raised in this petition but were informed that the NRC Staff and Beyond Nuclear have not yet taken a position on the instant petition.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Petition for Partial Reconsideration of CLI-22-04 has been served through the E-Filing system on the participants in the above-captioned proceeding this 7th day of March, 2022.

/signed electronically by Anne Leidich/
Anne Leidich