RULES AND REGULATIONS

TITLE 58. RECREATION

PENNSYLVANIA GAMING CONTROL BOARD

[58 PA. CODE CH. 441]

Response to Public Comment

Subpart C. SLOT MACHINE LICENSING

CHAPTER 441. SLOT MACHINE LICENSES

§ 441.19. Licensing hearings for slot machine licenses.

Comment:

§ 441.19(c)(2) - Is the order of statutory sections listed here intended to reflect the order of hearings? In other words, after the Conditional Category 1 hearings, will all Category 1 hearings be conducted, followed by Category 2 and then Category 3 or will the non-conditional categories be mixed?

Response: The Board will announce the order and dates of the licensing hearings for each category of licensure. The order of the presentations within each category of hearings will be determined randomly.

Comment:

§ 441.19(d) - States that "[t]he Board will allot each applicant a specified time for its presentation." The Isle recognizes the Board's desire not to specify the amount of time allotted in the regulations. However, issues of time are essential to the process and an applicant's preparation for the hearing and decisions about the content and manner of its presentation to the Board. Will each

applicant (or at least each applicant in a competitive grouping) have the same amount of time? What will that amount of time be? How will questions by the Board or its Chief Enforcement Counsel impact the allotted time? Assuming these issues are not addressed in the regulations, the Board should establish a prehearing conference process, to occur sufficiently before the deadline for the applicants' memorandum, at which these types of issues could be resolved. Additionally, Section 441.19(d) should direct that the order of applicants' presentations within a competitive grouping will be determined randomly. Applicants whose hearings will be after their competitors will have a significant advantage and the ability to adjust (within the confines of Section 441.19(n)) their presentations to account for issues or information raised at earlier hearings. The significance of this advantage makes random selection – and not alphabetical ordering – necessary.

Response: The Board is sensitive to the issue of confidentiality, as well as the burden of providing the required information and documents. The Board will review and consider these recommendations and will make a final determination at the pre-hearing conference.

Comment:

§ 441.19(d) **-** In the interest of fairness and equality, we suggest this provision should be revised as follows: "The Board will allot each Applicant an equal amount of time for its

presentation."

Response: The Board intends to allow each applicant the same amount of time for their presentations.

Comment:

§ 441.19(h)(14) - How is it contemplated that “areas of deficiency” as referenced in this section will be communicated to the applicants and in what time frame? Will there be advance notice? Will these include character issues? Will any reports be public and available to all applicants?

Response: The “areas of deficiency” will be brought to an applicant’s attention prior to the commencement of the licensing hearings, and these communications will remain confidential.

Comment:

§ 441.19(j) – Requires that the applicant file with the Board and serve on all applicants seeking the same category of license a memorandum that identifies all of the evidence that the applicant intends to use in support of its presentation before the Board. This memorandum must be filed "no later than 30 days before the first scheduled licensing hearing in the category of license for which the applicant has filed an application." Given the scope and complexity of the evidence that an applicant must prepare to present to the Board, KRP respectively requests that Section 441(j) be revised to require the applicant to file this memorandum no later than 10 days before the first scheduled licensing hearing in the category

of license for which the applicant has filed an application. Such a revision would be consistent with the goal of affording both the Board and the other applicants for the same category of license the opportunity to review the evidence the presenting applicant intends to put forth well in advance of the hearing, while at the same time affording the presenting applicant adequate time and greater flexibility to develop its evidentiary record and ensure that such record is comprehensive and up-to-date.

Response: The Board declines to accept this comment.

Comment:

§ 441.19(j) - We believe the obligation to provide a "copy of each document to be proffered" to each competitor prior to the hearing unworkable. Each Applicant will be forced to provide competitors its entire Category 2 application as well as any additional information it seeks to introduce at the licensing hearing. This because the Applicant has "proffered" its application to the Board. In HSP's case, the Category 2 applications of HSP and its affiliates exceeded 15 banker's boxes. Each applicant will therefore be serving thousands upon thousands of pages upon its competitors, which for Category 2 applicants translates into service on 14 entities. Even if limited to Philadelphia competitors; five Applicants are involved. The purpose of licensing hearings is twofold: (1) to

allow Applicants to demonstrate their eligibility and suitability for licensure; and (2) to provide the Board with an opportunity to question Applicants regarding the same. Requiring Applicants to submit a copy of their entire presentation and application to competitors does not further those purposes. The proposed rule also presents a logistical problem with the required service of these thousands of documents. We believe the licensing process would be better served by making the non-confidential/proprietary portions of the Applications available at the Board's offices for inspection, review and copying at the expense of the party seeking the information. (Copying could be performed by an outside vendor). Alternatively, a passcode-protected website could be established where competitor Applicants could view non-confidential filings upon approval by the Board. The bulk of the Category 2 Application (excluding the PHDF's and PA Supplements) is neither confidential nor proprietary and should be made available to the general public as well as competitors. Indeed, in our observation of the Public Input Hearings, Applicants made public much of their application, including portions of marketing plans, revenues estimates and other typically proprietary information. We believe the PGCB should invite Applicants to designate those portions of their applications they consider confidential or proprietary and,

following consideration of these comments and a ruling from the Board, the non-confidential/proprietary information should be made public. Finally, we believe the Board should adopt some procedure to officially seal those portions of the Application and other documents that actually are confidential.

Response: The Board is sensitive to the issue of confidentiality, as well as the burden of providing the required information and documents. The Board will review and consider these recommendations and will make a final determination at the pre-hearing conference.

Comment:

§ 441.19(m) - This subsection allows an applicant to designate reports and exhibits as confidential, and to seek the opportunity to present such confidential information to the Board in closed deliberations. The provision is generally acceptable, but in competitive Category 2 subsets there is an additional need to ensure that the applicants are on an equal footing, and that the confidentiality provisions have not been erroneously or improperly employed in an attempt to thwart the comparison process in Section 441.19(o). This is another issue that could be addressed through a prehearing conference procedure, whereby the applicants could exchange a list of the type of information they plan to designate as confidential and could discuss with a hearing officer whether that confidentiality had already been waived or was otherwise inappropriate. Further, the Isle suggests that the Board adopt a

process for handling proprietary information, employed by other Commonwealth agencies, under which counsel for the competitive Category 2 applicants, and their experts, would have access to confidential information and the ability to present comparisons regarding it to the Board (in the closed deliberations specified in subsection (o)(4)) upon signing a proprietary order and committing to adhere to the rules and requirements for the safeguarding of the information set forth in that order.

Response: The Board is sensitive to the issue of confidentiality, as well as the burden of providing the required information and documents. The Board will review and consider these recommendations and will make a final determination at the pre-hearing conference.

Comment:

§ 441.19(o) - The comparative process established by this subsection is vital to both the applicants' full and fair opportunity to be heard and the Board's ability to make the licensure decisions it is required to make under the Act. Because of its importance, the applicants' opportunity to make such comparisons must be meaningful, which will depend primarily on two factors: (1) access to information; and (2) time. The Isle's comment on subsection (m) and ensuring an equal footing among applicants as to confidentiality is one example of the need for access to information. However, more generally, the applicants in a competitive grouping need more access to each other's applications in order to be able to conduct necessary

comparisons. As discovery is not envisioned by the regulations, full access to all application materials (except those precluded by Section 1206 of the Act) is a reasonable compromise assuming the proprietary information process suggested above is established.

Turning to the time factor, the amount of time permitted for filing the comparison notice in Section 441.19(o)(2) and the reply notice in subsection (o)(3) are simply inadequate. Assuming that the vast majority of the information on which an applicant can make a comparison will come from the memorandum required by subsection (j), applicants will have a mere 10 days to review the opposing applicants' memorandums (which are expected to be voluminous), identify comparative issues, potentially find and employ various experts but, at a minimum, have already-retained experts review the memorandums' data and develop their analyses and reports and/or anticipated testimony, and complete and finalize the filing with the Board. A similar level of activity is required to occur within 10 short days for the reply notice. Isle of Capri strongly urges the Board to extend these time periods. Beyond these overarching concerns, the Isle notes the following:

- In subsection (o)(3), the three references to "paragraph (1)" should be to paragraph (2); and
- Subsection (o)(2)(iii) should be clarified as to its reference to Section 441.19(j) so as to make clear that

any documentary evidence to be used in a comparison must be filed with the comparison notice.

Response: The Board believes the time periods in the proposed regulation are reasonable. Section 441.19(o)(3) has been amended to reference paragraph (2). Section 441.19(o)(2) has been amended to require applicants presenting comparative testimony, to serve a copy of the notice and any documents or evidence supporting their comparative review on the Board and the on the applicant to whom the comparison is being made.

Comment:

§ 441.19(o) - This section allows an applicant, in certain circumstances, to present evidence during its licensing hearing which sets forth a comparison between the applicant and other applicants within the same category. Downs Racing believes that while this comparative process may be appropriate for competitive licenses, it is not relevant or appropriate for non-competitive Category 1 licensees. Downs Racing commends the Board for recognizing the distinction between the relevance of comparative information in the context of competitive and non-competitive licenses and prohibiting the introduction of such comparative evidence in Category 1 licensing proceedings. (See Section 441.19(o) "With the exception of Category 1 applicants, . . .".

Response: The Board agrees with this comment.

Comment:

§ 441.19(o) - Is the process provided for in this Section intended to be in lieu of intervention by one applicant into the

hearing of another applicant, or will applicants be permitted to intervene in other applicants' hearings in addition to providing "comparative" evidence in their own hearings under this Section?

Response: The comparative review process will provide the Category 2 applicants with the opportunity to be heard with respect to the competing applicants.

Comment:

§ 441.19(o) - As currently written, Section 441(o) allows applicants, except for those applying for a Category 1 license, the opportunity to "present evidence which sets forth a comparison between the applicant and other applicants within the same category" using the standards and criteria that are set forth in Sections 441(f), 441(g), 414(h) and 441(i). Section 441(o) is both unnecessary and confusing to the licensing hearing process. KRP respectfully submits that it is solely the responsibility of the Board to review and compare the merits of applications for slot machine licenses using the standards and criteria that the Board has promulgated, and also through investigations into the backgrounds, strengths and weaknesses of the various applicants (conducted by the Board's Bureau of Investigations and Enforcement and the Pennsylvania State Police), as necessary. Critically, the applicants themselves are limited in their ability to offer meaningful comparisons because of their lack of access to the type of information available to the Board, which information is required to make

any sort of informed and valid comparison. As a result, any comparisons that the applicants could make would be superficial and uninformed. Further, allowing an applicant to make a comparison between itself and the other applicants could easily result in hearing testimony that is without decorum. Finally, Section 441(o) is contrary to the Board's prior practice of prohibiting applicants from "comment[ing] on or referenc[ing] any other applicant for licensure" (see Public Input Hearing Rules and Code of Conduct for Operator Applicants, Item 5). Accordingly, for the above reasons, KRP respectfully requests that the Board strike Section 441(o).

Response: The Board declines to accept this comment.

Comment:

§ 441.19(o) - The proposed regulations permitting applicants to critique other applicants are, we believe, inappropriate. They will lead to uncertainty as to how to proceed and, more importantly, diminish the entire process. As the Public Input Hearings demonstrated, Applicants are capable of pointing out the distinguishing aspects of their project and highlighting the perceived defects of their competitors without specifically identifying the competitors by name or specifically attacking their project. Since the rules for those hearings prohibited direct comparison, this was done at the Public Input Hearings with a high degree of professionalism and civility.

The draft regulations, on the other hand, create an adversary proceeding where Applicants will be compelled to sharply criticize their competitors and their proposed projects. It should be expected that expert opinion testimony will be offered not only on technical issues such as traffic and access, but also on architecture, interior design, corporate management capabilities, marketing plans and other subjective criteria. Inviting applicants and their lawyers to devise and present reasons why their competitors should not receive a license will, we believe, lower the tone of the entire proceeding and introduce little relevant information which has not already been discovered by the Board's investigators. We also believe that the proposed process will render the hearings unmanageable. Each applicant that is the target of criticism will no doubt seek to rebut. Moreover, as a defensive measure, each applicant will be forced to take an adverse position vis-à-vis all of its competitors. In short, the entire process will be significantly expanded in both time and scope. If the Board concludes that the presentation of comparative evidence must be permitted, we suggest that comparisons be done only in written form as provided in subsection (o)(2). Applicants should be prohibited from calling witness to testify regarding the eligibility or suitability of other Applicants. If the comparative evidence is so limited, there should be no need to

present comparative evidence in closed deliberations as provided in subsection (o)(4). As such, this subsection should be deleted. We also suggest that subsection (o)(2) should be revised to provide that the comparative evidence must be provided no later than 30 days prior to the commencement of the first scheduled licensing hearing in order to be consistent with proposed Regulation Section 441.19(j). In addition, a copy of the notice relating to the comparative evidence (and reply notice, if applicable) should be served on all Applicants seeking the same category of license rather than just the applicant about whom the evidence will be presented. The category, however, should be limited to those actual competitors e.g. Philadelphia candidates for a Category 2 License, not all Category 2 applicants.

Response: The Board declines to accept this comment.

Comment:

§ 441.19(o)(3) - Is the reference here to "paragraph (1)" intentional or should that reference be to paragraph (2) instead? In addition, when a "reply notice" is filed under this section, does it become part of the record of the applicant against which it is directed?

Response: Section 441.19(o)(3) has been amended to reference paragraph (2). A reply notice becomes part of the official record.

Comment:

§ 441.19(p) - Under this section, it is left to the Board's discretion to determine whether an applicant will be allowed to present its evidence at the hearing using oral presentation, documentary evidence, or some combination of the two methods. As an initial matter, KRP respectfully submits that an applicant for a license should be allowed to present its evidence in the method it believes will be most effective. In addition, as Section 441(p) is currently drafted, it is unclear how the Board will make this decision. Section 441(p) does not indicate whether an applicant will be given the opportunity to present to the Board its arguments for why it should be allowed to present evidence in a particular form. KRP respectfully requests that the Board revise this section to remove the reference to the Board's discretion, or, in the alternative, to provide both the specific criteria the Board will use to guide its decision regarding the form of evidence, as well as a procedure an applicant may use to present to the Board its arguments concerning why it should be allowed to utilize a particular method of presenting its evidence.

Response: The Board will exercise its authority to control and direct the progression of the licensing hearings. The procedures for the licensing hearings will be addressed at the pre-hearing conferences.

Comment:

§ 441.19(p) - We believe that the Board should notify an

Applicant at least fifteen days prior to the licensing hearing if it is to be prohibited from presenting any evidence set forth in Applicant's memorandum submitted pursuant to subsection (j). This will allow an Applicant to revise its presentation.

Response: Procedures for the licensing hearings will be addressed at the pre-hearing conferences.

Comment:

§ 441.19(q) - In addition to questioning witnesses offered by the applicant, will the Board be able to call its own witnesses?

Response: Section 441.19(q) has been amended to allow the Board to call and question its own witnesses.

Comment:

§ 441.19(t) - Permits applicants to file a brief within 10 days of "the completion of the evidentiary record with respect to all applications within its category." The Isle seeks confirmation that the brief is due after the closing of the record for all Category 2 applications, and not the competitive subsets (Pittsburgh, Philadelphia, at-large) of applications. Additionally, again, Isle of Capri urges the Board to afford applicants more time to prepare their briefs. Assuming the applicants can obtain an expedited transcript, they will likely have eight days to review a voluminous record and prepare their briefs. Also, if the 10 days runs from the closing of the record of the entire category of applicants,

those applicants with hearings later in time will be penalized with an effectively shorter period of time to complete their briefs.

Response: Section 441.19(t) has been amended to require that all briefs for Category 2 applicants will be due ten (10) days after the completion of all of the licensing hearings of their sub-category.

Comment:

§ 441.19(v) - This provision states that applicants will have the opportunity to engage in oral argument before the Board. Like Section 441.19(d), additional detail about the oral argument in advance of the process would be helpful to applicants, particularly in regard to competitive subsets of Category 2 applications. For instance, will the oral arguments be with all applicants in a subset? Will applicants be able to reserve time for rebuttal? Or will the applicants' arguments be separate, unilateral arguments directly with the Board? If not addressed in the regulations, these issues should be addressed in a prehearing conference.

Response: The procedures for oral argument will be addressed at the pre-hearing conferences. Applicants will be limited to addressing only other applicants in their sub-category during oral argument. Applicants will not be allowed to reserve time from their oral argument for rebuttal.

Comment:

§ 441.19(w) - Is it presently contemplated how the final decision and order will be structured? Will there be a single decision and order for each Category or will there be separate

decisions and orders regarding each applicant? The difference here may affect appellate rights in that a single order could likely be appealed by any of the applicants impacted by it, whereas that may not be the case if the orders are issued individually. This also may have an impact on whether or not intervention would be required in order to protect all necessary appellate rights.

Response: The Board intends to issue licensure decisions by sub-category for the Category 2 applicants.

Comment:

§ 441.19(w) - The Isle respectfully suggests that the Board clarify this subsection, concerning its decision on the applications, in two important respects. First, the regulation could be read to suggest that the Board intends to issue one final order addressing all applications in all categories. Such an approach is not mandated by Section 1301 of the Act, and could lead to unnecessary delays impacting all successful applicants upon an appeal being filed by one or a few applicants. Second, the Board should clarify that, upon issuing its decision as to the applications in a competitive subset of Category 2 applications, it will consolidate the dockets for those respective applicants. If the Board does not declare its intent to consolidate such dockets in advance of the hearings, the affected applicants will be forced

to file defensive interventions in order to protect their appeal rights. In competitive subsets of Category 2 applications, the losing applicants will need to appeal both the denial of their applications and the granting of the successful application. Absent consolidation prior to the issuance of the Board's order, the losing applicants will not have access to the record in the successful applicant's proceeding. Absent, a declaration by the Board in advance of its intent to consolidate, the parties will have no option but to seek to intervene. Isle of Capri recognizes the draft regulations' attempt to avoid such a scenario with the comparison process in subsection (o), and believes the approach to be generally reasonable. However, the approach will be undermined if the consolidation issue is not clarified.

Response: The Board intends to issue licensure decisions by sub-category for the Category 2 applicants.

Comment:

§ 441.19(x) - We believe that the cross-reference therein should be to § 494.8 rather than § 494.7.

Response: The Board declines to accept this comment.

Comment:

§ 441.19(z) - We oppose the proposed intervention regulations. Our objection is based both on substantive and procedural grounds. Would be interveners have already been

granted the opportunity to express their views through the Public Input Hearings and the associated opportunity to provide written comments to the Board through June 2, 2006. Thus, their position is abundantly "on the record” Procedurally, if a person is granted the right to intervene in the licensing hearing, he or it may be deemed a party to the proceedings and thus obtain appellate rights. Potentially, hundreds of interveners could become parties through this mechanism, which may delay the implementation of the gaming legislation and frustrate the process. As to the particular draft regulations, we believe the 10 day time period prescribed in subsection (z)(5) for response to a petition to intervene is too short and suggest it be doubled to 20 days. We have no objection to the Board allowing individuals to submit written comments in conjunction with the licensing hearing as set forth in subsection (z)(6). We believe that the written submission process without formal intervention adequately addresses the interests of any potential intervener.

Response: The Board declines to accept this comment.

Comment:

§ 441(z)(2) - Allows a party to file a petition to intervene in a licensing hearing for a slot machine license if the party has an interest which is "substantial, direct and immediate and if the interest is not adequately represented in a licensing

hearing." While KRP understands and appreciates that the licensing hearings should be an open process, the regulations as currently drafted undermine efficiency and could result in an evidentiary record that is unduly repetitive. KRP respectfully requests that the language in Section 441(z)(2) be revised to read: "A person may file a petition to intervene under this subsection if the person has an interest in the proceeding which is substantial, direct and immediate, which is not adequately represented in a licensing hearing, and which has not been previously raised via prior testimony or written submissions before this Board." KRP's position is that, as a matter of efficiency and to avoid unnecessary burdens on both the Board and the applicants, it is not necessary to give parties whose interests have already been adequately represented as part of the Public Input Hearings or other proceedings before the Board the opportunity to intervene in an applicant’s licensing hearing.

Response: The Board declines to accept this comment.

Comment:

§ 441(z)(6) - States that the participation of a person granted the right to intervene in a licensing hearing will be limited to the submission of written statements attested to under oath "except where the Board determines it is necessary to develop a comprehensive evidentiary record." KRP notes two

potential problems with this provision. The first is that it is unclear what standards the Board will use to make their decision on whether more than a written submission is necessary. Second, the provision does not indicate what other methods a party intervening in a licensing hearing will be allowed to use if the Board determines that more than a written submission is necessary. As a result of this provision's current language, the applicant whose licensing hearing is the target of the intervention may not be given an adequate opportunity to contest the evidence presented by the intervening party. KRP respectfully requests that, for the sake of clarity and to protect the ability of applicants to adequately and thoroughly prepare for their licensing hearings, the provision "except where the Board determines it is necessary to develop a comprehensive evidentiary record" be eliminated, or that it be substantially rewritten in order to limit its application and more specifically define the standards and criteria the Board will utilize in allowing an intervening party to present evidence through methods other than written submissions attested to under oath.

Response: The Board declines to accept this comment.

Comment:

§ 441.19(z)(6) - This subsection addresses the ability of intervenors to participate in an applicant's hearing. The regulation should require that intervenors who participate

through the submission of written statements must provide the statements to the applicant sufficiently in advance of the hearing so as to enable the applicant to respond. Additionally, in competitive Category 2 subsets, the intervenor's materials and the applicant's response thereto should be filed in sufficient time for competitors to review the materials and respond if necessary or appropriate. For instance, an intervenor's statements could intentionally or unintentionally bolster an applicant's presentation and/or be utilized by an applicant to submit new or additional information not provided in the applicant's memorandum which the competitor applicants would then have no way of addressing in comparison filings or testimony. Also, the regulation should make clear that an applicant's response to an intervenor, and any additional comparison materials from other applicants that such exchange may prompt, are not limited by Section 441.19(n)'s evidentiary limitation. In the alternative, the intervenor should be required to submit its written statement with its petition to intervene, and the applicant's response thereto should be included with its memorandum.

Response: The Board declines to accept this comment.

Comment:

It is respectfully submitted that the Board decline the promulgation of certain aspects of 441.19(z) regarding Intervention and instead consider promulgation and implementation of alternative regulations as follows:

- The Board should hold hearings at each prospective location to allow local community impost.
- The input should be wide-ranging and should not be limited by standards which may superficially appear reasonable but which prevent local input on what is, in large measure, a political determination.
- The Board should exercise reasonable discretion in deciding who may be excluded.
- Interveners should be permitted to offer live testimony or evidence, as of right.
- The intervener should be able to submit an application to be heard any time within 25 days of the date of the hearing on a specific application.
- The Board should schedule local hearings with at least 60 days notice to the applicants and to the local community to allow all to prepare adequately to offer full information to the Board for proper consideration.

Response: The Board declines to accept this comment.

Comment:

There is no provision for subpoena power. Will any be provided? In addition to oral presentation in Section (v), will there be oral summation at the hearing? Will there be opening statements?

Response: These issues will be addressed during the pre-hearing conferences. The regulations will not contain a provision for subpoenas.

Comment:

These rules contemplate that the hearing will be conducted by the Board. There is no reference to a Presiding Officer. Will that be the Chair? If so, will the Chair then be authorized to render all evidentiary and pre-hearing rulings, or will that require full Board vote will all of the majority configurations otherwise part of the voting requirements in the act?

Response: The Chairman of the Board has the authority, as the Presiding Officer, to render all evidentiary and pre-hearing rulings, without a qualified majority of the other Board members.

Comment:

MTRA has a general question regarding the application of this section to a Category 1 applicant. Certain provisions (such as 441.19(j), 441.19(t) appear out of place when applied to a Category 1 applicant because such an applicant will not be competing against other entities for a license. MTRA

respectfully suggest that this section be restructured so that provisions applicable to Category 1 applicants are separated from provisions applicable to all other applicants. While this segregation may result in some redundancy, it will assist in clarifying the rules for those applicants who are competing against one another and those applicants who must simply establish their suitability for a license.

Response: The Board declines to accept this comment.

Comment:

We join in the comments submitted by HSP Gaming, LP under cover letter dated May 15, 2006 with the following exception: We believe that Mt. Airy should only be required to serve, if applicable, a copy of its hearing memorandum on Pocono Manor investors, LP rather than all Category applicants.

Response: Category 2 applicants will be required to serve all other applicants in their sub-category.