

213 Market Street, 9th Floor, P.O. Box 865, Harrisburg, PA 17108-0865
Tel: (717) 237-7160 ■ Fax: (717) 237-7161 ■ www.WolfBlock.com

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INDEPENDENT REGULATORY
REVIEW COMMISSION

Alan C. Kohler
Direct Dial: (717) 237-7172
Direct Fax: (717) 237-2752
E-mail: akohler@wolfblock.com

#2676

March 31, 2008

VIA HAND DELIVERY

Paul Resch, Secretary
Pennsylvania Gaming Control Board
5th Floor – Strawberry Square
Harrisburg, PA 17101

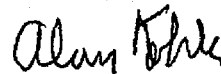
Attn: Public Comment on Regulation No. 125-82

Re: Greenwood Gaming and Entertainment, Inc. t/d/b/a Philadelphia
Park Casino's Comments to Proposed Rulemaking ("GGE")
In re: Regulation No. 125-82 (Independent Audit Committee)

Dear Mr. Resch:

Enclosed please find GGE's Comments to Proposed Rulemaking with regard to the
above-referenced Regulation.

Sincerely,



Alan C. Kohler
For WolfBlock LLP

ACK
Enclosures

HAR:79589.1/MOH005-222463

**BEFORE THE
PENNSYLVANIA GAMING CONTROL BOARD**

In re: Regulation No. 125-82 :
Proposed Rulemaking – 58 Pa. Code, :
Chapter 441a :

**GREENWOOD GAMING AND ENTERTAINMENT, INC.'S
COMMENTS TO PROPOSED RULEMAKING**

I. INTRODUCTION AND SUMMARY

Greenwood Gaming and Entertainment, Inc. ("GGE") is the holder of a Category 1 slot machine license which authorizes GGE to operate Philadelphia Park Casino in Bensalem, Pennsylvania. GGE submits these comments to the Board's proposed rulemaking, as captioned above, which was published in the *Pennsylvania Bulletin* at 38 Pa.B. 1039 on March 1, 2008. The proposed rulemaking at issue would require all non-publicly trading corporations, including GGE, to comply with a wide array of requirements pertaining to the operations of an independent audit committee.

By way of general comment, GGE does not object to a regulation requiring some form of independent audit committee. In fact, GGE instituted its own Audit Committee in 2007, shortly after opening of the casino in December 2006. However, GGE objects strenuously to the breadth and scope of the proposed regulation. Fundamentally, the proposed regulation appears to expand the requirements of an independent audit committee for privately-owned companies well beyond those required for publicly traded companies. The gaming industry is one of the most highly regulated industries in the Commonwealth, with an extensive array of detailed regulations, oversight procedures and reporting requirements. These proposed regulations would create a significant

additional administrative burden and expense without any corresponding additional actual benefit. The Board's own analysis estimates the annual additional cost of implementing the proposed regulation per gaming licensee at \$250,000; however, given the extensive nature of the regulations, GGE expects that the annual cost of the regulation to licensees will be well beyond the Board's very conservative estimate.

GGE's concerns over escalating regulatory costs, like those associated with the instant proposed rulemaking, are highlighted by the fact that GGE is paying over 60% of its gross terminal revenue in taxes under the Gaming Act. This means that GGE and other slot machine licensees are forced to operate their business under a basic expense structure that is six times higher than jurisdictions like New Jersey with which GGE competes directly. Given these circumstances, prudent business practices require GGE to constantly exercise efforts to minimize every cost and to operate at the highest level of efficiency. Stated differently, given the gaming tax structure in Pennsylvania which causes extremely slim operating margins, every dollar of increased cost has an impact on a slot machine licensee's finances. As a result, imposition of cost increases of this type and this magnitude can affect GGE's ability to remain competitive with other jurisdictions and will ultimately have an adverse impact on the casino product offered to patrons and to capital investment -- the net result being a potential decrease in GGE's revenues and in the Commonwealth's corresponding tax revenue.

II. COMMENTS

A. Lack of enabling authority.

As an initial matter, the Board does not have enabling authority from the General Assembly to promulgate this regulation. As explained below, the Board's authority is

not unrestricted and imposing the burdens associated with this regulation on regulated licensees goes well beyond the Board's authority.

The Pennsylvania Race Horse Development and Gaming Act ("Gaming Act") was adopted by the General Assembly in July of 2004 and became law.¹ The purpose of the law is to legalize certain forms of gaming in Pennsylvania. To accomplish this goal, the Board was created and assigned with regulatory responsibility over the new industry.² As an administrative agency, the Board is a creature of statute and cannot exercise powers that are not explicitly given to it by the legislature.³ The only powers an administrative agency possesses are those powers conferred upon it by statute in clear and unmistakable language.⁴

In this case, the Board cannot rely on clear statutory language to empower it to implement these proposed regulations, because none exists. Nowhere in the Board's enabling statute is an independent audit committee mentioned, much less expressly authorized. Rather, the Board can only cite to its general statutory authority to promulgate rules and regulations as support for its proposed regulations.⁵ However, this general authority is not without limitation.⁶ Without specific statutory authority that

¹ 4 Pa.C.S. §§ 1101 *et seq.*

² *Id.* § 1201(a), (b)

³ *Mazza v. DOT, Bureau of Driver Licensing*, 692 A.2d 251 (Pa. Cmmwlth. 1997); *Department of Environmental Resources v. Butler County Mushroom Farm*, 454 A.2d 1 (Pa. 1982); *Western Pennsylvania Water Co. V. PUC*, 370 A.2d 337 (Pa. 1977).

⁴ *Lookenbill v. Garrett*, 490 A.2d 857 (Pa. Super. 1985).

⁵ See 38 Pa.B. 1039 citing to the Board's reliance on its general rulemaking authority in 4 Pa.C.S. § 1202(b)(30).

⁶ See, e.g., *Process Gas Consumers Group v. PUC*, 511 A. 2d 1315 (Pa. 1986) (holding that PUC action creating conservation funds or mandating conservation

permits the Board to define the scope and specifics of a private company's independent audit committee in its enabling statute, the Board is without the authority necessary to implement these regulations.

Additionally, the Board's proposed regulations would place it in the improper position of making management decisions for the private companies that it regulates even though Pennsylvania law is clear that the power to regulate is not the power to manage.⁷ In its proposed regulations, the Board proposes to direct how the private companies should be operated (i.e. the structure of the audit committee) to comply with various requirements of the Board (i.e. certifications and reports). Such directives go beyond the scope of regulating an industry and instead place the Board in the position of a "super board of directors" for the company - a position where it makes management decisions for the company. Since agencies with regulatory authority are not permitted to take on such a role, these regulations as proposed are impermissible and should be withdrawn by the Board.

B. Formation of the Audit Committee.

There is a fundamental inconsistency concerning the composition of the independent audit committee as drafted in the proposed regulations. Generally speaking, an audit committee is formed, *inter alia*, to assist the board of directors in fulfilling its oversight duties for its company. However, the proposed regulation specifically prohibits members of the board of directors from serving on the audit

programs was not within the PUC's general statutory powers to supervise and regulate public utilities); *Pennsylvania Automotive Asso. v. Commonwealth, State Bd. of Vehicle Mfrs., Dealers & Salespersons*, 550 A.2d 1041 (Pa. Cmmwth. 1988) (held that board's general regulatory power over automobile sales did not extend to regulating automobile purchase programs).

⁷ *North Pennsylvania Power Company v. PUC*, 5 A. 2d 133, 134-135 (Pa. 1939).

committee. As proposed, no member of the committee may have a material relationship with the licensee or any of the licensee's principals (except for his or her membership on the audit committee), nor may he or she receive any compensation for anything (other than membership fees for serving on the committee).

The proposed regulation should be modified to permit members of the board of directors to serve on the independent audit committee. GGE posits that the appropriate focus of the independence of the audit committee members should be their independence from management, not owners. Such a focus is consistent with the traditional role of independent audit committees for publicly traded companies and the underlying purpose should be no different here. Otherwise, the only conceivable purpose of the audit committee would be to help the Board regulate GGE, a purpose which would be both inefficient and expensive, by adding another layer of regulation on operators -- a layer which is not legal in that it is not authorized by the Gaming Act.

GGE has an existing audit committee that was formed after careful consideration of its composition, goals and objectives. The audit committee is composed of Terrence Everett and Richard Kendle, both Key Licensed Principals who are on the Board of Directors, but who are not members of management. As with any public company, the audit committee evaluates and supervises the actions of management and the auditors of the company in preparing and auditing financial statements issued by the company under Generally Accepted Accounting Principals ("GAAP"). For a private company, such as GGE, this consists of meeting with management and with the independent auditors of the company to discuss the annual financial statements prepared by management, which includes assessing information and reports generated by the auditors relating to the sufficiency of the internal controls relating to financial reporting, the choices of accounting policy, establishment of estimates and procedures,

assessment of reports by management and the auditors regarding GAAP compliance and alternatives.

The Committee's responsibilities also include making inquiries of management and the independent auditors regarding various operational matters, the audit and other matters relating to financial reporting and the annual audited financial statements. Absent significant unusual circumstances where an independent investigation is required for a major item, the audit committee relies upon information from management and the independent auditors in conducting their duties. They do not hire independent legal counsel or auditors to work for the committee to double check management or the independent auditors. Based upon this review and inquiry, if the audit committee is satisfied, it will recommend to the Board of Directors that the company issue the GAAP financial statements accompanied by the independent auditors report.

GGE's Audit Committee has operated effectively and efficiently. It provides a valuable contribution to the owners and the Board of Directors, and also to the Board, in overseeing and assuring compliance. The Committee has fulfilled the role and the responsibilities expected of the independent audit committees of SEC regulated companies. GGE has heard nothing from the Board to the contrary. Against this background, there simply is no reason to take the drastic action proposed in this rulemaking and to fix something that isn't broken.

C. Definition of Independence.

The Sarbanes-Oxley Act of 2002 mandated that national securities exchanges such as NYSE and NASDAQ adopt their own requirements regarding audit committees of companies listed on their exchanges. These organizations have adopted their own different requirements for formation and membership of audit committees, which are

much less stringent and less restrictive than the present proposal. For example, in the New York Stock Exchange regulations, the focus is on independence from management. The ownership of a significant amount of stock of the entity by an audit committee member would not by itself act as a bar to a finding of independence. The board of directors has the discretion to make such a finding of independence, pursuant to certain guidelines. [NYSE Rule 303A.02] As drafted, the proposed regulation would prohibit an individual from serving on an audit committee if he or she received any compensation (other than committee fees), had any ownership interest or any material relationship with the entity. The NYSE rules consider a person to be independent if he or she receives less than \$100,000 per year in direct compensation (not including fees, pension and other forms of deferred compensation for prior service). [NYSE Rule 303A.02(ii)] Any compensation in any amount, aside from audit committee fees, would prohibit an individual from serving on the audit committee under the proposed regulation.

GGE contends that the concept of independence in the proposed regulation should be modified to establish more relaxed guidelines, which the board of directors may apply to determine the independence of particular audit committee members. For example, membership by management could be restricted but the board of directors should have the ability to determine based upon its evaluation of the facts and circumstances whether members of the committee are reasonably independent from management to enable them to fulfill their duties as members of the audit committee. The Board has not identified any rationale requiring a different or more stringent requirement than that imposed on public companies, and absent a full factual foundation for its extreme proposed standard, the standard should be dropped in deference to the widely tested publicly traded company standard

D. Scope of Responsibilities.

The scope of responsibilities for an audit committee in the proposed regulation is extremely broad and needs to be significantly reduced and focused. For example, Section 441a.24(a) provides that the general purpose of the audit committee is "to monitor and report to the Board on the operations and financial control of the slot machine licensee." This obligation would appear to require the committee to review all of the day-to-day operations and financial controls and produce some form of report. The preparation of the company's financial statements and other financial reporting information is currently the responsibility of management, the internal audit department and the company's external auditors. As a product of their day-to-day work responsibilities, or their intensive year end audit process, these individuals have greater familiarity with and more detailed information concerning the company and its financial affairs than the members of the audit committee would ever have under any reasonable regulatory proposal. The proposed regulation would require the audit committee to monitor and review a variety of periodic reports, some monthly and some even daily. In most public and non-public companies, the audit committee does not review such detailed information and generally reviews GAAP prepared financial statements. There are accepted practices and procedures for audit committees in corporate governance literature and law which provide reasonable guidelines for the scope of duties and responsibility of such a committee. We believe that such a system would be appropriate for introduction in Pennsylvania, so that the audit committee's responsibility would be to oversee the financial reporting process and make decisions based upon that information. The committee should not be required to provide any additional or special assurances or certifications, as appears to be required throughout the proposed

regulation. All reasonable and necessary certifications with respect to financial controls are currently provided by multiple members of senior management as well as the company's outside auditors under their certified public accounting certifications and licenses.

Again, the Board proposes to take extreme steps without evidence demonstrating that the steps are necessary and in the public interest. This is particularly true since implementation of the regulation would be very expensive, and without full justification and proof that the benefit of the proposed regulation exceeds the cost, the provisions establishing the scope of responsibilities should be narrowed as explained above.

E. Cost to Implement the Proposed Regulations.

The proposed regulation would significantly expand the responsibilities of an audit committee over that which has ever been required for a publicly traded company, and seeks to apply that expanded scope of authority and responsibility to privately owned companies such as GGE. As a gaming licensee, GGE already makes extensive disclosures to the Board and has both a compliance committee and an audit committee of its board of directors. The cost of establishing and maintaining the audit committee as proposed, including the additional consultants and advisors who would have to be engaged to enable the committee to acquit its responsibilities as described in the regulation, would significantly increase the expense associated with the maintenance of the audit committee function. The fact of the matter is that it would be extremely difficult to engage qualified persons meeting the requirements of the proposed regulations, unless the company expended significant monies to compensate committee members for the tremendous time, effort, responsibility and potential liability as well as to provide

the significant external resources that such persons would need to engage to perform the designated functions. For example, one proposed regulation requires the audit committee to approve and certify the company's program for compliance with Chapter 465a.4. The breadth, scope and complexity of this section would require those affected licensees to hire an additional layer of independent financial and legal experts. These experts would essentially be performing work that is currently being performed and certified by senior management and outside auditors and is being reviewed by the Board's Staff.

The Board's own analysis estimates the annual additional cost of implementing the proposed regulation per gaming licensee at \$250,000. Aside from duplicating efforts and costs, it would be difficult to find professionals qualified to perform such complex reviews required under the proposed regulation. While the selection difficulty and cost are very difficult to project, GGE has discussed the proposed scope of responsibility with persons who represent public companies, who have indicated that it would be difficult to find any high caliber person to serve on the committee under the proposed regulations because of the scope of responsibility and potential liability. Even if such selection were successful, the company would be required to pay high fees and provide the committee with independent outside lawyers, accountants and other professionals to investigate the work of the company's existing lawyers, independent auditors, professionals and management. GGE believes that it would cost many multiples of the Board's \$250,000 projection per year to implement the committee in the manner proposed by the regulations, which include fees for committee members,

committee costs, lawyers, accountants and other professional fees and liability insurance, which the members of the committee would require.⁸

F. Certifications.

The audit committee of a public company is not required to produce the numerous certifications and reports required in the proposed regulations. Those certifications and reports significantly expand the normal duties and responsibilities of an audit committee without clearly delineated procedures and responsibilities. For example, the proposed regulation would require the audit committee to certify that ". . . the independent certified public accountant has sufficient expertise in auditing the gaming industry." It is not clear what standard must be met in order to meet this requirement. This general concept relates to numerous provisions in the proposed regulation.

Additionally, the audit committee of a publicly traded company does not issue a certification regarding the truth and accuracy of financial statements as required by proposed Sec. 441a.24(12). Audit committee members do not have the independent knowledge to make this determination unless they hire another professional to perform an additional and separate audit solely for the audit committee and even then would only be able to rely upon the information provided to them by that third party

⁸ One of the most bothersome aspects of the proposed regulations is that the regulations are silent on the issue of potential liability of the audit committee members. Given the scope of responsibilities of the members, the potential liability could be enormous, imposing exorbitant insurance costs. While actual projections would require extensive research and investigative time, beyond that which has been provided to submit these comments, one can develop a scenario under which the cost of implementation would be well in excess of \$1,000,000 per year.

professional. The reason for choosing an independent auditor for gaming companies is to assure the shareholders and the Board that what management reports as the financial condition and performance of the company complies with GAAP and fairly presents the financial condition of the company. Aside from the enormous cost, this would be an additional duplication of efforts of others already performing these duties with no corresponding benefit -- an exercise that gaming licensees can ill afford in a 60% tax environment.

Audit committees in public companies do not get involved in filing or approving tax returns or regulatory filings other than GAAP financial statements and all other activities are the responsibility of management. The Board has provided no reason to depart from this standard and absent policy and cost justification, departures from the publicly traded standards should be rejected.

Public company audit committees perform support functions to the board of directors to protect the financial reporting of the public company for the benefit of its shareholders, the investing public. Here, the shareholders are the owners whose interest is achieved by having their representative(s) on the committee. The interests of the Commonwealth are protected by having a central control computer system upon which taxes are computed and a comprehensive scheme of regulation and licensing by **the Board**, as provided by law under the Gaming Act. These legal requirements, adopted by the General Assembly, already achieve the unidentified purpose of these regulations, without duplicative cost and expenses. Accordingly, absent full justification to the contrary, the proposed regulation should be withdrawn.

G. Conclusion.

As is indicated above, GGE does not object to the concept of an independent audit committee. However, the proposed regulations define "independence" in a way that is too restrictive and shrinks the pool of available, qualified persons for selection. The proposal also expands the responsibilities, costs and liabilities for such a committee beyond what is currently required of publicly traded companies, without any indication of the need for such a dramatic departure from currently accepted practice or reasonable expectation of any material attendant benefit to the Commonwealth or the Board.

In conclusion, for all of the foregoing reasons, GGE respectfully requests that the Board withdraw the proposed regulations, or, in the alternative, that the Board issue a new proposal that incorporates GGE's comments above.

Respectfully submitted,



Alan Kohler
WolfBlock LLP
213 Market Street, 9th Floor
Harrisburg, PA 17108-0865
(717) 237-7172

Of Counsel:
Thomas C. Bonner
Karen Wosnack
Greenwood Gaming and Entertainment, Inc.
3331 Street Road, Ste. 200
Bensalem, PA 19020
(267) 223-3812

Of Counsel:
Jim Doherty, Esq.
Doherty Law, LLC
1000 Bank Towers
321 Spruce Street
Scranton PA 18503
(570) 346-7651

Dated: March 31, 2008