

INDIANA STATE RECOUNT COMMISSION
MINUTES OF THE DECEMBER 5, 2010 MEETING

MEMBERS PRESENT: Todd Rokita, Chairman of the Indiana State Recount Commission (“the Commission”); Gordon Durnil, Member; Robert Kuzman, Member

MEMBERS ABSENT: None

STAFF ATTENDING: Bradley W. Skolnik, Recount Director; J. Bradley King, Majority Counsel; Leslie Barnes, Minority Counsel; Mr. David Brooks; Mr. Allen Brown; Ms. Karen Celestino-Horseman; Mr. William R. Groth

1. CALL TO ORDER:

The chair called the meeting of the Commission to order at 3:00 p.m. in Conference Center Room B, Indiana Government Center South, 402 West Washington Street, Indianapolis, Indiana.

2. COMMISSION BUSINESS:

The Commission transacted the business and took the official actions set forth in the Transcript prepared by Dabney A. Hill of Circle City Reporting, which is incorporated by reference into these minutes.

The Commission approves the Transcript, with the following corrections:

Page 2, replace “Mark Allen” with “Allen Brown”.

Page 5, line 23, replace “it’s” with “its”.

Page 19, line 6, replace “on” with “or”.

Page 20, line 12, replace “rulings” with “rules”.

Page 30, line 12, replace “it’s” with “its”.

At each of the following locations, replace “3-8-11” with “3-8-1-1”:

Page 46, line 17

Page 46, line 19

Page 50, line 6

Page 61, line 16

Page 62, line 2

Page 65, line 10

Page 72, line 20

Page 78, line 16
Page 82, line 9
Page 87, line 22
Page 102, line 18
Page 103, line 12

At each of the following locations, replace "MVRA" with "NVRA":

Page 72, line 1
Page 72, line 4
Page 74, line 8
Page 74, line 11

Page 74, line 7, replace "38-1-1" with "3-8-1-1".

Page 76, line 16, replace "determined" with "defined".

Page 89, line 21, replace "rules" with "rulings".

Page 102, line 4, replace "3-8-15" with "3-8-1-5".

Page 108, line 25, replace "your" with "you're".

3. ADJOURNMENT:

There being no further business before the Commission, the Commission adjourned at 5:46 p.m.

APPROVED:

Thomas E. Wheeler, II
Thomas E. Wheeler, II *by JBR*
Pursuant to Order 2011-15 of
The Indiana State Recount Commission

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INDIANA STATE RECOUNT COMMISSION
MEETING
OF
DECEMBER 5, 2010
3:00 P.M.

ORIGINAL

Taken at Conference Room B
Indiana Government Center South
402 West Washington Street
Indianapolis, IN 46204

A STENOGRAPHIC RECORD BY:
Dabney A. Hill
Notary Public
Stenographic Reporter

CIRCLE CITY REPORTING
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Indianapolis, IN 46204
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A P P E A R A N C E S

FOR THE COMMISSION:

Todd Rokita, Secretary of State
Leslie Barnes, Commission Counsel
Robert Kuzman, Commission Member
Gordon Durnil, Commission Member
Bradley King, Commission Counsel

Bradley W. Skolnik, Director

IN RE: House District 76

For Petitioner: Mark Allen, Esquire

For Repondent: David Brooks, Esquire

IN RE: Secretary of State

For Petitioner: Karen Celestino-Horseman,
Esquire
William R. Groth, Esquire

For Respondent: David Brooks, Esquire

1 MR. ROKITA: Good afternoon and welcome. I'm
2 Indiana Secretary of State Todd Rokita and as
3 Secretary of State for the State of Indiana I'm
4 also chair of Indiana's Recount Commission.

5 We will begin today's proceedings by pledging
6 allegiance to our flag.

7 (Pledge of Allegiance Given)

8 MR. ROKITA: I would like to take this
9 opportunity to introduce everyone at the table
10 with me here today starting on my immediate right
11 with Gordon Durnil, the Republican appointee to
12 the Recount Commission.

13 To my immediate left Robert Kuzman, the
14 Democratic appointee to the Recount Commission.
15 And on his left Leslie Barnes is the Democratic
16 counsel of the election division.

17 And to Gordon Durnil's right, Brad King, the
18 Republican counsel of the election division.
19 Election division's staff, help staff, of the
20 Recount Commission as well.

21 Then over here to the viewers' right is Brad
22 Skolnik, Indiana's Recount Director.

23 Again, thanks to everyone for their
24 attendance today, also for the people watching out
25 in the audience on this live video Internet stream

1 that will be archived.

2 Today's meeting of the Recount Commission,
3 like all our meetings, is too a healthy part of
4 the state's election process. Hoosiers can be
5 quite proud of Indiana's recount process. In
6 fact, we were cited by the United States Supreme
7 Court as recently as 2000 for the rules and state
8 statutes we have for guiding our recount, it is a
9 complex process. We serve as a model for other
10 states and I expect the same to be true today.

11 Today there are two election matters before
12 the Recount Commission. There is the election for
13 House District 76 of the Indiana House of
14 Representatives and election for Indiana secretary
15 of state.

16 Basically, there are two types of matters
17 that come before Indiana's Recount Commission.
18 Those matters come in the form of either election
19 contest or election recount. Election recount
20 consists mainly of a hearing before us where
21 disputed ballots are brought for resolution and a
22 final tally is made.

23 Another matter that comes before us is a
24 contest and that occurs when a valid party alleges
25 that it is basically impossible to determine who

1 received the highest number of votes in an
2 election due to an electronic failure, mechanical
3 failure or that the candidate is otherwise
4 ineligible to serve because of some constitutional
5 or statutory deficiency.

6 The two matters we are going to discuss today
7 of the Recount Commission involve two contests.
8 There was a contest filed for District 76, and
9 there was contest filed for the Secretary of
10 State's race. So we are going to address
11 specifically motions to dismiss those matters
12 today. And depending on how those motions are
13 ruled upon we will either have a hearing on the
14 contest or our work will be over pending any
15 further appeal on those matters.

16 Indiana recount laws provide for strict
17 deadlines in which the Recount Commission must
18 complete its work. In the matter of House
19 District 76, the Recount Commission must complete
20 it's work by December 20th, and that's according
21 to IC 3-12-11-21. In the matter of the Secretary
22 of State, the Recount Commission must complete
23 it's work by January 1st, and that's according to
24 3-12-10-2.1.

25 Today's proceedings, like all of the ones

1 before, will be handled in an orderly and
2 transparent manner. I also expect the parties,
3 counsel and attendees to treat this process with
4 the appropriate level of respect and decorum. I
5 will note as at past recount proceedings at which
6 I have served as chair, there will be little
7 tolerance for delays, extensions of time and
8 certainly no tolerance for any unprofessional or
9 uncivil conduct.

10 As I have stated, these proceedings are a
11 healthy part of the process and with today's
12 online video stream, all Hoosiers are enjoying the
13 opportunity to see its government service in
14 action.

15 I will note for the record that our notice of
16 today's meeting of the State Recount Commission
17 was properly provided pursuant to 5-14-1.5-5. We
18 have already introduced the Commission members.
19 And now for consideration are certain matters
20 before the Recount Commission as I alluded to,
21 there are two election matters before the Recount
22 Commission, House District 76 in which there is a
23 contest and the election of the Indiana Secretary
24 of State of which there is a contested vote. Both
25 of these matters have Motions to Dismiss before

1 them. We will first take up to House District 76.
2 This is a matter of the Recount contest for the
3 election of Indiana State Representative District
4 76, Mark Owen versus Wendy McNamara -- counsel,
5 will you please state your name for the record.

6 MR. BROWN: Allen Brown, counsel for Mark
7 Owen.

8 MR. ROKITA: We'll stop this. I don't think
9 these speakers or these microphones are on. You
10 could maybe get a little closer.

11 MR. BROWN: Allen Brown, counsel for Mark
12 Owen.

13 MR. BROOKS: I'm David Brooks, counsel for
14 Wendy McNamara.

15 MR. ROKITA: On November 18th, 2010 a
16 Verified Petition for Recount to contest the
17 election of Indiana State Representative District
18 76 was filed with the Indiana Election Division by
19 petitioner Mark Owen.

20 On November 23, 2010, a Motion to Dismiss the
21 contest action was filed with the Indiana Election
22 Division by respondent Wendy McNamara.

23 On November 24th, 2010, the Recount Director
24 issued an order to convene a meeting of the
25 Indiana Recount Commission for today's date and

1 location here at the Indiana Government Center
2 South to conduct a hearing on a Motion to Dismiss
3 the contest action. As such the Recount
4 Commission will be conducting a hearing on the
5 Motion to Dismiss the contest action only, it will
6 not be conducting a hearing today on the Verified
7 Petition for Recount filed in this matter.

8 As we proceed on the Motion to Dismiss the
9 contest action, each party is given 20 minutes for
10 presentation of arguments before the Commission
11 and 5 minutes for rebuttal. I understand you both
12 were informed of that earlier; correct?

13 MR. BROWN: I don't recall being informed of
14 that, but my argument is somewhat shorter than
15 that.

16 MR. ROKITA: Okay. Then we shall proceed.
17 Before we do, are there any matters either party
18 wishes to address to the Commission?

19 As the moving party, counsel for Wendy
20 McNamara you may proceed.

21 MR. BROOKS: Thank you very much Mr. Chairman
22 and members of the Commission. As I indicated,
23 this will be a fairly short and straightforward
24 argument. The essence of the Motion to Dismiss is
25 that with respect to the contest action the

1 petitioner did not list any precincts in which a
2 contest was requested. In IC 3-12-11-3, it lists
3 the various subsections that you can make an
4 allegation or a contest. In this particular case
5 the only allegation was Subsection D which is a
6 deliberate act or series of actions pursuant to
7 Subsection E following that. If you do allege
8 that, you must identify each precinct or other
9 location in which the act or series of actions
10 occurred to the extent known to the petitioner.

11 In this particular case, I assume Mr. Brown
12 and I will agree, that the statute is strictly
13 construed and that there were no precincts listed
14 in which petitioner wants to contest. My
15 assumption is that Mr. Brown will say that he did
16 not list any precincts because Subsection D is
17 somewhat limited by the phrase "to the extent
18 known to the petitioner."

19 My position on this is that that section and
20 that language is designed once you say where you
21 think you might have these acts or series of
22 actions, if you find additional ones that would be
23 for flexibility, but if you find similar
24 circumstances to add to the precincts. We believe
25 that all of the section must be read to provide

1 some meaning and that includes the fact that the
2 petitioner in good faith must believe that a
3 series of acts or a deliberate act took place. So
4 in a nutshell, the purpose of finding precincts is
5 to provide respondents with some sort of notice
6 and some sort of focus as to where to look for
7 these deliberate acts or series of actions. More
8 importantly, I think it is wholly inconsistent
9 with the overall meaning of the statute to say
10 that you can verify under oath that you have a
11 good faith belief that a deliberate act or a
12 series of actions occurred, yet not be able to
13 identify a single precinct out of 16 which you
14 actually -- in which they actually did occur.

15 Assuming that that is the case, I have never
16 seen one, perhaps Mr. Durnil has seen a lot more
17 of these, a lot more than I have been involved in.

18 MR. ROKITA: Counsel on this side, is there a
19 question?

20 MR. KUZMAN: I have a question. Could the
21 acts take place someplace outside the precinct?
22 Therefore, how would you know what precinct?

23 MR. BROOKS: Regardless, you have to have --
24 to have a contest -- the result of the contest is
25 a special election, you have to be able to say

1 what precinct or how many precincts you want that
2 special election in. So if there is a deliberate
3 act or a series of actions outside of -- that
4 occurred outside a particular precinct, that act
5 still has to have some impact on whether you can
6 determine whether it's impossible to determine who
7 received the highest number of votes.

8 MR. KUZMAN: What precinct would you list
9 then?

10 MR. BROOKS: Pardon?

11 MR. KUZMAN: If it happened outside, what
12 precinct would you list?

13 MR. BROOKS: I don't know. That is not -- I
14 don't know. That is my opinion of what the
15 purpose of identifying precincts are so that we'll
16 have some notes.

17 MR. KUZMAN: Okay.

18 MR. BROOKS: That really concludes my
19 comments.

20 MR. ROKITA: Questions from the Commission
21 members? Being none, Counsel.

22 MR. BROWN: Thank you Mr. Chairman, members
23 of the Commission. Ours will also be fairly
24 brief. Petitioner Mark Owens is not contesting
25 the meaning of the statute. I guess I would stick

1 to a reading of that statute. I would say that
2 none of the cases cited in Ms. McNamara's Motion
3 to Dismiss are directly related to this provision
4 of the contest statute, that we really need to, or
5 he had cited deliberate acts or a series of
6 actions. And the key, I guess, in our opinion is
7 if you would say that a petitioner would have to
8 list precincts when not known, the statute clearly
9 said to the extent known and to require them.

10 MR. ROKITA: Can you cite the statute?

11 MR. BROWN: Yes, 3-12-11-3, Subsection D.
12 Petition stating that there was a series of
13 actions described in Section D or E occurred,
14 identify each precinct or location in which the
15 act or series of actions occurred to the extent
16 known by the petitioner. There is no reference to
17 an amendment regardless of what that says. I
18 understand what Mr. Brooks is claiming, but there
19 is nothing in the statute to relate that provision
20 to an amendment. And it is that statute -- that
21 provision of the statute is distinguished by the
22 Legislature from other listing of precincts
23 required in the petition at that time. A precinct
24 alleged by the petitioner regarding a recount will
25 not qualify, that includes 12-11-3(B)2 and in

1 3-12-11(C) we are talking about all other
2 provisions of the contest. They say that you must
3 identify the precincts, and, again it is not
4 qualified. So in our view the Legislature clearly
5 intended that someone could find deliberate acts
6 and not know what precincts they happened in.

7 And furthermore relating to the other
8 provisions and another part of the statute is
9 3-12-11-B(4) where it starts, The petitioner in
10 good faith believes a deliberate act or a series
11 of acts occurred to require the petitioner on the
12 date of filing the petition when they believed in
13 good faith a deliberate act or series of actions
14 occurred. Although we could not identify
15 precincts at the time, that would then require us,
16 require that portion of the statute essentially to
17 be meaningless or to be violated because we could
18 not in good faith list precincts. We have -- we
19 did list in good faith and verify that we
20 throughout the discovery process plan to support
21 that case, but this is only a Motion to Dismiss on
22 that procedural ground.

23 Then just briefly, I found a Supreme Court
24 case, an Indiana Supreme Court Case directly
25 related to this statute in which the court in that

1 case -- I guess let me stop here and apologize to
2 the Commission. Because of the holiday weekend
3 and the timeliness and the recount procedure was
4 undertaken from Monday through Thursday and the
5 breach being the deadline being Friday at noon, I
6 apologize for not preparing a written statement
7 that could more clearly and concisely explain this
8 situation to the Commission. Due to those time
9 constraints I didn't feel I was able to do that so
10 bear with me as I cite this case.

11 It is actually Pabey v. Pastrick, it's 816
12 N.E.2d 1138, it's a 2004 case. In this case the
13 contest was brought directly under the deliberate
14 acts portion of the statute. And the Supreme
15 Court went to great lengths to distinguish this
16 statute from other provisions in the contest
17 statute and also went to great lengths to use
18 statutory interpretation rules to interpret what
19 that statute means and some of the statutory
20 construction guidelines they cite, Where possible,
21 every word must be given effect and meaning and no
22 part is to be held meaningless that can be
23 reconciled with the rest of the statute. And that
24 goes to the argument of requiring precincts to be
25 listed when not known would render meaningless the

1 good faith clause in this statute.

2 Also, interpreting a statute, unless you can
3 give it practical application, construe it so as
4 to prevent absurdity, hardship or injustice in
5 favor of public convenience. In our view, in
6 favor of public convenience to allow discovery of
7 this Board here and not dismiss this when in good
8 faith we believe a deliberate act or series of
9 actions did occur but could not identify
10 precincts.

11 And then finally, the Court states, In
12 addition this court has long held that statutes
13 provided for contesting elections should be
14 literally construed in order that the will of the
15 people in their choice of public officers may not
16 be defeated by any merely formal or technical
17 objection. I would urge that this is a formal and
18 technical objection by Ms. McNamara in that the
19 notice is clear as to House District 76. We
20 believe that a deliberate act or series of actions
21 occurred.

22 And to be honest, we plan, if discovery moves
23 forward, to narrow that down where possible. We
24 are willing to give notice to Ms. McNamara as we
25 go forward. So I would urge a full reading of

1 this statute could only leave the Commission with
2 the ability to defeat this Motion to Dismiss. I
3 thank you for your time.

4 MR. ROKITA: When you filed this contest
5 petition, were you aware if any of the actions
6 that you describe are eligible for contest?

7 MR. BROWN: Yes.

8 MR. ROKITA: Why didn't you describe those in
9 the petition?

10 MR. BROWN: It is not required by the
11 statute.

12 MR. ROKITA: Was this a placeholder in case
13 some evidence was yet to come in?

14 MR. BROWN: I don't know I would label it
15 placeholder. We have circumstantial evidence that
16 we are, are still, to be honest, to discover
17 evidence more directly concerned with the act or
18 series of actions.

19 MR. ROKITA: If you found more evidence,
20 would you have to amend the petition?

21 MR. BROWN: I don't believe so.

22 MR. ROKITA: Same question to our opposing
23 counsel. Just generically, if evidence is found
24 in a contest, after, is found, is there an
25 amendment required? And if so, can it be legally

1 done?

2 MR. BROOKS: I think it can legally be done
3 as long as the original position was legally
4 sufficient when it was filed. It seems to me this
5 is an important point. When you just asked were
6 you aware of any particular circumstances, the
7 answer was yes. What that means there is an
8 extent known. And to answer your question
9 earlier, Mr. Kuzman, and I apologize, but it says
10 that you must identify each precinct or other
11 location in which the act or series of actions
12 occurred. Now that we know that they actually had
13 some idea, although it's undescribed yet today,
14 once we know that they did have some particular
15 circumstance that they were looking for, they were
16 obligated clearly at that point, but then it was
17 to the extent known, to tell us what precincts or
18 other locations that that happened in. So if they
19 had a good faith belief, they are obligated to
20 tell us and they didn't. And I think that is
21 where you get the sufficiency of the petition.

22 MR. KUZMAN: Robert Kuzman, I have a question
23 of the Commission, if I may. We look at statutes,
24 harking back to law school, when you look at
25 statutes and don't understand them, you look for

1 some hearings and cases or precedent, has this
2 Commission ever allowed somebody to amend their
3 contest in the past?

4 MR. DURNIL: I'm not sure we have had
5 amendments. Can you give that question again?

6 MR. KUZMAN: After they found out more
7 information in the precincts?

8 MR. DURNIL: Well, before hearing.

9 MR. KUZMAN: But none before a hearing or
10 after a hearing?

11 MR. DURNIL: Well, if it came before the
12 hearing, this would follow through.

13 MR. KUZMAN: During the hearing you never
14 found any in the history?

15 MR. DURNIL: I don't know the answer to that.

16 MR. ROKITA: Does counsel have anything?

17 MS. BARNES: Mr. Chairman, during the House
18 District 97 recount in 2006 in an election
19 contest, during the Commission meeting the
20 Commission unanimously permitted a petitioner to
21 amend the contest petition.

22 MR. KUZMAN: I'm just asking.

23 MR. ROKITA: Mr. King.

24 MR. KING: I would say it was a little more
25 complicated than that. In 1999 the General

1 Assembly enacted legislation which is codified at
2 3-12-11-7 which provides that although generally
3 the Recount Commission may allow a petition to be
4 amended at any time upon the terms and conditions
5 the State Recount Commission orders, that ability
6 to allow is limited if the cross position on the
7 petition as originally filed failed to comply with
8 Section 3-12-11-3 which has been discussed in
9 counsel's presentation. So there are limits to
10 the ability of the Commission to allow an
11 amendment to a contest petition if, in fact, the
12 amendment was designed to correct a fatal defect
13 in the original filing.

14 MR. DURNIL: We don't have a motion before us
15 to amend.

16 MR. KUZMAN: I understand. I just wanted to
17 clarify.

18 MR. ROKITA: Other questions, Counsel?

19 MR. KING: No.

20 MR. DURNIL: Are you prepared today to state
21 something, make an allegation, are you prepared to
22 bring anything forward at this time?

23 MR. BROWN: I didn't come prepared to discuss
24 that today. I mean this is a procedural hearing
25 on the face of the petition. I not prepared to do

1 that today. I'm sorry.

2 MR. ROKITA: Let me respond to counsel for
3 Mark Owen. When you stated the time constraints
4 you have, that is understood and appreciated. I
5 don't know -- this is the first time I can recall
6 you being before this Commission -- I don't know
7 how much election law you practice. This is going
8 to be on a very tight timeframe, we are under
9 strict statutory deadlines. This is going to move
10 a lot faster than we -- this is just directed,
11 this is for the record. This is not a court of
12 law and we are not under civil rulings of
13 procedure or anything like that, there is good
14 public policy reason for that. The people of the
15 state deserve to know who their elected officials
16 are without that being drawn out. So any kind of
17 calendar clearing you have to do with regard to
18 other clients or any other time you have to make,
19 be advised you should do that because you are
20 going to be working until we get that done by
21 deadline at times like this.

22 MR. DURNIL: Mr. Chairman, are you ready for
23 a motion?

24 MR. ROKITA: Yes.

25 MR. DURNIL: Without a pleading or reports

1 setting out or alleging some sort of deliberate
2 act or actions, I would move that we grant the
3 Motion to Dismiss.

4 MR. ROKITA: I will second it for discussion
5 purposes only. Discussion?

6 MR. KUZMAN: Mr. Chairman, Todd, I apologize.
7 I think when you talk about the fact in law, you
8 don't know because of the time restraints put on
9 in the statutes all of the facts of law. The
10 petition is in front of us and we should allow the
11 petition to go forth if there is not facts or if
12 there is not a possible -- both counsels have the
13 obligation to say there is nothing here and
14 withdraw the petition.

15 Therefore, I think that there is enough
16 question here, and we are talking summary
17 judgment, you are talking about a Motion to
18 Dismiss. Any question whatsoever, you should let
19 that contest go forward and see what the facts
20 are. To deny that opportunity is a potential
21 denial of the voters rights that people have in
22 the district. I think we should at least let the
23 hearing proceed, let counsel prepare what he needs
24 to. He is correct, this is a procedural hearing
25 on a Motion to Dismiss, it is not about the issue

1 of what happened and when, that is for discovery.
2 I'm sure that any lawyer has the obligation if
3 there is nothing before the judge they are going
4 to withdraw their motion. I think we should let
5 this proceed because there is a question of fact
6 and not a question of law, we should hear the fact
7 situation.

8 MR. ROKITA: Does the Board have anything
9 else? Just so I understand what both sides are
10 saying here. It's true, Mr. Brown, that you did
11 not allege the precincts or other locations in
12 which these acts or actions occurred; is that
13 accurate?

14 MR. BROWN: It is accurate. It is implied
15 from the filing that it was somewhere within House
16 District 76 that you are seeking. For reference
17 we listed all the precincts in House District 76
18 for the recount. If it please the Commission, I
19 can gather -- once we have a hearing, I can gather
20 what evidence we do have and share that. This is
21 not an evidentiary hearing, I don't believe it's
22 good grounds for you to grant this motion based on
23 evidence I don't have and am not required to
24 produce now.

25 MR. ROKITA: My question only goes to, there

1 is a statutory procedure and strict compliance
2 with statute is necessary in order for a case to
3 go forward. Unless you think I'm misreading the
4 statute, please let me know if I am, 3-12-11-3
5 says, A petition stating that the petitioner
6 believes fully that the series of actions
7 described occurred must identify each precinct or
8 other locations in which the act or actions
9 occurred. So I'm asking, my question isn't given
10 to ask you to put evidence on today, I'm asking
11 why you think you comply with statute by not
12 listing the locations, be it precincts or other
13 locations?

14 MR. BROWN: With all due respect, Mr.
15 Chairman, you stopped before, To the extent known
16 by the petitioner. We admit that the materials
17 for this election were counted before we even
18 contemplated filing a petition, to be honest.

19 MR. ROKITA: Right, I did stop, but that was
20 only because it was assumed you knew something
21 happened because of an earlier answer you gave at
22 this hearing. You did know something, you said
23 you did know some act occurred earlier in this
24 hearing when I asked that question.

25 MR. BROWN: That does not qualify the act to

1 the extent known, qualification of the location.
2 This section only relates to listing precincts, it
3 doesn't relate to the belief of deliberate acts
4 and whether to --

5 MR. ROKITA: Mr. Brown's position is that he
6 knows some acts occurred, but he doesn't know
7 where they occurred.

8 MR. BROWN: I may know where. Correct, we
9 know that acts occurred, we don't know where,
10 exactly where those acts occurred. We also don't
11 know which precincts were affected by those acts.

12 MR. ROKITA: Right, some other location, so
13 you don't know where on earth these acts occurred,
14 so, therefore, you didn't state it in your
15 petition because you didn't know?

16 MR. BROWN: Are you asking for evidence that
17 I didn't know, or you asking me positive or
18 negative? I guess you are saying that -- to
19 interpret the statute that way.

20 MR. ROKITA: I'm not trying to trick you, I'm
21 just trying to say we have a statutory issue here,
22 and the allegation that happens to be going
23 forward is that you haven't complied with the
24 letter of the statute.

25 MR. BROWN: To interpret that way, it is our

1 opinion that -- so we have talked about the
2 position that we go forward, so you are saying if
3 we list -- that you are going to require that even
4 though we don't know exactly where it happened,
5 you said the petitioner is going to be required --
6 so every petitioner, again, this will render the
7 previous portion of the statute meaningless and
8 actually render those that -- why would any
9 petitioner ever do anything other than list the
10 entire district if you are going to read the
11 statute right there?

12 MR. ROKITA: Because they might be subject to
13 rule on the sanctions for lying to a tribunal,
14 that's called a frivolous lawsuit. I imagine --

15 MR. KUZMAN: I --

16 MR. ROKITA: Just a second. And I imagine
17 the reason is that if you know something, put it
18 down. If you don't know something, then don't do
19 it. I am not saying that is the case here, but
20 imagine so we don't have frivolous lawsuits going
21 forward. I'll let you answer.

22 MR. KUZMAN: But --

23 MR. BROWN: So you are saying that it's
24 impossible for me to believe there were actions
25 and not know where they occurred?

1 MR. ROKITA: No, I'm asking questions based
2 on the statutes, I'll say what I'm saying. I'm
3 just reading you the statute and asking you to
4 answer it and asking you why it is not included in
5 the petition.

6 MR. BROWN: You are asking me where it
7 occurred that way. I could have listed everything
8 I guess, that seems easier.

9 MR. KUZMAN: I think your point -- he is
10 right with regards to under good faith and under
11 the practice of law, this provision is there
12 because if you are not sure what precincts, to let
13 the hearing go on. It's a question. Why would
14 you ask the lawyer or ask me where this is taking
15 place because if I were to file because we are not
16 sure, why don't you list them all? So that's why
17 I think this provision is in the statute. We know
18 the key legislative intent, but it says to
19 identify to the extent known to the petitioner.
20 He filed the petition based on what he knew. Now
21 that's it, it's his obligation if he makes it past
22 this motion, which I think they should, to produce
23 that evidence. That is when it becomes important
24 to him to dispute the evidence, but not today. He
25 followed the statutory provisions and something

1 went wrong, something happened. Let's find out
2 what happened.

3 MR. ROKITA: Any further questions? I'd like
4 counsel to comment, both sides, on this issue
5 starting with Mr. King.

6 MR. KING: Thank you Mr. Chairman, members of
7 the Commission. As counsel for the parties have
8 already alluded to, the recount, contest statutes
9 are to be construed strictly under our underlying
10 cases. The particular provision here states the
11 petition must identify each precinct or other
12 location in which the act or series of actions
13 occurred to the extent known to the petitioner.
14 In this particular filing no reference is made
15 whatsoever to the location of the acts leading to
16 the contest or to the extent of the petitioner's
17 knowledge.

18 If the petition had, for example, alleged the
19 acts took place in several locations within the
20 district, but the exact locations are not known to
21 petitioner, I think that would fulfill the literal
22 requirement of the statute. With the absence of
23 any reference whatsoever to either the location of
24 the acts or to the extent that the petitioner has
25 filed is a fatal defect under 3-12-11-3.

1 MR. ROKITA: Thank you. Counsel.

2 MR. BARNES: Thank you Mr. Chairman. My
3 comment goes to Commission Durnil when he made the
4 motion he indicated that he moved that the
5 Commission respond to the Motion to Dismiss
6 because petitioner had not stated any facts, any
7 type of acts. The statute does not require the
8 petitioner to list the deliberate acts, just that
9 he acted in good faith that deliberate acts
10 occurred.

11 The petition does state a location somewhere
12 in House District 76, but it is possible for acts
13 to have occurred outside of a building that
14 affects the entire location. Absentee voting
15 occurred in the Clerk's office, absentee voting
16 occurred at satellite locations. Following an
17 election the county election board meets 10 days
18 after to determine whether or not to count
19 provisional ballots, not -- military and overseas
20 ballots, so there is a variety of actions that
21 could have occurred either prior to or after an
22 election date that may have also made it
23 impossible to determine who received the highest
24 number of votes. So in my interpretation this
25 petition does comply with the statutory

1 requirement.

2 MR. ROKITA: Any other questions? Hearing
3 none, we'll have a vote and Commission members are
4 welcome to put on record the reason for their
5 vote, but it's not required.

6 All in favor of granting the Motion to
7 Dismiss, say aye.

8 MR. DURNIL: Aye.

9 MR. ROKITA: Aye. All opposed, same sign.

10 MR. KUZMAN: Aye.

11 MR. ROKITA: The motion passes two to one.
12 For the record, I will put on there that counsel
13 in direct answer to my question has stated that
14 when he filed the Petition for Contest on November
15 18th, Were you aware of any actions described in
16 your petition? You answered in the affirmative,
17 and that wasn't part of the petition so the Motion
18 to Dismiss is carried.

19 The next contest dispute is -- with regard to
20 House District 76, I'm advised by the Recount
21 Director that election officials in the counties
22 of Gibson, Posey and Vanderburgh that make up
23 House District 76 have completed the initial work
24 associated with those recount filings as such and
25 as chair of the Recount Commission I will be

1 expecting the Recount Director to issue an order
2 to convene another meeting of this Commission for
3 Sunday, December 12th at 1:00 p.m. local time and
4 that will be in or around the Evansville area.
5 We'll be doing the recount in the district.

6 MR. KUZMAN: If we can't agree on something,
7 I agree on that date in Evansville.

8 MR. ROKITA: We did it for you. The Recount
9 Director will issue an order in that regard.

10 Next we have the matter of the contest for
11 the election of Indiana Secretary of State. Here
12 we have the Indiana Democratic party by it's chair
13 person, Daniel Parker versus Charlie White,
14 Respondent. Counsel, please state your name for
15 the record.

16 COURT REPORTER: You are going to have to
17 speak up.

18 MR. ROKITA: Which one?

19 COURT REPORTER: Ms. Horseman.

20 MS. CELESTINO-HORSEMAN: Karen
21 Celestino-Horseman and Bill Groth on behalf of Dan
22 Parker, chairman of the Indiana Democratic party.

23 MR. BROOKS: And David Brooks on behalf of
24 Charlie White.

25 MR. ROKITA: Thank you. On November 19,

1 2010, a Verified Petition for Election Contest of
2 the election of Indiana Secretary of State was
3 filed with the Indiana Election Division by
4 petitioner of the Indiana Democratic party by its
5 chair person, Daniel Parker.

6 On November 23, 2010, a Motion to Dismiss was
7 filed with the Indiana Election Commission by
8 respondent, Charlie White.

9 On November 24, 2010, the Recount Director
10 issued an order to convene a meeting of the
11 Indiana Recount Commission for today's date with
12 notification here at the Indiana Government Center
13 South to conduct a hearing on the Motion to
14 Dismiss.

15 On December 3, 2010, a response to the Motion
16 to Dismiss was filed with the Indiana Election
17 Division by Petitioner Dan Parker. As we proceed
18 on the Motion to Dismiss each party will be given
19 20 minutes for a presentation of its argument
20 before the Commission and 5 minutes for rebuttal.
21 Before we proceed are there any matters that
22 either party wishes to address before the
23 Commission?

24 MS. CELESTINO-HORSEMAN: Yes. I have two
25 matters. One of them involves this is my first

1 time in front of this body so to whom do I give my
2 exhibit?

3 MR. ROKITA: Mr. Skolnik. We are trying for
4 an OSHA violation-free session.

5 MS. CELESTINO-HORSEMAN: With all due respect
6 to Secretary Rokita, we are going to have to
7 object to your participation in these proceedings
8 and I realize that 3-12-10.1 requires you to serve
9 on this Commission and to serve as chair.
10 However, we believe that we would be denied due
11 process. My client has a right to an impartial
12 body tribunal and as you are aware, your office
13 has investigated this matter.

14 The letter that I have just handed out as an
15 exhibit sets forth the basis for your refusal to
16 produce this report, one of which basis is that it
17 is an inter-agency advisory or contains materials
18 which could be an expression of opinion.

19 Additionally, it says the report analyzed
20 actual legal issues. So at this point coming into
21 this it appears that you sitting in a professional
22 capacity that your office has reached some
23 opinions and conclusions about this matter. So we
24 do feel that that is a denial of due process to
25 our client.

1 MR. ROKITA: I will let counsel address this
2 issue. And I don't take your request as anything
3 animas as well my comments, believe it or not,
4 will not be directed that way. Procedurally I
5 don't see in this book or under Indiana law how I
6 am going to be able to recuse myself. It is clear
7 to me that the General Assembly has dictated that
8 there is no way for me to substitute myself unless
9 I'm a candidate in which case the General Assembly
10 did offer that explanation and exception. I don't
11 have see any procedural way to have me replaced.
12 So I will let counselors speak and I would like to
13 hear more. Procedurally, I probably should hear
14 from opposing counsel and then hear from my
15 counsel.

16 MR. BROOKS: We don't have any request for
17 you to recuse yourself and my understanding of the
18 statute is exactly what you said. This system is
19 set up for the Secretary of State to serve.
20 Routinely the Secretary of State does do
21 occasional investigations that are involved in
22 elections all over the state and I believe the
23 Legislature fully understands that when they
24 appoint the Secretary of State as the Chairman of
25 the Commission.

1 MR. ROKITA: Commission members, do you have
2 any comments at this point? Counsel, can I have
3 opinions, please?

4 MR. KING: Mr. Chairman, members of the
5 Commission. The contents of Indiana Code
6 3-12-10-2.1 has been correctly stated that it
7 requires the Secretary of State by virtue of
8 holding that office to serve as member and chair
9 of the State Recount Commission. The Legislature
10 chose to provide exception in the case where the
11 individual serving as secretary was a candidate in
12 a matter before the Commission in which case a
13 substitute can be named by the political party
14 chair. The Legislature could have chosen to
15 provide for another exception that would require
16 or permit the secretary to step aside as chair or
17 member, but the Legislature has not.

18 Further, the Commission is not subject to the
19 Administrative Orders and Procedures Act, it is
20 subject to the statute and as discussed earlier
21 would require strict construction of the recount
22 statutes would require your participation by
23 virtue of this proceeding.

24 MR. ROKITA: Counsel.

25 MS. BARNES: Thank you, Mr. Chairman. While

1 Mr. King is right that this proceeding is not
2 governed by IAC Rules and Procedures Act this body
3 is governed by constitutional due process
4 concerns. When the secretary's counsel prepared
5 their response to petitioner Chairman Parker when
6 he requested the record, the response indicated
7 that the review that the Secretary had completed
8 might contain opinions in this matter and that is
9 why it is not subject to review. It seems like
10 the secretary would like to be able to conduct an
11 investigation, but not release the results of the
12 investigation because they may contain some
13 opinion, but if you formed opinions then the
14 process requires that he not serve in a capacity
15 in which he might be voting on this issue.

16 I think in the statute counsel recognizes
17 this statute requires the chairman chair this
18 meeting, but I think perhaps the remedy would be
19 that the Secretary could continue to chair the
20 meeting but not vote on the issues that come
21 before this body.

22 MR. BROOKS: Can I make one other comment,
23 Mr. Chairman?

24 MR. ROKITA: Go ahead.

25 MR. BROOKS: I have just seen this letter for

1 the first time but obviously it is not a new item
2 to counsel for Mr. Parker. This letter is dated
3 October 28th and it seems to me a little
4 disingenuous to wait until after the motions are
5 filed and you are sitting here ready to perform
6 your statutory duty then say you ought to be
7 recusing yourself. If there was some procedure
8 with which you can recuse yourself, that motion
9 should have been made it would seem to me before
10 this proceeding started so that there would have
11 been some rebut address in terms to eliminate this
12 point.

13 MR. ROKITA: Thank you. You have a comment?

14 MS. CELESTINO-HORSEMAN: Yes, I do.

15 MR. ROKITA: I'm sorry, after you make the
16 comment I would like to know what your solution is
17 for this.

18 MS. CELESTINO-HORSEMAN: Well, the objection
19 has been made. Obviously, our objection stands as
20 made. The one possible to lessen the prejudice is
21 to produce the report so that we can see if there
22 is no opinions in there, if there is nothing too
23 speculative in there, if it demonstrates that you
24 have not entered these proceedings with having
25 already reached an opinion, certainly that report

1 would demonstrate this. We would ask today that
2 you go ahead and rule at the very least we can see
3 the report.

4 MR. ROKITA: I'm glad you brought that up.
5 In response to that, I don't know of any law
6 enforcement agency in Indiana or anywhere in the
7 United States that while an investigation is
8 pending releases its material. If you can produce
9 that precedent, then I will change the policy of
10 my securities division where we do criminal
11 investigations every day of the week, also civil
12 discovery, and we have to advise the prosecutors
13 and criminal law enforcement because that is
14 something that is just not done for the very
15 reasons that you are stating so the process
16 doesn't get prejudiced.

17 Secondly, I would like to address
18 specifically what line in here says that I formed
19 any opinion in this report. I would also note for
20 the record that the public access counselor
21 reviewed this issue and for the record and for
22 those listening and watching at home, the public
23 access counselor has statutory authority and
24 duties to decide in these very matters what should
25 be made public and what should be kept private.

1 And they very quickly and very directly concluded
2 the report that you are talking about as exactly
3 that kind of deliberative investigative material
4 that ethically and professionally needs to be kept
5 nonpublic at this time for the very due process
6 reasons you are describing.

7 I would like counsel to get a copy of that
8 public access counsel record. The counsel that
9 Leslie is describing is not Brad King, I have a
10 general counsel that is the subject of this
11 exhibit. We can ask him to put the public access
12 counsel's opinion into the record. Go ahead
13 please.

14 MS. CELESTINO-HORSEMAN: Thank you. First of
15 all, as far as law enforcement goes I will agree
16 that the Secretary of State's offices does have
17 securities and that type of thing going into
18 force, but this was not a law enforcement report,
19 I believe it was expressed in newspaper reports
20 that you or some spokesman for your office had
21 indicated that what is contained in your report
22 are not public records, the cases have no
23 investigative authority, you could not go out and
24 talk with private individuals or obtain records
25 that were anything other than public records. So

1 as far as also this was involving -- this was not
2 your typical election type of situation.

3 MR. ROKITA: A quick interjection here. If I
4 had no legal authority or law enforcement
5 authority, why did your client ask me to do that
6 investigation?

7 MS. CELESTINO-HORSEMAN: My client asked you
8 to take a look at this, yes, and for it to be
9 referred and it was referred, which was fine. But
10 my client didn't ask you to do a report that would
11 not be released to anyone and certainly it was not
12 released in time before the election.

13 You had asked me about the opinion part. I
14 would refer -- your counsel cited IC 5-14-3(4)(D)
15 and specifically cited the inter-agency exception,
16 and that's -- Paragraph No. 66 states, Records
17 that are intra-agency or inter-agency advisory or
18 deliver these materials that are expressions of
19 opinion or are of a speculative nature and are
20 communicated for purpose of decision making. So
21 we have the very real possibility that those do
22 contain things.

23 And finally, if the --

24 MR. ROKITA: But you don't have any evidence
25 that they do?

1 MS. CELESTINO-HORSEMAN: Well, no. If I had
2 the report, I would.

3 MR. ROKITA: I just want to make a record.
4 You are guessing that you don't have it.

5 MS. CELESTINO-HORSEMAN: I'm not guessing, I
6 have no idea. I will just flat out say it.

7 And finally, it would certainly seem that if
8 the prosecutors were concerned about this, and
9 were -- this was not requested by the prosecutors.

10 MR. ROKITA: How do you know?

11 MS. CELESTINO-HORSEMAN: Because in your
12 early statements you offered that you generated
13 it.

14 MR. ROKITA: You don't know who asked me for
15 it.

16 MS. CELESTINO-HORSEMAN: If the prosecutors
17 were concerned about this, they would have entered
18 something in, absolutely would have done that.

19 MR. ROKITA: And they very well may have.

20 MS. CELESTINO-HORSEMAN: It is my
21 understanding that prosecutors are not necessarily
22 involved in this so I mean as far as this report.

23 MR. ROKITA: Not necessarily accurate.

24 MS. CELESTINO-HORSEMAN: Well, either way, we
25 see it as relative. And with all due respect,

1 again, we do object to you continuing to serve on
2 this Commission especially under these
3 circumstances because we believe it is a denial of
4 due process to an impartial and unbiased tribunal.
5 And for those reasons we ask -- we assert that the
6 statute 3-12-10-2.1 is unconstitutional and
7 that --

8 MR. ROKITA: The statute, what is
9 unconstitutional?

10 MS. CELESTINO-HORSEMAN: It's 3-12-10-2.1 is
11 one of our bases because as you stated, as you say
12 you are unable to recuse, so, therefore, because
13 of this arrangement you have the discretion to do
14 that, we feel it's unconstitutional. And
15 alternatively, not as you think, we believe denies
16 due process.

17 MR. ROKITA: Thank you, Counsel.

18 MR. BROOKS: Before we get a bit further down
19 this road, I want to state that this is a Motion
20 to Dismiss based on that the facts as alleged are
21 not sufficient for this Commission to proceed at
22 all. So there are no -- there's no opinions
23 required with regard to whatever investigation is
24 going on, I don't know anything about it, we are
25 talking today solely about whether or not the

1 petition meets the statute or standards.

2 MR. ROKITA: Understood, but I asked for
3 issues and I'm glad that counsel brought this up.
4 I have been told, I'm not sure, if there is a
5 Colts game going on in 15 minutes. The fact of
6 the matter is there is no statutory procedure
7 ability for us to get that done.

8 And No. 2, I want this on the record as well.
9 You have not produced any evidence that I have,
10 No. 1, expressed an opinion. Or, No. 2, I'm
11 biased in this in any way.

12 MS. CELESTINO-HORSEMAN: Which includes the
13 possibility. We do have a second matter.

14 MR. ROKITA: Yes.

15 MS. CELESTINO-HORSEMAN: I would like to
16 just --

17 MR. ROKITA: Before we get there, do the
18 commissioners have any other comments? Please go
19 ahead.

20 MS. CELESTINO-HORSEMAN: Secondly, we had
21 raised in our response to the Motion to Dismiss,
22 maybe it would be easier to take this first in
23 consideration, that the Motion to Dismiss was not
24 properly brought according to the statutes and,
25 therefore, it should be denied right off the bat.

1 MR. ROKITA: We'll get to the motion.

2 MS. CELESTINO-HORSEMAN: Thank you.

3 One other thing I would like the record to
4 reflect, that my client Dan Parker is here, but
5 unable to sit at the counsel table.

6 MR. ROKITA: Because of something we did?

7 MS. CELESTINO-HORSEMAN: Because of the size
8 of the table.

9 MR. ROKITA: He can come up to the kiddie
10 table here.

11 As the moving party, counsel for Charlie
12 White may proceed with the Motion to Dismiss.

13 MR. BROOKS: Thank you Mr. Chairman, members
14 of the Commission. Pending that response from the
15 petitioner as to why we should not be able to
16 proceed with the Motion to Dismiss I must profess
17 to be quite confused. As I understand what they
18 are suggesting is that we will be limited to
19 attacking the petition solely on the grounds of
20 what is required in the petition, those grounds
21 are at 3-12-11-3. To me that is exactly what we
22 have done, so let me just walk through this
23 argument.

24 Again, it at its barest minimum this petition
25 in our opinion is defective and it's fatally

1 defective on multiple layers of reasons. The
2 easiest to understand is to look at what the
3 statute says has to be done. I'm looking at
4 3-12-11-3(B)(4)a which is the --

5 MR. ROKITA: Hold on a second.

6 MR. BROOKS: Yes.

7 MR. ROKITA: Please proceed.

8 MR. BROOKS: This is the only section --

9 MR. ROKITA: Could you restate that statute
10 for a second?

11 MR. BROOKS: Sure. IC 3-12-11-3(B)(4)a on
12 Page 406 of the book.

13 MR. ROKITA: There we go, 406. Okay. Thank
14 you.

15 MR. BROOKS: In particular this is the only
16 set of grounds that have been alleged statutorily
17 by petitioner so let's see exactly what you have
18 to cite. You have to be able to in good faith
19 declare that the person declared nominated or
20 elected, which in this case is Charlie White, does
21 not comply with the specific statute -- specific
22 constitutional or statutory requirement set forth
23 in the petition. So, I don't believe there is a
24 constitutional allegation. In order for this
25 petition to be sufficient Mr. Parker must allege

1 that Charlie White does -- that is does in the
2 present -- not comply with the specific statutory
3 requirement.

4 There is nothing difficult to understand
5 about what a specific statutory requirement is.
6 You have to look in the statute at the
7 requirements in there and you allege the specific
8 statutory requirement. Now in the petition, the
9 two statutes that were referenced are found in
10 Paragraph 3 on Page 2 and Paragraph 6 on Page 5.
11 I will start with the one Paragraph 6, this is led
12 as an alternative allegation and it says,
13 Petitioner believes in good faith that were White,
14 who is currently under investigation by the
15 special prosecutors on suspicion of voter fraud,
16 be convicted or pleads guilty to or pleads nolo
17 contendere to a felony before taking office would
18 be ineligible to take office pursuant to IC
19 3-8-1-5. So that is one, alleged that he does not
20 comply and it names a statutory requirement. They
21 have named the statutory requirement, but they
22 have not said that he does not comply. So this
23 allegation is merely Mr. Parker's hope and prayer
24 that some day, somehow, maybe at a later date,
25 Mr. White might fall under that statute. But the

1 petition and the statute requires he fall under it
2 now, he doesn't, this is a frivolous allegation.

3 So now let's look to the only other section
4 which is Section 4 -- or 3, Section 3 on Page 2.
5 This indicates petitioner believes in good faith
6 that White is not qualified to assume the office
7 of the Indiana Secretary of State pursuant to
8 3-12-11-3(B)(4)a, the one we just looked at
9 because White does not comply with the specific
10 statutory requirements set forth in IC
11 3-8-11n(B)(1)e. I.E., here is where they tell you
12 what the specific statutory requirement is and
13 that is that Charlie White be legally registered
14 to vote at the address at which he resided as of
15 July 15th. So on its face we have got a statutory
16 reference and they are saying he doesn't comply so
17 it ought to be pretty easy to look at 3-8-11 so
18 that is where I would ask you to turn right now,
19 IC 3-8-11-(B)(1).

20 MR. ROKITA: What page?

21 MR. BROOKS: Sorry, 152. And so that statute
22 requires that Charlie White would be under 1,
23 state office, B, registered to vote in the
24 election district the person seeks to represent
25 not later than the deadline for filing the

1 declaration. We agree that July 15th was the
2 filing deadline.

3 Let's look what they say. This says Charlie
4 White must be registered to vote in the election
5 district which in this case is the State of
6 Indiana. Their specific statutory requirement
7 that they have alleged is that he be legally
8 registered to vote at the address at which he
9 resided as of July 15th.

10 You cannot fabricate a specific statutory
11 requirement. They are giving you a requirement
12 that does not exist, it is not in that statute.
13 That statute simply says you have to be registered
14 to vote in this case in the State of Indiana, not
15 at the address you resided or any of the rest of
16 it. So unless that statute -- unless this
17 specific statutory requirement is indeed set forth
18 in the statute, it's insufficient as a matter of
19 law because they cannot satisfy saying that he
20 didn't comply with the specific statutory
21 requirement when there is no such specific
22 statutory requirement.

23 To make matters worse, the only requirement
24 that is in that specific statute is that Mr. White
25 be registered in the State of Indiana by that

1 deadline. And if you look at the petition, they
2 have admitted that indeed he was registered in the
3 State of Indiana as of July 15th. So basically --
4 and let's talk just a minute about this made-up
5 statutory requirement. Let's think about that for
6 a minute, I will give you an example. It's not in
7 the statute so it doesn't matter, can't comply
8 when that isn't the specific statutory standard.

9 Let's just say, hypothetically speaking,
10 let's say Vop Osili was a candidate for the
11 nominee for the Democrats for the Secretary of
12 State and on June 15th he resided at an apartment
13 in a precinct in Indiana, was registered at that
14 precinct with the State of Indiana, and the
15 apartment complex burned down. So he immediately
16 goes and finds another apartment to live in
17 hypothetically and moves into an apartment in
18 another precinct in the State of Indiana. Before
19 election he re-registers in September, now, is he
20 disqualified from running for Secretary of State?
21 I say obviously not, that's absurd. Why? Because
22 he was in fact registered as of July 15th.

23 There is no legal requirement in the State of
24 Indiana to change your registration at any
25 particular time after you have moved, and you

1 cannot take someone off the voter registration
2 rolls once they are registered because the
3 National Voter Registration Act prohibits it.
4 However, obviously it would be to us of course he
5 would still be eligible to run. Under this
6 fictitious specific statutory requirement
7 submitted by petitioner, he would be ineligible
8 because he was not registered to vote at the
9 address at which he resided. Not only is it
10 fictitious, it's sort of silly and
11 counter-productive when you think about it.

12 Now this alone I mean unless they can allege
13 properly that Charlie White currently does not
14 comply with the specific statutory requirement
15 this fails as a matter of law. They have done one
16 allegation where they have mentioned the
17 requirement, but not alleged that he didn't
18 comply. They have got one allegation where they
19 made up their own specific statutory requirement
20 and alleged he didn't comply, and one statute in
21 which by virtue of their own petition proves and
22 admits that he did comply. They have every
23 combination out of three of ways that you can fail
24 to meet the statutory standard. Nowhere is there
25 a specific -- an allegation that Charlie White

1 does not comply with the specific statutory
2 requirement, period.

3 Now, having said that, and I don't want to
4 belabor, I'm assuming that the Commission has read
5 my motion, but I do want to discuss Burke v.
6 Bennett for a minute. This statute, 3-8-11, is a
7 qualification requirement for a candidate. Almost
8 identical to the scenario in Burke v. Bennett in
9 which the losing candidate contested the winner of
10 the election based on the fact that he had -- the
11 winner had violated the Hatch Act. Well, here is
12 what the court is saying. First, he is seeking to
13 use the statute not to prevent Bennett's
14 candidacy, but to prevent his assumption of office
15 which is exactly what Mr. Parker is doing here.
16 The candidacy is over, he is trying to prevent
17 Mr. White's assumption of office.

18 Second, when as here an election victor
19 alleges Hatch Act involvement is being asserted to
20 establish disqualification, the issue is not
21 whether a successful candidate was subject to the
22 Act or been in violation of it when he was a
23 candidate. Rather, it is whether the election
24 winner is subject to the Act and whether he would
25 violate it by becoming and remaining a candidate.

1 This is a very similar situation. We have a
2 candidate qualification. The question is: Can
3 the winner of an election by the way be candidate
4 of qualification? This Indiana Court says no.

5 I would -- I might as well just go directly
6 to the suggestion in the petitioner's response to
7 my Motion to Dismiss citing, stating that we have
8 misconstrued Burke v. Bennett. In big, bold,
9 underline words it says, "In contrast, several of
10 the statutes other provisions clearly refer to a
11 person's past conduct as grounds for
12 disqualification. For example, disqualification
13 applies for past conduct if the person 'gave or
14 offered a bribe, threat or reward to procure the
15 person's election,' was convicted of a felony or
16 certain federal laws or had been previously
17 removed from the office."

18 However, what the Indiana Supreme Court has
19 done there is carved out past conduct. Notably
20 one thing not mentioned in there is that you have
21 to be registered to vote, that is a qualification,
22 not a disqualification, and it doesn't involve a
23 past act. We can leave it at that. It is quite
24 very closely now because even if we get past the
25 obvious fact that they simply have not met the

1 statutory standard with their allegations.

2 And last, as this Commission knows, it's
3 basically the purpose of all election law to try
4 to insure constitutional right to free and fair
5 elections. This is from Burke v. Bennett, "This
6 application of the Indiana disqualification
7 statute is consistent with the longstanding
8 respect for the right of the people to free and
9 equal elections." Read any law, meaning Indiana
10 Constitution law, Article 2, Section 1, "the
11 reluctance of this Court to remove from office a
12 person duly elected by the voters." "This court
13 has long held that statutes providing for
14 contesting elections should be liberally construed
15 in order that the will of the people in the choice
16 of their public officers may not be defeated by
17 any merely formal or technical objections." I am
18 citing from Burke v. Bennett. I just finished a
19 case in the Court of Appeals, Wyatt v. Wheeler
20 citing essentially the same quotations, for
21 purposes of election law it is important to secure
22 to the electorate an opportunity to clearly cast
23 its ballot and prevent disenfranchisement.

24 As we move forward look at the fact that they
25 simply have not alleged what has to be alleged to

1 qualify. That the case law in Indiana, in
2 particular Burke v. Bennett is very analogous to
3 this situation. And then remembering that the
4 purpose of all election law is to secure a free
5 and fairly won election.

6 What Mr. Parker is asking this Commission to
7 do after all of these arguments is disenfranchise
8 nearly one million Indiana voters and have you
9 decide that Vop Osili who lost by 345,000 votes
10 suddenly be declared the winner and that is
11 really, I think, what you have to keep in mind as
12 to whether we want to go through a big hearing on
13 all of this when in reality you are really going
14 to overturn an election based on a statutory
15 requirement that does not exist when you look at
16 the statute or a potential felony somewhere down
17 the line and a petition that admits that the only
18 requirement in the State of Indiana that is cited
19 is that he be registered to vote. They admit that
20 he is registered to vote. For these reasons I
21 specifically request that you dismiss this contest
22 action.

23 MR. ROKITA: Questions from commissioners?

24 MR. KUZMAN: If you look at the petition the
25 allegation is Mr. White didn't vote in the proper

1 precinct. If you don't vote in a proper precinct,
2 are you a duly registered voter in the State of
3 Indiana?

4 MR. BROOKS: First, let me start by saying
5 that voting in the proper precinct is not the
6 subject of this procedure because that is not an
7 allegation that is sufficient to justify a
8 contest, that is first.

9 MR. KUZMAN: My question is: You brought up
10 unless the person is registered to vote in the
11 election district. Granted, any district can
12 vote, it's a state office. But is he truly
13 registered if he voted in the wrong spot?

14 MR. BROOKS: The failsafe mechanism in the
15 State of Indiana clearly without question allows
16 people to vote in a place of prior residence once,
17 and so that act does not invalidate the prior
18 registration. Now we can argue, I think, whether
19 or not if one avails himself of the failsafe
20 procedure and assumes that there is a change of
21 residence which is not established, we are only
22 assuming that, we dispute that, but we are
23 assuming it for purposes of the Motion to Dismiss.
24 It doesn't invalidate the prior registration.

25 MR. KUZMAN: It is not a question of

1 validate.

2 MR. BROOKS: What?

3 MR. KUZMAN: What I just asked you. Is there
4 a question of fact to be determined if he voted in
5 the wrong spot, does that disqualify him to run
6 for the office?

7 MR. BROOKS: It's a question of irrelevant
8 fact because it's not the criteria that the
9 statute sets out. The statute's criteria is are
10 you registered to vote. If this is dismissed,
11 keep in mind this case and all these allegations
12 and Mr. Parker's efforts to make sure that one
13 million voters don't get their vote cast --

14 MR. KUZMAN: I'm sorry, you answered my
15 question by saying that if this Motion to Dismiss
16 should go forward that yes, it is a question of
17 fact, irrelevant or not irrelevant it's a question
18 of fact and --

19 MR. BROOKS: It's a question of fact whether
20 someone is walking across the street right now,
21 that doesn't make it relevant to this proceeding.
22 My point is that it is not part.

23 MR. KUZMAN: Thank you.

24 MR. ROKITA: Any other questions from
25 commissioners?

1 MR. DURNIL: In Indiana when a person
2 registers to vote, you become a registered voter,
3 you are registered until when?

4 MR. BROOKS: Well, I have set out all the
5 criteria in here, let me find it for you.
6 Essentially, the voter -- the National Voter
7 Registration Act tells you when you are not
8 registered anymore and it prohibits and
9 invalidates you. If you look on my Motion to
10 Dismiss starting at Page 13 and 14, 14 is more
11 particular.

12 MR. KUZMAN: What page?

13 MR. BROOKS: 13 and 14 of the Motion to
14 Dismiss. The purpose of the National Voter
15 Registration Act is quite direct and it's to make
16 sure that everybody gets registered for just about
17 any reason, whether we agree with that or not that
18 is the law. But what is relevant is once you are
19 registered, the only way when you look at A3 right
20 in the middle of Page 14 provides once you are
21 registered, May not be removed from the official
22 list of eligible voters except at the request of
23 the registered voter as provided by state by
24 reason of criminal conviction or mental incapacity
25 as provided in Paragraph 4. Paragraph 4 is the

1 general program where the counties go about some
2 systematic cleansing.

3 None of these things are applicable. So once
4 Charlie White and any other voters in the State of
5 Indiana are on the rolls, they are on the rolls
6 until one of these things happen.

7 MR. ROKITA: Question, Mr. Kuzman?

8 MR. KUZMAN: Doesn't that say how they should
9 take you off the voter rolls?

10 MR. BROOKS: No, this is telling the election
11 officials in states. It says --

12 MR. KUZMAN: How to remove them?

13 MR. BROOKS: Pardon?

14 MR. KUZMAN: How to remove them?

15 MR. BROOKS: The state can remove them, if
16 you are registered --

17 MR. KUZMAN: But a voter can disqualify
18 himself at any time; right?

19 MR. BROOKS: No. At the request of the
20 registrant that can happen. That did not happen
21 in this case.

22 MR. ROKITA: Commissioner Durnil?

23 MR. DURNIL: No.

24 MR. ROKITA: The Bennett case that you cited,
25 if I understand your primary point of that is once

1 you get past election day you are no longer a
2 candidate? Is that --

3 MR. BROOKS: Correct.

4 MR. ROKITA: I can't imagine how that is
5 analogous to this body here. We are in the
6 business of deciding who gets the highest number
7 of votes out of candidate count, a candidate
8 proceeding or a candidate contest. I just don't
9 know that I have seen a lot of ballots between
10 that case.

11 MR. BROOKS: I would say to be honest when I
12 read the case, I had a little bit of trouble
13 following it because the court is clearly going to
14 great extent to suggest that once you are not a
15 candidate, the candidate qualifications or
16 disqualifications don't apply anymore.

17 I think if you look at the contest section,
18 and it would appear on its face that it would
19 apply to candidates because that is what the
20 statute says, but that is not what the Indiana
21 Supreme Court says about that which is a
22 disqualifier. Remember in this case this is not a
23 disqualification, this is a qualification, it's
24 the same process as if you were in a primary and
25 you had to fill out the little form saying you

1 voted in the primary, it's a way to get on the
2 ballot, you have to perform something, it's fairly
3 minimal in almost every case. It's not like a
4 felony.

5 MR. ROKITA: We switch to your remedy
6 discussion. Are you suggesting that the only
7 remedy here is if Charlie White is found to be
8 disqualified as a result of this proceeding is to
9 have the second highest vote getter become the
10 office holder?

11 MR. BROOKS: In an adverse proceeding that's
12 correct. That is what they have asked for.

13 MR. ROKITA: In the prior -- I just want to
14 be clear.

15 MR. BROOKS: If there is a special election
16 in everything except the disqualification section.

17 MR. ROKITA: Okay. Understood.

18 Assuming from your argument that you think
19 the underlying action is frivolous, and I'm going
20 to ask this question of both counsel so everyone
21 has the advantage to answer the question. If an
22 admittedly frivolous contest is otherwise properly
23 filed with the Commission, does the Commission
24 have the jurisdiction to dismiss the frivolous
25 action under 3-12-11-12?

1 MR. BROOKS: I think my argument has been --
2 yes, that is right; that is correct, correct.
3 3-12-11-12 it says that if the petition fails to
4 comply with the chapter which requires. We have
5 gone through the requirement, they have only
6 alleged one requirement, we have identified it and
7 it doesn't pass muster because it's a two-prong
8 test. You have to say a person does not comply
9 and you have to cite a specific statutory
10 requirement, and they have not done that, period.
11 So that is the reason. Just like when we were
12 talking earlier about the statutory requirement
13 listed precincts or not. This is jurisdictional,
14 it's strictly construed if you haven't satisfied
15 or made an allegation that satisfies
16 3-12-11-3(B)(4)a, then it's dismissed, that is the
17 remedy, that's what happens.

18 MR. ROKITA: Thank you. Counsel, before we
19 start, Brad, how much time elapsed?

20 MR. SLOKNIK: With the questioning from the
21 members of the Commission, it was about 24
22 minutes. Mr. Brooks did finish his summation in
23 about 18 minutes.

24 MR. ROKITA: Thank you. We'll keep the same
25 time frame. Any questioning because of our silly

1 questions goes longer, you will get the time.

2 MS. CELESTINO-HORSEMAN: Thank you very much.
3 It is now time to talk about protecting the
4 integrity of the process because that is what this
5 case is actually all about. First of all, we do
6 not believe that the -- well, let me back up.

7 In our contest petition under 3-12-11-3(4)(a)
8 we were required to set forth and put in there,
9 required to say that the person whether nominated
10 or elected does not comply with the specific
11 statutory requirement in Step 4 of the petition
12 that is applicable to the candidate for the
13 office.

14 Paragraph 3 of our petition states, "White
15 does not comply with the specific statutory
16 requirement set forth in IC 3-8-11-3(1)." And it
17 has a modifier that says he has to be legally
18 registered to vote at the address at which he
19 resided as of July 15, 2007, which is the law of
20 Indiana, you are to be registered to vote at your
21 primary residence. That is all that that says.

22 MR. ROKITA: What statute are you reading
23 from there?

24 MS. CELESTINO-HORSEMAN: For which part,
25 3(a)?

1 MR. ROKITA: The legally registered part.

2 MS. CELESTINO-HORSEMAN: It is 3-8-11-(B)1.

3 Now, what he seems -- Mr. White seems to take
4 exception --

5 MR. ROKITA: Let me stop you there. Mr.
6 Kuzman and I are trying to catch up. On Page 152
7 I believe.

8 MS. CELESTINO-HORSEMAN: Yes.

9 MR. ROKITA: Before we go on you use the term
10 "legally," I thought we were citing from a
11 statute.

12 MS. CELESTINO-HORSEMAN: I think that is
13 implicit when you tell an office holder or a voter
14 that they have to be registered, I can't imagine
15 that they mean anything other than legally
16 registered to vote by law.

17 MR. ROKITA: Aside from you imagining or not,
18 do you have any state precedent, any court
19 decisions to refer to?

20 MS. CELESTINO-HORSEMAN: I guess if this
21 Commission --

22 MR. ROKITA: Otherwise.

23 MS. CELESTINO-HORSEMAN: First would be this
24 Commission if they said you do not have to be
25 legally registered to vote, all you have to be is

1 registered to vote whether it be illegal or
2 fraudulent. So, no. I think within the time
3 frame your history of your record goes to
4 protecting the process. Certainly that is what --
5 when they say here being registered that means to
6 be "legally" registered.

7 MR. DURNIL: Does the statute read legally?

8 MS. CELESTINO-HORSEMAN: The statute is the
9 law, if I follow your question.

10 MR. DURNIL: You used legally, the statute is
11 pretty clear. Thank you.

12 MS. CELESTINO-HORSEMAN: Thank you.

13 So we say that in our petition. We allege
14 the portion, set out the statutory basis under IC
15 regarding the Motion to Dismiss
16 3-12-11-12(B)(1)(2). A motion to dismiss the
17 grounds for it as set forth by statute are what
18 Mr. White was required to state was that we had
19 failed to comply with Chapter 11. They had to
20 specifically identify the requirement of Chapter
21 11. Mr. White was required to state at least or
22 specifically identify the requirement of Chapter
23 11 with which the petitioner did not comply.
24 Nowhere within his petition does he state the
25 specific requirement that we failed to comply

1 with. Nowhere within does he come out and say
2 that we failed to comply with Chapter 11.
3 Therefore, his Motion to Dismiss must be denied
4 because this Commission does not have the
5 authority to go any further other than to hold up
6 the petition along with the jurisdictional
7 requirements that are set forth by statute and
8 compare the two to make sure that it is clear he
9 has brought himself within the jurisdiction of the
10 Commission.

11 So in that case and as Secretary Rokita
12 earlier noted, these statutes require strict
13 compliance and since White did not properly do his
14 Motion to Dismiss, it did not state that we had
15 violated those particular provisions. Then his
16 Motion to Dismiss should be denied.

17 The problem that we get into is now going on
18 further by going on with this is we now get into
19 the merits of the action and as Secretary Rokita
20 earlier observed, this tribunal is not bound by
21 the Rules of Trial Procedure so what is the
22 articulated standard? We have no idea. Under
23 12(B)6 it is well satisfied that the allegation
24 taken is true and all reasonable inferences are
25 drawn on behalf of the plaintiff, but that is not

1 what White's Motion to Dismiss observes as the
2 standard. In fact, it provides absolutely no
3 standard. It only says the Recount Commission
4 adopted a standard as part of this rule for a
5 Motion to Dismiss and how it should be reviewed.

6 We went ahead and did our response under a
7 12(B)6 standard because that is the only standard
8 that we know of for provisions of a motion to
9 dismiss.

10 Now, our first point is that IC 3-8-11(B)1
11 states that a candidate is not qualified to run
12 for Secretary of State unless he is registered to
13 vote by July 15, 2010, the deadline for filing a
14 certificate of nomination. Now, Commissioner
15 Durnil asked how long is a voter registration good
16 for? Well, IC 3-7-13-8 requires the voter to
17 register when the voter has moved to a new
18 residence, so it is not in perpetuity and the
19 statute uses the word "register." IC 3-5-5-7 --
20 let me know if I go too fast.

21 MR. ROKITA: Page 95.

22 MS. CELESTINO-HORSEMAN: And the other one of
23 that requirement requires the registered voter to
24 move is on Page 95, register when they move.

25 MR. ROKITA: And the cite?

1 MS. CELESTINO-HORSEMAN: The cite on that one
2 is 3-1-7-8.

3 So a voter who moves must register to vote,
4 but cannot register to vote at new address that is
5 temporary. Using the example that Mr. Brooks
6 provided earlier about the voter residing in an
7 apartment complex, has fire damage and registers
8 to vote in September. That voter -- I would
9 submit for purposes of voter registration the
10 address remains that apartment until they have
11 moved somewhere with the intent of taking up
12 permanent residency. So in that example there was
13 no fraud or anything else involved which makes it
14 very distinguishable from the present case because
15 here is what we have in this case.

16 On February 22, 2010, Charlie White
17 registered to vote at the residence of his ex-wife
18 on Broadleaf in Fishers, Indiana. On February 26,
19 2010, Charlie White took title to a condominium on
20 Overview Drive. On February 26, 2010, that very
21 same day, he completed a sale disclosure form that
22 stated the Overview Drive residence was his
23 primary residence and his homestead. Now, Indiana
24 code defines homestead as an individual's
25 principal place of residence.

1 MR. BROOKS: Mr. Chairman, I'm loath to
2 interrupt here, I really have sort of an objection
3 here because if they are using the Motion to
4 Dismiss, they are arguing the merits of the case.
5 The question as I find it is: Have they set forth
6 exactly what is in the statute. They are using
7 this as an opportunity to --

8 MS. CELESTINO-HORSEMAN: I --

9 MR. ROKITA: Please don't interrupt. This
10 person didn't interrupt your remarks.

11 MS. CELESTINO-HORSEMAN: So a homestead means
12 the individual's principal place of residence. So
13 if we take all the allegations to be true and draw
14 all the reasonable inferences in favor of the
15 petitioner, Charlie White was illegally registered
16 to vote at an address that he knew was temporary
17 in violation of Indiana law.

18 Now, we have heard -- I do not think that
19 downplaying legal registration is in the best
20 interest of Indiana. There are no requirements
21 for Secretary of State, we have no age
22 requirement, we have no citizenship requirement
23 and we have no residency requirement. The only
24 way that those can be satisfied is if the
25 candidate is registered to vote. Those are the

1 qualifications for registration and voting in
2 Indiana. That is the only means that we have of
3 verifying that the Secretary of State fulfills
4 those. So if this Commission were to uphold that
5 registration as of July 15th, it doesn't matter
6 whether it's fraudulent, doesn't matter whether it
7 is legal, doesn't matter what he responds. That
8 means we have no way of being able to verify and
9 know and to be able to then come back should it
10 not be true that our Secretary of State is over
11 the age of 18, citizen of the United States and
12 resident of the State of Indiana. By registering
13 to vote they are saying I meet these criteria.

14 Now, in addition to this, and Mr. Brooks did
15 attack our allegations in our Complaint and that
16 goes way beyond what we are responding to today,
17 although we don't think it's necessary. Mr. White
18 did go ahead and perpetuate and conceal his fraud.

19 MR. ROKITA: You are allowed to go through
20 these facts to the extent you need to do in a
21 procedural motion. We are not going to argue the
22 merits here. You can confine it to the procedural
23 vote we need to take today, I will let it go, but
24 we are not going to have a hearing today.

25 MS. CELESTINO-HORSEMAN: I agree. I mean I

1 think that our petition -- I think that we
2 satisfied the jurisdictional requirement and that
3 is all that should be acted on, but the Motion to
4 Dismiss that was presented, my arguments on that
5 have not been ruled. The Motion to Dismiss as it
6 was presented goes through and points out all
7 these things and dismisses them by saying they are
8 not relevant to anything else.

9 MR. ROKITA: In a 12(B)6 fashion?

10 MS. CELESTINO-HORSEMAN: No, it is not in a
11 12(B)6 fashion. That's the problem, if they did,
12 they would take all the inferences together to
13 show that this was an illegal voter registration
14 and that is what we are saying is necessary to
15 make compliance.

16 MR. ROKITA: You are asking with respect to
17 the process we are in right now. Please proceed
18 if you have more.

19 MS. CELESTINO-HORSEMAN: Thank you.

20 I think that it shows that the registration
21 wasn't legal because Mr. White did have a bill of
22 sale then. He affirmed in November 2009 to the
23 poll clerk that his new address was the Broadleaf
24 address of his ex-wife. Then May 2010 after he
25 had changed voter registration formally to the

1 Broadleaf address he did not inform the clerk of
2 the change, he knew how to make the change and
3 chose not to exercise it.

4 Now, we also know that there was motive
5 involved in here and motive was that Mr. -- the
6 new condominium that Mr. White took title to was
7 five miles outside of his town council district,
8 he would have had to resign from his town council
9 position. So, therefore, we maintain when you
10 take all the obligations and reasonable
11 inferences, that he was attempting and was indeed
12 intentionally concealing his residence from the
13 Hamilton County voter registration board.

14 Now, besides the incident related --

15 MR. ROKITA: I have a question. Although it
16 is your opinion that White wasn't legally
17 registered to vote, do you have any conclusion
18 from anybody or the jurisdiction that he was
19 illegally registered anywhere?

20 MS. CELESTINO-HORSEMAN: That is being
21 investigated.

22 MR. ROKITA: Right, but there is nothing
23 available or conclusive, just your opinion and
24 your client's opinion?

25 MS. CELESTINO-HORSEMAN: Again, I don't know

1 what is in your report, I don't know what the
2 prosecutor is going to say. No, I do not have any
3 of that -- that is the whole purpose of this
4 proceeding.

5 MR. ROKITA: In my report you allege that I
6 have opinion.

7 MS. CELESTINO-HORSEMAN: I don't know to say
8 that.

9 MR. ROKITA: That's an opinion. My
10 conclusion -- my question is: You have no legal
11 conclusion anywhere, from any kind of body that
12 has jurisdiction over deciding the validity of a
13 voter registration, if anything was done illegally
14 with regard to registration; correct?

15 MS. CELESTINO-HORSEMAN: No. And I --

16 MR. ROKITA: What bodies in Indiana would
17 determine the validity of a registration?

18 MS. CELESTINO-HORSEMAN: This Commission is
19 part of the process to determine -- it is part of
20 the election process.

21 MR. ROKITA: Show me the statute where I am
22 supposed -- the three of us are supposed to
23 determine voter registration validity. I have
24 never had the case where we have determined the
25 validity of registered voters. Especially under

1 MVRA, I thought that was a county body that
2 determines that based on a challenge from a party
3 or another voter.

4 MS. CELESTINO-HORSEMAN: What the MVRA does
5 is not at issue. What this Commission is charged
6 with determining is whether there is a statutory
7 violation. The violation that we have alleged is
8 under 3-8-11 which was that Charlie White was
9 required to be legally registered to vote.

10 MR. ROKITA: Hold on, there you go again with
11 the legally registered and the statute has, as I
12 pointed out before to you, just has registered.
13 You responded back that obviously assumes legally
14 registered. So my question again to you is: Tell
15 me the body in Indiana that determines whether a
16 voter registration is legal or not, and point me
17 to some kind of statutory authority.

18 MS. CELESTINO-HORSEMAN: I have under the
19 contest provision.

20 MR. ROKITA: You point me to 3-8-11, so now
21 we are in a circular discussion.

22 MS. CELESTINO-HORSEMAN: And registered
23 voter. If your body wants to say it is perfectly
24 sufficient for anyone to register to vote in any
25 way without determining whether it is legal or not

1 and they can be a candidate and we are not going
2 to worry about the fact of whether they were
3 actually legally registered --

4 MR. ROKITA: Listen to the question. I'm not
5 saying that, I am asking: What body in the state
6 of Indiana determines, outside of you and your
7 client's opinion which is all I have heard said so
8 far, that a voter registration is legal or not?

9 MS. CELESTINO-HORSEMAN: I come back to you,
10 that issue is before the Commission. I mean if --

11 MR. ROKITA: For the record, I don't think
12 you have answered the question.

13 MS. CELESTINO-HORSEMAN: Well, let's say it
14 depends on the circumstances. For example, when
15 the absentee ballot voter fraud and someone
16 registers illegally at a place that he is not even
17 a resident, as we saw in northwest Indiana,
18 someone had to go through and determine that that
19 voter registration was not valid. Therefore, that
20 ballot being cast was not valid. It depends upon
21 the circumstances.

22 In this particular case because it is part of
23 an election contest it is this Commission. Now,
24 if this Commission says ultimately and that's why,
25 and that is a question of ultimate, it is not for

1 this Motion to Dismiss we agree, but if this
2 Commission ultimately says that he was registered
3 to vote, it didn't matter whether he actually
4 lived there or not, then that's the decision of
5 this Commission. But that is this Commission's
6 decision to make for purposes of determining
7 whether he was in compliance with 38-1-1.

8 And MVRA, as Mr. Brooks admitted, a
9 registrant can -- a voter registered person can
10 ask to be removed. We don't contend that there is
11 any issue with MVRA, Charlie White could have come
12 in and fixed this situation at any time.

13 MR. ROKITA: I have another question with
14 regard to procedure then since you brought that
15 up. Could a candidate -- could there have been a
16 candidate challenge to Mr. White sometime before
17 now?

18 MS. CELESTINO-HORSEMAN: If this had been
19 discovered I suppose there could have been, but
20 that is part of the question here. It is could
21 he -- I mean he did take acts, steps to conceal
22 from the Hamilton County voter registration board
23 that he was not registered where he actually
24 lives.

25 MR. ROKITA: When did your complaint discover

1 these things that led to your opinion?

2 MS. CELESTINO-HORSEMAN: Well, again, I would
3 say that these facts go outside the petition, this
4 is something that should this matter proceed here
5 we are prepared to answer. I will say that I
6 believe it was after the date for determining,
7 whether -- it was after August 20th when it was
8 brought to our attention.

9 MR. ROKITA: Counsel, do you have anything?
10 How much time, Brad?

11 MR. SLOKNIK: She has about 6, 7 minutes.

12 MS. CELESTINO-HORSEMAN: I will wrap this up
13 for you. Basically that the Commission should
14 resolve this issue in a manner that lets the
15 public know it will not support illegally or
16 fraudulently registered to vote at an address
17 where they do not live. That is the message that
18 needs to be sent, it's a step, a definitive step
19 in protecting the integrity of this office.

20 MR. ROKITA: Questions for Commissioners?

21 MR. DURNIL: In your petition -- by the way,
22 you said September 21st the act was announced.

23 MR. ROKITA: What was that date again?

24 MR. DURNIL: September 21st. You next
25 mention the whole potential of a felony in your

1 discussion, have you given up on that?

2 MS. CELESTINO-HORSEMAN: I beg your pardon?

3 MR. DURNIL: The potential of a felony.

4 MS. CELESTINO-HORSEMAN: That is just one of
5 our allegations in this petition.

6 MR. DURNIL: Allegations of what?

7 MS. CELESTINO-HORSEMAN: That if he should be
8 guilty or something should happen. I mean it is
9 just one of the allegations. We satisfied without
10 other allegations the jurisdictional criteria.

11 MR. ROKITA: Is registered voter defined in
12 the code that you mentioned?

13 MS. CELESTINO-HORSEMAN: I don't think it is.

14 MR. ROKITA: Counsel, do you have --

15 MR. KING: Mr. Chairman, members of the
16 Commission, voter is determined at 3-5-2-50 which
17 would be near the beginning.

18 MR. ROKITA: Do you have a page number?

19 MR. KING: Page 30.

20 3-5-2-50 is included in the chapter that
21 defines the use of terms through the entire
22 election code and reads, Voter means a person who
23 is qualified and registered to vote in an
24 election.

25 MR. ROKITA: I'm going to give, pursuant to

1 what we said earlier, both sides 5 minutes of
2 rebuttal and then an opportunity to entertain
3 further questions. Mr. Brooks.

4 MR. BROOKS: Thank you Mr. Chairman. Let me
5 cover just a couple of quick points. One is the
6 idea that somehow I did not, I wasn't specific
7 enough that this matter couldn't be heard as a
8 dismissal. I would just remind the Commissioners
9 and I'm sure you know, the failure to meet the
10 standards in 3-12-11-3(b)(4)a are jurisdictional.

11 MR. ROKITA: What page is that?

12 MR. BROOKS: That is the one on Page 406.
13 What you have to put in your petition, if you
14 don't it's jurisdictional. That jurisdictional
15 issues never go away and we have been through
16 exactly why it hasn't been. There seems to be
17 some concern about procedural prejudice. Some are
18 confused about that, what are in the statutes,
19 what are in the case law, they are there. There
20 is no procedural prejudice.

21 Then there is this continuing idea that we
22 have got to give more inferences to the facts as
23 alleged than were actually alleged. The fact of
24 the matter is we are only talking about almost
25 none of those for purposes because here is where

1 we are one more time. I guess they are
2 withdrawing that extremely frivolous Paragraph 6
3 because they didn't even attempt to say that
4 Charlie White doesn't comply. But what we are
5 looking at is Paragraph 4 or 3.

6 Now when Ms. Horseman was saying all she had
7 to do was reference the statute and that somehow
8 the next part was a modifier. I'm not exactly
9 sure what that means because the statute says you
10 have to say that you do not comply with the
11 specific statutory requirement set forth in the
12 petition that is applicable. You have to state
13 the statutory requirement, not just state the
14 statute. And unless I'm mistaken, this says, As
15 set forth the specific statutory requirements set
16 forth in IC 3-8-11 and so on, i.e., that means
17 that is.

18 That is where they are telling you what the
19 specific statutory requirement is. That is a
20 fabricated statutory requirement, it is not in the
21 statute that they are referencing. If it is not,
22 then you cannot allege that you don't comply with
23 the specific statutory requirement if there is no
24 such statutory requirement.

25 And furthermore, if the only requirement in

1 the statute is one that you admit had been
2 satisfied whether you are registered to vote in
3 the State of Indiana is a factual determination,
4 you either are or you aren't. You go to whatever
5 point you are, are they registered, they are
6 registered. They admit that Charlie White was
7 registered. All of these other issues can very
8 well be addressed in some other investigation here
9 or some other investigation somewhere else. What
10 we are talking about is has Parker satisfied this
11 requirement? He did not even allege that he
12 didn't qualify -- didn't comply with the felony
13 statutes. And the only thing that they have
14 alleged as a specific statutory requirement does
15 not exist.

16 MR. ROKITA: The legally registered?

17 MR. BROOKS: No. Only at the address at
18 which he resided as of July 15th. It's more
19 extensive than that because if you had moved on
20 July 13th and you have moved in and you intend to
21 stay there and you didn't register on the 14th, I
22 mean it's a silly construction. But it goes
23 farther than that. The question is if you move,
24 when do you have to register and so on. They are
25 not saying he's illegally registered, but you have

1 to be registered at the address at which he
2 resided as of a specific date. This is just not
3 in the statute. Either you are registered or you
4 are not. They have admitted that that's the case.
5 As such they have simply not met the statutory
6 requirements to have a petition for contest heard
7 by this Commission.

8 MR. ROKITA: Questions for Mr. Brooks from
9 the Commission?

10 Regarding the specificity with which you have
11 to make allegations in your Motion to Dismiss, we
12 just earlier today in another matter granted a
13 Motion to Dismiss and my reason is based on very
14 specific statutory grounds. How is that the same
15 or different from this case we are talking about
16 right now?

17 MR. BROOKS: It is different three ways. One
18 is the failure to meet these requirements is
19 jurisdictional. So for example, where you find,
20 but I wasn't specific enough, but I will come back
21 to show you what I have is specific enough. I
22 could file another one that was more specific, but
23 this is jurisdictional. Jurisdictional stuff is
24 good to go the day before the hearing, during the
25 hearing, whatever. But if you just take a look at

1 my motion.

2 MR. SLOKNIK: Mr. Chairman, you may want to
3 finish the question, the 5 minutes are up.

4 MR. ROKITA: Please finish.

5 MR. BROOKS: It is in the summary. If you
6 look at Page 2, I say it doesn't make any
7 allegation he is in violation of the statute they
8 reference.

9 In Paragraph 10 Parker's claim that White
10 must, quote, be legally registered at the address
11 at which he resided as of July 15, 2010, plus
12 there's no such requirement set forth. That would
13 be exactly what I have been telling you.

14 Again, on Paragraph 12 on Page 4, no legal
15 requirement that White be registered at that
16 address. So I mean that is repeatedly saying
17 exactly what I told you. They are referencing the
18 statute, I'm specifically telling you that one
19 doesn't exist and one they made no allegation and
20 several times, Paragraph 19, Paragraph 20,
21 Paragraph 25, Paragraph 26, pretty straight
22 forward stuff what I'm saying. I don't need to be
23 any more specific than to say that their specific
24 statutory requirement is fabricated, it doesn't
25 exist, it is not in that statute and they never

1 made an allegation on a felony. Does that answer
2 your question, Mr. Chairman?

3 MR. ROKITA: Thank you. Other commissioners?
4 Ms. Horseman.

5 MS. CELESTINO-HORSEMAN: Thank you. I just
6 want to go back, the reason that their Motion to
7 Dismiss fails to comply is that they are supposed
8 to identify the requirement of Chapter 11 that we
9 have not complied with. He cited 3-8-11, we admit
10 that, but Chapter 11 of Title 12 he has not cited
11 in there that we failed to comply with anything
12 within Title 11 and he is required to do that.

13 MR. ROKITA: Give me the statute page again.

14 MS. CELESTINO-HORSEMAN: Sure. It is -- it
15 is actually 406.

16 MR. ROKITA: Page 406.

17 MS. CELESTINO-HORSEMAN: And, okay, and 2, 3,
18 4 it says that we have to give the statutory
19 requirement -- I'm sorry I gave you the wrong
20 cite -- then he has to do 3-12-11-12 is on Page
21 408, in Paragraph (D)1, 2. And so when you read
22 this it says that he has to state that the
23 petitioner has failed to comply with this chapter,
24 which is Chapter 11, and he has to specifically
25 identify the requirement in Chapter 11 that

1 petitioner failed to comply with, and that is
2 nowhere within his petition. He cites 3-11 which
3 is our statutory basis, but now he is arguing
4 today for the first time that somehow he has put
5 in his Motion to Dismiss that we failed to satisfy
6 3-12-11-3(B)(4)a which is on Page 406. So he has
7 to say in his a petition that we failed to satisfy
8 something in this Chapter 11, and that is not in
9 his petition. He is supposed to state the reason
10 we didn't satisfy Chapter 11 and then he is
11 supposed to identify the specific provision of
12 Chapter 11 that we failed to comply with and that
13 is not in his Motion to Dismiss. That is the
14 requirement that he has to do for a successful
15 Motion to Dismiss.

16 MR. ROKITA: Questions? What about this
17 business you mentioned of amending petitions, what
18 is your take on that? Can a party amend
19 petitions? Can it be done verbally? Can it be
20 done in writing? Can a Commission member make a
21 motion to amend a motion or a petition?

22 MS. CELESTINO-HORSEMAN: Yes, I believe that
23 petitions can be amended and that there is a
24 provision for that in 11-7.

25 MR. ROKITA: How about motions?

1 MS. CELESTINO-HORSEMAN: Motions? There's no
2 provision in here for the amendment of motions.
3 Again, it's a simple compliance matter.

4 One other, to respond to your earlier
5 question which I inartfully answered and I
6 apologize. My co-counsel gave me some examples
7 when it comes to voter registration. One was the
8 Acorn that your office investigated voter
9 registration. Another one was that is for a
10 recount and the ballot was called into question as
11 to whether that voter actually should have been
12 voting in that precinct was properly registered.
13 Again, it would be this Commission that would make
14 that determination.

15 MR. ROKITA: Thank you. Second question I
16 asked earlier of counsel: What if an admittedly
17 frivolous contest was otherwise properly filed,
18 does the Commission have the jurisdiction to
19 dismiss the frivolous action?

20 MS. CELESTINO-HORSEMAN: If all the
21 jurisdictional requirements are present, then I
22 would maintain that no, there is no basis to
23 dismiss. However, there are things by which
24 counsel who signs off on something certainly at
25 some point or when they get into it, I mean it

1 also gets into depending what makes it frivolous.

2 I mean in our case there are lots of
3 questions of fact. If there is no, absolutely no
4 basis in law or facts I still, unfortunately,
5 would have to tell you that I don't think you
6 could dismiss under the current Indiana statute.

7 MR. ROKITA: Questions? Or do I keep going?

8 Talk to me, Ms. Horseman, about the
9 constitutional qualification for a voter and why
10 if that's something that is not disputed, assuming
11 you are pleading that he is not legally
12 registered. I'm referring to Article 2.

13 MS. CELESTINO-HORSEMAN: The qualifications?

14 MR. ROKITA: Yes.

15 MS. CELESTINO-HORSEMAN: I know them well.

16 MR. ROKITA: You have been through that
17 obviously.

18 MS. CELESTINO-HORSEMAN: Yes. Well, like I
19 was saying, for the Indiana Secretary of State
20 there are no express requirements that a candidate
21 or the office holder be a citizen, U.S. resident,
22 or be 18 years of age or older. The only
23 requirement is that they be registered to vote by
24 July 15th, 2010 for this particular race
25 specifically. So that that's the only means by

1 which we have to protest. So if someone -- if we
2 say that it doesn't matter what they put in their
3 registration and it doesn't matter whether it's
4 legal or fraudulent, then we are really saying we
5 have no requirements for this elected office
6 holder.

7 MR. ROKITA: I note that your petition is a
8 verified petition, that means you are signing it
9 pleading it under penalties of perjury.

10 MS. CELESTINO-HORSEMAN: Yes.

11 MR. ROKITA: If you did what Mr. Brooks is
12 suggesting, if you just pled that Mr. White was
13 not registered to vote, you didn't do that, you
14 said he wasn't legally registered at July 15th at
15 such and such address. Why didn't you just say he
16 wasn't registered to vote?

17 MS. CELESTINO-HORSEMAN: Because we felt we
18 had to give a basis for the belief he wasn't
19 legally registered to a vote.

20 MR. ROKITA: Why?

21 MS. CELESTINO-HORSEMAN: Because --

22 MR. ROKITA: The statute says you can allege
23 that he is not registered to vote, period.

24 MS. CELESTINO-HORSEMAN: Because I think that
25 it was known so we just put in the bare facts.

1 There is much more.

2 MR. ROKITA: He is arguing you put in a lot
3 more.

4 MS. CELESTINO-HORSEMAN: We are entitled to
5 do that in our Complaint. We are entitled to do
6 that, to put in there what I think is the basis of
7 our claim.

8 MR. ROKITA: What you put in you are saying
9 is the basis for being registered, or you can
10 argue the change of address like he is being
11 registered to vote to be legally registered at a
12 specific address at a specific time.

13 MS. CELESTINO-HORSEMAN: Well, no. We are
14 saying legal registration requires. I don't think
15 anyone would dispute that a legal registration
16 means you are registered to vote at your primary
17 residence. I mean you can have more than one
18 residence in the state of Indiana, you can only
19 register to vote at one. So I think what is
20 implicit in this is the legal. As far as the
21 comment we state, he doesn't comply with Section
22 3-8-11-whatever. Then we put i.e. I mean it is
23 that i.e. that says if intelligence are removed,
24 it doesn't matter. We put in the requisite
25 statutory language. We said it doesn't comply

1 with the statute and by law that is what we were
2 required to do under Chapter 11.

3 MR. ROKITA: I don't know if your counsel
4 would agree with that. That is irrelevant. But
5 the words that you put in gave you a basis, as you
6 said, if you were just to say he was not
7 registered to vote then your verified petition was
8 untrue.

9 MS. CELESTINO-HORSEMAN: I'm sorry, I thought
10 you were talking about allegations we put in. If
11 you are talking about that specific clause.

12 MR. ROKITA: And the time and place.

13 MS. CELESTINO-HORSEMAN: Yes. I mean the
14 time and the place is the statutory language. It
15 says that you have to be registered to vote by the
16 later of and in this case it was the certificate
17 of nomination. By putting -- we put in i.e. that
18 is to say, whatever, that registered. We put that
19 in there because we wanted to give an idea, yes,
20 we are maintaining that you have to be legally
21 registered to vote. Here is the problem. If we
22 had just put in you just have to be registered to
23 vote, period, that's it, I would say to you then
24 that that would be, you know, probably all right,
25 but it doesn't quite provide what is needed,

1 although we know this body does not follow the
2 rules of trial procedure.

3 MR. ROKITA: I would like to get information
4 from counsel on this idea of the Commission
5 determining the validity of voter registrations,
6 historical activity with that, any legal precedent
7 with that.

8 MR. KING: Mr. Chairman, members of the
9 Commission. I'm not aware of any situation in my
10 memory where the Commission has ruled directly on
11 the validity of an individual's voter
12 registration. Certainly the Commission in the
13 recount context looks at the sufficiency of the
14 ballots, but in a context the ballot is coming
15 before the Commission based on a previous
16 determination made by a county election board,
17 county precinct inspector regarding whether or not
18 the person cast an absentee ballot or provisional
19 ballot as a registered voter according to the
20 registration rules of the precinct.

21 So, no, I'm not aware of any direct rules by
22 the Commission with regard to a person's status as
23 a registered voter. The Commission has been in
24 situations where it has dealt with residence of
25 which voter registration where residence was a

1 requirement.

2 MR. ROKITA: Counsel, you may agree.

3 MR. BARNES: I know you had asked the
4 question earlier, what body determines or has the
5 authority to determine when somebody is registered
6 to vote. While I am not aware of specific
7 instances with this Commission being called upon
8 to determine that, the body that can determine
9 voter registration or whether a voter is
10 registered is dependent upon the situation. When
11 this applicant submits their registration, the
12 voter registration under 3-7, it's the county
13 voter registration board or a court in the case of
14 voter registration, they take the perspective they
15 determine on the face of the application it
16 appears someone is registered. But on election
17 day voters, watchers, precinct election officials,
18 precinct election board members, they can
19 challenge and they can say, I don't think this
20 voter is legally registered, I don't think they
21 are a resident, I don't think they are 18, I don't
22 think they are a citizen. If that is the case,
23 then the voter cast a provisional ballot and then
24 the county election board has the final say on
25 whether someone is registered and then there can

1 be a recount or a contest.

2 In this case you have a petitioner who is
3 alleging a statutory qualification for a candidate
4 that didn't register to vote on the date of their
5 nomination so I would say that this body has that
6 authority in this case to determine whether or not
7 someone is legally registered.

8 MR. ROKITA: Thank you.

9 I will entertain a motion for discussion.

10 Mr. Durnil?

11 MR. DURNIL: I have no questions.

12 MR. ROKITA: Do I have a motion?

13 MR. DURNIL: I would move we grant the Motion
14 to Dismiss based upon this question here today
15 about registration. He wasn't challenged by the
16 election, he was registered to vote, the statute
17 says he can go back to his previous address, or
18 can attempt to return to his precinct address, and
19 it seems to me that the Motion to Dismiss is in
20 order and I will make that motion.

21 MR. ROKITA: I'll second the motion for
22 discussion. Discussion? I am sure Commission
23 members will have a few questions for counsel to
24 discuss this.

25 MR. KUZMAN: I still haven't heard the answer

1 as to the reason to dismiss the case as to the
2 precedent, the Commission is staying consistent
3 with today which is to consistently deny the
4 motion.

5 MR. ROKITA: I would like to know the
6 specific reason.

7 MR. KUZMAN: It's the same because we are
8 talking the specifics of the statute and Mr.
9 Brooks alleged in the petition he specifically
10 said that candidate for Mr. -- let me get the
11 right name -- for House District 76 didn't meet
12 the specific requirements of the statutes in
13 3-12-11-12(D)2 therefore the motion should be
14 denied.

15 MR. ROKITA: Would you state the page?

16 MR. KUZMAN: 408, 3-12-11-12(D)2.

17 MR. ROKITA: One of the things I'm thinking
18 about, I'll throw this out to my fellow Commission
19 members, one party is saying if there was in fact
20 a frivolous underlying cause of action, then you
21 could go ahead and dismiss the action.

22 And the other party, of course, is saying no
23 as long as it's perfectly pled, that you should go
24 on and hear a frivolous action. So I'm concerned
25 about that from the standpoint I know the

1 frivolous action is denied where there is obvious
2 statutory case precedent. That leads me to some
3 thinking about this whole idea of this body at
4 this point getting into discussing or resolving
5 issues of registration and the validity thereof,
6 especially when it appears to me there is a
7 process in place for challenging voter
8 registration and it's not here after an election.
9 It seems to me it is at the county level, brought
10 by a voter or a political party. Again, my stream
11 of thinking is if that's the case, then underlying
12 all this it doesn't seem we have much to talk
13 about and how we get to the point of definitely
14 taking the point of specificity, how do we get to
15 not dismissing an otherwise frivolous action?

16 MR. KUZMAN: We don't know if it's frivolous
17 or not until you answer the discovery, and you
18 want to get the discovery request that was entered
19 on November 19th to deny this Motion to Dismiss
20 because the statute was not met. Therefore, it
21 seems to me we are done in determining once the
22 discovery has been made.

23 MR. ROKITA: Any comments to that? That
24 brings me to another issue that I have. The
25 discovery request that I have seen, I don't know

1 if the Commission members have seen the discovery,
2 pertains to a civil trial and this is not a trial
3 court. We are under a strict statutory guideline
4 to get this resolved and decided. It will not
5 necessarily be the basis for our decision here,
6 but I'm curious to know how do we intend to get
7 numerous depositions done and fight through the
8 discovery battles? Some of the discovery requests
9 that I have, pieces of paper, I agree that we
10 could get through that in short order through the
11 Recount Director. I have no intention of having
12 us three get together to decide discovery, but
13 what happens when if this goes forward and these
14 folks want to depose everyone under the sun to
15 determine what they think are factual issues, and
16 those witnesses don't want to go forward, don't
17 want to be cooperative or do want to be
18 cooperative and we have a decision to make by July
19 15th.

20 MR. KUZMAN: January 1st.

21 MR. ROKITA: I'm thinking July 15th. January
22 1st.

23 MR. KUZMAN: Let me just establish here. I
24 don't believe the people of the State of Indiana
25 want us to dismiss a case because we don't want to

1 do the work, that is the first thing.

2 MR. ROKITA: I've said it, I have a
3 responsibility, we have a statutory obligation to
4 get this thing resolved for the people of this
5 state by January 1st. There is a recount we have
6 to do.

7 MR. KUZMAN: I agree.

8 MR. ROKITA: I take exception to that, we are
9 here on a Sunday.

10 MR. KUZMAN: I agree, I understand that.

11 MR. ROKITA: Thank you.

12 MR. KUZMAN: My point is that we have --
13 there is a motion in front of us for discussion on
14 the issue of a case to be dismissed. I agree with
15 you that this is not discovery in the form of a
16 personal injury attorney and dealing with the
17 amount of discovery to get there. But I think we
18 are of good minds and would hope counsel would
19 take it under advisement of the Commission to act
20 quickly if this motion is denied and respect the
21 time of this Commission, but also respect the
22 voters of the State, we have to determine its
23 conscience. We have to work through it.

24 Looking over there to the Chairman, it looks
25 like he will have some work to do if this Motion

1 is granted but I think we can get through it, and
2 I would hope both counsel understand.

3 MR. ROKITA: Thank you. Can we go through
4 one more time the specificity argument?

5 MR. KUZMAN: As we had in the case that was
6 previously decided by this Commission two to one
7 that the statute wasn't specifically met, that
8 statute was 3-12-11-12-2 was not specifically met
9 and therefore the Motion to Dismiss should be
10 denied.

11 MR. BROOKS: I don't know what stage you are
12 in, can I comment on that?

13 MR. ROKITA: I'm undecided at this point. I
14 would like to hear another round of discussion for
15 a couple of minutes if that's all right.

16 MS. CELESTINO-HORSEMAN: That's fine.

17 MR. BROOKS: Unless I'm mistaken the only
18 problem as alleged by Ms. Horseman is with this,
19 all the reasoning is that I didn't mention IC
20 3-12-11-3(4)a, even though we have been talking
21 about it and it's the relevant statute the entire
22 time. Unlike my Motion to Dismiss the
23 requirements for the staff -- to met the statute
24 in the petition are jurisdictional. Because they
25 are jurisdictional, if you deny my Motion to

1 Dismiss simply because I haven't said the
2 violation didn't comply with IC 3-12-11-3-(4)a,
3 even though we talked about it, everything, all
4 the reasoning, is in here. Then there is no
5 jurisdictional -- I can file this thing tomorrow.

6 I mean this is the height of a waste of your
7 time, we have all talked about it. I don't know
8 what maybe counsel -- this isn't -- you get one
9 shot to complete and successfully file your
10 petition. That is not the case with a Motion to
11 Dismiss on jurisdictional grounds.

12 MR. ROKITA: You can file tomorrow?

13 MR. BROOKS: The only reason is that I had
14 mentioned that statute and I would verbally at
15 this point ask the Commission to consider. We
16 have already gone through it, everybody knows what
17 the situation is, it's silly for you to come back
18 and argue and do another Motion to Dismiss when
19 the only apparent defect is that I haven't
20 specifically said they didn't comply with that by
21 naming that statute although the entire discussion
22 is explaining why they didn't. So if I can amend
23 it verbally, it would certainly make a lot more
24 sense for you to just say, okay, you understand
25 that is the statute that I'm talking about. I'm

1 saying they failed to comply with the statute for
2 all the reasons that I have said, that they
3 haven't stated that Charlie White did not comply
4 with the specific statutory requirement for all
5 the reasons that we have talked about. That's the
6 only thing missing that I can understand.

7 MR. ROKITA: Counsel? Counsel is saying that
8 the only contention, if I have this right, is that
9 the statute wasn't specifically named on Page
10 406, 11-3-E.

11 MS. CELESTINO-HORSEMAN: Okay. It says -- it
12 isn't just saying -- I mean this is -- it's
13 similar to the requirements of the jurisdiction
14 because the statute simply says the Motion to
15 Dismiss must state, it's a must, it's not
16 discretionary, it's a must.

17 MR. ROKITA: Is he prohibited from just
18 amending or filing a second motion?

19 MS. CELESTINO-HORSEMAN: Well, there's no
20 amending amendment allowed here in the rules. He
21 can file a second motion or if he wants if it will
22 please the Commission and take care of the
23 problem, then I will move to uphold the petition
24 that follows the i.e. which seems to be what he
25 objects to and I certainly have the right to do

1 that which then takes care of this whole thing. I
2 don't think I have to do that, but if we are going
3 to get into amendments.

4 MR. BROOKS: That's just so wrong
5 statutorily.

6 MR. ROKITA: Because this petition is
7 jurisdictional and can't be amended is what you
8 are saying?

9 MR. BROOKS: If it doesn't satisfy now, it
10 can't be amended to satisfy later.

11 MR. ROKITA: I understand that part of it. I
12 think counsel I'll ask this: Can the Commission
13 amend the motion on its own motion?

14 MR. KUZMAN: You mean amend the
15 Commissioners' motion.

16 MR. ROKITA: No, no, a party's motion. Can
17 we respond to that motion?

18 MR. KING: Mr. Chairman, Commission members.
19 On this particular point there is one mechanism
20 that is spelled out in the statute with regard to
21 a Motion to Dismiss, that is found in 3-12-11-12
22 on Page 408, which says, Whenever a motion to
23 dismiss a petition is filed to the state Recount
24 Commission, or is made by a member of the
25 Commission. So the statute clearly contemplates

1 that just as the sua sponte motion to dismiss made
2 by a member of the Commission independent of a
3 motion made by the parties. The statute does not
4 address a procedure for the Commission to amend a
5 motion made by a party. I think the typical
6 procedure there would be for the Commission to
7 rule on whether a party could amend the party's
8 own motion.

9 MR. ROKITA: Thank you. Counsel, do you have
10 anything to add to that?

11 MR. BARNES: I agree this section allows the
12 Recount Commission to make a motion on their own.
13 But the statute doesn't provide anywhere for a
14 party to amend their motion, that is the question.

15 MR. ROKITA: That was the question, if this
16 Commission or any member can make a motion on
17 behalf or against one party or the other?

18 MR. BARNES: I think you can. Are you
19 proposing to make a motion to amend?

20 MR. ROKITA: You answer the questions, I'm
21 the one asking the question.

22 MR. KUZMAN: The issue is does it meet the
23 facts? If it doesn't meet the facts, deny the
24 motion and hear the facts.

25 MR. ROKITA: Let me understand your point.

1 He is saying if the only casualty here is that you
2 failed to mention the statute by name, but
3 discusses the statute throughout that it's still a
4 failed motion, what is your response to that?

5 MS. CELESTINO-HORSEMAN: It's not a question
6 of he failed to provide notice as to which
7 provision of Chapter 11 he is claiming that we did
8 not satisfy, that is what it evolved into.

9 MR. ROKITA: Did he not cite the 13-12-11-1?

10 MS. CELESTINO-HORSEMAN: He did not cite
11 3-12 -- he did not cite 3-12-11-3. He has brought
12 it up today for the first time, but he did not
13 cite.

14 MR. ROKITA: My question is: Didn't he cite
15 3-12-11-1, and isn't that sufficient as a specific
16 requirement?

17 MS. CELESTINO-HORSEMAN: He cited 3-12-11.

18 MR. ROKITA: He might not, but I thought he
19 did, on his motion didn't he cite the failure in
20 3-12-11-1 Commissioner Durnil is looking at.

21 MR. DURNIL: The Motion to Dismiss.

22 MR. BROOKS: Well, actually on Page 2,
23 Paragraph 5, before I get in the summary part I
24 say that Parker be declared ineligible under that
25 specific statute that we discussed based on

1 alleged violation of another statute. So I would
2 suggest to you that once I declare that that was
3 the basis of their petition and that I go on to
4 discuss 3-8-1-1 and 3-8-15 that they are on notice
5 their petition is relying on that statute which I
6 acknowledge, and then I proceed to say why what
7 they allege doesn't qualify or fit under that
8 statute. My first argument is that they --
9 everybody knows on reading this and what the
10 statute is about, it's not like they were
11 confused, they just got done making an hour, you
12 know, multiple-page argument.

13 MR. ROKITA: Just so I understand, you are
14 saying his failure to --

15 MS. CELESTINO-HORSEMAN: I think he said it
16 right there. He said that we alleged, we made an
17 allegation under 3-11-12(D)(4)a based upon a
18 violation of 3-8-11(D)1 which is exactly what we
19 are supposed to do. I'm so glad you brought that
20 language up because that is exactly. He just
21 admits right there in Paragraph 5 that is the way
22 we were supposed to plead.

23 MR. BROOKS: Let me finish the sentence
24 please.

25 MS. CELESTINO-HORSEMAN: It says based upon

1 an assertion, but that's okay.

2 MR. ROKITA: The assertion is something we
3 understand, but that for a Motion to Dismiss it
4 wasn't specific enough. So, therefore, the Motion
5 to Dismiss should be denied and he is both now
6 saying that it's pretty darn specific as to what
7 we are talking about.

8 MS. CELESTINO-HORSEMAN: No. He is saying
9 that we clarified in that paragraph. In Paragraph
10 5 it says that we alleged that he should be
11 declared ineligible under 3-12-11-1(D)(4) upon
12 that alleged violation of 3-8-11.

13 MR. ROKITA: But the reasoning that he is not
14 being specific enough?

15 MS. CELESTINO-HORSEMAN: He is supposed to
16 say, he never says in here. He says that we
17 alleged it, but he is supposed to allege that we
18 did not comply with it, he never said that. That
19 is what we understood that he is arguing the
20 merits of this thing all the way through. He
21 never said it, that we violated Chapter 11. He
22 never said that we specifically violated a portion
23 of Chapter 11. All he is says in his Paragraph 5
24 is that he admits that we pled it.

25 MR. BROOKS: If I might have one more try at

1 this.

2 MR. ROKITA: I want an agreement of my
3 Commission members before I have us go any
4 further. If we are inclined to have a vote that
5 carried a denial of the Motion to Dismiss and it's
6 clear from counsel that the parties and/or we can
7 make another Motion to Dismiss I am assuming that
8 would happen, we are in agreement that that is
9 legal procedure, No. 1? And No. 2 what the time
10 sequence is of something like that?

11 MR. KUZMAN: I agree that on this Motion to
12 Dismiss that all requirements set out in 3-12-11-3
13 that all is done today and if all those
14 requirements are met we should deny this motion.

15 MR. ROKITA: One of the parties is saying
16 that if we fail to stay on this motion, so I
17 imagine if this motion is denied there will be
18 another motion filed that states those things and
19 we will be back here again moving on to deciding
20 whether or not it was violated. So how do you
21 guys want to handle that?

22 MR. DURNIL: Can't we have a motion to rule
23 on it and come back?

24 MR. ROKITA: I'll call the vote. All those
25 in favor of the Motion to Dismiss signify by

1 saying aye.

2 MR. DURNIL: Aye.

3 MR. ROKITA: All those opposed to the Motion
4 to Dismiss as filed say aye. Aye.

5 MR. KUZMAN: Aye.

6 MR. ROKITA: The motion has failed. I would
7 entertain the motion assuming that the parties are
8 going to do that. How are we going to handle that
9 in terms of time?

10 MR. DURNIL: We have to --

11 MR. ROKITA: The Motion to Dismiss is denied
12 and there will be further proceedings assuming
13 that the parties are going to want to file an
14 amended motion.

15 MR. BROOKS: I just want to make sure before
16 I go through this again. Your vote is because of
17 the lack of specificity in my motion?

18 MR. ROKITA: Correct, that is my motive. I
19 suspect it is the other Commissioner's, but if the
20 Commissioners want to put something on record.

21 MR. BROOKS: It will be filed tomorrow, one
22 paragraph will be filed.

23 MR. ROKITA: Okay. Any other business before
24 the Commission?

25 MS. CELESTINO-HORSEMAN: Excuse me. I just

1 want to be sure before we proceed. Everything
2 related to the Motion to Dismiss was filed by you
3 on Friday, by that we have to go on focus. I am
4 concerned because it is going to add more time as
5 well as the need to come for another hearing
6 again. I also have to say that I have concerns
7 that counsel controls how the body may rule in the
8 event he does this. So I think we have some
9 serious due process concerns that have now been
10 raised again.

11 MR. ROKITA: I take your question concerning
12 that last as I mentioned before. We will have the
13 discovery go forward, as soon as another Motion to
14 Dismiss is filed we will have another stay so we
15 need to get this done.

16 MS. CELESTINO-HORSEMAN: Well then, can we go
17 ahead and talk doing discovery now?

18 MR. ROKITA: It is the Recount Director who
19 will handle that.

20 MS. CELESTINO-HORSEMAN: So the Recount
21 Director makes the termination on what discovery
22 we get and what we don't?

23 MR. KUZMAN: Have we ordered -- I apologize.

24 MR. SLOKNIK: No problem.

25 MR. KUZMAN: Giving you power to -- is there

1 anything you need from us, I guess, to move
2 forward?

3 MR. ROKITA: Brad, I don't know if we talk
4 about discovery in our guidelines, do we?

5 MR. SLOKNIK: I don't think that we
6 necessarily do. It does provide in the statute
7 briefly about the discovery actually proceeding.
8 As a general rule, I know we are having prior
9 discovery disputes. Also, it should be noted that
10 when a Motion to Dismiss a contest is filed, that
11 generally prevents the action from -- any further
12 action on that which I have always interpreted to
13 include the discovery process or any orders that
14 would be related to discovery.

15 MR. ROKITA: Let me ask this. Counsel, are
16 in you in fact going to file another Motion to
17 Dismiss?

18 MR. BROOKS: Absolutely. We are going to
19 refile this motion to reference one paragraph, to
20 reference one statute that we have already argued,
21 we already talked about. Don't blame us for any
22 kind of delays. And we certainly do object to any
23 discovery going forward until the Motion to
24 Dismiss is ruled upon. Certainly, do we
25 understand that a party -- is there a reason that

1 the Commission members cannot make their own
2 motion and have that done this evening?

3 MR. ROKITA: A Motion to Dismiss?

4 MR. BROOKS: On their own.

5 MR. ROKITA: We could, but I have been told
6 by counsel a Commissioner can make such a motion,
7 I haven't heard one.

8 MR. BROOKS: That's fine. I will file first
9 thing in the morning.

10 MR. ROKITA: We'll assume that another motion
11 is going to be filed that will stay the
12 proceeding. In case it is not filed by noon
13 tomorrow, I have a layout of discovery, some
14 discovery dates.

15 MS. CELESTINO-HORSEMAN: Can we set a time if
16 they are going to do this, then file it by noon
17 tomorrow with an e-mail copy to us, Mr. Skolnik
18 can do that?

19 MR. ROKITA: Are you amenable to that?

20 MR. BROOKS: I'm sorry?

21 MR. ROKITA: That we get an agreement right
22 here on the record that you will file by a certain
23 time tomorrow.

24 MR. BROOKS: Sure.

25 MR. ROKITA: Is that what your asking?

1 MS. CELESTINO-HORSEMAN: Yes, by noon
2 tomorrow?

3 MR. ROKITA: With service to the parties
4 through Mr. Skolnik.

5 MS. CELESTINO-HORSEMAN: And enough time to
6 respond.

7 MR. ROKITA: How much time? It is driven by
8 Mr. Skolnik, that is something in his
9 jurisdiction.

10 I know there is a discovery response pending
11 before the Recount Director. Any additional
12 discovery request we will make due by noon on
13 Tuesday, December 7th. Any objections to a
14 discovery request should be filed with the Recount
15 Director by noon, Thursday, December 9th. And the
16 Recount Director to grant or deny those discovery
17 requests by Friday noon, December 10th. All
18 parties shall complete discovery, all discovery
19 requests by noon, December 16th.

20 MS. CELESTINO-HORSEMAN: That means on
21 Thursday their objections?

22 MR. ROKITA: Noon on Thursday for any
23 objections and noon on Friday for the Recount
24 Director to grant or deny, and noon on Thursday,
25 December 16th, for all discovery to be completed.

1 MR. BROOKS: Schedule-wise I will have this
2 filed by noon tomorrow and then I think -- when is
3 the Commission going to rule on the amended one?

4 MR. ROKITA: I don't know yet. We have to
5 schedule it.

6 MR. BROOKS: I think the norm here is that we
7 did not start discovery, didn't do discovery if it
8 it's dismissed.

9 MR. ROKITA: I understand. In case the
10 filing doesn't occur. I don't want to make the
11 assumption and also get accused of pushing for
12 dismissal, I want to set the discovery order if
13 you don't comply by tomorrow.

14 MR. SLOKNIK: Mr. Chairman, just to clarify.
15 You have set forth the discovery schedule here;
16 however, it is my understanding that in the event
17 a Motion to Dismiss is filed by tomorrow at noon,
18 that the discovery would not go forward until such
19 time as this Commission has resolved the pending
20 motion?

21 MR. ROKITA: That's correct, per statute.

22 Okay. I'll take a motion to adjourn.

23 MR. DURNIL: So moved.

24 MR. ROKITA: We are adjourned. Thank you
25 everyone.

1 (At 5:46 p.m., on December 5, 2010, the proceedings
2 were adjourned.)

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1 STATE OF INDIANA)
2 COUNTY OF MARION) SS:

3 I, Dabney A. Hill, a Notary Public and
4 Stenographic Reporter, in and for the County of
5 Marion, State of Indiana, do hereby certify that on
6 the 5th day of December, 2010, I took down in
7 stenograph notes the foregoing hearing; and that the
8 transcript is a full, true and correct transcript
9 made from my stenograph notes.

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Dabney A. Hill

Dabney A. Hill
Notary Public
Stenographic Reporter

My Commission Expires:
August 23, 2018
County of Residence:
Marion