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1 BEFORE THE OIL AND GAS CONSERVATION COMMISSION
2 OF THE STATE OF COLORADO

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DUPLICATE

3
4 IN THE MATTER OF THE PROMULGATION) CAUSE NO. 1
AND ESTABLISHMENT OF FIELD RULES TO) Docket 10-12
5 GOVERN OPERATIONS IN THE LEYDEN)
GAS STORAGE FIELD, JEFFERSON COUNTY,) 1.62
6 COLORADO.)

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8 PURSUANT TO NOTICE to all parties in
9 interest, the above-entitled matter came duly on
10 for hearing at the offices of the Colorado Oil and
11 Gas Conservation Commission, Room 801, 1120 Lincoln
12 Street, Denver, Colorado 80203, on Tuesday,
13 October 15, 1996.

14 BEFORE:

15 CHAIRMAN ALLAN HEINLE

16 COMMISSIONER LOGAN MacMILLAN

17 COMMISSIONER CAROLINE BLACKWELL

18 COMMISSIONER BRUCE JOHNSON

19 COMMISSIONER MARLA WILLIAMS

20 COMMISSIONER MIKE MATHESON

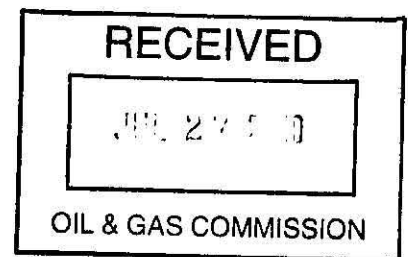
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22 Richard Griebeling, Director

23 Brian Macke, Deputy Director

24 Patricia Beaver, Manager of Commissioner Affairs

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1 CHAIRMAN HEINLE: The next item on the
2 agenda is Cause No. 1, Docket No. 10-12, the Leyden
3 Gas Storage Field, Jefferson County. The applicant is
4 Richard Loesby. The respondent is Public Service
5 Company, and intervenor, Colorado Interstate Gas
6 Company, and this is a matter to hold a hearing to
7 determine whether the oil and gas commission has the
8 authority to regulate gas storage fields in the state
9 of Colorado, and thus determine whether the commission
10 has jurisdiction to take enforcement actions against
11 gas storage fields.

12 Mr. Loesby, are you here today -- do you
13 have any legal representation with you?

14 MR. WELBORN: Jeff Welborn and Karen
15 Krug.

16 CHAIRMAN HEINLE: Public Service
17 Company.

18 MR. PHILLIPS: My name is Lee Phillips.
19 I am representing Public Service Company, and there
20 are various representatives of the company here.

21 CHAIRMAN HEINLE: Okay. How about
22 Colorado Interstate Gas Company?

23 MR. MINICH: Mark Minich, representing
24 CIG. Also with me is Gregg Depp, who would be our
25 witness in this proceeding.

1 CHAIRMAN HEINLE: Okay. Great. I guess
2 the way I would like to proceed is perhaps we could
3 have -- just have each party come forward and make an
4 opening statement. Again, as I understand, the
5 purpose of this hearing is to try to determine whether
6 the commission has jurisdiction over regulating gas
7 storage fields. I don't know if -- do all of the
8 parties today have witnesses that they plan to present
9 or --

10 MR. WELBORN: No, Mr. Chairman. We're
11 here just to talk about that issue.

12 CHAIRMAN HEINLE: Great. All right.
13 Mr. Loesby, your attorney -- would you like to come
14 forward? Mr. Welborn, excuse me. Perhaps, given the
15 nature of the matter, perhaps rather than opening
16 statements, we could just go into a presentation of
17 your position, if you prefer to do it that way.

18 MR. WELBORN: It's up to you. We'll
19 proceed however.

20 MR. PHILLIPS: That would be fine with
21 the company.

22 CHAIRMAN HEINLE: I hear from the
23 commissioners that we would like opening statements.
24 So that's what we'll do.

25 MR. WELBORN: Mr. Loesby's position,

1 then, I will summarize, as follows: We believe that
2 this commission has statutory authority to hear this
3 matter, and we believe that to the extent you find
4 that your exercise of that authority is discretionary,
5 you should exercise that authority. And, finally, an
6 issue which is not dealt with in the brief, but it's
7 part of our position; that is, that if you're inclined
8 not to exercise your authority, based on what you hear
9 today, you reserve that decision until there's been a
10 hearing on the facts in this case.

11 The reason for that position is we feel
12 that if you are going to draw a line, in this
13 important area of gas storage, they need to be drawn
14 in the context of -- based upon a specific fact
15 situation rather than in the abstract. There's
16 clearly gas storage reference in your authorizing
17 statute. If you are going to determine today what
18 that means, based on legal arguments, we feel you need
19 to go further and have, as part of your background, an
20 understanding of what the issues are in this case,
21 perhaps others. So, that's a summary of our position.

22 CHAIRMAN HEINLE: And I failed to
23 mention to the audience earlier, but we will take a
24 lunch break at 12 o'clock and then reconvene at 1:30.
25 Public Service, Mr. Phillips.

1 MR. PHILLIPS: Good morning, members of
2 the commission. My name is Lee Phillips. I am a
3 lawyer with the law firm of Hayes, Phillips & Maloney,
4 and I am representing Public Service Company this
5 morning. The company's position is that regulatory
6 authority as to gas storage fields is not with the
7 commission, but is with the Public Utilities
8 Commission. That's based on our analysis of the
9 statutory language.

10 This facility is defined and described
11 in the statutes as an underground reservoir. That was
12 clear, in 1960, when this commission initially issued
13 the siting permit and granted the company use of
14 eminent domain powers to acquire the facility. Had
15 the legislature intended to include an underground
16 reservoir within its definition of the term, "oil and
17 gas operations," it could readily have done so by the
18 simple expedient of using that term in the definition
19 of oil and gas operations. It did not elect to do so.
20 We think this is an issue almost entirely of statutory
21 interpretation. We think the general rules of
22 construction apply, which is basically that the
23 legislature is presumed to have said what it intended
24 to.

25 The argument, as we understand it, and I

1 have just been handed about three minutes ago, a
2 brief, apparently prepared by Mr. Loesby's legal
3 counsel. I am not a speed-reader. I haven't read it,
4 so I can't respond to it in any detail, but, as we
5 understand the contention, it's that this facility is
6 a gas storage well. The applicable rule of statutory
7 construction is the words used in the statute are
8 recorded in their plain and ordinary meaning. And I
9 don't think it takes a lot of argument to suggest that
10 this facility is not a well. It's an underground gas
11 storage reservoir. Again, it's an issue of statutory
12 interpretation, and the company's reading of the
13 statutes -- my reading of the statutes is this
14 commission does not have regulatory authority. Thank
15 you.

16 CHAIRMAN HEINLE: Colorado Interstate.

17 MR. MINICH: Thank you. Our issue in
18 this proceeding is a little different than the others,
19 and perhaps we can kind of get our issue on the table
20 and off in a hurry. As we stated in our notice of
21 intervention, we are a natural gas company, under the
22 Natural Gas Act, regulated by the FERC. We own and
23 operate three FERC certificated gas storage facilities
24 within the state, and we operate one other facility
25 for an affiliated company. That's the Young Storage

1 Facility. We're concerned with the purported scope of
2 this proceeding, which as described in the notice is
3 to determine whether the commission has the authority
4 to regulate gas storage fields in the State of
5 Colorado. We feel that's a sort of overbroad
6 statement of the scope of this proceeding. If the
7 scope is to determine whether the commission has the
8 authority over Leyden Gas Storage Field, then we're
9 not an affected party. If you are going to decide a
10 broader issue, which is your authority over all gas
11 storage fields, then we are an interested party.

12 We would note that Rule 401 of the
13 commission's rules of practice and procedure
14 recognizes that distinction between the regulation of
15 this commission and the regulatory authority of the
16 FERC, in that Rule 401(a) provides, in relevant part,
17 no person shall commence construction of a well for
18 use in either enhanced recovery operations or storing
19 of gaseous or liquid hydrocarbons without first
20 obtaining written authorization from the commission to
21 do so. It then goes on to say, these provisions shall
22 not apply to existing gas storage projects or projects
23 that have received approval of the FERC.

24 There's clearly going to be an issue of
25 federal preemption to the extent this commission

1 attempts to exert regulatory authority over a FERC
2 regulated project. The Natural Gas Act has been found
3 by the Supreme Court to be an attempt by -- to be an
4 action by Congress to preempt the regulatory powers
5 over the transportation and sale of natural gas in
6 interstate commerce. A subsequent Supreme Court case
7 has determined that underground gas storage
8 facilities, as part of the interstate pipeline
9 operations, falls within that description of the area
10 that the Congress attempted to preempt. We are
11 further trying to make a case that any action by a
12 state agency is preempted by the Natural Gas Act.
13 Clearly, we believe that the Oil and Gas Conservation
14 Commission does have authority over some aspects of
15 our FERC regulated storage operation, particularly in
16 the area of well drilling and construction and aquifer
17 protection; however, there are an awful lot of areas
18 where we think FERC has attempted and the Natural Gas
19 Act does preclude any authority or jurisdiction of the
20 state commission.

21 It's our understanding, from being
22 present at the last of your open meetings, that you
23 have a general question as to these, to the extent of
24 your jurisdiction. At that time I believe it was
25 proposed to have informal discussions with industry

1 groups. CIG stands ready to meet with staff and
2 discuss the extent to which the commission may have
3 regulatory jurisdiction over parts of our gas storage
4 operations. We think that would be a much better and
5 more efficient way to proceed than trying to do so in
6 the context of this particular contest, the
7 proceeding.

8 If we do elect to go forward today, we
9 have brought a witness who's prepared to discuss, in
10 some detail, the level of jurisdiction and regulation
11 that FERC does exert over our storage operation. So,
12 what I would like to do is sort of make this as a
13 motion in limine, at this point, to try to get a
14 determination from the commission that the scope of
15 this proceeding is limited to a determination of the
16 regulatory authority over the Leyden Gas Storage Field
17 as opposed to our FERC-regulated and certificated
18 operations.

19 CHAIRMAN HEINLE: Thank you.

20 MS. COULTER: I would tend to agree with
21 Mr. Minich, and I would make that distinction on the
22 conclusion that I have come to; that Leyden Gas
23 Storage Facility, being owned by Public Service
24 Company, is the public utility, and we're looking at,
25 do we have jurisdiction over a public utility who's

1 maintaining the gas storage field, to regulate any
2 problems with that gas storage facility itself. And
3 the other reason I would reach that conclusion is
4 we're looking specifically at the Loesby application,
5 itself, and the facts surrounding that application,
6 and it is complicated by the fact there is a public
7 utility issue outstanding.

8 So, I also have taken a look at the FERC
9 jurisdiction issues, and it's very complicated, and I
10 feel there are some issues relating to overlap in any
11 extension of jurisdiction, and the commission needs to
12 take a very close look at the FERC issues, the FERC
13 jurisdiction, and any preemption that they might have,
14 and I would see that as a very complicated procedure
15 at this point in time. We might not want to step into
16 that fire today, but it would be something that we
17 want to look at, generally, gas storage fields, we
18 could start talking to some industry people and
19 environmental people in getting that -- getting some
20 of that information. I would agree with Mr. Minich.

21 CHAIRMAN HEINLE: Would that be limited
22 to any discussions to the jurisdiction over the --

23 MS. COULTER: Gas storage facility.

24 CHAIRMAN HEINLE: Gas storage.

25 Mr. Welborn, do you have anything you would like to --

1 MR. WELBORN: We agree. We fully intend
2 to limit our comments to the Leyden Gas Storage Unit.
3 There is no intent here whatsoever to ask this
4 commission to assert jurisdiction and in an area
5 that's federally preempted. And, further, we would
6 agree with Mr. Minich that this is a matter of aquifer
7 protection. It falls within this commission's
8 jurisdiction and authority. That's why we are here.
9 We're here on an aquifer protection issue. We're not
10 here to ask this commission to regulate this gas
11 storage field from rate standpoint, from a public
12 utility standpoint, from a FERC standpoint.

13 With regard to any of the issues that
14 fall within FERC jurisdiction, we don't want to wade
15 into that swamp either. This is not to ask this
16 commission to take the position it is the sole
17 regulator of gas storage fields in Colorado. This is
18 asking the commission to look at the Leyden Gas
19 Storage Field, and what is happening in the Leyden Gas
20 Storage Unit with respect to aquifers and aquifer
21 protection, what's happening underground, and to
22 determine whether it can fashion a remedy that will
23 protect Mr. Loesby. We feel that this commission is
24 uniquely suited to do that. It has the expertise,
25 both on the commission and the staff, for dealing with

1 these issues.

2 These issues, as much as anything,
3 involve pressures underground, flowing of fluids
4 underground. These are your topics. These are the
5 topics that you deal with on a regular basis. This is
6 not an extension of your authority. This is merely an
7 application of your authority in an area that you
8 normally would look -- would apply it.

9 The reference was to the 1960 orders.
10 In 1960, the legislature or, excuse me, the statute in
11 1960, the, yes, the legislature did say certain things
12 in the Public Utilities Commission statute, but, in
13 1994, the legislature amended your statute, and it
14 included a definition of oil and gas operations.
15 Included within that definition of oil and gas
16 operations is the term, "gas storage well," production
17 operations relating to gas storage well. And the
18 issue here is what does that mean. And it is
19 Mr. Loesby's position that, for the limited purpose
20 that he is coming here, that is the purpose of
21 protecting aquifers in the vicinity of this well and
22 the gas storage reservoir, and we believe that those
23 terms are synonymous in the context of this
24 application, for purposes of this commission, to
25 determine, for that limited purpose, this agency is

1 the agency to come to, this is the agency that can
2 fashion a remedy, or determine whether a remedy needs
3 to be granted. This is the agency that can understand
4 the evidence that's going to be presented and deal
5 with it. We are not asking this agency to extend its
6 jurisdiction to areas that are exclusively the
7 province of either the Public Utilities Commission or
8 FERC.

9 CHAIRMAN HEINLE: Mr. Phillips, do you
10 have anything you want to add?

11 MR. PHILLIPS: I think the question was
12 whether the parties have any objection to restricting
13 this proceeding to the issue raised in the Loesby
14 complaint, and the company certainly does not.

15 CHAIRMAN HEINLE: I do have a question.
16 It seems to me that when you restrict it to the Leyden
17 Gas Storage Reservoir, aren't you moving into the area
18 of the jurisdictional issues? I mean, whether it's
19 from the standpoint of the operation of the wells or
20 the reservoir, by moving forward, aren't you entering
21 into that broader jurisdictional issue in terms of how
22 it affects other gas storage reservoirs, because, what
23 actions we take today may set up the, you know, the
24 path that we move down towards dealing with other gas
25 storage reservoirs. I mean we can certainly limit the

1 discussion today, but, by our actions today, aren't we
2 somewhat setting a framework for other gas storage
3 reservoirs?

4 MS. COULTER: It's possible, depending
5 on which argument wins. So, I think you can end up,
6 you know, making the conclusion, the ultimate
7 conclusion could be we don't have jurisdiction over
8 the -- or the conclusion could be we do have
9 jurisdiction, and we have jurisdiction to specifically
10 deal with any aquifer issues that might be resulting,
11 so if we can limit it to that, rather than extending
12 past that point.

13 CHAIRMAN HEINLE: I mean, that is the
14 first road block we have to get through, is whether
15 we, as a state agency, have jurisdiction to deal with
16 the matter at hand. And if we do, then when we move
17 down that path and probably have to renote the
18 matter.

19 MS. COULTER: I think that you could
20 make the determination today, No. 1, that you don't
21 have jurisdiction over it, or, No. 2, that you have
22 jurisdiction over it, to the extent that we'll be able
23 to enforce environmental regulations with respect to
24 the aquifer, and any resulting damage that might have
25 occurred, as an implementing agency, under the Water

1 Quality Control Act.

2 CHAIRMAN HEINLE: But, as I understand
3 it, why the parties are here today, that would be the
4 extent of it, today, and then if we proceeded down
5 that path, it would be another hearing at a later date
6 to address the specific issues --

7 MS. COULTER: To address any issues
8 outside of this proceeding.

9 CHAIRMAN HEINLE: Right.

10 MS. COULTER: Right.

11 CHAIRMAN HEINLE: Well, or to address --
12 I mean, if we come to the conclusion that we do have
13 the authority to regulate in the area of aquifer
14 protection, I was under the impression that the
15 parties were not prepared to present evidence as to --

16 MS. COULTER: That's, if I am
17 understanding you, that's correct. We have a separate
18 hearing on that.

19 CHAIRMAN HEINLE: Okay. Before we go
20 any further, any other questions or comments from the
21 commissioners? Director Griebeling?

22 MR. GRIEBLING: I just have a couple of
23 distinctions I wanted to bring out as to Leyden versus
24 other fields in the state. And, first of all, I don't
25 think there's any, from staff's standpoint, any reason

1 that this hearing has to go beyond Leyden at this
2 point, but I would like to point out a couple of
3 distinctions that would support that. One of them is
4 that Leyden is not comparable to the other storage
5 projects in the state, because, it's an old coal mine.
6 The other projects are abandoned oil and gas fields.
7 And so, again, it's a situation where gas is being
8 stored in the mine versus an abandoned oil and gas
9 field. It's also unique in it's the only one in the
10 western hemisphere, apparently, only one of three in
11 the world. So, that kind of distinguishes,
12 considerably, itself. The other is the timing of the
13 project. It occurred before FERC, and, to my
14 knowledge, the other projects are more clearly
15 FERC-regulated around the state, and that distinction
16 could be important. One of the things that may be of
17 interest to you is if you do decide that your issues
18 today will be limited to Leyden, I think there are
19 some people in the audience that may want make some
20 comments regarding the issues of gas storage
21 regulation, and elsewhere in the state. I just bring
22 that to your attention.

23 CHAIRMAN HEINLE: Well, I guess my
24 inclination is to limit it to Leyden, but, I mean
25 that's why we're here. I am not sure that that's a

1 black and white situation, though, it's -- because
2 even though the Leyden -- we'll call it Leyden --
3 we're still getting into the whole issue of regulation
4 of gas storage, in some facet, even though it's a coal
5 mine, and it's before FERC, and all of that. So, I do
6 think we are opening the box, so to speak, as we move
7 down this path, but that is the issue at hand. What
8 is our role in this, and the only way I see it, to
9 flesh that out, is to go forward with presentation by
10 the parties, and focusing on Leyden, and try to
11 address the jurisdictional issues, because I, at this
12 point, don't have enough information, myself, to make
13 that decision. So --

14 COMMISSIONER WILLIAMS: No, I agree that
15 the issue before us is Leyden, and it's our ability to
16 regulate, and, if so, how we exercise it, to what
17 extent we exercise it, under a specific set of facts.
18 There's no way to do that without looking at broader
19 principles that may, in fact, play into other
20 scenarios. We can't not -- we can't approach the
21 issue without perhaps doing -- engaging in some level
22 of interpretation that could have application outside
23 of Leyden, although, I think so -- I think, in the
24 sense of the motion in limine, I think, as it was
25 phrased, certainly we're going to confine our

1 determination to Leyden. That doesn't mean the
2 application would be without any precedential value or
3 without any analogous value, so, we can't pretend that
4 what we do may not impact other people who are in the
5 room.

6 CHAIRMAN HEINLE: Any other comments?
7 Okay. Well, why don't we -- Commissioner Blackwell?

8 COMMISSIONER BLACKWELL: No.

9 MR. GRIEBLING: I just want to make a
10 brief comment. If do you focus it on Leyden, one
11 issue it -- I am not sure is clearly brought out at
12 this point is the determination that you have
13 jurisdiction over a field or a mine cavern, as a well,
14 as gas storage wells, and we -- you have seen
15 information from us, in the past, but I think, at the
16 last hearing, regarding Leyden, and from our
17 standpoint, practical regulatory standpoint, if we're
18 confined to gas storage wells as being the problem, we
19 think we would have been able to deal with that.
20 Based on data we have seen, the problem is more than
21 likely a field problem.

22 CHAIRMAN HEINLE: We're almost getting
23 into the deliberation stage at this point. I would
24 suspect that one or the other of the parties will
25 probably raise those issues. After we get done with

1 their presentation, if they hadn't, then, I think we
2 can direct some questions, but, we're actually getting
3 further along than we probably should be at this
4 point. I would just like to proceed with the hearing,
5 you know, the parties' positions, and upon conclusion
6 of that, we can start deliberating the jurisdictional
7 issues. So, Mr. Welborn, you have about half an hour
8 before we break for lunch. You may not be able to
9 finish in that period of time. We'll just pick up
10 where we left off after lunch, if it's --

11 MR. WELBORN: No, that's fine. I will
12 be brief. First of all, I should apologize to both
13 sides. It is true that they just received our brief
14 today. We just realized we were going to be
15 representing Mr. Loesby in this matter yesterday, and
16 prepared the brief and filed it, and I apologize for
17 that, and I hope you are not compromised. I don't
18 think there's anything in the brief that wasn't
19 anticipated or that hasn't been addressed in materials
20 already filed.

21 Verbally, I would like to preface my
22 remarks with something I said earlier. I would like
23 to suggest that there's an third alternative here.
24 That third alternative is to hear the facts, and then,
25 make your jurisdictional determination which issue you

1 can make a finding on and enter an order on, and which
2 issue you cannot. And I feel that, in the context of
3 the specific factual situation, especially since this
4 case is limited to Leyden, that your jurisdictional
5 analysis would make more sense -- and it's very
6 difficult to make jurisdictional determinations in the
7 abstract, and I am concerned that's what's occurring
8 here. These are not the types of hearings this
9 commission has every day; that is, hearings dealing
10 with gas storage wells and gas storage facilities;
11 and, therefore, a fact hearing in this matter would
12 give us some background. If you got to the end of
13 that proceeding, and determined that you didn't have
14 jurisdiction, and couldn't grant the relief sought, so
15 be it, that would be your conclusion, based on the
16 facts as presented. If, on the other hand, you got to
17 the end of that proceeding, and felt that you could
18 enter an order on this issue or that issue, again, so
19 be it. Use that mechanism to craft your order, so
20 that you avoid pitfalls, especially the pitfall of
21 having your order be -- have an impact on other
22 unheard or unapplied for cases. Either way, if you
23 grant jurisdiction to go forward, or if you deny
24 jurisdiction, and ask Mr. Loesby to go elsewhere to
25 seek his remedy, you run the risk it's going to have

1 an impact on others that you don't know about, whereas
2 if you go through the hearing and craft an order, the
3 facts, I suggest, have more of an opportunity to
4 protect against that. So, again, I would ask you to
5 consider that as a third alternative.

6 Mr. Loesby's legal argument is
7 relatively simple and easy to follow. We begin with
8 the definition of oil and gas operations, which you
9 will remember was a new term to the statute in 1994.
10 It came in with Senate Bill 177. It is a term which
11 is used several places throughout the statute,
12 primarily in the environmental protection provisions.
13 The term is an exclusive term, but it's not a limiting
14 term. It's Mr. Loesby's position that that term was
15 designed to provide a mechanism for facilitating the
16 activities -- for defining the activities over which
17 the commission should assert its jurisdiction,
18 especially in the environmental protection area. It
19 was not intended and not written to be an absolutely
20 limiting provision. There were, in other words, it's
21 not written to be so strictly construed that the
22 commission runs the risk of not protecting significant
23 environmental impacts where they occur.

24 We feel that the one thing that is clear
25 from the definition of oil and gas operations is that

1 you have some authority with respect to gas storage.
2 It is referenced in the term. You need to read those
3 words. You need to read those words together with the
4 words that follow: Production operations relating
5 thereto. You need to see how those words are used in
6 the rest of the statute.

7 We also feel that the thrust of the 1994
8 amendments was to bring to this commission the public
9 health, safety and welfare and protection of
10 significant -- protection against significant adverse
11 impacts in the environment as part of your
12 jurisdiction and responsibility. And this is part of
13 it. If the legislature had intended for you not to
14 have an authority in the gas storage area, it could
15 have said so. It could have said so by leaving the
16 words "gas storage well" out of the definition of oil
17 and gas operation, or it could have gone further and
18 said, and this commission shall have no authority in
19 this area, but it did not do that. In fact, it did
20 the opposite. It included those words. We think the
21 reason the legislature did so is that this is -- I
22 guess this commission, especially with its new make
23 up, since the 1994 amendments, and the staff, which
24 has always had petroleum and oil and gas engineering,
25 geologic expertise on it, is the commission to hear

1 this type of proceeding, is the commission to hear
2 this fact situation and consider whether relief should
3 be granted. This is the commission that deals with it
4 on a regular basis, in a factual context, the movement
5 of fluids underground. This is the commission that
6 deals with impacts of pressure changes in one place,
7 in another place. If nothing else, this is an
8 opportunity, in a factual context, to define the
9 limits of your authority, to define the aspects of
10 underground reservoirs which you will regulate and
11 those which you won't.

12 It doesn't make sense to talk to us, to
13 Mr. Loesby, and to those of us who have analyzed, to
14 talk about oil and gas wells and the gas storage well,
15 say, well, we're regulating those, but we're not
16 regulating the impacts of those wells elsewhere.
17 We -- this reservoir is the well. Without the well,
18 it's not a reservoir. And vice versa. Without the
19 reservoir, the well wouldn't make sense. These are
20 part of one operation, and we're not asking for you to
21 regulate the public utility aspect of that gas
22 storage. We're not asking you to regulate the rate.
23 We're certainly not asking you to regulate the FERC
24 aspects. In fact, this is an interstate storage unit.
25 It's not FERC-regulated. But what we're asking you to

1 do is use your expertise to regulate the environmental
2 impacts of this gas storage well and the underground
3 reservoir of which it is a part. Again, I feel the
4 best way to do that is to have the hearing, and if you
5 are going to draw lines, draw them in the context of
6 the specific fact situation. That is a summary of
7 what is in our brief, and, with that, I would close.

8 CHAIRMAN HEINLE: Any questions at this
9 time from the commissioners of Mr. Welborn?

10 COMMISSIONER WILLIAMS: Yeah. How do
11 you respond to the claim that the PUC has jurisdiction
12 of this, as far as specific language governing the
13 safety of storage and the, I guess, the methods of
14 storage, whether it's reasonable and safe and proper
15 and adequate in its mission.

16 MR. WELBORN: We don't believe those
17 terms were written in the context of this fact
18 situation. We don't believe that those terms were
19 intended to include the environmental impacts of a gas
20 storage operation. They were not written at the time,
21 first of all, when that was a primary concern, and it
22 is a primary concern now. Secondly, they don't --
23 they are not as broad as the terms that are used in
24 the Oil and Gas Conservation Act, as amended, so we do
25 not believe, "safety," and as used in that statute,

1 was intended to include the kind of impact which is
2 alleged in this case. Secondly, we feel, as I said
3 earlier, that this commission is uniquely suited in
4 its expertise and its staff as to evaluating the
5 impact of both environmental and safety impact of this
6 operation. So, we do not feel that the word "safety"
7 was written for this purpose.

8 CHAIRMAN HEINLE: Commissioner Matheson.

9 COMMISSIONER MATHESON: Two questions.
10 First, are you -- do you know whether or not the
11 Public Utilities Commission has any staff or charge
12 specifically to deal with environmental matters?

13 MS. KRUG: I will speak to --

14 CHAIRMAN HEINLE: Could you identify
15 yourself for the record?

16 MS. KRUG: Karen Krug. Actually, they
17 have, currently, three staff people who oversee all of
18 the safety for pipelines that are run within the city
19 limits, or any facilities that come under their
20 jurisdiction. That would be the -- that would be
21 their staff that would have any jurisdiction in this
22 area, but they haven't exerted it in anything like
23 this. They look at more the distribution lines, the
24 LDC lines, those types of things, for utilities within
25 the city limits, and beyond city limits, and probably

1 it would be a good idea for you to talk with them
2 directly on exactly what they do.

3 CHAIRMAN HEINLE: We're a little out of
4 sequence here, but, Mr. Phillips, would you care to
5 respond to that question that was just --

6 MR. PHILLIPS: Actually, the PUC does
7 have staff which comes out and inspects the surface of
8 the facility, and that has been ongoing for a number
9 of years. So, we don't have to speculate as to
10 whether the PUC has exercised its regulatory authority
11 as to at least a portion of the facility.

12 CHAIRMAN HEINLE: Lori, do you have a
13 comment you would like to make?

14 MS. COULTER: Just two. I have spoken
15 with the assistant attorney general for the Public
16 Utility Commission in my office, and he has indicated
17 several instances, I think, actually where the PUC has
18 extended its jurisdiction into the environmental
19 arena, specifically enforcing the Water Quality
20 Control Act and the Clean Water Act. I won't get into
21 those facts at this point in time, but -- and I want
22 to reference, also, that that environmental authority
23 is extended -- there is a health aspect to the PUC
24 statutes, and that's at 40-3-101 which indicates every
25 public utility shall furnish, provide and maintain

1 such service instrumentalities, equipment and
2 facilities as shall promote the safety, health,
3 comfort and convenience of the patrons, employees and
4 public, and shall, in all respects, be adequate,
5 efficient, just and reasonable, so, there is a health
6 aspect of the Public Utility Commission. And that's
7 all I have to add. That's specific to Mike's
8 question; I would get into the other areas later.

9 COMMISSIONER MATHESON: One more
10 question.

11 CHAIRMAN HEINLE: Go ahead.

12 COMMISSIONER MATHESON: Mr. Welborn, at
13 least in my mind, certainly, this commission, we have
14 gas production -- gas and oil production wells and we
15 have the reservoir that it is being produced out of,
16 and we have an authority in that area. And I feel
17 very comfortable with that. Are you aware of any
18 statute, either state or federal, which somehow splits
19 that authority for gas storage well versus a gas
20 storage reservoir? Should they be looked at in the
21 same context as they do with production facilities,
22 and, again, is there any specific statute that you are
23 aware of that would make the split that does not occur
24 on the production side for us?

25 MR. WELBORN: None that I am aware of.

1 If you are asking about state statutes, as a matter of
2 fact, I did a quick run-through of neighboring states
3 yesterday afternoon and --

4 COMMISSIONER MATHESON: I am concerned
5 with Colorado or federal law.

6 MR. WELBORN: I am sorry. No, I am not
7 aware of any. No, I am not aware of any.

8 COMMISSIONER MATHESON: On a federal
9 level also.

10 MR. WELBORN: Not aware of any.

11 CHAIRMAN HEINLE: Mr. Phillips, would
12 you care to respond to that question?

13 MR. PHILLIPS: I am not aware of any
14 either.

15 CHAIRMAN HEINLE: Lori, do you have --

16 MS. COULTER: I am not aware of it, a
17 different split in the law, but I am aware of a split
18 in terminology. And we do, as the oil and gas
19 commission, we have been given authority, under
20 34-64-104, to issue orders with respect to gas storage
21 reservoirs. They call it underground gas storage,
22 specifically. That's how the 1960 order was entered,
23 wherein we permitted the Leyden Gas Storage Facility,
24 and you guys probably don't have a copy of that in the
25 statute.

1 COMMISSIONER BLACKWELL: What was the
2 cite again?

3 MS. COULTER: It's 34-64. You are
4 outside the realm -- I can get -- actually, I have got
5 a couple of copies right here that allow the
6 commission, again, to issue a permit for the purpose
7 of allowing a public utility to go to court and
8 condemn, and within that statute, it uses a term,
9 "underground gas storage." And I would, you know,
10 argue that that could be considered a term-of-art with
11 respect to where the public or where the oil and gas
12 commission is to be given authority to regulate.
13 Specifically in that statute it says, "underground gas
14 storage." When you go back to our enabling act,
15 34-60-101, Et seq., we're limited to the term, "gas
16 storage well." And I argue the opposite that
17 Mr. Welborn argued, that if the legislature had wanted
18 us to regulate gas storage facilities, in one statute,
19 they use the term, "underground gas storage," but they
20 never use it in the other enabling act, per se. And I
21 hope that answers your question, Mike.

22 CHAIRMAN HEINLE: Mr. Welborn, would you
23 care to comment before I give Mr. Phillips an
24 opportunity to present his? And the reason I am is
25 because, particularly, the attorney general -- the

1 representative from the attorney general has, you
2 know, addressed some of the issues that you had spoken
3 to. I want to give you an opportunity to respond to
4 that, if you want to, at this time.

5 MR. WELBORN: Yes. It's a gas -- this
6 gas storage -- a gas storage well is both an injection
7 well and the well through which the stored product is
8 removed from the reservoir. This commission has
9 the -- and, at no time that I know of, shirked its
10 responsibility of regulating the injection wells. Our
11 position is that you cannot separate the well from the
12 reservoir. You can't inject this product underground
13 and produce it again without having some potential
14 impact elsewhere. They are part of the same activity.

15 We feel that the Statute 34-64 supports
16 your authority in this area, but we prefer to look
17 directly at the Oil and Gas Conservation Act itself.
18 You regulate injection wells, regulate water --
19 produced water injection wells, you regulate gas
20 injection wells. When the town of La Salle blew up,
21 this commission convened an emergency hearing and
22 ended up regulating water wells in the vicinity,
23 because it was concerned about gas migrating into
24 those aquifers. This -- and I feel that you can see
25 this after the facts are presented. This case



1 presents a fact situation which this commission is
2 uniquely suited to regulate. 248

3 CHAIRMAN HEINLE: Any other questions of
4 Mr. Welborn at this time? Mr. Phillips?

5 MR. PHILLIPS: The commission has
6 received, I think, copies of both the briefing filed
7 by Public Service Company and also the supplemental
8 brief. So, I can read --

9 COMMISSIONER WILLIAMS: I didn't -- I
10 have the supplemental, but I don't have the --

11 MS. BEAVER: Does anybody else not have
12 the original?

13 COMMISSIONER MATHESON: I have it.

14 MR. PHILLIPS: That being so, I think I
15 can be relatively brief here. The issue is one of
16 statutory construction. The law is clear in Colorado,
17 and specifically as to this commission, that it's a
18 creature of statute. The commission has only those
19 powers that are delegated to it by the general
20 assembly, and in, our initial brief, we cited for that
21 proposition the case of Union Pacific Railroad Company
22 versus The Oil and Gas Conservation Commission. And
23 this was a 1955 Colorado Supreme Court case. So, in
24 order to exercise regulatory authority over gas
25 storage reservoirs, such as the Leyden facility, the

1 commission has to find some particular statutory
2 enactment that empowers the commission to exercise
3 that regulatory authority.

4 Now, it all reduces itself, I think, to
5 applying a name to this facility. And we know what
6 name is applied to this facility. The applicable name
7 is that it is an underground reservoir which is
8 defined in article 64 of Title 34 -- I am sorry,
9 Article 64 of Title 43 as follows: Underground
10 reservoir means any subsurface sand, stratum or
11 formation suitable for the injection and storage of
12 natural gas therein and the withdrawal of natural gas
13 therefrom. Attached to our initial brief is a copy of
14 the order that was entered by this commission, in
15 1960, and it tells us that, even in 1960, the
16 commission knew exactly what this facility was. The
17 order at the second page, under the centered word,
18 "Order," says, Now, therefore, it is ordered that the
19 project for the storage of natural gas in an
20 underground reservoir situated in the Laramie
21 formations, et cetera. The commission has been
22 perfectly consistent on what this facility is. It is
23 an underground reservoir.

24 Now, having said all of that, we turn to
25 the definition of oil and gas operations contained in

1 the 1994 act. There is a laundry list of items which
2 the definition of oil and gas operations defines as
3 being oil and gas operations. Distinctive or
4 distinguished by its absence is the term, "underground
5 reservoir." Again, the argument is very simple. Had
6 the legislature intended this commission to regulate,
7 as oil and gas operations, underground reservoirs, it
8 could have done so by the simple expedient of
9 including that term in the definition of oil and gas
10 operations. It did not do so.

11 Turning to the argument that this
12 facility is a gas storage well. We cited various
13 authorities for the proposition that the language used
14 in statutes, the words are to be accorded their plain
15 and ordinary meaning. This is an abandoned coal mine
16 into which natural gas is injected. It is not a well.
17 The term, "well," I think has a pretty
18 well-established meaning in the English language.
19 This is not it.

20 Well, getting to the point where we say,
21 okay, this commission does not regulate this facility,
22 the next obvious question is, well, then, who does.
23 And as I mentioned earlier, we don't have to speculate
24 in that regard. The applicable statute is Colorado
25 Revised Statute, Section 40-4-101(a), and it's quoted

1 in our supplemental brief, and it says whenever the
2 commission -- in that instance, the Public Utilities
3 Commission -- after hearing upon its own motion or
4 upon complaint finds that the rules, regulations,
5 practices, equipment facilities or service of any
6 public utility, such as the Public Service Company, or
7 the methods of manufacture, distribution,
8 transmission, storage, or supply employed by it are
9 unjust or unreasonable, unsafe, improper, inadequate
10 or insufficient, the commission shall determine the
11 just, reasonable, safe, proper, adequate or sufficient
12 rules, regulations, practices, equipment, facilities,
13 service or methods to be observed, furnished,
14 constructed, enforced or employed, and shall fix the
15 same by its orders, rules or regulations.

16 And, again, we don't have to rely on the
17 cold words of the statute to know that the Public
18 Utilities Commission regulates this facility. It is
19 simply a fact that, at least as to the surface of it,
20 the Public Utilities Commission employees do
21 inspections and then the Public Service Company files
22 reports. So, based on our analysis of the words of
23 the statute, we will settle the rules of statutory
24 construction, the facts on the ground as to what's
25 happening. We would contend to the commission that it

1 does not have regulatory authority over the Leyden
2 facility. That's all I have got. I would be happy to
3 answer any questions the commission might have.

4 COMMISSIONER WILLIAMS: I have a couple
5 of questions. If we interpret -- if PUC were not a
6 public utility, or if the public service were not a
7 public utility, and we did not have the PUC statute
8 that you have referenced, would it then be your
9 argument that no one has jurisdiction over facilities
10 like this, assuming it's not subjected to FERC,
11 because it didn't involve -- it's a totally intrastate
12 operation?

13 MR. PHILLIPS: I think my answer to that
14 is, I haven't researched that. The only answer I can
15 give you, it could seem to me, there's probably not
16 much of a gap there. That anybody who is likely to
17 operate one of these facilities is likely to be
18 regulated either by FERC or by the PUC as a public
19 utility.

20 COMMISSIONER WILLIAMS: The problem I
21 have with your argument is it has ramifications beyond
22 your argument, which is, for example, we have language
23 in here about injection wells, and if we were to -- as
24 I am interpreting your argument, it's basically saying
25 you can regulate the mechanics of a well, the

1 mechanical aspects of drilling a well, but you cannot
2 regulate the underground consequences of the well.

3 MR. PHILLIPS: It's more that the
4 regulation has been delegated to another state agency,
5 yes, ma'am.

6 COMMISSIONER WILLIAMS: So, you are
7 saying here, the operative fact is that -- well, you
8 are making two. If you are making the argument that
9 we -- that another agency has preempted our
10 jurisdiction in this issue, that's one argument. If
11 you are arguing that the words -- by using the word,
12 "well," rather than "reservoir," that we're precluded
13 from regulating, under any context, the substantive
14 consequences, because we only have jurisdiction over
15 the mechanical operation of the well, we only have
16 jurisdiction over the surface impacts, if you will,
17 then that's a very different argument, and I am not
18 sure which one of those you are making.

19 MR. PHILLIPS: Both. The two kind of go
20 together. Under the statutory authority for this
21 commission, the commission does not regulate
22 underground reservoirs, except for granting approval
23 for the use of eminent domain powers, as was done in
24 1960. And the second legal argument is that there's
25 logical reason that the legislature didn't empower

1 this commission to regulate underground reservoirs.
2 It's because it empowered another commission to
3 regulate those types of facilities.

4 COMMISSIONER WILLIAMS: How does your
5 argument play out, then, for example, your statutory
6 interpretation argument, about the use of the word
7 "well" as opposed to "reservoir" or "facility," how
8 does that play out with the injection well example?
9 It's the same kind of language in the statute where
10 "well" was used.

11 MR. PHILLIPS: I think "well" is
12 accorded the plain and ordinary meaning, and gas
13 storage well contemplates something other than an
14 underground storage reservoir. So, oil and gas
15 operations are defined to include gas storage wells,
16 and the commission has regulatory authority in that
17 sphere, but it has not been delegated regulatory
18 authority as to underground reservoirs.

19 COMMISSIONER WILLIAMS: You are saying
20 we can regulate the mechanism by which gas or some
21 other substance is injected into the subsurface. We
22 cannot regulate other subsurface consequences.

23 MR. PHILLIPS: Reduced to its essence,
24 that's pretty much the statutory scheme, yes, ma'am.

25 CHAIRMAN HEINLE: I have a question. In

1 the scenario where a well has been drilled into a gas
2 storage reservoir. Due to the -- either the way it
3 was drilled or cemented, or lack of cement, gas
4 started showing up in a shallower water aquifer, for
5 example, who would have jurisdiction, in your opinion,
6 over that scenario where the problem was created,
7 perhaps, from a lack of mechanical integrity in the
8 wellbore, but, yet, that was the cause of the problem,
9 and then the gas showed up in the shallower aquifer.
10 Would that fall under PUC or the oil and gas
11 commission?

12 MR. PHILLIPS: To be perfectly honest, I
13 would rather not speculate on that, because I haven't
14 researched the issue. I haven't looked at it.

15 CHAIRMAN HEINLE: I guess what I am
16 concerned about, some comments Commissioner Williams
17 has indicated, I could see a scenario like that if we,
18 as a commission, are only to look at the wellbore, the
19 permitting of it, the drilling it, cementing practice,
20 and stop at that point, who is going to address the
21 issue of, you know, potential contamination from the
22 failure of the mechanical integrity of the wellbore?
23 I mean, it seems to me it's difficult to separate the
24 two issues. I mean, in all of our normal actions that
25 we take at the commission, we not only look at the

1 well, but we look at the reservoir and impacts on it
2 versus, at this point, and now, as I understand your
3 argument, what we're being asked to do, or at least
4 your view of it is to, if the statute says look at the
5 wellbore, or if it says wells, it says just look at
6 the wellbore and forget about any impact that happens
7 to the reservoir, either on an injection or a
8 withdrawal basis. And so, you know, I guess I have
9 got some of the same concerns there, because I can
10 think of another -- hypothetical scenarios that may be
11 a result of the wellbore, yet we would be precluded
12 from looking at it. Commissioner Matheson.

13 COMMISSIONER MATHESON: Couple of
14 questions. Does PUC have any clear regulatory body on
15 aquifer protection?

16 MR. PHILLIPS: On aquifer protection,
17 specifically, not that I am aware of at this point.

18 COMMISSIONER MATHESON: Beyond the
19 safety language within the statute, are you aware of
20 anything within PUC that would apply to this case with
21 their -- whether regulation, order, statute?

22 MR. PHILLIPS: In terms of regulations?

23 COMMISSIONER MATHESON: What I am trying
24 to get at is how clear of a statement has PUC made in
25 the past concerning their role in environmental

1 protection, particularly with respect to aquifer
2 protection.

3 MR. PHILLIPS: Well, as Ms. Coulter
4 pointed out, there is public safety language in PUC's
5 enabling statute, in terms of exercising its
6 rulemaking authority as to aquifer protection. Again,
7 I haven't looked, in any detail, at that issue. I
8 would be happy to do so.

9 COMMISSIONER MATHESON: Okay. Second
10 question would be, does Public Service Company have
11 any data suggesting that there are problems with the
12 mechanical integrity of their wellbores, if you will,
13 at this facility?

14 MR. PHILLIPS: I would like, frankly, to
15 avoid getting into the facts of the case, because, as
16 I understand it, that's what the commission order
17 directed in this case. If, in fact, the commission
18 exercises jurisdiction, the company, frankly, shall
19 have a lot of evidence it would like to present on
20 what's going out at the Leyden facility, but this
21 isn't, as I understand it, the purpose of this
22 hearing.

23 COMMISSIONER MATHESON: Our problem, you
24 have granted that we have jurisdiction with regard to
25 the wellbores. That's the only area we have

1 jurisdiction. How are we going to know we have
2 jurisdiction unless you give us information about your
3 wellbores?

4 MR. PHILLIPS: Well, I've got technical
5 people here who would be prepared to answer those
6 questions, if you would like to ask them, it's the
7 commission's call. That's why they are here, frankly,
8 in case the commission does have technical questions
9 as to the operation out there.

10 CHAIRMAN HEINLE: Well, perhaps --

11 COMMISSIONER WILLIAMS: I was going to
12 make a suggestion, because we're kind of in this
13 chicken-and-egg thing about jurisdictional issues
14 versus the facts and merits of the case.

15 I was thinking that, perhaps, we could
16 ask Mr. Welborn to make an offer of proof, if you
17 will, where he can tell us exactly what he believes he
18 can demonstrate and I understand you disagree with
19 whether or not he can demonstrate that, but I guess
20 what I am saying is, if some of us feel like we need
21 to know what he is going to prove to know whether we
22 have jurisdiction, whether we go through -- we can
23 hold that all and let Mr. Welborn surprise us and let
24 it unfold as in that way, or we can ask, up front,
25 exactly like you would for a Motion for Summary

1 Judgment, assume his facts to be true, for purposes of
2 determining whether we have jurisdiction. Then, if we
3 agree that we do, then, obviously, all presumptions in
4 his favor, other than what he's otherwise entitled to,
5 would fall away, and we would hear that proof. I
6 mean, that's one way of kind of getting both the
7 chicken and egg on the table at the same time, if
8 people are feeling that they can't decide one without
9 knowing something about the other.

10 MR. PHILLIPS: It's certainly something
11 that would be appropriate, as an offer of proof, I
12 think, in a court proceeding, but this is a little
13 different situation, as I understand the commission's
14 rules. Should there be a determination that there is
15 jurisdiction, the initial step would be notice of
16 alleged violation sent out and investigation by the
17 staff, and I guess the only thing I would like to say,
18 on record, I am a little concerned about any kind of
19 prejudgment that may be created by this adjusted
20 procedure.

21 COMMISSIONER MATHESON: My question was
22 a pretty direct and simple one that could be answered
23 with a "yes" or a "no," even. Does Public Service
24 Company have any data suggesting they have mechanical
25 integrity problems with their wells, yes or no. That

1 was my question. But I don't think we have to get
2 into offers of proof, or anything, at all.

3 COMMISSIONER WILLIAMS: I guess the
4 reason I ask if what Mr. Welborn believes he can prove
5 is that there are mechanical integrity issues, that
6 might lead this commission to, one, question if what
7 Mr. Welborn said he intends to prove, that the mine
8 itself is not secured, and there's migration as a
9 result of underground -- lack of underground
10 containment, nothing to do with mechanical integrity
11 of the well, that might lead the jurisdiction
12 discussion in another direction. That's the only
13 reason, because I can't -- I frankly can't tell, from
14 what's in front of us now, what sort of the nature of
15 the complaint is. And, generally speaking, that
16 means -- courts decide jurisdictional issues from the
17 complaint, and they assume those allegations to be
18 true, and it doesn't prevent the case later on.

19 MR. PHILLIPS: Understood.

20 COMMISSIONER WILLIAMS: Here we're being
21 asked to decide jurisdictional issues, when, to me,
22 the claim is still very smokey. I don't understand
23 exactly what is alleged to have gone on on that
24 property that brought the complaint forward in the
25 first place. That's the part I would like to get a

1 little more clear, before we're asked to decide
2 jurisdictional issues. I think this issue about
3 operation of the well, from -- its consequences, if
4 you will, from the surface, the mechanical versus
5 the -- these are important issues that are,
6 unfortunately, for the parties here, will have impact
7 beyond the facts in this case, how we interpret our
8 statutes.

9 MR. PHILLIPS: I think that might be
10 appropriate, truthfully. As I understand it, the
11 allegation is the latter; that it's a problem with the
12 integrity of the reservoir and not with the wells
13 but --

14 COMMISSIONER MATHESON: I had a question
15 out there. I am hearing you are declining to answer
16 that question right now.

17 MR. PHILLIPS: The specific question as
18 to the wells?

19 COMMISSIONER MATHESON: Yes.

20 MR. PHILLIPS: Well, no. You are not
21 hearing that. Let me confer with my clients for a
22 moment, if I can, and give you a, perhaps, some more
23 thoughtful response.

24 CHAIRMAN HEINLE: It's time for us to
25 take a break for lunch. We can pick up after lunch,

1 where we have left off. It will give you the
2 opportunity to confer with your people. And I guess
3 my inclination, I mean, if the parties are agreeable
4 to hear some of that testimony, because I do think it
5 may help at least clarify the situation, we'll have a
6 clear understanding of where the complaint is arising
7 from, because that might or might not affect the
8 direction the commission has.

9 MR. GRIEBLING: I would like to make a
10 comment. It could be obvious, but, may not be; that
11 is, if we, as staff, based on the data we have seen so
12 far, felt that it was likely that the wellbore was
13 leaking, we would have been able to handle this at the
14 staff level through issuing a NOAV and remediating the
15 wellbore leak. We have not seen any data at this
16 point that indicates there's a wellbore that's
17 currently leaking, that needs to be repaired. I just
18 make a general comment; that public service has been
19 very cooperative, and in providing data and
20 information. If they are hiding anything, we sure
21 haven't seen any indication of that. And based on the
22 data available to us, it does not appear that that's a
23 problem. If it had been, we would have handled this
24 differently.

25 COMMISSIONER MATHESON: That's a help.

1 CHAIRMAN HEINLE: Mr. Welborn, do you
2 have a comment?

3 MR. WELBORN: The thing -- I know you
4 are trying to break. The point I was making earlier,
5 if it takes facts or some minimal presentation of
6 facts in order to make a determination, fine, let's do
7 that. That, to me, should be done. That's the third
8 alternative I had suggested. Mr. Loesby could put on
9 his case, we'll put it on and then you can rule on the
10 jurisdictional question after that, before we go
11 further, before public service has to proceed. I am
12 not prepared to do that today, because we didn't come
13 prepared to -- our witnesses aren't prepared and our
14 exhibits aren't prepared. We came prepared with a
15 legal argument. That's point No. 1.

16 Point No. 2 is I do think that this
17 issue of well versus the reservoir are interrelated.
18 It's going to take facts to help you draw that line.
19 If you think the line should be drawn -- I think 34-64
20 means that the line shouldn't be drawn. If you have
21 the jurisdiction to determine what's suitable, then
22 you certainly have the jurisdiction to determine
23 whether that area continues to be suitable, whether
24 that's an issue, but that's the legal side of it. I
25 am hearing that it would take facts or facts would

1 help you make this determination. We're prepared to
2 put on a limited case or full case. You stop us
3 anytime you want to, and tell us we're not going any
4 further. I would prefer not to put on witness or
5 exhibits today. We are simply not prepared to do it.

6 MS. COULTER: In that vein, I would say
7 that nobody is really prepared to present witnesses
8 today. And, in fact, I know I told Mr. Phillips it
9 was doubtful that witnesses would be called at all. I
10 would suggest --

11 CHAIRMAN HEINLE: Good call.

12 MS. COULTER: I would suggest the
13 attorneys make presentation as to the facts, as they
14 see them, and, of course, that always supplements your
15 legal arguments, so, would that be acceptable to both
16 parties, or go ahead and state your facts as you see
17 them, Jeff and Lee. That would also cut down on time
18 and maybe answer questions, specific questions from
19 the commissioners, like, about wellbore integrity, if
20 you see that as a problem.

21 MR. WELBORN: We need to confer with our
22 client.

23 MR. PHILLIPS: As do we.

24 CHAIRMAN HEINLE: We'll reconvene at
25 1:30, and can we get a copy of that --

1 COMMISSIONER MacMILLAN: I would also
2 like a copy of 34-64-104.

3 CHAIRMAN HEINLE: I think we need a
4 motion. Let me ask this. Do we need --

5 MS. COULTER: We need a notion for
6 executive session to go and discuss the Burlington
7 matter and Tiffany matter and Owens matter.

8 COMMISSIONER MacMILLAN: So moved, and
9 also add to that that we come out of executive session
10 when we reconvene after lunch.

11 COMMISSIONER MATHESON: Second.
12 (Whereupon the vote was called.)

13 CHAIRMAN HEINLE: Motion carries.
14 (Recess.)

15 CHAIRMAN HEINLE: Why don't we go ahead
16 and get back on record, get started. I think, where
17 we left off, prior to the breaking for lunch, is that
18 we were going to ask both Mr. Welborn and Mr. Phillips
19 to present some additional information related to the
20 dispute itself, and perhaps give the commission some
21 background information as to why we're here today, and
22 in a more specific sense. Before we get into that,
23 are there any questions from the commissioners before
24 we move forward?

25 COMMISSIONER MATHESON: The question I

1 had sits out there. I will defer right now. Listen
2 to what these folks have to say.

3 MR. PHILLIPS: Mr. Chairman, if
4 possible, we would like to provide a response, perhaps
5 an explanation of why the Public Service Company is a
6 little concerned about the factual presentation.

7 CHAIRMAN HEINLE: Excuse me for one
8 moment. Let the record reflect that Commissioner
9 Johnson has joined us.

10 MR. PHILLIPS: On Friday of last week,
11 Public Service Company was served in a lawsuit called
12 Northwest Industrial Subdivision II, Inc., and Natural
13 Resource Recovery, Inc., are corporations, I believe,
14 both of which Mr. Loesby is the principal of, versus
15 Public Service Company of Colorado. That civil case
16 involves many of the facts that are applicable in this
17 hearing. As a result, anything that transpires in
18 this hearing could presumably and potentially be used
19 as evidence in the civil case. I am particularly
20 sensitive to that, because Public Service Company has
21 hired me to defend that civil litigation, and it's
22 obviously very important to me that I remain a lawyer
23 in that proceeding, not a witness. So, if we were
24 perceived as being evasive or coy, I apologize for
25 that. The circumstances sort of compelled.

1 Having said all of that, I conferred
2 with the company's technical personnel over lunch, and
3 can state, in answer to the question, that none of the
4 wells -- none of the company's wells on the Leyden
5 facility show any problems, and, in fact, there has
6 been gas detection log and cement bond logs done
7 periodically for those wells and no leakage is
8 detected.

9 CHAIRMAN HEINLE: Thank you very much.

10 COMMISSIONER MATHESON: Thank you very
11 much.

12 CHAIRMAN HEINLE: Mr. Welborn.

13 MR. WELBORN: Yes. We're prepared to
14 proceed and since you can take judicial notice of the
15 fact that I have no technical ability whatsoever -- I
16 drank beer and read poetry in college -- I am going to
17 ask my partner, Karen Krug, to make the offer of
18 proof. Before she does, I want you to have a couple
19 of things in front of you. And I want to -- so that
20 we can emphasize them as we go along.

21 First, I am circulating a copy of
22 34-60-105, and 34-60-106, and I have highlighted the
23 provisions I have that we believe are important.
24 34-60-105 is the portion of the statute that tells the
25 commission what its powers are. "The commission has

1 jurisdiction over all persons and property, public and
2 private, necessary to enforce provisions of this
3 article, and has the power to make and enforce rules,
4 regulations and orders pursuant to this article, and
5 to do whatever may be reasonably necessary to carry
6 out the provisions of this order." Over the page, we
7 have highlighted paragraph 2(d), the commission has
8 authority to regulate oil and gas operations so as to
9 prevent and mitigate significant adverse environmental
10 impacts. That's where we are. That's why we are
11 here, statutorily.

12 And in support of that, I am circulating
13 the definition of oil and gas operations highlighted
14 as well, and so we can just look at the clauses
15 together. 34-60-103(6.5) which is highlighted, "Oil
16 and Gas Operations," means "siting, drilling,
17 deepening, recompletion, reworking or abandonment of
18 an oil and gas well, underground injection well or gas
19 storage well, production operations related to any
20 such well. . . ." That's the language we referred to
21 earlier.

22 Finally, I want to, so we all have it in
23 front of us, since it's been brought up, 34-64, and we
24 have highlighted provisions of 34-64, the underground
25 storage provision statute, which are important for our

1 position. Those provisions are the definition:
2 Underground reservoir means any subsurface sands,
3 stratum, or formation suitable for injection and
4 storage of natural gas. That's the determination the
5 Oil and Gas Conservation Commission made. That's the
6 determination that we feel gives it continuing
7 authority. It's ludicrous to say, or incongruous, at
8 least, to say that you had authority, initially, to
9 determine whether it was suitable, and you don't have
10 authority to evaluate that reservoir at the present
11 time. Our conditional position is that reservoirs and
12 the wells which provide the access to that reservoir
13 are a gas storage well for purposes of the oil and gas
14 operations definition.

15 Karen Krug will walk you through the
16 facts which we will present in support of that
17 position. Now, we're not going to present any
18 evidence, except through Karen, we will make an offer
19 of proof, but if there's no objection, in order to
20 orient everyone, we have two maps. One is an aerial
21 photo and the other is a location map, showing a
22 relative location of Mr. Loesby's property and the
23 underground cavern or reservoir and also showing the
24 well locations.

25 We would offer those for demonstrative

1 purposes only, and offer them to the other side. I
2 won't circulate them, unless there's no objection.

3 CHAIRMAN HEINLE: Mr. Phillips.

4 MR. PHILLIPS: I have no objection.

5 CHAIRMAN HEINLE: Have you had a chance
6 to look at the --

7 MR. PHILLIPS: I was handed them a
8 couple of minutes ago. I sure can't opine as to
9 whether they are to scale or accurate at this point,
10 but we have no objection to them for demonstrative
11 purposes.

12 CHAIRMAN HEINLE: Okay. Great.

13 MR. WELBORN: A few minutes is just
14 about all the lead time we're going to give
15 Mr. Phillips.

16 CHAIRMAN HEINLE: I am sure he
17 appreciates that.

18 MR. WELBORN: You may have to share. I
19 am not sure we have quite enough copies, so share
20 where you can. With that, I would turn it over to
21 Karen.

22 MS. KRUG: Just to get people oriented,
23 if you look at the aerial photo, you might want to
24 turn it upside down, that would show you north. You
25 can see the outline of the storage field there. And

1 then there's kind of a rectangle that has "NWIS,"
2 which is Mr. Loesby's property, north -- the evidence
3 will show that the storage field actually dips up to
4 the north where his property lies. And the other
5 important thing, what I would talk about is this PsCo
6 Well No. 31, that's shown on there. That's outside of
7 the boundary of the storage field. This was drilled
8 in 1993.

9 As a basic premise of what I want to
10 start with, is to show that, under the current
11 operating conditions, this storage facility is not
12 suitable for storage right now. The evidence will
13 show in the proceeding in front of this commission, in
14 1960, Public Service Company's testimony in that
15 proceeding addressed an issue that's very important
16 here, and that was that there was a lack of
17 permeability with the reservoir around the storage
18 field, but the absolute lack of permeability was not
19 particularly important, because the company would
20 operate the storage at a pressure lower than
21 hydrostatic, or the pressure that -- of the water that
22 lies within those materials surrounding the mine.
23 Under such subhydrostatic operations, small leak
24 channels will simply transmit water into the mine and
25 not gas out. These were very important to -- very

1 important prerequisites for the underground storage,
2 the hydrostatic pressure in the materials surrounding
3 the mine is the upper pressure limit for the gas
4 storage. This is the basis for the commission
5 determining that, at that time, that this reservoir
6 was suitable for gas storage.

7 The evidence will also show that the
8 Public Service Company has operated this facility for
9 many years above this hydrostatic pressure. That was
10 an important factor. The evidence will further show
11 that this Well No. 31 that you see on this map,
12 drilled in 1993, was tested, and the evidence will
13 show Public Service Company's statement was, in fact,
14 that the storage gas had definitely migrated uphole.
15 There was -- the evidence will show storage gas found
16 in that well, including helium, which statements from
17 Public Service Company's representatives has said that
18 helium wasn't used in the storage field for almost 20
19 years. So, it probably can be shown that the gas has
20 been leaking for at least that amount of time. The
21 evidence will further show that there is soil samples
22 taken on Mr. Loesby's property that show, also,
23 storage gas leaking at the surface.

24 Now, this facility, we have an issue
25 with whether or not -- people seem to be confused

1 whether or not we have a wellbore or whether we have a
2 storage reservoir, what we have. What we have
3 underneath the ground is an old mine. It was a coal
4 mine. It had been completely mined out. This was the
5 basis for their jurisdiction, in 1960, to determine it
6 was suitable for gas storage. That is like, when you
7 talk about drilling wells into that, it's a cavern.
8 It's like drilling wells into this room. It's
9 completely wide open. So, it's not your traditional
10 well or reservoir that you think about, to begin with.
11 All of those wells that come in here communicate with
12 each other, immediately, with pressure, immediately,
13 with everything. And, in fact, I will submit to you
14 that this is one big wellbore, the way it acts, one
15 big well. The evidence will show, also, that
16 Mr. Loesby is the landowner of that property zoned
17 industrial, and that he basically cannot develop that
18 land at all. Insurance has been cancelled because of
19 the high risk nature of it, as they feel. The
20 evidence will further show that gas has gone into his
21 water. He's not able to use his water zones. Those
22 are potable water zones. And, with that, I would let
23 you go with some of the legal --

24 CHAIRMAN HEINLE: Before you leave, are
25 there any questions? Commissioner Blackwell.

1 COMMISSIONER BLACKWELL: You started out
2 your comments with some reference to permeability, and
3 I missed that. Can you --

4 MS. KRUG: From the testimony in 1960,
5 Public Service Company's testimony, that was the basis
6 for this commission issuing their order to allow that
7 facility to be a storage -- a gas storage field
8 reservoir, and the concern there was some of the zones
9 that come -- think of this as being our mine here.
10 Some of those zones that are coming into this wall,
11 which is the reservoir next to it, some are permeable,
12 some are not permeable. The concern at that time,
13 because we have some permeable zones, if we pressure
14 up on this, won't we, in fact, push gas into those
15 zones. And their testimony was, no, we're never going
16 to exceed the pressure; that those zones naturally are
17 lying at hydrostatic pressure. The pressure of water
18 at that depth, in fact, will be below that, so you
19 actually see water coming out of those zones into our
20 cavern here. But, with evidence, we'll show that, in
21 fact, that wasn't the case. That we -- they exceeded
22 the pressures, pushed gas into the reservoir. That's
23 the problem, now, with the damage to the water zones.

24 CHAIRMAN HEINLE: Do you know, when
25 these wells were drilled into the storage area, did

1 they drill all of the way down and into the shaft
2 itself?

3 MS. KRUG: Yes.

4 CHAIRMAN HEINLE: Did they drill above
5 the shaft, cement the casing, and then drill open, you
6 know, open hole down into the shaft?

7 MS. KRUG: Actually, I don't know how
8 they completed -- they did it after the 1960 hearing.
9 There's -- I am sure --

10 CHAIRMAN HEINLE: It would seem like it
11 would be difficult -- maybe I can just direct that
12 question to Mr. Phillips. He can address it during
13 your presentation, if you want, or now, whatever.

14 MR. PHILLIPS: I will find out.

15 CHAIRMAN HEINLE: Okay. It would seem
16 to me that, perhaps, that wouldn't have drilled all of
17 way through, in -- if they did a cement job. Any
18 other questions? Commissioner MacMillan.

19 COMMISSIONER MacMILLAN: Explanation of
20 the map you provided us.

21 MS. KRUG: Okay. The second map, it
22 just shows you there's approximately 30 wells that are
23 gas storage wells that are in that area called the
24 "Area Mined." That's just showing you where those
25 wells lie.

1 COMMISSIONER MacMILLAN: I am
2 specifically interested in the wells located in what I
3 believe is Section 22.

4 MS. KRUG: Right. That's Well No. 31
5 there. The one there, that's the one where there has
6 been gas shown to be leaking. The well at the north
7 there, far north, is Well No. 32, which was a dry
8 hole, wasn't drilled for production. It was a well
9 with no gas test in it.

10 COMMISSIONER MacMILLAN: Those are wells
11 that were specifically drilled to monitor the gas
12 storage reservoir that's indicated here. Do you know
13 that or not?

14 MS. KRUG: Well, what I do know is, on
15 the completion report, it was permitted as a gas
16 storage observation well.

17 COMMISSIONER MacMILLAN: Okay.

18 MS. KRUG: Public service would have to
19 probably answer any other questions.

20 COMMISSIONER WILLIAMS: That was true as
21 to both of those wells, or just the 31?

22 MS. KRUG: I don't know about Well 32.
23 That's just 31. I don't have that with me.

24 CHAIRMAN HEINLE: Commissioner Matheson.

25 MS. KRUG: Both were observation wells.

1 COMMISSIONER MATHESON: Can you tell me
2 how you know the potable aquifer beneath the property
3 have been affected?

4 MS. KRUG: The reason is from an
5 engineering study, taking the results from Well No.
6 31, and extrapolating them underneath. There has not
7 been any wells drilled on Mr. Loesby's property.

8 COMMISSIONER MATHESON: Okay. All
9 right. And, then, can you perhaps elaborate a bit on
10 the idea of the mine itself being one big well and how
11 we should picture that.

12 MS. KRUG: Well, take this room. If you
13 have multiple wells coming in here and you are
14 injecting gas, you are -- it's a normal reservoir, you
15 have layers of rock, you have got, you know, sand
16 compacted and gas is going through the porous media
17 here. There is no -- there's nothing. It's a void.
18 It's a cavern. So, everything is in communication
19 with everything else, because there isn't anything to
20 start, stop it or delay it, or take more time or
21 anything, so it acts all as one reservoir. They
22 inject, in a matter of just a couple of days, reach
23 high pressure. They withdraw in a matter of a couple
24 of days. It's very different than a normal gas
25 storage field, which would take you many days to



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1 inject and many days to withdraw. It's because of the
2 characteristic of being -- it's a cavern.

3 COMMISSIONER MATHESON: It's
4 instantaneous response, even though that cavern has
5 been penetrated by a number of different bore holes.

6 MS. KRUG: Exactly. It's very unique.
7 There's no other, really, like it, truly, in North
8 America. They have salt caverns for storage in the
9 Gulf coast which may be similar. Nothing like this.

10 COMMISSIONER MATHESON: Okay. Thanks.

11 CHAIRMAN HEINLE: Any other questions?
12 Director Griebeling.

13 MR. GRIEBLING: I just had a couple of
14 quick -- have you had a chance to review the pressure
15 transient data that was collected on the 31?

16 MS. KRUG: I did. It's there. I would
17 put my engineering hat -- no, but Mr. Loesby has --
18 yes, right.

19 MR. GRIEBLING: Right. I don't know if
20 you can answer this. Are you aware of the
21 implications of that data with respect to the area
22 that could be filled with gas, the size of the area?

23 MS. KRUG: Yes.

24 MR. GRIEBLING: Whether that would
25 extend --

1 MS. KRUG: Our information is that it
2 would extend onto his property.

3 MR. GRIEBLING: And the only thing that
4 you mentioned, that I am completely unaware of, soil
5 gas data, and I haven't heard of or seen that. Was
6 that acquired?

7 MS. KRUG: It has been real recently,
8 yeah. And I -- you are welcome to have -- to review
9 that information, but that does show that gas has come
10 completely up to the surface. Those tests were taken
11 on his property. So it not only went north, but up.

12 MR. GRIEBLING: Okay.

13 COMMISSIONER MATHESON: Can I ask one
14 question related to that, then. Soil gas data showing
15 methane at the surface. Have you done any isotopic
16 analysis on that methane?

17 MS. KRUG: Yes, because they determined
18 it is the storage gas. It's not gas from coals. It
19 is storage gas.

20 COMMISSIONER BLACKWELL: Have there been
21 any visible effects of the gas seepage on the surface?

22 MS. KRUG: Not to my knowledge, no, I
23 don't think so.

24 CHAIRMAN HEINLE: I am wondering if
25 we're getting into an -- beyond the area. The issue

1 is really one whether there's been --

2 MS. KRUG: We're really concerned about
3 damage to the water -- the gas and water reservoirs is
4 really the scope of this.

5 CHAIRMAN HEINLE: Our issue, really,
6 focus, is one on jurisdiction, again, whether the
7 commission has the authority to regulate the area for
8 the purpose of this hearing. I guess we're assuming
9 that there is a dispute out there somewhere as to
10 what's occurred, and we're not too concerned, I think,
11 at this point, as to what happened to who or whatever.
12 It's more of a jurisdictional issue, so we can focus
13 on that, I think.

14 MS. KRUG: Which I will have -- we have
15 to focus back on.

16 COMMISSIONER WILLIAMS: If I can clarify
17 your theory of causation, it's not one based on
18 mechanical failure of a well or surface equipment, but
19 it's, in essence, breach of the cavern walls.

20 MS. KRUG: Not exactly. I think it is
21 also a mechanical failure of wells as well as a
22 reservoir storage problem in the reservoir itself. I
23 think, also, because it is like a single well, you are
24 going to --

25 COMMISSIONER WILLIAMS: Without getting

1 into whether it's one big well or multiple wells, or
2 whatever, we're talking about a mined out area.

3 MS. KRUG: Correct.

4 COMMISSIONER WILLIAMS: You are saying
5 that your causation theory does involve some problems
6 with the wellbores themselves, or with the surface
7 equipment associated with those wellbores.

8 MS. KRUG: We believe that that's part
9 of the cause of the damage, yes.

10 COMMISSIONER WILLIAMS: What kind of
11 mechanical inadequacies exist?

12 MS. KRUG: They are exceeding pressures
13 that they should, and that's clearly leaking into the
14 outcrop, the reservoirs offsetting the --

15 COMMISSIONER WILLIAMS: The wellbores
16 themselves are leaking or the --

17 MS. KRUG: The well.

18 COMMISSIONER WILLIAMS: From the mined
19 out area?

20 MS. KRUG: Right.

21 COMMISSIONER WILLIAMS: From what you
22 describe as the cavern.

23 MS. KRUG: Right.

24 COMMISSIONER WILLIAMS: I understand
25 your theory of rather than water seeping in, we now

1 have gas moving out the walls of the cavern, if you
2 permit that terminology.

3 MS. KRUG: Sure.

4 COMMISSIONER WILLIAMS: You are not
5 saying or don't have -- are not prepared to prove that
6 there's water -- that there is gas -- they're problems
7 with the wellbores themselves or the surface, other
8 than the pressure issue of the pressure in the cavern?

9 MS. KRUG: Correct.

10 COMMISSIONER WILLIAMS: We don't have
11 leaking casing. We don't have those kind of issues.

12 CHAIRMAN HEINLE: Just to clarify, in my
13 own mind, what you are talking about is two issues.
14 One, you have got the issue of how the gas is getting
15 from the inside of the storage reservoir out, through
16 what means, if it is indeed getting out, and then
17 whether that is affected by the production operations
18 or the operations of the well itself in terms of --

19 MS. KRUG: Injection, withdrawal and
20 pressure.

21 CHAIRMAN HEINLE: Pressure at which it's
22 injected and the reservoir is maintained.

23 MS. KRUG: Right. In fact, if you look
24 at the statute under the jurisdiction and underground
25 storage, in the definition of underground storage, it

1 means the right to inject, store and withdraw the
2 natural gas, so it's that whole process of injecting.

3 CHAIRMAN HEINLE: Could you reference
4 that number?

5 MS. KRUG: It's the other statute you
6 are not familiar with, 34-64-102, subsection 5. The
7 other basis for -- I will let Jeff go into this
8 more -- is that this facility is not suitable for gas
9 storage, the way it's being operated and the way it
10 has been operated. And this commission made the
11 determination, in 1960, that it was suitable. And
12 we're also submitting it's not suitable.

13 COMMISSIONER WILLIAMS: I don't know if
14 this is how you divide up your duties here, but, then
15 it's your -- what would you be asking the commission
16 to do, and what violations of this rule do you believe
17 have occurred?

18 MS. KRUG: I would let Jeff do that.

19 MR. WELBORN: I can tell you what we are
20 not asking the commission to do. We're not asking the
21 commission to redress damage. That's what the civil
22 action is for. What we're actually asking the
23 commission for is a determination, No. 1, of whether
24 this reservoir and this cavern, or whatever you call
25 it, as it's currently being operated for, is suitable

1 for underground storage. If it is, under what
2 conditions. We are asking the commission to cite
3 those conditions and we are asking it to take into
4 account, in doing so, what's necessary to protect the
5 aquifers from migration and leakages. So, what we
6 would be asking the commission to do, that we also ask
7 the commission to determine, in the scope of the
8 hearing, the manner in which the wells have been
9 drilled and completed. We're not 100 percent certain
10 that these wellbores are -- that there is integrity in
11 these wellbores. We don't know -- we know of at least
12 one well, in the '60s, that was capped because of the
13 integrity problem.

14 This hearing is -- we don't want to use
15 it for discovery purposes, but any oil and gas
16 commission hearing is a, necessarily, a port to
17 determine what the facts are. We know the gas is
18 coming to the surface. We have evidence that gas is
19 in the aquifers. We need to know where it's coming
20 from, so we're asking the commission to impose
21 conditions of the operation of this reservoir as a gas
22 storage reservoir that would prevent significant,
23 adverse environmental harm, and we ask the commission
24 to determine the significant, adverse environmental
25 harm is occurring, in the absence of the meeting those

1 conditions.

2 CHAIRMAN HEINLE: Any other questions?
3 Mr. Welborn, did you have something else you wanted
4 to --

5 MR. WELBORN: No. That actually is what
6 I was going to conclude with. I wanted you to
7 understand why we're here. We know you have not
8 promulgated rules and regulations on gas storage
9 reservoir. That doesn't lessen your authority in any
10 way. We have provided you the primary statutory cites
11 that we feel are important. We ask you to read them,
12 closely, and to interpret them in a manner that will
13 work within the context of this activity. It's our
14 position that this is an oil and gas operation. This
15 is not the time for arbitrary or fine distinctions.
16 This is the time for an agency, which has the
17 expertise and ability to act, certainly did at the
18 beginning, it asserted jurisdiction in the beginning.
19 We feel you either have continuing jurisdiction under
20 34-64, or you have jurisdiction now under
21 34-60-103(6.5) to regulate this as an oil and gas
22 operation. Either way, we feel it's your
23 responsibility, for this limited purpose, very limited
24 purpose.

25 CHAIRMAN HEINLE: Mr. Phillips.

1 MR. PHILLIPS: I would like to address
2 the last comments first. The commission has
3 undoubtedly the authority under statute 34-64-101, Et
4 sec., to determine whether or not the company has the
5 authority or has the ability to use its eminent domain
6 powers to acquire property for underground gas storage
7 facilities. That's what 34-64-101, Et seq. says. By
8 no means does that article empower this commission to
9 have regulatory authority over the operations of such
10 facilities, and there's nothing in the statute that
11 suggests that it does.

12 Turning to the presentation, for the
13 reasons that I indicated earlier, we are going to be a
14 little circumspect in terms of our offer of proof.
15 Commissioner, you weren't here a little earlier. The
16 fact is that Mr. Loesby's corporation filed suit
17 Friday, or served on the company a civil suit, Friday,
18 with the result that I am concerned that if I make
19 factual recitations in this proceeding that become
20 part of the record, I may find myself a witness in
21 that case rather than defense counsel.

22 COMMISSIONER WILLIAMS: I might suggest,
23 actually, in response to that, I am not sure we need a
24 factual response from Public Service Company. I guess
25 what I would rather have, with the understanding that

1 I am asking you to do this, is we're working with the
2 other side's facts, which I clearly understand you do
3 not admit to, where that leads us on those
4 jurisdictional arguments.

5 MR. PHILLIPS: Let me clarify a few
6 things so I can help you visualize this. You have a
7 map in front of you. I conferred with technical staff
8 from the company; just a few things we would like to
9 clarify.

10 First of all, if you look at the map,
11 this is, perhaps, a scale issue. You get the
12 impression that the light pink shaded area intersects
13 Mr. Loesby's property. That is not, in fact, the
14 case. The two properties are separated by a railroad
15 right-of-way. More importantly, the reason I think
16 this map is somewhat misleading is that what's
17 actually shaded isn't the coal mine. It is the area
18 that is leased by the Public Service Company. Coal
19 mine, as with most coal mines, consists of shafts
20 going out in various directions and rooms, and things
21 like that. But by no means is the area that's shaded
22 in pink the area that is mined. Perhaps we can even
23 stipulate to that.

24 MS. KRUG: Yeah. It's very, very close,
25 but we can stipulate to that. There's not significant

1 difference.

2 MR. PHILLIPS: Okay. I guess the other
3 thing I would suggest is that this is the very first
4 time that I, at least, have heard, or anybody who is
5 here on behalf of the Public Service Company, that
6 there's been gas detected at the surface of
7 Mr. Loesby's property. Accordingly, I can't respond
8 to that one way or the other. They've not seen data.
9 We can't make any response to that.

10 Turning to the jurisdictional issue.
11 Again, I guess I just harken back to the words of the
12 statute, and the statute defines the term,
13 "underground reservoir." And once again, it means any
14 subsurface sands, stratum or formation suitable for
15 injection and storage of natural gas therein and
16 withdrawal of natural gas therefrom. This commission
17 determined some 36 years ago that this facility is an
18 underground reservoir. It said so in the order that
19 was entered in September of 1960. Had the legislature
20 intended to include that type of operation within its
21 definition of oil and gas operation, there was an easy
22 way to do it. You simply take that -- define the
23 term, and you put it into the laundry list of items
24 that do comprise oil and gas operations. These
25 facilities are regulated in this state. Again, we

1 don't have to speculate on that. We know. And it's
2 regulated by the Public Utility Commission. We are
3 not suggesting, for one moment, that Mr. Loesby does
4 not have an agency to whom he can submit this
5 complaint. We merely suggest that it's not this
6 agency. Thank you.

7 CHAIRMAN HEINLE: Any questions of
8 Mr. Phillips? Commissioner Matheson.

9 COMMISSIONER MATHESON: I guess I have
10 one, and I am not an attorney. That's probably why I
11 am boring you so much. But, I don't know whether or
12 not my question is going to become a problem for you
13 becoming a witness later on. This Well No. 31, which
14 is outside of the operation boundary, has public
15 service found storage gas within that?

16 MR. PHILLIPS: Yes, sir. We filed
17 documents with the commission to that effect.

18 COMMISSIONER MATHESON: Very good.
19 Thank you.

20 CHAIRMAN HEINLE: Any other questions?
21 Lori, did you have any comments you would like to make
22 at this time?

23 MS. COULTER: Yeah, I do. I have a few
24 comments. I pulled this packet out of my file, and I
25 believe you all have copies of that in front of you.

1 I will reference some of these provisions. They are
2 very similar to what Jeff had, and, first, with
3 respect to the underground storage statute, that's
4 34-64-101. That gives the oil and gas commission
5 power to essentially permit an underground storage
6 facility. The only reason that permit is requested by
7 a public utility is so that they have the right for
8 condemnation. The permit itself doesn't have any true
9 force and effect as far as environmental enforcement
10 action. It's indicated in 34-60-104 that the
11 commission has to find that it's within the public
12 interest that a reservoir, or that underground storage
13 facility, be permitted, that's suitable and
14 practicable, and that the formation that's permitted
15 is nonproductive of oil and gas. It's very limited in
16 what that order has to say. In fact, our 1960 order
17 parroted that language to the T. And the statute
18 itself does not say that we have any power or
19 jurisdiction over regulating that facility itself,
20 what's stored in there, what it looks like, what
21 happens if there's an environmental consequence as a
22 result of that storage facility. In fact, what would
23 happen right now if we turned around and revoked that
24 order, the public utility wouldn't have the power to
25 condemn. So that's, essentially, the effect of this

1 statute. It's very specific and it's kind of strange.
2 Actually, I am surprised they gave us that authority
3 and looked to us to issue those permits and orders.

4 So, you know, I go back to the fact, and
5 it is the opinion of the office of the attorney
6 general, and I have taken this to the powers that be
7 and I have had several meetings with the Public
8 Utilities Commission attorney through our office, that
9 it is a Public Utility Commission jurisdictional
10 issue. First of all, it's pretty obvious -- and if
11 you want me to get into it I can tell you why the
12 Public Service Company is a public utility, but, I
13 think everybody would admit to that. We're going
14 to -- then we're going to look at what powers does the
15 Public Utility Commission have to regulate public
16 utilities. Well, it's very similar to what the oil
17 and gas commission's authority is to regulate oil and
18 gas operations. So, we look at things like -- let's
19 look to, first, the statute that's 40-4-101.
20 Essentially, I will just read it real quickly.
21 Whenever the commission, after hearing upon its own
22 motion or upon complaint, finds that the rules,
23 regulations, practices, equipment, facilities or
24 service of any public utility -- so that gives an
25 authority, overall, of those aspects of the public

1 utilities -- where the methods of manufacture,
2 distribution, transmission -- key word -- storage, or
3 supply employed by it are unjust, unreasonable,
4 unsafe, improper, inadequate or insufficient, the
5 commission shall determine -- that's the Public
6 Utilities Commission -- the just, reasonable safe,
7 proper adequate or sufficient rules, regulations,
8 practices equipment, facilities, service -- goes on --
9 that shall be enforced. So, there's statutory
10 authority with respect to the public utility itself.
11 Includes equipment, it includes storage, and to have
12 the ability to insure that's reasonable, safe and
13 proper.

14 Let's move to the next statute, which is
15 40-3-101. Take a look at that. It indicates that the
16 public utility -- every public utility shall furnish,
17 provide, maintain such service, instrumentalities,
18 equipment, and facilities as shall promote the safety,
19 health, comfort, convenience of the patrons, employees
20 and the public. So there's also health and safety
21 concerns.

22 And as I indicated previously, the
23 Public Utilities Commission has shut down public
24 utilities in the past, especially water utilities, for
25 failing to comply with the Water Quality Control

1 Commission standard and essentially Clean Water Act.
2 So, enforcement by the Public Utilities Commission has
3 stepped into the environmental aspects of public
4 utilities. So, I think I will, you know, some of
5 these other statutes indicate they have a violation
6 procedure just like we do. They can issue penalties,
7 just like we do. So, I won't go into that any
8 further, other than just to reference that.

9 I am not saying that we don't have
10 jurisdiction, per se, over gas storage fields or
11 underground storage facilities. In fact, I would
12 probably indicate to you that, as a commission, you
13 have the right to interpret your enabling act. And if
14 you find languages in your enabling act that allows
15 you to extend your jurisdiction over gas storage
16 fields or underground storage facilities, then that's
17 likely sufficient for all purposes. But, in this
18 case, I would say the oil and gas commission cannot
19 regulate a public utility. The public utility already
20 is regulated by the Public Utilities Commission. And
21 it would be like the Public Utility Commission trying
22 to regulate oil and gas operations. Just as we stay
23 away from other aspects of other agencies that are
24 already regulated, like we wouldn't go in and regulate
25 flow lines that are occurring through a municipality.

1 That's a public utility job. So we normally stay away
2 from public utilities. They have their own
3 regulations, and they try and stay out of oil and gas
4 operations, where their jurisdiction isn't extended.

5 COMMISSIONER WILLIAMS: Do you see that
6 as a matter of economy or is that a matter of
7 preemption?

8 MS. COULTER: I wouldn't call it -- I
9 wouldn't say preemption, per se. I would say -- I
10 would look at preemption, levels of government, local
11 versus state, state versus federal. I would say it's
12 more of a primacy issue; that they have authority,
13 wholly, over public utilities, and they have it in
14 every aspect, and our statutory guidance does not say
15 that we have any specific authority over public
16 utilities; therefore, I would say it would be
17 controlling as far as jurisdiction.

18 COMMISSIONER WILLIAMS: Would you agree
19 that how these wells are reclaimed would be our
20 jurisdiction?

21 MS. COULTER: Not necessarily.

22 COMMISSIONER WILLIAMS: Are you saying
23 that would be public utilities --

24 MS. COULTER: They have jurisdiction
25 over equipment and facilities.

1 CHAIRMAN HEINLE: What I would like to
2 do, I would like to give Mr. Welborn an opportunity to
3 respond. And then, perhaps, what we could do is move
4 into a deliberations mode, see -- still allow us to
5 ask questions. I want to, you know, at least give
6 Mr. Welborn the opportunity, and Mr. Phillips, if you
7 choose, to respond to what the attorney general has
8 said, and then move into the deliberations mode. We
9 can start asking specific questions, maybe come to
10 resolution of the case. Is that all right?

11 COMMISSIONER MacMILLAN: I have specific
12 questions of the attorney general, and the comments
13 she just made. Whether you want to allow the
14 applicant in this particular case to question her
15 before I do, doesn't make any difference to me. I
16 want an opportunity to get clarification.

17 CHAIRMAN HEINLE: You bet. I will give
18 it to you. I would just like to narrow down the scope
19 of this thing, otherwise we're going back and forth a
20 lot, and extending the amount of time that we need to
21 spend on it. Mr. Welborn, do you have any --

22 MR. WELBORN: Concluding remarks?

23 CHAIRMAN HEINLE: That might be a good
24 way of putting it, yes.

25 MR. WELBORN: Just briefly. We have, of

1 course, disagree with the attorney general's position.
2 I did not realize it was that official it had gone up
3 channel. We are not asking you to regulate Public
4 Service Company as a public utility. We're asking you
5 to step in and hold a hearing to determine whether
6 your statute has been violated, or whether there's a
7 place for you to regulate this entity as the operator
8 of the wells, gas storage wells and oil and gas
9 operations. We feel it's within your jurisdiction to
10 do so.

11 We, of course, are not asking you to
12 regulate the Public Service Company as a public
13 utility. That is the responsibility of someone else.
14 I don't agree that the commission does not have the
15 authority to regulate the proper plugging and
16 abandonment of those wells. I don't agree that this
17 commission does not have the authority to regulate the
18 drilling of those wells. Indeed, it permits them.
19 This entity is acting as the operator of oil and gas
20 operations when it drills those wells and operates
21 them, and our further point is that you cannot
22 separate those wells logically from the cavern into
23 which they inject. There's communication among them.
24 This is a pressure issue. This is the commission to
25 hear that issue. Again, we're not asking you to

1 regulate Public Service Company as a public utility,
2 nor are we asking you to rescind the order entered in
3 1960, nor are we asking you to rescind the
4 condemnation authority of public service. That's not
5 at issue here. The issue is this entity, as operator
6 of these wells, and what the standard should be under
7 your statute.

8 CHAIRMAN HEINLE: Thank you.
9 Mr. Phillips, anything?

10 MR. PHILLIPS: I would simply say,
11 Public Service Company concurs with the opinion of the
12 attorney general.

13 CHAIRMAN HEINLE: All right. I'm going
14 to close the record, still allowing the commissioners
15 to ask questions of any of the parties that they wish.
16 I would like you to move into that direction of
17 deliberation mode, so, Commissioner MacMillan, I know
18 you had some questions of the assistant attorney
19 general. Why don't you go ahead and ask those.

20 COMMISSIONER MacMILLAN: Lori, you
21 obviously reviewed the statutory authority of the
22 Public Utilities Commission, and you had conversations
23 with those attorneys that represent the Public
24 Utilities Commission. Did you ever look into the
25 actual staff and organizational structure of the

1 Public Utilities Commission to determine if they have
2 sufficient staffing and technical expertise to look
3 into issues that relate to the integrity -- geologic
4 integrity of the reservoir, this storage reservoir?

5 MS. COULTER: I did not Logan, but I
6 would assume that that big cavern, cave, out there
7 would not be filled with gas if there was not public
8 utility expertise behind it. And I know there's, you
9 know, it's a public utility, it's a gas, natural gas
10 storage field. They're regulating it. I assume
11 there's expertise, but I did not go talk to staff.

12 COMMISSIONER MacMILLAN: I am not clear
13 why you would make that -- I am not clear why you
14 would make the assumption that because of -- there's a
15 big cavernous reservoir that's been used for gas
16 storage, that someone in Public Utilities Commission
17 is necessarily overseeing it.

18 MS. COULTER: Because it's a public
19 utility. That's why I would make that assumption.
20 They have an authority over public utilities, so, you
21 know, I can't add any facts to support that, other
22 than they conduct oversight over public utilities.

23 COMMISSIONER MacMILLAN: And, to me, one
24 of the critical questions of that oversight is, do
25 they have the technical staff capable of gathering and

1 assessing geologic and engineering data that would
2 support the basic assumptions that you're presuming
3 the Public Utilities Commission makes on a routine
4 basis.

5 MS. COULTER: I would have to assume so,
6 just as our staff supports our commission, that
7 there's a staff of experts that supports their
8 commission. And I would not say that staff would
9 necessarily be in a position where they are, say,
10 bringing forth evidence on behalf of Mr. Loesby or his
11 company. He is probably going to have to present his
12 own engineering evidence. But, I know that staff is
13 in existence to monitor public utility practices. I
14 assume, if they are monitoring it, that that expertise
15 is there, just as it is with our staff.

16 COMMISSIONER MacMILLAN: Did you ever
17 look at the organizational chart of the Public Utility
18 Commission?

19 MS. COULTER: No, I have not.

20 COMMISSIONER MacMILLAN: Okay.

21 MS. COULTER: My conversation with their
22 attorney, they would accept jurisdiction over this,
23 and it would be reviewed by the commission. That
24 was -- we didn't get into expertise of the staff.

25 CHAIRMAN HEINLE: Any other questions

1 from the commission? Commissioner Blackwell.

2 COMMISSIONER BLACKWELL: I have a
3 question in your handout at 34-64-107. You have got
4 some underlined language.

5 MS. COULTER: Pardon my underlining.

6 COMMISSIONER BLACKWELL: How did that
7 language -- and I will read the language.

8 MS. COULTER: Go ahead, probably, for
9 the record.

10 COMMISSIONER BLACKWELL: It's about
11 two-thirds of the way down. Says, the right of
12 condemnation granted by this article shall be without
13 prejudice to the rights of the owner of said land or
14 of other rights and interests therein to drill or bore
15 through the underground stratum or formations so
16 proposed in such a manner as to comply with orders,
17 rules and regulations of the commission issued for the
18 purpose of protecting underground storage strata or
19 formation against pollution or against the escape of
20 natural gas therefrom.

21 I am wondering, what's your opinion in
22 terms of how this language fits in with your opinion
23 that the OGCC is preempted from regulating this area
24 by the PUC?

25 MS. COULTER: The key point in this

1 language is for the purpose of protecting. What are
2 you protecting? Underground storage strata or
3 formation. And when you -- and you protect it from
4 pollution or entries of other gaseous substances, so,
5 to me, that language said oil and gas, you can protect
6 the field itself. It doesn't go to the extent of
7 saying I can protect the people outside of it.

8 COMMISSIONER BLACKWELL: Narrow -- is
9 there a difference between, you know, the statute
10 references the need to protect against pollution or
11 against the escape of natural gas therefrom. And you
12 are saying, perhaps, in contemplating protection of
13 the reservoir itself and integrity of the reservoir
14 for the purpose of utilizing gas stored in there and
15 the need to protect against escape of gas from the
16 reservoir -- there's a waste concept and a loss of
17 gas. Is there a difference in that, in your mind, in
18 that intent? In other words, if this contemplates
19 regulation by this commission, to protect the escape
20 or migration of gas for the purpose of preventing
21 waste, there's a real difference if we use this
22 authority to protect not only for waste, because waste
23 would be an issue and is an issue, if gas is escaping,
24 but if -- it would also be a related issue that the
25 wasted gas that is migrating is contaminating the

1 environment. Would there be a difference, I guess, if
2 we have -- my question is, if we have the authority to
3 regulate to prevent waste, is that materially
4 different than saying you have the authority -- you
5 don't have the authority to protect against external
6 impacts? I guess I don't -- my feeling is, if we have
7 the authority to prevent leakage to prohibit waste,
8 that we have the related authority to regulate to
9 prevent impacts on adjacent areas.

10 MS. COULTER: Uh-hum. You know, once
11 again, I think this is limited to that kind of
12 condemnation issue, also. I don't think you have --
13 the sentence starts out, the right of condemnation
14 granted shall be without prejudice to the owner; to
15 enter into that strata without somehow compromising
16 the integrity of the field itself. So, if we were
17 going to issue an order saying we permit -- we can
18 say -- for instance, this might be going on right now.
19 We can say you can only drill to this aquifer because
20 the, you know, if you go any further than that, you
21 are going to compromise the integrity of the field,
22 yeah, it's a waste concept, but I think that the
23 issuance of those type of orders are specific for, you
24 have the right of condemnation, when an application
25 comes before us. So I can't really say that -- I

1 don't think it extends so far as to include the
2 general nature of the preventing waste, our general
3 authority to do that.

4 COMMISSIONER BLACKWELL: You don't read
5 this language as waste prevention, but rather relating
6 back to the issue of condemnation?

7 MS. COULTER: Yes. The field itself.

8 CHAIRMAN HEINLE: Commissioner Matheson.

9 COMMISSIONER MATHESON: The question is
10 determining the suitability of the reservoir. Would
11 it be reasonable to expect part of our analysis of
12 that would mean that reservoir is environmentally
13 protected?

14 MS. COULTER: Yes. If it isn't, we
15 rescind our order, and they lose their right to
16 condemnation.

17 COMMISSIONER MATHESON: However, if we
18 never issue that order, then that place would never
19 become a storage facility?

20 MS. COULTER: That's true.

21 COMMISSIONER MATHESON: If -- another
22 question. If we're talking about gas that escapes a
23 gas production well into the environment. Do you
24 consider that gas to be E&P waste?

25 MR. GRIEBLING: My understanding is that

1 E&P wastes are produced incidental to production of
2 oil and gas.

3 COMMISSIONER MATHESON: How do we
4 classify --

5 MR. GRIEBLING: Storage gas?

6 COMMISSIONER MATHESON: -- hydrocarbon
7 contaminants, then, in the environment?

8 MR. GRIEBLING: Well, there's not a
9 water quality standard for that, or other lighter
10 constituents that enter the groundwater. There are
11 situations -- are a variety of ways to get methane in
12 groundwater.

13 COMMISSIONER MATHESON: I respect it's
14 kind of a tough question, but I guess what I am trying
15 to get at is, we look at the escape of hydrocarbons
16 from production wells and other production facilities,
17 and that's within our purview. Does that -- is that
18 storage gas RCRA material also?

19 MR. GRIEBLING: I think, based on the
20 discussion we had this morning, it wouldn't be, given
21 that you accept -- at the point of transportation --

22 COMMISSIONER MATHESON: That's what I
23 was wondering.

24 MR. GRIEBLING: All this gas has gone
25 through gathering and processing and it's been sold

1 and transported. And my understanding is it's come
2 into the Denver market, well down the transportation
3 pipe, and it is taken and reinjected in storage. I
4 don't believe I have -- I am not familiar with any
5 aspect of the definition of -- EPA definition of the
6 E&P waste that would apply that far down the pipe,
7 that far down the transportation.

8 COMMISSIONER MATHESON: Okay.

9 Ms. Coulter, I am still kind of uncomfortable with
10 your statements concerning we don't have any authority
11 over storage wells, whatnot. I mean, that's pretty
12 clear in our statute.

13 MS. COULTER: No. I didn't even address
14 that issue, Mike. My point is that I think PUC has
15 jurisdiction over Leyden as a public utility,
16 specifically. My other point, if you want to
17 interpret your enabling statute as saying gas storage
18 wells to include gas storage facilities or a field,
19 then I think you are within your rights to do that.
20 And I really haven't commented on that extension of
21 jurisdiction, other than you have right to do that,
22 but not against the public utility.

23 COMMISSIONER MATHESON: What's the
24 difference, though?

25 MS. COULTER: The difference is the

1 public utilities are regulated by their own
2 commission, and they have their own statutory,
3 regulatory authority; that is, the PUC is the agency
4 to enforce any actions against public utilities.

5 COMMISSIONER MATHESON: Are not all gas
6 storage wells -- gas storage facilities going to be
7 associated with public utilities?

8 MS. COULTER: Not that I know of. I
9 haven't heard that. I don't think so. Like Young
10 Storage Field. There's, I think, some
11 cross-jurisdiction with FERC issues, but --

12 COMMISSIONER MATHESON: Okay. Thanks.

13 CHAIRMAN HEINLE: Director Griebeling.

14 MR. GRIEBLING: Before you're too far
15 away from Commissioner Blackwell's question regarding
16 the language in 34-64-107, I just wanted to add one
17 more point there. We looked at this a lot as well,
18 when the question first came up, and, in addition, the
19 sentence that was discussed just recently, begins the
20 right of condemnation. And in addition to -- it
21 appears to be limited to the right of condemnation.
22 It also appears to be contemplating the well being
23 drilled through the storage field to a deeper horizon
24 in search of oil and gas, and that's a specific
25 location. The gas storage is in the lower Laramie

1 Formation and mined out coal cavern, and there are
2 other cretaceous formations that could promote -- be
3 potential reservoirs for oil and gas. It is possible
4 that someone would want to drill an exploratory test
5 through that storage field in search of that. It's
6 our understanding that if we're to receive a drilling
7 permit application, that any condemnation that had
8 occurred previously wouldn't go to the point of
9 precluding us from applying permit conditions,
10 whatever, to protect the storage field. That we -- if
11 we were to approve a permit to drill -- exploratory
12 test, we ought to make sure the well doesn't
13 contaminate the storage field, doesn't allow any gas
14 to escape.

15 MS. COULTER: Thanks, Rich.

16 CHAIRMAN HEINLE: Any other questions or
17 comments from the commissioners? Commissioner
18 Johnson.

19 COMMISSIONER JOHNSON: I am not an
20 attorney, nor do I profess to be one. In my
21 interpretation of this same paragraph, as potential
22 property rights, and I think, from where the assistant
23 attorney general is coming from, is, if it has
24 anything at all belonging to the public utility, it's
25 a function of the public utility commission. In



1 paragraph -- the sentence after, the sentence 444
2 describes, this is the property right of that utility;
3 and therefore, I would concur with what she is saying.
4 The sentence prior to the one says in no event -- that
5 whole sentence states that it is that public utility's
6 property right. The one before that -- the sentence
7 before that again cites that. And the very last
8 sentence of the paragraph, it shall be paid by public
9 utilities, and those things indicate ownership
10 thereof; and, therefore, it would be under their
11 jurisdiction. This is purely a layman's
12 interpretation of that very last sentence.

13 CHAIRMAN HEINLE: Yeah. I think what I
14 would like to do right now, we sort of fleshed out
15 some of the questions here, and I think it would
16 probably be helpful to just go around the
17 commissioners and get a sense, perhaps, where they
18 were on this issue, perhaps, to see whether we have
19 enough consensus for a motion. So, I think I am going
20 to start with Commissioner Blackwell.

21 COMMISSIONER BLACKWELL: Well, I think I
22 understand the arguments that have been presented.
23 And to be honest, I still have some concerns. I
24 understand the language in the statute with reference
25 to the PUC authority, but, I had a question whether or

1 not this legislative language really contemplated this
2 type of unique storage facility in granting its
3 apparent exclusive jurisdiction to the PUC. And we
4 have some indications that the PUC, in other statutory
5 provisions, has turned to this commission and relied
6 on this commission, based on its expertise in geology
7 and geophysics in the management of oil and gas; that
8 the PUC has, in fact, turned to this commission and
9 given us a certain role, and it's done so in the
10 condemnation proceeding. And at least this other
11 statutory provision, 34-64-107, alludes to some other
12 authority where this commission would be called upon
13 to make a technical determination, so, from my
14 perspective, right now, it's not that cut and dry to
15 me.

16 I can certainly understand the arguments
17 that have been made with regard to the statutory
18 construction, and, in our definition of oil and gas
19 operations, it's true that gas storage well is
20 specifically listed and gas storage reservoir is not
21 specifically listed, but I am not convinced, at this
22 point, that the failure to specifically reference that
23 was a conscious decision on the part of legislature to
24 cut this commission out of this area. And, in fact,
25 our authority has been broadened very recently and

1 we're now -- we now have a very different scope, and
2 we're charged with new responsibilities and protection
3 of the environment, and we clearly have the technical
4 expertise to evaluate these sorts of issues.

5 So, where I am at now is that I am not
6 convinced that the pat, simplistic, cut and dry, you
7 don't have the authority because it doesn't say so, in
8 the definition, is accurate or was, in fact,
9 contemplated by the legislature. So, I would like to
10 have more information and look at this issue some more
11 before we make a determination. I think there may be
12 some areas with regard to this facility and the
13 impacts on management, the operation of these wells,
14 that we may have a role to play. So I am concerned
15 that we, you know, make a quick snap judgment we don't
16 have any role in this area.

17 CHAIRMAN HEINLE: Commissioner Matheson.

18 COMMISSIONER MATHESON: I am not
19 comfortable, at this point, with the PUC necessarily
20 having the expertise to deal with contaminant issues
21 such as this. I haven't heard, really, anything
22 compelling, that compels me that they are so equipped
23 versus what we do. Nevertheless, the public utility
24 arguments, those are important ones. Frankly, this is
25 a very mixed type of bag at this point, and I really

1 haven't decided yet. So, I would like to hear from a
2 couple of other people first.

3 CHAIRMAN HEINLE: That's fair.
4 Commissioner Johnson.

5 COMMISSIONER JOHNSON: Well, as I said,
6 just a few minutes ago, it's clear, in my mind, that
7 the Public Utility Commission has jurisdiction over
8 us, but I think it's, if you are prudent on their
9 behalf, much like our MOUs with Water Quality Control
10 Commission over us -- because of the technical
11 expertise of the staff, that this should be an area
12 that we should be handling on their behalf. You
13 start -- interesting thing. It's a legal type of
14 situation. But, looking at it the way I am reading it
15 here, that's how's it would be dealt with.

16 CHAIRMAN HEINLE: Commissioner Williams.
17 At least I didn't ask you to go first.

18 COMMISSIONER WILLIAMS: Well, it's
19 interesting. How's that? I am not persuaded by the
20 argument that said, because we don't list reservoir in
21 the oil and gas operations litany, that we don't have
22 jurisdiction over it, because if this were an
23 injection well and we were injecting -- it was being
24 injected at too high a pressure, it was causing
25 problems on adjacent lands, we would be the first ones

1 there saying this is appropriate for our regulations,
2 so, that particular piece of the argument I don't --
3 is not persuasive to me as far as interpretation of
4 our statute. We then end up -- I also believe that
5 PUC has concurrent jurisdiction. I think their
6 statute clearly contemplates storage. It clearly
7 contemplates safety and health style issues. And the
8 argument that says that it doesn't actually use the
9 word "environment," is not persuasive to me for the
10 same reason that the argument that it doesn't
11 specifically say "reservoir" is persuasive to me.

12 So, what we end up with, is, in my
13 opinion, PUC having jurisdiction, this commission
14 having jurisdiction, then the question becomes one of
15 appropriateness and accommodating and even primacy, as
16 the assistant attorney general phrased it, and while I
17 frame the issue the same way, I think I have a little
18 different lean on it; that is, when it comes to issues
19 where our technical staff is particularly adapt and
20 capable, then, you know, if the PUC is out there
21 telling people how to P&A wells, I think that's
22 inappropriate. If we were out there doing
23 rate-making, I think that's inappropriate too. Even
24 if we could claim jurisdiction over that, I think that
25 would be the proper place. Now, what we're dealing

1 with is issues of operational pressure. We're talking
2 about subsurface migration. We're talking about
3 issues that this commission, unfortunately, has had to
4 deal with in other contexts. And it does seem to me
5 that, certainly, this is something we can hear, if we
6 want to hear it. I think there are good arguments
7 about why we should hear it. I am not persuaded that
8 the PUC could do any better job than we could do. I
9 am not even persuaded, at this point, it's more
10 appropriate that they take a first crack at it. It is
11 such a setup of one unique circumstance after another,
12 that no matter what we do, I doubt it will be of any
13 precedential value to anybody at any time, ever again.

14 COMMISSIONER MacMILLAN: Amen.

15 COMMISSIONER WILLIAMS: Thank you. But,
16 you know, I do think this is something we want to
17 hear, that we're -- not only do we have the
18 jurisdiction to hear, but I think our staff is willing
19 to do it.

20 CHAIRMAN HEINLE: Commissioner
21 MacMillan.

22 COMMISSIONER MacMILLAN: I'll cut to the
23 chase and then come back and try and underscore one
24 significant point. I would reserve judgment on
25 whether we have jurisdiction on this matter or not,

1 until I heard the complete cases of both the applicant
2 and the protestant in this particular case, and, as
3 suggested by the attorney for the applicant, his third
4 choice or his third recommendation to us, and to me,
5 that are persuasive, particularly with the continuing
6 questions of jurisdiction, and I think that's what you
7 wanted to hear for the polling of the commissioners.

8 The other point I want to strongly
9 underscore is that, the case made by the protestant in
10 this case, to segregate our ability to deal with the
11 reservoir as opposed to the well, to me, it's totally
12 unfounded. Everything that we do when we look at
13 spacing hearings, almost everything that we do
14 involving our review of subsurface data, links the
15 wellbore with the reservoir. And I think we more
16 clearly understand what that relationship is. We
17 can't access the reservoir unless we have a wellbore.
18 Clearly, our responsibility is to look after the
19 integrity of the wellbore, and all of the production
20 equipment associated with the wellbore. But, we in my
21 mind, very, very clearly have jurisdiction over the
22 reservoir.

23 The question becomes, in the statutes,
24 whether it's just jurisdiction on exploration and
25 production from a particular reservoir as opposed to

1 putting gases back into a reservoir. And the
2 questions that I asked of the assistant attorney
3 general on the scope and make up the Public Utilities
4 Commission and so on, I think, have been answered by
5 other commissioners, and their responses, but, I
6 wanted it to be very, very clear that I personally
7 believe that the arguments that define what the Public
8 Utilities Commission oversight are on the reservoir to
9 me just don't play. Just don't play. We clearly have
10 that responsibility here. And we can look at a number
11 of specific actions that we take that specifically
12 deal with the reservoir, and as we know, our ability,
13 then, to require of an applicant, for any particular
14 case that they have, their proper definition of the
15 reservoir, the aerial extent, the thickness, the
16 characteristics, and the ability to produce
17 hydrocarbons. So, that's never going to fly with me,
18 because of the decades and decades of work that this
19 commission has done specifically working on that.

20 CHAIRMAN HEINLE: I guess where I am at
21 on the issue, I agree with Commissioner Williams and
22 Commissioner MacMillan. There does seem to be some
23 overlap, but I think under 34-60-103(6.5), it gives
24 this commission some clear areas of jurisdiction in
25 terms of the wells themselves, and the production

1 operations related to such wells, which means the
2 rate, pressures at which you inject into that well
3 that not only impact the well itself, the wellbore
4 around that well, but the reservoir itself. And, in
5 that context, I agree with Commissioner MacMillan that
6 it's difficult to separate the reservoir from the well
7 because the very production operations that you enter
8 into can have an impact not only on the wellbore but
9 the reservoir itself.

10 So, I guess where I am at on it is that
11 I think we should proceed with the hearing on the
12 matter, in somewhat of this narrow focus, and hear the
13 factual issues, perhaps, along the lines that
14 Mr. Welborn had indicated earlier, the third option.

15 COMMISSIONER WILLIAMS: In that regard,
16 since I was informed of the private litigation
17 involving this, I think it would be, if we go forward,
18 it would be very important that what we deal with and
19 what we focus on, exclusively, is those things that
20 constitute -- allegedly constitute violation of our
21 statute. And I think we're here to construe and
22 enforce our statute, not anyone else's, not the PUC's
23 even. I think that's important on a go-forward basis,
24 particularly. What I don't want is this commission
25 used for any private litigation purposes. That would

1 distress me greatly.

2 CHAIRMAN HEINLE: Any other comments
3 from the commissioners? Commissioner Matheson.

4 COMMISSIONER MATHESON: It's still a
5 tangled mess, to a degree. I guess what I am going to
6 come back to, 34-64-104, where it is our role to
7 determine suitability of that reservoir. PUC is
8 looking at us to perform a technical evaluation. If
9 environmental suitability is part of that, we have now
10 environmental problems, perhaps, with that reservoir,
11 I think it comes back to us again. And that the wells
12 and reservoir are intimate, so I think we ought to
13 hear it.

14 CHAIRMAN HEINLE: Any other comments
15 from any of the commissioners? Director Griebeling.

16 MR. GRIEBLING: Just to clarify, the
17 direction you are proceeding is to hear the issue of
18 whether you have jurisdiction over Leyden gas storage
19 or to hear questions as to the validity of the
20 complaints?

21 CHAIRMAN HEINLE: I think the latter.

22 COMMISSIONER MATHESON: We approve the
23 application, essentially, direct you folks to conduct
24 an investigation, then we'll go from there.

25 COMMISSIONER MacMILLAN: Wait a minute,

1 wait a minute.

2 COMMISSIONER MATHESON: Isn't that what
3 the application says?

4 MS. COULTER: Notice of Violation track,
5 that's correct.

6 COMMISSIONER WILLIAMS: I think we have
7 a procedural problem, obviously, because if we
8 determine the commission has jurisdiction to, in fact,
9 determine whether our statute has been violated, then
10 we have an -- I mean, the way these things normally
11 go, is, you know, generally, private complaint or by
12 staff's own initiative, then it goes through staff.
13 If we're not going to do it that way, then I think we
14 have to discuss how we're going to do it and find and
15 identify the basis for doing it that way.

16 MS. COULTER: If we can do it that --

17 COMMISSIONER WILLIAMS: If we can do it.

18 CHAIRMAN HEINLE: Why would we want to
19 take on a procedure that's different than how we
20 normally would handle the situation, whereas have the
21 staff investigate it, issue a Notice of Alleged
22 Violation?

23 COMMISSIONER WILLIAMS: Or not. Keep in
24 mind that's achievable too.

25 CHAIRMAN HEINLE: And then it's --

1 COMMISSIONER WILLIAMS: Or not.

2 CHAIRMAN HEINLE: Then Mr. Welborn's
3 client could always contest the lack of issuance of an
4 NOAV, if he chose to do so.

5 COMMISSIONER WILLIAMS: Public Service
6 could.

7 CHAIRMAN HEINLE: Right, or conversely.
8 So, it seems to me that process is in place there for
9 a reason and perhaps we should follow that process
10 before we take the next step, and in doing any
11 scheduling for hearing because, I mean, the groundwork
12 that's been laid, we can spend another, who knows how
13 long, discussing what other alternative we want to
14 take, but it seems to me that procedure is in place.
15 Give staff the opportunity to review all of the facts,
16 and it would be a good logical way to go forward.
17 Commissioner Matheson.

18 COMMISSIONER MATHESON: I think the
19 application is pretty clear on that. I think we
20 should follow our procedures and not move into any
21 type of an evidentiary hearing right now. Just deal
22 with the jurisdiction.

23 CHAIRMAN HEINLE: So, we probably have
24 two issues at hand here. I guess, we're at, maybe,
25 the point of some motions. Perhaps, first, would be a

1 motion along the lines of the jurisdictional issue and
2 then the second motion along the lines of directing
3 staff to --

4 MS. COULTER: I don't think you need a
5 motion.

6 CHAIRMAN HEINLE: We don't need to do
7 that. Just a motion on the jurisdictional issue.

8 COMMISSIONER WILLIAMS: If I could
9 clarify here, I am sorry to slow things down, but,
10 normally, if this were something that staff perceived
11 as being clearly right up their alley, the next step
12 in response to this letter would have been an
13 investigation, correct?

14 MS. COULTER: Yes.

15 COMMISSIONER WILLIAMS: The main reason
16 it's here is because the question about whether, in
17 fact, it is our up our alley, if you will. So, what
18 we're -- if we determine that, in fact, the commission
19 has the jurisdiction, then we're all understanding
20 that step would be for the normal procedures and
21 response to the complaint.

22 CHAIRMAN HEINLE: Yes. I think there's
23 lots of head nodding going on among commissioners. I
24 think we are in agreement with that.

25 COMMISSIONER WILLIAMS: Thank you,

1 Mr. Chairman.

2 CHAIRMAN HEINLE: Having said that,
3 would you care to propose a motion?

4 COMMISSIONER WILLIAMS: I move that
5 we -- is it a motion? I move that we determine -- so
6 instruct the director that he has jurisdiction to
7 investigate this matter.

8 COMMISSIONER MATHESON: Second.

9 CHAIRMAN HEINLE: Motion has been made
10 and seconded. Any discussion of the motion? The
11 only -- I have got a question that deals with the --
12 how the item's been docketed for hearing today. Does
13 that take care of how the application has been made?

14 COMMISSIONER WILLIAMS: We should
15 probably at least refer to the docket numbers.

16 CHAIRMAN HEINLE: It wasn't so much the
17 numbers. I was just concerned whether that addresses
18 the application.

19 COMMISSIONER WILLIAMS: Yes. We had a
20 very broad statement in our agenda and in the notice.
21 We were asked to narrow what we determine. That I am
22 not -- I am not making a motion that we have broad
23 jurisdiction over storage facilities. I am making a
24 motion that the director -- that we determine the
25 director has jurisdiction to investigate this

1 complaint, based on information in the complaint and
2 statements made here.

3 CHAIRMAN HEINLE: To determine what
4 rules, if any --

5 COMMISSIONER WILLIAMS: To determine
6 what rules, if any, of the commission, have been
7 violated.

8 MR. GRIEBLING: The application even
9 goes on to cite Rule 522 as the basis for
10 investigation.

11 COMMISSIONER WILLIAMS: I would -- it is
12 your decision if you determine other rules have been
13 violated or not.

14 MR. GRIEBLING: The procedure in 522, I
15 should say.

16 COMMISSIONER WILLIAMS: Procedure, I
17 should say, yes, right.

18 CHAIRMAN HEINLE: Trisha, are you clear
19 on the motion?

20 MS. BEAVER: Yes.

21 CHAIRMAN HEINLE: Is there any further
22 discussion of the motion?

23 COMMISSIONER JOHNSON: My own -- trying
24 to get a perspective back through -- we have
25 jurisdiction to instruct staff to investigate the

1 request rather than we have jurisdiction in this whole
2 gamut of situation, this whole gamut of underground
3 storage reservoir? Is that where you are directing --

4 COMMISSIONER WILLIAMS: I wasn't
5 purporting to go beyond the facts of this case, so my
6 motion was limited to jurisdiction over this
7 complaint, and not -- I wasn't purporting to declare
8 anything more broadly than that.

9 CHAIRMAN HEINLE: Any other discussion?

10 COMMISSIONER MATHESON: Second is still
11 fine.

12 (Whereupon the vote was called.)

13 CHAIRMAN HEINLE: Motion carries. Let's
14 take a --

15 MR. WELBORN: Commissioners, could I --
16 one quick question. Does the term "rules" in the
17 motion include the statute?

18 COMMISSIONER WILLIAMS: Oh, yes, that's
19 a fine clarification. I realize that. Yes, a
20 violation of our rules and our statutes.

21 MR. GRIEBLING: Reference to Rule 522
22 procedure.

23 COMMISSIONER WILLIAMS: As the
24 procedure.

25 MS. BEAVER: All of that.

1 COMMISSIONER WILLIAMS: 522 references
2 both the statute and the rules.

3 MR. WELBORN: Okay.

4 CHAIRMAN HEINLE: Let's take a
5 five-minute break, which will probably be a ten-minute
6 break, the way we normally operate, and pick up the
7 next matter.

8 (Whereupon this portion of the
9 proceedings were concluded.)

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1 CERTIFICATE

2
3 STATE OF COLORADO) ss
4 CITY AND COUNTY OF DENVER)
5

6 I, Harriet S. Weisenthal, Certified
7 Shorthand Reporter and Notary Public for the
8 City and County of Denver, State of Colorado,
9 do hereby certify that the foregoing proceedings
10 were taken in shorthand by me at 1120 Lincoln
11 Street, Denver, Colorado on the 15th day of
12 October, 1996, and was reduced to computer-aided
13 typewritten form under my supervision;

14 That the foregoing is a true
15 transcript of the proceedings had; that I am
16 neither attorney nor counsel, nor in any way
17 connected with any attorney or counsel for any
18 of the parties to said action or otherwise
19 interested in the event;

20 IN WITNESS WHEREOF, I have hereunto
21 set my hand and affixed my notarial seal
22 this 17th day of November, 1996.
23 My Commission expires October 15,
24 1997.
25

H. Weisenthal

Harriet S. Weisenthal

