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March 17, 2014

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BY ELECTRONIC MAIL
AND BY FIRST CLASS MAIL

Stephen Crosby, Chairman
Massachusetts Gaming Commission
84 State Street, 10th Floor
Boston, MA 02109

Re: City of New Bedford Comments on Region C Timeline

Dear Chairman Crosby and Members of the Commission:

This office serves as special counsel to the City of New Bedford (“City”) concerning the City’s review of potential proposals to develop a Category 1 gaming facility in the City. Please accept this letter as the City’s response to the Commission’s request for public comment “on the Region C schedule and how [the Commission] can improve the competitive environment in Region C given the upcoming RFA-2 application deadline of July 23, 2014.” As discussed below, the City submits that the Commission can significantly improve the competitive environment in Region C by taking two actions: (a) extending the RFA-2 application deadline by sixty (60) days, to September 22, 2014; and (b) granting a variance to all Region C applicants from the requirement in 205CMR119.01(7) that the referendum election required under G.L. c.23K, §15(13) take place prior to submission of the RFA-2 application.

A. Developments Subsequent To The Commission’s Adoption Of The Region C Timeline Warrant Reconsideration Of That Timeline

As the Commission has noted, the current Region C schedule was adopted by the Commission in May 2013, and the City is mindful of the Commission’s desire to conduct its business in an efficient and expeditious manner. However, the City submits that a number of developments have occurred since the Commission established the timeline that warrant revisiting the RFA-2 deadline for Region C in order to foster competition..

First, only one applicant filed a RFA-1 application for Region C by the September 2013 deadline. The City submits that this paucity of applicants was not anticipated at the time the Commission adopted the current Region C timeline. This fact alone warrants taking steps to foster competition.

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Second, in light of the lack of competitive applications for the Region C license, competition for that license can only come from applicants who unsuccessfully sought other licenses. When the Commission established the current timeline, it was anticipated that the Category 2 license may be issued in December 2013 and the Category 1 licenses for Regions A and B would be issued in April 2014. This would have allowed unsuccessful bidders for those licenses more time to enter the Region C competition. Now, the Region A license is not expected to be awarded until the end of June—less than one month prior to the current RFA-2 deadline for Region C. Under this timeline, the unsuccessful bidder for the Region A license would be precluded from competing in Region C.¹ Though not as severe, the unsuccessful bidders for the Category 2 license also face substantial temporal obstacles to entering the Region C competition.

Much has changed since the Commission established the Region C timeline in May of last year. The City submits that the determination of whether and to whom to issue a Category 1 license for Region C is of sufficient importance to warrant reexamination of that timeline and adjustment of the timeline to foster competition in the region. Therefore, the City respectfully requests that the Commission extend the current RFA-2 deadline by 60 days to September 22, 2014.

B. The Commission May Properly Waive The Requirement That The Statutorily-Required Ballot Vote Occur Prior To Submission Of An RFA-2 Application

Pursuant to the Commission's regulations, 205 CMR 119.01(7), an RFA-2 application must contain "a certificate showing that the applicant has received a certified and binding vote on a ballot question at an election in the host community in favor of the license." Though the ballot vote itself is a requirement of the Expanded Gaming Act, G.L. c.23K, §15(13), the requirement that the vote take place prior to submission of a final application is not. Accordingly, this requirement may properly be waived, in the discretion of the Commission, pursuant to 205 CMR 102.03(4) ("Waiver Regulation").

The Commission has already waived this requirement for two specific applicants.² The City proposes that the Commission waive this requirement and allow all potential host communities in Region C to hold their elections on or before November 4, 2014. As set forth below, each of the criteria listed in the Waiver Regulation is satisfied, and the Commission therefore has the discretion to grant the proposed waiver.

¹ Also unexpected was the substitution of one of the Region B applicants for a Region A applicant, which further limited the number of potential competitors for the Region C license.

² For Cordish in Leominster, the Commission granted a short waiver of the certification requirement. For Mohegan Sun in Revere, the Commission granted a two-month waiver of the election requirement itself.

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1. Granting the waiver would be consistent with the purposes of G.L. c.23K

The premise upon which the Commission has solicited public comment regarding the Region C timeline is the fundamental goal of the Expanded Gaming Act itself—to foster competition in order to maximize the regional and state-wide benefits of expanded gaming. By voting now to grant a waiver from the pre-application election requirement, the Commission will further this goal by allowing for maximum participation in the Region C competition. Under such a waiver, and in conjunction with a modest 60-day extension of the RFA-2 application deadline, none of the unsuccessful applicants for other licenses will be precluded from competing for the Region C license. This is clearly consistent with the goals of the Act.

2. Granting the waiver would not interfere with the ability of the Commission or the Investigations and Enforcement Bureau to fulfill their duties

Granting the requested waiver would not interfere with the Commission's or IEB's fulfillment of their duties. Waiving the pre-application election requirement would not delay the Commission's evaluation of the RFA-2 submissions of Region C applicants. The Commission would continue to charge applicants for the costs of such review, and the choice of an applicant to submit a RFA-2 application prior to the required election would be its own risk. Similarly, any remaining suitability investigation/review by IEB, and resultant determinations by the Commission, would in no way be impaired or delayed by waiver of this requirement, which only relates to the host community referendum election.

Though the Commission may choose to modify its current goal of making the Region C license decision by the end of November 2014, it would not necessarily have to do so. During the intervening period between the proposed RFA-2 submission date of September 22, 2014 and the election deadline of November 4, 2014, the Commission could continue with all of the other aspects of its review and processing of the applications. Further, any surrounding community issues (designations and, if necessary, arbitrations) would be resolved during this timeframe. Immediately after the November 4 election, the Commission could complete its deliberations and vote on whether and to whom to issue the Region C license. In the event the Commission determined more time was required to make this determination, a short extension of its November 2014 goal (e.g., until the end of December 2014) would be a small price for maximizing the competitive environment in Region C.

3. Granting the waiver would not adversely affect the public interest

For the reasons previously discussed, waiving the pre-application election requirement of 205 CMR 119.01(7) would not adversely affect the public interest and, to the contrary, would substantially further the public interest in competition in Region C. Moreover, granting the waiver would result in a significantly more informed electorate, in that voters would have the full RFA-2 application available for review at the time of the election and would have had the benefit of a longer

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period of public comment and debate on the proposal. Accordingly, the statutory purpose of having voters in potential host communities approve proposed gaming establishments would be far better served by granting the waiver than by denying it.

4. Denying the waiver would cause substantial hardship to the City, as well as to other potential host communities and applicants

As a potential host community to a Category 1 gaming facility, the City's goals are consistent with those of the Commission. The City has an interest in maximizing competition, finding the best potential developer/operator, evaluating the best potential site and making a fully-informed decision based upon the broadest range of proposals. The competitive environment in Region C has already been adversely affected by uncertainty regarding the potential for a tribal gaming facility in Taunton. Were the Commission to deny the requested waiver and adhere to its current RFA-2 deadline of July 23, the interests of both the Commission and the City would be substantially undermined. Indeed, it is possible that rigid adherence to the regulations and the current timeline would effectively preclude the City from entering into a Host Community Agreement at all. Forcing the City to make a decision of this magnitude on a purely procedural basis, and not based upon a reasoned, substantive evaluation of the merits of all potential proposals, would cause substantial hardship to the City and its voters.

C. Conclusion

With minor adjustments to the Region C schedule, and a waiver of the pre-application election requirement to allow potential host communities to vote on gaming establishment proposals up through the November 4, 2014 election, the competitive environment in Region C would be significantly enhanced, without substantially delaying the Commission's review of applications or potential award of a Category 1 license for the region. The City urges the Commission to take these modest but effective steps to further the goals of the Expanded Gaming Act and the interests of the people of the City, Region C and the Commonwealth.

Thank you for your consideration. Please do not hesitate to contact me if I or the City can provide any further information regarding this matter.

Very truly yours,



Jonathan M. Silverstein

JMS/jam

cc: Hon. Jonathan F. Mitchell