

0001

1 TCEQ COMMISSIONERS AGENDA MEETING

2 JULY 25, 2007

3

4 CHAIRWOMAN WHITE: Good afternoon. This is
5 a meeting of the Texas Commission on Environmental
6 Quality. The day is Wednesday, July 25th -- is it the
7 5th or the 3rd?

8 MR. SEAL: 5th.

9 CHAIRWOMAN WHITE: July 25th. I'm Kathleen
10 Hartnett White, Chairman. Present also for the record
11 are Commissioner Larry Soward and Commissioner Buddy
12 Garcia.

13 We have several Old Business items, at
14 least one --

15 MR. SEAL: Chairman, we --

16 **[NOTE: TDSL/Penske issue was taken up as the last action item of the
afternoon.]**

0013

1 MR. SEAL: Commissioners, that brings you
2 to your New Business for this afternoon. You do have one
3 item posted. Commissioners, the item that's in front of
4 you is a petition that's been filed by Texas Disposal
5 Systems Landfill, Incorporated, requesting that the
6 Commission review the Executive Director's action and
7 order, proper disposal of a particular category --
8 particular waste that's located in Travis County.

9 Commissioners, by letter dated July 13,
10 2007, the General Counsel's office notified the parties
11 that you would take oral argument. That letter provides
12 ten minutes each to the respective parties. You're
13 certainly -- certainly free to change that, if you so
14 desire.

15 I would recommend that if you do hear from
16 the parties, which I would recommend you do, that TDS, as
17 the petitioner, speak first, followed by Penske and
18 Zenith if they're present -- I don't have anybody signed
19 up from Zenith right now -- the Executive Director, and
20 OPIC, in that order.

21 I would recommend that since Texas Disposal
22 System did file the petition, that you allow them to save
23 some of their time for rebuttal.

24 And with that, I would certainly leave it
25 up to your discretion on how to proceed from here.

0014

1 CHAIRWOMAN WHITE: And I would ask the
2 representative of the petitioner to please come forward.
3 COMMISSIONER SOWARD: Madam Chairman --
4 CHAIRWOMAN WHITE: Yes?
5 COMMISSIONER SOWARD: -- before we do that,
6 I'd like to raise some procedural issues.
7 CHAIRWOMAN WHITE: Fine.
8 COMMISSIONER SOWARD: You might want to sit
9 down. This may take a little while.
10 (Laughter)
11 COMMISSIONER SOWARD: In just a moment, I'm
12 going to make a motion that we dismiss this petition for
13 lack of jurisdiction, and let me tell you the basis of my
14 motion, and then -- well, I'll put it out there and see
15 if it finds any fertile ground.
16 I would make this motion on the very simple
17 fact that the same issues that are in front of us with
18 this petition have been dealt with before by this
19 Commission in two separate instances, September of '06
20 and December of '06; and more specifically, though, for
21 the fact that the same issues that we are being asked to
22 consider are now the subject of at least 11 lawsuits in
23 which the same or substantially the same issues are on
24 appeal either from this Commission's action or from the
25 action of a federal agency or a private lawsuit between

0015

1 the parties.
2 And I believe that there is a sizable body
3 of case law that says that we do not have jurisdiction to
4 issue any new order on these issues, since they are the
5 subject of litigation, most of which are appeals of
6 decisions this Commission made, or this Agency made, on
7 those same issues.
8 I believe that there is a significant
9 litigation risk if any order is issued by this
10 Commission, based on this petition. It's -- I believe
11 that the Office of General Counsel agrees with that risk.
12 I would call your attention to page 15 and
13 16 of the petition, which is the basis -- it's the
14 request of TDS before us today. And as you look at that,
15 let me read you something: "TDSL asks the Court to order
16 Penske and Zenith to remove the broken cathode ray tubes
17 and commingled waste from its landfill property as a
18 Zenith and/or Penske defendant manifested regulated
19 hazardous waste and then provide for proper management in
20 accordance with federal and state statutes and
21 regulations governing regulated hazardous waste and
22 either return the transport containers to TDSL after
23 being cleaned or compensate TDSL for the transport
24 containers' value."
25 You will see that what's in front of the

0016

1 courts in this state is the exact same issues that
2 you're -- we're being asked to rule on today. And I
3 believe that the case law indicates that this Commission
4 has lost jurisdiction over those issues and that they are
5 now more appropriately in the courts.

6 I would -- I would point out that it is my
7 firm belief, based on my experience, any order issued by
8 this Commission today will immediately go back to court
9 with new litigation on the new order. So we accomplish
10 nothing by issuing an order today, simply adding more
11 dockets to our court system.

12 In the alternative, the other basis for my
13 motion to dismiss is that there are no new facts or
14 changed circumstances that this Commission needs to
15 consider from those that were presented to it twice, in
16 September '06 and December '06.

17 And therefore, there is no base -- no need
18 for this Commission to take this item up again, when it's
19 already dealt with those issues, made decisions, or taken
20 actions on those issues, and those issues are in the --
21 in the state and federal courts.

22 So at this time, I would move that we
23 dismiss this petition for lack of jurisdiction.

24 CHAIRWOMAN WHITE: I will not second that,
25 just so we don't have hanging silences.

0017

1 COMMISSIONER GARCIA: I can't second that
2 either, myself. I just -- I do think it accomplishes
3 something.

4 CHAIRWOMAN WHITE: And I would like to
5 address the jurisdictional issue, and I would also add
6 that the parties -- the petitioner itself and the parties
7 have different arguments on the jurisdictional issue, so
8 that if -- to one -- to some extent, perhaps the
9 Commission wants to hear their arguments before it
10 concludes. I would be prepared to conclude without
11 addressing each of the different parties' and the
12 Executive Director's arguments on jurisdiction.

13 And I'd like to try to articulate why I
14 think we have jurisdiction on this, why it's important
15 that we assert jurisdiction on this, and why, regardless
16 of the inevitability or risk of litigation of what legal
17 challenge of what the Commission may do or not, I feel
18 that the Commission -- and that's the Agency and the
19 Commission, all of that, has, to me, a really compelling
20 responsibility to act on this petition, and in the -- my
21 general perspective, and then I'm happy to enumerate what
22 I think are the statutory bases for our jurisdiction on
23 this and why it is justified to so exercise.

24 The statutory basis for jurisdiction is
25 that over ten years of this yet-unresolved issue, as you

0018

1 well characterized, in multiple layers of litigation,
2 state and federal courts, to me, there has -- the
3 Commission and the Agency has failed to articulate a
4 sufficiently clear legal position and sufficiently
5 decisive action that the Agency will follow on this.

6 And I -- and I believe I have failed in my
7 responsibility to do that and that the Agency has and
8 that, in so failing, we don't leave with the courts any
9 clear state position. And whether we reverse -- whether
10 the state position is reversed in a court or not, it
11 seems as if the -- to me, this Agency has a fundamental
12 responsibility, most particularly in issues that remain
13 unresolved for this length of time.

14 And that authority -- statutory authority,
15 under which I think the Commission may hear this
16 petition, is that general authority exists in a variety
17 of statutes. People hesitate to use the word "plenary."
18 I don't care what you call it. It is very general
19 authority in Water Code 5.012, 5.102, 5.221, 7.002 and
20 Health & Safety Code 361.017, which, in my opinion,
21 should be very rarely and very exceptionally exercised by
22 this Commission. The one other time in the six years
23 I've been here was in relation to an ASARCO matter.

24 But this one, to me, for a variety of very
25 compelling facts, and because of the complexity of the

0019

1 legal issues involved, so merits the Commission's
2 exercise of that authority.

3 COMMISSIONER SOWARD: Before I take up my
4 second procedural item, let me just point out, Chairman
5 and Commissioner, that it is my firm belief -- and I
6 think you should consult counsel on this -- that there is
7 no order that can be issued by this Commission today.

8 Any order that could be issued by this
9 Commission, based on this petition, would be in the
10 nature of an enforcement order, and unless agreed to by
11 Penske would have to go through the contested case
12 process, with full evidentiary processes and hearing,
13 affording all parties due process before any order could
14 be issued by this Commission.

15 CHAIRWOMAN WHITE: I think that that is not
16 necessarily so. I think that the Commission could
17 potentially issue what I would call a clarifying order --
18 an order clarifying the existing effective order of the
19 Commission of September 16th, 2004, which, yes, is being
20 challenged in the court, but until it's reversed by a
21 court, is an order binding this Agency's actions.

22 COMMISSIONER SOWARD: The second procedural
23 item is that in just a moment I'm going to move to grant
24 the Executive Director's motion for continuance. I was
25 going to bring up the request for continuance raised by

0020

1 Penske through Ms. Giblin, but the primary basis for that
2 particular motion appears to be moot at this point. And
3 so I'm not going to even raise that one.

4 But I do think it is -- should be of
5 serious note that the Agency's Executive Director has
6 asked for a continuance in this matter, on the basis of
7 not being able to properly and timely review all the
8 thousands of pages of documents and file an appropriate
9 reply brief. And I think it's unconscionable that we
10 would move forward, when our very staff has not had a
11 real opportunity to address the issues that are in front
12 of us.

13 The Executive Director's actions is the
14 very actions that are being petitioned for us to
15 overturn, or clarify, whichever way you want to
16 characterize it. And I think that the Executive Director
17 has raised very legitimate and reasonable bases for a
18 request for a continuance. There can be no harm
19 granted -- excuse me -- no harm had by granting the
20 continuance. And I think that we ought to honor that
21 request, and at this time I move to grant the Executive
22 Director's motion for continuance.

23 CHAIRWOMAN WHITE: Most respectfully to
24 you, Commissioner Soward, and to the Executive Director,
25 that is not a motion I can second because of the Agency's

0021

1 and Executive Director's involvement in this issue for
2 ten years, and because of the very reason which I think
3 which -- was some of your reason for concluding that
4 there wasn't jurisdiction.

5 There is nothing new in all of the
6 voluminous filings. Almost -- almost to a page, every
7 filing that is -- that has been filed in relation to this
8 petition has been filed in previous actions before the
9 Commission. And again I reassert, after ten years, I
10 think this is the time for -- if the Commission -- a
11 majority of the Commission so concludes, decisive clear
12 clarification of this matter.

13 COMMISSIONER GARCIA: Commissioner,
14 notwithstanding any of your comments, I -- it's my belief
15 that this agency has already ruled to overturn -- made a
16 motion to overturn, we've reached an agreement, and it
17 has not been completed. And I'm trying to get -- help
18 get to that point, where we avoid any missteps.

19 And as I've said, notwithstanding your
20 commentary, and legally this may be in front of -- at
21 least us again. But nonetheless, I do believe that the
22 conclusions by this Commission have been reached, and
23 it's a matter of trying to get this -- dispose of this
24 hazardous waste as efficiently as possible. I think it's
25 taking way too long.

0022

1 COMMISSIONER SOWARD: Commissioner, if I
2 thought that any action we took today would do that, I'd
3 be wholeheartedly joining you. But I guarantee you my
4 term won't see a resolution of this, and I'm not sure
5 your term will see a resolution of this issue. But I
6 understand your two positions, and thank you for allowing
7 me to raise those points.

8 CHAIRWOMAN WHITE: Then at this time we'll
9 proceed to hear from the parties in the order you listed
10 them.

11 MR. SEAL: Commissioners, are y'all okay
12 with the ten-minute time limit? Y'all are certainly free
13 to change that or --

14 CHAIRWOMAN WHITE: I'm fine. And I think
15 the briefer the better. But -- and as the petitioner,
16 you have the right to reserve for rebuttal.

17 MR. RUSSELL: Thank you. Commissioners,
18 for the record, I'm Kerry Russell. I'm here representing
19 TDSL in this matter today, and I'd like to reserve two
20 minutes for rebuttal if I could.

21 Also with me -- and I don't think they'll
22 be needed -- are Marianne Horinko and Robert Zoch, who
23 have appeared before the Commission previously on this
24 matter.

25 And as you've noted, a lot of time has

0023

1 passed -- in fact, almost three years has passed since
2 you last addressed this problem, in September of 2004,
3 and Penske's D008 CRT waste is still sitting out there at
4 the landfill.

5 EPA's May 6th determination makes clear
6 that what we have is a fundamental difference in
7 perspective here.

8 I believe that TDSL and Chairman White have
9 enunciated their perspective that they believe the waste
10 stream at issue is the D008 CRT waste that was generated
11 by Penske on October 9th, 1997, at the accident scene,
12 and that was the point of generation.

13 I believe Penske and the Executive Director
14 have clearly enunciated their perspective that they
15 believe the waste stream at issue is the commingled D008
16 CRT waste currently stored in the 99 containers at the
17 landfill, and the point of generation was when the
18 previously isolated CRT waste was placed in the roll-off
19 containers. It's a clear-cut difference of opinion here.

20 Before I discuss the EPA determination I
21 think that's the heart of the matter, let me list what I
22 think are some very clear facts that can't be disputed at
23 this point in time.

24 October 9th, 1994, a Zenith CRT trucking
25 accident happened in Illinois; disposal was D008

0024

1 hazardous waste. October 8th, 1996, Zenith CRT trucking
2 accident in Oklahoma, disposal as D008 CRT waste. The
3 facts on both of those were very similar. Those are
4 included in your pleadings -- somewhere in the voluminous
5 pleadings. March 10th, 1997, Zenith and Penske contract,
6 notifying from Zenith to Penske that damaged CRT must be
7 managed as hazardous material.

8 October 9th, 1997, the day of the accident,
9 Zenith advised Penske directly that the CRTs must be
10 disposed as D008 hazardous waste. October 9th, 1997, the
11 day of the accident, Penske notified emergency
12 responders, TNRCC, and the National Hotline that the CRTs
13 are D008 waste.

14 January 6th, 1998, Zenith notified TDSL by
15 letter that there were over 4,000 pounds of lead in that
16 load of CRTs. And lead is D008. That's what we're
17 talking about here, the hazardous constituent.

18 March 3rd, 1998, Penske manifested some of
19 the CRT waste to TECO as D008 hazardous waste. May 13th,
20 2004, TCEQ's NOV issued Penske -- called Penske the
21 generator of hazardous waste on October 9th, 1997.

22 There are documents here to back up every
23 statement. I tried not to say anything but actual facts
24 in that regard.

25 Now, let me say the EPA made its

0025

1 determination and so stated in that determination, based
2 primarily on the Executive Director's December 16th
3 letter, December 16th, 2004. TDSL believes that letter
4 carries a clear mistaken conclusion of law -- we call it
5 a flawed legal conclusion -- and two clearly distorted
6 facts that led the EPA to come to the decision they did.

7 And I note -- I particularly note that the
8 Executive Director's December 16th letter was in direct
9 contradiction to the position stated by Chairman White at
10 the December 1st, 2004 Agenda, two weeks after you,
11 Chairman White, stated the position. Direct
12 contradiction.

13 I'll briefly discuss this, what we think
14 are the flawed legal conclusion. The Executive
15 Director's position is, as stated to EPA, that the
16 commingled D008 CRT waste currently stored at TDSL -- and
17 its called "exhumed waste" by EPA in the determination --
18 is a new waste stream subject to testing and new waste
19 characterization.

20 I believe it's very clear, from our last
21 Agenda sessions and from the law, that is not true. The
22 waste at issue is the CRT D008 waste that was generated
23 at the accident scene. That's what has to be managed.

24 We think here's a distorted fact that EPA
25 relied on: The Executive Director said the CRT waste was

0026

1 deposited on this landfill working face, and most of it
2 was picked off before the isolation procedure. That's
3 wrong. In fact, the CRT waste, over a two-hour period,
4 was compacted into the working face, from two to four
5 feet deep, by a 75- to 100,000-pound compactor. And only
6 the CRT components and some cell glass MSW remained on
7 the surface, and that's what was removed during the
8 pickup action in the following days.

9 A second distorted fact that we think was
10 critical in the EPA's determination: The Executive
11 Director said little, if any, CRT waste remains in the 99
12 roll-off containers. In fact, Code 3, which at the
13 time -- earlier, was Penske's own hazardous waste
14 remediation contractor, in 1998, did an isolation.

15 And HBC Terracon, in 2004, during
16 containerization, noted that CRT components were present
17 throughout the commingled D008 CRT waste. That's the
18 waste that's in the 99 roll-off containers.

19 Right now, two separate environmental
20 professionals, totally independent, have noted that's
21 there. And they sworn to that under oath, by the way.
22 That's included in our briefing.

23 It seems obvious to TDSL at this point that
24 the Executive Director is diligently working with Penske
25 to create an inadvertent dilution exception to RCRA in

0027

1 Texas for toxic characteristic hazardous waste. I don't
2 think we can arrive at any other conclusion based on
3 what's happened over the last few years.

4 Chairman White, you and Commissioner Soward
5 got it right in September 2004 when you both said, on the
6 record, that the commingled D008 CRT waste must be
7 managed as D008 hazardous waste.

8 Today, TDSL comes before you and requests
9 that you immediately resolve at least part of this
10 problem by ordering -- by Commission order, ordering
11 Penske to removed the commingled D008 CRT waste from
12 TDSL's landfill under a standard unaltered hazardous
13 waste manifest for transport under that manifest to a
14 licensed treatment, storage, and disposal facility for
15 treatment, in accordance with 40 CFR 268.3.

16 And that way, that three-part hazardous
17 waste manifest, with copies back to TDSL from the
18 generator, the transporter, and the ultimate treatment
19 disposal facility, will once and for all clear TDSL's
20 site operating record in this matter. Thank you.

21 CHAIRWOMAN WHITE: Thank you, Mr. Sullivan.
22 I'd just like to make one -- I mean Russell.

23 MR. RUSSELL: We both have the same first
24 names. We frequently get each other's name, Mr. Sullivan
25 and I.

0028

1 CHAIRWOMAN WHITE: I know. I switch them,
2 anyway.

3 But my comment is this, which I don't think
4 is in any way determinative of all the matters before us.
5 As I previously said, the September 16th, 2004 order
6 granting TDS's motion to overturn, the specific
7 instructions to Penske in an ED letter, that -- that
8 motion to uphold and that order is what is governing my
9 consideration of this issue today.

10 And the subsequent discussions between the
11 Executive Director and EPA and all of that about RCRA
12 delegation, I really consider irrelevant to that.
13 Because in any of that, and however that all may or may
14 not be resolved in the future, none of that precludes
15 this Agency from interpreting law in a certain way and
16 for electing the most protective means of disposal of
17 this, I just wanted to say.

18 MR. RUSSELL: Chairman White, I agree.

19 CHAIRWOMAN WHITE: Because I think those
20 are huge rabbit trails that are not -- that are not --
21 are not binding on how the Commission interprets the
22 standing order of September 16, 2004.

23 MR. RUSSELL: I agree. And I believe the
24 statutory sections you cited support that. I would also
25 note that the EPA determination letter was brought up by

0029

1 Penske in their brief. That's why we're addressing it
2 here today. And it is, in fact, somewhat of a changed
3 circumstance that wasn't present when you considered this
4 in September --

5 CHAIRWOMAN WHITE: Right.

6 MR. RUSSELL: -- to the extent that you're
7 looking for changed circumstances, for further support
8 for action today. Thank you, Chairman White.

9 COMMISSIONER SOWARD: Well, you sought the
10 determination. You just didn't like the answer you got.

11 MR. RUSSELL: No, we didn't like the answer
12 we got.

13 COMMISSIONER SOWARD: I understand. So,
14 you know -- and I understand, as a good lawyer, you're
15 going to try to distinguish it. But the EPA answered the
16 very question you asked them.

17 You said it was a legal question, not a
18 factual question, and they answered it. You just got the
19 answer you didn't want.

20 MR. RUSSELL: And if you --

21 COMMISSIONER SOWARD: If you want to talk
22 about rabbit trails, you set the rabbit loose. You just
23 didn't like it when you caught it.

24 MR. RUSSELL: If you want to look at the
25 EPA determination letter, and if you read our brief,

0030

1 Chairman Soward, you'll look at the end of it when they
2 came to the critical conclusion that supported what
3 Mr. Wheatley said, when he was with the Executive
4 Director staff, that said, under 268.3, dilution may not
5 be used as a substitute for adequate treatment. And we
6 believe that that's the core of this issue.

7 If the point of generation was the accident
8 scene and the waste generated was D008, that's the end of
9 the story. As Chairman White said previously, then there
10 must be adequate treatment and dilution cannot be used as
11 the ultimate result.

12 COMMISSIONER SOWARD: And the EPA told you
13 the mixture rule has no application here.

14 CHAIRWOMAN WHITE: Well, I disagree -- I
15 don't -- to me, all of the discussion --

16 MR. RUSSELL: We don't believe it does
17 either. We don't believe it does either.

18 CHAIRWOMAN WHITE: All of the discussion
19 between the Executive Director and EPA is irrelevant to
20 the decision before us. It does not bind the Commission
21 in how we interpret the effect of a standing order and
22 how we elect to order proper disposal of this waste.

23 COMMISSIONER SOWARD: Well, let's --

24 MR. RUSSELL: I'll certainly defer to you
25 on that one, Chairman White.

0031

1 COMMISSIONER SOWARD: Let's paint this
2 picture correctly. This is not the ED communicating in
3 some conspiracy with the EPA. This is TDSL asking the
4 EPA to revoke our RCRA delegation based on noncompliance
5 with RCRA laws, and all parties having a chance to submit
6 to EPA their factual and legal positions, and EPA making
7 an independent determination. It's not the ED conspiring
8 with the EPA. It's TDSL initiating a process and getting
9 an answer.

10 MR. RUSSELL: I beg to differ with you,
11 Commissioner Soward. The process was the process. It's
12 the only process to go forward with that issue and bring
13 before EPA for a conclusion.

14 And the EPA, if you'll notice, said
15 specifically in the determination they were persuaded by
16 the Executive Director's December 16th letter, that the
17 legal conclusion and the two facts I've noted to you were
18 exactly the opposite of the statement Chairman White made
19 on December 1st, two weeks before the Executive
20 Director's letter.

21 Now, I don't know what kind of problem you
22 have here within the Agency between the Commission and
23 the Executive Director. But I do note, from the outside,
24 that there were two diametrically opposed positions
25 presented in December of 2004.

0032

1 COMMISSIONER SOWARD: Exactly.
2 MR. RUSSELL: And the EPA chose to listen
3 to what the Executive Director presented.
4 COMMISSIONER SOWARD: In a legal analysis.
5 And you know what? I'm sure you weren't very happy with
6 the Court of Appeals from the DC circuit's opinion
7 yesterday either.
8 MR. RUSSELL: Don't even know what it was,
9 so I can't be unhappy yet.
10 COMMISSIONER SOWARD: Dismissed it for lack
11 of jurisdiction.
12 MR. RUSSELL: And did they dismiss the
13 Fifth Circuit Court of Appeals?
14 COMMISSIONER SOWARD: I don't know.
15 MR. RUSSELL: Because the Fifth Circuit
16 Court of Appeals is the primary appeal on the EPA
17 determination.
18 COMMISSIONER SOWARD: I'm sure you'll be
19 unhappy when that comes.
20 MR. RUSSELL: Mr. Blackburn will probably
21 be unhappy on that one. I believe that's his case.
22 CHAIRWOMAN WHITE: I'd like to hear from
23 the next party, please. And you -- this was --
24 MR. RUSSELL: Thank you, Chairman White.
25 CHAIRWOMAN WHITE: You still have your

0033

1 rebuttal time.
2 MS. GIBLIN: Good afternoon, Madam
3 Chairman, Commissioner Soward, Commissioner Garcia, and
4 General Counsel Seal.
5 For the record, my name is Pam Giblin, and
6 I have the privilege of representing Penske Truck Leasing
7 today.
8 I think it is fair to say that the only
9 thing that these two parties agree on is that that waste
10 that's sitting out there does not represent any threat
11 whatsoever to human health and the environment.
12 Virtually every single other fact that they
13 have set out today is hotly disputed, and we have never
14 had an opportunity for an evidentiary hearing, where we
15 can actually cross-examine their witnesses, put on
16 evidence, et cetera.
17 Let me talk real briefly, though, about the
18 fundamental legal point about lack of jurisdiction. I
19 couldn't have said it better than Commissioner Soward.
20 We're obviously prepared to discuss it because it is
21 fundamental.
22 And I know the respect, Chairman White,
23 that you have for the law, and the law could not be
24 clearer that when a decision is made by an agency and
25 that decision is up on appeal, the agency has lost

0034

1 subject matter jurisdiction over the entire matter. You
2 do not have jurisdiction to go back to tinker, to refine.

3 And no matter whether -- they call it
4 clarification. They didn't like what happened in
5 December. The Commissioners did make a decision, but
6 they didn't like it. They didn't like the fact that the
7 Commission upheld the earlier decision from September.

8 And in fact, when you look at their
9 petition in the Travis County District Court, what they
10 are asking the court to do confirms that they understand
11 that they lost in December, that you found contrary to
12 the position that they were wanting to take.

13 So instead of, "Oh, the Commission hasn't
14 made a decision," you have made several. TDSL just
15 doesn't like the conclusion that y'all have reached.

16 And in Travis County District Court,
17 they're asking the court, in the -- in live pleadings
18 right now, they're asking a declaration that a waste that
19 has been classified as hazardous waste because of its
20 toxic characteristics, in accordance with TCEQ
21 regulations, must be manifested and managed as a
22 hazardous waste, exactly what they're asking here.

23 They're asking that the court reverse and
24 remand TCEQ's -- not the Executive Director's -- TCEQ's,
25 your decision, and they seek a judgment from the -- from

0035

1 the Travis County District Court, ordering -- saying that
2 you have improperly interpreted statutes and regulations.
3 The very issues that are in -- that they're trying to put
4 in front of you today are on appeal.

5 And as I said, the case law could not be
6 clearer. When they filed this appeal, which they haven't
7 dismissed, you lost subject-matter jurisdiction over this
8 matter. And it's not a legal technicality. I mean,
9 there's a real solid reason for that.

10 You can't have a party that, when they
11 lose, they just think, "Well, we're just going to try it
12 again two years later." Otherwise, motions for rehearing
13 and motions to overturn and all those time limits would
14 be meaningless if you could just anytime say, "You know
15 what? I want to take this up again."

16 But let me talk about some of the very
17 fundamental issues that I think -- especially for
18 Commissioner Garcia, who hasn't heard these -- these
19 issues brought up. And I -- and from the outside, people
20 think, "Well, gosh, why hasn't the Commission made a
21 decision?" And again, it's important to focus that they
22 have, but it's never been to TDSL's liking.

23 First of all, this EPA petition, in the
24 hazardous waste area, unlike air or water or municipal
25 solid waste, where you-all have your own rules, like, for

0036

1 example, your own definition of best available control
2 technology, that differs from the federal, so you do get
3 to have your own interpretation.

4 In the hazardous waste area, the
5 legislature and this Commission chose to simply
6 incorporate, by reference, the federal definition of
7 hazardous waste. So therefore, the EPA determination is
8 dispositive of the definition of hazardous waste. If
9 this Commission doesn't like it, there is a way to change
10 that. But it is not like the other programs that you
11 administer where you've got your own regime.

12 I thought it was fascinating that they
13 didn't even mention the EPA determination, which is
14 dispositive, and which not only said -- you know, EPA
15 could have easily just dismissed their petition and said,
16 "We don't see enough there to pull back the RCRA
17 delegation."

18 Instead, EPA went out of its way in 12
19 pages to explain, "Here's how the hazardous waste rules
20 work," I guess thinking, again, like everybody that's
21 ever touched this case, "If we just explain it to TDSL,
22 if we just try to reach out to them, maybe they'll
23 understand."

24 So they go through exquisite detail, and
25 they confirm the fundamental thing that you-all decided

0037

1 in September and that you re-upped in December. When
2 they tried to get you to change your mind in December and
3 y'all, as a -- as a body, said no, what you re-upped
4 was --

5 CHAIRWOMAN WHITE: We didn't say -- as a
6 body, say no.

7 MS. GIBLIN: Well --

8 CHAIRWOMAN WHITE: We were unable to act --

9 MS. GIBLIN: The -- the --

10 CHAIRWOMAN WHITE: -- towards the second of
11 a motion.

12 MS. GIBLIN: To overturn.

13 CHAIRWOMAN WHITE: We did not say no.

14 MS. GIBLIN: To overturn.

15 CHAIRWOMAN WHITE: Inaction.

16 MS. GIBLIN: Anyway -- well, and, you know,
17 they obviously -- in this Travis County pleading, they
18 don't call it inaction. They're saying to the court,
19 "The decision made by the Commissioners in December is
20 wrong. Court, tell them to correct it." So they're not
21 taking the position that there was no action.

22 But be that as it may, the fundamental
23 point that you-all and that the Executive Director has
24 said, which is correct and has been affirmed by EPA, is
25 that the determination of whether something is a

0038

1 characteristically hazardous waste is made by testing.
2 There have been about 80 tests of this
3 material. Every single one of them confirms that this is
4 not hazardous waste. It's not even close. The standard
5 is five micrograms per liter. We're talking about a
6 fraction of a fraction of a fraction. Not even close.
7 There's no question that this is not hazardous waste.

8 But let's talk about this point of
9 generation that's been discussed so much. I think it's
10 important to understand what really happened at the
11 scene. You had a Penske truck that was hauling product,
12 that was hauling CRTs for assembly down to Mexico. A red
13 Mustang crosses the centerline, accident occurs, no fault
14 of the Penske driver. This is all in the accident
15 report.

16 The driver, very correctly, brings the
17 truck down like they're sort of taught to do, very little
18 damage, Probably -- all indications are, from the
19 accident scene, that there were very few broken picture
20 tubes at the time; no creation of hazardous waste, we
21 believe.

22 DPS takes over the scene, and if anybody's
23 been in an accident, you know that they take over the
24 scene, especially on I-35 at rush hour, when they're
25 trying to clear it.

0039

1 The Penske truck driver is saying, "Please,
2 give us the opportunity to unload some of these, to save
3 some of these picture tubes. You know, don't -- you
4 know, we -- we can unload them and they're fine. They're
5 not broken."

6 Officer Aker -- you know, and we're not
7 faulting him because he, again, is trying to clear the
8 deck at rush hour -- says no. And they get their
9 contractors, the state's DPS and TxDOT contractors to
10 come over there, and they decide they're going to chain
11 the truck and to try to move it.

12 And the poor Penske truck driver is saying,
13 "Wait a minute. You're doing this incorrectly. You're
14 going to mess up my truck in addition to breaking my
15 load."

16 Well, sure enough, as they -- as they try
17 to pick it up -- this is all being done without letting
18 the Penske driver even close to the truck at that point.
19 It falls, and the -- the side falls off the truck and a
20 bunch more picture tubes are broken.

21 DPS hires contractors -- or uses
22 contractors that they have on call to haul this waste.
23 The Penske truck driver -- Penske doesn't know where it's
24 going. We had nothing to do with where it went. We had
25 nothing to do with the generation. Penske did not

0040

1 generate the waste at the side of the road. The
2 generator of that waste at the side of the road was the
3 State of Texas through DPS. And again, we're not
4 faulting them. But that's the reality.

5 And if we ever have an opportunity to
6 present evidence in any kind of evidentiary proceeding --
7 which is a second point that the only things you can do
8 with this petition are either to dismiss it or to deny
9 it, because there has never been the opportunity for us
10 to put on evidence that Penske did not generate the waste
11 at the side of the road.

12 We clearly didn't generate the waste in the
13 hundred roll-offs. That was clearly done by TDSL. The
14 waste was not hazardous by the side of the road. It is
15 not hazardous in the Dumpsters. Those are fact
16 questions, and you cannot grant the relief that they
17 seek. The relief they're seeking --

18 CHAIRWOMAN WHITE: I believe those
19 questions were answered when the Commission adopted the
20 TDS motion September 16th, 2004.

21 MS. GIBLIN: No, Madam Chairman. That --
22 you know, with all due respect, that motion of theirs
23 then wasn't asking for specific determination. This time
24 they're saying you've got to direct Penske to basically
25 fib on a manifest, which, with all due respect, you

0041

1 can't -- we can't do. We didn't -- we're not the
2 generators of the waste, and the waste is not hazardous.
3 And -- and there's --

4 CHAIRWOMAN WHITE: This is starting -- you
5 know, and I don't -- you know, perhaps my fellow
6 Commissioners want you to go on. You're starting far
7 beyond, I think, where we are now, including Executive
8 Director's --

9 MS. GIBLIN: No. What I'm -- what I am
10 saying is the fundamental principle -- that you cannot
11 grant the relief that they are asking for without
12 findings of fact, and there has never been an evidentiary
13 process.

14 The most fundamental thing before the
15 awesome power of government comes down on a particular
16 party is that they have the right to confront witnesses,
17 to cross-examine, and to put on evidence, and we have
18 never had that opportunity.

19 We're trying to get it in Hays County, if
20 they'll ever stop trying to get that delayed. We -- you
21 could do it at SOAH. I see every day at Agenda you-all
22 send stuff off to fact-finding hearings with a lot fewer
23 disputed issues.

24 CHAIRWOMAN WHITE: Then -- I think you also
25 argued then that we didn't have jurisdiction to take up

0042

1 the motion to overturn the Executive Director's letter
2 that resulted in the September 16th, 2004 order.

3 MS. GIBLIN: I'm --

4 CHAIRWOMAN WHITE: We wouldn't -- well,
5 then let me say again --

6 MS. GIBLIN: I'm not following you,
7 Chairman.

8 CHAIRWOMAN WHITE: And I believe that was
9 your position when, in September 2004, we took up TDS's
10 motion to overturn the letter of instructions to Penske
11 that was following the issuance of an NOV to Penske. I
12 think you drew the same conclusion that we didn't have
13 jurisdiction to hear that, and that it was inappropriate
14 to without an evidentiary basis.

15 COMMISSIONER SOWARD: But --

16 MS. GIBLIN: Right.

17 CHAIRWOMAN WHITE: But we did, and an order
18 was issued.

19 COMMISSIONER SOWARD: But no findings of
20 fact were in that order.

21 MS. GIBLIN: No findings of fact. That's
22 the huge distinction. That's exactly right. The
23 difference between the relief they are seeking today and
24 the relief that they have always sought is that this time
25 they're saying, "TCEQ, order this particular party --

0043

1 decide facts as between" -- are our facts correct or
2 are -- they're asking you to order us, not to -- not to
3 say something to your Executive Director or to opine in
4 the abstract.

5 They're asking you to order us to remove
6 waste that we did not generate and that we believe is not
7 hazardous waste, when we've never had an opportunity to
8 put on evidence. That's the huge difference, is that in
9 this case -- and if you look at it, I've never seen in my
10 career a petition or a draft order that does not cite a
11 single statutory provision or rule. You know, ordinarily
12 they say, "Pursuant to section such and such."

13 Ironically, the ASARCO district court
14 opinion that they're citing was one where the court
15 upheld y'all's plenary power to send something to SOAH.
16 Never have I seen plenary power to just reach out and to
17 say, "You know what? Party X, we're siding with you over
18 Party Y," no opportunity to present evidence.

19 That is the fundamental -- and it's just --
20 it's not only illegal, it is also wrong. And it's --
21 it's so fundamental to due process. And you don't get
22 the decision, due process to follow. You get due process
23 before the decision. And so you cannot grant the relief
24 they're seeking because they want you to make findings of
25 fact against Penske, very different from what you have

0044

1 done.

2 Again, they don't like the answer they've
3 gotten in the past, so they're, every time, getting --
4 I'll use the word sort of greedier or more aggressive
5 about what they want.

6 But if they pursued their Travis County
7 litigation -- not even the Hays County litigation -- if
8 they're right, they'll win and they'll get that relief.

9 And it's not an abdication of this court, because you
10 decided in December -- they said to the court that you
11 decide in December, and they're saying to the court --

12 CHAIRWOMAN WHITE: Have we exceeded the ten
13 minutes here? Then for the sake of fairness, I think --

14 COMMISSIONER SOWARD: Well, she's been cut
15 off a number of times, Chairman.

16 MS. GIBLIN: I was responding to questions,
17 just like Mr. Russell was, Madam Chairman.

18 But, I mean, I think the -- I think the
19 fundamental thing that -- that we have to convey is that,
20 again, you -- the only -- the only things you can do with
21 this petition are either dismiss it because you don't
22 have jurisdiction and the case law is clear, or deny it
23 because you cannot make findings adverse to Penske
24 without the opportunity for us to present evidence.

25 My client has tried every way possible to

0045

1 resolve this thing. We've tried every permutation of
2 "How about if we do it this way? How about if we do it
3 that that way?" "No, no, no."

4 Because the only thing they want is a
5 finding that they can then go use in a ten million dollar
6 damage lawsuit. And this is like that McDonald's thing
7 where -- you know, not every accident, not every
8 splashing of coffee, ought to result in a windfall, and
9 especially if Penske was not at fault. And we didn't
10 generate the waste, and it's not hazardous.

11 And with that, I'll be happy to answer any
12 additional questions.

13 COMMISSIONER GARCIA: Well, Ms. Giblin, I
14 do appreciate, and you articulate so well, your position
15 that we cannot simply correct yet another misstep or take
16 the liberties that we're attempting to take today.

17 And I wasn't here before, as you know. I
18 have done quite a bit of reading, and since going back to
19 my confirmation hearings, this was an issue that was
20 brought to my attention over and over again to look into.

21 And so, quite candidly, I do want to take a
22 shot at this. I wanted to get an opportunity to take a
23 look at this and see if we can correct -- avoid another
24 misstep.

25 If you'll indulge me a little analogy.

0046

1 About -- I was about 11 years old and my dad was out of
2 town, and one of the only things he asked me to do was
3 cut the grass before he got home. And I don't know why I
4 waited till the day he got back, and I don't know why I
5 waited till that afternoon. And by the time I pulled the
6 lawn mower out, it had rained and the grass was this high
7 (indicating), and I had -- probably had it cut way
8 down -- too low.

9 And instead of doing the back-and-forth
10 method that my father had, crisscross -- he was so, so
11 meticulous about his yard -- I was doing some figure-four
12 thing around the bush. And I don't know what I was --
13 why. I just didn't want to get stabbed by this one tree
14 that I always did.

15 And I was -- and lo and behold the lawn
16 mower stops, and I'm nowhere close to finishing. And it
17 is an old lawn mower, and I don't know why I always had
18 to use this thing. And I tried until my -- both hands
19 were raw trying to start the thing. Tried to start the
20 thing, tried to start it. Couldn't do it.

21 By now my mother says, "Get in here for
22 dinner." And when she says jump, you have to jump. And
23 then after that it was bed and -- shower and bed. The
24 whole time -- my father's coming home later that evening.
25 The lawn mower's still out in the front yard.

0047

1 He pulls in about ten o'clock at night. He
2 comes and gets me out of bed, takes me to the front yard,
3 and all I remember was his question, six words: "Does
4 this look good to you?"

5 And the machine's sitting there. The grass
6 is up. The yard was burned down. I don't -- and I had
7 all these things I was going to tell him, what rational
8 reasons why I was in the position I was in and what
9 happened. And all I said was, "No, sir, it doesn't."

10 The next morning, before I even got -- had
11 a chance to get up, I get up and he had already edged the
12 yard. And I go and look outside the window. He has the
13 lawn mower. He raised it up a little higher, checked to
14 see if there's gasoline -- thank goodness there was
15 gasoline in there -- closed it. In one pull, vroom, he
16 gets the thing started. And he cuts the yard and he cuts
17 it the right away, and he didn't say any word to me,
18 never said anything else again.

19 And I felt mortified. And it was nothing
20 that I could -- I don't know why I didn't ask the
21 neighbors for the lawn mower. I don't know why I didn't
22 think of things. You know, why did I wait till the last
23 minute? Why did I do all these things? It got to be a
24 mess. And again, his point was: Does this look good to
25 you?

0048

1 I come into this job, and this is the thing
2 that I'm dealt with, that I get thrown in front of me:
3 Does this look good? No, it looks horrible.

4 MS. GIBLIN: But --

5 COMMISSIONER GARCIA: And I know your
6 points legally, especially if we can't -- you're saying
7 we can't go through this exercise.

8 MS. GIBLIN: But --

9 COMMISSIONER GARCIA: But I feel like I
10 have to.

11 MS. GIBLIN: But, Commissioner Garcia, what
12 you can do is -- what you can do is either use what --
13 the power to broker some sort of a resolution that we
14 have tried to broker forever, or to at least say, "Okay,
15 let me -- let me get the facts nailed down."

16 What nobody has done before and that might
17 be an opportunity for you to do is say, "Let's go get a
18 SOAH judge to listen to the facts and come back with an
19 agreed-upon record." Because right now what you've got
20 is he said/she said, and you're right. They have been
21 much smoother on the politics.

22 I mean, my client is like a lot of large
23 companies. They really don't believe that this can
24 happen to them in these United States. And they were
25 slow in the uptake on the politics, and we have never

0049

1 spent the resources, probably, going and working that
2 piece. But I guarantee you that on the facts and the
3 law, we're right. And those do matter.

4 Like what you were describing about your
5 father, imagine if what he was chewing you out for was
6 something that you hadn't done. Imagine if you had done
7 everything right. And that's how we feel like: No good
8 deed goes unpunished. I mean -- and your staff gets
9 beaten up.

10 Right after the accident, they were out
11 there and they did a full-fledged report that TDSL was
12 fine with for years, for years, until they sent us an
13 extorted bill, then filed a lawsuit. That's when this
14 thing got started. This thing hasn't been lying around
15 for ten years. Your staff worked diligently. My clients
16 tried to resolve this thing nine ways to Sunday.

17 And so what you're talking about is exactly
18 right. I mean, jump on us if we had not done something
19 right. But what about the responsibility of a landfill?

20 Get this: Mr. Vallejo, the contractor for
21 DPS, shows up at their landfill, no paperwork. Clearly
22 it's picture tubes. They know it's picture tubes. "Come
23 on, bring it in." I mean, is there some accountability?

24 I mean, you're right. But if it -- if it
25 doesn't look good, it doesn't look good from both sides.

0050

1 But to then say, "Okay, you know, we're going to hammer
2 you" -- because the order that they are -- they're asking
3 you to enter is exactly the relief that they're asking
4 for in the Hays County court. I've got their last
5 amended petition.

6 CHAIRWOMAN WHITE: I really -- and we will
7 allow -- unless my fellow Commissioners disagree, I'd
8 really like to hear from the other parties before we --
9 and I just state this as my perspective. I think the
10 matter's much more simple before us. Please sit down,
11 Ms. Giblin.

12 I think -- and I'm sorry to keep repeating
13 myself, but I will keep repeating myself. In September
14 2004, the Commission upheld a motion to overturn portions
15 of a letter regarding waste characterization that the
16 Executive Director had sent to Penske because he had
17 initiated an enforcement action against Penske as
18 generator of the waste responsible for its disposal.

19 Several years later, in the manner in which
20 a Commission sees these things, not in the internal
21 actions and deliberations, the Executive Director writes
22 a letter to you, Ms. Giblin, saying that he was no longer
23 going to continue pursuing that enforcement action
24 because of the -- that in -- somehow, in the Executive
25 Director's words, it was better resolved in the courts.

0051

1 What I think before us today is simply a
2 request to correct half of the Executive Director's
3 letter to Penske following the Commission's September
4 16th order, which was the -- and that September 24th
5 letter of the Executive Director was the Executive
6 Director's attempt to implement the Commission's order,
7 half of which he got right, half of which, in my opinion,
8 he did not get right.

9 But that, to me -- we're in a much more
10 confined situation and not about the accident scene or
11 who or who is not the generator of waste.

12 COMMISSIONER SOWARD: And two Commissioners
13 in December, when that came back to us, chose not to make
14 any action -- take any action on that. And now this is
15 in front of us because there's a new commissioner sitting
16 down there. That's the only reason this is in front of
17 us. Two Commissioners upheld the September '04 decision.
18 That's the only reason this is here.

19 COMMISSIONER GARCIA: But after September
20 '04, nothing was done. Nothing got accomplished. I
21 mean, there was letters that went out. The letter went
22 out --

23 COMMISSIONER SOWARD: Because the parties
24 would not agree to accomplish anything. They chose to
25 go -- 11 lawsuits.

0052

1 CHAIRWOMAN WHITE: Well, as one of -- what
2 perhaps we -- now is an appropriate time to hear from the
3 Executive Director because --

4 COMMISSIONER GARCIA: Yeah, please.

5 MS. PERDUE: Good afternoon. For the
6 record, Stephanie Bergeron Perdue, Deputy Director of the
7 Office of Legal Services.

8 With me today I have Glenn Shankle, the
9 Executive Director. I also have Minor Hibbs with the
10 Chief Engineer's Office, as well as Brent Wade with the
11 Office of Compliance & Enforcement.

12 And I do have, of course, prepared remarks,
13 but I feel that before I start to address those items, I
14 think it's very important that I note that, respectfully,
15 the ED disagrees that he is trying in any way to create
16 an exception to the dilution rule.

17 Reasonable lines may differ, and that, I
18 believe, is what the courts are for, to resolve those
19 differences of legal interpretation and opinions.

20 And the other thing I might go ahead and
21 directly address today is the idea or notion that somehow
22 there's a collaboration between Penske and the Executive
23 Director with respect to interpretation of these rules.

24 And I will now move on to my prepared remarks.

25 The ED has recommended to the Commission

0053

1 that while the ED recognizes and respects the
2 Commission's plenary authority, in this instance the
3 Commission lacks jurisdiction to consider the matter.
4 I'm not going to get into detail on that because I
5 anticipate we'll have some discussion over that, but the
6 issue today, I would frame it as, is whether the
7 Commission will or can allow the regulatory process, in
8 the name of plenary authority, to be used -- to be used
9 in this manner.

10 And I would like to perhaps repeat some of
11 what has already been discussed, but since everybody's
12 giving their version of what they understand the facts to
13 be, I'll go ahead and repeat that too. And I think as --
14 in doing so, it might demonstrate a little bit of the
15 awkwardness of where we are today with the petitioner's
16 argument.

17 On September 16th, 2004, the Commission
18 discussed the exhumed waste and the 99 bins and whether
19 the waste, including any remaining CRT waste, was
20 required to be disposed of as a special waste.

21 At the hearing, it was discussed that every
22 bin could be sampled in accordance with appropriate EPA
23 sampling and testing procedures for heterogenous
24 mixtures. If any CRT waste was tested in a bin, then it
25 would be handled in accordance with applicable RCRA

0054

1 requirements. And it appeared -- at that time, the
2 petitioner agreed with this approach.

3 After a considerable amount of
4 deliberation, the Commission ultimately overturned the
5 ED's decision to classify the waste as special waste, but
6 did not specify the manner in which the enforcement
7 action against Penske must proceed.

8 On December 1st, 2004, the Commission took
9 up, as we all know now, the subsequent motion to
10 overturn, and this was based on the Executive Director's
11 September 24th, 2004 letter, which set forth two
12 alternatives, or two options, for removal of the waste in
13 the 99 roll-off containers.

14 The focus of the December hearing was
15 TDSL's objection to what I will call the ED's alternative
16 approach, which set forth that Penske pursue the actions
17 discussed at the September 16th hearing. Importantly,
18 the Executive Director directed Penske to ensure
19 compliance with all RCRA requirements, including any land
20 disposal restrictions.

21 The Commission affirmed the ED's September
22 24th directive, whether we call it by characterization of
23 inaction or otherwise, but it was, in essence, affirmed
24 that there was not a -- that there shouldn't be specified
25 a different manner for handling or disposing of that

0055

1 waste. And on May 17th, 2006, EPA determined that Texas'
2 administration of the RCRA program was consistent with
3 federal law.

4 And with respect to the petition that was
5 filed with the EPA and the response that we received back
6 from EPA, I would note that although we were criticized
7 at the time for including the lawsuits that had been
8 filed, the lawsuits -- both sides, TDS and Penske,
9 certainly set forth differing views of the facts as well
10 as differing views of the law.

11 So I might take issue with a --
12 characterizing the ED's December 2005 letter as a flawed
13 legal conclusion. We did make our statements in the
14 letter, but certainly there was an opportunity before
15 EP -- and with respect to the EPA having an opportunity
16 to review the information that had been provided as a
17 result of the petition, to have our program approval
18 withdrawn. EPA initiated an informal review and asked
19 for information. Information was provided.

20 Today, in 2007, and seven lawsuits later --
21 and this is seven lawsuits against TCEQ -- we are poised
22 to reopen this matter and once again discuss the same
23 waste and the same 99 bins and whether the exhumed waste
24 or some portion thereof is required to be disposed of at
25 a hazardous waste disposal facility.

0056

1 The concern is that -- well, it's not a
2 concern. I think that one can rest assured that whatever
3 action is taken today, that one will be presented to the
4 Hays County District Court, where the private litigation
5 has been pending, as we know. And also, there will be
6 another challenge filed against the TCEQ.

7 My concern is that it is abundantly clear
8 that the petitioner's request is not about environmental
9 protection anymore. It's about using authority of the
10 Commission to leverage a favorable position in civil
11 litigation where monetary damages are involved.

12 And again, the idea that there might be
13 resolution today, separate and apart from jurisdictional
14 issues and lawsuits, that this issue would be resolved --
15 it's not because the ED has ignored the Commission's
16 directives or has failed to exercise enforcement
17 authority. Rather, the issue has been that because
18 there's a difference of opinion with respect to the law,
19 the petitioner will not allow Penske access to the
20 property. So I want to be clear about this. This is not
21 the Executive Director ignoring the Commission or failing
22 to enforce his enforcement authority.

23 And in conclusion, determination to grant
24 the relief requested today will only confound the
25 ultimate resolution of the controversy and again generate

0057

1 another lawsuit.

2 And I'm available for any questions that
3 y'all may have.

4 CHAIRWOMAN WHITE: Well, just a couple
5 comments, and again one on the jurisdictional issue.
6 Because as I said before you began speaking, Stephanie, I
7 think that what's before us is a far more limited
8 question, really, about whether the Executive Director's
9 September 24th, 2004 letter, following the Commission's
10 order, gives accurate instructions to Penske to comply
11 with, at that time, the NOV the Executive Director had
12 issued to Penske, which is stated in a May 25th, 2004
13 letter, that Penske generated the hazardous waste and is
14 responsible for the proper disposal of the waste.

15 I think the Commission retains -- and this
16 is the first opportunity that the Commission -- I guess
17 it's the second, but is an opportunity for the -- for
18 the -- for -- and I'll speak as an individual -- to
19 clarify how I understood what were the legal requirements
20 following from the Commission's September 16th, 2004
21 order.

22 MS. PERDUE: And perhaps going back --
23 because there was the May 2004 letter. But in looking at
24 the notice of violation, May 13th, 2004, the alleged
25 violation was failure to prevent the disposal of any

0058

1 industrial solid waste or municipal hazardous waste
2 unless such activity is authorized, and then, further,
3 the second alleged violation is failure to determine if a
4 generated waste was a hazardous waste.

5 I think -- I don't disagree that the
6 statement was made in the letter, but we keep coming back
7 to the idea that there are -- suffice it to say, there
8 are differences of opinion with respect to the facts from
9 October 1997.

10 CHAIRWOMAN WHITE: And legal -- and legal
11 difference of opinion.

12 MS. PERDUE: And I agree -- and I agree,
13 legal difference of opinion.

14 CHAIRWOMAN WHITE: And again why I would
15 say why we have jurisdiction and are justified, should
16 the Commission so elect, to try to clarify to the
17 Executive Director what the Commission may think are the
18 legal consequences of Commission orders.

19 MS. PERDUE: And my -- and my concern there
20 is that the -- essentially, the same interpretive
21 differences and the facts associated with it are the
22 basis for at least the last amended petition in Travis
23 County District Court in January, I believe, 2006.

24 CHAIRWOMAN WHITE: But if for no other
25 reason -- because of the difference of opinion expressed

0059

1 on the Commission and between members of the Commission
2 and the Executive Director, there's no clear state
3 position for a court to review. There are multiple
4 arguments about what the state position is.

5 And as I -- as I said when I began, at
6 whatever risk of a court finding we don't have
7 jurisdiction or whatever error might we find, I think the
8 state agency, you know, with the Commission as the final
9 decision-maker, has an obligation to offer a final clear
10 position.

11 COMMISSIONER SOWARD: And we have.

12 CHAIRWOMAN WHITE: I don't believe so.

13 COMMISSIONER SOWARD: It wasn't the one you
14 wanted.

15 CHAIRWOMAN WHITE: No. And I -- and I can
16 go -- and I -- again, I'm only expressing my opinion.
17 And we can go to the transcript of September 16th,
18 2004 --

19 COMMISSIONER SOWARD: Exactly.

20 CHAIRWOMAN WHITE: -- which I will right
21 now first.

22 COMMISSIONER SOWARD: Go there. And then
23 hold it up against the ED's September letter.

24 CHAIRWOMAN WHITE: I will. Because there's
25 my motion to adopt the TDS's -- TDSL's, whatever the

0060

1 sequence, motion to overturn. Then there's fairly
2 lengthy conversation -- and particular from you,
3 Commissioner Soward. I said hardly anything.
4 Commissioner Marquez also joined in.

5 And you were repeatedly asked, because of
6 all the comments you made, whether you wanted to add
7 those as special instructions to the Executive Director.
8 And you declined to do so. And so the Commission action,
9 and therefore the order, is merely to uphold the motion
10 to overturn.

11 It is my opinion that then in the Executive
12 Director's September 24th letter that follows, half or
13 two-thirds of what I understood as the minimal legal
14 consequences falling from upholding that order, that the
15 waste must be manifested as hazardous and disposed of at
16 a permitted hazardous waste facility. I think that
17 legally follows from the Commission's upholding that
18 motion.

19 The rest of that letter, which talks about
20 alternative means of testing and therefore
21 recharacterization, which is in some of your comments
22 between the motion to uphold and the final action, are
23 included in that.

24 It is my opinion that those alternative
25 testings and -- for the possibility of recharacterization

0061

1 and therefore disposal of all or some of the waste as
2 nonhazardous, are precluded by the adoption of TDS's
3 motion to overturn.

4 COMMISSIONER GARCIA: Chairman, I --
5 COMMISSIONER SOWARD: You didn't raise that
6 at any point.

7 CHAIRWOMAN WHITE: That's, to me, what the
8 legal consequences of that order is.

9 COMMISSIONER SOWARD: We -- as you've
10 rightly pointed out, we had significant discussion after
11 your motion. I had to repeat my comments multiple times.
12 Ms. Giblin asked me a question. Mr. Russell wanted it
13 clarified, and he later agreed with it. And you never
14 once questioned about that. And yes, there --

15 CHAIRWOMAN WHITE: But I don't -- I -- and
16 these become procedural issues. I think that is
17 conversation and does not in any way diminish or vitiate
18 the legal consequences of adopting TDS's motion, which,
19 if it's not special waste, it's characteristically
20 hazardous waste, as determined at the point of
21 generation, and that's what dictates its management,
22 treatment, and disposal as hazardous under RCRA's land
23 disposal restrictions. I don't think there's legally any
24 wiggle room.

25 COMMISSIONER SOWARD: Well, EPA disagrees

0062

1 with you.
2 CHAIRWOMAN WHITE: I -- they don't --
3 they -- that doesn't -- EPA, one -- again, I don't think
4 that is relevant to how the --
5 (Mr. Soward sighs)
6 CHAIRWOMAN WHITE: -- the -- I don't.
7 Because it's not -- it does not preclude this agency from
8 electing an alternative legal interpretation that is more
9 protective.
10 COMMISSIONER SOWARD: It's their program.
11 CHAIRWOMAN WHITE: No, but it doesn't --
12 COMMISSIONER SOWARD: It is their program.
13 CHAIRWOMAN WHITE: It doesn't -- it doesn't
14 mandate that we only treat it as special waste.
15 COMMISSIONER SOWARD: No, we -- we -- no,
16 we agreed it was not special waste. We agreed. That's
17 why we granted the motion to overturn. We said to the
18 Executive Director, "Whether you agree or not, you know,
19 handle it -- handle the D008 waste as hazardous waste."
20 Now, to do that, because you've got 99 bins
21 of dirt and some cathode ray tubes mixed in it, follow
22 EPA procedures and determine where you've got hazardous
23 waste and treat it as hazardous waste. And where you
24 don't, treat it as dirt. And the Executive Director's
25 letter did exactly that.

0063

1 CHAIRWOMAN WHITE: I do not think -- again,
2 I think that EPA -- that what went on with the RCRA
3 delegation thing, and I also think that the Executive
4 Director, who was acting on the same interpretation of
5 the September -- his September 24th letter, was
6 incorrect. But that's neither here nor there.
7 But the TCEQ-EPA conversation on RCRA
8 delegation and this issue is -- does not bind how the
9 Agency interprets how this particular waste in an
10 enforcement action must be disposed of.
11 COMMISSIONER SOWARD: But -- but the other
12 point we need to remember is two -- this Commission
13 reviewed the Executive Director's September 24th letter
14 to determine if it correctly did what we talked about.
15 And at least two of us said, in effect, yes, it did.
16 CHAIRWOMAN WHITE: Well, I don't think
17 inaction -- there was nothing -- I -- there was -- there
18 was no Commission action taken at that second motion to
19 overturn, which is why the initial order stands. There
20 was no action.
21 COMMISSIONER SOWARD: And --
22 CHAIRWOMAN WHITE: And when there was no
23 action, I asked are there alternative motions, by which I
24 think you-all could have clarified that.
25 COMMISSIONER SOWARD: We had no reason to

0064

1 clarify. The letter agreed with what we did on -- in
2 September.

3 CHAIRWOMAN WHITE: I think a letter of the
4 Executive Director and a Commission order have different
5 legal value.

6 COMMISSIONER SOWARD: Remember,
7 Commissioner Marquez voted "no" in September on the
8 motion to overturn but then came back in December and
9 agreed that the letter shouldn't be overturned.

10 CHAIRWOMAN WHITE: I don't think you -- we
11 legally can agree not to overturn unless the Commission
12 takes action to overturn or action to uphold.

13 COMMISSIONER SOWARD: Well, I'm sorry if
14 the law says otherwise, Chairman.

15 CHAIRWOMAN WHITE: Inaction has the same
16 legal force for the Commission as upholding?

17 COMMISSIONER SOWARD: Yes, it does. You
18 had a -- you had an opportunity to grant a motion and
19 took no action.

20 CHAIRWOMAN WHITE: I think -- I think -- I
21 think you and Commissioner Marquez had an opportunity to
22 overturn the existing Commission order.

23 COMMISSIONER SOWARD: We didn't choose to.
24 We didn't see any reason to.

25 COMMISSIONER GARCIA: Madam Chair, if I

0065

1 could say -- if I could comment very briefly. My purpose
2 is not to impugn the methods of our Executive Director.
3 It's a tough job. I've looked over this record. I've
4 looked over what happened in September and the -- we --
5 no special instructions.

6 But I -- I would like to see the safe
7 management of this waste. The management of that waste
8 has not occurred yet. We have not achieved that goal in
9 this situation. I personally see this as
10 characteristically hazardous and would like to see it
11 removed.

12 I don't buy into anything that the -- our
13 Executive Director is in collusion or any of this
14 other -- this is tough stuff. This is -- this is really
15 hard stuff to determine in all the variables. And I
16 recognize what is being said as far legal -- legally,
17 where we -- what leg we have to stand on. I really do --
18 and the EPA program, what have you.

19 I think that we have an opportunity
20 again -- and this may be in front of us again -- to help
21 resolve this matter. And I would like not to get into a
22 number of these discussions, obviously, that I wasn't
23 here for, but to try and take from here where we can go
24 forward. And if it means even more legal red tape, I
25 don't see any other way -- any other alternative.

0066

1 I -- we have an obligation to achieve safe
2 management of this waste, and that's what I'm trying to
3 do here today. I know it's not resolved. I know this.
4 I am not so naive to think that. But I had to express
5 that, because I feel like whether it be Mr. Shankle or
6 this Agency and whether there are missteps, aren't
7 missteps, what the law says you can or can't do, this is
8 a mess. And I want to try to help resolve this today.

9 So in that sense, I really do believe that
10 we have taken up this issue because we -- it's been
11 lingering. It's been hanging around. I understand all
12 that. But it doesn't change the position that I am ready
13 to take today.

14 And I just wanted to make sure you knew
15 that, Mr. Shankle, because that is -- I know how hard
16 your job is and the latitude we've given you and the
17 expectations we have of you. This is not a normal --
18 hopefully not a normal situation that's going to come
19 before us. And it wouldn't surprise me if it's back
20 before us, Madam Chair, maybe long after your tenure.

21 But I -- we need this management of waste
22 to occur at some point, and I -- and I'm prepared, being
23 the first time I'm in front of it, to take a position on
24 that.

25 CHAIRWOMAN WHITE: Well, and I have not

0067

1 forgotten OPIC.

2 (Laughter)

3 MR. SEAL: I'm sorry, boss.

4 CHAIRWOMAN WHITE: But just because it is
5 relevant to what Commissioner Garcia has said, I'd like
6 to say that also to the Executive Director, that, you
7 know, I'm not -- I don't see myself -- I don't know what
8 words are appropriate -- criticizing or alleging
9 anything.

10 In fact, I think -- you know, and I only
11 want to speak for myself, maybe, as a commissioner or
12 chairman who presides over actions when we take them.
13 And I think that the Commission failed -- or I failed, as
14 chairman, on -- at the Agenda which led to the September
15 16th, 2004 order, by not clarifying more.

16 Your letter -- following letter, I think it
17 fully attempted to implement what were the legal
18 consequences of the Commission's actions that, in my
19 opinion, they get about two-thirds of it right but
20 two-thirds of it not.

21 And I see myself today considering this
22 petition because I want -- I want to clarify that last
23 third. And also, as Commissioner Garcia has said,
24 however imperfectly -- however imperfectly, the duty that
25 the state and the Commission has to try to reach a clear

0068

1 final resolution on the safe management and final
2 disposal of this waste that has been lingering through
3 extremely court -- complicated facts for ten years.
4 But please --

5 MR. SHANKLE: Chairman?

6 CHAIRWOMAN WHITE: Yes?

7 MR. SHANKLE: I'm not sure if my -- if the
8 Executive Director's time has expired, but I'd like to
9 comment.

10 CHAIRWOMAN WHITE: Okay. Please. I'm not
11 too concerned about that.

12 MR. SHANKLE: And I apologize for
13 interrupting.

14 I could go back to the beginning of time,
15 but for the -- for the sake of brevity, I'd just like to
16 try to clarify some things that I've heard today.

17 First I need to say that what the
18 Commission considered as a motion to overturn the
19 executive decision -- I mean -- the Executive Director's
20 decision on, was the fact that I had classified the waste
21 as special waste. And what the Commission did on
22 September 16th, 2004 is basically tell the Executive
23 Director, "You cannot classify it as special waste."

24 But taking into consideration the
25 three-hour dialogue that occurred that day, I went and

0069

1 wrote a directive to Penske, which I might add that even
2 though Penske is charged with an NOV, it is not a final
3 action. They have not feuded that action today, and they
4 still have that opportunity to do so. And that,
5 Commissioner Garcia, can bring us back here. But I want
6 to move forward to try to address your concern,
7 Commissioner Garcia.

8 Penske -- TCEQ, acting in the name of the
9 Executive Director, has on at least, that I can recall,
10 two occasions, offered an opportunity, in the abundance
11 of caution, if this waste is indeed hazardous, that TCEQ,
12 under the directive of the Executive Director, would take
13 it to a hazardous waste facility, treat it and dispose of
14 it, and let the two parties resolve their differences in
15 court as to who's responsible for it. Penske has made
16 the same offer.

17 I don't believe this Agency has missed a
18 step. I think in 1997 this Agency was at the site and
19 said that this waste could stay in the ground; it is
20 okay. But back then what it was in '97 and where we are
21 today -- we have attempted, by every means, to try to get
22 the waste out of those 99 bins at that facility and take
23 it and properly dispose of whatever hazardous waste is
24 supposed to be disposed of.

25 We have been disallowed to do that. Now,

0070

1 can someone disallow the state government to do
2 something? It seems that way. Can I go and get a
3 subpoena to get that waste? Yes. But I don't think we
4 should go through those extremes. I think this Agency
5 has made every attempt to dispose of that waste, and I
6 think it's a litigation matter about money, not about the
7 environment.

8 If somebody don't want to let that waste go
9 for ten years, I have to ask why. And if that waste has
10 been in the ground for six years, I have to ask why it
11 was dug up if it was so hazardous to the environment.

12 But nonetheless, Commissioner Garcia, to
13 answer your question, I believe that this Agency has made
14 every attempt to get that waste, whatever composition it
15 is, and go and dispose of it. We have been disallowed to
16 do that. Penske has been disallowed to do that. And
17 we're here today, and I can assure you that I don't think
18 today's action is going to lead to that waste getting
19 disposed of.

20 Thank you, Chairman, for allowing me to
21 speak. And thank you, Commissioner Garcia and
22 Commissioner Soward.

23 MR. ARTHUR: Good afternoon, Commissioners.
24 Garrett Arthur for the Public Interest Counsel's office.
25 This matter has come before you in a manner not expressly

0071

1 addressed by our statutes and rules. OPIC acknowledges
2 this procedural anomaly. OPIC also stands the --
3 understands the legal argument that once the validity of
4 an Agency order is the subject of an appeal, the Agency
5 loses jurisdiction over that order, absent a showing of
6 changed circumstances.

7 OPIC has two responses to this argument:
8 First, the relief OPIC finds appropriate is not a
9 revision of the September 16th, 2004 order, but rather
10 additional supplemental ordering provisions to clarify
11 Commission intent regarding further sorting, testing,
12 handling, and disposal of this waste.

13 Second, the fact that nothing has changed
14 with respect to the condition of this problem -- i.e.,
15 the roll-off containers continue to sit at the TDSL
16 site -- shows that the Commission's intent to address
17 this problem in 2004 has not been implemented.

18 This Commission has the authority to
19 address this problem under its plenary powers. OPIC has
20 no interest in supporting one side or the other in this
21 dispute. OPIC merely seeks clarity on what the
22 Commission expects with respect to sorting, testing,
23 handling, and disposal of this waste.

24 Currently there is no express Commission
25 order addressing these matters. The Commission's 2004

0072

1 order did not state what should happen to this waste, but
2 clearly the Commission's deliberations and its remand of
3 the matter to the ED evidence an intent that the waste be
4 addressed.

5 Under these circumstances, we find that an
6 exercise of the Commission's plenary authority is
7 warranted to address this ongoing situation and
8 supplement the '04 order with additional provisions
9 clarifying the Commission's intent regarding the
10 appropriate treatment, handling, and disposal of the
11 waste.

12 The fact that nothing has changed is
13 exactly the reason why supplemental ordering provisions
14 would be helpful, so that the public and the parties may
15 know the Commission's specific expectations.

16 Also, OPIC would like to stress that we are
17 not suggesting an enforcement order directed to Penske,
18 but rather an order which provides specific directions to
19 the ED.

20 The basic outline of proposed actions
21 offered by Penske sounds reasonable. Remove the waste,
22 transport the waste to a permitted facility, test the
23 waste in accordance with EPA protocol, and dispose of it
24 accordingly. However, the devil is in the details. The
25 parties disagree over the specific measures that are

0073

1 legally required.

2 Therefore, the crux of the matter is to
3 determine what is required for testing under these
4 circumstances and how to determine whether there is a
5 need to sort and extract hazardous materials from the
6 waste in the roll-off containers.

7 In conclusion, OPIC does not have a RCRA
8 technical expert on staff, nor has OPIC been privy to all
9 the specific proposals for sampling and handling of this
10 waste that have been exchanged among the parties through
11 the years. For these reasons, OPIC is not in a position
12 to opine on the content of specific measures regarding
13 sorting, testing, handling, and disposal that should be
14 included in any additional order.

15 However, Commissioners, if you were able to
16 agree on the content of these measures, OPIC recommends
17 the issuance of an order addressing these requirements.
18 Such action would provide clarity regarding your
19 expectations, and perhaps such a clarification of your
20 expectations would facilitate a resolution of this
21 matter.

22 At a minimum, the public interest would be
23 served by having a clear understanding of your specific
24 expectations as to how this exceedingly lengthy stalemate
25 should be resolved. Thank you.

0074

1 CHAIRWOMAN WHITE: Thank you. I believe
2 there's the petitioner's rebuttal time?

3 MR. SEAL: Commissioners, just for the
4 record, I believe Mr. Russell has three and a half
5 minutes left in his original ten minutes.

6 MR. RUSSELL: Thank you, Chairman White.
7 Thank you for the clarification, Mr. Seal. I don't think
8 I'll take that long.

9 A couple of brief comments. Penske, as
10 you've noticed again today and in pleadings, seems to
11 point the finger at everybody except themselves as
12 responsible for this D008 waste. It's that old country
13 saying: If that dog bit you, it wasn't my dog. And if
14 it was my dog, it don't bite. And that follows on with
15 what Commissioner Garcia was -- giving in his analogy.

16 Penske, on March 23rd, 1998, signed a
17 standard hazardous waste manifest sending some part of
18 the debris from the accident site to TECO as D008
19 hazardous waste. That is a federal document.
20 Falsification of a federal document is subject to
21 criminal penalty. If in fact Penske filed a federal
22 document admitting that it's D008 waste and at the time
23 they knew it was not D008 waste, perhaps that's a Justice
24 Department issue. I don't think the Commission has to
25 worry about that.

0075

1 Chairman White, you -- you've narrowed it
2 down once again to what the issue is here and how it
3 needs to be resolved. Ms. Giblin said there's no threat.
4 Well, I would submit to you that this is not a risk
5 analysis situation.

6 When toxic characteristic hazardous waste
7 is generated, regardless of the toxicity, if the rules
8 aren't followed and if it isn't properly treated, then
9 there is a threat to the environment. It's a
10 bioaccumulative threat, and it builds over time. And
11 that's why toxic characteristic waste is handled
12 different than the other three characteristics. There is
13 in fact a threat if it's not properly treated.

14 What we're asking for is that this waste be
15 manifested under a standard hazardous waste manifest from
16 the landfill to a TSD facility through a licensed
17 transporter, and when the TSD facility signs that
18 manifest, they accept it as D008 waste. And then it's
19 their legal responsibility to determine what treatment it
20 needs, what management it needs. All we're asking for is
21 that: A standard three-part manifest that can go in the
22 TDSL site operating record and clear its site operating
23 record.

24 Let me read one thing to you as far as
25 jurisdiction is concerned. And I realize this is a very

0076

1 unusual situation. I seem to get caught up in my legal
2 career in unusual situations.

3 Section 5.102 of the Texas Water Code,
4 General Powers: "The commission has the power to perform
5 any acts whether specifically authorized by this code or
6 other law or implied by this code or other law, necessary
7 and convenient to the exercise of its jurisdiction and
8 powers as provided by this code and other laws."

9 I submit to you, Commissioners, that you
10 are charged by the people of the state of Texas with
11 protecting the environment and the health and safety of
12 people in this state. And as part of that charge, you
13 should assure that D008 waste is properly treated before
14 disposal.

15 And I darn sure don't envy your positions.
16 I get the luxury of arguing a legal opinion or legal
17 position up here. You three are the decision-makers.
18 And I urge you to make a decision that sets a solid
19 precedent for the future, for the safety of the people of
20 this state. Thank you very much.

21 CHAIRWOMAN WHITE: Thank you.

22 COMMISSIONER SOWARD: Mr. Russell?

23 Mr. Russell?

24 MR. RUSSELL: Yes, sir.

25 COMMISSIONER SOWARD: I'm not going to ask

0077

1 you about your client's sworn testimony in which he said
2 there was no environmental threat from this waste. But
3 let me ask you, instead, what are you asking this
4 Commission to do?

5 MR. RUSSELL: I'm asking this Commission to
6 follow through on what you did on September 16th.

7 COMMISSIONER SOWARD: No, no. What are you
8 asking this Commission to do today? What are you asking
9 us to enter in the way of Commission action?

10 MR. RUSSELL: An order directing, either
11 through the Executive Director or directly to Penske,
12 ordering Penske, as the generator of the D008 waste, to
13 remove the 99 containers of waste from the TDSL landfill,
14 under a hazardous waste manifest, to a licensed
15 treatment, storage, and disposal facility, where they
16 will sign for it as D008 waste, and then they will manage
17 it properly --

18 COMMISSIONER SOWARD: Right.

19 MR. RUSSELL: -- whatever that management
20 might be.

21 COMMISSIONER SOWARD: Not -- you're not
22 asking for a clarification of any letter; you're asking
23 for an order to be entered directing one party or the
24 other to do something?

25 MR. RUSSELL: I'm -- I'm asking for you,

0078

1 the Commission, at your option, whatever you think is
2 best, to send that message and have that carried out so
3 that, as Commissioner Garcia says, this waste is finally
4 properly managed and the parties can get on with all
5 their legal disputes over damages and everything else.

6 COMMISSIONER SOWARD: And you -- and if you
7 were representing a client, let's say similar to Penske's
8 situation, do you believe this Commission could enter an
9 order against your client without any opportunity for due
10 process and evidentiary hearing?

11 MR. RUSSELL: Actually, I've represented
12 the City of San Antonio in the past in a similar
13 situation related to the Alamodome waste, where this
14 Commission did enter a similar order on a closed
15 landfill, and required the city to dig up the waste and
16 send it as hazardous waste.

17 So yes, I do believe this Commission has
18 the authority. I don't recommend, necessarily,
19 Commissioner Soward, that you do it that way. Perhaps
20 the best way is to, as Chairman White said, clarify to
21 the Executive Director what needs to be done, and let the
22 Executive Director it.

23 COMMISSIONER SOWARD: That's not in front
24 of us. That's not posted.

25 MR. RUSSELL: Well, I know. What we

0079

1 requested was a specific order from this Commission.

2 COMMISSIONER SOWARD: Right. That I
3 maintain we can't enter because it's a due process issue.

4 MR. RUSSELL: You and I obviously have a
5 difference of legal opinion on that.

6 COMMISSIONER SOWARD: I'm sure --

7 MR. RUSSELL: And that ultimately will be
8 tested in the courts again, I'm sure.

9 COMMISSIONER SOWARD: I'm sure you're going
10 to get a chance to --

11 MR. RUSSELL: And I -- to be perfectly
12 honest with you, if I was arguing Ms. Giblin's position,
13 I would probably argue the other side of this case.
14 Because I'm a lawyer hired to argue a legal position
15 before this Commission.

16 But I will tell you, personally, I feel
17 very strongly that our hazardous waste system depends on
18 everybody following the rules, regardless of the
19 circumstances. And in this case, the easiest way to
20 follow the rules is basically what you and I talked about
21 on September 16th, Commissioner Soward.

22 COMMISSIONER SOWARD: I agree with you.
23 And the improper or illegal storage of hazardous waste,
24 if it's hazardous, is also a violation of the rules.

25 MR. RUSSELL: Absolutely. I mean, we have

0080

1 recognized that, and TDSL has recognized that and
2 understands that it might be enforced against because of
3 that, in spite of the Executive Director's letter saying
4 it was okay to keep it there. I'm not trying to minimize
5 the seriousness of this situation because I've never seen
6 something like this happen before.

7 COMMISSIONER SOWARD: But you do agree that
8 no one believes it's an environmental threat because of
9 this waste?

10 MR. RUSSELL: Oh, I do believe it's an
11 environmental threat.

12 COMMISSIONER SOWARD: Your client said,
13 under oath, it's not.

14 MR. RUSSELL: You're talking about a
15 specific threat for a specific waste. I'm talking about
16 an environmental threat for untreated toxic
17 characteristic hazardous waste.

18 COMMISSIONER SOWARD: I'm talking about the
19 waste we're talking about. I'm not talking about some
20 generic issue. I'm talking about the waste that's in the
21 99 roll-off bins --

22 MR. RUSSELL: That is that case. I --

23 COMMISSIONER SOWARD: -- and sworn
24 testimony that there's no environmental threat. It's a
25 perception.

0081

1 CHAIRWOMAN WHITE: At what time -- at what
2 time --

3 MR. RUSSELL: Mr. Soward, let me answer
4 that directly. RCRA toxic characteristic waste or
5 bioaccumulative waste is built on the theory that this
6 particular load of waste may not be an explicit threat.
7 But if this is allowed to happen again and again and this
8 toxic characteristic waste builds up and biodegrades, it
9 becomes a threat to the groundwater.

10 The EPA said -- Ms. Horinko can quote it,
11 because she was involved in the rule-making. It said
12 toxic characteristic waste cannot be treated through
13 dilution, whereas the other three characteristics can.
14 The toxic constituent remains there. It's not actually
15 treated. In the case of lead that's D008 waste, the
16 treatment would be to change the pH, as you all know, to
17 raise it up to where it's no longer mobile.

18 That's where we disagree. I mean, I
19 disagree with it as a matter of law, and I think you're
20 looking at this specific piece of waste -- of whether
21 this specific piece of waste will ever threaten anybody.

22 COMMISSIONER SOWARD: Well, that's what
23 we're --

24 MR. RUSSELL: But if you say this specific
25 piece of waste doesn't threaten somebody and the law

0082

1 doesn't mean anything here, where do you draw the line?
2 I think, along with Chairman White, the line is clear.
3 It's a -- it's a bright-line test.

4 COMMISSIONER SOWARD: If it was a
5 bright-line test, we wouldn't be burning these hours
6 constantly.

7 MR. RUSSELL: That's why I don't understand
8 why we're still -- we're still burning these hours.

9 COMMISSIONER SOWARD: Because it's not a
10 bright-line test.

11 MR. RUSSELL: Well --

12 CHAIRWOMAN WHITE: Well --

13 MR. RUSSELL: A lot of folks -- Ms. Horinko
14 can speak to that.

15 COMMISSIONER SOWARD: Well, Ms. Horinko is
16 not with EPA anymore, with all due respect. And the EPA
17 that's in place now says it's not an issue. I'm sorry.
18 Just like, you know, if Commissioner --

19 MR. RUSSELL: The EPA takes their opinion,
20 and I agree with Chairman White that the state of Texas
21 has the authority, under RCRA delegation, to not follow
22 explicitly what Region 6 EPA or D.C. may say, and have a
23 more protective environment in the state of Texas.

24 CHAIRWOMAN WHITE: I'm going to --

25 COMMISSIONER GARCIA: I appreciate what

0083

1 OPIC had said, and I would really like if we could add
2 some clarity. I just -- it's a shame y'all can't opine
3 on the stuff that we need help with.

4 CHAIRWOMAN WHITE: Well, I would like to
5 hazard a motion, and it's a lengthy one and I think it
6 needs to be.

7 To return to my first expression of my
8 perspective, for many, many reasons that I -- ten years
9 is one of many, many reasons why I think this issue very,
10 very seriously merits the most clear and decisive
11 position from the state as a final state conclusion on
12 this issue as it is before us today.

13 I want to say that -- how much I respect
14 everyone that's involved in working on this issue, my
15 fellow Commissioners, the Executive Director, all of the
16 staff, and all the parties and their representatives.
17 What a complicated, contentious issue. But I really
18 think this demands a clear state decision.

19 And I am sorry that on a previous occasion,
20 when this was similarly before us, the Commission -- I
21 failed to offer a clear enough statement of on what the
22 Commission was acting and what were the legal
23 consequences of the Commission action.

24 So today, to that end, I move, pursuant to
25 the Commission's authority, under the Water Code 5.012,

0084

1 5.102, 5.221, 7.002, and Health & Safety Code 361.017,
2 the Commission exercises jurisdiction over this matter.

3 As necessary, clarification of the
4 Commission's order of September 16th, 2004, granting
5 TDSL's motion to overturn, the Commission reiterates that
6 the CRT waste in the 99 roll-off boxes at TDSL is D008
7 characteristically hazardous waste for reasons of
8 toxicity.

9 The Commission also reiterates that because
10 the D008 CRT characteristically hazardous waste has been
11 commingled with other MSW and landfill cover soil waste,
12 the entire volume of the waste in the 99 roll-off boxes
13 must be legally treated as hazardous waste and thus
14 subject to EPA's RCRA land disposal restrictions for
15 purposes of management, treatment, and disposal.

16 The Commission further reiterates that
17 because the D00 [sic] CRT was hazardous at the point of
18 generation, at the October 1997 accident scene, federal
19 law and rule preclude further testing of the D008
20 commingled waste for the purposes of reclassification of
21 the waste and determination of disposal alternatives.

22 Moreover, because the Commission finds that
23 the Executive Director, in part, erred in his September
24 24th, 2004 letter to implement the 9/16/2004 Commission
25 order, by allowing test -- by allowing that testing could

0085

1 be utilized to, quote, conclusively determine that no
2 D00 [sic] waste, at the level that is characteristically
3 hazardous, remains in the commingled CRT waste, the
4 Commission concludes to adopt this TDSL petition before
5 us, including the arguments therein.

6 The Commission now issues a clarifying
7 supplemental order specifying the following corrective
8 actions understood, as required by the September 16th
9 Commission order:

10 One, within 30 days from the date of
11 issuance, the Commission orders Penske to remove all
12 waste contained in the 99 roll-off boxes at the TDSL
13 landfill under an unconditional, standard, unaltered,
14 hazardous waste manifest that designates Penske as the
15 generator of the commingled D008 hazardous CRT waste and
16 identifies the 1997 accident scene on Interstate 35 in
17 Hays County as the point of generation;

18 Two, the hazardous waste manifest shall
19 designate the destination of the waste as a facility that
20 is authorized to treat and dispose of D008 hazardous
21 waste;

22 Three, Penske shall arrange for and
23 actually dispose of all hazardous -- all D008 hazardous
24 waste contained in the 99 roll-off boxes in one of the
25 two following ways: (A) by transport of the entire

0086

1 contents of the 99 roll-off boxes to a landfill that is
2 authorized to receive and dispose of such hazardous
3 waste. At such facility, Penske is responsible for the
4 management, treatment, and actual disposal of this waste
5 according to RCRA land disposal restrictions for
6 hazardous waste; or (B) by negative sort separation of
7 all nonhazardous municipal solid waste from the D008 CRT
8 component debris and D008 contaminated soil in the
9 roll-off boxes followed by disposal of the remaining D008
10 CRT debris, D008 contaminated soil, and any MSW
11 unsegregated from the mix, in a landfill that is
12 authorized to receive and dispose of hazardous waste;
13 Four, any MSW separated from the hazardous
14 CRT debris and contaminated soil by negative soil may be
15 tested for the presence of any hazardous characteristic,
16 and if there is none, disposed of in an MSW landfill;
17 Five, all commingled waste and solids that
18 have not been removed as a part of negative sorting
19 process shall be disposed of as D008 hazardous waste
20 contained within MSW and clay soils, with Penske
21 designated as the generator;
22 Six, the Commission directs the Executive
23 Director to take all necessary and appropriate action,
24 including oversight and inspections as necessary, to
25 expeditiously implement this order.

0087

1 That is the longest motion I have ever
2 gave -- have ever given, and painstakingly detailed,
3 because of all of the complex, unresolved issues we have
4 dealt with today.
5 COMMISSIONER GARCIA: I second the motion.
6 CHAIRWOMAN WHITE: We have a motion and a
7 second. All in favor?
8 (Ayes)
9 COMMISSIONER SOWARD: Chairman, please show
10 the record as me voting strenuously no. The
11 clarification that this motion and this action just took
12 is not an item that has been posted, and therefore
13 violates the Open Meetings Act. And the order against
14 Penske violates due process rights of Penske.
15 CHAIRWOMAN WHITE: That concludes our
16 business today, I believe.
17 MR. SEAL: Commissioners, I believe that
18 does conclude your business for today. With that, the
19 Commission stands adjourned. The time for the record is
20 2:49 p.m.
21
22
23
24
25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CERTIFICATION

I, Shelly M. Tucker, do hereby certify that the above and foregoing transcript was prepared by me and is a true and accurate transcription to the best of my abilities.

I further certify that the parties herein were not sworn, to my knowledge, by any authority.

I further certify that the RealPlayer video file from which this transcript was prepared was recorded outside of my presence, and was provided to me for the purpose of preparing this transcript.

I further certify that I am neither counsel for, nor related to, nor employed by any of the parties to the action in which this hearing was taken, and further that I am not financially or otherwise interested in the outcome of the action.

SHELLY M. TUCKER, RPR, CRR
Texas CSR 4419
Expires 12/31/08
Ross-Weidmann, Inc.
Firm Registration #17
805 West 10th Street, Suite 400
Austin, Texas 78701
FAX (512) 478-2782

Cost: _____

Paid By: _____