

March 31, 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 )

## **Constellation Response to the NRC Staff and Beyond Nuclear Views in Response to CLI-22-04**

Pursuant to the Commission’s direction in CLI-22-04, Memorandum and Order (February 24, 2022), Constellation Energy Generation, LLC (“Constellation,” formerly known as Exelon Generation Company, LLC) hereby submits its response to the views submitted by the NRC Staff and Beyond Nuclear on the practical effects of (1) the subsequent renewed licenses continuing in place and (2) the previous licenses being reinstated.<sup>1</sup>

In its views, the NRC Staff articulated, and Constellation agrees with, the difficulty in rescinding the subsequent renewed licenses (“SLR licenses”) for the Peach Bottom Atomic Power Station, Units 2 and 3 (“Peach Bottom”) and the significant impact that would have to the current licensing basis. As the Staff aptly put it, “[v]acating the SLR licenses would have the practical effect of [] vacating each of the amendments, orders, license conditions, exemptions, and changes to technical specifications included in the SLR licenses or approved after their

<sup>1</sup> Beyond Nuclear’s Response to Constellation Energy’s Petition for Partial Reconsideration of CLI-22-04 and Beyond Nuclear’s Views in Response to CLI-22-04 (Mar. 17, 2022) (ADAMS Accession No. ML22076A089) (hereinafter “Beyond Nuclear Views”). 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) (ADAMS Accession No. ML22080A274) (hereinafter “NRC Staff Views”).

issuance.”<sup>2</sup> This would have the practical effect of “removal of all requirements imposed by, and permissions granted by, the amendments made to the SLR licenses.”<sup>3</sup> As an example, the prior licenses “simply do not require the new and improved programs SLR licenses [sic] are currently required to implement,”<sup>4</sup> such as the eleven new aging management programs identified by the NRC Staff as an example.<sup>5</sup> As a result, the licensee would not be required to implement those programs.<sup>6</sup> Reinstating the prior license would also render the Updated Final Safety Analysis Report (“UFSAR”) “obsolete,”<sup>7</sup> and “result[] in the plant and its UFSAR being incongruent with [the] restored license.”<sup>8</sup> This would require the licensee “to determine how best to modify the UFSAR to assure that the current UFSAR reflects the new [current licensing basis],” potentially requiring license amendment requests.<sup>9</sup>

Unlike the NRC Staff, in its views on practical effects, Beyond Nuclear ignores the significant negative impacts of vacating the subsequent renewed licenses and instead claims that “from the practical standpoint of implementing NEPA, it would be preferable to vacate the subsequent renewed license and restore Constellation’s initial renewed license.”<sup>10</sup> On the contrary, for the reasons set forth below, revoking the subsequent renewed licenses for Peach Bottom is both unnecessary and an excessive response to the NEPA issue the Commission directed the Staff to address.

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<sup>2</sup> NRC Staff Views at 8.

<sup>3</sup> *Id.* at 10.

<sup>4</sup> *Id.* at 8

<sup>5</sup> *Id.* at 6.

<sup>6</sup> *Id.* at 8.

<sup>7</sup> *Id.* at 9.

<sup>8</sup> *Id.* at 10.

<sup>9</sup> *Id.* at 9.

<sup>10</sup> Beyond Nuclear Views at 14.

Instead, based on consideration of the factors 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), the Commission should direct the NRC Staff to revise the Peach Bottom subsequent renewed licenses to restore the expiration dates, pending completion of the additional environmental review.<sup>11</sup> For the reasons stated in Constellation’s previous submittals,<sup>12</sup> maintaining the subsequent renewed licenses in place with 2053/2054 expiration dates is consistent with the standards set forth in the *Oglala Sioux* and *Allied-Signal* cases, and would avoid unnecessary disruptive effects while causing harm to no one.

Beyond Nuclear incorrectly argues that from a practical standpoint it would be preferable to vacate the subsequent renewed licenses as that “would bring NRC into line with … judicial precedents.”<sup>13</sup> However, vacatur in the case cited by Beyond Nuclear was prompted by an absence of a NEPA analysis and, as a result, had far different practical impacts than in this case. Citing *Standing Rock Sioux Tribe v. United States Army Corps of Engineers*, 985 F.3d 1032 (D.C. Cir. 2021), Beyond Nuclear asserts that the failure to provide required notice and invite public comment constitutes a fundamental flaw that normally requires vacatur.<sup>14</sup> *Standing Rock*,

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<sup>11</sup> Pursuant to the direction in CLI-22-04, on March 25, 2022, the NRC Staff amended the subsequent renewed licenses for Peach Bottom, Units 2 and 3, to change the expiration dates from 2053 and 2054 to 2033 and 2034, respectively. Peach Bottom Atomic Power Station, Units 2 and 3 Modification to Renewed Facility Operating License Nos. DPR-44 and DPR-56 in Conjunction with the Commission Memorandum and Order CLI-22-02 (Mar. 25, 2022) (ADAMS Accession No. ML22073A193). In CLI-22-04, however, the Commission stated that after considering the briefing on the practical effects of maintaining the subsequent renewed licenses or reinstating the previous licenses, it will issue a subsequent order providing additional direction, if any, regarding the status of the licenses. CLI-22-04, slip op. at 4.

<sup>12</sup> Constellation Energy Generation’s Petition for Partial Reconsideration of CLI-22-04 (Mar. 7, 2022) (ADAMS Accession No. ML22066B335); Constellation’s Response to the Commission’s Request for Views in CLI-22-04 (Mar. 21, 2022) (ADAMS Accession No. ML22080A250).

<sup>13</sup> Beyond Nuclear Views at 14.

<sup>14</sup> *Id.* at 10.

however, involved a failure by the agency to prepare any environmental impact statement on a proposed action, even after a previous remand.<sup>15</sup>

In contrast, here the NRC prepared not only its generic environmental impact statement (“GEIS”) on license renewal<sup>16</sup> (which specifically defined the license renewal term that it analyzed as the “period of time past the original or *current license term* for which the renewed license is in force”<sup>17</sup> and which included notice and public comment),<sup>18</sup> but also a site-specific supplement for the Peach Bottom subsequent license renewal.<sup>19</sup> For each Category 1 issue, the supplemental EIS considered whether there was any new and significant information that might alter the conclusions reached in the GEIS for that issue<sup>20</sup> (as Constellation had previously considered in its Environmental Report). The supplemental EIS included a cumulative impacts analysis that considered “potential effects through the end of the current license term, as well as through the 20-year renewal license term.”<sup>21</sup> Before drafting the supplemental EIS for Peach Bottom, the NRC Staff conducted a scoping process that included public meetings<sup>22</sup> and then provided a 45-day period (including another public meeting) for public comments on the draft.<sup>23</sup> The notices of these multiple opportunities for public comment clearly informed the public that the supplemental EIS addressed subsequent license renewal.<sup>24</sup> In short, the environmental

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<sup>15</sup> *Standing Rock*, 985 F.3d at 1051.

<sup>16</sup> NUREG-1437, Revision 1, Generic Environmental Impact Statement for License Renewal of Nuclear Plants (June 2013) (“2013 GEIS”).

<sup>17</sup> *Id.* at 7-27 (emphasis added).

<sup>18</sup> *See id.* at S-2.

<sup>19</sup> Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Supplement 10, Second Renewal Regarding Subsequent License Renewal for Peach Bottom Atomic Power Station Units 2 and 3 (Jan. 2020) (“Peach Bottom SEIS”) (ADAMS Accession No. ML20023A937).

<sup>20</sup> *Id.* at 4-2, 4-112 to 4-113.

<sup>21</sup> *Id.* at 4-123.

<sup>22</sup> *See id.* at 1-2.

<sup>23</sup> *Id.* See also 84 Fed. Reg. 38,676 (Aug. 7, 2019); 83 Fed. Reg. 45,692 (Sep. 10, 2018).

<sup>24</sup> 84 Fed. Reg. 38,676 (Aug. 7, 2019); 83 Fed. Reg. 45,692 (Sep. 10, 2018).

review in this proceeding was in no way similar to the unsupported agency action in *Standing Rock*, or one where no notice or opportunity for public comment was provided as Beyond Nuclear suggests.

Further, the supplemental EIS for Peach Bottom specifically addressed and explained why uncertainties and knowledge gaps alleged by Beyond Nuclear in the understanding of aging effects would not alter the “SMALL impact” findings in the GEIS.<sup>25</sup> And although impact of design basis accidents is a Category 1 issue, the supplemental EIS for Peach Bottom included an analysis explaining why those impacts remain SMALL for subsequent license renewal.<sup>26</sup>

Beyond Nuclear’s reliance on *Standing Rock* is also misplaced because the agency action in that proceeding had immediate and ongoing environmental effects warranting vacatur. Indeed, in *Standing Rock* one of the practical effects of vacatur was to eliminate the risk of a spill from the then-operating Dakota Access Pipeline.<sup>27</sup> No such justification exists in this case. Beyond Nuclear essentially ignores the teaching in *Oglala Sioux* that vacatur is not required (even when a deficiency in the NEPA review is deemed significant) when it would result in disruptive effects and *no harm would occur* from a disposition that leaves the license in effect for now.<sup>28</sup> That is exactly the situation in this proceeding, where the subsequent period of extended operation (and any environmental effects from it) will not commence for over a decade, giving the NRC Staff ample time to clarify the applicability of the Category 1 findings to subsequent

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<sup>25</sup> Peach Bottom SEIS at A-4.

<sup>26</sup> *Id.* at E-2 (“[B]ecause of the requirements that the existing design basis and aging management programs be in effect for license renewal, the environmental impacts of design-basis accidents as calculated for the original operating license application should not differ significantly from the environmental impacts of design-basis accidents at any other time during plant operations, including during the initial license renewal and subsequent renewal periods.”).

<sup>27</sup> *Standing Rock*, 985 F.3d at 1051.

<sup>28</sup> *Oglala Sioux*, 896 F.3d at 538. *Accord Powertech (USA), Inc.* (Dewey-Burdock In Situ Uranium Recovery Facility), CLI-19-1, 89 N.R.C. 1, 11 (2019).

license renewal. As Beyond Nuclear acknowledges, it is unlikely that the process for preparing a new GEIS for subsequent license renewal will take as many as ten years.<sup>29</sup> In short, keeping the subsequent renewed licenses in place would cause no harm: to the environment, to NEPA, or to the public. Indeed, as there is no harm in doing so, the Commission should direct the NRC Staff to restore the 2053/2054 expiration dates in those licenses.

Nor is there any merit to Beyond Nuclear’s claim that “if Constellation’s subsequent renewed license remains in place, it . . . signal[s] a belief that the NEPA process will not result in any meaningful insights or changes.”<sup>30</sup> Leaving the subsequent renewed licenses in place (and restoring the expiration dates) would merely signal that there is no need to take any precipitous disruptive action, given that there is ample time to clarify the applicability of the 2013 GEIS to subsequent license renewal before any associated effects will occur. Further, 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 in the first, as Beyond Nuclear presumes. As the Commission acknowledged in CLI-22-02, the Staff may have intended the 2013 GEIS to address subsequent license renewal,<sup>31</sup> and as discussed above, 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. As a result, when the NRC Staff performs its revision to the 2013 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.

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<sup>29</sup> Beyond Nuclear Views at 13.

<sup>30</sup> *Id.* at 15.

<sup>31</sup> CLI-22-02, slip op. at 10.

Amending the expiration dates in the Peach Bottom subsequent renewed licenses has also already had the practical effect of confusing the public and Beyond Nuclear. In an attempt to dismiss Constellation’s observation that amending the expiration dates in the Peach Bottom subsequent renewed licenses creates confusion regarding Constellation’s statutory right to continue to operate under the timely renewal provision of the Administrative Procedure Act, Beyond Nuclear argues that “nothing in CLI-22-04 would appear to prevent Constellation from seeking timely renewal of its shortened extended license renewal term several years from now.”<sup>32</sup> Rather than refuting Constellation’s observation, Beyond Nuclear’s argument in fact demonstrates the confusion created by amending the license expiration dates. Because Constellation’s subsequent license renewal application has not been “finally determined” by the NRC, the timely renewal provision in the Administrative Procedure Act is already and remains applicable.<sup>33</sup> Constellation does not need to seek timely renewal twice for the same period of extended operation; yet the Commission’s decision has clearly misled Beyond Nuclear to believe otherwise.

Finally, there is no merit to Beyond Nuclear’s suggestion that revoking the Peach Bottom subsequent renewed licenses would have no effect on the aging management commitments and program enhancements currently required as a condition in the subsequent renewed licenses. Beyond Nuclear asserts that “[h]aving completed a safety review and offered an opportunity for a public hearing on Constellation’s revised Aging Management Plan (“AMP”), the Commission may declare that Constellation’s initial renewed license has effectively been amended, with the required procedures for fairness and due process, to incorporate the revised AMP.”<sup>34</sup> In support

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<sup>32</sup> Beyond Nuclear Views at 13.

<sup>33</sup> 5 U.S.C. § 558(c).

<sup>34</sup> Beyond Nuclear Views at 15.

of this assertion, Beyond Nuclear relies on *Amergen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-8-13, 67 N.R.C. 396, 400 (2008). This case, however, only supports the possibility that a subsequent renewed license could be conditioned as a result of administrative review and says nothing about imposing conditions in a prior license. If the subsequent renewed licenses were revoked, any attempt to impose new conditions on operation during the initial renewal term would need to comply with the backfit rule.<sup>35</sup>

In sum, the Beyond Nuclear Views only further demonstrate why the Commission should not vacate the subsequent renewed licenses. Instead, for the reasons stated in Constellation's Petition for Partial Reconsideration of CLI-22-04 and Constellation's Response to the Commission's Request for Views in CLI-22-04, the Commission should permit the licenses to continue in place and direct the NRC Staff to restore the 2053/2054 expiration dates while the Staff revisits its NEPA analysis.

Respectfully submitted,

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<sup>35</sup> 10 C.F.R. § 50.109.

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**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing Constellation Response to the NRC Staff and Beyond Nuclear Views in Response to CLI-22-04 has been served through the E-Filing system on the participants in the above-captioned proceeding this 31<sup>st</sup> day of March, 2022.

/signed electronically by David R. Lewis/  
David R. Lewis