

Indiana Election Commission
Minutes
August 27, 2007

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

Members Absent: None

Staff Attending: J. Bradley King, Co-Director, Indiana Election Division of the Office of the Indiana Secretary of State (Election Division); Pamela Potesta, Co-Director of the Election Division; Dale Simmons, Co-General Counsel of the Election Division.

Also Attending: Mr. James Ammeen; Mr. Chad Duran; Mr. Paul Okeson; Mr. John Price; Mr. Gordon White.

1. Call to Order

The Chair called the August 27, 2007 meeting of the Commission to order at 1:00 p.m. in Indiana Government Center South Conference Center, Room 20, 402 West Washington Street, Indianapolis, Indiana.

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

2. Transaction of Business

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

The Commission approves the correction of the following scrivener’s error in that document:

Page 26, line 22, replace “Oakeson” with “Okeson”.

3. Adjournment

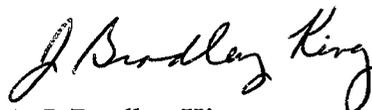
There being no further items on the Commission’s agenda, the Chair entertained a motion to adjourn. Mr. Dumezich moved, seconded by Mr. Long, that the Commission do now adjourn. The Chair called the question, and declared that with four members voting “aye”

(Mr. Dumezich, Mr. Long, Ms. Riordan, and Mr. Wheeler), and no Commission member voting "no," the motion was adopted. The Commission then adjourned at 3:15 p.m.

Respectfully submitted,

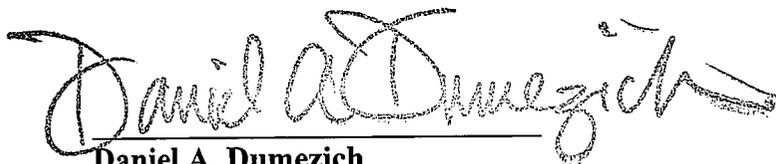


Trent Deckard
Co-Director



J. Bradley King
Co-Director

APPROVED:



Daniel A. Dumezich
Chairman

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

INDIANA ELECTION COMMISSION
PUBLIC SESSION AGENDA

Conducted On: Monday, August 27, 2007

Location: Indiana Government Center
South Conference Center
402 West Washington Street
Indianapolis, Indiana 46204

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

CONNOR REPORTING, Inc.
1650 One American Square
Indianapolis, IN 46282
(317) 236-6022

♀

2

1

A P P E A R A N C E S

2

3

INDIANA ELECTION COMMISSION:

4

5

Mr. Thomas Wheeler, II - Chairman

6

Mr. Anthony Long - Vice Chairman

7

Mr. Dan Dumezich - Commission Member

8

Mr. Sarah Riordan - Commission Member

9

10

INDIANA ELECTION DIVISION STAFF:

11

12

Mr. Bradley King -- Co-Director

13

Ms. Pam Potesta -- Co-Director

14

Mr. Dale Simmons - Co-Legal Counsel

15

Ms. Leslie Barnes - Co-Legal Counsel

16

17

18

19

20

21

22

23

24

25

♀

3

1

CHAIRMAN T. WHEELER: All right. I'm going

2

to go ahead and call this meeting of the Indiana

3

Election Commission to order. It's Monday,

4

August 27th, 2007. This meeting is being held

5

pursuant to appropriate notice, pursuant to

6
7 I note that we have a full quorum of all
8 commission members, and I thank all of the
9 commissioners for -- particularly, Commissioner
10 Long and Dan for making the trips from opposite
11 sides of the state to attend this meeting.

12 What I'd like to do is go ahead take this
13 slightly out of order. We have a very brief order
14 approving a form revision, and that would be Order
15 2007-119. Who's -- Dale, who's presenting?

16 MR. D. SIMMONS: I think -- let
17 (indiscernible) do it.

18 MS. P. POTEESTA: I was going to do it.

19 MR. D. SIMMONS: Oh, you were going to do
20 it -- all right.

21 MS. P. POTEESTA: That's okay. Mr.
22 Chairman --

23 CHAIRMAN T. WHEELER: Dale, Dale just
24 didn't want to do it.

25 MS. P. POTEESTA: Mr. Chairman and Members

4

1 of the Commission, we have another order, No.
2 2007-119 that we need approval. All we have is
3 the date change. This is a CAN-4, a Petition
4 for Primary Ballot Placement, and we have
5 highlighted where the date was changed.

6 CHAIRMAN T. WHEELER: And I believe in the
7 packet that we've got, we have a copy of the
8 CAN-4, and it's changing the petition for
9 primary ballot placement as a candidate for

INDIANAELECTIONCOMMISSION08-27-07.txt
10 governor to January 1st, 2008, and that was just
11 an oversight on the prior?

12 MS. P. POTEESTA: Right.

13 CHAIRMAN T. WHEELER: Any of the
14 commissioners have any questions regarding the
15 change on the date and the...

16 COMMISSION MEMBER D. DUMEZICH: which one,
17 on the motion to approve the form?

18 CHAIRMAN T. WHEELER: On the motion on the
19 form, yes, just need...

20 VICE CHAIRMAN A. LONG: That was the '08,
21 yeah.

22 CHAIRMAN T. WHEELER: Yeah, we just had a
23 typo.

24 VICE CHAIRMAN A. LONG: Did you make a
25 motion? Speak Dan I did.

5

1 CHAIRMAN T. WHEELER: I believe I had a
2 heard from...

3 VICE CHAIRMAN A. LONG: Second.

4 CHAIRMAN T. WHEELER: I have a motion and
5 seconded, any further discussion?

6 (No discussion.)

7 CHAIRMAN T. WHEELER: Hearing none, all in
8 favor of approving Order No. 2007-119 modifying
9 the CAN-4, signify by saying aye?

10 THE COMMISSION: Aye.

11 CHAIRMAN T. WHEELER: Those opposed, same
12 sign?

13 (No response.)

14
15 unanimously. The order is passed. Do we need
16 to sign this or are you going to stamp this?

17 VICE CHAIRMAN A. LONG: Which one -- you
18 got one you want -- do you got one you want us
19 to sign?

20 CHAIRMAN T. WHEELER: Do you want them
21 signed or are you just going to stamp it?

22 MS. P. POTEESTA: We could stamp it.

23 MS. M. THOMPSON: We could stamp it, sure.

24 CHAIRMAN T. WHEELER: All right.

25 MS. P. POTEESTA: Thank you.

♀

6

1 CHAIRMAN T. WHEELER: All right. That
2 brings us to the meat and potatoes of the matter
3 which is a consideration of a pending motion in
4 Administrative Cause No. 2007-01.

5 Procedurally, and I'm not sure who to address
6 this to -- I suspect to Gordon, our attorney, in
7 terms of actually convening the hearing, do we need
8 to do anything beyond simply a notification? We're
9 not swearing any witnesses because there's no
10 witnesses testifying?

11 MR. G. WHITE: (Indiscernible).

12 CHAIRMAN T. WHEELER: All right. Let me do
13 this first. What I want to do is I want to --
14 for myself and perhaps the other commission
15 members, but certainly for myself, I want to
16 kind of understand what -- because there have
17 been filings coming in as late as Friday

INDIANAELECTIONCOMMISSION08-27-07.txt
18 afternoon, I believe -- Jim, you got the last
19 shot in Friday afternoon maybe?

20 MR. J. AMMEEN: Yes, sir.

21 CHAIRMAN T. WHEELER: I'm trying to figure
22 out precisely what motions we have pending, and
23 then -- I guess I'm going to let Jim tell me
24 what motions they are and see if John agrees,
25 and then what I'd like to do is also hear

7

♀
1 briefly just the status -- not argument but
2 status of the other proceeding and the Marion
3 County proceeding -- I think all that is John,
4 since John -- you filed that in Marion County,
5 give you kind of a status of where that is; does
6 that make sense for you guys?

7 MR. J. AMMEEN: Yes.

8 CHAIRMAN T. WHEELER: All right. Jim, what
9 do we have -- what do we have before us?

10 VICE CHAIRMAN A. LONG: Mr. Chairman, --

11 CHAIRMAN T. WHEELER: I apologize.

12 VICE CHAIRMAN A. LONG: -- could you --

13 I'm -- we've not met before.

14 MR. J. AMMEEN: Sure.

15 VICE CHAIRMAN A. LONG: Tell us your name?

16 MR. J. AMMEEN: James Ammeen, Lewis &
17 Kappes for the Indiana Election Division.

18 VICE CHAIRMAN A. LONG: You don't need to
19 stand up. Thank you. I knew -- I know...

20 MR. J. PRICE: And I'm John Price.

21 CHAIRMAN T. WHEELER: And just -- but it

INDIANAELECTIONCOMMISSION08-27-07.txt
22 makes sense, and that's my fault. I should have
23 identified people for purposes of the...

24 VICE CHAIRMAN A. LONG: I made the
25 assumption, but I read the pleadings, but I --

8

1 we had not met before, I don't believe.

2 MR. J. AMMEEN: No, we hadn't.

3 CHAIRMAN T. WHEELER: All right. With
4 that, Jim, give me an idea, what is pending, and
5 just in general -- I don't care about who filed
6 what response or anything like that, but
7 generally, in categories what pending motions do
8 we have here going on today?

9 MR. J. AMMEEN: Your Honor, I believe there
10 are five motions that are pending. In serial
11 order, it is the order of Microvote first to
12 disqualify the commissioners from acting as
13 administrative law judges in this proceeding, or
14 the objection is it -- I think it was first
15 filed. The second is the Motion to Dismiss
16 filed by MicroVote. The third motion is the
17 Division's motion for referral to a special
18 administrative law judge. The fourth motion is
19 the motion of MicroVote for stay of this
20 proceeding. And the fifth motion is the
21 Division's motion to amend the prehearing order.

22 CHAIRMAN T. WHEELER: John, is that -- is
23 that accurate?

24 MR. J. PRICE: Yes, I agree with that.

25 CHAIRMAN T. WHEELER: So those -- those are

9

1 the things we need to deal with. I may go in a
2 different order than that. All right. From
3 that standpoint -- now what I'd like to do just
4 briefly -- John, because this plays in, I
5 believe, the motion to stay, give me just real
6 briefly where you are as an order of an issue in
7 the Secretary of State's -- going back with
8 respect to the -- from the ALJ, give me briefly
9 up-to-date.

10 MR. J. PRICE: A procedural briefing on
11 this is that the petition to review the order in
12 the '03 case and to stay these pleadings was
13 filed on August 20th, and we randomly were
14 assigned Superior Court Room 1. That was Judge
15 Cale Bradford's.

16 CHAIRMAN T. WHEELER: I was going to say,
17 who is that now?

18 MR. J. PRICE: It was Judge Cale Bradford's
19 court and the new judge has been picked.

20 COMMISSION MEMBER S. RIORDAN: I think it's
21 Judge David Shaheed.

22 MR. J. PRICE: I think that's right.

23 CHAIRMAN T. WHEELER: Yeah, they
24 switched -- they sort of replaced Bradford, but
25 he didn't go to that courtroom because...

10

1 MR. J. PRICE: Because they didn't want to
2 be in that courtroom.

3 CHAIRMAN T. WHEELER: well, there's a
4 seniority thing going on.

5 MR. J. PRICE: Right. So consequently, you
6 may not have received this yet, but on Thursday
7 or Friday, we filed a motion for change of judge
8 in that case, primarily because it's a brand new
9 judge and we wanted somebody with some
10 seniority. So obviously, having said that,
11 there have been no hearings, no rulings.

12 CHAIRMAN T. WHEELER: No rulings?

13 MR. J. PRICE: Right.

14 CHAIRMAN T. WHEELER: Has there been a
15 response even filed in any of your stuff yet?

16 MR. J. PRICE: Not -- that would be too
17 early, I think.

18 CHAIRMAN T. WHEELER: I know Jerry is here
19 from the Secretary of State's Office, as is the
20 Deputy Secretary of State.

21 MR. J. PRICE: You probably already have
22 copies of this, but I did bring additional
23 copies.

24 VICE CHAIRMAN A. LONG: That is what?

25 MR. J. PRICE: Of the suit we filed in

11

1 Marion County.

2 CHAIRMAN T. WHEELER: That's the Marion
3 County stuff.

4 VICE CHAIRMAN A. LONG: The petition to
5 review the...

6 CHAIRMAN T. WHEELER: Yeah, the Secretary

7 of State's, but it also -- in there, you also
8 have asked that judge to stay this particular
9 proceeding?

10 MR. J. PRICE: Correct.

11 CHAIRMAN T. WHEELER: And then I assume
12 that's somewhat redundant of the motion to stay
13 that you filed here as well?

14 MR. J. PRICE: Correct.

15 CHAIRMAN T. WHEELER: You said the same
16 thing both ways?

17 MR. J. PRICE: Correct.

18 CHAIRMAN T. WHEELER: Okay. What I would
19 like to do, and this may sound like it's a
20 little bit in reverse order, is the first issue
21 I'd like to take up if the other commission
22 members agree, is I'd like to start with the
23 motion to stay and work our way through.

24 And my thought is I want to -- I want to work
25 through the motion to stay, the motion to

12

♀

1 disqualify, and then I view -- I view the motion
2 for referral to take -- essentially being kind of
3 in tandem with the motion to disqualify, and then
4 the motion to dismiss, motion to amend, once we get
5 that far, depending -- because obviously those --
6 there's no point in us doing anything if we take
7 action on the other motions. Does that make sense
8 for you guys, as we go through there?

9 VICE CHAIRMAN A. LONG: Fine with me.

10 CHAIRMAN T. WHEELER: All right. The
Page 10

11 motion to stay was originally filed by Mr.
12 Price. Is it -- is the motion to stay fully
13 briefed? Has anybody...

14 MR. J. AMMEEN: We responded to it.

15 CHAIRMAN T. WHEELER: Has everybody -- has
16 everybody gotten their shots, okay. What I'd
17 like to do is I'd like to keep it pretty brief.
18 Can you give me -- give me the summary in about
19 ten minutes?

20 MR. J. PRICE: Well, I can do it less than
21 that.

22 CHAIRMAN T. WHEELER: Really? I've never
23 heard you do anything less than ten minutes.
24 I'll hold you to that.

25 MR. J. AMMEEN: (Indiscernible).

13

‡

1 CHAIRMAN T. WHEELER: That's right.

2 MR. J. PRICE: With age comes wisdom. Mr.
3 Chairman, as I begin responding to your request,
4 if I may take just two minutes to make a
5 suggestion because I think it bears on the
6 entire proceeding?

7 CHAIRMAN T. WHEELER: Please.

8 MR. J. PRICE: Micro -- MicroVote is
9 interested in settling on a global basis all of
10 the cases that it's involved in with the
11 Secretary of State, the pending matter here, and
12 the HAVA case that's pending in Marion County
13 Superior Court.

14 To help facilitate that, when we had a

15 prehearing conference with you and Sarah and myself
16 and others, we suggested there may be a mediation
17 coming up, and as I recall your response, you said
18 the commission would try to facilitate that and
19 that's -- that's good. I think that's what the
20 commission should do.

21 We went to the mediation. Unfortunately,
22 there were certain people eating tapas dishes at
23 Barcelona, so consequently, not everybody was
24 present.

25 CHAIRMAN T. WHEELER: I only did it for the

14

1 first three days, and after that, I went to
2 McDonald's. I told my wife I'm done with that.

3 MR. J. PRICE: In any -- in any case,
4 mediation, when everybody walked in the room,
5 two sides of the mediation said we are going to
6 settle this case today, but unfortunately, on a
7 four and a half period, it didn't happen.

8 Having given you this buildup, what I'd like
9 to suggest and then I'm ready to go ahead with the
10 legal arguments, is MicroVote would like to meet
11 under IC 5-14-1.5-6.1 which is the executive
12 session exception to the open door law with the
13 five of you, that is the commission and your
14 attorney for the purpose of making a formal
15 presentation for settlement on a global basis in
16 the case. And we're prepared to today that either
17 now, after the proceedings today, sometime this
18 week, at any time the commission wants to meet.

19 CHAIRMAN T. WHEELER: We couldn't -- we
20 couldn't do it today because we wouldn't have
21 appropriate notice. I'm sure we'd have a notice
22 issue. If you want to do it in private session,
23 if you want to do it in public meeting, there's
24 an option there.

25 MR. J. PRICE: Where prepared to try to

15

1 resolve the case on a global basis.

2 CHAIRMAN T. WHEELER: I mean it...

3 MR. J. PRICE: However you want to do it,
4 we're...

5 CHAIRMAN T. WHEELER: I guess --

6 MR. GORDON: Could you give me the cite on
7 that, please?

8 MR. J. PRICE: Yes.

9 COMMISSION MEMBER S. RIORDAN: Mr. Chairman?

10 VICE CHAIRMAN A. LONG: We can't settle it
11 on a global basis.

12 CHAIRMAN T. WHEELER: You're correct.

13 VICE CHAIRMAN A. LONG: We don't have any
14 jurisdiction over the Secretary of State's
15 issue.

16 CHAIRMAN T. WHEELER: And I think it was --
17 Sarah, that's your concern as well or...

18 COMMISSION MEMBER S. RIORDAN: Well, my
19 concern really is that we are -- as things stand
20 right now, are basically, if I can quote the
21 president, the deciders on the merits of this
22 case; right, and so we shouldn't be taking in

23 settlement proposals.

24 That would seem to be counter to what our role
25 is if we're, as it stands right now, to be the

16

1 ultimate decision makers on the merits of the case.
2 And so I don't think we should be involved in
3 settlement discussions. I think if we want to
4 encourage as a commission, that's fine, but for you
5 to make a settlement proposal to us, that doesn't
6 seem to me to be our role.

7 CHAIRMAN T. WHEELER: And I think
8 Commissioner Long also had a concern.

9 VICE CHAIRMAN A. LONG: That we would not
10 be in a position to have -- to meet with us, we
11 couldn't -- we don't have global responsibility.
12 As I see our responsibility, it's fairly narrow.
13 The Secretary of State has conducted in a
14 separate proceeding and there's a result there.
15 And I don't know -- when you say global, I don't
16 know what you mean by global but...

17 MR. J. PRICE: Well, what I -- what I was
18 trying to suggest is that -- let's divorce it
19 from these proceedings for a minute and be more
20 academic. Let's say an election vendor is cited
21 by the Indiana Secretary of State's Office for a
22 violation in marketing, leasing, using, selling
23 and so forth, and there's a discovery period
24 held and there is an order issued and it becomes
25 a final order, but at the same time that's going

17

1 on, the Election Division comes to you as a
2 commission and files charges on essentially the
3 same things.

4 And so the vendor wants to settle, as ES&S
5 did. And the question then becomes if the vendor
6 settles with the SOS and still has a pending matter
7 on essentially the same facts with this commission,
8 how does the vendor ensure that it's buying its
9 peace.

10 Because any good lawyer, and there's a bunch
11 of them in this room, knows that if you have
12 several people that might get a piece of your
13 client, you want to buy your piece on a global
14 basis so that everybody's settled up, and that's --
15 that's the purpose for the suggestion.

16 VICE CHAIRMAN A. LONG: That's the way of
17 the world, though. It happened just today.
18 Michael Vick's buying his peace with the federal
19 government, but he's going to have to contend
20 with the prosecutor in Richmond, Virginia or
21 wherever that is.

22 CHAIRMAN T. WHEELER: I believe he also has
23 to contend with the commissioner as well.

24 VICE CHAIRMAN A. LONG: well, then the
25 football league and the owners of the Atlanta

18

1 Falcons. I mean, the -- you understand -- I
2 mean, that's -- and I'm not trying to say if

INDIANAELECTIONCOMMISSION08-27-07.txt
3 there's any correlation here between the two --

4 MR. J. PRICE: Well, there's not.

5 VICE CHAIRMAN A. LONG: -- but that's a
6 very pointed issue that there are -- same facts
7 apply to different levels and different
8 circumstances.

9 MR. J. PRICE: But the criminal justice
10 system, it does exactly what you just said. You
11 can't control any part of it. But in the civil
12 justice system, you can require, as far as a
13 settlement, that everybody participated, but
14 there's no settlement.

15 So when you settle on an accident case and
16 there is seven or eight defendants, everybody
17 settles up or they don't settle up, which is maybe
18 what (indiscernible). But anyway, I just want get
19 on the table that MicroVote would like to do that.
20 If you all come up something you're comfortable
21 with. I, obviously, don't want you to do something
22 you're uncomfortable with.

23 CHAIRMAN T. WHEELER: Let me -- I guess
24 from my standpoint, and I think this was
25 reflected by what Commissioner Riordan and I

19

1 said at the prehearing conference and we
2 continue to believe. We certainly think this
3 ought to be settled. It ought to be resolved.
4 It's in the best interest of everyone, including
5 individual counties. It's certainly in the best
6 interest of MicroVote to resolve this, and I

INDIANAELECTIONCOMMISSION08-27-07.txt
7 think it's in the best interest of the taxpayers
8 of the State of Indiana this get resolved.

9 MR. J. PRICE: I agree.

10 CHAIRMAN T. WHEELER: It is my
11 understanding that you have at least two
12 mediation sessions and you actually have a
13 mediator in this case; correct?

14 MR. J. PRICE: Judge Frank is our mediator.

15 CHAIRMAN T. WHEELER: Is that the Mediation
16 Group?

17 MR. J. PRICE: Yes.

18 CHAIRMAN T. WHEELER: And my -- correct me
19 if I'm wrong, is that still outstanding or did
20 you guys stop or is he still trying to resolve
21 it or where are you on that process?

22 MR. J. PRICE: He made phone calls to us
23 twice after the aborted mediation that lasted
24 five and a half hours without our being
25 presented with anything and didn't come up with

20

1 anything further to proceed with.

2 We'd be very happy to sit down again in
3 mediation, but there's obviously a problem, and
4 that is what is the role of this commission and the
5 charges pending before this commission in regard to
6 a -- an overall settlement?

7 But how the case is fairly easily disposed
8 off, I've had conversations with Chad Duran in this
9 case.

10 CHAIRMAN T. WHEELER: All right. Let

INDIANAELECTIONCOMMISSION08-27-07.txt
11 me -- let me ask this question. It is my

12 understanding that the Division through Mr.
13 Ammeen participated in at least one of those
14 mediations; is that correct?

15 MR. J. PRICE: The second one, yes.

16 CHAIRMAN T. WHEELER: Okay. And at least
17 there were some -- there was some discussion of
18 this proceeding as part of that settlement;
19 correct?

20 MR. J. PRICE: I don't know if I'd call it
21 a discussion. There was a...

22 CHAIRMAN T. WHEELER: I don't want to get
23 into numbers or anything like that or whatever
24 happened, but my understanding is there was some
25 discussion?

21

1 MR. J. PRICE: There was a statement made
2 after four and a half hours and that was the end
3 of the mediation.

4 CHAIRMAN T. WHEELER: Okay. And that was
5 it, or that's just whatever, but I guess from my
6 standpoint is as a commission member, I don't
7 want us to be a barrier, and I think we've
8 expressed that, a barrier settling this thing,
9 okay.

10 And are you telling me that the mediation
11 broke down because the commission wasn't present
12 individually or as a body to present their
13 position?

14 MR. J. PRICE: Well, since we're just

INDIANAELECTIONCOMMISSION08-27-07.txt
15 having a frank discussion here, what happened
16 was the --

17 MR. J. AMMEEN: I'm going to object that
18 this is a violation of the Rules of Alternative
19 Dispute Resolution and the confidentiality
20 provisions. If we would like to have that
21 discussion, if we're going to have a complete
22 waiver, I think we need to hear that from the
23 Office of the Secretary of State.

24 Now Mr. Oakeson is here in the room, as is
25 Mr. Bonnet. However, I don't know that they would

22

1 be in a position to waive the rights of
2 confidentiality without speaking with the Secretary
3 of State himself. But I would be perfectly happy
4 to tell our version of what happened, if we're
5 going to go down that path.

6 CHAIRMAN T. WHEELER: I've got to tell you,
7 I -- I could care less about, and I think I sent
8 that in an e-mail, I could care less about name
9 calling between you guys and whose fault it is.
10 I really mean that. And I don't mean that in a
11 negative way. I just mean I'd rather move
12 forward to something productive and get this
13 case resolved if it's at all possible.

14 The only thing I want to know is from our
15 standpoint, if there is some utility for the
16 commission getting involved in this process, i.e.
17 is the process broke down because the commission is
18 not involved.

19 I think there's probably some willingness for
20 us to at least provide some direction or be
21 involved in some fashion so that you can
22 get -- that we're not the holdup toward getting
23 this resolved.

24 Because I do believe that for the citizens of
25 the State of Indiana and the taxpayers of Indiana,

23

♀

1 it's better -- we're a heck of a lot better off
2 getting this case resolved than spending a ton more
3 money. Certainly, your client doesn't want to pay
4 you -- with all due respect to -- to that.

5 MR. J. PRICE: They've paid enough.

6 CHAIRMAN T. WHEELER: They've paid enough.
7 I am certain the Secretary of State has paid
8 enough either in time or travel and everything
9 else, and I think the taxpayers, this ought --
10 this ought get settled and resolved.

11 MR. J. PRICE: Well, I agree.

12 CHAIRMAN T. WHEELER: That's -- that's my
13 own personal opinion.

14 VICE CHAIRMAN A. LONG: Mr. Chairman, may
15 I, and I draw upon -- I do a lot of criminal
16 practice. I envision this is a violation of the
17 law akin to the dispositional mode that you run
18 into in criminal proceedings, and it is very
19 very common for me to engage in settlement
20 negotiations with a prosecutor, come up with the
21 framework and an agreement, and then we present
22 that to the judge in a pretrial conference

INDIANAELECTIONCOMMISSION08-27-07.txt
23 setting and get the thought of the judge as to
24 whether or not he would accept that.

25 And I think -- I agree with Sarah that I don't
24

♀
1 think we're here in the business of negotiating a
2 settlement. I think that this is an adversarial
3 proceeding. The Division has brought charges,
4 filed a complaint, and the Division is an entity,
5 MicroVote is an entity, and if they come up with a
6 plan that they both agree to that both sides would
7 recommend to us, I think it is appropriate for us
8 to give feedback in a proper forum as to whether or
9 not that procedure, that resolution would be one
10 which we could accept.

11 CHAIRMAN T. WHEELER: And as -- as I
12 understand it, the appropriate -- from what
13 you're saying, the appropriate procedure for
14 that would be for the Division, for the two of
15 them to get together and do something and then
16 bring it to us.

17 VICE CHAIRMAN A. LONG: Or if they want to
18 go with the Secretary of State, they've
19 got -- they've got an entity -- they've got to
20 deal with the Secretary of State's
21 representatives also, that they can take a
22 global settlement that way and see what happens.

23 I mean, I think that's -- we do that just
24 customarily -- regularly as a matter of course.
25 And I think it's a system that works and I

♀
25

1 envision -- I view our role here as adjudicatory
2 and not as adversarial. I would be uncomfortable
3 sitting here trying to negotiate a settlement, but
4 given the proper facts and stipulations, I would be
5 willing to express my opinion as to whether or not
6 I could accept an agreement and I don't think that
7 that biases my independence in rendering an open
8 decision in this case.

9 CHAIRMAN T. WHEELER: Anything from
10 yourself?

11 COMMISSIONER D. DUMEZICH: I agree with
12 Tony.

13 CHAIRMAN T. WHEELER: So what I hear is we
14 certainly encourage additional settlement
15 negotiations. Certainly, you will get a -- if
16 you come up with anything, you'll get a fair
17 hearing from us as to how to resolve it based
18 upon what we think about the terms of the
19 settlement agreement, and then that takes care
20 of that issue. You're on for the motion to
21 stay?

22 MR. J. PRICE: Yes.

23 MR. J. AMMEEN: Your -- Your Honor?

24 CHAIRMAN T. WHEELER: I'm sorry.

25 MR. J. AMMEEN: I had one comment about the

26

1 mediation process. It is our regret that the
2 mediator did not do a better job of keeping
3 MicroVote informed during the afternoon and we

4 are welcome, willing to reopen settlement
5 discussions if there is a real good faith
6 attempt to settle the case.

7 CHAIRMAN T. WHEELER: I trust that you get
8 with Mr. Oakeson, and -- and see into that.
9 Certainly, we would encourage that. I mean,
10 I -- and certainly, Mr. Price has indicated a
11 willingness to revisit something or other. So
12 let's -- let's move on there.

13 MR. J. PRICE: And to respond to that, we
14 have made good faith offers and we'd like to
15 settle it so...

16 VICE CHAIRMAN A. LONG: Makes me happy.

17 CHAIRMAN T. WHEELER: There's a lot of
18 goodwill in this room.

19 VICE CHAIRMAN A. LONG: We ought to just
20 have a group hug.

21 CHAIRMAN T. WHEELER: A lot of love. A lot
22 of love. You hear that Mr. Oakeson?

23 MR. P. OKESON: Yeah.

24 CHAIRMAN T. WHEELER: All right. John,
25 motion to -- motion.

♀

27

1 MR. J. PRICE: Mr. Chairman, I'll be very
2 very brief in regard to the motion for stay. As
3 Mr. Chairman wheeler has pointed out, there is a
4 parallel motion for stay with the Marion County
5 Court System, and it's pretty simple.

6 It's what attorneys call the yin and the yang.
7 If the court affirms the final order in the

8 Secretary State Rokita, then we would assume that
9 this commission would deny our motion to dismiss
10 and that you will take his final order as
11 determinative of the facts that are before you and
12 issue the penalty that you're allowed under law to
13 issue in regard to whatever you decide to do.

14 what we don't see is that there's any need to
15 do any discovery between now and then because this
16 case has been discovered pretty heavily with
17 depositions and county clerks being deposed and
18 corporate officers being deposed, etc. And that
19 was all subsumed into Mr. McNeely's order which has
20 now been a final order from the Secretary of State.

21 So if we lose in Marion County court on our
22 petition for judicial review, I assume you're going
23 to do what you certainly have the right to do. On
24 the other hand, if the court sets aside the final
25 order and remands the case back to the Secretary of

28

♀

1 State with either a -- to enter a finding of no
2 liability or to enter a motion for summary
3 judgment, either one, then we would assume that at
4 that point because it's the same operative facts
5 that you would grant the pending motion to dismiss
6 and it'd be over.

7 Basically, we just don't see any reason
8 because between -- the proposal that's been
9 suggested here is we have until January to discover
10 this case. We don't see any reason to continue to
11 discover a case that's been very heavily discovered

12 on the same operative facts, and so that's why
13 we've asked to you stay everything until the court
14 rules.

15 Now a legitimate question is how long will
16 that take, and we've suggested in our motion to
17 stay, that it won't take very long because as soon
18 as a judge is selected and a response is filed,
19 we'll ask for an emergency hearing with the judge
20 on the question of the stay.

21 And my experience with the judges in Marion
22 County is within 30 -- you know, 45 days they find
23 time in their schedule and they have the hearing
24 and they decide whether you get a stay or not.

25 So that's -- that's less than 10 minutes,

29

♀

1 Mr. Chairman, but...

2 CHAIRMAN T. WHEELER: Any questions for
3 Mr. Price?

4 VICE CHAIRMAN A. LONG: I guess I have one.
5 The Commission has not been named as a party in
6 the Marion County proceedings, have we?

7 MR. J. PRICE: Not yet.

8 VICE CHAIRMAN A. LONG: Okay.

9 CHAIRMAN T. WHEELER: What about formal --
10 I know you have a copy of it. We've never been
11 formally served with the motion to stay, for
12 example.

13 MR. J. PRICE: That's correct. We've
14 requested a record of the proceedings.

15 CHAIRMAN T. WHEELER: And I believe part of
Page 25

16 that was in the Commission's packet?

17 VICE CHAIRMAN A. LONG: Yes.

18 CHAIRMAN T. WHEELER: Mr. Ammeen, I take it
19 you disagree with Mr. Price?

20 MR. J. AMMEEN: I do, Your Honor. I also
21 think that the first reaction is the taking of
22 things in the wrong order at this point. The
23 motion to dismiss really is the first issue that
24 ought to be decided by the Commission because it
25 is a challenge to your jurisdiction to hear the

30

♀

1 complaint in this case.

2 And so you need to determine whether or not
3 there's a legally sufficient complaint, whether or
4 not you have the power to go ahead and rule, and
5 then all other motions would follow, whether it's
6 the objection to your ability to serve as
7 administrative law judges or whether to stay the
8 case?

9 With that being said, what it comes back to,
10 to a pretty good extent, is to challenge the
11 Commission's authority to regulate an area of
12 certification of voting systems of vendors.

13 The motion to stay basically a request to ask
14 this body to take a step back and step away from
15 its responsibility to assure that voting systems
16 vendors are compliant with the law to ensure the
17 integrity of elections in this state.

18 The petition for judicial review is Paragraph
19 7.4, is the one place where there is a reference to

20 this proceeding where MicroVote foreshadows that
21 it's going to move to stay this proceeding.

22 CHAIRMAN T. WHEELER: Your further
23 petition, that's the one filed in front of...

24 MR. J. AMMEEN: Judge Shaheed.

25 CHAIRMAN T. WHEELER: Not Judge -- yeah,

31

1 Judge Shaheed.

2 MR. J. AMMEEN: And we were served with a
3 copy of that at the Division, and the -- whether
4 or not we're going to be a party to that
5 proceeding, I don't know. I don't know how
6 we're going to get the opportunity to respond.

7 Of course, there's separation of powers,
8 questions with respect to whether or not that body
9 can tell this agency, whether or not it can move
10 forward with this regulatory authority. So there
11 are a lot of questions there.

12 The logic doesn't lead to -- if there's a
13 reversal in the petition for judicial, the SOS
14 case, does not automatically lead to denial, or
15 excuse me, to granting of the motion to dismiss
16 here -- in fact, I think it may lead in the
17 opposite direction.

18 We don't need to get into all the logic of
19 that right now. It just does not hold up. There
20 are different facts that are alleged here. There
21 are different violations of law. There's a
22 different penalty. These are different
23 proceedings. And that's why it comes back to the

24 motion to dismiss, ultimately.

25 so what has happened here is although

32

♀

1 MicroVote says that it is concerned with the
2 taxpayers' dollars and the time of the
3 commissioners and it wants to be judicially
4 efficient, the fact what it's done is it's opened a
5 new theatre in the work.

6 So what it's done is it's driven the cost up
7 and created more work and more confusion in this
8 litigation and more expense to the people in
9 Indiana, because we're probably going to have to
10 appear at some point in the state court proceeding,
11 in the SOS case just to weigh in on the question of
12 whether or not that judge has the power to stay
13 this case.

14 So there are I think a number of reasons why
15 it just doesn't make sense for this body to stay
16 this proceeding, but instead to decide whether or
17 not it has the power to move forward, and then
18 moving onto the next issues regarding whether or
19 not there should be -- whether Your Honors are
20 disinterested enough to serve as administrative law
21 judges and that whether or not this should be
22 referred to a special ALJ anyway.

23 A quick word about discovery. It is kind of
24 interesting to have any discussion about discovery
25 at this point when there hasn't even been an answer

33

1 to the complaint. At some point in time, MicroVote
2 has to answer the complaint. At some point there
3 has to be some statement regarding the merits.

4 We're not out to reinvent the wheel. We're
5 not out on redo discovery. There are some things,
6 though, that we are interested in discovering, not
7 the least of which would be the value of what a
8 year of certification for a voting systems vendor
9 is in 47 counties in this state.

10 We think that there is a monetary value. We
11 think that that is relevant -- it is relevant, in
12 fact, to settlement discussions as well, and that
13 would be the kind of thing we'd want to zero in on.

14 We think that it's different than what
15 happened in the discovery in the other case. We
16 don't even know what happened about all the
17 discovery in the other case, but we do know what
18 the findings of fact are.

19 Further, as a very last point here, whether or
20 not there is a change of judge motion that is
21 granted and that finally gets set before one of the
22 judges, it's automatic, I would expect it to be
23 granted. We're looking at probably a couple of
24 months before anything can happen on the merits and
25 before there's any kind of response from the office³⁴

‡

1 of the Secretary of State.

2 MicroVote's proposed timeline is just entirely
3 too hopeful, and what we're looking at then is, in

4 all likelihood, no matter how the judge decides
5 that proceeding, an appeal to the Court of Appeals
6 which will take 190 days to get fully briefed, at a
7 minimum, maybe 120, --

8 CHAIRMAN T. WHEELER: So speaking of
9 optimism.

10 MR. J. AMMEEN: -- and then -- and then 90
11 days to be decided so you're looking at -- at
12 six, seven, eight months after the Marion
13 Superior Court has ruled on the petition for
14 judicial review.

15 And then assuming that -- we'll leave out
16 whether or not there will be a petition for a
17 rehearing of the court of appeals, assume that
18 one -- whoever loses will want to take this to the
19 Indiana Supreme Court for a resolution, considering
20 the importance of the public policy issues
21 regarding the Secretary of State's powers to act in
22 this area and the relationship between this body
23 and the Secretary of State, because it'll likely
24 come up in that litigation.

25 I suspect the Supreme Court of Indiana will

35

♀

1 not rule until after the certification period ends
2 on October 1, 2009. We'll be into 2010, and then
3 at that point we're talking about getting this
4 proceeding started. So at that point, if this body
5 is still interested in this case, it would be moot
6 with respect to revocation of certification;
7 however, the penalty that would allow for a -- an

INDIANAELECTIONCOMMISSION08-27-07.txt
8 injunction prohibiting the sale, use, marketing, or
9 permission to use a voting system in the state
10 could still be enforced.

11 But we're looking at going through -- we're
12 going to get through the presidential probably
13 before -- before this matter ever reaches a final
14 judgment if we proceed with all due haste, but
15 we're going to go through another congressional
16 election -- can maybe see this litigation dragging
17 out all the way into 2012 by the time the appeals
18 from this proceeding would happen.

19 So if we really want to go save the taxpayers'
20 dollars, let's decide the motion to dismiss now.
21 Let's amend the case management order and let's get
22 MicroVote to answer the complaint and move forward
23 in this proceeding, if indeed this body has the
24 power to adjudicate this complaint and could
25 regulate the certification and the refuse evasion

36

♀

1 of certification of a voting systems vendor in
2 Indiana. Thank you.

3 CHAIRMAN T. WHEELER: Questions?

4 VICE CHAIRMAN A. LONG: Huh-uh.

5 CHAIRMAN T. WHEELER: John, as I understand
6 your argument, your argument on the motion to
7 stay is essentially a prudential argument. It's
8 not a legal argument. It is golly, gee, this is
9 going to save a lot of time and resources if you
10 wait and see what happens; correct?

11 MR. J. PRICE: well, yeah, I think that's a

INDIANAELECTIONCOMMISSION08-27-07.txt
12 practical summation because if they rule in
13 favor of us or they rule against us, either one,
14 the end result if we show up with all the
15 discovery running between them, then is -- I
16 don't see how it helps anybody.

17 VICE CHAIRMAN A. LONG: I do have one
18 question. When I was reading these, and
19 procedurally, it was my understanding just on
20 the side lines or wherever, I guess, that the
21 election division did not participate as a party
22 in the Secretary of State proceeding, but
23 members of the Election Division were witnesses.
24 Was I -- have I misapprehended that?

25 MR. J. PRICE: You are correct. Mr. King

37

♀
1 was a witness of the April 17th hearing in front
2 of Mr. Rokita and Mr. Simmons.

3 VICE CHAIRMAN A. LONG: I was -- that was
4 consistent with my memory, that we had two --
5 two of the staff or election division staff
6 members that were witnesses that testified, but
7 as I read some of the proceedings, I wasn't -- I
8 wasn't for sure that I would remember it
9 correctly.

10 MR. J. PRICE: Your memory is correct. Mr.
11 Chairman, could I just make one 10-second
12 response? Mr. Ammeen brought up the question of
13 monetary value -- with all due respect, that's
14 not in front of this commission.

15 CHAIRMAN T. WHEELER: I don't disagree with

INDIANAELECTIONCOMMISSION08-27-07.txt
16 that, and I just certainly disregarded that,
17 specifically, as to applying a value. I do with
18 respect to the -- and this is a question
19 about -- in terms of the prudential, your
20 prudential argument, which is you were just
21 duplicating what's been going on, have there
22 been conversations about stipulating to
23 evidence, testimony, witnesses; are you guys
24 having any of that conversation?

25 MR. J. PRICE: We've had no conversation.

38

1 MR. J. AMMEEN: None.

2 CHAIRMAN T. WHEELER: All right. I mean,
3 it would seem to me that that could -- in
4 regards to this proceeding forward, certainly.
5 I don't disagree that there has been a lot of
6 testimony already taken.

7 MR. J. AMMEEN: The entire dialogue on the
8 issue, actually, is contained within the
9 pleadings on the motion to dismiss regarding the
10 application of offensive use of collateral
11 estoppel and defensive use of collateral
12 estoppel and res judicata.

13 CHAIRMAN T. WHEELER: All right. Anything
14 further from either side?

15 (No response.)

16 CHAIRMAN T. WHEELER: Discussion among the
17 commission members?

18 (No response.)

19 CHAIRMAN T. WHEELER: I'll entertain a

INDIANAELECTIONCOMMISSION08-27-07.txt
20 motion.

21 VICE CHAIRMAN A. LONG: I guess maybe that
22 procedurally is do we make a motion first and
23 then discuss it, or do we discuss it and then
24 make a motion?

25 COMMISSION MEMBER D. DUMEZICH: I'll make a

39

1 motion of -- I'd like to make a motion to
2 dismiss the Motion to Stay.

3 CHAIRMAN T. WHEELER: Dismiss or deny?

4 VICE CHAIRMAN A. LONG: Deny.

5 COMMISSION MEMBER D. DUMEZICH: Deny.

6 CHAIRMAN T. WHEELER: Motion's been made.

7 VICE CHAIRMAN A. LONG: I'll second that.

8 CHAIRMAN T. WHEELER: All right. Motion's
9 made and seconded, discussion?

10 VICE CHAIRMAN A. LONG: It seems to me that
11 the way we get this case resolved is not to stop
12 it and I think we have the duty to move it
13 forward with as much as dispatch as can be done.

14 This is a case of -- by allegation, is very
15 broad based as far as the number of counties
16 involved. It was alluded by one of the counsel
17 that we're -- and it's correct, we have a
18 presidential election coming forward.

19 You know, I would just as soon that the eyes
20 of the nation not be on Indiana as they were on
21 Florida or have been on Florida and I think we have
22 a responsibility.

23 we've got a gubernatorial election. We've got

INDIANAELECTIONCOMMISSION08-27-07.txt
24 congressional elections, and you know, in
25 reality -- well, it's also very important we have 40

1 elections this year in many many cities and towns
2 around this state. I think we need to get forward
3 and get this matter resolved so that the problem is
4 resolved.

5 COMMISSION MEMBER S. RIORDAN: I agree with
6 Commissioner Long's remarks.

7 CHAIRMAN T. WHEELER: Anything from
8 yourself?

9 (No response.)

10 CHAIRMAN T. WHEELER: From my standpoint,
11 and I agree a hundred percent with Commissioner
12 Long's notes, and I would note, and certainly, I
13 can't be mind to the fact that my home county
14 actually is sitting here, Boone County, and is
15 in a bind about purchasing equipment and they've
16 got to run elections in November and they're in
17 the same situation, I think, that the other
18 counties may be if we don't get this thing
19 moving along.

20 And so I agree a hundred percent with
21 Commissioner Long. It also certainly seems to me
22 that in order to address I think John's legitimate
23 concerns about duplicate expenses. And I know John
24 and I have litigated cases where I think a lot of
25 stipulations can be made to resolve those 41

1 particular issues.

2 Any further discussion from the commission
3 members?

4 (No response.)

5 CHAIRMAN T. WHEELER: A motion was made and
6 seconded, all in favor, signify by saying aye?

7 THE COMMISSION: Aye.

8 CHAIRMAN T. WHEELER: Those opposed, same
9 sign?

10 (No response.)

11 CHAIRMAN T. WHEELER: Motion carries
12 unanimously. The Motion for Stay is denied.
13 I'm now going to take up the Motion to
14 Disqualify and the Motion for Referral which I
15 view as being in tandem. John, you filed the
16 motion to disqualify, so I'm going to let you
17 take first -- first swing at this.

18 MR. J. PRICE: I can do it in one sentence.

19 CHAIRMAN T. WHEELER: Very good.

20 MR. J. PRICE: We filed it with a
21 recommendation that it be granted and we agree
22 with the recommendation.

23 CHAIRMAN T. WHEELER: Whose recommendation
24 do you mean?

25 MR. J. PRICE: The Division.

♀

42

1 CHAIRMAN T. WHEELER: And let me -- I'll
2 switch to allow Mr. Ammeen to address his.

3 MR. J. AMMEEN: Your Honor, that is a
4 completely incorrect statement. We do not

5 recommend granting the Motion to Disqualify
6 ourselves. We believe that if -- if that were
7 to be granted, it would raise serious issues
8 when the final recommendation from an
9 administrative law judge were to come back,
10 would there then be a Motion to Disqualify
11 yourselves as the ultimate authority in this
12 case -- having already disqualified yourselves
13 once as finders of fact, how then could you rule
14 on a recommendation containing findings of fact
15 and conclusions of law and a recommendation for
16 order?

17 So to protect the integrity of this
18 commission, I think it's necessary that you deny
19 the MicroVote motion and then grant the motion for
20 referral to a special ALJ, which indeed is a
21 jurisdiction prudential -- prudential motion to
22 prevent an interlocutory appeal that would further
23 stall this proceeding, and then let an
24 administrative law judge, and we would respectfully
25 suggest that it be a retired judge because of the

43

♀

1 political issues involved, so that there's no
2 question about someone's partisanship, but a judge
3 who's also skilled at handling discovery and rules
4 of procedure to move this thing along quickly so we
5 can get to a final hearing.

6 CHAIRMAN T. WHEELER: All right. Let me
7 stop you there, Jim. Let me see -- see if I can
8 harmonize. As I understand it, you both agree

9 that we need -- we ought to appoint an ALJ; is
10 that fair?

11 MR. J. PRICE: Correct.

12 MR. J. AMMEEN: Yes.

13 CHAIRMAN T. WHEELER: For purposes of fact
14 finding?

15 MR. J. AMMEEN: Fact finding and making
16 recommended conclusions of law with respect
17 to...

18 CHAIRMAN T. WHEELER: The preliminary --
19 allow a magistrate and we have final approval at
20 the back end.

21 MR. J. PRICE: Correct.

22 CHAIRMAN T. WHEELER: Identical to what you
23 did in the Secretary of State's action; correct?

24 MR. J. AMMEEN: Correct.

25 CHAIRMAN T. WHEELER: So as I understand

♀

44

1 it, you're both in agreement with that. The
2 only issue is how do we get there? Are you
3 comfortable, John, with Jim's suggestion that
4 the motion -- essentially the motion be denied
5 and their suggestion that we then appoint the
6 ALJ?

7 MR. J. PRICE: We have no -- no problem
8 with that.

9 CHAIRMAN T. WHEELER: Do you have any
10 objection to withdrawing your motion?

11 MR. J. PRICE: Sure.

12 CHAIRMAN T. WHEELER: All right. If you

13 withdraw your motion, the motion to disqualify
14 is off the table. We have the Election
15 Division's motion for a referral to an ALJ which
16 I understand both parties consent to. Any
17 discussion from the -- well, I'm sorry, I guess
18 I need to -- any questions? I'm sorry. That's
19 what I should have asked.

20 VICE CHAIRMAN A. LONG: I don't do
21 administrative practice so I'm going to have to
22 be led here -- maybe Mr. White would be who I
23 should direct this question to?

24 MR. G. WHITE: Well, I think where we're
25 going, fellas, is that there is the motion to

45

♀

1 disqualify which is directed at this body, but
2 then there's also been a suggestion from both
3 these gentlemen that this be referred to an
4 administrative law judge.

5 I think that the point that Mr. Ammeen is try
6 to go make is that, you know, if -- if there's some
7 perception that this body is impartial, you know,
8 you have to -- have to deal with that before --

9 CHAIRMAN T. WHEELER: You mean not
10 impartial?

11 MR. G. WHITE: Pardon?

12 CHAIRMAN T. WHEELER: You mean not
13 impartial?

14 VICE CHAIRMAN A. LONG: I hope there is a
15 perception in the room that we are.

16 CHAIRMAN T. WHEELER: I hope that we are,
Page 39

17 yes.

18 MR. G. WHITE: Those words are too long,
19 okay. But anyway, it would, you know, strictly
20 behoove the commission to -- to deny the motion
21 to disqualify.

22 CHAIRMAN T. WHEELER: If in this case it's
23 been withdrawn?

24 MR. G. WHITE: Withdrawn, yeah, then you
25 move on to the ALJ. And then what happens, of

♀

46

1 course, is that your administrative law judge
2 will conduct the hearing and then that person
3 will make a recommendation to you folks, that
4 you folks will review that recommendation, and
5 if they have any objections, you'll review that
6 as well and then you'll have to the opportunity
7 to either affirm that recommendation, modify it
8 or deny it.

9 So essentially, you would have somebody else
10 do your fact finding for you and make a
11 recommendation for you, but you would still have
12 the ultimate authority to issue the final decision
13 in this case.

14 CHAIRMAN T. WHEELER: And I believe
15 Commissioner Riordan, who was not one of the
16 fellows, to whom you previously referred, has a
17 question.

18 MR. G. WHITE: (Indiscernible). well --
19 I -- I have nothing more to say.

20 VICE CHAIRMAN A. LONG: Very wise.

21 COMMISSION MEMBER S. RIORDAN: Moving on.
22 what would be the standard that the commission
23 would apply when reviewing the recommendations
24 of an ALJ? what level of deference would be
25 given to the ALJ's recommendations, and if

47

1 there's a difference between the deference given
2 to the findings of fact the deference given to
3 the recommendation, if -- if you know the answer
4 to that or if the parties have any position on
5 that?

6 MR. G. WHITE: Well, I would -- I'm not
7 sure that you would owe the finder of fact much
8 deference other than, you know, that person
9 would have the witnesses in front of them and
10 then have the opportunity to, you know, review
11 the demeanor of the witnesses and so on and so
12 forth.

13 But the record is available to you and you
14 could review the whole record, and ultimately, if
15 you review the record and decided that the ALJ has
16 not done an adequate job, you can send it back to
17 that person. So I think -- I think from a
18 practical standpoint, you owe them a certain amount
19 of deference but not very much. Certainly, not as
20 much deference as a trial court would owe you or a
21 public court would owe to a trial court.

22 COMMISSION MEMBER D. DUMEZICH: Is
23 there -- is there any case law, whether it's the
24 de novo or probably another standard?

25

MR. G. WHITE: I don't think it's either,

48

1 frankly.

2 VICE CHAIRMAN A. LONG: What if the
3 Commission --

4 MR. G. WHITE: Well, it'd be more -- I'm
5 sorry, it'd be like the de novo standard.

6 VICE CHAIRMAN A. LONG: The Commission
7 referred it to an ALJ with instructions to make
8 findings of fact and recommended conclusions of
9 law but no recommendation? I see a certain
10 amount of efficiency if nothing else, and maybe
11 the -- to get all of us together to try to
12 conduct a hearing and to -- I can see efficiency
13 having a single person coordinating that --
14 certainly, a lot less calendars to coordinate
15 and I think it's within our authority, at least
16 as I understand the statutes, to seek that role
17 of an independent fact finder and allowing that
18 person who would be hearing the facts and
19 reviewing the law and making proposed
20 recommendations.

21 But I think that the ultimate thing that we
22 cannot assign, delegate is our statutory
23 responsibility of enforcement which I think enclose
24 should there be a finding of violation, the
25 assessment of the penalty, and I -- that's where

49

1 I -- as I read and tried to come to a conclusion in
2 my mind as to the most efficient way to get this
3 behind us, because I -- I truly think that speed is
4 important here. Is it appropriate to do that,
5 assign it for that recommendation, or excuse me,
6 assign it for that purpose, of making findings of
7 fact and recommended conclusions of law and then
8 the ultimate decision regarding the entry thereon
9 and would -- would be ours?

10 I'm -- I'm going to shut up in a second, but
11 what I don't want to be, and I do think that
12 person's going to have to be (indiscernible) and
13 should be (indiscernible) -- if we've chosen them,
14 we would afford a degree of respect to that
15 individual but I don't want to feel that I am boxed
16 in if that person is a hardliner, for example, and
17 wanted -- and recommended a penalty far more severe
18 than I think might be appropriate, then that could
19 cast us in a negative light if we entered, or at
20 least could potentially put us in a position of
21 leaning toward the acceptance of that recommended
22 penalty when I don't think that that's that person
23 person's responsibility.

24 MR. G. WHITE: Well, that -- that's the way
25 the statute operates. Your administrative law

50

♀

1 judge would hold a hearing, make a
2 recommendation, and I think they do have to make
3 a recommendation because the parties have an
4 opportunity to object to that recommendation,

5 but the way the statute is written, the ultimate
6 decision is yours, and what you're getting from
7 your ALJ is a recommendation and a
8 recommendation only, and that's very important,
9 but it is only a recommendation.

10 And frankly, if -- if your ALJ issued a, or
11 made a recommendation you were not pleased with,
12 you could do a complete 180, and I have seen that
13 happen, and you're well within your authority to do
14 that, as long as you explain why.

15 CHAIRMAN T. WHEELER: Mr. White, when you
16 refer the word recommendation, are you talking
17 about findings of fact, conclusions of law or
18 recommendation of a penalty?

19 MR. G. WHITE: Recommendation of a penalty,
20 yeah.

21 VICE CHAIRMAN A. LONG: So that's
22 statutory?

23 MR. G. WHITE: Yeah.

24 CHAIRMAN T. WHEELER: So from your
25 standpoint, that's required, that we get a

51

‡

1 recommendation --

2 MR. G. WHITE: Yeah.

3 CHAIRMAN T. WHEELER: -- on all the grounds
4 (indiscernible)?

5 MR. G. WHITE: Yeah. And I think it's -- I
6 think the reason for that is so your parties
7 will have an opportunity to object to it. You
8 know, if you find, in fact, they made no

INDIANAELECTIONCOMMISSION08-27-07.txt
9 recommendation at all, then they'd be kind of in
10 the dark.

11 COMMISSION MEMBER D. DUMEZICH: I think
12 based on the conversation I heard, I'm
13 comfortable with what the various roles of the
14 parties would be.

15 CHAIRMAN T. WHEELER: All right. And so
16 any further discussion on what appears to be an
17 agreement by everyone, at least the parties are
18 in agreement, to having -- their request to have
19 an ALJ appointed?

20 VICE CHAIRMAN A. LONG: Assuming we --
21 okay, we all -- we agree. We'll assign this to
22 an ALJ to be determined. Do we still have
23 jurisdiction to move forward on the remaining
24 pending motions that are before us?

25 MR. J. AMMEEN: Your Honor, if I might,

52

♀

1 that's part of why I believe the decision on the
2 motion to dismiss really is anterior to all the
3 other issues. The -- if you don't rule on the
4 motion to dismiss, all it's going to do is come
5 back to you as a recommendation later on. So
6 that's a question purely of law, and it is one
7 that ought to be resolved here at the threshold
8 because if Your Honors are inclined to dismiss
9 this proceeding, then we don't need to refer
10 anything to the special ALJ. We wouldn't even
11 need to have had the discussion about staying
12 this proceeding because it would have been over.

13 On the other hand, if you are inclined to deny
14 the motion to dismiss, then you can set the
15 schedule, and whoever is ALJ, will have to accept
16 what you provide them and that -- because that will
17 be an order in the case. And so I think that you
18 can -- you can decide here to refer it and still
19 decide the motion to dismiss, but it would make
20 more sense to decide the motion to dismiss first.

21 MR. J. PRICE: Mr. Chairman, if I might
22 just respond. First of all, I agree with
23 everything Mr. White said about AOPA. Secondly,
24 whether you decide anything on any of these
25 motions, the recommendations from the ALJ are

53

1 purely advisory because you're what the statute
2 calls the ultimate authority and you can decide
3 anything you want to, and as Mr. White
4 suggested, you can do a 180.

5 Mr. Rokita took most of what Mr. McNeely ruled
6 in the findings of fact and the conclusions of law
7 in the amount of the penalty assessed that he
8 didn't have to -- he could have decided anything he
9 could have wanted to, and you could, too.

10 CHAIRMAN T. WHEELER: Let me ask this
11 question: Is there any reason, Mr. White, that
12 we could not refer the motion to dismiss to the
13 ALJ if we appointed an ALJ?

14 MR. G. WHITE: No.

15 COMMISSION MEMBER D. DUMEZICH: But then
16 they're going to send it back to us; right?

17
18
19
20
21
22
23
24
25

recommendation.

COMMISSION MEMBER D. DUMEZICH: With a
recommendation.

CHAIRMAN T. WHEELER: With a recommendation
along with the remaining. I'd rather get the
whole package back. That's -- that's my
personal...

VICE CHAIRMAN A. LONG: I would rather go

54

‡

1 through it all today. If we're going to
2 dismiss, it's over, and if we're not going to
3 dismiss it, it's doing to be sent out to be
4 ruled on its merits.

5 CHAIRMAN T. WHEELER: All right. Then
6 procedurally hearing -- hearing at least two
7 members of the commission who seem to be
8 inclined in that direction, then what I'll do is
9 accept a motion to table a decision on the
10 motion for referral pending a resolution for the
11 motion to dismiss?

12 VICE CHAIRMAN A. LONG: So moved.

13 CHAIRMAN T. WHEELER: I've got a motion
14 made, second it?

15 COMMISSION MEMBER D. DUMEZICH: Second it.

16 CHAIRMAN T. WHEELER: Further discussion?
17 (No response.)

18 CHAIRMAN T. WHEELER: All in favor, signify
19 by saying aye of staying the motion for referral
20 upon pending a resolution of the motion to

INDIANAELECTIONCOMMISSION08-27-07.txt
21 dismiss?

22 VICE CHAIRMAN A. LONG: Procedurally it's
23 tabled.

24 CHAIRMAN T. WHEELER: Table, I'm sorry.

25 VICE CHAIRMAN A. LONG: I believe it's to

55

1 table it til later today, I think -- as I
2 understand --

3 CHAIRMAN T. WHEELER: Correct. I made a
4 wrong...

5 VICE CHAIRMAN A. LONG: -- Roberts' Rules
6 of order, you have to table it to a given point
7 in time.

8 CHAIRMAN T. WHEELER: I defer to your
9 knowledge.

10 VICE CHAIRMAN A. LONG: well, that's,
11 that's -- that shows in question your wisdom.

12 CHAIRMAN T. WHEELER: Tony, you want to
13 restate your motion?

14 VICE CHAIRMAN A. LONG: well, I meant that
15 we table it until later in this meeting until we
16 could at least have an opportunity to address
17 the motion to dismiss, that's the -- my intent.

18 COMMISSION MEMBER D. DUMEZICH: Second.

19 CHAIRMAN T. WHEELER: The motion's been
20 made and seconded, all in favor, signify by
21 saying aye.

22 THE COMMISSION: Aye.

23 CHAIRMAN T. WHEELER: Those opposed, same
24 sign?

♀

1 CHAIRMAN T. WHEELER: Motion carries. The
2 motion to dismiss was filed.

3 MR. J. AMMEEN: By MicroVote.

4 CHAIRMAN T. WHEELER: MicroVote.

5 VICE CHAIRMAN A. LONG: Can we -- just to
6 be clear on what we have here. We've a motion
7 to dismiss and a response and a -- when
8 MicroVote files a reply to the Petitioner's
9 response and the Division files a surreply?

10 MR. J. AMMEEN: Yes, sir.

11 VICE CHAIRMAN A. LONG: Is that all of it?

12 MR. J. PRICE: That's it, sir.

13 CHAIRMAN T. WHEELER: And a surreply is No.
14 what on our docket?

15 VICE CHAIRMAN A. LONG: Twenty-one.

16 CHAIRMAN T. WHEELER: That's 21. I got...

17 VICE CHAIRMAN A. LONG: Told you I was
18 going to read...

19 CHAIRMAN T. WHEELER: I got -- I got 21. I
20 got -- I got my number.

21 VICE CHAIRMAN A. LONG: I got mine
22 (indiscernible).

23 CHAIRMAN T. WHEELER: Yeah, you were way
24 ahead of me on the (indiscernible).

25 VICE CHAIRMAN A. LONG: I do -- I do have

♀

1 an issue with the copier, whoever copied these.

2 I think some we got -- has nothing to do with
3 the ones we have here, but some of these I've
4 got shortened version of things in the very
5 front and then it seems -- I'm sorry.

6 CHAIRMAN T. WHEELER: There is an official
7 binder; correct, Dale, with that, which is in
8 the possession of the Division which is our
9 official binder, if anybody wants to look -- you
10 know, look at it.

11 VICE CHAIRMAN A. LONG: No. With the ones
12 that we have here, I'm comfortable that my
13 pleadings are -- if they're not full, I've
14 certainly read all I want to read in them.

15 CHAIRMAN T. WHEELER: I know most of the
16 commission members reviewed most of this. I'd
17 like to keep this fairly brief. Can you do it
18 in ten minutes, is that too brief for you?

19 MR. J. AMMEEN: That's fine with me.

20 CHAIRMAN T. WHEELER: John.

21 MR. J. PRICE: I need less than...

22 CHAIRMAN T. WHEELER: Pardon me?

23 MR. J. PRICE: Less than ten minutes.

24 CHAIRMAN T. WHEELER: All right. I will
25 entertain a motion to adjourn briefly?

♀

58

1 COMMISSION MEMBER D. DUMEZICH: Five
2 minutes.

3 CHAIRMAN T. WHEELER: Five minutes.

4 VICE CHAIRMAN A. LONG: A five-minute
5 recess.

6 CHAIRMAN T. WHEELER: A five-minute recess.

7 (A recess was taken.)

8 CHAIRMAN T. WHEELER: All right. We are --
9 we have a promise from either side to stick to
10 actually much less than ten minutes for Mr.
11 Price, and at least -- around ten minutes. So
12 Mr. Price, it is your turn.

13 MR. J. PRICE: Mr. Chairman, and Members of
14 the Commission, what I think should not be
15 forgotten in all of this as we discuss these
16 arcane principles of law and empty the room with
17 people who aren't even lawyers (indiscernible)
18 is that when Gilbert and Sullivan and Mikado
19 wrote the infamous lines, "Let the Punishment
20 Fit the Crime," that that's a principle of law
21 that applies in civil matters, too.

22 And we do not have a situation here where any
23 voter lost their vote, where any count of any
24 voter's was incorrect, or any voting machines broke
25 down or any machines miscorrectly or incorrectly

59

♀

1 report vote results. We don't have anything like
2 that. We have a very narrow issue concerning
3 national trends that affected certification
4 deadlines that affected this company.

5 Nevertheless, the company is still willing to
6 try to settle, as I indicated before, and that's
7 for another matter. As to this motion, I'm going
8 to rest on our pleading which as Mr. --

9 Commissioner long pointed out is extensive from

10 both sides, there's no reason, as I heard them both
11 say to me one time, to repeat to the court, in this
12 case, the Commission what I've already put on paper
13 so I won't do that.

14 But I will just say a couple of quick points.
15 The purpose for a res judicata collateral estoppel
16 argument is to prevent a second bite of the apple
17 with the operative facts with the same people. The
18 Legacy Healthcare case could not be more clear,
19 that as long as you have the same core of operative
20 facts as the earlier action, you can't do it again.

21 I understand that when the Division who works
22 for the Secretary of State brought these
23 proceedings originally, filed before this
24 Commission many months, many -- several months
25 later that there might have been a desire there to

60

♀

1 encourage mediation. We went to mediation. We'd
2 still like to settle. But that's not a valid
3 excuse under AOPA or under the Legacy Healthcare
4 case to let the same identical agency do exactly
5 the same thing again to the same defendant.

6 I mean, to quote the -- Commissioner Long's
7 position on the criminal law, if you do that to a
8 criminal defendant, of course, it's double
9 jeopardy. If you do it to a civil defendant, it's
10 collateral estoppel. So consequently, I -- I won't
11 belabor the point. We've cited the cases. The
12 cases are right there.

13 I think I have a sense for how this is

14 proceeding, but the cases are clear, that if -- if
15 it ultimately all end up in front of a review in
16 court, they're going to have to look at the cases
17 and say there's an identity of claims, identity of
18 parties and this party can't be done at the same
19 time again.

20 That's not to say that if you took Mr.
21 Rokita's findings and looked at them because you
22 have a separate penalty that you can impose, that
23 you had the opportunity to do that back when they
24 were first filed, but the Commission decided for
25 whatever reason not to do that when it was first

61

♀

1 filed so we think they a preclusion there.

2 So consequently, that's really our argument.
3 Our argument is in the pleadings and we would ask
4 that the motion to dismiss be granted. Thank you,
5 Mr. Chairman. Thank you, Commissioners.

6 CHAIRMAN T. WHEELER: Let me just briefly
7 take the chairman's prerogative to ask the first
8 question.

9 VICE CHAIRMAN A. LONG: Sure.

10 CHAIRMAN T. WHEELER: I know -- I know Tony
11 was getting ready to go.

12 VICE CHAIRMAN A. LONG: No, not really.
13 I'm...

14 CHAIRMAN T. WHEELER: I was -- I was going
15 to follow your -- do two things. No. 1, and
16 I'll do them in reverse order. First of all,
17 with respect to -- did I understand you to say

18 that the -- essentially that you don't believe
19 we're precluded from assessing the penalty, you
20 just think that the fact finding would be the
21 collateral estoppel, is that what you...

22 MR. J. PRICE: No, I think you're precluded
23 now because you didn't do it at the time.

24 CHAIRMAN T. WHEELER: I'm not understanding
25 what you're saying.

♀

62

1 MR. J. PRICE: Well, in our reply brief,
2 we've cited cases with the concept that if two
3 different agencies have the ability to take
4 action, that when one -- when one agency took
5 the action and the other agency knew the action
6 that did not join them, that they're precluded
7 from coming later on and saying well, okay, now
8 we've decided we're going to join.

9 CHAIRMAN T. WHEELER: Even though they have
10 separate statutory authority?

11 MR. J. PRICE: That's correct. That's
12 Burtrum versus Wheeler 440 N.E.2d 1147, that if
13 a party has an interest in the subject matter of
14 the action fails to intervene in the action,
15 they are bound by the results of the action.

16 CHAIRMAN T. WHEELER: Now with respect to
17 your criminal analogy, are you telling me
18 that -- say, our good friends in Lake County who
19 are doing sidewalks, they couldn't be prosecuted
20 both under federal law or state law?

21 MR. J. PRICE: I'm sure, they can, but

22 that's...

23 CHAIRMAN T. WHEELER: I was trying to carry
24 your criminal analogy. I mean, I understand you
25 said that, you know, maybe different counties

63

‡

1 couldn't prosecute them for that but they could
2 be prosecuted under federal and state law
3 because those are different statutes. Any
4 further questions for the commissioners before
5 Mr. Ammeen?

6 VICE CHAIRMAN A. LONG: I don't -- I don't
7 have anything at this moment. I may -- I may
8 come back at the end and have a couple.

9 CHAIRMAN T. WHEELER: Mr. Ammeen.

10 MR. J. AMMEEN: Your Honor, there is
11 a -- for one, there is not a final direction in
12 either of these frivolous defenses, requires a
13 final judgment, and there's just not a certified
14 final judgment to corroborate any kind of
15 preclusive authority to rest. So they can't
16 even begin the elements.

17 But more important that that, the MicroVote
18 position proceeds from a fallacy and it's a fallacy
19 of the election division is somehow part -- a
20 hundred percent part and parcel of the Secretary of
21 State's Office because of one line in the code that
22 says that it would be located in the office of the
23 Secretary of State.

24 It is a bipartisan agency. It has
25 responsibility to ensure the (indiscernible) of its

♀

1 vendors, have equipment that will render results
2 fairly, impartially, truthfully and accurately to
3 preserve the integrity of elections. It is not run
4 by a partisan elected official and the statutory
5 authority and responsibility and decision to insure
6 impartiality and integrity of elections is complete
7 and separate from that of the Secretary of State,
8 who is an elections officer of the State of
9 Indiana, can proceed with a civil penalty, but he
10 does not have any authority to regulate the
11 certification of voting systems of a vendor.

12 As we see from around the country right now,
13 there are serious questions with the ability of
14 potential hackers to compromise a voting system.
15 The vendor Diebold was hacked and was certified in
16 California and is facing decertification
17 proceedings in New Jersey and Florida. What we saw
18 happen here in 2006 was that MicroVote installed
19 uncertified software that could not even properly
20 run the primary campaign and had to disable
21 portions of the applications so that votes could be
22 counted appropriately.

23 The risk that -- to the people, to the voters
24 of this state, if not also the system, is that
25 their vote will not be counted and that is why it

65

♀

1 is absolutely (indiscernible) that firmware and

INDIANAELECTIONCOMMISSION08-27-07.txt
2 software (indiscernible) systems would be -- be
3 certified by this body and that the (indiscernible)
4 complies with the law.

5 So that's what this proceeding is really
6 about. It is within your role, statutory authority
7 to decide those questions regarding the
8 appropriateness of the system, whether it's
9 decertification or suspension or whether or not
10 there should be a prohibition against further
11 sales, but none of those things can be decided in
12 the other case.

13 As a matter of pure practicality, I don't know
14 how you could have consolidated the two
15 proceedings. I suppose if they were filed
16 simultaneously, maybe both of these (indiscernible)
17 in terms of the Office of the Secretary of State
18 and this body could have reached an agreement,
19 interagency agreement to appoint a single
20 administrative law judge to hear all the evidence
21 and make findings and conclusions and render
22 recommendations to each ultimate authority
23 separately.

24 That would have been a very novel approach,
25 and maybe next time around there could be better

66

1 coordination between the agencies to accomplish
2 that. But where we are is that the Secretary of
3 State wanted to race to the courthouse. That
4 should not divest this agency of its power to
5 regulate in the area of voting systems vendors and

INDIANAELECTIONCOMMISSION08-27-07.txt
6 so there's no basis in the law to go ahead and
7 dismiss this proceeding, but instead, it should
8 proceed with -- with haste.

9 I do hope as Chairman Wheeler as expressed
10 that at some point in time we will be able to work
11 through stipulations and cut down the amount of
12 time and expense devoted to discovery and having a
13 final contested hearing, evidentiary hearing at
14 some point. But we're not there yet. We don't
15 even have an answer to the complaint yet.

16 So we would respectfully request that the
17 commission deny the motion to dismiss and set an
18 express date and time for MicroVote to finally
19 answer the complaint. Thank you.

20 CHAIRMAN T. WHEELER: Do any of you have a
21 copy of the Bartram case? Do you have one,
22 John, by chance?

23 MR. J. PRICE: With me, no, I don't.

24 CHAIRMAN T. WHEELER: Okay. Or Burtrum.
25 John, any -- any questions for Jim, I'm sorry?

67

1 VICE CHAIRMAN A. LONG: I assume you're
2 going to open it up for general answers?

3 CHAIRMAN T. WHEELER: I was going to give
4 John a brief chance to respond.

5 VICE CHAIRMAN A. LONG: Yeah, that would be
6 great.

7 CHAIRMAN T. WHEELER: Okay. John.

8 MR. J. PRICE: A ten-second response. In
9 the reply that was filed, the response that was

INDIANAELECTIONCOMMISSION08-27-07.txt
10 filed on the motion to dismiss, the statement is
11 made although the Division nominally is a
12 Division of the OSS, that's an admission, and
13 clearly, anybody's that's around the Division
14 very much knows that that would make us correct.
15 That's all I have.

16 CHAIRMAN T. WHEELER: That was your ten
17 seconds?

18 MR. J. AMMEEN: I can take about two.

19 CHAIRMAN T. WHEELER: Two seconds.

20 MR. J. AMMEEN: The Commission is not
21 nominally or in any other way a part of the
22 Office of the Secretary of State.

23 MR. J. PRICE: You said...

24 MR. J. AMMEEN: I didn't -- not the
25 Commission, the Division is what I said. If I

68

1 misspoke, I apologize.

2 MR. J. AMMEEN: No, you said Division.

3 CHAIRMAN T. WHEELER: You said Division and
4 then you said Commission.

5 MR. J. AMMEEN: And I'm saying that this
6 body isn't.

7 MR. J. PRICE: Oh, I hear you.

8 CHAIRMAN T. WHEELER: All right.

9 VICE CHAIRMAN A. LONG: Do I understand --
10 first of all, let me commend both of y'all.
11 This subject matter was -- while it's things
12 that we studied in law school, I've not had much
13 of a chance to get into this area in a number of

14 years, but these briefs were very well done and
15 they were informative and I appreciate it -- for
16 one, appreciated that.

17 And I tried to read these things
18 chronologically and there are at least -- as best
19 we can, we've got the -- and then as they were
20 circulated upon filing. Do I understand, Mr.
21 Price, that your feeling is if we had a single ALJ
22 cooperatively with the Secretary of State, you
23 would have entered a single set of findings, then
24 each agency -- well, I don't -- the Secretary of
25 State is an elected official and this agency is

69

1 appointed by the governor, could then have issued
2 their separate orders appropriately?

3 MR. J. PRICE: Well, you bring up a really
4 good point because this case will be over at
5 some point, and in the future, you're all going
6 to have to deal with this issue, I think, and
7 the more we dug into it, the more we realized
8 that if the two co -- I don't know if you're
9 co -- yeah, you're co-equal, the Secretary of
10 the State and the Commission are co-equal, if
11 you don't join together at the beginning of it
12 under Burtrum, I think that the non-joining
13 party loses the right to either go for money or
14 suspension.

15 So if you want to suspend and fine, I think to
16 pursue your suggestion, that you both jointly
17 appoint an ALJ. He does the fight -- fight -- fact

18 finding, he comes back to the Secretary of State
19 with his results and the Secretary of State says I
20 fine you a gazillion dollars or no dollars,
21 whatever, and he comes back to you and you look at
22 it and say I suspend you for no days or five years
23 or whatever, and I think that's the way it's going
24 to have to work.

25 So maybe that's one of good fallouts from this 70

♀

1 case is because the statute's pretty quiet on this
2 area, but the cases, I think, force this
3 conclusion.

4 VICE CHAIRMAN A. LONG: So my point is we
5 get to the ultimate decision that there could
6 be -- as I understand, the Secretary of State's
7 limited remedy is monetary punishment and the
8 legislature has chosen to give him that
9 authority and has chosen to put upon us the
10 responsibility of license suspension or license
11 to sell suspension for a period of time, --

12 MR. J. PRICE: Right.

13 VICE CHAIRMAN A. LONG: -- that the only
14 way that you could have both of those on the
15 same set of facts, but they have to be heard and
16 determined at the same time.

17 MR. J. PRICE: I think that's what the case
18 law says.

19 VICE CHAIRMAN A. LONG: What would then
20 prevent this body from simply adopting the
21 findings of the ALJ at this point in time and

INDIANAELECTIONCOMMISSION08-27-07.txt
22 say we're -- we're going to defer to his
23 findings and adopt them and enter them as
24 findings with this agency?

25 MR. J. PRICE: It's -- it's the Burtrum

71

1 case because the Commission failed to intervene,
2 even though it had notice of what was going on.

3 CHAIRMAN T. WHEELER: I will tell you this,
4 what I would do -- like to do is take a break
5 for a couple of minutes. I really would like to
6 see a copy of the Burtrum case. I did not read
7 the Burtrum case. It sound to me like your
8 entire argument is based upon the Burtrum case.

9 I will tell you I've litigated this issue a
10 bunch of times, and from your standpoint, I
11 routinely lost these arguments. You and I have
12 litigated to the Indiana Court of Appeals a
13 collateral estoppel res judicata case in the
14 Michael -- Scott County case.

15 So if I could get someone -- if we can just
16 take a break for just a minute and get a copy of
17 the Burtrum case.

18 VICE CHAIRMAN A. LONG: Can you go to the
19 cite?

20 MS. L. BARNES: Is this -- what cite are
21 you requesting?

22 VICE CHAIRMAN A. LONG: 440 N.E.2d 1147.
23 It's on Page 16 of Mr. Price's brief.

24 CHAIRMAN T. WHEELER: Here it is right
25 here. It's 440 N.E.2d 1147. Jerry will find

72

1 it.

2 MR. J. BONNETT: 440 N.E.2d 1147.

3 VICE CHAIRMAN A. LONG: Why don't you print
4 off about four, five copies of it, six or
5 however...

6 MS. P. POTESTA: Thank you.

7 CHAIRMAN T. WHEELER: While that's pending,
8 anything else? Is there anything else we can
9 address while we're sitting here or do you want
10 to take a break?

11 VICE CHAIRMAN A. LONG: Maybe Jim would --
12 do you have anything you want to say to that?

13 MR. J. AMMEEN: Your Honor, I believe that
14 your question actually is very practical. If
15 indeed Mr. Price's argument is correct, why
16 can't you just go ahead and adopt the findings
17 entered into the OSS litigation, that we could
18 move right ahead to the penalty phase and we
19 might be able to get to some kind of settlement
20 discussion, if that's all this agency had to do,
21 if you do not have to sit back and enter
22 findings of fact, but you can't walk away from
23 the responsibility, to license in the area so...

24 VICE CHAIRMAN A. LONG: Do you agree that
25 the statutory violations alleged -- I've not

♀

73

1 read the proceedings in the Secretary of State's
2 office proceeding, are the statutory violations

3 the same as the one that the Division is...

4 MR. J. AMMEEN: There are different
5 allegations put in this case, and particularly,
6 with respect to Count IV.

7 VICE CHAIRMAN A. LONG: I mean I -- that
8 might preclude in my mind a blanketed adoption
9 without the opportunity to be heard on matters
10 that were unique to this proceeding.

11 MR. J. AMMEEN: We actually address the
12 differences in our surreply, which I'd be happy
13 to go through it again or leave that to you to
14 review at your...

15 VICE CHAIRMAN A. LONG: Since we're
16 waiting, I don't mind him going through it again
17 within some level of brevity. I've learned that
18 the judges at home will thank you all.

19 COMMISSION MEMBER S. RIORDAN: If I can
20 just...

21 CHAIRMAN T. WHEELER: I believe that
22 Commissioner Riordan has a question.

23 COMMISSION MEMBER S. RIORDAN: I think this
24 is -- this is part and parcel of Commissioner
25 Long's question, but will help me understand a

74

1 little bit better. Maybe it's more directed to
2 the (indiscernible). And the number I am
3 addressing a former adjudication case like this
4 one during a preclusion or claimed preclusion
5 and I try to chart out or total up the parties
6 and the claims.

7 And so I'm interested in hearing from you your
8 take on I think what Jim is going to talk about --
9 what Jim would be responding to Tony's question
10 about identity of claims.

11 But I'm interested in hearing Mr. Price's
12 response on identity of parties, because I think if
13 we don't have identity of parties, that's the end
14 of the argument. But I think that may also bear on
15 the waiver issue that we're going to be looking at
16 when we get a chance to review the Burtrum case.

17 So if you could explain to me how the parties
18 in that -- the Secretary of State's action and this
19 action are identical, that would be very helpful to
20 me.

21 MR. J. PRICE: Sure. On Pages 13 through
22 17 of our reply brief, we deal with that, since
23 it is raised in Mr. Ammeen's response brief, and
24 essentially we would quote what I just quoted a
25 minute ago, that it's nominally a division of

75

1 the OSS -- if it's a nominally a division of the
2 OSS, then it's nominally a division of the OSS
3 and I don't see...

4 COMMISSION MEMBER S. RIORDAN: But wouldn't
5 you acknowledge that a bipartisan body
6 within -- whether it's within or nominally a
7 division and that it's -- I mean, if it weren't
8 distinct in some fashion, why would it be
9 bipartisan and why would it have distinct
10 responsibilities that in the wisdom of the

11 general assembly can only be carried out on a
12 bipartisan basis?

13 MR. J. PRICE: Because it's the charging
14 party.

15 CHAIRMAN T. WHEELER: Let me ask a similar
16 question to that. Dale, can the -- who can
17 remove the heads, the co-heads? Can the
18 Secretary of State remove the Democratic head?

19 MR. D. SIMMONS: The Secretary of State
20 neither hires nor can the Secretary of State
21 fire their government -- a governor appointee
22 for a term.

23 CHAIRMAN T. WHEELER: Both -- both heads;
24 correct?

25 MR. D. SIMMONS: Both heads.

76

‡

1 CHAIRMAN T. WHEELER: Republican and
2 democrat?

3 MR. D. SIMMONS: They're nominated, yes,
4 sir.

5 CHAIRMAN T. WHEELER: What about -- what
6 about the counsel, your people in your position?

7 MR. D. SIMMONS: We are hirees --

8 CHAIRMAN T. WHEELER: Of?

9 MR. D. SIMMONS: -- of the co-directors.

10 CHAIRMAN T. WHEELER: Of the co-directors.

11 MR. J. PRICE: Under which budget?

12 CHAIRMAN T. WHEELER: So can the Secretary
13 of State terminate your employment?

14 MR. D. SIMMONS: No. The co-director can
Page 66

15 terminate my employment.

16 CHAIRMAN T. WHEELER: Is that the same way
17 with our staff all the way down?

18 MS. P. POTEESTA: Yes.

19 CHAIRMAN T. WHEELER: When I refer to our
20 staff, I guess is that correct or not?

21 MR. D. SIMMONS: That's correct.

22 CHAIRMAN T. WHEELER: That being said, the
23 Commission. So as --

24 VICE CHAIRMAN A. LONG: I'm not for sure
25 they're our staff.

77

♀

1 CHAIRMAN T. WHEELER: I kind of note...

2 VICE CHAIRMAN A. LONG: I've always
3 wondered if we don't have any -- the same
4 question.

5 CHAIRMAN T. WHEELER: We don't have any
6 hiring or firing either; right?

7 MS. P. POTEESTA: No.

8 VICE CHAIRMAN A. LONG: I think they're --
9 they're charged with rendering assistance to us.
10 Actually, Mr. Price raised a good question, does
11 the Secretary of State submit our budget or do
12 we submit our --

13 CHAIRMAN T. WHEELER: Which budget?

14 VICE CHAIRMAN A. LONG: The Division
15 budget, who submits that?

16 MR. D. SIMMONS: The Division and the
17 co-directors submit their budget.

18 VICE CHAIRMAN A. LONG: To whom?
Page 67

19 MR. D. SIMMONS: Not been through the
20 process but the budget committee.

21 MS. P. POTEESTA: Budget committee with the
22 State.

23 VICE CHAIRMAN A. LONG: Not to the
24 Secretary of State?

25 MR. D. SIMMONS: No.

78

1 MS. P. POTEESTA: No.

2 CHAIRMAN T. WHEELER: You're not part of
3 the Secretary of State's budget; correct?

4 MS. P. POTEESTA: No.

5 MR. D. SIMMONS: (Indiscernible) budget.

6 MS. P. POTEESTA: The only thing we have
7 them would be to have (indiscernible).

8 COMMISSION MEMBER S. RIORDAN: So going
9 back to my question, is the only basis for your
10 it at this of parties' argument that the
11 division is nominally a division of the
12 Secretary of State?

13 MR. J. PRICE: And the statutory reference
14 that Mr. Ammeen made a moment ago, that under
15 3-6-4.2-1 there's a reference to the Secretary
16 of State performing administrative duties
17 relating to the administration of elections by
18 the State and the Election Division assisting
19 the Secretary of State in the administration of
20 the title.

21 CHAIRMAN T. WHEELER: Well, assist -- but
22 that doesn't -- I mean, doesn't that language

23 beg the question which is there's no reason to
24 say they assist him with it if they're -- if
25 they're under his direction; correct? I mean,

79

1 the word "assistance" indicates they're a
2 separate entity. If they were part of him,
3 you'd just say the Secretary of State
4 administers the election.

5 COMMISSION MEMBER S. RIORDAN: Right.

6 MR. J. PRICE: Well, the statute actually
7 refers to the fact that this commission as
8 opposed to the division is an independently
9 appointed commission of two Republicans and two
10 Democrats.

11 So in writing that, one wonders why the
12 drafters stuck in as opposed to the Division in a
13 sentence right after the election division assists
14 the Secretary of State in carrying out the
15 responsibilities assigned as Indiana's Chief
16 Election Office.

17 CHAIRMAN T. WHEELER: Jim, how do you
18 respond to 3-6-4.2-1 that says the Election
19 Division is established within the Office of the
20 Secretary of State?

21 MR. J. AMMEEN: Well, the Commission
22 doesn't have a regular staff; correct?
23 You -- you rely on the division to assist you?

24 CHAIRMAN T. WHEELER: And are capable, I
25 believe.

80

1 MR. J. AMMEEN: And they need to be lodged
2 somewhere in the limestone. That's how I think
3 that wound up there, is that they had to put it
4 somewhere. The legislature had to say that
5 well, we'll put it within the Office of
6 Secretary of State so it sits across the hall
7 from the Securities Division or upstairs in the
8 Securities Division and two floors up from the
9 Corporations Division, but it doesn't -- it
10 doesn't have the same kind of direct report to
11 the Secretary of State.

12 They need the Secretary of State to provide
13 assistance where it needed on election matters, but
14 it is managed by the Secretary of State where those
15 offices are.

16 MR. J. PRICE: It's still nevertheless a
17 difficult problem to explain to a reviewing
18 court that the Division is not within the Office
19 of the Secretary of State when the statute says
20 it is.

21 VICE CHAIRMAN A. LONG: And this is one of
22 the reasons that I think deferring to a court is
23 like an administrative practice. I've been on
24 the board long enough to know that that
25 relationship between the Division and the Office

♀

81

1 of the Secretary of State has not always been
2 harmonious, and certainly, has never been

INDIANAELECTIONCOMMISSION08-27-07.txt
3 subservient from my just observation over the
4 ten or so years that I've been on the board
5 where the Secretary of State has in fact tried
6 to exert administrative control over the
7 Division.

8 And over the years that probably predates
9 everyone here that has not always been -- well has
10 never been successful to my knowledge -- I'm sorry,
11 Sarah, you were -- started to say something?

12 COMMISSION MEMBER S. RIORDAN: No. No.
13 I -- I -- I agree with that observation, but
14 what I'm interested in -- I mean, I guess what
15 I'm thinking about is, you know, where does the
16 notion that the parties are identical come from?

17 I mean, in the case I have right now, I
18 represented a client in an administrative
19 proceeding and then the exact same government
20 entity got sued in federal court. So there's no
21 question that the parties are the same. I mean, it
22 was, you know, Smith versus Doe and it's Smith
23 versus Doe.

24 But here, because there's been this specific
25 carve out and creation of a bipartisan division to 82

♀
1 perform certain tasks and then the creation of this
2 division to look out for certain matters of public
3 interest into issues certain -- to give certain
4 remedies all under this bipartisan framework -- I
5 mean, if we were -- if we were part and parcel and
6 one and the same as the Secretary of State, why

INDIANAELECTIONCOMMISSION08-27-07.txt
7 would there be all of those distinctions?

8 MR. J. PRICE: I'm not saying that there's
9 a hundred percent overlap.

10 COMMISSION MEMBER S. RIORDAN: Because I
11 think under the rules of former adjudication, I
12 think there needs to be a hundred percent
13 overlap, particularly, when we're dealing with
14 issues of public interest so that there's
15 no -- there's no gap. But if you think there's
16 more to say about that, let me know.

17 MR. J. PRICE: Well, actually, that's
18 contained within our argument. You don't have
19 to have a complete overlap as long as there's a
20 substantial overlap. When the general assembly
21 put the division within the office of Secretary
22 of State and the Secretary of State brought an
23 action against MicroVote, took all the
24 discovery, appointed an ALJ, entered on final
25 order, and then that same process came to you

♀

83

1 and said we'd like to do it again, that's...

2 CHAIRMAN T. WHEELER: So the -- the basis
3 of your argument is the fact that the
4 claimant...

5 MR. J. PRICE: The same claimant -- that
6 was pretty quick.

7 CHAIRMAN T. WHEELER: There was copying and
8 collating.

9 MR. J. AMMEEN: Pardon me, are we going to
10 go in recess for a few minutes?

11
12 deliberative juncture, we may -- we're trying --
13 you got something -- if you want to say
14 something, I'm all for it.

15 MR. J. AMMEEN: No. I wouldn't mind making
16 a pit stop.

17 CHAIRMAN T. WHEELER: Oh.

18 VICE CHAIRMAN A. LONG: Oh.

19 CHAIRMAN T. WHEELER: Far be it for us to
20 preclude anybody from making a pit stop.

21 VICE CHAIRMAN A. LONG: (Indiscernible)
22 preclude...

23 CHAIRMAN T. WHEELER: We'll go -- we'll go
24 off the record here while we're...

25 VICE CHAIRMAN A. LONG: Go in recess for a

84

1 moment here to...

2 (A recess was taken.)

3 CHAIRMAN T. WHEELER: All right. Let's go
4 back on the record. Now as I understand it,
5 Mr. Price, you're -- you're relying for
6 your -- not the it at this of parties' argument,
7 but for your collateral estoppel argument,
8 basically the fact that the Commission -- is it
9 the Commission or -- I assume it must be the
10 Commission didn't intervene, that the Commission
11 is somehow bound the Secretary of State's
12 decision; correct, based upon this Burtrum case?

13 MR. J. PRICE: The Burtrum case was cited
14 on Page 16 for this point, it says on this point

INDIANAELECTIONCOMMISSION08-27-07.txt
15 that the Division can't avoid res judicata by
16 depicting itself as indistinguishable from the
17 Commission because the Commission is bound by
18 the Secretary of State's final order also.

19 CHAIRMAN T. WHEELER: So your position is
20 the Commission is bound as well?

21 MR. J. PRICE: Correct.

22 CHAIRMAN T. WHEELER: And I want to know
23 based upon reading this Burtrum case, what power
24 the Commission had to intervene in the Secretary
25 of State's...

♀

85

1 MR. J. PRICE: How to intervene?

2 CHAIRMAN T. WHEELER: Right.

3 MR. J. PRICE: Oh, I think you would have
4 the power to intervene in any election case in
5 the state that's instituted by the chief
6 election office.

7 CHAIRMAN T. WHEELER: Just give me a
8 statutory -- what empowers us to intervene?

9 MR. J. PRICE: Under AOPA.

10 CHAIRMAN T. WHEELER: Under AOPA? why
11 would we have the power -- I mean, I would
12 assume that would be under the election code, we
13 would have some power to intervene if we had a
14 power to intervene.

15 MR. J. PRICE: well, every state agency has
16 the power to intervene in a subject matter.

17 CHAIRMAN T. WHEELER: I'm not sure we're a
18 state agency either, the Commission, because

19 you're making a marked distinction between the
20 division and the commission, and I'm struggling
21 with this.

22 MR. J. PRICE: Right.

23 CHAIRMAN T. WHEELER: And let me tell you
24 what I'm struggling with. As I understand it,
25 the legislature very deliberately created two

86

1 sets of penalties for similar violations. Now
2 we have an additional marketing penalty that I
3 don't think the Secretary of State has, okay.

4 If you market unlicensed software, I believe
5 that's the -- correct me if I'm wrong, that's the
6 one distinction between the statutory violations
7 and the Secretary of State and ours and then we
8 have different penalties for a bunch of similar
9 conduct.

10 And what I'm struggling with is it seems to me
11 that the general assembly's created two different
12 remedies, and you're saying -- what you're saying
13 to me is our failure -- the Commission's failure to
14 intervene in the Secretary of State's is a -- is a
15 waiver of our jurisdiction to impose our penalty
16 and our statutory remedy. And that's -- that's...

17 MR. J. PRICE: Right.

18 CHAIRMAN T. WHEELER: I just don't buy
19 that. I've just got to tell you, I don't buy
20 that. I mean, in reading Burtrum, Burtrum says,
21 and you quoted a portion of this, when a party
22 having interest in the subject of a lawsuit, all

23 right -- you claim we have an interest in the
24 subject matter of the lawsuit because it's a
25 violation, okay, has notice of a trial

87

1 thereon -- I assume that's the Secretary of
2 State's proceeding, and fails to intervene, and
3 I don't understand where the commission has the
4 power to intervene in the Secretary of State's
5 proceeding.

6 I mean, if -- if the general assembly had
7 wanted us -- these to be single proceedings, I
8 assume they would have said that -- they didn't --
9 we -- I don't see where we are given authority as a
10 commission to intervene, particularly, when we
11 operate -- I mean, that's like a judge who's
12 hearing a case intervening in another proceeding
13 and I don't -- I just don't understand that.

14 MR. J. PRICE: Well, I'm not sure that I'll
15 be able to convince you of that beyond what I've
16 already said, which is if it's a case involving
17 a vendor and you have the right to suspend the
18 vendor and you know that the vendor's being
19 tried in a very public manner and don't
20 intervene, then I think under this case and
21 general principles of law, frankly...

22 CHAIRMAN T. WHEELER: The commission loses
23 all jurisdiction to punish that vendor?

24 MR. J. PRICE: Sure.

25 CHAIRMAN T. WHEELER: That's your -- that's

88

1 your core argument; correct? what if the vendor
2 is being tried in a criminal proceeding?

3 MR. J. PRICE: I don't see how that you
4 could inter -- well, sure. You mean criminal
5 relating to election systems?

6 CHAIRMAN T. WHEELER: Sure. Let's say
7 they're engaged --

8 COMMISSION MEMBER S. RIORDAN: Fraud.

9 CHAIRMAN T. WHEELER: -- in some kind of
10 fraud election system?

11 COMMISSION MEMBER S. RIORDAN: Fraud.

12 CHAIRMAN T. WHEELER: Correct.

13 MR. J. PRICE: Well, that's a little tough
14 to intervene in a criminal proceeding.

15 CHAIRMAN T. WHEELER: Well, I understand
16 that. That's my concern. But the logic of your
17 argument...

18 MR. J. PRICE: I'm probably not going to
19 convince you but that's -- that's our...

20 CHAIRMAN T. WHEELER: well, I don't
21 understand it. I mean, I'm -- you and I have
22 done this a long time. I'm trying to -- that's
23 what I'm struggling to understand because they
24 make -- they make a lot of point in the Burtrum
25 case. They talk about (indiscernible), possess

89

1 power to move for intervention.

2 MR. J. PRICE: Right.

3 CHAIRMAN T. WHEELER: And I don't see where
Page 77

4 statutorily or anywhere elsewhere the commission
5 possesses power to move -- to intervene in a
6 situation like that.

7 MR. J. PRICE: well, it -- it probably
8 would have been a nullity in a sense because the
9 charging parties is identical in both cases. If
10 you decided you wanted to, quote, intervene the
11 same people would brought the first charge or
12 the people who brought you this charge so I
13 don't know how there would be any difference.

14 VICE CHAIRMAN A. LONG: Now let me ask,
15 what do you have -- I have not seen anything --
16 is the complaint -- is it -- and if I've missed
17 this, I apologize, but the complaint that was
18 brought before the Secretary of State, is that a
19 part of our record?

20 MR. J. PRICE: No.

21 VICE CHAIRMAN A. LONG: And are you telling
22 us today that the Indiana Election Division
23 filed a charge in front of the Secretary of
24 State that was litigated by the Secretary of
25 state?

‡

90

1 MR. J. PRICE: Sure.

2 VICE CHAIRMAN A. LONG: Is that true?

3 MR. J. AMMEEN: Your Honor, I think maybe
4 we need to have Mr. Simmons who was the only
5 person who was around at the time that the
6 Secretary of State's claims were filed in the
7 OSS litigation and let him tell you if

8 they -- if he participated in the drafting of
9 that notice of violation. I mean, I -- I wasn't
10 there, but I think the answer is no.

11 VICE CHAIRMAN A. LONG: I mean, I -- as
12 it's been pointed out in the proceedings, I
13 stopped by one afternoon to see what was going
14 on and we've got -- we've had that referred to
15 and it's true and I saw people I didn't know
16 that were prosecuting the case.

17 You know, I guess maybe Mr. Simmons can
18 address if -- like in this case, the Division had
19 outside counsel to do that -- I mean, can you -- do
20 you mind if I ask him that?

21 CHAIRMAN T. WHEELER: No, I -- go ahead. I
22 have no idea.

23 VICE CHAIRMAN A. LONG: Can you clear that
24 issue up?

25 MR. D. SIMMONS: Well, my -- my

91

♀

1 participation has already been referenced was as
2 a witness. I was called as a witness by the
3 Secretary of State's Office.

4 CHAIRMAN T. WHEELER: You and Mr. King as
5 well?

6 MR. D. SIMMONS: Yes.

7 CHAIRMAN T. WHEELER: In the process -- the
8 question I think Tony is getting at is -- is so
9 who from the Secretary of State's Office
10 prosecuted the case?

11 MR. D. SIMMONS: I think initially it was

12 in-house counsel or Counsel Jerry Bonnet.

13 CHAIRMAN T. WHEELER: Let the record -- let
14 the record, you're pointing at Mr. Bonnet --

15 MR. D. SIMMONS: Yeah, Jerry Bonnet.

16 CHAIRMAN T. WHEELER: -- who is here today?

17 MR. D. SIMMONS: Yeah. And -- and I think
18 subsequently they had somebody -- they hired
19 counsel, Tom John.

20 MR. J. AMMEEN: But you don't know this for
21 certain anyway; correct, because you weren't
22 there?

23 CHAIRMAN T. WHEELER: The answer -- from
24 your perspective, the Division --

25 MR. J. BONNETT: Not me.

92

♀

1 CHAIRMAN T. WHEELER: -- did not -- the
2 Division did not prosecute that case; correct?

3 MR. D. SIMMONS: We did not prosecute that
4 case.

5 CHAIRMAN T. WHEELER: The Division did not
6 sign off on the complaint?

7 MR. D. SIMMONS: No.

8 CHAIRMAN T. WHEELER: All right. The
9 Division did sign off on the complaint here?

10 MR. D. SIMMONS: Yes.

11 CHAIRMAN T. WHEELER: So the Division was
12 not a party to both litigations, the Secretary
13 of State was a party to that one. The Division
14 is the litigator -- for my simple terms, I guess
15 I'll use Plaintiff and Defendant or Petitioner

16 and Respondent. In this case the -- just from
17 the caption, the Division is a Petitioner;
18 correct, Jim -- I'll just look at Jim?

19 MR. J. AMMEEN: Yes.

20 CHAIRMAN T. WHEELER: And in that case --
21 well, we don't have the complaint, do we, so we
22 don't know.

23 VICE CHAIRMAN A. LONG: well, we may have a
24 copy of the caption.

25 MR. J. AMMEEN: I've brought copies of the

93

♀

1 orders in the case.

2 CHAIRMAN T. WHEELER: And some of
3 them -- I'm just looking at what's in the
4 record. I mean, I think it may already be in
5 the record. Does it just say In Re, though?

6 VICE CHAIRMAN A. LONG: No, that's ours. I
7 thought I saw something in the exhibits that had
8 a caption to it.

9 MR. J. PRICE: Mr. Chairman, I think I can
10 clear this up. The verified petition for
11 judicial review we filed included all of the
12 orders, the final order, the...

13 CHAIRMAN T. WHEELER: But was that
14 filed -- but that wasn't filed with us, though?

15 MR. J. PRICE: No, in Marion County, the
16 July 28th order, the subsequent (indiscernible).

17 MR. G. WHITE: Well, what I was going to
18 say and maybe...

19 VICE CHAIRMAN A. LONG: Here it is -- no,
Page 81

20 it's just In Re.

21 MR. G. WHITE: (Indiscernible) county, talk
22 about is a final -- is it not a final
23 attachment?

24 CHAIRMAN T. WHEELER: That's what I
25 thought. I was looking at all the exhibits.

94

1 MR. G. WHITE: (Indiscernible).

2 MR. J. AMMEEN: May I approach the panel?

3 CHAIRMAN T. WHEELER: Sure.

4 MR. J. AMMEEN: Mr. Chairman, here's a copy
5 of the order granting the Secretary of State's
6 motion. It identifies the Petitioner as the
7 Office of Secretary of State and the Respondent
8 is MicroVote General Corporation.

9 CHAIRMAN T. WHEELER: And I assume that's
10 the order that's attached to your verified
11 petition; correct?

12 MR. J. AMMEEN: That might be the
13 recommendation actually from Administrative Law
14 Judge McNeely.

15 MR. J. PRICE: Yeah, this is not the final
16 order.

17 UNIDENTIFIED SPEAKER: This is the July 20.

18 COMMISSION MEMBER D. DUMEZICH: I
19 understand. (Indiscernible). I was wanting the
20 two of them (indiscernible).

21 MR. J. PRICE: Mr. Chairman, I need to do
22 similar to what my opposing counsel did a minute
23 ago when he said he wanted a pit stop, but I

24 don't need a pit stop. I'm supposed to in front
25 of Judge Carroll at 2:30, and I'm awful late,

95

1 and I apologize for that because I really didn't
2 anticipate this would be a lengthy proceeding,
3 but...

4 CHAIRMAN T. WHEELER: Well, I think -- I
5 think we're -- are we near where we need to be
6 or not or is there any further questions from
7 the commissioners?

8 COMMISSION MEMBER S. RIORDAN: My only
9 sense is -- is that we just want to make sure
10 that everybody's had a chance to make all their
11 points.

12 CHAIRMAN T. WHEELER: Are you good with
13 that, John?

14 MR. J. PRICE: Yes.

15 CHAIRMAN T. WHEELER: Jim, are you? Are
16 you good with...

17 MR. J. AMMEEN: Yeah. I -- I guess to be
18 really brief. I think that there are -- that
19 there is not an identity of party despite the
20 nominal reference from Article 3, Section
21 6-4.2-1.

22 With respect to the Division, the commission
23 certainly is not a part of the Office of Secretary
24 of State, but the Secretary of State, even despite
25 that one section in the -- in the chapter on the

96

1 Election Division, has had no control over this
2 litigation. The Division has no control over the
3 other litigation.

4 The issue is whether or not, in terms of
5 whether you've got privity, it's control of the
6 litigation. It's not there. It just never was
7 there and it never will be there.

8 And so there is no identity of parties. We
9 also have no identity on the issues so the motion
10 to dismiss should be denied on both grounds.

11 MR. J. PRICE: Mr. Chairman, if I may
12 just -- one quick sentence briefly.

13 CHAIRMAN T. WHEELER: I'm just trying to
14 get you -- okay.

15 MR. J. PRICE: I understand but I...

16 VICE CHAIRMAN A. LONG: You have a right to
17 close, as far as I'm concerned.

18 MR. J. PRICE: Well, this might close.
19 Based on the statement that was just made and
20 looking at the Burtrum case, on Page 8, it says
21 we accept the statement that identity of parties
22 is not a mere matter of form but of substance.
23 Parties nominally the same may be in the legal
24 effect different and parties nominally different
25 may be in legal effect the same. It's our

97

1 argument that the parties here are in legal
2 effect the same.

3 CHAIRMAN T. WHEELER: You like the second

4 part of that sentence, and I believe Mr. Ammeen
5 likes the first part of the sentence. I
6 happened to highlight that and I have a little
7 star next to it.

8 VICE CHAIRMAN A. LONG: So did I.

9 CHAIRMAN T. WHEELER: All right. In
10 any -- in any event, we'll leave it at that. I
11 think since Mr. -- Commissioner Long is keeping
12 me on Robert's Rules of Order, I need some kind
13 of motion on the pending motion to dismiss.

14 VICE CHAIRMAN A. LONG: I would move that
15 we deny the motion to dismiss.

16 CHAIRMAN T. WHEELER: I have a motion.

17 COMMISSION MEMBER D. DUMEZICH: Second.

18 CHAIRMAN T. WHEELER: Second. Motion's
19 made and seconded, any further discussion?

20 (No response.)

21 VICE CHAIRMAN A. LONG: I think we've --
22 no, I don't -- I don't have anything further.

23 COMMISSION MEMBER D. DUMEZICH: I'm
24 convinced that the parties are nominally
25 different and -- and different parties.

98

1 COMMISSION MEMBER S. RIORDAN: But one --
2 and one other point that I -- that I found
3 compelling that's supporting my position on this
4 issue, and that is -- you know, there's been a
5 petition for judicial review.

6 I don't know that we have a final adjudication
7 that could be binding, and that to me is -- is --

8 that's probably -- between that and the identity of
9 parties' issue, which admittedly is a really tricky
10 legal question, that's really kind of the linchpin
11 for me.

12 VICE CHAIRMAN A. LONG: And I would say
13 that I think we're mixing out here -- in all
14 deference to you, that I don't -- it wouldn't
15 make a difference to me if they had us rule or
16 it was not appealed.

17 I think that the other issues raised would
18 still give this commission jurisdiction because I
19 think that's the legislation, is that our purpose
20 here is different than the purpose given to the
21 Secretary of State in enabling legislation.

22 COMMISSION MEMBER D. DUMEZICH: And
23 different remedies.

24 CHAIRMAN T. WHEELER: The motion's been
25 made and seconded, any further discussion?

♀

99

1 (No response.)

2 CHAIRMAN T. WHEELER: Hearing none, I'll
3 call the vote on favor of the motion to deny the
4 motion -- the Respondent's motion to dismiss,
5 signify by saying aye?

6 THE COMMISSION: Aye.

7 CHAIRMAN T. WHEELER: Those opposed same
8 sign?

9 (No response.)

10 CHAIRMAN T. WHEELER: Motion carries
11 unanimously. That leaves us with a final issue

INDIANAELECTIONCOMMISSION08-27-07.txt
12 that was tabled which I which bring back for a
13 motion.

14 VICE CHAIRMAN A. LONG: I move to -- remove
15 from the table the issue of the appointment of
16 an ALJ.

17 COMMISSION MEMBER D. DUMEZICH: Second it.

18 CHAIRMAN T. WHEELER: All in favor, signify
19 by saying aye?

20 THE COMMISSION: Aye.

21 VICE CHAIRMAN A. LONG: You're getting
22 better -- aye.

23 CHAIRMAN T. WHEELER: I always ask for
24 discussion. All opposed, same sign?

25 (No response.)

100

‡

1 CHAIRMAN T. WHEELER: Motion carries. That
2 motion is back on the table. Let me ask a
3 preliminary question of legal counsel. With
4 respect to appointment of an ALJ -- well, let me
5 ask the parties. Would there be any agreement
6 on an ALJ?

7 MR. J. AMMEEN: Mr. Chairman, at --

8 CHAIRMAN T. WHEELER: Surely not so...

9 MR. J. AMMEEN: Well, no. Actually, before
10 we went into the mediation, if you recall, you
11 and Commissioner Riordan participated in a
12 conference call with Mr. Price, Mr. White and
13 myself. I believe -- I believe all constituents
14 of my client were present as well.

15 The -- we had actually entertained some

16 discussion at that point before then, and among
17 other things, I had floated the idea that we would
18 agree to the appointment of a -- of an ALJ, whether
19 or not we share the costs, but we had not discussed
20 individuals, if I'm not mistaken.

21 CHAIRMAN T. WHEELER: ALJ or a mediator?

22 MR. J. AMMEEN: ALJ. And I don't know if
23 that's possible under statute, but it was
24 actually an attempt to try and figure out a way
25 to work through the motions with an ALJ.

101

♀

1 If I might be so bold to make a suggestion, I
2 think that somebody with the career and stature,
3 somebody like Sue Shields would be an ideal
4 candidate if that were to be -- if she would be
5 willing to serve. I don't know if this is a
6 budgetary question in terms of what it takes.

7 CHAIRMAN T. WHEELER: I believe she's
8 preferring to golf these days.

9 MR. J. AMMEEN: That might well be.

10 CHAIRMAN T. WHEELER: So that's what I last
11 heard.

12 MR. J. AMMEEN: Wouldn't blame her if she
13 didn't want to stick her nose into this but
14 somebody that has (indiscernible) and worn a
15 black robe for some period of time and has been
16 out of the political ball game might be the
17 appropriate person to also help resolve any
18 pretrial and discovery issues that need to move
19 forward so that we can get this -- this case

INDIANAELECTIONCOMMISSION08-27-07.txt
20 moving on a fast track.

21 MR. J. PRICE: Mr. Chairman, why don't you
22 give us the set number of days to try to find
23 somebody that we can agree (indiscernible).

24 CHAIRMAN T. WHEELER: Let me do this. I'm
25 not inclined -- from my standpoint on the

102

1 commission, I'm not inclined to let this drag
2 out any longer and what I want to do is get
3 somebody appointed today because I think it's
4 going to take a full commission to appoint an
5 ALJ formally, correct me if I'm wrong, Gordon?

6 MR. G. WHITE: Yes, sir.

7 CHAIRMAN T. WHEELER: It will take an order
8 of the Commission, and having the entire
9 commission here is -- is somewhat difficult to
10 do; certainly, for -- for my fellow commission
11 members. Discussion with respect to an ALJ?

12 COMMISSION MEMBER D. DUMEZICH: Do we need
13 to (indiscernible)?

14 VICE CHAIRMAN A. LONG: I don't know any of
15 them so I'm -- I'm deferring to the knowledge of
16 the center state folks.

17 COMMISSION MEMBER D. DUMEZICH: With time
18 being of the essence...

19 MR. J. AMMEEN: Your Honor, I'm involved in
20 the Lawrence Utilities' litigation and he is
21 representing the opposing party. I think would
22 not be appropriate.

23 MR. J. PRICE: That would be an identity of

24 parties, I think we'd have to admit, but I could
25 go along with Sue Shields. That would be fine.

103

1 COMMISSION MEMBER S. RIORDAN: I'm not
2 calling her.

3 CHAIRMAN T. WHEELER: What?

4 COMMISSION MEMBER S. RIORDAN: I'm not
5 calling her.

6 CHAIRMAN T. WHEELER: What I want to do is
7 I'd like to see this expedited. I'm trying to
8 figure out how to -- tell you what, I'll give
9 the parties a week -- commission members -- I'll
10 give the parties a week to contact Sue Shields
11 to come up with an alternative agreeable
12 individual, otherwise, I will convene a meeting.
13 Can I -- can we teleconference -- we can
14 teleconference, can't we?

15 VICE CHAIRMAN A. LONG: I thought there was
16 something that in the legislature that
17 allowed...

18 CHAIRMAN T. WHEELER: I thought we could.

19 VICE CHAIRMAN A. LONG: I thought there --
20 I truly did think there was something in the
21 last session of the legislature that -- not
22 because of this body but I represented another
23 group at home and we had to get a bill passed to
24 lower the quorum so we could have a meeting.

25 MR. G. WHITE: You guys are all over the

104

1 place.

2 COMMISSION MEMBER S. RIORDAN: Just by
3 way -- by rule -- by rule of suggestion -- I
4 mean, if the parties do it by agreement business
5 then we don't need to --

6 CHAIRMAN T. WHEELER: Right. I'm just
7 thinking if they don't.

8 COMMISSION MEMBER S. RIORDAN: -- really do
9 anything.

10 CHAIRMAN T. WHEELER: I was going to --

11 COMMISSION MEMBER D. DUMEZICH: Let's just
12 call another meeting.

13 CHAIRMAN T. WHEELER: I was going to set a
14 meeting in, you know, two weeks. I just don't
15 want to drag you guys down here for a five
16 minute meeting.

17 COMMISSION MEMBER S. RIORDAN: Yeah. We
18 just -- it seems to be sending a pretty strong
19 message about why they need to agree?

20 CHAIRMAN T. WHEELER: All right.

21 VICE CHAIRMAN A. LONG: We can run proxies
22 on...

23 CHAIRMAN T. WHEELER: All right. So what
24 we'll do -- what we'll do is set a meeting
25 within the next 14 days. I'll have to

105

1 check -- I'll get calendars from everybody.
2 we'll run calendars and see what we look at.
3 But pretty much, 14 days from now, if you guys
4 haven't agreed, we'll appoint somebody.

5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

MR. J. PRICE: Okay.

CHAIRMAN T. WHEELER: If that's -- if the Commission is comfortable with that. All right.

MR. J. AMMEEN: You have a motion for amendment of the prehearing order or...

CHAIRMAN T. WHEELER: I prefer to sit on that right now and wait til we see if we have an ALJ and then we'll let you deal with...

VICE CHAIRMAN A. LONG: Can I ask counsel, now --

MR. G. WHITE: Yes, sir.

VICE CHAIRMAN A. LONG: Now the motion to dismiss, I don't do administrative practice work, once that's been resolved, isn't there not a time frame for an answer to be filed -- there would be in a civil litigation, but I don't know -- I don't know...

CHAIRMAN T. WHEELER: Your time is running, John.

MR. J. PRICE: (Indiscernible).

VICE CHAIRMAN A. LONG: Is it, okay.

106

♀

1
2
3
4
5
6
7
8

CHAIRMAN T. WHEELER: Okay.

VICE CHAIRMAN A. LONG: I mean, that's -- that gets -- I -- my goal is to move it forward and a place that allows all of you...

CHAIRMAN T. WHEELER: (Indiscernible) on the answer, then you guys either get an ALJ and you guys -- that's your problem with them directly.

9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

1
2
3
4
5
6
7
8
9
10
11
12

MR. J. PRICE: Okay.

CHAIRMAN T. WHEELER: There's no reason for us to try to amend anything until we got that figured out.

MR. J. PRICE: Thanks for expeditiously.

CHAIRMAN T. WHEELER: I think we were expeditiously looking for a couple of people. Anything further?

VICE CHAIRMAN A. LONG: If you need a --

CHAIRMAN T. WHEELER: I'll entertain a motion to adjourn.

MR. J. PRICE: An excuse.

VICE CHAIRMAN A. LONG: If you need a pass -- if you need a pass for the judge...

COMMISSION MEMBER D. DUMEZICH: Motion to adjourn.

CHAIRMAN T. WHEELER: Second.

107

♀

VICE CHAIRMAN A. LONG: Second.

CHAIRMAN T. WHEELER: Motion's been made and seconded, all in favor, signify by saying aye?

THE COMMISSION: Aye.

CHAIRMAN T. WHEELER: Those opposed?

(No response.)

COMMISSION MEMBER S. RIORDAN: Thank you.

CHAIRMAN T. WHEELER: Thank you, guys.

(At this time the proceedings were adjourned.)

13
14
15
16
17
18
19
20
21
22
23
24
25

♀