



PUBLIC COMMENT M E M O R A N D U M

TO: Secretary of State Scott Gessler

FROM: Paul Hultin and Matt Johnson

DATE: February 21, 2012

SUBJECT: Comments Regarding Proposed Changes to DRE Conditions of Use and Request for Suspension of Rulemaking Regarding Election Rule 43.

Paul Hultin and Matt Johnson hereby submit this Public Comment Memorandum on behalf of their law firm's clients, Myriah Sullivan Conroy and Jeffrey Sherman (the "Electors").

On February 14, 2012, the Colorado Secretary of State's office, headed by Scott Gessler (the "Secretary"), held a hearing regarding proposed rulemaking at the Secretary of State's Office at 1700 Broadway, Denver, Colorado 80290. The proposed rulemaking primarily relates to Election Rule 43. At that meeting, Ms. Conroy and Mr. Sherman provided public comments to the panel from the Secretary's Office, and their counsel, Matt Johnson of Wheeler Trigg O'Donnell LLP, also provided comments to the panel. During the rulemaking hearing, Ms. Conroy, Mr. Sherman and the law firm of Wheeler Trigg O'Donnell LLP submitted a Public Comment Memorandum to the Secretary's staff.

At the conclusion of the hearing, Deputy Secretary of State William Hobbs indicated that the public comment period on the proposed changes to Election Rule 43 would remain open until February 21, 2012 at 5:00 p.m. This memorandum supplements the Electors' December 8, 2011 Public Comment Memorandum and the Electors' February 14, 2012 Public Comment Memorandum, both of which were submitted to the Secretary for consideration. The purpose of this Memorandum is to raise concerns about the proposed changes to the Conditions of Use required for using Direct Record Electronic voting machines (DREs) in Colorado's elections and to request a suspension of the Election Rule 43 rulemaking process because the proposed changes to the Conditions of Use, which are interwoven with Election Rule 43, have been conducted outside of the public eye and in violation of the Administrative Procedures Act.

I. THE PROPOSED CONDITIONS OF USE CHANGES HAVE BEEN CONDUCTED OUTSIDE THE PUBLIC EYE AND THUS THE RULEMAKING FOR RULE 43 SHOULD BE SUSPENDED UNTIL PROPER NOTICE AND PUBLIC COMMENT PURSUANT TO THE ADMINISTRATIVE PROCEDURES ACT OCCURS FOR THE CONDITIONS OF USE.

A. The Secretary's Office First Included the Proposed Conditions of Use as Part of the Rulemaking Process, Then Improperly Removed the Conditions of Use from the Rulemaking Process.

As explained in the Electors' February 14, 2012 Public Comment Memorandum, the current Conditions of Use for DREs in Colorado have been in effect since 2008 and are an important part of the policies and procedures that protect against the hacking of DREs and voter tampering that threatens the integrity of Colorado's elections. The current Conditions of Use were created by a Testing Board of experts in DREs and were implemented under the Voting Systems Certification Program. Experts from around the nation contributed to the Testing Board's work, and now the Secretary seeks to destroy the Testing Board's work and to destroy the security measures currently in place for DREs in Colorado—and all of it is being done behind closed doors in violation of Colorado law. Secretary Gessler's November 9, 2011 Notice included a preliminary draft of "Revised Conditions of Use" for each of the four types of DREs currently in use in Colorado. Then, at the hearing on December 8, 2011, the Secretary distributed in writing at the beginning of the hearing, proposed changes to the Conditions of Use for the four types of DREs currently in use in Colorado.¹ As of November 9, 2011, clearly the Secretary's office acted as if it was required by law to subject the proposed "Revised Conditions of Use" to public comment and a public hearing—which is the correct interpretation of the law.

The Secretary's January 13, 2012 Notice did not contain a reference to Conditions of Use for DREs. But, at least two recent emails from the Secretary of State's staff indicate that the Secretary may believe he is entitled to unilaterally revise the Conditions of Use without the public's input and without a public hearing. First, Michael Hagihara of the Secretary of State's office told a concerned voter in an email that he does "not know whether a hearing will be held prior to this office issuing revised Conditions." *See* February 9, 2012 Email Fr. M. Hagihara to M. Eberle, Exhibit 1 hereto. Second, Judd Choate of the Secretary's office, stated that the Secretary of State's Office does not think that it is required to abide by the Colorado Administrative Procedure Act when revising the DRE Conditions of Use:

Mr. Hultin: Are you contending that the Conditions of Use are not subject to the requirements of the Colorado Administrative Procedures Act?

Mr. Choate: I'm not "contending" anything. I am saying that we find no statutory requirement to provide a rulemaking process for conditions of use.

¹ The Conditions of Use proposed changes that were issued at the December 8, 2011 hearing were not adequate notice because they were vague and virtually unintelligible.

See February 9, 2012 Email Fr. J. Choate to P. Hultin, Exhibit 2 hereto. Similar statements of non-applicability of the Administrative Procedures Act to the Conditions of Use were echoed by Mr. Hobbs and Mr. Choate at the February 14, 2012 rulemaking hearing. See, e.g., Transcript of Feb. 14, 2012 Hearing, at 23:1 – 19, Exhibit 3 hereto. However, Mr. Hobbs stated in the hearing that “[r]evisions to the statute do refer to the Secretary of State promulgating conditions of use,” presumably in reference to C.R.S. § 1-5-608.5(3)(b), discussed further below. *Id.* at 23:9 – 11.

Such statements from the Secretary of State’s Office run contrary to the law in Colorado, are an effort by the Secretary to diminish election security measures in violation of the law, and are plainly meant to undertake covert actions that threaten the integrity of Colorado’s elections. Specifically, the Colorado Revised Statutes state as follows:

When any agency is required or permitted by law to make rules, in order to establish procedures and to accord interested persons an opportunity to participate therein, the provisions of this section shall be applicable.

C.R.S. § 24-4-103(1). That same section of the Colorado Revised Statutes requires notice of a proposed rule-making to be provided. C.R.S. § 24-4-103(3)(a). In addition, the Colorado Supreme Court explained in an instructive Administrative Procedures Act case that “[i]n resolving this issue we are not bound by the label the PUC attached to its actions; rather, we must look at the substance of what the commission has actually done” to determine whether the agency was involved in rulemaking as defined by C.R.S. § 24-4-102(16). *Home Builders Ass’n of Metropolitan Denver v. Public Utilities Comm’n*, 720 P.2d 552, 560 (Colo. 1986). The Court added that The Public Utilities Commission undertook rulemaking because the PUC’s decision was “nothing less than an ‘agency statement of general applicability and future effect implementing [and] declaring policy,’ § 24-4-102(15), 10 C.R.S. (1982), and, under the particular circumstances present here, is functionally indistinguishable from *de facto* rule-making.” *Id.*

In fact, the current Conditions of Use are mandatory in the event of certification and state as follows:

The Testing Board recommends that the Secretary of State adopt the following conditions for use of the voting system. These conditions are required to be in place *should* the Secretary approve for certification any or all of the items indicated in the **COMPONENTS** section. The Testing Board has modified the conditions based on information provided through public hearing under legislative updates to consider additional procedures. Any deviation from the conditions provides significant weakness in the security, auditability, integrity and availability of the voting system.

See <http://www.sos.state.co.us/pubs/elections/VotingSystems/files/ESSCFU.pdf> (emphasis in original). The foregoing excerpt tells the entire story, yet Secretary Gessler may be seeking to violate the law by changing the Conditions of Use behind closed doors. In fact, C.R.S. § 1-5-

608.5(3)(b) states that the “secretary may promulgate conditions of use in connection with use by political subdivisions of electronic and electromechanical voting systems as may be appropriate to mitigate deficiencies identified in the certification process.” *See* C.R.S. § 1-5-608.5(3)(b).

Here, because the Secretary’s office “may promulgate conditions of use,” which is a legislative delegation of authority, any changes to the Conditions of Use, which are of course generally applicable in Colorado, must be done under the Administrative Procedures Act. *See* C.R.S. § 24-4-103(1). Any action to the contrary by Secretary Gessler is a breach of duty, it lacks transparency, it has the potential to minimize security of Colorado’s elections, and it is a violation of state law. Moreover, such an action by the Secretary, behind closed doors and without public notice and comment, violates the law and is an affront to transparent, free, and fair elections in Colorado.

B. Revisions to the Conditions of Use Are Interwoven With Election Rule 43.

The proposed changes to the Conditions of Use are hand in glove with Election Rule 43 because both are critical to election security in Colorado. Yet despite this undeniable fact, the Secretary’s office has seemingly reversed course several times in the last few months as to whether the Conditions of Use should be part of the rulemaking process. They of course should, and as articulated above in Section II(A), the Secretary initially acted as if that was the case.

At the February 14 hearing, Mr. Hobbs stated that there is not a “systemic process” in place to revise the Conditions of Use. February 14, 2012 Hearing Transcript, at 64:17 – 19, Ex. 3 hereto. However, Mr. Wayne Munster made clear that the Secretary’s Office has “paid a visit to each county for each vendor.” *Id.* at 65:11 – 12. In explaining what seems like a systemic process, Mr. Munster further added that the County Clerks with whom he is meeting are “experts” with respect to DREs. *Id.* at 65:13. With all due respect to the County Clerks, they are simply not experts in DREs or any form of electronic voting technology, they likely do not have computer science degrees, and they have no knowledge of how DREs are hacked, how they are vulnerable to hacking, and most likely the County Clerks have never had a single discussion with the world-class computer scientists at America’s top universities who routinely hack into DREs with no problems whatsoever. The current process being undertaken is flawed, if not covert.

In sum, the Conditions of Use are very much a part of the security considerations encompassed by Election Rule 43, and the Conditions of Use should be part of the exact same rulemaking process under the Administrative Procedures Act. Any process to the contrary would be an arbitrary and capricious maneuver on behalf of the Secretary’s office.

II. THE SECRETARY'S OFFICE COMMITTED TO OPENING THE PROPOSED CONDITIONS OF USE TO THE PUBLIC AND THE SECRETARY SHOULD HONOR THAT COMMITMENT.

A. Deputy Secretary Hobbs Committed to a Full Rulemaking Process With Respect to Proposed Changes to the Conditions of Use.

At the February 14 hearing, Deputy Secretary Hobbs stated as follows in response to concerns expressed by Mr. Sherman regarding the lack of transparency associated with the proposed changes to the Conditions of Use:

But we're certainly not foreclosing public input. That's why we had a public hearing in December. That's why we solicited public input, and that's why I'm still soliciting public input.

And I'd be curious to know if people would like, you know, a particular period of time to provide additional public input, a couple of weeks or more, even another meeting? I would certainly welcome, you know -- you know, that input because we're not trying to keep anything secret at all.

Transcript of Feb. 14, 2012 Hearing, at 16:7 – 17, Ex. 3 hereto. Thereafter, Mr. Sherman explained to Mr. Hobbs that he has concerns that the Conditions of Use are in fact being altered behind closed doors, and that this process is problematic because the “Conditions for Use are where, like I said, the rubber meets the road.” *Id.* at 17:6 – 7. Mr. Hobbs responded by again stating that he believes the changes to the Conditions of Use should be “just as open as a formal rule-making hearing, and that’s again – it is open, and we are welcoming the same kind of public comment that we would get under a formal rulemaking hearing.” *Id.* at 17:16 – 19.

B. Judd Choate Agreed That the Public Should Be Involved in Proposed Changes to the Conditions of Use.

Later in the hearing, after Mr. Hobbs express his viewpoint on the public nature of the proposed revisions to the Conditions of Use, Judd Choate of the Secretary’s Office stated, “[A]s I indicated, we’re trying to provide the same level of public input, same level of public involvement that there would be if they were being proposed as formal rules.” *Id.* at 23:16 – 19.

In addition to making the public hearing commitment, Mr. Choate explained that the revised Conditions of Use would be posted on the Secretary’s website in strike-through format within “a couple days.” *Id.* at 41:9 – 16. Yet on Saturday, February 18, 2012, Mr. Choate emailed Matt Johnson and reversed course and stated that the redline to the Conditions of Use proposed changes would not be available until the end of the month, but only to the Secretary’s office and even later for review by the public. *See* February 18, 2012 Email Fr. J. Choate to M.

Johnson, Exhibit 4 hereto.² This delay means that the rulemaking may go forward on Rule 43 while the Conditions of Use changes are not available to the public for comment. Such a path forward is arbitrary and capricious and violates the law of Colorado.

C. Wayne Munster Agreed That the Public Should Be Involved in Proposed Changes to the Conditions of Use.

Much like Mr. Hobbs and Mr. Choate, Wayne Munster agreed that the public should be involved in any proposed changes to the Conditions of Use for DREs. Specifically, Mr. Munster stated:

I'm envisioning that there's going to be now that we're going to do a public meeting, and I'm going to, you know, discuss our decision-making process.

Right, and what we have to do, though, is we have to get to a point where we have what we think is a good product and then bring the public in or, you know, the reasons everybody keeps asking, why is this so late? It took us a year to get through this process, so we need to get to a certain point, and then we do need to bring in public input.

Id. at 66:23 – 25 and 67:8 – 15.

III. CONCLUSION

The DRE Conditions of Use are hand in glove with Election Rule 43. Proposed changes to the Conditions of Use should not be taken apart from any changes in Rule 43, nor should they be undertaken behind closed doors and without public input, in part because the Conditions of Use are subject to Colorado's Administrative Procedures Act, and in part because it is simply bad governing to keep such an important process secretive and out of the public eye.

The Electors and their Counsel sincerely hope that the Secretary's office abides by its commitments as outlined above, and the Electors look forward to finally being able to take part in the process regarding proposed changes to the DRE Conditions of Use. Further, in light of the foregoing, the Electors respectfully request that the Secretary conduct the Conditions of Use rulemaking process in conjunction with the Election Rule 43 rulemaking process, thus ensuring that any revisions to the Conditions of Use and/or Election Rule 43 are undertaken simultaneously.

² Mr. Choate's email, Exhibit 4 hereto, indicates that Paul Craft from Freeman, Craft, McGregor is consulting on the changes to the Conditions of Use. We note that Mr. Craft does not have a computer science background and appears to lack any formal education with respect to computer science or engineering. In addition, the Florida Fair Elections Coalition has raised concerns about Mr. Craft's credentials at the following location: <http://www.ffec.org/reports/CraftMcGregorReport.pdf>

Exhibit 1

Johnson, Matt

Subject: FW: RE: Rule 43 hearing: Conditions for Use

----- Original Message -----

Subject: RE: Rule 43 hearing: Conditions for Use

Date: Thu, 9 Feb 2012 17:13:27 +0000

From: Michael Hagihara <Michael.Hagihara@SOS.STATE.CO.US>

To: 'Mary Eberle' <m.eberle@wordrite.com>

CC: Andrea Gyger <Andrea.Gyger@SOS.STATE.CO.US>, Judd Choate
<Judd.Choate@SOS.STATE.CO.US>

Ms. Eberle,

The current Conditions for Use will apply until this office issues revised Conditions. I do not know whether a hearing will be held prior to this office issuing revised Conditions.

Sincerely,

Michael Hagihara

Michael Hagihara
Voter Registration and Elections Management Manager
Colorado Department of State
1700 Broadway, Ste. 200
Denver, CO 80290
p: 303-894-2200 ext 6331
f: 303-869-4861

From: Mary Eberle [<mailto:m.eberle@wordrite.com>]

Sent: Thursday, February 09, 2012 10:04 AM

To: Michael Hagihara

Cc: Andrea Gyger; Judd Choate

Subject: Re: Rule 43 hearing: Conditions for Use

Dear Mr. Hagihara,

Thank you for this information. If I understand you correctly, the current Conditions for Use will apply until a hearing is held to revise them. Please confirm that impression, just for the record.

Sincerely,

Mary

Mary C. Eberle
1520 Cress Court
Boulder, CO 80304
(303) 442-2164

On 2/9/2012 9:47 AM, Michael Hagihara wrote:

Dear Ms. Eberle:

Andrea Gyger asked that I respond to the email that you sent her on February 5. We are waiting for the outcome of the Rule 43 rulemaking before we decide how to move forward with the Conditions for Use. If we decide to hold another meeting regarding the Conditions for Use our communications team will inform the public of the time and place for that meeting.

Sincerely,

Michael Hagihara

Michael Hagihara
Voter Registration and Elections Management Manager
Colorado Department of State
1700 Broadway, Ste. 200
Denver, CO 80290
p: 303-894-2200 ext 6331
f: 303-869-4861

From: Mary Eberle [<mailto:m.eberle@wordrite.com>]
Sent: Sunday, February 05, 2012 9:53 PM
To: Andrea Gyger
Subject: Re: Rule 43 hearing: Conditions for Use

Hi Andrea,

By what process will the current conditions for use be modified (if they are modified)? Will there be a hearing?

Thank you,
Mary

On 1/30/2012 1:48 PM, Andrea Gyger wrote:
Hi Mary,

The rule would apply to effective conditions for use. Until new conditions for use are released, the rule, if adopted, would apply to the current conditions for use. If new conditions are adopted the rule would then apply to those.

Thanks,
Andrea

From: Mary Eberle [<mailto:m.eberle@wordrite.com>]
Sent: Monday, January 30, 2012 1:39 PM
To: Andrea Gyger
Subject: Re: Rule 43 hearing: Conditions for Use

Good afternoon to you also, Andrea,

The information and links you sent are very helpful. Now I need a little more detail. Does the line 28 (copied below in red and blue) refer to the current conditions of use or the possible revised conditions of use discussed

on December 8, 2011?

Thank you,
Mary

On 1/30/2012 1:28 PM, Andrea Gyger wrote:
Good afternoon Ms. Eberle,

Thank you for your email. "Conditions for use" means the conditions that a voting system vendor with certified voting equipment in Colorado is required to meet. The current conditions are posted online at www.sos.state.co.us/pubs/elections/VotingSystems/CondsForUse.html. If new/amended rules are adopted, our office anticipates release of revised and updated conditions for use as well. A copy of the possible revised conditions for use that were discussed at the December 8, 2011 public meeting are available online at www.sos.state.co.us/pubs/rule_making/publicMeetings/2011/20111208Elections.html.

I hope this information helps. If you have additional questions or would like to submit written comments concerning the proposed election rules, please let me know.

Thanks,
Andrea

From: Mary Eberle [<mailto:m.eberle@wordrite.com>]
Sent: Saturday, January 28, 2012 1:10 PM
To: Andrea Gyger
Cc: Mary Eberle
Subject: Rule 43 hearing: Conditions for Use

Dear Andrea,

>From your email of January 13, 2012:

The following information is also available online at the Secretary of State's website:

- Rules and Notices of Rulemaking: www.sos.state.co.us/pubs/rule_making/rules.html
- Information relating to 2/14/12 rulemaking hearing: www.sos.state.co.us/pubs/rule_making/hearings/2012/RulesHearing20120214.html

Page 22 from 20120113_Elections_NoticeProposedRulemaking.pdf:

27 Affirm that the use of the certified voting equipment shall be conducted
28 in accordance with Rule 43 and the specific conditions for use of the
29 certified voting equipment; and

So, could you please tell me what conditions for use is meant?

Thank you,
Mary

Mary C. Eberle
1520 Cress Court
Boulder, CO 80304
(303) 442-2164

Exhibit 2

Johnson, Matt

Subject: FW: Notice of Public Meeting re ER 43 and Conditions of Use for certified voting equipment

From: Judd Choate [mailto:Judd.Choate@SOS.STATE.CO.US]
Sent: Thursday, February 09, 2012 4:22 PM
To: Hultin, Paul
Cc: Michael Hagihara; Andrea Gyger; Wayne Munster; Johnson, Matt
Subject: RE: Notice of Public Meeting re ER 43 and Conditions of Use for certified voting equipment

I'm not "contending" anything. I am saying that we find no statutory requirement to provide a rulemaking process for conditions of use.

Judd

From: Hultin, Paul [mailto:hultin@wtotrial.com]
Sent: Thursday, February 09, 2012 4:17 PM
To: Judd Choate
Cc: Michael Hagihara; Andrea Gyger; Wayne Munster; Johnson, Matt
Subject: RE: Notice of Public Meeting re ER 43 and Conditions of Use for certified voting equipment

Hi Judd,

Are you contending that the Conditions of Use are not subject to the requirements of the Colorado Administrative Procedures Act? Would you please copy Matt Johnson on all future communications.

Thanks,

Paul

Paul Hultin
Wheeler Trigg O'Donnell LLP
1801 California St.
Suite #3600
Denver, Colorado 80202
303-244-1840 (Direct)
303-929-1060 (Mobile)
303-244-1879 (Fax)

From: Judd Choate [mailto:Judd.Choate@SOS.STATE.CO.US]
Sent: Thursday, February 09, 2012 3:50 PM
To: Hultin, Paul
Cc: Michael Hagihara; Andrea Gyger; Wayne Munster
Subject: RE: Notice of Public Meeting re ER 43 and Conditions of Use for certified voting equipment

Hi Paul. We are not familiar with the “published as required by law” requirement that you mention. Could you please direct us to the statutory basis for this “requirement” for conditions of use?

Thanks, Judd

Judd Choate, Ph.D., J.D.
Director, Division of Elections
Colorado Department of State
1700 Broadway Suite 200
Denver, CO 80290
Office - 303-894-2200
judd.choate@sos.state.co.us

From: Hultin, Paul [<mailto:hultin@wtotrial.com>]
Sent: Thursday, February 09, 2012 1:27 PM
To: Andrea Gyger
Cc: Johnson, Matt; DRE - Sherman, Jeff; Myriah Conroy; Wayne Munster; Michael Hagihara
Subject: RE: Notice of Public Meeting re ER 43 and Conditions of Use for certified voting equipment

Dear Andrea,

Thanks for your response. Actually the conditions of use were handed out at the December 8 hearing and to my knowledge have not been published as required by law. I am informed that your office is contending that Secretary Gessler may change those by fiat. If I am wrong about this please advise.

Thanks

Paul Hultin
Wheeler Trigg O'Donnell LLP
1801 California St.
Suite #3600
Denver, Colorado 80202
303-244-1840 (Direct)
303-929-1060 (Mobile)
303-244-1879 (Fax)

From: Andrea Gyger [<mailto:Andrea.Gyger@SOS.STATE.CO.US>]
Sent: Thursday, February 09, 2012 12:02 PM
To: Hultin, Paul
Cc: Johnson, Matt; DRE - Sherman, Jeff; Myriah Conroy; Wayne Munster; Michael Hagihara
Subject: RE: Notice of Public Meeting re ER 43 and Conditions of Use for certified voting equipment

Good afternoon Mr. Hultin,

Thank you for your email. The notice of public meeting, released on 11/9/11, includes a copy of the proposed Conditions for Use considered on 12/8/11. A copy is available online at www.sos.state.co.us/pubs/rule_making/publicMeetings/2011/20111208Elections.html. We are not proposing any changes to the Conditions of Use at this time. The current conditions are available online at www.sos.state.co.us/pubs/elections/VotingSystems/CondsForUse.html.

The February 14th hearing is a formal rulemaking hearing regarding proposed amendments to the Election Rules concerning county security procedures. A copy of the notice and related documents are available at www.sos.state.co.us/pubs/rule_making/hearings/2012/RulesHearing20120214.html. The Conditions for Use are not codified in rule, therefore we are not scheduled to discuss any proposed modifications during the rulemaking hearing.

I hope this information helps. If you have any additional questions or would like to submit written comment regarding the proposed rules, please let me know.

Thank you,
Andrea

From: Hultin, Paul [<mailto:hultin@wtotrial.com>]
Sent: Tuesday, February 07, 2012 7:22 AM
To: Andrea Gyger
Cc: Johnson, Matt; DRE - Sherman, Jeff; Myriah Conroy
Subject: RE: Notice of Public Meeting re ER 43 and Conditions of Use for certified voting equipment
Importance: High

Hi Andrea,

I just checked the web page and did not find the proposed changes in conditions of use for the 1/14 public hearing. I apologize if I missed them

They were not posted before the 12/8 hearing and I do not see them now. Can you send Matt and me the link to the proposed conditions of use or can you please send us a PDF with what was handed out on 12/8 and any changes since then.

Thanks,

Paul

Paul Hultin
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303-244-1840 (Direct)
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Exhibit 3

COLORADO SECRETARY OF STATE

PUBLIC HEARING

February 14, 2012

1:05 p.m.

1700 Broadway, Denver, Colorado

Transcribed by: SueAnn Jones, CSR, RPR

1 DEPUTY SECRETARY HOBBS: We don't
2 anticipate rule-making because these are conditions
3 that are attached to the certification. When the
4 systems were originally certified, they were
5 certified with conditions, and that's what we're
6 proposing to revise.

7 But we're certainly not foreclosing
8 public input. That's why we had a public hearing
9 in December. That's why we solicited public input,
10 and that's why I'm still soliciting public input.

11 And I'd be curious to know if people
12 would like, you know, a particular period of time
13 to provide additional public input, a couple of
14 weeks or more, even another meeting? I would
15 certainly welcome, you know -- you know, that input
16 because we're not trying to keep anything secret at
17 all.

18 JEFF SHERMAN: Yeah. I guess I
19 understand that those aren't being acted on now,
20 but that's kind of my primary concern is that
21 they're being acted on or will be acted on outside
22 the purview of the APA.

23 I certainly would endorse and support
24 having public rule-making, you know. If we had
25 those -- kind of that preliminary meeting in

1 December, which was -- I'm glad we had those
2 meetings, and they were, you know, not official
3 rule-making meetings, and I'm glad -- I'm glad we
4 had them, but I think it would be appropriate to
5 have, you know -- because I believe that those
6 rules -- there are -- Conditions for Use are where,
7 like I said, the rubber meets the road.

8 This is, you know -- it's how we
9 determine whether or not those machines meet the
10 standards. First of all, I would suggest that
11 they -- that they should sit under the APA, but I
12 think we should have that process as open as
13 possible.

14 DEPUTY SECRETARY HOBBS: Well, and
15 I -- at least from my perspective, I think we want
16 to keep it just as open as a formal rule-making
17 hearing, and that's again -- it is open, and we are
18 welcoming the same kind of public comment that we
19 would get under a formal rule-making hearing.

20 You know, so if you have comments or
21 suggestions to those proposed changes, you could
22 submit them in writing. That would be great. And
23 we're even open to another public hearing if that
24 would be helpful.

25 So there's no -- there's no

1 They've never been updated, so at the
2 same time that we're updating Rule 43, we wanted to
3 update the Conditions of Use. You know, I
4 understand that you might think that they are of
5 general applicability to the future effect falling
6 under the definition of rule in the APA. I would
7 disagree with that. But at least historically,
8 they have not been treated as rules.

9 Revisions to the statute do refer to
10 the Secretary of State promulgating Conditions of
11 Use. That's to say by rule and regulation whereas
12 other provisions does require rules and
13 regulations, so at least based on the way they've
14 been treated historically, I don't think they can
15 or should be adopted as formal rules under the APA,
16 but as I indicated, we're trying to provide the
17 same level of public input, same level of public
18 involvement that there would be if they were being
19 proposed as formal rules.

20 And if you have suggestions for the
21 proposed Conditions of Use, we would love to have
22 those.

23 MATT JOHNSON: On that point, is the
24 working draft that was handed out on December 8 at
25 the hearing, is that still the draft that you're

1 whether or not you consider it to be a statutory
2 requirement to get the public involved, I would
3 hope that the Secretary's default setting is always
4 involve the public and not have to argue about
5 whether or not the law demands that you do that.

6 And so on the Conditions of Use, what
7 could we expect to be the next step if we want to
8 have substantive input?

9 JUDD CHOAT: This is Judd. I said the
10 next step is that we'll go upstairs. We'll get a
11 redline and a -- a strike-through version of that
12 so that you can all see the redlines right there.
13 That's pretty easily done. I don't know how long
14 it will take us, but let's say it takes us a couple
15 of days. We'll turn that around and get it posted
16 publicly.

17 We'll have -- we'll have some contact
18 information from many of you, so we'll distribute
19 it to those of you that we have contact information
20 for.

21 WAYNE MUNSTER: And post it on our
22 website.

23 JUDD CHOAT: And post it on our
24 website. And then subsequent to that, we'll set up
25 some sort of public opportunity for people to have

1 DEPUTY SECRETARY HOBBS: Thank you.

2 MATT JOHNSON: Thank you.

3 DEPUTY SECRETARY HOBBS: Ms. Marks?

4 MARILYN MARKS: Thank you for letting
5 me follow up on that point. I agree. It doesn't
6 really matter who sent it, but if there is already
7 a concern in the process that you have of getting
8 input, say from clerks' user groups or the vendor
9 or the vetting system manufacturers or from
10 computer experts, I think that would be helpful for
11 us to know, if there is a systematic, organized
12 process and how we can intersight with that
13 process.

14 So can you -- I mean was some of this
15 come from a user group or anything that was set up
16 by the Secretary's office?

17 DEPUTY SECRETARY HOBBS: I don't think
18 there's currently a systematic process, and I don't
19 think there's been one except that I think -- and I
20 think we've probably put out information before the
21 December hearing that we had had discussions with
22 parts over a long period of time, and Mr. Munster,
23 you were involved with that, if you want to just
24 comment generally.

25 WAYNE MUNSTER: Yeah. We did set

1 up -- and Howard, correct me if I'm wrong --
2 periodic phone calls with counties to discuss. We
3 would go through every single Condition for Use and
4 every single rule, and we -- we discussed with them
5 what's -- what's hampering them from complying,
6 what didn't make sense to the counties.

7 You could read a sentence, and we
8 would all in the room say "What does that mean?"
9 And we didn't know, so that's what we -- where we
10 dove into it.

11 We also paid a visit to each county
12 for each vendor, and we had -- and I consider the
13 users experts because they use this equipment every
14 single election, and they work on it on a daily
15 basis, and we sat there and just went through the
16 conditions and worked with the equipment and looked
17 at seals and seams and grooves and really did a
18 thorough analysis of what we thought was necessary
19 to keep that equipment secure.

20 And I think a public hearing is a good
21 idea. I could stand up in front of the group and
22 go one by one and say "Here was the discussion,"
23 because I remember it all, "and this is why we
24 determined what we determined." And we can debate
25 the merits.

1 MARILYN MARKS: That sounds like then
2 it was a -- more of a one-off individual process as
3 opposed to organized meetings or organized groups
4 or --

5 WAYNE MUNSTER: No. They were
6 organized, yes. We -- we solicited volunteers from
7 the counties, and we all would meet on a monthly
8 basis, either in a conference call or we would as a
9 group go to a county with a specific vendor, and
10 then other users for that vendor would join us, and
11 they would all bring their expertise to bear on the
12 challenges that we discovered in Conditions for
13 Use.

14 MARILYN MARKS: Okay. All right.
15 That's really helpful. And then the public had the
16 opportunity to be involved in --

17 WAYNE MUNSTER: We didn't make -- we
18 didn't put out a public notice for the meetings,
19 no.

20 MARILYN MARKS: Well, is there any
21 process like that going on now?

22 WAYNE MUNSTER: Well, I'm thinking --
23 I'm envisioning that there's going to be now that
24 we're going to do a public meeting, and I'm going
25 to, you know, discuss our decision-making process.

1 MARILYN MARKS: Okay. Well, I would
2 urge you in -- in the spirit of, as I say, the
3 default position being on that everything should be
4 public on something this important that for any
5 organized meetings like that that you do invite the
6 public to attend, even if they don't rise to the
7 level of a formal rule-making.

8 WAYNE MUNSTER: Right, and what we
9 have to do, though, is we have to get to a point
10 where we have what we think is a good product and
11 then bring the public in or, you know, the reasons
12 everybody keeps asking, why is this so late?

13 It took us a year to get through this
14 process, so we need to get to a certain point, and
15 then we do need to bring in public input.

16 MARILYN MARKS: Understood, but giving
17 a 45 minutes notice or whatever it was last time
18 with comprehensive changes, you know, that's --
19 that's probably very hard for us to be very
20 effective and knowledgeable.

21 WAYNE MUNSTER: Agreed.

22 MARILYN MARKS: Thanks.

23 DEPUTY SECRETARY HOBBS: And I don't
24 mean to be difficult, but you know, the Conditions
25 for Use were adopted without any public comments

Exhibit 4

Johnson, Matt

From: Judd Choate <juddchoate@gmail.com>
Sent: Saturday, February 18, 2012 7:10 PM
To: Johnson, Matt
Cc: Andrea Gyger; Hultin, Paul; Sherman, Jeffrey A. (jeff.sherman@FaegreBD.com); Myriah Conroy <myriahconroy@gmail.com> (myriahconroy@gmail.com)
Subject: Re: Changes to DRE Conditions of Use

Hi Matt. Thanks for the email. Unfortunately, both Wayne Munster and I left for an Election Center training the morning after the hearing, so we have been out of the office since Wednesday morning and will be until Tuesday. I did assign the duty of making sure a red-line version of Rule 12/43 was posted on our website. I just looked, and it is linked on the rulemaking site, so I believe you have all the information you need to provide comments for the Rule 12/43 changes.

I think we may have had a miscommunication on the conditions of use. I did not intend to suggest that we would have a red-line of the conditions of use by Tuesday. If we left you with that impression, I apologize. That was not my intent. Instead, we are working with Paul Craft from Freeman, Craft, McGregor to finalize a new version of our proposed changes to the conditions of use and get a red-line version posted publicly before holding a public discussion about the proposed changes. Paul believes he can provide a blueprint for our office to consider by the end of the month. Our hope is to then schedule a public discussion for a couple of weeks later, so it can be properly publicized.

Please know that we value and will take very seriously your comments regarding Rule 12/43. So, I hope you will consider providing additional comments, should you have any. And, I apologize for the misunderstanding regarding the conditions of use. We do plan to publicize our final version in the very near future, hold a discussion on the proposed changes, and receive feedback from you and others. As you can see, this is effectively a rulemaking process - even as we are not obligated to provide one under state or federal law.

Please look for a communication from me when I know the exact date the new proposed version of conditions of use will be available.

I hope that's helpful.

Judd

On Sat, Feb 18, 2012 at 5:30 PM, Johnson, Matt <johnson@wtotrial.com> wrote:

Good Afternoon Mr. Choate and Ms. Gyger:

It was nice meeting you at the Election Rule 43 Rulemaking hearing on Tuesday, February 14, 2012. As invited by Deputy Secretary Hobbs, we are contemplating submitting additional written public comments on or before February 21, 2012. To that end, Mr. Choate stated at the hearing that the strike-through version of the proposed changes to the Conditions of Use would be available on the Secretary's website within a couple days from the February 14 hearing. However, I do not see that those revisions are available on the Secretary's website yet.

Please provide us with a redline/strike-through and clean version of the proposed changes to the Conditions of Use with enough lead time such that we can incorporate our comments on those proposed changes into our February 21 Public Comment Memorandum. If you are unable to provide the materials until February 21, we request that the Public Comment period be extended beyond February 21 at the close of business to allow the public sufficient time to comment on the proposed revisions to the Conditions of Use for DREs in Colorado. Thanks in advance.

Best Regards,
Matt Johnson

Matthew E. Johnson

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