

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION

In the Matter of)	
Constellation Energy Generation, LLC)	
f/k/a Exelon Generation Company, LLC)	Docket Nos. 50-277/278 SLR
Peach Bottom Atomic Power Station,)	March 31, 2022
Units 2 & 3)	

**BEYOND NUCLEAR’S RESPONSE TO CONSTELLATION ENERGY
GENERATION, LLC’S AND NRC STAFF’S VIEWS ON CLI-22-04**

I. INTRODUCTION

Pursuant to the U.S. Nuclear Regulatory Commission’s (“NRC’s” or “Commission’s”) instructions in *Exelon Generation Co., LLC* (Peach Bottom Atomic Power Station, Units 2 and 3), CLI-22-04, ___ N.R.C. ___, slip op. at 4 (Feb. 24, 2024) (“CLI-22-04”), Beyond Nuclear, Inc. (“Beyond Nuclear”) hereby responds to Constellation Energy Generation, LLC’s (“Constellation’s”) Response to Commission Request for Views in CLI-22-04 (Mar. 21, 2022) (“Con. Views”) and NRC Staff Views on the Practical Effects of (1) the Subsequent Renewed Licenses Continuing in Place and (2) the Previous Licenses Being Reinstated (Mar. 21, 2022) (“Staff Views”).

II. DISCUSSION

Neither Constellation nor the NRC Staff makes any effective argument against the Commission’s sound legal and practical reasoning in partially vacating Constellation’s subsequent renewed license. Having held that the Generic Environmental Impact Statement for License Renewal of Nuclear Plants, NUREG-1437, Rev. 1 (2013) (“2013 GEIS”) does not apply to any reactor renewal period past the initial license renewal term, the Commission reasonably determined that the termination dates of the initial license

terms (2033 and 2034) demarcated the maximum temporal period for which it could, at this point, lawfully permit a second renewal of the Peach Bottom licenses.¹

Constellation repeats the arguments of its Petition for Reconsideration of CLI-22-04 (Mar. 7, 2022) (“Petition”) that the Commission should leave in place *both* the substantive content of the extended license *and* the extended termination dates of 2053 and 2054. Those arguments have three main threads: (a) a new environmental review for Peach Bottom is unlikely to reach any different conclusions than the 2013 GEIS, and thus should not prevent the Commission from approving a full extended license term; (b) no purpose would be served by reducing the length of the extended license term; and (c) the economic and practical effects of reducing the renewed license term from thirty to ten years could be significant. But none of these claims has merit.

A. Constellation’s Attempt to Minimize the Significance of the Commission’s Recent Decisions is Unsupported.

Constellation’s first argument, that a new environmental review is unlikely to reach any different conclusions than the 2013 GEIS, ignores the significance of the Commission’s recent subsequent license renewal decisions, including *Florida Power & Light Co.* (Turkey Point Nuclear Generating Units 3 and 4), CLI-22-02, ___ N.R.C. ___ (Feb. 24, 2022) (“CLI-22-02”) and CLI-02-04. In CLI-22-02, the Commission unequivocally held that “the 2013 GEIS does not cover the subsequent license renewal period” and therefore, “the Staff may not exclusively rely on the 2013 GEIS and Table B-1 for the evaluation of environmental impacts of Category 1 issues.”² And in CLI-22-04, the Commission further clarified that the 2013 GEIS covers *only* the temporal period of

¹ CLI-22-04, slip op. at 3.

² *Id.*, slip op. at 6.

the initial license renewal term.³ As the Commission concluded in CLI-22-02, the “issue” of the limited applicability of the 2013 GEIS “is significant and affects other proceedings.”⁴ Moreover, the Commission’s decision was based on a “plain language” reading of the regulations, under basic principles of regulatory interpretation.⁵

Thus, the inapplicability of the 2013 GEIS and the lack of any other environmental impact statement (“EIS”) to support a twenty-year license extension beyond 2033 and 2034 are not minor issues that can be waved away by speculating that a new GEIS would not come out any differently.⁶ Nor can the applicability of 10 C.F.R. § 51.53(c) to the Peach Bottom subsequent license renewal proceeding be characterized as a “close” question about an ambiguous regulation. Section 51.53(c)(3) states quite plainly that its terms apply only to “initial” license renewal. In any event, as discussed at length in Beyond Nuclear’s response to Constellation’s Petition, the record of this proceeding contains substantial evidence that the environmental impacts of operating aging nuclear plants out to 80 years are significantly different, more complex, and more uncertain than the impacts of operating them out to 60 years.⁷

³ CLI-22-04, slip op. at 3.

⁴ CLI-22-02, slip op. at 7.

⁵ CLI-22-02, slip op. at 7 (citing *Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92, 104-05 (2015) and *Christensen v. Harris Cty*, 529 U.S. 576, 588 (2000) (“Because the rule language is clear on its face, it is unnecessary to resort to other sources to discern its meaning.”)).

⁶ See Con. Views at 1 n.1 (“There is nothing in the record of this proceeding establishing that the environmental effects of Category 1 issues evaluated in [the 2013 GEIS] will not be the same in a second period of extended operation as the first.”)

⁷ See Beyond Nuclear’s Response to Constellation Energy Generation, LLC’s Petition for Partial Reconsideration of CLI-22-04 and Beyond Nuclear’s Views in Response to CLI-22-04 (March 17, 2022) (Beyond Nuclear’s Response”).

Likewise, if no valid GEIS exists to support extended renewal of the Peach Bottom licenses past 2033 and 2034, then there was no “final environmental impact statement” for the “proposed action” of extended license renewal that could have been supplemented by considering “new and significant information” under 10 C.F.R. § 51.92. As both a legal and practical matter, a nonexistent environmental impact statement is not capable of supplementation. Thus, there is no legal or practical validity to Constellation’s claim that it and the Staff considered “new and significant information” that could change the results of the inapplicable 2013 GEIS.⁸

Constellation’s arguments are also inconsistent with federal court decisions governing vacatur of agency decisions made under the National Environmental Policy Act (“NEPA”). These decisions generally call for *complete* vacatur for NEPA violations, especially violations involving the failure to comply with the notice-and-comment requirements of NEPA and the Administrative Procedure Act (“APA”).⁹ As discussed further in Section III below, if any change is made to CLI-22-04, it should be to vacate the *entire* subsequent renewed license and impose the conditions of the new license by Commission order.¹⁰

⁸ See Con. Views at 1 n.1.

⁹ See Beyond Nuclear’s Response at 10 (citing *Standing Rock Sioux Tribe v. United States Army Corps. of Eng’rs*, 985 F.2d 1032, 1050 (D.C. Cir. 2021)).

¹⁰ Constellation’s parade of allegedly horrible precedents set by the Commission’s decisions, see Con. Views at 2-3, is simply frivolous in light of the fact that CLI-22-02 is solidly based on a plain-language interpretation of an NRC regulation. Abiding by the plain language of a regulation is an essential element of APA compliance. *Christensen*, 529 U.S. at 588 (When presented with an unambiguous regulation, an agency may not, “under the guise of interpreting [that] regulation, . . . create de facto a new regulation.”). Thus, as Constellation must have been aware, it is highly doubtful that the Commission’s previous decision in *Exelon Generation Co., L.L.C.* (Peach Bottom Atomic Power Station, Units 2 and 3), CLI-20-11, 92 N.R.C. 335 (2020) -- which elided over the

B. Reducing the Length of the Renewed License Term Serves Significant Purposes.

Constellation's argument that modifying its extended license termination dates to conform to the initial renewed license terms "would serve no purpose" is incorrect. First, as discussed above, the change in the temporal license term serves the key purpose of ensuring that Peach Bottom is not licensed to operate for any period of time that is not supported by a lawful environmental impact statement. Thus, it is necessary for NEPA compliance. Second, by vacating the extended license term, the Commission maintains consistency with judicial precedents for vacatur of erroneous NEPA rulings.¹¹

Constellation argues that the timely renewal doctrine makes it unnecessary to modify the termination dates, because Constellation "has the right under the Administrative Procedure Act to continue to operate Peach Bottom Units 2 and 3 until its subsequent license renewal application has been finally determined."¹² But the timely renewal doctrine does not excuse NRC from complying with NEPA in its licensing decisions. And where the Commission's environmental analysis is limited to a particular time frame, *i.e.*, an initial 40-year term or an additional twenty-year term, a NEPA-compliant licensing decision itself may not be left open-ended. More importantly, there is no reason to think the NRC is incapable of finishing a new environmental analysis in well under ten years. Indeed, Constellation itself supports the reasonableness of that conclusion by

regulation's clear terms -- would have survived the fundamental plain-language test had the issue been appealed to federal court.

¹¹ See note 9, *supra*.

¹² Con. Views at 2 (citing 5 U.S.C. § 558(c)).

asserting that the conclusions of the 2013 GEIS are unlikely to change significantly.¹³ Thus, Constellation’s citation to the timely renewal doctrine provides no support for its position.

Constellation also argues that if the subsequent renewed license term is retained, there is “more than a decade before the subsequent period of extended operation commences and any related environmental effects will occur.”¹⁴ But Constellation ignores 10 C.F.R. § 54.31(c), which provides that a “renewed license will become effective immediately upon its issuance, thereby superseding the operating license or combined license previously in effect.” By operation of § 54.31(b), the remaining ten years of Peach Bottom’s initial licenses were added to the twenty years of the extended renewed licenses, amounting to a renewal term of thirty years. Thus, if Constellation keeps the extended license renewal terms for Peach Bottom Units 2 and 3, no time remains before the environmental impacts of those extended terms begin.

C. Constellation Fails to Provide Economic or Practical Justification for Restoring the 30-Year Extended License Term.

All parties appear to agree that maintaining the substantive content of Constellation’s subsequent renewed license best serves the interests of public health and safety, environmental protection, and orderly regulation of Peach Bottom’s operation. In addition, however, Constellation argues that the Commission should restore the full

¹³ Indeed, Constellation itself supports the reasonableness of that conclusion by asserting that the conclusions of the 2013 GEIS are unlikely to change significantly. Con. Views at 1 n. 1.

¹⁴ Con. Views at 3.

thirty-year extended license term in order to prevent significant economic and practical harm to its investors and ratepayers.¹⁵

1. Alleged economic harm

A supporting declaration by Bryan Michels, Constellation’s Director of Accounting Policy and External Financial Reporting, lists four “potential disruptive financial effects” that reducing Peach Bottom’s license renewal terms “could have” on Constellation and Peach Bottom ratepayers: (a) effects to the “income statement” of Constellation’s “parent company” caused by tens of millions of dollars in estimated depreciation expenses; (b) an increase by tens of millions of dollars to over a hundred million dollars in the liability on Constellation’s balance sheet, due to an increased asset retirement obligation; (c) impacts on union labor caused by delays in beneficial capital projects that can no longer be justified when plant life is shorter; and (d) an increase in decommissioning costs paid by ratepayers of PECO Electric Company.¹⁶

Constellation asks the Commission to consider these financial factors against the standards set forth 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).¹⁷ As stated in *Allied-Signal*, the relevant factors are: “the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed.”¹⁸ With respect to the first factor, there can be no

¹⁵ *Id.* at 4.

¹⁶ Con. Views at 4; Declaration of Bryan J. Michels at 2 (Mar. 21, 2022) (“Michels Declaration”).

¹⁷ Con. Views at 3.

¹⁸ 988 F.2d at 150-51.

doubt as to the significance of a NEPA violation that deprives the entire slate of extended license renewal decisions of any valid supporting environmental impact statement for a period beyond the reactors' initial license termination dates.¹⁹

With respect to the second *Allied-Signal* factor, as the D.C. Circuit of the U.S. Court of Appeals has observed, this factor "is weighty only insofar as the agency may be able to rehabilitate its rationale."²⁰ In this case, the Commission itself has determined there is no way for the NRC Staff to rehabilitate its rationale for failing to prepare a new GEIS for subsequent license renewal, because the Staff was precluded from relying on the 2013 GEIS by the plain language of NRC's own regulations. Thus, the second factor of economic harm to Constellation should be given no weight in considering whether to reverse the Commission's partial vacatur decision.

In any event, even assuming for purposes of argument that it is appropriate to consider Constellation's claims of economic harm under the *Allied-Signal* and *Oglala Sioux* standards, Constellation has not demonstrated anything more than the "potential" for economic harm that "could happen."²¹ The mere potential for financial harm is no

¹⁹ See discussion above at pages 2-3.

²⁰ *Comcast Corp. v. FCC*, 579 F.3d 1, 9 (D.C. Cir. 2009). See also *Env't Def. Fund v. FERC*, 2 F.4th 953, 976 (D.C. Cir. 2021) (finding vacatur appropriate in light of a serious administrative error even though the pipeline at issue was already operational); *Friends of the Earth v. Haaland*, 2002 U.S. Dist. LEXIS 15172 (D.C.D.C. Jan. 27, 2022) (holding that financial harm caused by disclosure of sensitive financial information did not outweigh "the seriousness of the NEPA error," a significant omission from the agency's environmental analysis of a factor that could have affected the ultimate outcome of the analysis).

²¹ Michels Declaration at 2.

match for the certain environmental harm caused by NRC’s significant NEPA violations.²²

Notably, the NRC Staff made no attempt whatsoever to evaluate Constellation’s claims regarding financial harm. As stated in the Staff’s Views:

In determining the practical effects of retaining the SLR licenses with modified end dates or vacating the SLR licenses and reinstating the initial LR licenses, the NRC Staff refrained from speculating about issues outside of NRC’s direct authority and knowledge (e.g., the practical effects of how a licensee is allowed to depreciate equipment).²³

To ensure compliance with NEPA and the integrity of its regulatory decision-making process, the Commission should not accept any of Constellation’s financial claims without the benefit of its own Staff’s independent review of those claims. While the Staff’s lawyers may not have “direct authority and knowledge” over such issues, the technical Staff clearly has the ability to assess economic issues, as demonstrated by Staff’s longstanding (and NEPA-required) practice of evaluating the economic impacts of licensing nuclear reactors.²⁴

2. Alleged practical harm

Apart from its economic arguments, Constellation also asserts that as a practical matter, amending the licenses’ expiration dates “creates confusion (and misleads the public and other stakeholders)” about Constellation’s “statutory right and authority to

²² It should also be noted that while shortening the license period could increase short-term expenses, converse results may also occur: a shorter license term may reduce long-term expenditures.

²³ *Id.* at 5.

²⁴ *See, e.g.*, 2013 GEIS at 4-158, E-19 (citing Generic Environmental Impact Statement for License Renewal of Nuclear Plants, NUREG-1437 (1996) (“1996 GEIS”)); 1996 GEIS at xlv and 5-96 – 5-99 (discussing economic impacts of severe accidents).

operate [the Peach Bottom] units under the timely renewal provisions in the APA while the Staff is performing additional environmental review.” *Id.* But Constellation does not elaborate on the source of this alleged “confusion,” and it is not apparent. Nothing prevents Constellation from invoking the timely renewal provisions of 10 C.F.R. § 2.109(b) during the next ten years.

And even assuming there is potential conflict between the timely renewal doctrine and the time-limited NEPA analysis of the 2013 GEIS, that issue is extremely unlikely to arise in this case, because the NRC has a full decade to complete a new GEIS for extended license renewal and provide timely support for a decision on whether to extend Peach Bottom’s licenses beyond 2033 and 2034.

III. CONCLUSION

As in its March 17 Response to Constellation’s Petition, Beyond Nuclear continues to maintain that the Commission should not reinstate the termination dates of Constellation’s subsequent renewed license for Peach Bottom. If the Commission takes any action, it should vacate the second license extension and order the Staff to impose the terms of Constellation’s extended license, including its current Aging Management Plan and amendments and exemptions to the license that have been issued since then.

The Commission has confirmed its broad authority to take such measures if they are necessary to ensure adequate protection of public health and safety and the fairness of its licensing decisions, notwithstanding its delegation of licensing authority to the NRC Staff in its immediate effective rule. The Commission originally articulated this expansive authority in 1981, when it gave the Staff authority to issue licenses before the Commission finished its review process; and it reiterated the same statement verbatim in

2007, when it promulgated regulations for new Part 52 reactors. This statement emphasized that the immediate effectiveness provision in NRC regulations “does not compromise the Commission’s commitment to the protection of public health and safety or to a fair hearing process.”²⁵ As the Commission elaborated:

Thorough technical safety reviews of license applications by the NRC staff and the Advisory Committee on Reactor Safeguards, the availability of public hearings on license applications, and *the Commission’s inherent supervisory authority* form the basis of the *network of procedural safeguards* intended to implement this commitment to a *fair decision process and public health and safety*.²⁶

Thus, the Commission retains full authority to protect the integrity of its decisions in CLI-22-02 and CLI-22-04 as well as the fairness and effectiveness of its regulatory process by any necessary and appropriate orders.

Respectfully submitted,

 /signed electronically by/
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²⁵ Final Rule, Licenses, Certifications, and Approvals for Nuclear Power Plants, 72 Fed. Reg. 49,352, 49,415 (Aug. 28, 2007) (quoting Final Rule, Commission Review Procedures for Power Reactor Operating Licenses; Immediate Effectiveness Rule, 46 Fed. Reg. 28,627, 28,628 (May 28, 1981)).

²⁶ *Id.* (emphasis added).

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CERTIFICATE OF SERVICE

I certify that on March 31, 2022, I posted copies of the foregoing BEYOND NUCLEAR'S RESPONSE TO CONSTELLATION ENERGY GENERATION, LLC'S AND NRC STAFF'S VIEWS ON CLI-22-04 on the NRC's Electronic Information Exchange System.

/signed electronically by/
Diane Curran