

**BEFORE THE
PENNSYLVANIA GAMING CONTROL BOARD**

**In re: Joint Application of PITG Gaming, LLC and
Holdings Acquisition Co., LP for Approval of
the Reorganization, Change of Control and
Recapitalization of PITG Gaming LLC.**

PaGCB Dkt. No.1361

**COMMENTS OF PENNSYLVANIA STATE SENATORS
JANE C. ORIE AND JIM FERLO, AND
NOTICE OF DISPUTE OF CLAIM TO CONFIDENTIALITY**

Senator Jane C. Orié, Majority Whip of the Pennsylvania State Senate, and Senator Jim Ferlo, the Minority Chairman of the Pennsylvania Senate State Government Committee, hereby submit these comments in opposition to the Joint Application of PITG Gaming, LLC and Holdings Acquisition Co., LP for Approval of the Reorganization, Change of Control and Recapitalization of PITG Gaming LLC, (hereinafter “Joint Petition”), and request the immediate and public disclosure of all supporting documentation submitted in conjunction with the Joint Petition. In so doing, we seek to share with this Board the unique, bipartisan perspective of two members of the legislature, each representing portions of Allegheny County – one who actively supported the legalization of slot machine gambling, and one who opposed the expansion of gambling activities in the Commonwealth. Though differing in our perspectives as to the public policy merits of legalizing slot machine gaming, we both strongly oppose the attempt by the PITG Gaming, LLC and Holdings Acquisition Co., LP (hereinafter “Joint Petitioners”) to rush this Board into approving a hastily created financial bailout of a failed development project – a

should never have been licensed by the Board.

Underscoring the highly questionable nature of the Joint Petitioners' filing, is the claim of confidentiality to all supporting documentation submitted to the Board. Representing an affront to traditional concepts of transparency and openness, the Joint Petitioners seek Board approval of a dramatic change in the ownership, financing, management and operation of the Pittsburgh gaming license at the same time they attempt to keep secret the identity of the proposed investors, their ownership share, the organizational and management structure, the terms and conditions of the new financing package and the joint venture agreement. This claim of secrecy is contrary to the provisions fo the Gaming Act, the rules and regulations promulgated thereunder, and this Board's prior practice.

As set forth in greater detail below, the Board should reject the Joint Petition and refuse to be manipulated into rushing its review and consideration of a financial bailout plan for a failed development project. Furthermore, it is consistent with the public interest for the Board to conduct public hearings in Pittsburgh to receive the input and testimony of city, county and state elected officials, community leaders and other interested persons. At a minimum, this Board is respectfully requested to consider the following:

- As a matter of public policy, it is not the responsibility of the Gaming Board to financially rescue failed development plans, rather it is the responsibility of the Board to protect the public interest.
- PITG is unable to maintain a financially viable and successful business operation.
- PITG is unable to comply with the terms and conditions of its gaming license.
- Revocation of PITG's gaming license is warranted and consistent with the public interest.

- Joint Petitioners' request to avoid payment of the change of control licensing fee is without merit.
- Multiple ownership of gaming licenses is prohibited.

Though not comprehensive, these are the most basic issues that require careful consideration and resolution by this Board before any determination may be made on the merits of the Joint Petition. Fundamentally, this Board has been presented with a request that is tantamount to a renegotiation of a licensing decision made almost two years ago in order to rescue a financially distressed development plan. It is inconsistent with the Board's statutory responsibility to protect the public interest and maximize the benefits of legalized gaming to the citizens of western Pennsylvania to consider and approve the Joint Petition.

COMMENT 1

As a matter of public policy, it is not the responsibility of the Gaming Board to financially rescue failed development plans, rather it is the responsibility of the Board to protect the public interest.

As noted by the Joint Petitioners, the PITG casino development project is in need of financial "rescue." However, it is not the responsibility of this Board to bailout a struggling casino – rather, as explicitly provided in the Gaming Act, it is the statutory mandate of this Board to only grant gaming licenses to persons who have demonstrated financial fitness, viability and who will provide a steady stream of revenue to the Commonwealth, and by implication, the local communities.¹ In addition, it would be a gross dereliction of the Board's statutory responsibility

¹ 4 Pa.C.S.A. § 1102 (legislative objective of the Act is to provide new sources of revenue, broad economic opportunities and that such licenses are conditioned upon the continued qualification of each licensee); § 1313 (no license shall be granted without establishing the

to consider any bailout plan under the artificially truncated time period requested by the Joint Petitioners.²

On February 1, 2007, upon consideration of the merits of the three applications for the Category 2 slots license, located within the City of Pittsburgh, this Board concluded that PITG's project "represents the best overall project for the City of Pittsburgh and for the Commonwealth."³ In so doing, this board explicitly stated:

"the Board gives great credibility in its decision to the testimony of Don Barden who steadfastly demonstrated not only his financial commitment but also his personal commitment to the project, the integration of diverse representation in the gaming industry in Pittsburgh, in terms of ownership, contracting and employment, as well as his commitment to the Pittsburgh community." (Emphasis added)⁴

Unfortunately, as evidenced by the Joint Petition, the "great credibility" given by this Board to the testimony and commitments of PITG was misplaced. The casino development plan approved by this Board seventeen months ago is, by the Joint Petitioners own admission,

financial stability, integrity and viability of each applicant).

² It is noted that the expedited time period the Joint Petitioners have sought approval of their reorganization and refinancing plan has not been made pursuant to any formal written application as is the ordinary practice before state administrative agencies. Accordingly, there is no written record of the time-table or identification of the exigent circumstances necessary to support such extraordinary relief. *See, e.g.*, 4 Pa.C.S.A. §§ 1314, 1315 (the Gaming Act only provides for an alternative expedited licensing process for Category 1 applications).

³ *In re Application for Category 2 Slot Machine License in Pittsburgh*, PGCB Dkt. Nos. 1357, 1361, 1363, Adjudication at 55 (February 1, 2007).

⁴ *Id.*

financially “distressed”, “struggling” and in need of “rescue.”⁵ The underlying financial facts are beyond dispute, Majestic Star (the gaming businesses managed and owned by the primary equity investor of PITG) has consistently posted earnings losses – \$5.3 million in 2005; \$14.3 million in 2006; and, \$26.1 million in 2007.⁶ The distressed financial condition of Majestic Star has been underscored in its most recent SEC annual report, in which management frankly conceded “we have a significant amount of debt. As a result of our offerings, acquisitions and refinancing, our consolidated indebtedness as of December 31, 2007, is \$556.7 million. . .”⁷ Management further conceded that a consequence of such existing debt will make it highly unlikely that Majestic Star will be able to obtain additional financing.⁸ Majestic Star Casino is currently operating at a net loss of \$7.35 million.⁹ In other words, PITG’s primary equity investor is losing money in the gaming industry.

The provisions of the Gaming Act are clear and direct – in its consideration of an applicant for a slot machine license, the Board is statutorily mandated to require each applicant demonstrate, by clear and convincing evidence, “the financial stability, integrity and

⁵ Joint Petition at 6, ¶ 6; 7, ¶ 39 (July 9, 2008).

⁶ Belko, “Barden report shows big losses at casinos,” *Pittsburgh Post-Gazette* (April 15, 2008).

⁷ Securities Exchange Commission Form 10-K, Majestic Star Casino Capitol Corp. at 13 (April 11, 2008).

⁸ *Id.*

⁹ Securities Exchange Commission Form 10-Q, Majestic Star Casino Capitol Corp. at 2 (May 15, 2008).

responsibility of the applicant, its affiliate, intermediary, subsidiary or holding company. . .”¹⁰

The General Assembly’s intent to ensure business stability and prevent financial risk is reenforced by the Act’s requirement that the Board;

“ . . . make a finding, after review of the application, that the applicant is likely to maintain a financially successful, viable and efficient business operation. . .”¹¹

This background serves the important purpose of establishing, that contrary to claims made in the media, the current financial condition of PITG is not simply the result of a tightening credit market, but rather, the result of a history of poor financial performance in the gaming industry. While there is no dispute that the existing credit market has increased the cost of many gaming development plans, the financial condition of Majestic Star has exacerbated the difficulty of obtaining credit and financing on favorable terms and conditions. These circumstances have not only undermined the timely development and quality of the entertainment venue approved by the Board and promised to the residents of western Pennsylvania, but has resulted in the principal investor in the PITG license being relegated to minority investor status.

The Joint Petition is little more than an attempt to renegotiate the original terms and conditions of the license issued to PITG in an effort to bail-out a financially failing development project – with an entirely new investor and management group. As admitted by the Joint Petitioners, this filing is not simply a change of control of a previously issued license, but is a

¹⁰ 4 Pa.C.S.A. § 1313(a).

¹¹ 4 Pa.C.S.A. § 1313(e).

complete reorganization and recapitalization of the PITG development project.¹² Instead of permitting the Board to solicit new applicants for the slot machine license, PITG is attempting to retain an equity stake in the license while seeking to change the entire ownership and management structure and renegotiate the development timetable. This is unacceptable.

Accordingly, this Board is respectfully requested to consider these comments and to take such steps necessary to protect the broader public interest of ensuring the best possible casino development project for western Pennsylvania – it is not the responsibility of the Board to rescue the financial investment of a failed developer.¹³

COMMENT 2

PITG is unable to maintain a financially viable and successful business operation.

Considered in its entirety, the Joint Petition is tantamount to an admission by PITG that it is no longer able to maintain a financially viable and successful business operation. Describing the Joint Petition as an effort to “rescue a struggling project” and as a “distressed project”, PITG has admitted that it is unable, on its own, to obtain permanent financing necessary to complete the casino development project as originally proposed and approved by the Board.¹⁴

In addition, PITG has conceded, for the first time, that it has been notified by its existing lenders that it is in default of its loan obligations, and that default remedies may be soon

¹² Joint Petition at 6, ¶ 35 (July 9, 2008).

¹³ It is noted that the Board’s consideration of the Joint Petition and the relief requested therein is subject to the qualified majority vote requirement pursuant to the Gaming Act. 4 Pa.C.S.A. 1201(f).

¹⁴ Joint Petition at 6, ¶ 6; 7, ¶ 39 (July 9, 2008).

exercised.¹⁵ Furthermore, the Joint Petition makes it clear, that without additional debt financing, it is unlikely that the development project will be completed.¹⁶

The provisions of the Gaming Act were intended to prevent the issuance of a valuable gaming license to an entity that was financially questionable or unstable. For example, Section 1313 of the Gaming Act mandates that any applicant for a slot machine license must establish, by clear and convincing evidence, the financial stability, integrity and responsibility of the applicant – including any such affiliates or holding companies. Not only is this a mandatory requirement for licensure, but pursuant to the Act a licensee must maintain its qualifications in order for any such license to be renewed.¹⁷ In other words, each licensee has an affirmative duty to maintain the continued qualification of licensure.¹⁸ The Act’s emphasis on the continued necessity of ensuring the financial health of licensed slot machine operators is reenforced by the statutory requirement that the Board:

“ . . . shall make a finding, after review of the application, that the applicant is likely to maintain a financially successful, viable and efficient business operation and will likely be able to maintain a steady level of growth of revenue to the Commonwealth . . . ”.
(Emphasis added)¹⁹

¹⁵ *Id* at 2, ¶ 5.

¹⁶ *Id.*

¹⁷ 4 Pa.C.S.A. §§ 1325, 1326.

¹⁸ 4 Pa.C.S.A. §1102(7) (a gaming license is a conditional privilege).

¹⁹ 4 Pa.S.C.A. § 1313(e).

It is beyond dispute, that PITG can no longer satisfy this licensing standard – it is a “distressed”, “struggling” project, in need of “rescue” and currently in default of loan obligations. Accordingly, as a matter of state law, PITG is in derogation of the Gaming Act’s financial fitness standards.

COMMENT 3

PITG is unable to comply with the terms and conditions of its gaming license.

The Board’s Statement of Conditions, upon which its approval of PITG for a gaming license were expressly contingent, are explicit:

“ . . .to build, within 2 years from the issuance of the Category 2 slot machine license, Phases I, II and III of said gaming facility . . .” (Emphasis added)²⁰

PITG legally bound itself to these conditions upon receipt of its license from the Board in 2007. The Board’s imposition of these conditions was not an arbitrary action, but directly derived from representations made by PITG to the Board in support of its license application. As this Board noted in its decision to approve PITG for a license, “PITG Gaming has submitted an accelerated construction plan that calls for the completion of the permanent facility by March 2008.”(Emphasis added)²¹ In fact, PITG specifically stated that its decision to forgo operation of a temporary facility was done in order to “accelerate completion of its permanent facility

²⁰ *Statement of Condition to Category 2 Slot Operator License No. F-1361* at ¶ 54 (April 24, 2008).

²¹ *In Re Application for Category 2 Slot Machine License in Pittsburgh, Pa.G.C.B. Dkt. 1357, 1361, 1363* at ¶ 80 (February 1, 2007).

sooner.”²² PITG boldly predicted that it would complete the first phase of its facility as early as March 2008 – four months ago. The accelerated development schedule was a material factor upon which this Board’s decision to approve PITG for a license was based. Unfortunately, the existing financial condition of PITG and the Joint Petition effectively forces this Board to forego the central benefit of a promised accelerated development schedule.

Faced with the reality of executing its original commitment to the Board, the Joint Petitioners now seek the modification of a development schedule that would delay completion of its promised facility until the end of 2011 or the beginning of 2012 – a postponement of 3 - 4 years. Furthermore, despite the fact that the Board’s analysis of PITG’s application was premised upon its acceptance of PITG’s projections of gross terminal revenue in excess of \$452 million annually at 5,000 machines,²³ the Joint Petition seeks to open the new facility with only 3,000 slot machines, and “contemplates” the addition of 1,000 machines within two year of its commencement of the development project.²⁴ This proposed modification is likely to have a substantial impact on the short term revenue performance of the gaming operation.

The Joint Petition also seeks modification of an important tool to mitigate traffic congestion – reducing the number of parking places from 4,100 to 3,750,²⁵ (100 spaces less than PITG’s first attempt to modify its original license conditions).²⁶ Though a 250 space reduction

²² *Id* at ¶ 82.

²³ *Id* at ¶ 69.

²⁴ Joint Petition at 9, ¶ 44.

²⁵ Joint Petition at 9, ¶ 46.

²⁶ Petition of PITG (April 17, 2008)

may not seem significant, PITG's commitment to ample parking was a significant factor in the Board's desire to mitigate traffic and parking related problems in the vicinity of Pittsburgh's sports stadiums. PITG is now attempting to back out of this promise as well.

Upon its own request, PITG was issued a gaming license by the Board on November 15, 2007. Pursuant to the Gaming Act, each slot machine operator is required to "operate and make available to play a minimum of 1,500 machines at any [sic] licensed facility within one year of the issuance by the board of a slot machine license. . .".²⁷ Intended to ensure the timely completion of development plans and to protect against unwarranted delays that may deprive the Commonwealth of expected revenue, this provision was included in the Act by the General Assembly. It is presently impossible for PITG to comply with this provisions within the next four months, thereby necessitating the need to petition the Board for additional time.²⁸ Inexplicably, the Joint Petition fails to acknowledge this statutory requirement or provide a clear timetable for the commencement of slot machine operations at the development site.

In 2007 PITG made the bold promise that if granted a license, it would complete all 3 phases of its development plan by March 2009 – less than a year from now.²⁹ Unfortunately, when faced with the reality of actually having to deliver on its promise, a promise that was central in winning approval of the Pittsburgh slots license, the Joint Petition now attempts to renegotiate its commitments. It is contrary to fundamental principles of equity for a licensee to

²⁷ 4 Pa.C.S.A. § 1210(a).

²⁸ Relief from this statutory mandate may only be provided upon "good cause shown" by the applicant. *Id.* To date, no such request has been made by PITG.

²⁹ *Statement of Conditions* at ¶ 54.

renegotiate the very terms upon which its license was approved and accepted. As evidenced by the joint Petition, PITG is unable to comply with the Board's original licensing terms and conditions.

COMMENT 4

Revocation of PITG's gaming license is warranted and consistent with the public interest.

A license to operate a gaming venue is not a right, rather, pursuant to the clear writing of the Gaming Act, such a license "shall be deemed a privilege, conditioned upon the proper and continued qualification of the licensee . . .".³⁰ As is clearly demonstrated by the Joint Petition, PITG has failed to maintain the financial viability of its business operation as required under the Gaming Act. As a consequence, the Commonwealth and the citizens of western Pennsylvania are now being asked by the Joint Petitioners to assume the consequences of PITG's failure in the form of additional delay, change of ownership, alteration of the development plans and compromise of the anticipated revenue stream.

The first words written by the General Assembly as part of the Gaming Act embody a declaration that the protection of the public interest is to be the primary touchstone of the Act. The legislature succinctly provided that;

"The primary objective of this [Act] to which all other objectives and purposes are secondary is to protect the public through the regulation and policing of all activities involving gaming and practices that continue to be unlawful." (Emphasis added)³¹

³⁰ 4 Pa.C.S.A. § 1102(7).

³¹ 4 Pa.C.S.A. § 1102(1).

Emphasizing this point, the members of the General Assembly also included the directive in the Act that it was the responsibility of the Board to “strictly” monitor and enforce the regulatory oversight over all licensees.³² In support of these legislative objectives, this Board was granted broad regulatory authority, at its discretion, to revoke, suspend, condition or deny the issuance or renewal of any slot machine license.³³ The failure of PITG to maintain the financial viability of its license, and the inability of PITG to comply with the terms and conditions of its license issuance, provide sufficient justification for revocation of the license and the commencement of an expedited process to solicit and consider applications for the issuance of a new license for the completion of the current development site.

The Joint Petition is a blatant attempt to renegotiate and completely change the composition of Pittsburgh slots license without subjecting the prospective investors to a competitive application process. Fundamentally, Don Barden, the primary equity investor in the original gaming license will be relegated to a minority stakeholder, and effectively lose control and management authority over the license. Not only does this proposed shift in ownership structure eliminate a central element of the Board’s licensing decision – the integration of diversity in the direct majority ownership of slot machine operations in the Commonwealth, but it creates the precedent by which those seeking a slot machine license may “bait-and-switch” the approved application with a new renegotiated application in order to obtain more favorable terms and conditions to the operator.

³² 4 Pa.C.S.A. § 1102(8), (9), (10).

³³ 4 Pa.C.S.A. § 1202(b)(12); §1326.