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TRANSCRIPT OF TEXAS SENATE COMMITTEE ON
NATURAL RESOURCES HEARING
HELD ON TUESDAY, FEBRUARY 1, 2005 (1:00 PM)

TRANSCRIBED
ON
FEBRUARY 3, 2005

A P P E A R A N C E S

1
2 Senator Kenneth Armbrister, Chair

3 Clerk, Kelly Gilbert (Calls roll)

4 Senator Mike Jackson, Vice-Chair

5 Senator Frank Madla

6 Senator Gonzalo Barrientos

7 Senator Craig Estes

8 Senator Robert Duncan

9 Senator Jon Lindsay

10 Senator Kel Seliger

11 Senator Todd Staples

12 PENSKE/ZENITH HAZARDOUS WASTE ISSUES:

13 Rafael Marquez, Commissioner TCEQ (Texas Commission
14 on Environmental Quality) Austin, TX

15 Larry Soward - Commissioner TCEQ (Texas Commission
16 on Environmental Quality) Austin, TX

17 Kathleen White - Chairwoman TCEQ (Texas Commission on
18 Environmental Quality) Austin, TX

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(NATURAL RESOURCE COMMITTEE HEARING BEGINS)

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2 **SENATOR KENNETH ARMBRISTER:** Let me get my notes. The
3 Senate Committee on Natural Resources will come to order.
4 The Secretary will call the roll.

5 **SECRETARY:** Armbrister?

6 **SENATOR KENNETH ARMBRISTER:** Here.

7 **SECRETARY:** Jackson?

8 **SENATOR MIKE JACKSON:** Here.

9 **SECRETARY:** Barrientos?

10 (No audible response).

11 **SECRETARY:** Duncan?

12 **SENATOR ROBERT DUNCAN:** Present.

13 **SECRETARY:** Estes?

14 **SENATOR CRAIG ESTES:** Here.

15 **SECRETARY:** Fraser?

16 (No audible response).

17 **SECRETARY:** Hinojosa?

18 (No audible response).

19 **SECRETARY:** Lindsay?

20 (No audible response).

21 **SECRETARY:** Madla?

22 (No audible response).

23 **SECRETARY:** Seliger?

24 **SENATOR KEL SELIGER:** Here.

25 **SECRETARY:** Staples?

1 **SENATOR TODD STAPLES:** Here.

2 **SENATOR KENNETH ARMBRISTER:** There is a quorum present.
3 In your packets, members you have a copy of the proposed
4 rules for the Committee. They are pretty much standard
5 as far as they have always been and there are no changes
6 to the rules of the Committee. Are there any questions
7 concerning the rules?

8 **SENATOR CRAIG ESTES:** I move adoption.

9 **SENATOR KENNETH ARMBRISTER:** Senator Estes moves adoption
10 of the rules. Is there objection? Chair hears none. The
11 rules are adopted. The first item on the agenda is the
12 status of material in the Texas Disposal site -- or
13 Systems landfill resulting from an October 9th, 1997
14 trucking accident involving Zenith electronic components,
15 TV picture tubes. We have asked the three Commissioners
16 from TCEQ to come with us -- or come before us today to
17 look into what the status of all of the issue is and of
18 this particular waste that was deposited at TDS and now
19 is being stored at TDS. So, at this time I would call
20 Chairwoman Kathleen White, Commissioner Larry Soward, and
21 Commissioner Ralph Marquez.

22 **(SHUFFLING IN BACKGROUND)**

23 **SENATOR KENNETH ARMBRISTER:** And if you could, Madam
24 Chair, if you could identify yourself and then your other
25 Commissioners likewise for the record.

1 **CHAIRWOMAN KATHLEEN WHITE:** For the record, I am Kathleen
2 Hartnett-White, Chairman of the Texas Commission on
3 Environmental Quality.

4 **SENATOR KENNETH ARMBRISTER:** Thank you.

5 **COMMISSIONER LARRY SOWARD:** Mr. Chairman, Senators, I am
6 Larry Soward, one of the three Commissioners at the TCEQ.

7 **COMMISSIONER RAFAEL MARQUEZ:** Chairman, members, I am
8 Rafael Marquez, a Commissioner at TCEQ.

9 **SENATOR KENNETH ARMBRISTER:** Thank you. Just to start
10 off, where are we?

11 **CHAIRWOMAN KATHLEEN WHITE:** Well, I would -- I really
12 welcome the opportunity to try to briefly on an extremely
13 complex matter share with you where I think we are.

14 **SENATOR KENNETH ARMBRISTER:** Okay.

15 **CHAIRWOMAN KATHLEEN WHITE:** And I think it will be
16 valuable to hear from all three of us on that, and not
17 surprising if the location is somewhat differently
18 described. This is a matter of not only a great length
19 of time, but tremendous factual legal complexity and one
20 that I think has really major public policy implications.

21 I am of the individual opinion it is important for the
22 state agency to reach a clear decision on this matter.

23 We have in large part been unable to do that to date for
24 a number of I think very important reasons. One very
25 much has to do with our process. We are in the middle of

1 an enforcement action. The Executive Director issued in
2 May, 2004 a notice of violation to Penske concerning the
3 waste at issue, which is in ninety-nine roll off
4 containers at the TDS landfill. Our governing statutes
5 really put enforcement of violations -- alleged
6 violations of agency law, rule, and orders under the
7 Executive Director. The Commission's role has been to
8 review final settlements of enforcement actions, or to
9 review administrative law judges' proposals for decisions
10 in disputed settlement matters. This matter -- and one
11 of the parties in this does not even think -- has legally
12 argued the Commission does not have authority to make
13 decisions during the pendency of this enforcement matter.
14 I disagree that we do have authority, as this has
15 unfolded. And the matter originally came to us as a
16 motion to overturn a legal decision the Executive
17 Director had made about a waste classification. I think
18 as far as Commission authority to review that legal
19 decision, we have plenty in Chapter 5 of the Water Code,
20 as well as in some specific rules in the Health and
21 Safety Code, which allow someone to challenge an agency
22 waste classification. At that hearing where we addressed
23 the motion to overturn, the Commission upheld Texas
24 Disposal System's motion about this legal classification,
25 which involved whether the waste in the ninety-nine roll

1 off containers at the landfill should be classified --
2 legally classified as hazardous waste or as special or
3 mixed waste. Very different legal consequences following
4 from either one of those -- we uphold -- we upheld Texas
5 Disposal System's motion that that waste should be
6 classified as hazardous. In my opinion, that meant the
7 entire commingled load of cathode ray tube waste should
8 be classified as hazardous. And in my reading of the
9 Federal rules governing such, the Federal Resource
10 Conservation and Recovery Act -- very specific actions
11 fall from that, the key one being what the Federal rule
12 calls the land disposal restrictions apply, which dictate
13 how that waste must be transported, treated, and finally
14 disposed of. The Commission and the record will show
15 from that hearing, the Commission very self-consciously
16 chose not to give the Executive Director specific
17 instructions on what actions follow. And again, I can
18 only speak for myself, I mean we have the record, but I
19 shared that opinion for this very unusual position we
20 were in -- in the middle of an enforcement matter. I
21 felt at that point a legal decision upholding that
22 motion, and I also felt that there were very specific
23 consequences that came from that motion -- that it would
24 be inappropriate to dictate specific actions like
25 language in a manifest and all the other actions that

1 would have to follow from that. I subsequently think I
2 was wrong -- that the issue given lots of things perhaps
3 should have been far more clarified by the Commission at
4 that September motion to overturn. And in the following
5 motion, which again challenged the actions of the
6 Executive Director on the basis of the Commission's
7 decision to regard the waste as hazardous, we received a
8 second legal challenge to what the Executive Director
9 understood that legal classification as hazardous meant.
10 We addressed that motion at that time. I felt that it
11 was really the same motion before us -- is this waste
12 hazardous? But what actions follow? If it is -- if the
13 CRT waste in those ninety-nine roll off containers must
14 be legally classified as hazardous, what must follow from
15 that? I agreed with TDS motion to overturn that the
16 actions in a letter that the Executive Director was
17 taking or authorizing Penske to do did not follow from
18 the legal decision we made. I attempted to re-articulate
19 those legal grounds, and then to specify exactly what I
20 thought actions would follow, which are in my individual
21 opinion as follows: If it's hazardous, testing levels
22 for concentrations of lead are irrelevant. If in a
23 commingled fashion -- if that waste stream -- that waste
24 volume is hazardous you have to physically separate all
25 of the constituents, which are hazardous -- the cathode

1 ray tube waste. And they go in one pile and they must be
2 disposed of as hazardous at a hazardous waste landfill.
3 The remaining waste then can be treated according to this
4 protocol that is required by the Resource Conservation
5 and Recovery Act to determine levels of lead
6 concentration. And what reaches that level is disposed
7 of as hazardous, and the remainder can be disposed of as
8 non-hazardous. My motion did not receive a second, and
9 we did not deal with any alternatives at this time. And
10 so nothing at this point is before the Commission, and we
11 are in this awkward position I think of a very
12 contentious, longstanding, complicated matter with at
13 least traditionally a very different role for the
14 Executive Director than the Commission. I would
15 optimistically like to think that this -- if there was a
16 Commission consensus that the state agency could reach a
17 clear decision, and I think there are really important
18 reasons for the state trying to make a final decision
19 about this. I'll be happy to answer questions. I tried
20 to do that as quickly as I could, and the legal issues
21 are somewhat complex, but actually I think quite clear in
22 the Federal rules, which are applicable to this
23 situation.

24 **SENATOR KENNETH ARMBRISTER:** Okay. Does anybody have any
25 questions of Chairwoman White? Let me ask one thing when

1 you talk about the legal rules are quite clear, and you
2 talked about the commingling issue.

3 **CHAIRWOMAN KATHLEEN WHITE:** Uh-huh.

4 **SENATOR KENNETH ARMBRISTER:** Meeting earlier during the
5 interim whenever it was -- a while back -- at first the
6 agency was citing to me a preamble to a proposed rule
7 that I understand was never adopted, and I made the point
8 then that I can believe Congress like I can believe the
9 Legislature sometimes inadvertently leaves a loophole.
10 It's hard to believe EPA and some of the staff people
11 would leave such a big loophole in place that if I've
12 got-- if these paper clips are hazardous and I move them
13 over to an area and as everybody is looking the other way
14 I dump some sand on them, it renders them non-hazardous.
15 I can't believe that EPA ever intended for that to
16 happen.

17 **CHAIRWOMAN KATHLEEN WHITE:** Well, I don't think they did
18 leave a loophole. And I think they were thinking
19 actually in my reading of the preamble and the rule of
20 waste like this, which are hazardous for reasons of
21 toxicity.

22 **SENATOR KENNETH ARMBRISTER:** Right.

23 **CHAIRWOMAN KATHLEEN WHITE:** In Federal rule waste can be
24 hazardous for reasons of corrosivity, ignitability, or
25 reactivity or toxicity.

1 **SENATOR KENNETH ARMBRISTER:** Right.

2 **CHAIRWOMAN KATHLEEN WHITE:** And they actually -- and you
3 know lawyers -- there are very credible different
4 interpretations of all these.

5 **SENATOR KENNETH ARMBRISTER:** Right.

6 **CHAIRWOMAN KATHLEEN WHITE:** I can find a very clear
7 reading if your objective is maximum public protection,
8 or the possibility of bio accumulation of lead in the
9 ground leaching into ground water. And avoiding ground
10 water contamination is generally viewed as the goal of
11 these land disposal restrictions for hazardous waste.

12 **SENATOR KENNETH ARMBRISTER:** Right.

13 **CHAIRWOMAN KATHLEEN WHITE:** And most particularly for
14 waste hazardous for reasons of toxicity, which dilution
15 or mixture can't trump.

16 **SENATOR KENNETH ARMBRISTER:** Right.

17 **CHAIRWOMAN KATHLEEN WHITE:** As they can perhaps for
18 something like you know ignitability or reactivity.

19 **SENATOR KENNETH ARMBRISTER:** Right. I -- to me hazardous
20 is gonna be hazardous. Nothing you can put on it -- this
21 type of waste we're dealing with. I understand our next
22 deal where you're talking about radioactivity, you can
23 take water that's radioactive and remove the radiation
24 out of it, and you've got some pretty good water. I
25 wouldn't drink it, but I mean supposedly it's pretty

1 good water. (Laughter)

2 **CHAIRWOMAN KATHLEEN WHITE:** Then you have the problem of
3 how you dispose of the radioactive residue.

4 **SENATOR KENNETH ARMBRISTER:** (Laughs) Yeah. Then you've
5 got the other problem that comes up. But -- okay.
6 Members do you have any other questions of the
7 Chairwoman? Whoever is next?

8 **COMMISSIONER LARRY SOWARD:** Sure, Mr. Chairman, Senators,
9 again, Larry Soward for the record. I, too, appreciate
10 the invitation to come before you today. During my
11 confirmation proceedings last May, this very same matter
12 was the focus of much attention and much discussion. In
13 answer to questions from Senator Barrientos and Senator
14 Jackson and others, I stated then that I believe that
15 there was a very straightforward, reasonable, and
16 effective approach to dealing with this matter. And that
17 was what I committed to do. Since this past September, I
18 believe the TCEQ has done just that. Unfortunately, the
19 two parties to this matter have demonstrated no intention
20 of allowing the TCEQ to resolve this, unless we resolve
21 it completely to their respective specifications. Their
22 legal positions and posturing have prevented, and
23 continue to prevent us from doing what needs to be done--
24 getting the waste that is still there from this incident
25 properly disposed of. It is truly unfortunate that the

1 Legislature must spend its valuable time dealing with a
2 matter that likely offers no real legislative solution.
3 No state, municipal, or hazardous waste laws or
4 regulations are at issue here. All that is at issue here
5 is the two parties' legal positions and their multi-
6 million dollar lawsuit against each other. Eight
7 lawsuits have been filed and are now pending. Seven
8 against the TCEQ, and one between Penske and TDS. I am
9 firmly convinced that the only solution to this matter
10 will be through the courts. Neither side will cooperate
11 with the TCEQ to get this waste appropriately disposed
12 of. Because by doing so, they fear they will jeopardize
13 their legal positions and their lawsuit against each
14 other. Mr. Chairman and Senators, you know me well
15 enough to know that I am a very candid, no-nonsense, get
16 the-job-and-move-on-to-something-else person. And to me
17 the only issue here is proper disposition of the waste.
18 And if that is the only issue that we're facing, the
19 resolution to that is very simple and could have been
20 accomplished months ago. Here's that simple resolution.
21 TDS simply needs to release the commingled waste in the
22 ninety-nine roll off bins to Penske. **Penske needs to**
23 **properly manifest the waste as hazardous according to**
24 **state and federal law, and transport it to an authorized**
25 **hazardous waste treatment and disposal facility. Once at**

1 such facility, the portion of the commingled waste that
2 is the cathode ray tube waste, the D008 CRT waste needs
3 to be properly disposed of in an approved hazardous waste
4 disposal facility. The portion of the commingled waste
5 that is not CRT waste needs to be properly disposed of in
6 an approved municipal waste disposal facility. And there
7 are several established and approved sampling and testing
8 techniques and protocols that cover how this segregation
9 can appropriately be done. You're likely to hear about
10 SW-848 or physical separation by reverse sort. That
11 simple resolution is exactly what the Executive Director
12 on September 24th, 2004 directed Penske to do. That's why
13 the directive has not been overturned by the
14 Commissioners. However, neither Penske nor TDS will
15 allow that disposition to occur. Of course, the entire
16 contents of the ninety-nine roll off bins could be
17 disposed of in a hazardous waste disposal facility. But
18 given that almost all of it is simply dirt and municipal
19 garbage, that would be taking up valuable, limited
20 hazardous waste landfill capacity in Texas to no
21 reasonable end. And I continue to question the
22 reasonableness of that approach. So, as I stated
23 earlier, I believe that only the judicial process will
24 resolve this matter since it has boiled down simply to
25 litigation between the two parties. If Penske or TDS

1 wanted this matter resolved, it would have been resolved
2 six months ago when the ED issued the September 24th
3 directive. I've spent a lot of time and research looking
4 into this matter, as I committed to you to do back in
5 May. Based on all of my review efforts, I am convinced
6 that what the ED has directed to happen will result in
7 proper disposition of the remaining waste consistent with
8 state and federal laws. If that's what the parties want
9 as well, then we all need to get on with it now. Thank
10 you.

11 **SENATOR KENNETH ARMBRISTER:** Any questions? Senator
12 Jackson.

13 **SENATOR MIKE JACKSON:** Larry, I thank you for your
14 testimony today. (Clears throat -- excuse me). I hear
15 what you're saying but it -- there are a few things that
16 don't make sense and don't add up here. I'm looking at a
17 manifest that you required -- that you said needed to be
18 sent out and claimed by Penske.

19 **COMMISSIONER LARRY SOWARD:** Uh-huh.

20 **SENATOR MIKE JACKSON:** To dispose -- properly dispose of
21 the hazardous waste.

22 **COMMISSIONER LARRY SOWARD:** Yes, sir.

23 **SENATOR MIKE JACKSON:** And I guess you know first thing I
24 think we're looking at a very important policy issue for
25 the State of Texas on whether or not waste can one day be

1 hazardous, and then in a day or two it get mixed with
2 something else and maybe it's not hazardous anymore. I
3 don't think that's the intent of TCEQ or EPA or anybody
4 else. And I think that's what is happening right here.
5 But I look at the fine print on the manifest -- of the
6 second manifest that was done and it says, "As requested
7 by TCEQ, Penske is managing the material described in
8 this manifest at a hazardous -- as a hazardous waste
9 until it can be further tested and shipped off." How do
10 you do that? How do you switch from being hazardous and
11 then well maybe it's not hazardous? Because I think we
12 know the manifest is a legal trail of who's responsible,
13 who is handling, who generated it, who -- you know who
14 comes first here gets to be a big question in my mind.

15 **COMMISSIONER LARRY SOWARD:** Senator, I -- to me there is
16 no issue about the CRT waste being hazardous.

17 **SENATOR MIKE JACKSON:** Okay, then why does it say as
18 requested by TCEQ?

19 **COMMISSIONER LARRY SOWARD:** That's the -- Penske's
20 lawyers wrote that language.

21 **SENATOR MIKE JACKSON:** So, they were lying? Y'all didn't
22 request that?

23 **COMMISSIONER LARRY SOWARD:** I think that's their
24 interpretation of the September 24th letter.

25 **SENATOR MIKE JACKSON:** Well, why didn't TCEQ do

1 something about that?

2 **COMMISSIONER LARRY SOWARD:** We have no authority to
3 direct what language is put in a manifest.

4 **SENATOR MIKE JACKSON:** Oh, okay. So, if it's
5 incorrect then you don't have any authority to penalize
6 for that?

7 **COMMISSIONER LARRY SOWARD:** Not -- no, sir we don't. But
8 let me answer your question though. There is no question
9 in my mind that the CRT waste are hazardous, but you have
10 sixteen hundred cubic yards of stuff -- dirt, municipal
11 garbage, and some amount of CRT waste. To me, the CRT
12 waste that are hazardous need to be disposed of as
13 hazardous waste. My question is whether the balance of
14 that sixteen hundred cubic yards of dirt and garbage
15 needs to be disposed of as hazardous waste because it is
16 not hazardous waste.

17 **SENATOR MIKE JACKSON:** So, who changed it? How did it
18 change from hazardous to non-hazardous?

19 **COMMISSIONER LARRY SOWARD:** Municipal garbage and dirt
20 have never been classified as hazardous.

21 **SENATOR MIKE JACKSON:** That's not what we're talking
22 about that was hazardous to begin with.

23 **COMMISSIONER LARRY SOWARD:** No, what was hazardous to
24 begin with were the CRT waste -- the TV tube waste.

25 **SENATOR MIKE JACKSON:** Okay. So, when did it change

1 from hazardous to non-hazardous.

2 **COMMISSIONER LARRY SOWARD:** It did not change, Senator.
3 The CRT waste in those ninety-nine roll off bins are
4 still hazardous.

5 **SENATOR MIKE JACKSON:** So, what's the -- I guess --

6 **COMMISSIONER LARRY SOWARD:** It's just, Senator --

7 **SENATOR MIKE JACKSON:** Where is the big dilemma? Where
8 is -- why is this so difficult to deal with?

9 **COMMISSIONER LARRY SOWARD:** It is not. That's why I said
10 it's very simple. You pull out the CRT waste that are
11 hazardous, and dispose of them as hazardous. What's left
12 is dirt and garbage, put it back in the landfill.

13 **SENATOR MIKE JACKSON:** This agency that is the second
14 largest environmental agency in the United States can't
15 seem to get this done.

16 **CHAIRWOMAN KATHLEEN WHITE:** May I comment, Senator
17 Jackson?

18 **SENATOR MIKE JACKSON:** You have to ask the Chairman.

19 **SENATOR KENNETH ARMBRISTER:** Yes. We're looking for
20 answers.

21 **CHAIRWOMAN KATHLEEN WHITE:** I'm looking at the letter --
22 the September 24th letter that the Executive Director sent
23 to Penske, which has the same language that you quoted
24 about the manifest which is the waste manifested as
25 hazardous until such time as it is conclusively

1 determined that no D008, that's the CRT waste at the
2 level that is characteristically hazardous remains. I
3 believe from the brief submitted to us with these
4 motions, that TDS has great concern with this and opposes
5 this because of the same issue that was at stake on
6 whether this is special waste, or whether this is
7 hazardous waste. If -- if it is hazardous, you can't by
8 sampling determine whether it's there or not. If it's
9 hazardous it all has to be -- a hundred percent of it has
10 to be physically separated. And it is from the briefs
11 that we've received, I understand that TDS thinks this is
12 very -- a very inadequate way for that waste to leave
13 their landfill and go to a hazardous disposal site
14 because it leaves unclear whether it will actually be --
15 a hundred percent of it will be physically sorted. And
16 they will identify a hundred percent of the CRT waste
17 that TDS' engineering specialist estimates could be from
18 eight hundred to twelve hundred pounds of lead in all of
19 the ninety-nine roll off containers, which is quite a bit
20 of lead.

21 **SENATOR MIKE JACKSON:** Okay. So, who would be liable?
22 Where would the liability trail fall in the scenario that
23 you just outlined?

24 **CHAIRWOMAN KATHLEEN WHITE:** Well, I think TDS is
25 concerned that without this complete physical separation

1 of the CRT waste and anything that is not that. That
2 they may still be liable for any lead contamination
3 issues that could occur because of waste that had lead in
4 it being disposed of as non-hazardous.

5 **SENATOR MIKE JACKSON:** So, should they be, I guess? I
6 mean is it their fault?

7 **CHAIRWOMAN KATHLEEN WHITE:** Should they -- should --

8 **SENATOR MIKE JACKSON:** Should liability apply to them?

9 **COMMISSIONER RAFAEL MARQUEZ:** Mr. Chairman?

10 **SENATOR ARMBRISTER:** Yes.

11 **COMMISSIONER RAFAEL MARQUEZ:** I think I'm getting
12 confused, Senator. I think as far as the liability and
13 as far as the manifest, the manifest is what tracks the--
14 where the waste originated, who originated it, where is
15 it going to be disposed of, and how it's gonna be
16 disposed of. That is an EPA legal document. We've
17 adopted it. And that is the purpose. Tracking cradle to
18 grave. I think to answer an earlier question about the
19 statements in the manifest. I think you made the
20 statement that if it's incorrect, you know what do we do?
21 The information that is required in the manifest is the
22 origin, the type of waste, and who the originator of the
23 waste is -- the generator of the waste is, and where it's
24 gonna go to -- any other statements that are written on
25 that manifest are beyond our control. That is not

1 something that we control. Anyone can write in anything
2 else they want to in that manifest as long as the basic
3 information we've required is there, and it's accurate
4 and it's complete. So, that part of it --

5 **SENATOR MIKE JACKSON:** Which brings the question that I
6 asked a moment ago. What happens if it's not?

7 **COMMISSIONER RAFAEL MARQUEZ:** Well, if it is not the
8 generator of the waste is responsible for it. They are
9 the ones who fill out the manifest. And the generator of
10 that waste in that manifest -- as I understand it -- is
11 Penske. Now TDS may have a fear that a court may make a
12 different decision at a later time, yes, I think that's
13 always a fear. But from our standpoint the generator of
14 that waste is Penske. They signed the manifest, and they
15 acknowledge it is their waste.

16 **SENATOR MIKE JACKSON:** So, TCEQ has no ability to levy a
17 penalty or do anything if they find someone that is
18 putting incorrect information on the manifest?

19 **COMMISSIONER RAFAEL MARQUEZ:** No, we do. We have that
20 authority.

21 **SENATOR MIKE JACKSON:** Oh, you do have that authority?

22 **COMMISSIONER RAFAEL MARQUEZ:** We have the authority.

23 **SENATOR MIKE JACKSON:** But I thought you said you
24 couldn't do anything.

25 **COMMISSIONER LARRY SOWARD:** Not about the language

1 you were talking about.

2 **COMMISSIONER RAFAEL MARQUEZ:** That's what I am trying
3 to clarify is that additional language that Penske's
4 lawyers decided to write on it -- on the manifest.
5 That's beyond what the manifest requires.

6 **SENATOR MIKE JACKSON:** Well, I guess we can't do anything
7 about it, Mr. Chairman.

8 **CHAIRWOMAN KATHLEEN WHITE:** Except that language is from
9 the Executive Director's letter to Penske.

10 **SENATOR CRAIG ESTES:** Thank you Commissioners for trying
11 to enlighten us on this, and Larry, I appreciate you
12 taking the definitive stand that yes, these ninety-nine
13 containers contain hazardous waste. Last time we talked
14 about this is from this Committee, one of your employees
15 over there just was silent on the matter, and was unable
16 to even say yes, no, or tell me to go jump in the lake.
17 But what you're telling me here is that a sharp lawyer
18 for a company puts something on a manifest that threw a
19 monkey wrench into the whole thing, and we can't get this
20 problem solved just because of some language that a
21 lawyer put on a manifest, is that correct? Is that what
22 you're telling me?

23 **COMMISSIONER LARRY SOWARD:** No, Senator. I think I said
24 it was much more than that. I think it's the parties'
25 positions against each other in a lawsuit for damages.

1 **SENATOR CRAIG ESTES:** Okay.

2 **COMMISSIONER LARRY SOWARD:** I think the language in
3 that manifest highlights some of the controversy between
4 those two parties.

5 **SENATOR CRAIG ESTES:** Okay. So, basically at least from
6 your perspective, you're saying the agency is kind of
7 giving up on this and it's up to the courts to decide it?

8 **COMMISSIONER LARRY SOWARD:** We --

9 **SENATOR CRAIG ESTES:** Your hands are tied so to
10 speak. I don't want to put words in your mouth.

11 **COMMISSIONER LARRY SOWARD:** I think we -- my view, this
12 is mine, is that what the Executive Director put in the
13 September 24th letter is the approach that will resolve
14 this issue. My point is that neither one of the two
15 parties will abide by that because it jeopardizes their
16 position in the lawsuit. And we -- the only -- our only
17 remedy is to go to the court ourselves and try to force
18 one or both of those parties to do what's been directed.

19 **SENATOR CRAIG ESTES:** Okay, thank you.

20 **COMMISSIONER RAFAEL MARQUEZ:** Could I make a statement?

21 **SENATOR KENNETH ARMBRISTER:** Sure.

22 **COMMISSIONER RAFAEL MARQUEZ:** I didn't get a chance to
23 make mine. Thank you for the opportunity, and I'll be
24 very, very brief. I just want to make two basic points.
25 If you look at the calendar of events, the accident

1 occurred on October 9th, 1997. The resulting waste was
2 cleaned up and secured by the next day. None of the
3 actions taken were disputed by any of the parties. By
4 April 29th, 1997 after review of the records during an
5 inspection of the landfill, the waste was allowed to
6 remain in the landfill. This essentially closed the
7 record on this incident less than seven months after the
8 accident occurred. No issues related to the agency
9 actions were disputed at that time. This matter came
10 alive again after the landfill operator dug the waste out
11 of the landfill and placed it in dumpsters in January of
12 2004, about six years after this matter had been closed.
13 TCEQ was not involved in the decision by the landfill
14 operator to dig out the waste. Over the last few months,
15 we have heard repeatedly that after seven years the
16 agency has not resolved this problem. Such an accusation
17 is disingenuous. Such statements hurt the credibility of
18 our agency, and perhaps are meant to put pressure on the
19 agency to make decisions that favor one private party
20 over another. I am very concerned with -- and care too
21 much about the reputation of our agency not to make that
22 statement. My second point is that our mission is to
23 protect human health and the environment. It is not to
24 favor one private party over the other in private civil
25 disputes. On September 24th, 2004 the Executive Director

1 of TCEQ issued a letter ordering the removal and disposal
2 of the waste that's currently in the dumpsters. The
3 waste or any part of it which may test to be hazardous is
4 to be handled and disposed of as a hazardous waste. This
5 decision meets our primary criteria that the actions
6 taken be protective of human health and the environment.
7 It does not tilt the balance in favor of one private
8 party over the other in a civil dispute. This matter
9 could be resolved this afternoon if the landfill operator
10 allowed the waste to be removed from the landfill
11 premises, as ordered by the Executive Director. Thank
12 you.

13 **SENATOR KENNETH ARMBRISTER:** Any questions?

14 **SENATOR GONZALO BARRIENTOS:** Senator Armbrister, forgive
15 me I got stuck in traffic on the interstate. I want to
16 ask a couple or three questions, but I don't want to be
17 out of order here.

18 **SENATOR KENNETH ARMBRISTER:** No, that's fine.

19 **SENATOR GONZALO BARRIENTOS:** So, proceed if you have
20 other --

21 **SENATOR KENNETH ARMBRISTER:** No, go ahead.

22 **SENATOR GONZALO BARRIENTOS:** Let me cite what I think are
23 some facts, and respond Commissioners. For example, I
24 understand you issued a notice of violation, and I may be
25 going over some material here. Please bear with me. A

1 notice of violation to Penske on May 13th of '04 -- that
2 was about seven years after the accident at which that
3 waste was generated. That notice of violation cited
4 Penske for "failure to prevent the disposal of any
5 industrial solid waste or municipal hazardous waste
6 unless such activity was authorized by a permit, amend
7 the permit, or other authorization." You then set a
8 deadline for disposal of the waste. But later, to me
9 remarkably, when Penske proposed to dispose of the waste
10 without admitting it was hazardous, and then TDS
11 understandably balked at that proposal, your Executive
12 Director threatened to void that notice of violation and
13 publicly blamed TDS. Penske has not been penalized one
14 dime for that -- for those violations. Is that true?
15 Anybody?

16 **CHAIRWOMAN KATHLEEN WHITE:** At this point in time the --
17 first of all it's really the early stages of an
18 enforcement process.

19 **SENATOR GONZALO BARRIENTOS:** Early stages?

20 **CHAIRWOMAN KATHLEEN WHITE:** I mean from the date in May
21 of 2004.

22 **SENATOR GONZALO BARRIENTOS:** Oh, I shouldn't count the
23 seven years?

24 **CHAIRWOMAN KATHLEEN WHITE:** No, I'm talking about when
25 the agency took action in May, 2004 in issuing a notice

1 of violation. It has yet been, in my opinion, unresolved
2 what will be required of Penske to correct those
3 violations.

4 **SENATOR KENNETH ARMBRISTER:** Kathleen, could you pull
5 that mike closer.

6 **CHAIRWOMAN KATHLEEN WHITE:** And whether it will remain
7 what the agency calls a notice of violation, rather than
8 a notice of enforcement. But you are correct, Senator
9 Barrientos, that if a matter is resolved under the rubric
10 of a notice of violation, there are no monetary
11 penalties. But because it is not concluded or resolved
12 that has not, that possibility has not been --

13 **SENATOR GONZALO BARRIENTOS:** Well, let me ask you this.
14 As you know I'm not an attorney. In your opinion,
15 professional, do you think that Penske and Zenith have
16 probably spent more money fighting their responsibility
17 to properly dispose of that waste than if they would have
18 just packed it up and taken it somewhere where it was
19 safe?

20 **CHAIRWOMAN KATHLEEN WHITE:** And I -- we -- I think we all
21 have sometimes different opinions on this matter, so I
22 don't want to -- but I have reflected on that prior to
23 your question that there may -- who knows but there may
24 have been already expenditures in excess of what
25 hazardous waste disposal for the entire load would be.

1 **SENATOR GONZALO BARRIENTOS:** So, what would you guess?

2 **CHAIRWOMAN KATHLEEN WHITE:** What would I guess?

3 **SENATOR GONZALO BARRIENTOS:** Money-wise?

4 **CHAIRWOMAN KATHLEEN WHITE:** Money-wise. I would -- my
5 fellow Commissioners --

6 **SENATOR GONZALO BARRIENTOS:** Well, now wait a minute.
7 Y'all are professionals. You're appointed by the
8 Governor and confirmed by the Senate of the State of
9 Texas to be there, can you have an idea of how much money
10 it costs to move this hazardous waste from here to there?
11 Do y'all have any idea?

12 **CHAIRWOMAN KATHLEEN WHITE:** Do you Ralph? The disposal
13 of sixteen hundred cubic yards at a hazardous waste
14 disposal? I do not know.

15 **COMMISSIONER RAFAEL MARQUEZ:** I have not looked into that
16 number, Senator. I don't believe that that is what I had
17 to do, that my decisions should be based on that.

18 **COMMISSIONER LARRY SOWARD:** Senator, I asked that
19 question early on of staff, and ballpark answer I got
20 back was if the entire sixteen hundred cubic yards of
21 stuff in those ninety-nine roll off bins were transported
22 and disposed of at a hazardous waste site, it could be
23 about a million dollars.

24 **SENATOR GONZALO BARRIENTOS:** I wonder how much they've
25 paid attorneys to fight this so far?

1 **COMMISSIONER LARRY SOWARD:** All sides have probably
2 exceeded that.

3 **SENATOR GONZALO BARRIENTOS:** Mr. Chairman, I've got about
4 twenty or thirty other questions, but I don't know if --
5 I think I'm gonna stop for the moment and try to settle
6 down a little bit. I've been dealing with this for about
7 seven years -- years. And as you know, this is the
8 district which I represent, which impacts my colleagues
9 from all over Central Texas and other areas. So, let me
10 just stop for a moment there.

11 **SENATOR KENNETH ARMBRISTER:** Okay. Senator Lindsay?

12 **SENATOR JON LINDSAY:** Commissioner Marquez, did I
13 understand when you were making your comments that you
14 felt like it was unnecessary for TDS to actually deposit
15 ninety-nine roll off containers with this material? Is
16 it your opinion? Did I understand that right that you
17 didn't think that they really needed to do that? They
18 could've left it right where it was?

19 **COMMISSIONER RAFAEL MARQUEZ:** That is not the statement I
20 made a moment ago. What I said --

21 **SENATOR JON LINDSAY:** Okay. Well, that's what I kind of
22 thought you implied at least. Are you not saying that?

23 **COMMISSIONER RAFAEL MARQUEZ:** No, I didn't mean to say
24 that it could be put back in the landfill where it's at
25 now. I said that if -- if they allow Penske to go and

1 remove the waste, the dumpsters from the current location
2 in the TDS landfill, this matter would be over from
3 a regulatory standpoint. This matter would be over.

4 **SENATOR JON LINDSAY:** I just thought earlier you might
5 have said that in your opinion it was not necessary for
6 them to package that stuff the way they did. You didn't
7 say that?

8 **COMMISSIONER RAFAEL MARQUEZ:** No, I did not say that.
9 Sorry.

10 **SENATOR JON LINDSAY:** I'm curious, it's been said a
11 couple of times here that this material could be
12 separated. What is the process for separating the
13 hazardous material from the dirt and the garbage? I mean
14 how hard is that to do? And how expensive would that be?

15 **CHAIRWOMAN KATHLEEN WHITE:** It was done before I believe
16 not long after the accident, I believe it's called a
17 negative sort process. I'm not exactly sure by what
18 engineering methods it was done, but it was done for a
19 smaller amount of mixed CRT and MSW waste I believe. I
20 don't know what this was, but there is a process.

21 **SENATOR JON LINDSAY:** But now we're not talking about
22 that. We're talking about ninety-nine loads out there.

23 **CHAIRWOMAN KATHLEEN WHITE:** But it's the same process, I
24 believe the same process would be used.

25 **COMMISSIONER LARRY SOWARD:** You would literally have

1 to sift through ninety-nine -- sixteen hundred cubic
2 yards of dirt and garbage to pull -- to pull out CRT or
3 picture tube waste, which are --

4 **SENATOR JON LINDSAY:** By hand?

5 **CHAIRWOMAN KATHLEEN WHITE:** No, I think it's a sifter --
6 industrial type sifter.

7 **COMMISSIONER LARRY SOWARD:** But it does require manpower.
8 So, that's what we call negative sort.

9 **SENATOR JON LINDSAY:** Even a sifter I mean the smaller
10 hazardous material is gonna go through that sifter just
11 like smaller dirt would.

12 **COMMISSIONER LARRY SOWARD:** And we're talking about
13 broken glass.

14 **SENATOR JON LINDSAY:** I don't see how you can effectively
15 separate this material at this point in time. I'd like to
16 have that explained to me a little bit better.

17 **COMMISSIONER RAFAEL MARQUEZ:** Senator, just looking at
18 the chronology one month after the accident happened on
19 October 10th, eighty cubic yards of CRT waste were removed
20 from that waste -- from the total wreckage waste before
21 it was all commingled in the landfill. So, there was a
22 separation that took place to begin with. Now what we
23 are talking about is -- any remaining CRT glass that may
24 have been left there. So, it is -- that and so many
25 cubic yards of municipal waste it's a task that's

1 gonna take quite a bit of labor.

2 **SENATOR KENNETH ARMBRISTER:** I don't read it that way.

3 I'm looking at this document that was supplied to this
4 Committee by your staff on 10/10/97. It says TDSL
5 removed approximately eighty cubic yards of accident
6 debris. That's commingled waste. That's not CRT waste.

7 **COMMISSIONER RAFAEL MARQUEZ:** Right. It's commingled
8 from the accident, not commingled with the municipal
9 waste, I'm sorry.

10 **SENATOR KENNETH ARMBRISTER:** All right. So, you're
11 saying that the pallets and the packaging are hazardous?

12 **COMMISSIONER RAFAEL MARQUEZ:** No, I -- eighty cubic yards
13 of the accident waste were removed because they were
14 considered hazardous. I assume that what was removed was
15 the CRT -- the glass primarily was removed. That's what
16 had the lead contamination in it.

17 **SENATOR KENNETH ARMBRISTER:** All right. Go ahead,
18 Senator.

19 **SENATOR JON LINDSAY:** I'm kind of still back at square
20 one. It seems to me like when you try to separate this
21 waste, you're gonna have as much hazardous stuff that
22 sifts through the whatever you're sifting through as you
23 had percentage-wise that you had to start with. And I
24 don't see why we would be trying to separate that. It
25 seems like yeah we've got ninety-nine loads of material

1 that needs to go to a hazardous waste site, and we ought
2 to just get on with it and send it on down there.

3 Even if it does cost a million dollars.

4 **CHAIRWOMAN KATHLEEN WHITE:** That I think is one
5 alternative. I think there are you know industry
6 recognized means for physically sorting. And I think the
7 two options I see that follow from my legal opinion, is
8 that you have to treat the whole -- because of federal
9 rule, you have to treat the whole commingled load as
10 hazardous unless you do two things. One, is just what you
11 said. Dispose of it all as hazardous. Or two, there is
12 an industry recognized negative sort process, which is
13 viewed as not losing more through the sifter than -- but
14 actually separating that. And then there is a means of
15 testing what remains after separation that can possibly
16 reduce the cost of disposal. But those -- it would be my
17 position that you offer those as two alternatives to
18 Penske in this notice of violation.

19 **SENATOR JON LINDSAY:** And that would be satisfactory to
20 the agency if that were done?

21 **CHAIRWOMAN KATHLEEN WHITE:** We have not reached an
22 agreement on that. That is my individual opinion.

23 **SENATOR JON LINDSAY:** And how about EPA? Are they --
24 would they sign off on something like that as well?

25 **CHAIRWOMAN KATHLEEN WHITE:** They have not been

1 involved in this to this point, nor would I imagine they
2 would weigh in on something like this. But these are
3 what I mentioned, I could be more specific about what's
4 required, they are EPA approved means of disposing of
5 commingled hazardous waste.

6 **COMMISSIONER LARRY SOWARD:** And Senator, if you read the
7 September 24th letter, that's exactly what the Executive
8 Director told Penske to do.

9 **SENATOR JON LINDSAY:** I'm sorry, I got distracted.

10 **COMMISSIONER LARRY SOWARD:** I said if you read the
11 September 24th letter from the Executive Director, that's
12 exactly what he told Penske to do. Penske has refused to
13 do it, TDA has refused to allow them to do it.

14 **CHAIRWOMAN KATHLEEN WHITE:** I would beg to differ in that
15 I think this -- the September 24th letter is
16 insufficiently clear and gives Penske a number of really
17 alternative means of doing that. And therefore, I
18 understand the other parties' concern that the language
19 is too open ended in the September 24th letter.

20 **SENATOR KENNETH ARMBRISTER:** Are you through, Jon?

21 **SENATOR JON LINDSAY:** Yeah.

22 **SENATOR KENNETH ARMBRISTER:** Senator Jackson?

23 **SENATOR MIKE JACKSON:** Okay. I'm sorry to be repetitive
24 here, but the letter that you're talking about on the
25 24th, I think the third line from the bottom it says, "In

1 any case the roll off containers must be removed from the
2 TDSL facility by October 27th, 2004. And the waste
3 manifested as hazardous waste until such time as
4 conclusively determined that no D008 waste remains." And
5 obviously that didn't happen, right?

6 **COMMISSIONER LARRY SOWARD:** Right.

7 **SENATOR MIKE JACKSON:** So, here it is. You guys -- the
8 Executive Director say do this, and nothing happens. And
9 you're telling me that you can't do anything about it. Is
10 that right?

11 **COMMISSIONER LARRY SOWARD:** No our only --

12 **SENATOR MIKE JACKSON:** This is a direct violation of the
13 Executive Director's order to Mr. Marc Althen or whatever
14 his name is, and he didn't do it. So, what -- why should
15 anybody in the State that is dealing with hazardous waste
16 if they're a generator, it would be -- this would be
17 perfect for me. I wouldn't -- I'd just send my waste to
18 a regular municipal landfill and then you know I wouldn't
19 have to worry about it anymore.

20 **COMMISSIONER RAFAEL MARQUEZ:** Senator, this letter was
21 addressed from the Executive Director to Penske.

22 **SENATOR MIKE JACKSON:** Uh-huh.

23 **COMMISSIONER RAFAEL MARQUEZ:** Ordering to remove the
24 waste. It is our understanding that TDS has not allowed
25 Penske to go in and remove the waste. And so who should

1 we take action against? If you give us a recommendation
2 you know as to who should we be taking action against?

3 **SENATOR MIKE JACKSON:** Commissioner, I don't want to try
4 to tell you how to do your job. All I can do is sit here
5 and observe and you make references that members of this
6 Committee are trying to take sides and steer you to take
7 sides for one private party against another private
8 party. My district, you know where it is, Texas City and
9 Pasadena and Galveston and Brazoria County doesn't have
10 anything to do with Penske. It doesn't have anything to
11 do with the landfill in Buda or wherever it is. I'm
12 honestly concerned about the people in the State of Texas
13 and this agency taking care of hazardous waste, which
14 last time I checked that was one of the duties that this
15 agency is charged with. But yet everything that I see
16 here is that you can't do anything. And that's what I
17 take issue with.

18 **COMMISSIONER RAFAEL MARQUEZ:** And it's frustrating for
19 all of us.

20 **SENATOR MIKE JACKSON:** Well, I mean if you can't -- if
21 you can't I don't really know who can. I'm a little bit
22 perplexed you know, I apologize. But it just is very
23 frustrating to me that an agency with as many people that
24 you have with as many liberties as the Legislature has
25 chosen over the years to give you in rule making

1 authority. You know in a lot of bills that we've passed,
2 we get mad at you because you make too many rules. And
3 then on this one you're saying you can't do anything.
4 So, it's really confusing to me to try to understand how
5 this has gotten the way it is.

6 **CHAIRWOMAN KATHLEEN WHITE:** Senator Jackson, subsequent
7 to this September 24th letter there was another motion to
8 overturn this, which came you know it took a month or two
9 to get before the Commission. It came before us in
10 December, and it was not upheld. There was a motion and
11 no second. But for part of the time there was a reason
12 why no action came from them. But now with the second
13 motion which failed to challenge this, this would remain
14 as the Executive Director's interpretation of the
15 September decision that the Commission made. I must add
16 that it's difficult, the Commission has not been -- I
17 think has credible different opinions on how to handle
18 this. And it's very difficult for the Executive Director
19 to know what the will of the Commission is when we have
20 had different --

21 **SENATOR MIKE JACKSON:** When you can't get a second on a
22 motion.

23 **CHAIRWOMAN KATHLEEN WHITE:** Well, or the -- an
24 alternative or I think we were insufficiently clear in
25 September, it is my individual opinion. I think we failed

1 the Executive Director in not being specifically clear to
2 maybe avoid some of the problems about language in the
3 manifest and all of those things. I assume we were
4 hesitant because I would prefer that was the Executive
5 Director's role, but the purpose is -- I can understand
6 why people feel the court is the proper venue for this,
7 not the agency. It is my hope that the state agency
8 could reach a decision, but you have to have a critical
9 mass.

10 **COMMISSIONER LARRY SOWARD:** Senator, let me follow-up
11 because I think -- I think the agency could address this.
12 We can go to court and get a court order requiring the
13 parties to comply with this. And that's why I said it's
14 gonna take the courts. Because we can't go out there and
15 make TDS open the gates. So, it will take a court order
16 for this agency to enforce this. That's where we are.

17 **SENATOR KENNETH ARMBRISTER:** Senator Barrientos?

18 **SENATOR GONZALO BARRIENTOS:** Let me follow-up on Senator
19 Jackson and that last comment about that motion to -- I
20 believe you made it, Commissioner. You didn't get a
21 second.

22 **CHAIRWOMAN KATHLEEN WHITE:** December hearing, yes.

23 **SENATOR GONZALO BARRIENTOS:** Right. Commissioner Soward,
24 we talked about this before.

25 **COMMISSIONER LARRY SOWARD:** Yes, sir.

1 **SENATOR GONZALO BARRIENTOS:** I think before the last
2 confirmation hearings. At that time, correct me if I'm
3 wrong, a trial judge had recently ruled a mistrial in the
4 Penske/Zenith TDS matter, right?

5 **COMMISSIONER LARRY SOWARD:** Yes sir.

6 **SENATOR GONZALO BARRIENTOS:** And that judge had the
7 opinion that the matter ought to be settled by the
8 appropriate state agency TCEQ rather than the court, is
9 that right?

10 **COMMISSIONER LARRY SOWARD:** I recall reading that in the
11 paper, yes sir.

12 **SENATOR GONZALO BARRIENTOS:** Okay. At your confirmation
13 hearing, I asked you if you agreed and you did.

14 **COMMISSIONER LARRY SOWARD:** Yes, sir.

15 **SENATOR GONZALO BARRIENTOS:** And then this past December
16 you said at a public hearing at the Commission that the
17 issue needed to be settled in court. What's changed? Is
18 that waste still hazardous? Do you still think that it
19 was generated at the accident scene? Does the Commission
20 then, as we've been talking, not have sufficient
21 authority to enforce it? What's hazardous and who's the
22 generator?

23 **COMMISSIONER LARRY SOWARD:** I don't think any of those
24 facts have changed in my mind. I think the CRT waste are
25 hazardous. I think Penske is the generator by law. And

1 I think the CRT waste still in those ninety-nine roll off
2 bins are hazardous. I do not believe by law that the
3 balance of that sixteen hundred cubic yards is hazardous.
4 What has changed from my perspective, and as -- you
5 missed my statement. But what I said was I committed to
6 y'all to try to get to the bottom of this and try to find
7 a solution to it. And I think there is a simple
8 solution. But the problem is now, and what has changed
9 is, there are eight lawsuits that have been filed on this
10 matter. And we have two parties that are unwilling for
11 the matter to be resolved because it jeopardizes their
12 legal positions. It has nothing to do with the proper
13 disposal of the waste. That could be done this afternoon
14 like Commissioner Marquez said.

15 **SENATOR GONZALO BARRIENTOS:** Do you think that had you
16 all gotten to the shall we say nitty-gritty much earlier
17 it could have been solved with all of this now legal
18 mumbo-jumbo going on and the fix that I think the agency
19 has put itself in?

20 **COMMISSIONER LARRY SOWARD:** I believe we got to the
21 nitty-gritty in September. And it could have been
22 resolved then.

23 **SENATOR GONZALO BARRIENTOS:** Isn't that what Commissioner
24 White was trying to do in trying to get a second?

25 **COMMISSIONER LARRY SOWARD:** You'll have to ask

1 Commissioner White what she was trying to do. I believed
2 at that time that the September 24th letter was exactly
3 what the Commissioners had said.

4 **SENATOR GONZALO BARRIENTOS:** Let me ask Commissioner
5 White, you're right. Tell me if this is the proper
6 characterization at that December hearing. You wanted
7 the commingled waste physically separated into hazardous
8 and non-hazardous. The purportedly non-hazardous pile
9 tested to ensure the sorting was done properly, and the
10 hazardous pile shipped to a licensed hazardous waste
11 disposal site. Is that the gist of it? In your opinion--
12 I'm sorry go ahead.

13 **CHAIRWOMAN KATHLEEN WHITE:** I would add that was necessary
14 to try to specify in a manner it was not done at the
15 September hearing, and in my individual opinion is not
16 reflected in the Executive Director's letter. And
17 actually in my opinion because of the plethora of
18 lawsuits, it seems as if every month yet another one,
19 that if it was possible to reach a consensus among the
20 Commissioners, it was important for the agency to take a
21 very clean, clear position supported by law, which I
22 think is possible and which addresses the broader public
23 policy implications for being extra protective about --
24 certainly keeping hazardous waste out of municipal solid
25 waste landfills affecting transporters of solid waste.

1 And in fact, the position is the position of Texas
2 Disposal Systems, so it could be viewed as I mean one
3 could look at this as huge and saying it's so tortured
4 that it's inappropriate for the agency to tilt perhaps on
5 either side. But to me law, policy, and fact led me
6 very confidently to that conclusion.

7 **SENATOR GONZALO BARRIENTOS:** So, do you think the agency
8 could still require those actions that you were trying
9 to--

10 **CHAIRWOMAN KATHLEEN WHITE:** I think it would involve the
11 three of us at again in another public setting because as
12 I just -- to speak you know candidly right here, we can't
13 speak to one another as you all know. So, on these rare
14 occasions where we are all together and can speak. I
15 believe Commissioner Soward -- he joined my motion in
16 September that was a decision in regards to CRT waste as
17 hazardous. I think he regards the Executive Director's
18 interpretation of that in his letter as sufficiently
19 clear. I do not. I do not think it is sufficiently clear
20 for reasons of law and precedent. But perhaps there is--
21 you know where I have no idea. I can't speak for
22 Commissioner Soward.

23 **COMMISSIONER LARRY SOWARD:** Senator, I have never sensed
24 that there is a difference of opinion between the three
25 of us on what needs to be done here. And I think even

1 what Chairman White just said is exactly what I've been
2 saying. The letter is extremely clear. It says do one
3 of two things Penske, remove the waste and dispose all of
4 it in a hazardous waste disposal site, or segregate the
5 hazardous waste out and dispose of it. How much clearer
6 do we need to be? The Executive Director doesn't
7 misunderstand it. Penske doesn't misunderstand it.

8 **SENATOR GONZALO BARRIENTOS:** Okay, fine. So, what
9 screwed that up?

10 **COMMISSIONER LARRY SOWARD:** What screwed that up? More
11 lawsuits and more motions to overturn. And parties not
12 willing to say yes we agree this is what you ordered us
13 to do.

14 **SENATOR GONZALO BARRIENTOS:** And the disclaimer is on the
15 manifest?

16 **COMMISSIONER LARRY SOWARD:** Sure.

17 **SENATOR KENNETH ARMBRISTER:** Senator Duncan?

18 **SENATOR ROBERT DUNCAN:** I've been trying to follow this,
19 and I nearly just thought about withdrawing my question
20 because it seems pretty simple to me, and I don't know.
21 I'm trying to figure out how -- you know you should have
22 the ability to do this either by filing your own lawsuit
23 and just taking -- getting injunctive relief against both
24 of these companies. It seems like you would be -- if
25 they're not obeying your orders then you should be able

1 to do that. And I don't know what it takes to get that
2 done, but my question would be this. Do we need to do
3 something legislatively to make this -- to resolve this?

4 **COMMISSIONER LARRY SOWARD:** Senator, as I said in my
5 statement, I don't believe that there's any legislative
6 issue involved here -- either municipal solid waste
7 laws or the hazardous waste laws.

8 **SENATOR ROBERT DUNCAN:** So, my next question then would
9 be -- so assuming the interest that's yours -- anybody,
10 y'all differ with that?

11 **COMMISSIONER RAFAEL MARQUEZ:** I agree with Commissioner
12 Soward.

13 **SENATOR ROBERT DUNCAN:** Commissioner White?

14 **CHAIRWOMAN KATHLEEN WHITE:** I agree with Commissioner
15 Soward, but I just reiterate I think that -- I do not
16 think we just have parties that won't cooperate with one
17 another. I think the reason the second motion to
18 overturn came to the agency is there were some very
19 significant legal, factual issues, yes, raised by Texas
20 Disposal Systems, which I in fact think are important.
21 And for the reason for their resistance to action coming
22 from this earlier letter.

23 **SENATOR ROBERT DUNCAN:** So, I guess what I'm trying to
24 figure out is I think to the question from this -- I
25 think everybody here is wanting some resolution, and so

1 what's gonna happen? I mean that's the bottom line here.
2 What are y'all gonna do? We've talked about the problems
3 and why we can't do this and why we can't do that. What
4 are we gonna do?

5 **CHAIRWOMAN KATHLEEN WHITE:** I think there are a range of
6 alternative things which could happen. Some of them I
7 hope don't. But I mean as far as what's within the realm
8 of possibility for the Commission, the September motion
9 stands as a legal motion. The December motion failed for
10 want of a second. But the September motion is a legal
11 decision of the Commission, and this letter from the
12 Executive Director to Penske is the Executive Director's
13 response to that September decision. The Executive
14 Director traditionally, if you're thinking about
15 injunctive actions, that is again according to our
16 governing statutes the prosecuting of enforcement matters
17 is the Executive Director's role -- does not need to come
18 before us for authorization and review. So, that could
19 occur without review of the Commission. The Commission
20 also I think could take an action giving further
21 direction to the Executive Director.

22 **SENATOR ROBERT DUNCAN:** To either seek injunctive relief
23 for some other --

24 **CHAIRWOMAN KATHLEEN WHITE:** Right. It would legally
25 be very odd because -- but I think our general powers

1 are sufficient to allow us to do that.

2 **SENATOR ROBERT DUNCAN:** Can we anticipate that y'all will
3 do that pretty quick? Or are we gonna --

4 **CHAIRWOMAN KATHLEEN WHITE:** I would be -- I would be
5 willing to -- we also may be not agree again. We
6 couldn't act the last time. My goal would be because the
7 policy I think is important of doing so to act and to
8 reach a consensus. But we could not reach a consensus
9 before.

10 **SENATOR KENNETH ARMBRISTER:** I'm not real sure I
11 understand some of the things that's happened. And let
12 me tell you why. Over the years I've dealt with the
13 agency albeit different Commissioners, different ED's.
14 One incidence was a body shop where a guy had an open
15 quart of used paint on the ground behind his shed. And
16 the regional man went out and cited him for it, fifteen
17 thousand dollar penalty. Most recently a fellow that had
18 been in the concrete business for -- since '71 had always
19 been grandfathered. They came out and proposed a penalty
20 of 1.7 million dollars. I'm not understanding -- you've
21 got a notice of violation. I'm not understanding why
22 there wasn't a proposed penalty. I mean this is
23 inconsistent with the track record of the agency. Tell
24 me what it is about this instance that changes everything
25 that you've been doing over there? We had hours and

1 hours of testimony on the issue of environmental citizens
2 last session where penalties were being assessed by you
3 and by various District Attorneys around the state. I'm
4 not understanding -- y'all talk about these lawsuits.
5 Cite me one other instance where a lawsuit has stymied
6 the ability of the Commission to do what they're supposed
7 to do. Cite me one other instance.

8 **COMMISSIONER LARRY SOWARD:** I'm not sure we've ever -- let
9 me answer from my perspective, Senator. Since I've been
10 there I have not seen a lawsuit or number of lawsuits
11 like this filed while something was pending. Every time
12 this agency tries to make a decision, we get a lawsuit
13 filed.

14 **SENATOR KENNETH ARMBRISTER:** Well, let's talk about it.
15 This accident according to the time line that was
16 provided to us by the staff at TCEQ occurred October the
17 9th of 1997.

18 **COMMISSIONER LARRY SOWARD:** Yes, sir.

19 **SENATOR KENNETH ARMBRISTER:** October the 10th, eighty
20 cubic yards of accident debris was removed. Nearly a
21 month later TCEQ Austin Regional Office requested in
22 writing that Penske verify the accident waste and that it
23 be cleaned up and properly disposed. Three months later,
24 Penske hired Code Three to go through the accident. And
25 sometime during that month, the 23rd, TDSL sues Penske in

1 district court. Well, if it comes to you on the 9th and
2 both Zenith and Penske self-categorize their CRT waste as
3 D008 after some of it was sent to the landfill in '97.
4 I'm like Senator Barrientos, I'm not an attorney but if
5 I'm a licensed landfill operator, and I've gone through
6 from the time of the accident until the time the lawsuit--
7 the first lawsuit was filed not against the department,
8 but against one of the involved parties. Four months and
9 nothing is happening, I'm not understanding some things.
10 I mean I --

11 **COMMISSIONER LARRY SOWARD:** Senator, note the entry April
12 29th, 1998.

13 **SENATOR KENNETH ARMBRISTER:** Gotcha, all right.

14 **COMMISSIONER LARRY SOWARD:** In which our regional office
15 inspected the facility and stated in their final
16 inspection report that the commingled waste was allowed
17 to remain at the landfill.

18 **SENATOR KENNETH ARMBRISTER:** Okay.

19 **COMMISSIONER LARRY SOWARD:** Note that nothing happened
20 again until January the 29th of 2004.

21 **SENATOR KENNETH ARMBRISTER:** Okay.

22 **COMMISSIONER LARRY SOWARD:** Which Commissioner Marquez
23 alluded to. When TDSL dug up the entire cell of their
24 landfill that contained municipal waste and other waste.
25 It was received on October 9th, 1997. They dug that

1 entire cell up and put it in ninety-nine roll off bins.

2 **SENATOR KENNETH ARMBRISTER:** Right.

3 **COMMISSIONER LARRY SOWARD:** So, from April of '98 until
4 January of '04, no parties had an issue with this. What
5 is interesting about the January '04 date, that's when
6 the litigation in Hays County kicked back up.

7 **SENATOR KENNETH ARMBRISTER:** Well, I guess that's one way
8 of looking at it. But if you had to go to court to begin
9 with and you're waiting on the court all this time,
10 they're probably not gonna be hammering y'all.

11 **COMMISSIONER LARRY SOWARD:** If it was the issue -- I
12 don't understand why it wasn't an issue with any of the
13 parties after April of 1998 and suddenly it was in '04.

14 **SENATOR KENNETH ARMBRISTER:** It should've been an ongoing
15 issue with your agency because they are not permitted to
16 handle it. And if your agency took action a month after
17 the accident and demanded in writing to verify the waste
18 and clean it up, and properly dispose of it -- how come
19 y'all didn't do anything during that period of time?

20 **COMMISSIONER LARRY SOWARD:** Because in my review of the
21 records with the removal of the eighty cubic yards of the
22 accident debris --

23 **SENATOR KENNETH ARMBRISTER:** Uh-huh.

24 **COMMISSIONER LARRY SOWARD:** This agency believed that
25 there was sufficient cleanup of that waste.

1 SENATOR KENNETH ARMBRISTER: Where is that on here?

2 COMMISSIONER LARRY SOWARD: On that chronology?

3 SENATOR KENNETH ARMBRISTER: Uh-huh.

4 COMMISSIONER LARRY SOWARD: I think --

5 SENATOR KENNETH ARMBRISTER: The eighty cubic yards was
6 removed 10/10, how come your guy showed up a month later
7 and wanted more evidence? More action? If it was
8 sufficiently cleaned up with removal of eighty cubic
9 yards, how come your guy showed back up?

10 COMMISSIONER LARRY SOWARD: Because in March of '98 was
11 when the seven roll off bins -- that's the amount of
12 waste that was reflected in the eighty cubic yards, when
13 it was ultimately disposed of.

14 SENATOR KENNETH ARMBRISTER: Uh-huh.

15 COMMISSIONER LARRY SOWARD: That's when we were in a
16 position to go out and track those wastes and determine
17 what I believe the agency found was the significant
18 portion of the waste had been removed and properly
19 disposed of, and what was left, if any, could remain at
20 the landfill.

21 SENATOR KENNETH ARMBRISTER: All right.

22 COMMISSIONER LARRY SOWARD: That's just, Senator, that's
23 just my evaluation of the facts, and I think there could
24 be a disagreement.

25 SENATOR KENNETH ARMBRISTER: I understand.

1 **COMMISSIONER LARRY SOWARD:** Could I answer Senator
2 Duncan's question too?

3 **SENATOR KENNETH ARMBRISTER:** Yes.

4 **COMMISSIONER LARRY SOWARD:** I think we're faced with just
5 that. I think we're faced with going to court -- this
6 agency is faced with going to court and getting a court
7 order telling these two parties to comply with the
8 Executive Director's directive. I think that's what
9 we're faced with.

10 **SENATOR KENNETH ARMBRISTER:** Let me just say something
11 about that. I'm real concerned about the Executive
12 Director's directive if he has written an out for a party
13 that has already admitted that it was D008 waste -- that
14 it's hazardous. They're gonna fall back on that letter
15 and say we were told to put that in there. Where are
16 they gonna take it? Let's assume this manifest is good--
17 TDS says come get it. Where are they gonna take it?

18 **COMMISSIONER LARRY SOWARD:** I don't know, Senator, what
19 their final plans were. I know where they took the
20 eighty roll -- eighty cubic yards and where I believe
21 they have proposed to TECO.

22 **SENATOR KENNETH ARMBRISTER:** TECO. And I talked to Robert
23 Kiser this morning who is the manager of TECO, who has
24 seen this manifest. He says there is no way in hell he
25 would ever be in a position to accept that with this

1 manifest -- not with that provision on there. There is
2 no way because he would end up just like TDS would end up
3 as being the holder of the hazardous waste in the chain
4 of possession. So, if you go -- if you go and seek an
5 injunction based on the September 24th letter that Penske
6 used in this provision in the manifest, where are you
7 gonna take it? Nobody will take the stuff.

8 **CHAIRWOMAN KATHLEEN WHITE:** Senator Armbrister --

9 **SENATOR KENNETH ARMBRISTER:** You can get a court order
10 all you want to, but it's kind of like our next issue.
11 Where are they gonna take it?

12 **CHAIRWOMAN KATHLEEN WHITE:** Senator Armbrister, I also
13 think that my reading of the language in this letter
14 would allow Penske to take it whether it was to a
15 hazardous waste landfill or another type of landfill and
16 go back to treating it as mixed waste and test the
17 concentration of level, and then dispose of it
18 accordingly. I don't think there's anything in this that
19 dictates that it all has to be physically separated,
20 which I felt was a legal consequence following from the
21 September decision.

22 **SENATOR KENNETH ARMBRISTER:** Let me just ask a
23 hypothetical. Let's suppose tomorrow you all got
24 together and said we're going to be three and 0 vote, not
25 a one and die lack of a second vote. What precedent does

1 that set? Looking at the fact situations in this
2 violation-- notice of violation 2004 -- and y'all go
3 tomorrow and you say you know what we've had -- we've
4 thought this over and we're gonna vote with Chairwoman
5 White on her motion. What kind of precedent does that
6 set?

7 **CHAIRWOMAN KATHLEEN WHITE:** I don't even quite understand
8 what -- what --

9 **COMMISSIONER RAFAEL MARQUEZ:** I think there is two
10 opinions in the decision that we could possibly make and
11 what precedent it may or may not set. On one side, we
12 hear that if we do not declare this waste was all
13 hazardous all the time and forever, that it would open
14 the door for unscrupulous generators to send waste to
15 municipal landfills and claim some excuses that they
16 didn't know or the law was not clear. On the other hand,
17 if we make the decision to allow waste that's being
18 disposed of and then scavenge out of the landfill, that
19 may also be setting a precedent that any old landfill can
20 dig out waste that was put there who knows when and now
21 create a new issue that would be very expensive and
22 difficult to solve, and would probably add to
23 environmental consequences rather than eliminate them.
24 So, I think there is -- people can dream up implications
25 on both sides, Senator. I think this is a very unique

1 case. I don't believe that this is a precedent setting
2 case either way.

3 **SENATOR KENNETH ARMBRISTER:** There's no other case before
4 the Commission that has some similarities to this?

5 **COMMISSIONER RAFAEL MARQUEZ:** I do not believe so. Not
6 that I'm aware of.

7 **SENATOR KENNETH ARMBRISTER:** There's a lot of landfills
8 that's got this in it just sitting over there -- just
9 keeps moving it around. Watching what's going to happen
10 on this one. Where a lot of your executive staff has
11 connections to that company. What about that? Not
12 worried about that precedent?

13 **COMMISSIONER RAFAEL MARQUEZ:** Which landfill did you say?

14 **SENATOR KENNETH ARMBRISTER:** There's another landfill in
15 the State of Texas that was purchased by another landfill
16 operator that has some hazardous waste in it that's just
17 been moved around, it's not in any containers.

18 **COMMISSIONER RAFAEL MARQUEZ:** I'm not aware of that, sir.
19 That's --

20 **SENATOR KENNETH ARMBRISTER:** Well, you've got a lot of
21 employees on your executive staff -- not just yours, it's
22 up there in hierarchy -- it's either husbands or wives or
23 whatever connected to the company that owns that landfill
24 watching this very closely. That doesn't sit real good
25 with me or this Committee. That's what's clouding our

1 issue as a matter of public policy, I can guarantee you.
2 If you want the name of your employees, I'll be happy to
3 supply them to you. But you should know them. Questions
4 members? Senator Barrientos? Wait, one more thing. Mr.
5 Marquez, I am a little concerned with your statement and
6 I want you to explain it to me. In your statement to a
7 Mrs. Horinko of the EPA, where is that at -- "I think
8 that RCRA -- RCRA is probably the worst environmental law
9 that Congress has ever written, primarily because it
10 leads to so many absurd results." As a Commissioner is
11 it your job to interpret the intent of Congress to make
12 a-- are you telling this Committee that you're making
13 decisions over there because you agree or disagree with a
14 law that the Federal Congress has passed?

15 **COMMISSIONER RAFAEL MARQUEZ:** No, sir. Texas has a --

16 **SENATOR KENNETH ARMBRISTER:** Then what was that statement
17 about?

18 **COMMISSIONER RAFAEL MARQUEZ:** That statement is one that
19 anyone who was working with the RCRA program realizes
20 that there are a number of situations where definitions
21 are used not based on risk, but based just on a
22 definition that someone came up with at the time the
23 rules were passed. And there is a number of situations,
24 well documented, where actions are taken. For example,
25 some waste are classified as hazardous and are handled as

1 hazardous, when there is not a risk -- a relative risk
2 that goes with them that deserves that classification.
3 But that is the law -- that is the law -- we do not
4 change that.

5 **SENATOR KENNETH ARMBRISTER:** I don't need your
6 interpretation of the federal law. What I want to know
7 under oath before this Committee, are you telling us that
8 you make decisions based on laws that you think are
9 good laws, bad laws, or are you basing them on the facts?

10 **COMMISSIONER RAFAEL MARQUEZ:** Based on the law, sir, I
11 was sworn in to uphold the law. I follow the law. I may
12 not agree with the law in some cases, but I have to
13 follow the law. And that's the basic premise in every
14 decision I've made for nine and a half years at the
15 Commission.

16 **SENATOR KENNETH ARMBRISTER:** Is that your opinion on air
17 quality issues over there?

18 **COMMISSIONER RAFAEL MARQUEZ:** I follow the law, sir. Yes,
19 sir. I follow the law.

20 **SENATOR KENNETH ARMBRISTER:** Do you think in your terms
21 it's the worst law ever written?

22 **COMMISSIONER RAFAEL MARQUEZ:** I think RCRA of all the
23 federal laws that have been written, it's probably the
24 worst one in the way that it has to be implemented.

25 **SENATOR KENNETH ARMBRISTER:** If it is, as a

1 Commissioner with TECQ, which member of our federal
2 Congress delegation have you contacted about changing
3 this worst law?

4 **COMMISSIONER RAFAEL MARQUEZ:** Sir, that's beyond what I
5 can handle --

6 **SENATOR KENNETH ARMBRISTER:** Your answer is none?

7 **COMMISSIONER RAFAEL MARQUEZ:** None. Yes, sir.

8 **SENATOR KENNETH ARMBRISTER:** Your answer is none?

9 **COMMISSIONER RAFAEL MARQUEZ:** Yes, sir.

10 **SENATOR KENNETH ARMBRISTER:** Well, I'm gonna tell
11 you that statement casts some severe doubts in my
12 mind about your ability to stay there and serve.

13 **COMMISSIONER RAFAEL MARQUEZ:** Yes, sir.

14 **SENATOR KENNETH ARMBRISTER:** I wish you would have made
15 those statements during confirmation. Senator Lindsay?

16 **SENATOR JON LINDSAY:** A couple of quick questions. First
17 of all, was it -- maybe you've answered this, but is it
18 possible in this letter that you wrote on September 24th
19 last year to include a threatened penalty into this if
20 they hadn't agreed -- hadn't done the things that are in
21 the letter? Could a penalty have been in this letter at
22 all?

23 **CHAIRWOMAN KATHLEEN WHITE:** Anything is possible just in
24 a nutshell. This is either actions required in a notice
25 of violation. If actions are not fulfilled if you do not

1 do what the agency tells you in a notice of violation
2 then it usually goes up to enforcement and penalty --
3 normal penalties.

4 **SENATOR JON LINDSAY:** You don't mention it in this letter
5 of course. But you could've.

6 **CHAIRWOMAN KATHLEEN WHITE:** We could've.

7 **SENATOR JON LINDSAY:** You could've put it in there.

8 **CHAIRWOMAN KATHLEEN WHITE:** Either actions required in a
9 notice of violation and if not complied with by a certain
10 date, the next step in the enforcement could have been
11 articulated.

12 **SENATOR JON LINDSAY:** Okay. Then is it too late to
13 review this letter and start over on this letter?

14 **CHAIRWOMAN KATHLEEN WHITE:** And this is the Executive
15 Director's letter, you know not the Commissions.

16 **SENATOR JON LINDSAY:** I know, but you can instruct him to
17 couldn't you?

18 **CHAIRWOMAN KATHLEEN WHITE:** As I have said earlier, and
19 again we may have had credible differences of opinion
20 about this, I had thought when I tried to make a motion
21 at a December hearing that it was necessary to be far
22 more specific in instructions to the Executive Director
23 on what actions could or could not be taken. And I think
24 that if the agency is to reach a clear decision on this
25 outside of the courts, that it would require that level

1 of specificity. The applicable law and these actions
2 must follow, and these must not.

3 SENATOR JON LINDSAY: So, it's a reasonable option to say
4 okay we're gonna redo this.

5 CHAIRWOMAN KATHLEEN WHITE: It's highly unusual, but if--
6 for my individual reasons, I think the policy
7 implications and the level of interest in this, and the
8 longstanding tortured problem, to me I felt it was very
9 important for the State agency to try to reach a clear
10 decision. Maybe in years reversed by a court,
11 but nonetheless a clear decision afforded by law and
12 fact.

13 SENATOR JON LINDSAY: So, this would be an option to redo
14 the letter and start again?

15 CHAIRWOMAN KATHLEEN WHITE: Yes, if the Commission could
16 all agree.

17 SENATOR JON LINDSAY: Thank you.

18 SENATOR KENNETH ARMBRISTER: Senator Estes?

19 SENATOR CRAIG ESTES: I'm worried about the precedent
20 that this whole affair is setting for the future of our
21 State and hazardous waste generators. And I'd just like
22 any of the three of you to comment on this, does this
23 send a message that if I'm a hazardous waste generator,
24 and I can get my stuff mixed in with some garbage and
25 then hire a bunch of Philadelphia lawyers to tie it up

1 and put handcuffs on a State agency that I can get out of
2 my responsibility taking care of this.

3 COMMISSIONER LARRY SOWARD: Absolutely not. From this
4 Commissioner's perspective. I think what we're saying is
5 you can't get away with it. You have to deal with the
6 hazardous waste that you put in that landfill eventually.
7 I understand the timing issues are inherent in this case,
8 yes sir.

9 SENATOR CRAIG ESTES: So, there's no bad precedent being
10 set here?

11 COMMISSIONER LARRY SOWARD: I don't think anybody should
12 consider this as a precedent, no sir.

13 SENATOR CRAIG ESTES: Okay.

14 COMMISSIONER LARRY SOWARD: And I would hope that the bad
15 aspects of it wouldn't be precedent either.

16 SENATOR CRAIG ESTES: I hope you're right, Commissioner.
17 Thank you.

18 SENATOR KENNETH ARMBRISTER: Senator Barrientos?

19 SENATOR GONZALO BARRIENTOS: I want to go back to those--
20 Commissioners to that terrible federal law -- is this
21 statement correct? By federal law -- it does not allow
22 the mixing or dilution to equal treatment of hazardous
23 waste? Is that true? I only see one nod of the head.

24 CHAIRWOMAN KATHLEEN WHITE: You'll get three answers. Go
25 ahead, Commissioner Soward.

1 COMMISSIONER LARRY SOWARD: No, federal law does not
2 allow mixture or commingling to render hazardous waste
3 otherwise non-hazardous.

4 SENATOR GONZALO BARRIENTOS: Isn't that the reason that
5 TDS I think went back to court because they couldn't rely
6 on the TCEQ determination of that?

7 COMMISSIONER LARRY SOWARD: I don't know why they went
8 back to court, Senator. I think we made it clear in
9 September, I think all three of us made it clear that the
10 CRT waste was hazardous.

11 SENATOR GONZALO BARRIENTOS: But you were gonna let them
12 move it anyway?

13 COMMISSIONER LARRY SOWARD: Yes, sir.

14 CHAIRWOMAN KATHLEEN WHITE: Senator Barrientos, I think
15 and you differ on this credibly, but I think at the
16 September decision we all -- there was the motion passed
17 to consider it hazardous, but what was omitted from that
18 and that's the lack of clarity I speak of, is how that
19 addressed the entire sixteen hundred cubic yards of
20 commingled CRT waste in the ninety-nine roll off
21 containers and what specific manner of manifest treatment
22 and disposal would follow from that. Because the
23 subsequent dispute about the Executive Director's letter
24 and then the second motion to overturn had to do with a
25 dispute about what followed from, in my opinion, what

1 followed from the decision regarding the CRT waste itself
2 as hazardous.

3 **SENATOR GONZALO BARRIENTOS:** Okay. Commissioner Marquez,
4 and I'm not being facetious here, but the worst
5 environmental law that Congress ever wrote, would you
6 care to comment on what might be the next worst
7 environmental law that Congress has written?

8 **COMMISSIONER RAFAEL MARQUEZ:** They have not written one in
9 quite a few years, so I hope it's several years more
10 before they do.

11 **SENATOR GONZALO BARRIENTOS:** Okay. Mr. Chairman, I'm not
12 gonna ask any more questions. There is other business to
13 transact, but I would like to make a comment at the
14 proper time.

15 **SENATOR KENNETH ARMBRISTER:** Okay. Senator Jackson?

16 **SENATOR MIKE JACKSON:** Just one quick question,
17 Commissioners. Could you as an agency give Texas
18 Disposal Systems an order or certificate or a blanket
19 statement that said -- that absolved them of all
20 liability in where this waste went? And therefore they
21 could release that waste and the generator be responsible
22 for the liability issue for disposal?

23 **COMMISSIONER LARRY SOWARD:** Senator, I've seen a letter
24 that says just that.

25 **CHAIRWOMAN KATHLEEN WHITE:** But I'm not certain

1 whether another's view of the liability flowing from the
2 law we've been speaking about RCRA -- the Resource
3 Conservation Recovery Act. I'm not certain whether that
4 this agency's letter absolving TECO's liability would
5 hold under someone who challenged it under the law.

6 **SENATOR MIKE JACKSON:** Whether or not that would stick.
7 But it could -- it could though state that according to
8 the second largest environmental agency in the United
9 States of America state that according to that agency
10 that there was no liability -- should be no
11 liability trail to the landfill.

12 **COMMISSIONER RAFAEL MARQUEZ:** Senator, to me that is what
13 the manifest tries to accomplish. It says who the
14 generator of the waste is, and there's no question about
15 it. The manifest has to say who generated that waste.

16 **SENATOR MIKE JACKSON:** Well, not -- okay. Let me -- did
17 you see the -- what was written under special conditions
18 or whatever on this manifest? It states exactly the
19 opposite of what you're saying.

20 **COMMISSIONER RAFAEL MARQUEZ:** Well, it's a disclaimer
21 that carries no weight as far as identifying who the
22 generator is. I think there is -- you know some lawyer
23 wrote on it as a disclaimer, but that doesn't say that
24 Penske is not the generator of that waste.

25 **SENATOR MIKE JACKSON:** Okay. But isn't it true

1 that these manifests have to be signed? Do they have to
2 be signed by both parties?

3 **COMMISSIONER RAFAEL MARQUEZ:** By the generator and the
4 party that transports it and the party that receives the
5 waste.

6 **SENATOR MIKE JACKSON:** Okay. By affixing a signature to
7 that would they not be agreeing with that statement?

8 **COMMISSIONER RAFAEL MARQUEZ:** No it's the generator of
9 the waste that has to sign it.

10 **SENATOR MIKE JACKSON:** I thought you just said
11 the generator, the transporter, and the party who takes
12 it.

13 **COMMISSIONER RAFAEL MARQUEZ:** Right. That's as it moves
14 out and I'm looking in terms of it moving from where it
15 is today. It would be the generator under -- Penske is
16 the generator of the waste, whoever has to transport it
17 has to certify that it's been transported as hazardous,
18 and whichever landfill whether it's TECO or any other
19 hazardous landfill they would have to sign that they
20 received the waste and they are handling it properly.

21 **SENATOR MIKE JACKSON:** Which they've said no way, they
22 told the Chairman that this morning. As requested by
23 TCEQ, Penske is managing the material described in this
24 manifest as a hazardous waste until it can be further
25 tested and classified -- it's hard to read.

1 CHAIRWOMAN KATHLEEN WHITE: At the level that is
2 characteristically hazardous remains.

3 SENATOR MIKE JACKSON: Penske does not admit for purposes
4 of any litigation or regulatory proceeding that the
5 material is a hazardous waste, or that it prevented the
6 material described -- that it generated the material
7 described in this manifest.

8 COMMISSIONER LARRY SOWARD: Right.

9 SENATOR MIKE JACKSON: Now, would you sign that?

10 COMMISSIONER LARRY SOWARD: If I was Penske I probably
11 would, but no.

12 (LAUGHTER IN BACKGROUND)

13 SENATOR MIKE JACKSON: Well they wrote it obviously, but
14 if you were on the other end of the spectrum, would you
15 sign that?

16 COMMISSIONER RAFAEL MARQUEZ: As a receiver?

17 SENATOR MIKE JACKSON: I think that you would be
18 classified as -- you would be nuts if you did. So, that
19 goes to my question if this agency can do something on
20 the liability issue here maybe that may help your
21 negotiating a deal on this thing.

22 COMMISSIONER LARRY SOWARD: Senator, two comments and I
23 will commit to find you a copy of the letter somewhere in
24 the volumes of documents on this you may not have it, but
25 there is a letter from the Executive Director that says

1 just what you suggested to TDS that they will not be held
2 any further liability on their part if they comply with
3 the directives. But let me also say that there's been a
4 lot of discussion about the manifest, but from my
5 research and review, this agency has not accepted that
6 manifest as the final position.

7 SENATOR MIKE JACKSON: To me this agency has given up.
8 Your comments put it pretty well --

9 COMMISSIONER LARRY SOWARD: We're at our wits end.

10 SENATOR MIKE JACKSON: That the only way we can do this
11 is go to court.

12 COMMISSIONER LARRY SOWARD: Exactly.

13 SENATOR MIKE JACKSON: You've got another Commissioner
14 that says in the middle that this is a hazardous waste
15 and ought to be treated that way. And the whole time
16 you've got another one that says I don't even like the
17 RCRA law so, you know this kind of waste happens when you
18 have a car wreck. So, you know I agree you're at your
19 wits end, and I'm at mine, but it's -- it's disturbing to
20 me that we're in this situation.

21 CHAIRWOMAN KATHLEEN WHITE: I'm not prepared to give up.
22 I still think it is in the realm of possibility that with
23 greater clarity from the Commission based on the decision
24 which was taken in September that did specify what kind
25 of action can and cannot follow, which could include

1 things like the manifest could be possible for the State
2 if there was two of the three of us that agreed to it,
3 that the State had a clear position on this issue and
4 then what happens in the court happens in the court. The
5 State based on what I think is very credible legal
6 conclusions and factual analysis, protective of the
7 public and voiding precedent in the future on these kind
8 of issues. I think it's possible.

9 **SENATOR MIKE JACKSON:** I sure hope so because it sure
10 doesn't look very possible right now. Thank you.

11 **SENATOR JON LINDSAY:** One final question.

12 **SENATOR KENNETH ARMBRISTER:** Sure.

13 **SENATOR JON LINDSAY:** In this letter of September 24th
14 going back to it, I'm getting kind of mixed reviews down
15 there I think, maybe I'm wrong I mean I hope I am. But
16 would this have been a better letter had there been a
17 period on the second to the last line behind the word
18 "waste" so you leave out all that stuff that's a little
19 bit until such and such and such. Would you all agree
20 that that would have been a better letter had it stopped
21 right there?

22 **CHAIRWOMAN KATHLEEN WHITE:** I would.

23 **SENATOR JON LINDSAY:** Does everybody else agree with
24 that?

25 **COMMISSIONER RAFAEL MARQUEZ:** I don't know.

1 COMMISSIONER LARRY SOWARD: Well, no I can't agree that
2 non-hazardous waste should be manifested as hazardous
3 waste. If there -- if they -- let's say they go in and
4 do this sort we're talking about, Senator.

5 SENATOR JON LINDSAY: Okay. Would it have been better to
6 have the period after "2004?"

7 SENATOR GONZALO BARRIENTOS: I have a better idea. After
8 the third sentence.

9 CHAIRWOMAN KATHLEEN WHITE: That would tend to require
10 almost all of those things being disposed of as
11 hazardous.

12 SENATOR JON LINDSAY: I know, but I'm just thinking about
13 if they indeed do rewrite a letter.

14 COMMISSIONER LARRY SOWARD: And I think I said, Senator,
15 my statement if -- the entire sixteen hundred cubic yards
16 could be disposed of as hazardous waste. I don't think
17 that's the reasonable thing to do because you're taking
18 up valuable landfill space with a lot of dirt. But if
19 that -- if that were to resolve it, then that's certainly
20 one option. And yes, you could put a period there and
21 that would be the net result of that.

22 (LOW VOICES SPEAKING IN BACKGROUND)

23 SENATOR KENNETH ARMBRISTER: Let me refer to a letter
24 dated June 18th from Mr. Shankle -- not Mr. Shankle, Mr.
25 Steves -- Steib -- Mr. Steib to Marc Althen with Penske

1 making a finding that this was to be classed as special
2 waste. Subsequent to that there was a motion to overturn
3 that resulted in a letter that we've been talking about
4 of the 24th by Mr. Shankle. The letter was written by Mr.
5 Shankle without any instructions as per -- Mr. Soward
6 asked the question well the Chairman's motion did not
7 have any instructions. The Chairman replied it did not.
8 And I didn't second a motion that had instructions.
9 Thank you. So, essentially the letter we're talking
10 about that Mr. Shankle wrote on the 24th was done without
11 any direction of the Commission. The reason I bring that
12 up -- let's go back to the manifest. If the language in
13 the disclaimer means nothing, why is it even in there?
14 Because it was -- there was no disclaimer in the manifest
15 dated 3/23/98 that Penske used. It was adequately signed
16 by the shipper and by the receiver of the Hazardous Waste
17 Solid, NOS, NA3077, 9, III (D008). And inconsistent.

18 **CHAIRWOMAN KATHLEEN WHITE:** I agree, Senator, and that's
19 why I concluded in an effort to avoid what we've never
20 done before in the three years I've been here --
21 dictating specific actions in an enforcement action. I
22 self-consciously declined from stipulating instruction. I
23 realized when I reviewed the Executive Director's
24 interpretation of our legal decision that we needed to,
25 and that's why I thought the second motion to

1 **overturn was a highly supportable one.**

2 **SENATOR KENNETH ARMBRISTER:** I'm obviously like we always
3 do we hire very good staff that does our homework for us.
4 I couldn't find any enforcement action that the
5 department has taken that one did not give instructions
6 to the ED. It would be easy to point a finger at Glen and
7 say, "Glen, this is your baby. You've messed this all up
8 from day one." He's had short time on task when he
9 inherited this stuff. I don't do that. So, I look back
10 further -- predecessors, Jeff Saitas, John, Dan. I
11 couldn't find any letter that had been written by an ED
12 on an enforcement action that didn't have instructions,
13 and no letter that provided a disclaimer on a manifest.
14 I just find that highly inconsistent with what the agency
15 has been doing at least in my twenty-three years.

16 **CHAIRWOMAN KATHLEEN WHITE:** I'd like to understand more
17 what you mean by instruction. The final order is an
18 enforcement that they are written you know as the
19 Commission's orders.

20 **SENATOR KENNETH ARMBRISTER:** Right.

21 **CHAIRWOMAN KATHLEEN WHITE:** But the Commission does not
22 even review them until the very end until the Executive
23 Director has proposed it. So, this was the first -- we
24 make about a thousand decisions a year, **this was the**
25 **first instance where we were in the middle of**

1 enforcement.

2 **SENATOR KENNETH ARMBRISTER:** Right. I was just trying to
3 see if we have a track record. I mean is this SOP, what
4 do we do here. I mean as has been said many times, there
5 are some things existent in this case study that have a
6 lot of similarities with other cases over the past, but
7 there are some things that just fall completely I don't
8 know where. It's just -- I think like Bob Duncan said
9 we're trying to get to a conclusion here of some type.
10 Let me just -- here's my real concern. I've got friends
11 on both sides of this issue. Some are personal friends,
12 some are personal lobby friends, everything else and they
13 both make good, good arguments. As Chairman of this
14 Committee and responsible for what policy that we as
15 policy makers let out of the Committee, I'm real
16 concerned from a public policy standpoint you got an
17 operator of a municipal solid waste dump that what
18 happens on this decision I think Ralph stated it, if you
19 hit it one way we're not gonna be able to cite a
20 municipal waste dump in the State because everybody is
21 gonna say yeah they're getting it for municipal waste,
22 but look what they're fixing to put in here. I fought
23 that battle over Tricor, I think that was the name of it
24 over at -- Altair when they got a license for just taking
25 garbage and then they wanted to voluntarily expand to

1 amend their permit. I mean the whole community of
2 Colorado County and Fayette County and -- I thought we
3 were gonna have two killings and a hanging over that
4 deal. And I'm real concerned if we don't make some
5 decisions here. We're not gonna be able to cite
6 anything. I see Michael Dell, I see Hewlett-Packard, I
7 see people with this e-waste, and what are we gonna do
8 with it, and if we're just saying dump a little sand over
9 it by accident or flip a truck over and we're gonna
10 change the point of generation to whose got it. We ain't
11 gonna never catch up. It really concerns me. **When do**
12 **y'all think that we can come to a resolution on this?**

13 **CHAIRWOMAN KATHLEEN WHITE:** **Well, we can only speak**
14 **for ourselves as individuals. I think there are two**
15 **possible courses of action that potentially could reach a**
16 **cleaner decision. One is a reconsideration of our first**
17 **motion to make it clear on what action falls from it.**
18 **The other is perhaps a directive -- Executive Director to**
19 **submit a plan in writing that included all of the**
20 **components of the actions, which will follow from this**
21 **notice of violation. The Commission in a public setting-**
22 **we can only make decisions in a public meeting or public**
23 **hearing. Now, I speak as an individual,** but I see those
24 as -- and I still remain persuaded for the reasons. By
25 when -- it takes us nine days to post again, my fellow

1 Commissioners should speak because it takes us --

2 **SENATOR KENNETH ARMBRISTER:** Okay.

3 **CHAIRWOMAN KATHLEEN WHITE:** And there may be other
4 procedures as our general counsel here. But again, my
5 other Commissioners could speak. I would be in -- support
6 a course of action like that with a potential of --

7 **SENATOR KENNETH ARMBRISTER:** Well, let me just -- I won't
8 pin you down on a you know Valentine's Day or the you
9 know June -- we'll pick my birthday, a State holiday
10 Juneteeth, I won't pick you a date on that. What I would
11 certainly want to see is some type of action, hey if you
12 come up with the same results, you just come up with the
13 same results. I don't want to tell you how you've got to
14 vote on it. But I think all of us are in a position
15 where we want to see some type of movement on this. This
16 has been seven years. And some things are out of sync
17 with what the agency has done. Granted, I don't think
18 all of you were there seven -- I know Larry wasn't there
19 seven years ago. Kathleen, I don't think you were
20 either, and no, I don't believe Ralph was seven years
21 ago.

22 **COMMISSIONER RAFAEL MARQUEZ:** I've been there nine and a
23 half years, sir.

24 **SENATOR KENNETH ARMBRISTER:** Okay.

25 **CHAIRWOMAN KATHLEEN WHITE:** The enforcement is a

1 peculiar function of the Commission and why over the last
2 year in part we were doing this major enforcement review
3 was the agency's action as most determinative and
4 significant.

5 **SENATOR KENNETH ARMBRISTER:** Right.

6 **CHAIRWOMAN KATHLEEN WHITE:** The force of the law, it
7 doesn't come -- it has not because of the way roles have
8 evolved it has not come to the Commission and until it's
9 at its completion -- either challenged or ready to issue.
10 And someone raised the issue on this when this came to my
11 attention -- I had read about it in the paper in the
12 summer. I had no idea we had this issue for seven years.
13 There ought to be -- someone said that Truman asked when
14 he became President you know why didn't you tell me about
15 the bomb? Or I want to know if there's a bomb. I mean
16 there must be some way things that legally are not within
17 your purview that are matters of potentially major
18 policy, there must be some way for them to come to the
19 Commission.

20 **SENATOR KENNETH ARMBRISTER:** Well, and I think we as
21 policy makers have an obligation as well, and in that
22 vein let me offer this. I can't remember if it was Larry
23 or maybe all three of you have said we can't get the
24 parties to come and talk to us or maybe that's their
25 legal people. But let me offer -- I'll be happy to sit

1 down with both parties and try to get some resolution on
2 behalf of both parties while you're doing your duty. In
3 fact, I'm gonna insist upon it -- y'all that represent
4 both parties. Because I've had no trouble talking to
5 either one - one-on-one. Maybe they don't like to be in
6 the same room, well we can do a video conference I don't
7 care. But I'll offer that and the resources of this
8 Committee to try to help you guys. We all do represent
9 the same bunch of people -- it's Texas. And try to come
10 up so we have a firm public policy issue that protects
11 neighborhoods and communities, but still gives them the
12 avenue to get rid of their waste. Any other -- Senator
13 Barrientos has a comment.

14 **SENATOR GONZALO BARRIENTOS:** It's related to exactly what
15 you're saying Mr. Chairman. And Commissioners you sit as
16 the ultimate -- three ultimate decision makers for this
17 State agency and you're charged with protecting our
18 environment for this generation and future Texans to
19 come. We, as Senators, represent six hundred -- seven
20 hundred thousand people who live in our districts, and we
21 too have a duty to all Texans to make this a good place
22 to live, work, and raise a family as possible. So, I
23 would urge Mr. Chairman, that this Commission go out and
24 do what it's supposed to do without additional help from
25 us. I know we meet every other year for a hundred and

1 forty days, and I know some people want us to meet every
2 hundred and forty years for two days, and not make any
3 more laws. But if we have to make more laws, Mr.
4 Chairman, I think we ought to. So, with that I'll be
5 quiet and hope that my constituents don't go broke in the
6 meantime.

7 **SENATOR KENNETH ARMBRISTER:** Anyone else? Madam Chair and
8 Commissioners, thank y'all for being with us and we'll
9 get after it.

10 **COMMISSIONER LARRY SOWARD:** Senator, I hope we don't wait
11 until your birthday.

12 **SENATOR KENNETH ARMBRISTER:** No, I just picked a day.
13 State holiday.

14 **(LOW VOICES AND CHATTER IN BACKGROUND)**

15 **SENATOR KENNETH ARMBRISTER:** Okay. All right.
16 We'll give everybody a minute. Those that are gonna be
17 here for the next bunch to find a seat, and then those
18 that -- some of the members need a short break, so we'll
19 recess just for an environmental break.

20 **(NATURAL RESOURCES HEARING ENDS)**

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CERTIFICATE OF TRANSCRIPTION

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I, DEBRA JENKINS, do hereby certify that the above and foregoing transcript was prepared by me, to the best of my abilities, and is a true and accurate record of the conversations between the parties herein; that I am neither attorney nor counsel for, nor related to, nor financially interested in these matters; that the parties herein were not sworn, to my knowledge, by any authority; that the Real Player 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.

NOTE: This Real Player video file had to be converted to a Wav audio file in order to be transcribed.

Debra Jenkins
DEBRA JENKINS

THE STATE OF TEXAS *
 *
COUNTY OF TRAVIS *

BEFORE ME, the undersigned authority, on this day personally appeared DEBRA JENKINS, known to me to be the person whose name is subscribed above, and acknowledged to me that she executed the above and foregoing document for the purposes therein expressed.

GIVEN UNDER MY HAND AND SEAL OF OFFICE on this the 10th day of February, 2005.

Susan C. Miller
Notary Public in and for
the State of Texas

