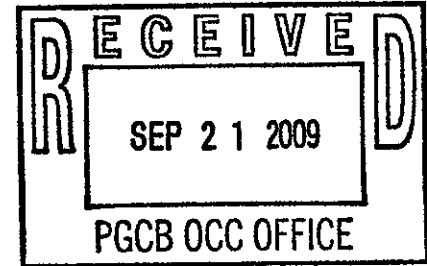


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September 21, 2009

## HAND-DELIVERY

The Honorable Arthur Coccodrilli, Chairman  
Independent Regulatory Review Commission  
333 Market Street, 14<sup>th</sup> Floor  
Harrisburg, Pennsylvania 17101



**RE: Comments to Final-Form Rulemaking #125-102 (Key Employees)**

Dear Chairman Coccodrilli:

Pursuant to 71 Pa.C.S. § 745.5a(j), Greenwood Gaming and Entertainment, Inc., d/b/a Philadelphia Park Casino ("GGE") and Downs Racing, L.P. t/d/b/a Mohegan Sun at Pocono Downs ("MSPD"), respectfully submit the following comments in opposition to the Pennsylvania Gaming Control Board's (the "Gaming Board") proposed administrative regulation, in the above captioned matter.

The Gaming Board's proposed regulation is a solution in search of a problem. Its development was not the result of a collaborative process that involved the participation of industry stakeholders in an effort to resolve a specifically identified concern.<sup>1</sup> Rather, the proposed regulation is the result of a failed attempt by the Board's Bureau of Licensing to bypass the regulatory review process, and *sua sponte*, expand the application of the "key employee" licensing standard to a significant number of new gaming employees. The Gaming Board's effort to expand its application of "key employee" licensing requirements is without merit.

Accordingly, it is the position of GGE and MSPD that the Gaming Board's proposed regulation does not satisfy the public interest standard necessary for Commission approval. In particular, the proposed regulation merits rejection for the following reasons: (1) the regulation fails to satisfy a public need or correct an existing regulatory deficiency; (2) the regulation does not protect the public safety or welfare; (3) the proposed regulation imposes significant regulatory costs upon slot machine licensees; and, (4) the regulation places Pennsylvania slot machine licensees at a competitive disadvantage.

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<sup>1</sup> As admitted by the Gaming Board, "no direct input was solicited from any advisory groups." See *Independent Regulatory Review Commission Regulatory Analysis Form*, Section III, 22 (Gaming Board response).

1. The regulation fails to satisfy a public need or correct an existing regulatory deficiency.

The Board's proposed regulation represents a dramatic expansion of the persons required to obtain licensure as a "key employee" under the Pennsylvania Race Horse Development and Gaming Act and the Gaming Board's current regulations and requires slot machine licensees to submit internal controls for complimentary services and items to the Gaming Board for approval. When confronted with the question as to "why this regulation is needed," the Board is unresponsive. It has identified no industry-wide problem, no public threat or actual harm and no regulatory deficiency that would be satisfied by its proposal to impose the more comprehensive licensing standards associated with "key employees" to shift managers and employees who are authorized to issue credits for free slots play.<sup>2</sup>

In response, the Gaming Board simply states that the proposed regulation broadening the application of the "key employee" licensing standard is based on its review of existing gaming operations. Significantly, the Gaming Board has failed to provide any explanation as to why existing licensing standards are insufficient or existing internal controls and safeguards implemented by each slot machine licensee are inadequate to protect the public interest. The primary distinction, between the "key employee" and the "gaming employee" licensing standards, is the significant financial background review an applicant and his or her immediate family must endure in order to receive a "key employee" license. It is unclear how further scrutiny of a prospective employee's financial history may serve as an indicia of future conduct or provide insight into the person's moral character, honesty and integrity.

Existing protocols and controls imposed by each of the slot machine licensees provide effective safeguards against improper authorization of free slots play. For example, MSPD's promotional slots play is implemented in the following manner:

- Free play may only be added to a player's account by placing that player into a pre-existing promotional group that is associated with a specific free play value. In other words, to provide a particular player with \$100 of free play, that player

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<sup>2</sup> GGE and MSPD have identified only two instances within the past 2 and ½ years of operations, involving a gaming employee who improperly issued free slots play. One person, licensed as a "gaming employee" without any prior criminal history, was arrested and pled guilty for issuing unauthorized slot play and splitting the winnings with players. The other instance involved a Marketing Supervisor who was licensed as a "key employee". In this case, the individual was terminated for poor job performance, including improperly allocating free slot play to a person not otherwise entitled. Interestingly, these instances involve two persons – one licensed as a "gaming employee" and one licensed as a "key employee," underscoring the fact that there is no causal connection between clearance of the "key employee" licensing standard and the future likelihood of improper conduct. It is also worth noting that in both instances, existing controls and safeguards imposed by the slot machine licensees detected and appropriately responded to each violation.

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must be placed into an active group that is specifically assigned \$100 of free play based on the past gaming activity of the player.

- Employees cannot arbitrarily add a chosen amount of free play to a player's account.
- The highest value group that MSPD has created is approximately \$1,000.
- Only "key employees" who are at a manager level or higher, may create the groups and the corresponding free slots play value.
- The assignment of players to free slots play groups is extensively audited by an independent operational accounting team.

It has not been explained to either this Commission or to industry stakeholders how existing industry practice, such as these internal controls and safeguards, are inadequate or how broader application of the "key employee" licensing standard is necessary.

The Pennsylvania gaming industry has operated over two years under the existing licensing standard. Despite this fact, the Gaming Board has expressed its intention to go beyond simply applying its proposed regulatory change to future employee applicants, but to retroactively impose the new licensing standard on existing employees who have performed their jobs well and without incident. These individuals have all undergone and passed appropriate criminal background checks and have been deemed by the Board to have satisfactory character and pose no threat to the public. The Gaming Board's proposed expansion of the "key employee" licensing standard would subject these employees to an intrusive review process, causing disruption of gaming operations, and causing unnecessary uncertainty concerning their future employment status.

The amendment in the proposed regulation requiring slot machine licensees to submit their internal controls regarding complimentary services and items to the Gaming Board for approval is uncalled for as the requirement does not satisfy the public interest standard stated above. The Gaming Board has failed to identify any deficiency in the current regulation or inadequacies in current internal controls. There is no clear public need or benefit that will result from the proposed internal controls requirement.

2. The regulation does not protect the public safety or welfare.

The Gaming Board has not responded to the fundamental question as to how the "key employee" licensing standard will be able to prevent misallocation of slots play or future improper conduct. The Gaming Board's attempt to include shift managers, who make discretionary decisions

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related to slot operations, is unwarranted.<sup>3</sup> There is no compelling reason why these individuals, who are subject to the supervision and oversight of department or division heads and already licensed as “key employees,” should be subject to the same extensive licensing standard as their superiors.

There is no dispute that the “key employee” licensing standard is more comprehensive, detailed and intrusive. However, simply because this licensing standard is more in depth, it does not necessarily follow that it is appropriate to apply the standard to all cases in which a person may hypothetically affect slot operations. If this were the case, there would be little practical use of the separate “gaming employee” licensing standard except in cases involving only the lowest level employee.

Akin to using a shotgun to kill a fly, the Gaming Board attempts to indiscriminately apply a licensing standard that has been traditionally used to vet top level employees with significant independent authority over slot operations. Shift managers and employees who allocate free slots credits are not independently empowered or authorized in the same manner as department heads – hence their subordinate organizational position.

Application of the “key employee” licensing standard by the Gaming Board has not been shown to provide any particular regulatory benefit or satisfy any oversight need that is not currently being met by existing operational controls. The fundamental fact involving free slots play is that it involves marketing / promotional dollars, not state revenues. Accordingly, the Gaming Board’s focus on employee involvement with free slots play is not only misdirected, but fails to explain how conversion to “key employee” status would prevent future misallocation of free credits.

3. The regulation imposes significant regulatory costs upon slot machine licensees.

The proposed regulation fails any reasonable cost-benefit analysis. It is the position of GGE and MSPD that the significant regulatory costs<sup>4</sup> associated with the Gaming Board’s expansion of the definition of “key employee” and the resulting increase in the number of employees being subjected to the increased obligations that are associated with holding a “key employee” license weighs overwhelmingly in favor of rejecting the proposed regulation. As identified by the Gaming Board in its response to the Commission’s comments, the application fee and investigative costs alone are approximately \$4,000, which includes an application fee of \$2,500

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<sup>3</sup> It is worth restating that though shift managers may make decisions concerning slot operations, those decisions are subject to supervisory oversight and clearly established protocols and procedures. This is not a situation in which a shift manager is provided unrestrained decision making authority.

<sup>4</sup> Regulatory costs as discussed in this instance include filing fees and investigative costs, as well as, administrative and legal fees associated with the key employee licensing process.

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and average investigative costs of approximately \$1,500. Noteworthy is the fact that the application fee is not a onetime expense, but must be paid annually when the license is renewed. These expenses represent a significant increase from the current licensing process associated with obtaining a "gaming employee" license (annual fee of \$350).

GGE and MSPD project, that if the Gaming Board's proposed regulatory change were approved, their regulatory compliance costs would increase by approximately \$28,000 to \$40,000 per year. These costs are not inconsequential -- they will affect slot machine licensees' profits, future employment expansion and potentially diminish revenue dollars to the Commonwealth as cost savings are implemented. The Gaming Board does not dispute that additional regulatory costs will be imposed on slot machine licensees. Furthermore, the Gaming Board has not attempted to quantify any cost savings associated with its proposed implementation of the higher licensing standard.<sup>5</sup>

4. The regulation places Pennsylvania slot machine licensees at a competitive disadvantage.

Pennsylvania is an extremely high cost gaming jurisdiction. For 2008, the effective tax rate for slot machine gaming at the open and operating casinos was 57.3%. Though this rate is expected to drop slightly when the percentage set aside for horse racing purposes is reduced, as more non-track based gaming facilities begin operations, Pennsylvania's effective tax rate will remain one of the highest in the nation -- far above New Jersey's rate of 8% and also West Virginia's rate of 48%.

Though Pennsylvania's tax rate was well known to and accepted by slot machine licensees, the Gaming Board's high regulatory cost structure that is paid by each slot machine licensee was not. The Gaming Board has projected that total industry costs in the first year of implementation of this single regulatory change will range between \$180,000 to \$225,000, increasing between \$200,000 to \$300,000 in fiscal year 2013-2014.<sup>6</sup>

Unlike many older jurisdictions that may impose higher licensing standards, the administrative costs incurred by the Gaming Board were anticipated to be lower as a result of the legislature's mandate that a central control computer system be used as the primary means of monitoring, auditing and controlling slot machine operations. *See*, 4 Pa.C.S.A. §1323.

The Gaming Board's operating and administrative costs have been the subject of significant criticism from members of the General Assembly as part of its annual legislative budget authorization request. At a Senate Appropriations Committee Budget Meeting, the legislature

<sup>5</sup> *See Regulatory Analysis Form*, Section III, 19 (Gaming Board response).

<sup>6</sup> *See Regulatory Analysis Form*, Section III, 17 (Gaming Board response). It should be noted that GGE and MSPD believe that the Gaming Board's projected costs are low, actual costs are anticipated to be higher.

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expressed concerns about the rising regulatory cost burden imposed on slot machine licensees and the Gaming Board's need to implement cost savings. The legislature took particular note of the fact that Pennsylvania's costs are well above those incurred by neighboring states of New Jersey and West Virginia, placing Pennsylvania slot machine licensees at a competitive disadvantage.

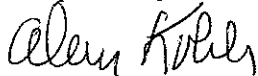
Unfortunately, the Gaming Board's proposed regulation is the latest example of an administrative agency failing to consider whether or not potential risk of loss sought to be prevented by the proposed regulatory change, justifies the added regulatory expense imposed on slot machine licensees. This is particularly true in the case of the Gaming Board's expressed intention to apply the new "key employee" licensing standard retroactively to those employees who have been working and performing their duties over the past 2 and ½ years without incident or problem.

Conclusion

GGE and MSPD acknowledge the importance and need for effective and strict regulatory oversight in order to ensure the integrity of gaming operations in the Commonwealth and prevent the actual or perceived appearance of impropriety. These are important public policy objectives that benefit both the Commonwealth and the regulated industry. However, superfluous regulations do not advance these policy objectives. To restate, the proposed new licensing standard is a solution in search of a problem. There is no evidence before this Commission demonstrating how existing regulatory safeguards are inadequate or how the proposed regulation would more effectively prevent future improper conduct.

Accordingly, for the foregoing reasons, GGE and MSPD respectfully request that this Commission revisit the concerns regarding Final-form Rulemaking 125-102 and reject the Board's submission on the basis of not providing adequate justification for the amendments.

Respectfully submitted,



Alan C. Kohler

cc: The Honorable George D. Bedwick, Vice Chairman  
The Honorable Silvan B. Lukewitte III, Commissioner  
The Honorable John F. Mizner, Commissioner  
The Honorable S. David Fineman, Commissioner

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James M. Smith, Regulatory Analyst  
Richard Sandusky, Director of Regulatory Review (PGCB)