

>> NEIL KELLEHER: It is a quarter after 12:00.

We are about ready to get the camera rolling here.

Thank you very much.

I think we will start by asking everyone at the activity table up here to identify themselves beginning with my co-chair.

>> DOUGLAS KELLNER: Douglas Kellner.

>> EVELYN AQUILLA: Evelyn AQUILLA.

>> HELENA MOSES DONOHUE: Commissioner.

>> PETER KOSINSKI: Co-executive director.

>> TODD VALENTINE: Todd Valentine.

>> ALLISON CARR: Allison Carr.

>> Paul Collins.

>> Lee Daghlian.

>> Bob Brehm.

>> Phil M c Cann.

>> Liz Hogan.

>> NEIL KELLEHER: We will start over on this side.

>> Audience Members stating thier names--

>> NEIL KELLEHER: Thank you very much.

And that being accomplished.

We will begin with the agenda for today.

The minutes of September 20.

>> Mr. Chair, I move adoption of all three minutes, September 20, October 16 and November 7.

>> NEIL KELLEHER: There being no objection, all those in favor.

[ Chorus of ayes ]

>> NEIL KELLEHER: Opposed nay?

They are adopted.

### **Unit updates?**

#### **Legal, Todd Valentine.**

>> TODD VALENTINE: We continue with our lawsuit with the Justice Department regarding the compliance.

Our response to their motion is due on December 14 and the appearance before the court was postponed -- or adjourned until December 20 at our request.

And the court granted that.

And we are putting our response together, working with the Attorney General's Office, basically, we have divided up the work that the attorney general is drafting,

the memo of law and obviously our responsibility really has always been a factual issue Paul and I are working together to put an affidavit -- laying out essentially our defense of what we've done so far.

It is really nothing new.

Also no strategy to discuss here.

But we're defending how we came up with the tests, the testing regime that we're using and putting in one package that we have not done before is how we have gotten to this point.

Related to that, the counties met separately with the Department of Justice.

They had their own meeting in the New York City, the leadership of the county organization as well as some in New York City, including some members from the city board.

The counties are planning another -- counties are planning their own statewide meeting.

Again, that meeting was without us.

We were not invited to the meeting.

They wanted to meet separately and make their own -- have their own discussions.

The counties have planned their own meeting to discuss how they can respond to the Justice Department and what they're planning on putting together.

That's scheduled for outside Syracuse on December 7.

>> Excuse me, Todd.

were they asked to respond?

Or are they responding on their own?

>> TODD VALENTINE: They're responding on their own.

>> That's all.

I just didn't know.

>> TODD VALENTINE: Related to that, I think it is obvious -- I have had discussions with Paul on this.

We are seeing the need -- I think we're seeing the need at this point that the counties need to be joined in that and, you know, as Peter's position as one defendant,

we're prepared -- he is prepared to make -- I am on his behalf to have them join.

Related to that, Nassau County is moving -- their motion to intervene was denied by the district court at that time.

But the court left open the door that the county should be brought in on the future and he said that on numerous occasions.

I think we've reached that point where enforcement of any judgment that comes

from the federal court will necessarily require the counties' action.

They will have to do something.

And it is our role at the state level is limited to the a certain extent without some intervention or some court -- if the counties refuse to do something.

Having them part of that, now that Nassau has moved to reverse that denial of intervention, we got a summary motion this week to do that.

So I think at this point, we'd probably consider changing our position that, yeah, we should consent to that motion.

They should come on in.

We need you.

Not just Nassau, but I think Peter's point is that's one.

We need them all.

As I said, I have talked with Paul on this.

And I don't know how far -- we should talk to Stanley.

But that's where we're at.

>> This has to be filed, the affidavit, on the 14 th of dose?

>> TODD VALENTINE: 14 th of December.

I did an original draft.

Paul made some comments to that.

I am doing back and forth revisions.

That's why we asked for that time because knowing our process, it takes a little bit longer.

We've shared some working drafts with the AG's office so they can get a sense of where we're at.

We didn't have our conference with the Justice Department last week because of the holiday but we did on the phone again today if any questions arise and keep the lines of communication open as far as our process is concerned as

far as contracting the ITA, the Independent Testing Authority, and the status for machines that are showing up for certification.

There is no real settlement discussion.

>> In the informational section, is it appropriate to inform them of the failure of the federal agency, the EAC, in what they did to us in holding back our certification?

>> TODD VALENTINE: Oh, yeah.

Paul wrote an excellent section on that.

That's part of the story.

>> That should be included.

At least 14 months they didn't tell us they had taken certification from Cyber

and then finding out in a newspaper or something and then practically denying after we went to them and said?

True and they danced us around a lot three times.

Not sharing any of the information of why they were no longer a corporation we could deal with.

That was eight, nine months into the process.

We figure what we have go through issuing new contracts, finding new firms, that's a long time.

We would have certified machines for now if it wasn't for the failure of the federal agency in its working with us.

I think the judge should know that very clearly.

>> TODD VALENTINE: Again, that's not new.

We've stated that before in previous communications.

Again, this is our opportunity to put this all into one package.

None of this stuff that we've done has been -- it has all been done out in the public.

Nothing is hidden here.

It has never really all been brought together.

>> In the papers they served on us, they never mentioned the failure of the EAC and I think they could have said.

>> TODD VALENTINE: That's not their issue.

That's our obligation to put that forward.

>> They were saying we were so negligent and we didn't do this and we had a smoke screen or whatever they were saying, they should have at least owned up to where the federal government failed New York State.

>> TODD VALENTINE: Well -- I don't know if Paul has anything to add.

>> The only thing I would add is the first time I read these papers it became crystal clear to me that the counties have to be parties to this litigation for two reasons.

One, they should have a full and fair opportunity to articulate their position before the court as a party.

And, two, so that the state board and Stanley and Peter are not caught between a federal court order and 58 recalcitrant counties in the New York State Board of Elections.

We only have oversight.

>> I think a lot of people think we run the elections in this state and we don't.

We merely have oversight.

It is the counties who run the elections.

That's why I agree that we all have to be part and parcel to this.

>> Todd, we were served with a summons at our last meeting.

>> TODD VALENTINE: Oh, yeah.

>> Has that been dealt with?

>> TODD VALENTINE: We've reached out to -- based upon the nature of the lawsuit, it's really -- it is the AG that's coordinating the response for us.

We will work with them to provide them the information.

But given the nature of the lawsuit is that they've sued not only us but every other state in the country, there is actually a network developing -

the other states have different defenses than us because the case was brought in New York State.

We may actually be the only party that was properly served because of the jurisdictional nature.

But we've been working with --

>> Just our luck, Todd.

Just our luck.

[ laughter ]

>> TODD VALENTINE: That's the way it works sometimes.

We've been working with Bruce Boven is our contact in the Attorney General's Office to put -

basically, he is going to do the response for us because it is really the nature of the suit just lends itself to that.

>> Everything is on time so far?

>> TODD VALENTINE: So far, yeah.

They had asked for an extension of time to respond because of the nature and the courts granted that.

>> Has there been any other new litigation or developments of old litigation in the last three weeks?

>> TODD VALENTINE: No, not that I can think of.

Any other questions?

Okay.

>> NEIL KELLEHER: Anything else, Todd?

>> TODD VALENTINE: No.

>> NEIL KELLEHER: Any other questions?

Thank you very much, Todd.

**We will move on to election operations,**  
Anna is not with us this morning so Ashley.

>> Thank you, Commissioners.

I will start out with the ITA.

The contract to hire Sistest went to Sistest for their signature.

They signed off on it.

It came back here.

Peter and Stanley then signed the contract.

The next step is that it went back to OGS then forwarded it on Monday to the Attorney General's Office for signature and it will go to the state controller's office for approval.

We've always been shooting towards the goal of December 7<sup>th</sup> as being the date that the contract would officially be in place so that Sistest can begin work.

At the same time, we have the voting system RFP which we now have bids on.

This is an open continuous recruitment bid so the first date for a vendor to submit a bid on either lot 1, the full replacement machines, or lot 2, the ballot marking devices, or both lots, was November 23<sup>rd</sup>, this past Friday.

On November 23<sup>rd</sup>, three bids did come in.

They were from ES and S, Avante and premiere which was formally known as Dbolt.

Now, I'm not sure yet what the bids are for, if they are for lot 1 systems, lot A, the ballot marking devices or if they are for both lots.

I can tell you that back in October when those three companies submitted intents to bid, they did say at that time that they would be bidding on both lots.

So there is an excellent chance that these bids contain full replacement machines as well as ballot marking ballot marking devices.

Now, the proposals haven't come here yet because OGS doesn't want to give us proposals until they have completed confidentiality statements from everyone who might view these.

That just came up this week after the bids came in on Friday.

Terry has confidentiality statements with her for your signatures, so you can sign them afterwards.

Once we get the bid proposals here, hopefully this afternoon, we will be able to tell what machines they submitted bids on.

They may be ballot marking devices that we've already seen in the past.

They might be new machines.

But I can tell you that our goal is to have the ballot marking devices that we receive bids on here and set up for you for the next board meeting date so you can see the machines and figure out if -

how the machines present a ballot and how they print a ballot is what the State Board of Elections is looking for before these vendors actually go through the process of the certification testing,

certification for limited purposes as ballot marking device.

Other than that, on the voting machine system RFP, the next step is to -- is for OGS to negotiate with the vendors the contract.

The actual contracts that they will be signing, we anticipate that the vendors will have some issues with contract language since some of the terms can be burdensome.

And so negotiation sessions between the vendors and OGS have been set up for the week of the 11 th through the 18 th for the three vendors who have submitted bids.

OGS requested, as you know, that members of the State Board of Elections be present for those negotiation sessions and we will be there.

So that's all that I really have to report other than that next week is a filing period for the presidential primary.

We're preparing for that.

Do you have any questions for me?

>> NEIL KELLEHER: Any questions or comments?

>> Ashley: Thank you, Commissioners.

>> NEIL KELLEHER: Thank you very much.

**We will move on to NVRA/PIO, Mr. Lee Daghlian.**

>> LEE DAGHLIAN: Thank you, Commissioner.

Just a couple of new things that I will mention here.

We have scheduled the first meeting with SOE clarity with the vendor for the training program in Albany here on December 10,

that meeting will consist of SOE personnel plus the internal committee that will be in charge of developing this program.

The meeting to establish timelines and guidelines and to see actually what kind of work we can start now, given the fact we don't have certified machines.

There is plenty more to do in a co-worker training program than actually the machines.

So from that meeting, we hope to have a schedule drawn as to when actual work will start and to also establish an advisory committee of county personnel and outside interested parties to assist us in developing that.

Secondly, the arrangement we have with NYSLK for receiving complaints about accessibility problems at polling sites, we've received a first batch of complaints and they arose from the election.

In November, there was approximately 75 complaints that were sent to us.

Three of which seem to be in New York City.

What we're doing at this point matching these complaints up with our surveys and applications that we have on file to see if, in fact, these were mentioned prior to the complaints being filed.

And in any event, following up with those counties to see if, in fact, they can be fixed quickly or whether they have to have this remedial action which they will be reimbursed for.

That's an ongoing program right now.

I'm assuming we will get some more these down the line from other independent living centers around the state.

Greg is in charge of that program and we are overlooking that.

Also, on that issue, the NYSILC has several meetings and committees that meet on a regular basis and we are in touch with them and they are in touch with us regarding those meetings.

And we have attended one already concerning accessibility issues, and there will be another one soon about machine accessibility that -- I know Anna is not here to respond to this.

But I believe somebody from her shop will be attending that meeting rather than ours because it is having to do with voting machines.

Other than that, just our normal business that we're carrying on and contending with.

Thank you.

>> NEIL KELLEHER: Thank you, Lee.

>> Lee, thank you very much for the report on following up with the access -- accessibility at poll sites.

I'm pleased to see that's moving along and that you're following through on that.

>> LEE DAGHLIAN: Thank you.

>> DOUGLAS KELLNER: I noticed some email traffic in the last week or two mentioning registration audits that I think it is my understanding that your group is preparing to do.

>> LEE DAGHLIAN: Yes.

>> DOUGLAS KELLNER: Could you explain for a minute or two what you're doing on that and how far along is it and what we expect to happen?

>> LEE DAGHLIAN: Well, I've got to tell you that I'm not hands-on on that particular project but Deidra is.

Part of a committee with George and other personnel having to do with the database and that entire system to develop a program to do those audits that serve the purpose of what we want to find out is the system is totally working, vis-a-vis the counties.

Right now, I think, if I'm not mistaken in Washington, D.C. -- I forget who is putting this conference on, but having to do with that situation right now in D.C. and Deidra and George and,

I think, Elizabeth are at this conference now to learn some more about what other states are doing.

That project, again, as I said, is an ongoing one.

I think now more steam has been injected into it than there has been in the past.

>> DOUGLAS KELLNER: Again.

Deidra, thank you for Deidra's work on moving forward on that.

I read Deidra's memo and I thought it is headed in the right direction and I think it is an important function of the agency to make sure that we are



checking to make sure that the registration database is accurate,

that it is being maintained properly and most significantly that we check back and make sure that people are not mistakenly purged from the system or that -

where an identification required flag is put on a voter's registration that it be there for a good reason and not because of typographical or clerical errors and that we need to be checking on that.

So I'm very pleased you're doing that.

Thank you.

>> Neil, may I ask a question?

>> NEIL KELLEHER: Sure.

>> I was pleased with Deidra's email, too, and it sounds like it is good work and you are doing good work, Lee.

Lee, on the accessibility complaints, you said there were 75.

Is that larger than the year before?

Is that a bigger number, do you remember?

>> LEE DAGHLIAN: Well, I can't gauge that at all, Commissioner.

I don't think we kept track of that sort of thing in this manner in the last election cycle.

>> Okay.

I think 75 is a healthy number, you know.

>> LEE DAGHLIAN: We used to get a few here but they are mostly anecdotal comments by email.

This is the first time this sort of formal gathering of complaints.

So I don't know how to put this in perspective.

>> I think it is good.

I think for a start, if this is the first year -- I thought the same thing.

This must be the first time we really did it.

But I wasn't sure so that's why I asked.

But I think that shows a good start and that your office is very open to working with people and I congratulate you for that because we have to really keep track of that.

>> LEE DAGHLIAN: Thank you.

NYSILC as I mentioned before is on the forefront of this with us.

It is a lot of their work that produces the information that we get.

I think if we continue to work together like this, we can solve a lot of problems.

>> For a small office that we are, I am surprised by the quality of the work that we get from so many of our people, Peter.

I think that we have an outstanding staff on many levels and they never get a pat on the back.

I don't know.

>> They just did.

>> I just gave it to them.

And I want to.

Thank you.

>> NEIL KELLEHER: Thank you.

>> Just like to get back a minute to the issue of the database and follow up on that for a minute because

I think what we're trying to do here is to do the database to give us information about what is going on out there in the counties and, you know,

we have had some discussions about what the database can do for us and I certainly think one of the uses we can make of the database is to give us reports about how counties are handling information that they receive,

for example, from agencies regarding voter registration.

And I think it is important for us to keep assessing that to make sure the counties are properly handling these voter registration forms.

For example, we get a report right now on purging and that was statutorily mandated.

But I think there's other issues going on out there.

For example, when a voter registration form is sent in to be matched and the DMV office matches and sends back a report,

I think it is important for us to know what the counties have done with those so that we know there's some uniformity at the very least out there of how the counties are handling the information they're getting.

I believe right now there's six points of matching that go on.

I guess I am interested and we've talked about trying to get a report that if there's full match or a partial match,

what the county's doing with that particular information and how the counties are handling that so that we know that each county is handling the same information the same way so that we don't find that in one county, you know,

the same information is being treated differently than another county.

I think the database can give us a lot of this information now so that we can ensure uniformity out there.

If we see issues in counties, we can identify them here and then we can reach out to those counties and try to, you know, work with them to make sure they are doing the right thing.

I think there is a lot of uses of this database that aren't fully realized yet.

But I think we are attempting to make sure the database is being used to that full extent.

>> NEIL KELLEHER: Thank you, Peter.

**That being said, we will now move on to campaign finance.**

Elizabeth Hogan.

>> ELIZABETH HOGAN: Thanks, Commissioner.

The number of projects that are ongoing in campaign finance that I have enumerated over the past meetings continue.

There's a continuous process involved in getting to different stages of these projects.

We're moving along with them.

The EBIS project is the electronic filing.

We've gotten to the point -- I talked to OGS about what is necessary as the next step to getting a contract in place for that and, basically, this is an industry for the disabled project.

And that industry for the disabled has to directly conduct some business with OGS in order to get this contract in place.

So I think we're close on that.

The administrative complaint procedure, we got the -- I think -- which are pretty much the final exhibits from NYSTAC in the process and actually getting the hearing process underway and we are continuing with the writing of the procedure --

the internal procedure for going forward with that to the next stage.

We're waiting for a draft contract from OGS on the process server RFP.

I think that's pretty close to them sending it.

I think Bill had talked to Warren quite recently and it was close.

We should see that shortly.

The '06 Senate and assembly overcontribution project is continuing.

We are a bit -- we are a bit behind in the timetable that we set up but we are still fairly close.

That's an ongoing project.

What we do with that is we have to take three people who are on the phones, three of the call center people to work on the project.

So they have to divide their time and try to make as much time available for them to work on the project as possible but they're off the phones when they do it so it is a balancing act.

Right now the supervisors in that unit are reviewing that work product, so that's moving along quite well.

In terms of the -- getting an initial print out for the '06 corporate, that's been done.

Right now it is being worked on in the initial stages of comparing it to the department state web site for incorporation issues to check on the status.

That's ongoing.

We are nearing -- I think we are pretty close to 9, 500 filers now in the unit.

The daily work process is quite significant in terms of getting that number of filers serviced by the call center and Bill and I both spend a lot of time every day in assisting and meeting with and answering questions for the program aids who deal with those call center issues.

It is a very busy kind of work and it takes a lot of meeting with them and being available to deal with the issues that arise that are unexpected day-to-day.

So we spend a lot of time doing that.

We have one new employee in the unit.

One of the auditors that you approved the position for has been hired and started.

Another has been hired and I believe is scheduled to start next Thursday.

One of the attorneys that you approved the position for has been hired and I think the second will -- the first has not started yet but I think it should be within the next couple of weeks.

I think the other attorney will be hired within the next couple of weeks and should start by the end of the year also.

So that has moved along quite well.

In your board packet was an unit plan that was put there to explain to you what the unit looks like in terms of hiring additional people in that packet.

If you have any questions at this point, I don't know when you might want to discuss that, but certainly we're available for that.

And I think that's about it at this point.

>> Do we need to vote on that proposal?

>> It needs approval by the Commissioners, yes.

>> NEIL KELLEHER: All in favor say aye.

[ Chorus of ayes ]

>> NEIL KELLEHER: Opposed say nay.

Adopted.

>> Thank you.

>> **NEIL KELLEHER:** Now a report by George Stanton who is not with us.

>> I think George should get the credit.

George does say he is happy to point out -- I will just read the pertinent information.

It was \$13,226,000 was the final cost for the database which is approximately \$2 million less than what they had previously projected.

So George, I know, does take some pride in that so, Commissioner, that's well-noted.

But I would give the credit to George.

>> Whenever poor George came before us with these numbers, he always said it will cost so much, it was frightening.

And he stuck to his guns and thank goodness it was under budget.

That's wonderful.

>> And there is one item for --

>> The last meeting you approved part of the enhancement money that we received the invoice from NTS, the required enhancements that we have wided for the public polling site lookup, the ability to recall voters that were purged in error and the DMV batch reprocessing.

Those three items from NTS collectively would cost \$33,495.

You approved 19,500 at the last board meeting so we need you to approve the additional cost by lumping all of the enhancements together in one group.

There is at least a savings to us of \$7,000 because of the deployment in one group as opposed to three separate deployments.

So we at least get some cost savings there.

It is spending a lot of motion so we need a vote.

>> NEIL KELLEHER: Any other comments?

If not --

>> Bob went through it so quickly, the three things, one is public polling site lookup which will allow the public on the web site then to get their poll site.

The second is for us to allow the system to put voters back into the system if they had been purged in error.

And the third is to allow us better auditing of -- for reprocessing of unverified voters.

And those are worthwhile functions.

>> There have been some timeout issues.

In order to verify a SSN number, we go through the DMV connection to the SSN and there have been some time-out issues on those.

This third item allows a rebatching in order to catch up when one of those systems times out to make sure we capture all those bits of data so the county can check those I.D.es faster.

A 33,400 --

>> You have already approved half of it.

It is another 19,500.

>> Yes, okay.

>> Need a motion.

>> So moved.

>> So moved.

>> NEIL KELLEHER: I have a motion.

All in favor say aye.

[ Chorus of ayes ]

>> NEIL KELLEHER: Opposed, nay.

It is approved.

We will move along.

### **Old business.**

>> The open source.

So I just want to indicate to my fellow Commissioners again that I think that -- I'm still asking for your consideration of this.

After a discussion with Peter this morning, I thought that it might be worthwhile to just break down some of the points here, what we're trying to accomplish here.

There are really two separate issues with open source software.

One is the general policy issue.

And the second is, well, how does it actually fit in with acquiring a new voting system in New York?

And there are very different answers to each of those questions.

First is the general policy issue.

If we start with the proposition that elections should be as transparent as possible, so that the public candidates in particular but everyone is able to observe as much as possible the functions of the voting system.

It seems to me a pretty clear proposition that the software that actually runs the computers that operate voting equipment should be as transparent as possible.

And open source software is clearly more transparent than proprietary software because it is easier -- I won't say it is easy because --

but it is certainly easier for people with computer expertise to look at what's going on in the system if it is open source rather than if it's proprietary.

So as a general policy if we had a choice between the system that worked in an open source model and system that was proprietary and everything else were equal,

in other words, the systems functioned equally well and were equally sophisticated, it seems to me the fact that it is open source would tip the balance, that you would go with the system that was more transparent.

So from a policy point of view, it is a good thing to promote and encourage open source software where it's feasible.

Point of view I want to stress I am pushing it where it is feasible.

I am not saying we should only use open source software because that's impractical given the current state of computer science for voting systems.

But to the extent that -- in my view it is impractical and I am thinking some of the open source advocates who were listening to me now observing our broadcast are thinking, oh, why did he say that?

We think it's feasible.

I think that there are some practical limitations to using -- that if we passed a rule today saying we would only use open source software that we would have a problem.

To the extent that it's feasible, I think that it's worth promoting.

That's a policy issue.

One of the glitches in promoting open source software is that the person who seeks to use it in their system would have to pay the cost of testing for certification even though anybody else would then be able to use that same software in their own applications.

That is unfair and in effect discriminates against open source software, when in the end if you use open source rather than proprietary source,

the public benefits because the software can be reused as well as the benefits of transparency and the ease of examination for others who want to look at the source code.

So what I am suggesting by this resolution is a system by which we would remedy that glitch by offering to use the public funds for the cost of certification testing of the open source software, just as we have now agreed to use public funds for the cost of preparing the master test plans

that will be used for our certification process rather than having the first vendor going through certification pay for the cost of the master test plan.

So all this does is sets a method for a policy and defines the parameters for using this policy where in which cases we would even consider picking up the cost of open source software testing.

I want to emphasize that the resolution does not commit us to approve any particular application.

It just sets out guidelines so that we would have a policy and it also makes it clear who should not bother to apply for this particular fee waiver.

And you just can't come in and say "gee, I put together a couple of codes" -- "-- a couple lines of code and I want you to test it for me."

No, it has to be part of the overall application for the testing of the new voting system.

That's the policy and I think that this resolution promotes a policy that we should be endorsing.

When would we actually use this policy?

I want to stress there is no pending application right now where a vendor has come in and says I have an open source solution.

We have one vendor Open Source Solutions, I guess, is the name of it, who filled out an application form but never submitted the rest of the paperwork for the application.

And as far as I know at this point, they don't have a complete voting system ready that they can submit for certification.

So I don't think that -- this is not aimed at any particular vendor or

particular proposal right now because I'm not aware of any that would actually fit the parameters of this resolution.

Instead, I am looking down the road, and I see two perspective ways that this would be used.

The first and most likely is that for the next generation of voting equipment, the U.S. Election Assistance Commission has set in process significant revisions to the existing voluntary voting system guidelines.

It will be at least a year before the EAC actually pins down the final text of those revisions and it will be years after that before there are vendors who will actually be able to tool up and produce equipment that meets those guidelines.

well, vendors who are looking to meet those new guidelines that call for software independence will at least be able to see New York's policy that - even if it is only as modest as this is, promotes open source software over proprietary software.

The second thing is that there are advocacy groups out there who are talking about other alternatives to the existing proposals for this cycle.

I have not yet been convinced that any of them are practical, but it is feasible that this resolution could also become useful if any of those models were followed.

So, again, I urge the adoption of the resolution.

>> May I speak in favor of the resolution?

>> NEIL KELLEHER: Go ahead.

>> Sorry.

I come from a point of being concerned about it to supportive of it.

And part of my reason is that the proprietary software is almost -- it is a take it or leave it policy.

We are the big corporations and you do it our way or you don't do it at all.

That's where I feel this frees us up -- not immediately, but it frees us up from companies saying to us -- I don't want to mention their names, but there are very few of them saying "listen, we don't take our source codes and do what New York State does.

New York State does what we say, we're the big corporations, you do it our way ."

And I think they need a little competition.

It will be a long time before open source people will be able to give them much competition.

But I think we should open that little crack in the door so we don't have these big corporations, just a few of them, less than one hand, who dominate the source codes in the voting machines.

They dominate it and they don't want to give an inch.

They just say you will do it our way, amend your laws, turn around, do it our way.

Our way or the highway.



And I think this gives us -- showing that we got a little spunk to stand up to them a little bit and say "there are other people out there trying to do this and we will give them a hand up in helping to do it."

That's why I'm in -- I am not a big electronics genius.

I don't know all of those things.

But I feel this is a good resolution and I urge you to support it -- support Doug's resolution.

>> NEIL KELLEHER: Thank you.

My concern is can I assume that all the people in-house here are satisfied that this document is something that we're ready to go forward with?

Or is it possible any of you have any questions?

>> I have a question.

What's the rush?

If it is a future -- a thing of the future, wouldn't we be better to take our time and see how this begins to unfold before we change our fee structure for testing.

I agree with you that if this is going to be available to everyone, it is certainly beneficial to everyone in this business.

But I really would like to take some time and see what else is involved in it.

It can be written up to satisfy almost anyone towards the future.

>> DOUGLAS KELLNER: I respect that.

I did propose it many months ago now.

Obviously you are entitled to as much time as you want on it.

I think that setting a policy, though, actually puts New York on record as saying that this is something that we believe is worth investigating and reviewing.

The amount of funds are not all that significant, but at least setting out a policy with some parameters and guidelines, I think, is worth doing so that it is out there.

And, of course, we can change it.

I should say first, we're not committed to doing anything.

We're setting policy.

We're setting guidelines, so that every proposal still has to come for Commissioner approval.

Nobody is going to actually get a fee waiver without putting together an application that conforms to these guidelines and then bringing it to us and having the Commissioners actually approve the expenditure of the public funds.

>> I think by taking this position gives an incentive to the open source people and that's what we would like to do.

And also says to those who are their competition who have such closed shops and have said "this is ours," we're not going to go by anything New York has

to say, they say, wait a minute, something is out there, maybe we have to sit down and rethink our policy.

I think it's beneficial to us on both of those ends.

It is a think of the future.

The future may be six months away, not six years.

I think we encouragement, we leave that forward.

By some of the people making the machines might say, let's go to open source.

It is more beneficial for us to put open source codes in our machines.

It is only a little piece of the machine but it is millions of dollars.

>> I understand that.

I think without anything -- I would like to see something before I give a blanket okay on it.

>> DOUGLAS KELLNER: But this isn't a blanket okay.

The question is if you think the policy should be different, you know, then I'm urging you to address that because we can revise it.

But Commissioner, I'm trying to -- I want to be able to be responsive to your questions and your concerns and try to move forward the issue.

And if you're not ready, I understand.

If you feel you need more time --

>> I would like time and I would like to over this again and when I see you the next time I will have something in writing.

>> DOUGLAS KELLNER: I guess the one thing is that it's clear I'm not going away.

I keep bringing it up until we either decide not to do it.

>> NEIL KELLEHER: Peter?

>> PETER KOSINSKI: Commissioner Kellner and I did talk about this before the meeting.

I want the Commissioners to note that staff has been looking into this.

In fact, we handed out to you guys -- I know it is late -- Nice Tech has prepared a report on this and we think it is helpful.

We've had ongoing discussions.

And Miles is here if you have any questions.

Allison found a report from the California's Secretary of State's office which I think is useful because I think it explains the open source concept and how California

I know the narrow issue that you are really wrestling with here is not the validity of the open source code

I don't think anybody really questions that there's some real benefits to open source codes in not only a competitive way but in a transparency way as well.

It is the narrow issue of the state sponsoring it and the state paying for it.

One of the issues I think you should look at and

Nice Tech raises this briefly in their report is the cost factor.

Something you may want to consider is putting a cap on the amount that the state would be willing to expend on this will project.

Nice Tech does have some projected cost that they would anticipate but I don't know if those are accurate.

Since there are public funds being expended here, you may want to consider having a fee cap that you are willing to spend up to a certain level for testing, clearly you're not -

I don't think -- anticipating doing all the testing that will be involved in getting a voting system approved in the state of New York.

It would be limited, as I understand it, to the open source component of the voting system.

So there would be significant additional costs, I believe, to any vendor that was using open source code to get certified in this state.

And we don't know exactly what those are ourselves right now.

We have estimates but we don't know what those are.

I think any estimate that Nice Tech is giving us on the open source code is just that.

I would just suggest that may be an area you want to think about as far as having some control, I'll call it, over the cost issue.

We will continue working on it.

Nice Tech is still involved and we are interested and I think I would even urge you as Commissioners to reach out to Nice Tech once you read their report to talk to them more about this so you do have a good firm understanding, as we're doing as staff members.

But I don't think it should be left in any way to think that there is -- there is a lot of interest in this and I agree with that and I think it is very valid.

I have talked to communities.

They are interested in seeing that a state is interested in them so that they are encouraged to go forward with this.

I think, you know, from my standpoint, this is an area New York is very interested in.

>> Yes.

>> PETER KOSINSKI: We do intend to pursue.

It is just a matter of getting that exact policy down in how to pursue it.

>> I suggest we do this at this next meeting only because I didn't think we had time to read the Nice Tech report.

And I think it is important for us to take the reading.

I didn't know there was a California report in here because the way I opened it, I thought it was a followup.

I think we should read them both.

>> DOUGLAS KELLNER: Is there any reason why we can't make the Nice Tech report public at this point?

>> PETER KOSINSKI: I don't have any reason.

No.

I think that's fine.

I think we should and could.

I'm not sure there won't be further revisions.

This is version 2.

There may be further updates.

I'm certainly comfortable releasing it.

>> DOUGLAS KELLNER: Lee and Bob may want to reorganize.

I realize it is a constant battle against clutter on our web site or how to organize it so people can find things.

I think it would be helpful if we put this up.

>> PETER KOSINSKI: As far as the California piece, Allison, where is that available to people?

Is that on our web site?

>> What I can do is I can get the link and I can provide it --

>> PETER KOSINSKI: We can put the link on the web page as well so people can look at the California report that their Secretary of State put out.

They could get that off our web site.

If we could link to that some way, that would be helpful.

>> DOUGLAS KELLNER: Or we could put the report up.

>> PETER KOSINSKI: That would be okay with me as well.

>> NEIL KELLEHER: The document is a very positive atmosphere.

Okay.

Election Assistance Commissioner voting system reports clearing house.

>> In our packets was a copy of the press release from the U.S. Election Assistance Commission, notifying us of the initiation of their clearinghouse.

Now, I have to say for many years, I've supported the concept of the clearinghouse.

The clearinghouse was written in as a requirement of the Help America Act and it has taken all these years for the EAC to finally come into compliance with that provision of the Help America Vote Act.

What I would like to do -- or my proposal is that New York support the

clearing house by participating on a regular basis.

The rules for the clearinghouse are in order to post a document it has to be an officially sanctioned report and the state or local election official responsible for the report has to request that it be posted.

The clearinghouse is a very important function because what it does is it, in a centralized location, allows election officials to share information they have of our voting systems.

One of the illustrations that I use on this is that in 2003, New York City discovered that it was having a problem with its central scanning equipment.

There was a special election for city council in Brooklyn, a very close election, and they kept scanning the ballots and they could never get the same count twice from the scanners.

And, of course, it was a small enough election with the special election they hand counted the ballots and they knew what the hand count was and nobody was arguing over it because they had the hand count.

But the election lawyers kept saying, you got to explain why the scanners don't count all the ballots and why they never come up with the same count.

So the city board did a formal technical study to find out why these scanners weren't counting all the ballots, and they found out it was a problem in the calibration of the scanners and needed new testing procedures to do.

Great.

I think we accomplished something by having that report.

That's a seven-page report.

The city has had it on its web site.

I go to a conference in Berkeley a year later and I'm talking to the commissioner from Napa County California and he tells me they had a problem in the January 2004 recall election for governor where their Sequoia Pacific scanning equipment was not scanning all the ballots properly.

I said that's exactly what New York City had nine months before.

He was very interested, heard the whole problem and said this is incredible that Sequoia never told us about the problems or the need to have the special calibration test done before every election with the equipment.

If there had been a central clearinghouse, then everybody who used the Sequoia equipment should have known that we had this test.

And so that's why I think the clearinghouse is an essential thing.

Now, some of the tests -- some of the things that we've already done were some of the Nice Tech reports that were prepared of the certification process that have been on our web site for a year or two.

My suggestion would be if the Commissioners agree that our election operations unit would cull through them and the ones that are appropriate, they would send in for posting on the clearinghouse.

That way we would be supporting the clearinghouse and helping to get it started.

So that's my motion and proposal.

>> NEIL KELLEHER: Does this --

>> Is it up and running yet, Doug?

>> DOUGLAS KELLNER: Yes.

Right now it only has the reports that California secretary Debra Bowen posted with respect to her top-to-bottom review of the existing equipment in California.

And as I say, I would submit that 2003 New York City study of the Sequoia scanners for posting.

I would submit some of the Nice Tech cyber reports that were generated about the machine certification testing process that also have wide applicability and that other election officials would be able to use.

>> It is limited to voting systems?

The clearinghouse?

It is limited to voting systems.

>> DOUGLAS KELLNER: Anything that relates to voting systems and operation.

>> NEIL KELLEHER: Motion?

>> DOUGLAS KELLNER: My motion is that we authorize the director of elections operations to send in reports on behalf of the New York State Board of Elections for filing with the clearinghouse.

>> NEIL KELLEHER: All in favor?

[ Chorus of ayes ]

>> NEIL KELLEHER: Opposed?

So ordered.

So moved so through.

**And now we shall move on to anything else in new business, may I ask?**

>> We had Pat Tracy's motion in the packets.

>> NEIL KELLEHER: Sorry about that.

>> Requested the Commissioners to move cyber bills in the million of \$1,753,545 and 75 cents from the federal state operations fund to the new federal funds

from the interest that we were given this year for that purpose for expenses in voting machine certification that are not the vendor's responsibility.

I would like permission to move that funding to there.

>> NEIL KELLEHER: Any questions?

>> No.

It seems practical.

>> NEIL KELLEHER: Thank you very much.

We have a motion on this.

>> So moved.

>> Yes.

>> NEIL KELLEHER: Motion by Mr. Kellner.

All in favor?

[ Chorus of ayes ]

>> NEIL KELLEHER: Opposed nay?

So ordered, so approved.

>> DOUGLAS KELLNER: Mr. Chair, while we have Ms. Tracy here, I warned her this morning that I would ask her a few questions about HAVA funding because I think there are a lot of people interested in where we stand with our HAVA funding.

Pat, is it easier for you if I ask questions or if you just do the report that we discussed this morning?

>> As of right now, we have in state operations 20 million in federal money. We have approximately 1.9 million left.

We've spent -- cyber, Nice Tech, and the software licensing which was pretty hefty.

When we get done with it all, we had some personnel expenses.

And we're -- right now 1.9 million remains of that.

And with the cyber money going back into it, that will raise that back up to a more reasonable --

>> DOUGLAS KELLNER: Let me start with the big picture.

>> Sure.

>> DOUGLAS KELLNER: Which is that we have three sources of HAVA funds.

You want to just quickly review what they are.

>> 16 million from section 1 title -- or title 1, section 101, 16.4 million.

Title 1, section 1, we have 49 million which is restricted to replacement of lever yesh machines.

In title 2, you have received 153,415.

>> NEIL KELLEHER: Million?

>> Yes, million.

Right now we've earned about 27 million in interest.

We learn about 900,000 a month, depending on the interest rate and the number of days in a month.

>> DOUGLAS KELLNER: All together the three programs plus the interest is how much HAVA money?

>> We've received 219 HAVA money.

We received another 27 million in interest so far.

We continue to earn interest.

>> DOUGLAS KELLNER: So of the 247 million in HAVA money including the interest, how much of that has been appropriated and how much of it has been spent?

>> All of it has been appropriated except for the section 102 money because that was in question last year.

So we appropriated the remainder of it.

But it hasn't been spent or allocated.

The state operations money has been spent and allocated except for the 12 million appropriation where we spent 3-point -- or we've allocated and spent up to 3.2 million of the title 1 money for the purpose of plan B machines.

We spent about 1.2 million the first year and another 2 million for expenses incurred for this year which will cover the primary general election and the presidential primary as long as they use the plan B machines.

So hopefully that 2 million will be sufficient to cover that.

At this point, I don't know what they've spent yet this year.

And the 15 million has been -- of interest they have allocated has not been touched.

We will move the 1.7 million to the 5.

That was for the vendor as non-responsibility.

We have a special revenue of 4 million for the vendor's responsibility.

That's a special revenue account.

That will be for the new ITA testing to be encumbered under.

We have the grants for the health and human services.

We've received one each year from 2003 to 2007.

And those funds have been allocated to the counties and upon their submission of expenses, they are being reimbursed as that happens.

As for the 90 million appropriation for machines, that is not being spent at this time until the machines are approved and ready to go.

The plan B machines didn't meet title 2 requirements, that's why it is out of title 1.

>> DOUGLAS KELLNER: Thank you so much.

I know that is a lot to put together on short notice.

>> It is, absolutely.

>> DOUGLAS KELLNER: But it is very helpful to have that.

When you get a chance, if you can write it up and anybody who wants it can email you or request it.

>> NEIL KELLEHER: I was watching you, Pat, and I convinced myself you had all those numbers written on the palm of your hand.

Very nicely done.



>> DOUGLAS KELLNER: Commissioners, when I met with Pat this morning, I asked her to begin accepting me the monthly -- sending me the monthly budget reports which she kindly said she would do.

And if anybody wants them in their packets --

>> we did years ago get them.

I think we got them monthly at that time and then we discontinued it.

I don't know why.

I guess, because it was repetitious to a degree.

We didn't have a lot of money in those days.

[ laughter ]

>> NEIL KELLEHER: Anything else in the area of --

>> There is one other item under new business.

>> NEIL KELLEHER: I'm sorry.

>> DOUGLAS KELLNER: I asked to just put it on the agenda because I thought that even though there may be consensus among us at the agency, that it was something worth a few minutes of discussion.

I'm willing to present it or if Todd or somebody else wants to just lay out the issue or Paul, whoever.

Or if you want me to do it, I'll do it.

>> The discrepancy between the regulations of the board and the laws enacted by the legislature.

>> NEIL KELLEHER: A little bit louder.

>> I'm sorry, Commissioner.

There is a discrepancy between the regulations of the board which require that various information including whether or not any political contributions be made be disclosed in the course of the process of certifying the voting machines.

The legislature this year in chapter 14 of the laws of 2007, the public employee ethics reform act amended section 73 of the public officers law and they specifically preclude any statewide elected official,

state officer or employee involved in the awarding of state grants or contracts from asking a current or prospective grantee or contract or any officer, director or employee to disclose the party affiliation of such grantee or officer or director,

whether such grantee or contractor or any officer, director, et cetera, has made campaign contributions to any party, elected official or whether such grantee or contractor or any officer,

director cast a vote for or against any elected official, et cetera.

So it would seem that the legislature has precluded in the context of purchases in awarding of state contracts questions such as "what are your political contributions"?

And that statute became effective April 25 of this year.

And that's why when our RFP and all of our materials, application and all that went over to the office of general services, we get an email back saying, hey, you can't ask that question.

Simple enough.

That's it.

>> Do we have to remove that from our regulations?

>> I think there is a theory of law that a state statute trumps an agency regulation.

>> I agree, it does.

>> It is like three of a kind beat two pair.

>> DOUGLAS KELLNER: I think there are two things I would raise on this.

I'm assuming that everyone agrees that the statute does, in fact, override the regulations and that there's no creative way of interpreting this.

That's my view.

But if there were somebody who had a different view, I would like to hear it.

>> We got four lawyers.

[ laughter ]

>> DOUGLAS KELLNER: So if we all have that view, then I think we have no choice but to amend the regulation and, therefore, I would ask that the formal process start.

It shouldn't take that long to draw this up but to put in the amendment because we don't -- I think it is a mistake if we leave regulations on the books that are not enforced, even if they've been -- if they're unenforceable.

we should just take it off so the people aren't misled.

The second question I raise is that I believe that this is really the result of the theory that no good deed goes unpunished.

This was part of the reform legislation that the legislature did early this year and that they never thought that they were -

they never thought about our regulation that required election equipment vendors to disclose their political contributions.

I still think that the regulation was a good idea and that we should, therefore, propose to the legislature an amendment to the law that would have it as a matter of legislative policy that voting machine

equipment vendors either disclose their contributions or something the legislature could do that we had no authority to do, the legislature could simply prohibit a voting machine vendor from making political contributions.

>> Can you do that, though?

Can you say that one set of suppliers of equipment to the state of New York have to answer to a different law than the rest of the corporations who sell us sandwich machines?

Carpets?

I mean, I'm not a lawyer but that seems to me there's something there that is not a level playing field.

I like our regulation.

>> DOUGLAS KELLNER: I think if the legislature decides if somebody wants to sell voting equipment and they decided as a matter of government policy that people who sell voting equipment should not be participants in the political process, that they would have the power to make that decision.

>> We could try.

I have little hope for it, but I would be willing to try if you want.

>> DOUGLAS KELLNER: To me the most important thing is that we amend the regulations now to conform to the statute.

But I would -- if there is a majority of us that support the idea, maybe the second part we should wait until next meeting so we can all think about whether we should propose to the legislature legislation dealing with the issue.

>> I think the problem at hand is we have to rewrite our --

>> That's number one.

Can't get out of it.

>> And worry about the other.

>> Omit it from our regulations.

Is there a formal procedure we have to go there?

>> DOUGLAS KELLNER: Yeah.

>> We will do the formal procedure.

Rewrite it.

>> DOUGLAS KELLNER: I guess all we have to do is say it is repealed, right?

>> We repeal that section of our regulations.

>> I guess the other question that comes up is in the meantime, while the regulation's still on the books that we have this conflict.

>> We have a quarter coming up.

We have been requesting the vendors submit these contributions signed in affidavit format each calendar quarter.

So we have December 31 st deadline for submitting these coming up.

So during this process, what should I be telling the counties?

What should we?

>> What we did we in the last quarter?

>> Excuse me, the vendors.

>> Last quarter was repealed and we still requested.

>> Yes, yes, yes, you're right.

That's correct.

It was brought to our attention now, so I think the responsibility --

>> DOUGLAS KELLNER: My question is.

>> It is on the application itself that you attest at the end of the application on the last page that you have with the

application complied that you've submitted your past political contributions for the last two years and that in the future you will continue to quarterly --

>> What I am thinking is we remove it from the application form while we're amending the reg.

And then when the application goes out, that item is not even on there so the vendor is not put in a position of having to answer or ignore it.

>> If the board were at this meeting to pass a resolution directing staff to do that, we could simply do that.

>> We can do that right away as opposed to waiting for the regulation to be repealed.

>> Correct.

We could advise the vendors they no longer have to supply that information.

>> PETER KOSINSKI: Is the board interested in that?

>> DOUGLAS KELLNER: Here's what I would propose as the motion then.

I will try to dictate a more formal motion.

whereas, the legislature has enacted chapter 14 of the laws of 2007, which include provisions that prohibit any state employees from asking a current or prospective vendor about political contributions.

>> They can submit information, no?

Sorry.

>> DOUGLAS KELLNER: I wish I could push the button and say off the record.

What we need to do is write a resolution or dictate a resolution.

If you want to dictate the resolution, you can.

>> No, I don't.

>> DOUGLAS KELLNER: If you let me dictate my resolution and then when I'm finished, you can make an amendment to it or we can say, no, we need to sit down and write it so that we can look at it.

It is very hard to dictate now.

I ask that it be put on the agenda.

>> I'm sorry.

Go right ahead.

>> NEIL KELLEHER: You were saying?

>> DOUGLAS KELLNER: And whereas it appears that that provision of the

regulations conflicts with the newly enacted chapter 14 of the laws of 2007.

Therefore, be it resolved, that, one, staff is instructed to draft appropriate amendments to the regulations to conform to the new statutory requirement.

And, two, that the agency recognizes that chapter 14 overrides the provisions of regulation 6209.4.

And that pending the formal adoption of the amendment to the regulations, the staff should comply with the statutory provision.

That's my draft.

I welcome any changes.

>> Allison points out correctly that the precise impediment is public officers law 73, subsection 16.

That is the precise impediment.

You may wish to consider incorporating that by reference.

>> DOUGLAS KELLNER: Right.

That's the provision amended by chapter 14 of the laws of 2007.

So wherever I said chapter 14 of the laws of 2007, we'll say the amendments to public officers law section 73, subdivisions 16.

>> If I can just make a suggestion without getting into the precise language, I think we understand -- and if I misunderstand tell me.

We will draft regulations but in the meantime we will change our application to remove that question.

>> We can let our lawyers here draft precise language that will be needed.

>> I don't know if we have to get into that.

>> I think we understand what we're doing and we're all in agreement.

>> That's the important thing.

>> So we're doing Peter's language?

>> DOUGLAS KELLNER: What is it we are going to vote on?

>> PETER KOSINSKI: Your language is fine.

I just want to understand we are both going to draft a new regulation and conform with a new law that was enacted by the legislature and in the meantime we would amend our application to remove the question that is required by our regulation of political contributions.

>> In the past, Doug, we would have handled it that way and then the legal staff would have drawn up the exact language.

That's all.

You're a lawyer so you tend to respond as a lawyer.

>> DOUGLAS KELLNER: Right.

So we're going to vote on my language as amended by Allison.

>> Fine, fine.

>> DOUGLAS KELLNER: Okay.

>> NEIL KELLEHER: Motion from Commissioner Kellner.

All in favor?

[ Chorus of ayes ]

>> NEIL KELLEHER: Opposed, nay?

[No response]

>> NEIL KELLEHER: There you go.

>> DOUGLAS KELLNER: We should talk about our next meeting.

And then we will move for executive session to deal with the enforcement determinations.

>> When do we have to be here, Allison?

>> The results of the general election need to be certified by the 15 th .

>> DOUGLAS KELLNER: Which is a Saturday.

>> Excuse me.

So sometime -- we're shooting --

>> DOUGLAS KELLNER: It is actually a better day for me.

>> A Saturday?

We were shooting --

>> We used to meet south.

Everybody had a hissie fit over that.

I have a seasonal business.

That's how I pay my taxes to the state of New York so we can exist.

But -- the only day that I have a full complement of designer, store people and everything else is on a wednesday which I know is tough for you.

>> I know it is, but I will do it for you.

>> I have to because I don't have any choice.

>> Will we be ready on wednesday?

>> We will be prepared.

>> I would appreciate it.

>> We got to meet before the 15 th .

You have to meet the 12 th then if it is a wednesday.

>> It is the 12 th .

>> DOUGLAS KELLNER: All right.

The 12 th .

AI move that we go into executive session to discuss enforcement preliminary determinations.

>> There is one personnel issue we would like to raise.

>> DOUGLAS KELLNER: And for personnel.

>> NEIL KELLEHER: The motion to go into executive session.

All in favor aye?

[ Chorus of ayes ]

>> NEIL KELLEHER: Opposed nay.

**And we are on our way into executive session .**

End of Executive session

ok

A preliminary determination as CMP 07-133 through CMP 07-147

I move that we lay over CMP 07-133 and that we adopt the report for CMP 07-134 thru 147

Thank you. That's a motion.

I suggest that I make a motion that we approve your motion, Mr. Chairman

All those in favor?

[ Chorus of ayes ]

Opposed? [ no response]

So moved

With respect to those, I make a motion, that we make public the referrals that we just voted on; 134 thru 147.

All those in favor, [ Chorus of ayes ]

Opposed, [ no response ]

Done.

Now CMP 05-34 and that's to open.

All those in favor? [ Chorus of ayes ]

Opposed? [ no response ]

Accomplished with no further business before this meeting, we stand adjourned