

STATE OF MINNESOTA

IN DISTRICT COURT

COUNTY OF RICE

THIRD JUDICIAL DISTRICT

Case Type: Other Civil

Benda for Common-sense, a Minnesota
Non-Profit Corporation, and Kathleen
Hagen,

Court File No. 66-CV-22-2022
Assigned to: The Honorable Carol M. Hanks

Plaintiffs,

vs.

Denise Anderson, Director of Rice County
Property and Tax Elections,

Defendant.

**MEMORANDUM OF LAW IN SUPPORT
OF MOTION TO PROHIBIT USE OF
UNCERTIFIED ELECTRONIC VOTING
SYSTEMS IN RICE COUNTY**

Plaintiffs, Benda for Common-sense and Hagen are entitled to an order on their Petition
(Count III) for the Correction of Errors and Omissions under Minn. Stat. 204B.44.

DOCUMENTS COMPRISING THE RECORD

1. Complaint dated August 22, 2022 ("**Complaint**");
2. Affidavit Matthew L. Benda in support of Motion to Suspend the Destruction of
Election Materials dated August 25, 2022;
3. Affidavit of Matthew L. Benda, verifying the Complaint dated September 1,
2022;
4. Affidavit of Kathleen Hagen, verifying the Complaint dated September 1, 2022;
5. Affidavit of Denise Anderson dated September 6, 2022 ("**Anderson Aff.**");
6. Affidavit of Sean McCarthy dated September 6, 2022 ("**McCarthy Aff.**");
7. Affidavit of Kathleen Hagen in support of Motion to Prohibit use of Uncertified
Electronic Voting Systems ("**Hagen Aff.**");
8. Affidavit of Evan Peterson in support of Motion to Prohibit use of Uncertified
Electronic Voting Systems. ("**Peterson Aff.**"); and

9. Affidavit of Matthew L. Benda in support of Motion to Prohibit use of Uncertified Electronic Voting Systems (“**Benda Aff.**”).

10. Answer of Defendant, Anderson dated September 13, 2022 (“**Answer**”).

ISSUE

1. Whether Plaintiffs are entitled to an Order Prohibiting Rice County from using uncertified modem functions on their Electronic Voting Systems.

STATEMENT OF UNDISPUTED FACTS

1. THE PARTIES.

1.1 Plaintiffs, Benda for Common-sense, is a Minnesota non-profit corporation, with its principal place of business at 1811 Broadway Avenue SE, Albert Lea, Minnesota 56007 (hereinafter referred to as, “BFC”).

1.2 Plaintiff, Kathleen Hagen, is an individual resident of Rice County, Minnesota, Lonsdale, Minnesota 55046. (hereinafter referred to as “Hagen”).

1.3 Defendant, Anderson, is the Director of Rice County Property Tax and Elections, with her place of business at 320 Third Street, Faribault, MN 55021. Defendant, Anderson, is designated by the Minnesota Secretary of State as register of voters and chief custodian of official voter registration records. Anderson is responsible for training election judges and officials, printing ballots, registering voters, filing certain candidates, providing ballots and election supplies to all of the voting precincts in Rice County, receiving and tabulating election ballots, and reporting the results to secretary of state.

2. ELECTRONIC VOTING SYSTEMS.

2.1 In Minnesota, an “**Electronic Voting System**” is defined as, “a system in which the voter records votes by means of marking a ballot, so that votes may be counted by automatic tabulating equipment in the polling place where the ballot is cast or at a counting center. An

electronic voting system includes automatic tabulating equipment; nonelectronic ballot markers; electronic ballot marker, including electronic ballot display, audio ballot reader, and devices by which the voter will register the voter's voting intent; software used to program automatic tabulators and layout ballots; computer programs used to accumulate precinct results; ballots; secrecy folders; system documentation; and system testing results." Minn. Stat. 206.56, subd. 8 (2006). For purposes of this memorandum an **Electronic Voting System** may also be referred to as "**EVS**."

2.2 The Office of the Minnesota Secretary of State ("**OSS**") is required to, "examine the [**EVS**] system and to report as to its compliance with the requirements of law and as to its accuracy, durability, efficiency, and capacity to register the will of voters." Minn. Stat. 206.57, subd. 1 ("**Examination of EVS**").

2.3 In addition to the **OSS Examination of EVS** requirement, an **EVS**, "must be certified by an independent testing authority accredited by the Election Assistance Commission. . ." Minn. Stat. 206.57, subd 6 ("**Certification of EVS**").

2.4 For purposes of this memorandum, the Election Assistance Commission may also be referred to as the "**EAC**".

2.5 By Resolution #22-046 dated June 28, 2022, Rice County has further instructed Defendant, Denise Anderson that all voting equipment must be "certified and approved" by "test labs accredited by the US Election Assistance Commission and undergo additional testing by the Office of the Minnesota Secretary of State." **Hagen Aff.** Exhibit 3 at _0019.

2.6 Resolution #22-046 dated June 28, 2022 further reads, "NOW THEREFORE, LET IT BE RESOLVED, that the Rice County Board of Commissioners, hereby establishes that the use of the election hardware and software from only certified and approved vendors will be required in all Rice County polling places," **Hagen Aff.** Exhibit 3 at _0019.

2.7 The manufacturer of the Rice County **EVS** is Election Systems & Software. For purposes of this memorandum, this company will be referred to as “**ES&S**”.

2.8 For the 2020 General Election, Rice County utilized 32, model DS200, Optical Scan Tabulators, manufactured by **ES&S. Complaint**, Exhibit B at _0013.

2.9 In September 2020, Rice County purchased a new Optical Scan Tabulator, model DS450, manufactured by **ES&S. Hagen Aff.** Exhibit 5 at _0039; and Exhibit 6 at _0044.

2.10 For the 2021 Election, Rice County utilized 32, model DS200, and 1 model DS450, Optical Scan Tabulators, manufactured by **ES&S. Complaint**, Exhibit B at _0018.

2.11 For the 2022 Elections, Rice County utilized 32, model DS200s, and 1 model DS450, Optical Scan Tabulators, manufactured by **ES&S. Complaint**, Exhibit B at _0023.

3. **RICE COUNTY ELECTRONIC VOTING SYSTEMS WITH MODEMS**

3.1 On April 18, 2022, **BFC** made a request for Public Data for an inventory of voting and election equipment used by Rice County. **Complaint**, Exhibit A at _0002. In response to this request, Rice County made no mention or disclosure of any of their **EVS** containing any modem equipment or function. **Complaint**, Exhibit B at _0005 through _0023.

3.2 On July 29, 2022, Anderson disclosed at a public meeting that the Rice County **ES&S DS200 EVS** machines have modems installed in them. **Complaint** at paragraphs 11 and 12; **Answer** at paragraph 2.

3.3 On August 8, 2022, BFC made a supplement request for Public Data, which stated in part:

“Further, at the most recent presentation, Denise Anderson confirmed that most, if not all, of the DS200 Machines used by Rice County contain modems. Please supplement your inventory to identify which machines contain modems (and provide description of the same) and include all DS&S manuals, marketing materials, letters and security updates relating to all DS&S machines that contain modems or other wireless connectivity.

Complaint, Exhibit C at _0026.

3.4 Rice County has never responded to this August 8, 2022 request for Public Data.

Complaint at paragraph 16; and **Benda Aff.** at paragraphs 4-5.

3.5 On September 1, 2022, Rice County confirmed by letter as follows:

“Rice County is one of the six counties in Minnesota that utilizes ES&S voting equipment with the option to use a modem to transmit unofficial election results...”

Peterson Aff. at _0044.

3.6 Attached to the September 1, 2022 letter is a fact sheet from **ES&S** which confirms that Rice County would have specifically contracted for and elected to use the modem hardware, “Modem components are not resident on the DS200 by default, but rather a separate board that is only installed in DS200s in those jurisdictions which choose this technology...”

Peterson Aff. at _0046.

3.7 For purposes of this matter, all Rice County DS200 machines will be referred to as **DS200s with Modems**.

3.8 Rice County further confirmed the existence of a modem contained, “within a hardened computer workstation within the Rice County Elections Department offices.”

Peterson Aff. at _0044 through _0045.

3.9 For purposes of this matter, the Rice County workstation at the Elections Department offices shall be referred to as **DS450 with Modem**.

4. **U.S ELECTON ASSISTANCE COMMISSION EXPRESSES CONCERNS WITH ES&S MODEMS**

4.1 As early as October 2018, organizations such as the National Election Defense Coalition (NEDC) were calling on the US Election Assistance Commission (**EAC**) to ban internet connectivity in election machines. **Hagen Aff.** Exhibit 8 at _0049 through _0056.

4.2 In this letter, the NEDC requests the following action:

“Therefore, we recommend discontinuing the use of wireless technology for transmitting vote totals...”

“Cellular modems within voting systems should be physically removed, and not simply disabled by software means.”

Hagen Aff. Exhibit 8 at _0050 and _0051.

4.3 On January 7, 2020, the National Election Defense Coalition and Free Speech People submitted a “Request to investigate ES&S for misrepresentation regarding EAC certification of voting machines with modems.” **Hagen Aff.** Exhibit 9 at _0058 through _0082.

4.4 On March 20, 2020, the **EAC** determined that **ES&S** had misrepresented that its DS200 machines with modems were “EAC-certified.” **Hagen Aff.** Exhibit 10 at _0085.

4.5 In response to this determination of misrepresentation, **ES&S** responded in part as follows: “... it was never the intent of ES&S to state or imply that ES&S’ DS200 modeming capability was EAC certified.” **Hagen Aff.** Exhibit 10 at _0091.

4.6 In addition, **ES&S** represented that they would provide written notice to “all of its DS200 customers who use the DS200 with modem, informing them that the DS200 with modem has not been certified by the EAC.” **Hagen Aff.** Exhibit 10 at _0087.

4.7 Defendant Anderson would have received a copy of a letter from **ES&S** notifying her that “modeming configuration has not been approved by the EAC.” This letter further offered to remove all EAC certified stickers from the **DS200’s with Modems.** **Hagen Aff.** Exhibit 10 at _0089.

5. **THE MINNESOTA OFFICE OF THE SECRETARY OF STATE HAS NOT CERTIFIED EVS WITH MODEMS.**

5.1 On April 18, 2022, **BFC** made a request for Public Data for “any documentation, emails of letters related to any ... certification ... of Rice County’s election computer network, and all election equipment...” by Rice County. **Complaint**, Exhibit A at _0002. In response to

this request, Rice County made no mention or disclosure of any certification documentation.

Complaint, Exhibit B at _0005 through _0023

5.2 On August 8, 2022, BFC made a supplement request for Public Data, which stated in part: “To further clarify, this request also includes all documents that Rice County claims support the certification of the Rice County Election equipment that includes optional election night reporting and any modems or other wireless connectivity.” **Complaint**, Exhibit C at _0026.

5.3 Rice County has never responded to this August 8, 2022 request for Public Data. **Complaint** at paragraph 16; and **Benda Aff.** at paragraphs 4-5

5.4 Rice County has stated that they have “provided all data responsive to the data requests referenced in the complaint.” **McCarthy Aff.**

5.5 In the **Complaint**, paragraph 53 alleges, “Upon information and belief, Defendant intends to utilize an Electronic Voting System that has hardware, software or features that are not properly approved, certified or secure.” In the **Answer**, Anderson does not specifically admit or deny this allegation, but relies upon a general denial in paragraph 1.

5.6 In response to a separate inquiry to Rice County regarding the testing and certification of the modems imbedded in their **EVS**, Rice County stated, “Regarding your concern that modems in election equipment are not being properly tested by the Minnesota Secretary of State, please be advised that Rice County lacks authority to direct or control the actions of the Minnesota Secretary of State. You may wish to share your concerns directly with the Minnesota Secretary of State.” **Peterson Aff**, Exhibit 4 at _0045.

5.7 Rice County has produced no documents supporting the requirement that their **DS200s with Modems** or the **DS450 with Modem** are properly certified as required by Minn. Stat. 206.57, subd 6 and Rice County Resolution 22-046.

5.8 The **OSS** has examined the ES&S EVS 5.3.4.1 as shown in **Peterson Aff.** Exhibit 1 at _0008 through _0028.

5.9 The **OSS** has certified the ES&S EVS 5.3.4.1 as shown in **Peterson Aff.** Exhibit 1 at _0005 through _0007.

5.10 The **OSS** has examines the ES&S EVS 6.0.6.0 as shown in **Benda Aff.** Exhibit 1 at _0002 through _0022.

5.11 The **OSS** has certified the ES&S EVS 6.0.6.0 as shown in **Benda Aff.** Exhibit 2 at _0024 through _0026.

5.12 The **OSS** has examined the ES&S EVS 6.0.7.0 as shown in **Benda Aff.** Exhibit 3 at _0028 through _00048/

5.13 The **OSS** has certified the ES&S EVS 6.0.7.0 as shown in **Benda Aff.** Exhibit 4 at _0050.

5.14 The **OSS** has consistently confirmed that any “Modem Function is not included” in its certification of ES&S EVS as follows:

- (1) ES&S EVS 5.3.4.1. **Peterson Aff.** Exhibit 1 at _0026 and Exhibit 1 at _0006;
- (2) ES&S EVS 6.0.6.0. **Benda Aff.** Exhibit 1 at _0020 and Exhibit 2 at _0026; and
- (3) ES&S EVS 6.0.7.0. **Benda Aff** Exhibit 3 at _0046 and Exhibit 4 at _0052.

5.15 At least one County in Minnesota, Wright County, has removed the EAC Certified sticker from their DS200 machines. **Peterson Aff.** Exhibit 7 at _0051 through _0054.

5.16 Another County in Minnesota, Lincoln County, completed an investigation to confirm that their DS200’s did not contain uncertified modem functions. **Peterson Aff** Exhibit 2 at _0038 through _0040.

ARGUMENT

I. STANDARD ON PETITION FOR CORRECTION OF ERRORS AND OMISSIONS

Under a petition for relief under Minn. Stat. 204B.44, the petitioners have the burden to show by a preponderance of the evidence that the relief under section 204B.44 is required. Weiler v. Ritchie, 788 N.W.2d 879, 882-83 (Minn. 2010). In the instant case, Plaintiffs have presented a clear record of facts to establish that Rice County utilizes **Electronic Voting Systems** with modems imbedded in them and that such modems are not properly certified as required by the Rice County Board of Commissioners and Minnesota Law.

Under Minn. Stat. 204B.44, “any individual may file a petition . . . for the correction of any of the following errors, omissions or wrongful acts which have occurred or are about to occur.” (emphasis added). This proactive language provides the court with broad authority to fashion a remedy to correct any, “wrongful act, omission, or error.” Minn. Stat. 204B.44, subd. 4. Of significance, Plaintiffs are not requesting that that Rice County be prevented from using their **DS200s with Modems** and the **DS450 with Modem** for any upcoming elections. Instead, Plaintiffs are requesting that the Court carefully fashion a remedy that allows for Rice County to conduct the upcoming elections, but without the use of the modem feature included on their **EVS**.

II. THE USE OF MODEMS IMBEDED IN ELECTRONIC VOTING SYSTEMS IS NOT CERTIFIED IN MINNESOTA.

Minnesota Statute Chapter 206 and Minnesota Administrative Rules 8220.0325 et Seq. govern the certification of **EVS** in Minnesota. The **OSS** has consistently completed its **Examination of EVS** and **Certification of EVS** role relating to the **ES&S EVS** systems. See Statement of Undisputed Facts 5.8 through 5.14.

Further, the **OSS** has made it standard to complete the **Examination of EVS** on the **ES&S EVS** systems with modems. Most recently, the **OSS** conducted an examination and certification of the **ES&S EVS** system EVS 6.0.7.0. See Statement of Undisputed Facts 5.12. In the **OSS** 6.0.7.0 Certification Report, there is a partial and apparently redacted explanation of the DS200 telecommunications capabilities. As detailed in that report,

“... Impacted Products: DS200, EMS, ElectionWare Regional Results:

- Added support for wireless modemming for DS200
- Modified the ElectionWare configuration to receive DS200... results data bundles from Regional Results.”

The “,,,” in the above quoted excerpts are included in the EVS 6.0.7.0 Certification Report produced by the OSS. See Statement of Undisputed Facts 5.12.

In every available report of the **Examination of EVS** and **Certification of EVS**, the SOS specifically excluded any “Modem Function”. See Statement of Undisputed Facts 5.8 through 5.14. Even the manufacturer of the Rice County EVS admits that the **DS200s with Modems** are not EAC-certified. See Statement of Undisputed Facts 4.4 through 4.7.

It is anticipated that Rice County and the **OSS** will attempt rely upon an unrelated statutory bootstrap to justify the use of uncertified modems in **EVS**. Minn. Stat. 206.845, subd. 2 references transmission of data through a modem to a “centralized reporting location.” While this statutory reference may *authorize* the use of modems, it does not remove the strict requirements of Minn. Stat. 206.57, subd. 1 to *examine* EVS and the Minn. Stat. 206.57, subd. 6 to be *certified* by an “independent testing authority accredited by the Election Assistance Commission...”

Rice County’s limited disclosures and the public records clearly establish that while the use of modems may be *authorized* for certain purposes, modems are not *certified* for

use as a part of an **EVS**. *Certification* is required by State Law and the Rice County Commissioners. This record of undisputed facts clearly supports the request of Plaintiffs for a determination that Defendant Anderson intends to utilize and further instruct election officials to operate the uncertified modems on the **DS 200s with Modems** and **DS450 with Modem**. Plaintiffs respectively submit that such a finding is an “error” under Minn. Stat. 204B.44, which should be corrected by Order of this Court.

III. THERE IS A STRONG PUBLIC INTEREST IN ENFORCING THE CERTIFICATION REQUIREMENT

In general, there is a strong government interest in the stability of the electoral systems. Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997); Blackwell & Klukowski, 28 Yale Law & Policy Review 107, 114. “The electorate’s “confidence in the integrity of the electoral process [is vital] because it encourages citizen participation in the electoral process.” Crawford v. Marion County Election Bd., 128 S. Ct. 1610, 1620 (2008); Blackwell at 144-115.

The only articulated reason for the use of modems in the Rice County EVS is to “transmit unofficial election results.” See Statement of Undisputed Facts 3.6. This feature is not necessary and does not provide any substantive public benefit. In contrast, the process Certification of EVS process required by the Minnesota Legislature and implemented by the Election Assistance Commission (EAC) has specifically excluded the use of modems as a *certified* feature or hardware.

Further, advocacy organizations have actively opposed the certification of modems in EVS. See Statement of Undisputed Facts, 4.1 through 4.3. In response to these concerns, the EAC even went so far as to determine that **ES&S** had misrepresented that DS200 machines with modems were “EAC-certified.” See Statement of Undisputed Facts 4.4. Further, **ES&S** agreed to send a letter to its customers notifying “all of its DS200 customers who use the DS200 with

modem, informing them that the DS200 with modem has not been certified by the EAC.” See Statement of Undisputed Facts 4.6.

The Public deserves to know that its election officials are following the rules and requirements of the election process. Just because the use of modems in certain circumstances is *authorized* does not make it correct in the current circumstances. Defendant Anderson’s insistence on utilizing an uncertified modem function to simply provide the media with some early election results certainly does not serve any substantive benefit and should be of concern to the public and therefore this Court.

CONCLUSION

For the reasons set forth above, Plaintiffs respectively request entry of an Order on Count III of the Plaintiffs’ Complaint Prohibiting the use of any modem function in all Rice County Electronic Voting Systems, together with a requirement that Rice County obtain from the manufacturer (ES&S) a certification to this Court that all modem functions have been disabled or otherwise made inoperable.

PETERSON, KOLKER, HAEDT & BENDA, LTD.

Dated: September 28, 2022

By: 

Matthew L. Benda (#026376X)
Attorney for Plaintiffs
1811 Broadway Avenue S.E.
Albert Lea, MN 56007
(507) 373-6491
Fax: (507) 373-7863
Email: mbenda@albertlealaw.com