

March 4, 1988

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	Byproduct Material License
	)	No. 53-17854-01
FINLAY TESTING LABORATORIES,	)	Docket No. 30-13435
INC.	)	EA-87-186
	)	ASLBP No. 88-559-01-SC

NRC STAFF REPLY TO LICENSEE'S OPPOSITION TO  
STAFF'S APPLICATION FOR STAY OF DISCOVERY ORDER

I. INTRODUCTION

On February 11, 1988 the Atomic Safety and Licensing Board issued a Memorandum and Order (Concerning Licensee's Discovery Requests) requiring the Staff to respond in full within three working days to Finlay Testing Laboratories, Inc.'s. (Licensee) discovery request dated December 14, 1987. On February 17, 1988 the NRC staff filed a timely "...Application for a Stay of the Effectiveness of Licensing Board Memorandum and Order Concerning Licensee's Discovery Request and Objections to that Order." By order dated February 18, 1988 the Commission temporarily stayed the Board's February 11th order pending review of the Staff's application. That order provided that the Licensee might file a response to the application by March 3, 1988 and that it should be served by express mail or rapifax. The order then provided that the Staff might reply within three working days of service of such response.

On February 26, 1988 the Licensee served by Express Mail <sup>1/</sup> its "Opposition to 'NRC Staff's Application for a Stay of the Effectiveness of Licensing Board Memorandum and Order Concerning Licensee's Discovery Requests and Objections to that Order.'"

## II. DISCUSSION

This matter is before the Commission under the Statement of Policy: Investigation, Inspections and Adjudicatory Proceedings (49 Fed. Reg. 36,032, September 13, 1984). That Policy Statement provides that where the Staff believes that "...unrestricted disclosure could compromise an inspection or investigation, [it may] present the information and its concerns about disclosure to the board in camera, without disclosure of the substance of the information to the other parties." Id. In this case, the Staff provided to the Board, first on an unrestricted basis and subsequently in more detail on an ex parte, in camera basis, declarations from an attorney with the United States Department of Justice (hereafter, DOJ). Those declarations set forth the basis for DOJ's request that the Staff seek a protective order providing that the investigatory documents developed by OI and Region V not be disclosed to the Licensee and that this proceeding be stayed in order to avoid irreparable harm to the parallel criminal investigation. See Declarations of Judith E. Olingy, dated December 15, 1987, attached to "NRC Staff Motion for Stay of Proceed-

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<sup>1/</sup> Although the certificate of service stated that Staff counsel was also served on February 26 by means of telecopier transmission, that copy was not received. Thus, in accordance with 10 C.F.R. § 2.710 (providing that where service is by express mail two days should be added to the period for response calculated from the date of service), the Staff had until March 4, 1988 for the filing of this reply.

ing," and February 3, 1988, attached to Staff's ex parte, In camera "Motion for Protective Order; Objection to Memorandum and Order on Prehearing Conference; and Motion for Stay," of that date.

In its Opposition (at 3) Licensee charges the Staff with seeking Commission review of the document disclosure question for the purpose of avoiding going to hearing on the September 21, 1987 suspension order and thereby putting the Licensee out of the radiographic business without having to afford it a hearing. This is a totally unwarranted and unsupported charge. Throughout this matter, the Staff has clearly and forthrightly stated the bases for the relief requested. As reflected in the December 17, 1987 "NRC Staff Motion for Stay of Proceeding," the February 3, 1988 ex parte, In camera motion and the application to the Commission for a stay of the discovery order, the Staff has sought protection of the documents and a stay of the proceeding at the request of DOJ. <sup>2/</sup> The NRC and DOJ have a common objective of assuring that potential violations of the Atomic Energy Act of 1954, as amended (42 U.S.C. §2011, et seq.), and of other provisions of the United States Code that may be applicable, are vigorously investigated. DOJ has advised the Staff that the investigation of potential criminality of the actions of the Licensee identified by the Staff during its investigation entails a consideration of "...essentially the same factual allegations..." that are involved in this proceeding. December 15 Declaration, ¶ 6. Further,

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<sup>2/</sup> The position of DOJ that the Staff should object to production of investigatory documents and seek a stay of this proceeding has the concurrence of the Assistant Attorney General, Criminal Division. See letter dated February 11, 1988 from William F. Weld to James P. Murray, attached hereto.

DOJ has advised the Staff that the same witnesses would be needed to prove these allegations in either the NRC proceeding or the criminal investigation. Id. Based upon these considerations, It is DOJ's belief that "...extensive discovery by Finlay Testing in this pending civil action would threaten to prematurely disclose substantial information relating to possible criminal misconduct by Finlay Testing, its officers and employees." Id., ¶ 8. Therefore, DOJ has requested the Staff to object to the discovery of investigatory documents that have been referred to DOJ for investigation of potential criminality and to seek a stay of the NRC proceeding. See Weld letter.

In view of DOJ's request to the Staff, the appropriate mechanism for asserting protection of the investigatory documents is under the Policy Statement. That Statement reflects the Commission's view that there may be a need to protect investigative material from premature public disclosure and to avoid compromising an ongoing investigation. 49 Fed. Reg. 36,032 and 36,033. While the Policy Statement does not address the protection of investigatory documents during the pendency of a DOJ investigation of matters referred to it by the NRC, this reasoning also appears applicable to the investigatory materials that have been referred by the NRC to DOJ.

The Licensee argues, however, that the Staff is engaging in a "tortured construction" of the Policy Statement in order to have the Commission review the Board's denial of the stay request. Opposition at 2. The Licensee appears to take the view that the only permissible way for the Staff to attain review of the denial of the stay of the proceeding is pursuant to an appeal to the Appeal Board and a request for a stay pending review under 10 C.F.R. § 2.788. Id. at 7. The Staff, howev-

er, seeks Commission review of the denial of the stay because appellate review of that denial is so closely related to a determination on the Staff's objections to the Board's order requiring production of the investigatory documents, a matter that is clearly properly before the Commission under the Policy Statement. Application at 1 n.2. Since production of the documents in question is essential to the litigation of this enforcement action, it is appropriate for the Commission to consider both aspects of the Board's February 11th order. To require the Staff to separately seek Commission review of the disclosure question and Appeal Board review of the denial of the stay of the proceeding, would be inefficient and inappropriate. If the Appeal Board were to render a decision on the stay application inconsistent with the Commission's decision on discovery, the Commission's decision could be effectively nullified. Furthermore, the Staff has addressed the § 2.788 standards for the grant of a stay in its application. <sup>3/</sup>

### III. CONCLUSION

For the reasons set forth in the Staff's application dated February 17, 1988 and this reply, the Commission should reverse the Board's denial

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<sup>3/</sup> Both Texas Utilities Generating Company (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-83-6, 17 NRC 333 (1983) and Commonwealth Edison Company (Byron Nuclear Power Station, Units 1 and 2), ALAB-735, 18 NRC 19 (1983), cited by Licensee in its Opposition at 7 n.7, preceded the issuance of the Policy Statement and do not, therefore, address the question of whether a denial of a stay that is so closely related to a disclosure determination on investigatory documents will be reviewed by the Commission under the Policy Statement. The cited decisions also preceded the interim procedures published in "Statement of Policy - Investigations and Adjudicatory Proceedings," 48 Fed. Reg. 36358 (August 10, 1983).



of a protective order preventing disclosure of the investigatory documents to the Licensee and should grant a stay of this proceeding for a reasonable period of time to enable DOJ to proceed with its criminal investigation. <sup>4/</sup>

Respectfully submitted,

*Stephen H. Lewis*

Stephen H. Lewis  
Senior Supervisory Trial Attorney

Dated at Rockville, Maryland  
this 4th day of March, 1988

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<sup>4/</sup> The Staff has advised DOJ that the Commission may request an update of its stay request and DOJ has responded that it will provide an update should the Commission so request.



U.S. Department of Justice

WFW:LL:JEO:fcu

Washington, D.C. 20530

FEB 11 1988

James P. Murray  
Deputy General Counsel  
Office of the General Counsel  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

Dear Mr. Murray:

Re: In the Matter of Finlay Testing Laboratories, Inc.

This is to confirm that a copy of an ex parte in camera declaration by Judith E. Olingy of this section was telefaxed to your office to be filed on February 3, 1988, in support of the NRC Staff's objection to discovery and motion for a 30 day stay of the administrative proceeding in the above-referenced matter. The signed original of the declaration is enclosed.

The Department of Justice requested that the NRC staff object to discovery and seek a stay of this matter in order to prevent the irreparable harm to the Department's parallel criminal investigation of Finlay Testing Laboratories, Inc. that would result from extensive discovery of the government's evidence by Finlay Testing if the administrative proceeding went forward. We made this request of the NRC after consulting with Department of Justice attorneys in the Civil Division concerning the submission of the ex parte in camera declaration in support of the stay.

Sincerely,

WILLIAM F. WELD  
Assistant Attorney General  
Criminal Division

By:

*William F. Weld*  
LAWRENCE LIPPE, Chief  
General Litigation and  
Legal Advice Section

Enclosure