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December 3, 2008

VIA HAND DELIVERY
Richard M. Sandusky
Pennsylvania Gaming Control Board
5th Floor – Strawberry Square
Harrisburg, PA 17101

Attn: Public Comment on Regulation No. 125-92

Re: Greenwood Gaming and Entertainment, Inc.'s Comments to Proposed Rulemaking
In re: Regulation No. 125-92 (Smoking Area)

Dear Mr. Sandusky:

Enclosed please find comments on behalf of Greenwood Gaming and Entertainment, Inc. in regard to the above-referenced proposed rulemaking.

Thank you for your attention to this matter.

Sincerely,

Alan C. Kohler
For WolfBlock LLP

ACK
Enclosures
cc: Doug Sherman
Paul Resch
Frank Donaghue

HAR:83934.1/PHI273-230266

BEFORE THE
PENNSYLVANIA GAMING CONTROL BOARD

In Re: Proposed Rulemaking -- 58 Pa. Code Chapters 441a and 467a	: : :	**Proposed Rulemaking 125-92**

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

Greenwood Gaming and Entertainment, Inc. t/d/b/a Philadelphia Park Casino ("GGE") submits these comments to the above-captioned Proposed Rulemaking which was published in the *Pennsylvania Bulletin* on November 8, 2008 at 38 Pa. B. 6158.

COMMENTS

The instant Proposed Rulemaking issued by the Board is an attempt to implement the recently enacted Clean Indoor Air Act, 35 P.S. §§ 637.1 *et. seq.* ("Act"), as that Act applies to licensed facilities or casinos. Summarily, under the Act, a licensed facility is permitted to allow smoking on 25% of the gaming floor from September 11, 2008 until December 10, 2008 and then is permitted to increase the size of the smoking area under a formula contained in the Act ("The Formula"). The Formula compares average slot machine revenue per machine in the smoking area with average slot machine revenue per machine in the non-smoking area.[1] The primary focus of the Board's Proposed Rulemaking pertains to the application of The Formula and subsequent potential increases to the size of the gaming floor smoking area from December 11, 2008, going forward for licensed facilities currently in operation.

As an initial matter, GGE applauds the Board for correctly interpreting the application of The Formula in Section 441a.25(d) of the Proposed Rulemaking. The proposed regulation

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[1] In industry parlance, revenue per slot machine is referred to as "win per unit."

reflects the legislative intent of The Formula which is to permit licensed facilities to increase the size of the gaming floor if the average win per unit in the smoking area exceeds the average win per unit in the non-smoking area and "in proportion to the percentage difference in revenue between the two areas."[2] The purpose of The Formula is to determine whether the initial 25% limitation causes economic harm due to lower revenues in the non-smoking area and, if so, to quickly and transparently permit operators to increase the size of the smoking area under the The Formula up to a maximum smoking area equal to 50% of the square footage of the gaming floor. The Board's proposed regulation accomplishes the underlying legislative objective and the Board should be commended accordingly.

However, as to another substantive provision of the Board's proposed regulations, the Board has not followed the legislative intent and the regulation contains a significant error which requires correction. Specifically, proposed subsections 441a.25(d) and (e) require operators to seek and receive regulatory approval from the Board's Executive Director prior to implementing an increase in the gaming floor smoking area as a result of the application of The Formula. Such a requirement of regulatory review and approval is inconsistent with the Act and should be omitted.

Under Section 3(b)(11) of the Act, the data used in The Formula for increasing the size of the gaming floor smoking area is provided for in a report produced by the Department of Revenue 90 days from the effective date of the Act or on December 10, 2008. Under Section 3(b)(11), the licensed facility must request the report from the Department of Revenue.

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[2] For example, if the average win per unit in the smoking area is 20% higher than the average win per unit in the non-smoking area (e.g. $300 average win per unit in the smoking area and $250 average win per unit in the non-smoking area), the licensed facility would be permitted to increase its smoking area to 45% of the gaming floor (i.e. 25% + 20% = 45%).

However, once the report is produced by the Department, the licensed facility is expressly authorized by the statute to apply The Formula and implement the resulting increase in the smoking area of the gaming floor in self-executing fashion, without regulatory review or approval from any agency, including this Board.[3] Accordingly, proposed subsections 441a.25(d) and (e) are inconsistent with the Act, and should not be included in any final form rulemaking.[4]

Furthermore, as to the proposed signage requirements in Section 441a.25(g), the Board should refrain from any requirement as to smoking/non-smoking labels on individual slot machines. The Act's signage requirements at 35 P.S. § 637.4 are specific and going beyond those requirements (including requiring signage on every slot machine) is neither necessary nor consistent with the Act. Signage on individual machines would be ineffective, costly and impractical. As to effectiveness and as reflected in the Act, what is important is that a patron with a smoking/non-smoking preference be able to locate a smoking or non-smoking area of the gaming floor. Once in the preferred area, patrons neither require nor desire the reinforcement of additional notice on each machine. If a patron is willing to violate the law and smoke in a non-

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[3] Section 3(b)(11) of the Act could not be clearer on this point. ("If the report shows that the average gross terminal revenue per slot machine unit in the designated smoking area equals or exceeds the average gross terminal revenue per slot machine in the designated non-smoking area, the licensed facility may increase the designated smoking area of the gaming floor . . ."). As a "State licensing agency," the Board may cite violations of the Act after the increase in size of the gaming floor has been implemented by the licensed facility. However, the Board has no authority to impose a regulatory review or approval requirement on licensed facilities as part of or prior to implementation.

[4] In reality, it appears this issue may be moot as to the December DOR reports for those licensed facilities already in operation. It is clear that from a timing perspective, the instant regulation will not be in effect when the DOR Report is produced and implemented in mid-December. Because no applicable regulations will be effective, implementation of the DOR Report and any increases in the size of the smoking areas of gaming floors by such licensed facilities will be self executing and will be completed well before any regulations are finalized – regardless of their content.

smoking area, the patron will do so whether or not there is a label on the individual slot machine. Simply put, the requirement would serve no purpose.

Installing thousands of labels on the thousands of existing slot machines would be costly in terms of time and materials – particularly given the fact that labels would not provide benefit to anyone. Also, slot machine turnover is high and machine relocations are essential to remain competitive and to provide the products for which customer demand is greatest. A requirement for labeling would add an additional administrative burden and cost that addresses no demonstrated need. In addition, as to the signage requirements in the Act, the Board should remain flexible and not interfere with signage which is designed to meet the Act's requirements without detracting from the hospitality atmosphere, which is so critical to a gaming facility's success.

Finally, under Section 5.2 of the Regulatory Review Act, 71 P.S. § 745.5b, the Independent Regulatory Review Commission ("IRRC") "shall, first and foremost, determine whether the agency has the statutory authority to promulgate the regulation..." Clearly, GGE has no objection to the Board promulgating regulations under the Act, as long as those regulations are consistent with the Act. Regrettably, it appears likely that the IRRC will question the Board's underlying authority since the Act, delegates sole authority to implement and promulgate regualtions under the Act to the Department of Health.[5]

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[5] 35 P.S. § 637.10(a). In fact, it appears that the Board is not provided any enabling authority to implement the Clean Indoor Air Act, and its only authority is to cite to and prosecute vioaltions of the requirements of the Act **after it has been implemented.** While the Board may feel that its lack of authority under the Clean Indoor Air Act is cured by the Board's general jurisdiction over the gaming floor, the IRRC may take the view that this general jurisdiction is restricted to the promulgation of regulations under the Gaming Act and does not reach the promulgation of regulations under the Clean Indoor Air Act. This is because the instant situation appears to be no different than the delegation of authority to the Pennsylvania Liquor Control Board under (Cont'd)

CONCLUSION

Overall, while the Proposed Rulemaking is well-intentioned and correctly interprets the statutory formula applicable to increasing the size of the gaming floor after December 10 of 2008, it is flawed in other respects and requires modification. Accordingly, the Board should modify the Proposed Rulemaking consistent with these Comments prior to proceeding to Final Form.

Respectfully submitted,

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Dated: December 3, 2008

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the Liquor Code. It is the Liquor Control Board which has authority to promulgate regulations and determine when, where and how liquor, wine and beer are provided in a casino, including on the gaming floor. As to smoking/non-smoking requirements under the Clean Indoor Air Act, it appears to be the Department of Health which has this authority. State licensing agencies, including this Board, and county boards of health are assigned only limited enforcement authority, and no implementation authority.