

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE COMMISSION

In the Matter of:)	
)	Docket No. 50-255-LA-2
ENTERGY NUCLEAR OPERATIONS, INC.)	ASLBP No. 15-939-04-LA-BD01
)	
(Palisades Nuclear Plant))	August 17, 2015
)	
)	

**ENTERGY’S ANSWER OPPOSING THE SIERRA CLUB’S
MOTION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF**

I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(c), Entergy Nuclear Operations, Inc. (“Entergy”) files this Answer opposing the Motion for Permission to File Amicus Curiae Brief (“Motion”) filed by the Sierra Club on August 7, 2015 in the above-captioned matter.¹ The Sierra Club filed the Motion—along with an Amicus Brief²—in response to Entergy’s July 13, 2013 Appeal, submitted pursuant to 10 C.F.R. § 2.311, of the Atomic Safety and Licensing Board’s (“Board”) decision in LBP-15-20.³ In that decision, a split Board admitted Petitioners’ only proposed contention, which purports to challenge Entergy’s November 12, 2014 license amendment request (“LAR”) for the Palisades Nuclear Plant (“Palisades”).⁴ The LAR seeks Nuclear Regulatory Commission (“NRC”)

¹ See *Motion by Sierra Club for Permission to File Amicus Brief* (Aug. 7, 2015) (“Motion”), available at ADAMS Accession No. ML15219A427.

² See *Amicus Curiae Brief by Sierra Club in Support of Atomic Safety and Licensing Board Decision* (Aug. 7, 2015) (“Amicus Brief”), available at ADAMS Accession No. ML15219A428.

³ See *Entergy’s Notice of Appeal of LBP-15-20* (July 13, 2015) and *Brief in Support of Entergy’s Appeal of LBP-15-20* (July 13, 2015) (“Appeal”), available at ADAMS Accession No. ML15194A503; *Entergy Nuclear Operations, Inc. (Palisades Nuclear Plant), LBP-15-20*, 81 NRC ___, slip op. (June 18, 2015) (“LBP-15-20”), available at ADAMS Accession No. ML15169A273.

⁴ See *Petition to Intervene and for a Public Adjudication Hearing of Entergy License Amendment Request for Approval of 10 CFR Part 50 Appendix G Equivalent Margins Analysis* (Mar. 9, 2015), available at ADAMS Accession No. ML15068A458 (“Petition”). The Petitioners are Beyond Nuclear, Don’t Waste Michigan, Michigan Safe Energy Future – Shoreline Chapter, and the Nuclear Energy Information Service. The Petitioners

approval of a Westinghouse equivalent margins analysis (“EMA”) for the Palisades reactor pressure vessel (“RPV”), submitted to meet the requirements of 10 C.F.R. Part 50, Appendix G.⁵

As discussed below, the Sierra Club’s Motion and Amicus Brief should be rejected because the Amicus Brief is not authorized by NRC regulations. In addition, the Commission should decline to grant the Sierra Club’s Motion as a matter of discretion. The Motion and Amicus Brief are legally and factually flawed and thus fail to add any value to the record or to inform the Commission’s decision on Entergy’s pending Appeal. If the Commission nevertheless grants the Motion and accepts the Amicus Brief as a matter of discretion, then Entergy respectfully requests the opportunity to respond to the Amicus Brief more fully.

II. ARGUMENT

A. NRC Regulations Do Not Authorize the Filing of *Amicus Curiae* Briefs In Connection with Appeals Filed Pursuant to 10 C.F.R. § 2.311

The Sierra Club’s Motion and Amicus Brief should be rejected because NRC regulations do not authorize the filing of amicus briefs in the present circumstances.⁶ Specifically, the relevant NRC regulation, 10 C.F.R. § 2.315(d), authorizes the filing of an amicus brief under very limited circumstances (or at the Commission’s discretion). Section 2.315(d) states that:

filed a brief opposing Entergy’s Appeal on August 7, 2015. *See Petitioners’ Brief in Opposition to Entergy Appeal of LBP-15-20* (Aug. 7, 2015), *available at* ADAMS Accession No. ML15220A000.

⁵ *See* PNP 2014-099, Letter from A. Vitale, Site Vice President, Entergy Nuclear Operations, Inc. – Palisades Nuclear Plant, to NRC Document Control Desk, Re: License Amendment Request for Approval of Palisades Nuclear Plant 10 CFR 50 Appendix G Equivalent Margins Analysis (Nov. 12, 2014), *available at* ADAMS Accession No. ML14316A370 (“LAR”). The EMA demonstrates that certain RPV materials predicted to possess Charpy upper-shelf energy (“USE”) values less than 50 foot-pounds will provide margins of safety against fracture, equivalent to those required by Appendix G of Section XI of the American Society of Mechanical Engineers Boiler and Pressure Vessel Code (“ASME Code”). *See* LAR, Attachment 5, Westinghouse WCAP-17651-NP, Revision 0, Palisades Nuclear Power Plant Reactor Vessel Equivalent Margins Analysis (Feb. 2013), *available at* ADAMS Accession No. ML14316A208.

⁶ In its Motion, the Sierra Club states that “Entergy Nuclear Operations and the NRC staff have no objection to the filing of the *amicus curiae* brief but reserve the right to respond to it.” Motion at 2. In actuality, counsel for Entergy conveyed that Entergy did not oppose the Sierra Club’s filing of a *motion for leave*, as a threshold procedural action, seeking Commission authorization to file an *amicus curiae* brief.

(d) If a matter is taken up by the Commission *under § 2.341 or sua sponte*, a person who is not a party may, *in the discretion of the Commission*, be permitted to file a brief “*amicus curiae*.” Such a person shall submit the amicus brief together with a motion for leave to do so which identifies the interest of the person and states the reasons why a brief is desirable. Unless the Commission provides otherwise, the brief must be filed within the time allowed to the party whose position the brief will support. A motion of a person who is not a party to participate in oral argument before the Commission will be granted at the discretion of the Commission.⁷

Importantly, the Commission generally accepts amicus briefs only *after it grants a petition for review pursuant to 10 C.F.R. § 2.341*, and does not provide for amicus briefs supporting or opposing initial petitions for review.⁸ As noted above, Entergy appealed the Board’s decision admitting Petitioners’ sole contention and granting their intervention petition pursuant to 10 C.F.R. § 2.311—not 10 C.F.R. § 2.341. Thus, timing considerations aside, neither Section 2.315(d) nor Section 2.311 authorizes the filing of an amicus brief in connection with an appeal filed pursuant to the latter regulation. Indeed, as the Commission has explicitly stated, “Section 2.315(d) provides for the filing of *amicus curiae* briefs when we have taken up a matter pursuant to § 2.341 or *sua sponte*, neither of which is the case here.”⁹ Further, the Commission clearly has not “taken up” any request for review yet, much less one initiated pursuant to Section 2.341. The Commission, therefore, should deny the Sierra Club’s Motion and decline to accept its concurrently-filed Amicus Brief.

⁷ 10 C.F.R. § 2.315(d) (emphasis added).

⁸ See, e.g., *La. Energy Servs.* (Claiborne Enrichment Ctr.), CLI-97-7, 45 NRC 437, 438-39 (1997) (citing *Sequoyah Fuels Corp. & Gen. Atomics* (Gore, Oklahoma Site), CLI-96-3, 43 NRC 16, 17 (1996)).

⁹ *S. Cal. Edison Co.* (San Onofre Nuclear Generating Station, Units 2 & 3), CLI-13-9, 78 NRC 551, 556 n.17 (2013). See also *U.S. Dep’t of Energy* (High Level Waste Repository: Pre-Application Matters), CLI-08-22, 68 NRC 355, 359 (2008) (denying Nye County’s motion to file an amicus brief in a 10 C.F.R. Part 2 Subpart J proceeding, noting that “[o]ur general rule on amicus briefs, 10 C.F.R. § 2.315(d), as a formal matter applies only to petitions for review filed under 10 C.F.R. § 2.341 or to matters taken up by the Commission *sua sponte*, not to appeals filed, as here, under 10 C.F.R. § 2.1015.”).

B. The Commission Should Decline to Grant the Sierra Club’s Motion As A Discretionary Matter Because the Amicus Brief Does Not Inform the Commission’s Decision-Making Process or Contribute Further to the Record on Appeal

As discussed above, 10 C.F.R. § 2.315(d) does not authorize the filing of an amicus brief in this situation. However, “it is within [the Commission’s] discretion to grant leave for participation as *amicus curiae*.”¹⁰ In determining whether to exercise its general discretion to accept amicus briefs, the Commission’s decision “ultimately depend[s] upon the value afforded to the decision-making process by consideration of the amicus briefs.”¹¹

The Commission should decline to grant the Sierra Club’s Motion as a discretionary matter, because it does not appear that the Amicus Brief will contribute any value to the Commission’s decision-making process as it pertains to Entergy’s Appeal. First, the Motion and Amicus Brief rely principally on patently-biased, conclusory arguments that lack factual and legal support and, in some cases, any relevance to the specific issues raised in Entergy’s Appeal. For example, after expressly noting its opposition to nuclear power in general,¹² the Sierra Club states that “the attempt by Entergy to shortcut assurances that the reactor vessel is safe is unacceptable.”¹³ It later states that “Entergy’s attempt to avoid following any NRC regulation

¹⁰ *DTE Elec. Co.* (Fermi Nuclear Power Plant, Unit 3), CLI-15-1, 81 NRC ___, slip op. at 5 n.19 (Jan. 13, 2015) (citing *Calvert Cliffs 3 Nuclear Project, LLC & UniStar Nuclear Operating Servs., LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-13-4, 77 NRC 101, 104 n.9 (2013)) (“Our rules of practice permit persons who are not parties to file a brief *amicus curiae* ‘if a matter is taken up by the Commission under [10 C.F.R.] § 2.341 or *sua sponte*.’ 10 C.F.R. § 2.315(d). Although this rule does not squarely apply here, it is within our discretion to grant leave for participation as *amicus curiae*.”).

¹¹ See Responses to Comments Not Addressed in the Statement of Considerations for Changes to the Adjudicatory Process: Final Rule, at 19 (Dec. 17, 2003) at 19, available at ADAMS Accession No. ML033510327.

¹² See Amicus Brief at 1 (“The Sierra Club opposes nuclear power because its fuel cycle from uranium mining to spent radioactive fuel poses grave dangers to the environment. In addition, reliance on nuclear power unjustifiably delays the beneficial transition to clean and renewable energy sources.”). See also Motion at 1 (same).

¹³ Amicus Brief at 2. See also Motion at 2 (“[T]he attempt by Entergy to shortcut assurances that the reactor pressure vessel is safe poses grave risks to the Sierra Club and its members in the Michigan Chapter.”).

provides no assurance that the pressure vessel is safe and reliable.”¹⁴ Such groundless allegations of impropriety or misconduct on the part of Entergy have no place in this license amendment proceeding, and they certainly do not add value to the record or aid the Commission’s deliberations on the Appeal.

Second, in attempting to defend the Board majority’s decision to admit Petitioners’ contention under 10 C.F.R. § 2.309(f)(1), the Sierra Club relies on legal precedent that pre-dates the Commission’s current contention admissibility standards, and thus does not accurately characterize a petitioner’s legal obligations under Section 2.309(f)(1) at the contention pleading stage.¹⁵ As the Commission long has noted, “[a] contention’s proponent, not the licensing board, is responsible for formulating the contention and providing the necessary information to satisfy the basis requirement for the admission of contentions.”¹⁶ In fact, this bedrock legal principle substantially underpins Entergy’s Appeal, given that Entergy contends that the Board majority “impermissibly augmented the contention with information derived from its own independent research and analysis.”¹⁷ Thus, the Sierra Club’s statement that “[t]he Commission and the courts have also made clear that the burden of persuasion is on the licensee, not the petitioner,”¹⁸ is

¹⁴ Amicus Brief at 9-10.

¹⁵ See Amicus Brief at 4-5 (citing *York Comm. for a Safe Env’t. v. NRC*, 527 F.2d 812, 815 n.12 (D.C. Cir. 1975) (where the information necessary to make the relevant assessment is “readily accessible and comprehensible to the license applicant and the Commission staff but not to petitioners, placing the burden of going forward on petitioners appears inappropriate”); *Vt. Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 554 (1978) (referring to the need only for a “showing sufficient to require reasonable minds to inquire further”)). Insofar as the Sierra Club is suggesting that the Petitioners should be held to a lesser pleading standard because they *allegedly* lacked access to necessary information, that claim is unfounded. The Petitioners had full access to the Palisades EMA LAR and its supporting materials, as well as the relevant NRC regulations and guidance, in preparing their proposed contention. Moreover, the Sierra Club’s argument is inconsistent with the Commission’s “longstanding policy that a petitioner has an iron-clad obligation to examine the publicly available documentary material . . . with sufficient care to enable it to uncover any information that could serve as the foundation for a specific contention.” *N. States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2)*, CLI-10-27, 72 NRC 481, 496 (2010) (internal quotation marks and citations omitted).

¹⁶ *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 22 (1998).

¹⁷ See Appeal at 3.

¹⁸ Amicus Brief at 4.

incorrect as a matter of law.¹⁹ And, insofar as the Sierra Club claims that the authorities cited on page 11 of Entergy’s appeal brief do not support its argument, those authorities are controlling Commission decisions applying the NRC’s contention admissibility standards in Section 2.309.²⁰ Those authorities, which are not subject to challenge here, clearly support Entergy’s arguments. In short, there is no question that, “[a]t the threshold contention admission stage, the burden for providing support for a contention is on the petitioner.”²¹

Third, the Sierra Club attempts to casually dismiss Entergy’s appeal as lacking merit by asserting that “Entergy simply disagrees with the reasoning of the ASLB majority.”²² Entergy certainly disagrees with the majority’s reasoning because, as fully explained in Entergy’s Appeal, that reasoning rests on multiple reversible errors.²³ In that regard, Entergy appropriately has asked the Commission to review and rectify those errors—not to embark on a “journey into the weeds.”²⁴ Such baseless allegations by the Sierra Club do not add value to the record or assist the Commission’s decision-making process and, therefore, do not support any discretionary decision by the Commission to grant the Motion and accept the Amicus Brief. Moreover, contrary to the Sierra Club’s claim, Entergy has not asked the Commission to “determine the merits of the contention.”²⁵ Instead, it has asked the Commission to review and reverse the majority’s decision on the basis that it contains numerous clear and reversible errors of law and fact, as identified in Entergy’s Appeal.

¹⁹ See, e.g., *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 262 (1996) (“[O]ur Contention Rule . . . places an initial burden on Petitioners to come forward with reasonably precise claims rooted in fact, documents, or expert opinion in order to proceed past the initial stage and toward a hearing.”).

²⁰ See Appeal at 11 nn.59-62 (citing Commission Orders CLI-99-10, CLI-99-11, CLI-01-24, CLI-09-12).

²¹ *Entergy Nuclear Generation Co. & Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-12-15, 75 NRC 704, 714 (2012).

²² Amicus Brief at 6.

²³ See generally Appeal at 11-28.

²⁴ Amicus Brief at 6.

²⁵ *Id.*

Finally, the Sierra Club does not accurately portray the facts of record. For example, it asserts that “the decision in this case will have far-reaching consequences for nuclear safety,” and that “Entergy [should] not be allowed to set a bad precedent in this case.”²⁶ But as Entergy explained in its opposition to the contention and also in its Appeal, EMAs based on the guidance in Regulatory Guide 1.161 and Appendix K to Section XI of the ASME Code have been prepared by licensees, and approved by the NRC, for numerous reactors seeking to comply with the requirements of 10 C.F.R. Part 50, Appendix G.²⁷ Thus, the Sierra Club’s claim of “bad precedent” is misplaced.

The Sierra Club further claims that the Board found that “Entergy is attempting to rely on an NRC staff guidance document that is still in draft form and an industry standard that has not even been approved by the Commission.”²⁸ That is incorrect. Entergy prepared the EMA LAR to meet the requirements in Appendix G to 10 C.F.R. Part 50, which permits a licensee to demonstrate, through an ASME Code-compliant analysis, that lower values of Charpy USE will provide margins of safety against fracture equivalent to those required by ASME Code Section XI, Appendix K. Thus, contrary to the Sierra Club’s claim, Entergy relied on NRC regulations, NRC-approved guidance, and longstanding, NRC-approved industry standards in preparing the Palisades LAR.

Additionally, the Sierra Club mischaracterizes the Board’s decision by stating that “[t]he ASLB majority also noted that the staff guidance document says that it may be used if there is no material, *i.e.*, coupons, available for testing,” and that “[i]n this case, however, there are more than

²⁶ Amicus Brief at 7, 8.

²⁷ See Appeal at 16 & n.90 (citing examples of previous NRC approvals of EMA license amendments).

²⁸ Amicus Brief at 9.

enough coupons available for testing.”²⁹ The Board majority reached no such conclusion. Rather, it found—erroneously in Entergy’s view—that “the Staff’s decision to approve a [RPV surveillance capsule] withdrawal schedule in accordance with Appendix H does not preclude modification of the schedule,” and that capsules “remain available for subsequent removal and testing.”³⁰ Therefore, contrary to the Sierra Club’s assertions, Entergy’s use of any potentially relevant NRC guidance (*e.g.*, Regulatory Guide 1.161) is not contingent upon the availability or unavailability of additional capsules.

III. CONCLUSION

For the reasons stated above, Entergy respectfully requests that the Commission deny the Sierra Club’s Motion and decline to accept the Sierra Club’s Amicus Brief, which is unauthorized and, in any event, does not enhance the record or aid the Commission’s decisional process with respect to Entergy’s Appeal.

Respectfully submitted,

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Dated in Washington, D.C.
this 17th day of August 2015

²⁹ Amicus Brief at 9

³⁰ *Palisades*, LBP-15-20, slip op. at 15, 17.

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CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I certify that, on this date, copies of “Entergy’s Answer Opposing the Sierra Club’s Motion for Permission to File Amicus Curiae Brief” were served upon the Electronic Information Exchange (the NRC’s E-Filing System) in the above-captioned proceeding.

Signed (electronically) by Martin J. O'Neill

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