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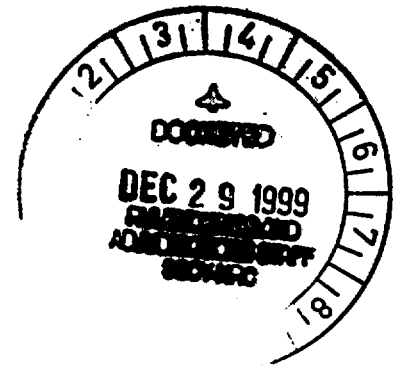
Before The Commission

In the Matter of Michel A. Philippon
(Denial of Senior Operator License)

Docket No. 55-32443-SP

ASLBP No. 99-755-01-SP

December 28, 1999



**Response to the NRC Staff's petition for Review of the Presiding
Officer's Initial Decision (LBP-99-44)**

Pursuant to 10 C.F.R. 2.7.8.6 I am submitting the attached response opposing the
Commission review.

PDR A DOCK

DS03

The Commission should deny the Staff's petition for judicial review for the following reasons:

- 1. The Staff does not demonstrate that a material fact is clearly erroneous.**
- 2. The Presiding Officer's bases supporting his Initial Decision are sound.**
- 3. The petition request relies on matters that could have been but were not raised before the Presiding Officer, and therefore should not be granted in accordance with 10CFR 2.786(b)(5).**

In its petition for review of the Presiding Officer's Initial Decision (9 Dec. 1999) the Staff argues that the Presiding Officer erred in construing the Staff's position. The Staff then mistakenly concludes that a material fact is clearly erroneous. The Presiding Officer's bases for his decision regarding exam scenario 2-2 events 8 & 9 are articulated on pages 62-67 of the Initial Decision (LBP-99-44). This represents an exhaustive review of all the record evidence. His conclusion was not based solely on the inability of the Staff to defend the "lapse in implementation of the EOP". The simple crux of the matter is that the Staff failed to defend its charge that a lapse in implementing a procedure occurred in either the AOP or the EOP, and its arguments that I did not comply with the EOP were not persuasive and could not withstand analysis. The Presiding Officer's decision was further based on the record of evidence that demonstrated that I in fact,

did comply with the EOP. But perhaps one of the most significant factors was that Mr. Peterson “attempted to reverse or override his superiors”. It is obvious that the position of the Staff changes from Mr. Peterson’s grading of the initial exam scenario 2-2 events 8 & 9, to the position taken by the appeal board, and finally, to that by Mr. Peterson representing the Staff in the Formal appeal. The fact that the Staff now implies that they represent a common position is particularly egregious. The Presiding Officer makes it clear that Mr. Peterson is not allowed to take a position or assert facts before the Presiding Officer contrary to a matter already decided by the appeal board, absent an explicit confession of error. Furthermore, by speculating on the Presiding Officer’s thought process that the determination “with respect to competency C.4.c *appears to be predicated on his view that the Staff based...*” (Petition, top of page 5) the Staff has not demonstrated that a material fact was *clearly erroneous*. Their argument must be required to be based on facts, not the Staff’s speculation. The facts of this case are not erroneous. The obvious conclusion then, is that the Staff has not met its burden in demonstrating that a “material fact is clearly erroneous” as required by 10CFR 2.786(b)(4)(i), and therefore a judicial review is not warranted.

The Staff’s statement that the Presiding Officer “failed to address the true concerns raised by the Staff” is incorrect. All of the record evidence was reviewed, and there is substantial evidence in the Initial Decision that the Presiding Officer considered all the evidence and addressed the issues of the Staff. The decision is based on sound judgement. Mr. Peterson’s arguments (the Staff’s arguments) regarding purported non-compliance with the EOP’s were found to be unpersuasive. Furthermore, the Staff has had several opportunities to defend their position that a lapse occurred in the implementation of a

procedure, but failed to do so. Specifically, on March 19, 1999 the Presiding Officer issued an ORDER that included, in part, question #24. This question specifically asked the Staff to defend the purported "lapse in the implementation of the AOP" charge, and explain how my actions constituted such a lapse. The Staff subsequently failed to defend its position. Thus any arguments made in the petition and any hoped to be made in a judicial review represent matters that could have been raised before the Presiding Officer, but were not. In summary then, the petition request *relies on matters that could have been but were not raised before the Presiding Officer*, and in accordance with 10CFR2.786(b)(5) the petition request should not be granted.

The Staff argues in footnote #8 (Petition, bottom of page 6) that the Presiding Officer errs in referring to the grade for competency C.7.b since this contention was not "put into controversy". The Presiding Officer, however, did not attempt to decide the grade for C.7.b; rather he used it to corroborate the record evidence in his evaluation of competency C.4.b. There is therefore no conflict with 10CFR 2.1251(d) as stated by the Staff.

The Staff continues to make the same unsubstantiated statements that I allowed a lapse in the implementation of a procedure, and that I incorrectly implemented the EOP. These statements are false and have not been able to withstand analysis. The record evidence as a whole was found to show that the description for the behavioral anchor for a grade of 3 most closely fits my performance on competency C.4.c exam scenario 2-2 events 8 & 9. The fact remains that the Staff could not substantiate its claim that a lapse occurred in the implementation of the AOP or EOP, because one did not occur.

After reviewing all of the evidence the Presiding Officer concluded that my actions during exam scenario 2-2 events 8 & 9 were reasonable and prudent. The arguments of the Staff in the petition do not change this conclusion. Thus for the reasons stated above I respectfully request that the Commission deny the Staff petition for judicial review.

Respectfully Submitted,

A handwritten signature in black ink that reads "Michel A. Philippon". The signature is written in a cursive style with a large initial 'M' and 'P'.

Michel A. Philippon

Carleton, Michigan