



September 16, 2014

**Sent by Email**

Hon. James F. McHugh  
Gayle Cameron  
Bruce Stebbins  
Enrique Zuniga  
Commissioners  
Massachusetts Gaming Commission  
84 State Street, Suite 720  
Boston, MA 02109

Re: Mohegan Sun Massachusetts and Brigade Capital Management Objection to Conduct of the Massachusetts Gaming Commission

Dear Commissioners:

Please accept this letter on behalf of Mohegan Sun Massachusetts (“MSM”) raising objections to the Commission’s award for a category 1 gaming license in Region A. The Commission’s decision and its process for reaching that decision is in contravention of its own clear direction to both applicants at its meeting of September 15, 2014 and the procedures it formally adopted at its meeting of August 21, 2014. Specifically, on September 16, 2014 the Commission afforded an opportunity to Wynn MA, LLC (“Wynn”) to add new terms to its response to the Commission’s proposed license conditions, but did not provide MSM this same opportunity. Likewise, unlike the way its competitor was treated, MSM was not given an adequate opportunity to address deficiencies in its application through licensing conditions, such as the ability to present new plans or methodologies for calculating the number of jobs in its proposal.

We once again want to express our strong interest in the Region A license and our willingness to address any concern in our application. If we were given the same opportunity as the Wynn applicant to improve the response to the conditions offered to the Commission at this morning’s meeting, we would have proposed new conditions, just as Wynn did. For example, we are willing to increase the number of operational jobs at our facility to match Wynn’s

proposal. We hope that you will consider this before you enter into any agreement to award Wynn a Category 1 license tomorrow morning.

**I. Defective and Unequal Procedures at the Commission's September 16, 2014 Meeting**

On Friday, September 12, 2014, both Wynn and MSM submitted their written response to the Commission's proposed conditions. On Monday, September 15, 2014, the Commission began discussing the responses to the proposed conditions and towards the end of that discussion recognized that it had questions about the responses and offered both applicants an equal opportunity to "clarify" the responses submitted to the Commission at the same time.

The Commission clearly instructed the applicants on the rules governing the remarks that were solicited for the following day's meeting. Commissioner Cameron stated:

"In reviewing what we said over the last hour or so, I think it's apparent to me that we are looking at this, maybe a little differently. I may interpret something different when it comes to finance and/or traffic, and remembering that part of our process is that we can hear from the applicant if we had questions about their response. I know for me personally, at this point, I think that would be helpful to listen to the applicants – to each of them – with regard to their response and that may help us clarify exactly what our thoughts are on moving forward here."

As further confirmation of this point, Commissioner Cameron stated: "One of our options was in the process was to hear from them if we thought it was necessary and at this point I'm saying it would be beneficial for me to hear from them with regard to their response to our conditions."

The process to which Commissioner Cameron referred is the "process" for the Issuance of Category 1 license – Region A that the Commission adopted at its August 21, 2014 meeting. This process was memorialized in a sequential list setting forth the order in which steps in the evaluation and deliberations process were to occur and is attached to this letter. Notably, following receipt of the applicants' response to the Commission's proposed conditions (Step 6), the Commission reserved for itself the right to: "ask questions of those requested to appear before it," including the applicants and evaluative consultants (Step 7).

At the September 15 meeting, Commissioner McHugh further elaborated that the Commission would "limit it [the remarks of the applicant] to the questions we had about the responses because we didn't have the opportunity to go back and forth with that and both applicants have heard the concerns we've had about those responses." Commissioner McHugh also explained:

You've heard our primary areas of concern and we would welcome some help from you and some insight from you on those specific areas. And, we welcome an opportunity to ask you questions . . . We'd look for twenty minutes to talk to us about the concerns you're hearing us express. There's a lot at stake here. I

don't have to remind anyone here of that. And, that is at this stage of the day and this stage of the proceedings the best way to go. So, that's what we'll do."

In other words, based on Commissioner McHugh's and Cameron's statements, it was clear that what the Commission was requesting was any clarification that either of the applicants would like to make with respect to the response that the applicants had submitted on September 12, 2014. By the express language of both Commissioners, however, the Commission was not inviting new proposals from either applicant.

At the September 16, 2014 meeting, MSM at the outset of its remarks confirmed the clear rules that the Commission set forth: only clarifying and explaining its response to the Commission's proposed conditions, but not fundamentally altering them.

However, Wynn, during its appearance after MSM, added new terms that were not included in the September 12 response Wynn gave to the Commission. For instance, Wynn's funding mechanism for Sullivan Square was entirely new, eliminating both the account in which to place those funds, the previous amount and payment schedule for the funding, and introducing a different, much lower traffic reduction payment, with a "cap" unrecognizable from the condition set forth by the Commission. Likewise, the so-called "look back" provision was also a new condition since it proposed using language from Surrounding Community Agreements, which was not addressed in Wynn's September 12 response to the Commission's proposed conditions.

The Commission not only allowed Wynn to propose new conditions, three Commissioners then stated that the new plan put forth by Wynn that morning was dispositive in influencing their votes for the Wynn proposal.

By allowing Wynn to introduce new conditions when the Commission – in its statements setting up the discussion and in its "process" document that it adopted after careful discussion at a prior meeting – indicated that it was only looking for clarifications, the Commission changed the rules midstream and applied those rules to the benefit of only one applicant. It is notable that Wynn did not provide any of these conditions in its September 12 response, as required by the rules the Commission initially imposed. This allowed only one applicant – Wynn – a final opportunity to improve its application after having seen its competitor's entire response to the Commission's proposed conditions and the Commissioners' reaction to that response.

Again, we would like to reiterate that if MSM was also given the opportunity to enhance its proposal, it would have added as conditions that MSM would increase the number of operational jobs at our facility to match the number set forth in Wynn's proposal.

## **II. Unfair Application of Conditions**

Throughout the deliberation process, the Commission unfairly suggested conditions to improve all deficiencies in Wynn's application, but did not suggest conditions to improve all deficiencies in MSM's application. The most notable example of the disparate treatment regarding conditions was that Wynn was given an extensive list of conditions to improve its traffic plan in Sullivan Square. Wynn's reaction to these conditions was a substantial factor that

led three Commissioners to vote for Wynn. However, the Commission did not offer MSM a way to improve its application through conditions concerning the number of operation or construction jobs it proposed. Ultimately, three Commissioners cited the greater number of jobs that Wynn proposed as a key factor in their vote for Wynn. In fact, the manner in which questionable job numbers, lacking any independent verification or analytical rigor, were presented minutes before the final statement of the Commissioners' preferences created additional undue influence and disproportionate impact on the ultimate decision. The Commission's unfair application of conditions was manifestly unfair to MSM and an abuse of its own process.

### III. Conclusion

MSM urges the Commission to correct these concerns prior to the formal award of the Region A license. We once again wanted to express our strong interest in the Region A license and our willingness to address any concerns in our application and we stand ready to appear before you tomorrow. If we are given an opportunity to introduce new conditions as Wynn was given, we are willing to increase the number of operational and construction jobs at our facility to match Wynn's proposal. We hope that you will consider this before you enter into an agreement with Wynn tomorrow morning.

Sincerely,



Mitchell Etess,  
Manager, Mohegan Sun Massachusetts  
CEO, Mohegan Tribal Gaming Authority



Doug Pardon,  
Partner  
Brigade Capital Management, LP

cc: Catherine Blue, Esq.  
John Ziemba, Esq.  
Mr. J. Gary Luderitz  
David Rome, Esq.  
David Waddell, Esq.  
Kevin Conroy, Esq.

## Issuance of Category 1 license - Region A

TIMING <sup>1</sup>	EVENT	
Step 1	<p>Commissioners call evaluation meeting to order and explain the process. IEB provides suitability report update. Legal provides update on law.</p> <p>Commissioners present the Building and Site Design and Finance evaluation reports.</p> <p>Commissioners recommend potential conditions as part of each evaluation report. Staff maintains a running list of all recommended conditions. The staff collects any material errors alleged by the applicants after each presentation.</p>	
Step 2	<p>Commissioners present the Mitigation and Economic Development evaluation reports.</p> <p>Commissioners recommend potential conditions as part of each evaluation report. Staff maintains a running list of all recommended conditions. The staff collects any material errors alleged by the applicants after each presentation.</p>	
Step 3	<p>Commissioners present the Overview report. The questions in the Overview report were allocated among the Commissioners for their review. Each Commissioner will respond to the questions and the report will be presented without a category evaluation rating. Following the individual presentations the Commission will determine a final category evaluation rating for the Overview section.</p> <p>The staff presents the alleged material errors to the Commission. The Commission determines whether additional information or review is required. If additional information is required, Commission will instruct staff to so advise the applicants.</p>	

<sup>1</sup> Number of days needed to complete the process is dependent upon length of individual presentations and extent of deliberations. Presentations and deliberations are not time restricted.

Step 4	<p>Any additional information on alleged material errors is presented to the Commission. The Commission reviews the information and determines if any changes need to be made in any of the reports.</p> <p>Staff/consultants present any conditions it deems appropriate for the Commission’s consideration.</p> <p>Staff creates a list of all conditions for each applicant.</p> <p>Commission reviews the list of proposed conditions; Commission does not vote on the conditions, but when the Commission is comfortable with the general list of conditions for each applicant, the Commission votes to authorize staff to present the conditions to each applicant. Commission reserves the right to add, delete or modify conditions during its deliberations.</p> <p>Staff delivers the list of conditions to each applicant and advises each applicant to review the conditions and prepare a response to the conditions. Applicants are advised that the response to the conditions must be in writing and must be delivered to staff by a date set by the Commission.</p>	
Step 5	<p>Evaluation meeting is recessed for period of time to allow applicants to review and draft response to proposed conditions. Staff is available to take questions from the applicants.</p>	
Step 6	<p>Staff receives written response to conditions from each applicant, reviews the response and distributes to the Commissioners and consultants. Written responses are posted to the Commission website. Commissioners advise staff if the Commission requires the applicant or any others to appear before the Commission to answer Commissioners’ questions.</p>	
Step 7	<p>Evaluation meeting reconvenes. Commission asks questions of those requested to appear before it. Commission requests information/advice from staff and consultants.</p>	
Step 8	<p>Commission begins deliberations on agreement to award a license.</p> <p>As part of the deliberations, Commission determines if conditions as agreed to, modified, or rejected by the</p>	

	applicant would be acceptable or whether conditions need to be added, amended or modified for each applicant.	
<b>Step 9</b>	Commission selects applicant for agreement to award a license and votes on final conditions. Commission instructs staff to deliver the agreement to award a license, including the final conditions, to the selected applicant. Staff and applicant meet if necessary to discuss agreement and/or conditions.	
<b>Step 10</b>	Applicant appears before Commission to indicate whether it agrees to enter into the agreement to award the license.	