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Elias J. Coy, Jr., *Public Interest Counsel*

## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

September 8, 2004

LaDonna Castañuela, *Chief Clerk*  
Texas Commission on Environmental Quality  
Office of the Chief Clerk (MC-105)  
P.O. Box 13087  
Austin, Texas 78711-3087

RE: Penske Truck Leasing, L.P.  
TCEQ Docket No. 2004-0984-IHW-E

Dear Ms. Castañuela:

Enclosed for filing is the Public Interest Counsel's Response to Motion to Overturn in the above-entitled matter.

Sincerely,

Handwritten signature of Anne Rowland in cursive.

Anne Rowland, *Attorney*  
Public Interest Counsel

Handwritten signature of Eric Allmon in cursive.

Eric Allmon, *Attorney*  
Public Interest Counsel

cc: Mailing List

Enclosure

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IN THE MATTER OF THE MOTION  
TO OVERTURN CONCERNING  
THE EXECUTIVE DIRECTOR'S  
AUTHORIZATION FOR DISPOSAL  
OF WASTE AS A SPECIAL WASTE  
ISSUED TO PENSKE TRUCK  
LEASING CO., L.P.

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BEFORE THE TEXAS  
COMMISSION ON  
ENVIRONMENTAL QUALITY

THE OFFICE OF PUBLIC INTEREST COUNSEL'S  
RESPONSE TO MOTION TO OVERTURN

TO THE HONORABLE MEMBERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL  
QUALITY:

The Office of Public Interest Counsel ("OPIC") of the Texas Commission on  
Environmental Quality ("the Commission" or "TCEQ") files this Response to the Motion to  
Overturn filed by Texas Disposal Systems Landfill, Inc. ("TDSL" or "Movant") and would  
respectfully show the following:

I INTRODUCTION

This is a matter involving a wreck of a Penske Truck Leasing Co., L.P. ("Penske") truck  
which was carrying cathode ray tubes ("CRTs") from Canada to Mexico. As a result of the wreck,  
the CRTs were broken and became waste. Many of the facts underlying responsibility and proper  
disposal of this waste are disputed by the parties. However, the issues are clear. These are  
primarily whether the waste generated by destruction of the CRTs was hazardous waste, and, if so,  
what was or is the proper method of disposal, and do the provisions of the land ban rule apply to  
the waste and any materials with which it has been mixed. This is important because the  
Executive Director has agreed that the waste from the CRTs that has been mixed with other waste  
can now be disposed of as special waste rather than hazardous waste, and there is a great deal of

concern regarding whether this conclusion meets the land ban restrictions.

Certain facts appear reasonably evident in OPIC's judgment. On October 9, 1997, a vehicle under the control of Penske was involved in an accident near Buda in Hays County, Texas. This accident resulted in the spill, and breakage, of CRTs which Penske had been transporting for Zenith Electronics Corporation ("Zenith"). Data from Zenith indicated that the glass and frit components of the CRTs exhibited a hazardous characteristic for lead,<sup>1</sup> and Zenith's pre-existing waste characterization for broken CRTs specified that broken CRTs constituted D008 characteristic hazardous waste, which is characteristic due to toxicity.<sup>2</sup> However, due to circumstances at the wreck site, the waste was initially treated as non-hazardous waste, which resulted in the disposal of a significant quantity of broken CRTs, and associated accident debris, at a Type I MSW landfill owned by TDSL.

Two to three hours after the receipt of part of the waste from the accident, TDSL was informed that the CRT waste was hazardous.<sup>3</sup> At this point, TDSL refused to accept additional waste from the accident site for disposal, and isolated CRT waste which had been commingled in the working face of the landfill.<sup>4</sup> The following day, TDSL sifted through the waste to remove as much of the CRT waste as possible from the landfill. The resulting waste was later sent to a hazardous waste disposal site by Penske. There is no indication of how many televisions (CRTs)

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<sup>1</sup> Zenith Electronics Corporation's Response to Motion to Overturn, July 15, 2004, p. 4.

<sup>2</sup> TDSL Motion to Overturn ED's Decision, dated July 9<sup>th</sup>, 2004, p. 2.

<sup>3</sup> Id.

<sup>4</sup> Id.

were removed by TDSL on the day following the accident, although 80 cubic yards of waste was removed. TDSL isolated the rest of the waste from the wreck and the municipal solid waste with which it had been mixed. In January of 1998, Penske sent a contractor to sift through this waste and remove further remnants of the CRTs and associated waste for disposal.<sup>5</sup> Penske's contractor states in his report that out of 1200 televisions on the semi-trailer, he believes that only 178 remained buried at the disposal site.<sup>6</sup> Later, TDSL had the remainder of the waste from the wreckage and municipal solid waste placed in ninety-nine roll off containers in anticipation of disposal at an appropriate facility.

## II. DISCUSSION

### A. Governing Authority

The Code of Federal Regulations (CFR) at 40 CFR Chapter 268 provides rules governing the disposal of hazardous waste in landfills.<sup>7</sup> These rules are promulgated in part under the authority of the Resource Conservation and Recovery Act (RCRA) Land Disposal Restrictions. Pursuant to these regulations, no hazardous waste may be disposed of in a landfill unless it is first properly treated.<sup>8</sup> Whether a waste is a listed hazardous waste or is hazardous due to a characteristic, both federal and state rules clearly provide that the determination of whether a

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<sup>5</sup> PTL 122, January 19, 1998 letter to Mark Althen, Penske Truck Leasing from Eric Cooper, CODE 3 Environmental Services.

<sup>6</sup> PTL 122, January 19, 1998 letter to Mark Althen, Penske Truck Leasing from Eric Cooper, CODE 3 Environmental Services.

<sup>7</sup> 40 CFR Part 268 has been adopted by reference at 30 TAC §335.431(c).

<sup>8</sup> See 40 CFR 268.40.

waste is hazardous, and, therefore, must be disposed of in accordance with the landfill disposal restrictions, is made at the point of generation.<sup>9</sup> When promulgating the Landfill Restriction Rule or "landban rule" governing the timing of the hazardous waste determination, the EPA made clear in the Preamble that its intent was to ensure that wastes which may pose a hazard to the environment will not simply be diluted to escape treatment requirements, but rather, will be properly treated prior to final disposal in a landfill.<sup>10</sup> The EPA recognized that in the case of characteristic wastes at the point of generation, "removal of the specific characteristic is not the same as assuring that the waste is safe."<sup>11</sup> Avoiding dilution is particularly important for wastes that are hazardous due to the characteristic of toxicity, since "simple dilution is not effective treatment for toxic constituents."<sup>12</sup> The EPA noted that, "Toxic constituents can pose a cumulative impact on land disposal even where the waste is below the characteristic level."<sup>13</sup>

#### B. Is the Waste Remaining at TDSL Hazardous?

In this case, there is no dispute that a hazardous waste was generated at the time of the accident. The CRTs constituted a hazardous waste characteristic for toxicity. Further, the landfill disposal restrictions clearly provide that the dilution of this hazardous waste through mixing with debris from the accident site and trash located at the landfill does not render the

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<sup>9</sup> See 40 CFR 268.7(a).

<sup>10</sup> 55 Fed. Reg. 22520, 22651.

<sup>11</sup> 55 Fed. Reg. 22520, 22651.

<sup>12</sup> 55 Fed. Reg. 22520, 22656.

<sup>13</sup> 55 Fed. Reg. 22520, 22655.

waste non-hazardous without further treatment. Therefore, unless there has been adequate treatment to render the ninety-nine containers of waste non-hazardous, it remains a hazardous waste that must be disposed of as such.

As reviewed above, the facts available to OPIC show that both TDSL and Penske have spent time sorting through the waste to remove the CRT debris. However, physical removal of the hazardous waste from surrounding material, along with proper disposal of the removed material, is not listed as an accepted treatment method in the treatment standards found in the regulation.<sup>14</sup> While there are provisions in 40 CFR §§268.42(b) and 268.44 that provide methods for approval of alternative treatments or variances from landfill disposal restrictions, such alternatives must be approved by the EPA Administrator. In order for the material remaining in the roll off containers to be found non-hazardous, OPIC finds that EPA would need to approve physical removal of the CRTs as an acceptable treatment method.

#### IV. CONCLUSION

For these reasons, OPIC recommends that the Commission find that the material remaining in the ninety-nine roll-off containers is hazardous waste and must be disposed of accordingly, unless the EPA Administrator approves of the removal of a significant amount of the CRT material by TDSL and Penske as an acceptable treatment technique or finds that such removal qualifies for a variance.

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<sup>14</sup> 40 CFR §268.40.

Respectfully submitted,  
Blas J. Coy, Jr.  
Public Interest Counsel

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CERTIFICATE OF SERVICE

I hereby certify that on September 8, 2004, the original and eleven true and correct copies of the Office of the Public Counsel's Response to the Motion to Overturn were filed with the Chief Clerk of the TCEQ and a copy was served to all persons listed on the attached mailing list via hand delivery, facsimile transmission, Inter-Agency Mail or by deposit in the U.S. Mail.

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