

Indiana Election Commission Minutes January 17, 2006

Members Present: Thomas E. Wheeler, II, Chairman of the Indiana Election Commission (the Commission); Jamie Sweeney, Proxy for S. Anthony Long, Vice Chairman of the Commission; Thomas E. John, member of the Commission; Jennifer Wagner, Proxy for Butch Morgan, member of the Commission.

Members Absent: S. Anthony Long; Butch Morgan

Staff Attending: J. Bradley King, Co-Director, Indiana Election Division of the Office of the Indiana Secretary of State (Election Division); Kristi Robertson, Co-Director of the Election Division; Dale Simmons, Co-General Counsel of the Election Division; Cody Kendall, Co-General Counsel of the Election Division; Michelle Brzycki; Lori Clark.

Also Attending: Bill Benning, Voting Technologies International; The Honorable Sharon Christner, Kosciusko County Circuit Court Clerk; Trent Deckard, Indiana House Democratic Caucus; The Honorable Jeff Lucas, Bartholomew County Surveyor; Shirley McCoy, Board of Voter Registration Member, Howard County; Stephanie Middendorf, Bartholomew County Voter Registration; Linda Moeller, Floyd County Circuit Court Clerk's office; The Honorable Diana Penick, Steuben County Circuit Court Clerk; Carol Shallenberger, Board of Voter Registration Member, Howard County; The Honorable Ronald L. Smith, Steuben County Commissioner; The Honorable Norma Trimpe, Bartholomew County Circuit Court Clerk; Maureen Bard, Legislative Services Agency, Office of Census Data (Census Data); Mark Stratton, Census Data.

1. Call to Order

The Chair called the January 17, 2006 meeting of the Commission to order at 1:09 p.m. in the Indiana Government Center South Conference Center, Room 20, at 402 West Washington Street Room E-204, Indianapolis, Indiana.

The Chair noted that proper notice of the meeting had been given, as required by state law, and that Ms. Sweeney was present as the designated proxy for Mr. Long, and Ms. Wagner was present as the designated proxy for Mr. Morgan. A copy of the meeting notice, agenda, and designations of proxy are incorporated by reference in these minutes. *[Copies of all documents incorporated by reference are available for public inspection and copying at the Election Division Office.]*

2. Approval of Commission Minutes

The Chair stated that copies of the minutes for the Commission meetings held on September 22, 2005, October 11, 2005, and December 13, 2005 had been distributed to Commission members for review.

Mr. John noted that line 5, under “Call to Order”, on page 1 of the September 22, 2005 minutes should be corrected to read “Mr. Morgan” instead of “Mr. Long”.

The Chair noted that the September 22, 2005 minutes concerning campaign finance enforcement should be amended to reflect the fact that the Chair had asked the representative of Representative Dumezich’s committee if he really meant to blame his mother-in-law for this violation, and that he had responded in the affirmative.

The Commission consented to these corrections. Mr. John moved, seconded by Ms. Sweeney, that the September 22, 2005 minutes be approved as corrected, and that the October 13, 2005 and December 13, 2005 minutes be approved as submitted. There being no further discussion, the Chair called the question, and declared that with four members voting “aye” (Mr. John, Ms. Sweeney, Ms. Wagner, and Mr. Wheeler), and no Commission member voting “no,” the motion was adopted.

3. Order 2006-01 Approving Forms

The Chair recognized Ms. Robertson, who stated that copies of Order 2006-01, a Commission order to approve revised absentee ballot forms, had been provided to Commission members. A copy of the Order is incorporated by reference.

Ms. Robertson stated that SECTION 1 of Order 2006-01 approved revisions to the ABS-1 and ABS-2 forms, which were absentee ballot application forms printed in Spanish that were identical to the English language versions previously approved by the Commission; the ABS-5 statement concerning lost, destroyed, or spoiled absentee ballots; and the ABS-18 notice to certain absentee voters to supply additional documentation for voter registration purposes. In response to a question from the Chair, Ms. Robertson noted that the current version of ABS-18 form contained a reference to the 2004 elections that should have been updated to refer to the 2006 elections.

Ms. Robertson stated that SECTION 2 of Order 2006-01 addressed an issue that had been brought to her attention this morning concerning the CFA-4 campaign finance report of receipts and expenditures form. She indicated that there are previous versions of the CFA-4 form which are not substantively different from the currently prescribed version of the form, but which have been provided to committees by campaign finance software vendors, and that these versions of the CFA-4 form are being filed with county election boards and the Election Division. She noted that although some instructions on the reverse of the forms had been changed in recent years, there were no substantive changes to the text on the front of the forms. Ms. Robertson stated that typically the Commission’s form approval order will grandfather the use of the two most recent previous versions of this form, but that some of the versions of this form being filed dated back to 1997. She said that the Election Division found that some committees filing on line with the Election Division were using a version of the form which had a form number dating to 1997, but the form was otherwise in compliance with the currently approved version of the CFA-4.

Ms. Robertson stated that SECTION 2 of Order 2006-01 would grandfather the use of versions of the CFA-4 form on the Election Division's software that contained the August 1997 revision date, but which otherwise contain all of the substantive changes in the form made since that date. She said that this concern had arisen since the Marion County Election Board had rejected filings presented on these forms which contained all of the required information, but had this incorrect form revision number. Ms. Robertson said that the Order would permit the filing of these forms during 2006 since the incorrect revision date was on software that the Election Division had previously found to be acceptable.

The Chair said that he understood that the CFA-4 form number appearing on the Election Division's website was incorrect. The Chair recognized Mr. King, who stated that shortly before this meeting started, he had spoken with Representative Hinkle about this problem. Mr. King said that Representative Hinkle had indicated that the correct version of the form was on the website page that he had looked at, as of today, but that the version downloaded by his secretary from the website on January 8 was not the current version of the form. Mr. King stated that he had been informed that one vendor, RaceTrax, was providing customers with a version of this campaign finance form that had been superseded by a version of the CFA-4 form that had been provided by the Election Division to the vendor some time ago. Mr. King added that he understood that the software provided by the Election Division currently contained an earlier incorrect revision number. He said that based on his conversation with Representative Hinkle, he understood that the only ongoing issue was with regarding to the Election Division software discussed by Ms. Robertson.

In response to a question from the Chair, Ms. Robertson said that the effect of this provision of the Order would be approve forms that a committee had downloaded from the Election Division's website, forms that were included in software provided by the Election Division, or forms provided by a software vendor, so long as these forms contained all of the information required by the campaign finance statutes.

The Chair responded that since this document was available in Word format, it would be possible for a committee to download the form and simply change the form number, but that he had been contacted by a Marion County committee to ask if changing the form number in this manner would violate state law. Ms. Robertson added that at its December 2004 meeting, the Commission had approved an order that grandfathered the use of any of the forms which had been on the website during the past two years. She said that there was nothing substantively wrong with these forms, it was just that the forms revision number needed to be changed.

The Chair recognized Mr. John, who asked how long this problem had been going on, and whether the Commission should be concerned about grandfathering *nunc pro tunc* any previous filings. Ms. Robertson responded that the Election Division has had the software available since 1997, and that this probably explained the 1997 revision date. She added that in the future, it might be wise to remove the revision date, and to state that this is the substantive version of the form that must be accepted. Ms. Robertson said that

if a committee filed a version of this form that had never been approved by the Commission, and did not substantively comply with the requirements, this could be a “defective” filing under the campaign finance laws. She stated that in this case, the Election Division would accept the filing, but would work with the committee to advise them that the committee must file a form containing the correct information since that information was needed for data entry by the Election Division.

Mr. John noted that the duration of any “grandfathering” should extend to cover those who could be subject to an enforcement penalty. The Chair recognized Mr. King, who stated that under the statute of limitations, an administrative campaign finance enforcement proceeding would have to be brought within two years of the violation occurring. He added that in the recent past, the Commission had approved forms that did not contain any form number with the understanding that the number would be added following processing and approval by Forms Management, and that therefore the form number itself had not been seen as a substantive part of the form and required for Commission action.

In response to a question from the Chair, Ms. Robertson stated that the current form and revision number for the CFA-4 was Form 4606, revision number 13, dated November 2005.

The Chair recognized Mr. John, who proposed a friendly amendment to the Commission order. Mr. John moved, seconded by Ms. Sweeney, Order 2006-01 be approved, with the following amendment: that SECTION 2 of Order 2006-01 be amended to delete the word “during”, and to insert the phrase “through the reporting period ending December 31, 2006”. There being no further discussion, the Chair called the question, and declared that with four members voting “aye” (Mr. John, Ms. Sims, Ms. Sweeney, and Mr. Wheeler), and no Commission member voting “no,” the motion was adopted.

In response to a question from Mr. John, Ms. Robertson stated that the Spanish versions of forms are prepared through the use of a translator who has entered into a quantity purchase agreement with the state to provide these translation services. Mr. John stated that since none of the Commission members present were Spanish-language speakers, that it might be desirable for the translator to provide a document to the Commission certifying that the translation was accurate. The Co-Directors agreed to do so.

The Chair recognized Ms. Robertson, who said that shortly before the Commission meeting, she had received a fax from the Marion County Democratic Party asking if the version of the Schedules that are part of the CFA-4 included in that fax would be acceptable for filing with the county election board. A copy of this document is incorporated by reference. Ms. Robertson stated that in the past, the Commission had approved form variations developed by counties (and perhaps by committees) to use.

Ms. Robertson said that these Schedules contained all of the information set forth on the Commission’s form, but was in a somewhat different format. She noted that this format was similar to the format used in the Schedules made available through the Election

Division's software, and that the committee was seeking approval of this format to comply with the requirement to file this report tomorrow with the county election board

The Chair recognized Mr. King, who stated that he had only a brief opportunity to review this form, but would have a concern about the Commission approving a form only for filing by a specific committee, and that if the format is approved, the form should be available on a county-by-county basis in conformity with past Commission practice. He added that in his opinion, any approval of the form should be limited to the Schedules attached to the CFA-4 form.

Ms. Robertson responded that the CFA-4 summary sheet (and other CFA forms, such as the CFA-11) that would be used by the committee would be in the same format as the current version approved by the Commission. Mr. King noted that in the past, the Commission had approved the use of variations of forms following the request of a county election board or circuit court clerk, and not at the request of a filer. He added that he did not want to be understood as advocating that the Commission approve or reject this request, but simply to note that it was coming from a different source than in past Commission proceedings. Mr. King stated that he had not received any communications from any member of the Marion County Election Board, so he could not speak to that body's view of this request.

Ms. Robertson responded that since the Commission was the only body that can approve state forms, this committee had brought this matter to the Commission's attention. She thought that it would make sense for a committee or software vendor to come to the Commission since these forms would be used by the committee or vendor, whereas the counties in the past had come before the Commission to seek approval for forms that the county would be using. She added that in the past, the Election Division had approved the use of software versions for campaign finance filings.

The Chair stated that shortly before the Commission meeting, he had received word from Mr. Eicholtz, a member of the Marion County Election Board, that the Board had met earlier today, and discussed similar concerns regarding committees presenting this version of the CFA-4 form for filing.

The Chair added that he was concerned that this matter was being presented to the Commission after receipt of a fax transmitted at about 11:30 a.m. He stated that he was not trying to cause difficulties for the chair or vice-chair of the Marion County Democratic Party, but that the Commission was being asked to approve an alternate form when the campaign finance filing deadline is tomorrow at noon. The Chair added that the committee must have known that it had this software for a considerable period of time.

The Chair recognized Ms. Robertson, who stated that the problem regarding the form version number had arisen this morning when the Marion County Election Board began rejecting CFA-4 filings presented by candidates using RaceTrax or other software programs that indicated the form was not the current version approved by the Commission. In response to a question from the Chair, Ms. Robertson stated that the

Marion County Election Board had been turning away candidates who sought to file using the RaceTrax version of the CFA-4 form because this form indicated that it was a previous version of the form. She added that the Marion County Democratic Party was seeking Commission approval to file the version of the CFA-4 form provided as part of this fax, and which has been accepted by the Election Division and the counties for several previous years.

Ms. Robertson stated that there are several versions of campaign finance software available from different vendors for committees to perform data entry, and that there was no requirement that this software be certified by the state. She noted that although the Summary Sheet is fairly easy to complete, the software is being used to fill out the attached Schedules. She said that for the last several years, a vendor would ordinarily submit a form such as the one included in the fax for Election Division staff to review and to indicate if the form would be acceptable if the form includes all of the information required by state statute.

Ms. Robertson added that now committees are beginning to use the same software for county filings of the CFA-4 form, and that county officials are raising questions and rejecting filings because the document submitted does not resemble the CFA-4 format and contain the current CFA-4 form number.

The Chair recognized Mr. John, who asked the Co-Directors if the Election Division has ignored the fact that these types of Schedules have discrepancies from the format of the CFA-4 approved by the State, and that state law required Commission approval of the Schedules, and for committees to only file on the approved format of the CFA-4, or, in the alternative, the Commission has not approved the format of the Schedules and therefore has no need to address this issue.

Ms. Robertson responded that when a vendor is developing campaign finance filing software, the Election Division has asked the vendor to provide a sample of the format for the campaign finance staff at the Division to review to ensure that the format contains all of the information found on the Schedules is included in the form generated by this software. She stated that if this form contained all of the required information, the Election Division has accepted the filings using these forms although the Schedule may have a different appearance, and lack a state seal or state form number. Ms. Robertson stated that she could not address what had been accepted for county filings, but understood that in most cases, committees filled in the Schedules by handwriting or typing in the information. She said that this issue was being raised because more committees are using software to file reports at the county level.

The Chair stated his concern that this was an “end-run” around the county, since the county has the option to make this determination. He said that the County Election Board would look at these filings and make a determination whether the filing was compliant or not. Ms. Robertson responded that the County has the authority to determine whether a filing is a defective report, or not, but that only the Election Commission has the authority to approve a form. The Chair said that the request then was basically to preempt the county’s determination by having the Commission approve this form. Ms.

Robertson said that she did not believe that the Commission would be pre-empting the county from determining that a filing was defective, if for example, there was information missing from the report. She said that all the Commission would be doing would be stating that this version of the CFA-4 form would be acceptable for filing.

Ms. Robertson stated that the counties were having difficulties because the county officials are not sure what to do with regard to the format of the forms. She said that if the Election Division had missed something that was required by statute to be included on the CFA-4 form, then the county could find that the filing was defective. She added that the county was rejecting CFA-4 forms in formats that had been accepted at the state level. In response to a question from the Chair, Ms. Robertson stated that she believed the counties had the authority to reject a form that had not been approved by the Commission. In response to a question from the Chair, Ms. Robertson said that the Marion County Election Board does not have the authority to approve campaign finance forms.

The Chair asked if Ms. Robertson was not asking the Commission to approve the form included in the fax, but simply to determine that the form submitted to the Commission contains all of the information required by state statute to be included on the form.

The Chair recognized Mr. Kendall, who stated that the request was to approve the form, since only the Commission had the authority to do so, since this would not be within the authority of the County Election Board.

The Chair asked whether the County Election Board could examine this form and state whether this was in an acceptable format. He noted that the CFA-4 form could be filled out by hand, and asked as a result, whether a handwritten version of the form would be acceptable. He said that he did not see a distinction.

The Chair expressed his reluctance to intervene in a dispute between the Marion County Election Board and campaign finance filers, out of respect for the status of that body as an election board.

In response to a question from Mr. John, Ms. Robertson stated that she did not understand that the Marion County Election Board would reject the form in the format provided in the fax, and that Election Division staff was not recommending one course or another to the Commission. She noted that this fax had simply been received at the same time that the Election Division was receiving other inquiries concerning the software issues. She added that the only reason that this request was being brought forward was that since the Commission was already scheduled to meet this afternoon, that there would be an opportunity to consider this request.

The Chair recognized Mr. King, who stated that there were some statutory provisions that might be useful to bring to the Commission for its discussion of this issue. He noted that Indiana Code 3-5-4-8 specifies that, as a general rule, the Commission prescribes a uniform set of forms that must be used throughout Indiana, and that filings not made on

those forms are required to be rejected by the office at the state or county level which would otherwise receive the filings. Mr. King said that it was to the credit of the counties that more of them are checking to make certain that the version of the form that the county is receiving is the current and acceptable version of the form. He stated that, with regard to campaign finance forms, and the procedure referenced by Ms. Robertson for Election Division campaign finance staff review, he did not see this procedure specifically referenced in the campaign finance law, but that there is another statute to call to the Commission's attention. Mr. King noted that Indiana Code 3-9-5-5, which states that the treasurer of each committee shall file reports of receipts and expenditures on forms prescribed *or approved* by the Commission. He stated that this statute provided the legal basis for the Election Division's approval of the use of variations on forms in other areas. Mr. King added that, generally, the version of the form that is prescribed is the form that must be used; but that if the phrase "or approved" has meaning, then it indicates that there is some ability for the Commission to authorize the use of forms on an optional basis. He noted that in the past, some counties had asked the Commission to approve voter registration forms (such as acknowledgment notices) on an optional basis in that county only.

The Chair stated that he was not inclined to elevate form over substance in this matter. He stated that requiring committees to redo the CFA-4 form to fill in this information by hand on the Commission approved form would cause difficulties for candidates of his party as well. He repeated his reluctance to interfere with the discretion of the Marion County Election Board in this matter.

The Chair noted that the Co-Directors had only had a few minutes to review the form submitted as part of the fax. The Chair stated that if the Co-Directors and Co-General Counsel were certain that the format used in this fax is consistent with the Commission's previously approved forms, and contains the statutorily required information, that he did not wish for a committee to jump through hoops unnecessarily.

The Chair stated that it was important for campaign finance software vendors and for committees to understand that the Commission did not want this problem to occur again, and that these variations in format needed to be approved by either the Commission or the county election board, pursuant to IC 3-9-5-5.

Ms. Robertson responded that she had reviewed the form, and asked campaign finance staff to review this format to determine whether it contained all of the information required by state statute, and was advised by campaign finance staff that this format did contain all of the required information. Mr. King responded that he had reviewed the statute which sets forth the requirements for the treasurer's report (Indiana Code 3-9-5-14) and after his first glance, saw nothing on the format that was obviously missing. He noted that he had not had an opportunity to discuss this matter with the Republican campaign finance staff member to learn if in fact this was her opinion, and so could not rely on his staff for an evaluation of this question.

Mr. John moved the following be adopted as Order 2006-05: (1) that the Election Commission acknowledge that the form submitted via facsimile at 11:38 p.m. on January 16, 2006, from the Marion County Democratic Party appears to comply with the prescriptions of Indiana Code 3-9-5-14 and that, upon review, the Commission sees no problems with that form; that this acknowledgment is specifically limited to this form, and the January 2006 filing; that this acknowledgment expires January 18, 2006; and (2) that any vendor or committee which wishes to use a form that is not the form specifically authorized by this Commission, whether a Schedule or other form, present to the Commission for approval, at least 60 days prior to the filing date for which the vendor or committee contemplate the use of that form, complete descriptions and specimens of that form. The Chair suggested adding the phrase “pursuant to Indiana Code 3-9-5-5”. Mr. John consented to this amendment of his motion. Ms. Sweeney seconded the motion and consented to the amendment.

Mr. John stated that this was an interesting example of the impact of developing technology, and that from his perspective, that there will be no exceptions for vendors going forward, since vendors have a responsibility to have forms included in their software approved by the Commission. He added that with regard to candidates, and their committees, “let the buyer beware.” The Chair stated that he agreed, since the Commission’s enforcement authority is not against the campaign finance software vendors, but against filers using the forms. The Chair asked that the minutes reflect that candidate’s committees had better make sure that they are using approved software when a report is filed, or the filing will be rejected. He asked that this be communicated to the circuit court clerks as well so that there is consistency between how the Commission is operating and how the counties are operating.

There being no further discussion, the Chair called the question, and declared that with four members voting “aye” (Mr. John, Ms. Sweeney, Ms. Wagner, and Mr. Wheeler), and no Commission member voting “no,” the motion was adopted.

4. Proposed County Precinct Establishment Orders

The Chair recognized Mr. King, who said that Commission members may recall that in the past there have been lengthy Commission meetings to approve proposed county precinct establishment orders. He noted that under legislation enacted in 2005, the Co-Directors are authorized, following review by Election Division staff and Census Data staff for technical comments, to approve a county’s precinct establishment orders. He added that the county then publishes a legal notice giving any objector 10 days to file with the Election Division, and if no objection is filed at the end of that period, the precinct changes automatically take effect.

Mr. King noted that there were 28 counties which had requested changes in their precinct lines during 2005, and that 3 of those counties had withdrawn their requests, He said that a large number of the remaining 25 counties had been able to use the legal notice procedure so that they were not required to come before today’s Commission meeting.

Mr. King said that there were 6 counties listed on the Commission's agenda under this item: Bartholomew; Elkhart; Floyd; Howard; Kosciusko; Tippecanoe; and Steuben (which involves special circumstances). He stated that these counties, for reasons related to the publication schedule for legal notices in local newspapers and when their precinct changes were finalized, were not able to take advantage of the Co-Director approval procedure. He said that as a result, he understood that the counties are resubmitting this precinct orders pursuant to statute to the Commission for approval in the normal process.

The Chair recognized Ms. Robertson, who noted that three Orders concerning precincts had been prepared and provided to Commission members: 2006-2; 2006-3; and 2006-4. These Orders are incorporated by reference in these minutes. She explained that Order 2006-2 provided for the approval of each of the counties identified above except for Steuben County; that Order 2006-3 concerned a waiver petition filed by Steuben County; and Order 2006-4 approved certain precincts in Steuben County assuming that the waiver petition was also approved. She noted that Ms. Brzycki and Ms. Clark were present from the Election Division staff to answer any specific questions. The Chair recognized Mr. King, who stated that several county circuit court clerks were also present to address any questions that might arise concerning their county's precinct changes.

The Chair recognized Ms. Bard and Ms. Stratton from the Office of Census Data, and asked about the Office's role in this process. Mr. Stratton said that the Office had been created following legislative and congressional redistricting in 2001. He noted that the process requires counties to work on their proposed precinct boundary changes and to receive approval for these changes from the county executive to put forward the county's proposed precinct establishment orders. Mr. Stratton stated that these materials along with maps, census block listings, and other material are sent to the Election Division. He indicated that the Election Division then assigns individual staff members to work on specific county precinct change proposals, and that these individuals review the proposed changes and transmit them to the Office of Census Data. He said that the Office does a second review of those materials to see, for example, if proposed precinct lines would cross a congressional or state legislative district line, or split census blocks. He added that the Office also reviews the forms to make certain that the information on the forms is complete and accurate (such as assignment to a congressional district), since after an election, the Office looks to see if the voters of the precinct actually voted in the appropriate district.

Mr. Stratton said that the Office then compiles a list of technical comments, based on the Office's review, and then transmits those technical comments back to the Election Division staff member who had worked on that particular county's changes. He stated that this Election Division staff member then works with county officials to resolve these technical issues by having the county provide clarifying information or to correct errors in the documentation. He said that when this process was completed, he presumed that the Election Division staff advises the Co-Directors so that the Co-Directors arrive at their conclusions regarding the proposed change. Mr. Stratton indicated that the Office of Census Data has no formal or statutory power to approve the proposed precincts, but that instead the Office reviews the precincts and makes technical comments to the Election

Division staff. He added that in some cases, since one of the Office's statutory charges is to work with the counties as well as the Election Division, the Office will work with county officials to help the county draw their proposed precincts before the changes are ever submitted to the Election Division. In response to a question from the Chair, Mr. Stratton indicated that this process had been followed both with respect to the counties which had previously received Co-Director approval, and with the counties who had proposed changes for consideration by the Commission. In response to a further question from the Chair, Mr. Stratton said that the Office had worked with Election Division staff concerning the proposed changes submitted by Bartholomew County, Elkhart County, Floyd County, Howard County, Kosciusko County, and Tippecanoe County, and that the Office was comfortable with where the Commission was on these. The Chair asked if the Office had any additional comments regarding any of these proposed changes in these counties, and Mr. Stratton responded that the Office did not.

The Chair asked if any county representative present wished to speak to the Commission regarding their proposed changes. There was no response. The Chair recognized Mr. King, who stated that the Co-Directors were recommending Commission approval of the proposed changes submitted by Bartholomew County, Elkhart County, Floyd County, Howard County, Kosciusko County, and Tippecanoe County. Mr. John moved, seconded by Ms. Sweeney, that Order 2006-2 be approved as submitted. There being no further discussion, the Chair called the question, and declared that with four members voting "aye" (Mr. John, Ms. Sweeney, Ms. Wagner, and Mr. Wheeler), and no Commission member voting "no," the motion was adopted. The Chair thanked the county representatives for attending this meeting.

The Chair recognized Mr. King to discuss the matters pending before the Commission regarding Steuben County. Mr. King noted that Commission members had received a copy of a petition from Steuben County, filed with the Election Division on October 13, 2005, and which is incorporated by reference. Mr. King noted that the Steuben County Circuit Court Clerk was present to speak regarding this petition for waiver.

The Chair briefly recessed the meeting, and reconvened the meeting to consider the Steuben County waiver petition. The Chair recognized Ms. Penick, the Steuben County Circuit Court Clerk, and Mr. Smith, Steuben County Commissioner, to present this petition.

The Chair recognized Mr. Simmons, who stated that this petition was to waive the precinct size limitations set forth in Indiana Code 3-11.5-1-3. He noted that the basic size limitation set forth in that statute for counties who are establishing precincts was 1,200 active voters per precinct. He added that this limit was subject to some exceptions set forth in the law.

Mr. Simmons noted that if a county sought to establish precincts with boundaries that resulted in a number of voters that exceeded these limits, it was necessary under this statute for the county to come before the Commission to seek a waiver under the procedure set forth in Indiana Code 3-11.5-1-3.2. He said that Steuben County's petition

recognized that the 1,200 active voter limit applied to precincts, but was asking the Commission to waive that requirement for those precincts identified in the petition.

Mr. Simmons stated that under IC 3-11.5-1-3.2, the petition must identify the precincts that would be subject to the waiver; to state the number of voters that would be included in the precincts if the waiver was granted; and to set forth the county's reasons for requesting the waiver. He noted that this section 1 of the petition did set forth this information, although the petition referred to the number of "registered voters", rather than the number of "active voters." He added that section 2 of this petition sets forth the county's reasons for requesting the waiver. Mr. Simmons indicated that on the second page of the petition, that even though the precincts identified in the petition have stated the number of "registered voters", the petition indicates that only about 1/3 of these registered voters are actually voting. In response to a question from the Chair, Mr. Simmons indicated that this statistic probably reflected the fact that the County had not had an opportunity to clean up its voter roles for quite some time.

The Chair recognized Ms. Penick, who stated that the County does not have the money to perform this clean up of its voter roles. The Chair asked whether the County had the money to set up additional voting sites. Ms. Penick responded that the County had been required to set up additional voting sites, and to make certain that the sites were HAVA compliant. She added that the County does not have the money to ask for some additional voting equipment that the County would be entitled to receive under HAVA.

Ms. Penick said that she had asked the County Council for money several times to perform this voter registration clean up. She stated that she understood that under the law, a voter registration clean up notice would be required to be sent to all 20,000 voters of the county, which would cost at least \$20,000.

The Chair asked if the County had any census information stating the actual number of persons living in these areas. The Chair recognized Ms. Bard from the Office of Census Data, who stated that the Office does keep population records, but does not maintain information concerning the number of registered voters or active voters in a precinct. She stated that she had performed the Office's review of Steuben County's proposed precinct changes, but that the Office does not compare the number of persons at least 18 years of age in a particular area with the number of registered voters and active voters in that area.

Ms. Bard stated that it was interesting to note that many of these precincts consisted of entire townships, and that as a result, the county would not have had the opportunity to adjust one census block or another to assign the block to a different precinct to accommodate a shifting population. The Chair asked why this was significant. Ms. Bard responded that in urban areas with a greater population, a county can shift census blocks from one precinct to another without violating the state law prohibiting a precinct from crossing a township boundary, but that in a rural area, the county would have to halve the township to comply with this requirement.

The Chair recognized Ms. Simmons, who stated that under IC 3-11-1.5-3.2, the Commission may grant the waiver if the Commission finds that compliance with the voter population size requirements in IC 3-11-1.5-3 would result in “unnecessary expense and inconvenience for the county.”

The Chair recognized Mr. King, who noted that, regarding the precinct boundary change administrative approval process following legal notice discussed earlier, Steuben County had published legal notice for all of the county’s precincts except those precincts identified in the waiver petition, and that the changes for these other precincts had taken effect. He stated that as a result, the only concern he wished to bring to the Commission’s attention was that if the Commission were not to grant this waiver petition, whether any overlap would result between the precincts which were previously approved through the legal notice process, and the boundaries for the precincts whose approval was currently under consideration by the Commission, and also included in the waiver. Mr. King stated that he did not know if this was a practical issue, since as the Commission had discussed at previous meetings, boundary discrepancies often involve very small slivers with no voters residing there. In response to a question from Ms. Penick as to whether this concern involved territory annexed by the City of Angola that had resulted in proposed precinct changes, Mr. King advised the Chair that he could not provide specific information about the impact of this concern on those particular details of the county’s proposal.

In response to a question from the Chair, Ms. Penick stated that the County was hoping that the Commission would approve the precincts listed in the waiver following the previous approval of the remaining precincts in the County following publication of legal notice.

The Chair stated that he recognized the County’s concern expressed regarding expense, especially since he had sat on a county council for an extended period of time and had had heard the circuit court clerk state that spending additional money was necessary to fund voter registration expenses or purchase voting equipment accessible to the disabled. He noted that he had recent experience with these types of request as a county council member since he had resigned his council seat to serve as Chair of the Commission. The Chair said that he was somewhat concerned that the basis for this request was the refusal of the county council to appropriate these funds.

The Chair added that, with all due respect, and knowing that money is tight, the bottom line is that the county council has to come up with funds to cover these expenses. He said that he was disturbed that the Circuit Court Clerk had not been able to have the county council provide this money to clean up the precinct rolls, since this was a basic obligation owed by government to the voters. He stated that the “unnecessary expense” referenced in the statute should mean more than just that the county council refused to provide funding. He remarked that if this waiver was granted, there would be an incentive for all county councils to seek these waivers from precinct size requirements and instead to purchase additional voting systems. The Chair stated that he was concerned about setting that precedent.

In response to a question by the Chair, Mr. King responded that the only previous precinct waiver petition that had been granted by the Commission under IC 3-11-1.5-3.2 since the statute was enacted in 1990. He said that the previous waiver concerned certain precincts in Monroe County, which had an artificially high number of voters due to the transient student population. Ms. Robertson responded that she did not recall the Commission granting any other precinct waivers under this statute other than the waiver for Monroe County.

The Chair recognized Mr. John who stated that, although he did not have the Chair's experience, he was extremely troubled by the idea that the County Council simply would not pay to clean up the county's voter rolls. He said he agreed that this was a very basic responsibility of our government in the running of fair elections. Mr. John said he knew that the Secretary of State and the Co-Directors had reached out to county officials to provide guidance and assistance through the voter registration system established under HAVA. He stated that the sense he had at the end of the day was that the county was saying that "we can't do this because we won't do this."

Mr. John said that this request put the Commission in a bad position due to the potential risk from overlapping precincts. In response to a question from the Chair, Mr. King said that the Commission had, at some point in the past, approved the precinct boundaries of those precincts subject to this waiver, whether that approval would have occurred in 1997 or 2001, or some other point in the past. He indicated that as a result, the boundaries of these precincts are fixed until or unless the Commission decides to change them, and the county election board would be required to administer elections using the current precinct boundaries.

Mr. King noted that if the Commission were to grant a waiver, the statute provides that the waiver expires when the county commissioners submit any subsequent precinct establishment order for that precinct. He added that if Steuben County's waiver petition were to be granted, and the county were to discover that an overlap of boundaries had occurred, the county could submit a proposed precinct change order for the precincts which overlap, and that as a result the waiver would expire. He noted, however, that since the filing period for declarations of candidacy begins tomorrow, that any such proposed precinct order could not become effective during the 2006 election year.

The Chair asked if the Commission could grant a waiver subject to conditions. In response, Mr. King and Mr. Simmons stated that there was nothing in the statute to prohibit or authorize the Commission to do so.

The Chair recognized Ms. Robertson, who stated that she had been reminded that in 2001, the Commission had considered and approved precinct establishment orders for all precincts in the state, but that Steuben County was one of several counties in which this process was not completed. She indicated that since there had not been review and confirmation of the county's precinct boundaries at that time, there would probably be some overlapping here if the Commission did not approve the waiver.

Ms. Robertson added that she had also been advised by Ms. Clark that according to the information available to the Election Division, the number of active voters in these precincts was probably considerably lower than the total number of registered voters. She indicated that although a mailing to each voter in the county might be expensive, that the county circuit court clerk also had the option to review the number of inactive voters who had not cast ballots during the four year period after the voters had been designated as inactive. She noted that although this work would be laborious to perform by hand, that the statewide voter registration system would provide a method to assist the county by generating reports listing these voters.

The Chair recognized Mr. King, who stated that if the Commission did grant approval of this petition, with conditions or otherwise, that there were state statutes which provided a method to deal with any overlapping problem. He noted that Indiana Code 3-11-1.5-6 and IC 3-11-1.5-7 state that every point in the state of Indiana belongs in only one precinct, and that no point in Indiana would be located outside of a precinct. Mr. King indicated that these provisions stated that if a county had assigned any point to more than one precinct (or had not assigned territory to any precinct within the county), then the territory including that point is assigned by statute to the precinct containing the fewest number of registered voters. He stated that if approval of the waiver petition, and of Order 2006-04, resulted in a gap or an overlap, the means existed in state law to fix this problem without requiring further action by the Commission.

The Chair said that he did not want to cause Steuben County problems the day before primary candidate filing starts, but that he wanted this problem solved. He noted that since Ms. Robertson had indicated that there is a method for the county to purge its rolls, without requiring a costly mailing by the county, that he was inclined to grant the waiver subject to certain conditions. He added that he was particularly concerned that the action taken by the Commission in this matter not set a precedent so that other counties would seek waivers due to the refusal of county councils to provide funding.

The Chair recognized Mr. Smith, who stated that he was currently a Steuben County Commissioner, and had served two terms as a County Council member before becoming a Commissioner. He stated that he did not believe that the Council had been told that the funding of voter registration rolls clean up was required. He added that he agreed that if the County Council had been so advised, and had then turned down the request, that this would be totally inappropriate.

Mr. Smith said he attends all County Council meetings as a representative of the Commissioners, and that this was never presented to the Council as a funding requirement to conduct this clean up process. He added that if the Commission would check to see how quickly the results of voting have been reported, the Commission would find that Steuben County was one of the first counties in the State to report its results. Mr. Smith said that the County has not been lacking in doing its duty, and carrying out a clean, efficient, and well-administered election process. He added that the County felt

that it was effectively in compliance with the 1200 maximum voter requirement, and that this had been a basis for seeking this waiver.

In response to a question from the Chair, Mr. Smith said that the County would have no objection to the Commission granting the waiver, subject to Steuben County performing the voter list clean up and reporting to the Commission on its efforts. In response to a question from the Chair, Mr. King said that the statute provided that a waiver would remain in effect until the County chose to submit a new precinct boundary establishment proposal for that precinct, so that as a result, the duration of the waiver was indefinite.

In response to a question from Mr. John, Mr. King responded that Indiana Code 3-11-1.5-3.2 does not, on its face, prohibit the Commission from further limiting the duration of the waiver. He added that since the circuit court clerk also served as the secretary of the county election board, and since one of the three members of the county executive were present, that if they both consented to these restrictions on behalf of the county election board and county commissioners that he could not imagine a legal issue arising from the Commission's conditioning of the waiver.

Mr. John stated that the Commission could therefore grant the waiver for a one year period, subject to renewal, assuming that the Commission has seen progress in the clean up of the voter registration rolls. In response to a question from the Chair, Mr. Smith responded that after the clean up of the voter registration rolls occurred, the County believed that the number of registered voters in these precincts would fall below the 1200 maximum, and that as a result, an extension to the waiver would not be necessary.

The Chair stated that he would be comfortable setting a one year duration on the waiver, and that if he was still a member of the Commission one year from this date, he would hold the County to its commitment to clean up the voter registration rolls, so that an explicit reference to that condition in approving the waiver would not be necessary.

Mr. John moved that the Commission accept Order 2006-3, with an amendment to SECTION 4 stating that "This waiver for the precincts identified herein and expires January 17, 2007." Ms. Sweeney seconded the motion. In response to a question from the Chair, Mr. Smith indicated that Steuben County would be comfortable with this condition since it would permit the County to get through its election. The Chair expressed the hope that the County would work with the Election Division to perform the voter registration rolls clean up in the most cost-effective manner.

There being no further discussion, the Chair called the question, and declared that with four members voting "aye" (Mr. John, Ms. Sweeney, Ms. Wagner, and Mr. Wheeler), and no Commission member voting "no," the motion was adopted.

In response to a question from the Chair, Mr. Simmons indicated that Order 2006-04 implemented the waiver approved by the Commission by approving the precinct boundaries of the precincts listed in Order 2006-03.

Mr. John asked what would be the effect if Order 2006-04 is adopted by the Commission and the precinct waiver order then expired. He said that on January 18, 2007, the waiver would have expired, but Order 2006-04 would still be before the Commission. Mr. Simmons responded that since Order 2006-03 expires January 17, 2007, the statutes previously discussed to resolve gaps and overlaps between precincts would come into play. He added that since the Commission had conditioned approval of the waiver petition, the Commission might wish to condition approval of the precinct establishment order as well. Mr. John said that the Commission should then approve the precinct boundary maps, as submitted, for one year.

The Chair recognized Ms. Robertson, who stated that the Commission might consider amending Order 2006-04 to provide that the Order expires January 17, 2007. The Chair recognized Mr. King, who noted that since the first day to file a declaration of candidacy for a municipal primary in 2007 would fall on January 16, 2007, that this might be the most desirable expiration date for Order 2006-03 as well.

Mr. John moved that Order 2006-03 be amended to provide that the Order expires January 16, 2007. Ms. Sweeney seconded the motion. There being no further discussion, the Chair called the question, and declared that with four members voting "aye" (Mr. John, Ms. Sweeney, Ms. Wagner, and Mr. Wheeler), and no Commission member voting "no," the motion was adopted.

Mr. John moved that Order 2006-04 be adopted, with SECTION 4 being amended by adding the phrase ", and expires January 16, 2007" at the end of the SECTION. Ms. Sweeney seconded the motion. There being no further discussion, the Chair called the question, and declared that with four members voting "aye" (Mr. John, Ms. Sweeney, Ms. Wagner, and Mr. Wheeler), and no Commission member voting "no," the motion was adopted.

Ms. Sweeney left the meeting following this vote, with Commission members thanking her for her participation.

5. Voting System Certification (Applications for Term Ending October 1, 2009):

The Chair recognized Mr. King, who stated that Commission members had received a memorandum from the Co-Directors, dated January 17, 2006, concerning voting system certifications. This memo is incorporated by reference in these minutes.

A. Voting Technologies International (VTI) application for a direct record electronic voting system upgrade (Dell Optiplex 280; software version 5.0.2; firmware version "not applicable").

Mr. King stated that the Election Division had received a filing from the vendor (VTI), requesting the Commission's consent to withdraw this application.

Mr. John moved that the Voting Technologies International (VTI) application for a direct record electronic voting system upgrade (Dell Optiplex 280; software version 5.0.2; firmware version “not applicable” be withdrawn. Ms. Wagner seconded the motion. There being no further discussion, the Chair called the question, and declared that with three members voting “aye” (Mr. John, Ms. Wagner, and Mr. Wheeler), and no Commission member voting “no,” the motion was adopted.

B. Voting Technologies International (VTI) application for an optical scan ballot card voting system Scantron ES 2800, hardware number ES 2800; firmware version 1.0.4; software version 1.0.4.

C. Voting Technologies International (VTI) application for a direct record electronic voting system upgrade (Dell Optiplex 280; software version 5.0.4.1; firmware version “not applicable”.

Mr. King noted that two applications from VTI described above were pending before the Commission, and that a representative of VTI was present to answer questions regarding these voting systems.

Mr. King said that VTI filed its application for approval of the optical scan system referenced above on September 20, 2005. A copy of this application and the accompanying material referenced in the memo is incorporated by reference in these minutes. He added that VTI has paid the required application fee and provided documentation of escrow of the firmware and software versions of this system. Mr. King noted that this optical scan voting system had not yet been demonstrated to the Commission, and that he understood that VTI was prepared to do so today.

Mr. King stated that with regard to reports from the independent testing authorities, the Election Division had received a filing from VTI earlier today, which consisted of a preliminary test report from Wyle Laboratories. He noted that page 5 of this report, indicates that “the Scantron has been subjected to reliability and function tests” and that the firmware complies with 2002 FEC Standards (the standards applicable to voting system certification applications under Indiana law). He added that the Wyle report also states that testing of the election management software, including end-to-end level testing, was performed by CIBER, a different independent testing authority laboratory, and that CIBER would be issuing the results of this testing in a separate report.

Mr. King said that the Commission had before it a report that indicates that this system meets the hardware and firmware requirements, but that the Election Division has no knowledge regarding the status of the CIBER tests of the system software.

The Chair recognized Mr. Benning, the Director of Voting System Sales, to testify on behalf of VTI, and asked Mr. Simmons to administer the oath to Mr. Benning. Upon his taking the oath, the Chair recognized Mr. Benning to speak regarding this matter.

Mr. Benning stated that the certification process was a very frustrating process for a vendor to go through, even before the vendor was able to appear before the Commission. He said that VTI had received its certification letters from Wyle after the Commission's October meeting. He noted that after this meeting, VTI had taken the opportunity to make some additional changes to the software, which was why the direct record electronic application pending before the Commission was for version 5.0.4.1. Mr. Benning said that it had taken since that October meeting until yesterday evening for VTI to receive these reports from Wyle Laboratories. He added that Wyle had told VTI that these reports would be made available to VTI before Christmas 2005, and again that they would be available last week.

Mr. Benning remarked that VTI had run into a similar situation with regard to the software testing performed by CIBER. He noted that there are only three ITAs accredited by the Election Assistance Commission (at Denver, and at Huntsville), and that these laboratories were overwhelmed with work at this point. He said that the ITA work was the point in the process where the delay comes. Mr. Benning said that the testing for these systems had been completed at both laboratories, but that VTI was waiting for the CIBER report. He remarked that these reports were submitted to the National Association of State Election Directors (NASED), which then assigns a NASED voting system certification number.

Mr. Benning said that in the meantime, VTI comes before the Commission today to demonstrate the system. He added that CIBER had told VTI that VTI would receive the CIBER reports by January 30, 2006, and that VTI hopes that CIBER can comply with that commitment. Mr. Benning said that VTI wanted to bring the latest version of the system to the counties which had purchased previous versions of the VTI system before the October 1, 2005 deadline, when VTI's certification for its only system expired. He noted that as a result, VTI has not shipped any of these voting system models to counties who are waiting for state certification and Commission approval.

In response to a question from the Chair, Mr. King stated that the lack of documentation from CIBER was a problem for both of the VTI voting system applications pending before the Commission. Mr. King added that the only missing elements from both applications were the demonstrations of the voting systems to the Commission, and the CIBER reports for each system.

In response to a question from the Chair, Mr. Benning indicated that VTI currently has four county customers (Boone County; Cass County; Parke County; and Randolph County).

The Chair asked whether in the past, the Commission had approved voting system certification applications contingent upon receiving the final software testing report. Mr. King responded that in the past, the Commission had approved voting system certification applications when there was a statement from the independent testing authority indicating that the 2002 FEC Standards had been complied with. He noted that at previous meetings, the Commission had required that this ITA letter be unambiguous

as to whether the system testing had been completed, and that the system fully complied with the 2002 Standards. He added that receipt of the entire text of the ITA report has not always been required by the Commission. Mr. King stated that he was not aware of any communication at all from CIBER regarding the status of its testing, beyond what Mr. Benning had included in his statement.

Mr. Benning said that VTI could provide a statement from CIBER, and apologized for not having this document with him for this meeting. In response to a question from Mr. John, Mr. Benning stated that he had been advised by CIBER that the report would be available by January 30, but that VTI had not yet received any documentation from CIBER. Mr. Benning added that this version of the software has already been escrowed through Wyle, and that this is the same source code that CIBER is currently reviewing. He stated that this software had to function properly when tested by Wyle for VTI to receive the Wyle reports. He said that CIBER performs additional tests of the software for election management and other functions.

In response to the Chair, Mr. Benning stated that the DRE application was for approval of a software upgrade from a version previously certified by the Commission. He noted that VTI had been conducting elections in the State of Indiana for the past two years.

The Chair recognized Mr. King, who stated that he understood that the optical scan system to be demonstrated by VTI was a new system not previously certified by the Commission, and that the software upgrade being referred to was regarding VTI's direct record electronic system. Mr. Benning confirmed that this was correct, that the optical scan system was designed for absentee voting, and that the DRE was available for voting by voters with disabilities.

The Chair recognized Ms. Robertson, who stated that in the past the Commission has approved a voting system certification application, contingent upon the Election Division receiving an ITA report, although this had not occurred recently.

The Chair stated that his concern, particularly with the new optical scan device, was that if the Commission gives a contingent approval, the vendor would be able to begin selling that product. He asked the Co-Directors and Co-General Counsel if this was correct.

Mr. Kendall stated that he understood that while the application was pending before the Commission, the vendor was prohibited from marketing the voting system. Mr. King added that the Commission might note that it was likely from past experience that another Commission meeting would be required no later than March 9 to resolve challenges to primary election candidates.

The Chair recognized Mr. Benning, who stated that he believed that the Indiana counties which had previously purchased VTI equipment would be using that version of the equipment for the May 2006 primary, and that VTI did not intend to sell additional uncertified systems. Mr. Benning said that in any case, the optical scan voting system would not be used by a county until April, when in-person absentee voting begins. He

added that at this point, VTI was trying to assist the counties with training, implementing the ballot, and other tasks to prepare for the primary election, by obtaining certification of these systems. Mr. Benning said that VTI would not object to a condition being placed on the Commission's certification of the systems, in which VTI would stipulate to not selling these systems, so that VTI's training and preparatory work could continue prior to VTI receiving the letter or an initial report from CIBER.

The Chair recognized Mr. John, who remarked that he appreciated VTI's perspective and its desire to work with the county circuit court clerks, but that regardless of past Commission practice before he began serving as a Commission member, he was uncomfortable with abdicating the Commission's responsibilities concerning voting system certification, based on statements for which the Commission has received no documentation. He added that the point of this discussion was whether VTI could market these systems between now and when the Commission conducts another meeting. He stated that there was no reason that VTI could not continue to work with its current county customers. Mr. John said that VTI's inability to market during this period would seem to be a minor inconvenience, particularly since VTI was not planning to market the system before the May 2006 primary in any case.

Mr. John moved that the Commission table the following applications: (1) Voting Technologies International (VTI) application for an optical scan ballot card voting system Scantron ES 2800, hardware number ES 2800; firmware version 1.0.4; software version 1.0.4.; and (2) Voting Technologies International (VTI) application for a direct record electronic voting system upgrade (Dell Optiplex 280; software version 5.0.4.1; firmware version "not applicable". Ms. Wagner seconded the motion.

In response to a question from the Chair, Mr. King stated that he saw no problem with the Commission asking VTI to proceed with a demonstration of these systems, notwithstanding the tabling of these applications.

The Chair stated that he agreed with Mr. John's concerns, and would be ready to convene a Commission meeting at any time when VTI was ready to proceed with completed applications, and to accommodate counties who were interested in these systems. He added that in this situation, he would like to proceed with the demonstration of the systems so that the only remaining requirement for approval of the systems was receipt of the CIBER report.

In response to a question from Mr. Benning, the Chair said that he understood that VTI was asking whether in this interim, when VTI would have performed all of the requirements for certification by the Commission, except receiving final approval following receipt of the CIBER report, whether VTI could continue county training regarding this voting system.

The Chair recognized Mr. Simmons, who stated that in his opinion, VTI could do nothing concerning this system until receiving Commission certification. He noted that VTI had been provided several times with the Indiana Code citation that prohibits the vendor from

implementing, marketing, or using any uncertified system. In response to a question from the Chair, Mr. Simmons said that, although there had been a legislative proposal in 2005 to permit an uncertified system to be marketed so long as the system is labeled as uncertified, this proposal had not passed the legislature. Mr. Kendall stated that he agreed completely with Mr. Simmons's analysis, whether the activity was described as "training" or "marketing", and that VTI could not perform any kind of training with regard to the uncertified version of this system, and that a disclaimer would be of no help. In response to a question from the Chair, Mr. Kendall responded that the Commission could not approve these applications without first receiving the CIBER reports. The Chair recognized Mr. King, who stated that the certification statute requires that the applicant provide "documentation" prior to the Commission's certification of the system, which could include a letter or report from CIBER.

There being no further discussion, the Chair called the question, and declared that with three members voting "aye" (Mr. John, Ms. Wagner, and Mr. Wheeler), and no Commission member voting "no," the motion to table both applications was adopted.

The Chair stated that he understood the difficulty that VTI was in, and that when the CIBER letter was received, he would convene another meeting of the Commission to consider approval of the applications. Mr. Benning responded that if VTI, despite CIBER's promises, did not receive a letter until June, then this would be a problem for VTI.

In response to a question from the Chair, Mr. Simmons stated that the Commission had no option under Indiana Code 3-11-15-7(b) to approve the VTI certification applications at this time. He noted that this statute provided that "if an application does not include any of the applicable requirements listed in subsection (a), those requirements must be filed with the election division before the application may be *considered* by the commission." He added that under subsection (a)(16), the applicant is required to provide documentation from all independent testing authorities that have examined the system. Mr. Simmons stated that the record in this proceeding indicated that the Election Division has not received any documentation from CIBER regarding these applications. The Chair stated that he agreed with this interpretation, and that the Commission was barred by statute from proceeding.

Mr. John moved that the Commission implement a policy that no proposed order to approve any vendor's application for certification of a voting system be submitted to the Commission for consideration, until the Election Division staff determined that the voting system application complied with all the requirements set forth in IC 3-11-15-7. He noted that adoption of this motion would prevent discussion of these questions at future Commission meetings. The Chair stated that he believed that the statute barred the Commission from considering the applications, and that the applications probably should have been rejected, rather than tabled. Ms. Wagner seconded the motion.

In response to a question from the Chair, Mr. King noted that the statute, as amended in 2005, would require a change from past practices of the Commission regarding these

applications. The Chair stated that he agreed. Mr. King added that whatever action is included within the term “*consider*” is what the Commission is now prohibited by law from doing. In response to a question from the Chair, Mr. Simmons stated that in his opinion, this statute prohibited the Commission from considering an application for final approval of a system, but would not prohibit a vendor from demonstrating the system to the Commission or otherwise receiving information concerning the system. The Chair and Mr. John stated that they were comfortable with this interpretation of the statute’s requirements.

The Chair recognized Mr. King, who stated on behalf of himself and Ms. Robertson, that in his opinion, regardless of what might be the minimum requirements set forth by the statute, a certification process would be much better organized by using the procedure described in Mr. John’s motion since the Election Division would have received all of the documentation and other requirements before the Election Division brought the application before the Commission for its consideration. He added that the Election Division would implement this policy for future meetings if this motion was adopted by the Commission.

The Chair recognized Mr. John, who stated that the Commission’s adoption of this policy would remove pressure brought by vendors and clerks upon the Election Division staff to bring forward incomplete applications. The Chair added that he had been called by his circuit court clerk before the meeting regarding this application, and that his response to the clerk would be that the reason that the Commission did not approve this application was because VTI failed to provide the required letter from CIBER.

Mr. Benning stated that he appreciated this, but that VTI was at the mercy of the ITA in terms of the ITA’s schedule. He added that the complexity of this situation had increased since the certification of VTI’s former system, which did not comply with 2002 Standards, had expired October 1, 2005.

There being no further discussion, the Chair called the question, and declared that with three members voting “aye” (Mr. John, Ms. Wagner, and Mr. Wheeler), and no Commission member voting “no,” the motion to adopt this policy was adopted.

In response to a question from Mr. Benning as to whether a letter from CIBER or a complete report from CIBER was necessary for an application to be in compliance, since there could be a three or four month interval between these events, Mr. John responded that the Commission’s past practice had been to approve the application upon receipt of the letter, subject to receipt of the full report within a specific period of time. The Chair recognized Mr. King, who stated that sometimes the letters from the ITA were ambiguous, and that it is critical in terms of presentations before the Commission that the letter from the ITA state unambiguously that the ITA has fully completed system testing, and that voting system complies with the 2002 Standards.

The Chair recognized Mr. Benning to demonstrate the Voting Technologies International (VTI) optical scan ballot card voting system Scantron ES 2800, hardware number ES

2800; firmware version 1.0.4; software version 1.0.4. and the Voting Technologies International (VTI) direct record electronic voting system upgrade (Dell Optiplex 280; software version 5.0.4.1; firmware version “not applicable”.

Mr. Benning demonstrated the systems, noting that VTI uses a “voter identity security” card, as opposed to the “swipe card” used by other vendors. He noted that the voter identity security number is a random five digit number not tied to a specific voter in any way, and cannot be used by any other voter. Mr. Benning noted that the voter be issued the number after signing the poll list and otherwise completing the process to check in at the polls, and that the voter would then enter the identity security number in the same manner that a person would enter data on microwave screen. Mr. Benning demonstrated that the DRE prevented overvoting in a race by a voter, and that the system uses both highlighting and audio features to assist voters with disabilities. He added that the system contains a pad to permit a voter to enter the names of write-in candidates.

Mr. Benning stated that the system permits the voter to change the voter’s choices before casting the ballot, and adds a confirmation message to make certain that the voter intends to cast the ballot as marked. In response to a question by the Chair, Mr. Benning stated that if a voter left the booth without pressing the “cast ballot” button, the system would time-out to prevent another person from changing or casting that ballot. He added that the system takes a photographic image of each ballot when cast, and that these images could be printed out if required during a recount.

Mr. Benning said that the PIN numbers are generated by the voting system, and that the individual systems are connected by quick connect cable units to a server, and that the precinct number is generated on the bottom of the paper containing the voter’s PIN number. In response to a question from Mr. John, Mr. Benning said that only one PIN number would be activated at any particular time, after the voter had “pre-registered” with the poll workers.

In response to a question from the Chair, Mr. Benning stated that if multiple voting systems were being used for multiple precincts at the same polling place, the entry of a PIN number by a voter would cause that voter’s precinct ballot style to appear on the voting system. He added that all of the ballot styles within the county would be included in one voting system unit.

Ms. Wagner asked if a ballot were inadvertently “double voted”, would the system kill the extra ballot at the end of election day. Mr. Benning responded that the initial ballot would be “killed” at the instant that the same ballot was re-entered.

Mr. John asked what would happen if a voter entered the PIN number incorrectly three or five times. Mr. Benning responded that if the PIN number were entered incorrectly that number would then be invalid for that precinct, and although a voter could attempt to reenter the number, it was statistically very unlikely that the voter could enter a random number that the system would accept. He added that Wyle Laboratories had run a software program on both the DRE and optical scan system in which 1.5 million numbers

were randomly generated and cast, and that the systems had functioned properly. He noted that the 2002 Standards were very rigorous.

In response to a question from Mr. John, Mr. Benning said that the system could have a time-out set of zero to up to 90 minutes for a PIN number, so that one voter could be prevented from voting using the PIN number issued to another person. He added that this system was far more secure than the “swipe card” system, since it was impossible to reprogram the voter identity security card.

The Chair said that he understood that there were only five “swipe cards” present at the polls, and that these are constantly re-circulated. He asked what would prevent a poll worker from running off 30 or 40 voter identification security cards. Mr. Benning responded that this would be possible if the poll worker wanted to commit election fraud, and added that the system contained a log that records every activity performed on these systems by the minute. He said that this log could highlight suspicious activity of this sort that could result in an investigation. The Chair noted that effective security within the polling place is necessary when any system is used to prevent this type of fraud.

Mr. Benning demonstrated the features of the DRE system designed for use by voters with disabilities. He noted that the voter would be directed to a voting station that would be accessible to a person using a wheelchair or with another type of disability. Mr. Benning said that the system contained a button that activated the audio features of the system, and that the system contained a light-weight keypad to assist with using this unit. He remarked that the audio feature used a synthesized voice to help guide disabled voters as they used the system. Mr. Benning noted that this system permits circuit court clerks to set up audio and multiple language ballots.

Mr. Benning proceeded to demonstrate the central count absentee ballot optical scan system. He stated that this was a “ballot on demand” system, and that the clerk will generate a paper ballot off a printer using a software tool within the system. He said that the voter would complete the ballot by sitting down at a table, which would be reusable election after election. He remarked that after voting the ballot, the voter would feed the ballot through a scanning machine, and that the scanner captures the votes cast on the ballot. Mr. Benning stated that if the scanner detected a problem with the ballot, that the voting system would stop and notify the user of the problem. He said that this program was hooked up to an EMS computer in the clerk’s office on election day, and that through using the system’s absentee tool, the number of votes cast on the cards would be tabulated, and any error in printing the precinct designation on the ballot would be detected.

Mr. Benning said that after the ballots were tabulated, they were forwarded to the “EMS sandbox”, which contained information concerning absentee ballots and provisional ballots for use as an auditing tool. He stated that these were all software tools used by the clerk to generate the election reports necessary for the state. Mr. Benning remarked that the system permitted a person to view a precinct report and a summary report of the votes cast, and that this data is gathered from CDs that are returned from polling places

throughout the county. He noted that the system also permitted electronic voting of provisional ballots, and had features to permit absentee vote totals to be added to election day vote totals.

In response to a question from the Chair concerning the use of provisional ballots in electronic voting, Mr. Benning stated that the provisional ballot voting ticket was similar to the other voting ticket, except that the provisional ballot ticket contains two numbers, rather than one number, and includes the designation of “provisional”. He added that when a voter casts a provisional ballot, the voter’s name is written down next to the provisional ballot number. In response to questions from the Chair, Mr. Benning said that the system will then track that particular ballot (but would not track regular ballots) and that the system will not permit provisional ballots to be tallied. He added that provisional ballots are not counted by this system on election day, because the provisional ballots would not yet have been approved.

Mr. Benning displayed one of the precinct vote total overview reports generated in Cass County for the 2004 presidential election race. He stated that this report will automatically tally the total vote totals reported for each precinct, along with the total number of absentee votes and in-person votes, and the percentage of registered voters voting, at the bottom of the report. In response to a question from Mr. John, Mr. Benning said that the number of provisional ballots cast in a precinct would be tabulated using another system report.

In response to a question from the Chair, Mr. Benning stated that this system is a master tabulation system that tabulates votes cast on both the DREs and optical scan voting systems used in the precinct.

The Chair asked when a voter casts a provisional ballot using the optical scan ballot card, what happens to that particular ballot as part of the tabulation process. Mr. Benning responded that this ballot is put into what the system calls a “provisional ballot tool”, and will be listed in a report of the final election results printed out by the system. He added that the provisional tool would contain all of the numbers of the ballots which were voted provisionally at each precinct, listed on the left hand side of the report, and that this report would permit the county to determine the total number of provisional ballots cast.

In response to a question by the Chair, Mr. King stated under Indiana law, every provisional ballot has to be processed at the county level, and either approved or rejected, regardless of the vote margin in any particular race.

In response to a question by the Chair, Mr. Benning said that a candidate will know immediately how many provisional ballots have been cast in a precinct, based on the information on the report described above. He noted that the circuit court clerk has to know which number has been assigned to each provisional ballot, so that if the voter contacts the clerk’s office, the clerk can tell the voter whether or not the provisional ballot has been counted. He remarked that there is some anonymity that is lost as part of the provisional ballot process.

Mr. Benning stated that the system contained a feature to highlight each person's provisional ballot, and for the county to determine individually whether each ballot should be counted or not. He said that once this decision is made, the information regarding the votes on this ballot is then put back into the system's tally tool, and that these additional votes would be reflected in the total tally and in the precinct reports. He noted that this is a very simple process for the county clerks to deal with.

The Chair recognized Mr. King, who asked if there was an overvote on the optical scan ballot card only in a particular race, but that the ballot was otherwise valid, how the central count optical scan system would process that ballot card. Mr. Benning responded that the system would kick out the ballot into a tray added to the side of the system, and that it would then be up to the county election board to determine which votes on the ballot should be counted. He added that if this event occurred, the absentee tool contains provisions for manual data entry so that the county election board could manually enter the valid votes cast on this ballot, and that these votes would then be added to the certified totals. Ms. Robertson added that the county election board could also remake the card, and run the remade card through the system. Mr. Benning agreed.

Mr. Benning said that the votes from scanned ballots would be saved in a file, which can later be pulled out, and added to the tabulation for the total votes cast. He stated that if he then ran another stack of 50 ballots through the optical scan system, the additional votes would be added to the tally tool to show up on cumulative vote report.

Mr. Benning said that the system contained an audit tool, which contains images of individual voters' ballots which can be printed out. Mr. John asked which printers this system had been tested with. Mr. Benning responded that the system included a VTI printer which had been included as part of the certification process for this system at the precinct level. He added that the printers at the county level that clerks use to generate the absentee ballots can be any printer that the clerk has in her office. He said that there was nothing that required a special certification for that process by an ITA. Ms. Robertson noted that the clerk would just be printing off this data.

The Chair thanked Mr. Benning for the demonstration of these systems.

The Chair noted for the record that the Commission had received copies of letters dated October 7, 2005 from the Co-Directors to the Circuit Court Clerks of Hancock County, Howard County, LaPorte County, Porter County, and St. Joseph County, concerning the tests performed on the ES&S AutoMARK Voter Assist Terminal at the Indiana School for the Blind. Copies of these letters are incorporated by reference in these minutes.

The Chair noted for the record that the Commission had received copies of a letter from AutoMARK Technical Systems to the Election Division dated September 29, 2005, and a letter from the Election Division dated December 23, 2005 concerning the use of the AutoMARK Voter Assist Terminal to mark Diebold Election System ballots. Copies of these letters are incorporated by reference in these minutes.

The Chair noted for the record that the Commission had received copies of a letter from MicroVote Corporation dated January 14, 2006 providing a status report on the independent testing authority progress concerning the MicroVote Infinity DRE with firmware version 3.0.4. The letter is incorporated by reference in these minutes.

6. Adjournment

There being no further items on the Commission's agenda, the Chair entertained a motion to adjourn. Mr. John moved, seconded by Ms. Wagner, that the Commission do now adjourn. The Chair called the question, and declared that with three members voting "aye" (Mr. John, Ms. Wagner, and Mr. Wheeler), and no Commission member voting "no," the motion was adopted. The Commission then adjourned at 3:15 p.m.

Respectfully submitted,

J. Bradley King
Co-Director

Kristi Robertson
Co-Director

APPROVED:

Thomas E. Wheeler, II
Chairman