

**Indiana Election Commission**  
**Minutes**  
**September 18, 2006**

**Members Present:** Thomas E. Wheeler, II, Chairman of the Indiana Election Commission ("Commission"); Ryan Poor as proxy for S. Anthony Long, Vice Chairman of the Commission; Dan Dumezich, member of the Commission; Sarah Riordan, member of the Commission.

**Members Absent:** S. Anthony Long, Vice Chairman of the Commission

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

**Also Attending:** Steve Shamo, John R. Price, Maureen Bard, Mark Stratton and Janet Ellis.

**1. Call to Order**

The Chair called the September 18, 2006 meeting of the Commission to order at 3:00 p.m. in the Indiana Government Center South Conference Center, Teleconference Media Center, at 402 West Washington Street Room E-204, Indianapolis, Indiana.

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

The Chair indicated that the first item of business is the approval of Commission minutes from January 17, 2002, March 20, 2006 and April 28, 2006. The Chair asked if there were any comments regarding the minutes.

The Chair recognized Commissioner Riordan who stated that she would be reluctant to vote to approve minutes for meetings where she was not present and she indicated that she would like an opportunity to read the minutes. She stated that she knew that staff was trying to catch up with the minutes but she made a motion to table approval of the January 17, 2002 minutes to a later meeting to give her a chance to read the minutes. The motion was seconded by Commissioner Poor. The Chair called the question, and declared that with four members voting "aye" (Mr. Wheeler, Mr. Poor, Mr. Dumezich and Ms. Riordan), and no Commission member voting "no," the motion was adopted and the minutes were tabled.

The Chair inquired as to whether Commission members wanted to approve the minutes for March 20, 2006. He noted that not all Commission member present today were at that meeting were not present so he asked Commission members if they wanted to table all minutes until the Commission's next meeting.

Commissioner Riordan indicated that she attended the March 20, 2006 and April 28, 2006 meetings, however, since all members here today were not present at those meetings she would move to table these minutes as well. Commissioner Poor indicated that he would abstain from voting on the approval of these minutes since he was acting as proxy.

The Chair suggested that the Commission table the March 20, 2006 minutes but approve the April 28, 2006 minutes since these minutes were only four pages long and the minutes might have some relevance to the business on the agenda for today's meeting.

Commissioner Riordan moved to approve the April 28, 2006 minutes. Commissioner Dumezich seconded the motion. The Chair called the question, and declared that with three members voting "aye" (Mr. Wheeler, Ms. Riordan and Mr. Dumezich), and no Commission member voting "no," the motion was adopted and the April 28, 2006 Commission minutes were approved.

### **3. Request for Commission to Extend Candidate Filing Deadline**

The Chair indicated that the next item on the agenda was a petition filed by Mr. Hanke for the extension of a filing deadline for a school board race in the Michigan City area. He indicated the petition was filed pursuant to IC 3-6-4.1-17.

The Chair recognized Mr. King who directed Commission members to some emails in their packets directly following the April 28, 2006 minutes. He indicated that the first email is from Mr. Henke who notes in the email that he will not be able to attend today's meeting. He stated that the second page consists of Mr. Henke's original email which is file-marked September 18, 2006. He indicated that the email was originally sent to Mr. Kendall and states: "I am hereby requesting an extension of the filing deadline for the Michigan City Area Schools Board of School Trustee Election to be held in November. Due to the recent weather, and a State of Emergency being declared in LaPorte County, I feel that this extension is just and fair to all those who still wish to file for public office."

Mr. King then indicated that following this email there are eleven pages of emails between staff and Mr. Hanke which the Commission may review. He added that the many of the emails involve discussion of potential meeting dates. He then directed Commission members to communications from other candidates for the same position Mr. Hanke was running for. He said the first communication in the form of a faxed letter was file stamped September 18, 2006 at 9:30 a.m. and it is from Timothy A. Timm. He indicated that he would give the Commission the opportunity to review the letter.

The Chair recognized Cody Kendall who indicated that the other communication was sent to him by email from Mr. Dennis Metheny. Mr. Kendall indicated that Mr. Metheny had explained at length to him that he had advertised the filing dates for school board several times.

The Chair asked whether staff would identify the party that had the burden of proof on this petition. Mr. responded that the petitioner would bear the burden of proof and that the Commission would have to find by unanimous vote of the Commission under IC 3-6-4.1-17 that a natural disaster or other emergency makes it impossible or unreasonable for a person to perform a duty or, as applied to this case, to file a document by the time required by Title 3.

The Chair then indicated that he thought that the Commission could consider hearsay evidence but could not base its decision on hearsay alone and asked whether staff could confirm whether his understanding was correct. Mr. Simmons confirmed that there was a provision to this effect contained in AOPA.

The Chair asked whether Mr. Hanke had filed any sworn testimony. Mr. King confirmed that this was correct. The Chair then indicated that, if no sworn testimony has been provided, then all that Mr. Hanke has submitted in support of his petition is hearsay evidence. The Chair also asked staff to confirm that the evidence in opposition to the petition, the letter from Timothy Timm and the email from Mr. Metheny was also hearsay. Mr. King responded that this was correct.

The Chair indicated that the Mr. Timm's letter indicates that the clerk's office was open on the final day of filing. The Chair asked whether staff had contacted the clerk's office to confirm this. Mr. King stated that he had a conversation with the clerk's staff to confirm the clerk's office was open.

The Chair indicated that he sees that there is evidence on both sides of this case but he does not see any concrete evidence offered by the petitioner. Commissioner Dumezich suggested that the Commission may be able to take judicial notice of the fact that staff had communicated with the clerk's office. The Chair indicated that Mr. Hanke has the burden of proof and he does not see how he has shown that it was impossible or unreasonable to complete the filing on time.

Commissioner Dumezich suggested that if the Commission took judicial notice of staff's conversation with the clerk then they would have a piece of evidence that would assist the Commission in deciding the petition. Commissioner Dumezich asked whether this should be made in the form of the motion and the Chair indicated that he would entertain a motion. Commissioner Dumezich then moved, seconded by Commissioner Riordan, that the Commission take judicial notice of the fact that the clerk's office was open on August 25, 2006. The Chair called the question, and declared that with three members voting "aye" (Mr. Wheeler, Ms. Riordan, Mr. Dumezich and Mr. Poor), and no Commission member voting "no," the motion was adopted.

Commissioner Dumezich then moved, seconded by Commissioner Riordan, that the petition filed by Eric Hanke to extend the filing deadline be denied. The Chair called the question, and declared that with three members voting "aye" (Mr. Wheeler, Ms. Riordan, Mr. Dumezich and Mr. Poor), and no Commission member voting "no," the motion was adopted.

#### **4. Voting Systems Applications for Certification for Term Ending October 1, 2009**

**MicroVote General Corporation (MicroVote) application for certification of an upgrade to a previously certified direct record electronic voting system: Infinity direct record electronic system: hardware version VP-1 Infinity Revision C; Firmware version VP-1 Revision C 3.10; Software version Infinity Election Management Software Version 3.1.1.0**

The Chair indicated that prior to the administration of the oath he asked that staff give a summary on the status of MicroVote's application for approval starting with the Commission's last meeting.

The Chair recognized Mr. King who stated he could address that issue. He stated that, at the conclusion of the Commission's last meeting, the Election Division staff was given direction to prepare a letter under the Chairman's signature on behalf of the Commission asking several specific questions that remained outstanding with respect to MicroVote's application and its compliance with 2002 FEC Voting System Standards. He indicated that the questions are set forth in the letter of September 8, 2006 in the Commission's packet on page three immediately after the Hanke materials.

The Chair then requested Mr. Simmons to swear in witnesses. Mr. Simmons requested that all persons present who anticipated giving testimony before the Commission to stand to take the oath and the oath was administered.

Mr. King suggested to the Chair then he may want to accept the information in the Commission's packet as evidence into the Commission's record. The Chair suggested that this be done in narrative format and he asked Mr. King to describe the items to include into the record.

Mr. King directed the Commission to a series of documents in their packets in chronological order following the Hanke material. He stated that the first of these documents is the letter to Shawn Southworth of Ciber dated September 8, 2006 from the Chairman asking specific questions with regard to the split ticket straight party over voting issue, the disabling of the straight party voting feature, and finally with respect to absentee voting in the clerk's office with respect to ballot coding. He said those problems are described in detail in the letter.

Commissioner Riordan asked if these items could be separately marked and admitted into evidence as they are described. The Chairman indicated agreement and marked the September 8, 2006 letter to Shawn Southworth as Exhibit A.

Mr. King indicated that consistent with that method of introducing exhibits that Exhibit B would be a September 8, 2006 memo from Ciber to Jim Reis of MicroVote addressing configuration source code review, Technical Data Package review, functional testing, and the absentee voting issue that was raised in the previous letter. He stated that these the letter to Ciber and this memo from Ciber were sent essentially simultaneously.

The Chairman asked if Exhibits A and Exhibit B crossed in the mail so that Exhibit B does is not directed at answering the issues raised in Exhibit A. Mr. King indicated that this was correct and indicated further that Exhibit B did not address the issues raised in Exhibit A in the detail requested.

The Chair asked Mr. King whether he had an understanding of when the testing described in Exhibit B was conducted. Mr. King indicated that he could not tell from that letter but a later exhibit may indicate when that testing was performed.

Mr. King indicated that Exhibit C which is also a letter from Ciber and dated September 12, 2006. He stated that the letter was signed by Jack Cobb who is an employee of Ciber. He indicated that Exhibit C notes the receipt of the Commission's letter of September 8, 2006 which is Exhibit A and it addresses the three specific questions posed at the end of that letter. He noted as an example the reference to testing dates. He indicated that Mr. Cobb states at the bottom of page one of his letter that the current problems in the voting system with straight party voting was noted prior to April 20, 2006 when it was removed from the qualification effort and presumably the same time the straight party voting functionality was disabled in the software and removed from the Technical Data Package.

Mr. King also indicated that, with regard to the second question about the dates of independent testing, Mr. Cobb states that he was on the road and did not have access to the entirety of his record but notes in the first paragraph of his letter that, with regard to the pending application, the source code functional testing started August 16, 2006 and indicates that all aspects of this testing was concluded in three days focusing on the addition of the straight party voting variation and the new features that were added to the voting system.

He added that with respect to the third question contained in the Commission's September 8, 2006 letter which is addressed in Mr. Cobb's letter on the following page the letter states that all aspects of testing were completed on August 20, 2006 and the voting system was found to meet the requirements of 2002 Federal Voting System Standards and that Ciber will submit a report recommending the voting system for certification to the Election Assistance Commission.

Mr. King indicated that the next item in the Commission's packet, which is now marked as Exhibit D, is the memorandum sent to MicroVote customers by the chairman dated

September 13, 2006 which sets forth in narrative form the events spoken about at the Commission's September 8 meeting. He described this memorandum as containing a description of the steps that the Commission and the Election Division are taking with regard to progress of the consideration of MicroVote's voting system approval application.

Mr. King continued by describing Exhibit E as an email from Ciber received last Friday and in original paper form today. He stated that this is the full test report for an earlier version of MicroVote's Infinity voting system, Election Management System 3.1.0.0. He stated that the current application for approval is for version 3.1.1.0.

The Chair asked if there was a date on the report. Mr. King stated that the date appears to be May 26, 2006. The Chair observed that this would have been after the April 26, 2006 Commission meeting. The Chair then asked if this was the complete report on the voting system that was approved by the Commission at its April 28, 2006 meeting. Mr. King indicated that this is correct, that the Commission approved version 3.1.1.0 on April 28, 2006.

The Chair asked staff if they had reviewed the Ciber report on version 3.1.1.0. Mr. King indicated that he has reviewed the report but did not profess to grasp the technical import of the document. The Chair asked if the report references, as Ciber describes, providing MicoVote the opportunity of correcting the anomaly with straight party voting or removing straight party voting as a voting variation. Mr. King indicated that he saw nothing in the report that indicates that, at least no to the non technical eye.

Mr. King continued and directed the Commission to the next document in the Commission's packet marked as Exhibit F which is an email sent earlier today by him to Mr. Price and Mr. Reis with regard to outstanding questions involving the application. He stated that the first outstanding issue is the full report from Ciber for the newest version of the voting system. He stated that the email also addresses a quotation in the September 12 letter from Ciber which contains a quotation that the EMS version 3.1.1.0 and firmware 3.10 "meets the requirements of the 2002 FEC Voting System Standards." He stated that email states that he understands this representation to mean that the split precinct problem identified in the initial testing by Ciber has been corrected and that the state party voting function has been restored to the Technical Data Package and that this function now complies with the 2002 FVSS voting variation standards and requested that MicroVote be prepared to confirm that to the Commission.

Mr. King indicated that the third item in the Commission's September 8 letter involved the function of the voting system for absentee voting in the clerk's office before election day. He stated that the letter of September 8 from Ciber indicated that the voter identification number would no longer be printed on the audit log of the Infinity. He stated that he posed the question to MicroVote in his email of whether the voting system would permit an absentee ballot to be rejected and not counted where the absentee voter is later disqualified or found ineligible to vote due to death or challenge, for example. He

stated that he also asked MicroVote in his email to be prepared to confirm the answer to this question to the Commission.

He stated that MicroVote's response to his email, which is the Exhibit G, is an email from John Price addresses the questions he posed in his email in the bold print below each of the questions. The Chair asked if the email response was from Mr. Price. Mr. King confirmed that it was and added that he did not know the source of Mr. Price's information. Mr. King stated that the email confirms that the full NASED report previously described is for version 3.1.0.0 certified by the Commission on April 28, 2006.

Mr. King then indicated that the email from Mr. Price states that the straight party function was tested by Ciber and additional documentation supporting the straight party function was added to the Technical Data Package.

Mr. King stated that the final point covered in the email in paragraph six notes that the voter identification number was originally included in both the detailed audit log and printed on the audit tape and that the voter identification number was removed from the audit tape only to allow for voter secrecy and that the voter identification number is stored randomly in the compact flash memory to allow for retraction. Mr. King stated that this indicates that the system is set up so that if a voter were to die after voting absentee in the clerk's office then that voter's ballot could be identified so that it was not counted.

The Chair mentioned that there was a Louisiana statute that actually states that dead people can't vote.

Mr. King stated that the last document in the Commission's packet for this agenda item is the memorandum submitted by the Co-Directors. He said he would not review with the Commission the part of the memorandum that remains unchanged from the September 8 meeting but he noted that on page two the memorandum lists each of the documents in bold that were presented as Exhibits at today's Commission meeting. He added that the memorandum makes a recommendation that, subject to the standard requirement for MicroVote to file a complete report regarding this version of its system from Ciber within seven days after receipt of the report that indicates that the voting system complies with the 2002 FEC Voting System Standards that the MicroVote Infinity DRE firmware version 3.1.0 and the Infinity Election Management Software version 3.1.1.0 be approved for marketing, sale, leasing, and implementation in Indiana for a term expiring October 1, 2009. He added that, in discussions he has had with Ms. Robertson earlier that this recommendation is also conditional on the Commission's satisfaction with the information provided in the email received today from Mr. Price.

The Chair asked if Commission members had any questions for staff. The Chair then asked whether there was a time frame for when the full report would be submitted by Ciber on version 3.1.1.0. Mr. King indicated that he did not know a time frame for that.

The Chair observed that at this time the Commission does have the September 8 and September 12 from Ciber.

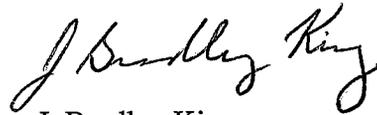
## 5. Adjournment

There being no further items on the Commission's agenda, the Chair entertained a motion to adjourn. Mr. Long moved, seconded by Mr. John, that the Commission do now adjourn. The Chair called the question, and declared that with four members voting "aye" (Mr. Wheeler, and Ms. Riordan), and no Commission member voting "no," the motion was adopted. The Commission then adjourned at 4:15 p.m.

Respectfully submitted,

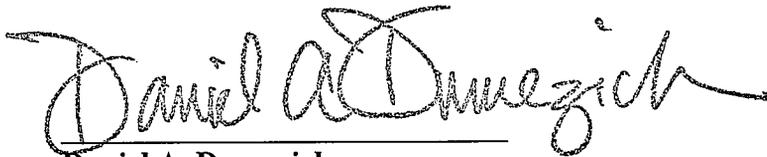


Trent Deckard  
Co-Director



J. Bradley King  
Co-Director

**APPROVED:**



**Daniel A. Dumezich**  
Chairman