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**Before the
OFFICE OF THE SECRETARY OF STATE
STATE OF COLORADO
1700 BROADWAY SUITE 200
DENVER, CO 80290**

In the Matter of)
Proposed Rulemaking dated December 15, 2015)

**COMMENTS BY THE JEFFERSON COUNTY BOARD OF COUNTY
COMMISSIONERS AND JEFFERSON COUNTY CLERK AND
RECORDER RELATED TO THE NOTICE OF PROPOSED
RULEMAKING DATED DECEMBER 15, 2015 (“NPRM”)**

To the Honorable Wayne Williams, Secretary of State:

This letter outlines the Jefferson County Commissioners’ and the Jefferson County Clerk and Recorder’s strong opposition to the changes to the election rules contained in the captioned NPRM.

The Board of County Commissioners and the Clerk and Recorder oppose those provisions of the NPRM pursuant to which only one electronic voting system is certified for use in Colorado elections and oppose the corresponding changes to Election Rules 11.9.1 through 11.9.4. If adopted, the proposed rules will cause a significant financial burden to Jefferson County and other counties throughout Colorado and upon the county taxpayers. Further, the NPRM creates a structure for the certification of electronic voting machines that runs contrary to the spirit of the Colorado Revised Statutes in Title 1.

The selection of one mandatory uniform voting system for Colorado causes a significant fiscal burden upon Jefferson County. During the pilot process the Pilot Election Review Committee (“PERC”) provided a comparative cost proposal worksheet to the counties that demonstrated that for a county of Jefferson County’s size, the estimated ten-year cost of ownership of the selected Dominion system would be \$1,238,273.00 including equipment acquisition, implementation,

training and software licenses. By comparison, the total cost for Jefferson County's current provider Election Systems & Software is listed as \$525,978.00. The price difference is over \$700,000, meaning the Dominion system would cost the County over twice as much as the ES&S system. Furthermore, the cost analysis provided by the PERC does not consider any incremental staffing costs that would be incurred changing from one electronic voting system vendor to another.

Upon request, your office prepared a regulatory analysis for Douglas County regarding proposed Election Rule 11.9.2 that stated that county taxpayers, boards of county commissioners, and county clerks and recorders "will benefit from the proposed rule." Jefferson County disagrees with this assertion: under the straightforward cost analysis provided by PERC, the Jefferson County taxpayers, Board of County Commissioners, and County Clerk and Recorder will be forced to expend additional monies beyond what would be necessary to maintain statutory compliance for electronic voting systems under the current structure. Even without undertaking the analysis of economic efficiency mentioned above, the NPRM creates a financial burden upon Jefferson County, its citizens and elected officials.

In the regulatory analysis you also state "None," under the section regarding probable costs of the proposed rule. The County disagrees with this assertion: this statement fails to address the cost differential between the proposed uniform electronic voting system and the other options for electronic voting systems that should be available to designated election officials under Colorado law.

The statutes governing this topic in Colorado indicate that the legislature intended for multiple voting systems to be utilized depending on the needs of the various political subdivisions of the State. To this end, the Colorado Revised Statutes contemplate:

- (1) That designated election officials are able to adopt "any kind of voting machine fulfilling the requirements" (§1-5-603);
- (2) That multiple electronic and electromechanical voting "systems" be for sale rather than a single system and from multiple "vendors" rather than a single vendor (§1-5-608.5(1),(3)(c));
- (3) That multiple voting system providers and "technologies" rather than a single technology should be certified by the Secretary of State in a timely manner and available "for selection" if they meet the minimum standards set forth in the statute (§1-5-616(4));
- (4) That the Secretary of State "shall certify" electronic and electromechanical systems which satisfy the requirements of part 6. (§1-5-608.5(3));

- (5) That the certification process and subsequent use of voting systems is flexible: the Secretary of State may promulgate “conditions of use” for electronic and electromechanical voting systems as appropriate to mitigate deficiencies identified in the certification process (§1-5-608.5(3)(b));
- (6) That the certification of voting systems by the Secretary of State is intended to be a review of “minimum standards” for systems which satisfy the statute (§1-5-616(1));
- (7) That the Secretary of State has standards set forth in §1-5-615 and -616 upon which the Secretary may base his or her certification decisions and such standards do not contemplate the selection of a single vendor to the exclusion of other vendors which meet the qualifications set forth in statute;
- (8) That the Secretary of State must produce a written report on each [voting] system submitted for certification. (§1-5-617(2)), and
- (9) That the Secretary of State must allow selection of new voting systems in a timely manner (§1-5-617(4)).

The statutes referenced above consistently imply the presence of several market participants in the context of electronic voting systems. Similarly, they mandate that the Colorado Secretary of State exercise his or her power to regulate and certify systems that satisfy the requirements of that part 6 of the statute in a timely fashion. Nowhere do the statutes contemplate the concept that the Secretary of State can, by rulemaking, dictate which voting system must be used by all the State’s election officials. In fact, the statutes contemplate the opposite, by stating that designated election officials should be able to select vendors, and that governing bodies of political subdivisions, upon consultation with the designated election official, may adopt an electronic voting system.

Colorado statutes do not provide the Secretary of State with the discretion to deny certification to systems that are otherwise qualified by Colorado election statutes and rules promulgated by the Office of the Secretary of State. If the systems submitted for certification are tested and approved by federally certified laboratories as required by statute, and meet the “minimum standards” set forth in statute and in the rules set forth, then under the statute the Secretary of State “shall” approve those voting systems and certify them accordingly. The County has not been provided with any written report, as required by statute, describing whether or how the piloted voting systems submitted for certification failed to meet the requirements of Colorado statute and applicable rules. Even if strict compliance with the standards is not possible, the statutes contemplate that the Secretary of State can promulgate conditions of use for any particular system in order to mitigate deficiencies discovered during certification.

The NPRM, by its changes to Elections Rules 11.9.1-11.9.4, stifles the potential for innovation or development in elections voting system technology. By barring competition in this fashion,

several financial risks are created that wouldn't exist in a market that allows several participants. First, there is a very real risk of monopolistic pricing structures due to the lack of competition. Second, this NPRM creates a risk that the uniform voting system vendor could go out of business or the system could fail now or in the future and leave the entire state without any functioning, previously-certified alternative vendors. Third, this NPRM impacts counties throughout Colorado in a disparate way: small counties with a small demand on in-person voting center equipment should not be forced to purchase the same equipment that large counties purchase.

Over the past several years Jefferson County has seen continual growth in the participation in elections via mail ballots, with a corresponding drop in the use of electronic voting systems in the County. The rise of mail ballot election participation in the State of Colorado serves to reduce the need for a uniform electronic voting system, as the use of electronic voting systems continues to decline.

The system piloted by Jefferson County during 2015, the Election Systems & Software system (the "ES&S System"), met the minimum standards set forth in statutes as well as the elections rules promulgated. Furthermore during the 2015 election and under the supervision of Secretary of State staff, the ES&S System was able successfully to complete a "mock risk limiting audit" to begin to prepare for the risk limiting audit which will be required for the first time in 2017. The only potential issue that arose with the risk limiting audit in the ES&S System during the 2015 election was one of voter privacy that is easily mitigated by utilizing a central count for the ES&S System vote records.

Without a specific rationale for why three piloted electronic voting systems were denied certification with reference to the standards contained in statute and the rules promulgated by the Secretary of State, and the statutory written report regarding certification of these systems, a decision not to certify these systems could be found to be groundless, arbitrary or capricious.

Finally, the NPRM does not contain any reference to the time period for which a uniform electronic voting system will be certified. No process is set forth for certification sunset or for periodic review or reselection of a uniform electronic voting system selected by the Secretary of State. This unlimited structure further erodes the principles of economic efficiency.

Jefferson County has further concerns about specific rule changes contained in the NPRM as set forth below:

Rule 7.5.1(c)

The County objects to the modification to drop box signage requirements, this imposes an additional cost on every jurisdiction for compliance.

Rule 7.8.8

Regarding the ability to “remove or retrain” deficiently performing signature verification judges, designated election officials do not have resources to retrain signature verification judges during the pendency of an election.

Rule 8.9

Having watchers present at a group residential facility presents the potential for voter intimidation and Jefferson County would request that this addition to the rules be stricken.


Rule 11.3.2(c)


The County requests that the words “if appointed” be left in this rule to allow designated election officials flexibility in convening the logic and accuracy Testing Board.

As you are aware Jefferson is not the only county with significant concerns regarding the NPRM and the impact of a uniform electronic voting system in Colorado. The County has pledged support to a coalition of other counties in opposition to this implementation. Please give due consideration to the concerns of the designated election officials, county commissioners, and taxpayers impacted by this NPRM.

Sincerely,

COUNTY OF JEFFERSON,
STATE OF COLORADO

By 
Libby Szabo, Chairman
Board of County Commissioners

By 
Faye Griffin, Clerk and Recorder