A REPORT ON THE
UNITED STATES DEPARTMENT OF TRANSPORTATION'S RESPONSE
TO SAINT JOSEPH COUNTY, INDIANA'S 2005 TIME ZONE PETITION

ADVISORY COMMITTEE ON THE TIME ZONE

3 November 2010

A. INTRODUCTION

The Advisory Committee on the Time Zone for St. Joseph County has been asked to consider possible courses of action open to prospective proponents of Central Time for the region surrounding and including St. Joseph County, Indiana. As part of our response we have prepared this report as a primer on time law, Congressional time policy, and the methodology employed by the Department of Transportation (DOT or Department) in time line location proceedings.

From our review of time zone boundary decisions and the history of time keeping in the United States we have concluded that the Department initially employed an *ad hoc* approach to petitions for changes in time zones originating from Indiana in 2005 and persisted in this *ad hoc* approach with respect to St. Joseph and Marshall counties through the conclusion of the 2005 process. This approach was inconsistent with the seeming focus of the DOT "Procedure for Moving an Area from one Time Zone to Another" (the "Procedure").[1] The inconsistencies emphasized procedure over substance and likely flowed from Indiana's reputation for time zone controversy and from St. Joseph County's pivotal political and geographic position. The DOT may be tempted to repeat this approach should a renewed petition originate from St. Joseph County. We also concluded that the Procedure is legally problematic.

The bases for, and ramifications of, our conclusions are explored in depth in this report. They may be summarized in brief though. While the economic logic for moving St. Joseph County to Central Time is strong, perhaps even compelling, the DOT is "genetically predisposed" to see this possibility as a threat to the uniformity of time observance across parts of two states. This "genetic predisposition" comes from Sec. 260 of the Uniform Time Act which directs the Department to "promote" the "widespread" and "uniform" observance of a single standard of time throughout each time zone. This language, and the history of time observance in Indiana, channel the DOT into a political rather than a substantive response to time zone petitions, including ignoring the statutory criterion on which time line location decisions are to be made and evading the Department's obligations under the Administrative Procedure Act. St. Joseph County is a prime candidate for a political rather than a substantive response on the part of the Department.

B. A HISTORY OF INDIANA AND LOCAL TIMEKEEPING

How and why the Procedure came into existence, and how the DOT executes its responsibilities under the Uniform Time Act of 1966, may be better understood from a brief review of the history of time line location disputes in this country and specifically in Indiana. The experiences of the Interstate Commerce Commission (ICC) in handling petitions for movement of time zone boundaries through 1967, and events in Indiana in 1967-1970 involving

[1] Attached as an Appendix.

the DOT, illuminate the likeliest concerns behind the Procedure's creation.[2]

It is convenient to begin with an examination of the federal Standard Time Act of 1918 and its interaction with state and local time laws. There are a few key points to keep in mind about time law after World War I. Federal time law did not cover everyone. Although it initially provided for daylight saving this was abolished in 1919. Finally, it lacked enforcement mechanisms against the limited class of entities it covered. States and locales commonly had their own time laws, which usually referred to the federal standard time zones or to railroad standard time as their base, but which after 1919 began to include daylight saving provisions.[3]

Such was the case in Massachusetts which led to an attack in federal court against that Commonwealth's daylight saving law. Justice Oliver Wendell Holmes, writing for the Supreme Court in *Massachusetts State Grange vs. Benton*, 272 U.S. 525 (1926), addressed whether a state law establishing the observance of daylight saving conflicted with the federal Standard Time Act which did not. Applying a straightforward comparative reading of the two statutes, he found that the two laws applied to different classes of people. In the case of the federal law, the law applied to acts of officers and departments of the United States. The Massachusetts law applied to acts of officers or departments of that Commonwealth. Simply put, there being no overlap in the classes of people obligated to observe the laws, there was no conflict between the laws.

As is so often the case, appreciation of this distinction may have been lost on the public. *Massachusetts State Grange* seems to have been perceived as a holding that states and locales could advance federal civil time when in fact those laws had nothing directly to do with federal civil time. In a modern context that was exactly how Prof. Michael O'Malley recounted *Massachusetts State Grange* in his book *Keeping Watch: A History of American Time*. Prof. O'Malley wrote that:

> Massachusetts adopted a statewide daylight saving law in 1925, prompting the Massachusetts State Grange to bring a suit against the measure. The case reached the United States Supreme Court, and Justice Oliver Wendell Holmes, a year later. Over forty years before, as a Massachusetts Supreme Court Justice, Holmes had offered the nation's first ruling in favor of standard time. Now Holmes ruled that individual cities and towns could legally adopt daylight saving if the difference from standard time amounted to no more than one hour.[4]

The notion that two distinct, but out of phase, civil time regimes could exist for the same

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[2] Prior to the DOT the Interstate Commerce Commission set time zone boundaries.

[3] See Bartky, Ian R., *Selling the True Time*, Stanford University Press (2000).

[4] O'Malley, Michael, *Keeping Watch*, (1990) at page 290.

geographic area might well have struck the public as unnatural by the mid 1920's.[5] But that was exactly what Justice Holmes had announced. The public, not being bound to observe either law, had its choice of which to use. In the aftermath of *Massachusetts State Grange*, the daylight saving feature of local time systems would prove particularly popular in the two most commercially important urban areas in the country, New York City and Chicago.[6] These cities, the nation's principal commercial centers, carried a great deal of influence over large areas and, as a result, ever greater portions of the population began drifting into state and local time systems.[7] This movement even extended to common carriers and local federal officials. The federal time system lost market share to a stealth version of state/local time via a process which became acute after World War II. This would eventually drive passage of the Uniform Time Act 1966 amending the Standard Time Act of 1918.

The drift to state/local time regimes took a different turn in the western extremes of the Eastern Time Zone and bordering areas in the Central Time Zone. How time observance evolved in western Ohio, Michigan, eastern Tennessee, Kentucky and Indiana following the 1918 Standard Time Act has echoes to the current day. In broad form it played out as a drift into year round Eastern Standard (or year round Central Daylight) driven in part by a desire to gain the purported benefits of daylight saving while avoiding the drawbacks of biannual time changes.[8] By 1936 the Eastern/Central time line, which initially had been located well to the east of Indiana, had been displaced westward until it tracked Indiana's northern and eastern borders (for Michigan this brought federal regulation and state law into conformity). To the south of Indiana the time line moved off through eastern Kentucky. Beginning in the late 1950's into 1960 the situation again became fluid. The ICC began to receive petitions requesting shifts of areas of Tennessee, Kentucky and Indiana from Central to Eastern Time. The area covered included the cities of Nashville, Louisville and Indianapolis.

The 1961 report of the ICC, which relates to these petitions, recounted how events in Indiana unfolded through the spring of that year and included a history of time observance in the state:[9]

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[5] In contrast, the use of two or three different times within a single city was apparently commonplace in the 1870's and early 1880's. See Bartky, Ian R., *Selling the True Time*. Justice Holmes, a Civil War veteran, had likely encountered this as a younger man. During the 1870's some advocates of railroad standard time expected that differing local and railroad times would operate side by side.

[6] Both of these cities are a few minutes to the east of their respective standard time meridians.

[7] See generally Prerau, David, *Seize the Daylight*, (2005), pages 103-140. A lesson here is that cities had considerable influence in setting and stabilizing time observance over their hinterlands.

[8] This was made quite explicit in hearings before the Interstate Commerce Commission (ICC). See page 18 of the Examiner's Proposed Report, 30 September 1960.

[9] ICC, *Standard Time Zone Investigation No. 10122,* 6 June 1961.

The State of Indiana has been in the United States Standard Central Zone continuously since the boundaries were first established by this Commission in 1918. State law has long provided for the central standard as the legal time for the State, and the State has officially opposed proposals heretofore made to extend the eastern zone in adjacent States. Except for the periods of national daylight saving, during 1918-1919 and 1942-1945, the State had never officially adopted daylight saving, until 1957, when the State law was amended to provide for daylight-saving time from the last Sunday in April to the last Sunday in September and to prohibit the observance of any other time by any city, county, or other agency of the State, including school corporations, subject to penalties in the form of denial of State funds.

Prior to World War II daylight saving in the warmer months was observed by some cities in the eastern part of the State, although some other communities also observed that arrangement, notably those near Chicago, where summer daylight time has long been the practice. During the war the entire country shifted to "war time," an advanced standard provided by Federal regulation during the entire year. In 1946, after the repeal of war time, spotty daylight saving was resumed; but Aurora and Lawrenceburg in Dearborn County, near Cincinnati, Ohio, remained on eastern time year round.[10] In 1940 a State law was passed prohibiting the use by the State or local governments of any time other than central standard time, but no penalties were provided and it was largely ignored. In 1950, of 110 communities surveyed, only 25 observed central time all year, and most of those were in the southwestern part of the state.

In the 1956 general election the time question was put to the voters of the State: The results of the vote on the four questions placed on the ballot (simplified for brevity) were as follows:

	Yes	No
1. Do you favor Central Standard Time as the official time?	626,794	209,433
2. If the answer is yes, do you favor Daylight Time in summer?	273,633	350,667
3. Do you favor Eastern Standard Time as official time?	511,536	243,013
4. If answer is yes, do you favor Daylight Time in summer?	147,095	397,148

. . . On the basis of this referendum the law was amended to require daylight-saving time for about five months of each year. Under pressure of this enactment, the number of municipalities observing year-round eastern time or its practical equivalent dwindled to 24, confined to 10 counties in the northeastern corner of the State and 4 counties near the

[10] The Commission freely substitutes "Eastern time year round" for what legally was year round "Central daylight." No one in this area used Eastern daylight.

> Cincinnati area. In the past few years, however, the practice has again spread to 70 communities in 39 counties in the eastern part of the State.
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> Technically, the City of Indianapolis and other Indiana cities have not officially adopted eastern time but have adjusted their official activities and city ordinances and regulations relating to time to an earlier hour in terms of central time during the period when the central standard is required by State law. A like adjustment has been made by the residents of the city to govern other local matters. As would be expected, great confusion has resulted, particularly for nonresidents. Residents have solved the problem, however, by adjusting their clocks and watches to the faster standard and keeping them there permanently. The practical effect is year-round central daylight time or its equivalent, eastern [standard] time. This arrangement is known as "unofficial" or "voluntary" daylight-saving time, as distinguished from that brought about by an actual change in the legal city time by ordinance.

Such was the situation in Indiana when, in 1960, the city of Indianapolis asked the ICC to shift the time line west from the eastern Indiana border to a position about 2/3's of the way across the state and thereby move 60 Indiana counties to the Eastern time zone. The time line proposed by Indianapolis, shown in Fig. 1, ran along the western borders of St. Joseph, Marshall, Fulton, Cass, Carroll, Clinton, Boone, Hendricks, Morgan, Monroe, Lawrence, Orange and Crawford counties. The logic of this proposal seems to have been to draw a nearly straight line from north to south through the state which was located sufficiently far west to place all of the Indianapolis metropolitan area on Eastern time. The Indianapolis bid was supported by two principal co-petitioners, the Indianapolis Chamber of Commerce and the Central Labor Council of the AFL-CIO of Marion County (Indianapolis). The Wayne County Labor Council-AFL-CIO, Richmond's Committee of 100, Inc., the Marion Chamber of Commerce, Inc., the Greater Franklin Chamber of Commerce and the Columbus Chamber of Commerce joined the effort. A Clark County proponent had joined in the Louisville, Kentucky petition. The locations by county of the proponents are marked with "P's" in Fig. 1. Geographically the proponents were focused on the southeast quarter of the state. None of the proponents came from west of Indianapolis and only one from north of that city.

Fig. 1 - 1960 Indianapolis proposal.

Regarding arguments advanced by the proponents of moving to Eastern Time, the Commission reported that:

> The proposal . . . received support from many communities in the area, and they rely to a large extent on the fact that these and other communities are now observing the eastern standard or its equivalent, and many of them in the eastern and northeastern part of the state have been doing so for years. The time situation in Indiana is extremely confusing,

> and a large part of the evidence stressed the disadvantageous effect of this confusion generally, and particularly in the conduct of business with others outside the city or State. Much of this evidence emphasized the desirability of the eastern standard for the area, because of the resulting time parity with eastern business connections for at least part of the year.[11]

The Commission noted that much of the opposition was unorganized. Opposition came from western communities, some of which non-the-less preferred one zone over division of the state. One community's opposition to the proposal in 1960 was highlighted though:

> The mayor of South Bend [the late Edward F. Voorde] testified that although the city had observed the equivalent of eastern time in the past and the county had registered a vote in 1956 in favor of eastern time, the city council now joined the St. Joseph County Board in opposing the proposal, and asserting the preference of the city and county for the central standard with daylight saving for 6 months of the year, which is the same as observed by Chicago and other points in the northeastern [sic-northwestern] corner of the State. Others from the area opposed the official stand of the city and county and supported the proposal.

The ICC examiner recommended turning down the Indianapolis petition.[12] But in 1961 the Commission found that circumstances had changed:

> While the recommendation of the examiner was based on the entire record, it is obvious that it was substantially influenced by the State time law, which established central standard time, with 5 months of summer daylight saving, as the legal time for the State and forbade, under severe penalties, the employment of any other standard for the State, county, municipal, or local purposes. However, we believe we should take official notice of the action of the General Assembly of the State of Indiana, approved March 2, 1961, repealing the State time law. [Senate Enrolled Act No. 97 (1961)]. This substantially changes the situation.[13] We must recognize the fact that, regardless of their reason for doing so, most of the residents of the eastern part of the area involved have been

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[11] There was no consideration given here to observing Eastern *Daylight* Time. Some Proponents of Eastern Time in Louisville touted changing time zones in order to eliminate biannual time changes.

[12] Proposed Report by Thomas E. Payne, Hearing Examiner, September 30, 1960.

[13] Examiner Payne summarized the state law on page 39 commenting that "State law has long provided for the central standard as the legal time for the State." The evolution of the law from 1940 through the 1956 referendum was discussed, mostly in connection with its amendment to accommodate daylight saving. It is unclear from the text how the Commission came to conclude that the Examiner's recommendation had been strongly influenced by the state law. It is certainly possible that the ICC interviewed the Examiner or that the ICC routinely gave deference to state law. If the latter is the case, the reasons for the expression of Congressional purpose in 15 U.S.C. Sec. 260 become clearer. On the other hand, repeal of the state law would have substantially changed the situation in that repeal reduced the chances of competing standards being observed in the same geographic area. Repeal of the state law has parallels in this regard to the actions of the legislature in 2005, which are discussed below. The legislature gave up trying to force unity on the state. It was not endorsing Eastern or Central time.

> observing the equivalent of the eastern standard for some time past, and the recent action of the State Legislature has removed the principal obstacle to local action officially adopting eastern [standard] time throughout the year. Even in the 1956 referendum vote, the most easterly tier of counties, along the existing time-zone boundary line, showed a substantial majority in favor of the eastern standard. The sentiment for the faster standard is particularly strong in the northeastern corner of the State and in the southeastern section just west of Cincinnati. These counties have been observing the equivalent of eastern time for a number of years. With respect to the Indianapolis area in the central part of the State, there was considerable opposition to the eastern standard in some of the counties adjacent to Marion County and in nearby counties to the east. In a few of them the 1956 vote was very close, but in most the majority was for the central standard. The strong support for eastern time in populous Marion County, however, outweighed the opposition of nearby counties so that if taken as a whole this central Indiana area must be considered as favoring the eastern standard. With respect to the counties in the northwestern and southwestern parts of the area which it is proposed to place in the eastern zone, the *meagre [sic] support* for the proposal on this record does not overcome the showing that in 1956 the residents of these counties registered a decided preference for the central standard, in many of them with a proportion of more than 2 to 1. (emphasis added)

In northern Indiana the decision left St. Joseph County, along with Marshall, Fulton, Cass, Miami, Carroll, Howard, Tipton and Clinton counties on Central time as shown in Fig. 2. This boundary roughly reflected county by county preferences from the 1956 vote. Subsequent to the relocation of the time line in Indiana and Kentucky in 1961, up until the passage of the Uniform Time Act, western Ohio, Michigan, and most or all of the Eastern Time Zone portions of Indiana and Kentucky would not observe Daylight Saving.[14]

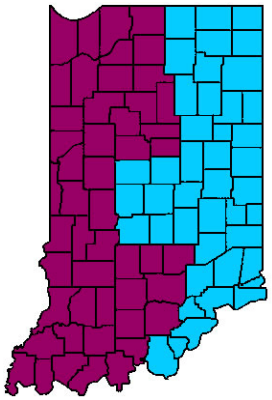

Fig. 2- 1961 Time Line-Source: Wikipedia.

After the 1961 time line relocation, much of the Central Time Zone portion of Indiana began to observe *year round* Central daylight. For a time this included St. Joseph County. On 10 September 1962 the common councils of the Cities of South Bend and Mishawaka passed resolutions asking residents, courts and businesses to observe year round "fast time," i.e. Central daylight.[15] Schools adjusted schedules so that children would avoid travel to and from school in darkness.[16]

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[14] Bartky, Ian R. and Harrison, Elizabeth, *Standard and Daylight-saving Time*, Scientific American, Vol. 240, No. 5, May 1979, pages 49-53. The authors noted that Daylight Saving was almost never used "30 minutes or more west of the standard meridian in the Eastern zone."

[15] The South Bend resolution is missing from the city's records.

[16] See South Bend Tribune from 6-11 September 1962.

C. THE UNIFORM TIME ACT OF 1966

In 1966 Congress passed the Uniform Time Act (UTA). The UTA, as amended, establishes nine Standard time zones and provides for determination of the boundaries of those zones by the DOT, except where time zone boundaries are fixed under the UTA. In establishing time zone boundaries the UTA calls on the DOT to have "regard" for the "convenience of commerce" and "existing junction points and division points" of common carriers.[17] In addition, the Secretary of Transportation is:

> authorized and directed to foster and promote widespread and uniform adoption and observance of the same standard of time within and throughout each such standard time zone.[18]

The Secretary of Transportation has very nearly achieved these objectives. The public now widely believes that federal civil time is the only possible civil time.[19] Yet the observance of federal civil time is technically still "voluntary" for the public, including most businesses, state and local governments and obligatory only for "the movement of common carriers engaged in interstate or foreign commerce"(in so far as practical) and in connection with "any act by an officer or department of the United States."[20]

Perhaps mindful of its objective of making observance of federal civil time "widespread and uniform," Congress applied the informal rulemaking requirements of the Administrative Procedure Act (APA-Title 5, Subchapter II of chapter 5 and chapter 7) to determinations of time zone boundaries by the DOT.[21] Time zone boundary determinations are issued under statutory authority making them legally equivalent to "legislative/substantive rules."[22] Such rulemaking is subject to the procedural protections enjoyed by the public under the APA and the First Amendment.

One change in the federal time law was a new section, 15 U.S.C. 260a, which

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[17] 15 U.S.C. Sec. 261.

[18] Persons other than common carriers and agents of the federal government are still not obligated to observe federal civil time. The policy embodied in 15 U.S.C. Sec. 260 directs the Secretary of Transportation to foster, not to require, the universal observance of federal civil time.

[19] Today people increasingly rely on cell phones to provide the time and have no need change the time of a watch on crossing time zone boundaries. We doubt that a large part of the public is even aware that civil time might be something other than the "real time," or much cares.

[20] 15 U.S.C. Sec. 262.

[21] 15 U.S.C. Sec. 266.

[22] Eisner, Neil, *Rulemaking Requirements*, United Stated DOT (2009) page 4.

[re]introduced daylight saving to federal time law and made seasonal daylight saving the default condition. This section also conferred upon the states a limited power to nullify federal daylight saving within their territory. As originally enacted nullification/exemption could only be done across an entire state, a critical point relating to Indiana. The UTA also gave the government enforcement powers against entities subject to the act.[23] Subparagraph (b) of section 260a further provided that it was:

> the express intent of Congress by this section to supersede any and all laws of the States or political subdivisions thereof as they may now or hereafter for provide for advances in time or changeover dates different from those specified in this section.

This subparagraph appears to be a bit of legislative sleight of hand. Sec. 260a (b) does not make it mandatory for the general public, or state/local government, to observe federal civil time. Thus the effect of this section is limited to setting limits on the authority granted to the states to nullify *federal* daylight saving. Nothing in section 260a, or any other part of 15 U.S.C., relates to classes of people subject to *state daylight saving*. *Massachusetts State Grange* is still good law.

D. THE RESPONSE TO THE UTA IN INDIANA AND ST. JOSEPH COUNTY

In October 1966 South Bend Mayor Lloyd Allen (Rep.) directed the city of South Bend to return to "slow time," i.e. Central Standard, during the period set in the UTA.[24] Following the city's lead St. Joseph County returned to observing winter Central Standard time and summer Central Daylight. At the end of 1966 the statewide situation was as illustrated in Fig. 3. The unshaded area observed year round EST/CDT. The shaded areas, including St. Joseph, Marshall (excluding the town of Bourbon), Starke, LaPorte, Porter, the northern half of Newton, Jasper (excluding the town of Remington) and Lake counties observed Central Standard Time in the Winter and Central Daylight Time in the Summer. The Michigan legislature quickly passed

Fig. 3 - 1967 Situation. Source: South Bend Tribune, 28 March 1967.

[23] Whether the delegation of the power to the states to nullify federal daylight saving is constitutional is outside the scope of our concern.

[24] Mayor Allen stated that the UTA compelled taking this stance, however, the timing of Mayor Allen's action was extremely close to the date for changeover from daylight saving time to standard time and curiously aligned with submission of a petition by the South Bend/Mishawaka Chamber of Commerce to the ICC to move St. Joseph County to Eastern time.

an exemption from daylight saving for that state.[25] The requirement that a state exempt its entire territory from daylight saving posed problems for Indiana because such an exemption would have had force in Central Time areas of the state, and would have put Chicago's Indiana suburbs one hour behind Chicago in the summer, at least in theory.[26]

On 26 April 1967 then Governor Roger Branigin petitioned the Department to place the entire state in the Central Time Zone. In full his petition read:[27]

> I, Roger D. Branigin, Governor of the State of Indiana, hereby petition the United States Department of Transportation to modify the boundary between the Eastern Standard Time Zone and Central Standard Time Zone so as to include the entire State of Indiana in the Central Time Zone.
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> The passage of the Uniform Time Act of 1966 has created unique problems for the State of Indiana. The provisions of that Act do not permit an observance of the time patterns historically adhered to in this State, split as it is by a time zone.
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> In order to allow statewide observance of a time which is consonant with mean solar time, the convenience of commerce in and through the State, and economic ties of business enterprises, it is necessary to place the entire State in one time zone.
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> The eastern boundary of Indiana lies approximately nine degrees West of the longitudinal basis for the Eastern Time Zone specified in the Uniform Time Act.[28] A further movement of the time zone boundary in a westerly direction would place the western part of the State far beyond mean solar time. There is every indication that observance of such a time would seriously disrupt the activities of Indiana citizens living in that area of the State. The observance of Central Time would insure normal daylight and darkness hours.

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[25] The implementation of Michigan's exemption from daylight saving (Senate Bill No. 1), which had been enacted in the winter of 1967, was delayed until 1969 pending its confirmation in a referendum. See *Michigan Farm Bureau v. Secretary of State*, 379 Mich 387, 151 NW2d 797 (1967). The referendum occurred in 1968 and confirmed the state's exemption, which would last through 1972.

[26] In practice this was purely theoretical. In 1971 the General Assembly exempted Indiana from Daylight Saving. At that time the UTA had still not been amended to permit a state to exempt less than its entire territory. Indiana's law was written to trigger exclusion the Central time portion of the state from the exemption upon amendment of the UTA. From 1971 to 1973 the Central time portions of the state simply ignored the statewide exemption.

[27] Box 117, Folder 22, of the Branigin Papers, Hamilton Library, Franklin College. The Governor asked the DOT to put the entire state on Central Time on the advice of the DOT. [Container 117, Folder 16, Transportation, U.S. Dept. of- - General, Branigin Papers, Hamilton Library, Franklin College.]

[28] This appears to be a small error. The eastern border of the state is much closer to 85 degrees west longitude, which is ten degrees west of the Eastern Standard time meridian.

> Such a modification would also enable Indiana to observe advanced time during the Summer months as provided for in the Uniform Time Act. Moreover, advanced time will also be observed by many neighboring states with which Indiana has strong economic ties.
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> The requested modification would enable the entire State to observe the same time, and the convenience of citizens and businesses throughout the State will be best served by statewide uniformity.
>
> I request that the Department of Transportation initiate proceedings as soon as practicable on this petition.
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> ROGER D. BRANIGIN
> Governor of Indiana

Areas in the southeastern part of the state resisted this proposal. The DOT then tried a proposal to put all of the state on Eastern Time. Evansville and Chicago's Indiana suburbs rejected this proposal. The newly established Department of Transportation was confronting several time zone petitions and Indiana's was proving particularly intractable.[29] By December 1967 the Department had settled on a different approach than it had recommended to Governor Branigin in March of that year.[30]

A three step "solution" to the situation was proposed which would involve putting as much of the state on Eastern time as possible, amending federal law to allow a state to exempt less than the whole territory of the state from daylight saving and having Indiana exempt its Eastern time region from daylight saving. The disadvantage of this "solution" was that its implementation lay outside the scope of Department's legal authority. Writing to United States Speaker of the House John W. McCormack and to Senate President Hubert H. Humphrey in early 1969 then Secretary of Transportation Alan S. Boyd laid out Congress's part in the solution:

> With respect to Indiana, for example, after two attempts by proposed rule making [respecting the time zone boundary], neither of which was well received, and an attempt to investigate observance of the time now set, the Department favors a decision involving two steps: first, it would issue a final rule based on a proposal to place all but the northwestern and southwestern counties in the Eastern time zone; second, it would recommend this legislation to allow any State having more than one time zone to exempt any of the zones within the State, as well as the entire State, from advanced time. The Indiana legislature could then exempt the Eastern time portion of the State from advanced

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[29] See Fed. Reg. Vol. 32, pages 11477-11481 (9 August 1967) which reported receipt of time zone petitions from Nebraska, Indiana, North Dakota and Kansas.

[30] Miller, Jr., Frederick M., *Memorandum on Time Zone Boundary in the State of Indiana*, 11 December 1967. [Container 118, Folder 4, Branigin Papers, Hamilton Library, Franklin College.]

time.[31]

Putting most of Indiana on Eastern time and encouraging the state to exempt its Eastern time portion from daylight saving would accommodate:

> the desires of the majority of its population, *would promote observance of the established time zones* and would extricate the Department's zone-line-defining function from matters of primarily local concern. (emphasis added)

Indiana's long standing exemption from daylight saving was done at the behest of the Department which believed it would bring stability and predictability to the situation and promote the adoption of uniform standards across Indiana (and, implicitly, Michigan). The viability of the proposal was rooted in the proposal's replication of Indiana's historical patterns of time observance and its putting all of the state on the same time for six months each year. But in extricating "the Department's zone-line-defining function from matters of primarily local concern" the Department dropped any pretext that it was setting the boundary with "regard for the convenience of commerce." It can be surmised that the Department gave up on trying to resolve the issue on the basis of the statutory criterion and was simply seeking to stabilize the situation in a way which promoted the "widespread and uniform adoption and observance of the same standard of time" across an area including Michigan and as much of Indiana as feasible.

Former Undersecretary, United States Department of Transportation (General Counsel) John E. Robson enlisted Senator Birch Bayh in implementing this solution and confirming the foregoing conclusions. Writing the Senator he summarized the situation as follows:

> Dear Senator Bayh:
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> This will confirm the several conferences we have had with you and members of your staff for the purpose of clarifying the Department's position on the Indiana time situation and identifying an ultimate solution.
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> Briefly stated, the present difficulties stem from a number of reasons:
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> 1. As you are aware, there is pending before the Department an administrative proceeding to determine what time zone boundary alignment would best suit the needs of commerce and the people of Indiana. However, because of the inconclusive nature of the information thus far presented to the Department in the proceeding, the Department does not believe it is in *a position to make a final administrative determination at this time.*
>
> 2. The historical patterns of time observance in Indiana tentatively seem to indicate a preference for eastern standard ('slow') time year round in all parts of the state except in 12 counties in the northwest and southwest corners of the state where central standard time is observed in the winter months and central daylight ('fast') time is observed in the summer. These 12 counties are: Lake, Porter, LaPorte, Starke, Jasper,

[31] Boyd, Alan, letter dated 13 January 1969, from the National Archives. The two proposals were, first, to place all of the state on Central Time, and second, to place all of the state on Eastern Time. The letter also noted the strong "communications influence" of the Atlantic Coast communities had resulted in "the observance of Eastern time [having] been extended considerably further into the Central time zone that it would be if the sun alone were the determining factor."

Newton, Gibson, Pike, Spencer, Warrick, Vanderburgh, and Posey.[32]

3. The Uniform Time Act makes the application of daylight ('fast') time automatic throughout each state from the last Sunday in April to the last Sunday in October, unless the state legislature exempts the state, in which case standard ('slow') time applies all year round in the entire state. The Department of Transportation has no authority to deal with the question of daylight versus standard time. The Indiana legislature has not exempted the state.

4. The Uniform Time Act does not authorize a state having more than one time zone within its boundaries to exempt one time zone area from daylight time while leaving daylight time applicable in the other time zones. However, this would become possible under S. 790, the bill you have introduced in the Congress.

The Department is most anxious to work with you and others concerned in accommodating to the extent possible within the law, the interests of commerce and the people of Indiana. The discussions we have held with you have been very helpful in emphasizing the desirability of a clear indication of the Department's policies and the areas where it can prove helpful in finding a durable solution. In response to your questions, we can, therefore, advise you as follows:

1. Enforcement. The Department does not have authority to exempt a state from the Uniform Time Act or alter what is technically the legal time under the Act. For that reason, the Department, in its recent announcement indicated that the technically 'legal' time would have to be ascertained by reference to the Uniform Time Act as applied to the existing time zone boundary in the state. (That 1961 boundary runs to the west of the following counties: Elkhart, Kosciusko, Wabash, Grant, Madison, Hamilton, Boone, Hendricks, Morgan, Johnson, Shelby, Decatur, Jennings, Scott, Clark, Floyd and Harrison. All of these counties, and everything to the east of them, are in the eastern time zone).

This clarification was made on the assumption that interstate carriers would follow the technical time pattern. However, it should be noted that the Uniform Time Act authorizes the Department to permit variance from technical time observance by

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[32] When read in conjunction with the concluding language of the 1969 decision it is clear that the "information" never assumed more than an "inconclusive nature." The Department simply stopped trying after it recommended a political solution allowing the portion of the state in the Eastern time zone to be excluded from daylight saving and allowing the Department to "extricate" itself from the case. An internal USDOT memorandum from Frederick L. Miller, Jr. to the General Counsel's Staff dated 11 December 1967 makes it clear that the DOT had substantially settled on a decision to relocate the time line over a year before the decision was announced. [Container 118, Folder 4, Branigin Papers, Hamilton Library, Franklin College.] There are several reasons why the DOT might have delayed announcement of the decision. It may have wanted to wait until the Michigan referendum occurred and the Indiana legislature could meet to pass an exemption (the Department had announced it was deferring enforcement of DST pending resolution of the rulemaking proceeding). It may have wanted to spare Gov. Branigin and itself embarrassment by waiting until the Governor left office in January 1969. On this latter point see the memorandum of Jim Farmer to Gov. Branigin dated 15 December 1967. Farmer reported there that:

> Robson anticipates that this [i.e. the decision to move the time line essentially to the Indiana/Illinois border] may leave the Governor on a limb because (on advice of the Department of Transportation) he petitioned for Central Standard Time. It was explained to the Governor before the petition was drafted that only CST would comport precisely with the Uniform Time Act and that CST coincided best with sun time. [Container 118, Folder 4, Branigin Papers, Hamilton Library, Franklin College.]

interstate common carriers for reasons of practicability. The Department will consider as an appropriate grounds for variance a carrier's own bona fide determination that technical time observance will be disruptive to its operations during the pendency of the Department's administrative proceeding.

The Department's practice has been to defer consideration of court enforcement actions while (as is the case here) a properly instituted administrative time zone boundary proceeding is pending before the Department. The practice will be followed here.

2. S. 790. As we understand S. 790, it would permit the 12 counties in southwest and northwest Indiana to remain on central time with daylight time in the summer, while the rest of the state could observe eastern standard time year round. On the basis of information now before us and our discussions with you, it appears that S. 790 could be useful in a final resolution of the peculiar situation in Indiana. Accordingly, we have advised the Chairman of the Senate Commerce Committee of the Department's Concurrence, should Congress enact the legislation.

3. Final Resolution. The Department is continuing to collect and analyze information in its administrative proceeding in order to be in a position to arrive at the most informed judgment. By the time the Indiana legislature next meets we should have taken final administrative action. This will enable the Indiana legislature to properly consider and vote upon the question of exempting the state from daylight time.

We hope that the above will serve to clarify the Department's position and indicate our concern for a prompt and sensible solution to this most troublesome problem.

Sincerely, (signed) John E. Robson[33] (emphasis added)

Congress, the state legislature and the Department of Transportation would cooperate to construct a legal and regulatory framework freezing the patterns of time observance practiced in the mid 1960's and preserving an "Indiana Time" solution to the issue. Most of the state was to be moved to Eastern Time (ignoring Governor Branigin's request) and the UTA was to be amended to allow Indiana to exempt its Eastern time portion from daylight saving without exempting the Central time portions.

The Department did not set the 1969 time zone boundary on the basis of the convenience of commerce and in effect it has never acted on Governor Branigin's petition. This was made all but explicit in the conclusion to the 1969 decision:

> This action of altering the time zone boundary is necessary, in the Department's opinion, to foster and promote widespread observance of standard time to the fullest extent of the Department's authority. However, the Department is also of the opinion that to accommodate the very strong preference of the people of Indiana a means should be provided whereby that portion of the State being placed in the eastern time zone could

[33] The letter was received by Senator Bayh on 15 April 1968 and a copy forwarded to Governor Branigin who received it the next day. The representation made to the Senator that "[B]ecause of the inconclusive nature of the information thus far presented to the Department in the proceeding, the Department does not believe it is in a position to make a final administrative determination at this time" was an interesting take on reality considering the Department had completed its substantive analysis and reached its decision over 4 months earlier. [Container 118, folder 12, Branigin Papers, Hamilton Library, Franklin College]

> have a legislative opportunity to be exempted from advanced time, without disrupting the activities of those in the central time zone who accept the advanced time situation. Therefore, coincident with the release of this decision, the Department of Transportation is recommending legislation to the Congress that would authorize the legislature of any State having more than one time zone to exempt the portion of the State in any one time zone . . . from the mandatory requirements of the Uniform Time Act of 1966 for advanced time during the April-October period.[34]

The DOT appears to have launched a political campaign to give much of Indiana its own time system (joining Michigan on year round GMT-5) thus promoting, after the fact, the legal basis for the decision. The modifications to the UTA promised to give the DOT the power to construct, in cooperation with state governments, hybrid time zones such as was proposed for most of Indiana. This hybrid was, in effect, Eastern in the winter and Central in the summer. To buttress this campaign it would be logical to put as much of the state onto Eastern time as possible without prompting an open revolt (it being acknowledged that northwest and southwest Indiana would simply not go along). Placing pro-Central time zone areas on Eastern time would bolster popular support for keeping the state off daylight saving and sustain the hybrid zone.[35] At the same time the DOT could argue that it was accommodating public opinion on the need for statewide "unity" on the time issue. Still, the Department could hardly have been clearer as to why it was really altering the time zone boundary. It was being done to pull the people of Indiana into observing some form of federal civil time.

It was still necessary for the Department to construct a rationale for the decision directed to the statutory criterion. In this regard it should come as no surprise that much of the 1969 decision is short on substance. The decision took evidence out of context and gave it a pro-Eastern time spin in order that the new time line would appear to have been drawn "having regard for the convenience of commerce." But we know from the Department's correspondence that in fact no such conclusion had been reached. We know only that the evidence, on a statewide basis, was in conflict. Thus when the plaintiffs in *Allied Theatre Owners vs. Volpe* (S.D. Indiana, Indianapolis Division, Cause No. IP 69-C-148) challenged the DOT decision, they could ignore the real basis for the 1969 decision and have a field day picking apart the rationalizations that the Department advanced in support of the decision. Incidentally, but perhaps most importantly, they confirmed that an arbitrary line had been drawn around the

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[34] Fed. Reg., Vol. 34, Nol. 11, page 607. If so, the petition of the Governor and legislature in 2005 could have been viewed as simply a request to reopen Governor Branigin's 1967 petition, which in effect had not been acted on, with the option of dividing the 77 counties identified in that petition between the two zones.

[35] The habit of those responsible for setting federal civil time in Indiana of wrapping themselves in the cloth of statewide unification is a recurring one. Only Gov. Branigin tried to achieve it however. In their posturing on the issue the DOT in 1969 and Gov. Daniels after 2005 would simply ignore or minimize the significance of the remaining Central time areas of the state. It can be submitted that advocacy of a hybrid time zone such as was done by the DOT in 1969 was an admission the time line had been drawn with no regard being given to the convenience of commerce or the division points of common carriers (at least those that did not operate seasonally).

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irreconcilably Central time oriented portions of the state and the concerns of that portion of the state erased from consideration. In their challenge to that decision the plaintiffs noted that:

a. A majority of the comments which favored the Eastern time zone actually were expressly supporting only Eastern Standard Time (Central Daylight Time) throughout the year. (emphasis in original)
b. In considering comments on the time zones, *the defendant [the Secretary of Transportation] arbitrarily excluded comments from the Gary and Evansville areas although it did not exclude comments from Fort Wayne, Richmond, Muncie or other cities near the state's eastern border*.[36] (Emphasis added)
c. More than 14,000 of the comments counted as favoring the Eastern time zone came from a single two-chair barbershop on the east side of Indianapolis and asked for Eastern Standard Time throughout the year.[37]
d. [omitted]
e. The Secretary himself questions the reliability of many of the comments as an indication of preference.
f. It is the plaintiff's understanding and interpretation that of the 80,000 some odd comments received by the defendant as of March, 1968, about 50,000 supported the petition of then Governor Roger D. Branigin asking for Central time, and most of the rest supported Eastern Standard Time (Central Daylight Time) throughout the year.[38]

Mr. Richard T. Lochry of the Allied Theatre Owners of Indiana (admittedly not an unbiased source, his organization being openly pro-Central time) further addressed some of these points in a report dated 2 February 1968 regarding a meeting which occurred on 30 January 1968 between Mr. Lochry and John Robson, DOT General Counsel. The meeting was attended by colleagues and assistants to both men. Mr. Lochry reported that:

> The members of the General Counsel's staff, and Mr. Robson himself, admitted that the people of Indiana seemed to prefer Eastern Standard Time, or Central Daylight Time, all year long and admit that they can have six months of this under the Uniform Time Act regardless of which zone Indiana is in. At this point they are refusing to analyze this evidence except to interpret that the people want the Eastern Time Zone . . .

[36] Once a decision was taken to put as much as possible of the state on Eastern Time those areas which could not be made to fit simply disappeared from consideration. The Office remained true to this approach in 2005 when hearings were scheduled in Eastern time areas of the state not petitioning for a change in time zone but none were scheduled for Central time areas.

[37] This was reported elsewhere as the shop of one Roy Rainey. Report of Richard T. Lochry, President, Allied Theatres of Indiana, 2 February 1968. Container 117, Folder 6, Transportation, U.S. Dept. of –General, Branigin Papers, Hamilton Library, Franklin College.

[38] Unfortunately we were unable to verify these statements independently as virtually all of the records relating to the 1969 time line decision predating the final rule were missing or misplaced at the National Archives.

> An interesting reaction was obtained from Mr. Robson and his staff when we questioned that the Department or even the ICC in the past had the authority to swing the time lines so far from mean solar time limits as defined in the Act.[39] This met with the reaction that the lawyers had some doubt about it too, but of course would leave it up to the court.[40]

What we can take from this is that what the Department said in the 1969 final ruling is simply not accurate history.[41] But that has not stopped the Department from repeating conclusions from that ruling in later time line decisions from Indiana. In particular, the conclusion, which was repeated in 1985, that Governor Branigin's proposal to place the state on Central time "was overwhelmingly unpopular with the people of Indiana" appears at best to have been hyperbole and was certainly not accurate in regard to the residents in the western half of the state. On 10 February 1969 then U.S. Rep. Roger Zion (R-8th District) wrote the DOT requesting delay in enforcing the 1969 rule stating:

> [A]fter April 26 Indiana will be required to observe the new zone boundaries which will continue to work a hardship on a substantial portion of our citizenry.
> As you will note from the correspondence contained in your file, my position has been that the new state and national Administration leaders, including yourself, were not thoroughly consulted before Mr. Boyd made his ruling. No hearings were ever held in Indiana and the state legislative leaders were not consulted regarding their views of the proposed rule.[42]

It is self evident that a solution based on giving Indiana such a singular time system

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[39] References to mean solar times, or more accurately to standard time meridians, are no longer part of the 15 U.S.C. Sec. 260 *et seq*.

[40] Container 117, Folder 6, Transportation, U.S. Dept. of –General, Branigin Papers, Hamilton Library, Franklin College.

[41] Whatever the merits of the plaintiff's contentions they lost at the district court and on appeal to the 7th Circuit Court of Appeals (*Allied Theatre Owners of Indiana, Inc. v. Volpe*, 426 F. 2d 1002 (7th Circ. 1969), cert. denied, 400 U.S. 941 (1970). The decision preceded *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971) which appears to be the first instance where the Supreme Court overturned a regulatory action on the basis of the Administrative Procedure Act. While the courts currently give regulatory bodies a great deal of deference it is not the near total deference that existed prior to the *Overton Park* decision.

[42] Letter from Roger H. Zion to Secretary of Transportation John Volpe, dated 10 February 1969. An internal government memorandum dated 3 July 1969 relating to Rep. Zion's communications to the Department reflect the Department's "sensitivity" to public opinion on the subject of time zones:

> In spite of the Congressman's impressive pile of petitions, there is a real question as to whether or not the population of Perry County wants the time zone changed because it is the understanding of the General Counsel's office that Governor Whitcomb would prefer to leave things as they are. Consequently, I talked with Congressman Zion and told him that he could expedite the procedure by checking with the Governor and having him make a similar request for a change.

Robert F. Bennett, Director of Congressional Relations, writing to the Secretary.

would be stabilized if as much as possible of the state were placed in the system, even if it meant running rough shod over the preferences of the western half of the state outside the immediate Indianapolis area. What we take from the Department's actions, in contrast with its word from the final decision, was that the Department recognized the influence that a handful of major cities, selected political leaders and broadcasting interests had in selling a time regime to the public at large. The trick was to bring as many as possible of this array of interests into alignment.

That point brings us to the issue of St. Joseph and Marshall counties' inclusion in the Eastern Time Zone in 1969. The Department stated in the Final Rule that:

> When all of the evidence available had been tabulated and analyzed, the conclusion was that the central time proposal was unacceptable to a large segment of every group and geographical area responding, except the areas and businesses around Gary and Evansville. This 15-county area which has historically observed central time [that is central time with a return to standard time in the winter] continued to favor central time except for two counties in the northwest-Marshall and St. Joseph Counties. The South Bend/Mishawaka Area Chamber of Commerce (St. Joseph County) favored eastern time and a detailed petition was sent to the Department explaining the reasons for placing St. Joseph County in eastern time. Marshall County is closely tied economically with St. Joseph County, and for that reason has indicated a preference for eastern time. (34 FR 605, 606)

Thus, having told then Senator Birch Bayh that the character of the evidence regarding the appropriate time zone for the state was of an inconclusive nature, the Department told the world that the evidence for St. Joseph County, a county relatively close to Chicago, was detailed and conclusive, on the basis of an October 1966 petition.

Unfortunately, the records relating to the 1967-1969 proceedings prior to January 1969 could not be located by the National Archives so we have no idea what the South Bend/Mishawaka Chamber petition said. It appears clear though that this petition was one and the same as had been submitted to the ICC in October 1966 and that it predated Governor Branigin's petition to the DOT.[43] Having decided on a course of action almost directly opposite

[43] A memorandum from Jim Farmer to Governor Branigin dated 30 March 1967 mentions a petition from St. Joseph County already before the ICC. Mr. Farmer did not identify the source of the petition.[Container 117, Folder 16, Transportation, U.S. Dept. of- - General, Branigin Papers, Hamilton Library, Franklin College.] A letter dated 24 April 1967 to Mr. John Robson from one R.L. Biscomb (and copied to Governor Branigin) references a petition from the South Bend/Mishawaka Chamber of Commerce to move St. Joseph County to Eastern time occurring about October of 1966. [Container 117, Folder 16, Branigin Papers, Hamilton Library, Franklin College.] We are unaware of St. Joseph County government initiating such an effort and surmise that all references to a petition from St. Joseph County to move to Eastern time are one and the same as the South Bend/Mishawaka Chamber of Commerce petition referred to in the 1969 DOT decision and submitted to the ICC in or about October 1966. It appears that no proceeding was initiated on this petition and it seems unlikely that the public was made aware that is was being "considered" by the DOT. The DOT's statement in the final rule that "a detailed

of what the Governor of the state had asked for (and which the Department had recommended to him), this earlier petition assumed new significance which would have allowed the Department to seize on it as a pretext to increase the area of the state on Eastern time.[44]

The events from the 1950's and 1960's make clear that the issues of time zone and daylight saving were inextricably bound one to the other in Indiana and that an objective consideration of whether Eastern Time was appropriate, or even legal, was not and never has been, done. The DOT's correspondence with then Senator Birch Bayh, House Speaker John W. McCormack and Senate President Hubert Humphrey, surviving internal correspondence from the Department, the record from *Allied Theatre Owners* and Rep. Zion's objections make a clear and convincing case that dozens of northwest and southwest Indiana counties, including St. Joseph County, were moved to the Eastern Time Zone not because the evidence supported it, nor because the counties involved had themselves asked it, but simply to build a stable hybrid 'Eastern in the winter/Central in the summer' time zone incorporating most of Indiana and Michigan.

E. THE DOT "PROCEDURE FOR MOVING AN AREA FROM ONE TIME ZONE TO ANOTHER"

The DOT "Procedure for Moving an Area from One Time Zone to Another" dates from 1971.[45] It came in the immediate aftermath of numerous petitions for changes in time zones, primarily triggered by the introduction of "default" daylight saving into federal law, and two law suits in Indiana, one relating to daylight saving and the other to the time line drawn in 1969. We surmise that its author was familiar with these events and knew something of the ICC's experiences in drawing time lines. The Procedure sets forth how the DOT says it handles petitions relating to shifting a time zone boundary and includes both "Procedural" and "Substantive Requirements" for such petitions. The section marked "Procedural Requirements"provides that:

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petition *was sent to the Department*" may have been misleading in suggesting that the Chamber's petition had been received as part of the rulemaking proceeding initiated on the basis of Governor Branigin's 1967 petition. It is of course possible that the Chamber had resubmitted its petition but nothing in the extant record suggests that to have been the case.

[44] Acting on a petition from a private party such as a Chamber of Commerce is forbidden by the Procedural Requirements the Department now employs. The actions of the Department also contrasted with a comment reported by Jim Farmer to Gov.Branigin, apparently made by the DOT to Mace Broide on 15 March 1967, "that the ICC would be ready to move the time zone line on 24 hours' notice if *a responsible, state-wide authority* asked for such action." *infra.* The Mace Broide mentioned was probably then U.S. Senator Vance Hartke's (D-Ind.) chief of staff.

[45] In response to a Freedom of Information Act Request the DOT was able to provide nothing in the way of information about how the Procedure came into existence other than it "was provided in 1971 to Office of the General Counsel attorneys who worked on time issues by Lee Santman, former Assistant General Counsel for this issue." Letter of Kathy Ray, FOIA Officer, DOT General Counsel's Office, 27 September 2010.

1. Requesting Party. The request *must* be made by the highest *political* authority in the area which is subject to the request.

a. State Government - - For any part of the State, a request by the Governor or the Legislature meets this requirement; however, requests from this level are quite rare.

b. Local Government - - Usually, the request covers one or more counties, or parts of a county; hence, the request should come from the board of county commissioners or similar body. [emphasis added][46]

This express restriction of the petition process to state and local political officials seems logically related to undermining the motivation on the part of such officials to support local time systems and co-opting them into the federal system. These restrictions though raise serious questions under the Agency Good Guidance Practices issued by the Office of Management and Budget, under the APA and, not least, under the First Amendment to the Constitution.[47] The limitations contradict DOT guidance regarding informal rulemaking which the DOT publishes on its website.[48]

The Agency Good Guidance Practices defines "guidance" as:

an agency statement of general applicability and future effect, other than a regulatory action (as defined in Executive Order 12866, as further amended section 3(g)), that sets forth a policy on a statutory, regulatory or technical issue or an interpretation of a statutory or regulatory issue.[49]

Clearly the Procedure qualifies as "guidance" even if was not written as such in 1971. In addition:

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[46] In *Allied Theatre Owners v. Volpe* (S.D. Ind. 69 C 148) the court afforded standing to a group of theater owners challenging the 1969 Indiana time zone boundary decision. The same court had also entertained a challenge by television station owners to the DOT's deferral of enforcing daylight saving in Indiana pending resolution of a time zone boundary rule making process (*Time-Life Broadcast v. Boyd*, S.D. Ind. 68 C 168). These decisions might have put the Department on notice about the potential for difficulties in handling time zone issues giving it an incentive quietly to restrict access to the process once litigation was concluded.

[47] See 72 Fed. Reg. No. 16, pages 3432-3440 (25 January 2007); 5 U.S.C. Sec. 553(e); and The First Amendment which provides: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to assemble, *and to petition the government for a redress of grievances.* (emphasis added).

[48] See http://regs.dot.gov/informalruleprocess.htm. As stated on the website: "The public has the right to petition an agency to issue, modify, or rescind a rule, and we may agree on the need for action." An agency is free within the guidelines of the statute to determine if the grievance has merit, subject to court intervention, but it cannot just refuse to receive the grievance.

[49] 72 Fed. Reg. 3432 at 3429

> given their legally *nonbinding* nature significant guidance documents should not include mandatory language such as "shall," "must," "required" or "requirement," unless the agency is using these words to describe a statutory or regulatory requirement, or the language *is directed to agency staff and will not foreclose consideration by the agency of positions advanced by affected private parties.* (emphasis added)

While it is not clear that the Procedure is "significant guidance," it is liberally larded with exactly this type of mandatory language, none of which belongs.

The restriction of the petition process to state or local political authorities forecloses the Department from the consideration of petitions from affected private parties. Affected private parties would certainly include common carriers, anyone shipping or traveling by common carrier and possibly anyone having business before the federal government. In contrast with this, the Administrative Procedure Act (APA) provides that "Each agency *shall* give *an interested person the right* to petition for the issuance, amendment, or repeal of a rule" (5 U.S.C. Sec. 553(e), emphasis added).[50] Consideration of petitions from an interested person is obligatory on the part of the DOT. The class of "interested persons" is clearly broader than, for example, Article III standing to challenge rulemaking in court, and in fact, has been recognized by the DOT as corresponding to the general public.

The Procedural Requirements place state and local political authorities in the role of gatekeepers between the public and the federal government with respect to grievances relating to time zone boundaries set by the federal government. In view of the courts having granted standing to an industry alliance of theater owners to challenge a 1969 time zone boundary decision, the DOT's position that it will entertain petitions from only state or local governmental authorities appears untenable. See *Allied Theatre Owners of Indiana, Inc. v. Volpe*, 426 F. 2d 1002 (7th Circ. 1969), cert. denied, 400 U.S. 941 (1970).[51] The restriction of the right to petition is nothing less than a gag rule impinging on the right of the public to bring petitions for a redress of grievances to the government under the Administrative Procedure Act and the First Amendment to the Constitution.

F. THE DOT'S *AD HOC* RESPONSE TO THE 2005 PETITIONS

In the 2006 Indiana time zone decision the Department recited, but treated in cursory fashion, the "eight" factors which the "Procedure" provides as the substantive bases for time zone boundary decisions. Instead of analysis, much of the Department's discussion in the 2006 Final Rule, particularly with respect to St. Joseph County, seemed to be a "he said, she said" dialogue. The Notice of Preliminary Rulemaking also set forth "standards" which do not appear among the eight factors listed in the Procedure.

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[50] This appears to be a legislative implementation of a procedure whereby the people can bring grievances to the government as provided by the First Amendment.

[51] Standing was questioned at the trial court level but was not an issue on appeal.

The cursory character of the analysis in relation to the Substantive Requirements in 2005/2006 is consistent with a conclusion that political considerations dominated the DOT's approach to the petitions it received from Indiana in 2005. In addition, the petitions were not handled the way other time zone petitions have been in recent years. The individual usually responsible for time zone petition matters was replaced in the course of the process by a dispute resolution expert. Such a step would also be consistent with a decision to approach the issue politically rather than substantively, though not conclusive on the point.

Recalling the events of the 2005 Indiana General Assembly, under heavy pressure from Governor Daniels, the General Assembly repealed Indiana's exemption from daylight saving for its Eastern Time section.[52] As part of the deal brokered to secure narrow passage of the repeal, the Governor was obligated to submit a petition to the DOT on behalf of his office and the General Assembly requesting hearings to determine the proper location of the time line with respect to the Eastern Time zone portion of the state, excluding five counties in the southeastern part of the state. The DOT rejected the petition for failure to specify a location for the time line and invited individual counties to submit petitions. Some seventeen Indiana counties then submitted petitions to move from Eastern to Central time in the late summer of 2005.

The DOT, in response to the seventeen petitions, issued a Notice of Proposed Rulemaking (NPRM) where it said in part:

> Under normal procedures, we do not take action unless the county makes a clear showing that the proposed change would meet the statutory standard. We recognize, however, that this is an unusual case because of the number of counties involved, their relationship to each other and to neighboring counties, and the circumstances leading up to these petitions. Although the proposed counties have provided adequate supporting data to justify the issuance of an NPRM, we will critically review contrary and supporting information that may be provided by others, and any other related comments and data prior to issuing a final rule.[53]

The Department added that "time zone boundary changes can be extremely disruptive to a community and, therefore, should not be made without careful consideration."[54] This warning was somewhat ironic considering the Department had taken some time before declining to consider the issue across the Eastern time portion of the state, had then directed that the matter be taken up county by county, not regionally, and had suggested the counties would have little over a month to prepare and submit petitions. All of these occurred against a backdrop where the state's long established customs regarding time observance were about to be profoundly interrupted. This was the same Department that had worked to lock those customs in place during the late 1960's and early 1970's.

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[52] Senate Enrolled Act 127.

[53] 2005 NPRM, page 7.

[54] 2005 NPRM, page 10.

The Committee speculates that the Department had hoped the short window given for submitting petitions would result in only a handful being submitted and then, when it received 17, opted to adopt a stance directed to derailing the process. Notwithstanding its comments about the possibility of time zone boundary changes having the potential to be "extremely disruptive," the 2005 NPRM treated each county's petition in isolation, with reference to a static time line and imputed a preference to some petitioning counties for the *status quo ante*, that is, Eastern Time.

Reference to the state map in Fig. 4 illustrates the situation after issuance of the 2005 NPRM. Four major categories of counties appear, the existing Central Time Zone counties, Eastern Time counties petitioning to move to the Central Zone which the NPRM proposed moving, Eastern Time Zone counties petitioning to move to the Central zone which the NPRM did not propose to move and non-petitioning Eastern zone counties. Two counties, Benton and Fountain, submitted possible petitions and then withdrew them.[55] All of the counties which received provisional assignment to the Central Time Zone already bordered the existing Central Time Zone along a substantial portion of their borders. Four out of five of these counties bordered other Central Time Zone jurisdictions in two cardinal directions.

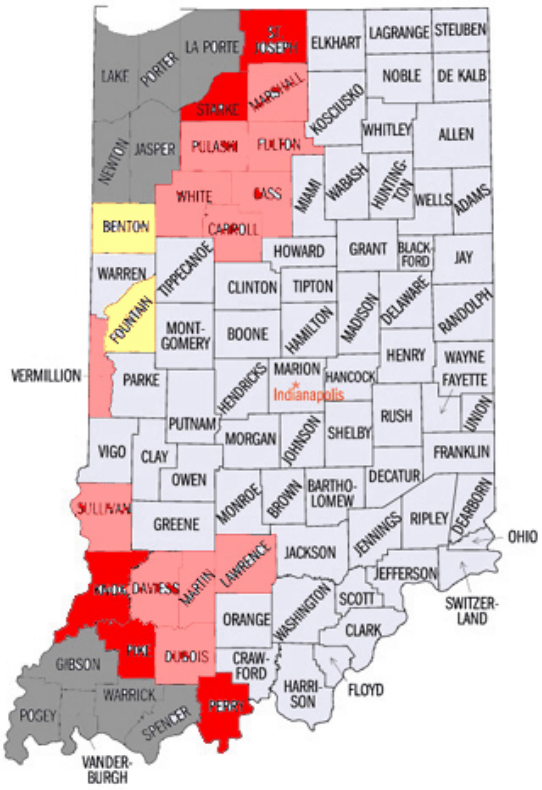

Fig. 4 - Situation after issuance of the 2005 NPRM. Source-Masson's Blog: *A Citizen's Guide to Indiana*.

While some of the petitioning counties that were initially excluded "presented almost no arguments or supporting data" for the change, the Department did not identify any particular county's petition as deficient.[56] The 2005 NPRM explained the proposed location for the time line by reference to some more specific considerations. One consideration apparently seen as supporting minimal movement of the time line was that:

> A number of counties focused on the potential change to their neighbors' time zone, and

[55] Benton County's "petition" had been the act of a single commissioner.

[56] This point was valid with respect to a few counties. Cass, White, Carroll and Lawrence Counties petitioned but presented essentially no data or argument in support of a change. Sullivan County's petition was minimal at best. Marshall County, which was not included among counties to be moved, presented a substantive petition the merits of which were never addressed by the Department.

> seemed to be more concerned with staying in the same time zone as their neighbors than in changing their time zone.

In view of the Department's complaint that "time zone boundary changes can be extremely disruptive to a community" one might have thought it reasonable for counties to consider what their neighbors were requesting in order to avoid disruptive consequences. But the Department seemed to view this consideration as justification for preliminary denial of petitions and for imputing a preference for the existing time zone to some petitioning counties rather than accept those counties' petitions for a change in time zone as a *bona fide* statement of preference. What such an approach had to do with the "statutory criterion" escapes us.

The NPRM identified no specific county which was "focused on the potential change to their neighbor's time zone," leaving it to the reader to guess which counties they meant. From the circumstances we infer that the DOT was referring to Marshall county.[57] Marshall County's links to St. Joseph County were old news to the Department. The preliminary denial of Marshall County's petition would play a pivotal role in the eventual disposition of St. Joseph County's petition which we believe was the DOT's objective all along. In 1969 the Department would use Marshall County's links to St. Joseph County to support moving Marshall County to Eastern Time, something neither had asked for. In 2005 Marshall County's links to St. Joseph County would become a rationalization for denying both counties' petitions to return to Central Time. For now though we will confine ourselves to questioning what a county's motivation in seeking a change in time zones had to do with the validity of its petition. We do not see how "motivation" relieved the DOT from considering the factors it enumerated as relating to the convenience of commerce.[58] But the "motivation" test was just one of several interesting novelties conjured up by the Department to deal with the 2005 Indiana situation.

The Department also expressed a reluctance to "create 'islands of time' by placing one county in a different time from all its neighboring counties in the State." Reference to Fig. 4 illustrates that the petition process had produced no "islands of time," at least if the petitions

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[57] See 34 *Federal Register* 605 (16 January 1969) and OST Docket No. 2005-22114-1705. Marshall County's petition was substantive but contingent on St. Joseph County's petition. For example:

> St. Joseph County to the north, Starke County to the west, and Fulton County to the south, are petitioning the Department of Transportation for the Central Time Zone. If those counties are approved for the Central Time Zone, eighty-three percent (83%) of the workers commuting into Marshall County would be coming from the Central Time Zone. (DOT-OST-2005-22114-0261)

[58] On this point, and its treatment of the "evidence" it considered regarding St. Joseph County's petition [Section G below], one might consider the Departments own words from 2000 relating to a petition from Wayne County, Kentucky to shift time zones. There the Department said:

> "We carefully considered, and reconsidered, the degree of public support necessary to make a time change viable. Although we considered 'tabling' the issue until there was greater unanimity in the community, we ultimately decided that this would be a dereliction of our duty to make the decision based on the *statutory* criterion". 65 Fed. Reg. 50157 (17 August 2000), emphasis added.

were handled dynamically, something which was within the power of the Department to do. The petition process produced two major groups of counties, one in northwest Indiana and one in the southwest Indiana. Only two counties qualified on the face of the map as nominal outliers (and even one of these, Vermillion County, shared a long border with Central Time Illinois). The two major groups were internally contiguous and were, for the most part, fairly compact. Both groups adjoined the Central Time Zone along lengthy borders. The Department's objections made sense only if it was taking a completely static view of each petition as it came in and was was trying to create"islands of time" to rationalize its preferred decision. Once a preference for the *status quo* was imputed to selected counties it is easy to see how the Department could conjure up "islands of time." Such an approach strongly argues that the Department was focused on derailing the process, was not applying its "statutory criterion" and may not even have given much thought to its warning about avoiding disruption to communities. The novel tests announced by the Department in the NPRM were so filled with internal contradictions that they seem to have been created on the fly.

Finally, the Department stated that it "looked at the distance each county is from the *current* time zone boundary, the proximity of each county to important metropolitan areas, and where the major roads and bridges are located."[59] The reference to "distance . . . from the current time zone boundary" confirms that the Department was acting with reference to a static time line. Such an approach could only isolate counties and again does not seem directed to meeting the statutory standard. Petitioning counties one or more steps removed from the time line had virtually no choice but to focus on a potential change in their neighbors' time zone in drafting a petition. The Department's approach was the very antithesis of reviewing the situation regionally and failed to deal with the convenience of commerce dynamically. Taking a more open approach the DOT could have seen that some counties had gone to extra efforts to consider what was going on around them. Those counties should not have had those efforts held against them as would be the case with Marshall County. What might have appeared as a bandwagon to the DOT could readily have been interpreted as indirect inter-county cooperation and an indication of regional economic boundaries.

G. THE INTERPLAY OF MARSHALL AND ST. JOSEPH COUNTIES' PETITIONS

In response to St. Joseph County's petition in 2005 the Department proposed placing St. Joseph County in the Central Time zone in its Notice of Proposed Rulemaking (NPRM). The NPRM also proposed moving four other counties, Starke, Knox, Pike and Perry, to Central time. Of these all but Starke were in southwestern Indiana. Notwithstanding general language in the NPRM stating that "additional information" could result in additional counties being moved to Central Time, the NPRM appeared to expressly exclude that possibility around one county, that being St. Joseph County:

> we are aware of the importance of South Bend to its neighboring communities in Indiana and Michigan and *specifically request comment on potential effects to those communities*

[59] NPRM., supra, page 10.

> *to the north, east and south if St. Joseph County is changed at the final rule stage and placed in a different time zone from the greater Michiana area* as additional information could change our tentative decision.[60] (Emphasis added)

The Department of course left itself an out on this point. Technically they were only asking for comments relating to two particular *possible* outcomes, changing or not changing St. Joseph County's time zone, however, these were the only *possible* outcomes mentioned. The NPRM left the distinct impression that the only possibilities under consideration were that St. Joseph County would remain on Eastern Time or it would be shifted to Central Time *alone*.

In considering the full consequences of this positional posture, it serves to contrast the Department's approach in 2005 with how the Department conducted itself in 1985. In 1985, in response to a petition from the Indiana General Assembly to shift the Evansville area from Central to Eastern Time, the Department stated that it would:

> reserve the right to grant more or less than what the Indiana legislature has requested. If the information gathered as part of this proceeding supports moving to the eastern zone areas other than those mentioned in the Resolution *(including portions of Illinois and Kentucky)*, or moving less than the five counties, or making no time change at all, DOT is free to act accordingly, and *interested persons should direct their comments to these alternatives*.[61] (Emphasis added)

In 1985 the extent and the interests of a region as a whole were considered while in 2005 the bounds of the affected region were predetermined and the Department set the constituent parts of this "region" against each other.

The relationship of the "statutory criterion" to an *ad hoc* focus on a selected set of purely local interests in 2005 as compared to the geographically broad and dynamic convenience of commerce approach taken in 1985 was at no time spelled out by the Department. It is interesting to note that the Department, having sought to extricate itself from matters of purely local concern in 1969, was doing everything in its power to see to it that such matters dominated the process in 2005. Such a politically manipulative approach is consistent with a process which makes a gag rule its centerpiece. It appears to have been intended to bring the process to a dead stop and to introduce so much ill will among the participants that it would scare off the political gatekeepers

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[60] 2005 NPRM.

[61] See *Standard time Zone Boundary in the State of Indiana: Proposed Relocation*, Fed. Reg./ Vol. 50, No. 120 (June 21, 1985), page 25856. A petition from the Indiana General Assembly requested the DOT move Gibson, Posey, Vanderburgh, Warrick and Spencer Counties to the Eastern Time Zone. See also *Relocation of Eastern-Central Time Boundary in the State of Michigan*, Federal Register, Vol. 38, No. 70 (April 12, 1973), pages 9228-9229. In response to four Michigan counties petitioning to move from Eastern to Central Time, the "Department invited comments on whether any counties in the upper peninsula contiguous to the four named should be placed in the Central Time Zone. Since very few persons addressed themselves to this, only the four counties named [were] placed in the Central zone".

from ever attempting such a thing again unless the request became completely uncontroversial.

The apparent inflexibility on possible locations for the time line with respect to St. Joseph County stood out particularly in the treatment of Marshall County to the immediate south of St. Joseph County. Marshall County had petitioned to move to Central Time but had not received preliminary approval of its petition. The NPRM provided no specific reasons for their exclusion leaving it to be inferred that its petition was negatively viewed based on the various general considerations discussed in the prior section, namely that it did not border the existing time line and that its petition was being driven by St. Joseph County's petition.

Viewed from the perspective of the proposed time line, the Department (being *"aware of the importance"* of "South Bend") was already in possession of information supporting provisional approval of Marshall County's petition. In fact, on the basis of the Substantive Requirements section of the Procedure the Department knew that had St. Joseph County been on Central Time, approval of a petition from Marshall County to move to Central Time would have been virtually automatic. Nonetheless, the Department lumped Marshall County with non-petitioning Eastern Time Zone counties to the east and north of St. Joseph County and then *"specifically request[ed]"* Marshall County tell the Department why shifting St. Joseph County to a different time zone would negatively impact the county. Marshall County was in effect told to recast its petition into an attack on St. Joseph County's 2005 petition.

One might almost wonder why the Department proposed moving St. Joseph County at all. One possibility is that had they not proposed moving St. Joseph County then St. Joseph and Marshall counties' interests would have remained aligned during the subsequent hearing stage and the two counties might have cooperated in their efforts before the Department. If avoiding such an eventuality was on the mind of the Department, then preliminary approval to St. Joseph County's petition did not reflect any intention, or even interest, on the part of the Department to approve the petition in the end. Preliminary "approval" was about putting St. Joseph and Marshall Counties on a collision course in order to produce a record justifying a decision that had already been taken to deny the petition.[62]

In the Final Rule, the Department withdrew preliminary approval of St. Joseph County's petition. This was based in part on the fact that Marshall County was not to be moved to the Central Time Zone. In turn, Marshall County's petition was denied because St. Joseph County was not being moved to Central Time. No mention was made of regarding some counties petitioning only because their neighbors had. The Department's process was a Catch-22 operating to deny both counties' petitions based on refusal to allow either petition individually. The character of the Department's actions in 2005 and 2006 could be challenged as arbitrary and capricious under the Administrative Procedure Act.

[62] See Marshall County Resolution No. 2005-07 (9 November 2005).

H. ST. JOSEPH COUNTY

In its final rule the Department noted that:

> St. Joseph County filed detailed information with its petition addressing each of the Department's time zone factors, showing how changing to the Central Time Zone would be beneficial for the community.

In declining to make the proposed rule shifting St. Joseph County to the Central Time Zone permanent, and apparently as a partial rebuttal of St. Joseph County having satisfied the factors the Department considers, the Department cited "conflicting views of the county commissioners and two local mayors" including then St. Joseph County Commissioner Mark Dobson's "point by point rebuttal." The DOT went on to add that there was information relating St. Joseph County to Elkhart and Kosciusko counties.[63] Then came a long recitation of witnesses speaking for or against the proposal. What was missing from all of this was much in the way of analysis of the significance of what was said either for and against the proposal. The Department's object seems to have been nothing more than to highlight that there was disagreement. The Department did little to address the evidence presented outside of generating several "Regional Configurations" tables and it subjected statements of local government officials who had taken pro-Central time positions to a sort of heightened scrutiny.

This heightened scrutiny can be seen in the DOT's treatment of then St. Joseph County Commissioner Cynthia Bodle:

> although the President of St. Joseph County [Board of Commissioners] signed the county petition, spoke in favor of it at the South Bend hearing, and subsequently submitted an additional letter of support to the docket, as a member of the Michiana Council of Governments (MACOG), she also made a motion to "support the sending of a letter by the policy board to ask that the four county region all remain in the same zone."[64]

The case of Ms. Bodle's "motion" and the letter later sent by the MACOG executive director is interesting and we believe was misapprehended by the Department. The mentioned letter was sent by MACOG executive director Sandra Seanor on 21 November 2005, however, former Board president Cynthia Bodle's motion had been made and voted on more than five months

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[63] While the Final Rule discusses Elkhart County we cannot determine what the substantial relationships to Kosciusko County were in the mind of the Department. Kosciusko County was then only informally affiliated with the Michiana Council of Governments (since formalized). Letters from two state representatives were cited as asserting relationships. One of these was from Gerald Torr who represents the Indianapolis area and had been a long time vocal opponent of Central Time. The other was from William Friend, a member of the Governor's party, who represents a district which extends from Elkhart County to the Peru area.

[64] Federal Register/ Vol. 71, No. 13/Friday, January 20, 2006/ pp. 3243.

earlier, on 8 June 2005.[65] This motion and vote preceded the Department's rejection of the Governor's Petition while the letter came near the end of the hearing process on the petitions of the seventeen counties. By collapsing the interval between the events and by ignoring intervening events the Department totally changed the seeming significance of Ms. Bodle's actions. Setting out the chronology of all of these events substantially changes the significance of her actions.

The expectation in early June 2005 had been that the Department would act on the Governor's petition as a request to move 77 Eastern Time counties in Indiana to Central Time. While it could be foreseen that some but not all of these counties would be moved to Central Time Ms. Bodle could not have anticipated at the time she made her motion how totally differently the process would play out. The expected statewide process did not come about. Instead a county by county free for all ensued. Such a scenario was not on anyone's mind at the local level in Indiana in June 2005. Nor was it on anyone's mind that the focus of the regulatory proceeding would metamorphose into one which locally was exclusively about whether or not St. Joseph and immediate neighboring counties in Indiana would end up in different time zones. A reasonable inference to draw from the vote on Ms. Bodle's motion, given when it occurred, was that the MACOG counties considered their ties to one another more important than their ties to the remaining Eastern Time Zone counties in downstate Indiana and that they preferred to move to Central Time as a group rather than have some MACOG counties cleaved off to remain with downstate should downstate remain on Eastern Time.

Other aspects of the Department's analysis almost appear directed to misleading readers. For example, the Final Rule grouped the following observations relating to St. Joseph County:

> Many businesses favored the Eastern Time Zone. The Chamber of Commerce of St. Joseph County stated that 91% of its survey respondents believed that it was essential for Elkhart and St. Joseph County to be in the same time zone "due to our regional economy."

This seems to suggest that 91% of the businesses in St. Joseph County favored Eastern Time, a totally unsupported contention. In addition, the Department "time shifted" the events. It failed to mention, or to notice, that the survey had been conducted prior to dismissal of the Governor's petition. Interestingly, the Department didn't seem to have any qualms about accepting the reliability of the Chamber's "survey," unlike the treatment it gave to pro-Central members of the County's political leadership. The Department's handling of St. Joseph County's petition in 2005 cannot be said to be a diligent application of the statutory criterion.

I. THE POLITICAL DYNAMICS OF GATEKEEPING

It is the conclusion of the Committee that in fact the Procedural Requirements/gatekeeper section of the Procedure is viewed by the Department as being more important than the

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[65] Michiana Area Council of Governments, Minutes of 8 June 2005 meeting.

Substantive Requirements. The gatekeeper function is likely viewed by at least some in the Department as critical to the management of time zone issues, including the management of public opinion, as well as to controlling access to the process. It is justified to the public as necessary for determining if there is public support for requests for changes in time zones.[66] Thrusting state and local government into a gatekeeper function might have had a connection to the Department's purpose in securing widespread and uniform adoption of a single standard of time in 1971 through the suppression of local time regimes. Today the task of suppressing local time regimes is essentially complete and the likelihood of departure from federal civil time across an urban setting such as St. Joseph County virtually nil. It is worth considering whether the gatekeeper process really helps determine if there is public support in a relevant area for a request to change time zones, or whether this departure from the Administrative Procedure Act's requirements for rulemaking serves to distort the process from the outset.

In so far as the gatekeeper system relates to Indiana, events in this state demonstrate that the Department could hardly have selected a more conflicted and largely unsuitable group of intermediaries for most of the state, particularly at the state level. The gatekeeper aspect of the Procedure appears to push back room political considerations ahead of the statutory criterion in the consideration of time zone boundary changes.

There are a number of criticisms against using state and local political authorities as exclusive gatekeepers for the time zone location process. State and local government officials are poorly positioned to appeal DOT decisions in court for a number of reasons including turnover in office and budgetary constraints. They are also subject to pressure from campaign contributors and, as discussed below, will be put into the position of having their analysis colored by diffuse and legally irrelevant political considerations. They may be wary of offending a federal Department responsible for dolling out money for road and transit construction projects. Under the ICC private parties could bring petitions and the public had some idea of who was sponsoring efforts to change time zones. The gatekeeper approach adopted by the DOT allows proponents to remain behind the scenes and this can result in a sense on the part of the public that it and the process are being manipulated. History suggests that gatekeepers were inserted into the process because the DOT wanted more control over the process than the APA affords it or the ICC exercised. Gatekeepers may be selected because they are in positions sensitive to public opinion, or because they represent "regional configurations" the DOT feels comfortable working with. But gatekeepers in positions sensitive to public opinion can also be subjected to private and political pressure and vulnerable to that individual's own ambitions. For example, shortly after the DOT's refusal to allow St. Joseph County to move to Central Time, the one Commissioner who had opposed the petition quit his job as Commissioner and moved to a more lucrative position with the local Chamber of Commerce. While we do not assert that these actions were parts of some sort of *quid pro quo*, they can be seen as raising an appearance of a conflict of interest.

[66] As if a public opinion survey would be so very difficult to do.

The actions of Indiana Governor Mitch Daniels in 2005 can be seen as reflecting the possible problems of too much political sensitivity. When Governor Daniels' "Petition for Hearings" subsequent to the repeal of the state's DST exemption was effectively denied by the DOT, the Governor characterized denial of the State's petition for hearings on the location of the time zone as stemming from such petitions not "traditionally" originating with the Governor's Office and asserted such measures were better a local concern.[67] He had no interest in a job that entailed the kind of political costs advocacy of a single time zone for the entire state has.[68]

In 2005, rather than pressure the General Assembly in passing a repeal of daylight saving, the Governor could simply have asked the DOT to move most of the state to Central Time, which would have made the daylight saving issue moot. Instead he chose a route that moved much of the heat to the legislature. As recently as 28 July 2010 a spokeswoman for Governor Daniels repeated his support of "local preference" on the time zone matter, while at the same time insinuating that the Governor had brought about the highest level of statewide uniformity with respect to time observance as ever achieved when she wrote the following:

> Thank you for contacting Governor Daniels with your concerns regarding time zone placement. The governor has asked me to respond to your questions.
>
> In 2005, the governor led a successful effort to move the entire state to observe Daylight Saving Time. The governor consistently stressed that the new law was only aimed at getting all of Indiana in synch with the rest of America for economic and job attraction purposes. When most of our state was on the same time zone as the Eastern Zone part of the year, but the Central Zone the rest of the year, the daily mass confusion was very negative for businesses of all kinds in a global, interconnected world.
>
> During the next year, several counties elected to petition the federal government to move to a different time zone. Governor Daniels supported the local leadership, and additional changes were granted by the United States Department of Transportation (USDOT). Subsequently, no Indiana had [sic] sought to shift its current time zone assignment. Meanwhile, we now have the highest percentage of Hoosier citizens ever, well over 4 out of 5, on the same time year-round.
>
> Federal law controls this area and makes time zone designations on a locality by locality basis and the governor has long respected local preference. Should a county petition to move to a different time zone, the governor will make every effort to assist with the request. It should be noted that no county can force change of zone on another county against its will.
>
> The governor said then and still agrees that a good geographic case can be made for the Central Time Zone applying to more of the state than the current ten counties. [Sic-twelve counties are in the Central Time Zone] The goal of getting in year-round step with

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[67] *Indianapolis Star*, 25 October 2005.

[68] Editorial, *Indianapolis Star*, 22 July 2005.

> the national and world economy having been achieved through the adoption of DST, the choice of time zone is always open to review and the federal petition process.
>
> I encourage you to share your views with your local elected officials and the USDOT. Thank you for your active citizenship.[69]

Notwithstanding the statements in the foregoing letter, St. Joseph County was the only county which the DOT proposed to shift to Central Time where the proposal was openly opposed by the Governor of the state. The proposed shift was also opposed by members of the state legislature from well outside the county. It is appropriate to consider the negative reaction of downstate politicians to the 2005 petition and how these politicians were encouraged by the approach taken by DOT before and in the NPRM.[70]

While the DOT and the Governor said choice of time zone was a county by county issue, they deployed negative narratives, unique to St. Joseph County, as arguments against this county's 2005 petition rather than deal with the substantive merits of the petition itself. More than any other petitioning county, St. Joseph County found itself repeatedly tied to issues of regionalism. And it was assumed from the outset that the region was a well-defined one whose preferences trumped St. Joseph County's interests. The DOT focused on the "controversy" generated by the petition. The Governor characterized the proposal as "disruptive" to some unspecified good of a larger region.

To demonstrate that St. Joseph County's petition was "controversial" the Department in the Final Rule noted that 40% of the commenters:

> opposed moving St. Joseph County to the Central Time Zone . . . [M]any of these commenters spoke about their frequent cross country trips and trips between Indiana and lower Michigan for personal and business reasons, complaining that they would be made more difficult by changing the time zone boundary of only a single county. They feared that this would create problems for businesses and citizens alike.

The DOT freely gave substantial weight to opposition that obviously came from outside the county and in some cases seems to have had no more connection to the county than they sometimes passed through it traveling to and from Michigan. Why these people would be

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[69] Spahr, Suzi; Constituent Services, Office of the Governor.

[70] State Rep. Gerald Torr (R-Carmel) represents a metropolitan Indianapolis district. He long championed bringing daylight saving to Indiana, led the fight for it in the house and has always been quite public in his support of Eastern Time on behalf of "outdoor recreation interests." Rep. Torr is on the record in the Prior Proceeding opposing St. Joseph County's bid for Central Time but *supporting* the petitions of Knox, Daviess, Martin, Pike and Dubois Counties even if he couldn't express why. We assume that support for Knox County's petition was a bit of reciprocity for former State Rep. Troy Woodruff (R-Vincennes) switching his vote from opposing daylight saving to supporting it. Rep. Woodruff's vote was the final vote which secured passage of the repeal measure in the state House of Representatives.

troubled by St. Joseph County time differing from what they observed at home or at their destination was not spelled out, only their expression of "fears" was highlighted. That the DOT had to accumulate "votes" from outside St. Joseph County to reach even a 40% level of opposition seems to confirm that a substantial majority of commenters from St. Joseph County agreed with the shift to Central time and that the Department was seeking out controversy where it could find it. So why is St. Joseph County's choice of time zone a statewide issue at all?

For a Governor, and his political allies in the legislature, particularly State Rep. Gerald Torr and then Speaker of the House Brian Bosma, all of whom are from the Indianapolis area, the political issues could well have been paramount over exercising due diligence regarding time law and the economic consequences of time zone choice for St. Joseph County. The political solution to the problem of locating the time line while minimizing the negative political fallout for a downstate-oriented administration required (and requires) keeping the time line deep in northwest Indiana. An expansion of the Central Time Zone involving St. Joseph County is a political problem for a downstate administration, particularly for a Republican administration, unless Central Time can be extended statewide. The relocation of St. Joseph County to the Central Time Zone could well change the location of the time line in relation to over a half dozen districts in the state House of Representatives. It goes almost without saying that most people do not want the time line next door and some voters will blame relocation of the time line to their neighborhoods on the most convenient elected official. If St. Joseph and Marshall counties had been moved to Central time most of newly affected seats would have been seats controlled by the Governor's party.[71] Short term *political advantage*, not the convenience of commerce, can all too easily color decisions relating to time zone relocations from Indiana government officials, particularly in the face of two year election cycles and the fact that control of Indiana's House of Representatives has frequently turned on shifts of one or two seats.[72] This is not to claim the issue doesn't run both ways, however, in this regard, deference to local officials in a county requesting a change in zone makes some sense. Unlike a governor, or the county commissioner for a neighboring, non-petitioning county, such a county commissioner is at least answerable to a set of voters all of whom are directly affected by the decision.

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[71] For example, moving St. Joseph and Marshall counties to Central Time would result in the time line running through the 48th, 5th, 21st and 23rd House districts. Such a move have would eliminated division of the 17th district. At the 2005 hearings in South Bend one Republican member of the House of Representatives, then State Rep. Steve Heim (R-17th), who would have benefitted from moving the line locally, argued strongly for the shift and even praised House Democratic leader Pat Bauer (D-6th) for his leadership on the issue. The 48th district is currently represented by Tim Neese (Rep.), the 5th by Craig Fry (Dem.), the 21st by Jackie Walorski (Rep.) and the 23rd by William Friend (Rep.). In addition, movement of the line would have placed it on the border of the 16th district, represented by Douglas Gutwein (Rep.).

[72] It would be very easy to see just how such considerations led Governor Daniels and State Rep. Torr to endorse shifting counties in southwest Indiana to Central Time in 2005 in an effort to save the seat of former State Rep. Troy Woodruff. The Republicans lost control of the House in 2006. State Rep. Brian Bosma, who was Speaker in 2005-6, blamed his party's loss of control of the House on the time controversy.

The interests of the Governor would have dovetailed nicely with those of the DOT in 2005 and 2006. Both state and federal officials abandoned the substantive criterion relating to time zone boundary changes in favor of a political response promoting the *status quo ante* with respect to St. Joseph and Marshall counties. For the DOT this would be perceived as promoting stability. For the political leadership outside St. Joseph County it would have promoted their political standing with their base constituencies.

The attraction of gatekeepers to the DOT remained undiminished in the aftermath of 2005/06. Wittingly or unwittingly at least one DOT official took a new card from the deck of interposing local, regional and state officials to petitions in 2007 in response to an inquiry from two of St. Joseph County's commissioners. In 2007 St. Joseph County Commissioner Robert Kovach met three members of the Advisory Committee regarding the possible renewal of St. Joseph County's bid for a change in time zone. Shortly after this meeting the DOT issued its Final Rule relating to a joint petition of five counties in southwestern Indiana to change back to Eastern time. In the Final Rule the DOT announced a moratorium on any consideration of new petitions from Indiana elected officials relating to time zone changes effective with the changeover to standard time that fall.[73] As a consequence of this announcement, Commissioners Kovach and Steve Ross wrote the DOT requesting an extension of time in which St. Joseph County might file a renewed petition.[74] On 20 November 2007 DOT Senior Counsel for Dispute Resolution, Judith S. Kaleta, responded to the request by pointing out there was no prohibition on *filing* such a Petition, simply that it would not be considered for a year. It was internally felt that there was little point in pushing a petition as it stood in 2007 given its preliminary character and the insistence of Commissioner Kovach that any new petition must be objective and supported by solid data. Ms. Kaleta's closing remarks also had a chilling effect:

> DOT appreciates the interest of the St. Joseph County Board of Commissioners in the economic viability of the County. Should the Board decide to petition for a time zone change, DOT encourages the Board to work collectively and to collaborate with officials from the Michiana Area Council of Governments of which St. Joseph County is a member.

The implication of this comment was that a renewed petition would receive the same treatment that the 2005 petition had received unless it came through, or had the support of, the Michiana Area Council of Governments [MACOG]. Yet another gatekeeper seemed to have been inserted into the process.

Ms. Kaleta was the hearing officer at the 2005 hearings and she certainly should have known that MACOG's "officials" were county and city officials from the member counties of MACOG. She had seen first hand the animosity and sarcasm directed at St. Joseph County Commissioners by officials from Elkhart County. In 2005 she had even gently cautioned one of

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[73] Fed. Reg./ Vol. 72, No. 185, page 54376. (25 September 2007)

[74] Board of Commissioners, *Time Zone in Saint Joseph County, Indiana*, 2 November 2007.

Elkhart County's commissioners about the character of his testimony during the hearing at South Bend.[75] She also had to understand full well that Elkhart and Kosciusko counties would not and will not cooperate in placing the time line on their boundaries no matter what the consequences for St. Joseph County in keeping it on St. Joseph County's western border. At least one of Elkhart County's Commissioners had been quite blunt on that point. In 2005 Elkhart County Commissioner Mark Yoder told *The Wall Street Journal* that:

> "We ought to be Central. *There's no doubt about it.*" (emphasis added)[76]

He explained that his public stance opposing expansion of Central Time in Indiana was to "avoid creating a time zone peninsula" across northern Indiana.[77] Clearly Mr. Yoder had no issue with Central Time, he in fact *favored* Central Time. His only issue was with locating the time line on Elkhart County's borders. By the time he made this statement he understood he was operating in a political and procedural environment where no county could "force a change in zone on another county against its will," where counties whose petitions were contingent on the petition of another county would have a preference for the *status quo ante* imputed to them and where there seemed to be little problem with one county forcing an adjacent county to remain in its current zone against its will.

To a person not familiar with the ill will the Department had engendered between officials of the member counties of MACOG, a suggestion to "work collectively and collaborate with officials of [MACOG]" probably looks fine in print. But the effect was to interpose yet another gatekeeper into the process and an expansion of Procedure's gag rule on the general public to include St. Joseph County's Board of Commissioners. In this case the proposed gatekeeper (MACOG) embraced territory primarily to the east of St. Joseph County. Some of this territory would obviously prefer to keep the time line's location 40 to 50 miles to the west and out of its back yard. It seemed a reasonable inference that Ms. Kaleta was planting one more excuse to deny relief in response to any new petition coming directly from St. Joseph County.

The Procedure, federal daylight saving and limited state nullification of daylight saving can all be seen as logically related to the Congressional objective of promoting adoption of a single, uniform standard in each zone. The problem with the Procedure is that it is likely both illegal and unconstitutional. In addition it adopts a decision mechanism which favors behind the scene manipulation over openness and it obstructs the general public seeking a redress of grievances from government. In the 2006 Final Rule the DOT made a point of saying that it

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[75] Members of this Committee witnessed the event and we have video tape of the incident.

[76] Originally reported in the Wall Street Journal, cited here from the Pittsburgh Post-Gazette: http://www.post-gazette.com/pg/05292/591293.stm. Published 19 October 2005.

[77] There was no proposal at the time to put Elkhart County on Central Time, just St. Joseph and Marshall Counties so presumably it was this "peninsula" he was working to stop. Of course there already was a peninsula comprising Lake, Porter and LaPorte Counties.

gives:

> substantial consideration to the views of local elected officials because the foundation of time zone boundary proceedings rest [sic] upon their requests.[78]

The average reader would probably conclude from this statement that what the DOT meant regarding "the views of local elected officials" was a marshaling of facts, and an analysis of those facts, as they related to the "Substantive Requirements"section the Procedure.

Instead the DOT seems more focused on a political consensus across regions than it is in the substantive merits of petitions. It can be seen that local political consensus can be harnessed to the task of assuring the continued monopoly of federal civil time over local time regimes. If this is the case then the "Substantive Requirements" of the Procedure are completely subordinate to the "Procedural Requirements." Worse, what constitutes a relevant "region" will depend upon the availability of a political structure which the DOT feels it can work through. Little or nothing of the process, or even definition of the relevant region, will have anything to do with commerce or economics.

Such an approach has almost nothing to do with the "convenience of commerce." It may have made some sense in 1971 when the memory of dominance by local time systems of the "market" was fresh. Today few local time regimes exist. The most significant local time system is probably that of Phenix City, Alabama, a community of 30,000 residents on the Georgia/Alabama border, which is in the Central time zone but observes Eastern time.[79] A partial example exists in St. Joseph County, where the school in Olive Township operates on Central Time but town government is on Eastern. We would guess that local time systems are beyond the comprehension of most of the public.

Today the situation throughout much of Eastern Time Indiana, outside of St. Joseph County, is that there is *no* political consensus behind either Eastern or Central.[80] The reasons why St. Joseph County was put on Eastern Time no longer exist. The situation is ripe for finally answering Governor Branigin's 1967 petition, or, failing that, at least dealing with the 2005 petition of the Governor and Legislature, that is, a determination of where the time line belongs with respect to 77 (now 75) Eastern Time Zone Indiana counties based on the convenience of commerce.

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[78] Federal Register/Vol. 71, No. 13/Friday, January 20, 2006/pp. 3243.

[79] Wikipedia article on Phenix City, Alabama (accessed 1 November 2010).

[80] Perhaps uniquely among Indiana counties petitioning for a change in time zones in Indiana in 2005, St. Joseph County's petition was endorsed not only by the Commissioners, but also by the County Council, town and city common councils and the mayors of the various cities and towns. The then mayor of Mishawaka, who now heads the St. Joseph County Chamber of Commerce, later backed away from his original endorsement.

J. CONCLUSIONS

The Procedural Requirements of the DOT, limiting the class of petitioners to state and local governmental authorities, are inconsistent with the Administrative Procedure Act and the DOT's own policies. The Administrative Procedure Act requires the DOT to afford "an interested person" the right to petition. Putting state and local government officials in a gatekeeper role is not only legally questionable, it reduces the "Substantive Requirements" for petitions, the portions of petitions which are directed to the convenience of commerce, to a subordinate role in the process. The "Procedural Requirements" make political considerations the dominant consideration. It creates a temptation for the DOT to construct "regions" and put in place gatekeepers as needed to suppress petitions.

DOT actions suggest that it continues to believe, given the choice of Central or Eastern, neither time zone is objectively better for a majority of Indiana. While the western part of the state has some affinity for Central, the case is not overwhelming outside the northwest and southwest sections of the state. The best it could do in 1969 was to pursue the Congressional purpose of assuring uniform and widespread adoption on one standard. This belief controlled its 1969 time zone decision in Indiana and has colored the significant major decisions occurring since then, notably in 1985 and 2005. At least in 1969 the DOT understood what it was doing and why. Today the DOT and the public seem unaware that the 1969 decision cannot be read as an objective analysis. The 1969 decision was a political rationale advanced in the cause of stability and unlike the 1961 ICC decision cannot be read as reliable history. The territory moved to Eastern time in 1969 was expanded in pursuit of stability to every section of the state that didn't threaten open revolt as a consequence and with the implicit promise that Eastern Daylight time would not be observed.

The DOT has failed to apply time law correctly in Indiana since the inception of the Uniform Time Act. In 1969 it opted for a time line chosen not for the convenience of commerce, but to bring about stability rooted in the non-observance of daylight saving. Indiana time was intended only to get the residents of the state off of local time regimes and onto some sort of federal civil time. In 2005 the DOT again avoided dealing with the substantive legal factors relating to time line location. The state executive cooperated in this approach because it was expedient to do so and out of an apparent lack of understanding of Indiana history. After the exemption from daylight saving was secured, Governor Daniels needed to minimize the negative electoral consequences stemming from relocations of the time line. Politicians and their concerns matter to the DOT where the support of a state or local political authority can be harnessed to promoting the widespread and uniform the observance of federal time throughout a zone. Where the interests of a Governor and the DOT could overlap is obvious.

While St. Joseph County may be economically tied to Chicago it is excluded from the northwest Indiana counties on Central Time because it appears central to a region which some wish to keep on Eastern Time for political reasons. We must overcome the Department's indifference to the economic consequences of this arrangement both to St. Joseph and Marshall counties and persuade them of the lack of economic impact on other counties in this area by a

change in the time zone.

Recommendations regarding specific steps potential proponents of Central Time can take will depend upon a review of the specific circumstances of each proponent and should be developed with them individually. The Department's "Procedural Requirements" should not be viewed as a roadblock to seeking regulatory relief, pursuing litigation or working through (or joining) a local political process. Petitions from private parties are not advised unless the potential proponent can show substantive economic damages stemming from the current time line location. Economic damages confer Article III standing on a petitioner to attack a negative decision by the Department through litigation. School corporations make plausible candidates for such petitions. They endure constraints on school scheduling imposed by working parents and suffer losses based on educational time which is paid for but lost due to school delays related to morning darkness and weather conditions.

The town of New Carlisle, Indiana, at the western edge of St. Joseph County is also a plausible candidate. New Carlisle has experienced a number of problems stemming from its local school corporation operating its school buildings in both LaPorte (Central Time) and St. Joseph counties (Eastern Time) all on Central Time. This has resulted in some confusion in the town and surrounding Olive Township stemming from what are referred to as "Town Time" and "School Time." The town could petition for a change of time zone independent of St. Joseph County. Precedent for such a step exists in the case of West Wendover, Nevada. The Department received and approved a petition for a change from Pacific to Mountain time by the town of West Wendover in 1999 in the form of a letter from the Mayor.[81] While West Wendover's circumstances were unusual, so too are New Carlisle's. Alternatively, New Carlisle could follow the example of Phenix City, Alabama and simply start observing Central time.

We hope these comments have gone some way to meeting the request.

[81] 64 Fed. Reg. No. 203, Pages 56705-56707 (21 October 1999).

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PROCEDURE FOR MOVING AN AREA FROM ONE TIME ZONE TO ANOTHER

I. WAYS TO CHANGE A TIME ZONE -- Under Federal law, there are two ways in which an area in the United States can be moved from one time zone to another.

By Statute: The first is by a statute enacted by Congress.

By Regulation: The second is by a regulation issued by the Secretary of Transportation.

This paper discusses only the second, since the first has not been used in sixty years.

II. SUBMISSION OF THE REQUEST

A. Procedural Requirements:

1. Requesting Party. The request must be made by the highest political authority in the area which is the subject of the request.

a. State Government -- For any part of the State, a request by the Governor or the Legislature meets this requirement; however, requests from this level are quite rare.

b. Local Government -- Usually, the request covers one or more counties, or parts of a county; hence, the request should come from the board of county commissioners or similar body.

2. Information Required. The request must be accompanied by the following:

a. A formal certification from the appropriate governmental official that the request is the result of official action by the requesting party, if the requesting party is a legislative body.

b. The name, address, telephone number, and title or position of a person representing the requesting party whom DOT may contact for further information.

c. Detailed information supporting the requesting party's contention that the requested change would serve the convenience of commerce, as discussed below.

3. Address. Submit the request to the Secretary of Transportation, Washington, DC, 20590, Attention: General Counsel (C-50).

B. Substantive Requirements: The principal standard for deciding whether to change a time zone is the convenience of commerce which is defined very

broadly to include consideration of all the impacts upon a community of a change in its standard of time. Examples of some of these considerations are:

1. From where do businesses in the community get their supplies and to where do they ship their goods or products?

2. From where does the community receive television and radio broadcasts?

3. Where are the newspapers published which serve the community?

4. From where does the community get its bus and passenger rail services; if there is no scheduled bus or passenger rail service in the community, to where must residents go to obtain these services?

5. Where is the nearest airport; if it is a local service airport, to what major airport does it carry passengers?

6. What percentage of residents of the community work outside the community; where do these residents work?

7. What are the major elements of the community's economy; is the community's economy improving or declining; what Federal, State, or local plans, if any, are there for economic development in the community?

8. If residents leave the community for schooling, recreation, health care, or religious worship, what standard of time is observed in the places where they go for these purposes?

III. DOT HANDLING OF REQUESTS -- The General Counsel's Office reviews requests for time zone changes. If there is enough information to conclude that the change may in fact serve the convenience of commerce, the General Counsel issues a proposal to make the change and invites public comment on the proposal. Normally a public hearing is held by DOT in the community so that those affected by the issue can make their views known, and the public is given approximately two months in which to submit their written comments, which should address the proposal's impacts upon the convenience of commerce. After analyzing all of the comments, the General Counsel decides whether the change would in fact serve the convenience of commerce. If he believes that it would not, he ends the proceeding and leaves the time zone unchanged. If he believes that it would, he forwards his recommendation to the Secretary of Transportation, who alone has authority to change a time zone.

IV. EFFECTIVE DATE OF ANY CHANGE -- If the decision is made to change the time zone boundary, DOT attempts to make the change effective at the next changeover to or from daylight saving time, whichever is appropriate.

V. DOT CONTACT POINT -- Further information may be obtained by contacting the General Counsel (C-50), Department of Transportation, Washington, DC 20590; telephone (202) 366-9315.