Thursday, April 25, 2013
2:09 p.m.

Location

Evans House
1100 West Washington Street
Phoenix, Arizona 85007

Attending
Colleen C. Mathis, Chair, telephonically
Jose M. Herrera, Vice Chair, telephonically
Scott Day Freeman, Vice Chair
Linda C. McNulty, Commissioner, telephonically
Richard P. Stertz, Commissioner, telephonically
Raymond F. Bladine, Executive Director
Kristina Gomez, Deputy Executive Director
Buck Forst, Information Technology Specialist
Mary O'Grady, Counsel, Osborn Maledon
Joe Kanefield, Counsel, Ballard Spahr

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CHAIRPERSON MATHIS:  This meeting of the Arizona Independent Redistricting Commission will now come to order.

This date is April 25, 2013. The time is 2:09 p.m.

We'll go ahead and run through roll call.

Sounds like everyone is here, but --

Vice Chair Freeman?

VICE CHAIR FREEMAN:  Here.

CHAIRPERSON MATHIS:  Vice Chair Herrera?

VICE CHAIR HERRERA:  Here.

CHAIRPERSON MATHIS:  Commissioner McNulty?

COMMISSIONER MCNULTY:  Here.

CHAIRPERSON MATHIS:  Commission Stertz?

COMMISSIONER STERTZ:  Here.

CHAIRPERSON MATHIS:  Okay. And other folks in the room, Ray Bladine, our executive director; our deputy director, Kristina Gomez; we have our legal counsel, Joe Kanefield and Mary O'Grady. And our court reporter is Michelle today. Thank you, Michelle.

And anybody else I've missed?
RAYMOND BLADINE: I think that's it.

CHAIRPERSON MATHIS: Okay. Great.

We'll go ahead and go to agenda I -- or II, legal advice, direction to counsel, discussion and possible action regarding Harris versus IRC, first part.

Two, counsel for individual commissions in ongoing lawsuits and Commissioner Stertz's request for separate counsel.

Three, Leach versus IRC.

Four, State Legislature versus IRC.

And five, access to Commission documents, including documents subject to attorney/client or work product protection and executive session transcripts. The Commission may vote to go into executive session which would not be open to the public for the purpose of obtaining legal advice and providing direction to counsel.

So with that, does counsel want to say anything now on any of those five topics?

MARY O'GRADY: This is Mary, and I'll just give a brief procedural status in open session of the cases.

CHAIRPERSON MATHIS: Okay.

MARY O'GRADY: Before we go into executive
session on Harris versus AIRC, we are awaiting the
decision from the court. We have filed our closing
briefs and the trial is complete. So that's the
status there.

On Leach versus AIRC, that's the State
court challenge to the congressional maps. And
that -- we are in the early phase of exchanging
information and we have -- we'll be exchanging what
would be our supplemental disclosure and our initial
disclosure next week.

And the third lawsuit that's pending is
is the State Legislature versus AIRC. And this is
the case that's pending in federal court that the
legislature filed challenging the Commission's
authority to do congressional redistricting.

And that -- the status of that, we have
two motions pending. One is our motion to
reconsider the appointment of a three-judge panel
and the second is our motion to dismiss.

So we are waiting to hear on those issues
or for an argument to be scheduled. But that's the
procedural status.

And as to the remaining -- the remaining
issues that we wanted to discuss, we recommend that
we do so in executive session.
CHAIRPERSON MATHIS: Okay. Any questions from the commissioners?

COMMISSIONER STERTZ: Madame Chair.

CHAIRPERSON MATHIS: Mr. Stertz.

COMMISSIONER STERTZ: Thank you.

I would like to do as much of the discussion about this agenda item in public session. I think that the public needs to know some of the reasons about why we're looking for -- or why I'm looking for separate counsel, why the agendized item four, access to Commission documents, is -- I don't think there's evidence, in my opinion to subject to attorney/client privilege, and I think that I would like to have the public hear about this as they can.

CHAIRPERSON MATHIS: Okay. Do you have a comment, Mary or Joe, on Mr. Stertz's request?

VICE CHAIR FREEMAN: Madame Chair, it's Scott Freeman.

CHAIRPERSON MATHIS: Mr. Freeman.

VICE CHAIR FREEMAN: I would endorse Commissioner Stertz's comments.

I don't think there's anything new with respect to the posture of the lawsuit, so I assume the recommendation to go into executive session
deals strictly with the issue pertaining to separate
counsel for Commissioners -- Commissioner Stertz's
request and the access to documents, the way it's
been couched on this agenda item.

With respect to the access to documents,
that is something I've been requesting since
probably November with the executive director.
There's always been a reason for a delay.

It was February of last year when I put
it in writing to the executive director requesting
that the Commission, at least if it wasn't going to
honor my request, to get access to Commission
documents, that it be put on the agenda.

And I told the executive director I
wasn't going to let the issue go. And with every
subsequent hearing, I think there's been maybe five
of them, I've asked that all of my requested agenda
items be put on the agenda.

I guess this -- I did so again with
respect to this hearing, and I guess this agenda
item has something to do with it.

As a commissioner, I think I have a
responsibility to look over the shoulder of the
staff and the experts and the lawyers that the
Commission retains to make sure that everyone is
doing their job, that we are spending State money wisely. And that entails, if I request, getting access to records and communications among staff with the experts, with the lawyers.

And this arose in October -- in particular in October of 2011 when the Commission was working on the draft map and there seemed to be delays with respect to getting some information with respect to competitiveness, with respect to racial polarized voting analysis from the expert and nobody really knew what was going on and the reasons why there were these delays.

And that's what prompted that aspect of my request for at least some internal transparency with this Commission.

I also saw at least one instance of where communications -- you know, the commissioners regularly get e-mails from the staff and they almost always say, and there might have been a brief period of time when they didn't say this, but, you know, don't reply to all, lest you violate the open-meeting law. They want to comply with that.

I know the Commission took the position there for a while that the open-meeting law didn't apply to us, but we now know that it does, except
where it conflicts with the constitutional provision.

And yet I saw an instance where a commissioner's response had been circulated to other commissioners. Now, it might have been inadvertently, it might have been just an innocent mistake. I don't know that, but I would like to know whether that was commonplace, whether certain commissioners' communications were being shared with the other three commissioners.

So I included that with my request, that I would like to have access to those communications.

I know that there was the issue of attorney/client privilege that came up. And I respect that, but that's kind a murky area for me because we have lawyers representing the Commission, not individual commissioners.

In fact, I've had a Commission lawyer tell me point blank, look me right in the eye and tell me that he does not represent me and that he gave -- this was a meeting with respect to our run-up to the trial last month, that -- a speech that lawyers often give when they are meeting with unrepresented parties. They say, I don't represent you. I want to make that clear.
And, in fact, at that meeting, I had my own lawyer, the lawyer that the Commission had retained for me, in attendance. So that was sort of a record, quote, unquote, was made of that.

If that's the case, then -- if there is strictly -- the lawyers strictly work for the Commission as a body, I'm a commissioner, I shouldn't -- I should have access to those communications by commissioners to the lawyers, too.

But even if there is a problem with that, it's an easy one to solve. The Commission could easily vote to at least waive any claim of privilege within the Commission itself. The documents wouldn't necessarily be made public, but at least the commissioners would all have an opportunity to know what's going on on this Commission.

So that prompted me to make that request. I styled them as internal transparency request.

You know, the law is what it is. I don't know if that -- I don't see a reason to go into executive session to get legal advice on that. I would not support that.

With respect to the component of this agenda item dealing with separate counsel for commissioners, again, that's another murky area for
me. And again, you know, it raises all sorts of issues in my mind, given the posture of the Commission's counsel has taken with respect to certain commissioners. With respect to me and with respect to Commissioner Stertz, as I have seen it.

Obviously, I voted against the maps. I stated my objections in numerous public hearings. That's no secret. So in that respect, my interests might be contrary to the Commission's interest. That situation has been in existence since at least December of 2011.

Furthermore, in the context of the lawsuit, the Harris lawsuit, there came a time when the plaintiff's counsel intimated or requested discovery with respect to the commissioners.

So there was this issue of legislative privilege. Is there one? Can the commissioners invoke it? Can they claim it?

And there was a communication by Commission counsel to the plaintiff's counsel saying that, at least with respect to me, I was not inclined to invoke legislative privilege. That was early December that communication took place.

So there we have one commissioner, me, saying I wasn't inclined to invoke privilege, at
least a blanket claim to privilege. I didn't understand exactly the confines of the privilege. We knew that I was at a position contrary to what -- to the Commission with respect to the maps and I believe that the Commission really was implementing part of the maps, and said so in hearings.

And if there was an issue with respect to a conflict of interest, it certainly was manifest at that moment. And yet after that communication to opposing counsel, the Commission took positions contrary to my interest, made representations to the court that all of the commissioners had invoked privilege.

And it wasn't until the hearing in January of this year when there was oral argument that the three-judge panel asked a lot of questions about that and said, you know, there's a conflict of interest there. You guys can't be advising the individual commissioners on the issue of privilege. They all got to get their own lawyers.

So all of a sudden I got my own lawyer and then I filed something with the court through my -- this lawyer that the Commission had retained for me that said Commissioner Freeman does not assert a claim and has not asserted a claim to
legislative privilege in this matter.

It's a bizarre situation for me, at least, and I don't know exactly how -- it almost seems untenable because we've got the Commission's lawyers now taking positions contrary to positions that commissioners have taken.

The Commission's lawyer have sought to undermine positions commissioners have taken. They have made arguments to the court that are contrary to the positions that commissioners have taken in hearings and in their depositions.

There was no need, I don't think, to do that. We've had Commission's counsel seek to really cross-examine and impeach commissioners.

It's not a very comfortable situation. And even going forward I feel like how do I know now that in hearings a statement will be elicited from me that the design was really to undermine my position in any subsequent legal position. That concerns me.

So I think all of these issues -- and I really just scratched the surface -- should be aired publicly. I think whatever the law is with respect to attorneys representing public bodies and how that interplays, I mean, it is what it is. The law is
what it is, and I don't see how a resolution of
those issues would necessarily impact what the
Commission is doing in any subsequent lawsuit. It
might actually, to air this out, might actually, you
know, foster public confidence that at least we're
following the rules and we're doing what's
appropriate to defend the Commission's interest.

And I honestly have different opinions of
what's in the Commission's interest than three of
the other commissioners do, but I don't think my
opinion is any less valuable or deserves to be
undermined you undercut by the Commission's counsel.

I recall way back when we were
interviewing the lawyers for the Commission that it
was said in reference to the 1990 redistricting, and
that was a redistricting conducted by the
legislature, that -- you know, we had -- the comment
was made that, you know, maybe all of the
legislators should have had their own lawyers in
that because they were all working for their own
partisan interest and they probably all should have
been individually represented.

I think that comes into play with respect
to this Commission because it has not been
independent. It has, at least this lawsuit, has
shown some ray of sunshine on what was going on,
that we had commissioners in direct contact with an
elections director for the State Democratic party
and really just implementing their maps, having
numerous meetings with that individual during
critical mapping periods.

That individual had direct access,
apparently, to Strategic Telemetry and the maps on
their survey.

VICE CHAIR HERRERA: Can I break --
VICE CHAIR FREEMAN: Excuse me.
VICE CHAIR HERRERA: I have one that I want to
devote to this meeting, and I apologize to
Commissioner Freeman, but I want to make sure that
everybody understands that I have one hour --
VICE CHAIR FREEMAN: We understand that,
Commissioner Herrera. I'll let you know when I'm
finished. I'm almost finished.

So we've got Commission's counsel taking
positions directly contrary to positions I took
during hearings. We've got eliciting testimony that
I just think -- I was flabbergasted that -- it's
flat out wrong that we've got eliciting testimony
that the chair of the Commission was actually the
procurement officer for the Commission.
I'm not aware of any hearing that this Commission inducted -- in fact, the only thing I remember the Commission doing is agreeing to follow the procurement code. And I think the chair, herself, said that at one of the hearings back in April or May of 2011. That's what we were going to do.

And we never took action to anoint any particular commissioner for the procurement officer for this Commission. Doesn't say that in the Constitution.

Robert's Rules says, you know, that the president or the chair of the Commission -- of the body has administrative duties but only those set forth in the bylaws or by agreement of the body.

Well, there's nothing set forth in the Constitution that says anything about the duties of the chair, and this Commission never made any decisions as to what additional administrative duties the chair was going to have.

So I was kind of blown away that that story came out now, almost two years later during a trial.

Yeah. And I could go on, but, you know, I'm concerned that the situation might be untenable.
I don't want to cause unnecessary problems or anything like that. I'm certainly trying to be cooperative in every stage with Commission's counselor.

I've offered to make myself available to them. In fact, did make available to them before the trial to find out -- try to find out as a commissioner what was going to happen.

And, you know, we've got a couple more lawsuits to deal with, so let's just try and figure out the best approach to take going forward. And I think we can do that in a public session.

And that's all I got for the moment, Madame Chair.

CHAIRPERSON MATHIS: Do other commissioners have comments before I ask legal counsel to talk?

(Inaudible).

(Interrupting by the court reporter.)

THE COURT REPORTER: I'm sorry, Madame Chairwoman, your voice is very muffled.

CHAIRPERSON MATHIS: I'm sorry, what?

THE COURT REPORTER: I'm having a hard time understanding you.

CHAIRPERSON MATHIS: Oh, okay. Sorry about that.
I asked -- I thanked Mr. Freeman and then I said, does any other commissioner want to say anything before I ask Mary or Joe to talk?

Okay.

COMMISSIONER McNULTY: Madam Chair.

CHAIRPERSON MATHIS: Go ahead, Ms. McNulty.

COMMISSIONER McNULTY: This is Linda McNulty.

I have a question for counsel.

Can you hear me Joe and Mary?

VICE CHAIR FREEMAN: You're coming through -- we can hear you real good, Linda.

COMMISSIONER McNULTY: Okay. To the extent that any of us disagree with the characterization of the events as Commissioner Freeman has just described them, I'm going to just state for the record that I think this isn't the place for me to recite all of the ways in which I disagree.

I expect we'll deal with those things in, you know, the lawsuits as they become -- as the opportunity presents itself.

But I would just ask Joe and Mary whether we need to respond to those things right now or whether we can reserve those and deal with those at another time and place?

MARY O'GRADY: Commissioner -- Madame Chair,
Commissioner McNulty, I don't think a point-by-point response on the record right now is necessary.

I think -- and I don't think that the fact that commissioners don't do a point-by-point rebuttal of one another suggests that any commissioner agrees, you know, with what Commissioner Freeman said.

I don't think the record -- and so we'll just -- we can make that clear for the record that we aren't going to -- that commissioners don't need to put that on the record right now. And we -- we can proceed with the issues.

CHAIRPERSON MATHIS: Thank you.

COMMISSIONER STERTZ: Madame Chair.

CHAIRPERSON MATHIS: Mr. Herrera.

COMMISSIONER STERTZ: Mr. Stertz.

This is Rick Stertz. Madame Chair? In absence of the chair's response, can you hear me in Evans House?

VICE CHAIR FREEMAN: Loud and clear.

COMMISSIONER STERTZ: My -- in respect to my request for separate counsel, my request for separate counsel comes really because I was at the Harris v. IRC trial, I was called up by the Commission counsel as a hostile witness.
And if their position of me as a standing commissioner is that they are considering me as a hostile witness, I cannot come to any comprehension of how they can recognize my voice and opinion as a standing commissioner with equality with the other four commissioners.

It is not just a gray area, and I know that in the letter crafted by Mr. Kanefield, he shows that -- and has the opinion that there is no conflict of interest, I cannot reconcile that.

And more importantly is that in the preparation for the Harris v. IRC -- I'll just make a point that I happened to have never been contacted for any discussion with the Commission's counsel to ever get them to a place where they could determine what my testimony may or may not be.

I found it -- so I find it absolutely disingenuous to believe that there isn't an agenda that is contrary to at least this commissioner's view of his role on this Commission by the existing sitting legal counsel.

And therefore, I cannot in any way, shape or form determine that there is anything other than a conflict of interest. And to say otherwise by legal counsel is just, again, disingenuous.
So therefore, I'm going to be requesting that the Commission make the request to the State to fund independent counsel for not only myself but I believe the other four commissioners as it pertains to legal representation going forward, not just in the Leach v. IRC, but all subsequent legal matters where representation would be required.

VICE CHAIR HERRERA: Madame Chair.

Madame Chair, this is Jose.

We can assume that Chairwoman Mathis can't hear me?

VICE CHAIR FREEMAN: Commissioner Herrera, we're not sure whether she's even on the line, so let's just hold on a second.

VICE CHAIR HERRERA: Okay.

VICE CHAIR FREEMAN: Will she dial back in?

RAYMOND BLADINE: Unless we locked it.

Remember last time there was a question about locking it. And we talked about doing it, but I don't know if we did. I had thought of that.

COMMISSIONER STERTZ: Madame Chair?

This is Commissioner Stertz.

In absence of the chair being available and this is an ongoing meeting and there is no way to postpone, the vice chair should take the chair's
role so that we can continue moving this meeting forward.

CHAIRPERSON MATHIS: Can you hear me?

VICE CHAIR FREEMAN: We can hear you now, Colleen.

CHAIRPERSON MATHIS: Okay. Sorry. I'm sorry you couldn't hear me before but I was on. I could hear you but you couldn't hear me.

VICE CHAIR FREEMAN: Correct. We thought we had lost you.

CHAIRPERSON MATHIS: So the last I heard, I thought Mr. Herrera wanted to say something, but maybe I was mistaken.

VICE CHAIR HERRERA: No. No, you actually weren't.

Thank you for acknowledging me.

Again, I don't -- this isn't the time or place to either debate points that both commissioners made, but if Commissioner Stertz feels really passionately that he is entitled to --

THE COURT REPORTER: I'm sorry, I'm having a hard time -- Mr. Herrera, I'm having a hard time hearing you.

VICE CHAIR HERRERA: Is this better?

THE COURT REPORTER: Yes, it is.
VICE CHAIR HERRERA: As I was saying, I'm not going to argue with the point by point of the points that both Commissioner Freeman and Stertz made. But if Commissioner Stertz feels that passionately that he is entitled to his representation for legal action going forward, you know what, I have no problem with it as long as each individual commissioner is entitled to their own attorney as well.

And if they want to make a vote -- motion for that, I'm happy to support it. That's not what I want, but again, I do want to move this forward. And if they feel that passionately, I would support it.

MARY O'GRADY: Madame Chair, this is Mary. I just had a comment along the lines of Commissioner McNulty said.

The lawyers also will not be clarifying the record and making -- you know, in terms of whether we agree or disagree with statements made. And obviously, communications that we have with commissioners, we consider privilege, so we'll just -- again, I don't want to -- but wanted to make that clear.

VICE CHAIR FREEMAN: Madame Chair, this is
Scott Freeman.

CHAIRPERSON MATHIS: Go ahead, Mr. Freeman.

VICE CHAIR FREEMAN: I agree with that, and I just want to make sure that the Commission in any subsequent legal proceeding does not make the argument that failure to make a point-by-point response to any action or -- by the Commission or any statement made by commissioner does not constitute consent and agreement and consensus because those positions were made, at least during my deposition, and I cannot recall whether it was during the trial, and I don't agree with that.

I agree with the position that Commissioner McNulty made her statement and I agree with Ms. O'Grady's statement, it does not require a point-by-point response. Silence does not constitute consent or consensus.

VICE CHAIR HERRERA: Madame Chair, this is Jose.

CHAIRPERSON MATHIS: Go ahead, Mr. Herrera.

VICE CHAIR HERRERA: Commissioner Stertz, if you're willing to make a motion, I would love to hear it.

COMMISSIONER STERTZ: Madame Chair.

CHAIRPERSON MATHIS: Mr. Stertz.
COMMISSIONER STERTZ: Is the time for a motion now?

The motion would be that for all current litigation, I guess it would be for all pending litigation and all future litigation, that the -- between the IRC and any other outside parties, that the Commission would approve the -- and authorize independent legal counsel for all five commissioners, if they desire.

CHAIRPERSON MATHIS: Mr. Stertz's motion.

COMMISSIONER McNULTY: Madame Chair.

Ms. O'Grady, are you going to give us legal advice on these issues today in point or do we -- are you waiting for us to decide whether or not we're going to go into executive session or --

MARY O'GRADY: Well, our recommendation was that the legal advice on these issues, that we give that in executive session. So that's been our recommendation. And that --

COMMISSIONER McNULTY: Are we waiving anything if we -- for future legal advice if we don't do that?

MARY O'GRADY: We -- you can always seek future legal advice. So there is no waiver.

COMMISSIONER McNULTY: I don't know. I guess
we need legal advice about the legal advice.

You know, I don't have a problem with
Mr. Freeman and Mr. Stertz, you know, making their
statements, you know, and I should probably do the
same because I just -- you know, I'm getting tired
of all of the insinuation about the behavior of the
other three commissioners, which includes myself.

And I just have to -- I have to say, again, it's just categorically incorrect what's
being insinuated.

But nevertheless, now that Mr. Freeman
has said that he would like you to give your legal
advice on agenda number I in public, you know, what
would be the reason not to do that? I mean, if the
law is what it is, that you represent this
Commission, we have a legislature who can't, you
know, afford to pay for the legal counsel we have
now, never mind five lawyers.

So I'm asking you for legal advice about
whether or not we need to get your legal advice in
executive session or whether you can give us some
legal advice in public.

MARY O'GRADY: Well -- and I think you were
talking about agenda II, counsel for individual
commissioners?
COMMISSIONER MCNULTY: Yes.

MARY O'GRADY: And let me defer to Joe on that issue.

JOE KANEFIELD: Madame Chair --

COMMISSIONER STERTZ: Madame Chair, before Mr. Kanefield proceeds, there is a motion on the floor awaiting a second. If the motion is not going to be seconded, let's let the motion fail for lack of a second or let's allow the -- a second to take place before we move off-target, because the motion has been made and the next step would be for a second to be requested.

VICE CHAIR FREEMAN: Madame Chair, this is Scott Freeman.

Colleen, if you responded, we couldn't hear you.

CHAIRPERSON MATHIS: Mr. Freeman.

VICE CHAIR FREEMAN: Okay. I just want to make sure I understand the motion.

It is that -- to authorize all -- any commissioner who desires to have individual counsel with respect to ongoing litigation where they are named as a party in their official capacity or is it -- is it broader than that? Is it narrower than that? I can't remember the verbiage.
COMMISSIONER STERTZ: Madame Chair.

CHAIRPERSON MATHIS: Go ahead, Mr. Stertz.

COMMISSIONER STERTZ: I didn't spend much time in designing or crafting the motion. The concept of the motion is going to be that each individual -- it will be very similar to what we have done in the past -- that was done in the fall of 2011 where each individual commissioner has the right on any litigation that is in front of them where they are either a direct or an indirect party, where they may or may not be asked to testify or be deposed or to be involved, that they have got the right to their own individual legal counsel and the fees for that legal counsel would be paid for under contract with the State of Arizona.

CHAIRPERSON MATHIS: Does that help clarify, Mr. Freeman?

VICE CHAIR FREEMAN: A little bit. And I guess another question is, so right now, the Commission has retained individual counsel for the commissioners to give them legal advice on issues of legislative privilege and discovery matters in Harris and in Leach and I think it's limited to that.

This -- I take it then that this -- the
The intent of the motion is to expand that authority -- well, I'm not sure. That would allow individual commissioners then to have their own lawyers retained by the Commission, file papers and pleadings with the court on their behalf to assert their positions, their defenses and allegations.

Is that correct?

COMMISSIONER STERTZ: That's correct.

COMMISSIONER MCNULTY: Why would there be defenses if they are not parties? There aren't any defenses if people aren't defendants.

VICE CHAIR FREEMAN: Well, I think we're all still parties in our official capacities in the Leach matter. I'm not sure about the legislature's lawsuit.

COMMISSIONER MCNULTY: But again, that's just as a proxy for the Commission.

COMMISSIONER STERTZ: Again, I was taken -- in the Harris case, I was taken by the Commission, which as a commissioner, they are my counsel, I was considered by my own counsel as hostile to derive testimony, of which they had never ever interviewed me, discussed with me anything about the Harris case leading up to this, unlike what had been done with other commissioners.
So I take great umbrance to the concept of requiring some level of independence, as I do not believe for a millisecond that there is independence in this representation for this independent redistricting commission.

So I'm pleased that Mr. -- Commissioner Herrera is going to support this motion and we just want to, in my opinion, make sure that we have individual commissioners working for a single body to benefit the entire body.

COMMISSIONER MCNULTY: It's not disingenuous. Rick, you disagree with the body. I mean, the lawyers are just representing the Commission. They are trying to defend our maps. That's all. And you disagree with that. It's just -- it's not a legal issue, it's a personal, political issue.

COMMISSIONER STERTZ: It's not a personal or political issue, Linda.

COMMISSIONER MCNULTY: But it is. You disagree with what we did. You disagree with what we agreed to do. And that's all it comes down to. And, you know, I don't want to debate it with you, but I do feel like I need to respond in some way.

COMMISSIONER STERTZ: Why?

COMMISSIONER MCNULTY: Why do I feel like I
1 need to respond?

2 COMMISSIONER STERTZ: Yes.

3 COMMISSIONER MCNULTY: Because decisions were
4 made by -- in what we believe was in the best
5 interest of the Commission and the state.

6 COMMISSIONER STERTZ: Who is "we"?

7 COMMISSIONER MCNULTY: A majority of the
8 commissioners. All of the commissioners. And your
9 decisions -- you had a different perspective but
10 that doesn't mean anyone was bad or anyone has a --

11 COMMISSIONER STERTZ: You had a different --
12 you had a different perspective than me.

13 COMMISSIONER MCNULTY: Yeah, we did.

14 COMMISSIONER STERTZ: My view is not the
15 result -- my view on this has to do with the
16 process. And my -- what was represented about me in
17 testimony in Harris and the way that the Commission
18 -- the Commission's attorneys approached me as an
19 individual, I feel was absolutely -- had nothing to
20 do with working for the benefit of the Commission as
21 a body, including all five members.

22 COMMISSIONER MCNULTY: Well, that's how I
23 feel --

24 COMMISSIONER STERTZ: If they are representing
25 three members -- if this legal team is only
representing the majority, then, Linda, I agree with you completely. Because that is the appearance that they are -- that they have given. That is how -- they assisted to couch testimony during this trial. They assisted the couch testimony during depositions and they are representing the majority.

I have not -- had no participation at all with my own, quote, unquote, commissioner's legal counsel.

So I believe it's disingenuous. I think that it's real and I think that the public needs to know that what we have is that we've got two very high-powered legal firms working together with the perceived majority on this. And I believe that the result of the maps -- of whatever the result of the maps are, my issue had to do, and currently still has to do, with the process.

And I still believe that there were things during -- that were in the process that we could have all done better. But no one asked that question.

When I was asked at trial, Linda, about you, I've got the highest level of respect for you, the highest level respect. I thought that our interplay was fantastic. I thought that we worked
extremely well together.

But to be brought up in this Harris case and even referred to in a letter from Joe Kanefield saying that this was a personal issue, this isn't a personal issue. They had no idea what I was going to testify. They didn't -- they had no knowledge at all because they never asked me.

My own attorneys, as a sitting commissioner, never contacted me to find out what was going to take place at the Harris trial.

So therefore, I don't believe that they are looking out for the benefit of the body; that they are looking out for the benefit of the majority. And I happen to not be in that majority.

COMMISSIONER MCNULTY: Well, all I can say is that it's a difficult situation because I feel the same way that you do about the high-powered attorneys that are being paid by the Republican party and Republican interests who are impugning me. And it just so happens that it's not the majority on the Commission but it's the same thing going the other way. It's exactly the same thing going the other way.

You know, I acted in good faith. I did what I thought was best and right. I educated
myself and you guys were doing the same thing.
But -- and, you know, I don't know how we get
through it and we get to the end, but I do believe
we need to stop calling each other bad people. We
just did what we each believed was correct.

We had different perspectives, but we're
wasting a whole lot of money using process as an
excuse to argue about our different perspectives.

VICE CHAIR HERRERA: Madame Chair.

COMMISSIONER MCNULTY: And accusing one
another of directly or indirectly or allowing these
third-party people to accuse us directly or
indirectly of things that are just plain wrong.

VICE CHAIR HERRERA: Madame Chair.

CHAIRPERSON MATHIS: Mr. Herrera.

VICE CHAIR HERRERA: Yeah, I constantly agree
with Commissioner McNulty. That's probably why
she's highly paid as an attorney and I'm not.

You know, one of the things -- I think if
we're ever going to come up with a consensus or
start, you know, coming up with, okay, this is an
area we can agree -- there's five of us and we're
all very different. You know, there were things
that were said when I was being deposed that -- you
know, it just shocked -- it really shocked me
because I really felt that there were a couple commissioners on the Commission that took things personally.

When I was asked -- I was actually asked if I like the other commissioners. I said, you know what, I like them all. I don't have an issue with all of them because what we do --

COMMISSIONER STERTZ: That's not in your deposition.

VICE CHAIR HERRERA: No, actually you read it. I don't have a problem with anyone.

COMMISSIONER STERTZ: I read your deposition. That's not what --

VICE CHAIR HERRERA: Mr. Stertz, can I finish? I actually did not interrupt you at all. I would appreciate it if you would let me talk.

You know, I didn't take things personally at all because this wasn't personal for me. This was a job that we were all -- we all volunteered to do.

And, you know, I never -- coming in, I never thought, oh, I'm going to agree with the Democrat because there was times where I disagreed with Commissioner McNulty quite often. And if you look at the record, we didn't vote consistently yes
or no on issues. We disagreed quite a bit. I disagreed quite a bit with the chair.

And I was fine with that. This isn't personal for me. We had a job to do.

But, you know, when we have commissioners that consistently, you know, label people this or that, it's, like, what did I do to this individual for them to dislike me that much. All I was doing was what I thought was best for the State. And I still think that. I still think whatever I did, however I voted was best for the State.

And, you know what, I'm not going to take that back. Not at all. Nothing I did I regret because I did -- as I said, the right thing.

And -- but I want to move forward because I -- the maps -- we keep forgetting that these maps were approved on the first try. And it never happened before and it was completely ignored. And we did a damn good job and all we can focus on and all we focused on has been these lawsuits by our state.

And, I'm, like, we did a huge thing. Never been done before. Even when the old legislators were doing these maps, it had never been approved on the first try.
And, you know what, we didn't pat ourselves on the back. We actually never had time

to do that because we've been arguing, bickering,

spending government money that I'm opposed to. But,

you know what, if these two attorneys -- these two

commissioners want their own -- want their own legal
counsel going forward, let's vote on that, let's
move forward and let's keep wasting it. If they
want to waste government state money that we don't
have? Okay.

I don't like it, but I want to move

forward. I want to move on with my life because I
have a life. The maps are through, done. And I
have kids to look after. I have a job to do. They
are not paying me for this. I'm not being paid at
all.

And, you know what, I thought I did my
job but it just keeps going on and on and on and I'm
tired of it. I really am. Because this is not fun.
This is not what I signed up for. I didn't sign up
for my own commissioners, my own colleagues to be
calling me -- I don't know what names they were
calling me. I didn't sign up for that.

It isn't -- and again, I don't want to
take things personally and I'm doing my best not to,
but you know what, we did a damn good job. Yeah, we disagreed and we're still going to disagree. Ten years from now, guess what, we're still going to disagree but it doesn't matter because we did our jobs and we need to move forward. And that's what I want to do. I want to move forward.

And whatever it takes for us to move forward today, that's what I want to do. That's exactly what I want to do because I want to end this as quickly as possible.

CHAIRPERSON MATHIS: Mr. Herrera, thank you.

COMMISSIONER STERTZ: Madame Chair.

Just one question before Mr. Stertz talks.

Mr. Herrera you have to leave when? Like soon?

VICE CHAIR HERRERA: Shortly. I'll probably leave in 10 or 15 minutes.

CHAIRPERSON MATHIS: Okay. I'm just wondering how much time we have.

One idea would be to continue this, because this is, needless to say, a weighty topic and there's, you know, these five subparts to this, you know, legal advice and maybe it needs to be broken up into separate things and we have another
meeting at some point to discuss it because we're not going to get through this with Mr. Herrera leaving in 10 or 15 minutes.

So I'm just kind of practically wondering how we --

COMMISSIONER STERTZ: Madame Chair, I'll be brief.

Just on the --

CHAIRPERSON MATHIS: Go ahead, Mr. Stertz.

COMMISSIONER STERTZ: Just in response to Commissioner McNulty.

The issue of representation and attacks -- the Commission's attorney from Ballard Spahr and Osborn Maledon, represent the Commission and the individual commissioners in their capacity as commissioners.

I have no relationship with the plaintiff's attorneys in any of these cases. Don't know them. Don't know anything about them.

So when I'm saying that -- when the concept of your guys and their guys, I believe that Osborn Maledon and Ballard Spahr are our guys. And it was the way that our guys treated me that I had my issue with. And therefore, I don't believe that I can have a relationship with our guys going
forward.

I don't have a relationship with the plaintiffs. I wasn't taking the positions, and I didn't even know what the positions were going to be of the plaintiffs.

Again, I had no idea what -- the direction that the defendants, our guys, were going to take because our guys never contacted me. They were believing through assumption and true their own view of who I am. And therefore, I don't see them as being able to represent me as a commissioner going forward.

So either -- let's either second my motion and vote on it or let's go on to the second.

VICE CHAIR FREEMAN: Madame Chair, it's Scott Freeman.

CHAIRPERSON MATHIS: Mr. Freeman.

VICE CHAIR FREEMAN: I'll second the motion because I would like to hear what Mr. Kanefield has to say.

CHAIRPERSON MATHIS: I couldn't make out what you said there. You said you second the motion but what?

VICE CHAIR FREEMAN: Because I would like to hear what Mr. Kanefield has to say.
CHAIRPERSON MATHIS: Okay. So we have this motion that's been seconded for Mr. -- motion made by Mr. Stertz, seconded by Mr. Freeman.

Is there any discussion on -- even though we've been discussing it?

JOE KANEFIELD: Madame Chair.

COMMISSIONER MCNULTY: Go ahead.

JOE KANEFIELD: Madame Chair, members of the Commission, this is Joe.

I think this would probably be a good time for me to summarize our response to Commissioner Stertz's request for us to withdraw as counsel on behalf of Mr. Stertz in his official capacity.

We copied the Commission on the letter, so you're all familiar with it.

And let me just start by saying, you know, we're very sorry that this has all played out the way it has. Speaking for myself, when you all interviewed me, it was done in public session. You asked me very pointedly, who would I represent -- whose interest would I represent and I told you that I would represent the Commission as a whole because that's what you were hiring me to do and that's ethically what I would be required to do, not
individual commissioner's interest but the Commission as a whole.

And I apologize to Commissioner Stertz. I can hear very clearly how he feels as a result of the trial and the discovery leading up to the trial. And it doesn't surprise me. Unfortunately, litigation is an ugly business. It's very adversarial. It's -- cross-examination is part of the process of ascertaining the truth. It's not pleasant to be deposed. I've been deposed and I've been subject to cross-examination in my former capacity as the election director. So I know the feeling. And I'm sorry that you all had to go through it.

We were doing our best as counsel for the Commission to represent the Commission and the decision made by the Commission. The problem, of course, is that the Commission is divided. That's not uncommon in state government or even sometimes in corporate life. And our ethical rules guide us in these situations and tell us what to do, and that is to continue representing the body.

So what -- the reason we felt that we needed to respond to Commissioner Stertz's letter
requesting that we withdraw -- to put it in context
of those that aren't as familiar with this as we all
are -- in the Leach case, the State court action,
the Commission was sued as a whole alleging
irregularity -- procedural irregularities with
respect to the process for drawing the congressional
map.

In addition to naming the Commission as a
whole, the individual commissioners were named in
their official capacity. And that's an important
point to make because that's the way you plead a
case sometimes when you need to name individuals to
get specific relief.

Without boring everyone about the details
of that area of the law, we know in federal court
you do have to name individuals in their official
capacities to get some relief because of the 11th
Amendment prevents you from naming the state. Same
issues don't necessarily present themselves in the
state court proceeding.

When we were asked to withdraw as
counsel, you know, we had to look at this issue a
little more carefully, of course, but this isn't the
first time it's come up. To the credit of
Commissioner Freeman, he's identified this issue in
the past and we've certainly looked into it.

The letter --

COMMISSIONER McNULTY: Joe, I'm having a little trouble hearing you. If you have a mic, could you get closer to it?

JOE KANEFIELD: Yes. I'm sorry, Commissioner McNulty. I was not speaking directly into the mic. Can you hear me now?

COMMISSIONER McNULTY: That's much better. Thank you.

JOE KANEFIELD: I can't repeat everything I just said.

COMMISSIONER McNULTY: You don't need to.

JOE KANEFIELD: Anyway, I was getting to the letter to just explain the position of Ballard Spahr and Osborn Maledon. Mary -- this isn't Mary's letter but she sent a separate letter indicating that she and her firm were in agreement.

And frankly, you know, one of our concerns as that this issue about us withdrawing raises ethical questions about conflicts of interest, and that's a very serious matter with respect to members of our profession.

So we, of course, wanted to make sure that we were responsive to our client, the
Commission, was responsive to Commissioner Stertz and setting forth how we see the law and how we interpret the law.

So essentially, what we have pointed out, as I've already said at least two or three times now, is that we represent the Commission as an entity, not individual commissioners but the Commission as an entity.

The relief requested in the Leach case is against the Commission, not against any specific commissioner. So the -- obviously, the relief is that new maps be drawn, following what the plaintiffs say should have been the proper procedure.

So if they were successful in this case, the relief would not be personal to any particular commissioner, but it would be to the Commission as a whole. So that certainly factored into our analysis.

We also cite to the case law that -- as I noted earlier, that discusses official capacity suits and why you caption a case naming individuals in their official capacity, which usually is required in federal court proceedings to deal with the 11th Amendment issues.
But in this case, we have yet to identify what the issue -- why the plaintiffs felt the need to name the individual commissioners in their official capacity. I'm not saying that there isn't a reason why they did. We just haven't identified it. Perhaps they will tell us at some point.

But the lawsuit doesn't seek relief against any of you in your official capacities. And therefore, we -- as I indicated in the letter to Commissioner Stertz -- do not -- our role is to defend the Commission's decisions and not necessarily the personal interests of any individual commissioner.

And, Commissioner Stertz, I apologize if that statement sounds harsh. It was not meant to sound that way, but the issue is whether you -- I think what I was trying to say is that if you as an individual commissioner had some kind of an exposure as an individual, then that is a different question. If it's just a disagreement with the majority and the final decisions of the map or even the process, then we -- without any specific relief requested against you, we don't see that as a conflict. So ethically we don't see that as a conflict.

Now, having said all of that, on the
question of individual representation and withdrawal, we felt that it was necessary for the Commission to address those questions because that's who we represent and we think that that's your decision to decide whether the individual commissioners should, in fact, have their separate counsel.

And if you would direct us to withdraw as counsel for the commissioners in their official capacity, then we would most certainly honor that request.

We also told Commissioner Stertz that we would let the court know about this in any filings and -- before the issue is resolved, but we haven't had to file. Our next filing will be next week. It's not even a filing, it's a disclosure exchange between counsel.

And again, in fairness, we brought this up before we filed our first responsive pleading because we did want to get this resolved. We certainly don't want to be accused of any ethical impropriety.

On the issue of expense, we do take the position that separate counsel for individual commissioners in their official capacity is not a
justified expense for the reasons stated in that
there's no specific relief sought against the
individual commissioners, with one caveat being that
there may be occasion for separate counsel for
individual commissioners, and we have already
identified that situation with respect to privilege
and waiver. And there may be other situations --
conflict situations that identify themselves where
individual counsel would be appropriate at
Commission-Stated expense.

But in terms of a blanket recommendation
to authorize the expenditure of individual counsel,
counsel for individual commissioners in their
official given the manner in which this case is
postured, we're just not seeing how this is a
justified expense.

In addition to obviously representing you
and defending the maps in these cases, we also are
obligated to advise you on other aspects of the law,
including incurring expenditures and what kind of
exposure they might be there.

So we are not saying that it's
necessarily legal or unlawful, but we just aren't
convinced that it's a necessary expense.

And with that having been said, I will
pass the microphone to Mary to see if she has anything to add. On that last point, the Commission can discuss that perhaps in a little bit more detail.

MARY O'GRADY: I guess my comment in terms of expense and what the separate counsel might do, as I understand the motion, it would be, you know -- well -- and Commissioner Stertz's proposal, we would not represent Commissioner Stertz. And perhaps if this motion is approved, we would only be responding for the Commission and perhaps we would have five separate lawyers who do everything for the individual commissioners. So we would have six separate defense counsel doing whatever needs to be done in the lawsuit.

And again, as Joe said, that doesn't seem to be either appropriate or necessary, given the nature of this lawsuit, which is the commissioners are named in their official capacity in this challenge to the Commission's decisions and the relief sought is against the maps and the naming of the commissioners in their official capacity is unnecessarily, like in the Harris case, they were dismissed based on legislative immunity. We think that same action is likely appropriate in the State
case. And really, the commissioners in their
official capacity are just proxies, therefore, the
entity. And in our research, as we have pointed
out, you know, commissioners in this type of
lawsuit, really their role is as witnesses perhaps
and -- perhaps but perhaps not because of
legislative privilege. And -- but -- and as
decision-makers as commissioners in the body's
defense, but not to individually direct, you know,
their personal representation in the case. And you
have five individual voices representing the
commissioners in their official capacity when they
are really just named as proxies for the entity.
And I think that's my supplemental
comment at this point.

VICE CHAIR FREEMAN: Madame Chair, this is
Scott Freeman.

CHAIRPERSON MATHIS: Mr. Freeman.

VICE CHAIR FREEMAN: Question to counsel, and
it's just -- I guess my question is, am I
articulating a legitimate concern here?

I understand it as the Commission
authorized individual counsel for commissioners in
their official capacity for -- with respect to the
issues pertaining to legislative privilege and
discovery, but that was it.

So at trial, I mean, we were told at the last hearing you all can have your individual lawyers there when you testify at trial but it probably would be a waste of time if they stay for other parts of the trial, although I think some of the other lawyers did stay.

But -- so my lawyer was there, the lawyer the Commission had retained for me, but he couldn't object, he couldn't take, at least that I was aware -- he couldn't take any action. He could object at the deposition, which he did a couple of times, but -- and there were probably times when I was up there where I wanted an objection and there was nobody. There was nobody. I guess I could have lodged my own objection, but there was nobody to do that.

And maybe -- I guess what I'm -- is that a concern and is there maybe a third way whereby maybe the scope of representation of the individual lawyers is maybe broadened in some way that would address some of these concerns and yet not upset the applecart too much?

JOE KANEFIELD: Madame Chair, Commissioner Freeman, I'll take a quick stab at that.
I think the answer is yes, and I always felt it was appropriate for the individual commissioners to have separate counsel on privileged questions because I could see a potential for a conflict with commissioners and the body with respect to positions taken.

I think that that's an appropriate request, I'm just not sure what the exact language or scope of that would be. But, yes, in certain situations it may very well be appropriate to expand the scope of the counsel that the Commission has authorized you to hire -- or us to hire on your behalf.

VICE CHAIR FREEMAN: And I'm searching for it as well. And I go back to the example of which commissioners invoked privilege. Well, Freeman didn't but the court thought maybe I did and so that -- to me, that was a problem. And I didn't know about it until later.

And I know you guys thought, you know, all the commissioners, they were named as proxies so it doesn't matter what they say, but -- and I don't mean to put words in your mouth, but, I mean, I've got my own -- I feel like my duty and responsibility is to uphold the Constitution. So I do have -- and
I'm named. I was served. You accepted service for me. So there is this notion that there is an interest that each individual commissioner has that maybe isn't being protected enough under the construct we have right now.

VICE CHAIR HERRERA: Madame Chair.

CHAIRPERSON MATHIS: Go ahead, Mr. Herrera.

VICE CHAIR HERRERA: Yeah, I'm going to have to be hanging up now. I apologize. So -- you guys still have a quorum without me, so I'm going to be hanging up.

Both of our attorneys really don't need to apologize for anything. I think they did the job they needed to do, the job we hired them for. You know, and I felt very comfortable talking to Joe Kanefield. And myself as a Democrat talking Joe Kanefield, a Republican. And sometimes I talked to him more than I did to Mary.

And, you know, that's what the Commission is supposed to be about, when we hire attorneys. I really never thought that we were going to hire attorneys for Democrats and Republicans. I never saw Joe that way and I never saw Mary that way.

And it's sad to say -- to hear the other commissioners felt that they were -- they don't --
you know, they weren't listened to or they
weren't -- you know, they felt that they were being
ignored or whatever the case might be that -- you
know, I feel bad, but I never saw it the same way.

Obviously, it's their opinion and I'm
going to have to respect that, but, you know, our
attorneys don't have to apologize for anything.

If I had to do it all over again, these
are the attorneys I want as well. So -- and again,
I hope one of these days these people will look back
and say, you know what, I don't even know why I took
this personally. They all had a job to do, they did
it. So that's all that I got to say.

Like I said, I don't know how long you're
going to be on the conference call, but I wish you
guys the best but I will have to hang up.

COMMISSIONER STERTZ: Madame Chair, are we
able to take a vote before Mr. Herrera hangs up?

CHAIRPERSON MATHIS: I'm not (inaudible) -- I
feel like -- I don't want to (inaudible) --

THE COURT REPORTER: I'm sorry, I can't --

what was that last sentence.

CHAIRPERSON MATHIS: Can you hear me? I don't
know where -- what part -- where do I --

RAYMOND BLADINE: Madame Chair, we can't hear
you, but I would like to ask a question before you vote, if I may.

CHAIRPERSON MATHIS: Is that Ray?

RAYMOND BLADINE: Yes, it is. I'm sorry. This is Ray.

I would just ask that whatever you vote, that we make sure that our attorneys feel we can pay for those services.

I've just spent the last three months meeting with legislative leadership and talking about the amounts of money that we are spending on lawyers and defending it. And I think the legislature knows it has a constitutional responsibility, but I think we also have a legal responsibility to not ask staff to be paying invoices unless we know that they legally can be paid.

And I heard something in Joe's comments that raised a question whether such a broad-ended motion as was made, whether or not that would be legal. I don't want to put words in his mouth, but since I'm the one that approves, or Kristina, the invoices, I want to make sure that I'm in a position where I can do that and not have to come back to you.
CHAIRPERSON MATHIS: Okay. Can you guys hear me?

RAYMOND BLADINE: Yes.

CHAIRPERSON MATHIS: Is Mr. Herrera gone?

VICE CHAIR HERRERA: Is Mr. who?

CHAIRPERSON MATHIS: Herrera.

VICE CHAIR HERRERA: I'm sorry, I didn't hear you. Yes, I am still on.

CHAIRPERSON MATHIS: Okay. Good.

So I was going to say with regard to taking a vote before you depart, I would prefer if we could postpone a vote on this motion. I don't -- is somebody talking? Can you guys hear me?

VICE CHAIR HERRERA: I can hear you.

CHAIRPERSON MATHIS: I can hear everybody on -- that's dialing in, I can hear Mr. Stertz and Ms McNulty super well but I can't hear Evans House very well.

Can Evans House hear me?

RAYMOND BLADINE: Evans House can hear you.

We're just being quiet.

CHAIRPERSON MATHIS: Okay. You guys stay quiet.

I would prefer we not take a vote on Mr. Stertz's motion that's been seconded by
Mr. Freeman right away before Mr. Herrera gets off the phone. I don't want to foreclose the option of having any commissioner getting any individual counsel at all, but I also am not ready to authorize lawyering up and spending a whole bunch more money on individual counsel when we have counsel representing all five commissioners right now.

So I see both sides of this and I have my own -- my own issues, too, because I feel that we need to be represented individually. I felt that before as well.

So I guess I would like to, if possible, have some more time to think about this before we actually vote today. But I'm one commissioner. If there is already a group of you that are ready to go and vote, you know, I can --

VICE CHAIR HERRERA: Madame Chair.

CHAIRPERSON MATHIS: Mr. Herrera.

VICE CHAIR HERRERA: If you would like to postpone the vote, when we would we be voting -- at what meeting --

CHAIRPERSON MATHIS: Yeah, that's a good question.

We would need to, obviously, notice another meeting, and I know -- you know, I know it's
very difficult for us all to get together. But that
would be my preferred route.

VICE CHAIR HERRERA: And, Madame Chair.

CHAIRPERSON MATHIS: Mr. Herrera.

VICE CHAIR HERRERA: How would it be different
if you were to -- what would be different if we were
to postpone the vote? So let's just say we met two
weeks from now or maybe a week from now. What would
be different then as it is now?

CHAIRPERSON MATHIS: I just need to think
about it for my own self because I'm not ready to
vote on this right now. But if others are and want
to go ahead, we can do.

VICE CHAIR HERRERA: Madame Chair, one last
comment.

If you were to postpone the vote, as long
as we have a date in mind of when we want to
schedule this -- reschedule the topic and talk about
it and finally do a vote, either up and down, I'm
okay with that, with postponing it, but not much
longer because I'm assuming when we have another
meeting, we're going to talk about the same things
over again. People will say the same things they
have said today, rehashing everything.

I don't want to do that. If it's going
to be a meeting where we -- it's agendized and we
discuss things that haven't already been said, then
I'm okay with that. But I don't want to prolong it
and then go through the whole thing over again. I
mean, we have been on the phone for almost an hour
and a half and it hasn't been, to me as productive
as it could have been.

CHAIRPERSON MATHIS: I agree.

COMMISSIONER STERTZ: Madame Chair.

CHAIRPERSON MATHIS: Mr. Stertz.

COMMISSIONER STERTZ: The issue of Leach case,
the clock is ticking, and I think that we're all --
all members of this Commission are cognizant of the
financial constraints of the State of Arizona and
the desire to not use the phrase, to lawyer up, I
just feel that it is imperative to bring this to a
vote now so that we can -- if we want to revisit
post-Leach on any other litigation, that would be
satisfactory to me and I could restrict our -- the
motion and amend it to dealing specifically with the
cases that are currently active. I can withdraw any
future for us to have conversation later.

But at this time, I think that it is
imperative, from my perspective and I believe the
perspective of the other commissioners, to at least
have guidance from individual legal counsel in their official capacity as commissioners, if they so choose.

VICE CHAIR HERRERA: Madame Chair, I know I gave my last comment. I do want to hear from Commissioner McNulty and I would love to hear her thoughts on this.

COMMISSIONER MCNULTY: My concern -- thank you, Mr. Herrera. My concern is that the legislature is concerned about funding counsel right now and I don't want to put ourselves in a position where we have representation which would not, from a legal perspective, be justified and which could cause the legislature to be unwilling to pay the Commission's lawyers or to -- or to reduce the compensation to the Commission's lawyers. So I feel like I need to think about this some more, too.

I liked the question that Mr. Stertz and Mr. Freeman asked Joe Kanefield about whether there is a way to expand the scope of the existing representation somewhat to address Mr. Stertz's concerns without being quite so open-ended.

But I am concerned about having -- you know, all of us have lawyers in our individual
I capacity when we really haven't been sued as
individuals and when we could and probably should
move for the Harris -- for the Leach court to
dismiss us out as individuals in our official
capacity so that it's clear that it's just the
Commission that's at stake -- that's a defendant and
then try and deal with Mr. Stertz's concern about
the depositions and, you know, being -- all of our
concerns about being -- about those things in a
narrower way.

I guess we don't yet know in Leach
whether we're going to waive executive --
legislative privilege and, you know, whether we will
be deposed and wonder whether this decision should
await a little better sense of all of that.

VICE CHAIR HERRERA: Madame Chair.

CHAIRPERSON MATHIS: Mr. Herrera.

VICE CHAIR HERRERA: Now, if we decide to
postpone it, when would be the soonest day we could
schedule this meeting to discuss whatever hasn't
been discussed, questions that have been brought --
that have come up since this discussion, when would
be the soonest time -- soonest date we could
schedule this next meeting?

CHAIRPERSON MATHIS: 48 hours from now, but I
don't know if everyone is available. So we would have to, you know, poll everybody and ask when folks are available.

VICE CHAIR HERRERA: I want to be as accommodating as possible and -- but I also want to -- I understand the concerns from the other two commissioners that want to delay the vote. I do understand that.

So if the vote needs to be delayed to accommodate everyone, or at least the other two, I'm okay with that as long as it's scheduled as soon as possible, whether it be maybe Tuesday or Monday. I don't know, Monday is -- I think that's plenty of time.

That's my only concern, is if we decide to postpone the vote, that we reschedule it as soon as possible and have people think about what -- you know, whatever issues that have been -- arose from these conversations, think about it, discuss it and then come into the meeting, if it's Tuesday, we talk those issues and hopefully answer them and then vote on whether or not to proceed.

MARY O'GRADY: Madame Chair --

COMMISSIONER STERTZ: Madame Chair.

MARY O'GRADY: -- this is Mary.
CHAIRPERSON MATHIS: Mr. Stertz.

COMMISSIONER STERTZ: Quick question, and, Ms. O'Grady, just bear with me because this actually pertains to you.

The letter that you have delivered to me gives me the indication that you will be withdrawing as representing me as a commissioner; is that correct?

MARY O'GRADY: No, Madame Chair, Commissioner Stertz. The letter just supported the analysis of Joe Kanefield.

CHAIRPERSON MATHIS: Okay. So when can we next all get together?

RAYMOND BLADINE: Madame Chair, I think Mary has something she wants to offer --

CHAIRPERSON MATHIS: Oh, okay.

RAYMOND BLADINE: And then I would say this: If everyone would, today, send us their availability calendar for the next -- starting next Tuesday, then we can quickly set a meeting, but that's normally the first step.

If we try to set a meeting now, we're just going to be changing it because people have their own lives to live. And the thing that would move it the fastest is everybody doing what they
have been good about doing, and that's sending us the times they could meet over the next, say, starting 48 hours from now.

MARY O'GRADY: And, Madame Chair --

CHAIRPERSON MATHIS: Availability -- go ahead, Ms. McNulty.

COMMISSIONER MCNULTY: That's Mary.

CHAIRPERSON MATHIS: Sorry, Mary. Go ahead, Mary.

VICE CHAIR HERRERA: Mary, before you speak -- I mean, Ms. O'Grady, before you speak, do you mind if I cut in real quick?

I will send the IRC staff my availability for next week and I will be as flexible as I need to be so we can schedule a meeting, if Tuesday is the date that everyone is available. Hopefully that's the case.

But I'll send you my availability after I hang up and I look forward to discussion on this topic next week.

So thank you guys. Take care.

(Mr. Herrera left the meeting.)

MARY O'GRADY: Madame Chair, this is Mary, and commissioners, just a few points.

One, I would appreciate the opportunity
for an executive session on legal advice because some of the -- in terms of the Commission's strategy and whatever issues are going on there because some of this is interrelated with the -- you know, how the Commission approaches things and so can talk about some of the other issues that might come up if there is there is -- if we do have expanded roles of counsel in terms of the Commission's representation. So I would like the opportunity to have that executive session.

I do think it makes sense to have the budget briefing as well. And -- and this information is helpful so Joe and I can also think about some of the options that the Commission is considering in terms of roles for counsel. But I would like that opportunity for an executive session on Leach before a vote is taken and for that budget briefing.

And procedurally, we do have a motion and a second on the table. So if we're going to delay the vote, not vote on those today, if there is -- either those are withdrawn, the second and the motion, or motion to table that motion.

COMMISSIONER STERTZ: Madame Chair.

CHAIRPERSON MATHIS: Mr. Stertz.
COMMISSIONER STERTZ: Since both you and Commissioner McNulty have given your opinion that you do not wish to vote at this time, if we took -- a question was called, I know that you would vote nay, so we would have a stalemate.

It's going to be easier for me just to table the motion and the second so that we don't have to debate that issue again.

And I would suggest that if there's any -- as Mr. Kanefield was describing, if there's any --

You've heard our concerns. And the goal is not to excessively expand the cost to the Commission, but you also need to recognize the place that I was put in. I would not have made the request if I did not feel very strongly about where I am.

This is not a personal issue. I'm not taking this as a personal issue, although I did use the word "personal" in my letter to you and you did respond to it in such a way that you're believing that this is just something that's personal and having personal feelings.

It was that our legal team did not, in my opinion, approach at least this commissioner as a
part of that team. And therefore, I believe that having counsel from outside is going to be helpful in moving the facts down the field.

I will then table the motion if the seconder agrees with the second. Then we will reconvene at a date hopefully set within the next 10 days.

VICE CHAIR FREEMAN: Madame Chair, it's Scott Freeman.

CHAIRPERSON MATHIS: Mr. Freeman.

VICE CHAIR FREEMAN: Given what Commissioner Stertz has said, I will withdraw the second.

CHAIRPERSON MATHIS: Okay. Thank you.

So we'll table it until we next meet, which will -- it will be on the agenda and everyone is to provide their availability over the next week to -- I mean for the next week but provide the availability as -- you know, as soon as possible, like today, to Ray and Kristina so they can figure out what's going to work for everybody.

COMMISSIONER STERTZ: And, Madame Chair and this if for Executive Director Bladine, I will make myself available, Madame Chair, to their schedule.

RAYMOND BLADINE: And, Madame Chair, Commissioner Stertz, I think Lisa is sending you all
an e-mail right now so there would be something for you to respond to.

CHAIRPERSON MATHIS: Perfect.

Anything else from any commissioner?

VICE CHAIR FREEMAN: Madame Chair, it's Scott Freeman.

CHAIRPERSON MATHIS: Mr. Freeman.

VICE CHAIR FREEMAN: Just so I'm clear, at the -- if we have a hearing next week, which we're going to try to schedule, this agenda item II will appear again in its entirety?

CHAIRPERSON MATHIS: I couldn't hear that.

VICE CHAIR FREEMAN: Well, at least, I would request, then, that agenda item II appear on the next agenda as well. That nothing gets dropped off it.

CHAIRPERSON MATHIS: Oh, right.

COMMISSIONER STERTZ: In other words, Madame Chair, we still want to be talking about documents and we still want to be talking about things that each one of us as individual commissioners should be getting from the Commission that is being asked for.

A lot of these legal expenses ended up because I was asked to prepare for a trial and I asked the Commission, and the attorneys for the
Commission blocked me getting documents that I as a commissioner believe that I should have got.

I want that to be talked about at our next hearing. I don't need to talk about anything else other than that, but I want to make sure that we go through the reason why I as a commissioner am not privy -- can't be privy to the work product of the Commission itself.

I find that not just strange, but for -- to adequately prepare for a legal case, to not be able to review all of that data was unfair and inappropriate.

MARY O'GRADY: And, Commissioner Freeman -- I'm sorry, again --

CHAIRPERSON MATHIS: Is that Mary?

MARY O'GRADY: This is Mary.

And, Commissioner, Madame Chair, again, we're not responding to everything, but we'll follow-up with you, Commissioner Stertz, and address your concerns.

COMMISSIONER STERTZ: Thank you.

MARY O'GRADY: But I disagree with what was said concerning those issues.

COMMISSIONER STERTZ: Okay. You can disagree. I mean, but I didn't get all of the stuff that I was
asking for.

MARY O'GRADY: Right, because you were asking for things that you had never seen before and there's no need to see those in the context of preparation for trial.

COMMISSIONER STERTZ: Yes, this is even a larger level of concern about things that are taking place behind the scenes that we are required to vote on and participate in. It's our vote. It's our names. It's our faces. It's our reputations that are on the line with all of this. And we've all gotten beaten up for various reasons at various times.

And hiding stuff behind the scenes is exactly what Proposition 106, and it was voted on to not do, was to take all of this secret stuff that's, you know, not being shown to the public and get it all out there under the bright lights. And that's what I don't understand why we can't get that done.

So if we're hiding stuff that commissioners themselves can't see, as you've just described, I got an issue with that. So we'll talk about that at the next meeting.

CHAIRPERSON MATHIS: Okay. And everything -- the agenda will just continue -- the same agenda
from today will be the agenda for the next meeting.

Is that everyone's understanding?

COMMISSIONER STERTZ: Right.

CHAIRPERSON MATHIS: Okay. So with that, everybody respond to Lisa's request.

And, legal counsel, did you have anything else that you wanted to say before we adjourn?

RAYMOND BLADINE: Madame Chair, it's fine with us if all of the items go over. I think the material we gave you told you where we are with budget. But if you want me to comment on that, I would be glad to.

I can tell that everyone is bored with the idea of talking about budget.

So, Madame Chair, we're going to assume silence in this case is assent to not talking about the budget.

VICE CHAIR FREEMAN: Madame Chair, it's Scott Freeman.

CHAIRPERSON MATHIS: Mr. Freeman.

VICE CHAIR FREEMAN: Mr. Bladine or Ms. Gomez, is there anything that we need to address today that's of particular concern?

RAYMOND BLADINE: No, Commissioner Freeman, Vice Chair, there's not.
VICE CHAIR FREEMAN: Thank you.

CHAIRPERSON MATHIS: Okay. Anything else?

Okay. With that, this meeting is adjourned. And the time is 3:37 and we'll be together next week at some point.

Thank you.

(The meeting adjourned at 3:37 p.m.)
I, MICHELLE D. ELAM, Certified Reporter No. 50637 for the State of Arizona, do hereby certify that the foregoing 71 printed pages constitute a full, true, and accurate transcript of the proceedings had in the foregoing matter, all done to the best of my skill and ability.

WITNESS my hand this 26th day of April, 2013.

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MICHELLE D. ELAM
Certified Reporter
Certificate No. 50637