



Meeting Minutes

Date: April 4, 2013

Time: 9:00 a.m.

Place: Division of Insurance
1000 Washington Street
1st Floor, Meeting Room 1-E
Boston, Massachusetts

Present: Commissioner Gayle Cameron
Commissioner James F. McHugh
Commissioner Bruce Stebbins
Commissioner Enrique Zuniga

Absent: Commissioner Stephen P. Crosby, Chairman

Call to Order:

Chairman Crosby opened the 62nd public meeting.

Approval of Minutes:

See transcript pages 2-7.

Commissioner McHugh stated that the Commission has three sets of minutes to vote on from March 12, 14, and 21. Chairman Crosby stated that he had not had an opportunity to read the minutes from March 21 and asked to postpone voting on these until the next meeting.

Motion made by Commissioner McHugh that the minutes of March 12, 2013 be approved as presented. Motion seconded by Commissioner Cameron. The motion passed unanimously by a 5-0-0 vote.

Motion made by Commissioner McHugh that the minutes of March 14, 2013 be approved as presented. Motion seconded by Commissioner Cameron. The motion passed unanimously by a 5-0-0 vote.

IEB Report:

See transcript pages 7-44.

Phase 1 Application Status Report – Director Wells reported that the IEB is well underway with all eleven investigations and she is pleased with the progress and pace of the investigations. She stated

that the IEB has expedited the four investigations for slots licenses and anticipates completing three of those investigations by the end of April and completing the fourth by the third week of May. Commissioner Cameron asked if the IEB would need additional time to prepare a report and presentation for the Commission. Director Wells stated that she does anticipate needing this extra time in order to prepare a presentation that will enable the Commission to make a proper determination. She stated that, if the IEB can save any time, it will do so between May 1 and July 25.

Commissioner McHugh reviewed the regulations and stated that the IEB will complete its investigations, prepare a report, and submit the report to the Commission and the applicant. If the report contains a negative finding, then the applicant has 30 days to file a claim with the Commission. If the report contains no negative finding, then the application can proceed. In either case the Commission must hold an adjudicatory hearing and make a finding as to qualification.

Director Wells stated that the IEB anticipated six months in total for the investigations for the seven applicants for Category 1 licenses. She stressed that six months is already a very aggressive timeframe for these types of investigations. She stated that the applicants have been very cooperative with investigators' requests for supplemental information, however, the investigations process is time consuming, particularly for applicants with overseas qualifiers. She anticipates that the IEB will not be able to complete several of these investigations by the end of June.

Director Wells stated that the IEB has reviewed all of the redacted applications and found that some were over redacted and some under redacted. She stated that the IEB is now in the process of redacting the original submissions as it has determined that redacting from scratch would be easier than correcting mistakes in the redacted materials. She stressed that the redaction process has been a drain on the IEB's investigative resources and is an unforeseen expenditure.

Chairman Crosby stated that the Commission has received many requests for the RFA-1 applications, which the Commission will provide as quickly as possible, but not until the IEB has properly redacted the records. Commissioner McHugh stated that the Commission is prohibited by law from releasing certain private information and he recommended including in the Phase 2 application a release from the statutory privacy issues for information that could be protected but the applicant fails to indicate should be protected. Commissioner Zuniga recommended organizing the Phase 2 application in a way that separates out the protected information.

Commissioner Cameron asked if the Commission should consider the applications on a rolling basis, rather than all at once, as the IEB completes them. Chairman Crosby stated that considering applications on a rolling basis would be a better use of the Commission's time and would allow communities to move forward with their referendum votes.

Public Education and Information:

See transcript pages 44-116.

Report from the Ombudsman: Ombudsman Ziembra stated that he has asked each host community whether it would be able to meet the Commission's September 1 aspirational deadline for award of licenses under Category 2, and whether it anticipates taking advantage of the June 25 special election date. He stated that Raynham reports that it would be impossible for it to have a host community agreement in place by April 25, and consequently a referendum on June 25. Worcester reported that

it would prefer a longer deadline and would almost certainly not be able to meet a September 1 deadline. Plainville reported that it can meet the September 1 deadline. He stated that PPE Casino Resorts MA has not selected a host community and it would be almost impossible to have a host community agreement in place by April 25.

Ombudsman Ziemba also reported on the Category 1 applicants. He stated that West Springfield does not expect to hold the referendum concurrently with the special election in June. West Springfield plans to hold the referendum in the summer or fall. The City of Springfield is hoping to meet the June 25 date. Everett reports that it plans to hold the referendum on the special election date or earlier. Palmer reports that it will not use the June 25 special election date, and may hold the referendum in September. He stated that Milford reported that it will not be able to meet the special election date. He stated that Boston and Revere have not provided an official answer. He stated that the City of Revere does not want the Commission involved in the question of whether or not a community can hold the referendum prior to a suitability determination.

Ombudsman Ziemba outlined the licensing scenarios previously discussed with the Commission. He stated that Scenario 1 anticipates a July 1 date for the referendum. Scenario 2 provides a little more flexibility for completion of the referendum, with a vote occurring no later than early August, and the award of licenses occurring by December 2, 2013. Under this scenario, an applicant would need to execute a host community agreement no later than June 3, 2013. He stated that the third scenario sets early September for the referendum date. Ombudsman Ziemba reported that although one applicant has not identified a site, that applicant has been conducting due diligence on a site and will provide more information to the public.

Chairman Crosby stated that, based on the information provided by Ombudsman Ziemba, the Commission should leave the targeted award date for Category 2 licenses in the first week of December, with an extension if there is a surrounding community problem. He recommended setting a firm date for submission of the RFA-2 applications. Commissioner Zuniga stated that the Commission could consider accepting the application in pieces so analysis could begin on one piece while the applicant completes the other piece. Commissioner Cameron stated that she would prefer having a complete application before beginning review. Chairman Crosby stated that the Commission could consider this question over the course of the next few weeks. Chairman Crosby stated that Category 1 is on track for a license award in February or March of 2014.

Chairman Crosby asked whether the Commission wants to reconsider its decision to preclude a referendum prior to making a suitability determination. Commissioner Zuniga expressed concern that if the referendum eliminates an applicant, which required total expenditures greater than the \$400,000 application fee, then the Commission may not be able to recoup the excess money. Commissioner Cameron stated that the Commission originally decided to postpone the referendum until after the suitability determination so that the communities would know the financial stability and integrity of the company involved.

Commissioner McHugh outlined factors that the Commission should consider when deciding to allow the referendum prior to a determination of suitability. The host community would save on costs by combining the referendum with the special election, however, the host community passes along all referendum costs to the applicant. Voters may be fatigued and stay home if there are too many elections. He quoted as follows from an earlier Commission discussion on this subject: "It's absolutely critically important that the communities not make final judgments of people who have not

passed the background checks. There's nothing more fundamental in our licensing and regulatory process than to make sure that the people who are in the game are people who we want in the game and would pass the most rigorous standards." He stated that allowing an election to proceed before the Commission finishes the qualification process risks injecting into the middle of an electoral process information that has not been verified, may not be true, and negatively affects perceptions of the qualifications of the applicants. He stated that he would be in favor of leaving the draft regulations as currently written.

Ombudsman Ziemba stated that an applicant that has passed the referendum would more easily expend money to fully evaluate its gaming project. Commissioner Cameron expressed concern with voters being misinformed when they cast their votes. Ombudsman Ziemba emphasized that the Commission would need a significant outreach effort to educate the public if it does change the regulations. Commissioner Zuniga stated that continuing on the path that the Commission originally set and leaving the regulation in place is the proper course on this issue. Commissioner Stebbins stated that the suitability determination will help voters cast their votes with the best information that the Commission can provide.

Chairman Crosby stated that the Commission has reached a consensus and this regulation will stay as it is written. Ombudsman Ziemba recommended that any communities thinking about the June 25 election should stay updated on the status of the investigations.

Commissioner McHugh stated that the Phase 2 Regulations contain language stating that a host community cannot hold the referendum until after the Commission's suitability determination. The Secretary will not promulgate these Phase 2 Regulations until June 7, so the Commission may need to adopt an emergency regulation so that this policy is in effect prior to June 7. Chairman Crosby agreed.

Ombudsman Ziemba provided a chart showing applicants' responses on whether they would like to participate in the regional planning agency process. Nine of the eleven applicants are considering taking part in the process. There is currently no process in place for communities to submit information to the IEB regarding background investigations. He has discussed this issue with Director Wells and will put forward an advisory to communities on how they can share information with the IEB.

Commissioner McHugh asked whether the Commission should set additional deadlines for tasks such as site and qualifier identification. Director Wells stated that the applicant that has not selected a site has proposed that its land contract would contain a default provision resulting in sale of the land if the Commission finds that a new qualifier related to the land is unsuitable. The legal department still must review this provision. Chairman Crosby stated that in order for the Commission to meet its deadlines, the IEB would need to complete background investigations by early May. Commissioner Zuniga recommended setting a deadline for qualifier determinations by taking the latest possible date for the Commission's final determination on suitability for Category 2 applicants, which is July 25, and backing out from that date how much time it will realistically take to conduct a background investigation, draft a report, hold a hearing, and make a final determination. Chairman Crosby stated that in order for Director Wells to have her recommendation on suitability ready by May 15, she would need to know the identities of the qualifiers now. Director Wells stated that she can set a deadline for proposing new qualifiers and submitting BED and PHD forms in order to meet the May 15 deadline.

A brief recess was taken.

Chairman Crosby reconvened the 62nd public meeting.

Racing Division:

See transcript pages 116-178.

Administrative Update – Director Durenberger stated that the Racing Division is requesting public comment on its latest round of proposed changes to 205 CMR 4.00 and 6.00, which were adopted by the Commission on an emergency basis last week. The deadline for public comment is Friday, April 19, 2013 and the Commission has scheduled a public hearing for Monday, April 22, 2013 at 84 State Street at 11:00 a.m.

Director Durenberger stated that the live racing season is rapidly approaching. Plainridge's scheduled opening is Monday, April 15, 2013 at 1:00 p.m. and the Suffolk Downs backstretch will open for training on Saturday, April 20, 2013.

Director Durenberger stated that the Racing Division could have the pari-mutuel auditing system up and running as soon as April 19, with full functionality in mid-May. She stated that the Racing Division has ordered the equipment and sampling items for the equine drug testing, and she anticipates that the testing program will be fully operational by the start of live racing. She stated that Plainridge has put forward an additional name, Anthony Salerno, for approval in the position of judge, and she recommended approving Mr. Salerno pending completion of a background check.

Motion made by Commissioner Cameron that the Commission conditionally approve Anthony Salerno pending a successful background investigation by the State Police. Motion seconded by Commissioner Zuniga. The motion passed unanimously by a 5-0-0 vote.

Legislative Review – Director Durenberger stated that her team has incorporated changes to the draft legislation based on the Commission's comments. David Murray, consultant, addressed the Commission to review these changes. Commissioner Zuniga noted that wagering by minors only carries a penalty of \$100 and asked whether this proposed penalty is consistent with the penalty in the Gaming Act. Commissioner Cameron stated that the penalty under the Gaming Act is substantially greater. Commissioner Zuniga recommended changing the regulations to bring the penalty in the proposed legislation in line with the Gaming Act penalty. He also asked whether the excluded person list is compatible with the Gaming Act. Mr. Murray stated that the Gaming Act creates a much more rigorous environment than has ever existed for racing and he is not sure that the Commission should treat the two industries exactly the same. Chairman Crosby and Commissioner McHugh agreed that the Commission should discuss integration of the laws governing racetracks and casinos in the future, but keep the two legal frameworks distinct at present.

Director Durenberger stated that she met with representatives from the Thoroughbred Horsemen's Group to discuss their concerns relative to the premiums, but she would not recommend making any changes at this point. Commissioner McHugh recommended including a definition of what a premium is for the edification of those who may not be familiar with racing.

Motion made by Commissioner Zuniga to accept the report and proposed chapter as drafted, with the small edits suggested today, and forward the report and draft legislation to the Legislature. Motion seconded by Commissioner McHugh. The motion passed unanimously by a 5-0-0 vote.

Hearing Officer – Director Durenberger stated that General Counsel Blue has recommended appointing a hearing officer for the Racing Division. Commissioner Cameron has been acting in that role since June 2012. General Counsel Blue stated that hiring a hearing officer makes sense due to the large amount of racing hearings that the Commission now faces and the gaming hearings that will be forthcoming. Chairman Crosby agreed but stated that Executive Director Day is now in charge of hiring.

First Quarter Review of Operations – Director Durenberger provided the Commission with the Division of Racing Quarterly Report and gave an overview of what the Racing Division has accomplished. The Commission thanked Director Durenberger for the contribution she has made to the Commission since being hired and the outstanding work she has performed.

A recess was taken.

Chairman Crosby reconvened the 62nd public meeting.

Region C Discussion:

See transcript pages 178-251.

Commissioner McHugh stated that the Commission should consider four issues when discussing Region C: the status of the tribal project, the land in trust application, the current litigation involving KG Urban, and commercial RFP considerations.

He stated that the compact is currently with the State Legislature for review and approval. Once approved, the Tribe will send the compact to the Bureau of Indian Affairs (BIA), which will have 45 days from submission to approve or disapprove. He stated that the Tribe has identified a site in Taunton and the residents voted to approve tribal gaming at that site on June 9, 2012. The Tribe and the City of Taunton signed an intergovernmental agreement on July 10, 2012. The Tribe paid the City a \$1.5 million mitigation fee in mid-August of 2012. The Secretary of Energy and Environmental Affairs issued an ENF certificate on August 24, 2012, and the Tribe will have to undergo a MEPA and NEPA process. The BIA concluded on February 17, 2013 that the initial reservation exception applied to the Tribe.

Commissioner McHugh stated that a final decision on taking the land into trust is a big step that the BIA has yet to take, and an outcome favorable to the Tribe is unclear at best. The timing of any land in trust decision is very difficult to determine, but Commissioner McHugh does not believe that a final determination will occur soon. He reviewed the Supreme Court's 2008 decision in *Carcieri* that interpreted the statute that deals with when the Secretary of the Interior can take land into trust. The Supreme Court said that the Secretary may only take land into trust for a recognized tribe that was under federal jurisdiction in June of 1934 when the statute was passed. He also stated that the "under federal jurisdiction" component of the statute required a fact-intensive determination. He stated that there have been a number of unsuccessful efforts to fix the *Carcieri* decision through legislative amendments, but at present it does not appear that a fix is likely. Should the BIA make a

favorable decision on the land in trust issue, a challenger has the right to appeal the decision and has six years to file the appeal.

Commissioner McHugh provided an overview of the KG Urban litigation, which is a 14th amendment equal protection case that is pending in the Federal District Court after a remand from the First Circuit. He stated that the First Circuit decision may limit the amount of time that the Commission is permitted to do nothing, as it states that the Commission may freeze Region C to commercial applications only for a period necessary to support the Indian Gaming Legislation. The longer the freeze remains in place without a defined end date, the less likely the court will be to consider the freeze as a temporary support for the IGRA process, and the more likely that the court will view the freeze as a race based preferential set aside subject to strict scrutiny.

Commissioner McHugh reviewed Section 91(e) of the Expanded Gaming Act, which says that the Commission must issue applications for Region C commercial licenses if there is no signed compact approved by the Legislature by July 31, 2012 or if the Commission determines that the BIA will not take land into trust. He stated that nothing in that section prohibits the Commission from issuing an RFP for commercial licenses at any time. Chairman Crosby emphasized that the Commission's legal counsel as well as the legislation supports this interpretation. He stated that Paragraph 2.6 of the current and former compact interprets Section 91(e) as stating that the Commission will not start a commercial RFP process in Region C unless it determines that the BIA will not take land into trust. Commissioner McHugh stated that Section 91(e) does not require such a determination prior to opening Region C to commercial applications.

Commissioner McHugh stated that the question becomes whether a contract negotiated between the Governor and the Tribe, and approved by the Legislature, can alter statutory language that conflicts with the contractual language. He stated that the compact has built into it a remedy that kicks in if the Commission issues a commercial Category 1 license in Region C, giving the Tribe the right to terminate the compact entirely and proceed without it. He stated that the Tribe could also bid and become a commercial applicant. The Tribe would have a number of options if the Commission opened Region C to commercial applicants.

Commissioner McHugh reviewed a potential timetable if the Commission were to start a commercial RFP process for Region C. He outlined potential issues that may arise if the Commission were to wait to see how the Tribe progressed. He stated there would likely be no construction or gaming revenue in Region C for a considerable period of time, though the length is impossible to determine. If the land in trust decision were negative, then the Commission would have to begin a commercial process. In this scenario, the Region C license award might occur many years after awarding licenses in Regions A and B, leaving part of the state without the revenue stream that the casinos will be providing to other regions. If the land in trust decision is positive, the Commission will face not only a revenue stream 8-10% less than the revenue stream from the commercial casinos, but also a revenue stream that could start considerably later.

Commissioner McHugh stated that if the Commission proceeded now to issue a commercial RFP in Region C, the Tribe could elect to pursue a commercial application without abandoning its land in trust application. If the land in trust application is successful, Region C could then have two casinos operating. The Tribe could also disavow the compact and operate Class 2 gaming without any Commonwealth participation or oversight.

Commissioner McHugh outlined financial questions to consider: Would a commercial casino be viable in the same region as an untaxed tribal casino? What kind of rate of return would an investor require considering the risk of an untaxed competitor? What kind of a market share would the commercial casino require in Region C to provide the Commonwealth with tax revenue equivalent to that of a tribal casino operating exclusively in that region? How much revenue is the Commonwealth foregoing between now and the time the dust settles?

Commissioner Zuniga stated that commercial operators would have to make the risk evaluation for themselves prior to applying, and they would have to consider the minimum investment amounts set forth per the regulations. He stated that the Commission will not know the internal rate of return that investors are looking for unless it bids out the commercial license. He stated that the Commonwealth faces a number of opportunity costs stemming from delays in opening a commercial or tribal casino in the form of forgone revenue, jobs, and economic expansion from the casino. Commissioner Zuniga stated that he discussed the issue with one of the gaming consultants, who advised that commercial applicants put great value on regional exclusivity. A commercial applicant would have to decide if it can meet the minimum investment requirements while creating a rate of return commensurate with the risk.

Commissioner Cameron stated that the Commission's gaming consultants, who have a wealth of expertise in this area, predict that the Tribe will not be able to start operating a casino for many years. Commissioner Zuniga acknowledged that the Tribe's assertion that it is ahead of everyone else in this process is correct, and would serve it well if it were pursuing a commercial license. Commissioner Stebbins asked whether the Commission should conduct a thorough review of previous applications before the BIA to determine why they were turned down.

Chairman Crosby stated that the Commission's first priority is to protect the integrity of gaming in Massachusetts. The compact arrangement makes doing so difficult as the Commission has no say in the Tribal operation. Chairman Crosby pointed out that if the Tribe's assertions about when it will have land in trust are accurate, it will occur before the Commission's decision on the commercial license, at which time the Commission will have to determine whether awarding a commercial license is still in the best economic interest of the Commonwealth. Commissioner McHugh stated that the decision should be based on economic concerns.

Chairman Crosby stated that it is not a wise choice to further postpone commercial applications for an unknown time period. Commissioner Cameron stated that she does not believe that it would be fair to accept \$400,000 from a commercial bidder and then later decide to not issue a commercial license. Commissioner Zuniga stated that if the Commission issues an RFP for Region C, the Commission should analyze the proposals that come under the RFP on their own merits. He stated that the Commission does not have to issue a license in any region unless it is convinced that the license will bring an economic benefit to the Commonwealth. The Commission should analyze Region C in the same manner, but with a different flavor of competition.

Commissioner McHugh stated that opening the RFP process is a major decision and he suggested coalescing around a target solution and allowing one more opportunity for public comment on that solution. Receiving one last round of public comment would ensure that the Commission has not overlooked any issues. Chairman Crosby stated that he would like to hold a vote that creates a clear presumption that the Commission is on a certain road. Commissioner Zuniga agreed that it is incumbent upon the Commission to make a decision. Commissioner Cameron stated that the

Commission has not yet put forward this particular proposal for public comment as it is different than the previously discussed process. She stated that she is hearing this plan for the first time and would be more comfortable receiving public comment. Commissioner McHugh stated that although there is a sense of urgency with making this decision, he would be in favor of allowing a two week comment period if it would raise the universal comfort level of the Commission. Commissioner Stebbins agreed with allowing a public comment period as he believes that this proposal is different than anything previously discussed.

Commissioner Zuniga stated that he does not agree that this proposal is a new proposal, as the plan to bid Region C always carried the risk of the Tribe eventually obtaining land in trust and being able to conduct Class 2 gaming by their own right in that region.

Commissioner McHugh recommended asking for public comment on why the Commission should or should not open Region C to commercial RFPs, with the Commission basing its ultimate award decision on economic and other circumstances as they exist at the time of the licensing decision in light of the statutory objectives that govern expanded gaming in the Commonwealth.

Chairman Crosby stated that it is important to begin to work on a plan, so that if the Commission does open Region C to commercial applicants, the process can move forward. Commissioner McHugh stated that the Commission should have a contingent process ready for a vote if that is the direction the Commission decides to take.

Motion made to adjourn, motion seconded and carried unanimously.

List of Documents and Other Items Used at the Meeting

1. Massachusetts Gaming Commission April 4, 2013 Notice of Meeting and Agenda
2. Massachusetts Gaming Commission March 12, 2013 Meeting Minutes
3. Massachusetts Gaming Commission March 14, 2013 Meeting Minutes
4. Massachusetts Gaming Commission March 21, 2013 Meeting Minutes
5. Massachusetts Gaming Commission RPA Election Chart
6. Massachusetts Gaming Commission 3/27/2013 Summary Schedule Update
7. Massachusetts Gaming Commission Master Schedule Category 2 Licensing Schedule Scenarios
8. Report of the Massachusetts Gaming Commission to the Senate and House of Representatives Pursuant to Chapter 194, Section 104 of the Acts of 2011, Analyzing the Commonwealth's Pari-Mutuel and Simulcasting Laws, with Recommendations as to Their Efficacy and Need to be Replaced
9. Text of Chapter 194 Section 91 and Section 2.6 of Compact
10. Proposed New Chapter
11. April 4, 2013 Memorandum Regarding Hearing Officer for Racing
12. Division of Racing Quarterly Report – April 4, 2013
13. March 28, 2013 Letter From Todd & Weld, LLP Regarding Region C
14. April 1, 2013 Letter from Shefsky & Froelich Regarding Region C
15. Massachusetts Gaming Commission Region C Suggested Issues for MGC Discussion

/s/ James F. McHugh
James F. McHugh
Secretary