

INDIANA RECOUNT COMMISSION

MINUTES OF THE NOVEMBER 20, 2002 MEETING

MEMBERS PRESENT: Sue Anne Gilroy, Chair of the Indiana State Recount Commission ("the Commission"); Gordon Durnil, Member; Mark Palmer, Member.

MEMBERS ABSENT: None

STAFF ATTENDING: Brad Skolnik, Recount Director; J. Bradley King, Majority Counsel; Kristi Robertson, Minority Counsel; Mike Fiwek and Susan Gordon, State Board of Accounts; and Colonel Larry Delaney, Indiana State Police.

ALSO ATTENDING: Lawrence Reuben, William Bock, III, Mark J. Colucci, Matthew T. Klein, Thomas Wheeler, Mitchell Harper, Timothy Kuiper, Joel C. Miller, Sarah Taylor, Niki Kelly, Jim Shella, Matt Kelty, Julia Vaughn, Joseph E. McClain, Myer Blatt, and Terry A.M. Mumford.

1. CALL TO ORDER

The chair called the November 20, 2002 meeting of the Indiana State Recount Commission to order at 1:30 p.m. in State House Room 431, 200 West Washington Street, Indianapolis, Indiana.

The chair indicated that a sign-in sheet would be circulated and asked everyone to complete the sheet and include contact information. She stated that this recount was the first recount since the mother of all recounts, the recount following the presidential election of 2000. She stated that the Indiana guidelines were favorably referenced in arguments before the United States Supreme Court. She added that, during those arguments, the observation was made that, if Indiana guidelines had been applied during the Florida recount, then the recount would have been handled in a different manner. She stated that she was confident, even in an era where greater scrutiny is being given to elections, that Indiana's laws and processes will stand up well.

She stated that the Commission is committed to a recount that is efficient, organized, transparent, timely and accessible. She said that the Commission's meetings would take place in the districts, Indiana House of Representative Districts 81 and 86, so that the Commission would be accessible to the people who are most interested in the recount. She added that it is a great honor to serve as the chair of the Commission along with two distinguished citizens who will be introduced in a few moments, and with an accomplished staff who have done much to prepare for today's meeting and who will continue to work hard between now and December 20.

The chair stated that, as the first order of business, she would like the minutes to reflect that all proper notices under the Open Door Law (Indiana Code 5-14-1.5) were given at least 48 hours before the meeting as required. She added that the candidates and other interested parties were also provided notice based upon the contact information provided to the Commission. She noted that a quorum of Commission members was present. A copy of the meeting notice is incorporated by

reference in these minutes. *[Copies of all documents incorporated by reference are available for public inspection and copying in the Office of the Secretary of State.]*

The chair stated that the other two members of the Commission were appointees of the state chairmen of the Republican and Democratic Parties. She then introduced Gordon Durnil as the member appointed by the state chairman of the Indiana Republican Party. She indicated that Mr. Durnil has served as a member of the Commission since 1995. She then introduced Mark Palmer as the member appointed by the state chairman of the Indiana Democratic Party. She added that Mr. Palmer is serving on the Commission for the first time.

2. ADMINISTRATION OF OATH

The chair stated that the Indiana Constitution requires that all officers be sworn in before assuming the duties of their office. She then administered the oath to Mr. Durnil and Mr. Palmer. *[Copies of the signed oath of the members of the Commission are available for public inspection and copying at the office of the Secretary of State.]*

The chair then introduced the staff of the Commission. She introduced Brad King and Kristi Robertson, who are co-directors of the Indiana Election Division, and thanked them for the work they had performed for the Commission prior to today's meeting. She then introduced Michael Fiwek and Susan Gordon. She stated that Mr. Fiwek is the deputy examiner, and Ms. Gordon is staff counsel, for the Indiana State Board of Accounts. She stated that Michael and Susan would be coordinating the work performed by the State Board of Accounts for the Commission. She then introduced Colonel Larry Delaney of the Indiana State Police. She thanked Colonel Delaney for his assistance in delivering the notices and documents on behalf of the Commission.

3. APPROVAL OF JULY 24, 1998 MINUTES:

The chair indicated that each Commission member had previously received a draft of the proposed Commission minutes for the July 24, 1998 meeting. There being no additions or corrections, Mr. Durnil moved that the minutes be approved as presented. Mr. Palmer seconded the motion. There being no further discussion, the chair called the question, and declared that with three members voting "aye" (Mrs. Gilroy, Mr. Palmer, and Mr. Durnil), and no member voting "nay", the motion was adopted and the minutes were approved.

4. APPOINTMENT OF RECOUNT DIRECTOR

The chair noted that one of the Commission's responsibilities was to appoint a recount director. She referred Commission members to Order 2002-02 contained in their packets. She stated that the order provides for the appointment of Mr. Brad Skolnik as recount director and sets his salary at the sum of zero. She added that she was pleased that Mr. Skolnik would be working in this capacity. She noted that Mr. Skolnik has served as securities commissioner for her office and has overseen a number of administrative processes as securities commissioner.

The chair asked if there was a motion to approve Order 2002-02. Mr. Palmer moved that the order be approved as presented. Mr. Durnil seconded the motion. There being no further discussion, the

chair called the question, and declared that with three members voting "aye" (Mrs. Gilroy, Mr. Palmer, and Mr. Durnil), and no member voting "nay", Order 2002-02 was adopted.

5. APPOINTMENT OF RECOUNT COUNSEL

The chair noted that in previous recounts the Commission had designated attorneys to advise Commission members. She referred Commission members to Order 2002-03 in their packets. She stated that the order provides for the appointment of Brad King to serve as counsel to the Republican members of the Commission, and for the appointment of Kristi Robertson to serve as counsel to the Democratic member of the Commission.

The chair asked if there was a motion to approve Order 2002-03. Mr. Durnil moved that the order be approved as presented. Mr. Palmer seconded the motion. There being no further discussion, the chair called the question, and declared that with three members voting "aye" (Mrs. Gilroy, Mr. Palmer, and Mr. Durnil), and no member voting "nay", Order 2002-03 was adopted.

6. REVIEW AND AMENDMENT OF RECOUNT COMMISSION GUIDELINES

The chair stated that the Commission adopted Recount Guidelines in 1998 to establish consistent and practical procedures for performing recounts. She stated that, during previous recounts, Commission staff had noted issues that could be addressed by further amendments to the guidelines and the Commission adopted those at the end of the process in 1998. She added that the legislature had changed some election laws since 1999, and that she had asked Commission counsel to review the guidelines for the Commission.

The chair recognized Mr. King, who advised the Commission that he and Ms. Robertson would review the Indiana Recount Commission Guidelines for Recounts and Contests set forth in six chapters. He stated that he was going to review the first two chapters, definitions and general procedures, and that Ms. Robertson would review some of the specific procedures used for individual voting systems. He added that the guidelines are available on the election division's website.

He stated the guidelines begin with definitions and that he would focus on some of the terminology that may be used during the recount process. He said that the term "disputed ballot" refers to a ballot challenged by a party to a recount, whether that party be a candidate or a county chair who filed a recount petition. He added that this might also refer to ballots that the State Board of Accounts has determined do not conform to state statute governing ballots. He stated that the term "no votes" refers to a ballot where a voter did not cast a vote for any candidate in the race under review. He stated that term "valid ballots" was self-explanatory while the term "invalid ballot" applied to a ballot that, for a number of reasons, the voter's intent may be possible to determine but there may be some compliance problem with state statute such as over voting or placing a distinguishing mark on the ballot.

He stated that chapter two of the guidelines contains general rules regarding the conduct of recounts and contests. He explained that he wanted to emphasize that the guidelines provide for the state recount commission to conduct all recounts under identical procedures to the extent reasonably possible. He added that there is some variation in the guidelines based on the type of voting system that is used in an election and that those variations will be addressed shortly.

He stated that the State Board of Accounts plays a role under the guidelines in terms of counting the ballots in each of the precincts in accordance with the guidelines. He said that chapter two of the guidelines also provides for the recount director, who is responsible for supervising the conduct of the tally by the State Board of Accounts in conjunction with the Indiana State Police.

He further explained that the guidelines provide that candidates, or county chairs, may appoint observers to watch the tally process and interpose objections or disputes with regard to the tally of a particular ballot. He stated that the State Board of Accounts would assign two-member audit teams of varying number in any recount. He stated that the ballots that are disputed would be marked as exhibits and categorized by the audit teams so that, when the Commission reconvenes, it will be possible to determine which ballot is in contention and subject to the determination of the Commission.

He stated that the guidelines set forth the procedures for inspecting a number of different items of election-related evidence, ranging from absentee material and poll books to the ballots themselves. He stated that, upon completion of the tallying, the State Board of Accounts will prepare a report that is submitted to the recount director for each precinct and then presented to the Commission at the hearings where the Commission will rule on the disputed ballots and determine the recount. He stated that, at the Commission's hearing, each party may present evidence and argument to dispute a ballot and the opposing party may respond. He stated that the recount director is responsible for making sure that the Commission has ruled upon all the ballots in dispute. He concluded by turning the discussion over to Ms. Robertson.

The chair recognized Ms. Robertson who stated that there are several different types of voting systems involved in the counties subject to recount. She explained that punch card voting systems would not be involved in this recount. She stated that ballot card systems, otherwise known as "optical scan" voting systems, would be involved. She explained that Hamilton County and Allen County utilize direct electronic voting systems at the polls on election day and optical scan ballots for absentee voting. She stated that chapter 3 of the guidelines reviews procedures related to optical scan ballots used in those two counties. She added that there are procedures for counting these ballots by using an electronic ballot card reader, however, both parties have asked for a manual recount and, therefore, these optical scan ballots will not be run through the ballot card readers but will, instead, be manually counted.

She stated that chapter 4 of the guidelines covers voting machines, which are also known as "lever" machines. She explained that this type of machine is used at the polls on election day in Marion County. She stated that the counter number on the lever machines will be inspected by State Board of Accounts audit teams and that any discrepancy between the audit inspection and what was recorded on election day will be noted.

She also noted that chapter 5 of the guidelines covers procedures for paper ballots and that paper ballots are utilized in Marion County for absentee voting. She stated that Marion County uses an optical scan style ballot, where the voter fills in a circle to record a vote, however, Marion County does not run these ballots through an ballot card reader that automatically tallies the votes on recorded on the ballots. She stated that Marion County manually counts these ballots on election day. She added that these ballots will also be manually counted during the recount. She explained that these ballots would also be counted manually during the recount, according to the rules set forth in the guideline for paper ballots.

She continued that chapter 6 of the guidelines sets forth the rules for a recount with respect to direct electronic voting systems like those used in Hamilton County and Allen County. She explained that these counties both use a system manufactured by MicroVote. She added that it is anticipated that the State Board of Accounts will insert the cartridges from these systems into one designated MicroVote machine to read the cartridges unless the parties want the cartridge to be read by the original machine used on election day.

The chair thanked both counsel and asked if there were any questions. The chair then indicated that she had previously asked Mr. King and Ms. Robertson to review the guidelines to determine if any additional amendments were required.

The chair then indicated that, on consultation with counsel, it was determined that a few amendments were needed and she referred Commission members to their packets and asked Mr. King and Ms. Robertson to explain the amendments and given any recommendation they might have. The chair then recognized Mr. King who directed the Commission's attention to Order 2002-01. Mr. King indicated that the guidelines have been previously adopted and previously amended by the Commission to reflect the resolution of problems and issues identified in past recounts. He stated that Order 2002-01, section 3 through 7, addresses several policies that were adopted as part of the 1998 recount but never formally added to the guidelines.

Mr. King explained that the proposed amendments concern ex parte communication with regard to members of the Commission and other individuals with respect to matters pending before the Commission. He added that these amendments are modeled on the ex parte communication standards that are applied to judges as part of a judicial canon and commentary on the canon. He explained that, in brief, the amendments allow the discussion of technical, non-substantive matters such as scheduling dates, however, the amendments clearly prohibit ex parte communications regarding the substance of the recount or any evidence to be presented before the Commission.

He further explained that section 4 of the proposed amendments provide that testimony before the Commission shall be sworn testimony. He stated that section 5 provides that the rules of evidence do not apply to Commission proceedings so long as the proceedings are conducted with decorum and with due regard for the rights of the parties. He stated that section 6 provides for a 48-hour deadline for the submission of written briefs prior to the Commission's meeting in which those briefs will be offered as argument. He added that section 7 is simply the result of renumbering the sections.

He stated that, aside from the 1998 policies, which are codified in Order 2002-01, the first two sections address additional issues. He stated that the first section clarifies the definition of candidate to indicate that, when a county chair instead of a candidate files a petition, the county chair has the same rights and responsibilities as a candidate under the guidelines. He stated that section 2 addresses the manual for recounts prepared by the State Board of Accounts. He explained that the State Board of Accounts has always used a very detailed manual for their staff members to perform recounts and that counsel deemed it advisable for the Commission to officially adopt the manual as part of the guidelines noting that, if there was a conflict between the guidelines and the manual, the guidelines would prevail. Mr. King offered to answer any of the Commission's questions regarding the proposed amendments.

The chair characterized these amendments as an update to the guidelines to meet the needs of this recount based upon the past experience of the Commission with recounts. The chair asked whether there was a motion to approve the order. Mr. Palmer moved that the order be approved as presented. Mr. Durnil seconded the motion. There being no further discussion, the chair called the question, and declared that with three members voting "aye" (Mrs. Gilroy, Mr. Palmer, and Mr. Durnil), and no member voting "nay", Order 2002-01 was adopted.

7. REVIEW OF MATTERS PENDING BEFORE THE RECOUNT COMMISSION

A. RECOUNT PETITIONS

The chair requested that Mr. Skolnik, as recount director, review the matters pending before the Commission, including the petitions and motions that have been filed and the status of the service of any notices. The chair recognized Mr. Skolnik who stated that two petitions requesting a recount were filed. He stated that he would review these petitions very briefly and that the petitions were in the Commission's packets. He stated that on November 12, 2002 Mathew Kelty filed a petition for recount for the election in the Indiana House of Representatives, district 81. He added that a copy of this petition, along with proof of service of the notices, were in the Commission's packet. He added that the cash deposit required under Indiana Code 3-12-11-11 was tendered with this petition.

He stated that the second recount petition was filed on November 14, 2002. He stated that this was a joint petition for recount and contest filed by Marion County Republican chair John Keeler and Hamilton County Republican chair Leeann Cook. He explained that this petition concerned the election in the Indiana House of Representatives, district 86. He added that a copy of this petition, along with proof of service of notice of the petition, were in the Commission's packet. He stated that the petitioners made the statutorily required cash deposit. He stated that he would also like to draw the attention of the Commission to the fact that a motion for issuance of subpoena and pre-recount inspection was filed today by counsel for petitioners and that it is his understanding that this motion has been distributed to Commission members as well.

The chair asked Mr. King to address the statute that addresses granting a recount petition. Mr. King stated that Indiana Code 3-12-11-12, subsection (b), provides that, except as provided in subsection (d) which concerns motion to dismiss, whenever a petition is filed under this chapter that requests a

recount in all precincts in the election district, the Commission shall order a recount in the precincts upon: (1) the filing of the cash deposit or bond under this chapter; and (2) service of all notices.

The chair noted that the first recount petition filed involves Indiana house district 81 and asked if the attorneys representing the candidates in this recount were present and, if so, whether they would introduce themselves.

The chair recognized Mitch Harper of Fort Wayne as the representative of petitioner, Matthew Kely. The chair then recognized Larry Reuben who introduced himself as attorney for the respondent.

The chair indicated that the Commission would proceed to consider whether this petition should be granted and asked if there was any objection to the petition. There being none, the chair asked if there was a motion to grant the petition. Mr. Durnil moved to grant the petition. Mr. Palmer seconded the motion. There being no further discussion, the chair called the question, and declared that with three members voting "aye" (Mrs. Gilroy, Mr. Palmer, and Mr. Durnil), and no member voting "nay", the petition for recount for Indiana house district 81 was granted

The chair noted that the second petition involves the petition for recount in Indiana house district 86 and asked that the attorneys for the parties introduce themselves. The chair recognized Bill Bock, who introduced himself as attorney with the law firm of Kroger, Gardis and Regas in Indianapolis. He stated that he represented the petitioners John Keeler and Leann Cook. He also introduced Matthew Klein and Mark Colucci, as attorneys from his office.

The chair then recognized Larry Reuben who indicated that he was counsel for the respondents with respect to the petition in Indiana house district 86.

The chair indicated that the Commission would proceed to consider whether this petition should be granted and asked if there was any objection to the petition. There being none, the chair asked if there was a motion to grant the petition. Mr. Palmer moved to grant the petition. Mr. Durnil seconded the motion. There being no further discussion, the chair called the question, and declared that with three members voting "aye" (Mrs. Gilroy, Mr. Palmer, and Mr. Durnil), and no member voting "nay", the petition for recount for Indiana house district 86 was granted

The chair indicated that the Commission would consider the motion for the issuance of subpoena and for a pre-recount inspection. The chair asked Mr. Bock to come forward and address the petition. Mr. Bock indicated that petitioners desired to speed the process up by obtaining access to some of the documents that they will see, in any event, as part of the recount. He specified that he was asking for copies of the poll books for the 86th district for both Marion and Hamilton Counties. He stated that he would like both petitioners and the respondent to have copies of these documents in advance of the recount so that they could review them. He added that he was requesting copies of the affidavits for the absentee ballots provided and copies of any challenge affidavits and any counter affidavits. He stated that he was also requesting a pre-recount inspection as is provided for in the Commission's guidelines. He added that they were asking for the executed affidavits that are requests for transfer of voter registration. He stated that all of these documents would be reviewed as part of the recount process and that he did not think that the request would be voluminous. He

added that he would like the opportunity to compare the poll books within the 86th district to poll books in other precincts, outside of district 86, in Marion and Hamilton Counties. He explained that this latter request would come after they had an opportunity to review the poll books within district 86.

The chair asked if the Commission had any questions or comments. There being none, the chair requested Mr. Reuben to address the motion on behalf of the respondent. Mr. Reuben indicated that he appreciated the request and thought it would expedite the process, however, he stated that making copies of all these materials would be an incredibly large job. He said that petitioners are asking for copies to be made of each poll book in each precinct. He said that asking someone to make at least two copies of the poll book in each precinct without in any way contaminating the material may be asking too much. He also raised the issue as to who would bear the cost of the copying. He also raised the issue of whether the Commission has jurisdiction to order the copying of materials outside of the 86th district in other parts of Marion and Hamilton Counties. He argued that the petitioners have no right to ask for this and that the statute does not allow them to go outside of the district. He stated that if the petitioners can establish some relevance as to why this material should be produced, or some statutory authority that would allow its production, the petitioners should make it clear for the Commission. He added that petitioners are asking for copies of all of the active voter materials in paragraph 2.4 and that this would not only be huge job, but that some of these materials are very difficult to copy. He asked who would spend the time and effort that it would take to perform this copying. He stated that the request is overbroad, excessive and burdensome, but aside from that that, he was all for it.

The chair stated that she thought that there were 78 precincts involved. Mr. Bock indicated that this was correct and added that he had no intention to impose the burden or cost of making the copies requested on the respondent. He stated that he believed it would be appropriate for a representative of the state police to be present while the poll books are copied, as well as a representative of both parties if desired. He added that petitioners would be happy to provide a copying service to take care of this. He stated that he thought that the copying could be completed in the course of a few hours if the materials were gathered together. He argued that, as to Mr. Reuben's point on the authority of the Commission, Indiana Code 3-10-12-5 gives the Commission full authority to issue subpoenas and discovery orders and to exercise any other necessary powers necessary to perform its function.

Mr. Reuben argued that this was an absurd interpretation of this statute. He argued that the phrase "necessary powers to perform its functions" does not empower the Commission to go beyond district 86. He stated that if this phrase is all that petitioners are relying on in support of their request, then the request should be denied.

The chair asked Mr. Bock whether his motion was asking to copy everything. Mr. Bock responded that they were only seeking to copy the poll books and the absentee ballot materials for the 78 precincts in the 86th district. He added that the subpoena would not require the copying of anything else, however, his request would allow petitioners to compare the information on the poll books within district 86 to other poll books within the two counties but outside of district 86. He added that there was nothing in the statute that would prohibit this investigation.

The chair indicated that she saw Sarah Taylor, clerk of the circuit court in Marion County, and asked Ms. Taylor to address the material requested in the motion. Ms. Taylor indicated that Marion County has three recounts now pending, including this one. She stated that she was willing to cooperate with all those involved in the production of election materials. She asked for a clarification about how to handle challenge affidavits since those affidavits are sealed for the grand jury. She also asked for a clarification about what was requested with respect to the absentee materials.

The chair recognized Mr. Bock who indicated that petitioners were asking for the envelope that contains the affidavit of the voter that on the envelope that is sent back to the county by the voter.. He added that he wanted these affidavits only for ballots that were counted.

Ms. Taylor explained that these envelopes also have the absentee ballot application attached. She added that these affidavits and applications would be placed, by the precinct election board, in envelope number 8. She explained that for those absentee ballots that were rejected, the ballot would still be sealed inside the outer envelope and the application would be attached to the envelope. She stated that these envelopes and applications would be placed in envelope number 10, assuming that the poll workers followed the instructions they were given.

The chair recognized Mr. Bock who indicated that, for clarification purposes, petitioners would be asking for only those materials in envelope 8, which contains the voter's affidavit for the absentee ballots that were counted. Mr. Durnil asked if petitioners were asking to simply view those or whether they were asking to copy them. Mr. Bock responded that they were asking to copy these materials. He added that the reason that they want to copy these is to reduce the time it takes for the clerk to be present while they examine these. He explained that, if they were allowed to copy these materials, then the clerk would only have to be there as long as it takes to make copies.

Mr. Durnil asked whether they intended to make the copies where the documents are kept. Mr. Bock responded that they were willing to do whatever would make the process efficient.

The chair recognized Mr. Reuben who stated that there are two other recounts in Marion County, at least one of which affects the same territory as the 86th district recount. He stated that, as he understands it, the Commission has not yet issued an impoundment order with respect to these materials. He then requested that the Commission issue an order to the Indiana state police to impound, in favor of the Indiana Recount Commission, all of the voting materials and machines involved in the 86th district so that the parties to this recount will have the first shot at these materials.

The chair recognized Mr. Bock who responded that he did not think an impoundment order was necessary because of the good job that the clerks in these counties perform, however, if issuing the order would make Mr. Reuben more comfortable, then petitioners would have no objection to the issuance of an impoundment order.

The chair indicated that she did anticipate that someone might ask for an impoundment order. She stated that it might be more efficient if the motion for subpoena was tabled while the Commission considered the request for an order of impoundment. She stated that this would include the absentee ballots, tally sheets and poll books. Mr. Reuben asked if this would include the voting

machines. The chair responded that it would include the impoundment of voting machines, including the keys for the machines.

The chair recognized Mr. King who stated that Order 2002-06 is an order of impoundment in house district 86 and would include the following items: all absentee ballots, including absentee ballot security envelopes, all paper ballots, all voting machines, including the keys for the voting machines, electronic voting system memory cartridges, keys, and other elements of an electronic voting system (which he stated would be relevant in Hamilton County), used at the November 5, 2002 election for casting votes in house district 86, along with all tally sheets, canvass sheets and poll lists. Mr. King noted that the draft of the order will be amended to show that it will be issued on the motion of respondent rather than on the Commission's own motion.

The chair recognized Mr. Reuben who noted that all parties who might be interested in the motion may not be present and asked about the affect the order would have on the other recounts pending in Marion County. The chair recognized Mr. King who explained that state statute provides that any impoundment order issued by the Indiana Recount Commission takes precedence over any local recount proceeding.

The chair asked if there was any further discussion on the impoundment issue. There being none, the chair asked if there was a motion to approve the order. Mr. Palmer moved that the order be approved as presented. Mr. Durnil seconded the motion. There being no further discussion, the chair called the question, and declared that with three members voting "aye" (Mrs. Gilroy, Mr. Palmer, and Mr. Durnil), and no member voting "nay", Order 2002-06 was adopted.

The chair asked Ms. Taylor where the materials subject to the impoundment order were currently physically located. Ms. Taylor indicated that they were located at 68 North Gayle Street in Indianapolis in suite C, about 10 minutes from the state capitol building on the near east side. She added that, in response to the earlier question about the amount of material in envelopes numbered 8, she stated that there were approximately 1100 absentee envelopes within the envelopes numbered 8 previously described. She stated that there were hundreds of pages of poll books. She stated that, whatever the amount of material involved, she wanted to fully cooperate with the Commission.

The chair stated that the order would be presented to Colonel Delaney of the state police who would secure the materials subject to the order as quickly as possible.

The chair stated that the Commission would return to the consideration of the motion for subpoena and for a pre-recount inspection. The chair asked if there was any further discussion.

Mr. Palmer stated that he had a concern about undertaking any action that would result in a delay. He stated that while Mr. Bock indicated that it would take a couple of hours, Mr. Reuben indicates it may take a couple of years. Mr. Bock stated that he promised it would be closer to a couple of hours than a couple of years. Mr. Reuben jested that he has been guilty of hyperbole before but he thought that perhaps the clerk could give a better estimate than either he or Mr. Bock. Mr. Palmer observed that this week was already half over, and that next week was going to be a short week, therefore, he sees some logistical problems and would like to be assured in some manner that the process will be efficient.

Mr. Reuben stated that he had no problems with allowing access to the materials, however, he was concerned about the possibility, depending on who is doing the copying, that some of the materials would be damaged or lost due to the handling and moving of the records.

The chair stated that it should be understood that, once the materials are impounded, the materials couldn't be moved from the premises. She also stated that the Commission would be proposing a schedule and, as of this moment, the actual recount will begin December 3. She stated that any copying would have to take place between the impoundment through December 2.

The chair recognized Mr. Bock who stated that he understood and agreed that this should in no way interfere with the recount because the whole process must be completed by December 20 according to statute. He stated that, if they cannot complete copying by then, they would not raise this as an issue to delay the recount. He clarified that he was not asking to copy ballots and so there would be no ballots handled or damaged. He stated that he was simply seeking to copy other documents that reflect who voted.

Mr. Palmer also indicated that he was concerned about copying documents that may be used to compare to other documents that are not technically involved in the recount. He also asked who would pay for the copying.

The chair asked Mr. King who indicated that he and Ms. Robertson had conferred regarding the issue of payment of costs. He stated that the petitioners in this matter had submitted a cash deposit. He explained that state law provides for recount expenses to be charged against that deposit, however, if the petitioner is successful then the deposit is refunded. He added that state law also provides that the payment of any expense that exceeds the cash deposit, would come from the state recount fund. He explained that this fund was created in 1999 after the last recount. He stated that payment of these expenses is subject to the submission of appropriate documentation. He stated that, ultimately, payment of these expenses would be from the state recount fund.

The chair asked if this was an expense of the Commission rather than the petitioner. Mr. King responded that because the Commission would order the copies to be made then it is an expense of the recount. Mr. Bock offered to pay the charges if there was a way for that to be done.

Mr. Reuben requested, in case the Commission should grant the motion, that Mr. Bock provide an outline of the specific procedures to be utilized in copying, subject to the approved by the Commission. He added that the procedures should provide for notice to respondents regarding when, where and how the copying will be done.

The chair stated that the recount guidelines cover this issue. She stated that section 5(a) sets forth basic guidelines and indicates that the recount director should authorize the procedure and oversee any disputes.

Mr. Skolnik stated that the proposed schedule provides that the recount director and respective co-counsel be in Fort Wayne over the next few days to begin the recount in district 81 and that the Commission should take this into account.

The chair asked Mr. Palmer if this addressed his concerns. Mr. Palmer indicated that he was still concerned about meeting the deadlines if Mr. Skolnik was in Fort Wayne. The chair indicated that Mr. Skolnik could delegate some of his duties.

The chair asked if there was a motion. Mr. Durnil moved that the Commission grant the motion for subpoena without the provision that would allow the petitioners to look at materials outside of district 86 unless some relevance was established. Mr. Reuben asked for clarification about whether he would obtain copies of whatever the petitioner obtained. Mr. Durnil indicated that it was his understanding that this was part of the motion. Mr. Palmer seconded the motion. There being no further discussion, the chair called the question, and declared that with three members voting "aye" (Mrs. Gilroy, Mr. Palmer, and Mr. Durnil), and no member voting "nay", the motion was adopted.

The chair recognized Mr. King who stated, for the sake of the record and the minutes, the effect of the motion should be clarified. He asked if the effect would be to delete the final paragraph on page 2 of the subpoena. Mr. Bock indicated that this was his understanding.

Mr. King also suggested that the paragraph providing for Commission to sign the order under oath be stricken in favor of the phrase "so ordered this day." Mr. Bock indicated no objection.

Mr. Palmer suggested that it be made clear that the subpoena may not be argued as a reason to delay or interfere with the recount in any way. There being no further discussion on the suggested amendments to the subpoena the chair moved that the amendments be adopted and called the question, and declared that with three members voting "aye" (Mrs. Gilroy, Mr. Palmer, and Mr. Durnil), and no member voting "nay", the amendments were adopted.

The chair stated that prior to today's meeting Brad Skolnik, Brad King and Kristi Robertson met with representatives of the State Board of Accounts to discuss a proposed schedule so that the Commission could proceed in an organized way. She asked Mr. Skolnik to present the latest draft of the schedule to the Commission.

Mr. Skolnik stated that the critical role of the director, counsel and, for that matter the Commission, was to make sure that a schedule is adopted that allows for the Commission to conduct its work in an organized and timely fashion. He stated that in anticipation of today's meeting he held a number of meetings with Mr. King and Mr. Robertson, as well as with representatives of the State Board of Accounts, Michael Fiwek and Susan Gordon, who have a great deal of experience in recounts. He added that he also consulted with Colonel Larry Delaney of the Indiana State Police. He stated that, as a result of these discussions, and with assistance of counsel, he prepared a draft schedule in an effort to assure that the Commission complete all recounts prior to December 20 while allowing the parties ample time to conduct their investigations and to insure the results are accurate. He indicated that he had distributed this proposed schedule to the members of the Commission. He stated that there are two recounts pending and, as he will explain in a few moments, there are three contests also pending before the Commission.

He stated that he has proposed, and the State Board of Accounts and state police representatives agree, that the recount in house district 81 begin tomorrow. He explained that they would start the

initial classification of ballots and prepare a recount report. He added that it is anticipated that this recount will occur on Thursday November 21 and Friday November 22. He stated that the tallying would begin at 9:00 a.m. tomorrow in Fort Wayne at the Keystone Building located at 602 South Calhoun Street in Fort Wayne. He added that they projected that the tally could be completed within those two days. He indicated that this would allow the Commission to meet in Fort Wayne on Tuesday November 26, 2002 at 10:00 a.m. He stated that the Commission would meet in Fort Wayne and rule on any disputed ballots. He added that he anticipated that this meeting would occur in the city-county building at One Main Street in Fort Wayne in Room 128. He stated that the room is the room where the council meets and it provides ample space for the Commission to conduct its proceedings.

He proposed to commence the second recount on Tuesday December 3, 2002 in Indianapolis and Noblesville. He noted that it was within the Commission's discretion to designate the county where the recount in the 86th district would begin. He advised that he, Mr. King and Ms. Robertson had met with the State Board of Accounts and proposed that tallying begin in Marion County first, since the larger number of precincts are located in Marion County.

He stated that there have been three contests filed and it was his understanding of past practice that the Commission allowed the parties an opportunity to brief the issues. He said that his proposed agenda establishes Wednesday December 4, 2002 at 9:30 a.m., as the date briefs must be filed with the Indiana Election Division. He added that the Commission would then meet in Indianapolis on Friday December 6, 2002 at 9:30 a.m. to conduct a hearing and rule on some or all of the contests if possible. He stated that this meeting is tentative and it may be postponed if the recount in house district 86 is not completed within that time frame. He proposed that the next meeting of the Commission occur on Wednesday December 11, 2002 at 9:30 a.m. in house district 86 at a location to be determined. He indicated that this meeting would be held to rule on disputed ballots, if any, in house district 86. He proposed that any remaining contest issues be addressed at this meeting as well. He recommended that the Commission schedule a final meeting for Tuesday December 17, 2002, most likely to occur at the state house, to adopt any final orders and conclude any remaining business as well as any final housekeeping matters. He then offered to address any questions.

The chair recognized Mike Fiwek and Susan Gordon of the State Board of Accounts and asked if they had anything to add. Ms. Gordon said that she wanted to add that the State Board of Accounts planned to have six audit teams assigned to the recount in Fort Wayne and eight teams assigned to the recount in Marion County.

The chair recognized Colonel Delaney and asked if he had anything to add. Colonel Delaney indicated that he could comply with the proposed schedule.

The chair recognized Mr. Bock who indicated that he had a couple of questions. He asked if the December 4, 2002 deadline for the submission of briefs applied only to the contests other than the contest in house district 86 since it is anticipated that the recount in house district 86 will be ongoing at the time.

The chair asked Commission members if they would be amenable to changing the due date for the briefs for the house district 86 contest to 48 hours before the December 11 meeting. The

Commission members indicated that they had no objection to this modification in the schedule. The chair then stated that, to clarify, the schedule would require that briefs for the contest in house district 86 would be due 48 hours before the December 11 meeting, on December 9, and the briefs required on December 4 would then be the briefs for the other two pending contests. Mr. Bock asked whether the recount and contest for house district 86 would then be heard on the December 11 date and the chair responded that this was correct.

Mr. Bock then asked if it was possible to move the date for copying the material in house district 86 pursuant to the subpoena. Mr. Durnil asked who would be required to be present and whether the copying could be accomplished before December 3. The chair indicated that the clerk and recount director could work out those details.

Mr. Palmer asked whether a time certain should be established for the filing of briefs in the house district 86 contest. The chair stated that it would be, at the latest, 9:30 a.m. on December 9.

Mr. Reuben asked whether the parties would exchange briefs. Mr. Palmer indicated that he favored the exchange of briefs. Mr. Reuben indicated that this was consistent with the rules of engagement. After some discussion with Commission members, the chair indicated that it should be a simultaneous filing with the Commission and, in addition, an exchange between the parties. Mr. Skolnik added that any matter filed with the Commission would be a matter of public record.

The chair recognized Mitch Harper who identified himself as the legal representative of Matthew Kelty, petitioner in the house district 81 recount. Mr. Harper indicated concern about whether he could marshal a sufficient number of watchers for Mr. Kelty to assign to each of the six teams of auditors in the recount. He stated that it would be very difficult to line up these six volunteers on what is essentially twenty-four hours notice. The chair indicated that he would be entitled to one watcher per each of the six teams of auditors and one supervising watcher.

The chair asked Mr. Reuben about his thoughts on starting the next morning at 9:00 a.m.

Mr. Reuben stated that he did not think it was appropriate for recount counsel to whisper legal advice to Commission members in a public meeting.

Mr. Reuben expressed his concern about starting the next morning because of deadlines he faces in other matters, including a trial he has scheduled for Friday. He added that he did not see any difficulty in meeting recount deadlines, given the speed with which the State Board of Accounts operates in recounts, if the recount in house district 81 was moved into the first of next week.

The chair asked if the parties would prefer deferring the date to Thanksgiving weekend. Mr. Harper indicated that he believed he could have his volunteers in place by the first of next week.

The chair asked Mr. Fiwek and Ms. Gordon if it would possible to move the recount in house district 81 to Monday and Tuesday of next week and then have the Commission meeting on Monday, December 2nd. Mr. Fiwek and Ms. Gordon indicated that they could accommodate that schedule. The chair then stated that the schedule would be amended to move the recount in district 81 from Thursday and Friday to next Monday, November 25 and Tuesday, November 26 and that

the Commission would then reconvene in this recount on Monday December 2nd at 10:00 a.m. in Fort Wayne.

Mr. Reuben asked, given this schedule, when the recount would begin in house district 86. The chair responded that this recount would begin Tuesday, December 3rd. and then the hearing for house district 86 would occur on Wednesday December 11th and the contest briefs for the contest in house district 86 would be due December 9th in the morning as was previously discussed.

The chair asked if there was a motion to adopt the proposed schedule as amended. Mr. Durnil moved that the proposed schedule be adopted as amended. Mr. Palmer seconded the motion. There being no further discussion, the chair called the question, and declared that with three members voting "aye" (Mrs. Gilroy, Mr. Palmer, and Mr. Durnil), and no member voting "nay", the schedule as amended was adopted.

The chair directed the attention of the Commission members to Order 2002-04 in the Commission's packets. She described the order as giving the recount director the authority to act on behalf of the Commission in certain situations, like scheduling. The chair asked if there was any discussion. There being none, the chair asked if there was a motion to approve the order. Mr. Durnil moved that Order 2002-04 be adopted as presented. There being no further discussion the chair called the question, and declared that with three members voting "aye" (Mrs. Gilroy, Mr. Palmer, and Mr. Durnil), and no member voting "nay", Order 2002-04 was adopted.

B. CONTEST PETITIONS

The chair asked Mr. Skolnik to address the information on file with respect to the contest petitions that have been filed with the Commission, including the service of notice regarding these contest petitions.

Mr. Skolnick stated that on November 8, 2002, George Baronowski filed a petition to contest the election for Indiana House of Representatives, district 15. He added that a copy of this petition, along with proof of service of the required notices, was in the Commission's packet. He stated that there was also an answer and motion to dismiss filed by the respondent, Don Lehe, in this contest.

Mr. Skolnik stated that, on November 12, 2002, Myer Blatt filed a petition to contest the election to the United States House of Representatives, congressional district number 2. He added that a copy of Mr. Blatt's petition, along with proof of service of the required notices, was in the Commission's packet. He stated that an answer and motion to dismiss filed by the respondent, Chris Chocola, in this contest was distributed to Commission members.

Mr. Skolnik also indicated, as previously mentioned, that the recount petition filed in house district 86 was a joint petition for both a recount and a contest. He stated that this was filed by Marion County Republican chairman, John Keeler, and Hamilton County Republican chairman, Leeann Cook.

The chair requested that Mr. King address the statutory framework for an electron contest. Mr. King stated that Indiana Code 3-12-11-12(c) provides that, except as provided in subsection (d)

concerning motions to dismiss, the state recount commission shall grant a petition for contest and order a contest proceeding upon: (1) the filing of a petition under this chapter; and (2) proof of service of all notices.

The chair indicated that the contests would be considered one at a time, the first one being the contest filed in house district 15. The chair requested the attorneys to identify themselves for the record. The chair recognized Timothy Kuiper who identified himself as counsel for the petitioner, Mr. Baronowski. Mr. Bock introduced himself as counsel for the respondent, Don Lehe.

The chair then requested Mr. Bock to address the motion to dismiss he filed in this contest. The chair asked that Mr. Bock limit his comments to the briefing schedule, without addressing the merits of the motion or petition for contest. The chair recognized Mr. Kuiper who stated that he had not yet received a copy of the motion to dismiss and was not prepared to comment on the motion.

The chair asked Mr. Bock to go first and then Mr. Kuiper could respond. Mr. Bock stated that, as he understood it, the Commission would meet on Friday December 6 at 9:30 a.m. and that, therefore, briefs would be due by Wednesday, December 4 at 9:30 a.m. He stated that this schedule was acceptable to respondent.

The chair stated that she would entertain a motion to table the motion to dismiss until the December 6, 2002 meeting of the Commission. Mr. Durnil moved that the motion to dismiss be tabled until December 6. Mr. Palmer seconded the motion. There being no further discussion, the chair called the question, and declared that with three members voting "aye" (Mrs. Gilroy, Mr. Palmer, and Mr. Durnil), and no member voting "nay", the motion to dismiss in the contest in district 15 was tabled until the December 6, 2002 meeting of the Commission.

The chair recognized Mr. King who asked that Mr. Kuiper, and any other attorney appearing for the first time before the Commission, provide the Commission with contact information so that proper notice of meetings may be provided.

The chair then indicated that the Commission would consider the contest petition filed in the 2nd congressional district and asked attorneys to identify themselves for the record. The chair recognized Myer Blatt who identified himself as the petitioner and indicated that he was not represented by counsel. The chair recognized Tom Wheeler who identified himself as the attorney for respondent. Chris Chocola.

The chair requested that both parties come forward. She asked Mr. Wheeler to address the briefing schedule for his motion to dismiss. She indicated that this contest would have the same briefing schedule as the contest in Indiana house district 15 with December 6 being the date set for the meeting and December 4 being the date that briefs would be due.

Mr. Wheeler stated that he had no objection to the schedule, however, he argued that the petition for contest is so facially deficient that it would be a waste of time and effort to proceed to a briefing schedule. He added that it is quite clear that under Indiana Code 3-11-12-2 the petition for contest does not meet any of the criteria set out in the statute. He stated that, in substance, the code indicates that the whole reason for having a contest petition is to show that there was a mistake, or

error of some kind, that makes it impossible to determine which candidate received the highest number of votes cast in the election. He stated that Mr. Blatt's complaint indicates that he was a write-in candidate who received either zero or one vote and that there were two other votes for him that were not counted. He stated that there was in excess of one hundred seventy five votes cast in this election, ninety five thousand were cast for respondent Chris Chocola, eighty six thousand were cast for Jill Long Thompson, 7,000 were cast for the Libertarian candidate and one was cast for Mr. Blatt. He argued, given this, even assuming Mr. Blatt's contention is true, the failure to report the votes identified in Mr. Blatt's petition had no impact on the outcome of the election. He concluded that the petition for contest does not even allege sufficient facts to indicate the result would have been any different and this facial defect justifies the immediate dismissal of the petition for contest.

The chair recognized Mr. Blatt who requested permission to modify the date of the election as stated in his petition. He stated that the petition should be modified to show that the election occurred on November 5, 2002. He stated that he wished to thank Mr. King and Ms. Robertson for their patience in answering his questions over the years. He stated that he agreed with Mr. Wheeler that odds are that Mr. Cholcola had the majority of the votes but he added that he thought it was difficult to determine since there have been five people who have contacted him who used the paper ballot and voted for him in St. Joseph County. He stated that the officials in St. Joseph County report no votes for him. He stated that he voted in St. Joseph County and he assured the Commission that he was most careful in marking his ballot and voting for himself. He stated that he was questioning the validity of the entire election. He added that there was obviously serious interference with the voting process, at least in St. Joseph County. He stated that the one vote that was reported for him came from LaPorte County. He indicated that the people he has talked with in St. Joseph County represent voters in four separate precincts. He added that he has not had time to look through all the legalities of the election but he does maintain that it is difficult to determine what the result of the election really was and noted that there is no guarantee that the machines were not tampered with either.

The chair recognized Mr. Wheeler who indicated that, in response, the requirements stated in statute are not discretionary. He argued that the statute requires that a contest petition contain a statement setting forth that, whatever happened, whether mistake, error or misconduct, it is impossible to determine which candidate received the highest number of votes in the election. He stated that the section of the statute that he was referring to is Indiana Code 3-12-11-3(d), which sets forth what a petition for contest must contain. He added that, with all due respect to Mr. Blatt, the reason that the petition does not contain what is required to contain is that Mr. Blatt would have to show a mistake of something like eight thousand votes, or at least the petition must contain an allegation of some kind of widespread fraud or mistake, that affects eight thousand ballots. He observed that that the petition for recount only identifies three votes, and today Mr. Blatt identifies perhaps five votes, and these allegations are simply insufficient to meet the minimum requirements of statute.

The chair recognized Mr. Blatt who indicated that he did not have the statutes at hand in the thirty minutes he had to prepare the petition. He admitted that there might be technical defects in his petition, however, he maintains that there is clear evidence that indicates that it is impossible to tell what the result of the election was. He argued that there was no guarantee that the machines used in the election were not tampered with. He added that the paper ballots were clearly tampered with.

Mr. Dunill asked Mr. Blatt if he had evidence of a mistake affecting eight or nine thousand votes. Mr. Blatt stated that he has no idea how many paper ballots were used and then discarded. He stated that the mistakes in the election probably affected every race in St. Joseph County. He stated that he understands that it may be impractical and expensive to conduct another election.

Mr. Wheeler asked if Mr. Blatt was the only write-in candidate and he answered that he was not. Mr. Blatt then indicated that he knew of at least one person who was actively discouraged from using a paper ballot and voting for a write-in candidate. He stated that he contacted State Representative Kromkowski. He stated that he also contacted the U.S. attorney who showed no interest in the matter. He stated that even if only one ballot was thrown out this, at least in principle, puts the election in question.

Mr. Durnil indicated that, for purposes of the Commission, a contest petition must indicate that, but for fraud or mistake, there would be a change in the outcome of the election. Mr. Blatt responded that the mistakes might have changed the election. He stated that he has no idea about how the machine votes were cast. Mr. Durnil pointed out that Mr. Blatt had the burden of proving that mistakes were made. Mr. Blatt acknowledged that he was aware that he had the burden of proving his case. Mr. Blatt stated that he did not have the resources to ask everyone in the county about the election.

The chair recognized Mr. Palmer who indicated that he was sympathetic to what Mr. Blatt was trying to accomplish but noted that the contest petition appears to be defective in form and substance. He stated that he understood Mr. Blatt's difficulty because he is a layperson and might not have a lot of resources at his disposal. He stated that he was disturbed that clerk's offices could have disregarded Mr. Blatt's ballot, or other write-in ballots. He stated that the charge of the Commission was to make every vote count. He stated that he would like to find a way to avoid extensive briefing because he doesn't believe that Mr. Blatt has demonstrated to any great degree that the outcome of the election would change. He stated that, from his perspective, it seems important that the clerks in these counties come forward and explain what happened to those votes. He asked whether there was any middle ground where they could find out what happened to these votes.

The chair recognized Mr. King who noted that the Commission was not required to take action at today's meeting, either with regard to granting the contest petition or the motion to dismiss. He stated that if those matters were tabled then he and Ms. Robertson could come up with a memorandum for the Commission that addresses the Commission's questions and suggests alternate methods for addressing the problem that Mr. Blatt raised in his petition.

The chair asked if the problem Mr. Blatt was addressing was in St. Joseph County. Mr. Blatt responded that it was. Mr. Blatt stated that he has no idea what happened in the other counties in the district. He stated that all he knows is that in four precincts in St. Joseph County four votes were tampered with. He said that he is disappointed that his vote, and the vote cast by his son, was lost.

Mr. Palmer stated that he thought there was a difference between votes being tampered with and votes being disregarded. He stated that he thought it was important to find out why votes, if any, were disregarded, however, at the same time, he would like to avoid the parties spending hours

preparing a briefs. He indicated that it was more important to him to find out why votes were disregarded but he did not think that this would affect the outcome of the election.

Mr. Blatt stated that he would also like to know why votes were not counted and noted that he had talked to the clerk in St. Joseph County, Linda Scopelitis, who assured him that there were no votes cast for him in St. Joseph County.

Mr. Wheeler stated that he had no objection to the Commission taking his motion under advisement at this time.

The clerk asked if there was a motion to table. Mr. Palmer moved to table the recount petition and the motion to dismiss in the 2nd congressional district. Mr. Durnil seconded the motion. There being no further discussion the chair called the question, and declared that with three members voting "aye" (Mrs. Gilroy, Mr. Palmer, and Mr. Durnil), and no member voting "nay", the contest petition and motion dismissed were tabled.

The chair indicated that there was an additional housekeeping matter that the Commission ought to consider, namely, the presentation of the State Board of Accounts manual. The manuals were then presented and distributed to Commission members.

Mr. Reuben stated that he wished to raise one other issue. He stated that if Mr. Skolnik is still the securities commissioner then he thought this could pose a problem under Indiana law with holding two lucrative offices. Mr. Durnil responded that the recount director position was not lucrative. Mr. Reuben responded that the recount director could get a per diem and he could recover expenses. He added that, if the recount director is a lucrative office, then he believed that, according to case law, it is a lucrative office. He added that, if Mr. Skolnik was still on the payroll at the secretary of state's office, then he may be holding two lucrative offices. He argued that this would be a constitutional problem. He stated that he was not challenging Mr. Skolnik's integrity.

The chair indicated that they would certainly take this under advisement but her recollection was that Todd Rokita, her deputy, served as the election director four years ago.

The chair recognized Mr. King who indicated that counsel had done some initial research on this question and, after conducting some additional research on this issue he and Ms. Robertson would be happy to prepare a memorandum to address the issue.

Mr. Reuben then stated that he did not know whether it was a dual lucrative office or not, he just did not want this to surface as an issue later on. He then asked the Commission to issue an impoundment order for house district 81 as they had done for house district 86.

The chair recognized Mr. King who indicated that he had an impoundment order had been prepared for the Commission's action, namely Order 2002-05. The chair asked whether there was a motion to approve the order. Mr. Durnil moved that Order 2002-05 be adopted as presented. There being no further discussion the chair called the question, and declared that with three members voting "aye" (Mrs. Gilroy, Mr. Palmer, and Mr. Durnil), and no member voting "nay", Order 2002-05 was adopted.

8. ADJOURNMENT:

There being no further business to come before the Commission, Mr. Palmer moved, seconded by Mr. Durnil, that the Commission adjourn. There being no further discussion, the chair called the question, and declared that with three members voting "aye" (Mrs. Gilroy, Mr. Palmer, and Mr. Durnil), and no member voting "nay", the motion was adopted. The Commission then adjourned at 3:30 p.m.

APPROVED,

Sue Anne Gilroy, Chair