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Written Testimony Against State Provisional Certification of Sequoia WinEDS 4.0 And Associated Voting System

The Sequoia 4.0 is being presented to the Voting Systems Panel for recommendation for provisional certification for use by Pierce Co. in the November general election. The reason given by the state is that this system must be used in order for the county to institute Ranked Choice Voting.

The present status of the Sequoia 4.0 with regards to federal testing by an accredited Voting System Test Lab (VSTL) and certification by the Election Assistance Commission (EAC) is that the VSTL, iBeta Labs, has not even provided a test plan to the Election Assistance Commission for approval. According to Brian Hancock, Director of Voting System Testing & Certification for the EAC, "Testing has not yet begun on the system. iBeta tells me that they are finalizing the test plan for submission [to the EAC]".

In other words, for what the state deems to be an "emergency," they are willing to certify for use a voting system that has had no federal testing or inspection at all and a voting system that could see marked changes before testing is complete. The state is willing to take a chance that no serious problems will be found during testing by iBeta, a federally accredited Voting Systems Test Lab. Essentially the state is willing to let the voters gamble when their votes are counted.

Accuracy Mandate In Washington Administrative Code and State and Federal Law

State law and administrative code, as well as federal law, discuss one issue over and over again — accuracy. RCW 29A-12-080 states, in part:

Requirements for approval.

No voting device shall be approved by the secretary of state unless it:

- (4) Correctly registers all votes cast for any and all persons and for or against any and all measures;

And RCW 29A-12-101 states, in part:

Requirements of tallying systems for approval.

The secretary of state shall not approve a vote tallying system unless it:

- (1) Correctly counts votes on ballots on which the proper number of votes have been marked for any office or issue;
- (2) Ignores votes marked for any office or issue where more than the allowable number of votes have been marked, but correctly counts the properly voted portions of the ballot;
- (3) Accumulates a count of the specific number of ballots tallied for each precinct, total votes by candidate for each office, and total votes for and against each issue of the ballot in that precinct;

WAC 434-335-040 echoes the words of both RCW's:

1) No voting device or its component software may be certified by the secretary of state unless it:

- (c) Correctly registers all votes cast for any and all persons and for or against any and all measures;

WAC 434-335-200 grants to the Secretary of State the right for emergency approval of a voting system under certain circumstances, one of which is to ensure accuracy:

Emergency approval for a modification of an existing voting or vote tabulating system or equipment may be obtained from the secretary of state during the restricted period if failure to modify the system could materially affect the lawful conduct, efficiency, accuracy, or security of an upcoming election.

WAC 434-335-212 discusses the procedures for temporary approval of an emergency certification by the Secretary of State, allowing the requirement for independent testing to be waived, but specifically NOT allowing accuracy to be impacted. . It says:

If, after reviewing the application, the secretary of state determines that an emergency exists, the examination and testing of the proposed modification is expedited to meet the needs of the upcoming election. The secretary of state develops a test plan and audit procedures to ensure the modified system does not adversely affect the lawful conduct, efficiency, accuracy, or security of the upcoming elections. The secretary of state may consult with the voting systems review board. The requirement that the modification be certified by an independent testing authority is waived for an emergency approval. An emergency approval of a modification must state the time period it is effective.

As to the responsibilities of the Voting Systems Panel WAC 434-335-090 covers those (in part):

The voting systems review board evaluation must include, but is not limited to:

- (1) A review of statutory requirements;
- (2) A review of applicable federal standards;
- (8) A review of any effect the application will have on the accuracy of the voting system;

Please note the overriding theme of these laws and administrative code. They all require accuracy of the voting system. Nowhere do they mention administrative procedures to mitigate inaccuracies found in voting system software. They require that voting systems are accurate. In fact, WAC 434-335-200 allows emergency certification in the event that an existing system must be modified because it is not accurate. It is counter-intuitive to even consider that an inaccurate system should receive emergency certification to replace an accurate system.

The state legislature and Secretary of State also echo federal law. The Help America Vote Act of 2002 (Public Law 107-252) (HAVA) includes technological standards for the use of voting systems. Title III of HAVA, entitled “Uniform and Nondiscriminatory Election Technology and Administration Requirements” imposes certain requirements upon states and local jurisdictions conducting federal elections. Section 301(a) sets forth the standards that voting systems must meet after January 1, 2006. Those features include functions and features that,

among other things, define the maximum error rate in operating the voting system that is no greater than the error rate set forth in Section 3.2.1 of the 2002 Voting System Standards adopted by the Federal Election Commission.

Unlike the other 2002 Voting System Standards, this accuracy standard cannot be waived by administrative rule. It is federal law.

The State's Arguments

While the state may argue that the mandate for error rate is not an operational requirement to be followed by the state or local jurisdictions but is, instead, a testing requirement for VSTLs, the EAC has determined otherwise.

In "EAC Advisory 2005-004; How to determine if a voting system is compliant with Section 301(a) - a gap analysis between 2002 Voting Systems Standards and the requirements of Section 301(a)" the EAC offered analysis of Section 301(a) to states and local jurisdictions. (see advisory attached). Regarding the accuracy mandate, this advisory said that these HAVA requirements:

"provide for an error rate in operating the voting system that is no greater than the error rate set forth in Section 3.2.1 of the 2002 Voting System Standards adopted by the Federal Election Commission (FEC)."

Note that the EAC specifically stated that the error rate applied to "operating the voting system" not testing it.

HAVA Section 301(a)(5) clearly defines accuracy as the maximum error rate of the voting system in counting ballots, and states that the error rate is to be "determined by taking into account only those errors which are attributable to the voting system and not attributable to an act of the voter." Again, nowhere does federal law recognize any mitigation, through administrative workarounds, of errors in voting systems compiling, tabulation, or reporting

The state may also argue that an act of the voter can include poll worker error. However, federal and state law both define "voting system" as "The total combination of mechanical, electromechanical, or electronic equipment including, but not limited to, the software, firmware, and documentation required to program, control, and support the equipment." (HAVA Section 301(b) and RCW 29A.12.005) Essentially both federal and state laws

recognize that administrative procedures are part of the overall voting system. An act of the voter is separate and cannot be interpreted as including poll worker errors.

Conclusion

Ellen Theisen, in her testimony, has clearly laid out the technical issues with the error that was discovered during testing in Pierce County earlier this month. The state and the vendor, Sequoia, have both agreed that software modifications must be made to the system in order to prevent the error from happening at any time in the future. Clearly the issue is one of accuracy of the Sequoia WinEDS 4.0 voting system.

Federal and state laws all make the accuracy of our voting systems crucial. Nowhere do those laws allow administrative workarounds or mitigations. The Sequoia WinEDS 4.0 system that was tested in Pierce County failed to accurately count the votes, and the failure could not be attributed to an act of the voter. After a review of the statutory requirements and federal standards you, the members of the Voting Systems Panel, can only find that the accuracy benchmark has not been met. You have only one choice and that is to deny your recommendation to the Secretary of State that he provisionally certify this system for use by Pierce County even one time.

And what of the ballots cast in Pierce County? The Sequoia voting system is not the only answer. The county can hand-count all paper ballots cast and the voter verified paper audit trail from any Direct Recording Electronic voting machines used. While this system may be more time consuming, it is an option still used by jurisdictions across the nation and is the only viable option for the county.

Sincerely,

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