

14.12 Executive Order 03-11: Gifts.

(a) Pursuant to Executive Order 03-11, no official or employee in the Executive and Administrative Branch of the City shall solicit or accept, directly or indirectly, anything of value, including any gift, gratuity, favor, entertainment, invitation, food, drink or loan, unless consideration of equal or greater value is conveyed in return, from any of the following sources:

- (1) A person seeking to obtain business from, or who has financial relations with the City;
- (2) A person whose operations or activities are regulated or inspected by any City agency;
- (3) A person engaged, either as principal or attorney, in proceedings before any City agency or in court proceedings in which the City is an adverse party;
- (4) A person seeking legislative or administrative action by the City; or
- (5) A person whose interests may be substantially affected by the performance or nonperformance of the official's or employee's official duties.

(b) Provider understands and agrees that if it offers anything of value to a City official or employee under circumstances where the receipt of such item would violate the provisions of this Executive Order, Provider shall be subject to sanctions with respect to future City contracts. Such sanctions may range from disqualification from participation in a particular contract to debarment, depending on the nature of the violation.

14.13 Chapter 17-1900 of the Philadelphia Code: Equal Benefits Ordinance.

(a) Unless Provider is a government agency, this is a "Service Contract" as that term is defined in Section 17-1901(4) of the Code. If the Service Contract is in an amount in excess of \$250,000, then pursuant to Chapter 17-1900 of the Code, Provider shall, for any of its employees who reside in the City, or any of its employees who are non-residents subject to City wage tax under Section 19-1502(1)(b) of the Code, extend the same employment benefits the Provider extends to spouses of its employees to life partners of such employees. Provider certifies that (i) it is in compliance with the requirements of Chapter 17-1900, (ii) its employees have been notified of the employment benefits available to life partners pursuant to Chapter 17-1900, and (iii) such employment benefits are currently, or will be made available within the time required by Section 17-1902(2), or that the Provider does not provide employment benefits to the spouses of married employees.

(b) Provider acknowledges and agrees that the following terms are included in this Contract:

- (1) Provider shall notify its employees of the employment benefits available to life partners pursuant to Chapter 17-1900 of the Code.

(2) Noncompliance by the Provider with the requirements of Chapter 17-1900 of the Code shall be a material breach of this Contract.

(3) Discrimination or retaliation by the Provider against any employee on account of having claimed a violation of Chapter 17-1900 shall be a material breach of this Contract.

(4) In addition to any other rights and remedies available to the City pursuant to this Contract at law or in equity, a material breach of this Contract related to Chapter 17-1900 may result in the suspension or debarment of Provider from participating in City contracts for up to three (3) years.

(c) An overview offering guidance on the applicability of, and requirements placed on City contractors by Chapter 17-1900 of the Code is available on the City's website (at <https://secure.phila.gov/eContract/> under the "About" link) (see "Minimum Wage and Equal Benefits Ordinances Impacting Some City Contractors").

ARTICLE XV: MISCELLANEOUS

15.1 **Governing Law.** This contract shall be deemed to have been made in Philadelphia, Pennsylvania. This Contract and all disputes arising under this Contract shall be governed, construed and decided in accordance with the laws of the Commonwealth of Pennsylvania, without giving effect to principles of Pennsylvania law concerning conflicts of laws.

15.2 **Amendments; Waiver.** This Contract may not be amended or modified in whole or in part, except by a written Amendment signed by all Parties. Except to the extent that the Parties may have otherwise agreed in writing, in an Amendment, no waiver, whether express or implied, by either Party of any provision of this Contract shall be deemed: (a) to be a waiver by that Party of any other provision in this Contract; or (b) to be a waiver by that Party of any breach by the other Party of its obligations under this Contract. Any forbearance by a Party in seeking a remedy for any noncompliance or breach by the other Party shall not be deemed to be a waiver of rights and remedies with respect to such noncompliance or breach.

15.3 **Integration.** The Contract Documents forming this Contract, including the Provider Agreement and the General Provisions and the exhibits incorporated by reference therein, contain all the terms and conditions agreed upon by the Parties, constitute the entire agreement among the Parties pertaining to the subject matter hereof, and supersede all prior agreements, understandings, negotiations and discussions, whether oral or written, of the Parties (except to the extent specifically set forth herein). No other prior or contemporaneous agreements, covenants, representations or warranties, oral or otherwise, regarding the subject matter of this Contract shall be deemed to exist or to bind any Party or to vary any of the terms contained in this Contract.

15.4 **No Joint Venture.** The Parties do not intend to create, and nothing contained in the Contract shall be construed as creating, a joint venture arrangement or partnership between the City and Provider.

15.5 **No Third Party Beneficiaries.** With the exception of the remedy provided to third party beneficiaries by Section 14.10€, nothing in this Contract, express or implied, is intended or shall be construed to confer upon or give to any Person, other than the Parties, any rights, remedies, or other benefits, including but not limited to third-party beneficiary rights, under or by reason of this Contract. This Contract shall not provide any third party with any remedy, claim, liability, reimbursement, cause of action or other right other than any such remedy, claim, etc. existing without reference to the term of or the existence of this Contract.

15.6 **Counterparts.** This Contract may be executed in one or more counterparts, each of which shall be deemed an original, but all of which taken together, shall constitute one and the same instrument.

15.7 **Severability and Partial Invalidity.** The provisions of this Contract shall be severable. If any provision of this Contract or the application thereof for any reason or in any circumstance shall to any extent be held to be invalid or unenforceable, the remaining provisions of this Contract and the application of such provision to Persons, or circumstances other than those as to which it is held invalid or unenforceable, shall not be affected thereby, and each provision of this Contract shall be valid and enforceable to the fullest extent permitted by law.

15.8 **Survival.** Any and all provisions set forth in this Contract which, by its or their nature, would reasonably be expected to be performed after the termination of this Contract shall survive and be enforceable after such termination. Any and all liabilities, actual or contingent, which shall have arisen in connection with this Contract shall survive the expiration or earlier termination of this Contract, along with the following: Provider's representations, warranties and covenants set forth in Article IV (Provider's Representations, Warranties and Covenants) above and in Article VII (Title) of the Provider Agreement; Provider's obligation to indemnify, defend and hold harmless the City, its officers, employees and agents as set forth in Section 8.2 (Indemnification) above and in Article X (Indemnification for Infringement of Proprietary Rights) of the Provider Agreement; the Parties' rights and obligations set forth in Article IX (Confidentiality) above and in Article IX (Confidentiality) of the Provider Agreement; and the Parties' rights and obligations set forth in Article VII (Title) of the Provider Agreement.

15.9 **Interpretation; Order of Precedence.** In the event of a conflict or inconsistency between the terms of these General Provisions and the terms of the Provider Agreement, the terms of these General Provisions shall control, except to the extent (if any) that the Provider Agreement expressly provides that a term or condition set forth in the Provider Agreement has precedence over these General Provisions.

15.10 **Headings.** The titles, captions, or headings of Articles, Sections and Exhibits or schedules in this Contract are inserted for convenience of reference only; do not in any way define, limit, describe or amplify the provisions of this Contract or the scope or intent of the provisions, and are not a part of this Contract.

15.11 **Statutes and Other Citations.** All statutory or other citations of law referenced in the Contract shall refer to the statute or citation referenced, as it may be amended or superseded from time to time.

15.12 **Days.** Any references to a number of days in this Contract shall mean calendar days unless the Contract specifies business days.

15.13 **Forum Selection Clause; Consent to Jurisdiction.** The Parties irrevocably consent and agree that any lawsuit, action, claim, or legal proceeding involving, directly or indirectly, any matter arising out of or related to this Contract, or the relationship created or evidenced thereby, shall be brought exclusively in the United States District Court for the Eastern District of Pennsylvania or the Court of Common Pleas of Philadelphia County. It is the express intent of the Parties that jurisdiction over any lawsuit, action, claim, or legal proceeding shall lie exclusively in either of these two (2) forums. The Parties further irrevocably consent and agree not to raise any objection to any lawsuit, action, claim, or legal proceeding which is brought in either of these two (2) forums on grounds of venue or *forum non conveniens*, and the Parties expressly consent to the jurisdiction and venue of these two (2) forums. The Parties further agree that service of original process in any such lawsuit, action, claim, or legal proceeding may be duly effected by mailing a copy thereof, by certified mail, postage prepaid to the addresses specified in Section 5.1 (Notice) of the Provider Agreement.

15.14 **Waiver of Jury Trial.** Provider hereby waives trial by jury in any legal proceeding in which the City is a party and which involves, directly or indirectly, any matter (whether sounding in tort, contract or otherwise) in any way arising out of or related to this Contract or the relationship created or evidenced hereby. This provision is a material consideration upon which the City relied in entering into this Contract.

15.15 **Notices.** All notices, demands, requests, waivers, consents, approvals or other communications which are required or may be given under this Contract shall be in writing and shall be deemed to have been duly made (a) when received or refused if delivered by hand with receipt given or refused; (b) on the next business day if delivered by a nationally recognized overnight courier service (e.g., Federal Express or United Parcel Service); (c) on the date confirmed for receipt by facsimile if delivered by facsimile; and (d) upon receipt or refusal of delivery if sent by certified or registered United States mail, return receipt requested. In each case notices shall be sent to the addresses set forth in the Notice section of the Provider Agreement, or to such other address as either Party may specify to the other by a notice complying with the terms of this Section 15.15 (Notices).

Certificate Of Completion

Envelope Id: DED053F1618E49A0B5BB5E6BC74432CB

Status: Completed

Subject: City of Philadelphia ES&S Contract

Source Envelope:

Document Pages: 196

Signatures: 4

Envelope Originator:

Certificate Pages: 4

Initials: 0

City of Philadelphia Law Department

AutoNav: Enabled

1234 Market Street

Envelopeld Stamping: Enabled

Suite 1800

Time Zone: (UTC-08:00) Pacific Time (US & Canada)

Philadelphia, PA 19107

law.contractinitiation@phila.gov

IP Address: [REDACTED]

Record Tracking

Status: Original

Holder: City of Philadelphia Law Department

Location: DocuSign

5/10/2019 11:51:14 AM

law.contractinitiation@phila.gov

Signer Events

Richard J. Jablonski

djjablonski@essvote.com

VP of Finance

Security Level: Email, Account Authentication (None), Access Code

Signature

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Signature Adoption: Pre-selected Style

Using IP Address: [REDACTED]

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Eric Anderson

eaanderson@essvote.com

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Christopher Malcarney

Christopher.Malcarney@phila.gov

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Finance ContractCertification

Finance.ContractCertification@phila.gov

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Completed

Using IP Address: [REDACTED]

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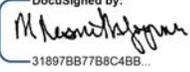
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Signed: 5/13/2019 7:54:51 AM

Electronic Record and Signature Disclosure:

Accepted: 5/13/2019 6:43:35 AM

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Signer Events	Signature	Timestamp
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<p>Monique Nesmith-Joyner, Interim Commissioner Monique.Nesmith-Joyner@Phila.gov Interim Commissioner Security Level: Email, Account Authentication (None)</p> <p>Electronic Record and Signature Disclosure: Accepted: 3/4/2019 8:45:50 AM ID: 9e2fd9e4-dd4e-4a8b-9ae0-14dfbad9cab2</p>	<p>DocuSigned by:  31897BB77B8C4B5...</p> <p>Signature Adoption: Pre-selected Style Using IP Address: [REDACTED]</p>	<p>Sent: 5/13/2019 9:19:15 AM Viewed: 5/13/2019 9:20:21 AM Signed: 5/13/2019 9:27:41 AM</p>

In Person Signer Events	Signature	Timestamp
Editor Delivery Events	Status	Timestamp
Agent Delivery Events	Status	Timestamp
Intermediary Delivery Events	Status	Timestamp
Certified Delivery Events	Status	Timestamp
Carbon Copy Events	Status	Timestamp
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Witness Events	Signature	Timestamp
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Notary Events	Signature	Timestamp
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Envelope Summary Events	Status	Timestamps
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Certified Delivered	Security Checked	5/13/2019 9:20:21 AM
Signing Complete	Security Checked	5/13/2019 9:27:41 AM
Completed	Security Checked	5/13/2019 9:27:41 AM

Payment Events	Status	Timestamps
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Electronic Record and Signature Disclosure
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This Electronic Records and Signature Disclosure is provided by the City of Philadelphia in connection with a pending electronic transaction. Any party proceeding with such electronic transaction is deemed to have consented i) to conduct the transaction by electronic means; and ii) where execution of an agreement is required, to the use of electronic signatures using the method provided in the agreement. Questions regarding this Electronic Records and Signature Disclosure should be addressed to econtractphilly@phila.gov.

EXHIBIT 9



Focused on Pennsylvania's public policies, politics and statewide issues

POLITICS & POLICY

DECEMBER 20, 2019 | 9:51 AM

Northampton officials unanimously vote 'no confidence' in ExpressVote XL voting machine

Emily Previti 

EASTON – Northampton County Election Commissioners unanimously supported a “vote of no confidence” in the county’s new voting machines after vendor Election Security & Software presented findings Thursday night from an investigation into tabulation errors and other problems when the system debuted.

The incorrect tallies in last month's election were linked to races with cross-filed candidates and straight-ticket ballots cast by voters. Cross-filed candidates are ones seeking an office on more than one party line, while the straight ticket option lets voters click one box to select every candidate on the ballot from one party.

Voters also complained that the ExpressVote XL touchscreens registered votes they hadn't cast.

Commissioner Kathy Fox said it happened to her.

"I didn't even think I touched it," Fox said at Thursday's meeting. "And [the machine] recorded that vote. And so that made me a little nervous. Just because I don't really think I was touching it."

According to ES&S, a selection on the XL can be triggered by an infrared sensor without the voter actually touching the machine. "It's very thin, but you can make a selection just by getting just close enough," said ES&S Vice-President of Product Development Adam Carbullido.

Carbullido has placed the blame for the problems squarely on ES&S, which has more county contracts than any other vendor in Pennsylvania and dominates nationally as well. He's attributed the problems in Northampton to mistakes that went undetected before the machines shipped from the company's warehouse in Omaha, Neb., and again during pre-

election logic and accuracy testing (which the Pa. Department of State will oversee in the county next spring).

Carbullido and ES&S Product Manager Tobey Dingbaum returned to Easton Thursday to explain what went wrong and answer questions from election commissioners, the same opportunity afforded [Northampton County Council](https://papost.org/2019/12/12/human-error-and-sensitive-touchscreens-blamed-for-northampton-co-election-problems/) last week. [< https://papost.org/2019/12/12/human-error-and-sensitive-touchscreens-blamed-for-northampton-co-election-problems/>](https://papost.org/2019/12/12/human-error-and-sensitive-touchscreens-blamed-for-northampton-co-election-problems/)

"You are going to send extra staff on-site [and] to train," Commissioner Deb Hunter said to Carbullido, who agreed. "I want that at no charge," Hunter added. "That should all be gratis."





Emily Previti / PA Post

Northampton County Election Commissioner Deb Hunter listens during a Dec. 19, 2019, commission meeting during which she moved a vote of no confidence in the ExpressVote XL voting machine and manufacturer Election Systems & Software after hearing ES&S explain why the XL's rollout was so problematic there in the Nov. general election. (Emily Previti/PA Post)

After nearly an hour of grilling Carbullido and Dingbaum, Hunter said she wanted to “reject these machines and request a refund from ES&S because they’ve broken our contract.” She also revealed that none of the commissioners has actually seen the document.

Although the county Election Commission selected the ES&S system, their choice amounted to a recommendation, subject to approval and financing by County Council. According to Assistant Solicitor Richard Santee, the commission doesn’t have the authority to cancel the contract under [Northampton’s home rule](#) <

<https://www.northamptoncounty.org/COUNCIL/Documents/Home%20rule.pdf> charter – only the council has that power.

"I'm trying to give council paper backup from this commission [on where it stands]," she said. "They're looking to us to fix this. Even though they have the purse strings, they want us to have this debate."

Ultimately, Hunter moved a resolution to formally express "no confidence [in] ES&S's ability to make sure these machines are operable, fulfill all their promises with regard to staffing, training, helping to run a proper logic and accuracy test –all of the things ... they say to ensure we'll have a verifiable, proper election."

The commission voted 4-0 in support of the measure (the fifth person on the panel, Chairman George Treister Jr., left the meeting at the 45-minute mark, citing a health issue).

County Council is scheduled to meet next on Jan. 6.

Republican Councilman John Cusick says he thinks the issues should be resolved in time for the presidential primary April 28 (ES&S personnel the issues won't occur again due to a software update and Pa.'s elimination of straight-ticket voting).

"If Northampton County continues to have problems with the ExpressVote XL, then additional options will have to be considered," Cusick wrote in an email.

Other council members didn't respond to requests for comment.

In a court filing last week, <
<https://papost.org/2019/12/18/state-officials-break-silence-on-controversial-expressvote-xl-voting-machine/>>
attorneys for DoS and officials from the two other XL
counties outlined why a decertification would cause chaos
four months out from the presidential primary (though
Northampton's been through it before, [switching systems in 2008](https://www.mcall.com/news/mc-xpm-2008-01-18-3961611-story.html) <
<https://www.mcall.com/news/mc-xpm-2008-01-18-3961611-story.html>> on a similar timeline after the state
decertified its Advanced Voting Solutions machines).

The ExpressVote XL was picked as the new voting machine in
Cumberland County, where the machines will roll out for the
spring primary, and in Philadelphia, where voters did report
problems with the XL — if less dramatic than in Northampton
and limited to touchscreen hypersensitivity (Philly ballots
didn't have any cross-filed candidates Nov. 5).

Most of the 32 other ES&S counties opted for hand-marked
scannable ballots, with about half a dozen choosing the
machine-marked ExpressVote system, according to *PA Post's*
analysis.

California, Delaware, Mississippi, New Jersey and Texas also
have certified the XL, according to an affidavit from ES&S in
the state's [recent response in a federal case](https://papost.org/2019/12/18/state-officials-break-silence-on-controversial-expressvote-xl-voting-machine/) <
<https://papost.org/2019/12/18/state-officials-break-silence-on-controversial-expressvote-xl-voting-machine/>> seeking
decertification of the machine.

The filing also includes statements from DoS as well as officials from Philadelphia and Cumberland — but not Northampton.



Emily Previti / PA Post

Northampton County Election Commissioner Maudeania Hornik speaks during a Dec. 19, 2019, meeting of the Northampton County Election Commission in Easton, Pa. Hornik says confidence in election integrity is particularly critical in swing counties like Northampton. Hornik is the only one of the five commissioners who will return next year for another term. (Emily Previti/PA Post)

A separate, more recent lawsuit filed in state court last week < <https://papost.org/2019/12/13/suit-filed-in-pa-court-challenges-widely-used-electronic-voting-machine/>> also demands the XL's decertification. An outgoing county councilman is among five people from Northampton in that group of plaintiffs. It also includes eight Philadelphians and two fair election advocacy groups.

“Quite a number of residents in our county ... have no confidence in [ES&S's] machines or in the results of the last

election,” said Commissioner Maudeania Hornik. “We owe it to our residents, but I also think we owe it to future candidates that their election would be honest and fair.”

Hornik is the only commissioner returning in 2020 for another term. For everyone else, their last meeting was Thursday.

“We are a swing county,” Hornik said. “We are a county that likes our Republicans, and we are a county that likes our Democrats. And we must have confidence in our machines.”

Editor's note: This post was updated to add comment from Northampton County Councilman John Cusick.

LINKS

- **[Human error and sensitive touchscreens blamed for Northampton Co. election problems](https://papost.org/2019/12/12/human-error-and-sensitive-touchscreens-blamed-for-northampton-co-election-problems/)** < <https://papost.org/2019/12/12/human-error-and-sensitive-touchscreens-blamed-for-northampton-co-election-problems/>>
- **[Machine errors delay election reporting in Pa.'s Northampton County](https://papost.org/2019/11/06/machine-errors-delay-election-reporting-in-pa-s-northampton-county/)** < <https://papost.org/2019/11/06/machine-errors-delay-election-reporting-in-pa-s-northampton-county/>>

TAGS

[election security & software](#)

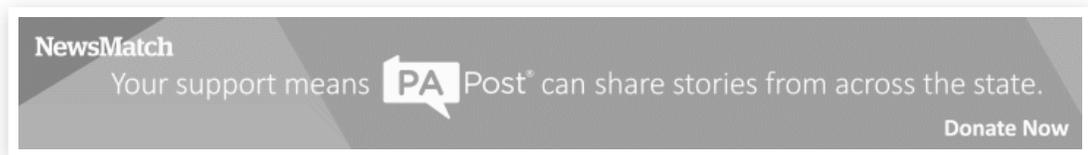
[expressvote xl](#)

[northampton county](#)

[voting machines](#)

CATEGORIES

POLITICS & POLICY



< [https://support.papost.org/give/199341/#!/donation/checkout?
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EXHIBIT 10

COURT OF COMMON PLEAS OF NORTHAMPTON COUNTY
COMMONWEALTH OF PENNSYLVANIA
CIVIL DIVISION

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IN RE: :CV-
2019 MUNICIPAL ELECTION :
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NOTES OF PROCEEDINGS

BEFORE **THE HONORABLE F.P. KIMBERLY
McFADDEN**, Judge, Northampton County, Third
Judicial District, Easton, Pennsylvania,
Courtroom No. 7, on Tuesday, November 5, 2019.

APPEARANCES:

ROBERT NITCHKEY, ESQUIRE
-- For the Movants

RICHARD E. SANTEE, JR., ESQUIRE
-- Solicitor County of Northampton

OFFICIAL COURT REPORTER: MOIRA E. EVANS

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I N D E X

WITNESSES

All Witnesses:	Page
JOSEPH WELSH	
Direct Examination	
By MR. NITCHKEY	10:21
Cross-Examination	
By MR. SANTEE	12:1
AMY HESS	
Direct Examination	
By MR. NITCHKEY	12:24
Cross-Examination	
By MR. SANTEE	15:7

1 THE COURT: Now, I want the record
2 to reflect that my first notification of this
3 matter coming before me was at 10:30, and it is
4 now 12:25. And now are we ready to do
5 something?

6 MR. NITCHKEY: Yes, we are, Your
7 Honor. For the record, Bob Nitchkey on behalf
8 of the Honorable Michael J. Koury, Jr. and
9 Honorable Craig A. Dally with respect to some
10 difficulties with the voting machines in various
11 precincts.

12 THE COURT: Now, let me ask you this
13 before you go any further.

14 MR. NITCHKEY: Sure.

15 THE COURT: How is that I, who sit
16 on the same bench as these two gentlemen, is
17 supposed to be hearing this on their behalf?

18 MR. NITCHKEY: Well, number one, I
19 don't think there is anybody else to hear it.
20 Number two, they are not going to -- no, no, no.
21 I don't mean -- I mean in another county.

22 Number two, they are not going to be
23 appearing as witnesses.

24 THE COURT: But it's on their behalf
25 that I'm having this.

1 MR. NITCHKEY: It is on their
2 behalf.

3 THE COURT: Well, maybe they can
4 answer that for me. How is it that you, who are
5 bringing this to my attention, and I'm a member
6 of your bench, is supposed to hear this?

7 JUDGE KOURY: I believe it would be
8 under the Rule of Necessity, Judge, under the
9 Rules of Judicial Conduct. There is an
10 exception under the Rule of Necessity if there
11 is no one else available under an emergency
12 circumstance.

13 MR. DALLY: And also it's basically
14 an agreed-to Order with the exception of the
15 costs.

16 THE COURT: There is agreed to --

17 MR. NITCHKEY: There is an agreed-to
18 Order. I should have mentioned that.

19 JUDGE KOURY: Except with respect to
20 one issue.

21 JUDGE DALLY: As far as costs of
22 service.

23 JUDGE KOURY: Service of the Order.

24 THE COURT: Okay. Well, we'll see
25 what the upper courts say about that. Go ahead.

1 Continue.

2 MR. NITCHKEY: Call Joe Welsh.

3 MR. SANTEE: Your Honor, Richard
4 Santee on behalf of the County. I just note the
5 County's objection to any offer of proof or
6 evidentiary hearing in this matter, because we
7 have an agreed Order, except as to costs. And
8 so any evidence, except for the Judge's decision
9 about what -- who is to award costs is --

10 THE COURT: Well, do we have a
11 stipulation of facts?

12 MR. SANTEE: Your Honor, we can
13 certainly provide an offer of proof.

14 THE COURT: Okay.

15 MR. SANTEE: That's not evidentiary.
16 And so basically, it's not part of the record,
17 but that -- there have been reports of an issue
18 with the machine. And we've agreed to an Order.
19 And if Your Honor -- it probably makes sense if
20 we could, hand up a copy of the Order, so that
21 you can review it.

22 THE COURT: Why don't we do that
23 first.

24 MR. SANTEE: Sure.

25 THE COURT: Good idea.

1 MR. SANTEE: And you'll see what the
2 issues are, Your Honor.

3 THE COURT: Let the record also
4 reflect that at 7:45 this morning, I personally
5 called the Election Board, because I had a
6 problem in the voting booth in Lower Saucon.

7 MR. NITCHKEY: Well, and, Your
8 Honor, we can probably check with -- we can
9 probably dispense with formal testimony if we
10 can place on the record that the -- unless you
11 have anything, any objection; the purpose for
12 the agreed Order is because there have been
13 multiple reports and incidents of difficulty
14 voting on yes/no questions insofar as it appears
15 as though they are on the periphery of the
16 voting board.

17 THE COURT: Oh, let me assure you,
18 and I have no right to testify here, but the
19 problems existed before you got to the yes/no's
20 with the machine.

21 MR. NITCHKEY: Okay.

22 THE COURT: I personally experienced
23 that.

24 MR. NITCHKEY: Okay. But this --
25 this, just so -- just so you understand and

1 we're clear, this Order relates only to the
2 yes/no questions insofar as there has been
3 reported difficulties voting either yes or no.

4 And of course the reason we're here
5 is because that likely is going to affect the
6 integrity of the results of the election.

7 THE COURT: I think that this Order
8 may solve their problems. But I think there's
9 more problems than this.

10 MR. NITCKEY: I don't disagree,
11 Your Honor.

12 THE COURT: So to that end, you
13 think you need to take testimony about people
14 calling in? Do you agree that people called in?

15 MR. SANTEE: Your Honor, I would
16 agree that people called in. I -- that -- of
17 reports. And actually, Your Honor, in terms of
18 calling in, how the reports came to the
19 attention of Amy Hess, it's -- we don't agree
20 necessarily to that specific sets of facts
21 exactly.

22 Based on the initiative of the
23 deputy -- the Acting Chief Clerk, Amy Hess, she
24 reached out to polling places based on reports
25 of issues and discovered problems; that there

1 were reports of issues with the machines. So --

2 THE COURT: Issues that go beyond
3 the yes/no's.

4 MR. SANTEE: We're only here about
5 the yes/no questions right now.

6 MR. NITCHKEY: So in other words,
7 the issues that Amy called about and was told
8 about related specifically to the yes/no
9 questions.

10 THE COURT: Oh, no. Because I --

11 MR. NITCHKEY: No, no, no. I'm
12 talking about the ones that Amy called about.

13 THE COURT: Okay.

14 JUDGE KOURY: Mr. Nitchkey.

15 (Discussion held off the record.)

16 MR. NITCHKEY: If we may just have
17 Mr. Welsh testify so that the record reflects
18 that the problems have been more than just the
19 yes/no questions.

20 MR. SANTEE: Your Honor, I object
21 because it is beyond the scope of this
22 application.

23 THE COURT: Look, guys, here's the
24 deal, I'm going to go have lunch now. You're
25 going to resolve this. It goes beyond yes/no.

1 Figure this out.

2 MR. NITCHKEY: Okay.

3 THE COURT: The longer this takes,
4 the worse this gets. Understood?

5 MR. NITCHKEY: Understood, Your
6 Honor.

7 THE COURT: I will be back here at
8 1:00. This Order will be redone, and it will be
9 encompassing the problems.

10 MR. NITCHKEY: Okay. Thank you,
11 Your Honor.

12 THE COURT: You're welcome.

13 (Brief recess.)

14 THE COURT: How are we doing?

15 MR. NITCHKEY: Good. I hope you had
16 a good lunch, Judge.

17 THE COURT: Oh, I had half a
18 sandwich. It was wonderful.

19 MR. NITCHKEY: We have worked on the
20 language and believe we have an agreed Order.

21 THE COURT: Oh, good.

22 MR. NITCHKEY: The Movants, Your
23 Honor, with you all due respect, just in case
24 there is a cause to set the election aside,
25 would like us to make a five-minute record with

1 two witnesses.

2 THE COURT: Oh, of course. Yes.

3 MR. SANTEE: And the County believes
4 this is premature at this time.

5 THE COURT: To what?

6 MR. SANTEE: To make a record about
7 that. But I understand your -- that's our
8 position.

9 MR. NITCHKEY: Right.

10 Joseph Welsh.

11 THE COURT: You're going to testify
12 from up here? Or you're going -- yes. He
13 doesn't have to go up on the witness stand.
14 Raise your right hand.

15 * * *

16 **JOSEPH WELSH**, having been duly
17 sworn, was examined and testified as follows:

18 THE COURT: Okay.

19 * * *

20 DIRECT EXAMINATION

21 BY MR. NITCHKEY:

22 Q. Would you state your name and
23 address for the record, please.

24 A. Joseph E. Welsh, 138 South Tenth
25 Street, Easton, Pennsylvania.

1 Q. And are you a registered voter here
2 in Northampton County?

3 A. Yes, I am.

4 Q. In that capacity, did you go to your
5 designated poll and cast your vote this morning
6 in the municipal election?

7 A. Yes. I cast my vote at Saint
8 Anthony's Youth Center.

9 Q. Did you encounter any difficulties
10 when you went through that process?

11 A. Yes, I did.

12 Q. And can you describe those for the
13 Court, please.

14 A. The difficulties I encountered were
15 on the right-hand side of the machine. Pressing
16 the retention questions for Judge Dally and
17 Judge Koury, I had to repeatedly press the
18 button for the -- the light to indicate that my
19 ballot was being cast for my option for both of
20 those retention questions.

21 MR. NITCHKEY: Okay. I have nothing
22 further.

23 MR. SANTEE: Briefly.

24 * * *

25 CROSS-EXAMINATION

1 BY MR. SANTEE:

2 Q. Just to confirm that you were able
3 to cast your vote, correct?

4 A. That's correct, after several tries.

5 Q. And that you were able to vote for
6 is the candidates and make the selection that
7 you intended to do?

8 A. That's correct.

9 MR. SANTEE: I have nothing further,
10 Your Honor.

11 THE COURT: Okay. Any other
12 questions from anybody? Nothing else you need
13 from him?

14 MR. NITCHKEY: No.

15 THE COURT: Okay. You may be
16 seated.

17 MR. NITCHKEY: One other witness.
18 Amy.

19 * * *

20 **AMY HESS**, having been duly sworn,
21 was examined and testified as follows:

22 * * *

23 DIRECT EXAMINATION

24 BY MR. NITCHKEY:

25 Q. Would you state your name and

1 address for the record, please.

2 A. Amy Hess, 113 Broad Street, Bath, PA
3 18014.

4 Q. And what is your occupation, Amy?

5 A. I am currently the acting Registrar
6 at the Elections Division.

7 Q. And in that capacity, did you -- did
8 there come a time this morning when it was
9 brought to your attention that there was some
10 difficulties, specifically with the periphery
11 buttons on unspecified voting machines?

12 A. Yes.

13 Q. Here within the County?

14 A. Yes.

15 Q. And what did you do as a result?

16 A. What we did was, we did take these
17 phone calls, and we gave them to the ES&S, who
18 is here with us, and we --

19 THE COURT: What is ES&S?

20 MS. HESS: ES&S is the voting
21 machine company. We do have technicians here.
22 And we did walk through to re-calibrate the
23 machines.

24 BY MR. NITCHKEY:

25 Q. And what happened when you tried to

1 re-calibrate one of the machines? Do you have
2 any idea? If you know?

3 MR. SANTEE: I object based on
4 personal knowledge.

5 MR. NITCHKEY: Yes. If you don't
6 know. That's fine. Okay.

7 BY MR. NITCHKEY:

8 Q. As a result of these reports, did
9 you contact any other polls to determine whether
10 they were having similar problems with their
11 machines?

12 A. Yes, we did.

13 Q. And what was the response?

14 A. We found about three, to my
15 knowledge, that I found.

16 Q. Three?

17 A. Additional.

18 Q. That were having the same problem?

19 A. Yes.

20 Q. With the periphery buttons?

21 A. Yes.

22 Q. Particularly the yes and no
23 questions?

24 A. Correct.

25 MR. NITCHKEY: On the ballot.

1 Okay. I have nothing further.

2 THE COURT: Nothing else?

3 MR. SANTEE: Your Honor, briefly.

4 THE COURT: Sure.

5 * * *

6 CROSS-EXAMINATION

7 BY MR. SANTEE:

8 Q. Ms. Hess, have you received any
9 reports that a voter was not able to cast a
10 vote?

11 A. No.

12 Q. Have you received any reports that
13 any voter was not able to cast a vote for the
14 candidate of their choice?

15 A. No.

16 Q. Have you received any reports that
17 any voter was not able to cast a yes or no
18 selection for any of the ballot questions?

19 A. No.

20 MR. SANTEE: That's all I have, Your
21 Honor.

22 THE COURT: She may sit down?

23 MR. NITCHKEY: Yes.

24 THE COURT: You may sit down. Thank
25 you very much.

1 May she be excused if she wants to
2 be? I'm sure she has other stuff to do.

3 MR. SANTEE: If -- Your Honor, may
4 I? I would request Ms. Hess be excused.

5 THE COURT: You may be excused.
6 Thank you. You don't have to stick around.

7 MR. NITCHKEY: Your Honor,
8 obviously the concern here is that even though
9 the skilled, if you will, voters in this
10 courtroom stayed at the vote they were trying to
11 make, obviously there may be a number -- any
12 number of people who may just give up on that
13 vote. And, of course, that's going to taint the
14 results.

15 Therefore, we have come to an agreed
16 Order which --

17 THE COURT: Is that it?

18 MR. SANTEE: It's -- it's a rough,
19 Your Honor. It's similar to what was proposed.
20 The only blank is the costs, imposition of costs
21 at the bottom.

22 THE COURT: Okay. So we're now
23 taking out the language that limits this to the
24 yes/no, that allows them to help with any
25 problems?

1 MR. SANTEE: Correct.

2 MR. NITCHKEY: Right.

3 MR. SANTEE: Right. It's something
4 the County has been doing --

5 MR. NITCHKEY: To try to correct
6 those problems.

7 THE COURT: I can do that on my
8 original that you gave me if you want me to.

9 MR. NITCHKEY: If you wouldn't mind.

10 THE COURT: With your agreements.

11 MR. SANTEE: That's fine, Your
12 Honor, if you strike out that language.

13 MR. NITCHKEY: And as far as the
14 costs, Your Honor, it's the Movants' position
15 that, of course, the County is responsible for
16 conducting the election. And part of that of
17 course is making sure that the machines work
18 correctly and that there are sufficient
19 instructions for the poll workers to convey to
20 voters in the event that the machines do not
21 work properly. And, therefore, we feel that the
22 cost of serving this on the Judges of Election
23 should be on the County.

24 MR. SANTEE: Your Honor, the
25 County's position is that is the Movants' --

1 it's essentially personal relief in this action,
2 that they're the candidates in this election,
3 that typically the plaintiff in any action would
4 bear the costs of service in such an action, and
5 that this is serving an Order to carry out the
6 wishes of this Court.

7 The County's position is it should
8 be borne by the Movants in this case personally
9 should they wish this to be served. Because
10 part of the issue was with who would serve. The
11 Movants themselves indicated they identified
12 constables, because sheriffs are not allowed
13 under the Police Powers Act of the Election Code
14 to be in a polling place. Neither can police
15 officers for that matter, unless called to keep
16 the peace.

17 THE COURT: But --

18 MR. NITCHKEY: Or -- I'm sorry. Go
19 ahead, Your Honor.

20 THE COURT: Go ahead. No. My
21 question is, isn't it the responsibility of the
22 County to provide machines that work --

23 MR. NITCHKEY: Absolutely.

24 THE COURT: -- for these elections.
25 It's the County that's providing the opportunity

1 for the public to come in and vote. Why would I
2 throw this on --

3 MR. SANTEE: Your Honor, if the
4 County is --

5 THE COURT: -- private citizens to
6 do. Go ahead.

7 MR. SANTEE: The County -- it's
8 again, it's because it's -- it's a private right
9 to relief of individual candidates for election.
10 And typically those costs are borne by --

11 MR. NITCHKEY: And, Your Honor, with
12 all due respect to Mr. Santee, if you take that
13 argument to the extreme, then it would make
14 sense to place the costs of correcting the
15 machines on the Movants, and that's not their
16 responsibility.

17 THE COURT: I know it's not. Okay.
18 So I have signed the Order with the exception
19 of -- I took out the language that you took out
20 on your original Order. And I've put the --
21 assessed the costs on Northampton County.

22 MR. NITCHKEY: Thank you.

23 THE COURT: Now, I don't know how
24 you're going to do this, but you've got to do it
25 fast, because there's only like seven hours

1 left, and --

2 MR. NITCHKEY: Understood, Your
3 Honor.

4 THE COURT: -- and things have to
5 get out.

6 And I will just say for -- because
7 of this, that somehow or the other, we've got to
8 make sure that in the future, there's a way to
9 communicate that's maybe a computer or faxes
10 available to these folks at these polling
11 places. I don't know how to do that. I haven't
12 thought that through. But we've got to figure
13 that out, because there's got to be a way to
14 say, here it is.

15 MR. SANTEE: Your Honor, the
16 County -- I mean the reason the Order is agreed
17 to, the County has already taken these steps
18 that are in there to address these concerns as
19 they arise. But I understand that --

20 THE COURT: Well, there has to be
21 some way of getting in touch with folks who are
22 at a firehouse in Hellertown or wherever they
23 are to let them know that they are allowed to
24 help out if somebody is having a problem, and --

25 MR. SANTEE: There are phone numbers

1 and cell phones at every polling place, and
2 that's how they've been contacted.

3 THE COURT: Okay. Good.

4 MR. SANTEE: So far. That's what
5 we're doing in the first instance.

6 THE COURT: Here's your Order, and
7 good luck.

8 MR. NITCHKEY: Thank you, Your
9 Honor.

10 THE COURT: You're welcome.

11

12

* * *

13

(Proceedings concluded.)

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CERTIFICATION

I.

I HEREBY CERTIFY that the proceedings are contained fully and accurately in the notes taken by me in the above cause, and that this is a correct transcript of the same.

Date: _____, 2019

Maira E. Evans
Official Court Reporter

II.

The foregoing record of the proceedings in the within matter is directed to be filed.

Date: _____, 2019

F.P. KIMBERLY McFADDEN, Judge

EXHIBIT 11

SECTIONS

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BREAKING NEWS

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ELECTIONS NEWS

The 'new machines are garbage.' Northampton County fielded dozens of elections complaints, newly released records show

By RILEY YATES and TOM SHORTELL
THE MORNING CALL | DEC 28, 2019



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BREAKING NEWS SPORTS THINGS TO DO

Northampton County Council president Ronald R. Heckman asks questions of Northampton County Executive Lamont McClure and Amy Hess, acting registrar of elections, after voters experienced problems with the county's new machines. (April Gamiz/The Morning Call)

Almost as soon as the polls opened in November, Northampton County was receiving complaints about its new voting machines, with residents and poll workers detailing technological problems that have drawn withering criticism as the county braces for a presidential election next year, newly released documents show.

More than two dozen written complaints were sent to Northampton County's top officials, with voters' reporting machines that registered votes for the wrong candidates, refused to accept their selections, and caused long lines and confusion at their precincts.

“The touch screens on these new machines are garbage,” Paul Saunders, a judge of elections in Hanover Township, emailed the county less than an hour after voting began, citing difficulties voters were having.

“This is totally unacceptable now and will be impossible to cope with in 2020,” Saunders said.

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Problems with Northampton County’s election have been well-documented since widespread glitches Nov. 5 threw the results into

uncertainty for hours after polls closed. This month, the county's Election Commission Board voted no confidence in the \$2.9 million new machines, even as county Executive Lamont McClure's administration promised lessons learned and defended the returns as legal and accurate.

Emails obtained by The Morning Call offer a further accounting of Election Day issues, which continue to face scrutiny in the lead-up to the presidential primary April 28, when the same machines will be used. The messages were among 473 pages of documents obtained by the newspaper through the Right-to-Know Law, under a request that sought all elections-related communications sent and received Nov. 4-12 by four key officials: McClure, county Administrator Charles Dertinger, acting registrar of elections Amy Hess and administration aide Amy Cozze.

[Lawsuit seeks to halt reuse of Northampton County voting machines »](#)

In an interview, McClure said the county intends to stick with the ExpressVote XL voting machines, which produce paper ballots that were used to tally last month's results. McClure estimated it would cost \$3 million to \$4 million to replace the system, which he said has now survived a "stress test" that showed its results can be trusted.

That test was on display on election night after it became apparent the machines undercounted the votes in a race for county judge, with one candidate's totals off by tens of thousands. That prompted [an all-night count of the backup ballots](#) the machines generate, which seek to protect voters' intent and which county officials said correctly captured the returns.

[McClure defended the machines](#) even as he criticized their manufacturer, Election Systems & Software of Omaha, Nebraska, which has publicly apologized for the problems. The company says its employees

failed to properly configure the touch screens and the ballot, and that the mistakes should have been caught during preelection testing.

SECTIONS BREAKING NEWS SPORTS THINGS TO DO LOG IN

“ES&S really let us down, not only on Election Day, but leading up to Election Day,” McClure said Thursday.

Still, McClure downplayed concerns that voter confidence was damaged last month.

“There’s no evidence that a lot of voters don’t have confidence going forward,” McClure said. “It’s really unfortunate that there are small elements, small minority elements, that are seeking to sow voter mistrust.”

Though County Council members publicly expressed their displeasure with ES&S, they’re at least begrudgingly giving the company a second shot. Councilwoman Lori Vargo Heffner said the county would face a host of challenges to get a new voting system in place for the upcoming primary, and ES&S spelled out the steps to avoid another round of problems. Given the circumstances, she said, it is in the county’s best interest to continue with the machines.

“I’m a solutions-oriented person. What we need to do is get these machines up and running. Let’s fix it. Let’s make it work right,” she said.

The emailed complaints from voters and poll workers came from across the county — from Easton, Nazareth and Bethlehem, to Washington, Moore and Lower Saucon townships. Fifteen of the complaints mentioned touch screens that did not work properly, either by failing to register selections or by highlighting the wrong candidates. Others cited too few

machines, long delays and machine-generated paper ballots that were
difficult to read.

SECTIONS

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BREAKING NEWS SPORTS THINGS TO DO

One Upper Nazareth Township man said it took him 20 minutes to complete six votes, and he called the new system "TERRIBLE!" A Bethlehem woman reported that having voted in 50 elections, she'd never seen anything like it. A Lower Saucon woman worried that amid the problems, older voters may have given up and accidentally voted for the wrong candidates.

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"I would like to be assured that my votes were counted," a Washington Township man wrote the elections office. "A few of the people I voted for, the light would not turn green, so I don't know if my vote counted."

Kenneth Kraft, a former county councilman who now works at Northampton County Jail, wrote on election morning that the touch screen would not "pick up my choices no matter what i did." William Leeson, a Bethlehem attorney who serves as the city's solicitor, shared his impressions with the county that evening, saying his voting machine kept refusing to register three or four of his choices.

SECTIONS LOG IN

“I called the observer to observe and he confirmed the votes could not be cast, no way, no how,” Leeson wrote McClure, later adding: “Voter confusion and delay from learning the new system is one thing but bad machines is another.”

ES&S has said that as much as 30% of the county’s 320 machines were improperly configured, according to preliminary testing. Adam Carbullido, a senior vice president with the company, vowed that the problems will be corrected, saying ES&S plans to go machine by machine to ensure they are working properly before the next election.

“Through thorough investigation and analysis after the Nov. 2019 election, ES&S defined and remedied the issues that occurred in Northampton County,” company spokeswoman Katina Granger said Thursday in a prepared statement. The problems were “caused by human error” and “will be prevented with additional training and quality control processes.”

The emails released to The Morning Call were not all negative. One poll worker in Easton wrote that while it took longer for voters to cast their ballots, some liked how the new machine produced a paper ballot that they could check. Another praised the elections office for its “professionalism and patience” throughout a difficult day.

“I voted this morning and had no problem with the new equipment,” Rick Molchany, Lehigh County’s director of general services, who lives in Lehigh Township, wrote McClure. “I asked the election staff who are at the polling place if they had problems and they said no.”