

Indiana Election Commission Minutes August 19, 2005

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

Member Absent: Butch Morgan

Staff Attending: Kristi Robertson, Co-Director of the Indiana Election Division of the Office of the Indiana Secretary of State (Election Division); Dale Simmons, Acting Co-Director and Co-General Counsel of the Election Division; Cody Kendall, Co-General Counsel of the Election Division.

Also Attending: Mr. William Barrett (Fidlar Election Company); Mr. Steve Corey (Diebold Election Systems); Mr. Robb McGinnis (Election Systems & Software); Mr. Steve Pearson (Election Systems & Software).

1. Call to Order

The Chair called the August 19, 2005 meeting of the Commission to order at 1:00 p.m. at Conference Center Room C, Indiana Government Center South, 402 West Washington Street, Indianapolis, Indiana. The Chair noted that proper notice of the meeting had been given, as required by state law, and that three members were currently present with a fourth member represented by a designated proxy. A copy of the meeting notice, agenda, and designation 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.]*

The Chair took a moment of personal privilege to express how excited he was to be working with his fellow Commission members, and with the Election Division staff. He noted that he had previously had the opportunity of working with the staff on election law cases in his capacity as an attorney in private practice. He said that he knows the quality of staff members on both the Republican and Democrat sides of the aisle, and is very excited to be working with Kristi, Brad, Dale, and Cody.

The Chair noted the absence of Mr. King, who he stated had been hospitalized for pneumonia, but had since been released from the hospital, and should be returning to Indiana next week. The Chair, on behalf of the entire Commission, offered Mr. King its best wishes for a speedy recovery. Ms. Robertson added that she and Mr. King had been in Los Angeles to attend the National Association of State Election Directors (NASSED) meeting, and that he became sick while in Los Angeles. The Chair noted that Mr. King

was not permitted by his doctors to fly at this point, and so would be returning by taking a very scenic train ride through Arizona, New Mexico, and Colorado on Amtrak.

The Chair noted that letters of appointment dated July 27, 2005 and signed by Governor Daniels for himself and the Vice-Chair had been filed. These letters are incorporated by reference. Mr. Long thanked the Governor for reappointing him to the Commission.

The Chair recognized Ms. Temple, who was serving as a proxy for Commissioner Morgan. A filed copy of this proxy is incorporated by reference.

2. Voting System Certification

The Chair recognized the Co-Directors of the Election Division to present these matters to the Commission. Ms. Robertson noted that Commission members had received a memo from the Co-Directors dated August 18, 2005 concerning Voting Certification applications and other related matters. This memo is incorporated by reference.

Ms. Robertson expressed her appreciation to the tremendous efforts made by Cody, Dale, and other staff members for their assistance during this week and during Mr. King's absence. She noted that previously this week, staff members had attended meetings of the Census Data Advisory Committee (the legislature's interim election law committee); the Statewide Voter Registration System (SVRS) Steering Committee, and the Vote Indiana Team (the committee that assists with the implementation of the Help America Vote Act (HAVA)).

Ms. Robertson noted that after the June 22, 2005 Commission meeting, the Commission requested that the Election Division send a letter to county circuit court clerks and local county election administrators to explain the difference between the Commission's certification of voting equipment and the county purchase of voting equipment that complies with HAVA. She added that there were some questions coming from the counties about whether Commission certification of a voting system meant that the voting system complied with federal law requirements concerning voting systems. She stated that these procedures were somewhat different, in that the Commission certified voting systems, but that the Secretary of State and the Co-Directors determined whether a county could be reimbursed under HAVA for purchasing the voting system.

Ms. Robertson referred Commission members to the letter of June 28, 2005 sent out to these county officials, and incorporated by reference. She indicated that the Election Division had received some additional questions concerning these procedures, and that this letter provided the counties with helpful information.

A. Voting Technologies International direct record electronic VOTWare software upgrade (Version 3.6.10 application filed July 3, 2003).

Ms. Robertson noted that Election Division staff had asked vendors to provide information to the Commission concerning the status of pending voting system applications.

She said that at this meeting, Voting Technologies International (VTI) had indicated that they wished to proceed with certification of their voting system upgrade, but were not quite ready yet to do so. She stated that VTI had withdrawn its pending application by consent of the Commission, and had expressed its intent to submit a new application after the independent testing authorities (ITAs) had completed their examination of the new system upgrade.

B. Cause 2005-2: UniLect Corporation “The Patriot” direct recording electronic voting system, application filed December 29, 2003.

Ms. Robertson stated that the UniLect Patriot Direct Record Electronic voting system (DRE) is an application for an entirely new voting system and UniLect has paid the required fee for this application. She added that vendor had partially demonstrated this voting system to the Commission at its last meeting, but not the entirety of the voting system. She noted that although the Election Division has received correspondence from UniLect indicating that the software for this system had been escrowed, the Election Division has not yet received confirmation from the escrow agent that this escrow has been completed. She referred Commission members to the faxes from UniLect dated August 16, 2005, which are incorporated by reference.

Ms. Robertson added that the Election Division has not yet received any ITA reports from the vendor. She said that she understood that these voting systems have been submitted by the vendor to the ITAs, but the Election Division had not received any further information.

Ms. Robertson said that the Co-Directors recommended that this application be tabled by the Commission until: (1) the Election Division receives proof of escrow and all required documentation, including ITA reports; and (2) the Commission is provided with a full demonstration of this system if it wishes.

The Chair recognized Mr. Long, who noted that this application had been filed on December 29, 2003, nearly two years ago and was still pending. He noted that the Commission had some discussion in the past about how long the Commission wished to endure these continuances. He indicated that this vendor either needs to get moving on the application, or withdraw the application and start over.

The Chair recognized Mr. Simmons, who stated that before the last Election Commission meeting, the Election Division sent a notice to this vendor at the Commission’s direction, asking the vendor to “show cause” why this application should not be dismissed. He

added that as Ms. Robertson indicated, the vendor did appear at the last Commission meeting and provided a partial demonstration of the voting system. Mr. Simmons said that this vendor had made some progress since the last meeting by filing documentation with the Election Division indicating their efforts to complete the required escrow.

Mr. Simmons noted that he and Mr. Kendall had discussed the pertinent statutes concerning the vendor's requirement to pursue a pending voting system application, and the Commission's authority to dismiss an application if a vendor fails to meet this requirement. He stated that he and Mr. Kendall agreed with regard to the dismissal of the UniLect application that it would be preferable for the Commission to ask the vendor to "show cause" before the Commission dismissed the application. He noted that the Election Division had already issued a "show cause" order to UniLect for the last Commission meeting, and that if the Commission wished, the Election Division could issue another "show cause" order to UniLect with regard to the next Commission meeting.

In response to a question from Mr. Long, Ms. Robertson stated that UniLect had not requested a continuance of the cause for this meeting, but had sent her an email indicating that a UniLect representative would not be able to attend this Commission meeting, and had faxed the escrow information referred to earlier to the Election Division yesterday. She added that the Election Division had tried to give the best notice of this meeting that it could, and that the notice to this vendor was sent out last week. She said that since she wasn't certain who Mr. King had discussed this matter with at UniLect before his absence, the proper individual at UniLect may not have received the notice until late last week.

Mr. John stated that obviously the Commission would not approve UniLect's application today, but said that if the Commission did do so, the approval would expire October 1, 2005. He asked if the vendor would be required to submit an additional application for approval of this system for the term beginning October 1, 2005. Mr. Simmons responded that any vendor with a currently certified voting system will have the certification expire October 1, 2005, and that if a voting system is certified after October 1, 2005, the certification remains valid until four years later (October 1, 2009). He noted that the statutory change was intended to have all vendor certifications be on the same certification cycle, so that no matter whenever a voting system certification occurred during the next cycle, those certifications would all expire at the same time. Mr. Simmons noted that if a vendor had a voting system certified before October 1, 2005, this statute attempts to make it easier for the vendor to have the system recertified by the Commission. He indicated that a vendor in this case would not have to submit another application fee, but simply submit an application to request renewal of the voting system's certification for that four year cycle. In response to a further question from Mr. John, Mr. Simmons indicated that there is no difference in the requirements applicable to certification of a voting system under Indiana law before or after October 1, 2005.

The Chair expressed his understanding that since VTI had withdrawn its application, that if VTI submitted another application after October 1, 2005, that VTI would have to go

through the entire certification process. He added that if the Commission were to dismiss UniLect's application at today's meeting, then UniLect would be required to go through the entire certification process for a new application submitted after October 1, 2005. The Chair recognized Mr. Kendall, who referred to the minutes of the June 22, 2005 Commission meeting, and indicated that Chairman Burdick had expressed the view that a recently certified voting system should go through an expedited process for recertification as part of the October 1, 2005 transition to the new certification cycle.

The Chair asked if UniLect were required to withdraw its application, and to start over after October 1, 2005, whether the vendor was then starting from ground one; he understood that this would be a different result from allowing the vendor's application to linger on, instead of dismissing the application and requiring the vendor to start over, including providing a new application fee. Mr. Simmons responded that if this application was dismissed now, UniLect would be required to submit a new application fee, just as VTI will, but that if UniLect's application remains pending between now and October 1, Mr. Simmons does not understand the statute to require UniLect to submit a new application fee for that additional certification period.

The Chair recognized Mr. Long who stated that he would move to dismiss this application, but if the motion was seconded, he would then move to table the motion until the next meeting. He said that his purpose in doing so was that the application process was like a lawsuit, and that the vendor needed to be serious about it or not. Mr. Long indicated that if the vendor was candid with the Commission, and provided information for the delay in the process, that he was in favor of the Commission helping the vendor out in any way that it could. The Chair seconded this motion, and asked for discussion.

There being no discussion, Mr. Long moved, seconded by Mr. John, to table this motion until the next Commission meeting, and to notify UniLect of this motion and of the time and date of the next meeting so that UniLect can prepare for the meeting. The chair asked for discussion on the motion to table.

Mr. John expressed his complete agreement with the statements made by Mr. Long, and stated that he has real trouble with these voting system applications hanging on when there is no sign of progress being made by the vendor or effort made by a vendor to appear before the Commission to explain the delay. The Chair expressed his agreement as well, and noted that some vendors have representatives here at the meeting prepared to explain their applications. There being no further discussion on the motion, the Chair called the question, and declared that with four members voting "aye" (Mr. John, Mr. Long, Ms. Temple, and Mr. Wheeler), and no Commission member voting "no," the motion to table was adopted.

Mr. John moved, seconded by the Chair, that the UniLect application be tabled until the next Commission meeting. There being no further discussion on the motion, the Chair called the question, and declared that with four members voting "aye" (Mr. John, Mr. Long, Ms. Temple, and Mr. Wheeler), and no Commission member voting "no," the motion was adopted.

C. Avante International Technology Vote-Trakker direct record electronic version 4.7.6, application filed August 9, 2004.

Ms. Robertson stated that she and Mr. Simmons had not had any communications with Avante since the last Commission meeting, and that no additional material had been received by the Election Division from this vendor. She noted that this application was for a certification of new Direct Record Electronic (DRE) Voting System had been filed with the Election Division with the required application fee. She added that the Election Division had not received documentation of proof of escrow, the system had not yet been demonstrated to the Commission, and although the Election Division had received some ITA reports, there are still questions regarding whether this voting system meets 2002 FEC Standards, as required by current Indiana law for Commission certification of any voting system.

Ms. Robertson stated that the Co-Directors recommendation regarding this application was similar to the recommendation made to the Commission at its last meeting, namely that the Commission table the application until: (1) the Commission receives demonstration of the system; and (2) the Election Division receives documentation of escrow and an ITA report that demonstrates the voting system's compliance with 2002 FEC Standards.

In response to a question from Mr. Long, Ms. Robertson stated that the Election Division had not yet received documentation of escrow from the escrow agent. In response to an additional question from Mr. Long, she indicated that although the ITA report previously filed by this vendor with the Election Division was for a different version of the voting system rather than the version of the voting system that the vendor had applied for, the ITA on file indicated that the voting system complied with 1990 FEC Standards, but did not document the voting system's compliance with 2002 Standards. She added that obtaining this ITA report indicating compliance with 2002 Standards was probably the main reason this vendor's application was being delayed. In response to a question from Mr. Long, Ms. Robertson stated that in the past Avante had been responsive to Election Division communications regarding the application, but that she and Mr. Simmons were unaware of any further conversations that Mr. King may have had with Avante concerning this application after the last Commission meeting.

The Chair asked whether a tabled application would be automatically brought up at the next Commission meeting or whether the Commission could conditionally table the application based on the vendor's compliance with a requirement. He noted that since the Co-Directors recommendation concerning the Avante application was based on the vendor's failure to file documents, he was not certain that it needed to be placed on the next Commission agenda. Ms. Robertson responded that generally the Election Division included at least a status report to the Commission regarding all pending voting system applications, but that the Election Division could prepare the agenda either way.

The Chair recognized Mr. Long, who stated that he would prefer that all pending voting system applications be brought forward on the Commission's next agenda, in the same

manner as the UniLect application, so that at an appropriate point the Commission would be reminded to take action on a long pending application and move to dismiss it. The Chair expressed his agreement with Mr. Long.

Mr. John moved, seconded by Mr. Long, that the Avante application be tabled until the next Commission meeting.

Mr. Long stated that that motion puts Avante on the bubble, and that he would like to have a representative of Avante appear at the next Commission meeting or to at least satisfy the Co-Directors with pre-meeting communications that indicate that the vendor is moving forward with the application. Mr. John said that he agreed that at the next meeting, this application would be subject to a similar motion to dismiss, as in the UniLect case.

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

D. Hart InterCivic eSlate direct record electronic voting system

1. Version 4.0 application filed May 2, 2005.

2. Version 4.1 application filed May 13, 2005, including Ballot Now Absentee Paper System, Version 4.1, including the following software: JBC version 3.1.3; eSlate version 3.1.3; SERVO version 3.0.17; BOSS version 4.0.48; Ballot Now version 3.0.24; Rally version 2.0.11; Tally version 4.0.

Mr. Simmons stated that Hart InterCivic application was for approval of an upgrade to a previously certified direct record electronic voting system. He noted that the vendor has developed new versions of both system hardware and software. Mr. Simmons said that the vendor has submitted the applications for software version 4.0 and hardware version 4.1, and paid the required fee.

Mr. Simmons noted that the use of “firmware” in a voting system refers to when the voter interfaces with a voting system unit which has software programs imbedded in that unit. He remarked that most of these systems operate with election management software, and that the Hart InterCivic software has many sub-parts that perform election management and tally functions.

Mr. Simmons stated that one of the outstanding issues regarding this application was the documentation of escrow by an escrow agent. He noted that the memo from the Co-Directors indicated that this documentation had not yet been filed with the Election Division. Mr. Simmons stated that earlier today the vendor stated that proof of this escrow had been faxed to Mr. King by the escrow agent, and that Mr. King had confirmed this filing when he was contacted by telephone. Mr. Simmons added that he

had been unable to locate the filing in the Election Division office, but that the vendor had emailed proof of this filing with the escrow agent to Ms. Robertson today.

The Chair noted that the document demonstrating proof of escrow that was distributed by Ms. Robertson to the Commission referred to version 4.1 of this system, but indicated that there was no reference in this document to version 4.0. Mr. Simmons responded that this was correct, and that this was a different document than the document provided earlier to Mr. King. He indicated that the document distributed at the Commission meeting was a client account with the escrow agency, and indicating the State of Indiana's account number. Mr. Simmons stated that he had no further information beyond what Mr. King had recalled in his telephone conversation that morning, which was that the vendor had provided proof of escrow for both firmware and software.

The Chair noted that in its application, Hart InterCivic indicated that versions 4.0 and 4.1 are identical. The Chair recognized Mr. Kendall, who noted that the applications for both versions 4.0 and 4.1 had been discussed at the previous Commission meeting on June 22, 2005. He said that the minutes indicated that Hart InterCivic did state in its applications that the two versions were mostly identical, and that Mr. King stated at that meeting that documentation of escrow was the only outstanding issue regarding this application.

Ms. Robertson provided an initial draft of the minutes of the June 22 meeting, noting that since Mr. Kendall had just completed this draft earlier today, the Election Division staff had not asked the Commission to consider approval of those minutes at today's meeting due to editorial corrections that Commission members might find during their review. She added that these minutes would be submitted for formal approval at a later Commission meeting, but that members might find this draft useful for their discussion today.

Ms. Robertson noted that the memo prepared by the Co-Directors for the June 22 meeting only referenced the Hart InterCivic application for version 4.1, and asked Mr. Simmons if Hart InterCivic might have amended its application and dropped the previous application for approval of version 4.0. He responded that this must be what Hart InterCivic's application reflects, but that he did not have a copy of the application at hand.

The chair recognized Mr John, who stated that regardless of the answer to that question, based on the documents before the Commission, the Commission could not approve version 4.0 because there was no proof of escrow, but that all of the requirements for certification appear to have been met for version 4.1.

Mr. John moved, seconded by Mr. Long, that the Commission approve the application for version 4.1, pursuant to the recommendation of the Co-Directors and the Co-General Counsels, and that the application for version 4.0 be left pending for the moment, since Hart InterCivic could pursue approval of that application in the future, with the version 4.0 application being subject to dismissal at the next Commission meeting.

The Chair recognized Mr. Simmons, who stated that the May 13, 2005 application for approval of version 4.1 was the only application he had available for reference.

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

The Chair recognized Mr. Long, who asked about the May 2, 2005 Hart InterCivic application for version 4.0. Mr. John then asked if there was any additional information regarding whether the application for version 4.1 superseded the application for version 4.1, or if Hart InterCivic had any reason for wanting to market version 4.0. Ms. Robertson responded that often a vendor will seek to amend an existing application, and that the Election Division would not put the two applications for certification of the same system together.

The Chair recognized Mr. Long who moved, seconded by Mr. John, to dismiss the Hart InterCivic version 4.0 application. The Chair asked for discussion on the motion to dismiss.

There being no discussion, Mr. Long moved, seconded by Mr. John, to table this motion to dismiss until the next Commission meeting, and to request Hart InterCivic to provide additional information. There being no further discussion on the motion, the Chair called the question, and declared that with four members voting “aye” (Mr. John, Mr. Long, Ms. Temple, and Mr. Wheeler), and no Commission member voting “no,” the motion to table was adopted.

E. Diebold Election Systems, Inc. AccuVote-TSX direct record electronic voting system; firmware version 4.5.2, application filed March 2, 2005.

Ms. Robertson stated that before the last Commission meeting, Chairman Burdick had sent a letter to Fidler Election Systems asking for a report concerning issues that had arisen in Franklin County, Indiana, at the November 2004 general election. She noted that the Commission had not received a response from Fidler before the June 22, 2005 Commission meeting, and she thought that this might be the result of a change of personnel.

Ms. Robertson noted that Mr. William Barrett from Fidler was present, and had emailed her a letter dated January 14, 2005, addressed to Chairman Burdick, which is incorporated by reference. She noted that the person who drafted this letter had since left Fidler, and it was not clear that this letter had actually been sent to Chairman Burdick. Commission members proceeded to review the letter.

The Chair recognized Mr. John, who said that although the letter indicated that “procedures had been put in place” to prevent future errors, the letter was not clear as to what those procedures are.

The Chair recognized Mr. William Barrett, a representative of Fidler, and asked Mr. Barrett to provide a one-minute explanation of what had happened in Franklin County for his benefit as a new member of the Commission.

Mr. Barrett stated that Fidler had made a mistake in the coding of the program, and that this mistake was compounded because the mistake confused the order of the Democratic Party and the Libertarian Party on the ballot, which caused the straight party votes to be credited to the wrong candidates, so that Democratic Party candidates received straight party Libertarian votes, and Libertarian Party candidates received straight party Democratic votes. He said that there was human error involved in the programming that Fidler, regrettably, did not catch.

Mr. Barrett noted that there were a couple of different checks that were designed to catch those kinds of errors and that in the hustle and bustle preceding an election, these errors were missed.

The Chair noted that Fidler's letter indicated that the error was not the result of equipment failure or software defects, and asked where the human error occurred. Mr. Barrett responded that the human error was in the placement of the values for those two parties within the software by the individual who was working with that particular program.

The Chair responded that there was therefore a problem with the software that affected the counting. Mr. Barrett said that this was correct, but that the distinction was that the software was not making the error, but that human error was causing the software to perform in accordance with the manner in which the software was incorrectly programmed. The Chair stated his understanding that this was not an error in the software program provided by Fidler nationally, or throughout Indiana, but only in the version provided to Franklin County. Mr. Barrett responded that this was correct, and that the error was unique to Franklin County. In response to a further question by the Chair, Mr. Barrett stated that this was the only mistake that had happened.

The Chair asked Mr. Barrett what steps Fidler has taken to prevent this mistake from occurring again. Mr. Barrett said that Fidler has taken a number of steps, and that a few of these had been addressed in the January 14 letter. He added that Fidler has taken a number of additional steps since the January 14, 2005 letter was drafted. Mr. Barrett stated that Fidler has completely rewritten the entire front end of this process, and have made dramatic changes to the process since the letter was written.

The Chair recognized Mr. John, who requested more detail concerning this matter. He stated that everyone in the room has dealt with elections, and that they all have hectic times leading up to election day. Mr. John said that Fidler was talking about people programming on the fly, and clearly there were not the necessary checks and balances in place. He added that just telling him it would be better next time was not making him feel any better about what would happen. Mr. John asked what specifically Fidler has put in place.

Mr. Barrett responded that Fidlar has created a new template for a software program called "Project Freedom" that Fidlar is introducing to its customers to allow the customers to load in that part of the database which is localized to Franklin County, for example. He noted that for the 2004 election, Fidlar received certifications for every office on the ballot from President down to every office in a county, but that only from the county down to the precinct level that Fidlar gets the distinction of being in different databases that go to different jurisdictions, such as Franklin County.

Mr. Barrett stated that the "lower" portion of the ballot will now be "served up" on a database on which the local jurisdiction will create those datasets for Fidlar. He added that Fidlar will take that data directly from the customer instead of receiving this data in a variety of forms, such as faxes and floppy discs. He said that Fidlar is trying very diligently to standardize the process so that every customer gets the same database on the front end, the customer loads the data, the customer is the author, and Fidlar will be able to produce Fidlar's ballot proofs from that data through the GEMS software. Mr. Barrett added that the local jurisdiction would then receive the data back in a 24 hour turnaround time, and that the process of checks and balances would begin. He noted that since the county would be the author (rather than Fidlar), Fidlar hopes that there will be stricter attention to the integrity of the data.

Mr. John asked if Fidlar had not previously been strict in paying attention to the integrity of the data, since that was implied by what Mr. Barrett had just said. Mr. Barrett responded by saying that Fidlar has 12 jurisdictions in Indiana, and the same people are working at the same time during this November timeframe, along with people serving Fidlar's jurisdictions in Michigan, Illinois, and Wisconsin. He noted that this was a very busy time, and that Franklin County was the unique instance where this problem occurred. He added that Fidlar had 70 jurisdictions in Illinois that were going through the same process, over 400 jurisdictions in Michigan, and over 200 in Wisconsin. He noted that Michigan runs this software on a jurisdictional basis, rather than on a county-by-county basis. Mr. Barrett remarked that out of a dataset with several hundred chances for this error to happen, it happened only once. Mr. John responded that five tenths of a percent of error is not an error rate that he likes to see in an election.

The Chair recognized Steve Corey, a representative of Diebold Election Systems. Mr. Corey stated that large vendors who do a lot of databases, not only in Indiana, but across the country, were given the information for the state races from the Election Division, with the local county and city races being provided by the county election board or circuit court clerk. He added that once those databases are created, the vendor has the county proof the data, and have the county officials sign off on the data. Mr. Corey said that if the county official signs off on the data and indicates that everything is okay, it becomes a true partnership where the vendor has to work with the county, and sit down with the county to go through the proofing process when the county requests it. He noted that on occasion in the field in Indiana, he always advised having multiple people check the proofs, including individuals who might not be involved in the elections, since one person might catch a mistake that everyone else had overlooked. Mr. Corey stated that

sometimes even with all these safeguards being used, errors are not detected, and slip through the cracks.

The Chair stated that he read Fidler's January 14, 2005 letter to indicate that Fidler's testers did not know the difference between Democrats and Libertarians and why the voting was getting flipped, or that this was a case of "garbage in, garbage out" in the test situation. He added that what Fidler had done to solve this problem was to say "fine, we won't do that piece of the process; we will let the individual counties deal with this", using the assumption that counties will catch a ballot flip like this after seeing anomalous numbers of Democratic and Libertarian votes, and that Fidler's testers may not realize that a problem is present. He asked if this was the rationale for placing the burden on the counties to perform this work concerning the database.

Mr. Barrett responded that the other part of the logic was that this procedure does relieve Fidler's staff of some of the burden up front, and permit them to have time to pay more attention to that data input into the GEMS program having the right values in the right places.

In response to a question from Mr. Long, Mr. Barrett and Mr. Corey said that county officials were asked to proof the ballots now, but that this was a new type of partnership. Mr. Corey stated that when Fidler representatives collected ballot data from the counties, these Fidler staffers returned to their offices and created a database. He added that this database then creates a proof set of ballots for every precinct in every ballot style.

In response to questions from the Chair and Mr. Long, Mr. Barrett and Corey indicated that the practice above was that which had always been used by vendors to work with county officials to create ballot proof, and that the change from this practice would create a front-end database program, to be offered to the counties at no charge, with county officials being the author of this data. In response to a further question from the Chair, Mr. Barrett stated that the county officials would be entering this initial data. In response to a question from Mr. Long, Mr. Barrett indicated that county officials would be entering this data into a word processor in the county's office into an electronic format that Fidler had created.

The Chair said that he understood that county officials would be entering this information into a spreadsheet, which would then be shipped by the county officials to Fidler, with Fidler then creating a customized database for that county. Mr. Barrett indicated that this was correct. The Chair stated that Fidler would then create a proof ballot from the information that Fidler has received from the county, that the county then receives this ballot proof back to examine, and then after review, the county clerk signs off on the proof. Mr. Barrett responded that this was correct. The Chair asked if this program was common within the industry, and did the county clerks realize that they would have to be doing this additional data entry. Mr. Barrett responded "probably not."

In response to a question from Mr. Long, Mr. Corey stated that this would be an option for the county, and that in the past, the information was collected and the database

created, a proof set of ballots was given to the county before the actual print run was started, and the county proofed all of the ballot styles for every precinct in that election.

The Chair stated that he understood the difference that Fidler and Diebold were proposing was to tell the counties that rather than sending the vendor a list of candidates by township or precinct for the election, and having the vendor enter this data, the county would physically enter the data on a spread sheet that the vendor would provide. Mr. Barrett responded that many of Fidler's customers had suggested this approach, and was not born out of the vendor trying to avoid this work. Mr. Corey responded that before computerization was as widespread, Diebold was simply providing customers with printed sheets listing each office, and having the customer write in by hand each candidate's name. The Chair asked if the difference was simply who was typing this information into the database. Mr. Barrett responded that this was correct, and that Fidler was trying to automate this process because it speeds up the process on Fidler's end to receive the proofs back from the counties.

Mr. Long asked whether Fidler was saying that the Franklin County clerk had signed off on this ballot, and that the ballot was in error. Mr. Barrett responded that this was correct. Mr. John asked if the ballot was actually incorrect, or was the counting what was incorrect. Mr. Barrett responded that both were incorrect. Mr. John and the Chair asked if the ballot actually showed the Democratic candidates in the Libertarian column, and the Libertarian candidates in the Democratic column, and the Franklin County clerk had signed off on that. Mr. Barrett responded that this was correct.

Mr. Barrett stated that the situation reflected the unique circumstances that Fidler deals with in the field, and that in his opinion, Fidler has done a good job in doing so, but that there will be human error.

Mr. Corey stated that the largest human factor is in proofing the ballots, and once the vendor is told by the county that the proofs are okay, the ballots are then printed and shipped. He said that sometimes mistakes have been caught after ballots have been printed, and ballots must be reprinted as a result.

The Chair asked the Co-Directors to let Franklin County know that the Commission has conducted this inquiry, and provide the County with the portion of these minutes related to its discussion of this problem so that Franklin County is aware of the Commission's discussion, and to also provide the county with a copy of Fidler's letter of January 14, 2005 drafted for signature by Mr. Kruszynski, the Director of Elections for Fidler Election Company, which is incorporated by reference. The Chair added that if Franklin County had additional concerns after receiving this information, he would like for the County to send the Commission a letter expressing those concerns at its next meeting.

The Chair then recognized Mr. Simmons to discuss Diebold's pending application for voting system certification.

Mr. Simmons stated that this was an application for certification of a new direct record electronic voting system (AccuVote firmware version 4.5.2.). He noted that at the last Commission meeting, the Commission had discussed the lack of engineering drawings required to be supplied by Diebold as an element of the application under Indiana Code 3-11-15. He said that he had since had several discussions with representatives of Diebold, and that he had received a copy of Diebold's tender letter dated August 12, 2005 that has been provided to Commission members and is incorporated by reference.

Mr. Simmons indicated that Diebold pointed out in the letter that accompanied these drawings that Diebold had some expectation that the Election Division would keep these drawings confidential. He stated that this was the topic of his discussions with Diebold representatives, and reflected Diebold's reluctance to provide these drawings as "confidential" or "proprietary". Mr. Simmons said that there was nothing in Indiana law that indicated that this was the case, and that he promptly responded to Diebold's letter and stated that he had done nothing to create any expectation by Diebold that these documents would be confidential. He noted that his letter to Diebold on this point is dated August 15, 2005, and is incorporated by reference.

Mr. Simmons added that the Election Division assumed that all records it maintained are public records, unless otherwise demonstrated under the Public Records Law. Mr. Simmons remarked that no one had demonstrated to him that these records were not public records under Indiana law, and given the risk and burden of proof that the Election Division would have to demonstrate that the records were confidential, that he would advise the Co-Directors that the Election Division not consider these records to be confidential. He added that he did not know if this was still an issue with Diebold, but that in any case, the Election Division has now received the required documentation for the application. In response to a question from the Chair as to whether this remained an issue for Diebold, Mr. Corey stated that after discussions with the Co-Directors and Mr. Simmons, Diebold had decided that it would be in Diebold's best interest to file the documents. The Chair stated that he certainly understood Diebold's concern regarding the proprietary nature of the software, and that it should properly be escrowed, but that he was not aware of any prior Commission ruling regarding engineering drawings. Mr. Corey responded that Diebold had initially suggested escrowing the engineering drawings, but that Diebold eventually decided to file these drawings.

Mr. Simmons noted that Diebold had provided proof of escrow of version 4.5.2, which was made available to Commission members and incorporated by reference.

Mr. Simmons said that the Election Division had an outstanding question regarding version of the GEMS election management system software would be used with firmware version 4.5.2. He stated that since the last Commission meeting, Diebold has clarified that GEMS version 1.18.19 would be used with version 4.5.2. and that Diebold provided proof of escrow of that GEMS version by email to the Election Division this morning. In response to a question from the Chair, Mr. Simmons indicated that this escrow issue has now been resolved.

Mr. Simmons stated that the outstanding issue involving this application was that although Diebold has indicated the version of GEMS that this version of AccuVote TSX will work with, the Election Division does not yet have a report from a software ITA indicating that this version of GEMS complies with the 2002 FEC Standards and has been tested with the 4.5.2 version of AccuVote TSX. He noted that Commission members had received a seven page report from CIBER titled “Software Functional Test Report for Diebold System GEMS 1.18”, which is incorporated by reference.

Mr. Simmons indicated that the purpose for issuing this report and the addendum, as stated on page 2 of the document, was to keep the version numbers of all tested hardware and software up to date, and therefore to let readers know which firmware had been tested with which software. He said that the relevant addendum called to his attention by both CIBER and Diebold is on page 7 of the report. In response to a question by the Chair, Mr. Simmons stated that at the invitation of Diebold, he had telephoned Shawn Southworth of CIBER this morning. He remarked that Mr. Southworth said that he did not know if GEMS 1.18.19 had been tested with the TSX 4.5.2 based on this addendum, since Mr. Simmons pointed out that the addendum had two columns, with one listing various voting system hardware, and the other with the heading GEMS 1.18.19, but that the hardware list in this addendum does not include AccuVote version 4.5.2.

Mr. Simmons noted that although the addendum on page 7 does contain a reference to “AccuVote TS Precinct Counter Rev 6... Firmware version 4.5.2”, Mr. Simmons understood that this was a different voting system from the AccuVote TSX system. In response to a question from the Chair, he said that the bottom of this page under the title “GEMS 1-18-22”, the AccuVote TSX system 4.5.2 is listed as having been tested with that version of GEMS (rather than GEMS 1-18-19). Mr. Simmons added that Mr. Southworth had also advised him that neither the GEMS 1-18-19, nor the GEMS 1-18-22 had been found by the ITA to comply with the 2002 FEC Standards, but instead had been tested for compliance with the 1990 FEC Standards.

In response to a question from the Chair, Mr. Simmons stated that Mr. Southworth was employed by CIBER, but that he did not know Mr. Southworth’s exact title. He noted that Mr. Southworth had been the signatory on several reports received by the Election Division from CIBER. In response to a further question from the Chair, Mr. Simmons stated that CIBER, Inc. had served as the ITA whose reports were relied on by the Commission in considering several previous applications.

Mr. Simmons said that this system has not yet been demonstrated to the Commission, but that he understood that representatives of Diebold were prepared to do so at this meeting.

The Chair recognized Mr. Corey, who proceeded to demonstrate the operation of this system to the Commission.

Following the conclusion of the demonstration, the Commission proceeded to discuss the outstanding issues regarding the application.

Mr. John moved, seconded by Mr. Long, to table this application until the next Commission meeting, and the Commission proceeded to discuss this motion.

At the conclusion of this discussion, Mr. Corey stated that Diebold had received information from the ITA indicating that a more recent version of the AccuVote TSX had been tested with a more recent version of GEMS, and found to be in compliance with 2002 FEC Standards. He added that Diebold was waiting for written confirmation from the ITA concerning this testing and compliance, and would supply this documentation to the Election Division as soon as possible. The Chair stated that the Commission did not wish to slow down the certification process for vendors, and that the Commission wished to proceed with the processing of these applications as well.

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

F. Election Systems & Software (ES&S) AutoMARK voting system (Voter Assist Terminal [VAT] and Information Management System [AIMS] application filed May 11, 2005.

The Chair recognized Ms. Robertson, who stated this was an application for certification of a new voting system, and that this system had been demonstrated at the June 22, 2005 Commission meeting. She added that the application had been submitted with the required fee, and that the Election Division has received proof of escrow of the system firmware and software with Iron Mountain Intellectual Property Management, Inc, an escrow agent, included with a letter dated August 10, 2005 from ES&S, which is incorporated by reference.

Ms. Robertson stated that the Election Division has now received full ITA reports for both the AutoMARK Voter Assistance Terminal (VAT) and the Information Management System (AIMS), which are both components of AutoMARK. She noted that this was pretty much the status of this application at the last Commission meeting, except for the subsequent proof of escrow documentation.

Ms. Robertson noted that there was one additional issue left over from the last Commission meeting, which the Commission may wish representatives of ES&S who are present to address. She stated that the Election Division understood that when the AutoMARK voting system was tested at the ITA, the AutoMARK system was tested with Unity version 2.4.3. She noted that in Indiana, Unity version 2.5 is the version that is currently certified. Ms. Robertson stated that the questions raised at the last meeting were what was the relationship between Unity version 2.4.3, Unity version 2.5, how will these versions of Unity work with AutoMARK, how will the AutoMARK be sold to the

counties and used, and which Unity version would be used by the counties. Ms. Robertson stated that the Election Division had further conversations about this issue with ES&S following the last Commission meeting that ES&S representatives might be able to address. The following additional documents were presented to Commission members and are incorporated by reference: (1) a letter dated June 28, 2005 from Mr. David M. Hughes, Senior Certification Specialist with ES&S, with enclosures; (2) email correspondence from Mr. Steve Pearson to the Co-Directors and Co-General Counsels, dated August 10, 2005.

The Chair recognized Steve Pearson, Vice-President of Certification for ES&S, and noted that he had previously been sworn and remained under oath. Mr. Pearson stated that he would like to provide some general background before going into detail regarding the relationship between these systems.

Mr. Pearson stated that ES&S had applied for certification of the AutoMARK voting system which is comprised of two components: the AIMS portion of AutoMARK which does the programming of the ballot layout that would be installed in the VAT portion of the system. He indicated that AIMS basically gives instructions to the VAT portion of the system as to what ballot style the terminal should expect to receive.

In response to a question from the Chair as to what type of voting system the AutoMARK was, and if the system was designed for disabled voters, Mr. McGinnis and Mr. Pearson responded that the system was a ballot marking device and is a “glorified pen.” Mr. McGinnis indicated that Mr. Pearson would be able to conduct a demonstration of the system for the Chair. The Chair responded that since Mr. John and Mr. Long had seen the system demonstrated at the previous meeting, and since he had been involved with different voting systems used in Pennsylvania, Florida and Indiana over the last two years, that another demonstration would not be necessary at this meeting. In response to a question from Mr. Long, the Chair indicated that he had been prepared to go to Ohio, but had bailed out and went to Pennsylvania instead.

Mr. Pearson noted that as part of the ITA process, all hardware, firmware, and software components of the AutoMark system are tested by the ITA for compliance with 2002 FEC Standards. He indicated that in May 2005, the AutoMARK completed all of these tests successfully, and that both AIMS and VAT were “ruled to be in compliance and received a NASED number.” He stated that both components of the AutoMARK “are 2002 compliant.”

Mr. Pearson said that in order to take a system through the ITA process, and to get a NASED number, “it is required to be tested with a system”, and that “you have to have something that will read the marks that are printed on these ballots.” He remarked that in the qualification process, the firmware versions on the optical scan systems that were tested happened to be the 2.4.3 versions of the Model 100, Model 650, and the Optech 3P Eagle, which are other optical scan voting system models that ES&S uses.

Mr. Pearson stated that the AutoMARK system was designed and tested as a ballot marking device, and is designed to operate independently with any optical scan system that is available on the market today. He said that the AutoMARK has been certified currently in six states, four of which “are on the same 2.5 level as Indiana.”

Mr. Pearson said that the AutoMARK system has also been tested successfully with competitor products, so it is designed independently to allow a ballot to be laid out from a pdf file. He added that AIMS has the ability to lay out the ballot, to read the ballot layout, and to make a mark where the voter selects. He indicated that the system is essentially an “electronic pen” which can work with any compatible system that is on the market. Mr. Pearson said that as a result, ES&S is seeking certification of the AutoMARK as a stand alone product designed and able to be used with any compatible optical scan system.

Mr. McGinnis added that the AutoMARK does not recognize any difference between Unity 2.4.3, Unity 2.5, or other Unity upgrades that will be available in the future because it is simply a marking device. In response to a question from the Chair, Mr. McGinnis responded that the Chair was correct in stating that any change to the Unity voting system would not require a change in the AutoMARK. Mr. Pearson said that the AutoMARK was totally separate from other voting systems and should be viewed in that way.

The Chair asked if regard to that Unity voting system upgrade, any county using an optical scan system with Unity will be able to use the AutoMARK system in the May primary or November general election without changes to the AutoMARK. Mr. Pearson responded that this was correct.

Ms. Robertson stated that it might help the Commission to consult with Mr. Kendall and Mr. Simmons to understand the unique legal issue involved with this system. She said that this application was the first instance where this issue had come up with a voting system, since the AutoMARK is a unique type of voting system. She indicated that the AutoMARK was an effort to provide counties who currently use an optical scan voting system the ability to meet the accessibility requirements which are part of HAVA.

Ms. Robertson said that HAVA requires the counties to have at least one fully accessible unit in each polling place which permits a blind or visually impaired voter to vote privately and independently. She stated that this was a new type of system which would allow that interface, so that a person with a disability would be able to vote using a headphone and a keypad as a way to navigate through a ballot. She added that the Auto MARK voting system, by itself, then prints off an optical scan ballot.

Ms. Robertson noted that this optical scan ballot is taken to an optical scan reader, which reads the voted ballot. She stated that the system was “stand alone in a way”, but unless all of the optical scan ballots will be hand counted, the system will require an optical scan reader. She noted that usually an optical scan ballot reader (or a DRE system) is all one thing, and that is why the Election Division asked what software version the vendor tested the AutoMARK with, and what version will the system run on. Ms. Robertson said

that the issue here is that while the AutoMARK will print out a ballot, something else must read that ballot.

Ms. Robertson said the question remains that when the AutoMARK system is tested at the ITAs, must the system be tested with that reader to test the system in the way that the AutoMARK will actually be used on election day by a county. In response to a question from the Chair, Ms. Robertson said that this involves a question of Indiana law, insofar as Indiana law addresses it.

The Chair asked if Ms. Robertson was correct in stating that the ITA testing was performed on Unity version 2.4.3, which is not currently certified in Indiana (as opposed to Unity version 2.5, which is certified in Indiana). Mr. Pearson said that 99% of the testing of the system was on the VAT and AIMS components to determine if they were 2002 compliant. He added that each of the tests required that the system be activated by a ballot reader. In response to a further question from the chair, Mr. Pearson responded that she was correct that the reader used in these tests was Unity version 2.4.3, not version 2.5. The Chair stated that he understood the concern of the Co-Directors to be that the AutoMARK had not been tested to determine whether the system would work properly when Unity 2.5, the Indiana certified version, was used. The Chair said that the legal issue being presented was whether Indiana law required the use of Unity 2.5.

In response to a question from Mr. Long, Mr. Pearson stated that although the AutoMARK system had been tested with Unity 2.5, but was not tested in the ITA exam that the ITA has since signed off on. The Chair stated that if the AutoMARK had been signed off by an ITA after testing on the Unity 2.5, the Commission would be able to proceed. Mr. McGinnis stated that at the time the ITA signed off on the AutoMARK, Unity version 2.5 was not yet in existence.

The Chair recognized Mr. Simmons, who noted that in approaching this question under Indiana law, it was important to recognize that the AutoMARK is a completely new system. He said that he and Mr. Kendall had looked at the statutes concerning the approval of voting systems, and indicated that Indiana Code 3-11-15-13.3(b) states that the "voting system" must meet 2002 FEC Voting System Standards, adopted by the Federal Election Commission on April 30, 2002. He noted that although this provision was amended in the 2005 legislative session, the amendment had no substantive effect on this requirement.

Mr. Simmons remarked that the only definition of "voting system" under Indiana law is found at IC 3-5-2-53, which was not amended during the 2005 legislative session. He noted that this provision contained two definitions of "voting system", one of which was effect until December 31, 2005. Mr. Simmons then read the current definition of "voting system" found at IC 3-5-2-53(a). He called the Commission's attention to the part of this definition which included the statement "Equipment that is not an integral part of a voting system that can be used as an adjunct to the system is considered to be a component of the system." Mr. Simmons said that he interpreted this provision to mean that if there is a component that is involved in recording the vote on the AutoMARK and counting the

vote on whatever optical scan used, he viewed this as a “voting system.” He noted that the points he focused on were: (1) whether the components that work together to cast and count votes comply with 2002 FEC Standards as Indiana law requires; and (2) whether the components that the vendor is asking to be approved as part of this certification of a voting system actually tested together to ensure that the components work together. Mr. Simmons indicated that this was the legal issue that he had struggled with: namely, does the applicant have to demonstrate that these components work together properly, or not.

Mr. Simmons said that simply showing that the AutoMARK voting system had been through ITA review, and having the AutoMARK tested with an optical scan system, does not resolve the issue of having AutoMARK tested with a version of an optical scan system not certified for use in Indiana. He said that he understood the position of ES&S to be that this testing using the Indiana certified system was not necessary, since the AutoMARK would work properly with any ballot reader on the market, and that as a result, all ES&S needed was certification of the AutoMARK itself, and any software installed in the AutoMARK.

Mr. Simmons emphasized that he would be more comfortable with this position if an ITA had issued a report or letter stating that the ITA considered all optical scan units to be “off the shelf components that would work with anything” when the ITA tested the AutoMARK system. He said that instead, all the Commission has before it, is the representation by ES&S that the AutoMARK works with all optical scan units.

The Chair recognized Mr. Kendall, who stated that he had an analogy that might be helpful for the Commission’s consideration. He indicated there were two pieces of equipment here which were both 2002 certified. Mr. Kendall noted that the Food and Drug Administration (the FDA) will certify one drug as safe, but must separately certify that another drug certified as safe will also work safely with the first drug, since mixing two otherwise safe drugs together may be deadly. He said that this may be an extreme analogy, but it brings home the point that these two pieces of equipment have not been tested together. Mr. Kendall said that if you bring something “off the shelf” and feed it into a reader, you may not necessarily obtain the results that you want.

The Chair asked Mr. Simmons if he had discussed this question with Mr. King, and indicated that he wanted to be certain that there was unanimity among both the Co-Directors and the Co-General Counsels in the view that although both pieces of equipment were certified as 2002 compliant, that Indiana law requires additional certification from an ITA that the two pieces of equipment work together.

Mr. Kendall responded that his recommendation would be that this certification be obtained from an ITA before the Commission approved this application.

Mr. Simmons responded that he had discussed this question with Mr. King, who stated his beliefs were consistent with those of Mr. Simmons. Mr. Simmons added that he had not discussed with Mr. King his comments regarding an ITA document actually setting forth these additional statements.

Ms. Robertson stated that something like that would be helpful to her, since it may work, and she does understand the argument that the AutoMARK is a separate piece of equipment that can work on its own. She added that this would continue to be an issue for the counties because the county may already have another vendor's optical scan reader, and may wish to continue to use that optical scan reader. Ms. Robertson said that she could guarantee that an ITA would not test another vendor's optical scan reader with the ES&S AutoMARK since the ITA would not receive authority to do so. She added that since this will be an issue in other states, that some guidance from the ITAs or the federal Election Assistance Commission would be helpful and provide additional reassurance if it stated that there are standards for optical scan readers and when you print out the ballot, it all looks the same, and the marks are all the same, and any system could read the ballot.

Ms. Robertson said that she did not understand this to be true, since she had been told by counties that the counties must have specially printed optical scan ballots since the timing marks are very important, and perhaps there is a standard for printing these marks out there, but she is not aware of that.

The Chair recognized Mr. Long, who said that the last sentence of the definition of "voting system" addresses that, since once the component is brought into the system, the component becomes a part of the system. He added that this then takes us back to the other Indiana Code section which requires voting system certification. Mr. Long stated that he was not knowledgeable concerning the technology used in these voting systems.

After further discussion, Mr. John moved, seconded by Mr. Long, to table this application until the next Commission meeting. There being no further discussion on the motion, the Chair called the question, and declared that with four members voting "aye" (Mr. John, Mr. Long, Ms. Temple, and Mr. Wheeler), and no Commission member voting "no," the motion to table was adopted.

3. Co-Directors Report

The Chair recognized Ms. Robertson, who noted that the 2005 Indiana Election Legislation Summary had been prepared by the Election Division, provided to Commission members, and is incorporated by reference.

Ms. Robertson noted that Commission members had been provided with copies of the April 11, 2005 minutes of the Vanderburgh County Election Board with reference to the storage and handling of election materials by the county, along with a May 13, 2005 letter to her from Mr. Long, these documents being incorporated by reference.

4. Adjournment

There being no further items on the Commission's agenda, the Chair entertained a motion that the Commission do now adjourn. Ms. Temple, seconded by Mr. Long, so moved. There being no further discussion on the motion, the Chair called the question, and declared that with four members voting "aye" (Mr. John, Mr. Long, Ms. Temple, and Mr.

Wheeler), and no Commission member voting “no,” the motion was adopted. The Chair then adjourned the meeting at 3:00 p.m.

Respectfully submitted,

J. Bradley King
Co-Director

Kristi Robertson
Co-Director

APPROVED:

Thomas E. Wheeler, II
Chairman