March 31, 2006

The Honorable Pedro Cortés
Secretary of the Commonwealth
302 North Office Building
Harrisburg, PA 17120-0029

Dear Secretary Cortés:

I am writing in response to a letter sent by the commissioners of six Pennsylvania counties (Wayne County, Bradford County, Tioga County, Sullivan County, Northampton County, and Pike County) to the U.S. Election Assistance Commission (EAC or Commission). You were copied on this letter, which was dated March 23, 2006. The letter was a request from the counties for relief from the deadline imposed by Section 102 of the Help America Vote Act (HAVA). (42 U.S.C. §15302). This section of HAVA provided money to states for the replacement of punch card or lever voting machines. The Commission is writing to you, because the 102 Funds were issued to the Commonwealth and, as such, are your responsibility to administer. As you know, Pennsylvania has already received the only waiver provided by HAVA, which gave the Commonwealth an additional two years to purchase new voting equipment. The Commission has no authority to grant additional time.

Pennsylvania received $22,916,952 in HAVA Section 102 funding from the Federal Government. As a condition of receipt, the Commonwealth certified that it would “use the payment... to replace punch card voting systems or lever voting systems (as the case may be) in the qualifying precincts within the state by the deadline prescribed....” (42 U.S.C. §15302(a)(3)(A)). This deadline was initially set for the general election for Federal office held in November of 2004. However, HAVA provides for the receipt of a waiver extending compliance to the first election for Federal office held after January 1, 2006. (42 USC §15302(a)(3)(B)). Pennsylvania, like many states, requested and received this waiver. HAVA provides no additional waiver or extension of the deadline. As the deadlines, requirements, and conditions for receipt of HAVA 102 Funds are prescribed by statute, the EAC has no authority to alter them. Only Congress, through its statutory authority, may grant further relief.

Ultimately, HAVA requires all punch card or lever machines in each qualifying precinct be replaced by the HAVA 102 deadline. A qualifying precinct is one which used punch card or lever machines to administer the regularly scheduled

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1 The first election for Federal office in Pennsylvania is the primary scheduled for May 16, 2006.
general election for Federal office held in November of 2000. Failure to replace these systems requires repayment of 102 funds. The repayment provisions of HAVA require recoupment of funds on a prorated basis. The rate is established by taking the total number of qualifying precincts that have \textit{fully} met the requirements of HAVA, as a function of the total number of qualifying precincts within the State. (See 42 USC §15302(d)). Thus, to the extent that any qualifying Pennsylvania precinct has failed to replace all its punch card or lever voting machines, the Commonwealth will be obligated to return a portion of its Federal funds. The Commission invites your office (and at your request, the counties) to discuss this matter. We know your office is focused upon meeting HAVA requirements. While we cannot waive the deadline, we can provide advice and recommendations to assist the Commonwealth in its present efforts.

The EAC would also like to address some additional statements made by the counties in their letter. First, the letter makes repeated reference to a “Federal certification process.” While the EAC is working to implement a voluntary Federal certification program, this program is still in development. To date, the Federal government has not operated a voting system certification program. We must presume that the letter referenced the program run by the National Association of State Election Officials (NASED). NASED is not a Federal agency, but a private organization of state officials. As you know, it is Pennsylvania law that sets the requirements and procedures for voting system certification.

The Commission understands the variety of obstacles state and local governments face in the replacement of a voting system. This was the very reason Congress provided a waiver for HAVA’s 102 Funds deadline. This waiver, which Pennsylvania received, granted officials an additional two years to take action. Like most states, Pennsylvania received all its HAVA 102 funds by June 16, 2003. However, based upon the letter from the counties, it appears that they did not begin their efforts to select a voting system until fall of 2005. The letter implies that this late start was a result of NASED inaction, noting that the organization did not begin the certification process “in earnest” until 2005. NASED has been certifying voting systems to the 2002 Voting System Standards since January 2003. In fact, at the time the counties began their voting system selection process, NASED had approved 13 voting systems from 9 different vendors (as of November 16, 2005). The system the counties at issue chose, \textit{Advanced WinVote}, was not among these certified systems and, to date, is not qualified by NASED. Moreover, as your office has informed us, the Commonwealth does not require NASED qualification as a prerequisite for its Pennsylvania certification. Thus, the counties were not dependent upon NASED for action. Certification timing was solely a function of contractual agreements between voting system vendors, testing laboratories and the counties.
The EAC is committed to assisting Pennsylvania election officials in meeting the requirements of HAVA Section 102. We share your goal of working to ensure that the people of the Commonwealth retain as much of the 102 Funds as possible, so that the money may be used for its intended purpose. Please contact the Commission if you have any questions about this letter or seek further guidance.

Gavin S. Gilmour
Deputy General Counsel

Cc:

The Honorable Arlen Specter, U.S. Senator
The Honorable Rick Santorum, U.S. Senator
The Honorable Robert A. Brady, U.S. House of Representatives
The Honorable Chaka Fattah, U.S. House of Representatives
The Honorable Philip S. English, U.S. House of Representatives
The Honorable Melissa A. Hart, U.S. House of Representatives
The Honorable John E. Peterson, U.S. House of Representatives
The Honorable Jim Gerlach, U.S. House of Representatives
The Honorable Curt Weldon, U.S. House of Representatives
The Honorable Mike Fitzpatrick, U.S. House of Representatives
The Honorable Bill Shuster, U.S. House of Representatives
The Honorable Don Sherwood, U.S. House of Representatives
The Honorable Paul E. Kanjorski, U.S. House of Representatives
The Honorable John P. Murtha, U.S. House of Representatives
The Honorable Allyson Y. Schwartz, U.S. House of Representatives
The Honorable Mike Doyle, U.S. House of Representatives
The Honorable Charles W. Dent, U.S. House of Representatives
The Honorable Joseph R. Pitts, U.S. House of Representatives
The Honorable Tim Holden, U.S. House of Representatives
The Honorable Tim Timothy F. Murphy, U.S. House of Representatives
The Honorable Todd R. Platts, U.S. House of Representatives
Mr. Toby Burke, Special Assistant to the President for Intergovernmental Affairs
The Honorable Harry VanSickle, Pennsylvania Commissioner of Elections
Wayne County Commissioners
Bradford County Commissioners
Tioga County Commissioners
Sullivan County Commissioners
Northampton Office of the County Executive
Pike County Commissioners
Mr. Douglas Hill, Executive Director, County Commissioners Association of Pennsylvania