

**INDIANA RECOUNT COMMISSION
MINUTES OF THE NOVEMBER 12, 2004 MEETING**

MEMBERS PRESENT: Todd Rokita, Chair of the Indiana State Recount Commission ("the Commission"); Gordon Durnil, Member; John Griffin, Member.

MEMBERS ABSENT: None

STAFF ATTENDING: Heather Willis, Recount Director; J. Bradley King, Majority Counsel; Kristi Robertson, Minority Counsel; Marilyn Rudolph, State Board of Accounts; and Lt. Colonel Michael Medler, Indiana State Police.

ALSO ATTENDING: Raeanna S. Moore, representing Mike Sodrel; Marlee Ginter, WISH-TV; DeAndre Taylor, WISH-TV; Judson Kring; Aaron Milewski, Indiana Libertarian Party; Luke Clippinger, representing Baron Hill; Kevin Rader, WTHR; Jerry Snook, Metro Source; Bill Groth, Geoff Lohman, Karen Horseman, Terry Burns, Indiana Democratic Party; Larry Shickles, Indiana 9th District Republicans; Troy Liggett, Indiana House Democratic Committee; David Buskill, Sodrel for Congress; Noah Sodrel; Lesley Stedman Weidenbener, The Courier-Journal; Kevin Boehnline, Campaign Manager, Mike Sodrel for Congress; Michelle Gough, Secretary of State's Office; Kate Shepherd, Secretary of State's Office.

1. CALL TO ORDER:

The chair called the November 12, 2004 emergency meeting of the Indiana State Recount Commission to order at 4:35 p.m. in State House Room 201, 200 West Washington Street, Indianapolis, Indiana.

2. DOCUMENTATION OF MEETING NOTICE

The chair recognized Mr. King, who stated that the required notice was provided to conduct an emergency meeting of the Commission under the Open Door Law (Indiana Code 5-14-1.5-5 (d)), which sets forth the requirements for conducting a public meeting with less than 48 hours notice.

3. INTRODUCTORY REMARKS

The chair introduced himself as the Secretary of State of Indiana. The chair introduced the remaining members of the Commission: Mr. Griffin, the appointee of the Indiana Democratic Party, and Mr. Durnil, the appointee of the Indiana Republican Party.

The chair introduced Ms. Willis as Deputy Secretary of State and Recount Director pursuant to previous order of the Commission. The chair introduced Ms. Rudolph of the State Board of Accounts and Lt. Col. Medler of the Indiana State Police. The chair thanked everyone for attending on such short notice.

4. DOCUMENTATION OF FILING OF PETITION FOR RECOUNT AND CONTEST FOR THE ELECTION FOR INDIANA STATE REPRESENTATIVE DISTRICT 9 (*Kelver v. Pelath*)

The chair noted that this petition for recount was filed with the Election Division on November 12, 2004 at 10:35 a.m. The chair asked for any questions or comments from counsel. Mr. King noted that simultaneously with the filing, the Election Division received a \$100 cash deposit from the petitioner. The chair asked for questions from the commission. In response to a question from the chair, Mr. King confirmed that the deposit met the statutory requirement.

The chair noted that the petition did not appear to be verified, as required by statute. The chair concluded that as a result of this lack of verification, the petition did not meet this statutory requirement to permit this petition to go forward. After the chair opened for discussion from the Commission, Mr. Griffin asked which section of the statute was referenced as requiring verification. Ms. Robertson answered Ind. Code 3-12-11-2.

The chair moved to dismiss the petition for failure to meet the verification requirements of state statute, but added that, to ensure due process, interested parties would be allowed to file arguments for the Commission to consider. He indicated the motion to dismiss would be voted upon at the next meeting of the commission.

The chair noted that under the recount law, the commission was precluded from taking further action regarding this petition until the commission ruled on the pending motion to dismiss. There being no discussion, the chair called the question, and declared that with three members voting “aye” (Mr. Rokita; Mr. Durnil; and Mr. Griffin), and no member voting “nay,” the motion was adopted.

The chair asked for any persons present involved in the petition at issue. Mr. Milewski was present for the Indiana Libertarian Party but not as a representative for the party involved. The chair explained that the commission was allowing the parties time to file briefs regarding the issue and ruling on the motion to dismiss the petition will occur at the next meeting, the time and place of which to be decided later in the agenda. The chair stated that the statutory filing requirements must be complied with, pursuant to prior decision of the commission, and that court precedent holds that the petition cannot be amended after time and date of filing.

5. DOCUMENTATION OF FILING OF PETITION FOR RECOUNT AND CONTEXT FOR THE ELECTION FOR UNITED STATES REPRESENTATIVE DISTRICT 9 (*Tew v. Sodrel et al*)

The chair noted that this petition had been filed with the Election Division on November 12, 2004 at 11:51 am, and that the Election Division had received a check for \$6,130 from the petitioner with that filing.

The chair asked for comments or questions from Commission members regarding this petition and noted that the petition was verified. The chair stated that statute allows time

for respondents to cross-petition and that the deadline for receipt of an answer or cross-petition is noon fourteen days after the election.

Noting that the petition requests that impoundment of election materials begin immediately, the chair said that he would entertain a motion that the commission allow the Indiana State Police to begin impounding materials pending receipt of any cross-petition or answer by noon, Tuesday, November 16. He suggested that the Commission reconvene some time after the noon deadline on November 16 to proceed with the recount. Mr. Durnil, seconded by Mr. Rokita, moved for the impoundment of election materials in the twenty counties within the 9th congressional district.

6. ADOPTION OF ORDER 2004-13 TO IMPOUND ELECTION MATERIAL

The chair recognized Mr. King who noted that Order 2004-13 had been prepared for the commission to order impoundment of the material requested by petitioner. He noted that Order 2004-13 is very similar and essentially identical to the impoundment order that the commission approved earlier in 2004 for State Senate District 36.

Under its terms, Order 2004-13 notes that with regard to matters other than state legislative recounts, impoundment is permissible and not required by law, but Order 2004-13 indicates that the commission finds that the integrity of the election records and equipment used in the election should be preserved, and the Commission has the authority to impound materials. It then orders the state police to immediately impound the materials that are listed within all the precincts included within the 9th congressional district. The description of Congressional District 9 is set forth in an executive order that was signed in 2001 and is incorporated by reference into the Order.

Mr. King noted that the items to be impounded under Order 2004-13 are the following: 1) all ballots and voting systems as defined by Indiana Code 3-5-2; 2) all tally sheets and canvass sheets relating to the votes cast in the district in that election; 3) all poll books relating to the votes cast in the district in that election. The material would remain impounded until further order of the commission. The order requests that the state police consult with the commission regarding logistics of impoundment and providing access for purposes of the recount.

The chair moved to order the impoundment. Mr. Durnil seconded. The chair asked for questions. Mr. Griffin clarified that the motion before the commission was to approve the order for impoundment, and the chair affirmed. There being no discussion, the chair called the question, and declared that with three members voting "aye" (Mr. Rokita; Mr. Durnil; and Mr. Griffin), and no member voting "nay," the motion was adopted. The commission members then signed the order. Upon question from the chair, Lt. Colonel Medler stated that the State Police understood the parameters of the order.

Mr. King added further that the notices of the pendency of the recount and contest have been prepared for service to all candidates involved and will be submitted to the state police for them to perform that service.

Mr. Griffin asked whether the Commission should act on the petition today. The chair referred the question to Ms. Robertson. Ms. Robertson explained that the Commission can rule on the petition on its own because a cross-petition may not be filed. Mr. Durnil added it was also possible that that a cross-petition could be filed that has a good argument and then the Commission would have to rescind a decision made today and moved that the Commission wait to rule on the petition. Mr. Griffin commented that it seemed to be a properly verified petition and thought that the Commission may want to rule on accepting the petition today. Mr. Griffin then requested comment from the representing party, and the chair accepted.

Mr. Groth, representative for Petitioner, stated that Petitioner would like the Commission to act on the Petition today and would like to see the recount begin as soon as possible.

Mr. King cited Ind. Code 3-12-11-17(b), which sets the procedural requirements for the commission to conduct its proceedings at least two days after a contest proceeding is ordered to address constitutional due process concerns. Mr. King stated that this petition is for both a petition for a recount and a contest. It is submitted as a single filing, and for the same reasons that the commission chose to defer acting on the motion to dismiss in the House District 9 matter to give parties an opportunity to receive notice and to submit pleadings, the same constitutional considerations would apply here.

Mr. Griffin restated that he thought that the commission should rule on the petition being properly verified and meeting statutory requirements today but not start the recount proceedings until the deadline for receipt of cross-petitions as statute requires.

The chair asked if a representative for Mr. Sodrel was present. Ms. Moore spoke as one of the representatives for Mr. Sodrel and noted that they had not yet met with Mr. Sodrel. She did want to note that petitioner included Franklin County in the petition, which is not a part of Congressional District 9.

The chair recalled Mr. Durnil's motion to not rule on the petition until Tuesday, and seconded the motion. There being no discussion, the chair called the question, and declared that with two members voting "aye" (Mr. Rokita; Mr. Durnil), and one member voting "nay" (Mr. Griffin), the motion was adopted.

The chair recognized that he did see a properly verified petition in front of him.

Mr. Griffin moved that the commission recognize that a properly verified petition for a recount has been filed that meets the statutory requirements. The chair called for a second, and hearing none, indicated the motion failed.

The chair noted that due process requires that the other side be heard, and as the other side may raise an issue that requires the commission to dismiss the entire issue, he wanted to make sure that due process is preserved.

The chair asked for any other business before the commission. Ms. Willis asked that the commission set a time for the next meeting after the noon filing deadline on November 16. Mr. Durnil moved, seconded by Mr. Griffin, that the Commission meet at 4:30 p.m. Tuesday, November 16, 2004, which would meet the 48 hour statutory requirement for notice to the public of the meeting. There being no discussion, the chair called the question, and declared that with three members voting "aye" (Mr. Rokita; Mr. Durnil; and Mr. Griffin), and no member voting "nay," the motion was adopted.

7. ADJOURNMENT

The chair inquired whether there was any additional business to come before the commission. There being no further business, Mr. Durnil moved, seconded by Mr. Griffin, that the Commission do now adjourn. There being no discussion, the chair called the question, and declared that with three members voting "aye" (Mr. Rokita; Mr. Durnil; and Mr. Griffin), and no member votng "nay," the motion was adopted. The Commission then adjourned at 4:57 p.m.

APPROVED:

Todd Rokita, Chair