

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Christopher T. Hanson, Chairman  
Jeff Baran  
David A. Wright

In the Matter of

CONSTELLATION ENERGY GENERATION, LLC  
(F/K/A EXELON GENERATION COMPANY, LLC)

(Peach Bottom Atomic Power Station, Units 2 and 3)

Docket Nos. 50-277-SLR  
50-278-SLR

**CLI-22-07**

**MEMORANDUM AND ORDER**

In CLI-22-4, we asked the participants to submit their views on the practical effects of two options—leaving in place the subsequently renewed licenses for Peach Bottom Atomic Power Station, Units 2 and 3, and reinstating the previous licenses.<sup>1</sup> The participants provided timely responses and answers.<sup>2</sup> Additionally, Constellation Energy Generation, LLC (Constellation, formerly known as Exelon Generation Company, LLC) requested reconsideration

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<sup>1</sup> CLI-22-4, 95 NRC \_\_ (Feb. 24, 2022) (slip op.).

<sup>2</sup> *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* (Mar. 17, 2022) (Beyond Nuclear Views); *Response to Commission Request for Views in CLI-22-04* (Mar. 21, 2022) (Constellation 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) (Staff Views); *Beyond Nuclear's Response to Constellation Energy Generation, LLC's and NRC Staff's Views on CLI-22-04* (Mar. 31, 2022) (Beyond Nuclear Response to Other Views); *Constellation Response to the NRC Staff and Beyond Nuclear Views in Response to CLI-22-04* (Mar. 31, 2022) (Constellation Response to Other Views); *NRC Staff's Response to Views on Practical Effects* (Mar. 31, 2022) (Staff Response to Other Views).

of the portion of CLI-22-4 that directed the NRC Staff to amend the expiration dates in the subsequently renewed licenses for Peach Bottom.<sup>3</sup>

## I. BACKGROUND

The Staff issued the subsequently renewed licenses after completion of its safety and environmental reviews, and pursuant to 10 C.F.R. § 54.31(c), the licenses became immediately effective. We found in CLI-22-4 that the environmental review of the subsequent license renewal application in this case was incomplete.<sup>4</sup> Since 2020, Constellation has been operating under the subsequently renewed licenses, which include safety enhancements compared to the previous licenses. To best reconcile Constellation's current licensing bases<sup>5</sup> with the recognition that the agency's National Environmental Policy Act (NEPA) review was incomplete, we directed that the subsequently renewed licenses remain in place but with shortened terms to match the end dates of the previous licenses until completion of the NEPA analysis. After considering the views of the participants, we deny Constellation's petition for reconsideration and maintain the direction in CLI-22-4 without modification.

## II. DISCUSSION

### A. Petition for Reconsideration

Constellation submitted a partial petition for reconsideration pursuant to 10 C.F.R. §§ 2.341(d) and 2.323(e). Under these regulations, a motion for reconsideration must demonstrate "compelling circumstances, such as the existence of a clear and material error in a decision, which could not have been reasonably anticipated, that renders the decision invalid."<sup>6</sup>

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<sup>3</sup> *Petition for Partial Reconsideration of CLI-22-04* (Mar. 7, 2022) (Reconsideration Petition).

<sup>4</sup> CLI-22-4, 95 NRC at \_\_\_ (slip op. at 3).

<sup>5</sup> The current licensing bases include changes from license amendments, exemptions, and changes made under 10 C.F.R. § 50.59.

<sup>6</sup> 10 C.F.R. § 2.323(e).

Constellation argues that the portion of CLI-22-4 that directs the Staff to amend the expiration dates in the Peach Bottom licenses should be overturned because it “constitutes a clear and material error,” “is arbitrary and capricious, and an abuse of discretion.”<sup>7</sup> Constellation contends that CLI-22-4 “is not supported by an adequate explanation or reasoned analysis of the effects of this partial vacatur of the Peach Bottom licenses.”<sup>8</sup> Constellation argues that the standards in *Oglala Sioux Tribe v. NRC* and *Allied-Signal, Inc. v. NRC* should have been applied.<sup>9</sup> Further, Constellation charges that the decision violates the Administrative Procedure Act (APA) because it violates the timely renewal provisions in that statute.<sup>10</sup> As discussed below, we find that Constellation does not demonstrate compelling circumstances; therefore, we deny the petition.

In *Oglala Sioux Tribe*, the D.C. Circuit reviewed the Commission’s decision to leave Powertech’s license in place “notwithstanding the Commission’s conclusion that there has been a significant deficiency in its NEPA compliance—unless an intervenor demonstrates irreparable harm.”<sup>11</sup> The court “expressly declined to decide whether the NRC may itself lawfully fashion remedies for NEPA violations based on an analysis of equitable factors in accordance with *Allied-Signal*.”<sup>12</sup> The court noted that the NRC “fail[ed] to identify any statute that authorizes it not to comply with NEPA on equitable grounds,”<sup>13</sup> and in *Powertech* we explicitly did not decide

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<sup>7</sup> Reconsideration Petition at 1, 2.

<sup>8</sup> *Id.* at 2.

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

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

<sup>11</sup> *Oglala Sioux Tribe v. NRC*, 896 F.3d 520, 529-30 (D.C. Cir. 2018).

<sup>12</sup> *Powertech (USA), Inc. (Dewey-Burdock In Situ Uranium Recovery Facility)*, CLI-19-1, 89 NRC 1, 6 (2019); see *Allied-Signal, Inc. v. NRC*, 988 F.2d 146 (D.C. Cir. 1993).

<sup>13</sup> *Oglala Sioux Tribe*, 896 F.3d at 536.

“whether, or under what circumstances, an NRC presiding officer should perform an *Allied-Signal*-style equitable analysis in the first instance upon finding a significant NEPA deficiency.”<sup>14</sup>

While the court left open whether we could perform an equitable analysis in some circumstances, it did not direct us to perform such an analysis. Constellation’s claim that we violate the law by not performing such an analysis incorrectly equates the court’s leaving open the question with the court’s directing us to perform such an analysis. Constellation does not cite any authority that allows us to either disregard NEPA or exercise the equitable powers a court has when fulfilling our NEPA obligation in the first instance.<sup>15</sup> Constellation does not cite anything to indicate that declining to undertake an *Allied-Signal*-type analysis is contrary to law. Quite simply, Constellation has not shown that our decision to follow NEPA is a clear violation of the law.<sup>16</sup>

Indeed, we do not believe that the agency’s decision to follow the law in these circumstances could constitute legal error. When the Staff issued the subsequently renewed licenses, Constellation knew that the renewal was subject to legal challenge before the agency and, potentially, in the courts of appeals, and that all remedies, up to and including reinstatement of the previous licenses, were possible.<sup>17</sup> Under our regulations, CLI-20-3 was

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<sup>14</sup> *Powertech*, CLI-19-1, 89 NRC at 10.

<sup>15</sup> See CLI-19-1, 89 NRC at 6 n.26. We are not acting after a judicial remand, but rather, we are still in the process of fulfilling our NEPA obligations at the agency level before there has been judicial review.

<sup>16</sup> See *Oglala Sioux Tribe*, 896 F.3d at 523 (“The statute does not permit an agency to act first and comply later.”). The court also expressed skepticism regarding a federal agency’s ability to undertake an *Allied-Signal*-type analysis once it has found a significant NEPA deficiency. The “harmless error” doctrine that the federal courts apply is compelled by section 706 of the Administrative Procedure Act; since the Commission is not a court, section 706 does not govern our choice of remedy for Staff errors. *Id.* at 533. Neither does NEPA “give the NRC authority to forgive ‘harmless’ violations of NEPA.” *Id.* at 533, 536.

<sup>17</sup> See 10 C.F.R. § 54.31(c).

always subject to modification as a consequence of the adjudicatory process, and that contingency has come to pass.

Similarly, Constellation's claim that our decision was in error because it violates the timely renewal provision in the APA is unpersuasive.<sup>18</sup> Amending the end dates of the licenses did not affect the timely renewal provision in our regulation, 10 C.F.R. § 2.109, or in the APA. Constellation submitted a renewal application within the timeframe prescribed in our regulation, and as we have not yet finished the environmental review, the application is still pending for purposes of that regulation.

Finally, Constellation requested that we direct the Staff to refrain from amending the expiration dates of the licenses while its petition was pending.<sup>19</sup> Constellation essentially requested a stay but did not address the relevant criteria: (1) whether the moving party has made a strong showing that it is likely to prevail on the merits; (2) whether the party will be irreparably injured unless a stay is granted; (3) whether the granting of a stay would harm other parties; and (4) where the public interest lies.<sup>20</sup> Of these, irreparable harm to the movant is the most important factor.<sup>21</sup> Constellation did not show that the modified license terms taking effect for a short time between the issuance of CLI-22-4 and the issuance of our decision today would cause irreparable harm, and therefore, we did not direct the Staff to delay amending the licenses.

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<sup>18</sup> See Reconsideration Petition at 2.

<sup>19</sup> *Id.* at 6-7.

<sup>20</sup> See *Va. Petroleum Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958); see, e.g., 10 C.F.R. §§ 2.342, 2.1213.

<sup>21</sup> *Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2)*, CLI-77-27, 6 NRC 715, 716 (1977).

**B. Confirmation of Direction in CLI-22-4**

All parties acknowledge that there are safety benefits associated with the Peach Bottom units operating under the subsequently renewed licenses compared to the prior licenses.<sup>22</sup> In addition, reconciling the licensing bases under reinstated licenses would be a time-consuming, complex process.<sup>23</sup> As the Staff stated, maintaining the subsequently renewed licenses “is the simplest, most efficient way to continue requiring those enhanced aging management programs found desirable by both Beyond Nuclear and Constellation.”<sup>24</sup>

With respect to Beyond Nuclear’s suggestion that we completely vacate the subsequently renewed licenses and reinstate the previous licenses but with the enhanced aging management program provisions included, we find that they have not provided sufficient legal authority or a safety justification for the Commission to further pursue that option.<sup>25</sup> Beyond Nuclear correctly identifies that it is “ordinary practice” for courts to vacate agency actions taken in violation of NEPA.<sup>26</sup> However, as the Staff points out, a decision by the Commission to

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<sup>22</sup> See Staff Views at 5-8; Beyond Nuclear Response to Other Views at 6; Constellation Response to Other Views at 1-2.

<sup>23</sup> See Staff Views at 2-10; Constellation Response to Other Views at 2.

<sup>24</sup> Staff Response to Other Views at 5.

<sup>25</sup> See Beyond Nuclear Views at 14-16; Beyond Nuclear Response to Other Views at 10-11; Staff Response to Other Views at 2-3. A license renewal may be conditioned or vacated after administrative or judicial review, in which case the operating license previously in effect would be reinstated. *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-13, 67 NRC 396, 400 (2008); 10 C.F.R. § 54.31(c).

<sup>26</sup> *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs*, 985 F.3d 1032, 1050-51 (D.C. Cir. 2021) (quoting *United Steel v. Mine Safety & Health Admin.*, 925 F.3d 1279, 1287 (D.C. Cir. 2019)).

reinstate the previous licenses would make the enhanced aging management program provisions no longer required.<sup>27</sup>

Constellation advocates that we balance the equities in determining the remedy here, as federal courts have done.<sup>28</sup> In Constellation's view, the balancing would call for the subsequently renewed licenses with end dates coextensive with the subsequent license renewal period to be in effect while the NRC completes its NEPA review. Even if the NRC has the authority to craft an *Allied-Signal*-style equitable remedy,<sup>29</sup> we decline to pursue such a remedy before we have fulfilled our NEPA duty to fully evaluate the environmental impacts of the proposed action.<sup>30</sup> While our authority to perform an *Allied-Signal*-style equitable analysis is in question, our obligation to comply with NEPA is not. Through NEPA, Congress tasked the NRC with evaluating the environmental impacts of a proposed major federal action before taking that action.<sup>31</sup> Here, that means we must evaluate the environmental impacts of subsequent license

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<sup>27</sup> See Staff Views at 8. The Staff identifies other problematic outcomes that would result from the reinstatement of the previous licenses, including obsolescence of the updated final safety analysis reports and impacts to the current licensing bases. See *id.* at 9-10.

<sup>28</sup> Reconsideration Petition at 3-4; Constellation Views at 2-7.

<sup>29</sup> While federal courts have discretion to leave an agency action in place while the decision is on remand, the court in *Oglala Sioux Tribe* noted that the NRC did not "identify any statute that authorizes it not to comply with NEPA on equitable grounds." *Oglala Sioux Tribe*, 896 F.3d at 536. The court did not resolve "whether the absence of statutory authority is sufficient to reject the analogy to judicial remand-without-vacatur." *Id.* And in our decision on remand, we did not address "the question, left expressly open by the court, of whether, or under what circumstances, an NRC presiding officer should perform an *Allied-Signal*-style equitable analysis in the first instance upon finding a significant NEPA deficiency." *Powertech*, CLI-19-1, 89 NRC at 10. Similarly, we find it unnecessary to do so in this case.

<sup>30</sup> To support its views in response to CLI-22-4, Constellation submitted an expert declaration on the potential disruptive financial effects of modifying the end dates in the subsequently renewed licenses. Constellation Views, Attach., Declaration of Bryan J. Michels (Mar. 21, 2022). Because we will not perform an *Allied-Signal*-style equitable analysis to determine the next steps after recognizing the NEPA deficiency, this declaration does not change our approach.

<sup>31</sup> With respect to Constellation's argument that the "new and significant" information review undertaken for the Supplemental Environmental Impact Statement for Peach Bottom Atomic Power Station Units 2 and 3 cured the deficiency in the 2013 GEIS, we find that such an

renewal before approving issuance of a license that covers the period of subsequent license renewal.<sup>32</sup> As Constellation’s licenses were still subject to modification due to pending agency litigation, it is within the NRC’s authority to maintain the shortened end dates of the subsequently renewed licenses. We find that this remedy is the best way to fulfill our statutory duty while maintaining the enhanced aging management programs and safety enhancements of the subsequently renewed licenses favored by all parties to the proceeding. As stated in CLI-22-4, we separately directed the Staff to update the GEIS, and we recently directed the Staff to complete that effort in twenty-four months while seeking opportunities to accelerate the schedule.<sup>33</sup>

**C. Applicability of 10 C.F.R. § 54.21(b)**

While we have found that Constellation’s application is still pending for purposes of our timely renewal regulation, the Staff raised a related matter in its response—the applicability of 10 C.F.R. § 54.21(b). That regulation requires license renewal “applicants” to periodically update their applications. The Staff questioned whether Constellation—the current license holder of the Peach Bottom licenses—is an “applicant” under this regulation because the Staff’s review of the environmental impacts related to subsequent license renewal is still active.<sup>34</sup> We hold that

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analysis did not adequately address environmental impacts during the subsequent license renewal period. See Constellation Response to Other Views at 4-6. The “new and significant” analysis used the 2013 GEIS as its baseline and assumed that analysis covered the subsequent license renewal period. “Generic Environmental Impact Statement for License Renewal of Nuclear Plants Regarding Subsequent License Renewal for Peach Bottom Atomic Power Station Units 2 and 3” (Final Report), NUREG-1437, Supplement 10, Second Renewal (Jan. 2020), at 1-3 (ML20023A937).

<sup>32</sup> See *Oglala Sioux Tribe*, 896 F.3d at 532 (“[NEPA’s] requirement that a detailed environmental impact statement be made for a ‘proposed’ action makes clear that agencies must take the required hard look *before* taking that action.”).

<sup>33</sup> See CLI-22-4 at \_\_\_ (slip op. at 4 & n.13); Staff Requirements—SECY-22-0024—Rulemaking Plan for Renewing Nuclear Power Plant Operating Licenses—Environmental Review (RIN 3150-AK32; NRC-2018-0296) (Apr. 5, 2022) (ML22096A035).

<sup>34</sup> Staff Views at 7.



Constellation does not need to update its application pursuant to 10 C.F.R. § 54.21(b) while the Staff completes the environmental review. Because Peach Bottom is already operating under the subsequently renewed licenses, it would not serve any useful purpose to require Constellation to update its application to identify changes to the current licensing bases. Our ruling in CLI-22-4 did not disturb the safety review.

### III. CONCLUSION

For the reasons discussed above, we *deny* Constellation's petition for reconsideration, *affirm* our direction in CLI-22-4 regarding the status of the Peach Bottom subsequently renewed licenses without further modification, and *terminate* this proceeding.

IT IS SO ORDERED.

For the Commission



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Russell E. Chazell  
Assistant for Rulemakings and Adjudications  
Office of the Secretary

Dated at Rockville, Maryland,  
this 3<sup>rd</sup> day of June 2022.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

In the Matter of )  
 )  
EXELON GENERATION COMPANY, LLC ) Docket Nos. 50-277 and 50-278-SLR  
 )  
(Peach Bottom Atomic Power Station )  
Units 2 and 3)

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **COMMISSION MEMORANDUM AND ORDER (CLI-22-07)** have been served upon the following persons by Electronic Information Exchange.

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Peach Bottom, Units 2 & 3, Docket Nos. 50-277 & 50-278-SLR  
**COMMISSION MEMORANDUM AND ORDER (CLI-22-07)**

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Office of the Secretary of the Commission

Dated at Rockville, Maryland,  
this 3<sup>rd</sup> day of June 2022.