

Indiana Election Commission
Minutes
June 10, 2008

Members Present: Thomas E. Wheeler, II, Chairman of the Indiana Election Commission (“Commission”); S. Anthony Long, Vice Chairman of the Commission; Daniel A. Dumezich, member of the Commission; Sarah Steele Riordan, member of the Commission.

Members Absent: None

Staff Attending: Gordon E. White, Jr., Attorney for the Indiana Election Commission, Office of the Attorney General; J. Bradley King, Co-Director, Indiana Election Division of the Office of the Indiana Secretary of State (Election Division); Pamela Potesta, Co-Director of the Election Division; Leslie Barnes, Co-General Counsel of the Election Division; Dale Simmons, Co-General Counsel of the Election Division; Michelle Brzycki, Precinct and Voter Registration Coordinator.

Also Attending: James J. Ammeen, Jr., AMMEEN & ASSOCIATES, P.C.; Patrick Guinane, *Northwest Times of Indiana*; Niki Kelly, *Fort Wayne Journal Gazette*; John R. Price, PRICE OWEN.

1. Call to Order

The Chair called the June 10, 2008 meeting of the Commission to order at 1:00 p.m. in the Indiana Government Center South Conference Center, Conference Room A, at 402 West Washington Street, Indianapolis, Indiana.

The Chair noted that proper notice of the meeting had been given, as required by state law. 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. Transaction of Business

The Commission transacted the business set forth in the Transcript of Proceedings prepared by Ms. Rhonda J. Hobbs, RPR, of Connor and Associates, Inc. A copy of this document is incorporated by reference in these minutes.

The following corrections of scrivener’s errors in this document are approved by the Commission:

Page 3, line 12, the phrase “Form 2008-166” is amended to read “Order 2008-166”.

On the following pages and lines, the word "I" is amended to read "aye":

Page 4, line 19

Page 4, line 20

Page 6, line 5

Page 6, line 6

Page 86, line 12

Page 86, line 13

Page 128, line 6

Page 128, line 7

Page 133, line 8

Page 133, line 9

Page 15, line 2, the word "President" is deleted.

On the following pages and lines, the word "Morgan" is amended to read "Warrick".

Page 20, line 6

Page 24, line 4

Page 113, line 14

Page 32, line 7, the word "commissioner's" is amended to read "commissioners".

Page 40, line 6, the word "find" is amended to read "fined".

Page 70, line 17, the name "Prize" is amended to read "Price".

Page 73, line 13, the word "Buy" is amended to read "But".

Page 121, line 14, the word "President" is amended to read "Chairman".

Page 129, line 20, the word "signs" is amended to read "assigns".

3. Adjournment

There being no further items on the Commission's agenda, the Chair entertained a motion to adjourn. Mr. Long moved, seconded by Mr. Dumezich, that the Commission do now adjourn. The Chair called the question, and declared that with four members voting "aye" (Mr. Wheeler, Mr. Long, Mr. Dumezich and Ms. Riordan), and no Commission member voting "no," the motion was adopted. The Commission then adjourned at 3:00 p.m.

Respectfully submitted,



Trent Deckard
Co-Director



J. Bradley King
Co-Director

APPROVED:



Daniel A. Dumezich,
Chairman

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BEFORE THE
INDIANA ELECTION COMMISSION

IN THE MATTER OF MICRO VOTE) ADMINISTRATIVE CAUSE
GENERAL CORPORATION) NUMBER 2007-01

Taken On: June 10, 2008

At: Indiana Government Center South
402 West Washington Street
Conference Room A
Indianapolis, Indiana 46204

A STENOGRAPHIC RECORD BY:
Rhonda J. Hobbs, RPR
Notary Public
Stenographic Reporter

Connor + Associates, Inc.
1650 One American Square
Indianapolis, IN 46282
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A P P E A R A N C E S

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FOR THE PETITIONER(S):

Mr. James J. Ammeen, Jr.
AMMEEN & ASSOCIATES, P.C.
Barrister Building, Suite 800
155 East Market Street
Indianapolis, Indiana 46282

FOR THE RESPONDENT(S):

Mr. John R. Price
PRICE OWEN
9000 Keystone Crossing
Suite 150
Indianapolis, Indiana 46240

FOR THE INDIANA ELECTION COMMISSION:

Mr. Gordon E. White, Jr.
Deputy Attorney General
OFFICE OF THE ATTORNEY GENERAL
402 West Washington Street
IGCS 5th Floor
Indianapolis, Indiana 46204

INDIANA ELECTION COMMISSION

Chairman Thomas E. Wheeler, II
Commissioner S. Anthony Long
Commissioner Daniel A. Dumezich
Commissioner Sarah Steele Riordan

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1 CHAIRMAN T. WHEELER: I'm going to call
2 this meeting to order. The meeting of the
3 Indiana Election Commission is now called to
4 order. We are meeting pursuant to notice in the
5 Indiana Government Center South Conference Room.

6 It is June 10, 2008 at 1:00 p.m. I note that
7 all commissioners are here and present, as is
8 the staff. The first order of business is Order
9 2008-166, approval of forms, and Brad or Pam?

10 MR. J. KING: Mr. Chairman and members in
11 the commission, in a small packet with a paper
12 clip, you should have a copy of Form 2008-166.
13 It's approving one form, the certification of
14 the political party presidential and vice
15 presidential ticket. This is the form you use
16 to define the Democratic Party, the Libertarian
17 Party and the Republican Party, to certify the
18 presidential and vice presidential nominees for
19 the fall ballot, as well the presidential
20 electoral candidates. The only changes that
21 have made to the existing form is updated
22 references to 2008 from 2004.

23 CHAIRMAN T. WHEELER: Any questions from
24 the commissioners?

25 (No response from the commissioners.)

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1 CHAIRMAN T. WHEELER: Brad, that is
2 probably really picky. On the second to the
3 last page at the 2008, is there a space there
4 that shouldn't be there -- it just looks a
5 little...

6 MR. J. KING: It looks a little funny. I
7 don't think it's a spacing problem. It's a font
8 problem. We can take care of the problem.

9 CHAIRMAN T. WHEELER: Other than that, I'll

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accept a motion.

COMMISSIONER A. LONG: So moved.

CHAIRMAN T. WHEELER: Motion's been made,
do I have a second?

COMMISSIONER D. DUMEZICH: Second.

CHAIRMAN T. WHEELER: Motion's been made
and seconded that the Commission approve Order
No. 2008-166, approving the presidential
electoral form, which is attached. All in
favor, signify by saying I?

THE COMMISSIONERS: I.

CHAIRMAN T. WHEELER: Those opposed, same
sign.

(No response by the commissioners.)

CHAIRMAN T. WHEELER: Motion carries. The
new order 2008-166 is approved and signatures

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will be affixed or not?

MR. J. KING: We can affix the signatures.

CHAIRMAN T. WHEELER: The second item on
the agenda is a ratification of campaign finance
settlement agreements, and I believe there's a
list 27 settlement agreements in front of the
commissioners. Who is doing that?

MS. M. THOMPSON: Mr. Chairman, members of
the commission, in front of you, you do have a
list of committees to ratify and have agreed to
pay the fine. The settlement agreement is waive
the hearing.

CHAIRMAN T. WHEELER: Any questions from

18 the complaint of Trident Air.
19 CHAIRMAN T. WHEELER: Just a point of order
20 for either the co-directors or the counsel, do
21 we actually have to take action; is this like a
22 court case where the court has to ask for
23 dismissal of a lawsuit or does the party simply
24 have the right to withdraw it without any action
25 whatsoever?

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1 COMMISSIONER D. DUMEZICH: I think we
2 ordered them to investigate so...

3 MR. J. KING: Mr. Chairman, just to
4 respond, that this is a matter that did come
5 before the Commission at a public meeting and
6 the letter, in particular, is addressed to
7 request of Commission to show the complaint is
8 withdrawn, and so for that reason, we brought it
9 to this body for action.

10 I think if it had not come before the
11 Commission or it didn't request action by the
12 Commission, we wouldn't be required to bring it
13 to you, in my opinion.

14 CHAIRMAN T. WHEELER: And I ask that
15 question, I guess, more to generate some
16 discussion of the commissioners and not
17 necessarily today, but I want to think about how
18 we handle these complaints. Do we want to set
19 up a prescreening process? It is my
20 understanding that there are a number of
21 complaints pending in front of the Secretary of

22 State's Office coming out of this election.

23 Do we want to do a prescreening process
24 where -- I don't know legally, do they have to
25 go to the Commission or could the Division

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1 prescreen these, and the ones that are without
2 merit, simply not act on them or dismiss them --
3 yeah, I think we should act and know what
4 happened, but does the Commission actually need
5 to take action on these complaints or not, and
6 legally, I guess I ask that question -- I want
7 to figure out if we want to develop a process
8 for this?

9 MR. J. KING: Mr. Chairman, if I could
10 address it briefly. There are a couple of
11 specific statutes that involve either the
12 enforcement of the National Voter Registration
13 Act or the Help America Vote Act that has
14 separate complaint procedures that do call for a
15 prescreening by the co-directors, but even if
16 the co-directors dismiss a complaint under the
17 prescreening, the person has a right to appeal
18 and ask for a hearing before the Commission.

19 There are other types of complaint, like
20 campaign finance, that don't have a specific
21 statute because federal law is not involved, and
22 therefore, there is no requirement or
23 prohibition, as I would understand it, against
24 some kind of prescreening procedure.

25 CHAIRMAN T. WHEELER: Comments.

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1 COMMISSIONER S. STEELE RIORDAN: One
2 concern that I have is that somebody who doesn't
3 have a lot of ethics could use, you know, the
4 idea of the campaign finance, that I think may
5 be, you know, a little bit iffy and file it and
6 it gets on our agenda and it gets published and
7 the media publishes it, even though it's
8 meritless, and it's very easy to put it in front
9 of the Commission and put us in a position where
10 we have to take some kind of action and then
11 someone could use that as a political issue. I
12 don't think that the system should be used that
13 way and I don't think it was intended to. So
14 I'm not sure what sort of prescreening, you
15 know, mechanisms might be available, but I will
16 be in favor of that.

17 I mean, you know, the opposing interest, of
18 course, is that people should be able to bring
19 their complaints, but you know, we don't have
20 sort of a Rule 11 mechanism that we use in the
21 law if somebody files an iffy complaint, you
22 know, because having the complaint judged on the
23 merits is never really the purpose of filing
24 this sort of a straight suit before the Indiana
25 Election Commission, which is what they are

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1 attempting to do. So I think it is something
2 that we should look into. I don't know if today

3 is the day for developing the procedure, but I
4 think we need one.

5 COMMISSIONER D. DUMEZICH: To the extent of
6 procedure that already exists with these things
7 under federal jurisdiction, would we be able by
8 administrative rule to adopt a similar procedure
9 and put it in place for non-federal rules and
10 regulations; do we have the authority to do
11 that?

12 COMMISSIONER A. LONG: To me, the Division
13 could adopt the simple rule that if we have
14 something that's filed in the nature of a
15 complaint that the co-directors unanimously
16 agree is without merit, they should nullify the
17 complaint. If they do not intend to forward it
18 on, they have a right to file an appeal and --
19 or if it's anything short of a unanimous
20 agreement, the committee would come to us, and
21 that way I think everyone would be -- that would
22 be within the spirit of the structure. I would
23 support something like that.

24 COMMISSIONER D. DUMEZICH: As would I.

25 CHAIRMAN T. WHEELER: And I agree, because

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1 I mean, the Schellinger complaint is an example.
2 It was a politically motivated stunt.
3 Obviously, it was filed -- I'm not saying it has
4 merit, I don't know what it was, but clearly, it
5 was filed in the heat of the campaign probably
6 to generate a lot of headlines, and as soon as

7 the campaign is over, it's been withdrawn.

8 And I know there's at least one other one
9 pending without merit now that is of a similar
10 nature, that it seems to me like more sour
11 grapes than anything else. But it seems to me
12 that I'd rather see the co-directors take a look
13 at this stuff and what Commissioner Long had
14 suggested, and so if we could develop a
15 procedure and set that up because I do know
16 there are already a number of ones out of the
17 last election that are coming to us.

18 I have every expectation out of the general
19 election -- in November, there will be another
20 stack, and I've been given the understanding
21 from reading the paper on Saturday that there is
22 something wrong with the IPS board election that
23 was supposedly filed with the Division -- I
24 don't know if it was filed.

25 The article on Saturday -- it involves the

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1 election two of the school board members that
2 are not supposed to live in the same district
3 but do. But it's those sort of things, it seems
4 to me, that will need a prescreening process --
5 I guess is the consensus from the Commission
6 that we would like to see that.

7 COMMISSIONER D. DUMEZICH: I think the next
8 time we could compare all of the other
9 structures, and then make some sense out of
10 them, that we have one set of procedures that

11 would apply to both.

12 CHAIRMAN T. WHEELER: I like Tony like the
13 idea the -- if it isn't unanimous, to come to
14 us, and if it's unanimous to reject it. If the
15 co-directors differ, then it comes to us, and we
16 figure it out. All right, that takes care of 1,
17 2, 3, 4, and 5 is next on the agenda. On the
18 agenda is In the Matter of MicroVote General
19 Corporation, Administrative Cause No. 2007-01.
20 Mr. Price.

21 COMMISSIONER A. LONG: I think we have a
22 duty based on counsel's advice to make a matter
23 of record, do we not, of the communications?

24 MR. G. WHITE: Yes, sir. If I may for just
25 a minute...

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1 CHAIRMAN T. WHEELER: Let me -- give me one
2 second.

3 MR. G. WHITE: All right.

4 CHAIRMAN T. WHEELER: Let me go through the
5 procedures. AS I understand it, this is a
6 hearing under AOPA; is that correct?

7 MR. G. WHITE: Yes, sir.

8 CHAIRMAN T. WHEELER: Under AOPA, this is
9 an appellate hearing; is that correct?

10 MR. G. WHITE: Yes, sir, you're reviewing
11 the ALJ's decision.

12 CHAIRMAN T. WHEELER: That is a -- the
13 standard of review is?

14 MR. G. WHITE: The standard of review would
Page 11

15 be a de novo review, because frankly, you're the
16 ultimate authority. You owe no particular
17 deference to an administrative law judge, unlike
18 the trial court owing deference to you after you
19 make your decision here today, so it's a little
20 bit different.

21 CHAIRMAN T. WHEELER: The Commission is not
22 taking any evidence today?

23 MR. G. WHITE: That is correct. That's my
24 understanding, yes.

25 CHAIRMAN T. WHEELER: That's the

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1 notification the parties were given. At this
2 time we have representing the Election Division?

3 MR. J. AMMEEN: James Ammeen, Ammeen &
4 Associates P.C.

5 CHAIRMAN T. WHEELER: And Mr. Ammeen, you
6 several people sitting next to you. Can you
7 identify who's sitting at the table with you for
8 the record?

9 MR. J. AMMEEN: To my left is Democratic
10 Co-Director Pamela Potesta; to my right is the
11 Republican Co-Director of the Election Division,
12 J. Bradley King; and to the far right is the
13 Republican Co-General Counsel Dale Simmons;
14 Democratic Co-General Counsel, Leslie Barnes, is
15 absent. She's on vacation.

16 CHAIRMAN T. WHEELER: All right. And then
17 representing MicroVote General Corporation.

18 MR. J. PRICE: Yes, John Price with Price
Page 12

MinutesTranscript6 10 08

19 Owen.

20 CHAIRMAN T. WHEELER: And Mr. Price, your
21 clients aren't here today?

22 MR. J. PRICE: They're actually down at the
23 Clerks Convention in French Lick.

24 CHAIRMAN T. WHEELER: Matter of priorities.
25 Now I believe it's appropriate at this point to

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1 address the initial issue that Mr. Long, Vice
2 President Chair Long is raising with respect to
3 that.

4 MR. G. WHITE: Over the last few days, it's
5 come to our attention that letters have been
6 sent mostly from county clerks to the
7 commissioners. As their legal advisor, I have
8 concluded that these are inappropriate
9 communications. I won't use the term ex parte
10 communications because I'm not sure what implies
11 and what doesn't apply because some of these
12 communications may have been shared with all the
13 parties and some of them may not -- I don't
14 know.

15 what I do know is what letters the
16 commissioners have received and we will put
17 those in the record. I have shared those
18 letters with Mr. Ammeen. I have shared them
19 with Mr. Price. Most of them are letters from
20 clerks. We also have some acknowledgment
21 letters from Mr. Wheeler to the letters that he
22 received. I'm not aware of any e-mails or phone

23 conversations.

24 Commissioners Dumezich and Long have not
25 had an opportunity to communicate to me as

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1 exactly what letters they have received,
2 although the letters I have were received by
3 wheeler and Riordan so I wouldn't be surprised
4 if those two guys got the same letters.

5 And like I say, I have given you copies of
6 those letters. I've given you a rough inventory
7 of those letters. My secretarial skills are not
8 very good and I will clean that up before this
9 proceeding is all over but not immediately.

10 The point I want to make now, however, is
11 that these gentlemen here have seen every
12 communication that has come to the commissioners
13 and any communication that has gone from the
14 commissioners in acknowledgment of those letters
15 that they have received.

16 CHAIRMAN T. WHEELER: Are those -- Do you
17 have those in a packet that we can put into the
18 record?

19 MR. G. WHITE: I have them in a packet --
20 yes, sir, I have them in a packet of letters
21 that you have received and letters that Sarah
22 has received. I'll let Dan and Tony speak for
23 themselves.

24 CHAIRMAN T. WHEELER: As I understand it,
25 in terms of the Division's process, the

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1 letters -- I did not receive any letters at my
2 place of business. The only letters I received,
3 and I'll let the vice chair and everyone else
4 speak as well, were actually received in packets
5 or bundles that actually came from the Election
6 Division to me in a separate envelope but then
7 had the clerk's letters and the envelopes within
8 those letters.

9 So they were -- as typically addressed,
10 they would go -- as I understood it, they went
11 to the Division, and the Division, as it does
12 with other pieces of mail to the rest of the
13 commissioners, simply turned around and sent
14 them -- bundled them and sent them out.

15 That's my understanding of at least what I
16 received. I would note, with respect to myself,
17 in addition to the information here, I received
18 a forwarded e-mail from Penny Bogan, who is the
19 Boone County clerk from another clerk that
20 addressed this issue peripherally, but primarily
21 addressed the clerks conference which I
22 understand is going on right now. I did not
23 retain or bring a copy of that particular
24 e-mail.

25 I will submit it to Mr. White for

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1 submission to the parties as well. So from my
2 standpoint, that's what I've received, in which

3 I understand it all to be in the packet that
4 Gordon has prepared, and then I assume Sarah's
5 stuff was all?

6 COMMISSIONER S. STEELE RIORDAN: It's the
7 same.

8 CHAIRMAN T. WHEELER: The same thing.

9 MR. G. WHITE: Yes, I have the stuff that
10 Sarah sent me. I have the stuff that you, Tom,
11 sent me. I also have, for what it's worth,
12 letters that were until recently in possession
13 of the Indiana Election Division, and I think
14 for our purposes here today, those communiques
15 were unquote/unquote intercepted, if you will,
16 so I do not see those as a problem.

17 It might create another issue -- I mean, I
18 don't know what it is, but my concern today is
19 that these communications not get through to the
20 decision makers before they make their decision.
21 After their decision, maybe it's another issue.

22 But I do have, like I said, these
23 collection of letters that were mailed, but they
24 haven't been delivered yet so I don't see those
25 as an ex parte communication problem. whether

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1 it's another problem, I don't know, but I'm not
2 worried about that.

3 CHAIRMAN T. WHEELER: Let me make one
4 additional note on my end, then I'll let Sarah
5 and then Tony go. With respect to me, I
6 responded to each of these letters essentially

7 acknowledging the letter indicating that in
8 these cases as the clerk of the circuit superior
9 courts, I'm sure that you are aware there's a
10 judge over this matter. I cannot make any
11 comments regarding the merits of the case.

12 I did enclose a copy of the ALJ's letter to
13 each of them and encouraged them to attend this
14 meeting, if they wanted to make -- and I quote,
15 I also invite you and other interested parties
16 to attend the meeting which is the meeting we
17 have here. So that was the only response I made
18 to any of those, and I believe my response is in
19 there?

20 MR. G. WHITE: Yes, sir, they are.

21 COMMISSIONER A. LONG: I didn't have a
22 chance to send mine. I'm just going to identify
23 them and send them on down to you.

24 MR. G. WHITE: Sure.

25 COMMISSIONER A. LONG: I've got a -- and

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1 I'll indicate whether I've read them or not.
2 Most of them I have not. A letter that was date
3 stamped in my office June 2, received, I assume,
4 this letter. The letter is dated May 28th,
5 addressed to Chairman Wheeler, from Shannon
6 Weisheit, Morgan County Clerk, that's my clerk,
7 and it's got a note attached that I left -- Hi,
8 Anthony, this is the letter I sent in regards to
9 Microvote. Thank you, Shannon. I did not read
10 the letter.

11 I received -- I went back and got your
12 e-mail on this. Some of mine are pretty old. I
13 got another letter from her on April 24, 2006.
14 I have a letter from --

15 COMMISSIONER D. DUMEZICH: We commend your
16 record keeping.

17 MR. G. WHITE: I was going to say...

18 COMMISSIONER A. LONG: I got a letter from
19 Steve Shamo, and I don't know where I got it,
20 dated April 21, 2006 regarding MicroVote appear
21 before the Secretary of State. If I read it, I
22 have no memory of reading it. I probably did
23 when I got it.

24 I have a letter from Janet Chadwell, clerk
25 of the Decatur Circuit Court addressed to me,

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1 Care of the Division. I have to assume that it
2 was forwarded on down. It's got attached to it
3 a letter from Jane Runyon (Phonetic) -- the
4 first one is May 13th, '08 and May 15, '08.
5 Attached to that is Mary Brown, Clay Circuit
6 Court Clerk, addressed to all of us dated --
7 it's got a May 23rd received date. I have not
8 read those letters.

9 CHAIRMAN T. WHEELER: These three letters
10 were in the packet?

11 COMMISSIONER A. LONG: I assume they were.
12 I got an urgent memorandum from the Division
13 regarding MicroVote Infinity, which I don't
14 think it's relevant, but it's MicroVote, and

15 it's dated April 16, 2006, and I probably read
16 it then.

17 I've got an e-mail, and I have no idea
18 where I got this, unless it was sent to me and
19 I -- there's several people, but from Steve
20 Shamo dated August the 25th, 2006. It was in my
21 MicroVote file, two pages. I probably read it
22 when I got it. I haven't since then.

23 I have a fax from my clerk -- I guess when
24 you're handy, it's easy -- April 28, 06. Here's
25 the reply that I got from MicroVote, and Shannon

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1 got attached to the Steve Shamo e-mail and
2 something about specs. I know this one is in
3 the packet already. This was the forwarded
4 e-mail.

5 CHAIRMAN T. WHEELER: I don't believe
6 that's in the packet.

7 COMMISSIONER A. LONG: Oh, it's not?

8 CHAIRMAN T. WHEELER: That's the e-mail I
9 was referring to that I received from the Boone
10 County Clerk. You do not have that e-mail.

11 MR. G. WHITE: That doesn't
12 look familiar -- even from a distance, it
13 doesn't look familiar.

14 COMMISSIONER A. LONG: It's two pages long.
15 It has a bunch of folks -- I had a hard time
16 reading it, but I did read it when it came
17 through, and it's dated May 22nd, and that one I
18 saved on my computer because it's in the format

19 and I printed it off to bring it here today, and
20 I put that in the packet. I don't remember what
21 it said. I was wore out from the addresses.

22 COMMISSIONER D. DUMEZICH: May I see it.

23 COMMISSIONER A. LONG: Then I've got all of
24 them that Mr. Wheeler sent out in his responses
25 that he's already addressed -- I'm not going to

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1 go through those individually, but there were a
2 number of those. Then I have an envelope
3 showing that I have received -- an unopened
4 letter from Spencer County Elections, a letter
5 from Shelly Hiatt Parris, Fayette County Clerk,
6 all addressed to me in care of the Division,
7 Clark -- Wells Circuit, Pike Circuit -- some of
8 these people I know personally because I
9 practice law in that area, but I -- Clinton
10 Circuit and Hendricks -- Hendricks appears to
11 not be sealed. I've not opened it, but they
12 were in a packet, sent to me by -- the Division
13 is forwarding all of my mail -- when you said
14 bundling, I assume that's what you received?

15 CHAIRMAN T. WHEELER: Yes, sir.

16 COMMISSIONER A. LONG: And Pulaski, two
17 unopened letters addressed to me, and I noted in
18 the filings, and I have got to assume that
19 everybody saw this at some point, the submission
20 by MicroVote Corporation by -- dated back in
21 April of 2006.

22 The reason I thought I'd bring -- I just

23 refer to it, it's got -- I saw in a number of
24 letters from the clerks, but they're all dated
25 back in 2006. I'll throw it in my packet, and I

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1 have -- I don't -- I have no memory of anyone
2 lobbying me directly verbally -- I'm sure over
3 the years we've had conversations.

4 I vote in Morgan County on equipment that's
5 the subject of this cause, and I'm sure when
6 I've been there, the clerk has mentioned
7 something, but nothing from the standpoint other
8 than she's happy with her equipment and happy
9 with MicroVote, and I disclose that. That's the
10 only memory of anything I have with her.

11 CHAIRMAN T. WHEELER: I'd like to go ahead
12 and make that -- is that an exhibit or what have
13 you...

14 MR. G. WHITE: That is a collection of
15 paper right now. I'm not sure I would call it
16 an exhibit but I...

17 CHAIRMAN T. WHEELER: I would like to place
18 that into the record.

19 MR. G. WHITE: And we will do that, the
20 only -- but before we do that, the point of
21 exercise is to make sure that these gentlemen
22 have an opportunity to see what you have seen --

23 CHAIRMAN T. WHEELER: Right.

24 MR. G. WHITE: -- and then I'll put my
25 skills to work and try to, you know, index that

25

MinutesTranscript6 10 08

1 and put that into an exhibit, but I think at
2 this stage of the game, maybe if we could share
3 that with these men and ladies, that that would
4 be the logical next step.

5 CHAIRMAN T. WHEELER: Let's see what
6 Commissioner Dumezich has.

7 COMMISSIONER D. DUMEZICH: Sarah.

8 CHAIRMAN T. WHEELER: Or Sarah.

9 COMMISSIONER S. STEELE RIORDAN: Everything
10 that I received was likewise forwarded by the
11 Division, and I got it in my office, but it was
12 addressed to me, the Division offices, and I
13 have given them all to Gordon, who has a pile of
14 them, and I don't have anything.

15 COMMISSIONER D. DUMEZICH: My report is I
16 have received very similar to what other people
17 got, which is the packet of documents that was
18 forwarded by the Commission. In addition, the
19 e-mail that I'm holding in my hand dated May
20 22nd, '08, I was also a recipient of.

21 When I received this e-mail, I called up
22 the clerk of the Boone County -- the clerk in
23 Boone County -- Penny Bogan, I believe her name
24 is, I'm not certain, and had a brief discussion
25 with her, and then I received a call from the

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1 clerk of Spencer County, and I can't remember
2 Ann's last name.

3 COMMISSIONER A. LONG: Jochim J-O-C-H-I-M,
Page 22

4 I think.

5 COMMISSIONER D. DUMEZICH: And I spoke to
6 both of them about this e-mail. The content of
7 the conversation was that from my perspective
8 much of what was in this e-mail was a
9 misrepresentation and I wanted to know whether
10 they came by these facts from gathering
11 themselves firsthand or whether -- or where they
12 came from? Outside of those communications,
13 those are the only communications I've had in
14 the '08 with respect to this proceeding.

15 CHAIRMAN T. WHEELER: One additional
16 communication this morning, a secretary for the
17 commissioners in Boone County, and as I think
18 I've disclosed before, I used to sit on the
19 Boone County Council and was involved in
20 purchasing machines back then, called and asked
21 for my address, my business address, and I said
22 why, and she referred that it was a letter from
23 the Commissioners related to the MicroVote
24 situation.

25 It is my understanding it has been faxed to

27

1 me. I have not seen it nor do I intend to look
2 at it. I will forward it on to Mr. White for
3 distribution whenever I get access to my e-mail
4 after this meeting.

5 MR. G. WHITE: Okay. I'm not exactly sure
6 what this is going to look like, because
7 frankly, I've never done it before, but I do

8 want to share this with you folks. I want you
9 to see what these communiques are.

10 The statute gives terminology, make it of
11 record. I don't know that it's an evidentiary
12 matter. I don't know that it needs to be marked
13 or anything. I just think it needs to be out
14 there so that everyone can -- can see it.

15 Like I say, I -- frankly, I would like to
16 index it, I think that would be helpful, and I
17 have not had an opportunity to do that yet
18 because some of this stuff we've just seen
19 today, and I will certainly do that for you, but
20 I can't do it at this very moment.

21 But like I say, I think the main point of
22 the exercise is that you folks get a chance to
23 see this now so the playing field is level,
24 which is my point anyway.

25 MR. J. AMMEEN: May I ask a question of the

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1 Chair?

2 CHAIRMAN T. WHEELER: Certainly.

3 MR. J. AMMEEN: Mr. Chairman, we would
4 prefer to make it part of the record. Did you
5 intend to mean the record of proceedings which
6 are produced in those two binders there or a
7 record of this meeting; is it to be part of the
8 appellate record, in a sense of judicial review?

9 CHAIRMAN T. WHEELER: You can make it a
10 record --

11 MR. G. WHITE: well, I would say it's part

12 of the record of today's proceedings as opposed
13 to evidence that the administrative law judge
14 saw. Obviously, he didn't see this stuff, or at
15 least I don't think he did. Now I'm repeating
16 myself, but my goal is just to prove to anybody
17 who's interested that we're all looking --
18 everybody is looking at the same thing when a
19 decision is made. So no, I would not see that
20 as an evidentiary matter, but I don't know what
21 you call it, frankly.

22 COMMISSIONER A. LONG: I don't think it's a
23 part of the record for the review unless someone
24 would ask that it be brought up.

25 MR. G. WHITE: Well, exactly.

29

1 COMMISSIONER A. LONG: If it's available,
2 someone would need it.

3 MR. G. WHITE: Yeah, if it becomes an
4 issue, and hopefully, it won't.

5 CHAIRMAN T. WHEELER: I would like the
6 information, since it's referred to in the
7 record of this particular meeting -- I believe
8 we opened -- have we formally opened this
9 hearing?

10 MR. G. WHITE: It sounds like it.

11 CHAIRMAN T. WHEELER: I thought we had,
12 which means it's referred to in the record,
13 particularly, since Commissioner Long has
14 referred to those things, I would be more
15 comfortable, and that's the lawyer in me, if the

16 document is referred to in the record.

17 MR. G. WHITE: Okay.

18 CHAIRMAN T. WHEELER: I would prefer the
19 document be in the record, particularly, for
20 appellate review. It's up to Mr. Long.

21 COMMISSIONER A. LONG: You're the chairman.
22 I don't care if it's in the record. I think it
23 encumbers it if someone wants it there.

24 CHAIRMAN T. WHEELER: I don't think it's
25 going to encumber it a whole lot more, let me

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1 put it that way.

2 COMMISSIONER D. DUMEZICH: To the extent
3 that it would be duplicative and given to both
4 parties after this, at that point in time, if
5 someone felt that they were going to appeal,
6 they could always just take it to the module of
7 the court at that time. So I think you got
8 yourself in a little bit of a procedural bind
9 because the exhibit that you would be creating
10 isn't compiled yet.

11 CHAIRMAN T. WHEELER: Well, assuming we go
12 through a compilation process, I would simply
13 introduce exhibits as an exhibit. I'm
14 comfortable with doing it that way.

15 COMMISSIONER D. DUMEZICH: That works for
16 me.

17 CHAIRMAN T. WHEELER: Let's -- are the
18 commissioners comfortable with simply
19 attaching as -- once there's a compilation as an

20 exhibit to this meeting, and if somebody wants
21 to do something with the ex parte stuff later,
22 they can introduce that as part of an appellate
23 record and move on.

24 COMMISSIONER A. LONG: Whatever.

25 CHAIRMAN T. WHEELER: That way, it's there,

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1 and it's part of the minutes from this meeting
2 and an exhibit just as --

3 MR. G. WHITE: Well, I guess the question I
4 have is we could put all of this stuff in a big
5 pile right now and put a sticker on it and say
6 this is exhibit whatever, all communications to
7 the commissioners, and then just move on from
8 there, or I can, you know, index it and make it
9 look a little bit better.

10 COMMISSIONER D. DUMEZICH: I'd instruct
11 that he do that.

12 CHAIRMAN T. WHEELER: Let me ask this, John
13 and Jim, I'll give you each a chance, how do you
14 want to handle it, it's your record?

15 MR. J. PRICE: I think in light of the fact
16 that it's been discussed as much as it has, and
17 in light of a case I'd like to quote one
18 sentence from, it says attaching it as part of
19 the record in some form is a good idea.

20 CHAIRMAN T. WHEELER: Jim.

21 MR. J. AMMEEN: My question was really to
22 understand what it was you were thinking, Mr.
23 Chairman. I believe that this transcript is

24 going to wind up as part of any kind of
25 appellate record, so it's in the record, so I

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1 guess my question was did you mean it was going
2 to be numbered?

3 MR. G. WHITE: Yeah, whatever.

4 CHAIRMAN T. WHEELER: Given the fact that
5 it sounds like both of you want it as part of
6 the record, are you comfortable with the
7 commissioner's attorney making a compilation,
8 attachment in the record, and we'll call it...

9 MR. G. WHITE: Exhibit A to final hearing.

10 CHAIRMAN T. WHEELER: Something like that.

11 MR. J. AMMEEN: I would imagine that Ms.
12 Hobbs...

13 COMMISSIONER A. LONG: Isn't that what
14 the -- Counsel, or Gordon, this is the
15 requirement, or the exposure requirement of
16 AOPA?

17 MR. G. WHITE: Yes, sir.

18 COMMISSIONER A. LONG: I mean, that's all I
19 see that it is.

20 CHAIRMAN T. WHEELER: So it would just be
21 captioned AOPA disclosure?

22 MR. G. WHITE: Yeah, and if there's some
23 more artful language than AOPA, we'll find it,
24 but yea.

25 CHAIRMAN T. WHEELER: I thought

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MinutesTranscript6 10 08

1 Commissioner Long was very artful.

2 MR. G. WHITE: He was. He was.

3 MR. J. AMMEEN: To answer your question,
4 I'm comfortable with that.

5 CHAIRMAN T. WHEELER: Okay.

6 MR. J. AMMEEN: I would imagine Ms. Hobbs
7 is going to scan it for the record anyway so...

8 CHAIRMAN T. WHEELER: All right.

9 MR. G. WHITE: My only question, and it's
10 the secretary in me, I guess, do you want me to
11 index that stuff or are we just going to put it
12 in a big pile today?

13 CHAIRMAN T. WHEELER: I thought I heard
14 agreement by counsel that you could index it.

15 MR. G. WHITE: Okay.

16 COMMISSIONER A. LONG: And the envelopes
17 that I have left and are unsealed, I would
18 they -- the ones that are sealed need to stay
19 sealed.

20 MR. G. WHITE: Okay. I can do that.

21 CHAIRMAN T. WHEELER: I believe counsel
22 opened them up. I saw Mr. Price look at them.

23 COMMISSIONER A. LONG: If anyone wants to
24 open them, they can. I've not seen anything.

25 CHAIRMAN T. WHEELER: In conclusion on the

34

1 ex parte or the AOPA thing, I will advise both
2 parties that, frankly, I paid little attention
3 to the second, third, fourth and fifth letters

4 since they seemed to be somewhat repetitive and
5 they are certainly not going to impact any
6 decision or any determination I'm going to make
7 today.

8 MR. J. PRICE: Mr. Chairman, can I take 20
9 seconds on the record because the phrase --

10 CHAIRMAN T. WHEELER: You've got 20
11 seconds.

12 MR. J. PRICE: Because the phrase ex parte
13 has been used, and the Indiana Court of Appeals,
14 in the case of Cumberland versus IDEM dealt with
15 that, when they entered this straight forward
16 statement, in the context of administrative
17 proceedings pursuant to AOPA, the prohibition
18 against ex parte communications applies only to
19 contact with administrative law judges.

20 And since we have here government officials
21 contacting a government agency, I would disagree
22 with the phrase ex parte because they're not
23 parties and these are not communications that
24 are ex parte. They're actually petitioning the
25 government for addressing grievances so I just

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1 wanted to state that on the record. Thank you
2 for your forbearance.

3 CHAIRMAN T. WHEELER: Are you done with
4 those?

5 MR. J. AMMEEN: I want to get them off of
6 here before I mix them up.

7 MR. G. WHITE: Let me mix them up.

8 CHAIRMAN T. WHEELER: Give them to Mr.
9 white. That way he's got full responsibility.
10 MR. J. PRICE: I've got the case, I'm
11 sorry, 691 NE2nd 206.
12 MR. J. AMMEEN: I brought a copy of that,
13 too.
14 CHAIRMAN T. WHEELER: All right. Moving on
15 to the -- anything further on this particular
16 issue, anything from the commissioners?
17 COMMISSIONER A. LONG: No.
18 CHAIRMAN T. WHEELER: Moving onto the
19 second issue which is the appeal of the order.
20 what I'm going to ask that we do is we handle
21 this in a bifurcated fashion. I want to discuss
22 the findings and conclusions and leave the
23 sanction issue for later depending on what the
24 Commission does, because obviously, if the
25 Commission chooses to overturn the order, there

36

1 is no reason to discuss sanctions. As a
2 consequence of that, I'm assuming I have an
3 agreement from the commissioners to vote in a
4 bifurcated fashion?
5 COMMISSIONER A. LONG: Agreed.
6 CHAIRMAN T. WHEELER: which I believe we
7 do. Let's move forward. All the commissioners
8 have all the proceedings in front of them. I
9 believe...
10 COMMISSIONER A. LONG: That was one of the
11 things, I've got the order that was issued by

12 the ALJ, and then we have Respondent MicroVote's
13 objections with the designation of evidence and
14 support and the brief, and I have the Election
15 Division's brief and support of the conditions
16 accepted. That's what I've got. I believe I
17 have.

18 CHAIRMAN T. WHEELER: That is all the
19 documents I have. Now I would note...

20 COMMISSIONER A. LONG: Did I leave
21 something out?

22 COMMISSIONER S. STEELE RIORDAN: That's it.

23 CHAIRMAN T. WHEELER: It's designated
24 Exhibits A through G, according to what I got.
25 I believe all the commissioners have that in

37

1 front of us. With respect to the particular
2 order, the original -- the notice with respect
3 to this hearing indicated, I believe, there
4 would be no oral argument on this.

5 I'm going to take the prerogative as the
6 chairman to give each side ten minutes with
7 respect to -- if there's anything -- I don't
8 think -- we're all attorneys here so we've all
9 been sitting in the same exact chair that you
10 guys have sat at.

11 There's absolutely no need to read us
12 what's in your brief or read us what -- the
13 materials in your brief, or if there's
14 something, in particular, new or relevant that
15 you wish to bring to the commissioners'

16 attention that isn't in this brief, I will give
17 you ten minutes to do that. I will start with
18 the Petitioner.

19 COMMISSIONER S. STEELE RIORDAN: Again, Mr.
20 Chairman, for purposes of clarification, first,
21 you're going to have -- center our discussion on
22 the findings and the conclusions --

23 CHAIRMAN T. WHEELER: Absolutely.

24 COMMISSIONER S. STEELE RIORDAN: -- and not
25 address sanctions?

38

1 CHAIRMAN T. WHEELER: Sanction issue, we'll
2 do that separate.

3 COMMISSIONER S. STEELE RIORDAN: Thank you.

4 CHAIRMAN T. WHEELER: Mr. Price.

5 MR. J. PRICE: This truly gets to be an
6 off-the-cuff series of comments since I wasn't
7 prepared to do this and we were told there would
8 be no oral argument but I'm very happy to do it.

9 When John Locke, the famous Scottish
10 political philosopher, came up with the concept
11 of separation of powers, he -- he did it because
12 he recognized that if there's only a king and
13 there's no other power and if the king happens
14 to be wrong on something, then it creates a
15 problem for the people living in the kingdom.
16 So Locke's concept was executive, legislative,
17 judicial, and he gave each a check on the
18 others, and for the most part in our country
19 that's been pretty successful.

20 Occasionally, there have been some
21 problems, but for the most part, it's worked
22 well, because if an executive gets out of line,
23 we have a right to go to the judicial, which is
24 what AOPA provides for judicial review, and the
25 courts look at it and they say either the

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1 executive was right or the executive was wrong.
2 The legislature gets to make the ground rules,
3 and they have adopted AOPA and they have adopted
4 the Election Code.

5 Now what brings us all here together today
6 on this exercise really started in Florida with
7 the hanging chads and then HAVA, and for some
8 reason, the Congress in the United States in its
9 finite wisdom decided to make all the vendors in
10 the entire country go back and get recertified.

11 There wasn't any reason for that because
12 the vendors in the whole country didn't have a
13 problem. It was a very limited subset in a
14 certain state. But nevertheless, that was the
15 law. So all the vendors in the country began
16 that process, and as we know, there are only a
17 couple of labs that can certify, and what
18 happened was they ran into a problem and they
19 weren't able to certify and we ran up against
20 the primary here in Indiana and the Ciber Labs
21 refused to certify because they were being held
22 up in Washington D.C.

23 And when they finally were able to certify,

24 they came in here and worked on Easter Sunday
25 weekend to get the certification done so that

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1 MicroVote could come before this commission, and
2 you were kind enough on April the 28th to
3 certify the election systems, and we went into a
4 very successful election cycle, and no one lost
5 a vote and no one lost a dollar.

6 Based on that MicroVote has been find
7 \$250,000, \$113,000 in legal fines, which is now
8 on appeal, and that 380 some thousand dollars on
9 deposit with the Marion County Clerk of the
10 Courts based on what happens with the appeal,
11 and when MicroVote was not willing to exceed to
12 the demands of the executive in this matter
13 because they felt they hadn't done anything
14 wrong, then this proceeding started, and this
15 proceeding, of course, as you know, the
16 administrative law judge was appointed.

17 Mr. Jefferson took no evidence. He had no
18 hearings. He took what was done in the prior
19 matter and stamped it and sent it to you and
20 said put this company out of business for five
21 years. Their crime, they were a little late
22 getting to the commission, but your commission
23 did approve their certification of the voting
24 systems and nobody lost a vote, nobody lost a
25 dollar, nobody ever filed a complaint, so for

41

1 that crime, they've now been penalized over
2 \$300,000 and asked to go out of business.

3 Gilbert and Sullivan and Ricato (Phonetic)
4 had a line that I think applies, and that is let
5 the punishment fit the crime, and I realize
6 you're bifurcating here today, but it seems to
7 me that we need to see the whole picture, and
8 the whole picture is Indiana's only election
9 systems company with very few employees, who
10 serves the needs of 49 counties, is being faced
11 with a prospect not only of pay a third of a
12 million dollars out in fines for a two-week
13 delay or going out of business.

14 And if ultimately, the courts of this state
15 look at that entire body of evidence, facts and
16 law, and decide it was a just conclusion, then
17 John Locke was right. On the other hand, if the
18 courts of this state look at that and say that's
19 not the way we do business in a democracy, not
20 in a representative democracy, then John Locke
21 would also be right. So we're very happy to
22 proceed and I appreciate this opportunity to
23 address these issues. Thank you.

24 CHAIRMAN T. WHEELER: If I could ask just
25 one question, you use the word a little bit late

42

1 getting to the commission, and I wrote that
2 down, what did you mean by that?

3 MR. J. PRICE: Well, it would have been
4 nice if we could have gone in in January with a

5 Ciber Lab letter saying that the election
6 systems had been certified by Ciber Lab, but we
7 couldn't, because on a national level, it wasn't
8 until late March that the national -- the
9 Federal Election Commission withdrew their hands
10 off of the two certification laboratories and
11 said okay, now you can go do that.

12 well, we had an early May primary coming up
13 so we had very little time, which is why Jack
14 Cobb with Ciber Labs had to come in here on
15 Easter Sunday weekend to complete the
16 certification so that we could come to you and
17 you could approve it on April 28th.

18 So when I say a little bit late -- it would
19 have been great to come early but we couldn't.
20 We were prohibited from coming until the
21 laboratory was set free by the Federal Election
22 Commission.

23 CHAIRMAN T. WHEELER: Are you conceding
24 that you installed uncertified software?

25 MR. J. PRICE: No, of course not. This

43

1 commission on April 28th certified our software.

2 CHAIRMAN T. WHEELER: I understand it was
3 certified, but are you conceding that it was
4 installed prior to that?

5 MR. J. PRICE: No.

6 CHAIRMAN T. WHEELER: Okay. I didn't --
7 that's what I was trying to understand, because
8 you also used the words punishment fit the

9 crime, so are you conceding that there were
10 violations in here and you're saying...

11 MR. J. PRICE: No.

12 CHAIRMAN T. WHEELER: Okay. I'm just
13 trying to understand.

14 MR. J. PRICE: As I understand it, the
15 Commission, or the Division, I should say,
16 excuse me, the Division, Mr. Rokita, when we had
17 our first April 17th hearing felt that we should
18 have been there sooner -- well, on April 17th we
19 were not certified, that's true, because under
20 HAVA, we were decertified as of October the
21 prior year.

22 So the only way to be certified and go to
23 the voters in the May primary, which we had to
24 do by law, and everybody had to do it by law,
25 and we wanted to do it by law and you wanted to

44

1 do it by law, was to get Ciber Labs to stamp it
2 and say it was okay, which they did, and then
3 you approved it on April 28th, and the election
4 was conducted properly, not a vote off, not a
5 dollar misspent, and everybody was happy.

6 COMMISSIONER A. LONG: I don't understand.
7 The specific complaint says starting in October
8 the 1st, after systems were decertified, I guess
9 as you say, and before they were recertified in
10 April, which is six months later, that the
11 complaint for which the administrative law judge
12 found was that MicroVote sold -- and I'm just

13 looking at one paragraph, 14 of the complaint
14 40, MicroVote Infinity Voting Systems to Shelby
15 County, and then on October 18th, you sold,
16 Paragraph 15, to Fayette County, is this not
17 true?

18 MR. J. PRICE: It is not true.

19 COMMISSIONER A. LONG: You did not sell
20 these to these companies?

21 MR. J. PRICE: In the response, Mr. Long,
22 there's a copy of the minutes from the Fayette
23 county commissioners that the contract was
24 approved before the October 1st deadline. A
25 contract is a contract when it's approved, and

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1 so in regard to that county, an approval was
2 made before the HAVA certification deadline.

3 In regard to the other two candidates that
4 are referenced in the response, the approvals by
5 the counties were based upon approval by the
6 Secretary of State's office. So what we have
7 here is a congressionally mandated drop dead
8 deadline that MicroVote was very well aware of.

9 But before October 1st, they had done
10 certain things; for example, going to the
11 Fayette County commissioners and saying do you
12 want to buy these and them saying yes, we do and
13 the commissioners approved it, and the minutes
14 show that they made the final vote to approve
15 the contract.

16 The commissioners didn't actually -- the
Page 39

17 final commissioner of the three didn't actually
18 sign the contract until two or three days after
19 October 1st.

20 COMMISSIONER A. LONG: Were they installed?

21 MR. J. PRICE: They weren't even shipped
22 for sometime.

23 COMMISSIONER A. LONG: So they weren't
24 installed before April 28th?

25 MR. J. PRICE: Were they installed?

46

1 COMMISSIONER A. LONG: Yeah.

2 MR. J. PRICE: I have no idea. I didn't
3 come prepared to argue that specific issue, but
4 they were not used in an election which is the
5 statutory criteria until they were approved by
6 this commission on April 28th. Maybe a better
7 phrase is no harm, no foul, and the punishment
8 fit the crime.

9 CHAIRMAN T. WHEELER: Let me ask, do either
10 of the parties have a copy of Exhibit 125, the
11 deposition transcript of Steve Shamo?

12 MR. J. AMMEEN: Not with me.

13 MR. J. PRICE: No, I didn't...

14 MR. J. AMMEEN: I think I inadvertently
15 didn't include it in the copy when we submitted
16 out designation of evidence, as in court we
17 would do a summary judgment, but rather
18 supplement the record later. I just left it and
19 cited to it.

20 COMMISSIONER D. DUMEZICH: Do you have it?
Page 40

21 CHAIRMAN T. WHEELER: Hold on, I think I've
22 got it. I think I have a copy. I'm confused.
23 Steve Shamo testified on Page 14 of his
24 deposition --

25 MR. J. PRICE: Can I ask where this

47

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1 occurred?

2 COMMISSIONER S. STEELE RIORDAN: Fourteen.

3 CHAIRMAN T. WHEELER: I'm looking at Page
4 14.

5 MR. J. PRICE: What format, what hearing,
6 what context?

7 CHAIRMAN T. WHEELER: I'm looking at the
8 designation of evidence Respondent, MicroVote's
9 briefing to the Indiana Election Commission, so
10 I'm looking at Exhibit U of your...

11 MR. J. PRICE: So to your Commission,
12 you're quoting from testimony at your
13 Commission; is that right?

14 COMMISSIONER S. STEELE RIORDAN: No, this
15 is your deposition.

16 CHAIRMAN T. WHEELER: This is testimony of
17 Mr. Shamo that you submitted.

18 MR. J. PRICE: I'm just trying to find out
19 where it came from.

20 CHAIRMAN T. WHEELER: Okay. It looks like
21 it's in the Secretary of State's proceeding.
22 It's evidence that you presented to the
23 Commission.

24 COMMISSIONER A. LONG: No, it's --
Page 41

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CHAIRMAN T. WHEELER: well, you submitted

48

1 it for these proceedings. You submitted it.

2 MR. J. PRICE: In that case, it had to be
3 with the Secretary of State?

4 COMMISSIONER A. LONG: It is. The caption
5 State of Indiana, Office of the Secretary of
6 State Cause No.

7 MR. J. AMMEEN: The '03 case.

8 COMMISSIONER A. LONG: 06-0003.

9 MR. J. PRICE: Thank you.

10 CHAIRMAN T. WHEELER: I guess based upon --
11 I'm confused with your position that there
12 weren't any violations. I'm reading Mr.
13 Shamo's -- and this is cited in Mr. Jefferson,
14 the administrative law judge's, proceedings. He
15 says -- and this is Mr. Shamo speaking so -- and
16 I don't know who is actually doing the
17 questioning -- I assume the attorney for Mr.
18 John, it looks like, and I believe you're listed
19 as being present there, Mr. Price.

20 It says so have you ever installed software
21 that wasn't certified at the time of
22 installation -- at the time of physical
23 installation for preparation or for use --
24 again, reading from Line 4: Question: Have you
25 ever installed software for a machine that

49

1 wasn't certified? Answer: Yes. Question:
2 when has that happened? Answer: Maybe leading
3 up to the '05/'06 primary. Question: where did
4 that occur, what county? Answer: In all
5 counties. Question: All 47? Answer: Yes.

6 And then he goes on to discuss the
7 production and running -- running right up to
8 the election. That was during -- am I correct,
9 that was during the prohibitive period when it
10 was uncertified?

11 MR. J. PRICE: Mr. Chairman, are you
12 implying that MicroVote, since they weren't
13 certified until the 28th, could have done it in
14 three days, could have installed all of the
15 software in all 47 counties in three days
16 because...

17 CHAIRMAN T. WHEELER: I'm implying that the
18 administrative law judge found based upon the
19 testimony of your own client, which you've just
20 introduced as evidence in front of us, he found
21 that uncertified software had been installed in
22 all 47 counties.

23 MR. J. PRICE: By definition, it had to be
24 uncertified. It wasn't certified until the
25 28th.

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1 CHAIRMAN T. WHEELER: And that is in
2 violation of the law; correct?

3 MR. J. PRICE: No, it's not.

4 CHAIRMAN T. WHEELER: Apparently, I'm

5 missing...

6 COMMISSIONER D. DUMEZICH: I'm troubled by
7 that and I'm also troubled by the representation
8 that it was never done.

9 CHAIRMAN T. WHEELER: You just -- I asked
10 you that, and you said no, we did not install
11 uncertified software -- I thought I asked you
12 that question.

13 MR. J. PRICE: If that was your question, I
14 misunderstood it. It had to be installed before
15 the 28th because you couldn't install it in
16 three days.

17 CHAIRMAN T. WHEELER: Well, I understand
18 that, but you would agree with me that your
19 client admitted under oath that they installed
20 uncertified software in all 47 counties; you
21 would agree with me?

22 MR. J. PRICE: How could they not have --
23 that's what he testified to, how could they not
24 have?

25 CHAIRMAN T. WHEELER: And that's the basis

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1 for the ALJ's findings; correct, your client's
2 admission.

3 MR. J. PRICE: That's the \$250,000 fine
4 that Mr. McNeely -- that's the basis for the
5 \$250,000 fine that Mr. McNeely entered and
6 \$113,000 worth of legal fees, and the five-year
7 suspension, that's correct.

8 CHAIRMAN T. WHEELER: So you don't deny?

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MR. J. PRICE: What?

CHAIRMAN T. WHEELER: That your client installed uncertified software, and Mr. Shamo admitted it under oath?

MR. J. PRICE: That was Mr. Shamo's testimony at the hearing in front of Mr. Todd Rokita, and for being prepared for the election three days later by installing it and then you certified it, they have paid a pretty heavy price.

CHAIRMAN T. WHEELER: Have they paid anything?

MR. J. PRICE: Yes, 3__ --

CHAIRMAN T. WHEELER: I thought you told me that was on appeal. They haven't paid that money to anybody?

MR. J. PRICE: Yes, they have. They paid

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it to the Marion County Clerk?

CHAIRMAN T. WHEELER: Upon a -- awaiting a determination. He's entitled to get it back, I'm assume, if you're successful in an appeal?

MR. J. PRICE: That's correct, but it's not as if they haven't put the money up. There's \$263,000 -- \$363,000, over a third of a million dollars, sitting in the Marion County coffers.

CHAIRMAN T. WHEELER: I guess what I want to understand, are you sitting here today -- I think there are two different arguments, I think, you can make. One is it's not fair

13 because the Secretary of State already did this
14 to us and we've already been punished, and
15 that's what I thought by punishment fit the
16 crime; or secondly, we didn't do anything wrong
17 and the hearing officer's decision is factually
18 incorrect. Are you challenging his findings as
19 factually incorrect, that's my question?

20 MR. J. PRICE: May I answer?

21 CHAIRMAN T. WHEELER: Yeah.

22 MR. J. PRICE: First of all, the basis for
23 the appeal is a res judicata collateral estoppel
24 argument, which we have briefed twice in front
25 of this commission, in our objections and in the

53

1 brief that's sitting before you today, and that
2 is this Commission had the opportunity to join
3 the 003 action, and under the Miller case, by
4 not doing it when the 003 action was filed, the
5 Commission waived its opportunity, and that
6 would be a legal argument that we'll be making
7 in our appeal.

8 As to did MicroVote do something wrong?
9 The answer is MicroVote did everything the law
10 required, so they could not by definition have
11 done anything wrong. The alternative scenario,
12 Mr. Chairman, to what you're proposing is that
13 MicroVote would have said because of the federal
14 election commission, we can't get the Ciber
15 certification, we can't get this commission to
16 approve it, we're not going to install software

17 ahead of time on these machines and half the
18 State of Indiana can vote on paper ballots.
19 They have done that but that's not what
20 happened.

21 CHAIRMAN T. WHEELER: Apparently, I didn't
22 understand the brief of yours I read. The brief
23 yours that I read discussed line by line why you
24 didn't do anything wrong.

25 MR. J. PRICE: They didn't do anything

54

1 wrong. They followed the law completely.

2 CHAIRMAN T. WHEELER: So your contention is
3 installing uncertified -- installing uncertified
4 software is not wrong?

5 MR. J. PRICE: Actually, the software was
6 installed back before it was decertified. I'm
7 sorry, I'm making this humorous, but that's
8 exactly what happened. They went for several
9 years in these counties with software that was
10 installed. The Congress then said on October
11 1st, it's all decertified.

12 CHAIRMAN T. WHEELER: That's true.

13 MR. J. PRICE: And then you recertified it
14 on April 28th.

15 COMMISSIONER A. LONG: The legislature of
16 Indiana did that also, didn't they?

17 MR. J. PRICE: They adopted the HAVA
18 provision and made it applicable to Indiana.

19 COMMISSIONER A. LONG: Indiana -- we're not
20 cited in any federal law in any of this --

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21 3-11-7.5.28 says that...

22 MR. J. PRICE: To get the HAVA funds,
23 Indiana had to adopt that, that's true.

24 COMMISSIONER A. LONG: And we did.

25 MR. J. PRICE: That's correct.

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1 COMMISSIONER A. LONG: I mean, to get
2 highway funds, we sometimes have to do things
3 that some of us don't like to do but...

4 MR. J. PRICE: You're right, Commissioner
5 Long, in order to obtain the HAVA funds, we had
6 to as a state agree to the decertification.

7 COMMISSIONER A. LONG: And then it says
8 that the commissioner's commission before acting
9 on application must receive a report from a
10 person...(a)93-11-16 (Phonetic) indicating that
11 hardware, firmware and software, including the
12 application for renewal of systems, is identical
13 to the original voter system previously
14 certified by the commission, and you're saying
15 there was difficulty because of backlog, somehow
16 the Congress causing all sorts of problems,
17 which they were wanting to do...

18 MR. J. PRICE: It was worse than a
19 difficulty. It became an impossible situation
20 because there were only two.

21 COMMISSIONER A. LONG: But it wasn't
22 impossible. Isn't the real fact, and maybe
23 the -- the real fact of the case, forget who's
24 fault, what was, that No. 1, you can't conduct

25 an election on equipment that's not certified,

56

1 and you're saying we didn't, and that's only
2 because this commission -- as I understand, all
3 of us came together on the eleventh hour to bail
4 you out after your people had installed
5 software, firmware, whatever they want, before
6 it was certified in 47 counties, and that we
7 were in a position that counties either had to
8 have an approved software system in a special
9 meeting, or if we had not, they were going to
10 have to go on paper ballots. And it seems that
11 the statute makes very clear that you shall not
12 install anything within a county relating to a
13 voting system until it's been certified by this
14 commission.

15 MR. J. PRICE: But the Commission on the
16 28th could have said...

17 COMMISSIONER A. LONG: No, I'm talking
18 about -- let's talk about the 25th of April or
19 the 24th, or all the way back to October 1st,
20 the Commission had not certified anything, and
21 it's my understanding from what Mr. Shamo said
22 in that thing that you submitted, his testimony,
23 was that in 47 counties we installed equipment,
24 software in all of our counties, all 47 -- yes,
25 and that that occurred without the approval of

57

1 this commission for the equipment software

2 system that was being put in there?

3 MR. J. PRICE: The problem here is the
4 question that was asked of Mr. Shamo was wrong,
5 and I think he probably perceived it -- the
6 question should have been as of October 1st, did
7 uninstall your software, because what we're
8 talking about here is something that existed
9 before October 1st that was decertified by the
10 act of Congress and by the act of the
11 legislature, as you just pointed out. Now
12 MicroVote could have gone back out to 47
13 counties and said we're taking all the software
14 off, because officially, as of today, it's
15 decertified. They could have done that.

16 CHAIRMAN T. WHEELER: Hold on, Mr. Price,
17 they installed versions 3.01 and 3.04, which are
18 upgrades --

19 MR. J. PRICE: They were upgrades.

20 CHAIRMAN T. WHEELER: Those were upgrades
21 which were uncertified; correct?

22 MR. J. PRICE: These were not significant
23 upgrades.

24 CHAIRMAN T. WHEELER: They were upgrades
25 that were uncertified; is that correct?

58

1 MR. J. PRICE: If I were an expert -- I
2 don't own Cyber Labs so I don't know.

3 CHAIRMAN T. WHEELER: Mr. Shamo testified
4 to that; would you like -- I mean, it's your
5 exhibit?

6 MR. J. PRICE: If I had known I was going
7 to be on trial today, I probably should have
8 brought counsel.

9 COMMISSIONER A. LONG: I'm just trying not
10 to get into a big argument. I really...

11 CHAIRMAN T. WHEELER: We're trying to
12 understand what you're saying.

13 COMMISSIONER D. DUMEZICH: And this was the
14 nature of my side, which you misidentified as
15 humor in your comments. This is what I
16 understood when you made your argument, you said
17 we didn't do anything wrong because we didn't
18 touch the equipment during this period. Now I'm
19 understanding that the equipment was in fact
20 touched because the software was upgraded,
21 version 3.0 and 3.1 were put in?

22 MR. J. PRICE: I think to -- to the best of
23 my limited knowledge, there were a couple of
24 upgrades to help the systems operate that were
25 installed. Now I guess you could have put me

59

1 out of business for that.

2 CHAIRMAN T. WHEELER: That's what I was
3 trying to understand. Is your -- are you
4 admitting that you installed uncertified
5 software and simply asking for leniency on the
6 sanction part, that's what I'm trying to
7 understand?

8 MR. J. PRICE: As I recall the testimony --
9 I'm trying to answer your question, if I recall

10 the testimony from Secretary of State Rokita for
11 Mr. Shamo, and I don't have it in front of me, I
12 wasn't prepared to discuss this today, this is
13 purely from memory, the question was asked about
14 certification of the software -- installation of
15 the software. I don't think he actually got to
16 the 3.1 testimony until he came to your
17 commission on April the 19th.

18 CHAIRMAN T. WHEELER: With all due respect,
19 it's Page 15 of the deposition testimony that
20 you put into evidence before this commission. I
21 don't think it's unfair to ask you about
22 evidence that you submitted.

23 MR. J. PRICE: Would it be fair to share
24 with me what it says?

25 CHAIRMAN T. WHEELER: You don't have your

60

1 pleading?

2 COMMISSIONER A. LONG: You can take my
3 copy, if you want. I haven't marked on it.

4 MR. J. PRICE: I was told that this was a
5 perfunctory hearing today, Mr. Chairman, and
6 there would be no testimony and no oral argument
7 so I brought nothing except a pen and a pad.
8 Page 15, he's talking about the public tests
9 which was an issue that was discussed.

10 COMMISSIONER A. LONG: I think it's 14.

11 CHAIRMAN T. WHEELER: Page 14, it says have
12 you ever installed software or firmware that
13 wasn't certified? Answer: Yes. Do you see
Page 52

14 that on Page 14, Lines 9 to 11.

15 MR. J. PRICE: I see where he says maybe.

16 CHAIRMAN T. WHEELER: Yeah, Line 11.

17 MR. J. PRICE: I see that, but that -- is
18 he not allowed to expand his answer?

19 COMMISSIONER S. STEELE RIORDAN: Excuse me,
20 Mr. Chairman?

21 CHAIRMAN T. WHEELER: Please.

22 COMMISSIONER S. STEELE RIORDAN: I don't --
23 I don't know -- well, I'll just say this. It
24 seems to me that this is -- this looks like a
25 pretty good case of it's easier to ask

61

1 forgiveness than permission -- I mean, to me,
2 that's the argument you're making.

3 But we've had situations before where we
4 see that a vendor or a clerk or our own division
5 and staff are in a situation that because of the
6 time lines that the law lays down, they're in an
7 impossible situation and they have to have some
8 sort of exemption or some sort of dispensation.

9 MR. J. PRICE: That's true.

10 COMMISSIONER S. STEELE RIORDAN: I think
11 for me the issue in this case, at least the way
12 I see it, and I'm prepared to be convinced
13 otherwise but I haven't read anything to that
14 effect yet, is that Microvote was up against
15 some deadlines that made it very difficult for
16 them to do what they needed to do to service the
17 clerks, that they went for it, they went for it,

18 and you have made the argument no harm, no foul,
19 and I think that's right, but that is not what
20 we are here to do.

21 I mean, the -- meeting those time lines and
22 meeting their requirements of certification, all
23 of those requirements have been put in place to
24 protect the process and to make the process as
25 fair and as reliable and trustworthy and, you

62

1 know, solid as it must be because of the -- you
2 know, the sacred right that's being carried out.

3 MR. J. PRICE: Sure.

4 COMMISSIONER S. STEELE RIORDAN: I don't
5 understand -- I mean, I hear you saying that,
6 you know, no harm resulted from this, but you
7 know, we're talking about the question of
8 whether or not Microsoft --

9 CHAIRMAN T. WHEELER: Vote.

10 COMMISSIONER S. STEELE RIORDAN: I'm sorry,
11 MicroVote -- I mean, MicroVote -- I mean, you
12 agree that MicroVote installed software that
13 wasn't certified, but your argument is they
14 didn't have a choice; right, they had no choice?

15 MR. J. PRICE: I appreciate what you're
16 saying. I'd like to fine tune it a little bit.

17 COMMISSIONER S. STEELE RIORDAN: Well, my
18 point is that I think we should move on than
19 fighting about what his client said,
20 particularly, line by line of deposition.

21 MR. J. PRICE: I don't want to fight, but I

22 do want to clarify this one point, I think, for
23 the commissioners and for myself, which is very
24 important. The statute says you can't install
25 and use uncertified software in an election.

63

1 That's a phrase that the legislative branch put
2 in there, and the fight that occurred that you
3 read about on these four pages that occurred in
4 front of Mr. McNeely and we didn't get a chance
5 in front of Mr. Jefferson was does the public
6 testing ahead of the election before April 28th
7 when you approved it constitute an election, and
8 the argument was no, it didn't, that's not
9 really the election, and the Division's argument
10 was yes, it is, and ultimately, a court of
11 appeals will decide whether that's right or not.

12 COMMISSIONER S. STEELE RIORDAN: Well, I
13 mean, my take on that is -- you know, you can't
14 have it both ways. You can't put the software
15 in the machine and poll all the votes all on the
16 same day.

17 MR. J. PRICE: I understand your argument.

18 COMMISSIONER S. STEELE RIORDAN: There has
19 to be a continuum there. I think what you're
20 saying is you couldn't install it on the day of
21 the election because that was way too late.

22 MR. J. PRICE: That's true.

23 COMMISSIONER S. STEELE RIORDAN: So
24 everybody gets to look at that breath of time
25 frame, but I -- I think we talked about ten

1 minutes. I'd ask we look at the clock and see
2 if Mr. Ammeen has a presentation.

3 CHAIRMAN T. WHEELER: I agree. Mr. Ammeen.

4 MR. J. AMMEEN: Thank you, Mr. Chairman.
5 There really is no question of fact here in this
6 proceeding. There's no question of fact before
7 the administrative law judge earlier this year.
8 There's no question of fact before the
9 administrative law judge in the OSS litigation.

10 MicroVote, in fact, sold, marketed, and
11 installed and permitted counties to use
12 uncertified voting systems in the period between
13 October 1 and April 27 of -- October 1, 2005,
14 April 27, 2006.

15 My issues actually relate more to the
16 nature of the proceeding. The allegation that
17 the administrative law judge took no evidence is
18 utter hogwash, and virtually, sanctionable in
19 and of itself because you are sitting here and
20 looking at --

21 CHAIRMAN T. WHEELER: Could you refrain
22 from doing -- we're not doing -- John -- I mean,
23 we've had this before. Just stick to it. No
24 personal attacks.

25 MR. J. AMMEEN: It's not -- it's not a

1 personal attack, Your Honor.

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CHAIRMAN T. WHEELER: It is.

MR. J. AMMEEN: It is about the -- it is about the process.

CHAIRMAN T. WHEELER: I'm not interested in hearing it and I don't think any of the commissioners are interested in hearing words like sanctions or anything like that, if you could stick to your argument.

MR. J. AMMEEN: The matter of fact is the evidence before the administrative law judge and there is no question of fact that these violations occurred. With that, I'm going to stop.

CHAIRMAN T. WHEELER: Questions from the commissioners?

COMMISSIONER A. LONG: I don't have anything.

CHAIRMAN T. WHEELER: With respect to evidence before the administrative law judge, how did that evidence come before the administrative law judge?

MR. J. AMMEEN: The Division submitted evidence in the traditional form of summary judgment procedure, according I.C. 4-21.5-3-23.

66

1 MicroVote waived its opportunity to submit
2 evidence in the traditional course but instead
3 chose to merely incorporate that which was filed
4 and served and put into the record in the OSS
5 litigation.

6 Perhaps at one level, that's consistent
7 with the strategy of relying on res judicata and
8 collateral estoppel. However, it's inconsistent
9 then with failing to stipulate to the findings
10 of facts and conclusions of law as requested by
11 the administrative law judge in this case, all
12 of which require the Division to do things using
13 the traditional Rule 56 and Section 23 manner.

14 CHAIRMAN T. WHEELER: So I understand it
15 procedurally, the Division, or at least there
16 was an inquiry about stipulating to the
17 Secretary of State record; correct?

18 MR. J. AMMEEN: Yes, Your Honor.

19 CHAIRMAN T. WHEELER: And MicroVote
20 declined to do that?

21 MR. J. PRICE: That is incorrect.

22 CHAIRMAN T. WHEELER: Oh, I'm sorry.

23 MR. J. AMMEEN: We agreed on seven facts
24 out of all of them. One of those facts,
25 however, was a stipulation to the fact that

67

1 uncertified voting systems were sold during that
2 period of time between October 1, 2005 and
3 April 27, 2006. I believe that might have been
4 Fact No. 5.

5 CHAIRMAN T. WHEELER: Where in the record
6 is that, that stipulation?

7 MR. J. AMMEEN: It is -- I did not bring my
8 summary judgment brief, but I know I pointed it
9 out in there. It was also in the stipulation

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filed I think February the 5th --

CHAIRMAN T. WHEELER: Was there a joint --

MR. J. AMMEEN: January 21st.

CHAIRMAN T. WHEELER: I see where you did stipulate a fact on January 22nd. They did propose stipulated facts. Did they join together at some point?

MR. J. AMMEEN: Yes. What happened, Your Honor, I think it was January 14th, MicroVote submitted their proposed stipulations of fact. We came back then a week later and submitted both our own version of stipulations. We had not incorporated the ALJ's order forbidding that and then we also then submitted a direct response to what Mr. Price did. Because there is some difference in the numbering of the

68

paragraphs, the ALJ then asked us to submit a cleaned up version, which I think we did late in February.

CHAIRMAN T. WHEELER: Which is where, show me where that is?

COMMISSIONER D. DUMEZICH: Were there motions for summary judgment?

MR. J. AMMEEN: Yes, there were.

COMMISSIONER D. DUMEZICH: Okay.

CHAIRMAN T. WHEELER: There's a revised response of stipulations here.

COMMISSIONER A. LONG: Look at the index.

COMMISSIONER D. DUMEZICH: I'm just tying

14 to reconcile the point that Mr. Price said that
15 they heard no new evidence.

16 MR. J. PRICE: Correct, or no hearings.

17 COMMISSIONER D. DUMEZICH: But, obviously,
18 they have at least a partially stipulated record
19 and you felt comfortable to file motion on
20 summary judgment but no evidence was heard.

21 MR. J. PRICE: I don't think we were
22 comfortable but we did.

23 CHAIRMAN T. WHEELER: This was by
24 agreement, though?

25 COMMISSIONER D. DUMEZICH: I can appreciate

69

1 your comment.

2 CHAIRMAN T. WHEELER: There are seven --
3 Mr. Price, there's a document here which is
4 entitled, Indiana Election Division's Revised
5 Response to Proposed Stipulated Facts, and then
6 MicroVote General Corporation, it has seven
7 stipulated facts; did you stipulate to that?

8 MR. J. PRICE: If I could take a look at
9 it. I know we submitted a stipulated fact.

10 CHAIRMAN T. WHEELER: I don't see your
11 signature on it, that's why I'm asking the
12 question. He was referring to seven
13 stipulations.

14 MR. J. PRICE: No, this is their response
15 to our stipulation.

16 MR. J. AMMEEN: It's a revised response in
17 response to the ALJ's request. You'll have to

18 go --

19 CHAIRMAN T. WHEELER: I want to see what
20 you were referring to.

21 MR. J. AMMEEN: I've got to see it. I
22 can't read upside down.

23 CHAIRMAN T. WHEELER: You said there were
24 seven that Price agreed to, that MicroVote
25 agreed to?

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70

1 MR. J. AMMEEN: Yes. These were the seven
2 facts that Mr. Price had identified in his
3 January 14th filing.

4 CHAIRMAN T. WHEELER: That you picked out?

5 MR. J. AMMEEN: That we agreed with.

6 COMMISSIONER A. LONG: Where is that
7 January 14th filing?

8 CHAIRMAN T. WHEELER: January 14th or
9 January 21st?

10 MR. J. AMMEEN: It's No. 37.

11 CHAIRMAN T. WHEELER: I have their
12 stipulations of fact and then -- so you agreed
13 to seven of those, is that what you're telling
14 me?

15 MR. J. AMMEEN: Correct.

16 CHAIRMAN T. WHEELER: And John what were
17 you saying you guys stipulated to -- Mr. Prize
18 what were you saying you stipulated to what now.

19 MR. J. PRICE: I believe there were seven
20 stipulated facts that we what agreed between us.
21 As in any stipulation, you look at what they

22 want to stipulate and we picked out the ones we
23 would stipulate to and...

24 CHAIRMAN T. WHEELER: And then they picked
25 out the ones that they could live with and what

71

1 you could live with?

2 MR. J. PRICE: Right.

3 CHAIRMAN T. WHEELER: Is that Exhibit 49?

4 MR. J. PRICE: I don't think so because I
5 don't see my signature on there.

6 CHAIRMAN T. WHEELER: That's what I don't
7 understand.

8 MR. J. AMMEEN: There was never a document
9 that was signed by both of us, Your Honor.
10 Mr. Price submitted No. 37. I then submitted --

11 CHAIRMAN T. WHEELER: I've got No. 37. You
12 submitted...

13 MR. J. AMMEEN: Thirty-nine and 40.

14 CHAIRMAN T. WHEELER: Correct.

15 MR. J. AMMEEN: After receiving 40, the ALJ
16 requested orally that I submit something that
17 identified which paragraphs, specifically,
18 because what I had done in No. 40 was I had put
19 different objections and things in there.

20 CHAIRMAN T. WHEELER: My question for you
21 is simple. You said that MicroVote had
22 stipulated to selling uncertified software?

23 MR. J. AMMEEN: I said it was No. 5.

24 CHAIRMAN T. WHEELER: And where was that --
25 I didn't see that before, and I assume Mr. Price

72

1 has indicated he did not so stipulate?

2 MR. J. PRICE: That's correct.

3 MR. J. AMMEEN: We'll then have to go to
4 the Secretary of State, the way he did it, go
5 back to 37 for a second.

6 CHAIRMAN T. WHEELER: Then why isn't it in
7 here? This is your revised --

8 MR. J. AMMEEN: May I not look at it upside
9 down. Right here, No. 4, MicroVote's electronic
10 voting system software has been decertified by
11 operation statute. After this decertification,
12 MicroVote had no voting equipment certified for
13 use --

14 CHAIRMAN T. WHEELER: I think Mr. Price
15 would agree with that; correct?

16 MR. J. PRICE: Correct.

17 CHAIRMAN T. WHEELER: But I thought you had
18 said that they had sold, they had stipulated
19 that they had sold that software?

20 MR. J. PRICE: That's exactly what he said.

21 MR. J. AMMEEN: All right. Sitting here
22 without a brief and without preparing for
23 argument, I over spoke on -- or oversold that
24 point. They stipulated that they were
25 uncertified. The proof is that they sold it.

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73

1 we have -- we submitted the copies of the
2 receipts and delivery documents. We have

3 testimony of Mr. Shamo, so we pulled the
4 traditional summary record using the traditional
5 business records that are available to prove
6 that the sales occurred between October 21 and
7 April 27.

8 So we know that sales occurred because we
9 have the documents. We know that money was
10 being exchanged and equipment was being sold and
11 installed and it was during the period of time
12 that they admit that it was decertified.

13 CHAIRMAN T. WHEELER: Buy they didn't
14 stipulate to the fact that they had sold it to
15 them?

16 MR. J. AMMEEN: No, I'm sorry.

17 CHAIRMAN T. WHEELER: Any questions from
18 the commissioners, anything else?

19 (No response from the commissioners.)

20 CHAIRMAN T. WHEELER: All right. I'll
21 accept a motion.

22 COMMISSIONER A. LONG: So are we
23 deliberating now?

24 CHAIRMAN T. WHEELER: We need a motion to
25 deliberate.

74

1 COMMISSIONER A. LONG: What motion, do we
2 need to deliberate, move to deliberate or go
3 into deliberation?

4 CHAIRMAN T. WHEELER: We can simply make a
5 motion.

6 COMMISSIONER A. LONG: I mean, I don't care

7 about the motion to deliberate. I just -- I'm
8 just looking down here at our lawyer who...

9 MR. G. WHITE: I'm not a part of that.
10 They don't pay me enough to do that.

11 CHAIRMAN T. WHEELER: I don't believe we've
12 ever adopted the Roberts Rules of Order for the
13 commission, so if we can just go ahead and
14 deliberate, feel free. As Mr. Price and I know
15 from -- spent quite a bit of time with the
16 Roberts Rules of Order earlier this week -- I
17 think it was last week?

18 MR. J. PRICE: Last week.

19 CHAIRMAN T. WHEELER: So I've had a great
20 deal of time to familiarize myself with that
21 particular concept. I guess we'll -- we'll do
22 it the way that I did it with the Boone County
23 Council, which is I start at the left and work
24 to the right.

25 COMMISSIONER S. STEELE RIORDAN: Okay.

75

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1 CHAIRMAN T. WHEELER: And as a junior
2 member, I start at the left and we also voted in
3 that direction.

4 COMMISSIONER D. DUMEZICH: It's only
5 because he doesn't trust me.

6 CHAIRMAN T. WHEELER: It keeps him quiet.
7 The more you talk, the less he does.

8 COMMISSIONER S. STEELE RIORDAN: Based on
9 my review, and I think we've had some
10 discussions about this today which sheds a

11 little bit of light on it, but my sense is it's
12 hard that a violation didn't occur. I'm saying
13 now saying that a violation occurred -- you
14 know, is only the first part of the question,
15 and we have to look at what do we do about it,
16 but I don't think there's any question in my
17 mind that uncertified software was installed in
18 all of these counties and that that is not
19 supposed to happen under Indiana law, and I feel
20 pretty confident that that matters because those
21 rules for certification mean nothing unless
22 they're enforced.

23 So I guess I would say that I would be in
24 favor of a motion that upheld the ALJ's finding
25 that MicroVote violated the applicable statutes

76

1 and then when we move on to the next part of the
2 proceedings to talk about sanction -- you know,
3 I see that as a separate discussion, but I move
4 that we uphold the ALJ's finding on the
5 violation, and I don't know that that was --
6 that I actually made a motion. I just wanted to
7 say what my thinking would be.

8 COMMISSIONER A. LONG: Did you make such a
9 motion?

10 COMMISSIONER S. STEELE RIORDAN: No, I just
11 talked about it.

12 COMMISSIONER A. LONG: All right. Is it my
13 turn to deliberate?

14 CHAIRMAN T. WHEELER: You are up to

15 deliberate.

16 COMMISSIONER A. LONG: Sarah focuses, as
17 she also does, right to the heart of the matter.
18 It is very clear -- very very clear that
19 Microvote went ahead -- I assume they perceive
20 themselves in a box that they didn't create, but
21 I don't -- I think Mr. Price's position is all
22 this stuff was out there and it suddenly got
23 decertified and then later it got recertified --
24 I don't think that answers the tone.

25 As I understand, there were -- if that

77

1 would be the case, then there wouldn't have been
2 all these contracts running to meet the
3 deadline, that things were being installed in
4 the counties after the statutory
5 decertification. I don't think they were
6 truthful with the commission. I don't think
7 they were candid with the commission.

8 I don't think they brought it to the
9 commission that we've got a problem -- you know,
10 here's where your counties are going to be, what
11 can we possibly do, they just chose the route
12 which coincidentally brought money into their
13 pockets, into their coffers by selling equipment
14 on a gamble that they would get certification
15 approval in time for the election, and that's
16 just clearly not provided for in the law.

17 It doesn't say we shall only do this or
18 fail to do this unless it's horribly

19 inconvenient or unprofitable for us. I don't
20 think it gives them an option. I think that,
21 unfortunately, when there's no harm, no foul, I
22 think that Mr. Price fully does not comprehend
23 the value of the credibility of his clients
24 before this commission.

25 I, obviously, as quoted at some point, and

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78

1 I said it and I believe it, we have to rely on
2 the credibility of our vendors, and that
3 credibility has been severely harmed, at least
4 as to one of the vendors, and I think that is a
5 major harm.

6 I think that there is a harm, there is a
7 foul, and that I would be inclined to vote in
8 favor of a motion to uphold the findings and
9 facts and conclusions of law of the
10 administrative law judge, except for in this
11 bifurcated portion, excluding out the sanction
12 portions of his findings.

13 CHAIRMAN T. WHEELER: Exercising one of the
14 two powers, the other being to set the agenda, I
15 will let Commissioner Dumezich address his
16 deliberation and conclude with my own.

17 COMMISSIONER D. DUMEZICH: Always afraid to
18 let me have the last say.

19 CHAIRMAN T. WHEELER: Absolutely.

20 COMMISSIONER D. DUMEZICH: You operate in
21 47 counties; is that correct, sir?

22 MR. J. PRICE: It's 49 now.

23 COMMISSIONER D. DUMEZICH: Forty-nine?

24 MR. J. PRICE: It was 47 at the time.

25 COMMISSIONER D. DUMEZICH: Okay, at the

79

1 time it was 47. That means that there's another
2 45 counties; correct?

3 MR. J. PRICE: No.

4 COMMISSIONER D. DUMEZICH: Or 47 and 45,
5 don't we have 92 counties in Indiana at the --

6 MR. J. PRICE: Yes.

7 COMMISSIONER D. DUMEZICH: I think we have
8 92.

9 COMMISSIONER A. LONG: We do.

10 MR. J. PRICE: I was given 49 counties.

11 COMMISSIONER D. DUMEZICH: Okay. Anyway,
12 somewhere over 40 counties got this right and
13 their vendors got it right. Given the
14 impossible task that MicroVote had in front of
15 it based on everything that I've heard, I don't
16 think it's impossible because somebody else got
17 it right in 45 other places.

18 That tells me that MicroVote is different
19 than the others. Whether it be their ability to
20 generate software, firmware, or hardware that
21 complies with the standards set forth by the Fed
22 or State or by us. And I certainly believe
23 with -- believe that the comments made by
24 Commissioner Long are correct as well.

25 I think there is a difference in the level

80

1 of credibility that's associated with your
2 client as well. So I see two sets of -- two
3 sets of problems; one, their stuff doesn't work
4 right, and two, they have what I won't call lack
5 of credibility, but certainly, they should be
6 held to the high standards that the other
7 vendors that we have that provide equipment to
8 the state.

9 So I too believe that the findings of facts
10 and conclusions of law of the administrative law
11 judge should be accepted by this committee.

12 CHAIRMAN T. WHEELER: There's a reason we
13 ask for certification, and that's to make sure
14 it works, and the simple fact is -- and I
15 convened that meeting on the 28th as an
16 emergency to ensure that it worked. It did
17 not -- your software did not work up to that
18 point. It had at least three flaws, as I
19 recall, going into that, and that was the reason
20 that Cyber was unable to certify. So it did not
21 work.

22 Now with respect to the approval -- and the
23 commission was willing to meet at any time to
24 give certification if it did work. I, again,
25 take the same concern that Commissioner Long

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81

1 expressed, that the idea if there's no harm, no
2 foul. I think that's a little bit ridiculous.

3 The answer is yes, there is a foul. The point
4 is the software didn't work and we were
5 approached within two weeks of an election and
6 it did not work.

7 Now, was it fixed -- was it fixed by people
8 working over Easter and working their rear ends
9 off -- yes, and did we come in in a special
10 meeting to certify it once it was fixed, yes.
11 But to argue that there's no harm, no foul, the
12 simple fact is that the uncertified equipment
13 and software being produced was not working. It
14 had not been certified.

15 And there's a reason Ciber didn't certify
16 it beyond the temporary moratorium, and that's
17 why there were fixes, 3.01 and 3.04. So the
18 certification absolutely means something, it
19 means does it work or not, and those individual
20 counties rely upon this commission and this
21 commission's certification that it works and
22 that's why it's important.

23 Now with respect to this particular issue,
24 I don't find this particularly difficult. I see
25 3-11.7.5.26 (f) says, "If the Commission finds

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82

1 that a vendor has marketed, sold, leased,
2 installed, implemented, or, and that's the
3 disjunctive or, permitted the use of a voting
4 system in Indiana that: 1) has not been
5 certified by the Commission for use in Indiana."

6 Mr. Shamo testified on November 27th, 2006,

7 and I would note this is an item of evidence
8 that Microvote has placed in front of this
9 commission at Page 14. Question, Line 9: Have
10 you ever installed software or firmware on a
11 machine that wasn't certified? Answer: Yes.
12 When has that happened? Maybe leading up to the
13 2005/2006 primary.

14 Question: Where did that occur? What
15 counties? Answer: In our counties: Question:
16 All 47? Answer: Yes. I think that's a legal
17 admission by Mr. Shamo on behalf of Microvote
18 Corporation that they did indeed install
19 software or firmware on a machine that wasn't
20 certified.

21 So the question has been asked and answered
22 from my perspective that Mr. Shamo has admitted
23 installing uncertified in all 47 counties that
24 form the primary basis for the determination and
25 the facts, specifically, cited throughout the

83

1 findings of fact, and as a consequence, I too
2 believe that those findings of fact and
3 conclusions of law are correct, and I will
4 accept a motion.

5 COMMISSIONER A. LONG: I would move we
6 adopt the findings of fact and conclusions of
7 law that the Administrative Law Judge Paul L.
8 Jefferson that were submitted to us and filed --
9 is that April 15th, 2008, Gordon -- I think
10 that's someone's handwriting there in the

11 corner?

12 MR. G. WHITE: Let me...

13 COMMISSIONER A. LONG: And that's in
14 Administrative Cause No. 2007-01.

15 MR. G. WHITE: Actually, sir, I don't know
16 when it was filed with the Commission, but it
17 was issued on March 31st, 2008.

18 COMMISSIONER A. LONG: Just a second.

19 MR. G. WHITE: I don't have a file stamp.

20 COMMISSIONER A. LONG: It's the last page
21 of the order. I've got the attachments. I just
22 want to make sure I'm properly identifying it.
23 It's dated March 31, 2008. My copy, it shows --
24 I believe that's the co-directors' initials at
25 the top. It is filed by e-mail pursuant to

84

1 Trial Rule 5(f) on April 15th, 2008. I think
2 that's Brad and Pam's initials that are there.
3 That's -- that was my identifying -- that was my
4 motion.

5 CHAIRMAN T. WHEELER: Did your motion
6 except out the civil penalty?

7 COMMISSIONER S. STEELE RIORDAN: Yes.

8 COMMISSIONER A. LONG: And I'll make it
9 specific, excluding the section entitled --

10 MR. G. WHITE: I think it's entitled
11 judgment.

12 COMMISSIONER A. LONG: Judgment, yes.

13 CHAIRMAN T. WHEELER: I think we're --

14 MR. G. WHITE: Or the second paragraph

15 actually.

16 CHAIRMAN T. WHEELER: It was after the word
17 "granted." I think you're deleting the
18 remainder of that paragraph; correct, on Page
19 20?

20 COMMISSIONER A. LONG: Yes, down to the
21 last two sentences unless I'm -- after the word,
22 and the Indiana Election Division's motion for
23 summary judgment is granted. That would be the
24 end of what I'm moving that we approve and
25 adopt.

85

1 CHAIRMAN T. WHEELER: Approve with the
2 exception of that?

3 COMMISSIONER A. LONG: And adopt by
4 reference as opposed to entering specifics.

5 CHAIRMAN T. WHEELER: Do I have a second on
6 the motion?

7 COMMISSIONER S. STEELE RIORDAN: Seconded.

8 CHAIRMAN T. WHEELER: The motion's been
9 made and seconded that the Commission adopt the
10 findings of fact and conclusions of law of the
11 administrative law judge, Paul L. Jefferson,
12 dated March 31st, 2008, consisting of 21 pages,
13 with the exception of the last two sentences on
14 Page 20 beginning the Division requests the
15 finding to be for decertification and injunction
16 and ending determined by the Commission.

17 COMMISSIONER A. LONG: There may be --

18 CHAIRMAN T. WHEELER: And any other

19 references to...

20 COMMISSIONER A. LONG: And there may be --
21 mine has attachments to it. I don't know if
22 those were...

23 CHAIRMAN T. WHEELER: I didn't get any
24 attachments.

25 COMMISSIONER A. LONG: That's fine. It's

86

1 the findings and conclusions.

2 CHAIRMAN T. WHEELER: And per the
3 Commissioners, the motion is to reserve a
4 decision on the sanctions for the next portion
5 of this hearing?

6 COMMISSIONER A. LONG: Correct.

7 CHAIRMAN T. WHEELER: Any further
8 discussion on the motion?

9 (No response from the commissioners.)

10 CHAIRMAN T. WHEELER: Hearing none, motion
11 has been made and seconded. All in favor,
12 signify by saying I?

13 THE COMMISSIONERS: I.

14 CHAIRMAN T. WHEELER: Those opposed, same
15 sign?

16 (No response from the commissioners.)

17 CHAIRMAN T. WHEELER: Motion carries. We
18 will now turn to the latter part of the order
19 where the...

20 MR. G. WHITE: Mr. Wheeler, if I may for
21 just a minute. You had asked me earlier what
22 deference this commission owes to its

23 administrative law judge, and I think I might
24 have told you it's a de novo review. That's not
25 exactly right, and I want to correct that now.

87

1 You have the ability to affirm, modify,
2 reject your ALJ's recommendation, so you have a
3 lot of authority there, but case law provides
4 that if you adopt a decision which is different
5 from your administrative law judge, which you
6 are more than entitled to do, you have to
7 explain the reason why.

8 CHAIRMAN T. WHEELER: So that doesn't
9 affect the standard of view. It simply means
10 that we have to give a reason for why we're
11 departing from it?

12 MR. G. WHITE: That is correct. So to that
13 extent -- I don't know if deference is the right
14 word or not, but if you vary from what he's
15 recommended, then you need to explain the
16 reasons why.

17 COMMISSIONER A. LONG: You're talking about
18 in the findings and conclusions?

19 MR. G. WHITE: Yes, sir, in the final
20 order.

21 COMMISSIONER A. LONG: And I understood
22 that we are -- that we had that authority?

23 MR. G. WHITE: Yes, sir.

24 COMMISSIONER A. LONG: In my motion and
25 deliberation, that was my understanding.

88

1 MR. G. WHITE: Yes, sir.

2 COMMISSIONER A. LONG: My question to you
3 is does the standard apply to what appears to
4 me, and I've interpreted it as a recommendation,
5 but he starts off saying the commissioner
6 requests, or the Division excuse me, requests,
7 and then he submitted a proposed judgment for
8 us, and I've treated that as a recommendation
9 also.

10 MR. G. WHITE: Yes, sir, that's right. And
11 like I say, I don't know that it's clear in the
12 AOPA itself, but there is case law which I am,
13 unfortunately, aware of, that when a final
14 authority changes the decision of the
15 administrative law judge, they need to be very
16 up front about explaining why they do it,
17 because if they don't, we all may be in trouble,
18 and I don't want to have that happen during my
19 commission.

20 COMMISSIONER A. LONG: That was my
21 understanding of the law.

22 MR. G. WHITE: Yes, sir.

23 COMMISSIONER A. LONG: Could I ask for
24 about another five-minute recess to go to the
25 vending machine to get a drink?

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89

1 CHAIRMAN T. WHEELER: Absolutely.

2 Five-minute recess.

3 (A recess was taken.)

4 CHAIRMAN T. WHEELER: I'm going to go ahead
5 and reconvene the meeting. We are working on
6 the second portion or the second leg of this
7 bifurcated hearing, which is the penalty phase
8 of the hearing. At this point in time, we're
9 going to engage in our deliberation process, and
10 do you want me to start at the right-hand side?

11 COMMISSIONER S. STEELE RIORDAN: Yeah, I'm
12 happy to go first.

13 CHAIRMAN T. WHEELER: Okay.

14 COMMISSIONER S. STEELE RIORDAN: Now that
15 we've determined that there's been a violation,
16 and the serious -- I think that was a serious
17 discussion. An even more serious discussion is
18 trying to figure out what we're going to do
19 about it. I've already expressed myself, that I
20 think that systems that were installed that
21 weren't certified matters and that that has to
22 have teeth in it.

23 My view of the situation is that when
24 MicroVote sold and installed systems without
25 certification, they really put the Commission up

90

1 against the wall, and as Anthony said, gambled
2 and took a chance that it would be certified
3 after the fact, and really took the teeth out of
4 laws that are there to protect voters, and our
5 job is to protect voters, and we can't allow
6 vendors to come to Indiana and aggressively sell
7 and market stuff without crossing every single

8 one of the bridges that the election laws put
9 before them.

10 And we recognize that procedurally it's
11 very difficult and sometimes the time lines
12 don't all fall together as they did in this
13 case. But what I think should have happened is
14 MicroVote should have come to us and said, you
15 know, we are in a pickle, because this
16 commission -- since I've been involved, when
17 people are in a pickle and the voters will come
18 out short at the end, we will take care of the
19 voters and do what's necessary, but here we are
20 asking for -- with MicroVote asking for
21 forgiveness rather than permission.

22 I guess what I see as our responsibility is
23 to ensure that this doesn't happen with any
24 other vendors again, but we also have to think
25 about what's appropriate for MicroVote. Another

91

1 factor in all of this is that isn't just about
2 MicroVote, this is about the State of Indiana
3 and the people who vote in the State of Indiana
4 and those are the people we're here to protect.

5 So you know, we're in a -- we're in a tough
6 spot. I, personally, believe that we need to do
7 something to sanction MicroVote. I don't think
8 it would be right to take out our punishment on
9 MicroVote and then hurt a bunch of counties and
10 a bunch of voters in the process, and so what
11 I'm hoping we can talk about as a commission and

12 on the record is how we can do that in a way
13 that makes sense for everybody?

14 So what I would believe we should do is to
15 think about a way to -- I mean, if we pull the
16 plug certainly on systems that are already
17 certified, that hurts everyone, and I don't
18 think we should do that. The things that we
19 have to look at then are if we're going to
20 revoke certification for things that have yet to
21 be delivered and what we are going to do about
22 de-authorizing MicroVote to do business in the
23 State of Indiana.

24 The ALJ said five years, and I, personally,
25 think that's too long, and I think we should

92

1 start there and work backwards. I'm not going
2 to say, specifically, what the solution ought to
3 be, because frankly I don't know, but I think
4 hopefully we can start a discussion.

5 COMMISSIONER A. LONG: I think you have to
6 craft -- you have a duty to craft a sanction
7 here that recognizes a number of things, not the
8 least of which MicroVote has been a valuable
9 vendor, a credible vendor, and they've made a
10 mistake here, and I've been on the commission, I
11 guess, longer than anyone, and we've never dealt
12 with this situation quite like this before where
13 I think there was a purely willful violation
14 that was made in a business sense.

15 Maybe they felt strained to it because we

16 were up against it. Sarah's absolutely right,
17 that this commission has bent over backwards to
18 facilitate vendors. We've had special meetings.
19 We've called proxys in for those of us that had
20 to drive a ways in order that their needs could
21 be accommodated and there wouldn't have been no
22 reason why we wouldn't have done that in this
23 instance.

24 I think they were disingenuous to us, and
25 there has to be a consequence to that, but I

93

1 don't want to enter a punishment that has
2 consequences that we may not intend. I think
3 based on the recommendation, one of the -- one
4 of the disagreements I have is that I'm
5 concerned with any revocation of approval and
6 I'm probably going to refer to it as
7 decertification.

8 Simply, the statute talks about revocation
9 of approval granted. I don't think that it
10 should relate to any system or any part thereof
11 that's in place at the present time, and I don't
12 think -- I think its impact would be prospective
13 during a period of time and I think that we have
14 to recognize that the systems that are in place,
15 MicroVote is going to have to service, they have
16 contractual obligations, and I suspect they're
17 going to come up with improvements or
18 modifications, refinements, or whatever the
19 proper term is, to their systems to make them

20 function even better than they have.

21 I think we have to acknowledge when those
22 things are developed -- they'll most probably be
23 developed for other states at the same time,
24 that they should bring those -- have the ability
25 to bring those to us for certification along the

94

1 process in order that they can meet their
2 commitments to the counties.

3 We cannot put the counties, which I --
4 again, I know when this whole thing broke, I
5 remember our local clerk was so distraught that
6 when all this was going to come down that she
7 was going to be blamed for this. She didn't
8 want to -- she's a very conscientious
9 individual, but I think that the system by a lot
10 of hard work by a lot of people that did work,
11 or it appears to have, I think we have to allow
12 them to fully service and see that the equipment
13 that's in place, that that certification remains
14 in place with those.

15 I think that in looking at the term of
16 prohibition for marketing, leasing or selling
17 any voting systems in Indiana -- I agree with
18 Sarah that the five years is too long, but I
19 think that it says for a specified period. I've
20 spent some time with this because I think this
21 is the crux of the matter. I was willing to
22 hear it in the argument regarding the findings
23 and conclusions, but I've always felt that since

24 I've read them, they were well done, well
25 presented, and I think they were well briefed,

95

1 and depositions were taken and argued, and the
2 decision in my mind has been this serious
3 deference in making the decision, but that the
4 real crux of what we're dealing with is what are
5 we going to do if we approve them.

6 It probably would have been easier if we
7 would not have approved them and gone on down
8 the road, but that's not why we're here. It's
9 not why we get the big per diems for coming up
10 here at \$5 dollars a gallon. But I think -- I
11 call upon some of my experience in the criminal
12 field -- I've been a prosecutor and I've been a
13 defense attorney and I think that it might be
14 something to consider -- at least I've
15 considered it, that we may impose a prohibition
16 and then let it be in place for a specified
17 period, and then after that, have it stayed in
18 the initial order, which as I understand,
19 counsel can advise.

20 But as I understand, it's something that we
21 may be able to do, that it would function almost
22 like a prohibition until we have an opportunity
23 for this company to start to rebuild its
24 credibility with the public and with this
25 commission and with the clerks, that --

96

1 something along the line that they would report
2 their contacts and require them to seek or at
3 least provide advance notice to the Division of
4 any proposed contracts with any counties, but
5 for nothing else, other than we would be aware
6 of what's going on, and that the Division can
7 make comments to the counties that are doing
8 business with the company.

9 I think if we do that, we would honor
10 the -- and give due credence to the
11 recommendation that we would, in essence,
12 suspend -- that may not be the proper term -- a
13 significant portion of that and allow them to
14 fully and completely service their contracts. I
15 think they -- I don't think they should be
16 during the period of prohibition, and that's one
17 reason I favor decertification or approval
18 regarding their systems just to prevent them --
19 hopefully, to prevent them from marketing or
20 installing them in Indiana during their period
21 of prohibition, but after that period, they pass
22 and they are on the suspended portion of their
23 prohibition, that the equipment may well be able
24 to be recertified or that revocation be
25 terminated to allow them to go forward under

97

1 supervised places.

2 I think I want to send the appropriate
3 message to MicroVote here. We will not tolerate

4 that. we've always been willing to help to do
5 the things to try to help them do their jobs,
6 but to go out on your own and be disingenuous
7 with us and I think put our whole system, the
8 credibility of the whole voting system in
9 jeopardy on this is a -- is very serious.

10 I would like to also add to my comments
11 that this is the first offense that we've had to
12 deal with, and I think that the level of
13 seriousness in this is such that were we to face
14 another one now -- this is not a threat to
15 MicroVote, but by another vendor that would come
16 into play, that I would probably be less
17 inclined to agree to any suspension. I think
18 that MicroVote found themselves in -- and I
19 accept that. The law -- the federal government,
20 the legislature sometimes does things that puts
21 us in real perplexing situations, but I don't
22 think that that is an excuse for violating the
23 law.

24 So my thoughts are that we decertify or
25 revoke certification, prospectively that we

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98

1 enter a period of prohibition for some period,
2 maybe as much as five years but then suspend
3 their stay after a period of time to allow them
4 to get back into the normal business at hand and
5 good at what they do.

6 CHAIRMAN T. WHEELER: Commissioner.

7 COMMISSIONER D. DUMEZICH: I am from the

8 Great State of Lake which uses MicroVote.
9 Interestingly, I think if they didn't have the
10 MicroVote machines, they would be still counting
11 the May primary and the results would vary
12 daily. So having said those things, I realize
13 that it's very very important to clerks in those
14 47 counties -- at that time 49 counties to have
15 equipment that they can use to conduct
16 elections. I think that that's very very
17 important.

18 I also think it's very important that the
19 equipment be reliable and that programming be
20 reliable and that is an important charge that is
21 given to this commission and I think that we
22 take that charge very seriously, and that's why
23 we're here. We are not here to hurt the clerks,
24 we are here, frankly, to make sure that the job
25 that they do is supported by the vendors that

99

1 say that they are supporting the elections.
2 That is our job to help ensure that reliability.
3 I do think that there is a credibility
4 issue here, and it is not a credibility issue of
5 counsel of either party. I think that
6 everything that I've read can be supported by
7 some part in the record and I think that both
8 counsel have argued the cases before us and made
9 presentations before us that have more than
10 adequately represented their client. I've been
11 very impressed with the attorneys for both

12 sides.

13 Having said that, I do think that there is
14 a credibility problem with MicroVote, to the
15 extent that the credibility problem extends to
16 the equipment, and the software, I think, is
17 covered under reliability. I think what I've
18 seen before the Commission from them is that --
19 it goes past that, and that troubles me,
20 therefore. I think that, first of all, we have
21 to serve the clerks, we have to make sure it's
22 reliable, but on the other side of it, I see
23 that there is a problem with MicroVote so I will
24 agree with the other commissioners that there
25 needs to be some sort of control over them.

100

1 I think that existing equipment that's
2 certified should not be decertified. I think
3 they should be prohibited for selling equipment
4 for some period of time, and when I say selling,
5 I also mean leasing. I may differ from the
6 other commissioners because none of them have
7 spoken on this point. When we look at the
8 Indiana Code Section 3-11-7.5-28(g), I read that
9 to say that we may prohibit marketing, leasing
10 or selling any voting system in the State of
11 Indiana. That's how I read that. I note the
12 "or" there -- I would say leasing or selling.

13 I understand the Clerks Conference and all
14 those things that they are currently involved
15 in -- MicroVote's currently involved in

16 sponsoring, I wouldn't want to dissuade them
17 from doing that in the future. So I have no
18 problem with how they spend their money, my
19 problem is how are they going to receive it. So
20 with that in mind, I think that it would be
21 appropriate for them to continue to market, to
22 develop, to work on their software, but I
23 think -- I do not believe, so that they
24 understand the severity of what they have done
25 here, that they should be able to continue to

101

1 lease or sell a voting system in Indiana for
2 some period of time.

3 I think that's an appropriate remedy here
4 and I think this commission should also have the
5 ability to look at their actions in the future
6 and render judgments with respect to that and
7 their compliance with the statute. Over to you,
8 Mr. Chairman.

9 CHAIRMAN T. WHEELER: I see 3-11-7.5-28(f)
10 provides a two-part process; No. 1, that the
11 Commission can find that a vendor has in this
12 case not been certified by the Commission for
13 use and has sold or at least installed that
14 equipment -- No. 1, we made that finding, or the
15 second part of that, which says if that has
16 happened then, "The Commission may revoke the
17 approval granted under this section and prohibit
18 the vendor from marketing, leasing or selling
19 any voting system in Indiana for a specific

20 period not to exceed five years.

21 Clearly, the Indiana legislature
22 contemplated our role in this process. There's
23 been discussion of the Secretary of State's role
24 and the fines under the Secretary of State. The
25 general assembly -- when the general assembly

102

1 enacted this statute, it was in conjunction with
2 the defined statute. It was clearly to be two
3 differentiated roles between the Secretary of
4 State and the Election Commission.

5 The Secretary of State's role is to
6 investigate and fine. The Commission's role is
7 to investigate and to consider whether that
8 particular entity ought to continue based upon
9 the commission or its designee's findings,
10 whether that's the kind of company that ought to
11 continue selling equipment in the State of
12 Indiana, and that's really the focus of what the
13 commission is looking at here today.

14 Having made the finding and having heard
15 the other commissioners discuss the credibility
16 problems with respect to MicroVote, I find
17 myself in agreement, that certainly, a sanction
18 of some kind and a significant sanction is
19 warranted. With respect to the particular
20 sanction contained in the ALJ's decision, I
21 believe, and I'm looking at the order
22 designating him as administrative law judge,
23 that it specifically, provided that it was for

24 purposes of making a "recommended decision" of
25 the Commission.

103

1 I take the recommended decision in this
2 case, the ALJ, based upon his review found that
3 it was appropriate to prohibit -- to do two
4 things, No. 1 to revoke MicroVote's approval to
5 electronic voting system, and No. 2, prohibit
6 MicroVote from marketing, leasing or selling any
7 voting system in Indiana for five years.

8 I have a concern, and I believe it's been
9 expressed, again, that revoking the approval of
10 its electronic voting system may imply that the
11 47 counties that currently -- I guess 49
12 counties now, and I'll address that in just a
13 second, the 49 counties currently using the
14 MicroVote system would be then using an
15 unapproved system, so I have -- I have real
16 reservations with that portion of the
17 recommendation from the administrative law
18 judge.

19 With respect to the five-year ban, which is
20 the harshest ban that can be imposed --
21 according to the General Assembly, I am
22 certainly sympathetic and I believe that the
23 gravity of the violation is significantly more
24 than that -- than counsel for MicroVote has
25 expressed. I don't believe that it's no harm,

104

1 no foul that's been expressed by my fellow
2 commissioners here today.

3 with that being said, my feeling is that I
4 would certainly support a decision by this
5 commission that would prohibit MicroVote from
6 marketing, leasing or selling, and I would
7 include marketing and differ with Commissioner
8 Dumezich in that regard, for five years in
9 deference to the issues raised by my fellow
10 commissioners, Long and Riordan, as well as
11 Commissioner Dumezich.

12 I am willing to support a decision that
13 would suspend a portion of that. It would be my
14 recommendation that if the Commission chooses to
15 suspend a portion of that five-year ban that the
16 Commission do so and make that suspension
17 contingent upon MicroVote comporting with not
18 only its contractual requirements but also its
19 statutory requirements.

20 I would note that subsection G states
21 beyond -- if an action is taken by this
22 commission to prohibit them from any of these
23 actions, the vendor is still required -- in
24 front of it, it says a vendor subject to
25 subsection F may continue to provide support

105

1 during the period specified to a county that has
2 acquired voting system from the vendor after the
3 vendor certifies that the voting system to be
4 supported by a vendor only includes hardware,

5 firmware and software approved for use and need.
6 I take that to read that -- assuming this
7 commission takes an action that would prohibit
8 them -- we've just used the word
9 "decertification," but prohibit them from
10 marketing, leasing or selling, that MicroVote
11 may continue to provide support during this
12 period of time, even though they cannot market,
13 lease or sell.

14 I would note that it does not say that
15 MicroVote must continue to provide support.
16 There is certainly the potential that MicroVote
17 could simply -- facing a ban of this, simply --
18 as we have seen, and in fact, my home County of
19 Boone has seen, another vendor, VTI, simply
20 close up shop and no longer support the software
21 and leave -- in this case, as opposed to four
22 counties when VTI closed up shop, leave 49
23 counties, which would unfortunately include my
24 own home county of Boone again which went from
25 VTI to MicroVote -- could leave the potential

106

1 now that MicroVote could do that.

2 So I would support a -- I would support a
3 five-year ban with a suspension period that
4 would -- in exchange for that suspension period,
5 a commitment by MicroVote that it would continue
6 to meet its contractual obligations and continue
7 to "provide support" to those counties that have
8 purchased MicroVote during this period.

9 I would also view the period during which
10 MicroVote will be under the prohibition to be
11 essentially a probationary period and giving
12 them the opportunity to demonstrate, I guess I
13 would use the word "good corporate citizenship,"
14 but demonstrate that they truly have gotten the
15 message, that they understand that this is an
16 important issue, that this wasn't just a minor
17 error.

18 It is core to what we do which is to
19 guarantee free and fair elections here in
20 Indiana, and our elections can impact not just
21 us here in Indiana, and as we saw recently, the
22 United States as a whole, and that they
23 understand that that is important. I need to
24 see that during that period.

25 To that end, it would be my recommendation

107

1 to the Commission that the Commission ban or
2 prohibit MicroVote from marketing, leasing or
3 selling any voting system in Indiana for five
4 years, that two years of that period be stayed,
5 they have a three-year ban with two years stayed
6 under the terms and conditions that I discussed
7 a moment ago. Any further discussion by the
8 commissioners?

9 COMMISSIONER S. STEELE RIORDAN: Yes. I
10 think that three years is too long. I would
11 support an order prohibiting sale, marketing or
12 leasing for five years, that we suspend four

13 years of that, so that is a one-year time period
14 to be determined by the Commission. I want to
15 make clear that we are not revoking the approval
16 of any delivered systems or systems that have
17 been sold and are to be delivered. We are not
18 taking any action that would impede MicroVote's
19 ability to fulfill its contractual obligations
20 and service the systems that are in place.

21 And the suspension of the prohibition, in
22 other words, the four-year suspension of the
23 penalty would be contingent, certainly, as the
24 Chairman said, to MicroVote carrying out all of
25 its legal and contractual obligations, but I

108

1 would also insert a requirement that they be
2 subjected to more oversight -- realizing that
3 that creates more work for the Division, but
4 that MicroVote be required to submit for the
5 period of suspension -- for that four-year
6 period of time to submit reports to the Division
7 of all of their sales, marketing, leasing
8 efforts that are basically a monthly report of
9 what they're doing in Indiana to the Division
10 of, you know, prospects, problems that are going
11 on with systems, what they're doing to address
12 those problems, and I think basically be
13 required to report to us on a monthly basis.

14 CHAIRMAN T. WHEELER: Is that during the
15 period?

16 COMMISSIONER S. STEELE RIORDAN: Of
Page 94

17 suspension, yes, and that --

18 CHAIRMAN T. WHEELER: The four-year period
19 that you're talking about?

20 COMMISSIONER S. STEELE RIORDAN: Right. So
21 I'm talking about we're going to be able to
22 prohibit them from sell, market and leasing for
23 five years, and we're going to suspend four
24 years of that, and during that four-year period,
25 they have to submit weekly, or not weekly,

109

1 monthly reports to the Division about their
2 activities in Indiana -- what's going on with
3 their systems, who they're marketing to so that
4 there's some transparency.

5 As for when the one-year prohibition would
6 occur, I would propose that it either be up
7 front starting immediately and going through
8 2009 -- of course, 2009, we're off the calendar,
9 we don't have elections in Indiana, but I would
10 have Mr. Price explain what impact that timing
11 would have on his client.

12 But I just think -- I think that three
13 years is too long. We can't know the
14 consequence of that -- I mean, putting an
15 Indiana company out of business is probably the
16 last thing that any of us wants to do,
17 certainly, and like I said, put our clerks in
18 jeopardy and their ability to carry out
19 elections is something that none of us wants to
20 do, so that's why I would suggest that we tailor

21 it down to one year, if any.

22 But I certainly think that suspending the
23 period of prohibition would have to contingent
24 upon submission of regular reports to the
25 Division. This would not do anything to revoke

110

1 the approval of delivered systems or systems
2 that have been sold that are to be delivered, it
3 would not impede MicroVote's obligations to
4 service the existing systems. So I think -- I
5 wanted to make it much more point form, but that
6 was about the best I could do.

7 COMMISSIONER A. LONG: Could I make a
8 motion that we haven't discussed?

9 CHAIRMAN T. WHEELER: Sure.

10 COMMISSIONER A. LONG: I'm sort of of the
11 opinion that the revocation of approval or
12 decertification probably doesn't accomplish
13 anything. If we would prohibit them from
14 selling or leasing, then what do we accomplish
15 by recertifying them than maybe change the ones
16 that are in place, I -- Mr. Chairman, your
17 observations there -- I take that to heart. So
18 to that end, I leave that out of the motion, and
19 that would not be part of my motion for
20 decertification.

21 But I would move that we enter a sanction
22 which would prohibit MicroVote from marketing,
23 leasing or selling any voting system in Indiana
24 for a period of five years, starting this date

25 and ending June the 9th, 2013, that we stay or 111

1 suspend, whatever the appropriate language is,
2 that portion that would come after July the 1st,
3 2009 through June the 9th, 2013 and that the
4 conditions of that stay would be that MicroVote
5 would comply with all of its contractual
6 obligations for voting systems in the State of
7 Indiana.

8 Secondly, that it would comply with all of
9 its statutory obligations regarding those voting
10 systems in the State of Indiana, that it would
11 comply with certification or any upgrades to its
12 system, even if it were during prohibition
13 period, treating -- that that would be a part of
14 its maintenance -- contracts or maintenance
15 obligations, that it would forward or submit
16 reports of its sales contacts and leasing
17 contacts periodically, maybe monthly at the
18 outset. I don't know that necessarily you would
19 have to -- if the Division would have the
20 ability to make it quarterly after a period of
21 time.

22 And lastly, that it submit all of its
23 contracts that it proposes once it's in its
24 probation period of review to the Division
25 within 30 days prior to their execution and the 112

1 Division to be able to issue comment with regard
2 to those, and that if there be any provisional
3 stay of this proceeding, that it tag along --
4 our dates be pushed down until such time that it
5 conforms to the number of days that that would
6 become effective.

7 COMMISSIONER D. DUMEZICH: Would you
8 consider two changes?

9 CHAIRMAN T. WHEELER: Let me do this. Is
10 there a second for the motion?

11 COMMISSIONER S. STEELE RIORDAN: I'll
12 second the motion.

13 CHAIRMAN T. WHEELER: The motion has been
14 made and seconded. Is there any further
15 discussion on the motion?

16 COMMISSIONER D. DUMEZICH: Yeah, I would
17 propose two amendments the motion.

18 CHAIRMAN T. WHEELER: Okay.

19 COMMISSIONER D. DUMEZICH: One -- instead
20 of one year, make it two years.

21 CHAIRMAN T. WHEELER: You're splitting the
22 difference.

23 COMMISSIONER D. DUMEZICH: Yeah, 3 and 1,
24 so they'll get a suspension for three years, and
25 I would also ask that the prohibition not extend

113

1 the marketing.

2 COMMISSIONER A. LONG: Let me say that I
3 would agree to this amendment, that instead of
4 July 1st of '09, we move that out to December

5 1st, '09, and that would, in essence, make it an
6 18-month suspension, and that we provide that
7 marketing -- the term "marketing" would not
8 include demonstrations of their system at
9 convention type gatherings.

10 So long as they advertise prominently that
11 they would not be able to sell until a given
12 date, if that would accommodate your -- I mean,
13 I don't want it to -- to the extent that they
14 would go down to Morgan County, for example, and
15 say they have -- well, we're in the prohibition
16 period, they wouldn't be able to do that.

17 I think your comment earlier that they
18 should be able to have a presence at Clerks
19 Conferences or voter type conferences,
20 particularly, if -- I mean, again, in Indiana, I
21 could imagine that maybe there's some nationally
22 that Indiana people might go to, I wouldn't want
23 that to be -- they would not be banned from that
24 type of thing.

25 COMMISSIONER D. DUMEZICH: That was the

114

1 problem I saw. If someone from Indiana shows up
2 at one of these things...

3 COMMISSIONER A. LONG: Well, then once
4 you...

5 COMMISSIONER D. DUMEZICH: So that's why --
6 that's why I think if we just take out
7 marketing, it solves a lot of problems for them.

8 COMMISSIONER S. STEELE RIORDAN: And

9 otherwise, if we try to define what marketing
10 is, particularly, given the parties and the
11 counsel involved who are very good at splitting
12 hairs and make good points, that we'd be getting
13 down too far in the weeds, I think.

14 COMMISSIONER D. DUMEZICH: Okay.

15 COMMISSIONER S. STEELE RIORDAN: So I would
16 say that 18 months -- but marketing during that
17 18 months is not prohibited. So it would be
18 basically be for an 18-month period no deals can
19 be closed, no money can change hands.

20 COMMISSIONER A. LONG: No contracts signed,
21 effective in 18 months.

22 COMMISSIONER S. STEELE RIORDAN: Right.

23 COMMISSIONER A. LONG: I mean I think yeah.

24 COMMISSIONER D. DUMEZICH: Okay.

25 COMMISSIONER S. STEELE RIORDAN: I mean, so 115

1 essentially, all of the work that has already
2 been done, everything that they've already sold,
3 they must continue to service, and none of that
4 is being decertified. We're basically talking
5 about five years forward and 18 -- the first 18
6 months of that you can't close any deals, it's
7 marketing only.

8 COMMISSIONER D. DUMEZICH: Yep.

9 COMMISSIONER S. STEELE RIORDAN: And we're
10 not going to get into the definition of
11 marketing.

12 COMMISSIONER A. LONG: I would agree with

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those modifications.

CHAIRMAN T. WHEELER: Let me suggest one additional modification. To the extent that there are marketing activities, the individual to whom they are marketing will be given a copy of the order issued in this matter so that the individuals they are marketing to are fully aware of their past activities, that --

COMMISSIONER D. DUMEZICH: Or displayed prominently.

CHAIRMAN T. WHEELER: Or displayed prominently. That would then allow those people to be on notice, and the position frankly,

116

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MicroVote is going to have to explain why they can't sell their equipment in Indiana.

COMMISSIONER S. STEELE RIORDAN: What do you think about them reporting to the Division, I would agree that quarterly reports.

COMMISSIONER D. DUMEZICH: Yeah, quarterly.

CHAIRMAN T. WHEELER: I guess I would inquire of the Division if that would present an administrative problem to the Division?

MS. POTEESTA: I don't see that there would be a problem.

CHAIRMAN T. WHEELER: I note, despite the comment about oh, we're government bureaucrats, I know you guys do work hard and I know there are times when you guys do get swamped, so this is adding a pretty decent burden on top of this.

17 So with the assurance from the two co-directors
18 that they're willing to do this, I would
19 appreciate it.

20 MS. POTESA: Given the 18-month --

21 COMMISSIONER A. LONG: What am I -- I'm
22 sorry.

23 MS. POTESA: I'm sorry.

24 COMMISSIONER A. LONG: Go ahead.

25 MS. POTESA: Given the 18-month time

117

1 frame, we won't be as busy next year.

2 CHAIRMAN T. WHEELER: I haven't agreed to
3 the 18-month time frame.

4 MS. POTESA: Okay.

5 COMMISSIONER D. DUMEZICH: But three of us
6 have.

7 CHAIRMAN T. WHEELER: Don't underestimate
8 my power of persuasion. I have the gavel and...

9 COMMISSIONER A. LONG: So the motion I
10 think, that Gordon is writing, and I've got some
11 notes if you need it --

12 MR. G. WHITE: I might.

13 COMMISSIONER A. LONG: -- would propose
14 that the stay -- I mean, the changes are so that
15 we get -- it would be 12/31/09 as opposed to
16 July 1 that I said earlier and that we delete
17 marketing and that at -- I'm not for sure, Mr.
18 Chairman but you said at the marketing events
19 that something would be displayed?

20 COMMISSIONER D. DUMEZICH: Prominently.

21 COMMISSIONER A. LONG: Prominently.

22 CHAIRMAN T. WHEELER: Both the
23 administrative law judge order and what we issue
24 here.

25 COMMISSIONER A. LONG: Okay, that any

118

1 marketing --

2 COMMISSIONER D. DUMEZICH: Occurring within
3 the state.

4 CHAIRMAN T. WHEELER: During the blackout
5 period, and that's fair, I can certainly live
6 with that, within the state.

7 COMMISSIONER A. LONG: That they would
8 prominently display the order of the commission
9 which are going to have the ALJ's order attached
10 to it, I think -- I believe that's what we were
11 contemplating. I would add that as a condition
12 showing my motion amended accordingly...

13 CHAIRMAN T. WHEELER: And again, that's
14 marketing of Indiana, not any other state.

15 COMMISSIONER A. LONG: Yeah, within
16 Indiana. And I'm -- you know, for
17 interpretation purposes, I'm talking about mass
18 gathering events, like conferences and things of
19 that nature.

20 COMMISSIONER D. DUMEZICH: Agreed.

21 CHAIRMAN T. WHEELER: But if there's
22 one-on-one marketing, I'd like the recipients of
23 that marketing to receive a copy of the order
24 pursuant to the orders of the ALJ.

1 propose at some point that once the order is
2 entered that we forward it onto all the clerks
3 in the state, which I think is appropriate.
4 I've amended my motion, so are you amending your
5 second; do you agree with that?

6 COMMISSIONER S. STEELE RIORDAN: Yes,
7 second -- re-seconded.

8 CHAIRMAN T. WHEELER: The motion has been
9 made and seconded as amended?

10 COMMISSIONER A. LONG: Yes.

11 CHAIRMAN T. WHEELER: Any further
12 discussion?

13 COMMISSIONER A. LONG: There may be some
14 comments maybe out here, if you want...

15 CHAIRMAN T. WHEELER: Let me get one
16 additional comment, which is I'm going to agree
17 with the year and a half primarily because
18 I've -- I view this a little more serious and
19 I'd rather see a longer suspension but I also
20 recognize the fact that coming into the 2010
21 elections that having the stay, or having the
22 ban expire on December 31st allows five months,
23 assuming that Indiana does not change its
24 primary date, we will -- the clerks will have
25 five months to get ready for the primary and

1 install new equipment and market new equipment
Page 104

2 that MicroVote so desires and 11 months into the
3 general election.

4 I would note that my -- my biggest concern
5 and desire for a more stringent penalty, a lot
6 of that is the lack of remorse expressed by
7 MicroVote and a lack of recognition. With that
8 said, I would support the motion as well. Any
9 further discussion, and I think Commissioner,
10 did you want to hear from the Division?

11 COMMISSIONER D. DUMEZICH: I don't want to
12 hear from anybody.

13 CHAIRMAN T. WHEELER: Okay, I'm sorry.

14 COMMISSIONER A. LONG: I'm concerned -- the
15 only comment I want to hear is have we done
16 something here that there's an unintended
17 consequence that anybody from the Division who
18 works closer to the clerks than we do would see
19 that we've created any abomination for them?

20 CHAIRMAN T. WHEELER: So you're addressing
21 that question to the two co-directors?

22 COMMISSIONER A. LONG: Yeah.

23 MR. J. AMMEEN: I think overall --

24 CHAIRMAN T. WHEELER: I think it was
25 directed at the -- hold on, Jim. Did you want

121

1 to hear from counsel or the co-directors?

2 COMMISSIONER A. LONG: Co-directors at this
3 point. They're the ones, they know more about
4 it than their lawyer.

5 CHAIRMAN T. WHEELER: I think the question

6 is directed -- we are asking -- with all due
7 respect, we're asking the co-directors.

8 MR. J. AMMEEN: That's understood.

9 COMMISSIONER A. LONG: Is there anything
10 that's impractical in this and that the clerks
11 are going to be experiencing that you all can
12 see that may be an unintended consequence here?

13 MR.. B. KING: Mr. Chairman and Mr. Vice
14 President, I don't see any unintended
15 consequences that the Commission hasn't already
16 addressed in its consideration of the sanction
17 of its motion.

18 COMMISSIONER A. LONG: Pam, do you agree?

19 MS. POTESTA: Yes, I think it sounds fair
20 and reasonable.

21 COMMISSIONER S. STEELE RIORDAN: I guess
22 the only thing I'm wondering, and I don't want
23 to open up the terms any further, but the
24 inability to sell from now until 12/31/09, are
25 there going to be things that clerks are going

122

1 to need to purchase -- I mean, nobody's looking
2 at installing a new system in that period of
3 time; right?

4 This would basically be prohibiting them
5 from going to new customers. I mean, we're not
6 saying if you need X accessory to support your
7 existing system that Microsoft, or Microvote is
8 prohibited from selling that to you. I don't
9 think we would intend to say that; right?

10 MR. J. AMMEEN: If I might for a moment. I
11 think that's a very good question. I think it's
12 something that needs to be thought through and I
13 think we might want to ask a couple of
14 procedural questions as to what happens at the
15 end of '09, but there was an article on May
16 30th regarding MicroVote selling up to 85 new
17 devices in Delaware County, and Mr. Shamo in
18 fact testified that it would cost the taxpayers
19 for 16 machines \$190,000.

20 CHAIRMAN T. WHEELER: That's the -- this is
21 an article?

22 MR. J. AMMEEN: It was before the Delaware
23 County Board. It was a hearing, not testimony.
24 There are, obviously, going to be situations
25 where population shifts and some counties are

123

1 going to have more voters now than they had in
2 the past and may need more equipment, and so I
3 think defining what you mean, in terms of
4 marketing or sales, that's an important point.

5 COMMISSIONER A. LONG: I think we can deal
6 with that. If they have a situation, we can
7 file a petition for relief.

8 MR. J. AMMEEN: Okay. And that is, again,
9 coming back to some of the procedural questions.
10 Is there a mechanism for MicroVote to come back
11 and seek relief or a clerk to come back and
12 should there be an application with more
13 compliance here at the end of '09?

14 COMMISSIONER A. LONG: I think -- my
15 position on that question would be if a county
16 by growth needed to purchase new equipment and
17 they were already buying -- had the same
18 equipment that is now the subject of this
19 proceeding that MicroVote with that county's
20 blessing would come before us and ask for a stay
21 or permission to go ahead and do that marketing
22 for that purpose. Under that circumstance, you
23 can't that would be something -- you know, you
24 can't prejudge what you're going to do, but I
25 would be inclined to...

124

1 COMMISSIONER D. DUMEZICH: Right. We see
2 routine maintenance -- we see routine
3 maintenance that they're not going to be able to
4 charge for but they have to provide.

5 COMMISSIONER A. LONG: Or if they buy --
6 have to have equipment some part of equipment
7 that they have -- that they have to pay for -- I
8 mean, it's a part of their maintenance -- the
9 labor's covered but the part's not -- I mean, I
10 don't think that's selling -- that's not selling
11 systems.

12 COMMISSIONER S. STEELE RIORDAN: Right.

13 CHAIRMAN T. WHEELER: Well, what Brad is
14 going to do is give us a definition of what a
15 voting system is or not?

16 MR. J. KING: That's part of it, yes, Mr.
17 Chairman. I wanted to clarify one issue with

18 regard to Commissioner Riordan's comment about
19 purchasing accessories, I think was a term you
20 used. What I understand the Commission's -- the
21 motion before the Commission to apply to is the
22 existing current certified systems.

23 There may be a development or an
24 improvement that a vendor might want to make to
25 their system that might be called an accessory

125

1 that would require a vendor to go through the
2 certification process first before it...

3 COMMISSIONER S. STEELE RIORDAN: Yes,
4 Absolutely.

5 MR. J. KING: So I just want to be clear on
6 that.

7 COMMISSIONER S. STEELE RIORDAN: I just
8 wouldn't change the requirements that are
9 already -- otherwise would be...

10 CHAIRMAN T. WHEELER: Does the code, does
11 it define the word "selling?"

12 MR. J. AMMEEN: No Article 2 does, the
13 Uniform Commercial...

14 CHAIRMAN T. WHEELER: I mean, we spent --
15 there was a lengthy dissertation and Mr. Price's
16 argument relating to when -- during his brief he
17 spends a lot of time discussing when these sales
18 took place of the allegedly uncertified
19 software -- well, they approved it, the board
20 hadn't signed it -- now the contract was signed
21 after October, but it wasn't really a sale after

22 October, the sale really occurred prior to that.
23 There is no definition of the sale of that; is
24 that correct?

25 MR. J. KING: No.

126

1 MR. J. AMMEEN: Not through any election
2 code.

3 CHAIRMAN T. WHEELER: I guess my position
4 would be a sale done under any of those
5 circumstances -- negotiating a deal with a
6 county prior to that to be executed on January
7 1st, 2010 would be done at your own peril,
8 particularly, given the remainder of the three
9 and a half year suspension, in my -- in my
10 belief. I think we'll address that when we get
11 that.

12 COMMISSIONER A. LONG: It would be one of
13 those things that if there's something comes up,
14 they need to be here before they're out there.

15 CHAIRMAN T. WHEELER: And which they have
16 not -- which if they have not done before, that
17 would be part of the good citizenship that I
18 would prefer to see.

19 MR. J. AMMEEN: Mr. Chairman, when the
20 suspension period commences on January 1, 2010,
21 is that going to be automatic or is that going
22 to be subject to some kind of compliance type
23 meeting where the Division is in a position to
24 report to that Microvote is complying with the
25 terms of the order or not or MicroVote needs to

1 come and ask for relief?

2 COMMISSIONER D. DUMEZICH: I don't think we
3 need to do that because I would assume that if
4 they are not compliant, we're going to find that
5 out.

6 CHAIRMAN T. WHEELER: The Division will
7 notify us of that?

8 COMMISSIONER D. DUMEZICH: Yeah.

9 MR. J. AMMEEN: I guess our position really
10 is who needs to file?

11 CHAIRMAN T. WHEELER: Your contemplation
12 and motion is that it would be automatic?

13 COMMISSIONER A. LONG: That would be
14 automatic. The terms of the probation, and
15 that's -- again, that's a good question, because
16 in the criminal practice they apply even
17 before -- during the time of the execution of
18 the sentence. So if you violate the terms of
19 the probation during the execution, it could
20 still revoke the suspended part.

21 If you're in jail and you commit a crime
22 and you've got a suspended sentence coming, they
23 can revoke it based on that crime. So the terms
24 of the suspension here, i.e. the compliance with
25 the law, etc. would apply with the probation

128

1 period also.

2 CHAIRMAN T. WHEELER: Motion's been made
3 and seconded, is there any discussion?
4 (No response from the commissioners.)
5 CHAIRMAN T. WHEELER: All in favor, signify
6 by saying I?
7 THE COMMISSIONERS: I.
8 CHAIRMAN T. WHEELER: Those opposed, same
9 sign?
10 (No response from the commissioners.)
11 CHAIRMAN T. WHEELER: Motion carries.
12 Procedurally, how are we going to do this?
13 COMMISSIONER A. LONG: I think our lawyer
14 is going to put this in writing and we're going
15 to have an order here in just a little bit. I
16 believe he said he could do that.
17 MR. G. WHITE: I said I could do that
18 before about an hour ago.
19 MR. J. AMMEEN: That's why Rhonda's here,
20 too.
21 COMMISSIONER A. LONG: I do realize that my
22 time is different from yours.
23 MR. G. WHITE: No, that's all right.
24 COMMISSIONER A. LONG: You're going to sign
25 it?

129

1 MR. G. WHITE: I can get it to Tom tomorrow
2 or...
3 COMMISSIONER A. LONG: I would suggest that
4 you e-mail it out to us and --
5 CHAIRMAN T. WHEELER: Make sure it complies

6 with the motion.

7 COMMISSIONER A. LONG: And then Tom, once
8 he determines that it has everything, then he
9 can sign it.

10 MR. G. WHITE: well, I'll circulate it no
11 later than tomorrow. You folks can all take a
12 look at it. I think I understand it, but you'll
13 get a chance to look at it and you'll set me
14 straight and we'll get it done pretty quick.

15 COMMISSIONER S. STEELE RIORDAN: And we
16 can -- we can wordsmith it that way, can't we,
17 because that is a general...

18 MR. J. AMMEEN: Mr. Chairman, the order, of
19 course, would be binding on any successors or
20 signs in the event that MicroVote would have a
21 change of control or stock ownership?

22 COMMISSIONER A. LONG: Actually...

23 MR. J. AMMEEN: whoever would buy it would
24 pay subject to the order?

25 CHAIRMAN T. WHEELER: Let me ask a question 130

1 of the Division. If that occurs, does the new
2 vendor need to come back for certification -- it
3 doesn't seem like it?

4 MR. J. KING: Mr. Chairman, if the vendor
5 sells to a different vendor but it's the same
6 certified equipment that's being marketed -- no,
7 we would not require the new vendor, the
8 purchaser to come back for certification.

9 CHAIRMAN T. WHEELER: I guess we'll jump

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that hurdle when we get there.

COMMISSIONER D. DUMEZICH: When it happens.

MR. J. PRICE: Mr. Chairman?

CHAIRMAN T. WHEELER: Yes.

MR. J. PRICE: I have a quick matter that arises out of the code that I need to address very briefly while you all are still here and during the 30-day period after the adoption of this order that we've just adopted.

And it comes IC 4-21.53-31(b), it's two sentences, and with your forbearance, I'll read the two sentences and then make a request. The first sentence is a party may petition the ultimate authority for an agency for a stay of effectiveness of the final order. The ultimate authority or its designee may before or after

131

1 the order becomes effective stay the final order
2 in whole or in part.

3 we all know that on judicial review, we can
4 ask a court to do that, but AOPA allows you to
5 stay your own order, and so my request on behalf
6 of Microvote would be that you would stay your
7 order pending the outcome of any judicial
8 review -- if there is a judicial review, and
9 obviously, I haven't talked with my clients and
10 I have no idea how they're going to react to
11 your decision here today. But my question is
12 whether or not under AOPA you would consider a
13 stay?

14 CHAIRMAN T. WHEELER: I wouldn't right now.
15 I will certainly accept a motion if you choose
16 to file one.

17 MR. J. PRICE: Okay.

18 CHAIRMAN T. WHEELER: But that would be my
19 take on that.

20 COMMISSIONER A. LONG: Agreed.

21 COMMISSIONER D. DUMEZICH: Agreed.

22 COMMISSIONER S. STEELE RIORDAN: Yes.

23 CHAIRMAN T. WHEELER: I'll accept a motion
24 to adjourn.

25 COMMISSIONER A. LONG: One moment.

132

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1 CHAIRMAN T. WHEELER: Okay.

2 COMMISSIONER A. LONG: I would ask the
3 chairman to write a letter to the attorney
4 general and thanking him for this and what a
5 great job he's done.

6 CHAIRMAN T. WHEELER: I have made a point
7 of mentioning that despite the convention.

8 COMMISSIONER A. LONG: And I would ask that
9 the co-directors for the next meeting to put on
10 the agenda -- I'd like to discuss the early
11 voting procedure. I think I voted early and I
12 think there's some things that we can do -- it's
13 one of the most exciting things we've done in
14 Indiana. I think we're going to get much better
15 turnouts, and I think there's some things that
16 would be simpler to do. I went ahead and voted
17 early just to sample it and immediately came up

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1 STATE OF INDIANA)
2 COUNTY OF HENDRICKS) SS:

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4 I, Rhonda J. Hobbs, RPR, and a Notary Public
5 and Stenographic Reporter within and for the County
6 of Hendricks, State of Indiana at large, do hereby
7 certify that on the 10th day of June, 2008, I took
8 down in stenograph notes the foregoing proceedings;

9 That the transcript is a full, true and
10 correct transcript made from my stenograph notes.

11 IN WITNESS WHEREOF, I have hereunto set
12 my hand and affixed my notarial seal this _____
13 day of July, 2008.

14

15

16

N O T A R Y P U B L I C

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18 My Commission Expires:
19 Septemer 12, 2009
20 County of Residence:
Hendricks County

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