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March 27, 2009

VIA HAND DELIVERY

Richard Sandusky
Director of Regulatory Review
Pennsylvania Gaming Control Board
303 Walnut Street
Verizon Tower, 5th Floor
Harrisburg, PA 17106

Re: Comments to Proposed Rulemaking #125-97

Dear Mr. Sandusky:

Downs Racing, L.P., t/d/b/a Mohegan Sun at Pocono Downs ("MSPD"), is a Category 1 slot machine licensee that owns and operates a licensed facility located at 1280 Highway 315 Wilkes-Barre, Pennsylvania. MSPD respectfully submits the following comments to the Pennsylvania Gaming Control Board (the "Board") in connection with its proposed rulemaking #125-97.

The proposed rulemaking concerns the ability of vendors to conduct business pending their certification or registration. More specifically, the proposed rulemaking would amend Section 437a.9 of the Board's regulations by adding two provisions that would require a vendor applicant and the slot machine licensee it is working with to cease doing business with each other immediately upon notification from the Office of Enforcement Counsel of the issuance of a Notice of Recommendation for Denial of the vendor's application.

On both practical and legal levels, the proposed rulemaking is problematic for a number of reasons. The proposed regulation has the potential to cause enumerable problems, disruptions, delays and additional expense for slot machine licensees (or applicants) that are relying on vendors to perform important (and at times sequenced) work on time-sensitive facility projects. Further, the required immediate cessation of business and lack of any transition period will exacerbate these negative ramifications.

Moreover, the proposed regulation will significantly impinge on the due process rights of the vendor applicants. First, while the ability to perform work pending certification or registration is a matter of the Board's discretion, once that discretion is afforded to applicants it

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cannot be taken away without providing the applicant with adequate procedural due process, including notice and an opportunity to be heard before the Board. Second, by making the cessation requirement effective upon the action of the Office of Enforcement Counsel ("OEC"), a prosecutory arm of the Pennsylvania Gaming Control Board, the regulation would result in the commingling of prosecutory and adjudicative functions in violation of due process of law.

In terms of the practical concerns, the proposed immediate cessation requirement has the very real potential to result in substantial difficulties, work stoppages, and expense for slot machine licensees. Essentially, if the provisions are triggered, the slot machine licensees are left high and dry, and potentially in the middle of what could be very important projects or vendor service needs. Slot licensees will be scrambling to find replacement vendors, and may face situations where new vendors are not available or where new vendors, even if available, cannot schedule the work for months. Moreover, replacement vendors may not exist if the vendor's work is of a peculiar type or skill.

The potential problems do not end at finding a replacement, though. To the extent that vendor work entails a warranty, it will be highly unusual for the replacement vendor to warrant any of its work given that it will be taking over and assuming responsibility for another vendor's work product.

All of these scenarios are unduly burdensome on and costly for slot licensees, and are not justified by any countervailing public benefit given the fact that less burdensome alternatives exist that would equally serve and protect the public interest. The Board should also allow time for an orderly transition prior to the required cessation of vendor work. For instance, a 30 day notice period prior to the required work stoppage would enable the vendor to attempt to cure any defects in its application prompting the anticipated Notice of Recommendation for Denial, as well as to either complete the work (or a portion thereof) or take the steps necessary to prepare for a new vendor to efficiently complete the job. Likewise, the slot licensee could utilize the notice period to locate a replacement vendor, address its affairs with the existing vendor, and otherwise prepare for the transition in the most cost-effective manner.

Turning to the legal defects in the proposed regulation, the revocation of the right to do business as a vendor under Section 437a.9(a) of the Board's regulations cannot occur without prior notice and an opportunity to be heard by the subject vendor. Where interests such as the right to do business are at stake, even where initially granted via a discretionary governmental act, procedural due process prohibits the denial or revocation of that right without adequate notice and an opportunity to be heard. *See, e.g., Pennsylvania Coal Mining Association v. Insurance Department*, 370 A.2d 685 (Pa. 1977).

Furthermore, the manner by which the cessation of a vendor's right to do business pre-certification or registration is implemented under the proposed regulation entails a complete commingling of the prosecutorial and adjudicative functions of the Pennsylvania Gaming Control Board in violation of the Pennsylvania Supreme Court's decision in *Lyness v. Commonwealth, State Bd. of Medicine*, 605 A.2d 1204 (Pa. 1992).

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Under the proposed regulation, the OEC is acting as both the prosecutor and the judge in regard to the continued ability of a vendor to perform work pre-certification or registration. Much like a prosecutor, OEC assesses the facts regarding the presumed defect in the vendor's application, formulates an opinion as to whether that application should be denied, and "brings the charges" in the form of the Notification of Recommendation for Denial. Yet, as to the revocation of the right to do business pre-certification/registration, OEC also acts as the judge because the same act of issuing the Notice of Recommendation for Denial has the instant effect of revoking the vendor's right to do business. As the Supreme Court has clearly and repeatedly stated, such a commingling of functions is "anathema to the notion of due process in Pennsylvania, where citizens rightly presume that the same individual does not wear the mantle of zealous prosecutor and impartial judge." *Lyness*, 605 A.2d at 1208.

Given all of the issues raised herein, MSPD respectfully requests that the Board withdraw Proposed Rulemaking # 125-97 in its current form.

Thank you for considering the comments of MSPD in regard to the proposed rulemaking. We will be happy to answer any questions the Board has on these comments.

Sincerely,



Mark S. Stewart
For WolfBlock LLP

MSS

cc: Michael Bean, Esq.