

COMMONWEALTH OF PENNSYLVANIA

GAMING CONTROL BOARD

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PUBLIC HEARING

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BEFORE: GREGORY C. FAJT, CHAIRMAN
Raymond S. Angeli, Jeffrey W. Coy, James B.
Ginty, Kenneth T. McCabe, Gary A. Sojka,
Kenneth I. Trujillo

HEARING: Thursday, July 29, 2010, 9:00 a.m.

LOCATION: North Office Building
Hearing Room 1
401 North Street
Harrisburg, PA 17120

WITNESSES: None Present

Reporter: Kenneth D. O'Hearn

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CHAIRMAN:

My name is Greg Fajt. I'm the Chairman of the Gaming Control Board. And as our first order of business, I'd just like to ask everybody to please turn off your cell phones, Blackberries and PDAs. They tend to interfere with our communication system here. And I will lead by example, as soon as I can figure this out, turn mine off. There you go.

The full Board is present. I call today's meeting to order. As the first order of business, please join me in the Pledge of Allegiance.

PLEDGE OF ALLEGIANCE RECITED

CHAIRMAN:

We have two items before the Board today by way of public hearing which will take place prior to our public meeting. These public hearings pertain first to Philadelphia Entertainment and Development Partners, which is known as Foxwoods. Their matter is regarding a Motion for Reconsideration of the Order of the Office of Hearings and Appeals (OHA) dated June 30.

And the second hearing is a Petition for Relief from the Table Games Manufacturing Licensing

1 Requirement, or in the Alternative, a Reduction of the
2 Manufacturer License --- or in the Alternative, for a
3 Reduction of Manufacturer Licensing Fee which was
4 filed by U.S. Playing Cards.

5 For each matter we will hear from each
6 entity as well as the Office of Enforcement Counsel
7 (OEC). The Board will then be given the opportunity
8 to ask questions of the parties and any witnesses.

9 At the conclusion of all of that the
10 Board will then take a recess to conduct quasi-
11 judicial deliberations on these matters before
12 returning to conduct our regularly scheduled meeting.

13 Having explained all that, I see that we
14 have the representatives from Philadelphia
15 Entertainment. Prior to your presentation could all
16 the witnesses presenting evidence from either
17 Philadelphia Entertainment or the OEC please stand and
18 be sworn in? All lawyers, okay? Just for the sake of
19 the public, a lawyer does not need to be sworn in for
20 a proceeding. They are already assumed to be sworn in
21 to tell the truth. I also ask that ---. Notice the
22 lawyers on the panel are laughing at that. But as I
23 was saying, and I thought I was sending up a softball,
24 and thank you for getting that. I'd also ask that the
25 people speaking today please state and spell your name

1 for the stenographer before you start. And with that,
2 Philadelphia Entertainment, you may begin.

3 ATTORNEY JACOBY:

4 Good morning, Mr. Chairman, my name is
5 Fred Jacoby from Cozen and O'Connor. I represent
6 Philadelphia Entertainment and Development Partners,
7 LP, sometimes referred to as PEDP or Foxwoods. Mr.
8 Graci, introduce yourself.

9 ATTORNEY GRACI:

10 Good morning, Mr. Chairman and members of
11 the Board. Robert Graci, G-R-A-C-I, co-Counsel for
12 Philadelphia Entertainment Development Partners, LP.

13 ATTORNEY JACOBY:

14 Mr. Chairman, in addition, sitting on my
15 right is Barbara Melvin, who is a paralegal with the
16 firm Cozen O'Connor.

17 CHAIRMAN:

18 You may begin.

19 ATTORNEY JACOBY:

20 Begin?

21 CHAIRMAN:

22 Yes.

23 ATTORNEY JACOBY:

24 Good morning, Mr. Chairman and the
25 members of the Board. We're here today for a hearing

1 with respect to the Emergency Petition filed by PEDP
2 in response to an Order issued June 30, 2010 by the
3 Director, in which she refused to forward our Appeal
4 from the Discovery Order issued June 18, 2010 to the
5 Board. And we're using a PowerPoint today just
6 because there are a lot of dates involved and wanted
7 to have the Board to have the benefit of it.

8 In her Order of June 30th, the basis for
9 the Presiding Officer, the Director, not to forward
10 this matter to the Board, was the language cited on
11 the screen, primarily the word that's emphasized
12 during. The Director concluded that because rulings
13 of a Presiding Officer may not be appealed during the
14 course of the hearing or conference except for in
15 extraordinary circumstances when a proposition by the
16 court is necessary, she felt that this Board should
17 not be entitled to hear the appeal we initially filed
18 from her Order of June 18th.

19 We disagree with her interpretation of
20 the regulation. I believe the clear meaning of that
21 regulation, which is worthwhile, is that during a
22 hearing you would expect the Presiding Officer to deal
23 with issues that come up during that hearing or
24 conference, certainly after a discovery conference is
25 concluded by a number of days, a week or more, or when

1 a hearing is over, and where there was no hearing.
2 It's a matter that should have been referred to this
3 Board. We therefore filed our Emergency Petition.

4 Now, as if the Board doesn't know, the
5 complaint filed against us on April 29, 2010 by OEC
6 contained four counts that we've not met certain
7 reporting conditions set forth in the Order of
8 September 1st, that we've not maintained undefined
9 suitability requirements, that we were unable to open
10 May 29, 2011, and we were no longer suitable and/or
11 financially fit.

12 Now these are serious allegations. Our
13 client, in addition to all the other monies it's spent
14 and probably aggregate, including the fee of about
15 \$100 million, paid the fee for the license. We can
16 have an intellectual discussion here about whether
17 it's a property right or entitlement or whatever. But
18 at the end of the day my client is still entitled to
19 due process.

20 And due process doesn't just extend to
21 the conduct of these hearings, and due process extends
22 to the discovery process. And we're entitled to have
23 full and fair notes of the claims and full and fair
24 opportunity to be heard. We're rightfully --- and I
25 won't go into too much detail today because that's not

1 an issue before you today. And the only reason I will
2 go into it today is only because we're sitting here on
3 July 29th, the Discovery Order issued June 18th
4 expires tomorrow. And I assume that as part of your
5 consideration you'll want to know, well, what's left
6 to be done, Mr. Jacoby? So without getting involved
7 in a lot of issues, I may refer to it, but you'll have
8 to indulge me. And I appreciate it.

9 Now, every time we have a discussion,
10 whether it's looking at an Order we get from the
11 Presiding Officer or from OEC, we're told one of two
12 things. We're told you have no right to discovery, or
13 that your discovery is limited. And that seems to be
14 the panacea for anything we ask for.

15 Now, I think what's important is if the
16 Board's regulations establish a right to discovery.
17 And I think it's important also that you look at the
18 Order issued June 18, 2010, the Board --- even the
19 Director gave us rights to discovery. Now this is a
20 particularly big problem because, as opposed to other
21 matters, this is the first time to my knowledge, and I
22 wouldn't know it from discovery because I can't get
23 any, that the Board has ever considered bringing an
24 Action for Revocation based upon lack of suitability
25 or financial fitness. And regretfully, it processes

1 in our mind the result to us is the denial of due
2 process. I know those words sound like, you know,
3 they're attack words, but they're not meant to be
4 attack words. I think the Board wants to conduct a
5 full and fair hearing. We want to participate in a
6 full and fair hearing, and that's what we're asking.
7 So that when we get done with that hearing or those
8 hearings, if and when there are appeals, there may or
9 may not be, at least there's a fair and balanced
10 record as opposed to just an outcome based on no
11 record at all because we've been denied access to any
12 of these.

13 Now, the Board's regulations provide in
14 58 Pa. Code 493a.11(a)(2) that the party may request
15 discovery by one or more of the following methods,
16 which are listed. And those are the methods that
17 we've attempted to implement without success. It was
18 attempted exiguously. And every time there's a
19 denial, whether it's an objection by OEC or a denial
20 by the record or Presiding Officer, we try to promptly
21 file a motion. We're not trying to delay the
22 hearings. We're only trying to get due process and
23 trying to get reasonable discovery. And I think
24 that's an important tenant for you to appreciate this.

25 Paragraph three of the Discovery Order

1 issued June 18th is to simply provide all discovery
2 requests in the form of interrogatories, production of
3 documents or things, or requests for admissions will
4 be responded to by the receiving party within ten
5 business days of the day of service of the document.
6 Again, not only does the Board regulations provide for
7 discovery, but the Order contemplates discovery. So
8 it's difficult for us to understand each time we make
9 a reasonable request in our minds for discovery we're
10 told, you know, you're lucky we even let you do what
11 you're doing because there is no right to discovery.
12 And by the way, if there is a right, which don't
13 necessarily admit, it's limited. I don't see that
14 either in the regulations or the Discovery Order.

15 Now this is important, and I think it's a
16 keystone of our problem, having --- the Board having
17 agreed to regulations as they're going to be
18 discovery. And frankly, the Discovery Order provided
19 for discovery that requires, at that point, that there
20 be due process and fundamental fairness. If there was
21 a prohibition of discovery by regulation, I wouldn't
22 be here today. I'd be maybe one day challenging the
23 regulations, whether they're valid, but I wouldn't be
24 here today. But that's not what we have here. We
25 have specific regulations that say you have the right

1 to discovery. You have the Order saying you have the
2 right to discovery, and whatever discovery we get ---
3 frankly, the only discovery we've had from OEC is when
4 they've given us our own documents back. Now, they
5 also gave us a statement under oath taken of Mr. Moles
6 after the complaint was filed.

7 ATTORNEY MILLER:

8 I'm going to object at this point. Are
9 we here to discuss the motion or are we here to
10 discuss PEDP's complaints in the discovery procedure
11 so far? I think they filed a motion --- at least,
12 this type of a petition, that's what's before the
13 Board, and they should argue the petition on that
14 provision.

15 CHAIRMAN:

16 I'm going to give Mr. Jacoby a little
17 leeway on this, but thank you --- proceed
18 expeditiously.

19 ATTORNEY JACOBY:

20 I'll try to.

21 CHAIRMAN:

22 Thank you.

23 ATTORNEY JACOBY:

24 I'll try to move along. But a response
25 is what I said previously, we're sitting here on July

1 29th, and the order --- the Discovery Order is from
2 --- discovery concludes tomorrow, and I'm trying to
3 explain what we have left to do. It's not just, well,
4 you're done tomorrow, what's the problem?

5 This is a timeline of the events. The
6 Consent Agreement was executed by us on the 28th. It
7 was rejected the next day, the 29th. That afternoon,
8 probably within minutes of the rejection, the
9 complaint was filed. We filed an unopposed Motion to
10 Extend the time to respond. It was denied. Because
11 of the fact that we had no choice and we didn't have a
12 say, we worked 24/7 and filed our Answer and filed
13 some other motions, another one of which is before
14 this Board. And I think the Board consolidated it
15 with the hearing that we're going to have on our
16 complaint, that's our Motion to Extend Time, Mr.
17 Chairman.

18 Now, on June 1st, the day we filed our
19 action, the very first day we asked for a discovery
20 conference, we got an Order scheduling the conference
21 on the 11th. And the Order says, be prepared to set a
22 schedule as well as discuss any other issues.
23 Which we were prepared. We attended that conference,
24 which was on the 17th.

25 Now, at the conference, without any

1 discussion as to what our discovery needs were, when
2 you walked in there you were told you have 25 business
3 days for discovery. No discussion. What you need,
4 how many depositions, who do you want deposed, things
5 like that. We told the Presiding Officer this is the
6 summertime, you have July 4th holiday, you have people
7 on vacations and things like that, there's logistics
8 that was of moment. And at the time, she said to us,
9 that's not negotiable. She did say, perhaps if we
10 were making some progress at the end of July, we might
11 get another week.

12 This is important, at the discovery
13 conference it was indicated that the reason why the
14 discovery had to conclude by the end of this month was
15 Pa. Code 491a.8(h), and that's cited below, which says
16 the hearings will be scheduled by the OHA, except for
17 hearings under 441a. And she said, look, the
18 indication was the hearings had to start within 90
19 days. Well, I'd first of all tell you that the 90
20 days expired yesterday, in the first instance. The
21 complaint was filed, the act was commenced April 29th,
22 so I'm not sure what the basis for that is.

23 But that was the sole basis for saying
24 you got to be done by July 30th. It had nothing to do
25 with what we wanted to discuss with her. As I said,

1 they only provide for 25 business days. More
2 importantly, the 21st of June, when I filed a motion
3 and conference, there was 16 days there. Now, if the
4 Hearing Officer intended to implement this regulation
5 it would strike me that that could've been done
6 relatively quickly. The conference was scheduled ---
7 it was a half an hour, it was more than it was. We
8 lost 16 days of discovery. We then filed our Motion
9 to Petition, appealing it, which she denied, refusing
10 the Board to --- she concluded that she did not have
11 to forward any matters to you folks until after the
12 merits hearing on the complaint.

13 And this is a quote I read to you before,
14 in which the Presiding Officer made about the appeal
15 during the course of the hearing or conference, which
16 we believe is applicable. As I said before, it's not
17 issued during the course of the hearing or conference.
18 More importantly, the general rules provide for prompt
19 right of appeal from actions of subordinate acting
20 under authority delegated by the Board. Ms. Lloyd was
21 in that capacity and that Order should have been
22 referred to you quite a while ago rather than on July
23 29 when we're now hearing this Order.

24 We then filed a Petition for
25 Reconsideration and this hearing was scheduled. Our

1 appeal is not moot, as I said to you before. Even
2 though tomorrow is the last day of that Discovery
3 Order, we've been forced to litigate our right,
4 frankly, from the start to take discovery. We had to
5 file a number of motions, and we'll enumerate them
6 briefly below. And, in fact, right now there's
7 another appeal pending before you folks with respect
8 to another Order. And there is a motion from which we
9 just got an Answer to yesterday at four o'clock.

10 ATTORNEY MILLER:

11 At this point ---.

12 CHAIRMAN:

13 No, no, that's fine. Go ahead.

14 ATTORNEY MILLER:

15 I apologize for that, I must object to
16 getting into the details of the discovery process here
17 in front of the ultimate Triers of Fact. I believe
18 it's improper. And at one point during the discovery
19 process PEDP requested that the items produced and
20 discussed in discovery be confidential, we didn't
21 object to that. And in fact, the Hearing Officer and
22 the Director of Hearings and Appeals ruled that items
23 of discovery and points of discussion in discovery are
24 confidential. For PEDP to bring those items to the
25 attention of the Board, who will ultimately be the

1 Trier of Fact in this case, I believe is improper and
2 I object to it.

3 CHAIRMAN:

4 Mr. Miller, I understand your objection.
5 You will get your chance in a couple of minutes. I'm
6 going to overrule the objection. But Mr. Jacoby,
7 again, please bring this matter to a conclusion.

8 ATTORNEY JACOBY:

9 This is just a timeline to get
10 appreciation for the discovery process. And you can
11 see we filed the Request for Discovery promptly the
12 day of the discovery conference. There were
13 boilerplate objections for purposes of --- this is
14 important again, Mr. Chairman, because these things
15 have to be done. There's an appeal pending before you
16 on these issues, frankly, that's not being heard
17 today. And plus, we anticipate probably two more
18 motions will be subject to an appeal in the timeliness
19 and responsive order. And I'll move on at the
20 direction of the Chairman.

21 I know that the Board at this point ---
22 we had tried to ask you for a subpoena to the Board
23 for certain records. That request was denied. We
24 asked the Board the opportunity to take a deposition
25 of Mr. Pitre and the investigative agent in the

1 Western Region, that was denied. We thought we were
2 going to take the depositions of two investigative
3 agents yesterday, that had been agreed until Tuesday
4 afternoon at about ---.

5 ATTORNEY MILLER:

6 Again, Mr. Chairman, I must object. He's
7 getting into details of discovery upon which there are
8 many disagreements and have been disagreements all
9 along. And again, bringing things to the Trier of
10 Fact is an attempt to prejudice the Trier of Fact
11 against the opponent, and I object.

12 CHAIRMAN:

13 Mr. Miller, you'll get your chance in a
14 minute.

15 ATTORNEY JACOBY:

16 I'm almost done, Mr. Chairman.

17 CHAIRMAN:

18 Thank you.

19 ATTORNEY JACOBY:

20 I'm trying to go through the details.
21 Very quickly, the reason why we need this discovery is
22 because, number one, obviously our license is at stake
23 and there's really no guidance. You know, we wanted
24 to find out what happened with PITG as an example, and
25 I won't go into any details. We weren't allowed to

1 get basic information and questions answered. What
2 we're trying to do is understand as an example what
3 are the guidelines by which OEC and perhaps the Board
4 are deciding this suitability. We need to defend
5 ourselves, whatever the orders come down, the orders
6 saying, you know, it's not relevant to the charges of
7 the complaint. If I remember the law correctly, the
8 law is --- first of all, is also an issue of whether
9 it leads to the discovery of admissible evidence. But
10 more importantly it deals with our defenses, too.
11 There's no reference to our defense in the Answer,
12 it's only you don't need that for the complaint. But
13 we need to defend ourselves. I still think this might
14 be recognized as due process.

15 We're here today, basically, to ask
16 number one, that the discovery deadline be extended.
17 The reason we're doing it, and I won't go into
18 details, because first of all, we haven't completed
19 discovery. Number two, there's a pending appeal
20 before you that has not been scheduled for hearing.
21 We anticipate there'll be at least two more appeals.
22 There was an order issued four o'clock last night and
23 we'll file an appeal today. And there's one other
24 motion still pending that hasn't been responded to.
25 We suspect it will be denied and we'll appeal that.

1 We think, in addition to all the other
2 arguments we have, as we said to the Board before, the
3 Board has authority to extend deadlines before for
4 cause shown. And we believe we've acted promptly,
5 we've acted fairly, we've acted in a manner consist
6 with jurisprudence. And reasonable people may
7 disagree, but at the end of the day, we're the ones
8 who suffer the penalty for the absence of having
9 reasonable discovery, where we could lose a \$100
10 million investment at this point. We would lose a
11 license that we worked hard to get and we're trying to
12 retain.

13 We're here for two purposes. Number one,
14 we just want our day in court. We want a chance to
15 defend ourselves. And number two, we continue to
16 believe in --- and I'm tired of making promises to the
17 Board where I can't control the negotiations of third
18 parties over which I have no control. But we have
19 every expectation based upon what is done this morning
20 that we should be submitting a proposed arrangement to
21 the Board next week some time. All we're asking for
22 is our day in court, with the right to defend
23 ourselves. Our clients are entitled to it no matter
24 how much people criticize what they've done or failed
25 to do. Even the most heinous criminal gets some level

1 of due process, and that's what we're asking for here.
2 Thank you.

3 CHAIRMAN:

4 Thank you. OEC?

5 ATTORNEY MILLER:

6 Thank you, Mr. Chairman. I'm Dale
7 Miller, Deputy Chief Enforcement Counsel for the
8 Eastern Region of the OEC. It's D-A-L-E, M-I-L-L-E-R.
9 And I'm here on behalf of the OEC.

10 Mr. Chairman, number one, the OEC doesn't
11 believe that this petition is properly before you for
12 several reasons. Number one, it's entitled a
13 petition, and a petition under our regulations ---
14 when a petition is filed, the other party has 30 days
15 to respond, and 30 days haven't elapsed since the time
16 the petition was filed, and therefore, it's improperly
17 before you and it's not right.

18 The second reason is the Board should not
19 be hearing this petition because it was not referred
20 to you by the Presiding Officer in this case, who's
21 the Director of the OHA. PEDP cites a regulation
22 which is not a --- or excuse me, cites a provision in
23 the administrative code that's not controlling in this
24 case. The controlling citation is the one that the
25 Director cited in her Denial of the original petition

1 --- or excuse me, the original request to overturn the
2 Discovery Order. And that is our own regulation that
3 says that in the course of a hearing or conference, a
4 matter should not be referred to the Board, or need
5 not be referred to the Board except under
6 extraordinary circumstances.

7 And as I listened to Mr. Jacoby, I didn't
8 hear the words extraordinary stated one time, because
9 this isn't an extraordinary circumstance. And the
10 Director of Hearings and Appeals was appointed to
11 preside over this matter and did, in fact, preside in
12 a discovery conference which we maintain continues
13 throughout the discovery process. She was in control
14 of the entire matter. What PEDP is doing is trying to
15 ask the Board to reconsider the decision that the
16 Board never made. The decision was made by the
17 Director of Hearings and Appeals, only she can
18 reconsider the decision. And she, in fact, did deny
19 it. She did not refer the matter to the Board because
20 it was not, in her opinion, an extraordinary
21 circumstance which required referral to the Board.
22 PEDP tries to get around that by citing a provision in
23 the administrative code which allows an appeal from
24 the decision of a staff officer in the agency, can be
25 referred to the agency head, that's not what we have

1 here. If the Director of Hearings and Appeals has
2 said to PEDP, you can't come into my building this
3 morning, I think that can be referred to the Board.
4 Well, if I'm the Director of Hearings and Appeals
5 conducting a conference or a hearing and makes a
6 decisions that's not agreeable to one or the other
7 parties, they can't immediately appeal that decision
8 to the Board. It can create chaos.

9 In this case, PEDP argues that the
10 conference was over and that, therefore, the matter
11 must be referred to the Board. OEC's position is the
12 conference isn't over until the discovery's over.
13 Well, either side, if they had a disagreement, can ask
14 for a --- ask the matter to be considered by the
15 Director of the OHA. In fact, Mr. Jacoby said that
16 during the initial discovery conference the Director
17 said, hey, you guys are getting towards the end of the
18 45 days for discovery, you're making progress and you
19 need more time, give me a call. Nobody's done that.
20 Instead PEDP tries to get this matter in front of the
21 Board in an improper way in order to appeal the
22 decision of the Board and waste more time.

23 Now, I will tell you, discovery, as of
24 today, is not complete, I'll be honest about that. We
25 have several more things to do and I have no doubt

1 that one party or the other may go to the Director of
2 Hearings and Appeals and ask for guidance on that
3 issue and she will give it. But this matter should
4 remain in her hands. It has no right to be in front
5 of the Triers of Fact at this point and, in fact, has
6 no right to be in front of the Triers of Fact at any
7 point until the hearing is set. And for those
8 reasons, we oppose this motion. Thank you.

9 ATTORNEY JACOBY:

10 May I respond briefly?

11 CHAIRMAN:

12 You may.

13 ATTORNEY JACOBY:

14 Thank you. I'm troubled by what Mr.
15 Miller said from the standpoint that they have yet to
16 have an opportunity to respond to the Emergency
17 Petition before you. It's troubling because we had
18 tried to be cognizant of the deadline to file
19 pleadings, motions, petitions promptly because we're
20 trying to work within this deadline. So it's a little
21 disturbing to me to hear on July 29th that, you know,
22 the reason why we're --- even though this hearing's
23 been scheduled for weeks, I believe, that they have
24 yet had an opportunity to respond to the petition.
25 They didn't respond to the appeal we took initially

1 from the Discovery Order, they didn't file a response.
2 The Director ruled without any further response.
3 There's no reason to believe that, frankly, they'll
4 respond, but more importantly it's a matter of equity,
5 yeah, we only had X number of days to get a discovery.
6 It's just troubling to hear that today.

7 Number two, we disagree about the code,
8 but more importantly, looking at the literal wording
9 of the Discovery Order, she provided for discovery,
10 for discovery we're engaged in. There's no limitation
11 there. But once you provide for discovery, I think
12 the rules of due process have to kick in.

13 Of course they're extending --- she
14 decided there weren't any when she ruled. But more
15 importantly, she ruled that because of that word
16 during, and I suggest to you that that's just not the
17 right --- and that's not in front of this Board today.
18 Because of the word during, you didn't get a right to
19 hear that petition we filed for the appeal. And you
20 should have. And that's why we're here today, not to
21 meet with anyone but the Director. I don't think the
22 Director had the right to stall that weeks ago had the
23 Director --- and we had to wait until the 29th to be
24 speaking with you. Discovery is not complete, Mr.
25 Miller is correct. We'll be glad to --- but we, at

1 this point, given the scheduling of this hearing and
 2 given the issue and the jurisdiction of the Director
 3 as to the orders in the Discovery Order of --- sorry,
 4 excuse me, June 18th, 2010. Or pardon me, that's
 5 before you folks. I wasn't about to pick up the phone
 6 and call Ms. Lloyd at that point when I had this
 7 hearing today which will decide whether she really had
 8 the authority to decide whether we should have had
 9 more time in the first place. And those are the
 10 reasons, not because we're playing fast and loose with
 11 the Board, with Mr. Miller, with OEC or with anything
 12 else. Thank you.

13 CHAIRMAN:

14 Thank you. Any other comments from OEC?

15 ATTORNEY MILLER:

16 No, sir.

17 CHAIRMAN:

18 Questions? Comments?

19 ATTORNEY JACOBY:

20 We want to move into evidence the
 21 PowerPoint.

22 CHAIRMAN:

23 So moved.

24 ATTORNEY MILLER:

25 That's the first time we saw the

1 PowerPoint. We haven't had a chance to review it
2 other than seeing it here.

3 ATTORNEY PITRE:

4 I'd also like to add with regard to the
5 PowerPoint, the motion's filed, the petition's filed,
6 the Order, they all speak for themselves. That
7 PowerPoint is so prejudicial I can't even imagine that
8 it can be placed into the record.

9 ATTORNEY JACOBY:

10 If I had known that we're going to take
11 the position I would have asked you to indulge me
12 more. I'd have created more of a record. This is
13 merely a PowerPoint, it is what it is. It's our
14 contention, it's not an admission of fact by them.
15 I'll admit that they haven't made any defenses by not
16 responding to it. But it is what it is, Mr. Chairman.
17 And I've tried to move this as quickly as possible,
18 otherwise I would've gone through each panel slide
19 with you on the record. And that's why I didn't. I'd
20 asked the Board to consider that issue, and allow me
21 to admit it with the qualification that they preserve
22 any rights, they don't admit anything, there's no
23 waiver of defenses.

24 CHAIRMAN:

25 Mr. Pitre?

1 ATTORNEY PITRE:

2 We would have taken our time and objected
3 to every page of that PowerPoint being presented to
4 the Board today.

5 CHAIRMAN:

6 I'm going to allow the admission only
7 because as I heard Counsel stating, and Counsel, you
8 correct me if I'm wrong, but that you admit on the
9 record that they have not had a chance to review it,
10 they have not had a chance to object to it. And any
11 objections they make will also be allowed. Am I
12 correct in my statement?

13 ATTORNEY JACOBY:

14 Allowed if this is used at some future
15 time?

16 CHAIRMAN:

17 Correct.

18 ATTORNEY JACOBY:

19 That's right.

20 CHAIRMAN:

21 Thank you. Any questions from the Board?

22 MR. TRUJILLO:

23 Mr. Chairman?

24 CHAIRMAN:

25 Yes?

1 MR. TRUJILLO:

2 I have a few questions.

3 CHAIRMAN:

4 Yes, Mr. Trujillo.

5 MR. TRUJILLO:

6 Mr. Jacoby, I guess what I'd like to
7 start with is the --- what exactly do you want this
8 Board to do?

9 ATTORNEY JACOBY:

10 Today?

11 MR. TRUJILLO:

12 Today.

13 ATTORNEY JACOBY:

14 Today, what I'd like you to do is to rule
15 that we should have additional time to conduct and
16 complete discovery. At the end of the day, that's the
17 only issue specifically before the Board.

18 MR. TRUJILLO:

19 And so as I review the June 18th Order,
20 what I'd like you to do is get that in front of you if
21 you would, please. I'd like you to tell me because,
22 as I read your petition --- you're Emergency Petition
23 in the nature of this appeal of that order, I believe
24 you ask for us to overturn the Order. What I want to
25 know is what part of that Order do you want

1 overturned, the entire thing?

2 ATTORNEY JACOBY:

3 I'm trying to get the right petition here
4 in front of me. Here it is.

5 OFF RECORD DISCUSSION

6 ATTORNEY JACOBY:

7 One thing I'm asking the Board to do
8 today is to extend the time for the conduct of
9 discovery, the deadline is tomorrow. We believe that
10 that is not sufficient time to conduct discovery. I'm
11 looking at my proposed order that is attached to my
12 petition, Commissioner. And in that I said all
13 discovery be completed by October 30, 2010. And I
14 also submitted for two reasons, one, there is
15 additional discovery. And there is a pending appeal
16 on substantive issues, and I believe there will be two
17 more. And that is the relief I'm asking, the proposed
18 order be submitted with this petition.

19 MR. TRUJILLO:

20 All right. So as I understand then as to
21 the June 18th, 2010 Order, your objection is simply
22 that it ought to be completed by Friday, July 30th,
23 2010 and that that should be extended by the Board
24 until October 2010?

25 ATTORNEY JACOBY:

1 October 30th, 2010 correct.

2 MR. TRUJILLO:

3 Mr. Jacoby, this Order was entered on
4 June 18, 2010, what discovery was promulgated
5 thereafter and when was it promulgated by your client?

6 ATTORNEY JACOBY:

7 I'll put the slide back up. The day
8 after the conference we propounded a request for
9 production of interrogatories. We received well
10 played objections to everything, except on a limited
11 basis we were given the names of the people who might
12 have knowledge, without telling what knowledge they
13 have, what role they might play. And that's the
14 extent of the responses we got. The objections were
15 boilerplate. We were told things were confidential
16 without being specific. I've already been told that
17 the guidelines of the Board or OEC regarding
18 suitability are confidential. I was told that my own
19 records, PEDP's records the Board had with the OEC are
20 confidential. I can't get them.

21 MR. TRUJILLO:

22 Mr. Jacoby, I'm just trying to get the
23 sense of what you asked for and when.

24 ATTORNEY JACOBY:

25 I propounded a request for discovery,

1 sent the request for discovery on June 18th, I got
2 objections back. The objections basically refusing to
3 produce anything or provide any responses, so we
4 immediately filed a motion with the Director to compel
5 discovery. That motion was denied. And I believe
6 without response, frankly, I might be wrong. I won't
7 take the time to go through it. We then filed an
8 appeal, that's the other appeal that's pending, that's
9 what I want. I also ask about those issues. If I
10 may? I asked for --- first of all, I asked for a
11 subpoena directed to the Board with respect to certain
12 documents. Now, if these documents are privileged or
13 confidential for some reason, then give me ---.

14 ATTORNEY MILLER:

15 I mean, that's what I'm saying. I'm
16 sorry, excuse me.

17 MR. TRUJILLO:

18 I'm not trying to get into the merits of
19 that, but what I'm trying to understand is, as I
20 understand then Hearing Officer Lloyd's Denial of your
21 --- and I believe what you said you requested from
22 her, you had objections from OEC; correct?

23 ATTORNEY JACOBY:

24 Correct.

25 MR. TRUJILLO:

1 And then what did you do then with ---?

2 ATTORNEY JACOBY:

3 Filed a Motion to Compel promptly with
4 the Director; it was denied.

5 MR. TRUJILLO:

6 And that Denial has been appealed;
7 correct?

8 ATTORNEY JACOBY:

9 I believe so, yes.

10 MR. TRUJILLO:

11 Then what I really don't understand is
12 how can you be denied due process if, in fact, you
13 have appealed and there is a pending appeal of that
14 Denial by the Hearing Officer? What are your due
15 process rights that are being violated?

16 ATTORNEY JACOBY:

17 Well, okay, that's what I said. We also
18 filed a Motion to Seek the Issuance of a Subpoena.
19 First of all, we made the request in our initial
20 request for production from the Board because we
21 thought that was the process that OEC wanted. They
22 told us, we misunderstood them. We then filed a
23 separate Motion for Subpoena with the Director to
24 Subpoena certain information from the Board. That was
25 also denied, that's being appealed.

1 We also requested discovery and
2 depositions of Mr. Pitre, the Western Region
3 representative, Mr. Morace and Mr. Dobbins. We were
4 told that Mr. Pitre, the Western Region representative
5 would not be produced. When we got that response we
6 filed a motion with the Director. We were told ---
7 and since you've asked me, I'm sure Dale Miller won't
8 scream and yell at me. We thought we were going to
9 take Mr. Dobbins' and Mr. Morace's deposition
10 Wednesday, Tuesday afternoon we were told they would
11 not be produced. So we've been denied, we have no
12 discovery. We have not had the opportunity ---.

13 ATTORNEY MILLER:

14 I object, that goes into the merits and
15 it's improper.

16 MR. TRUJILLO:

17 Hold on. What I'm trying to understand
18 is if you have appealed the denials by the Hearing
19 Officer and those appeals are pending, how are you
20 being denied due process? What due process rights are
21 you being denied?

22 ATTORNEY JACOBY:

23 We are being denied --- well, first of
24 all, we believe that the decisions being made by the
25 Director are without basis. And we believe that at

1 the end of the day there's a tally of all this, and we
2 believe that the process at the present time is
3 depriving us of due process. Having said that, Mr.
4 Commissioner, you know, go to issues of rightness,
5 that ultimate decision will be made when we have all
6 the orders.

7 MR. TRUJILLO:

8 Mr. Jacoby, I don't even understand this.
9 When you start throwing around that you're being
10 denied due process, I need to know, I want to know, I
11 must know, what due process rights are you being
12 denied?

13 ATTORNEY JACOBY:

14 I think when the Director ---.

15 MR. TRUJILLO:

16 You may think that the Hearing Officer is
17 wrong, that's different. You may disagree with her
18 order, and if that's what you're saying to me that you
19 think she was incorrect, that's fine. I'll be happy
20 to hear that. But what you've been saying during your
21 argument before and now again is that your due process
22 rights are being violated. How are your due process
23 rights being violated and what due process rights?

24 ATTORNEY JACOBY:

25 Okay. Let's start with the hearing on

1 June 17. We walk in there --- since you asked the
2 question. We walk in there, Mr. Graci and I do, with
3 the purpose of --- as you would do in a court of law,
4 and describe the discovery we want. The notice of the
5 hearing said come prepared to discuss it, we're told
6 --- frankly, the day started, they said it doesn't
7 matter and it's based upon, with all due respect,
8 Commissioner, we believe a regulation that's
9 inapplicable and, in fact, without any basis. But
10 that's the day we filed a request for discovery. We
11 get that boilerplate objection to everything. Based
12 on --- you name it. We file a motion with the
13 Director, even before OEC answers, that's denied.

14 We then learned for the first time that
15 the objections, that they're not going to facilitate a
16 reduction of anything through the Board. We file a
17 Motion for a Subpoena, that's denied. We then had to
18 actually press to get them to tell us --- under the
19 regs they're required to tell us the subject matter of
20 the post-depositions of our witnesses, and even that
21 went to impasse and finally they gave us some very
22 vague answers. We then filed a --- we then discovered
23 these witnesses I mentioned before and they objected
24 to producing Mr. Pitre, the Western Region person, and
25 at the same time they agreed to produce these two

1 individuals, now they're not going to produce them. I
2 would suggest to you, Mr. Commissioner, that if you
3 look at the totality of what's been happening since
4 June 1, maybe perhaps since April 29th, I'm not sure
5 --- the effect of that is that this, right now,
6 subject to any appeal, we believe that we're being
7 deprived, subject to whatever resolution this Board
8 comes up with on these issues, of due process.

9 We have a right to defend ourselves.
10 We're being told --- it's not a question of rightness
11 or wrongness, when you look at the total reality of
12 what's going on. We're told that something is not
13 relevant based upon the claims in the complaint.
14 Well, where I come in, also deals with your ability to
15 defend yourself with what your allegations are and
16 your answer. You have a right to take reasonable
17 discovery. Relevance is not solely relevance, it's
18 what we need to do --- this discovery of admissible
19 evidence. And so what I'm describing to you, frankly,
20 is an environment that for all intents and purposes
21 has squelched our ability to get a stick of paper
22 other than the statement taken of Mr. Moles from OEC,
23 started on June 1 to the present time. They took
24 areas that ---. I'm sorry.

25 ATTORNEY MILLER:

1 I'm going to object.

2 ATTORNEY JACOBY:

3 I want the right to ---.

4 MR. TRUJILLO:

5 Let him respond.

6 ATTORNEY MILLER:

7 We delivered part of the discovery over
8 two boxes of documents, items that we're going to
9 produce at this hearing to Mr. Jacoby's office. If
10 he's going to come in today and say that we have not
11 complied with his order, I object.

12 ATTORNEY JACOBY:

13 Well the --- a few more minutes if you
14 would?

15 MR. TRUJILLO:

16 No, no. I just want you to articulate
17 because all I am hearing --- just what I'm hearing
18 from you is that you disagreed with the Hearing
19 Officer. I have not heard any claim of due process
20 being violated. And I'm just trying to understand
21 what that is.

22 MR. GINTY:

23 Could I ask a question because I am
24 totally confused? You're requesting about 90 days,
25 but that doesn't address any of the issues you just

1 raised. The other issue is that the Hearing Examiner
2 is not, in your view, granting you appropriate
3 discovery. Because I don't see where what's before us
4 today, an extension of time, solves any of that.

5 ATTORNEY JACOBY:

6 The extension of time does two things,
7 Commissioner. Number one, it affords us the
8 opportunity to get rulings for the Board on issues of
9 whether they should have been compelled to produce the
10 information in the documents, they refused to. Which
11 is a pending matter before you. There are three other
12 issues that are to be appeals and will allow us,
13 hopefully, to have the ability, and I thought counsel
14 did a very good ---.

15 MR. GINTY:

16 Wait, wait, other than that. If in fact
17 those come before us and if in fact we address them,
18 which I think that there could be an issue. We would
19 at that time have an opportunity to extend time, if we
20 came out in your favor, would we not?

21 ATTORNEY JACOBY:

22 Yes, you would, although there's still
23 some discovery that needs to be done. But as Mr.
24 Graci just has confided, shared with me the response
25 to the issue of due process, I guess if you decide not

1 to grant our request for extension of time, I mean,
2 just think of the magnitude of this litigation. And I
3 know you were a trial lawyer and can appreciate ---.

4 MR. TRUJILLO:

5 I still am.

6 ATTORNEY JACOBY:

7 You are or will be a trial lawyer, this
8 is extensive. The documents that they produced ---
9 they gave us back our own documents, that's all they
10 gave us. But I want to say something because you
11 asked about due process, you know, I don't know if
12 this will be or is an issue. On April 28th we signed
13 --- the night of April 28 or the morning of the 29th,
14 we signed a Consent Agreement that this Board rejected
15 on the 29th. On April 28th, I've learned since that
16 litigation started that BIE sent investigators to
17 interview our former CFOs, former ---.

18 ATTORNEY MILLER:

19 I object again. Again, I object.

20 ATTORNEY JACOBY:

21 They won't give us the investigative
22 notes.

23 ATTORNEY MILLER:

24 I object. I object, I object.

25 CHAIRMAN:

1 I'm going to sustain that objection, Mr.
2 Jacoby. Thank you.

3 MR. TRUJILLO:

4 Okay. And just one more, Mr. Chairman.

5 CHAIRMAN:

6 Sure.

7 MR. TRUJILLO:

8 One thing I want --- the fact that there
9 is a lot of money at stake, is that what --- in your
10 mind what makes this extraordinary? Because as I read
11 your petition I was trying to find what a good cause
12 for the extraordinary nature was, and actually then
13 there's a lot of money at stake. So I'd like to know
14 what makes this even extraordinary, or what gives the
15 good cause given, what it is that your discovery
16 request is given the complaint here? I'm just trying
17 to --- what's extraordinary and what's a good cause?

18 ATTORNEY JACOBY:

19 Do you want to respond?

20 ATTORNEY GRACI:

21 If I might, Mr. Commissioner, what makes
22 it a good cause is not just the money. The remedy
23 that the complaint seeks is a death sentence for
24 PEDP's License. So in that sense, it's a capital
25 case. And in capital cases we have super due process.

1 There may be limits on discovery, and I'll certainly
2 impose them in their underlying enforcement
3 proceeding. But when you're trying to take the life,
4 literally, of this entity, a little more process is
5 due.

6 You asked the question what --- do we
7 have an appeal? Yes, we do. Quite frankly, all of
8 our due process issues might go away, if we got the
9 relief that we think we're entitled to from this
10 Board. But right now we've been denied. And yes, Mr.
11 Pitre is correct. They gave us two boxes --- as I
12 understand it, it was a box for Mr. Jacoby and a box
13 for me, and it was the same box, same information in
14 the boxes. And they provided documents that they
15 expect to utilize at a hearing on this matter. They
16 did not respond to what we thought were reasonable
17 requests for discovery. And again, as a trial lawyer,
18 you know the difference between relevance at the
19 discovery stage and relevance at trial. Well, this
20 discovery stage is anything that might lead to the
21 discovery of evidence or to admissible evidence at
22 trial. It's not limited to only to the evidence that
23 will be.

24 We've asked for information because this
25 is a death sentence for PEDP. We've asked for

1 information as to situations that might have been
2 similar but did not result in revocation. We've asked
3 simply for what standard do you expect to apply
4 because we looked through the statute, it doesn't
5 define financial suitability. It talks about
6 financial fitness. Now, I know that this Board
7 wrestled with that concept when it granted all of the
8 licenses as to whether or not an applicant was
9 suitable. Now we're talking about continued
10 suitability and we ask simply what standard will
11 apply? Because this is a brand new thing, I think,
12 certainly for me, I think it's a brand new thing for
13 the Board. All we want to know is what is it we're
14 going to have to defend against. But we've been told
15 that's not discoverable. We've virtually been told
16 that everything in the OEC/BIE file is confidential,
17 even some of our own information. I don't know how it
18 could possibly be confidential to us. But they
19 haven't been specific. And generally when you lodge
20 an objection as to confidentiality or certainly to
21 some privilege and we ask for a privilege law, haven't
22 gotten any. We just get the blanket it's
23 confidential. I don't know how, quite frankly --- as
24 a former government attorney, I don't know how you can
25 uniformly say it's a process that the agency will

1 follow. Not in a particular case, but just generally
2 is somehow confidential. This Board --- one of the
3 hallmarks of this Board since its inception a little
4 over four years ago has been transparency. Well,
5 doesn't transparency include how it is you can go
6 about stripping a licensee of its license?

7 So that's what we're talking about. And
8 as I said at the offset, Commissioner Trujillo, if you
9 reverse at some point, and maybe Attorney Miller may
10 be correct, that this isn't the appropriate time. But
11 right now we're asking for an extension of time for
12 the discovery process even though the particulars
13 aren't yet before you, although there are pending
14 appeals. If you agree with us even in part, some of
15 the due process issue might go away, because we will
16 --- there is a process. I think this is what, Your
17 Honor --- you know where I come from. I think this is
18 what the Commissioner was referring to. There is a
19 process. We're following a process, but right now as
20 we speak we believe --- and that's the basis for our
21 appeal, that we've been denied due process. Because
22 everything that we've asked for has either been denied
23 without either the waiting for a response from our
24 opponent or even if it is, it's denied. And we're not
25 getting what we think we're reasonably entitled to.

1 MR. TRUJILLO:

2 That's what I was trying to understand,
3 is that the due process right that you're saying
4 you're being denied is that you're not getting what
5 you're asking for; am I correct?

6 ATTORNEY GRACI:

7 And what we really --- we don't get them
8 because we ask for them. We think we're reasonably
9 entitled to them.

10 MR. TRUJILLO:

11 Okay. That's really all I was trying to
12 get to. Thank you, Mr. Chairman, that's all.

13 CHAIRMAN:

14 Mr. Miller, go ahead and respond.

15 ATTORNEY MILLER:

16 Well, my response is that those items
17 that the PEDP requested in the discovery were not
18 discoverable under the administrative law. This is
19 not a civil procedure. They didn't sue us. This
20 isn't a procedure where everything is open to
21 discovery. This is an administrative law in an
22 administrative hearing, and as the Director of
23 Hearings and Appeals stated in her Order of June 30th,
24 discovery is not automatic in most administrative
25 proceedings of the Commonwealth. And she cited a

1 case. You're only entitled to limited discovery in an
2 administrative process. What PEDP wants is items that
3 they're not entitled to. And we certainly will not
4 produce those items. When they asked the Director of
5 Hearing and Appeals to compel us to produce those
6 items, she denied their request based upon good
7 applicable administrative law. They seek to come and
8 relitigate when it's already in front of her. And to
9 state that we are somehow purposely depriving them of
10 items they are entitled to is simply not true.

11 To this date, we have not received any
12 documents from PEDP that they may produce at the
13 hearing, even though we requested it several weeks
14 ago. We may end up having to file a Motion to Compel
15 because they haven't given us anything. I will say
16 that this process has been vigorous, and vigorously
17 defended and vigorously fought on both sides and we
18 filed a complaint and I expect it to continue. But
19 this is not a forum it should continue in.

20 CHAIRMAN:

21 Commissioner McCabe.

22 MR. MCCABE:

23 Thank you. I'm going to try and keep it
24 simple because I'm a simple guy. I understand that
25 the reason we're here today is to hear your Petition.

1 And the petition is to grant you more time, to extend
2 the deadline.

3 ATTORNEY JACOBY:

4 Right.

5 MR. MCCABE:

6 Is that correct?

7 ATTORNEY JACOBY:

8 That's the issue today.

9 MR. MCCABE:

10 Okay. I also heard that you said that
11 the Director told you that if you were making progress
12 that you had --- that all you had to do was come to
13 her and she would grant you more time. Is that ---
14 was that correct?

15 ATTORNEY JACOBY:

16 This statement was made by Ms. Lloyd.

17 MR. MCCABE:

18 Then my next question would be what
19 progress have you made? What progress have you made?
20 What have you been doing? I'm sitting here listening
21 and I'm trying to --- I'm hearing about all these
22 appeals that you're doing, but I haven't heard
23 anything about what the discovery --- your process of
24 going out and interviewing people doing the discovery
25 process to be able to say you're making process. So

1 what progress --- what have you been doing in this
2 time? Has it just been appeal after appeal or are you
3 working towards discovery?

4 Going back to what Commissioner Trujillo
5 said was you just don't agree with the decisions we
6 made against you and you got to look at that. You
7 know what I mean, and there are many times that we
8 were ruled against and we didn't like it but you have
9 to live with those rules. So what have you done? And
10 then, have you asked the Director for more time yet?

11 ATTORNEY JACOBY:

12 Let me make two separate answers, number
13 one, we have --- by the way, I wasn't sure I heard Mr.
14 Miller correctly. We have produced substantial
15 information and documents to them pursuant to
16 discovery. I don't know if I heard right, Mr. Miller.

17 ATTORNEY MILLER:

18 You produced specific items that we
19 specifically asked for. When I asked you for items
20 that --- the documents that you were going to use for
21 trial, exactly pursuant to our regulations, you
22 haven't produced a thing.

23 MR. MCCABE:

24 Please answer my question first.

25 ATTORNEY JACOBY:

1 I'm trying to. So you've asked what I've
2 been doing. We produced the documents we feel are
3 responsive. We have produced witnesses and had
4 depositions, there have been depositions of our
5 witnesses, and we worked out an arrangement regarding
6 the statement taken of Mr. Moles. There were
7 depositions of our witnesses this week. There are two
8 depositions of witnesses they've deposed tomorrow. So
9 that any witnesses they've asked to be deposed has
10 been produced for them, you know, within whatever
11 we've worked out between us, so I've done that. I
12 haven't been able to take any depositions because they
13 refuse to produce anybody I've asked to take a
14 deposition of.

15 I've produced, in my mind, all the
16 documents that I believe are responsive to what
17 they've asked for. And ---.

18 MR. MCCABE:

19 Okay. That's on your side, you're
20 answering for him. What have you done to get your
21 discovery?

22 ATTORNEY JACOBY:

23 Well, I can't --- you know, there's no
24 copies of some of these --- they just do a tango and
25 the problem is that I can't get discovery from someone

1 who won't give me it. I can't get documents from
2 somebody who won't give me documents except of my own
3 documents. I can't get depositions from my opponent
4 because he won't produce any of the witnesses.

5 MR. MCCABE:

6 So I understand, is that a separate
7 appeal, a separate appeal?

8 ATTORNEY JACOBY:

9 They're all subject to appeal.

10 MR. MCCABE:

11 Okay. Because I want to go in that area
12 in a minute. But have you asked our Director to
13 extend the time?

14 ATTORNEY JACOBY:

15 I think as I said previously ---.

16 MR. MCCABE:

17 Yes or no. Just the facts please, you
18 know, answer the question yes or no? I know lawyers
19 can't answer a question yes or no. Did you ask the
20 Director for more time?

21 ATTORNEY JACOBY:

22 I can answer yes or no, it's just your
23 characterization of what she said to me was not what
24 she said and I think the record will speak. What was
25 said was, if you get to the end of the period and need

1 another week, we'll consider it if you're making good
2 progress. Now, the answer is no, I haven't because of
3 what I said before, Commissioner, which is this
4 hearing has been scheduled for some time, and
5 depending on how you rule, whether you grant all or
6 some of what we've asked for, there would be no need
7 to ask the Director for more time with that extra week
8 she'd give us.

9 MR. MCCABE:

10 So the answer to that question is no, you
11 haven't asked them. Now I've got a question, and I'm
12 throwing this out. Say we ruled today on this
13 Petition that says about for the grant of time and we
14 say no. Then we hear your Petition about the
15 discovery and we agree with you there then, in fact,
16 you should have this information and then we direct
17 BIE/OEC to give you this information. Does the
18 discovery period then begin again? Do we give you
19 another discovery period? What is --- OEC or
20 somebody, is that what would happen?

21 ATTORNEY MILLER:

22 There's no set time for discovery, it is
23 --- the discovery normally takes as long as it takes
24 unless it's specifically set by the Judge or Presiding
25 Officer. I can guarantee if you order them to produce

1 all the evidence that they've asked to be produced
2 discovery will be continued for another six months.

3 MR. MCCABE:

4 Well, how can put a time period because
5 the obvious subject to that where if the court has
6 said, okay, you know, we have two weeks to give them
7 all the information and you got two weeks to review
8 it. It gets done. You drop everything and you get it
9 done because there was an order to do it. And if this
10 is a capital type of offense, as Mr. Graci's
11 indicated, they're going to have to drop everything,
12 put people full time on the discovery to get it done
13 in an expeditious way. Part of my frustration is it
14 just seems to be dragging out for years. And, you
15 know, we got to try to get a resolution.

16 ATTORNEY MILLER:

17 Mr. Commissioner, I believe --- I will
18 admit, we are making progress in discovery. We have
19 been conducting discovery, we have been taking
20 depositions, it's not over, but we have been making
21 progress.

22 MR. MCCABE:

23 I think that's all.

24 ATTORNEY GRACI:

25 May I make one brief response,

1 Commissioner, in response to one of the things that
2 Mr. Miller said? They did make a request for us for
3 what we expected, the witnesses we intend to produce
4 and the documents we expected to rely on at trial. We
5 didn't ignore their request, we responded by saying
6 that's a little premature to ask us who our witnesses
7 would be and for our exhibits, what our exhibits are
8 going to be when we haven't yet completed discovery.
9 We didn't just ignore them, and I wanted to clarify
10 that for the record. We responded to them simply by
11 saying, hey, that's --- maybe they made that
12 determination as to who they're going to call. We're
13 defending this, which puts us in an entirely different
14 situation, which I'm sure you can appreciate, and for
15 all the Board to appreciate. And that's why we
16 responded the way we did, not to ignore them. But
17 that's what's happening because we've had delays as
18 recently as this week, where we thought we were going
19 to be conducting some depositions that were cancelled
20 literally at the last minute. And the BIE has its
21 reasons. And then we responded to that as we believe
22 appropriate. But that matter may soon come before
23 you. It was an extraordinarily truncated period of
24 time, it was told to us, we didn't discuss what the
25 deadline should be, and we were told the deadline will

1 be July 30th. That basically was the first comment
2 that was made in our discovery conference. So we're
3 here asking for relief from that.

4 MR. MCCABE:

5 And I understand your frustration about
6 turning over documents and then being told they're
7 confidential and you can't get your own information.

8 ATTORNEY GRACI:

9 We have turned over documents. I don't
10 think Mr. Miller disputed that otherwise.

11 MR. MCCABE:

12 We did that, we used to get some of our
13 information through another agency, it began with a C
14 and ended with an A, they take it, classify it and ---
15 wouldn't give it back to us, so we couldn't do
16 anything with it. So I understand how it hurts you,
17 because we gave you this information. This is ours
18 and now you're telling me I can't have it back. So I
19 understand that frustration. Thank you.

20 ATTORNEY GRACI:

21 Thank you, sir.

22 CHAIRMAN:

23 Other questions from the Board members?
24 I have a couple. Mr. Jacoby, you've obviously been
25 here before, I think you've sensed the frustration of

1 this Board. And just for the record, I'm going to ask
2 you a series of questions that I would like you to
3 respond to. When did PEDP receive their initial
4 license from the Gaming Board?

5 ATTORNEY JACOBY:

6 May of 2008.

7 ATTORNEY GRACI:

8 The license was issued that date after
9 the payment of the fee, were you talking about when it
10 was adjudicated in December of 2006 and then there
11 was ---?

12 CHAIRMAN:

13 Thank you.

14 ATTORNEY JACOBY:

15 The adjudication was February 2007, the
16 license was issued May of 2009.

17 CHAIRMAN:

18 Okay. And the initial Board decision
19 granting the license was when?

20 ATTORNEY JACOBY:

21 February 2007.

22 CHAIRMAN:

23 I believe ---.

24 ATTORNEY MILLER:

25 The adjudication, December 20th, 2006.

1 CHAIRMAN:

2 Thank you. It's December 20th, 2006.
3 Let me read you a couple of other dates that I think
4 you laid out, and I just want to, again, make it
5 clear. The timeline of this latest proceeding, on
6 April 29th, 2010 OEC filed a Complaint for Revocation.
7 My take, you can answer yes, no or disagree with me,
8 you were put on notice that day that this Board was
9 moving --- or OEC was moving down in a revocation
10 path, is that a correct statement?

11 ATTORNEY JACOBY:

12 That's correct.

13 CHAIRMAN:

14 Thank you. On June 11th, 2010 our
15 Director of OHA, Linda Lloyd, issued an Order
16 scheduling a discovery conference; is that correct?

17 ATTORNEY JACOBY:

18 That is correct.

19 CHAIRMAN:

20 On June 22nd, 2010 you filed an Emergency
21 Petition appealing her June 18th, 2010 Discovery
22 Order; is that correct?

23 ATTORNEY JACOBY:

24 That's correct.

25 CHAIRMAN:

1 On July 7th, 2010 you filed your current
2 petition in the nature of a Motion for Reconsideration
3 of Director Lloyds' Discovery and Denial Orders; is
4 that correct?

5 ATTORNEY JACOBY:

6 On June 30th, that's correct.

7 CHAIRMAN:

8 Okay. Here's my personal frustration.
9 In that Order from Director Lloyd, the initial Order
10 on discovery, 25 days were given to you, that's five
11 weeks. I understand summer is here, people go on
12 vacation, but five weeks, in my opinion, with all due
13 respect to Counsel Graci and the severity of this
14 matter being a capital case as he referred to it.
15 Five weeks is, in most people's time frame, a fairly
16 long period of time. And our job as a Board is to get
17 casinos up and running, provide property tax relief to
18 the citizens of the Commonwealth, provide economic
19 development money, provide money for volunteer fire
20 departments, provide money to the horse racing
21 industry and do all of that in the fairest and proper
22 oversight with all the safeguards that we can put into
23 place to make sure that this is happening in a fair
24 manner for the gaming public.

25 What I see is since December of 2006, now

1 coming on four years, your client has had an asset of
2 this Commonwealth, and that asset is wasted. That's
3 the way I see it.

4 ATTORNEY JACOBY:

5 Do you want me to respond?

6 CHAIRMAN:

7 No. Any other questions from the Board?
8 Thank you. Any other questions from OEC?

9 ATTORNEY MILLER:

10 No, sir.

11 CHAIRMAN:

12 Thank you. That concludes our first
13 hearing.

14 * * * * *

15 HEARING CONCLUDED

16 * * * * *

17 CERTIFICATE

18 I hereby certify that the foregoing
19 proceedings, hearing held before Chairman Fajt, was
20 reported by me on 07/29/2010 and that I Kenneth
21 Dominic O'Hearn read this transcript and that I attest
22 that this transcript is a true and accurate record of
23 the proceeding.

24 
25 _____
Court Reporter