

Neil W. Kelleher  
Co-Chair

Helena Moses Donohue  
Commissioner

Peter S. Kosinski  
Co-Executive Director



40 STEUBEN STREET  
ALBANY, N.Y. 12207-2108  
Phone: 518/474-6220  
[www.elections.state.ny.us](http://www.elections.state.ny.us)

Douglas A. Kellner  
Co-Chair

Evelyn J. Aquila  
Commissioner

Stanley L. Zalen  
Co-Executive Director

**TESTIMONY BEFORE THE NEW YORK CITY COUNCIL  
DOUGLAS A. KELLNER  
Co-Chair, New York State Board of Elections  
January 29, 2007**

The report on New York's efforts to comply with the Help America Vote Act is mixed. The bad news is that it is very unlikely that we will be able to use new voting machines in the 2007 elections. The good news is that election administrators throughout the state appear to be committed to making certain that New York implements HAVA the right way, the first time, so that we avoid the catastrophes that arose from sloppy implementation of new voting systems in so many other states.

New York City should be proud. The New York City Board of Elections has done more to prepare for HAVA implementation than any other jurisdiction throughout the state. Its reports have provided helpful guidance for the other 57 county boards as well as the New York State Board of Elections.

While the press constantly repeats the refrain that New York is last in the country to implement HAVA, the often overlook the numerous ways that New York is actually leading the nation. New York's voting machine law is the best in the nation in securing transparent, verifiable and accurate elections. There are three key provisions:

voter verifiable paper audit trail: New York was one of the first states to require that all direct recording electronic machines have a voter verifiable paper audit trail; New York was the first state to mandate a manual audit of three percent of all machines used in each election;

wireless communications functionality is prohibited in all electronic machines, whether they are direct recording machines or ballot scanning machines; New York is one of only two states to mandate this important safeguard, which the National Institute of Science and Technology recently recommended to be included in the new Voting System Guidelines to be updated in 2008;

escrow of all software source code is required by the New York Election Law; New York is the only state in the nation with this requirement; the recent episode in Sarasota County, Florida reveals why it is so important that experts have access to the source code when there is a serious question regarding the integrity of an election.

The regulations adopted by the New York State Board of Elections also place New York far in the lead in assuring the transparency, verifiability and accuracy of voting equipment. New York is still the only state in the nation to require compliance with the Voluntary Voting System Standards adopted by the US Election Assistance Commission in December 2005. All of the other states that already purchased voting equipment with their federal HAVA funds most now replace or retrofit that equipment at very substantial cost in order to come into compliance with the current standards. Even worse, several states are now discussing grandfathering their sub-standard, non-compliant voting equipment rather than replacing it.

New York's regulations require full disclosure of all political contributions by vendors and their executives and set several other standards that are more rigorous than the Voluntary Voting System Guidelines.

New York has also taken the lead in challenging the old conflict-ridden practices of voting machine testing. In the past, the vendors selected and paid the testing authority to prepare a report recommending the certification of the vendor's equipment. The states merely rubber-stamped these recommendations.

Before I became commissioner, New York retained Ciber, Inc. as its independent testing authority. Ciber has been the testing authority for approximately 70% of the machines now in use throughout the country. Shortly after I became commissioner of the State Board of Elections, I recommended that New York retain its own consultant to review the testing performed by the independent testing authority. New York retained the New York State Technical Enterprise Corp. (NYSTEC) a state-chartered technical research organization based in Rome, New York to perform that function. NYSTEC has done a superb job of reviewing the technical documents prepared by Ciber and recommending improvements.

I wish I could say the same for Ciber. Ciber has missed many deadlines and has had a great deal of difficulty recognizing that New York has many requirements that go beyond those that used to be acceptable in the voting industry. In December, when the New York Times publicly disclosed that the US Election Assistance Commission had refused to accredit Ciber as an independent testing authority, the State Board of Elections determined that it should thoroughly review the issue.

On January 4, 2007, the New York State Board of Elections voted to suspend Ciber from further testing of voting systems submitted to the New York State board for certification pending a thorough review of Ciber's accreditation

status. We also addressed requests to both the Election Assistance Commission and to Cyber for all of the relevant documents and reports concerning Cyber's application to the EAC for accreditation as a testing laboratory.

Much to our surprise (well, maybe *I'm* not really surprised), EAC did not provide any of the background documentation that we requested. The New York State board felt compelled to make a formal Freedom of Information Act request. Mr. Wilkey's only response so far is that the EAC is reviewing the issue and is deciding how to respond. EAC did not respond until last Friday, after many critical newspaper accounts, and only after Cyber provided the documents after we threatened to serve a formal subpoena.

This week the New York State Board will carefully consider its options regarding its relationship with Cyber.

Secrecy in the testing process has also been a problem. Vendors and testing authorities proper claim that certain aspects of voting machine security and trade secrets should not be publicly disclosed. But this is not a basis for shielding the rest of the testing process from public scrutiny. New York's regulations provide for open disclosure of all but security and trade secret matters. Nonetheless, it has been a struggle to get Cyber to understand the value of public scrutiny of its work.

I have become increasingly annoyed with Cyber's use of the label "confidential competition-sensitive" on reports that they have prepared for our agency at our expense. In November I circulated for comments Cyber's first draft of their report to explain New York's interpretation of the exceptions to the exemption from testing of Commercial Off the Shelf (COTS) software that is used in the voting machine itself as opposed to election management software that does not generate code used in the actual voting process. (Yes, "exception to the exemption" is a double negative that means that the COTS source code must be tested in those cases.)

Cyber was apparently miffed that I dared to subject the advice that they furnished to New York to public scrutiny. They added the "confidential competition sensitive" label to the second draft. I objected and requested that they remove the label. Cyber said they'd think about it, but ignored my request. When I received the final document that had been approved by both Cyber and our independent security review consultants, New York State Technical Enterprise Corp. (NYSTEC), I insisted that I be allowed to make the document public. Cyber balked. When I renewed what had become demands, Cyber's attorney—yes their attorney—revised the technical report that the "experts" at Cyber and NYSTEC had determined to be final and said that he would not object to release of that report. (I have distributed that report, known as COTS Testing Version 4 to many). I then asked for an explanation why Version 3, the "final" report was still labeled confidential. I also gave formal notice that I would ask the commissioners to release the report. Last Tuesday Cyber's in-house attorney wrote me that he agreed that there was nothing in the "final" report that was properly labeled competition sensitive. On Wednesday, the New York

commissioners voted to make the Version 3 "final" COTS report public today. I will send copies of Version 3 to the technical blogs and anyone else who requests it. I am still distressed, however, at Ciber's efforts to stifle discussion of the issue by improperly claiming confidentiality.

Finally, I should report on the conundrum faced by many vendors. The certification testing process is expensive, costing approximately \$0.5 million per machine. A vendor must pay this substantial amount without any commitment that anyone in New York will purchase its machine. This is a costly gamble that has prevented many small entrepreneurs from even considering to enter the New York market. I strongly urge the Legislature to fund this cost from the general fund rather than imposing such a steep fee to enter the New York market. Similarly, I would urge that Congress provide similar funding to the US Election Assistance Commission. This would be a substantial step toward making voting machine testing truly "independent."

The good news is that the New York State Board of Elections is working well on a bi-partisan basis to do a meaningful review of all voting equipment before certifying its use. Unfortunately, the vendors and testing authority are not yet ready with machines that fully comply with New York's rigorous requirements. Right now, the earliest that New York could certify any voting machine is May 7, 2007, and that date is realistic only if there are no additional problems with the two voting systems that have so far passed the first two steps in the testing process. Frankly, the date may be postponed again if it is necessary to assure that New York does not purchase sub-standard equipment.