

# Indiana Election Commission

## Minutes

### January 20, 2004

**Members Present:** Brian Burdick, Chairman of the Indiana Election Commission (the Commission); S. Anthony Long, Vice Chairman of the Commission; Butch Morgan, member of the Commission; and Bradley R. Hiller, member of the Commission.

**Members Absent:** None

**Staff Attending:** J. Bradley King, Co-Director, Indiana Election Division of the Office of the Indiana Secretary of State (Election Division); Kristi Robertson, Co-Director of the Election Division; Dale Simmons, Co-General Counsel of the Election Division, Clay Patton, Co-General Counsel of the Election Division, Michelle Thompson, Campaign Finance Co-Director of the Election Division, Pam Potesta, Campaign Finance Co-Director of the Election Division, Lori Hershberger, Special Projects Coordinator of the Election Division and Michelle Brzycki, Special Projects Coordinator of the Election Division.

**Also Attending:** Randall Artis, George Pabey, Alicia L. Rodriguez, Mike Rodriguez, Stephen Stiglich, Joe Hero, John Aguilera, Andrew Wood, Lisa Garoffolo, Don Dayton, Rosemary Abel, Nan Nidlinger, Frank Kresich, Robert Febus, Samuel Perez, Claudia Thornburg, Suzanne Fogleman, Vickie Kivett, Sarah M. Benter, Rita Benton, Mark Stratton, Maureen Bard, Norma Trimpe, Jeff Lucas, Stephanie Middendorf, Byron Stockwell, Lisa Lullen, Ruth Kinney, Sandy Hamersperger and Robbin Stewart.

## 1. Call to Order

The Chair called the January 20, 2004 meeting of the Commission to order at 1:10 p.m. at the Indiana Government Center South, Conference Center, Training Center Room 5, 302 West Washington Street, Indianapolis, Indiana. He noted that proper notice of the meeting had been given as required by state law, and that all members of the Commission were present. A copy of the meeting notice and agenda is incorporated by reference in these minutes. *[Copies of all documents incorporated by reference are available for public inspection and copying at the Election Division office.]*

## 2. Approval of Minutes

The Chair indicated that the December 9, 2003 Commission minutes were before the Commission for approval. The Chair observed that he recalled that the Commission met for a few minutes that morning and noted that the proposed minutes indicate that the Commission meeting was called to order at 8:50 a.m. and adjourned at 8:50 a.m. The Chair indicated that he would entertain a motion to amend the minutes to show that the Commission adjourned at 8:55 a.m. to indicate that the Commission actually met for

some period of time that morning. Commissioner Hiller moved that the minutes be amended to show that the Commission adjourned at 8:55 a.m. on December 9, 2003. Mr. Long seconded the motion. There being no further discussion, the Chair called the question, and declared that with four members voting “aye” (Mr. Burdick, Mr. Long, Mr. Morgan, and Mr. Hiller) and no Commission member voting “no,” the minutes were as amended.

The Chair indicated that he would entertain a motion to approve the December 9, 2003 minutes as amended. Commissioner Hiller moved that the minutes as amended be approved. Commissioner Long seconded the motion. There being no further discussion, the Chair called the question, and declared that with four members voting “aye” (Mr. Burdick, Mr. Long, Mr. Morgan, and Mr. Hiller) and no Commission member voting “no,” the minutes were approved as amended.

### **3. Campaign Finance Enforcement**

The Chair indicated that the Commission would next consider campaign finance enforcement matters. The Chair stated that the Commission has two campaign finance matters on the agenda today that are continued causes from the Commission’s previous meeting.

#### **A. Indiana Federation of Republican Women, Cause 03-321-163**

The Chair opened a formal hearing on cause 03-321-163 in the matter of Indiana Federation of Republican Women. The Chair asked that the appropriate staff person address the case. The Chair recognized Pam Potesta who stated that the committee filed its report on October 17, 2003 at 3:47 p.m. and received its notice of hearing on January 14, 2004. She explained that the committee has been before the Commission one other time and that the committee has a proposed civil penalty of Fifty Dollars (\$50.00), plus investigative costs in the amount of Two Dollars and Fifty Cents (\$2.50), for a total of Fifty Two Dollars and Fifty Cents (\$52.50).

Commissioner Morgan inquired as to whether the oath should be administered for the campaign finance hearings. The Chair indicated that this was correct and asked Mr. King to administer the oath. The Chair then invited all those present who were going to testify on any of the topics on the agenda, including precincts, campaign finance, voting system certification, or on the voter’s bill of rights, to stand for the administration of the oath. Mr. King then administered the oath.

The Chair asked if there anyone from the Indiana Federation of Republican Women was present. There being no response, the Chair closed the hearing and asked Commission members for discussion. The Chair indicated that the documentation before the Commission shows that the committee has been before the Commission one time and stated that it had been previous custom and convention before the Commission to grant some leniency for committees that are not frequent visitors before the Commission. He stated that the Commission’s custom is to impose a fine of 25% of the proposed

maximum fine for committees that have never appeared before the Commission, 50% of the proposed maximum fine for committees that have appeared before the Commission one time, and 75% of the proposed maximum fine for committees that have appeared before the Commission three times. He stated that if a committee has appeared before the Commission more than three times then the whole of the proposed maximum fine was imposed. The Chair moved to have a proposed order drafted that fines the Indiana Federation of Republican Women 50% of the proposed maximum fine in the sum of Twenty Five Dollars (\$25.00), plus investigative costs in the amount of Two Dollars and Fifty Cents (\$2.50), for a total of Twenty Seven Dollars and Fifty Cents (\$27.50). Mr. Hiller seconded the motion.

The Chair asked if there was any discussion. Mr. Long indicated that he understood from Republican counsel at the last meeting that the Commission had to first vote to find that a committee committed a violation before the committee is fined. He added that the Commission should have one set of rules that apply to all violators. He said he didn't think the Commission could fine a committee until the Commission found that the committee was guilty.

The Chair indicated that the fact that the committee is guilty of the offense and that the fine be imposed would be reflected in the order.

Commissioner Long stated that this was not in the motion. He stated that if the statute says that if the person fails to file the report or the statement of organization by the deadline, the Commission shall assess the civil penalty. He stated that nothing in the Chair's motion indicates that the committee failed to file a timely report. He stated that he could not vote for a motion reducing the fine until the Commission votes for a motion, or incorporate in the same motion as your counsel has advised, a finding that the committee violated the law.

The Chair recognized Mr. Simmons who stated that Commissioner Long has indicated his prior advice was that the Commission must first make a finding of guilty. He stated that the Commission doesn't have the benefit of the minutes from the last meeting but that he was unsure of the advice that Commissioner Long is referring to with respect a requisite finding. He indicated that, as part of the campaign finance enforcement process, the Commission receives testimony from staff and that, if it is appropriate, a finding is made that there has been a violation and that a fine should be imposed. He does not recall advising the Commission to bifurcate the hearing or motion. He stated that maybe the minutes will show that. Mr. Long stated that he thinks that the minutes will show that.

The Chair duly noted the comments and asked Commissioner Long for the statutory citation he had given. Commissioner Long indicated it was IC 3-9-4-16(c). Commissioner Long indicated that the section makes the fine mandatory at Fifty Dollars (\$50.00) per day unless the Commission votes to reduce it by unanimous vote under IC 3-9-4-19. Commissioner Long indicated that he was prepared to support the motion if there is a finding of a violation.

The Chair indicated that he would entertain a motion. Commissioner Long moved to find, by appropriate order, that the Commission determines that the Indiana Federation of Republican Women failed to file the requisite report as required by IC 3-9-4 and that the Commission reduce the penalty to Twenty Five Dollars (\$25.00) plus the costs of mailing of Two Dollars and Fifty Cents (\$2.50). Commissioner Hiller seconded the motion. There being no further discussion, the Chair called the question, and declared that with four members voting "aye" (Mr. Burdick, Mr. Long, Mr. Morgan and Mr. Hiller), and no Commission member voting "no," that the motion was adopted.

### **B. Miller Neese PAC, cause 03-4982-185**

The Chair opened the hearing on Miller Neese PAC, cause number 03-4982-185, and requested a report from staff. The Chair recognized Pam Potesta who indicated that the Miller Neese PAC, cause 03-4982-185 filed its final report October 17, 2003 at 5:54 p.m. She indicated that the committee has not previously appeared before the Commission for a campaign finance violation and that the committee received its notice of hearing on January 14, 2004. She advised that the proposed penalty for this committee is Fifty Dollars (\$50.00) plus costs in the sum of Two Dollars and Fifty Cents (\$2.50) for a total of Fifty Two Dollars and Fifty Cents (\$52.50). She indicated that the committee submitted correspondence and that staff has placed that correspondence in the Commission's packet. These documents are incorporated by reference in these minutes.

The Chair identified the correspondence as a request by the committee to continue the case today and to hold the case over until the next meeting. Commissioner Long moved to grant the continuance. Commissioner Hiller seconded the motion. There being no further discussion, the Chair called the question, and declared that with four members voting "aye" (Mr. Burdick, Mr. Long, Mr. Morgan and Mr. Hiller), and no Commission member voting "no," that the motion was adopted.

### **C. Campaign Finance Orders from Previous Meetings**

The Chair recognized Michelle Thompson who indicated that Orders 2004-01 through 2004-05 have been prepared on the actions taken at the Commission's November 20, 2004 meeting and that those orders are ready for adoption at the pleasure of the Commission.

The Chair indicated that he noticed as he reviewed his packet prior to the meeting that the minutes of the previous meeting are incorporated by reference into the orders Commission relies on a few of these orders numbered 01, 02, and 03. The Chair indicated that he would move that the orders be tabled until the Commission has had an opportunity to review the minutes from the previous meeting. He added that he would also place the Divinity Funeral Home case in the same category since the Commission has not yet had the opportunity to review and approve the minutes. The Chair suggested that the Commission continue its consideration of campaign finance orders numbered 01, 02, 03 and 04 over to the next meeting. He then indicated that he would have to appoint a proxy as to order numbered 05 since he had a conflict on the EDIS case.

The Chair moved that the Commission continue its consideration of campaign finance orders numbered 01, 02, 03 and 04 over to the next meeting or at least until the Commission has had an opportunity to review and approve the Commission's November 20, 2003 minutes. Commissioner Hiller seconded the motion.

Commissioner Long indicated that some discussion may be in order. The Chair recognized Commissioner Long who stated that there were a number of decisions at the November 20, 2003 meeting and only four or five of these decisions have been reduced to order form. There were many motions that were made to reduce fines and penalties that failed at the last meeting and that the Commission has no orders for those cases. He added that, at the previous meeting, the Commission made a specific finding of a violation as to the Brooks LaPlante committee and that there has been no order tendered to the Commission with regard to action. He stated that he requested that the Brooks LaPlante case be placed on the agenda today but indicated that the Chair in his wisdom and power declined to do that. He stated that he did not intend to vote on any order that occurred at the November 20, 2003 meeting until the Commission has all the orders before it. He added that it is getting close to being ninety days from the date of the November 20, 2003 Commission meeting and that Mr. LaPlante was allowed to replead his case at the November 20, 2003 meeting because the Commission did not meet within ninety days of the Commission's hearing on the case. He stated that he hoped that the Commission would hold another meeting within ninety days of November 20 to formally act on these matters. He said that if the Commission does not hold such a meeting, the Commission is going to be derelict in its duties.

The Chair recognized Commissioner Morgan who indicated that he had a question for anyone, the Co-Directors, Co-General Counsel, or staff, whether there was a reason that the minutes from the last meeting were not yet prepared. Commissioner Morgan stated that it did not make sense to him and that it was an embarrassment.

Commissioner Hiller stated that he agreed and that it was very hard to act on items where the Commission cannot see exactly what happened. Commissioner Hiller asked if the Co-Directors could address this issue.

The Chair recognized Mr. King who stated that he could address the issue by saying that the Co-Directors typically assign work to individual staff members. He stated that, in the case of the November 20, 2003 minutes, Ms. Robertson assigned the production of minutes to a member of her staff. Mr. King indicated that Ms. Robertson may be able to address this issue further and added that the Co-Directors do try to work out an equitable division of labor between the staff and this is one task that fell on the other side of the aisle.

The Chair recognized Ms. Robertson who stated that the Election Division has had election, an election conference, that candidate filing begins tomorrow, that the Election Division is in the middle of the current legislative session and that the campaign finance deadline is tomorrow. She stated that the Election Division has been working diligently

with a staff of ten people, one of which is on maternity leave. She added that counsels have been assisting the Election Division with the implementation of HAVA, including the statewide voter registration file RFP which required a lot of work and was issued on Friday. She stated that the Election Division has presented twenty counties to the State Budget Committee for reimbursement for voting system equipment. She said that the Election Division has been busy but that staff is working diligently on the minutes. She said that she does apologize that the minutes are not yet ready for this meeting.

The Chair indicated that he did not believe anything was omitted with respect to the proposed orders from the last meeting but recognized that there might be a difference of opinion among members on the issue. He stated that there was a motion on the table to continue orders 2004-01 through 2004-04 until such time as the Commission has had the opportunity to review and approve the minutes from the November 20, 2003 meeting. He stated that the motion has been seconded. There being no further discussion, the Chair called the question, and declared that with four members voting "aye" (Mr. Burdick, Mr. Long, Mr. Morgan and Mr. Hiller), and no Commission member voting "no," that the motion was adopted.

#### **Cause 03-141 (E.D.I.S); excess corporate contribution**

The Chair then indicated that he had a conflict of interest and his law firm with respect to the EDIS case and will turn the Chair over to Commissioner Long to deal with that matter. The Chair then exited the meeting room.

Commissioner Long indicated that he would entertain a motion on EDIS, cause number 03-141, to continue the case until such time as the Commission had the opportunity to review and approve the minutes from the November 20, 2003 meeting. Commissioner Hiller moved to continue the case until such time as the Commission had the opportunity to review and approve the minutes from the November 20, 2003 Commission meeting. Commissioner Long seconded the motion. Commissioner Long asked whether the Commission needed all four members to vote on this motion. Mr. Simmons indicated that four members were not necessary for the disposition of this motion. There being no further discussion, Commissioner Long, as acting Chair, called the question and declared that with three members voting "aye" (Mr. Long, Mr. Morgan and Mr. Hiller), and no Commission member voting "no," the motion was adopted.

## **4. Orders Approving Forms**

The Chair returned to the meeting room and indicated that the Commission would consider the orders approving forms. The Chair recognized Ms. Robertson who explained that the first order was 2004-09 that approves minor corrections and revisions to current versions of the ABS-1 absentee ballot application. She stated that there were some revisions to the instructions on the form and that a deadline for the traveling board was added. She indicated that the order approves previous versions of the ABS-1 for use in the 2004 elections so that the forms that are in now in the hands of the parties or candidates may still be used in this year's election. She indicated that the order also

approves a minor correction to the instructions on the CAN-3, the write-in candidate form. She indicated that the order also approves a change to the CAN-46; the small town candidate's withdraw form updated for use in the 2004 election. She added that the order also approves a change to the CAN-34, the candidate's petition for school board office. She indicated that the CAN-34 was changed to remove the congressional district break down for the certification of the signatures since this was not necessary for the office of school board. She indicated that the order also revises form CFA-2 which is the statement of organization for a political action committee. She explained that there were minor changes in the title and instructions for this form. She indicated that the order also revises form CFA-4 which is the form that committees report contributions and expenditures on. She explained that, under the section that identifies the type of report being filed, a box for "nomination or other" was added to the form to account for candidates from the Libertarian Party and other minor party candidates.

Ms. Robertson indicated that order 2004-10 approves a number of forms that primarily implement provisions of the Help America Vote Act. She explained that the ABS-14 is a new form to address a notice that HAVA requires states to send military and overseas voters when there is a problem with their absentee ballot application. She explained that the ABS-15 is a special absentee ballot application for military and overseas voters since there are different requirements for this application under HAVA, including a different oath. She explained that the ABS-16 is the absentee ballot security envelope for military and overseas voters. She stated that the order also includes a new series of forms to implement provisional voting. She indicated that this is the first time in Indiana that provisional ballots will be used. She stated that the PRO-2 is the security envelope that a provisional ballot will be placed into at the precinct and segregated and delivered to the county election board for a determination of whether the ballot may be counted. She indicated that the PRO-3, the form with the big seal on it, is the cover page to be placed on the provisional ballots that will be delivered to the precinct. She explained the PRO-4 is the general provisional ballot envelope cover that will be printed on an envelope for use at the precinct to place all provisional ballots and challenges into for delivery to the county election board. She explained the PRO-5 is for the precinct election board to place provisional ballots into where the provisional ballots are issued in response to an emergency court order that the polls remain open after the regular closing time. She explained that the PRO-6 is the provisional ballot envelope for spoiled provisional ballots. She explained that the PRO-7 is the envelope for rejected provisional ballots. She explained that the PRO-8 is the oath for the provisional ballot counters who are responsible for placing the ballots in an envelope and delivering them to the clerk. She explained that the PRO-9 is a notice given to a provisional voter at the precinct that advises the voter that the voter may check with the county to determine if the voter's provisional ballot was counted and, if not, why the provisional ballot was not counted.

Ms. Robertson stated that the last order in the Commission's packet is order 2004-11 that approves revised voter registration forms. She explained that the first four VRG-6 forms listed on the order are voter registration forms used by full-service voter registration agencies, including WIC offices, the Department of Workforce Development, and public assistance agencies. She explained that the VRG-7 form is the general voter registration

form that is sometimes printed on heavier cardstock so that it can be mailed more easily. She explained that the VRG-7i is the registration form that may be printed from the Election Division's website. She explained that the voter registration forms were revised to add the new requirement, under HAVA, that a registrant answer the questions "Are you a citizen of the United States?" and "Will you be at least 18 years of age by the next election?" She explained that this concluded her presentation on forms

The Chair asked whether there were any questions about the forms. Commissioner Hiller asked whether expenditure codes would be added at some point to Schedule C with directions on the back of the form to make sure that committees include expenditure codes on the report. Ms. Robertson indicated that she was not sure and asked counsel if expenditure coding for public questions was required or whether that requirement is only applicable to Schedule B.

Mr. Simmons indicated that, notwithstanding the discussion among staff a couple of weeks ago about whether an argument could be made that IC 3-9-5 does not require expenditure codes on any report, he did not see any distinction made in the code with respect to a committee organized to support a public question so that he believed that the expenditure codes would be required on this schedule for these committees.

Ms. Robertson stated that staff would look further into this issue and make a revision to the schedule if appropriate and bring a revised form back for approval to the Commission at its next meeting. She stated that at the Commission's next meeting the Commission could then grandfather any of the older forms in circulation as the Commission adopts any appropriate change to Schedule C.

The Chair stated that he would be inclined to approve the orders today, give staff time to perform due diligence to determine if any additions to the forms are needed, and if there are any revisions necessary then the Commission could make that motion at a future meeting and grandfather the older forms at that time. The Chair asked other Commission members if they had any questions.

Commissioner Long indicated that there were four separate forms for the VRG-6 with the same number. Ms. Robertson stated that they have different form numbers. Commissioner Long indicated that he was looking at the forms and could not tell what was supposed to be used for what. Ms. Robertson responded that a person should not be able to tell the difference in these forms since statute requires that the location of agency where a person registers is required to remain confidential. She stated that, under NVRA, the Election Division is required to track the source of the registration forms and that is why there are different numbers at the top on the form. She indicated that these numbers are tracked by the counties and reported to the Election Division quarterly. She explained that the Election Division compiles and reports this information to the FEC. She explained further that federal law requires that these forms look the same except for the form tracking number. She stated that other than this tracking number the information about where a person registered is confidential.



Commissioner Long asked where BMV gets its forms. Ms. Robertson responded that the BMV uses the forms approved by the Commission. Commissioner Long asked whether a person who went to the BMV for voter registration forms would obtain forms that look like all the other registration forms that come from the BMV. Ms. Robertson stated that if an individual requested forms from the BMV to do voter registration on their own, then the BMV should provide the individual with a copy of the mail-in registration form VRG-7p.

The Chair asked if there were any further questions. There being none, Commissioner Long moved for the adoption of orders 2004-9, 2004-10 and 2004-11. Commissioner Morgan seconded the motion. There being no further discussion, the Chair called the question and declared that with four members voting "aye" (Mr. Burdick, Mr. Long, Mr. Morgan and Mr. Hiller), and no Commission member voting "no," the motion was adopted and the orders were approved.

## **5. Voter's Bill of Rights**

The Chair indicated that the next matter for the Commission to consider is the 2004 edition of the Voter's Bill of Rights. The Chair recognized Mr. King who directed Commission members to the tab in the Commission's binder labeled "Voter's Bill of Rights." He noted that this document should look reasonably familiar as it is based on the Voter's Bill of Rights that the Commission approved during 2003. He stated that the new version has additional language required under the Help America Vote Act. He indicated that he would call the Commission's attention to the new language that appears in the Voter's Bill of Rights for the first time. He stated that on the first page, under the heading "How to Vote," there are three paragraphs and then two more paragraphs on the following page that explain how to cast a vote on a paper ballot, lever machine, punch card ballot, an optical scan ballot, and a touch-sensitive computer screen. He indicated that typically only one or two of these types of voting systems would be used in a particular precinct. He explained that there will be variations of the Voter's Bill of Rights that will be tailored for the specific voting systems in use at each precinct. He added that, under the Help America Vote Act, Indiana is more likely to have a combination of voting systems in one polling place as where, for example, voters without disabilities would vote on an optical scan ballot card and voters with disabilities or blind voters would vote on a computerized screen with a headset to guide the voter through the ballot.

Mr. King explained that the Voter's Bill of Rights also contains a new section on the third page that contains instructions on how to cast a provisional ballot. He further explained that provisional ballots will be used for the first time in the 2004 elections. He stated that this language clarifies when provisional ballots may be used and how provisional ballots may be cast. He stated that on the next page there are new instructions under the heading "Instructions for Mail-in Registrants and First Time Voters." He explained that this language reflects a new requirement under the Help America Vote Act where certain individuals who register by mail are required to provide additional identification documentation as part of the process of registration. He explained that a

voter subject to this requirement can present the documentation at any time including when, for example, they apply to register or when they cast an absentee ballot. Mr. King indicated that there will be situations where a voter has been notified of the requirement to present additional documentation but has not yet done so until they show up at the polls on the election day. He stated that language was added to the Voter's Bill of Rights to explain the documents that are needed at the polling place on election day.

Mr. King added that on the final page of the Voter's Bill of Rights is language that adds additional information about voter fraud. He stated that the language in the Voter's Bill of Rights was taken from the Department of Justice's website which contains model language for states.

He indicated that the Voter's Bill of Rights also contains information about who a voter should contact regarding a violation of their rights. He stated that there are numbers for state and federal law enforcement officials printed on the Voter's Bill of Rights and that there are spaces in the document where each county can add the county election board's number or the county prosecuting attorney's number to customize the Voter's Bill of Rights for each county.

Mr. King requested that Commission consider approving the use of the Commission member's signature stamps for the orders that were adopted at today's meeting. The Chair asked Commission members if the matter could be taken by consent. The members indicated their consent and the Chair declared that the matter was determined by consent and that the signature stamps may be used on approved orders.

The Chair asked Mr. King whether the Voter's Bill of Rights was posted in every polling place. Mr. King indicated that, under both state and federal law, the Voter's Bill of Rights is required to be placed in each polling place.

Commissioner Long moved for the approval of the text of the Indiana Voter's Bill of Rights as presented. There being no further discussion, the Chair called the question and declared that with four members voting "aye" (Mr. Burdick, Mr. Long, Mr. Morgan and Mr. Hiller), and no Commission member voting "no," the motion was adopted.

## **6. Voting System Certification**

The Chair invited Mr. King and Ms. Robertson to report on the status of pending voting system certification matters. The Chair recognized Ms. Robertson who stated that in the Commission's packet under voting systems are copies of letters that involve an outstanding issue with Election Systems and Software or ES&S. She stated that as the Co-Directors reviewed applications for reimbursement for the purchase of voting systems under the state plan they discovered that ES&S's iVotronic firmware version 7.4.5 was listed as the voting system purchased and this system has not yet been approved by the Commission for use in Indiana. She added that the correspondence also indicates that this system might have been used in the November 2003 election.

Ms. Robertson explained that she and Mr. King sent a letter dated January 9, 2004 to ES&S stating that the Commission's policy is to require Commission certification of firmware upgrades to certified voting systems and that the upgrades must meet the 2002 FEC voting system standards that were adopted in Indiana effective July 1, 2003. She stated that the Co-Directors also requested that ES&S provide affidavits to identify the version number for the software on the iVotronic voting system for Indiana counties that were sold the iVotronic voting system.

Ms. Robertson indicated that ES&S responded to the Co-Directors' January 9, 2003 letter with a letter dated January 13, 2004. She stated that the letter indicates that the uncertified software version 7.4.5 was used in the iVotronic in the November 2003 election in Henry, Wayne and Johnson Counties. She stated that these three counties have already been before the State Budget Agency for reimbursement for their voting system purchases. She stated that ES&S is asking the Commission to accept software version 7.4.5 and to allow the counties use 7.4.5 in the 2004 primary. She added that ES&S is also requesting that Henry, Wayne and Johnson Counties be reimbursed for the purchase of version 7.4.5. She stated that, at this point, the reimbursement is on hold because of the purchase of equipment not yet certified by the Commission.

Ms. Robertson indicated that the Co-Directors sent another letter to ES&S on January 15, 2004. She indicated that this letter states that software upgrade 7.4.5 must be certified for use by the Commission before it may be used in an election and that 7.4.5 has not yet been certified by the Commission. She stated that the letter also inquires about information provided to the Co-Directors that indicates that Marion County was sold software version 8.0.0 for the iVotronic voting system. She stated that software version 8.0.0 has not yet been certified by the Commission. She stated that the letter advised ES&S to either reverse install the iVotronic voting system with approved software 6.1.2 or obtain an opinion from independent testing authority Wyle Laboratories that version 7.4.5 complies with the 2002 FEC voting system standards so that approval of 7.4.5 can be obtained from the Commission. She stated that the letter also indicated that ES&S could amend their pending application to approve version 7.4.5 and request approval of software version 8.0.0. if ES&S could tender a report from Wyle that version 8.0.0 meets the 2002 FEC voting system standards. She stated that version 8.0.0 appears to be ES&S's newest version of software for the iVotronic voting system.

Ms. Robertson stated that, until one of these alternatives are completed by ES&S, the reimbursement money for Henry, Wayne and Johnson will not be released and that no county should use software that has not been certified by the Commission. She added that the Co-Directors have requested affidavits from ES&S for all the counties that have the iVotronic voting system and that all of those counties were copied on the letter. She stated that these counties have been before the Budget Committee for review and the Budget Agency is ready to release the money but that the Co-Directors have requested an affidavit from ES&S that identifies the version now installed on the iVotronic voting system in these counties.

Commissioner Long asked whether the Election Division has asked for a copy of the contracts or invoices between ES&S and these counties.

Ms. Robertson responded that the counties provided the Election Division with a copy of their contracts with ES&S as part of the reimbursement application process. She stated that the counties and ES&S provided a certification indicating that the voting system was approved for use in Indiana.

Commissioner Long asked whether these certifications were in the form of an affidavit. Ms. Robertson responded that they were not in the form of affidavit but that the Co-Directors are now asking that ES&S submit an affidavit under oath identifying the version of software on these voting systems.

The Chair asked if Marion County has asked for reimbursement. Ms. Robertson stated that Marion County has requested reimbursement but that it did not purchase the iVotronic voting system. The Chair asked whether Marion County had a voting system that has not been approved by the Commission. Ms. Robertson stated that Marion County has a central count absentee ballot reader that has not been approved by the Commission but that Marion County is not seeking reimbursement for that system at this time.

The Chair recognized Mr. King who stated that he joins and concurs in the presentation made by Ms. Robertson. He stated that the Co-Directors view this as a very serious issue since this not only involves the marketing and sale of uncertified system but also involves the use of uncertified voting systems in elections. He added that the contracts that were submitted with the reimbursement applications did not specify the software or firmware version numbers and so, as part of staff review of the applications, counties were contacted for information. He stated that the Commission's packet contains a note from Johnson County indicating that Johnson County had iVotronic firmware 6.1.2., and, following that note, is an affidavit from the county indicating that the voting system meets all the requirements under applicable Indiana or federal law as of the date of the application.

Commissioner Long asked whether the affidavit really said very much. Mr. King agreed that it did not indicate much on its face but that it is important to note that in each of the cases where the Election Division contacted the counties and the counties responded the counties indicated that they had certified version 6.1.2. He stated that the county was apparently relying on the representations made by the ES&S. He stated that he had no evidence that the county itself had attempted to present information that was inaccurate.

Commissioner Long asked if there was uncertified firmware in the counties. Ms. Robertson stated that there appears to be uncertified firmware in Wayne County and we think there is also uncertified firmware in Henry and Johnson Counties. Commissioner Long asked whether we knew this for a fact. Ms. Robertson said, according to the letter from ES&S, version 7.4.5 was used in the November 2003 election and that version is not certified.

The Chair asked Ms. Robertson to identify the letter. Ms. Robertson stated it was in the January 13, 2004 letter from ES&S. Commissioner Long indicated that the letter states on the first page that “version 7.4.5 was used in Henry, Wayne and Johnson County” in the 2002 municipal election.

Commissioner Long asked if anyone knew what was sold to Vanderburgh County. Ms. Robertson stated that this is one of the things that the Co-Directors are trying to find out. Ms. Robertson stated that Vanderburgh County has indicated that they purchased the 6.1.2 but that this is the same thing that Johnson and Wayne County have indicated. She stated that she believes that the counties are relying on the representations of their vendor. She added that ES&S apparently gave Johnson and Henry incorrect information about the voting system version that they had. She stated that this has caused the Co-Directors to be concerned about all of the counties and that this is why the Co-Directors have requested that ES&S identify the voting system version installed in each county in an affidavit.

The Chair asked whether the Election Division has received an affidavit to that effect. Ms. Robertson indicated that the Election Division has not yet received the requested affidavit. The Chair asked when the letter was sent and Kristi indicated that the letter was sent by overnight mail on January 15.

The Chair asked if there was anyone present from ES&S that wanted to speak on this matter. There being no response, the Chair asked counsel regarding the penalties for selling uncertified voting systems to counties and representing to the counties that the systems are certified. The Chair also asked for the penalties for using uncertified voting system in an election if a person has knowledge before the election that the system was not certified.

The Chair recognized Mr. Simmons who stated that there is a section in the code that prohibits the use of uncertified voting systems in Indiana elections. He stated that, in addition, there is a section in the code that permits the Commission to examine and decertify a voting system after its approval. He stated that there is currently no penalty provision that would apply to a vendor who sells, delivers, or markets an uncertified voting system. He added that Senate Bill 422, now pending in the legislature, does have a provision in it that would allow the Commission to impose a penalty. He indicated that the pending bill includes a sanction that would prevent the vendor from certifying voting systems in Indiana for a period of up to five years if the Commission finds that the vendor sold an uncertified voting system. He added that bill has not yet been heard in committee but that the author of the bill is the chairman of the committee so that there is a good chance that the bill will be heard.

The Chair indicated that he was bothered by this. He indicated that the county can purchase the voting system but can't use it.

Commissioner Long indicated that he thought the issue should be put in the hands of the attorney general since this is a presidential election year. He stated that the Commission

needs to notify the counties that they shall not use this equipment to vote or tabulate votes in either the primary or the general election unless and until the voting system has been certified by the Commission. He added that he thought the attorney general should be investigating this company for selling these voting systems. He stated that there may be an innocent explanation but that ES&S's correspondence that asks the Commission to certify the voting system just because it was sold to the counties does not carry a whole lot of weight with him. He stated that a penalty of not being able to certify systems in the future is a pretty stern message to take forward, however, we are looking forward right now to the 2004 elections and the potential use of uncertified systems in those elections. He added that this situation needs to be rectified now.

The Chair indicated that, as a fiscal matter, there are certainly breach of contract issues present for the counties to pursue. Commissioner Long indicated that he thought there was a criminal issue of fraud also.

The Chair stated that ES&S should be interested in its good name and its ability to continue selling voting systems in Indiana.

Commissioner Long indicated that he thought that ES&S could fix the problem simply by installing the certified version of the firmware into these systems. He added that you would think that ES&S would be sensitive to this issue after Marion County went through this with respect to their absentee ballots in the last election where they ended up having to count by the ballots by hand. He stated that, in fairness to ES&S, it has been a good company. He stated that he did not know what the problem was but if the Commission failed to take some affirmative and stern action then a number of counties could be put in jeopardy. He stated that he thought that the Commission should ask the attorney general to seek an injunction against ES&S from selling this or any other equipment to the counties and to determine whether this matter should be forwarded to the state police for investigation.

The Chair recognized Mr. Morgan who indicated that he was surprised that this has gotten to this point. He said that he agreed with Commissioner Long's comments and he is surprised that someone from ES&S was not at the Commission's meeting. He stated that the Commission should, based upon the past reputation of ES&S, and the large number of dollars available through HAVA, and the integrity of the elections going forward, exhaust every possibility of getting ES&S in front of the Commission. He indicated that he was not ready to turn it over to other agencies if the Commission can rectify the matter by ES&S coming forward with the affidavits or with reports from the independent testing authorities so that the Commission can vote on it and rectify it. He stated that if the Commission can't resolve it then the Commission may have to go to more extreme measures. He stated that, rather than pointing fingers at this time, he would rather get all parties, including the counties, before the Commission and see if this problem can be resolved.

The Chair recognized Commissioner Hiller who stated that the Commission should set a deadline for ES&S to respond to the Commission and indicate that it is in the best

interests of both ES&S and the counties involved to come to the Commission and tell the Commission what was going on.

The Chair stated the Commission will have to meet for candidate challenges between February 28 and March 11 and that, as he understands it, Commission members are interested in getting ES&S and the counties to attend the next meeting.

Commissioner Morgan indicated that ES&S needed to get documents to the staff earlier than the day of the Commission's next meeting. The Chair asked if the form of that letter should come from the Co-Directors.

The Chair asked if Commission members would be comfortable including in the letter an indication of what the Commission might do if ES&S fails to cooperate, including referral to the state police or the attorney general.

Commissioner Morgan indicated that Commissioner Long has been very focused on voting system issues for the last couple of years. He indicated that the Commission relies on the independent testing authorities like Wyle because the Commission does not have anyone on staff technically capable to analyze the systems. He stated that the demonstrations only show the Commission whether or not the system is user friendly. He added that there is so much more about voting systems that the Commission does not know and yet the Commission votes on whether the system should be approved. He stated that the Commission needs to take a strong stance because the issue is getting away from it.

The Chair asked Commissioner Long about his reaction to Commissioner Morgan's suggestion. Commissioner Long indicated that he has stated what he would do but, if the Commission was going to go forward with a meeting, he suggested that the Commission should subpoena the records about what they did in fact sell to these counties and that we should forget this affidavit. He stated that representatives should be brought before the Commission and put under oath and let them tell it and bring the records to show it. Commissioner Long indicated that millions of dollars have been spent on this voting equipment yet we have elections in three or four counties in jeopardy. He stated that the Commission should invite someone from the attorney general's office to listen and then we may learn more about the Fifth Amendment than we care to know about.

The Chair indicated that he would try to craft a motion to get things going and invited other members to contribute to the motion. The Chair moved that the Commission direct the Co-Directors to issue a subpoena for documentation from ES&S regarding the sale of any uncertified software or firmware in Indiana and to send a letter directing representatives of ES&S, as well as representatives of the Henry, Wayne, Johnson, Vanderburgh, Posey and Parke Counties to come to the Commission and submit supporting documentation a week before the meeting. He indicated that the letter should include an indication that if things are not resolved to the Commission's satisfaction that the Commission will pursue whatever remedies available to it to insure that the integrity

of the upcoming election is maintained and that no uncertified equipment is used in any jurisdiction.

The Chair asked Mr. Simmons if he had any comment on the motion. Mr. Simmons indicated that he thought he understood the will of the Commission and offered to provide some statutory background for the motion. He stated that the Commission is scheduling a proceeding contemplated by IC 3-6-4.1-21 which would require notice and an opportunity to be heard and he thinks that this is being provided by the Commission. He said that this section contemplates that the Commission may hold a hearing to determine, or make a judgment regarding, whether an election law violation has occurred or will occur. He added that among the remedies available to the Commission if the Commission finds that an election law violation has occurred or will occur is to refer the matter to the prosecuting attorney or the attorney general for action under IC 3-6-4.1-22. He stated that section 22 refers to the attorney general action filing an action for temporary or permanent injunction or for a restraining order.

Mr. Simmons stated that the Commission's subpoena power is described in IC 3-6-4.1-19 that provides that the Commission has the power to subpoena and may require a person to appear before the Commission, a member of the Commission, or the Co-Directors to be examined regarding a matter before the Commission. He stated in subsection (b) of this section, it states that the Commission, or the Co-Directors, may require appearances at the office of the Commission or a place fixed by the Commission. He added subsection (c) of this section mentions tendering witness and mileage fees. He stated that, in his opinion, the Commission has the power to authorize the issuance of the subpoena. He stated that he did not know if the Commission viewed the subpoena as a document that the Commission members should sign themselves or whether, as described in the Chair's motion and as consistent with subsection (b), that the Commission viewed the motion as directing that the Co-Directors issue the subpoena on behalf of the Commission.

Commissioner Long stated that he agreed with the interpretation of the statute and his interpretation would be that the Co-Directors issue the subpoena at the direction of the Commission. He stated that you do have to pay mileage. He added that it has been his experience that when you deal with a company then you should subpoena the chief executive officer and then you will usually find out pretty quick what is going. He added that, whoever is the appropriate person to subpoena, he thinks the Commission is on sound ground in proceeding in this manner.

Commissioner Long seconded the motion. There being no further discussion, the Chair called the question and declared that with four members voting "aye" (Mr. Burdick, Mr. Long, Mr. Morgan and Mr. Hiller), and no Commission member voting "no," that the motion was adopted.

Commissioner Long stated there should also be a letter drafted to all the clerks expressing concern that uncertified voting systems may be sold and marketed in Indiana. He added that the letter should set forth the consequences for purchasing uncertified systems,



including invalid elections, no reimbursement and the requirement to purchase new certified equipment to replace the uncertified equipment.

The Chair added that another consequence would be an action for waste if the uncertified voting system never gets approved.

Commissioner Long added that the letter should suggest that counties require vendors to provide them with copies of the software and firmware certifications that the Commission issues.

The Chair indicated that he would be in favor of that letter and using the stamps of all board members so that it is sent as a message from the Commission.

Commissioner Morgan asked if the voting system certification issue was addressed in the December conference. Ms. Robertson indicated that she addressed the issue in the voting equipment breakout session. She stated that she passed out a current list of certified equipment and went over the list because the Marion County situation caused her concern that other counties might get caught in this. She added that the Co-Directors have heard from some counties and encouraged them to double-check the equipment to make sure that the equipment is certified.

Commissioner Morgan stated that if the Commission sends a letter then it might be worthwhile to include a copy of what Ms. Robertson passed out at the conference in case there were some clerks who were not there.

The Chair indicated that he was fine with the suggestions and asked counsel whether a motion to direct the Co-Directors to do this would be appropriate. Mr. Simmons indicated the form of the motion would be at the pleasure of the Commission but that he thought it would be helpful if the Commission made clear its direction that the letter be sent.

Commissioner Long indicated that he has not been too successful in getting letters sent out. The Chair indicated that Commissioner Long might have a better chance with this one.

Commissioner Morgan moved that a letter be sent as described by Commissioner Long, as elaborated by Commissioner Morgan, including the attachment suggested by Commissioner Morgan. Commissioner Hiller seconded the motion. There being no further discussion, the Chair called the question and declared that with four members voting "aye" (Mr. Burdick, Mr. Long, Mr. Morgan and Mr. Hiller), and no Commission member voting "no," that the motion was adopted.

The Chair recognized Mr. King who stated that the Election Division received two late arriving documents that were not included in the Commission's packet. He stated that the first document was from Hart Intercivic and constitutes a tender of additional documentation to support its application. He said that this documentation demonstrates that Hart Intercivic's software has met 2002 FEC voting system standards that have been

adopted into current Indiana law. He stated that the final document he wished to bring to the attention of Commission members under the voting systems agenda item is the initial voting system approval application from a firm called UniLect which needs to submit all of its documentation for a new DRE voting system.

The Chair asked whether Hart Intercivic has submitted documentation from the independent testing authority that they actually meet the 2002 FEC voting system standards. Mr. King indicated this was correct. The Chair commented that this shows it is possible to meet the new 2002 FEC standards.

Commissioner Long asked whether that meant that Hart Intercivic was ready for approval. The Chair recognized Mr. King who stated that the Election Division just received the packet containing the information in the mail this morning and the Co-Directors have not had an opportunity to review the documentation but that it should be ready by next meeting. Commissioner Long asked, if the documentation was in order, whether they would be in a position to market this system for the fall election. Mr. King indicated that he assumed that this was correct.

## **7. Litigation Report**

The Chair recognized Mr. Simmons for the litigation report. Mr. Simmons indicated that at the Commission's last meeting counsel provided the Commission with a fairly detailed litigation report. He stated that the purpose of that was to give new Commission members some background in the current cases pending against the Commission. He stated, at this point, he would simply update the Commission on the status of the pending cases since the Commission's last meeting.

Mr. Simmons explained that the only update he has with respect to the pending cases is item "a" under the litigation report section of the agenda, which is the *Lawyers Educational Advocacy Forum v. Abell* case. He stated that following the landmark decision in *McConnell v. FEC*, which upheld large portions of the Bi-Partisan Campaign Finance Reform Act, the Seventh Circuit Court of Appeals requested that the attorney general, on behalf of the Commission, and plaintiff's counsel, submit a brief to argue the impact of the McConnell case. He explained that the attorney general has filed a brief on behalf of the Commission but there has been no further action taken on the case.

Mr. Simmons explained that Mr. Patton did indicate that he received a call from Mark Rutherford who is attorney for the Libertarian Party in the Majors case. He explained that Mr. Rutherford indicated that a pending Motion to Dismiss for Failure to Prosecute in the Majors case was granted and that the case was dismissed. He stated that staff has been unable to confirm this dismissal with the attorney handling the matter on behalf of the Commission.

Mr. Simmons stated that the only other matter under the litigation report involves the investigation into voting on a BMV receipt. He explained that whenever a voter votes on a BMV receipt it indicates that the voter applied to register with the Bureau of Motor

Vehicles. He explained that statute directs the Co-Directors to investigate all incidents where a voter had voted on such a receipt. He explained further that, as part of the investigation, staff interviews the voter and forwards a copy of the receipt to the BMV for investigation and response. He stated that the Co-Directors attempt to determine from the investigation whether the problem can be addressed administratively and whether the investigation reveals a violation of the NVRA.

He explained that the Commission's packet includes a response from the BMV to the request for information sent by the Co-Directors to the BMV. He stated that he thinks that there may need to be further clarification from the BMV in that its response indicates registration applications were forwarded to Grant County and this investigation involves a BMV receipt used by a voter in Delaware County. He stated that he thinks that this was probably simply a typo. He added that the BMV report indicates that the handwriting on the BMV receipt is not the handwriting of a BMV employee. He stated that the BMV reports that the voter did not have a transaction with the BMV and, therefore, the BMV did not think that they processed the application. He stated that the BMV also reports that they have provided BMV license branches with the appropriate VRG-7 mail-in forms to provide to people who do not have transactions with the BMV.

Mr. Simmons explained that the BMV is required, as a full service agency, to use a VRG-6 registration application if a person has a transaction with the BMV, like renewing their license. He added that the BMV is required to take possession of the registration application and forward it to the appropriate county voter registration office if the person has a transaction warranting this full service. He explained that, if a person does not have a transaction with the BMV that warrants this service, the BMV is supposed to provide the voter with a VRG-7 mail-in form and the voter will take the VRG-7 form, fill it out, and mail it or deliver it himself to the county voter registration office. He stated that the mistake suggested by the investigation could be that the BMV gave the voter a VRG-6 instead of the VRG-7 mail-in form and the voter filed out the receipt portion of the VRG-6 form and voted on it.

The Chair asked if there were any questions on the litigation report and, hearing none, indicated that the Commission would take a five minute break and reconvene at 2:55 p.m.

## 8. Precincts

The Chair called the Commission back into order at 2:55 p.m. and indicated the Commission would move on to county precinct boundary orders and status reports. The Chair indicated that there appeared to be one order for precincts a through j.

The Chair recognized Mr. Simmons who indicated that Vigo County was done under a separate order at the request of Michelle Brzcyki since she was not certain whether Vigo County would be ready for approval at the time that counsel prepared the order.

The Chair indicated that staff has brought it to his attention that there may be persons who were not present at the time the oath was administered at the beginning of the

meeting. The Chair requested all those who intended to testify, and who did not yet take the oath, to stand for the administration of the oath. Mr. King administered the oath.

a. Precinct Order 2004-06: Adams, Bartholomew, Boone, Daviess, Hamilton, Jackson, Jennings, Morgan, Owen and Randolph Counties

The Chair indicated that there appears to be an order 2004-06 to approve precinct changes in the packet for Adams, Bartholomew, Boone, Daviess, Hamilton, Jackson, Jennings, Morgan, Owen and Randolph Counties. He indicated that he would like to entertain a motion to approve the order with a second, take testimony on the precincts, close the hearing, and then take a vote on the motion.

Commissioner Long moved that order 2004-06 be approved. Mr. Morgan seconded the motion. The Chair requested a staff report on the status of the precincts identified in the order.

The Chair recognized Ms. Hershberger who indicated that she would comment on the status of the counties on the agenda, items numbered a through j. She stated that Adams, Bartholomew and Boone Counties have each proposed changes to their precincts based upon annexations. She stated that Daviess County proposed changes to its precincts because a city in the county changed its boundary and the changes follow the new city boundary. She stated that Hamilton County's proposed changes were related to a combination of changes related to municipal boundaries changes, annexations and increases in voter population. She explained that in Jackson, Jennings and Morgan Counties there was a full review and documentation of all the precincts in each of the counties. She stated that Owen County proposed combining some of its precincts in order to cut down on the number of precincts in the county. She stated that Randolph County was also a full review and documentation of all the precincts in the county.

She explained that all of these counties have been through a full review by OCD (Office of Census Data) and that there are no further comments from OCD to resolve. She indicated that all of the counties have notified their Republican, Democratic and Libertarian, if any, county chairpersons of the proposed precinct changes.

The Chair recognized Mr. King who stated that the Commission's packet also contains a recommendation from the Co-Directors indicating that, based upon the information provided, the Co-Directors have determined that the orders comply with the requirements set forth in IC 3-11-1.5.

The Chair asked if a representative of OCD was present and wished to comment on the proposed precincts. The Chair recognized Mark Stratton who indicated that OCD has no outstanding comments at this time. Commissioner Hiller asked if that meant that there were no problems. Mr. Stratton repeated that OCD had no outstanding comments at this time.

The Chair asked if a representative from Adams County was present and wished to make a comment. The Chair recognized Nan Nidlinger who identified herself as the circuit court clerk of Adams County and stated that she believes all the appropriate paperwork to support the changes to the precincts has been submitted.

The Chair asked if a representative from Bartholomew County was present. The Chair recognized Norma Trimpe who indicated that they have also submitted the appropriate paperwork and have no further questions.

The Chair asked if a representative from Boone County was present and wished to make a comment. The Chair recognized Lisa Garaffolo who identified herself as the circuit court clerk of Boone County and indicated that the precinct changes in Boone County were strictly due to annexations and that they tried to keep on top of these so that they are reflected in the precinct changes.

The Chair asked if a represented from Daviess County was present and wished to make a comment. The Chair recognized Rosemary Abell who identified herself as the circuit court clerk of Daviess County and indicated that Daviess County was simply proposing a change to its precinct 12 boundary due to a change in the districts in the City of Washington.

The Chair asked if a representative from Hamilton County was present. The Chair recognized Kathy Richardson who identified herself as the election administrator for Hamilton County and indicated that the changes in Hamilton County were driven by annexation and, with respect to two precincts, there were changes driven by population growth.

The Chair asked if a representative from Jackson County was present. The Chair recognized Sarah Benter who identified herself as the circuit court clerk of Jackson County who indicated that she had no additional testimony but that with the assistance of Lori Hersberger they believe they have submitted that appropriate paperwork.

The Chair asked if a representative from Jennings County was present. The Chair recognized Sandy Hamersperger who identified herself as a voter registration employee and indicated that they have submitted the required paperwork as well.

The Chair asked if a representative from Morgan County was present. The Chair recognized Vikki Kivett who identified herself as the circuit court clerk of Morgan County and indicated that they have submitted all of their paperwork to Ms. Hersberger and she had no other testimony except to say that this was an eye-opening experience.

The Chair asked if a representative from Owen County was present. The Chair recognized Nick Robertson who identified himself as the circuit court clerk of Owen County and indicated that he had no additional testimony to add to what they have submitted.

The Chair asked if a representative from Randolph County was present. The Chair recognized Suzanne Fogleman who identified herself as the circuit court of Randolph County and indicated that they have been working with Lori and that everything they worked on seemed to be in order.

The Chair thanked the county representatives for coming to the Commission's meeting and making themselves available for questions.

The Chair indicated that a motion has been made to adopt order 2004-06 and that the motion was seconded. There being no further discussion, the Chair called the question and declared that with four members voting "aye" (Mr. Burdick, Mr. Long, Mr. Morgan and Mr. Hiller), and no Commission member voting "no," that the motion and order 2004-06 was adopted.

#### b. Precinct Order 2004-08: Vigo County

The Chair indicated that the next item on the agenda was order 2004-08 that approves precinct changes in Vigo County. The Chair indicated that he would entertain a motion on the order and Commissioner Long moved that order 2004-08 be adopted. Mr. Morgan seconded the motion.

The Chair then requested a staff report and recognized Michelle Brzycki who indicated that the proposed precincts for Vigo County do not breach any house, senate or congressional boundary. She said that that Vigo County proposes one new precinct and changes to two other precincts. Ms. Brzycki indicated that she had a map for the Commission.

The Chair asked a representative of OCD to address any problems and recognized Maureen Bard who stated that there was a problem regarding the assignment of a house district boundary that was corrected on the paperwork. The Chair asked Ms. Bard if this was corrected as far as she was concerned and Ms. Bard indicated that it was corrected.

The Chair recognized Mr. King who stated that, as in the previous cases, based on the information supplied by staff and OCD, the Co-Directors have signed the recommendation concerning the precinct boundary changes indicating that the precinct orders comply with the requirements set forth in applicable state law.

The Chair asked if there was a representative from Vigo County present. Ms. Brzycki indicated that there was not. There being no further discussion, the Chair called the question on the motion to approve order 2004-08 to approve the precincts in Vigo County and declared that with four members voting "aye" (Mr. Burdick, Mr. Long, Mr. Morgan and Mr. Hiller), and no Commission member voting "no," that the motion and order 2004-06 was adopted.

#### c. Precinct Order 2004-07: Lake County

The Chair then indicated he would entertain a motion with respect to order 2004-07 approving the precincts in Lake County. Commissioner Morgan moved that the commission adopt order 2004-07 approving the precincts in Lake County. Commissioner Long seconded the motion.

The Chair then asked for a report from staff and recognized Michelle Brzycki who stated that the precinct changes involve the entire City of East Chicago, including precincts that did not change and the creation of precincts in parts of the city due to annexations. She said that any place where the proposed precincts breach a house or senate boundary contained zero population.

Commissioner Long asked if there was a boundary change form for Lake County.

The Chair recognized Mr. King who stated that the Co-Directors discussed the Lake County precincts prior to the Commission's meeting and noted that there were some emails from OCD that are in the Commission's packet dated January 9 and January 15, 2004. He explained that the emails detail a number of potential issues involving either splits in house districts or splits in census blocks that were not properly defined. Mr. King indicated that he would sign the Co-Directors recommendation upon a presentation by OCD indicating that the issues identified in the emails had been resolved. He explained that the Co-Directors are recommending the approval of the proposed precinct changes based upon the premise that the proposed precincts meet the requirements of IC 3-11-1.5 which concerns the boundary issues but not necessarily the constitutional or legal arguments that might be made by persons who have filed documents with the Commission.

The Chair asked if the Co-Director's recommendation is based upon the technical compliance of the precincts with state statute. Mr. King indicated that this was correct.

The Chair requested OCD to address any outstanding issues and recognized Mr. Stratton who indicated that Lake County came to OCD as two submissions. He explained that the work in East Chicago came first and then, sometime in the last week, they received the other thirty-eight precinct changes. He stated that as late as this morning OCD was trying to resolve some of the remaining precinct splits. He stated that OCD did receive and review additional documentation this morning that resolves all outstanding issues.

Mr. King stated that he understood Mr. Stratton's testimony to be that the issues in the January 9 and January 15 emails have been resolved and that OCD has no further comments with regard to either the legislative district breaches or census block splits. Mr. Stratton stated that this was correct.

Commissioner Hiller asked Mr. Stratton if all of these issues have been corrected. Mr. Stratton indicated that the short answer is "yes" that all the issues have been addressed.

Commissioner Hiller asked if the population satisfied statute. Mr. Stratton stated that, as Ms. Brzycki testified in her presentation, some of the splits in the legislative boundaries

that go back to when Lake County was recertified in 2001 or January 2002 appear to have no population which he understands to be permissible. He stated that, with respect to population, OCD does not review that statutory requirement because OCD would have no way to verify that information. He explained that OCD tries to look at issues like documentation, statutory criteria and whether the corresponding IEC 8 indicates that the precinct is in the correct house, senate and congressional district.

Commissioner Hiller asked Ms. Brzycki if this was correct. Ms. Brzycki indicated that she could provide the documentation to Commissioner Hiller and she did so. Commissioner Hiller asked if there was an IEC 8 for every precinct change. Ms. Brzycki indicated that there was.

The Chair indicated that the Commission has received some letters in opposition to the proposed precinct changes and some in support of the precinct changes. He indicated that there was a letter from John Curly, the Lake County Republican Chairman, who indicates that changes are necessary due to annexations to Crown Point and St. John. He indicated that the letters to the Commission opposing the precinct changes all come from East Chicago. He said there was also a letter from Stephen Stiglich, the county chairman of the Lake County Democratic Party supporting the precinct changes. He indicated that there is also a joint letter from the two counsels who represent the Lake County Election Board.

The Chair indicated that he would like people who are in favor of the adoption of order 2004-07 to testify first. He stated that persons who are not for or against the precincts, but simply supplying information, can testify in the middle. He stated that the people who oppose the adoption of order 2004-07 will testify last. He stated during testimony persons are subject to the questions of the Commission.

Joe Hero requested to be recognized. The Chair recognized Joe Hero who asked that the precincts in St. John be separated out from the other orders because he only wanted to oppose the precincts in St. John.

The Chair asked if the order in front of the Commission was for approval of Lake County in total. Commissioner Long indicated that the order could be amended.

The Chair recognized Mr. Stiglich who stated that he submitted the amended precincts for Lake County and the documentation, including the documentation that shows that the Lake County Board of Elections and Registration voted five to zero to support the precinct changes. He stated that he included a letter from John Curley, the chairman for the Lake County Republican Party, that indicates support for the precincts. He stated that the two board attorneys support the changes as well. He stated that a document of demographics from precinct committeemen show that the proposed precincts do not disenfranchise any minorities but will enhance and increase such participation. He indicated that he had nothing else to add.



The Chair asked Mr. Stiglich about the letter from Nathaniel Ruff, who identifies himself as counsel for George Pabey, and a letter from East Chicago third district councilman Randall Blue Artis, who are opposed to the precinct maps as drawn. He described the letters as alleging voter disenfranchisement and things like that.

The Chair first asked when the precincts were last changed. Mr. Stiglich stated that he thought they were changed in 1999. Commissioner Morgan said they were changed after the 2000 census.

The Chair recognized Mr. Morgan who asked Mr. Stiglich if the actions taken by the election board were taken at a public meeting. Mr. Stiglich stated that they were. Mr. Morgan asked if there were remonstrators at the meeting. Mr. Stiglich indicated that there were.

The Chair asked if the remonstrators had an opportunity to speak at the meeting and Mr. Stiglich indicated that they did.

The Chair recognized George Pabey who identified himself and stated that he attended the meeting where the board approved the precincts. He indicated that he asked the board whether the East Chicago precincts were changed and the board indicated to him that the East Chicago precincts had been changed. He stated that he asked the board to explain the changes since this was not on the board's agenda. He also asked for a map and they indicated that they did not have to show him a map. He stated that he asked to be shown the changes and was told that both party chairmen have a right under party rules to change the precincts. He stated that this was not done at a public hearing, it was just a meeting of the election board. He stated that the board did not let anyone know that they were going to change the precincts. He indicated that the only reason he was able to attend is because someone called him up and told him to come to the meeting because the board was going to change all the precincts.

Mr. Pabey said that he came to this meeting of the Commission because they did not get a hearing in Lake County and that he was requesting that the Commission send it back to Lake County so that Lake County could have a public hearing and explain the changes.

The Chair asked Mr. Stiglich if Mr. Pabey was factually correct. Mr. Stiglich indicated that the county election board meeting was advertised prior to the meeting as required by law. He stated it was advertised and the press was there and it was considered a public meeting.

The Chair recognized Commissioner Morgan who asked Ms. Sally LaSota to stand and identify herself. She did so and explained that she is the director of the Lake County Board of the Elections and Registration. Commissioner Morgan asked whether public notice was required forty-eight hours in advance of the meeting. Ms. LaSota indicated that this was correct. She indicated that public notice was posted on the building.

Commissioner Long asked Ms. LaSota if an agenda was posted for the meeting. Ms. LaSota stated that an agenda had been posted for the meeting.

Commissioner Morgan asked about the constitution of the election board in Lake County. Ms. LaSota indicated that the board consists of two republicans, two democrats and the circuit court clerk as an ex officio member.

The Chair asked if the maps were made available at the board meeting. Ms. LaSota stated that the maps were sent down to the state to make sure that the maps did not violate any of the house or senate district lines or had problems with the census blocks. She stated that since people rely on the accuracy of the maps to determine whether the council districts are correct, she did not want to give out maps with erroneous information.

The Chair asked whether the maps were back and signed off on by the time the board met. Ms. LaSota indicated that the board had to vote on the precincts before the maps were sent down to the state.

The Chair asked Ms. LaSota whether the board voted on the precincts without getting any community input. Ms. LaSota stated that a lot of the precincts were over fifteen hundred voters. She explained that St. John and Highland had precincts with over fifteen hundred in it and these precincts had to be split due to growth in those areas.

The Chair stated that the Commission did not receive any written objection on St. John or Highland; the objections the Commission received were focused on East Chicago. Ms. LaSota stated that you have to remember that at the last election the election board in Lake County was told to have Spanish speaking assisters in every polling place. She added that the Voter's Bill of Rights was also posted in Spanish. She stated that the board did everything possible, yet some people in East Chicago still complained. She said that the board is very sensitive to the issue of the disenfranchisement of voters due to language difficulties and the board wanted enough precincts in the community to accommodate voters.

The Chair asked again if the board approved maps at this public meeting when no one else was permitted to see the maps. Ms. LaSota stated that, unless she is mistaken, she believes that they were given the maps after the meeting.

The Chair asked Mr. Pabey if he received a copy of the maps. Mr. Pabey stated that he was not given a copy of the maps. He stated that he went to the board of elections office and waited about forty minutes but was not given copies of the maps. He stated that the press was there and could verify this. He stated that all they give him was the copies of the paper.

Commissioner Hiller asked what the agenda that was posted indicated. Ms. LaSota indicated that the agenda included precinct changes.

The Chair indicated that the correspondence opposing the precincts contains some conjecture about the reasons for the precinct changes and he noted that they were recently changed so he asked what was going on in East Chicago requiring these precinct changes.

The Chair recognized Mr. Stiglich who indicated that it was related to the case filed in federal court in the primary by the Hispanic community. He thought by adding minority precincts it would help people to vote in three specific districts, in the fourth, the third and in the second. He stated that this in no way took away the opportunity for minority representation.

The Chair asked if the judge's order was related to the Hispanic community's need for additional time to understand and complete the voting process, and the proposed precinct changes were made for that reason, then why is it that the Hispanic community is objecting to the precinct changes and raising a concern about being disenfranchised. The Chair added that he would like to know why the Hispanic community wasn't brought to the table prior to the approval of the precincts at the county level if the changes were being made for their benefit.

Mr. Stiglich answered that the statute allows them to do it and he thought that the precincts were fair. He stated that he did not agree with the federal court's judgment to provide extra Spanish speaking helpers on election day when most of the precinct boards in this area are bilingual. He stated that Mr. Pabey was allowed to submit names of persons to be appointed to be the helpers.

The Chair stated that he is not talking about the language assistance case now; he is talking about the precinct maps. The Chair asked if the court order was still in effect.

Ms. LaSota stated that they were waiting for a report from the board's attorneys who must make a report to the court.

Mr. Stiglich indicated that many of these assisters were paid.

Commissioner Hiller asked Mr. Stiglich that if the precinct orders were created to assist minority voters as far as travel and location, how would Mr. Stiglich respond to the letter from Mr. Artis that claims that, in certain precincts, it will make it more difficult for the minority voters to get to their polling place by requiring voters to travel farther and to cross railroad tracks and state roads.

Mr. Stiglich stated that Mr. Artis has a right to his opinion but East Chicago is an industrial community with a lot of railroad tracks and there are pockets between these industries. He stated these problems are problems that simply can not be avoided all the time. Mr. Stiglich indicated that they examined the location of the precincts but they determined that, by creating more precincts, they could reduce the number of voters per precinct. He explained this will permit persons who are having difficulty with the voting process more time to vote without causing a backup or line at the precinct. He stated that people will be more comfortable in taking their time in this situation.

Mr. Hiller asked if the locations of the polling places are more convenient. Mr. Stiglich indicated that he could not guarantee that in every case, however, if anyone experiences any difficulty he would see to it that transportation was arranged to get them to the polls. Mr. Hiller asked Mr. Stiglich if Mr. Artis was a member of Mr. Stiglich's party and Mr. Stiglich indicated that he was.

The Chair recognized Mr. King who stated that this may be a good time to mention that, based upon the testimony provided by Mr. Stratton and Ms. Brzycki, he has signed the form which indicates that the Co-Directors recommend approval of the precincts based upon their compliance with IC 3-11-1.5 which the chapter in the code that contains the technical requirements for precincts.

Commissioner Long asked if the recommendation could be entered into the record and copies provided later. The Chair indicated that the recommendation would be entered into the record and copies should be made available to supplement the Commission's packet.

Commissioner Hiller asked if the precincts were also done last year. Ms. Brzycki indicated she couldn't speak to that since she was not employed by the Election Division at that time. Mr. Pabey indicated that there was a change in 2001 but not in 2003.

The Chair asked if anyone else was present to support the proposed precincts in Lake County. There being no response, the Chair asked if there was anyone present just to provide information without taking a position for or against the proposed precincts. There being no response, the Chair asked for those who oppose the proposed precincts to identify themselves and state their position.

The Chair recognized Randall Artis who identified himself as a city county councilman, third district, East Chicago. He stated that there are six precincts in the third council district.

The Chair asked for the total number of precincts in East Chicago. Mr. Artis stated that there were thirty three precincts in East Chicago. Mr. Artis stated that he was representing all six precinct committeemen in his district. He stated that the precinct committeemen signed a letter opposing the proposed precinct changes. He stated that there were three predominately African-American precincts and three predominately Hispanic precincts in the district. He explained that the proposed precincts will cause a hardship for, and may disenfranchise, senior citizens and handicapped individuals. He stated that for some of handicapped people voting is an opportunity to get out and be with their neighbors. He indicated that these people do not want to vote by absentee ballot. He stated that the map will cause them to go across two state roads and two sets of railroad tracks just to get to a polling place. He stated that he feels, and these voters feel, it will discourage them from voting.

Mr. Artis described another area in the third district with an individual currently within walking distance of the polling place who may now have to go across town just to vote. He stated that he does not understand the tactics.

Mr. Artis complained that he had no knowledge that there was a board meeting where they were considering precinct changes. His colleagues on the council did not know that the board was meeting to consider precinct changes until after the meeting. He said that precincts were just changed in 2001 so they were not expecting changes. He indicated that the population in East Chicago has been decreasing.

The Chair asked Mr. Artis if he could quantify the decrease in population. Mr. Artis said that the population has decreased by about five thousand in five years. Commissioner Morgan expressed concern about accepting hearsay evidence.

Mr. Artis indicated that the proposed precincts would combine two existing precincts with a population of eleven hundred and fifty registered voters. He stated that one of the precincts has three hundred eighteen registered voters and the other precinct has approximately eight hundred registered voters. He feels like this is going to discourage some voters.

Commissioner Long asked how Mr. Artis knew where the polling places in the new precincts were going to be located. Mr. Artis indicated that the paperwork that documents the new precincts identifies the location of the polling places. Commissioner Long asked if the County Commissioners have approved those yet. Ms. Robertson indicated that, in Lake County, the election board establishes the location of the precincts.

Mr. Stiglich stated that there are no pre-determined polling sites. He stated that the polling sites are established before each primary and general election. He stated that you have to remain flexible and indicated that the board would look at this thing in the whole prior to an election.

Mr. Artis stated that to satisfy the residents in this area they are going to have to establish two polling places for each precinct because of the configuration of the proposed precincts.

Commissioner Long asked Mr. Artis if he has asked the election board in Lake County to reconsider their proposed precincts. Mr. Artis responded that the election board had a meeting last Friday and that they attended the meeting to make this argument. He explained that when they got to the meeting they were told that the meeting was a public integrity meeting, not an election board meeting. He said that it was publicized in the paper as an election board meeting to talk about the East Chicago situation.

Mr. Pabey offered a copy of the newspaper article.

Mr. Stiglich stated that Mr. Artis was correct about the news article; however, the news article was in error. He said that Steve Patterson, the beat reporter for the Post-Tribune in

Lake County, made that admission. He said that the meeting was about making recommendations to the legislature to reduce absentee ballot fraud.

Commissioner Morgan asked Mr. Artis how many East Chicago councilmen there were. Mr. Artis indicated that there were nine. Commissioner Morgan asked if there were other council members present today. Mr. Artis said that Mr. Pabey is a former council member. Mr. Artis also explained that he asked the council to vote to support his position at its last meeting and the vote was five to four against his request.

The Chair asked how this could happen on something that seems straight forward that four members on the council could oppose the precincts given that the reason for the proposed precincts was to make it easier to vote.

Commissioner Long indicated that four out of the nine justices on the Supreme Court didn't think that George Bush should be elected president either but this country recognizes majority rule.

Commissioner Hiller asked Mr. Stiglich why there are minorities who oppose a precinct plan when it is designed to help them. Mr. Stiglich stated that in politics you have some people that support your agenda and others who do not and that this is true within both major parties. He stated that they looked at the whole county with an eye toward accommodating voters, including voters in other areas in Lake County outside of East Chicago.

Commissioner Hiller asked whether Mr. Stiglich was saying the precinct changes were about politics rather than about assisting voters. Mr Stiglich stated that he went from six to seven precincts in the district so it is only logical that this created more opportunity to vote. Mr. Stiglich stated that the population is 85% minority and that he did not think there was any question but that these proposed precincts will help the minority community to vote. He said that if the proposed precincts gave non-minority or whites more precincts, but not the minority community, then he could see the argument.

Commissioner Long indicated that the last time Lake County was before the Commission the number of precincts were reduced and everybody objected to the reduction because it disenfranchise voters and reduce the number of persons representing areas within the party organization.

Commissioner Morgan stated that in this case both Co-Directors have recommended approval of the precincts; the election board in Lake County supported the precincts by unanimous vote, the county chairman of the Republican and Democratic Party supported the precincts, the two attorneys for the election board signed off on the precincts, and the technical aspects of the precincts has been through a complete review. He stated that any political questions that come out of the county can be solved by the precinct committeemen in March of 2005. He stated that if committeemen are dissatisfied then they will have an opportunity to pick new party leadership at that time. He said that the

Commission will be here forever if it tries to sort out the political situation in East Chicago.

The Chair indicated that he appreciates Commissioner Morgan's comments and indicated that they were well made and well taken. He indicated that he just had some questions and that he was just going to have to request the indulgence of Commission members.

Commissioner Hiller asked why the republican county chairman was not present. Mr. Stiglich indicated that the chairman was on vacation out of town.

Commissioner Hiller asked about the reasoning for the proposed precincts. Ms LaSota indicated that it was so that people would not be lined up at the precincts.

Commissioner Hiller asked if the two sides of the issue could compromise. The Chair indicated that it doesn't sound like anybody even tried.

Mr. Stiglich indicated that the politics as a whole is the driving mechanism here and if the Commission wants to deal with it from that perspective then that's up to the Commission. Mr. Stiglich stated that they presented it in the best light and that he hoped the Commission would view it that way and not get caught up in the other stuff.

The Chair indicated that he has not heard anything like this. Commissioner Long stated that this is not that uncommon.

Commissioner Morgan indicated that if the Commission goes beyond the recommendations and approvals in this case, and gets into local politics, then the Commission will have to start scheduling longer meetings. He stated that this will also happen in other places in the state.

Commissioner Long stated that the statute says that after the Co-Directors have reviewed the proposed precinct establishment order, and the order has been revised if necessary to comply with the chapter, the Commission shall approve a proposed precinct establishment order under this section no later than the following January 31. He stated that the reality is that, while it sounds like a good alternative to send it back for hearing, if it is sent back for hearing the approval process is dead since it can't be approved by the Commission after January 31. He said that the Commission is a technical review agency and the proposed precincts have been certified as complying with the precinct statutes by both Co-Directors and the Office of Census Data.

Mr. Long indicated that the situation with the Marion County precincts was, in fairness, different. The Republican Party came to the Commission and complained that they had been cut out of the process. He stated that maybe this was true. He said that this was not the issue here. He indicated that in this the political parties have signed off on the proposed precincts. He stated that establishing precincts is a local issue. He stated the the Commission has locked horns in the past over whether both sides were heard on the issue. He said that both political parties have been heard from in this case, and

unfortunately for he and Commissioner Morgan, this appears to be fight between democrats.

Commissioner Hiller asked whether the Commission could consider the fact that voters are being disenfranchised assuming that this is true.

Commissioner Long stated that this would not be within the jurisdiction of the Commission. He stated that there is nothing in the statute that gives the Commission the responsibility to conduct trials to determine if the Commission likes the way the precincts are drawn. He said that if the proposed precincts meet the technical requirements set forth in statute then the Commission should approve the precincts. He stated that if someone is disenfranchised then the lawyer involved, Nathaniel Ruff, can file a lawsuit tomorrow claiming that their constitutional rights have been violated. He stated that all he has heard is that some voters have to cross state roads or railroad tracks. He stated that increasing the precincts from six to seven does not indicate disenfranchisement.

Mr. Stiglich stated that the city council does not call him when they establish their district lines. He stated that the law states they the city council has that right as a legislative body and that he has no business in that and he never sticks his nose into that.

The Chair asked if there were any other questions of Mr. Artis.

Mr. Hero asked if St. John could be excluded from consideration at this time and considered after the disposition of the rest of Lake County.

Mr. Hiller indicated that the people who have not spoken should be granted the opportunity to speak since they have driven a long way.

The Chair recognized Mr. Pabey who stated that the proposed change is a big change. He stated that there are sixteen Hispanic precinct committeemen in East Chicago and that these committeemen did not ask Mr. Stiglich to add three more precincts to put more Hispanics in. He stated that Mr. Stiglich is doing this because he has his own agenda.

Mr. Stiglich indicted that he had a right to have his own agenda as does Mr. Pabey.

Commissioner Long asked Mr. Pabey, assuming Mr. Stiglich as an elected party official does have an agenda, isn't he entitled to an agenda. Mr. Artis indicated that he should have consulted them about the changes. Mr. Artis stated that they were not arguing about the changes.

Commissioner Long indicated that Bob Pastrick may have some suggestions on what they should have done.

Mr. Pabey stated that all he was asking for was to have a meeting and to have the changes explained and shown on a map. Commissioner Long said that there are maps down here.



Mr. Pabey indicated that there were about one hundred and fifty people at the last council meeting that were protesting the changes.

Commissioner Hiller asked Mr. Pabey that if the precincts were approved today would Mr. Pabey file a lawsuit in federal court. Mr. Pabey indicated that he would. Commissioner Long indicated that this would protect their rights.

The Chair asked if there were any more questions for Mr. Pabey. There being none, the chair recognized Alicia Rodriguez who stated that she was from East Chicago and wanted to address Chairman Stiglich's comments about the lawsuit that was filed in district court. She indicated that she was a plaintiff and that the purpose of the lawsuit was not to get more precincts. She stated that the purpose of the lawsuit was to obtain interpreters because there is a *butturo* system in place in East Chicago where one family member is devoted to the administration and the other family members are recruited through that family member to vote for the administration. She stated that this is what they are fighting. She said that it has nothing to do with the precincts. She said that the reason that they want more precincts is so that they can stronghold East Chicago like they have done in the past.

She stated that they gave the names of fifteen interpreters to the judge in the lawsuit and the judge approved them. She stated that their interpreters were not paid. She stated that the interpreters hired by the Lake County election board were paid. She stated that they were not asking for more precincts to obtain more elected officials.

Commissioner Hiller asked Ms. Rodriguez if she was claiming that the proposed precincts would disenfranchise her. She said that they would disenfranchise her.

Mr. Artis said of the seven precincts in districts three, four of the precincts would cause a hardship to voters by requiring voters to cross roads and railroad tracks.

Commissioner Long asked Ms. Brzycki if there was a map. Ms. Brzycki indicated she had a map on her laptop.

The Chair asked if there were any more presenters on the East Chicago portion of the proposed precincts. There being none, the Chair asked for presenters regarding the St. John portion of the proposed precincts.

The Chair recognized Mr. Joe Hero who identified himself as the chairman for the Republican Party organization in St. John. He stated that he was remonstrating against splitting the precincts in St. John. He said that the precincts were made smaller but he favors larger precincts. He stated that the old precincts have 1200, 1034, 1346, 723, 1137 and 1059. He stated that the way the polling places are equipped, population is not an issue. He stated that splitting precincts creates more polling places and more election boards. He stated that at some of the new polling places there will be congestion. He stated that when you cause congestion then there is another window where people get to vote.

Mr. Hero stated that one of the proposed precincts has 342 people and another has 439 and yet another precinct has 1200. He stated that this shows that the precincts are not balanced. The prior precincts were more balanced. He stated that he would rather have the precincts more balanced and more population in the precincts because it provides parties that operate with limited resources the ability to cover the precincts with watchers to provide more security against election fraud. He stated, as a party official, you only have so many resources and he would like to be able to spread those resources over fewer, larger precincts.

Mr. Hero indicated that he has an argument based on Article 2, Section 1 of the Indiana Constitution that requires that all elections be free and equal. He thinks that by having some precincts at 1200 and others at 342 that the voters in the precincts don't have the same kind of access to voting.

Mr. Hero also argued that Article 13, Section 13 of the Indiana Constitution provides that "all elections by the people shall be by ballot" and indicated that the proposed precincts limit ballot access when the number of people voting in different precincts is disproportionate.

Mr. Hero stated that he hasn't studied the East Chicago situation but he would request that the Commission, in whatever order deemed appropriate, preserve the old precincts in St. John as they exist now.

The Chair asked Mr. Stiglich if he wished to respond and Mr. Stiglich indicated that he respected Mr. Hero's concerns. He stated that he had intended to do more than what was proposed today but there were time limitations. He indicated that there would be more work on the precincts in the future and that the number of precincts will be increased and some other reduced in the future.

Mr. Hero stated that all precincts should have been balanced in St. John at one time. He said they left one precinct that is too large.

Commissioner Long stated that he was sensitive to that but that sometimes there is reason why one precinct is larger than another.

Mr. Hero stated that the only reason he was given was that there was no convenient road that ran through the precinct but he stated that there is always a road you can use as a boundary.

Mr. Stiglich stated that one of the precincts was split to take Briar Ridge out of one precinct and make it its own precinct so voters who didn't live there wouldn't have to travel to vote in that gated community.

Commissioner Long indicated that he was sensitive to the cost in St. John but that the fiscal impact on St. John for the municipal election may be reduced by additional reprecincting that occurs before the next municipal election.

Mr. Stiglich stated that all cities and towns are assessed through the auditor's office for the cost of their municipal election and that they have to pay the county back. He stated that the county bears the cost for general elections.

Mr. Hero stated that St. John has phantom precincts that are precincts that no one lives in and are only created because of census blocks. He stated that, technically, because it is a precinct, the county chairman could appoint a precinct committeeman for the phantom precinct because party rules do not require residency. He stated that this would violate the principal of one man one vote.

Commissioner Long indicated that under the Democratic Party rules a precinct committeeman has to be a resident of the precinct to vote.

The Chair indicated that he had Mr. Simmons look into the issues surrounding the disenfranchisement argument and talked with Mr. Simmons about it. He asked Mr. Patton whether he had any views on that argument. Mr. Patton indicated that under IC 3-11-1.5 only the Lake County board of elections and registrations gets to vote and that they voted 5-0 to approve the precincts. He stated that there is a letter from the attorneys for both parties as well as a recommendation in favor of the proposed precincts. He added that the state statute referenced by Commissioner Long, IC 3-11-1.5-31, states "after the Co-Directors have reviewed a proposed precinct establishment order and the order has been revised, if necessary, to comply with this chapter the Commission shall approve the proposed precinct establishment order under this section no later than the following January 31." He stated that, based upon the Co-Directors recommendation, it is his view that the Commission is required to approve the proposed precincts and, if the Commission does not approve the precincts, the Commission would be in violation of Indiana law.

The Chair asked Mr. Simmons if he had anything to add. Mr. Simmons indicated that he would have only one thing to add. He stated that the provisions of IC 3-11-1.5 have been well stated by Mr. Patton, Mr. Morgan and Mr. Long. He stated that there is no question that the statute applies to this proceeding and no question that it appears that all the statute requirements have been met in this case, including the recommendation from the Co-Directors. He stated that the only thing that he would add is that notwithstanding the fact that Indiana statute does not incorporate the U.S. Constitution or the Voting Rights Act; those provisions still apply to the extent that the Commission could be sued under those laws. He stated that, as an example, if the Commission does not give a person the required notice and opportunity to be heard that the constitution requires, the Commission could be sued and could lose in court for failing to abide by the constitution. He indicated that, to the extent people are trying to couch their arguments in terms of constitutional violations or the Voting Rights Act, he believes that it is proper for the Commission to listen to those arguments and consider the arguments. He stated that he did not think that

politics should be part of the discussion but the discussion should focus on the discriminatory impact, if any, of the proposed precinct changes. He stated that the cases on the Voting Rights Act have not involved politics but involved discriminatory impact on minorities and that there are two cases coming out of Lake County that discuss these issues. He stated that the most recent case was the case being alluded to here today that was filed by Mr. Pabey that resulted in a judgment against the board requiring them to provide Spanish language assisters at the polls. He added that, in 1983, Mr. Pasterick was a party to a case where the court, in dicta, acknowledged that when there are procedures that affect precinct committeemen, in their capacity as caucus members, then Section 2 of the Voting Rights Act may apply. He stated that he thought that, based upon these cases, these issues are an appropriate subject for hearing before the Commission. He stated that the burden of proof would be on those persons raising the issues.

The Chair asked if Mr. Simmons believes it would be a violation of state law if the Commission did not approve these precincts. Mr. Simmons responded that state law clearly says that the Commission shall approve precincts under the circumstances described in the statute and that the statute contains a mandatory direction. He added that he is unaware of any contradictory section as there is in a certain circumstances. He stated that the statute would appear to require Commission approval but that the Commission could also consider additional arguments based upon the constitution or the Voting Rights Act.

Mr. Hiller asked if the oath taken by a Commission member includes that the member will uphold the U.S. and Indiana Constitutions. Mr. Simmons answered "yes." Mr. Long indicated that Commission members also take an oath to uphold the laws of the State of Indiana.

The Chair recognized Mr. Patton who stated that Mr. Simmons indicated that there was a potential for a lawsuit if the precincts are approved. He raised the point that the Commission opens itself up for a lawsuit if the Commission does not approve the precinct establishment order. He stated that it's a double edge sword whether you approve or don't approve the precincts. He stated that one side to the controversy is going to be upset and sue the Commission. He stated that his recommendation would be to follow IC 3-11-1.5-31 and the "shall" provision contained in that section.

Commissioner Hiller asked if Mr. Patton was saying you could get sued either way. Mr. Patton stated that someone could sue the Commission because they didn't like the way the Commission talked to them today.

Commissioner Long indicated that precincting is a local issue. He stated that the Commission's sole and only purpose is to see that the precincts comply with state statute. He stated that if they have disenfranchised someone locally, there is a remedy for that. He stated that there is nothing in the statute that says if the Commission thinks someone is disenfranchised then the Commission has the right to redress that. He stated that the reason for that is that the courts would require someone to prove it by something more than a letter saying that old folks are disenfranchised because they have to walk clear

across town. He stated that the district involved is not any bigger under the new precincts. He stated that the Commission is a technical review agency and that if there were technical problems then the Commission should address them and that's why the law says that if the precincts comply with this chapter, the Commission must approve the precincts.

Commissioner Long stated that when he was county attorney years ago, before the Commission came into existence, the State Election Board refused one of the precincts they proposed and he advised the local board to tell the state to go to hell and that the county would do it its own way and they did. He stated that we did that because we followed the law and that is what Lake County has done here.

Commissioner Hiller stated that it's too bad that this process has come to this. He stated that he thinks that the complainants probably got a raw deal. He said that it sounds like notice problems and everything else. He stated that he did not think the precincts were about helping minority voter but about politics. He stated that Mr. Stiglich said it was about politics and that precincts would be revisited in the future. He stated that whatever way he voted on the precincts he would hope that Mr. Stiglich would revisit this and try to mend the party and try to make everyone happy because he thinks that there was a disservice done but he wasn't there and he doesn't know and he's just a dishonest lobbyist.

Commissioner Long indicated that he hoped that was not true.

Commissioner Morgan asked if there was anyone present that will not be able to vote because of the precinct changes. There being no response. Commissioner Morgan indicated that no one appeared to be disfranchised.

Mr. Stiglich stated that if a person has a hard time getting out of the house because of mobility that that person can vote by absentee ballot. He stated that there is also a traveling board that can come to your house and vote you.

Mr. Stiglich stated that when he indicated it was political he did not mean it was political from his perspective but that politics as a whole were involved. Commissioner Hiller stated that he said it was political. Mr. Stiglich stated that calling it political was Commissioner Hiller's opinion and that he has his own opinion.

The Chair asked if there was a caucus election to replace an elected official, won't the existing precinct committeemen still be the same as the ones today. Mr. Hero indicated that the Republican Party rules indicate that the precinct committeeman remains a committeeman somewhere but he did not know what the Democratic Party rules provide.

The Chair stated that he has some concerns as it relates to the supremacy clause of the U.S Constitution and he does think that the precinct committeemen have something to do with this and he has a case that references that fact in dicta. He stated that the case is *Trevino et al*, a 1983 case, and that the point made in the case was that the appointment

and selection of caucus members acting in caucus election may become significant either under the 14<sup>th</sup> Amendment or the Civil Rights Act or where practices and procedures involving precinct committeemen adversely affect voting rights then Section 2 of the Voting Rights Act may also apply. The Chair stated that he is bothered by the fact that the Commission has had to spend two and one half hours on this and stated that the thing didn't get taken care of at the local level is beyond him. He indicated that Marion County had to go to the courts to get its situation resolved.

The Chair recommended to Mr. Stigich that if he plans on coming back to get together with the complainants and get on the same page.

Commissioner Long asked if the standard was that there had to be 100% agreement and whether three people who disagree with proposed precincts were enough to defeat the precincts. He requested the Chair to call the question and be done with it. He indicated he had a long way to drive home.

The Chair recognized Mr. Artis who stated that 100% of the precinct committeemen in his area oppose the precincts and that the voters are disenfranchised. He said he is representing his entire district.

Commissioner Long asked for a vote to be done with it and move on down the road and get it court. Commissioner Long recommended that they file a declaratory judgment.

The Chair indicated that he would call the question on the motion to approve order 2004-07 which approves the precinct changes. There being no further discussion, the Chair called the question and declared that with four members voting "aye" (Mr. Burdick, Mr. Long, Mr. Morgan and Mr. Hiller), and no Commission member voting "no," the motion passed and that order 2004-07 was adopted.

Commissioner Long congratulated the Chair and Commissioner Hiller.

## 9. Next Commission Meeting

The Chair requested that Commission members consult their calendars to schedule the next meeting. Commissioner Long indicated that there must be a meeting before February 28.

The Chair asked if the Commission needed to schedule a date between February 28 and March 11 for candidate challenges.

Commissioner Long stated that, if there is no meeting before February 18, he is going to ask the governor to call a meeting. He stated that the Commission has let Brooks LaPlante escape because the Commission did not act within 90 days and that the Commission took some action on the case on November 20. He stated that if the Chair is not going to call a meeting to get LaPlante on the agenda then he will ask the governor to call a meeting of the Commission under IC 3-6-4.1-12.

Commissioner Long also indicated that he would ask the Chair and Commissioner Hiller to disqualify themselves with respect to any further action on Brooks LaPlante. He stated that he did not know this on November 20 but the Chair is a paid lobbyist and the Chair lobbies Brooks LaPlante for pay. He stated that he thinks that it is a conflict. He stated that he did know that Commissioner Hiller was a lobbyist but it escaped him. He stated that if his income is ever in any way dependent on lobbying then he intends to step down from the Commission or, at least, disqualify himself.

Commissioner Hiller stated that it is against the law for him to get paid based upon a legislative outcome.

Commissioner Long stated that he represents people charged with crimes and that it is unethical for him to base his pay on case determinative outcomes. He stated that if he doesn't produce results, he doesn't get hired in the future. He stated if a lobbyist doesn't get bills passed then he is not going to be a lobbyist for very long. He indicated that he did not think it was realistic for a lobbyist to impose a fine against a legislator and then expect the legislator to be receptive to the lobbyist on legislation.

Commissioner Hiller indicated that he was offended if Commissioner Long is implying that he can't separate the lobbying from being a Commission member and following the statutes. He stated that he felt his most recent vote was a disservice but he felt he had to follow the statute on that matter. He added that the governor appointed him as a Commission member well knowing that he was a lobbyist.

Commissioner Long stated that he didn't know if the governor knew that or not. He stated that if the governor did so then he would take issue with the appointment.

Commissioner Hiller responded that the governor performs a thorough background check. Commissioner Long stated that it must not be too thorough, they appointed him. Commissioner Hiller stated that he had never been indicted for a crime.

Commissioner Long stated that if Commissioner Hiller is going to accuse him of being indicted then he should get a lawyer hired because he will file a lawsuit tonight. He stated that he has never been indicted and he is damn tired of you all spreading that crap up here. He stated that it cost the state police \$500,000 to accuse him of being the target of a grand jury investigation.

Commissioner Hiller stated that he did not use Commissioner Long's name in any way with respect to his comment. Commissioner Long stated that Commissioner Hiller was alluding to that fact.

Commissioner Hiller stated that he did not think he is dishonest because he is a lobbyist. Commissioner Long stated that he did not think Commissioner Hiller was dishonest.

The Chair asked to get a meeting date scheduled and is looking at between February 28 and March 11. He stated that the Commission would like to deal with candidate challenges. Commissioner Long asked what the deadline was for candidate challenges. The Chair indicated that the last date that the Commission could meet for candidate challenges was March 11. The Chair indicated that he would prefer not to do Mondays or Thursdays because he coaches basketball for six and nine year olds on those days.

Commissioner Morgan expressed concern about rectifying the voting system situation prior to the primary.

The Chair suggested Wednesday March 10 at 1:00 p.m. The other Commission members responded that they could make it on that date so the Chair indicated that a meeting would be scheduled on that date.

The Chair indicated that he would entertain a motion to adjourn. Commissioner Long moved that a meeting date be established so that the Commission does not lose the 90 days on all of the cases and orders that the Commission made on November 20. Commissioner Morgan seconded the motion. There being no further discussion, the Chair called the question and declared that with two members voting “aye” (Mr. Long and Mr. Morgan), and two members voting “no” (Mr. Burdick and Mr. Hiller) the motion failed.

## 10. Adjournment

The Chair moved that the Commission adjourn and declared that the Commission was adjourned by consent of the Commission members at 5:30 p.m.

**Respectfully submitted,**

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**J. Bradley King**  
Co-Director

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**Kristi Robertson**  
Co-Director

**Approved,**

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**Brian L. Burdick, Chair**