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DOUGLAS KELLNER: Hello everyone, my name is Douglas Kellner, Co-Chair of this afternoon's meeting.

JAMES WALSH: Jim Walsh.

GREGORY PETERSON: Gregory Peterson.

EVELYN AQUILA: Evelyn Aquila.

DOUGLAS KELLNER: And will staff introduce themselves please?

>> Stan Zalen.

>> Cheryl Couser.

>> Bob Eckels.

>> George Stanton.

>> John Conklin.

>> Bob Brehm.

>> Pat Campion.

>> Anna Svizzero.

>> Joe Burns.

>> Paul Collins.

>> Todd Valentine.

>> Sue Green.

>> Bob Warren.

>> Nils Ekberg-- of NYSTEC.

>> Rob Zeglan, NYSTEC.

>> Bob Gronczniak-- , NYSTEC.

>> Barbara Murphy, Saratoga County.

>> (Inaudible speakers)

DOUGLAS KELLNER: And we extend a particular welcome to Commissioner Tom Farrerese from Monroe County who has contributed quite a bit in working with some of our committees, and also with the Election Commissioner Association. Welcome, Commissioner.

COMMISSIONER FARRERESE: Thank you.

DOUGLAS KELLNER: First item on the agenda is approval of the minutes of July 15 and August 6.

Those in favor of adopting the minutes as drafted say aye.

[Chorus of Ayes.]

DOUGLAS KELLNER: Opposed? Minutes are adopted. We turn to the unit updates, the co-executive directors Stanley Zalen and Todd Valentine.

Executive Unit

STANLEY ZALEN: I have a couple of things. Testing is moving ahead for certification.

At the end of this month the CEMAC (Citizens' Election Modernization Advisory Commission) group has been invited to participate in continued functional testing for several days towards the end of the month and into October. Anna will have more details in her unit report.

We have received almost final granting of a total of just over $14 million from the Federal government through the EAC for our amended state plan covering several years. Just a few more documents have to be signed by me as chief election official.

They'll be signed today and go down there today and we should see the money deposited in the appropriate controller's account for us very shortly.

Also with regard to the EAC, I believe on May 10, 2010 they'll be auditing us as their routine audit.

But it will be the first time that they will have been auditing us. That's pretty much it. Todd?

TODD VALENTINE: Well we have the primary elections coming up next week, and that doesn't impact us as directly as an election concern because it's not a statewide primary, but Election Ops can talk about this more in detail if you want. We have a plan for having some of the voting machine staff out in the field to at least - to gain knowledge. This is a pilot program. All the counties in the program are not engaged in a primary election, of course.

So we're trying to develop the tools to gain the information out of - the learning experience that is the pilot program.

DOUGLAS KELLNER: I notice we've also been joined by Commissioner Dennis Ward from Erie County. Welcome to you, Commissioner.

We'll move on to the legal report from Paul Collins.

Legal Unit

PAUL COLLINS: I'm happy to give the report because my colleague is otherwise engaged, so to speak.

Peterson can appreciate that.

With respect to our under vote regulation I confirmed this morning with counsel from GORR (Governor's Office of Regulatory Reform) that it has left GORR and gone to the Governor's Office where they've posited the recommendation.

Hopefully we'll have it back shortly from the Governor's Office, publish it, go through the 45 day comment period, etc.

The emergency regulation expires on the 19th of October, but under the rules we can re-up it for an additional 60 days now that we have the number from GORR that has been filed.

Earlier this month we sent to the Department of Justice eight chapters from the laws of 2009 for pre-clearance.

If all goes according to form we'll probably get our letter saying they have no objection to them sometime in late October --

We have five or six pieces of legislation that the Governor has asked that we comment on at this time.

Our DOJ case is moving along. The testing, I'm sure as Anna will address in her report, is going along to the satisfaction of the Department of Justice, and they now seem to be turning their inquiry and their angst on the NYSVoter issue and the New York City piece of that.

And that -- is also on --.

We've been advising the county boards continuously on issues. We've now moved away from petitions and are dealing with caucus issues.

The Attorney General's office has settled the Ciber litigation and they're just going through the final hoops of that.

The way they do that is they somehow withdraw their answer to the claim and allow the claimant to take a default judgment.

And we've seen those papers. They're going through. That's been resolved.

We also have received a request for a legal opinion from the Village Attorney of the Village of West Hampton.

He's looking for a counsel's opinion. They had a somewhat contested election. There are a number of issues that he's raised.

I just want to make the Board aware of that.

DOUGLAS KELLNER: So with that opinion you and Kim will draft something --.

PAUL COLLINS: I believe that what we'll do is prepare a draft opinion that is the opinion of the State Board until the Commissioners have signed off on it, if that's acceptable.

DOUGLAS KELLNER: I think that's what we should do.

EVELYN AQUILA: Could I - I have something that deals with legal, it doesn't exactly deal with you, Paul.

But I think it needs to be said and I'd like to say it publicly.

Yesterday Justice Roberts heard arguments between the United Voters and the Federal Election Commission was the case.

He heard the arguments trying to do away with the campaign finance laws, and I think that's a very serious issue and I think it's something nobody knows about unless you happen to see an obscure little article in the New York Times, or something, and you hear about it.

But I think, Will Rogers always said - he was dead long before I was born, don't look at me like that Jim -

He always said the Supreme Court reads the newspapers, and that's why I think we have to get the information out, and that's why I feel so strongly about butting in right after our legal counsel. Since the Tillman laws in 1907, I understand we have had some kind of campaign finance laws. To do away with them now would be, I think, terrible.

We know in elections you need two things. You need people and you need money, and the more money you have the louder you talk.

I would hope that people would discuss this matter, find out about it. Don't go with what I'm telling you because I don't know enough of the particulars, but I do know it is an effort to get rid of campaign finance laws and while Justice Roberts heard the arguments yesterday, he will give a decision in several weeks.

So, you know, write a little note to the voice of the people or something, or tell your neighbor.

It is not something that we want or something that will make elections better anywhere in this country. Thank you.

DOUGLAS KELLNER: Alright, we should turn to Election Operations, Anna Svizzero.

Election Operations Unit

ANNA SVIZZERO: Thank you, commissioners. We have a special election also being run on Tuesday and in the City of New York we have a candidate list that was received by them. We will await their results so there will be a Board of Canvassers scheduled at some point in the future.

Our status meetings with SysTest and NYSTEC are ongoing.

Our vendor conference calls are almost daily now. We are working with all of the parties involved with the certification process to make sure that we are on track, not only with the time, but with the spirit of the testing to be sure that the testing is what can be reported in a way that makes sense to all of us, and a way that is consistent with the requirements of the EAC and how some of those regulations are interpreted.

Needless to say there have been some questions and getting answers out of the EAC has been interesting, and not always timely.

So that doesn't help us with our timeline. So I think we're, with the assistance of NYSTEC and Bob Warren constantly on the phone with the vendors and the lab, I think we're on that right track.

Our status reports - one day we're behind by a day or a half of day, the next day we make that time up, so the status reports that some of you are privy to aren't determinative. They certainly are a moving target.

We, as Stanley pointed out, notified CEMAC that our public testing will be at the end of the month.

We do have two test plans, one for each vendor for that process. So Bob Warren will be reaching out to them to work out any of the final details that we have, and we'll be working with Public Information to get that message out to the general public.

We will have separate voting machines there for the public to cast ballots on so that the interaction with the public will be separate.

The testing can be monitored because this is a run for the record, but that anyone who does come will have the chance to comment on the system and speak to the vendors.

They will be managing that end of the public demonstration on their own.

We expect that we will incur costs in reimbursing CEMAC members for their participation.

But without really knowing how many will participate and for how long, the test is about a week, five days of testing – so without really knowing that we may have to come back to you for a Resolution if we exceed that $5,000 limit that is our cap for the use of HAVA funds.

We will have three teams of people in the field on primary day. We had hoped to have more but because we did not get the new staff that we wanted on board until just last month we really haven't had the chance to train them in a manner that is sufficient to send them out on their own, so we will be having them team up with a couple of the more experienced staff members that we have.

And we're working out where to go. We're focusing on full-county primaries, but clearly we're focusing on the larger primaries, and getting a mix of both vendors and use in the polling place. If we have time depending on the day and the kind of activity in that county, we're going to try to visit either at the county board with the commissioners or at the facility where they store their voting systems so we can see how they implemented some of the many, many new procedures that we provided to them over the past few months.

We're looking to evaluate the pilot project. We have about 15 counties in our pilot project that don't have primaries, so our ability to – and the counties that are doing it county-wide, some of them have just Conservative and Working Families primaries.

So the ability to really get the impact of the pilot project and evaluate it in a meaningful way is a little bit diminished.

But we will be doing that review to see if we've missed something, which is entirely possible – or, if there are already suggestions out in the field that we can implement between now and the general, because the general clearly is a much bigger project, and then we'll be evaluating after both of the elections, obviously.

We continue with the generic work in election operations. We did have one Independent petition filed with us for Supreme Court in the 9th JD, and we have no issues with that petition.

Acceptances were all filed in a timely way.

We will be sharing with boards later today a list of judges that will be assigned to Election Day duty.

Other than support for the counties through the objection period for independent petitions, ballot layout issues, appearances on the ballot and that kind of thing, I think Election Operations and Election Services was consistent with normal routine business.

Joe, do you have anything to add?

JOE BURNS: No.

DOUGLAS KELLNER: I have few questions on certification issues. So Anna, we're on schedule basically as far as the timeline that was submitted to the Justice Department?

ANNA SVIZZERO: We are more so with one vendor than the other.

DOUGLAS KELLNER: Well we can name names.

ANNA SVIZZERO: We have had a couple of issues with Dominion but SysTest is looking to make that time up.

Dominion is very committed to making this work. We get emails from them in the middle of the night, so we know that their teams are on some of the issues that have been raised.

I think a lot of what we see is documentation related, and being such a new company, my understanding from speaking to Bob Warren and NYSTEC and others are that that's always where a new company may have some gaps. But they clearly are committed to making this work and we have every reason to believe that they will.

1
2 We, as I said, speak to them daily, so I have no reason to think that we can't try to make up some of
3 this time.
4
5 ES & S is moving along a bit more event-free than Dominion is, so they are more on target than
6 Dominion.
7
8 But I don't think we have any critical, show-stopper kinds of issues that are causing us to question
9 the system itself, or its accuracy, or anything like that.
10
11 DOUGLAS KELLNER: That's reassuring to hear. Now my understanding is that we have one
12 pending request for interpretation of the voluntary voting system guidelines with the US Election
13 Assistance Commission. And I just want to go over, either with you or if you want to ask NYSTEC
14 to respond, that's okay also.
15
16 ANNA SVIZZERO: We had questions about COTSS.
17
18 DOUGLAS KELLNER: Right, commercial off-the-shelf software.
19
20 ANNA SVIZZERO: And we were wondering how the EAC was interpreting that and they told us
21 that it takes a long time, but for a formal opinion the board has to vote on it, etc.
22
23 So we followed up by asking, well you certified three systems. How did you interpret it for your
24 own purposes?
25
26 We're struggling little bit with that.
27
28 DOUGLAS KELLNER: My understanding was they initially approved the New York State report on
29 definitions of the outlines of what was commercial off-the-shelf software and what was not.
30
31 ANNA SVIZZERO: I think NYSTEC and the EAC were in agreement on how to interpret that, but I
32 can have Robert Mills speak to that, or Bob.
33
34 DOUGLAS KELLNER: Would someone from NYSTEC just indicate what is happening with that and
35 is there potential, based on what you know that's going on at the EAC where the EAC may have
36 some differences with the opinions with the procedure that we laid out.
37
38 NILS EKBERG: Well you know originally they accepted and approved the document that we wrote
39 a couple of years ago, and defining what COTSS was and -- primarily done for the DOJ.
40
41 And then recently when we're reviewing and working with the vendors, the vendors had some
42 questions on what's COTSS and what's not?
43
44 So we submitted some questions, or our opinions to the EAC.
45

They unofficially agreed with our opinions on what the definitions were, but when asked further to give the EAC official opinion they wouldn't do that.

They'll only do that to vendors and ITAs (Independent Testing Authorities).

ANNA SVIZZERO: So at this point in time Bob Warren has been going back and forth, would have been asking additional questions trying to prod some more information out of them.

We haven't got anything.

DOUGLAS KELLNER: But as of now then the report that was drafted by NYSTEC and Ciber and approved by the commissioners here is still -

EKBERG: That's still intact and that's still what we're working towards, yes.

But we're just asking for some final opinions on how far we have to take certain things. Nothing is really life threatening.

We're still taking the testing and evaluation to the right point. But there's just some clarification that we need.

DOUGLAS KELLNER: Well I appreciate that explanation.

ANNA SVIZZERO: Brian Hancock was very helpful. He even contacted us from a conference he was at.

He's been, obviously interested in what we're doing because we are doing so much.

DOUGLAS KELLNER: Just so we - Brian Hancock is the Director of Certification at the EAC.

ANNA SVIZZERO: So we understand that he has opinions but the board's opinion is a formal one and it's a little bit different. So he has been helpful with those initial interpretations that we were going through since our last Board meeting.

DOUGLAS KELLNER: Anna, is there a plan for your unit to prepare a report on the pilot project following the primary?

ANNA SVIZZERO: There is. We're putting together a protocol for the staff people who are out in the field to ask certain questions, keep an eye out for certain issues that are of interest to us collectively, and then we will - I think the EAC and Todd can speak to that if he wants to- was also going to be participating in that review. But we will initially review the comments our field representatives get back and we will follow up with a survey to the boards to get across the board sentiments from them.

But we thought in the field our protocol would give us some really good insights as to what was going on.

And we got the inspectors point of view, if there were voters at the polling place we would be speaking to them as well.

We'll be in contact with all of the commissioners in the boards that we're targeting for this monitoring so that commissioners are not hearing about this initially from us. We talked about this on the phone call we had with the commissioners association several weeks ago. But we will be reaching out to those commissioners to make personal contact.

And that report will come to this board just from our staff people.

Then we'll have to follow up with the survey with the county boards. That may take us a little bit longer.

DOUGLAS KELLNER: Alright, thanks very much. So we'll turn to public information, John Conklin.

Public Information / NVRA Units

JOHN CONKLIN: Thank you. Good morning, commissioners, or good afternoon, rather.

The two constitutional amendments that are going to be on the ballot this November have been translated into Spanish and we received official certification of those translations.

We're still waiting on a cost estimate from the New York Press Service for the publication of those amendments in the newspapers around the state. So we'll have more information on that shortly.

As you know we've been working on a draft of the voter registration form. Last year the legislature enacted legislation requiring us to add an organ donor registration form to the registration form. And we decided that was a good opportunity to revise the entire form.

We employed a usability expert to do some work on that. They've come back with a second draft which you have copies of.

That's been circulated around to select groups. Some of the good government groups outside the agency, select members in the officers of the Election Commissioners Association, some other interested parties, so we're continuing to work on that.

We've been very pleased initially with the product that was given back to us so we hope to wrap that up relatively shortly but obviously some of the entities that we submitted to for comment are very busy with the primary. So we'll eagerly await some of their comments after the primary takes place.

The revised poll worker training items are completed and on the Vote-NY website. The public information office sent out a notice to that effect to all the county commissioners with their log in and password information, and that's basically it from the Public Information office.

Do you have anything to add, Bob?

BOB BREHM: In addition to the notice to the county board on what's available online we also told them we were taking steps to provide them offline copies of CDs.

Today we received the voter education videos and the vendor told us that they will be over-nighting us today their shipping the poll worker offline CDs.

So George's staff will make copies like they did the last time and we have a mailing plan for all the counties to get the offline content in addition to the online content.

And the only other major issue that has taken a great deal of time and hard work of many people in the agency -- is the county funds program when the Federal grant runs out.

It's different than the other HAVA money. The Health and Human Services grant money runs out at the end of the fifth year.

So the 2004 grant money that we received runs out in a few weeks. And they've done a great deal of effort to try and make sure we spend it all.

PAT CAMPION: Yes, as Bob mentioned, with the 2004 money it gets recalled at the end of September, so originally the grant was set up for about $560,000 and, to-date payments of about $450,000 have been submitted. So there's about $110,000 sitting out there at risk. We've been working daily with the counties out there who haven't spent the money, to get their paperwork in.

We've worked daily with the OGS folks also to make sure that the remaining balance is spent by the end of the month. So we'll continue to monitor that going forward.

As of today there are four counties out there that haven't submitted anything. So we'll be working with them too.

DOUGLAS KELLNER: What are the four counties?

PAT CAMPION: Franklin, Genesee, Ontario and Rensselaer. And they're well aware of it.

JOHN CONKLIN: Commissioners, any other questions?

DOUGLAS KELLNER: Thank you very much. So, Information Technology, George Stanton.

GEORGE STANTON: You skipped Campaign Finance.

DOUGLAS KELLNER: Oh, you're right, I did. Okay. We'll do campaign finance. Cheryl?

Campaign Finance / Enforcement Units

CHERYL COUSER: The July periodic order-to-show-cause was signed on August 13. The judgment return date for the periodic is today and contains 286 candidates and treasurers.

As a result of the order-to-show-cause the judgment in local elections, phone volume has been and we expect will continue to be high.

The new regulation regarding duplicate filing of campaign receipts and expenditures went into effect on September 2. Information about that has been posted on our website.

Audit continues to work on a number of projects. They are working from a timeline for all projects, and are essentially on schedule.

Education and Outreach continues to work with the IT department to develop the new version of the ESF software for filers. They are also reviewing and updating additional forms to continue to make our forms easier to use.

The unit has two Albany law interns working for credit with us.

Thank you.

DOUGLAS KELLNER: I just wanted to make one comment because we will be going into executive session to discuss the complaints.

But on a generic level there was one of the preliminary determinations was to open an investigation on a complaint that, I'm not going to go into the details, but someone who opened an anonymous website to post campaign information.

And that certainly I'm going to vote in favor of pursuing that investigation and I think it's worth mentioning to the public that we will investigate complaints like this because it is a circumvention if they are not filing the necessary disclosures with their financial disclosures then it circumvents the law. And people should be aware just because they open what appears to be an anonymous Web site, that doesn't mean the subpoena powers of our agency won't reach it to find out who actually is responsible for the Web site and that we can then bring appropriate legal action. So I thank your unit for pursuing that and bringing that recommendation to the commissioners.

EVELYN AQUILA: If you watch "Law and Order" -- there are always getting ITU guys like George who know everything, bingo!

Here is the name and address of that person.

JAMES WALSH: I know we don't tell what our votes are going to be on something in executive session in advance --

DOUGLAS KELLNER: We are not disclosing what the complaint is.

JAMES WALSH: No, no.

DOUGLAS KELLNER: I think people should know.

JAMES WALSH: I think we should because this is a public record we have here, a public warning that this will not be tolerated. They can't hide behind some anonymous literature you want to put out in whatever manner it may be, so I think Mr. Kellner brought up just to get it on the air here and say don't think you will get away with it because we're coming after you if you do.

DOUGLAS KELLNER: Information Technology, George Stanton.

Information Technology Unit

GEORGE STANTON: Good afternoon, Commissioners.

Nothing exceptional to report IT is doing.

We've been obviously taking in campaign finance filings, helping the filings on the phone that need help with their filings.

We have been monitoring NYSVoter on a daily basis, obviously, and still having Microsoft come in.

They did a health check for us here within the last two weeks so helping to train some of our people to do some of that kind of thing with biz talk, which is a very specialized tool that not a lot of people use, but we use it as part of our system.

So it's very specialized and we need a lot of coaching on that so they have been working with us on that.

We have been working, as Cheryl, mentioned on the operating system-neutral software.

We had a meeting about three weeks ago, I guess, with Campaign Finance to talk about some modifications to the look and feel and the usability of that so that's ongoing.

About nine months ago we upgraded Oracle to the latest and greatest version 11G which sometimes when you go to the latest and greatest it turns out to be a mistake so within the last week, Phil Perry on my staff came and recommended to me we roll back to the previous version because they were having a lot of connectivity and issues, it was breaking down basically and we rolled it back, Phil worked hard on it late at night over the last week, rolled it back and it's

performing as it was before we upgraded so we'll stay with the old tried-and-true for a while before the life expectancy goes out of it.

Other than that, nothing, like I said, nothing exceptional going on in IT.

DOUGLAS KELLNER: George, can you tell us what's happening with New York City's connection to NYSVoter?

GEORGE STANTON: I knew you were going to ask that; nothing.

They are still not using the web interface to do their voter maintenance.

It's causing some problems with other counties, we are seeing more and more of it where there are - state voter IDs not being transferred -- state voter IDs -- move to New York and New York City is not taking the old voter.

They are supposed to replace the state voter ID and it's not being done.

The problem just kind of continues to snowball really.

EVELYN AQUILA: That's really wrong.

DOUGLAS KELLNER: We may have to discuss this in executive session, then.

All right.

So we will move on to old business.

Old Business

First item is discussion of the post election audit issues in proposed regulation 6210.18.

You are listed, Anna.

Post-Election Audit Proposed Regulation 6210.18

ANNA SVIZZERO: I can certainly tell you the county boards and Commissioners Association has sounded off regularly on this with our conference call with them and the agency received a letter I believe has been shared with all of you from the association president this year, Bill Scriber stating the Association's position.

I expect they are interested in more conversation.

We are interested in using the procedures that we put forth in this primary election and getting the feedback from actual use so that some of the positions that the -- or the points that the Commissioners made will be borne out in the actual use of it.

It's hard even for us in writing procedures and drafting things, it's certainly helpful to add real life experiences to help us better understand how these regulations will be implemented. But we have given them a draft and we're expecting them to follow the instructions that they've been given so far and then listen to what they have to offer post audit.

We also did a survey, Stanley and Todd contacted The Election Center, and we are getting feedback from states on what they do by way of an audit.

Do they escalate?

Do they expand in contests?

Do the audits cross jurisdictional lines from one election office to another?

So I think there were about 12 or 14 responses when we last checked the other day so we'll be monitoring the responses to that to see if there's any information there we can glean and share with the board with regard to the process as it's used elsewhere.

We had done some of that before.

We did our own reg. We've been talking to a lot of states about audits and I think one of the most surprising things is that not a lot of states have a statewide recanvass process the way we do, so that's an asset we count on.

The audit does not serve as a recanvass tool in our realm of elections wherein other states I think it's probably serving that other purpose.

We have clearly delineated there are two separate functions.

Other than that, as I said, we've given them procedures, forms, steps to follow.

We have an oath that anyone they bring in to do the audit work, because we understand it can't be done with the board of elections staff alone because there are recanvass tasks that have to go on so we've provided them with an oath, we have encouraged that they bring in inspectors to help them because inspectors understand ballot layout so you are not bringing people into the process who are cold to it.

Other than that, I don't think we have anything more to share, other than that we welcome to hear anything anybody wants to raise on the issue.

DOUGLAS KELLNER: I am in favor, as I indicated at the last meeting, of adopting the proposed regulations today while we continue the process of tweaking it. And I would point out that the Election Reform and Modernization Act of 2005 required we adopt audit regulations.

We did the first draft of these regulations in April of 2006 and there have been a number of revisions to the drafts and the Commissioners have voted to approve this particular version twice for posting it and receiving the public comments and we have received the public comments and the public comments breakdown into two sides.

Basically, the Verified Voting people are saying that there are some glitches in the audit regulations in terms of escalations where there are races that cross county boundaries.

And there may be a legitimate concern that we haven't really addressed how multi-county races are coordinated for the purposes of the audit.

We have very general comments we have received from the Election Commissioners Association that basically raise concerns about the costs of the audit and the scopes of the audit.

We have been discussing that since 2006 when the first draft was out but there are no specific proposals that have come from the Election Commissioners Association and meantime we are now doing live elections where we are required to have regulations in place with respect to the audit.

I am not aware of anything that makes our draft legally binding on anybody at this point.

For that reasonable the time has come we should approve the draft and continue to work on additional revisions so there won't be any ambiguity as to what the rules are for the elections this year.

EVELYN AQUILA: I have some concerns and my concerns are really the letters that I have received in the past month which did address the audit and they are expensive for the counties and some of the counties saying they didn't know if they could afford it.

I think we have to take that into some kind of consideration.

That is, I don't want to -- in these hard times, let's face it, a lot of money isn't floating around out there.

DOUGLAS KELLNER: But is there a proposal?

EVELYN AQUILA: Well I say --

DOUGLAS KELLNER: The only draft is the text we wrote in 2006 and nobody has come up with --

EVELYN AQUILA: Maybe they thought we would.

Maybe they thought we would be the ones who would draft that proposal.

And truthfully, I am ashamed of myself never to have thought of it until you said it earlier in your remarks. I thought maybe we should have come through with some kind of proposal.

DOUGLAS KELLNER: I put my proposal on the table.

EVELYN AQUILA: I know you have.

DOUGLAS KELLNER: I have spent many dozens of hours.

EVELYN AQUILA: I know you have and to you to be -- I congratulate you for that.

DOUGLAS KELLNER: It's very frustrating four years later.

EVELYN AQUILA: Absolutely.

DOUGLAS KELLNER: After the law was adopted that we still have no proposal from anybody else the draft that's on the table --

EVELYN AQUILA: But --

DOUGLAS KELLNER: -- we're not adopting it.

EVELYN AQUILA: I think it's wonderful you work that hard, and listen, nobody works harder than you and I'm ashamed that maybe I didn't even think about this sooner, to be honest with you, but it was really the letters that I received and this folder, this time round, two of them which brought up the question of audit and the cost of audit and only because we have hard financial times across the state at this time, I don't know even though we work hard on something and want it to be done to force it on the rest of the people of the state, I don't know --

DOUGLAS KELLNER: It's not – the time has come.

EVELYN AQUILA: The time has passed come.

DOUGLAS KELLNER: We are now doing paper ballot elections and paper ballot elections need to have an audit procedure in them in order to assure the machines were properly functioning.

So that is part of the cost of conducting a paper ballot election.

It's an inherent part of the cost.

EVELYN AQUILA: I think you saw those two letters, one from the association and the --

DOUGLAS KELLNER: Yeah, but there's no specific proposal other than saying --

EVELYN AQUILA: I understand.

DOUGLAS KELLNER: -- the best cost-saving device we could have is not to have elections!

EVELYN AQUILA: Of course!

DOUGLAS KELLNER: We would save a lot of money if we didn't have elections but if we're going to have elections, we have to run them properly and spend the money it takes to run them properly.

EVELYN AQUILA: I'm conflicted, I have to be honest with you, Doug, and I'm conflicted because of the fact of putting any kind of burden on these counties, especially when so many of the counties have been good for us.

DOUGLAS KELLNER: But, Commissioner, how do you propose we fulfill our statutory responsibility to have an audit without regulations?

EVELYN AQUILA: Well, there are a lot of regulations out there, don't make it sound like there are no regulations.

DOUGLAS KELLNER: There are no audit regulations.

EVELYN AQUILA: No audit regulations.

DOUGLAS KELLNER: The law requires we have regulations, this is a law passed in 2005 and we are now having live paper ballot elections.

EVELYN AQUILA: I told you my concerns.

I'm just putting my concerns out.

How I'm going to vote for this, I haven't made up my mind but I'm conflicted is the word I used before I began.

I didn't say I wasn't or I will, I just said --

DOUGLAS KELLNER: I'm not opposed to changes.

EVELYN AQUILA: Not opposed to changes.

DOUGLAS KELLNER: And we have called this a pilot project, the purpose of this is to examine it but meantime we should have regulations in place as the statute mandates and I might point out to my Republican colleagues the initial draft that I had did not require that the whole ballot be audited for every race, that the initial procedure that I had to select the 3% by race basis and it would have had substantially fewer races that would have been audited overall and it was Peter

and Mr. Valentine who insisted that it should be changed and I agreed to that as an accommodation to them.

And then to now say that, as I said --

EVELYN AQUILA: I'm not saying --

DOUGLAS KELLNER: - we should be adopting regulations today so we have regulations in place as the statute mandates and then we should continue the process to look at and revise the regulations.

I'm very flexible and aware of all these other concerns but I think the worst possible thing we can do is go ahead in an election without the regulations required by the state.

JAMES WALSH: If I may, I had a conversation prior to the preparation of this meeting and my comments were similar to Evelyn's when I was asking some questions.

I don't know what kind of financial impact this has on counties.

Some counties may be small, some may be significant, and I'd like to know the answers before I take a position.

Secondly as long as Mr. Valentine's name has been thrown into the mix, I think he should have a chance to comment on what we're speaking about.

TODD VALENTINE: Well, I think we put the regulations out to get public comment and the fact the county Commissioners have taken time to get those issues back to us and the fact that they look to us to come to those proposals, I'm not surprised they didn't come back with a detailed response.

I would not have expected that.

EVELYN AQUILA: I would not have expected it.

TODD VALENTINE: But I think we should listen to the comments raised and I think doing the analysis that Anna had suggested with regards to looking how the pilot project works and analyzing, going back and reanalyzing some of the information we receive from other states, I think we're in a position to now go forward this fall after the pilot project, perhaps provide an avenue for a conversation with the election Commissioner's association to say you're the ones who have the to administer this and we have to address that.

As for the legalities, the draft proposed regulations are part of the court-ordered implementation of the pilot project. It has a reference to that in the court's order so my understanding as to the legality is that while the regulations have not been adopted officially, obviously, that as far as the Court is concerned, it has that bearing underneath that limitation.

That's what the pilot project is based upon.

That's a court-ordered implementation.

That's been my understanding as far as the legality is concerned.

DOUGLAS KELLNER: I don't see it in the text of the court order.

Where does it say in the court order these regulations -- that the counties are required to comply with these regulations?

It doesn't.

It's just not in the court order.

I mean, you can...

GREGORY PETERSON: Well, it wouldn't be because it's a draft at this point.

DOUGLAS KELLNER: That's my point and we've had this draft out here so now three years and we're raising questions for the first time without any alternative language that we can put in place as an emergency regulation so that we have the regulations in place?

EVELYN AQUILA: I had no idea it was going to cost money to the counties.

TODD VALENTINE: That letter from the county Commissioners.

DOUGLAS KELLNER: We were talking about this and I guess the thing that I am really annoyed at is that the initial proposal that I drafted was less costly and it was the Republicans -- as I say, it was Todd – you and Peter – and mainly Peter, who insisted that if we are going to do an audit, that the whole ballot had to be audited and not just individual races on that ballot.

And I acceded in that change.

Then to turn around now and say that's why you're holding up the approval of the regulations, I think is wrong.

TODD VALENTINE: Well, that's now become -- it's become publicly a problem.

The public comments from the county boards indicate that's a problem.

The reason behind that and clearly the verified voting comments are an example is look -- if you are analyzing -- we have to focus now on what we need to refocus back on, what is the purpose of the audit?

1 The machine or device that is in use is not untested.
2
3 It's tested before it's delivered, tested before it's built for the counties.
4
5 It's tested when it is delivered to the counties.
6
7 It's tested immediately before the election, there is a pre-election test and there are periodic test
8 of those devices scheduled throughout the year to make sure they work even when we are not
9 running an election with the device itself.
10
11 What the audit is designed to deal with is that time or a scenario where something occurs after the
12 postelection test, something is triggered on election day that may have disrupted the election and
13 it's designed either to catch that or to act as a deterrent to somebody from doing that which you
14 can read that into the random requirement of the statute.
15
16 In developing the regulations, did the 3% go far enough?
17
18 We did hear from groups that, well, if I'm in an office that's not selected in that 3% and a local year
19 is a perfect example, if you just selected 3% you wouldn't select every office, do I now have an
20 argument to say that I have now been treated unfairly if I was not included in the audit?
21
22 But if the audit is viewed as some states do, and this is something Anna was saying, they see it
23 more as a recanvass whereas for ours it's a defense mechanism designed to catch the one scenario
24 where something goes on after the pre-election test.
25
26 It's designed to catch that.
27
28 I think we need to go back and focus on that, and yes, we need to scale regulations back, certainly
29 in light of public comment it seems we should look at that and come back with that written
30 proposal.
31
32 DOUGLAS KELLNER: Todd, we have an election Tuesday.
33
34 Tuesday is the election.
35
36 What regulation are we putting in place for Tuesday's election?
37
38 TODD VALENTINE: I think we're working with the regulations as proposed based upon what the
39 Court-ordered.
40
41 DOUGLAS KELLNER: So why shouldn't we do that?
42
43 If you are not comfortable with adopting it as a permanent regulation, we should adopt it as an
44 emergency regulation and then it will expire in 30 days or 60 days.
45

1 But there needs to be a regulation in place on Tuesday so that there's no ambiguity as to what the
2 rules are. My problem is that it's not as if you're coming in and saying we don't like this sentence
3 of the regulation, change it to that sentence.
4
5 You are saying that we're not going to have any regulation at all on Tuesday in place.
6
7 That's wrong.
8
9 We had four years' notice that this was required, we've had drafts on the table and I'm very
10 flexible what the language is that has to be in the regulations as I've been in the three years of
11 negotiations that we have had over the text of these regulations.
12
13 But I find it unacceptable to go into the election without any regulation in place at all.
14
15 I just think that that is -- it's absolutely wrong.
16
17 I don't see that the Election Commissioners Association has said that in their letter either that
18 there should be no regulations.
19
20 Commissioner Ferrarese?
21
22 TOM FERRARESE: If I might, the comments about -- I think as the chair of the executive
23 committee of the Election Commissioners' Association, there was basically three points we had
24 made actually the financial was kind of part of it but the two points we tried to make in our
25 relative to those regulations is the fact we don't believe enough consideration has been given to
26 the fact there is a recanvass and not enough consideration has been given to the fact we do so
27 much testing of the machine up front.
28
29 Just to simplify it, and I realize this is not a simple situation, our concern is that we keep talking
30 about being separate, which they are and they need to be maintained separately but where those
31 two items play in we really do need to take them into consideration as we put the audit together
32 and it has to address those two issues as being broader part of the bigger picture.
33
34 We do believe that probably regulations need to be put in place for this election.
35
36 We would really agree with some type of emergency or expiration or some way the regulations
37 can go back and be revisited.
38
39 I must confess the Association does feel very good because certainly the state board is showing a
40 willingness to go back and revisit regulations.
41
42 Last month in a really big way -- we think that's really big stuff so it makes us feel comfortable
43 from that perspective.
44
45 At the same time we just don't think those three elements are being looked at.

1
2 That's the detail of what we believe in terms of regulations.
3
4 How you deal with this is in your hands and we ask you look at that as you put those together.
5
6 [Pause]
7
8 [discussion, not audible to the captioner]
9
10 PAUL COLLINS: Commissioner, it seems to me that if I understand my colleague Mr. Valentine --
11
12 SOMEONE IN AUDIENCE: Excuse me. We can't hear.
13
14 PAUL COLLINS: You're not missing much!
15
16 [Laughter]
17
18 It seems to me if I understand my colleague, Mr. Valentine, correctly, he feels the Federal Court
19 order is the operative document that effectuates the draft regulations.
20
21 If I understand Commissioner Kellner correctly, he is uncomfortable because he doesn't see those
22 words and phrases within the four corners of the court order.
23
24 It seems to me that if you adopt an emergency regulation of the draft regulation, that Mr. Valentine
25 believes the court order implements, you are kind of splitting the baby, you have taken away the
26 potential flaw in the election, in that there is not a state-adopted regulation.
27
28 In the unlikely event, and I have no opinion one way or the other as to whether or not the court
29 order is specific enough because it's very general, and if you adopt it --
30
31 GREGORY PETERSON: Does it address it at all, Paul?
32
33 PAUL COLLINS: The order itself? No. It has all these attachments to it.
34
35 TODD VALENTINE: And cross reference.
36
37 It has that in there.
38
39 You will concede it has that in there.
40
41 GREGORY PETERSON: Wait, wait, wait -- does it have an addendum or an attachment?
42
43 ANNA SVIZZERO: I have a copy here if you want it.
44
45 COLLINS: It adopts the SBOE proposal, that is the operative document, that is attachment A.

1
2 TODD VALENTINE: For purposes of the court order?
3
4 PAUL COLLINS: Postelection verification.
5
6 The Board will also provide for a postelection audit system to verify the election results.
7
8 While these processes are still being discussed by SBOE staff and the Commissioners, it is
9 anticipated that the counties', plural possessive, required audit requirements will be as follows:
10 Full compliance with the audit provisions contained in Election Law 9-211 and the audit
11 provisions contained in the proposed regulations 6210.18.
12
13 Conduct 100% hand audit, that's the operative.
14
15 GREGORY PETERSON: Just what I said.
16
17 PAUL COLLINS: If you view that as adopting.
18
19 DOUGLAS KELLNER: It says it's anticipated.
20
21 It doesn't say that they're going to do it.
22
23 PAUL COLLINS: That is correct.
24
25 DOUGLAS KELLNER: That's what we have to make clear as that has to be done.
26
27 GREGORY PETERSON: Wait a minute.
28
29 It refers to --
30
31 DOUGLAS KELLNER: Bring up the text.
32
33 Read the text.
34
35 PAUL COLLINS: Commissioner Peterson, you know I'm a belt and suspenders guy.
36
37 If you adopt it on an emergency regulation you haven't done any harm.
38
39 STANLEY ZALEN: Can it be implemented on an emergency basis?
40
41 PAUL COLLINS: Absolutely.
42
43 DOUGLAS KELLNER: The emergency expires so the intent is to --
44
45 PAUL COLLINS: Mr. Brehm can draw the regulation right away.

DOUGLAS KELLNER: My problem is I don't want lawyers coming in and arguing that these regulations are not in place.

GREGORY PETERSON: Wait a minute.

It says it is anticipated that the counties required audit -- requirements will be as follows, full compliance with the audit provisions contained in --

DOUGLAS KELLNER: We haven't actually done that.

We haven't done that!

GREGORY PETERSON: What are they referring to then?

DOUGLAS KELLNER: It is referring to the draft.

It says it's anticipated.

We have not actually done it.

JAMES WALSH: It's anticipated they will comply with the provisions of the Election Law.

EVELYN AQUILA: That we will do it, yes.

DOUGLAS KELLNER: Well, the provisions of the Election Law and the proposed regulations but we haven't actually said they have to abide by the proposed regulations.

But we haven't actually said that they have to abide by the proposed regulations.

JAMES WALSH: Go by the regulations that currently exist.

DOUGLAS KELLNER: There are none that currently exist.

TODD VALENTINE: Reference to proposed regulations.

DOUGLAS KELLNER: It only says anticipated.

It doesn't say -- we have to put something in place for these elections.

EVELYN AQUILA: Then let's --

DOUGLAS KELLNER : You can't --

GREGORY PETERSON: You know --

TODD VALENTINE: I think we have this.

GREGORY PETERSON: I understand what you're saying, Doug, but it does say provisions contained in the proposed regulation 6210.18.

DOUGLAS KELLNER: It says anticipated.

GREGORY PETERSON: No no, yeah, but --

DOUGLAS KELLNER: So what's the harm of actually adopting it as an emergency regulation and making it binding?

EVELYN AQUILA: Right. Right. I agree with you there.

TODD VALENTINE: It's already binding.

DOUGLAS KELLNER: It's not already binding.

It says it's anticipated.

It doesn't say that it's there.

Listen, if I believed that no election lawyers were going to come in and challenge this, I wouldn't be raising this.

My problem is unless you make the rules before the election and that they're done unambiguously then people argue about them afterwards as it suits them for their own political purposes.

PETERSON: He's right.

The best time to make the rule is before the election when we don't know who is going to be affected by the regulation and if you are telling me that you agree that for this election we're going to follow these procedures, then we should vote to adopt them and not leave them in a vague situation.

DOUGLAS KELLNER: Right -- where there's ambiguity as to whether or not these are -

EVELYN AQUILA: And the lawyers can argue over it, yeah, I think I vote for them as emergency regulations and then we have to put -- in the next two months to make these permanent.

GREGORY PETERSON: Excuse me Commissioner -- in your letter to the board, in the analysis No. 2 is number of counted ballots, always understood the intent to check machine operations but not test each candidate.

In reality the 3% audit was to test the machine's functionality.

Now, if we pass something today on an emergency basis, as far as the association is concerned, that would be not -- that would not be a problem for you, for the -- for the courts?

THOMAS FERRARESE: I think the association will do its absolute best to meet the requirements the state board puts forward and I say they'll do their best.

You know, it's difficult to resist a wall of water that is five times as big as you are.

GREGORY PETERSON: Not always.

THOMAS FERRARESE: We'll do our best and hopefully not drown in the process.

I think every board is going to attempt to try to work through this and figure out what it takes to do it.

I think you'll get a lot more information after the election than you have right now.

Having something in place is having something in place.

EVELYN AQUILA: Todd, make an emergency...

GREGORY PETERSON: It's the same difference.

EVELYN AQUILA: ...emergency adoption.

TODD VALENTINE: Except -- no, it will apply to more than the pilot.

It will apply to everybody and that hasn't been worked out yet.

EVELYN AQUILA: We'll just say to those --

TODD VALENTINE: Much broader audience than is covered under the court order.

EVELYN AQUILA: Why not just say to those in the --

TODD VALENTINE: Well, everyone who's using paper ballots, it would apply to a broader audience than -- it would apply to everybody beyond the pilot program that would be unintentionally applying something that clearly the county Commissioners Association has an issue with and it would put boards that are not prepared to address that situation in a possible scenario -- take, for example.

EVELYN AQUILA: I disagree.

TODD VALENTINE: Take New York City.

EVELYN AQUILA: Just to apply to the pilot program. We could say that.

That's the end of that argument. Just applying it to --

TODD VALENTINE: We already have that. That's in place.

EVELYN AQUILA: I don't think so. No, I don't think so.

TODD VALENTINE: To be honest, this is the first time it's been relayed to the staff this was not applying.

DOUGLAS KELLNER: You're full of it, Todd?

GREGORY PETERSON: Wait, wait, wait. Back off, back off. That's not --

DOUGLAS KELLNER: Where have you been the last two weeks!

GREGORY PETERSON: That's not --

EVELYN AQUILA: Don't get excited. Everybody is trying to do their best here.

JAMES WALSH: Why don't we take a ten-minute recess.

EVELYN AQUILA: That might be sensible.

GREGORY PETERSON: Good idea.

EVELYN AQUILA: Let's not get upset. He works so hard on it.

[recess taken]

DOUGLAS KELLNER: We're back in session.

BOB BREHM: Is the camera on?

DOUGLAS KELLNER: We'll -- I understand text is being drafted so we'll take that up when we're ready on that. Next item on the agenda is the voting system escrow issue. I understand that there is circulation and procedures for dealing with those.

Update on Voting System Escrow

PAUL COLLINS: There are two items, Commissioner.

1
2 On August 20th I circulated throughout the building a draft of a waiver that the statute requires
3 the vendor sign and consent to cooperate and we got signoff on that.
4
5 It was not in final form because quite honestly I haven't quite figured out whether the office of the
6 state controller has approved the assignment in the Sequoia dominion world.
7
8 We haven't done it.
9
10 Then with respect to the procedures to be followed, that is an Election Ops, and Anna and Joe have
11 been working and have circulated on protocols and procedures with regard to the tapping of the
12 of the escrow copies ask that is in circulation, I don't mean to -- I won't speak for you.
13
14 ANNA SVIZZERO: No, quite all right.
15
16 PAUL COLLINS: That's essentially where it is.
17
18 DOUGLAS KELLNER: So is there agreement now that we are going to hold the escrow in-house?
19
20 PAUL COLLINS: Yes, sir. Yep.
21
22 DOUGLAS KELLNER: Well, that's what's important because that's what NYSTEC has been raising in
23 their weekly reports as one of the unfinished pieces of board business.
24
25 Is that what NYSTEC needs now in order to take it off the list?
26
27 NYSTEC REPRESENTATIVES [off camera]: Yes, yes.
28
29 EVELYN AQUILA: Some of the things were sent --
30
31 PAUL COLLINS: You're just trying to make me look bad!
32
33 [Laughter]
34
35 DOUGLAS KELLNER: I appreciate what they have been doing is they keep this checklist and I'm
36 sorry it takes a Commissioner to keep beating up on the staff to make sure it gets done.
37
38 PAUL COLLINS: Sometimes we pay lip-service to the Commissioners.
39
40 GREGORY PETERSON: Sometimes?
41
42 [Laughter]
43
44 PAUL COLLINS: We really don't have any fear.
45

EVELYN AQUILA: It's nice to hear that!

DOUGLAS KELLNER: All right. So is there anything else on that?

At least we're moving ahead ask essentially they'll work out the details on the procedures but at least we are agreed.

EVELYN AQUILA: I know we received some of that in the mail.

DOUGLAS KELLNER: There is a draft circulating around, I know I sent back a list of comments and things that I thought were overlooked in the draft but the main thing is that we at least know that it's going to wind up in-house so vendors can now start to -- so that when – my understanding of the process is as soon as the testing is completed, that the official paperwork and the copies of the source code and the copies of the actual trust and build will be sent here, then, and we will keep them in a secure location so we will have those records so at least we're all agreed on how it's going to be done.

ANNA SVIZZERO: If any of the Commissioners have any thoughts -- you can share those with Joe or I any time you want by e-mail or scribble on a copy if you have any other thoughts for us but we're -- we need to run this past Kim and obviously she's preoccupied with her wedding happening tomorrow but we'll do that when she gets back so we run the complete draft of it past Kim and Paul to make sure we're on the right track.

This doesn't require a vote of the board or anything, we just wanted it in for your information.

DOUGLAS KELLNER: All right.

Proposed Amendment to NYSVoter Regulation 6217.50

Let's move to the next item which is the proposed amendment to the NYSVoter Regulation 6217.5 and that has been up for public comment and public comment period has expired.

I believe the only comment we got was from New York City.

I certainly read what they had to say about it.

GREGORY PETERSON: It was my understanding that after reading it, New York City misinterpreted some things and they are now on board. They are OK with it and it doesn't put an extra burden on things.

DOUGLAS KELLNER: Those in favor of adopting the regulations, say "aye."

[Chorus of ayes]

DOUGLAS KELLNER: So the regulation is adopted. Any additional items for new business?

New Business

GREGORY PETERSON: No.

Post-Election Audit Proposed Regulation 6210.18 (Part 2)

GREGORY PETERSON: Want to put something on the record regarding this --

DOUGLAS KELLNER: We could go into the executive session and then --

GREGORY PETERSON: This way it will be public so we don't lose anybody.

DOUGLAS KELLNER: Go ahead. Go ahead.

GREGORY PETERSON: Just as a clarification of some of the things we had been talking about regarding regulations, proposed regulation 6210.18, as a preamble, it will be the unanimous feeling of this board that pursuant to the court order which states that the board will also provide for postelection board system to verify election results and while these processes are still being discussed by the state board of elections staff and Commissioners, it is anticipated the counties' audit requirements will be as follows; part of that being the audit provisions pursuant to the audit provisions contained in the proposed 6210.18, it will be anticipated by this board and these Commissioners that we expect everybody to be affected to be following the dictates of 6210.18 and after we have a real-life and real time analysis of this, subsequent to the primary election, we will then be in a position to talk about those things that concern some of the boards of elections and will make certain whatever changes may be necessary to effect this in a proper manner.

DOUGLAS KELLNER: Commissioner, again you use the word expect.

GREGORY PETERSON: No, no. We are mandated.

DOUGLAS KELLNER: We are mandating, we are requiring that the counties comply with 6210.18 as proposed for the pilot project.

EVELYN AQUILA: Uh-huh.

DOUGLAS KELLNER: We all agree that they are required to comply.

GREGORY PETERSON: Yes.

DOUGLAS KELLNER: -- with the proposed regulation for the pilot project.

GREGORY PETERSON: We can put it in resolution form and I would propose that be it resolved by this board to reaffirm that the court order requires the county boards to comply with the State Board's proposed audit regulations pursuant to 6210.18.

DOUGLAS KELLNER: I second that.

EVELYN AQUILA: Yes.

DOUGLAS KELLNER: All in favor?

[chorus of ayes]

JAMES WALSH: I want to thank Commissioner Peterson for his contribution to help us come to an amicable solution today. I'm voting in favor, also.

DOUGLAS KELLNER: So I think the only thing left for the public session is to set our next meeting date.

[discussion held, not audible to the captioner]

DOUGLAS KELLNER: All right.

Executive Session

So we have voted on the resolution, we have agreed on Tuesday, October 6th for the next meeting date, and so I think at this point I propose to go into executive session to discuss litigation matters and the campaign finance enforcement cases. All in favor say aye?

[chorus of ayes.]