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MEMORANDUM

DATE: For the November 28, 2016 Commission Meeting

TO: Members, Wisconsin Elections Commission

FROM: Michael Haas
Commission Interim Administrator

SUBJECT: Statewide Recount Procedural Issues

This memorandum outlines several organizational and procedural issues related to the requests for a statewide recount of the Presidential Election, and Commission staff's analysis and recommendations for proceeding with the recount.

1. Recount Estimate and Fee

When the margin between the leading candidate and the candidate requesting the recount is greater than 0.25% of the total votes cast for the office, a recount may be ordered only if the petitioner pays the entire cost of the recount. Wisconsin Statutes establish a process by which the Commission provides an initial estimate to be paid by the petitioning candidate, with any additional amount paid if the actual costs exceed the estimate, or a refund being issued if the actual costs are lower than the estimate.

Here are the relevant statutory provisions from Wis. Stat. s. 9.01 regarding the timing of the fee calculation and payment:

9.01(1)(ad) *Upon receiving a petition for a recount, the clerk or body receiving the petition shall reasonably estimate any fee due under par. (ag) 2. The clerk or body shall provide the petitioner promptly with the total due or estimate.*

9.01(1) (ag)

1. If the difference between the votes cast for the leading candidate and those cast for the petitioner or the difference between the affirmative and negative votes cast upon any referendum question is less than 10 if 4,000 or fewer votes are cast or not more than 0.25 percent of the total votes cast for the office or on the question if more than 4,000 votes are cast following canvassing of all valid provisional and absentee ballots, the petitioner is not required to pay a fee.
2. If subd. 1 does not apply to the difference between the votes cast for the leading candidate and those cast for the petitioner or the difference between the

affirmative and negative votes cast upon any referendum question following canvassing of all valid provisional and absentee ballots, the petitioner shall pay a fee equal to the actual cost of performing the recount in each ward for which the petition requests a recount, or in each municipality for which the petition requests a recount where no wards exist.

3. All fees estimated under par. (ad) shall be prepaid in cash or another form of payment which is acceptable to the officer to whom they are paid. *No petition for which a fee is required is valid unless the proper calculated or estimated fee is paid at the time of filing.*

3m. The petitioner shall pay any balance owing toward the fee due under subd. 2. within 30 days after the clerk or body receiving the petition provides the petitioner with a written statement of the amount due. If the petitioner has overpaid the fee due under subd. 2. the clerk or body receiving the petition shall refund the amount overpaid within 30 days after the board of canvassers makes its determination in the recount. If, as a result of the recount, the petitioner is the leading candidate, or the majority of votes cast on the referendum changes from affirmative to negative or from negative to affirmative, the clerk or body receiving the petition shall refund the amount paid within 30 days after the board of canvassers makes its determination in the recount. For purposes of this subdivision, a petitioner has not overpaid the fees due under subd. 2., and is therefore not entitled to a refund under this subdivision, if the recount results in a difference in the votes cast that is below the threshold for paying the fee under subd. 2.

There is an ambiguity regarding the timing of the recount fee as described in the italicized language above of Section 9.01(1)(ad) and Section 9.01(1)(ag)3. The former subsection requires the Commission to reasonably estimate the fee upon receipt of the recount petition and the latter subsection states that the recount petition is valid only if the “proper calculate or estimated fee” is paid at the time of filing. To address this ambiguity, Commission staff communicated with representatives of the Stein and De La Fuente campaigns prior to the filing of the petition and advised that no recount fee would be required at the time of filing, and would only be required after Commission staff received feedback from county clerks regarding their estimated costs.

The staff’s determination was based upon several factors. Commission staff was not informed that either candidate intended to file a recount petition until mid-day on Wednesday, November 23rd when the Stein campaign’s attorney notified the agency by telephone. The petition from the Stein campaign was filed the afternoon of Friday, November 25th, about two hours before the 5:00 p.m. deadline. Until the petition was filed, it was not certain that an estimate needed to be generated or whether the estimate would need to encompass a recount only in certain wards or counties as opposed to the entire state.

Most of the recount costs will be generated at the county level, as they are required to pay staff, canvass board members, and tabulators to conduct the recount, possibly program tabulating equipment, and purchase supplies. Therefore, a credible estimate of the cost could not be calculated without input from county clerks. Commission staff issued an email to all county

clerks in the late afternoon of Wednesday, November 23rd requesting that they generate an estimate of their expected costs for a statewide recount. Staff sent a second email to county clerks on Friday, November 25th after the two recount petitions were filed, asking that they submit estimates to the Commission by noon on Monday, November 28th. The Thanksgiving holiday fell between the two communications to clerks and therefore some clerks may not have seen either request until returning to the office on Monday, November 28th.

Due to the ambiguity in the Statutes, and the information needed to calculate a credible and realistic estimate of the recount costs, Commission staff's proposed timeline includes generating a statewide estimate by the close of business on Monday, November 28th which would be provided to the candidates, with a due date for payment by the close of business on Tuesday, November 29th. Staff believes this approach is consistent with a plain language reading of the statutory mandate to reasonably estimate the recount costs upon receipt of the recount petition, as well as with the intent of the Statutes to ensure that the petitioning candidate bear the full cost of the recount. In effect, the required fee at the time the petition was filed was estimated to be \$0, and it will be revised after the Commission receives input from county clerks.

In addition to county costs, staff believes that the State's costs are to be included in the calculation of the recount fee. Wis. Stat. s. 9.01(1)(ag)2. states that the petitioner shall pay a fee "equal to the actual costs of performing the recount. . . ."

Clearly the recount could not occur without the involvement of WEC staff, so it seems clear that Commission staff time would be included in the actual costs, as well as any agency out of pocket costs such as process service fees. Commission staff intends to start documenting time spent on the recount so that we can accurately assess that cost if the Commission agrees that it is appropriate.

Finally, assessing recount fees for two candidates who file petitions is a unique situation. The Statutes require payment of the full estimated cost for the recount to proceed. It is staff's recommendation to initially assess the total estimated cost to each campaign as there is not certainty that both petitioners will submit payment. Each would be asked to pay the entire sum unless they coordinate to split the fee and each pays one-half of the amount prior to the deadline for payment. If each campaign pays the entire amount, staff proposes that it refund one-half of the payment to each campaign. If one campaign does not pay their required fee, that candidate would not be named as a petitioner in the recount order. The recount would still proceed if full payment is received from the other candidate. Regardless of which candidates are named as petitioners, all ballot candidates are entitled to designate representatives at the recount locations to raise objections or challenges to individual ballots or the process.

Recommended Motion: The Commission approves the staff's recommendations outlined above and directs staff to provide the estimate recount fee, including any valid State costs, to the petitioning candidates on Monday, November 28, 2016, for payment due at the close of business on Tuesday, November 29, 2016. The Commission further directs staff to assess the full estimated recount fee to both petitioning candidates unless the candidates each submit payment for one-half of the total estimated cost by the close of business on Tuesday, November 29, 2016.

2. Method of Recount

At the time of the 2011 statewide recount of the Supreme Court Justice election, the statutes required that voting equipment must be used to conduct the recount in those locations where ballots were originally tabulated by equipment, unless the petitioner convinced a court that due to an irregularity, defect or mistake a recount using tabulating equipment would produce incorrect results and that a hand count would likely produce a more correct result and change the outcome of the election.

The option to petition still exists under Wis. Stat. s. 5.90(2) if court action is initiated by the next business day following the petition filing deadline. But in addition, the statutes have been changed to allow each county to determine whether they wish to conduct the recount by hand. In some cases a hand count will be less expensive and time consuming than using tabulators due to the cost of programming equipment again, and due to the fact that each ballot must still be examined even if tabulating equipment is used. The relevant language in s. 5.90(1) is:

Unless a court orders a recount to be conducted by another method under sub. (2), the board of canvassers may determine to conduct the recount of a specific election by hand and may determine to conduct the recount by hand for only certain wards or election districts. If electronic voting machines are used, the board of canvassers shall perform the recount using the permanent paper record of the votes cast by each elector, as generated by the machines.

The second sentence of this provision refers to the touch screen equipment which tabulates votes electronically but also produces a voter verified paper audit trail. The Stein campaign's recount petition requests a hand recount of all ballots. As part of the Commission's recount order and procedures, it is the recommendation of Commission staff to honor each county's statutory option to make the decision regarding the method of their recount.

Recommended Motion: The Commission directs staff to decline the Stein campaign request to order counties to tally all ballots by hand, and to permit each county to determine whether ballots will be counted by hand or using tabulating equipment, consistent with existing state law.

3. Voting Equipment Audit:

While a handful of municipalities chosen for the post-election voting equipment audit have completed their audit, many are scheduled to begin on Monday, November 28th. Commission staff excused municipalities from the audit that are involved in the 32nd Senate District recount because the recount process is a more intensive review of the voting equipment's performance and the overall election processes than the audit.

Staff has advised municipalities selected for the voting equipment audit that they can postpone that process until the completion of the recount, and that staff will consult with the Commission at its December 14th meeting as to whether it is still necessary to conduct the voting equipment audit following completion of the recount. No Commission action is required at this time unless the Commission wishes to alter this staff direction.