

Peter Kosinski: Okay. Then I'll start the meeting. I believe all the Commissioners are here. I'd like to welcome everybody to the meeting of the State Board of Elections here on January 28<sup>th</sup>. I'm Peter Kosinski. Joining me are Commissioner's Doug Kellner, Commissioner Tony Casale, and Commissioner Andy Spano. Today really, is a continuation of our last meeting, where we left some unfinished business, and we scheduled a meeting for today to complete that business. So, we have three items of old business that we will undertake today. I'm getting feedback. Is there somebody else?

Douglas Kellner: It's probably from Commissioner Spano.

Peter Kosinski: Let me know when that's resolved, and then we'll go on.

Douglas Kellner: It's resolved, Commissioner Spano muted both the designs. And I would remind Commissioner Spano that he can have the sound on for one or the other but not both, because you'll get feedback.

Peter Kosinski: Okay, we clearly want Commissioner Spano to be heard, so let's make sure he has that opportunity. But we'll go on. If there's any other issues just let me know as we go along. But we'll open up the meeting today then, under old business we have really 3 agenda items; the first one is the Dominion voting system, a modification on it, and there was a resolution that's been submitted to the Board for approval today, and I would ask that staff, I know we discussed a lot of this at the last meeting and I just want, since this is a new meeting, for the public to just be reminded of what we're contemplating today. So, Tom or Brendan maybe you could just speak on the resolution what it entails and then of course, if there's any comments from the Commissioners, we would welcome them as well. So, the first one is Dominion, and I think we should take that up first. It's resolution 21-03 and if one of the staff go ahead.

Tom Connolly: Sure, so the Dominion resolution is for an upgrade to both the image cast precinct and image cast evolution machines. There were some small updates to the firmware for the image cast precinct, it was to improve ballot image processing and for the image cast evolution, it was to update the firmware used by the printer component. As part of the resolution, there are two additional items that we are basically restating based on previous board action. One of them is the additional step in our audit procedures that needs to be followed for any county that owns ICE machines. That is an additional check on the counters about the printing functionality that happens on each machine. And the second item added in was also a restatement of the number of voters per machine. That is the formula that should be used by county boards when deploying machines. In the resolution it states the meetings at which both of those items were first enacted.

Peter Kosinski: Okay. Are there any questions by the Commissioners on this particular item?

Doug Kellner: I move the adoption of the resolution.

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Peter Kosinski: It's been moved; is there a second? I'm not hearing a second. Commissioner Casale is seconding I believe. So, we will then, it's been moved and seconded. All in favor aye.

(Chorus of ayes) Opposed? Hearing none, it's passed unanimously.

Okay the second item is the Express Vote XL and other ES&S items, other components of ES&S items in a single resolution. And if the staff would like to speak to that.

Tom Connolly: Sure thing, thank you. So, with regard to the ESS 6041 submission that was made by ES&S there were a number of different hardware and software components. Obviously, there were public comments that were given at the last meeting, but the resolution is stating that the total submission we are considering certification of the new version of the Election ware software, which is the Election Management System software used by ES&S in three hardware-based updates; one of the DS200 precinct base scanner, one for the DS850 central count scanner and one of the DS450 central count scanner as well. The resolution also states that we are not certifying the Express Vote XL component of the submission for the reasons that are stipulated last meeting, but also in the resolution. And those two, as a quick reminder, are the issues regarding the paper and electronic display of the voter's selections as well as the ability of the system to print alternative languages for the voter. In addition, there is a statement in the resolution that even though the DS200 which is a precinct base scanner is a piece of hardware that's being approved because it did pass the certification testing, that nothing in the resolution should be construed to allow for it to be used currently on a precinct, due to the fact that there is no ballot marking device that is currently certified to work in tandem with it. Since the auto mark which is the former ballot-marking device and currently certified ballot-marking device from ES&S was not submitted as part of this overall submission. I will also note based on some feedback or e-mails that I have seen, there were some people who had some concern about certifying the DS850 because of what they believe to be incapability with the auto mark, but we are not decertifying the existing software that can be used with the 850 and the auto mark, and we are not decertifying the auto mark either. So, the systems can be used, yes it would require a separate EMS to run if a county were to choose to run 850 on the new version of the software, there's no requirement that they do so. They can continue to use the existing version and the auto mark is not going away.

Peter Kosinski: Okay, thank you. Are there any questions for Tom or Brendan on this issue?

Douglas Kellner: I move the resolution.

Peter Kosinski: There's a motion to adopt the resolution is there a second?

Anthony Casale: I'll second.

Peter Kosinski: Commissioner Casale moved and seconded. All in favor aye.

(Chorus of ayes) opposed? I take that as a unanimous vote to adopt that resolution as it was presented to the Commissioners.

So that completes the first two items on the agenda and then last, we have an item to discuss rank choice voting. This is really a continuation I think of not the last meeting, but the meeting back in December where that issue came up and there was a discussion and, of course, there's been a lot of activity since then, and I think it would behoove is to discuss that for a few minutes.

So, I believe yesterday the staff reached out to the City to try to work out a way that we can be helpful to them, in regard to the system that they're using for the counting of votes down there. They have an election going on right now, and I'm aware that the City is conducting that election as a rank choice voting election. And as such, they have been looking at some devices to assist the City in doing the counts of those so that they weren't necessarily left to do them by hand, and we've reached out to see if we can be accommodating to that. That said, I just want to reiterate what I had discussed earlier in December regarding this particular proposal.

I think first of all, it's an important concept or an important principle that we establish that voting system are not used in this state unless they're certified by this Board. So, I was glad really that the City acknowledged that and that they were not prepared to go ahead without our approval of the system that they were going to utilize for this purpose. So, I think that's an important principle and I think it's important that we continue to be the body that certifies voting systems in New York, regardless of what municipality is using them. That said, I had raised in December some concerns about the authorization that the City had to go forward with this particular voting system or this voting practice. I continue to have those concerns. I think that there is a very, I don't know if I'd use it as a strong legal case, but I think, I read over the City's paper that they presented to really, I'll say justify, the acceptance of this particular type of voting in New York City and they relied heavily on the home rule law as authority for the City to go ahead without state approval. I think there's some real serious questions about this matter. I think the cases that they cited I looked at; I didn't feel they were particularly on point, or that they really supported the concept that they were alleging. In fact, I've looked at other cases, I would note the McDonald case which was a case that was brought regarding the New York City Campaign Finance Board and its adoption of that and at that time there was a challenge to that particular system, because there is a state law in this particular aspect as well. And in that case, I'll just note that, I'll just read the language of the court it says: "The local law was preempted by state law where there either is a direct conflict or inconsistency between the two laws." They found in that case, that there was none because the City Campaign Finance Law was more restrictive than the State Law and that it accomplished really a state goal. But in this case, there is a direct conflict, there is an inconsistency with State Law, just one of them being that the City under state law has a runoff election, currently in state law, this particular new way of voting will eliminate that. It will be rank choice voting, so there will never be anybody under 50% at the end of the voting process which will then trigger the runoff process that is outlined in state law. To me that's a direct conflict between state law which says, do a runoff when you're below a certain percentage, and then in New York City law now we're eliminating that, and we're going to go ahead with this rank choice voting. So, I think there is some legal issues here that are arising in the context of this, and I think it incumbent on us to follow state law as a state body and I still have concerns about the legality of this and whether there is authority to go forward. In fact, I'll even note in the report that the City put out on this particular topic, they identify 20 different

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areas in that report where there's inconsistencies between state law and now the New York City Rank Choice Voting Provisions. So, I think within their own document they outline a number of ways that the City law under this new Rank Choice Voting will not really follow the way state law outlines elections to be conducted. So, I think there's lots of issues, but I understand the City is going ahead with this. I think as a State Board we're trying to be helpful, realizing that they have an obligation to their City to go ahead and do their job as well, and I know that not having a device to assist will hamstring their ability to conduct a selection. My feeling is it's our job to try to be helpful to the City Board of Elections to do their job. And I think that if we can be involved in a way that does that, I want to try to do that but that does not mean that I don't continue to have some very serious questions about the legality of this. I think again it opens up the doors. If localities want to adopt new provisions regarding their elections, whether we're just going to sit by and let them do that, even if they're in contradiction really to what State Law provides. I know there's home rule authority that exists out there, but it's limited. The way our government is constructed, the State is the dominant actor. I mean that's true as it relates to state government, as it relates to local government, as well as how it relates to the federal government. That's just the way our country is formulated. So, states are the primary governmental entity. And states give authorities to the localities as they so choose. But all the authority really emanates out of the State. So, when there's this inconsistency its state law that dominates because the state is the basic form of government that this country was founded on. So, when you have a locality adopting laws that are inconsistent, I think that's why the courts articulated that principle that way, that the state is the entity that is predominant in that relationship. So, I think it's important for the state to have its role here and to continue to be the entity that certifies voting systems. I wholeheartedly agree with that, but I think we also have to make sure we're doing it in compliance with state law. So, I wanted to say that. I think we'll try to be helpful to the City, of course, because that's what we try to do is help our local boards. So, I wanted to say that in conjunction with this and if any other Commissioners have any other comments. I'm not hearing any other comments. Oh, I'm sorry, Commissioner Kellner.

Douglas Kellner: So, I'm very pleased that we're finally moving forward to process this procedure for handling the runoffs that New York City has proposed. I very much respect the comments and concerns that Commissioner's Kosinski and Casale have raised over the legal issues. I certainly disagree with them that Article 11 of the State Constitution gives very strong home rule powers to municipalities in this state and the simple fact is that no court has declared the Charter amendment adopted in New York City more than a year ago to be invalid and we certainly have an obligation to defer to the courts on this issue. So, I thank the Commissioners for joining now in good faith attempt to do our job with respect to the certification of voting systems to make sure that the voting systems are effective and accurate, transparent, and verifiable as Article 7 of Election Law requires. So, thank you.

Peter Kosinski: Okay that's good. Are there any other comments by any other Commissioners on this topic? No? I just have one more thing I wanted to mention while we're here. The other day we agreed on a comment or a paper, letter to the editor, whatever we call it that we put out as a Board to support our local boards. I know John and Cheryl worked on this to put out what we thought was our position regarding the importance of our boards, the bipartisan nature of our boards in this state and I know, John, are you there? Are you able to just share briefly at this

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meeting the statement that we put out, so that people are aware that this Board went on record on this topic?

John Conklin: Yes, Commissioner. As you said at the previous meeting the four Commissioners discussed a statement in support of the county boards and the bipartisan operation of the county boards. The following is the statement that you four have agreed to. I was just going to read it very quickly if there's no objection.

Peter Kosinski: That's fine go ahead.

John Conklin: The New York State Constitution has since 1894 required the administration of elections be conducted by bipartisan boards of elections. New York has 57 county boards of elections and the New York City Board of Elections composed of local officials who conduct those elections. There were excellent reasons in 1894 where the voters of the state decided to create bipartisan administration of elections. Those issues still exist today, and we as the four state election commissioners support the continued administration of our elections by bipartisan county boards. The local commissioners and their staff are dedicated public servants and in an election unlike any other in our history, they performed admirably. Candidates, public officials, and especially voters need to have confidence in an accurate, verifiable, uniform, and transparent election process and only a bipartisan structure can guarantee that. The Corona Pandemic had a dramatic impact on election administration 2020. Our county boards of elections made numerous staffing and voter service adjustments in response to health and safety protocols due to the pandemic. County boards rapidly enacted social distancing, office cleaning, and safety protocols. Our county boards were able to conduct our elections and provide a safe environment for their staff and for the voters of the state. In addition, a series of executive orders were issued, and state laws were enacted throughout 2020 to ensure all voters had an opportunity to vote in a safe manner, by absentee, during early voting, or on Election Day. Some of these changes were made close to Election Day affording minimal opportunity to plan before implementation. County boards well versed in adapting to difficult scenarios rapidly made adjustments to make the changes and successfully run the election. Our county boards of elections should be recognized for their herculean efforts in running the 2020 elections during an unprecedented global pandemic.

Peter Kosinski: That's it.

John Conklin: That's it.

Peter Kosinski: Thank you John, I appreciate that. You know I think that's important for us to go on the record like that, I mean similarly to what we'd done earlier with the New York City Board, we do support our local boards. I think it's important that our commissioners be on public record that we do support them and support the continued good work that they do so I appreciate you're putting that together John, and Cheryl. I know both you and Cheryl put that together. So, I appreciate that.

Alright are there any other matters to come before the Board today? I know we have another Board Meeting scheduled for February 10<sup>th</sup> that will be a full board meeting where we will have our normal reports of the different units and other items coming before the Board. So, if there's nothing else to come before the Board today, I would entertain a motion to adjourn until February 10th.

Anthony Casale: So moved.

Peter Kosinski: And seconded. And all in favor?

(Chorus of ayes) I believe that's unanimous. I appreciate that we will see everybody at noon on February 10<sup>th</sup>. Thank you very much.