06-CV-0263 (GLS)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiffs,

-against-

NEW YORK STATE BOARD OF ELECTIONS; PETER S. KOSINSKI and STANLEY L. ZALEN, Co-Executive Directors of the New York State Board of Elections, in their official capacities; and, STATE OF NEW YORK.

Defendants.

AMICUS CURIAE ELECTION COMMISSIONERS' ASSOCIATION FOR THE STATE OF NEW YORK'S MEMORANDUM OF LAW REGARDING UNITED STATES' MOTION TO ENFORCE THE JUNE 2, 2006 REMEDIAL ORDER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

PRELIMINARY STATEMENT 1

FACTUAL BACKGROUND 4

ARGUMENT

I.

PLAINTIFF'S PROPOSAL FAILS TO ACCOUNT FOR THE EXCEEDINGLY COMPLEX AND LABOR-INTENSIVE NATURE OF PLACING BALLOT-MARKING DEVICES AT EACH POLL SITE, AND THE COUNTY BOARDS OF ELECTIONS DO NOT HAVE THE TIME, RESOURCES OR ABILITY TO ACHIEVE THIS GOAL WHILE SIMULTANEOUSLY CARRYING OUT THREE ELECTIONS IN A PRESIDENTIAL ELECTION YEAR 6

II

THE COURT SHOULD NOT ENTERTAIN ORDERING FULL HAVA COMPLIANCE BY SEPTEMBER 2008 BECAUSE SUCH COMPLIANCE WOULD ONLY BE MORE DIFFICULT TO ACHIEVE AND EVEN RISKIER THAN PLACING BMDS AT EVERY POLL-SITE 10

III.

PLACING BALLOT-MARKING DEVICES AT EACH POLL-SITE WOULD WASTE LIMITED RESOURCES AND PUT THE FRANCHISE GRAVELY AT RISK 11

Page

IV. THE COURT SHOULD ADOPT ECA'S PROPOSED PLAN FOR THE 2008 ELECTION CYCLE 13

CONCLUSION 15

TABLE OF AUTHORITIES

Cases **Pages**

James Square Nursing Home, Inc. v. Wing,
897 F. Supp. 682 (N.D.N.Y. 1995),
aff'd, 84 F.3d 591 (2d Cir. 1996),
cert. denied, 117 S. Ct. 360 (1996) 1

Onondaga Indian Nation v. New York,
97-CV-445 1997 U.S. Dist. LEXIS 9168,
1997 WL. 369389 (N.D.N.Y. June 25, 1997) 1

Statutes

Section 5 of the Voting Right Act, 42 U.S.C. § 1973c 7

Section 203 of the Voting Rights Act, 42 U.S.C. § 1973aaa-1a 4

UNITED STATES DISTRICT COURT
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The Election Commissioners' Association of New York ("ECA") hereby submits this Amicus Curiae Memorandum of Law with supporting declarations regarding the Motion to Enforce the June 2, 2006 Remedial Order filed by Plaintiff United States of America.[1]

PRELIMINARY STATEMENT

Frustrated at the sluggish pace of the New York State Board of Elections ("SBOE") in choosing new voting systems, the United States has moved the Court to order that SBOE "take immediate and specific steps" so that by the September 2008 elections all counties

[1] District courts have "'broad inherent authority to permit or deny an appearance as amicus curiae in a case.'" *Onondaga Indian Nation v. New York*, 97-CV-445, 1997 U.S. Dist. LEXIS 9168, at *7, 1997 WL 369389, at *2 (N.D.N.Y. June 25, 1997) (citing *James Square Nursing Home, Inc. v. Wing*, 897 F. Supp. 682, 683, n.2 (N.D.N.Y. 1995), *aff'd on other grounds*, 84 F.3d 591 (2d Cir. 1996), *cert. denied*, 117 S. Ct. 360 (1996)). The usual rationale for allowing such an appearance is so that amicus curiae can aid the court and provide insight not available from the parties. *See id.* (citations omitted). The County Boards of Elections of New York State, although not parties to this case and clearly blameless for delays in HAVA compliance, are singularly able to provide this Court with insight about matters now in dispute and can aid the Court in evaluating problems inherent in the proposals put forward by the United States.

in New York State place accessible voting systems (most likely ballot-marking devices ("BMDs")) at every poll-site and entirely overhaul their voting systems by replacing lever machines with new voting technologies. The United States makes this motion despite unequivocal warnings from most County Boards of Elections – who, unlike the Defendant SBOE or Plaintiff, must actually *administer* elections in the State – that they will not have the time, resources or ability to carry out such Herculean tasks and that, moreover, granting such relief would waste limited resources and put the franchise at risk. Thus, it would appear that Plaintiff, unable to make the SBOE move at a satisfactory pace, wishes to punish County Boards of Elections and the voters in New York State for the SBOE's failures. The Court must not countenance such a result.

To be clear, Amicus Curiae ECA wants nothing more than for New York to achieve compliance with the Help America Vote Act ("HAVA") and, indeed, shares the frustration of Plaintiff that the SBOE has failed to certify new machines. ECA fully supports the implementation of new voting systems that provide unambiguous, reliable results and provide a better, more inclusive voting experience. Indeed, in the recent past, ECA has advocated for the necessary State legislation and regulatory actions by the SBOE, such as the certification of new voting systems that will allow each county board to implement the HAVA provisions and purchase new systems.

To the extent there have been delays in implementation of the subject court order, those delays cannot in any way be attributed to the County Boards of Elections, who are doing their best to comply with the subject order. As this Court is aware, the County Boards of Elections cannot act unilaterally in this matter, but are constrained by mandates of the State Election Law. Most significantly, most ECA members will not be able to replace lever machines with a full implementation of a new HAVA–compliant voting system, until the State Board of

Elections certifies such a system, at which time the County Boards of Elections would begin the selection/procurement process.

Plaintiff clearly fails to grasp the difficulties and complexities the County Boards of Elections would face in trying to put BMDs at every poll-site by September 2008. As explained more fully below, to do so, the County Boards of Elections, under an extremely tight time frame, would have to select such BMDs, procure them, accept their delivery (assuming the producers have them in stock), test *each* machine, survey and adapt poll-sites currently used only for lever machines, locate new poll-sites (if necessary), adapt computer systems to interface with the new technologies, create new BMD-specific security measures, hire thousands of new poll workers and train them on BMD technology, hire new tech staff to trouble-shoot problems with BMDs, and train the public about voting on these new machines. Moreover, Plaintiff wants the County Boards of Elections to carry out these tasks in a presidential election year where there will be *three major elections* in a ten-month stretch. This simply can *not* be done with guarantees of full and unadulterated success, a standard each New York State voter deserves unequivocally.

Even if the tasks can be achieved, the costs are too high and the risks too great. Although the State does have some federal HAVA funds available, the well is not bottomless. Thus, every dollar spent on purchasing machines that may not be used to achieve ultimate HAVA compliance is a dollar thrown away. Perhaps more crucially, having poll-sites with two different voting systems without giving the County Boards of Elections enough chance to prepare their election managers, their poll workers and the State's voters could put the franchise at serious risk. If the goal of every party involved is to avoid the disaster that befell Florida in 2000, Plaintiff's proposals work against, rather than towards, such a goal.

In short, Plaintiff's proposed approach can not be accomplished and, even if accomplished, puts the State's electoral process at risk of confusion or chaos. Thus, the Court should adopt the ECA's proposed plan below, which avoids all of these potential problems and still gives disabled voters an opportunity to vote on BMDs at specific sites in each county (or, alternatively, by absentee ballot). It is a plan based on the considerable hands-on experience of County Boards of Elections in administering elections. Full HAVA compliance should then in turn be achieved in one fell swoop, only *after* the SBOE has finally selected the machines that will be used in future elections and giving the County Boards of Elections enough time to make what will be a monumental transition.

FACTUAL BACKGROUND

By way of background, as of April 1, 2007, there were 11,222,042 registered voters in the State. In the November 2006 election, throughout the State 16,359 lever voting machines were used in 16,359 election districts located at 6,508 poll sites. These poll sites were staffed by more than 124,000 poll workers. In both the 2006 primary and general elections, thousands of candidates appeared on the ballot in contests across the State. Moreover, Boards of Elections throughout this State serve a diverse voting population and several administer elections that must comply with the minority language requirements of Section 203 of the Voting Rights Act, 42 U.S.C. § 1973aaa-1a.[2]

[2] The declarations in support of this Amicus Curiae memorandum are as follows: Amicus Curiae Declaration of Norman P. Green as President of the Election Commissioners Association of the State of New York (hereafter, Exhibit A); Amicus Curiae Joint Declaration of William W. Scriber and Donald M. Wart as Members of the Election Association Commissioners Association of the State of New York (hereafter, Exhibit B); Declaration of Eleanor Sciglibaglio and John A. Degrace (hereafter, Exhibit C); Amicus Curiae Declaration of the Commissioners of the Rockland County Board of Elections (hereafter, Exhibit D); Amicus Curiae Joint Declaration of Anthony Como and James J. Sampel as Commissioners of the Board of Elections in the City of New York (hereafter, Exhibit E); Amicus Curiae Joint Declaration of Robin St. Andrews and Deborah Pahler as Members of the Elections Commissioners Association of the State of New York (hereafter, Ex. F).

Pursuant to the June 2, 2006 Order, each County in New York State placed and/or used ballot marking devices ("BMDs") at a limited number of locations within each jurisdiction in the 2006 and 2007 elections. The devices placed and/or used at each of these sites were programmed to mark any ballot for any election district located within the jurisdiction. Accordingly, any disabled voter in the State had the opportunity to cast a ballot utilizing a BMD at the appropriate site. That plan supplemented the current voting options for disabled voters in that a disabled voter would continue to vote at his or her current poll site and use a lever voting machine, with assistance if necessary. In addition, disabled voters could continue to vote by absentee ballot if they choose.[3]

As the Court may be aware, following the 2006 election, the Legislature of the State of New York enacted Chapter 506 of the Laws of 2007 on August 6th of this year. That legislation mandates that each County "shall provide at least one location with one or more ballot marking devices which are equipped for individuals with disabilities and provide individuals with disabilities the same opportunity for access and participation as other voters." This legislation reflected the reality that County Boards of Elections cannot effectively operate dual voting systems in every poll site without the serious risk of disenfranchising vast numbers of voters until permanent replacements for lever voting machines are certified by the State Board of Elections and purchased by the County Boards of Elections.[4]

ECA also wishes to the remind the court that the federal government – now moving for such drastic relief – shares blame with the SBOE for the predicament in which SBOE now finds itself. Early in 2006, the SBOE obtained Ciber, Inc. to serve as its Independent Testing Authority ("ITA") after a selection process, as per State law. In July 2006, the United

[3] *See* Ex. A, at ¶¶ 6-11; Ex. D, at ¶¶ 5-9; Ex. E, at ¶ 6.

States Election Assistance Commission ("EAC"), which is tasked with providing technical assistance in voting technologies, performed an interim assessment of Ciber and refused to grant interim certification to Ciber as an ITA for the 2005 EAC "voluntary voting systems guidelines" because of problems with Ciber's testing procedures. But EAC withheld this conclusion from the SBOE and the County Boards of Elections, even as the SBOE continued to use Ciber as its ITA, thus turning the clock back considerably. EAC never willingly shared this information with the SBOE or any State or local election management agency; instead, those agencies only learned of this determination from a *New York Times* story. It is at least conceivable, therefore, that the SBOE might have had the time to have machines certified in time form the 2008 elections had it not been denied crucial information withheld by the EAC.[5]

ARGUMENT

I.

PLAINTIFF'S PROPOSAL FAILS TO ACCOUNT FOR THE EXCEEDINGLY COMPLEX AND LABOR-INTENSIVE NATURE OF PLACING BALLOT-MARKING DEVICES AT EACH POLL SITE, AND THE COUNTY BOARDS OF ELECTIONS DO NOT HAVE THE TIME, RESOURCES OR ABILITY TO ACHIEVE THIS GOAL WHILE SIMULTANEOUSLY CARRYING OUT THREE ELECTIONS IN A PRESIDENTIAL ELECTION YEAR

Plaintiff asks the Court to order that the SBOE require that County Boards of Elections put BMDs at every poll-site, while simultaneously running three elections in a presidential election year. For the following reasons, this task is as infeasible as it is imprudent.[6]

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[4] *See* Ex. A, at ¶¶ 7-8; Ex. E, at ¶ 7.

[5] *See* Ex. C, at ¶¶ 6-14.

[6] *See* Ex. A, at ¶¶ 16-18.

First, since many County Boards of Elections now only have BMDs for use at one site per county, those boards would need to go through the process of selecting BMDs for much wider usage and of expediently procuring those machines. Once the machines are selected and purchased, many County Boards of Elections will then have to go through the process of finding new storage sites for such machines, as current storage sites are only equipped for lever machines.[7] Obviously, none of this can be done overnight.

Then once the County Boards of Elections receive the new machines, the intricate and complex task of preparing for an election with duel voting systems will be begin in full.[8] First, the boards must perform the crucial task of testing every BMD received from the manufacturer. Assuring that each BMD is functioning properly can *not* be rushed – the very heart of the franchise will be at stake. After loading each BMD with the specific election data for the jurisdictions using the BMDs, extensive testing must follow, including a review of each displayed ballot, audio ballot and where applicable, printed ballot and testing of each BMDs functionality, including each of the features used by voters with disabilities. Thereafter, the boards will have to establish new technological interfaces so that the tallying and collection of votes cast on BMDs can be synced with systems currently in use for lever machines. Additionally, new procedures will have to be established to manage the security of the BMDs, both to assure that they are not tampered with while in storage nor hacked remotely.[9] Finally, certain County Boards of Elections must arrange for these new BMDs to be accessible to voters in various other languages, where such language translation and assistance is required by the Voting Rights Act.

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[7] *See* Ex. A, at ¶ 13; Ex. B, at ¶¶ 11-12; Ex. C, at ¶ 21; Ex. E, at ¶ 10.

[8] *See* Ex. A, at ¶ 13.

[9] *See* Ex. C, at ¶ 20; Ex. E at ¶¶ 10, 13.

Granting Plaintiff's requested relief would also require County Boards of Elections to survey and investigate poll-sites to determine whether they can even accommodate new voting technologies. It goes without saying such a process is time-consuming in a way Plaintiff clearly fails to comprehend. Simply finding the staff to conduct such surveys is onerous in and of itself, but surveying only begins the process. Staff then would have to report as to deficiencies at poll-sites, recommend solutions and, in a worse case scenario, find new poll-sites that will be entirely unfamiliar to staff and the voters themselves.[10] In addition, some County Boards of Elections do no have the capacity of transporting massive numbers of BMDs, which require climate-controlled conditions.

In addition, to implement any change, both the SBOE and the Board of Elections in the City of New York ("BOE in NYC") are required to obtain preclearance under Section 5 of the Voting Right Act, 42 U.S.C. § 1973c, for the changes to voting procedures as provided for in any plan. Section 5 provides, in relevant part, that when any covered jurisdiction seeks to make a change in voting practices or procedures, it must submit this change to the Attorney General of the United States or institute a proceeding in the U.S. District Court for the District of Columbia for preclearance. When the SBOE or the BOE in NYC submit the proposed changes for preclearance either to the U.S. Department of Justice ("DOJ") or the District Court, DOJ or the Court will have to review the proposed change to determine whether it has the purpose or effect "of denying or abridging the right to vote on account of race or color" or membership in a minority language group. Implementation of the Plaintiff's proposal can result in just such

[10] *See* Ex. A, at ¶ 13; Ex. E, at ¶¶ 10, 11.

actions occurring. Needless to say, this approval process will necessitate additional time to render a decision.[11]

After sites have been reviewed, machines have been procured, tested and properly stored, new security procedures are put in place, and, where applicable, preclearance obtained, County Boards of Elections will then have to turn to the mammoth task of actually preparing for and administering an efficient voting process on election day with two different voting systems at every poll-site. This will require most County Boards of Elections to hire vast numbers of new poll workers who can manage use of BMDs and to train those new workers on administering the vote on those machines.[12] To repeat, County Boards of Elections simply can not afford to rush this process or to cut corners in order to meet artificial deadlines imposed as a result of Plaintiff's insistence. It is *crucial* that poll workers be adequately trained in order to assure that when voters reach the poll-sites on election day, they will be given all necessary instructions to cast their votes free of confusion and delay.[13] Moreover, many County Boards of Elections will need to hire new technology staff to trouble-shoot on election day if anything goes awry with BMDs. And current election inspectors, who may only be trained on lever machines, must also be trained on inspecting BMDs. Finally, a central and critical element of putting new machines at every poll-site will be educating the public, most of whom likely have never seen, let alone used, BMDs.[14]

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[11] *See* Ex. A, at ¶ 14; Ex. E, at ¶ 18.

[12] *See* Ex. A, at ¶ 13; Ex. B, at ¶ 13; Ex. E, at ¶ 12; Ex. F, at ¶¶ 9-11. It is important to note that many County Boards of Elections already have difficultly hiring sufficient poll workers, putting aside any need to hire additional workers. *See* Ex. B, at ¶ 16; Ex. F, at ¶ 4.

[13] *See* Ex. B, at ¶ 26; Ex. E, at ¶¶ 10-12.

[14] *See* Ex. E, at ¶ 10.

All of the tasks just highlighted would be complicated and labor-intensive enough were they to be done while the County Boards of Elections had only those tasks to achieve. But those boards will already be working at full steam to administer three elections in a ten-month period, and it is essential for the Court to understand that this is a zero sum game – the County Boards of Elections, while full of diligent and dedicated staff members, have limited resources and limited staff capacity. Complying with a plan to put BMDs in every poll site would only divert those limited resources from the boards' ability to generally administer elections.[15]

Additionally, 2008 is no ordinary election year. It is a presidential election year, when turn-out can be expected to jump considerably. Forcing County Boards of Elections to carry out all of these complicated tasks while simultaneously providing for fair and efficient elections in the face of such massive turnout exemplifies how the County Boards of Elections would be wrongly punished for the failings of the SBOE. [16]

II.

THE COURT SHOULD NOT ENTERTAIN ORDERING FULL HAVA COMPLIANCE BY SEPTEMBER 2008 BECAUSE SUCH COMPLIANCE WOULD ONLY BE MORE DIFFICULT TO ACHIEVE AND EVEN RISKIER THAN PLACING BMDS AT EVERY POLL-SITE

Plaintiff additionally proposes that the SBOE insist that County Boards of Elections attempt to replace every lever machine in the State with new voting machines by September 2008. Plaintiff makes this proposal even though neither proposed plan submitted by

[15] *See* Ex. C, at ¶ 48; Ex. E, at ¶ 20; Ex. F, at ¶ 8.

[16] It is important to stress that while many problems with the DOJ's plan are shared by counties far and wide, each county has unique issues. For example, in New York City, the shear size and breadth of the electorate and of the election process raise daunting issues. In a rural county such as St. Lawrence (2,822 square miles in area), by contrast, the issue is not population necessarily but massive geographical size and rural topography. *See* Ex. F, at ¶¶ 3-6.

the State Board Commissioners accounts for how this could happen given that SBOE's current proposed time frame for certifying machines is, in a *best-case scenario*, June 2008 (three months before the September elections). Moreover, DOJ proposes that County Boards of Elections use machines that were only certified to the 2002 Federal Election Commission standards, even though those machines have now been rejected in many jurisdictions because of problems they have presented in accurately counting votes.

In short, every issue and problem discussed above in regard to putting BMDs at each poll-site would be magnified and exacerbated ten-fold by trying to replace every voting machine in the State by September 2008. Plaintiffs fails to even recommend how the process for selecting the new machines – a process in which the public deserves an opportunity to participate – could happen in time to prepare for the September 2008 elections. Even if the machines were selected in a timely fashion – which they can not be – the County Boards of Elections would clearly not be left the time to test and store those machines, adapt them for the September 2008 elections, prepare for the administration of those elections, hire new poll workers, and carry out what will be one of the most important public relations campaigns any of these local boards have ever carried out.

Again, the County Boards of Elections understand Plaintiff's frustration and share Plaintiff's goal that the State achieve HAVA compliance expeditiously. But the risk that rushing this process (one of the most important changes in voting in New York State for decades) will cause voter confusion or, worse, chaos is extremely high.

III.

PLACING BALLOT-MARKING DEVICES AT EACH POLL-SITE WOULD WASTE LIMITED RESOURCES AND PUT THE FRANCHISE GRAVELY AT RISK

Even if County Boards of Elections could accomplish the impossible, by placing BMDs at every poll-site by September 2008, the Court should still take the much more prudent approach by adopting ECA's proposed plan (discussed more fully below).

First, forcing the counties to place BMDs at every poll-site before machines have been selected for the ultimate solution could result in significant financial waste. Plaintiff does not – nor could it – confirm for the Court that the BMDs used in the September and November 2008 will definitively be used in any ultimate solution. As such, it concedes the obvious: if County Boards of Elections eventually choose voting systems that do not incorporate the BMDs used in 2008, they will have no choice but to throw those BMDs away or sell them (if they find any purchasers).[17] The argument that HAVA funds will cover this waste presumes that there are enough HAVA funds to account for these one-time BMDs as well as the cost of full HAVA compliance.

Putting aside costs, it is crucial for the Court to understand the what Plaintiff is proposing would seriously impede the County Boards of Elections' ability to assure that all the State's voters have a chance to cast votes without hindrance and that, most importantly, those votes are counted without error.[18] The County Boards of Elections will not have such assurance because they will have rushed to buy, test and secure new machines, and they will not have had the time to do the necessary training of poll workers and voters to guarantee that voting runs without any major hitches. The shadow of the 2000 presidential elections, of course, looms large over this discussion. The lessons learned from that debacle is clear: the ability for voters to cast votes and have their votes counted must be paramount to all other concerns.

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[17] *See* Ex. B, at ¶ 21; Ex. C, at ¶ 30-36; Ex. E, at ¶ 21.

[18] *See* Ex. A, at ¶ 18.

The Court need look no further than examples from the around the country to understand the problems that can arise when these new technologies are transitioned into voting processes. For instance, in California, the Secretary of State de-certified machines after they were found to have security flaws. And in other jurisdictions, problems with new machines demonstrate that if local boards are not given adequate time to test machines, to prepare their staff and to educate the public, serious issues can arise on election day that such boards may not be able to resolve easily.[19]

The County Boards of Elections want nothing but to avoid such mishaps by assisting the State Board in achieving HAVA compliance in one coherent step, on a timeline that will allow those boards to account for all eventualities and cover all bases.[20]

IV.

THE COURT SHOULD ADOPT ECA'S PROPOSED PLAN FOR THE 2008 ELECTION CYCLE

Given the clear problems and risk evident in Plaintiff's proposal, the Court should instead adopt the ECA proposal of limited implementation of BMDs in specified sites accompanied by an extensive outreach program to inform all the State's disabled voters of their voting options.

To carry this plan out, the SBOE, along with other State agencies, should develop a comprehensive public education campaign to notify disabled voters of the temporary, alternative option for the 2008 primary and general elections. This was not done on a

[19] *See* Ex. A, at ¶ 18; Ex. E, at ¶¶ 22-23.

[20] Plaintiff also requests that the SBOE ask that County Boards of Elections increase the numbers of BMDs in each county by the February 2008 primaries. Given that this extremely important presidential primary is less than six weeks away, ECA asserts that this can not be done for many of the same reasons stated throughout this memorandum.

coordinated, integrated statewide basis in 2006. In this instance, ECA recommends that the State fund this intensive outreach and communications program.

Under this proposal, the State of New York, using many of its agencies – including the Commission for the Quality of Care of the Disabled, the Office of Temporary and Disability Assistance, the State Department of Transportation and the various regional transportation authorities – would expand both the informational opportunities made available to the members of the disabled community, as well as enhance the transportation alternatives to enable disable voters to get to these poll sites in a reasonable and reliable manner. Also, both the State and County Boards of Elections would continue to work with the local government agencies, as well as community based organizations, to promote increased participation in the electoral process by persons with disabilities.

ECA understands that this proposal is not a "quick fix" and would add another year to full implementation. But for all the reasons previously stated, ECA believes that this reasonable and practical proposal is far preferable and far more in line with the interest of the State's voters than the federal government's various proposals.[21]

[21] Ex. A, at ¶ 20-22; Ex. E, at 24-26.

Conclusion

For the foregoing reasons, the Court should deny the relief requested by the United States and adopt the plan proposed by Amicus Curiae ECA.

Dated: Saratoga Springs, New York
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