

January 12, 2016

Honorable Wayne W. Williams
Colorado Secretary of State
1700 Broadway, Suite 200
Denver, CO 80290

Re: Response to Proposed Changes to Election Rule 11.9.2

Dear Secretary Williams:

We have become aware of your pursuit of a policy to create and enforce a Unified Voting System that would permanently limit all Colorado Counties to purchasing only from a single system vendor selected by your agency. Though we recognize the obvious and immense benefit such a policy would be for your election staff and the potential benefits to select counties that may need outside assistance during an election, we are concerned that your office may have exceeded its authority and is unnecessarily creating an unfunded mandate. We believe that rejecting qualifying election equipment and vendors in favor of a single source is not in the best interests of the people we are elected to serve.

Enclosed is a letter detailing more specific concerns with your proposed policy. We sincerely request that you consider our concerns and do not change the current Election Rules regarding the purchase of voting equipment in a way that limits counties from using any systems that meet all of the statutory requirements. We further request that you do not implement a policy that limits the choices of counties to purchase voting systems to run their elections.

We applaud your efforts to improve the Colorado election system and we stand ready to support you in your efforts to do so, but we ask that you respect the rights of each county when it comes to selecting an election system that fits their individual needs.

Respectfully,



David A. Weaver, Chair
Board of Douglas County Commissioners



Merlin Klotz
Douglas County Clerk and Recorder

Enclosure

January 12, 2016

The Honorable Wayne W. Williams
Secretary of State
1700 Broadway, Suite 200
Denver, CO 80290

Re: Response to the Regulatory Analysis of Proposed Election Rule 11.9.2

Dear Mr. Secretary:

The County has received the Regulatory Analysis of proposed Election Rule 11.9.2.1 of 8 C.C.R. 1505-1. The analysis did not reach the specific question of who will bear the cost of limiting all counties in the State to the use of the Dominion Election System under the Uniform Voting System (UVS) policy being proposed. Nor did the analysis thoroughly explore the effects of creating a State-mandated monopoly nor alternatives that were considered. In an effort to ensure these matters are given proper consideration, this response will look at those specific issues to ensure that you more fully understand the scope and effect of the rule and policy that you are proposing.

Classes that will bear the costs of the proposed rule:

- County taxpayers

It is interesting to note that your analysis admits that your rule will create a financial burden on County taxpayers, but makes no effort to explore what that cost will be. In effect, this rule would be creating an unfunded mandate on counties in potential violation of § 29-1-304.5, C.R.S.

Classes that will benefit from the proposed rule:

- Colorado mobile and disabled voters
- County Clerks and Recorders in need of outside assistance
- Colorado Secretary of State
- Candidates for office and Ballot Issue Committees in multiple County jurisdictions

The list above is abbreviated from the one provided in your analysis, but the one above is a far more accurate list of the proposed classes that will benefit from this rule change, and it is a pretty narrow group. The primary beneficiary is really the election staff of the Secretary of State, as almost all of the impacts cited make their responsibilities easier. While there is some secondary benefit for counties in having a more responsive (and less burdened) state support system, there are considerable negative impacts to counties that were entirely ignored by this analysis – as though they simply did not exist.

Description of the probable quantitative and qualitative impact of the proposed rule, economic or otherwise, upon affected classes of persons:

Quantitative impact:

All of the impacts cited were solely for the benefit of the SoS election staff except:

“• Finally, the proposed rule will reduce the amount of time currently required for the Secretary of State’s office and county election officials to ensure that the voting system interfaces seamlessly with other dependent technologies”

Though there is potential here for some ancillary benefit to the counties if state election staff is more responsive because they are less busy, generally, the amount of time needed for county staff to perform the tasks is otherwise entirely unchanged by being forced to use a system selected by the SoS. If one of the systems not selected by the SoS as the UVS would have been a better fit for the needs of a particular county – what about the time and resources potentially lost by the inefficiency of making all counties use a one-size-fits-all system? It is our Clerk and Recorder’s belief that some functions such as ballot resolution are slower on the Dominion system than on Hart thereby costing the County considerable lost time and inefficiency. Although both systems use the same scanners, it is the software and what processing is done as it scans the ballot that determines the production speed of that process. Ballot creation time on the piloted Hart system was substantially faster than our Legacy Hart system and there was no quantitative comparison between the speeds and methods of the two systems. For example, the point in the process that audio must be added may dramatically impact the time required to create a ballot.

Qualitative impact:

Most of these are simply a different way of stating the same idea that if the state elections staff were less burdened, there would be some increase in support they are able to provide to counties but it still ignores the problems that it might create for those counties. There also appears to be a benefit to mobile voters (both disabled and non-disabled) not getting confused by different ballot templates and voting devices – however, Douglas County is unaware of any such problem being widespread and in need of solving. It is almost as if a problem is being blown out of proportion in order to justify this “solution.” Besides, if there are any difficulties with the single system selected as the UVS, what are the costs to ALL counties? Problems with the system will now be magnified fifty fold since all counties will be forced to use the flawed system.

There is one clearly identified tangible benefit to distressed county election staffs:

“• In the event of high staff turnover, natural disaster, or other disrupting event, the rule will allow counties to cross-train and support each other on the single voting system. Currently, such support is limited to the other counties with the same system provider. This enhanced support capability by the state and other counties would come at no cost to counties and may significantly decrease other costs.”

While this benefit is undeniable, are the costs of this solution worth the benefits when the chance of such an occurrence is minimal? Again, this seems to be a case of “what is easiest for the state election staff?” rather than a well thought out, long-term solution that works best for all stake holders. Conversely, the system selected (Dominion), as a single server-based system, has a single fail point that no help from the State or neighboring counties can help with if that server fails at 4:00 pm on Election Day.

Comparison of the probable costs and benefits of the proposed rules to the probable costs and benefits of inaction:

Probable costs of the proposed rule:

“ • None. Counties have always been required to pay for title 1 elections, and the proposed rule does not alter that responsibility.”

Because the financial cost falls on the counties, it does not exist? You are certainly aware that the legislature has directed any election system be capable of running a risk limiting audit by 2017 and that most, if not all, of the existing approved and certified systems currently are not capable of performing that task. In effect, your new policy and rule will force all counties to invest in a single voting system of your choice within the next couple of years. Douglas County estimates (based on the 12/11 “final” pricing from the vendors) that the selected Dominion system will have a 10-year cost excess over the Hart Verity system of \$585,000 or 80% more. Garfield similarly estimates a 75% excess the first year and a \$118,000 or 30% cost excess over 10 years. Those considerable financial costs warrant more consideration than “none” by your office.

Probable benefits of the proposed rule:

• The new rule will allow most if not all interested counties to acquire a uniform voting system without devoting significant time, energy, and money to engage in the competitive procurement process.

If the counties are spending taxpayer money from their constituents on an election system, it is their responsibility to devote such time and energy to the task in order to ensure that taxpayer money is well spent. Taking this choice away from those duly appointed by the people to make it is a benefit?

• The rule will allow the Secretary of State’s office, on behalf of the counties, to negotiate a standard price point and support terms with a single provider. This means the office can leverage the state’s negotiating and purchasing power for the benefit of all counties.

Creating a state-mandated monopoly may save money initially needed to invest in the UVS, but the long-term costs of eliminating competition will outweigh any short-term benefit. There is a reason that businesses are willing to offer a rebate if they can get a monopoly on services, because they will be able to recoup those and more in maintenance and volume. Your analysis seems to only see the benefit without considering this inevitable cost.

Probable costs of inaction:

Not implementing this rule for a UVS does nothing to solve the problems for a county that needs to update its existing voting system. All it would do is give such a county a choice as to which system it could use (a benefit NOT a cost). The SoS has already issued temporary approval for four different upgraded systems to be used so the statement that SoS staff would be unable to provide sufficient choices for counties is entirely without merit. There already are several good choices and this seems to again point to the adoption of the rule because “it is what is easiest for state election staff” rather than it is what is best for the state as a whole.

- If no action is taken, counties will pay higher costs for onsite training of new election staff members from the various voting systems providers, rather than receiving training without cost from the Secretary of State’s office or a neighboring county.

Since this rule does not mandate that the state election staff provide such training, creating a single vendor UVS does nothing more than make it possible for the State to provide the services – a far cry from counties actually receiving such services. This would not be the first time the State promised a benefit to counties if they let the State take over, and every county is familiar with the State not always following through on such promises.

Benefits of inaction:

- Each county will be able to purchase whatever voting system it chooses without regard to price or capabilities, assuming the Secretary of State has the technical and human resources to certify and test, and oversee the deployment, installation and use of, more than one voting system

Also, each county may invest in an election system that meets the particular needs of that county rather than being forced to invest in a system that the SoS determines is best for everyone. Some counties will weigh cost more than quality. Some will emphasize efficiency or accuracy over initial cost. Some will want the system that requires the least maintenance or that will have the greatest longevity. Those are decisions that belong in the hands of those who will have to pay for the system – not state election staff. That is an immense benefit.

Determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule:

- There is no less costly or intrusive method to implement a uniform voting system.

This ignores the fact that your own public committee that reviewed possible UVS vendors recommended using more than one system and, at the very least, using both Dominion AND Hart systems. Though this may not be less costly (that depends on the final figures and the situation/wants of the particular county) it would definitely be much less intrusive.

Description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule:

- There are no alternative methods for implementing a uniform voting system.

Why was no alternative even considered? This raises some potentially troubling questions about the use of public input and rulemaking procedures if no alternatives were ever truly considered. The Pilot Election Review Committee appears to have considered alternatives. In fact, they recommended using more than one vendor. Why was that recommendation ignored as part of this Regulatory Analysis?

A final point that your analysis was not legally required to explore but that must be considered prior to any action to change the rule and implement the UVS policy would be the legal authority to do so. Statute clearly places the authority to choose an election system within the jurisdiction of “the governing bodies of political subdivisions” (*See* § 1-5-603, 612, & 616(4), C.R.S.) and does not appear to grant your office discretion to refuse to certify and approve systems that meet all of the statutory requirements (*See* § 1-5-608.5(3)(a) & 616(4), C.R.S.). Any agency action to limit the choices of counties to select statutorily qualifying systems would appear to be an overreach of authority vulnerable legal challenge.

Thank you for taking the time to review this response and it is our genuine hope that this will help you understand our position that selecting a single source election system vendor as the only option for counties to purchase is the wrong decision. What is best for the State election staff is not what is best for the State as a whole and the costs do not outweigh the benefits when all of the costs are thoughtfully considered. We urge you to keep rule 11.9.2 unchanged and to rethink implementation of a policy that will force all counties into an election system monopoly.

Respectfully,



Chris Pratt
Assistant County Attorney