

New York's New Plan for Deploying Optical Scanners Is Dependent on Historically Undependable Vendors and Proper Functioning of Their Historically Defective Equipment

June 12, 2009, by Ellen Theisen, VotersUnite.Org

New York has been struggling to comply with federal and state laws that require changes to their voting equipment. The state has encountered many problems with its current vendors – Sequoia/Dominion and Election Systems and Software (ES&S) – and their equipment. Nevertheless, the State Board of Elections' most recent plan is wholly dependent on the performance of those vendors and that equipment.

A little background

The federal Help America Vote Act (HAVA) requires every polling place to offer a method of voting that enables people with disabilities to vote privately and independently. A New York State law passed in 2005 requires the replacement of lever machines by September 2007. The law was amended in August 2007 to remove any specific date for the replacement of levers, because no system could be certified in time to meet the original deadline.

New York State regulations require the new equipment to meet 2005 federal voting system standards, but after three years of rigorous state testing, no voting system has been able to pass its certification tests. The delay has been caused by 1) deficiencies in the test labs contracted to test the equipment, and 2) [deficiencies in the equipment](#) being tested and its documentation produced by the vendors.

New York State initially contracted with Ciber, Inc. to perform certification testing. In December 2006, the state discovered that the U.S. Election Assistance Commission (EAC) -- in charge of accrediting voting system test labs – had determined [Ciber was deficient](#) in their testing procedures and documentation. The state then contracted with Systest Labs, which [lost its accreditation](#) in October 2008, and regained it in March 2009. New York's testing resumed in May 2009 when the vendors submitted their products once more.

But the delay continues because, even though one of the systems – Sequoia/Dominion's ImageCast BMD and scanner – has been under test for several years, the test lab continues to find so many problems in the equipment that the State cannot legally certify it. Testing hasn't yet started on the other system under consideration – the ES&S DS200 scanner.

In 2008, to comply with a federal court order, the state finally put accessible equipment into every polling place. The ballot marking devices (BMDs) provide computerized assistance for people with disabilities to select their choices and then the machines print the choices on a paper ballot. Since no computerized vote-counting machines had been approved by the state, all the BMD-marked ballots were hand counted.

Last year, the state also agreed to the replacement of lever machines for the 2009 elections. Now, since the new equipment is still not certified for use in the state, the New York State Board of Elections (SBOE) has proposed an alternative to the judge.

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The SBOE's proposal

On June 4, 2009, Judge Gary L. Sharpe of the United States District Court, Northern District of New York, [approved the SBOE's proposal](#), which was to:

- 1) Implement a "pilot program" using uncertified optical scanners to tabulate the votes in the 2009 primary and general elections, and
- 2) Delay full deployment of the optical scanners until September 2010.

45 counties have volunteered to participate in the pilot. Of these, 18 will participate countywide, while the others will participate in varying levels as little as one town.

Bo Lipari has written [an excellent commentary](#) on the Board's proposal, pointing out that it isn't really a "pilot program" and offering concrete suggestions for turning it into one.

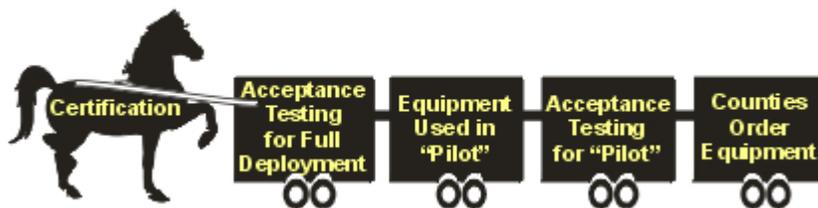
The focus of this article is different: **It points out that the proposal demonstrates a level of dependence on the vendors and confidence in their equipment that runs counter to the state's own experience.**

Of carts and horses

In deploying a new voting system, the **logical and lawful** flow of equipment-related events is this: 1) state certification, 2) purchase by the counties, 3) acceptance testing, 4) use in an election. But the Board's plan places four carts before the certification horse. It requires all the following actions to occur **before the equipment has been certified for use in the state**:

- ◆ The "vast majority" of new machines will be ordered by the counties.
- ◆ Equipment for the "pilot program" will be acceptance tested and accepted.
- ◆ 45 counties will use the equipment in the 2009 primary and general elections.
- ◆ The rest of the equipment for full deployment will be acceptance tested and accepted.

After purchase, use in an election, and acceptance for full deployment – finally then, the equipment will be certified for use in the state if it passes its certification tests.



The only way in which the plan places a horse properly before any cart is this: The vendors will receive purchase orders before they deliver the equipment.



“We’ll give the equipment a fair test and then pass it.”

Despite the ongoing failure of the equipment to meet the requirements of state law, the SBOE’s proposal has no contingency plan in case testing shows that the equipment continues to fail. Reminiscent of the old saying, “We’ll give him a fair trial and then hang him,” the SBOE’s plan takes this position:

“We’ll give the equipment a fair certification test and then certify it.”

The SBOE plans to complete certification testing for both vendors’ scanners by mid-December and then certify them both on December 15, 2009. The proposal states:

“SBOE has urgently and repeatedly stressed to all involved that everything and anything that can be done to move this process forward should be undertaken.”

and

“SBOE is committed to full certification and delivery as indicated in this document and the accompanying documents.”

This commitment to certification is highly optimistic, in light of these facts:

- ◆ During the last three years of testing the Sequoia ImageCast scanner, the labs have found hundreds of problems that had to be corrected, and the SBOE has not yet certified it.
- ◆ No testing (none) has been done on the ES&S DS200 scanner.

It is extraordinary optimism to expect that – in less than six months – the Sequoia equipment will pass certification tests that it has been failing for three years and the ES&S equipment will pass certification tests that the State has not yet begun.

One day into the schedule, both vendors are already behind

Even though Sequoia and ES&S both have a history of delivering equipment late, the proposal includes no contingency plan in case the vendors deliver equipment behind schedule.

And, in fact, they are already behind the SBOE’s schedule.

The counties participating in the pilot project need working equipment to begin training for the September primary. Regarding the timeline for the “pilot program”, the proposal says:

“Both vendors [Sequoia and ES&S] assured the State Board that they will finish the provision of “working machines” by May 30, 2009.”

On June 5, 2009, I randomly selected and called five of the counties using the Sequoia ImageCast for a countywide “pilot” and was able to speak to election commissioners in three of them. Steuben County Commissioner Vicky Olin seemed satisfied that her equipment was in working condition. Jefferson County Commissioner Jerry Eaton said that Sequoia had replaced batteries in 10 of their 65 machines and had sent them off to be upgraded; he felt they were on schedule, even though the upgrade required for the machines to be fully functioning was yet to be done. Chautauqua County Commissioner Norman Green told me that Sequoia was coming on Monday (June 8) to replace some batteries; **in Chautauqua County, Sequoia was already more than a week behind schedule.**

On June 5, I also called the Boards of Elections in the two counties using ES&S scanners for a limited “pilot”: Albany and Schenectady. ES&S had not yet delivered sufficient working scanners to either county. Albany County Commissioner Matthew Clyne told me he expected that they would be delivered to the State the following week for acceptance testing. On June 10, Schenectady County Commissioner Brian Quail told me that one of their ES&S scanners was ready for training; the other was not since it had not been prepared to scan New York ballots.

The judge approved the plan on June 4. **On June 5, ES&S was at least two weeks behind schedule.** Given the track record of ES&S in other states, and the track record they have begun establishing in New York, the following statement in the SBOE’s proposal shows extraordinary optimism.

“ES&S has assured the State Board that they can meet the same deadlines as outlined above for Sequoia/Dominion and that we will have all of the scanners that are needed for the pilot counties in possession of those counties by July 15, 2009.”

Once burned, twice shy

At the time of the Judge’s approval, Erie County was not planning to participate in the SBOE’s “pilot program.” (*Update: The county has since decided that 248 of its 625 poll sites will participate.*)

Early in 2009, the county was eager to hold a true pilot. On March 18 they were to hold a small election, just eight villages, with three or fewer candidates on the ballot, and uncontested contests in four of the villages. This was a simple election – ideal for a pilot, rather than a full roll out during this year’s primary and general elections. The county started planning in January and checked with ES&S in early February. ES&S said they would provide the machines, so the county proceeded to set up training sessions, conduct public outreach, hire IT specialists for support and evaluation. They were determined to do this pilot right.

On March 5, less than two weeks before the election, ES&S said they were no longer willing to provide machines for the pilot. (Read the county's [press release](#); or listen to the [county's report here](#) -- time 43:17, or click on "B. VOTE on Erie County Board of Elections request to pilot program the opscan voting.") Fortunately, Erie County had backup plans and was able to conduct the election in spite of ES&S leaving them in the lurch.

Nassau County is not participating in the SBOE's "pilot program."

Last year, Sequoia was under a court order to deliver 450 ImageCast machines to Nassau County by the end of July for use as ballot marking devices in the September primary election. By the first of July, the county had received 240 machines, and 85% were so defective they were unusable.

A [news article by Kim Zetter](#) relates that:

"The problems include printers jamming, broken monitors and wheels, machines that wouldn't boot up, and misaligned printer covers that prevented the covers from closing completely, creating security concerns."

Ironically, the machines were to be used solely as accessible ballot marking devices to print ballots with choices made by voters with disabilities (the tabulation function was not to be used), but it was the printer function that failed in half the machines.

By mid-August (two weeks after the court-ordered deadline) Sequoia had repaired most of Nassau County's machines, though some were still working intermittently and the diagnostic function didn't work properly so it had to be disabled. County Commissioner William Biamonte likened it to driving a car with the dashboard controls disabled.

It's difficult to believe that things will go better using uncertified ES&S and Sequoia equipment in the state-wide "pilot program."

In fact, many citizens don't.

A coalition of election integrity and good government groups have written letters to the SBOE, the U.S. Department of Justice, and the New York State Attorney General urging improvements to the program, such as a reduction in the size of the pilot to no more than 10% of the registered voters in any participating county, contingency plans, and 100% election-night hand counts of every paper ballot tabulated by the uncertified scanners. [One such letter](#) points out the obvious: that **"failure to make meaningful changes to the pilot will raise serious questions about the results of these elections."**

See the proposed timeline on the following page.

“Pilot Program” Timeline

Test machines due to counties. 5/30/09

Test machines not yet working 6/5/09
in 3 of 5 counties contacted

Sequoia upgrades done; 7/15/09
pilot scanners back at counties.
ES&S pilot scanners acceptance tested,
deployed to counties.

Primary Election. 9/15/09

General Election. 11/3/09

Full Deployment Timeline

5/30/09. All machines to be ordered by counties

6/15/09. ES&S acceptance testing begins
for counties outside NYC.

7/30/09. ES&S acceptance testing ends.
All machines deployed outside NYC.

8/10/09. Sequoia acceptance testing begins
for counties outside NYC.

11/30/09. * ES&S machines built,
acceptance tested, and deployed to NYC.

12/15/09. All certification testing is complete.
Machines are certified.

12/23/09. Sequoia acceptance testing ends.

12/31/09. * Sequoia machines built,
acceptance tested, and deployed to NYC.

* If NYC obtains equipment
from indicated vendor.

5/15/09. All machines for full deployment
will be in possession of the counties.