

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,
-Plaintiff,

-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

AFFIDAVIT

06 CIV 0263 (GLS/RFT)

I, PETER S. KOSINSKI, swear under penalty of perjury that the following is true and correct:

1. I, PETER S. KOSINSKI, am a Co-Executive Director for the New York State Board of Elections (“the State Board”). I have been employed by the State Board in various capacities since 1990.
2. Stanley L. Zalen, is the other Co-Executive Director for the State Board. He has been employed by the State Board in various capacities since 1974.
3. The State Board, as established pursuant to New York State Election Law section 3-100, is composed of four Commissioners. The commissioners are appointed by the governor as follows: two commissioners, one each recommended by the chairman of the state committee of each of the major political parties; and one each by the legislative leaders in each house of the legislature. Pursuant to New York State Election Law section 7-202, the State Board is charged with the responsibility of certifying that all voting machines that are used in the state meet the requirements set out in statute and regulation.

Introduction

4. New York is fully committed to implementing HAVA as soon as practically possible and also ensuring that every voter can vote and that every vote is counted. The State Board has made considerable progress toward achieving HAVA compliance.
5. The State Board is investing enormous resources toward achieving HAVA compliance and has made great strides towards meeting that goal. It is in full compliance with HAVA's requirements for a statewide voter registration database. And it is taking every measure possible to ensure that the State will be in full compliance with HAVA's voting systems requirements, as well as with the greater protections mandated by New York's Election Reform and Modernization Act. The State Board's work requires coordination with the 58 separate county board of elections and it will be working with those many jurisdictions¹ to ensure HAVA compliance.
6. This litigation focuses on two of HAVA's requirements. First, HAVA requires that every state develop a statewide voter registration database that satisfies specific criteria set forth in the statute. The voter registration database goes to the very heart of HAVA's intent to safeguard the right of every voter to vote. It is an essential tool to ensure that voters are not turned away from polling places because of errors or irregularities in voter registration lists. The Board of Elections has a fully HAVA-compliant statewide voter registration database.

¹ New York State has over 11 million registered voters with counties ranging in size from just over 5000 registered voters in Hamilton County, to over 4 million registered voters in New York City. To do as the United States suggests that New York go to an entirely paper ballot election is a step backwards by eliminating machines and to count over 6 million paper ballots by the county boards would be unwieldy and impractical. It would be massive undertaking to switch to hand counting paper ballots in a State that has not voted on a paper ballot system in 100 years.

7. Second, is meeting HAVA's requirement that there be a disabled accessible voting system in every polling place. In discussions with the United States Department of Justice, the State Board developed a strategy to comply with both HAVA and New York State law to provide a voting system which is accessible to voters with disabilities in every polling place in time for the 2008 elections. The State Board continues to take the steps necessary to accomplish this. I cannot commit that every county board of elections will be able to carry out the plan developed by the State Board. Given the realities of the situation, and the State's fundamental responsibility to ensure that elections are orderly and smooth, the State Board has assured the Department of Justice that it will achieve this full HAVA compliance as quickly as possible. To demand more than that, as the United States does, compromises New York's ability to conduct an orderly and fair election.

Procedural History

8. On March 1, 2006, the United States Department of Justice commenced this lawsuit in the United States District Court for the Northern District of New York to compel the State Board to implement the voting system and statewide voter registration database requirements of HAVA. On March 23, 2006, the District Court granted an application by the Justice Department to require the State Board to submit a plan for complying with HAVA in time for the September, 2006 elections. The Plan was filed with the Court on April 10, 2006, with a supplement filed on April 20, 2006. On April 28, 2006, the Justice Department responded to the Plan. After gathering responses to the proposed plan from the County Boards of Elections, and after having discussions with the State Board, the Justice Department recognized that full compliance with HAVA with regard to the voting

machines was not practicable for 2006. The Justice Department asked the District Court to order that the State achieve compliance, to the best extent possible, by providing voting machines accessible to voters with disabilities. On June 2, 2006, this Court issued a preliminary injunction setting forth deadlines for an interim plan for the State to achieve compliance with HAVA, requiring the placement of at least one disability-accessible voting machine in each County for the 2006 elections. All counties had at least one such device and in some instances some counties had multiple devices. In the end, the Court ordered the State to achieve full compliance with HAVA by September, 2007.

9. On the day before the 2007 General Election, November 5th, the United States filed the current motion. This motion seeks to enforce the Court's prior order of June 2, 2006 which mandated the New York State must come into compliance with the mandates of HAVA.

Congress Passes the Help America Vote Act

10. In response to the 2000 Presidential Election debacle in Florida, Congress passed the Help America Vote Act of 2002 ("HAVA"), Public Law 107-252, effective October 29, 2002, codified at 42 USCS §§15301-15545. HAVA was intended to improve the administration of federal elections and update voting equipment and maintenance requirements.
11. HAVA sets standards for voting systems to be used by states in federal elections. These requirements concern, among other things, verification of votes cast, audit capacity, error rates, and accessibility to voters with disabilities and to non-English speaking voters. While HAVA sets the minimum requirements for voting systems, states are free to

establish higher standards *See*, 42 USCS §15481 (HAVA Section 301). HAVA left the specific methods for compliance with its voting systems requirements to the states' discretion. *See*, 42 USCS §15403 (HAVA Section 253(c)). These requirements go to the heart of Congress's intent to ensure that every vote cast is counted and that voters with disabilities are able to cast their votes at the polling place. HAVA also authorized financial assistance to states to use in implementing the statute's mandated improvements to the voting process, including the standards for voting systems. *See*, 42 USCS §15401 (HAVA Section 251).

New York State Responds to the Passage of HAVA

Development of the State's HAVA Implementation Plan

12. Pursuant to HAVA Section 255, on February 7, 2003, the Chief State Election Official at the time, Peter S. Kosinski, then the Deputy Executive Director of the State Board², appointed a task force to advise in the development of the HAVA State Implementation Plan (HAVASIP), designated the Help America Vote Act State Implementation Plan Task Force (Task Force). The group included persons who provided expertise and meaningful input to the formation of the Plan, as well as representatives of groups mandated by HAVA.
13. Representatives of various government groups were appointed, including the Governor's Office; the New York State Senate and Assembly; the New York State Department of Motor Vehicles; New York State Office for Technology. The Secretary of State's Office and the Division of the Budget assisted with local government interaction issues and

² Shortly after Governor Spitzer's election, defendant Stanley Zalen was appointed as the State's Chief Election Official. Mr. Kosinski and Mr. Zalen are currently Co-Executive Directors for the State Board.

budgetary concerns, respectively.

14. Also mandated by HAVA and included on the Task Force, were representatives from the boards of elections of the two largest jurisdictions in the state, New York City and Suffolk County. Representatives from two upstate county boards of elections and an official representing county government also served as Task Force members.
15. In light of the provisions of HAVA concerning persons with disabilities, a representative of disability groups, as well as New York's Advocate for Persons with Disabilities, were appointed. A representative of each of the major state political parties and the New York State League of Women Voters also served on the panel.
16. The Task Force held open, public meetings on February 26, March 5, 12, 19, and 26, 2003 and advised and provided feedback to the Chief Election Official on elements for the State Plan.
17. To comply with HAVA Section 256 a preliminary version of the state implementation plan was made available for public inspection and comment on June 20, 2003. The Plan was made available through the State Board's web site and at every public library throughout the state.
18. Three public hearings were conducted throughout the state during the public comment period affording interested persons and groups an opportunity to present comments to the chief election official, State HAVA Task Force members and staff of the State Board. Comments were also received by e-mail and regular mail. The public comment period extended to July 23, 2003. Each of the comments was thoroughly reviewed by the State and considered in the final plan which was submitted to the Federal government in August, 2003.

New York State Debates and Passes ERMA

19. At the same time that the HAVASIP was being developed, the State Legislature began a two year process of reviewing and debating changes to New York's Election Law. Both the New York State Senate and Assembly passed separate bills to implement HAVA in New York. To resolve the differences in the legislation a joint conference committee was formed and, working in public sessions, ultimately resulted in the Election Reform and Modernization Act of 2005 (ERMA)(codified in Election Law 7-200 through 7-209). ERMA was signed into law as Chapter 181 of the Laws of 2005 by the Governor on July 12, 2005.
20. It was not until after ERMA was enacted that the State Board could begin the process to promulgate the regulations necessary to implement ERMA. The complex and controversial nature of the subject matter developed in HAVA and ERMA resulted in a lengthy period of development of these regulations. It took almost 11 months to develop the regulations. Those regulations, set out in NYCRR section 6209 established the detailed standards and processes for implementing new voting systems in New York. After a lengthy public comment period, which elicited over 2000 public comments, and included 4 public hearings around the State at which 86 speakers were heard, they were formally adopted by the State Board on June 7, 2006.
21. ERMA required the complete replacement of all lever voting machines in New York in time for the 2007 Primary. Although the State Board has made considerable progress toward achieving HAVA compliance the New York State Legislature realized that a September 1, 2007 date for full HAVA compliance in the state was impossible and in Chapter 506 of the Laws of 2007, it removed the September 1, 2007 deadline for full

compliance. Chapter 506 recognized the complexity of this issue by removing all deadlines and requiring one ballot marking device per county until full replacement of the lever voting machines. It is important to note that the State Legislature had met all of the functional requirements for a HAVA compliant voting system in ERMA and even gone beyond those requirements in terms of access for the disabled. The legislative scheme for carrying out this mandate is for the State Board to certify voting systems as compliant with the federal and state statutory requirements (Election Law 7-201). That statutory provision provided that the State Board would engage an outside testing laboratory to produce a report on any vendor's voting system which report would indicate whether the system complied with or failed to comply with the state and federal requirements for voting systems.

While New York Develops its Standards Other States Have Problems

22. Nearly half of the states missed one or more of HAVA's deadlines largely because questions remain about voting system reliability, security and accuracy. *electionline.org, Election Reform, What's Changed, What Hasn't and Why 2000-2006*. p. 5. These are the kinds of devastating problems that New York is taking great care to avoid. Electronic voting systems deployed in Florida, North Carolina, Indiana, Ohio, Maryland and California, to name a few, have been plagued with certification questions, security concerns and questions about the reliability and accuracy of their paperless ballots. *See, electionline.org, Election Reform, What's Changed, What Hasn't and Why 2000-2006*, p.9.
23. The atmosphere under which the State Board and county boards must operate is affected by the challenges faced by other states. California recently de-certified non-compliant

systems and is spending more money to upgrade and/or replace them. Florida and New Jersey also implemented new voting systems, only to discover that the voting systems they purchased were flawed. Those states, and others, have been forced to discard millions of dollars worth of voting equipment, leaving the taxpayers with the burden of purchasing new systems. See, electionline.org, *The Help America Vote Act at 5*, p 13-21. The problems that other states have faced with their voting systems, have had a direct effect upon the State Board, forcing it to constantly re-evaluate whether it has properly addressed the issues that are being identified across the country in order to prevent them from occurring here. New York is now in a position to benefit from the problems experienced by other states and committed to avoiding those problems. New York would be remiss if it did not do so.

24. There have been a number of well documented reports and studies showing the difficulties of creating reliable and secure voting systems that feature the improvements that HAVA was intended to produce in the next generation of voting systems.³

The EAC Develops Standards for New Voting Machines

25. While New York State was developing its HAVASIP and the State Legislature was debating and passing ERMA and the State Board was adopting its regulations. Pursuant to HAVA the newly created United States Election Assistance Commission (EAC),

³ See, General Accounting Office (GAO), September 2005: Federal Efforts to Improve Security and Reliability of Electronic Voting Systems are Under Way, but Key Activities Need to be Completed, <http://www.gao.gov/new.items/d05956.pdf>; CalTech MIT Voting Technology Project, <http://vote.caltech.edu/reports.htm>.

- developed the specific standards for voting systems to meet the requirements of HAVA.⁴
26. To assist the EAC in developing the new standards, HAVA provided for the National Institute for Standards and Technology (NIST) to create the standards for the EAC to approve. Founded in 1901, NIST is a non-regulatory federal agency within the U.S. Department of Commerce. They set the standards for measurements, and technologies for a variety of services and industries.
 27. HAVA established the Technical Guidelines Development Committee (TGDC) and directs NIST to chair the TGDC. This committee is composed of The Director of NIST Members of the EAC's Standards Board, the EAC's Board of Advisors, the Architectural and Transportation Barrier Compliance Board; the American National Standards Institute; representatives from the Institute of Electrical and Electronics Engineers (IEEE) and representatives from National Association of State Election Directors (NASD).
 28. Under HAVA the TGDC is guided by the 110 members of the Standards Board, 55 State election officials selected by the chief State election official of each State and 55 local election officials.
 29. The TGDC did not have its first meeting until July 9, 2004 and the Standards Board wasn't even convened until June 28, 2004, almost a year after the deadline set by HAVA, and they were so under funded that they had no meaningful way to carry out their mandate. *See*, United States Election Assistance Commission, Fiscal Year 2004 Annual

⁴ Prior to the development of these new HAVA standards two prior iterations of federal voting system standards have been issued by the federal government. The first set of standards was created in 1990 by the Federal Election Commission (FEC.) In 2002, the FEC updated the standards by adopting a second iteration. HAVA transferred the responsibility of developing voting system standards from the FEC to the EAC.

Report, p23 (Standards Board) p 25 (TGDC).⁵

30. The Election Assistance Commission was to have issued new Voting Systems Standards by January 1, 2004, when in fact it did not release even a draft for public comment until June 24, 2005. See, United States Election Assistance Commission, Fiscal Year 2004 Annual Report, p. 23. The EAC said at that time that “EAC proposes that the Guidelines become effective 24 months after final adoption, which is anticipated to take place in October 2005.” Press release: “06/27/05 - EAC Releases Voluntary Voting System Guidelines for Public Comment”.⁶ Final adoption did not actually occur until December 13, 2005, with publication not posted until January 12, 2006.
31. These standards, known as the 2005 Voluntary Voting System Guidelines (2005 VVSG), while voluntary, provide the only nationally recognized testing standards for voting machines. The EAC adopted the voting system guidelines, which significantly increase security requirements for voting systems and expand access, including opportunities to vote privately and independently, for individuals with disabilities. “These guidelines were created to ensure that voting systems will be accurate, reliable, secure and accessible to all voters. The EAC will also certify all voting systems to make certain that they meet these goals. The voluntary guidelines provide a set of specifications and requirements against which voting systems can be tested to determine if the systems provide all of the basic functionality, accessibility and security capabilities required of these systems. In addition, the guidelines establish evaluation criteria for the national certification of voting

⁵ Annual reports available at the EAC website:
<http://www.eac.gov/about/reports/EAC%20Annual%20Report%20FY04.pdf/view?searchterm=annual%20report>

⁶ Available at the EAC website: <http://www.eac.gov/News/press/2005/news-062705>

systems.” Press release: “12/13/05 - EAC Adopts 2005 Voluntary Voting System

Guidelines”⁷ I believe that New York State's reliance on the standard developed by the federal government given the substantial credentials of those involved is well-founded.

32. The EAC did not accredit any independent testing labs to test to the 2005 voting systems standards until March of 2007. Nationwide currently only three labs are accredited to do the testing.⁸
33. Upon information and belief, the source of such belief being conversations with the EAC, no state has certified any voting system to the 2005 VVSG which were adopted by the EAC on December 13, 2005 and became fully effective December 13, 2007.⁹ Thus, in order to grant the relief which the Department of Justice seeks this Court would have to order the Defendants to certify, contract for and take delivery of a voting system which has not been certified to the standards created by the federal agency charged with the responsibility with establishing voting machine testing guidelines.
34. The voters of New York deserve a voting system which is secure, free from electronic and/or mechanical functional flaws and accessible to all voters. The only way to ensure that goal is to require that voting systems applying for use in New York be certified to the standards set forth in the 2005 VVSG and ERMA. The fact that New York now has selected a testing agent, has received bids for new voting systems in conformity with the current 2005 VVSG and is in the process of certifying those systems to that standard must

⁷ Available at the EAC website: <http://www.eac.gov/News/press/2005/news-121305-2>

⁸ See EAC website for list of “EAC Accredited Test Laboratories”:
<http://www.eac.gov/voting%20systems/test-lab-accreditation/eac-accredited-test-laboratories/>

⁹ See Press Release: “12/13/05 - EAC Adopts 2005 Voluntary Voting System Guidelines” Available at the EAC website: <http://www.eac.gov/News/press/2005/news-121305-2>

not be abandoned for the sake of expediency. To short circuit the process developed by the state, such as overriding state purchasing and certifications statutes and regulations, would dismiss what the rest of the country now sees as a responsible response to the mandates of HAVA. The goal is an accessible, reliable and accurate voting system, not one fashioned in haste that replicates the disastrous experience of California, Florida and other states.

35. The State Board recognized the merits of the standards that the EAC had developed and adopted them for New York voting systems on June 6, 2006. Many computer experts, including David Dill, Professor of Computer Science at Stanford University; Aviel Rubin, Professor of Computer Science at Johns Hopkins University, and Doug Jones, Associate Professor at the University of Iowa Department of Computer Science have all commented on the need for more stringent testing of voting machines to ensure their security. Without the safeguards contained in the 2005 VVSG, New York runs the risk of developing the same voting machine problems experienced in the states previously cited. These standards are the minimum that must be followed.
36. In September of 2007, NIST and the EAC proposed yet another set of new standards which are described as “significantly different” from the 2005 VVSG.¹⁰ These voting systems standards that will not be finalized until 2009. The federal government estimates that voting equipment to meet those new standards will not be available until 2012. The term “significantly different” means more stringent requirements, particularly in the area of security. These extensive tests are necessary to ensure the integrity of the machine and

¹⁰See EAC website for a copy of the proposed 2007 VVSG, currently known as the “TGDC Recommended Guidelines”: <http://www.eac.gov/voting%20systems/voluntary-voting-guidelines>

instill voter confidence. While New York is not demanding time to test to these new enhanced testing standards, the Federal government's continued upgrading of voting system standards further complicates our efforts to ensure secure and accurate voting machines. It raises the issue as to why New York is being asked to buy new machines under standards that will soon be outdated. However, in an effort to move New York into compliance with HAVA the State Board is moving to certify systems to the 2005 standards believing they are the minimal standards the voting systems must meet to ensure properly functioning machines.

The New York State Voting System Certification Process

37. All new voting equipment, whether part of an interim solution or final implementation plan, will be fully tested at the direction of the State Board to both the federal Election Assistance Commission's 2005 Voluntary Voting System Guidelines and to requirements of our own state law. All testing will be conducted in a transparent process. This agency has consulted with numerous groups throughout this process including activists, community groups, disability groups, legislators, and our county board of elections in developing our plan to introduce new voting systems in New York. The State Board will continue this process as it moves forward.
38. The certification of voting systems in New York State consists of three main parts:
 - i. Security. The machines, and the software that runs the machines, must be tested to ensure that the software and the operating systems are secure from external hacking and that the source code does not contain any malicious programming that could be triggered at a later time.
 - ii. Physical Functioning of the Machine: Will it Work in the Intended Environment.

Here, the machines are tested for resistance to moisture, dust and movement that occurs in the normal use and transportation of the machines.

iii. **Functionality.** The machines are tested to ascertain if they will record and count votes accurately. This involves repeatedly placing votes on the machine in a prescribed pattern to ensure that it functions correctly.

39. Charged with the statutory duty to certify voting systems and empowered to engage a testing laboratory to ensure that voting systems selected are state and federal compliant, the State Board set about its task in an orderly fashion. The first task was to engage an independent testing authority and the State Board, working with its statutorily mandated partner, the Office of General Services, contracted with Ciber Testing in January of 2006. Ciber had been previously identified as one of three operating testing authorities by the National Association of State Election Directors (NASED) as able to test voting systems to determine compliance with the Voluntary Voting Systems Guidelines. The function of NASED in this regard was taken over by the EAC when it established the Test Lab Accreditation Program.¹¹ An interim certification program was designed to accredit NASED certified testing authorities to continue voting system testing under an EAC accreditation until such time as the National Voluntary Laboratory Accreditation Program/EAC joint accreditation qualified one or more testing laboratories as Voting System Test Laboratory (VSTL).

Problems develop with Ciber

40. The Congressional mandate to the EAC to “provide for the testing, certification,

¹¹ See EAC website <http://www.eac.gov/voting%20systems/test-lab-accreditation>

decertification, and re-certification of voting system hardware and software by accredited laboratories” is set forth in Section 231 (a)(2) of HAVA, codified at 42 USC 15371(a)(2). Under HAVA, states were given the option of providing for the “testing, certification, decertification, and re-certification of its voting system hardware and software by “laboratories accredited by the Commission” (Section 231(a)(2) of HAVA , codified at 42 USC 15371 (a)(2), emphasis added).

41. The EAC was aware of the shortcomings in Ciber’s performance as an ITA as early as July of 2006 when it conducted an assessment of Ciber which concluded that Ciber was deficient in its performance and needed additional quality control management. The findings were such that another assessment by EAC was scheduled for 120 days later (See EAC Assessment Report of Ciber & Wyle, July 17-22, 2006).¹²
42. It was not until September 15, 2006 that the results of the July Assessment were conveyed to Ciber by letter from Thomas R. Wilkey, the Executive Director of EAC, that letter directed Ciber to implement certain quality control practices and then apply for a new Assessment of its qualifications to continue in the interim certification program.
43. For reasons known only to the EAC, this information was not shared with the State Board which continued to engage Ciber as its ITA, without any word from the EAC that there were serious issues with its performance.
44. On December 6-8, 2006 the EAC conducted another Assessment of Ciber which resulted in a Report dated January 18, 2007.¹³ Again, the findings of that Report were not shared

¹²Available at EAC website: “09/15/06 -- CIBER & Wyle Assessment”:
<http://www.eac.gov/voting%20systems/test-lab-accreditation/interim-accreditation/press-releases-public-meetings/>

¹³ See EAC website for a copy of the January 18, 2007 EAC Letter to Ciber:
<http://www.eac.gov/voting%20systems/test-lab-accreditation/interim-accreditation/pending-applications>

with the State Board which continued to engage Ciber as its ITA, in reliance on the interim EAC certification. It was not until January 4, 2007 that the Ciber infirmity became public through an article in the New York Times, and then only because Ciber had released it to a third party (*See*, January 26, 2007 letter of Thomas R. Wilkey).

45. The Ciber's application for interim certification was denied when the EAC voted to terminate Ciber's application. The rationale which EAC provided for its rejection of Ciber's application for interim certification is telling for another reason germane to the issue before the Court. That rationale is set forth in a June 13, 2007 letter to Ciber from the Chair of the EAC, Donetta Davidson:

"Finally, as you know, the EAC Commissioners voted to close the interim accreditation program under which you are seeking accreditation on February 8, 2007. This interim program served only to temporarily accredit test laboratories to conduct testing to the 2002 VVS. Ultimately, the EAC will cease certifying full voting systems to the 2002 VSS in December of this year, a mere six months from now. Continuing to utilize EAC's limited resources to accredit CIBER solely to a soon to be obsolete standard under a defunct interim accreditation program adds little value to EAC's certification program. This conclusion is made even more poignant when you consider that the EAC now has an established permanent accreditation program to accredit laboratories using NIST/National Voluntary Accreditation Program (NVLAP) as required by the Help America Vote Act."¹⁴

46. Thus, the State Board was left with a testing authority which was unable to meet the interim accreditation requirements and with the knowledge that the 2002 VVS was a "soon to be obsolete standard". The new standard was the 2005 VVSG which the EAC adopted on December 13, 2005 to be effective in December, 2007 (see December 13, 2005 Press Release of the EAC). The 2005 Guidelines significantly increased security

¹⁴ Available at EAC website:
<http://www.eac.gov/voting%20systems/test-lab-accreditation/interim-accreditation/pending-applications>

requirements for voting systems and expanded access, including opportunities to vote privately and independently for individuals with disabilities as is pointed out in the EAC Press Release.

47. The significance of the chronology of events set forth above can not be overstated - the EAC did not adopt a testing methodology in a timely fashion, relying upon the previous certification procedures of NASED until it had developed its own certification procedures in 2007, after the 2006 federal elections. However, it was not until June of 2007 that the EAC chose not to issue an interim certification to Ciber. This left New York without an ITA certified to the 2002 standards let alone one certified to test to the 2005 VVSG.
48. Any voting system adopted by New York must comply with the 2005 VVSG, which is the current standard. The difficulty is however, is that to date, the EAC has not certified any manufacturer's system as compliant with the 2005 VVSG. The EAC's Web Site lists those systems which have applied for certification under the 2005 VVSG but does not list any systems as having met that standard.¹⁵

Systest Selected to Replace Ciber as the State Board's ITA

49. After it was determined that Ciber would not be capable of testing voting systems with the degree of confidence needed because of the failure to meet the EAC certification requirements, the State Board sought to procure a new testing vendor. In August 2007 the New York State Office of the Comptroller (OSC) advised the State Board that the original selection it had made would be rejected. This required the procurement process to begin again. The State Board was able to work from the first attempted procurement to expedite the re-bid. The State Board selected Systest at its meeting on November 7, 2007. The contract has been approved by the Office of the Attorney General and the OSC.

¹⁵See EAC website: <http://www.eac.gov/voting%20systems/voting-system-certification>

There are Challenges to Implementing HAVA

50. Implementation of HAVA in New York also presents significant challenges because of the State's size and demographic diversity. New York's sixty-two counties, which bear the lion's share of work in implementing HAVA's voting systems requirements, include densely populated urban areas, like New York City, and largely rural regions in upstate New York. Selecting appropriate technologies that adequately accommodate disabled voters and meet multi-lingual needs for such diverse geographical areas and populations requires great care. Training poll workers and educating voters around the State requires developing entirely new curricula for new voting systems, training trainers, and ensuring that 60,000 part-time poll workers truly understand how the new voting systems work and know what to do when they do not. There is also the basic task of selecting, contracting for, awaiting the manufacture and delivery of, certifying, and installing thousands of new voting systems throughout the state.¹⁶
51. The goal has been to have new voting machines in place in time for the September, 2008 primary elections, in accordance with the Federal Court order and New York State Law. The schedule to complete the voting machine replacement project is constantly evolving in response to forces beyond the control of the State Board. This includes delays by voting machine vendors in bringing in machines that are ready to be tested, and the development of security testing protocols. The schedule for the counties to select voting machines has been altered more than once in order to allow the counties the opportunity to select a voting machine after certification is fully finished. The State Board Plan for replacement of voting machines was submitted to the Court on August 15, 2006, and

¹⁶ New York presently uses approximately 20,000 voting machines in over 8,400 different polling places.

supplemented on September 7, 2006 with a voting machine ordering date of October 31, 2006.

52. Based upon continued delays by voting machine vendors in having test ready products and delays in establishing security test protocols, the Board has been forced to anticipate that certification will not be complete until early in 2008, and further adjustments may be necessary.
53. One issue the United States raises as an impediment to HAVA compliance is the requirement for all voting system vendors to escrow their source code prior to being certified and available for purchase in New York State. At this time such a concern is premature. This is not related to whether a voting system can meet the standards for operating and is not an impediment to testing. This would only arise, if at all, after the testing process. Based upon the responses to the bids for voting system, to date, no vendor has raised this as an exception to the terms of the procurement. In addition, the State Board is having a consultant examine possible alternatives to the traditional escrow arrangements that also meet the need to preserve the entire voting system in the event of future election challenges.
54. The Court noted that the State Board has not yet certified a list of voting systems to be purchased. The State Board is in the process of preparing to test and certify voting systems from which the list for county purchase will be based upon. The State Board has reiterated its intention to have the Counties order after the certification of new voting systems in accordance with Section 12 of Chapter 181 of the Laws of 2005.

Purchasing Voting Machines by the Counties in New York

55. The New York State Office of General Services (“OGS”) is in the process of establishing

purchase contracts with voting machine manufacturers. As discussed above, the State Board is also in the process of testing voting machines to certify that the voting machines meet all Federal and State regulations.

56. In response to a Request for Proposals for both a full lever replacement system (Lot I) and a disabled accessible ballot marking device (Lot II) put out by the OGS, to date, three responses have been received, from Avante, ES&S and Premier/Diebold. All three have submitted bids on both lots. Those responses will be evaluated and tested for compliance with the voting system standard New York's new ITA, Systest. At the same time as they undergo the state certification process, contracts for their purchase by the various counties in the state will be negotiated by OGS.
57. The county boards are integral to the selection process. Each county decides which machine(s) they wish to purchase and then provides a request to purchase along with a check representing their prorated share of the five percent match to the State. These checks will then be deposited into an interest bearing special revenue fund established by the New York State Office of the State Comptroller ("OSC").
58. If, for some reason, a County does not select a type of voting machine, the Election Law section 7-203(3) authorizes the State Board shall make the choice for the recalcitrant County. However it is the counties themselves which must set up the voting machines and staff the polling places with inspectors knowledgeable in their operation.
59. Because of the essential nature of the county board's role in implementing any new voting system, the State Board intends to move this Court to join all the county boards as parties to this action so that complete relief may be afforded.

New York is Working with the Justice Department

60. In order to meet HAVA's requirement that there be a disabled accessible voting system in every polling place, in agreement with the United States Department of Justice and ordered by the Court, the State Board put in place a strategy to comply with both HAVA and New York State Law by providing a voting system which is accessible to all voters with disabilities. As part of the agreement with the Justice Department, the State implemented a phased plan to comply with HAVA. The first phase was to provide disabled accessible ballot marking devices that were approved by the State Board and used by all counties in the State in the September, 2006 primary election and the November, 2006 general election and the September, 2007 primary election and the November, 2007 general election. The next phase is to complete the replacement of the lever voting machines in time for use as soon as practicable after a replacement system is certified by the State Board.¹⁷

The Need for the County Boards to be Parties for Complete Relief

61. Finally no judicial direction as to the implementation of New York's HAVA obligations should be issued without the presence before the Court of the various county boards of elections, to which fall the burden of administering elections in this state.
62. Although the various counties within New York will be on the front line of HAVA implementation as the owners of the voting systems, the trainers and employers of the

¹⁷ Due to the timing of the United States demands regarding the February 5, 2008 Presidential Primary, just over 90 days after the United State filed the current motion, "At the least, the State should provide for the use of so-called Plan B devices on a much greater scale than was the case for the fall 2006 elections". However this demand ignores the fact that the State Board and OGS are currently engaged in an orderly process for the acquisition and certification of both Plan A and Plan B (Lot 1 & Lot 2) machines at this time, a process which is well on its way but a process which simply can not infuse massive numbers of Plan B/Lot 2 machines throughout the state in the two months left before the Presidential Primary given the contractual, certification and purchasing issues in play. This is to say nothing of training sufficient poll workers in their use.

elections inspectors who will be charged with running the elections on Presidential Primary Day as well as the September Primary and the General Election, they are not parties to this action and subject to the mandate of this Court.

63. The State Board defendants are currently moving by Order to Show Cause for an Order pursuant to FRCP Rule 19 joining all county boards of as party defendants in this action.

Conclusion

64. The wholesale replacement of the lever voting system in New York is a very complicated project. Testing to the standards set by the federal government has proven to be a very challenging enterprise. From testing and certification, through purchase and ultimately deployment there are many steps that must be done. State Board must test and certify voting systems to the federal standards and the additional New York State statutory and regulatory standards. County Boards select a voting system from the list certified by the State Board. Those systems are purchased by the county utilizing a statewide contract. The state statute requires that the State's main purchasing agent, the Office of General Services, attempt to aggregate the choices that the counties make in order to get the best price for the voting system. Ultimately, the systems are delivered. The statute requires that State Board to test the voting systems when the county accepts delivery to make sure that they function properly upon delivery. The election workers must be trained to operate the equipment and the voting public must be educated on the use of the machines.
65. Given the delay in establishing standards and testing and certifying new voting systems, New York State has continued to use a voting system that has been working for a long time. The State Board recognizes the need to augment that system with a system that is accessible to the disabled community.

66. Proceeding in haste to achieve full HAVA compliance, given that neither the EAC nor any state has certified any voting system to the current VVSG, would compromise New York's ability to evaluate and test thousands of new voting systems, to train tens of thousands of poll workers, and to educate millions of New York State voters in the use of these new technologies. It would sap resources from the State and local boards of elections throughout the State that are critical to government's ability to perform its fundamental responsibility to ensure smooth and orderly elections.
67. Therefore, in light of all of the diligent steps that the State Board has taken and is taking to be in compliance with HAVA, it is respectfully requested that the Court reject the Department of Justice's attempt to impose judicial supervision over New York's implementation of HAVA absent some showing in the future that New York is failing to adhere to the workable and reasonable HAVA compliance strategy it developed with the Department of Justice. It is our belief that the State Board should continue to work diligently with the local boards of elections, the Department of Justice, the EAC and other interested parties in meeting that strategy so that HAVA is not implemented in a rushed or haphazard way that would ultimately undermine public confidence in our electoral system.

Dated: December 13, 2007



PETER S. KOSINSKI
Co-Executive Director
New York State Board of Elections

Sworn to before me this 13th day of December, 2007



NOTARY PUBLIC

Comm. Expires: 4/14/2011

TODD VALENTINE
Notary Public, State of New York
County of Albany
No. 02VA5076181
Term Expires April 14, 2011