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BEFORE THE  
PENNSYLVANIA GAMING CONTROL BOARD

In Re: Application of Bushkill :  
Group, Inc. for a Category 3 Slot : Docket No. 1567-2010  
Machine License :

BRIEF OF  
DOWNS RACING, L.P. D/B/A  
MOHEGAN SUN AT POCONO DOWNS

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Dated: November 29, 2010

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## I. INTRODUCTION

Downs Racing, L.P., t/d/b/a Mohegan Sun at Pocono Downs (“MSPD”) respectfully submits this Brief in opposition to the Application for a Category 3 Slot Machine License filed by Bushkill Group, Inc. (“Bushkill”). Bushkill’s proposed Category 3 facility is to be located at the Fernwood Resort along U.S. Route 209 in Middle Smithfield Township, Monroe County, Pennsylvania. The site is just over 15 miles from the Mt. Airy Casino Resort (“Mt. Airy”), and is within the northeast Pennsylvania gaming market that is already comprised of Mt. Airy, MSPD and the Sands Casino Resort Bethlehem (“Sands”).

Bushkill is competing for the single available Category 3 license with three other applicants: Mason-Dixon Resorts, L.P., located in Adams County; Nemaocolin Woodlands, Inc., located in Fayette County; and Penn Harris Gaming, LP, located in Cumberland County. Given MSPD’s status as an existing slot machine licensee and a direct would-be competitor of the proposed Bushkill facility, among other interests, MSPD has a direct, substantial and immediate interest in Bushkill’s application proceeding<sup>1</sup> and would be an aggrieved person should that application be granted.<sup>2</sup>

On October 29, 2010, MSPD, in conjunction with the Pennsylvania Harness Horsemen’s Association, which represents the horsemen and horse racing interests at Pocono Downs Racetrack, filed a Notice of Intent to Contest Bushkill’s Application. In further expansion on the grounds for opposition in its Notice, and without waiving or abandoning any of the grounds cited

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<sup>1</sup> *Application of El Rancho Grande, Inc.*, 496 Pa. 496, 502-06, 437 A.2d 1150, 1153-56 (1981); *Malt Beverages Distributors Ass’n v. Pa. Liquor Control Bd.*, 965 A.2d 1254, 1262 (Pa.Cmwlth. 2009); *Malt Beverages Distributors Ass’n v. Pa. Liquor Control Bd.*, 881 A.2d 37, 42 (Pa.Cmwlth. 2005); *MEC Pennsylvania Racing v. State Harness Racing Com’n*, 827 A.2d 580, 589 (Pa.Cmwlth. 2003).

<sup>2</sup> *Citizens Against Gambling Subsidies, Inc. v. Pa. Gaming Control Bd.*, 591 Pa. 312, 916 A.2d 624, 628 (2007); *South Whitehall Twp. Police Service v. South Whitehall Twp.*, 521 Pa. 82, 555 A.2d 793, 795 (1989).

therein, MSPD respectfully submits this Brief to the Board, and urges the Board to deny Bushkill's application.

**II. BUSHKILL WILL NOT MAINTAIN A FINANCIALLY SUCCESSFUL AND VIABLE BUSINESS OPERATION AND WILL NOT PROVIDE SIGNIFICANT NEW REVENUE TO THE COMMONWEALTH.**

The Board should deny Bushkill's application because Bushkill fails to satisfy the Gaming Act's requirements and fulfill its policies related to revenue generation. The Gaming Act demands, in order for an applicant to be financially suitable, that the applicant's proposed facility be able to generate significant amounts of new revenue for the Commonwealth. Consistent with this principle, proposed facilities that will cannibalize the revenues received by existing licensees are discouraged under the Act. Bushkill fails these tests; particularly when compared to the other choices the Board has before it for Category 3 licensure.

Section 1313 of the Gaming Act sets forth the financial fitness requirements, which include a finding 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." 4 Pa. C.S. § 1313(e). This requirement goes to the very heart of one of the General Assembly's key purposes behind the Gaming Act:

The authorization of limited gaming is intended to provide a *significant source of new revenue* to the Commonwealth to support property tax relief, wage tax reduction, economic development opportunities and other similar initiatives.

4 Pa. C.S. §1102(3) (emphasis added).

**A. The Northeast Pennsylvania Market is Oversaturated**

As the experience from Pennsylvania's existing gaming market shows, and as is commonly accepted by gaming experts (and reflected in the 2003 Innovation Group Report upon which the entire Gaming Act is based), location is absolutely vital in determining a facility's

success at generating gaming revenue.<sup>3</sup> Unfortunately, Bushkill's proposed Category 3 facility is situated in an already crowded eastern Pennsylvania gaming landscape and an oversaturated northeast Pennsylvania market.

As the Board is aware, Bushkill would be the ninth (9th) gaming facility in Eastern Pennsylvania, and will be competing with several gaming facilities in New York as well as potential future gaming opportunities at the Meadowlands.<sup>4</sup> Moreover, as several witnesses addressed, Bushkill's facility would add a fourth (4th) casino within the already crowded northeast Pennsylvania market and literally locate a new facility virtually right on top of Pennsylvania's worst performing existing licensee, Mt. Airy Casino Resort.<sup>5</sup> Indeed, the Board has already seen the damage that the addition of a new casino can have on Mt. Airy Casino Resort. When the Sands Casino Resort Bethlehem, some 45 miles from Mt. Airy, was fully up and running in 2010, Mt. Airy suffered a decline in revenue of over 11%.<sup>6</sup> Bushkill's proposed facility, which is just over 15 miles from Mt. Airy, will only exacerbate this revenue erosion and further undermine Mt. Airy Casino Resort.

As Mr. Bean, Assistant General Manager at MSPD, testified, convenience is the greatest factor in determining where a patron gambles, and this factor is typically measured by the market within 30 miles of the facility.<sup>7</sup> The actual experience of Pennsylvania licensed facilities reflects this fact.<sup>8</sup> Moreover, Christiansen Capital Advisors, Bushkill's own expert, admits this fact.<sup>9</sup> If

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<sup>3</sup> See, e.g., Bushkill Suitability Hearing Transcript ("Tr."), November 16, 2010, at 114, 140; Christiansen Capital Advisors Analysis of the Fiscal Impacts of Adding a Category 3 Casino in the Eastern Pennsylvania Market (Nov. 8, 2010) ("CCA Report") at 9-10.

<sup>4</sup> See, Downs Racing Exhibit 1 at 1, 3; Sands PowerPoint (Nov. 16, 2010) at 5-7; Mason-Dixon Comparative Exhibit A ("Fine Point Report") at 9-10.

<sup>5</sup> Tr. at 114-15, 140-42; Downs Racing Exh. 1 at 1, 3; Sands PowerPoint at 7-8.

<sup>6</sup> CCA Report at 8.

<sup>7</sup> Tr. at 140, 142.

<sup>8</sup> Tr. at 125-36, 140.

the Board grants Bushkill a license, the convenience market for four (4) different facilities will overlap.<sup>10</sup> There is simply not enough demand to support such an oversaturated level of supply in northeast Pennsylvania.<sup>11</sup>

In fact, the experience of the facilities currently operating in the market - Mt. Airy Casino Resort and MSPD - indicate that the area is already oversaturated. The win per unit for these facilities is either well below or just barely above the state-wide average.<sup>12</sup> Further, Mt. Airy is the lowest revenue producing facility in the Commonwealth and MSPD is in the bottom half of Pennsylvania licensed facilities.<sup>13</sup> As Mr. Bean testified, if this market were not oversaturated, but rather in need of gaming supply, the performance of these facilities would be significantly improved, with higher revenue production and a win per unit that was well above the state average.<sup>14</sup>

Ultimately, in enacting the Gaming Act, the General Assembly gave considerable thought and study to the most advantageous location of the gaming facilities. The 2003 Innovation Group Report was conducted for the Commonwealth as part of this review. In the end, after this review, the Legislature only endorsed *one* location in the state for having four casinos – Philadelphia. *See*, 4 Pa. C.S. §§ 1302, 1307. As Mr. Bean testified, Philadelphia is a very different market than northeast Pennsylvania.<sup>15</sup>

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<sup>9</sup> CCA Report at 9-10 (“other things being equal, gambling patrons overwhelmingly tend to gamble at the facility that is most conveniently located for them”).

<sup>10</sup> Downs Racing Exh. 1 at 3; Tr. 141-42.

<sup>11</sup> Tr. 143-44.

<sup>12</sup> Fine Point Report at 12-13.

<sup>13</sup> Downs Racing Exh. 1 at 2; Tr. 141.

<sup>14</sup> Tr. at 143-44.

<sup>15</sup> Tr. 142.

**B. Bushkill Will Generate the Least New Net Revenue**

While the experts for Mason-Dixon Resorts, LP (The Fine Point Group) and Nemaocolin Woodlands, Inc. (TMG Consulting) disagree strenuously on numerous matters, both experts agree that Bushkill's proposed facility will substantially cannibalize the revenue of existing slot licensees and perform poorly in terms of new revenue generation for the Commonwealth.<sup>16</sup> Indeed, TMG Consulting projects Bushkill as producing the lowest amount of gross gaming revenue, the lowest patron visits, the lowest win per unit, the lowest gaming tax revenue, and the lowest net, or new, gaming revenue and gaming tax revenue.<sup>17</sup>

The Board might be tempted to ascribe the dire nature of these predictions to the fact that they are included within reports produced by experts for Bushkill's competitors. However, dismissing the expert's conclusions would be a mistake. First, the projections find notable support in the conclusions of Bushkill's own experts - that is, Bushkill's experts from 2008. Indeed, in its first suitability hearing (when Bushkill was admittedly "less sophisticated" at making an application look good),<sup>18</sup> Bushkill called upon the Innovation Group to opine on its revenue generating capacity. The Innovation Group projected figures for visitation, win per unit, and gross terminal revenue that were consistent with the findings of the reports by TMG and the Fine Point Group.<sup>19</sup> Indeed, the experts of its competitors were arguably more charitable toward Bushkill's ability than was its own expert in the 2008 suitability hearing.

Second, as Mr. Bean testified, the Board does not need to rely on projections in this instance; whether the projections are from TMG, Fine Point Group, Innovation, or Penn

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<sup>16</sup> Fine Point Report at 16, 28; Nemaocolin Woodlands Comparative Exhibit A ("TMG Report") at 5-6, 25-31.

<sup>17</sup> TMG Report at 5-6, 25-33.

<sup>18</sup> Tr. at 97.

<sup>19</sup> See, Notice of Intent to Present Comparative Evidence of Penn Harris Gaming at 3; Fernwood Resort & Casino PGCB Suitability Hearing Presentation (October 23, 2008) at 39.

National. Instead, the Board has actual market results it can rely on in assessing the ability of Bushkill to generate revenue.<sup>20</sup> Like Bushkill, Mt. Airy is a resort. Like Bushkill, Mt. Airy maintains a sizeable hotel. Like Bushkill, Mt. Airy targets the same primary and secondary market in Pennsylvania, New Jersey and New York. Yet, Mt. Airy has the lowest win per unit and generates the least gaming revenue in the Commonwealth.<sup>21</sup> There is no credible evidence of record for the Board to rely on to conclude that, despite having all of the same inputs, Bushkill will somehow miraculously produce diametrically opposite results from Mt. Airy.

Plaguing Bushkill's ability to generate significant new revenue for the Commonwealth is the simple fact that it will substantially cannibalize the gaming revenue currently generated by Mt. Airy, Sands and MSPD. Even Bushkill's own expert, CCA, acknowledges that "the rate of cannibalization of a new gaming supply in a given market is highly dependent upon the level of saturation of that market, i.e. the relative balance between supply and demand."<sup>22</sup> As established above, Bushkill's proposed market is already oversaturated. As a result, both TMG and the Fine Point Group identify Bushkill as one of the worst applicants of the Category 3 applicants for cannibalizing revenue.<sup>23</sup> TMG ascribes 24% of Bushkill's revenues to cannibalization.<sup>24</sup> Bushkill's 2008 expert, Innovation Group, set Bushkill's cannibalization rate at 19%.<sup>25</sup> Consistent with all of the other calculations performed for the current round of applications,

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<sup>20</sup> Tr. 141, 144.

<sup>21</sup> Tr. 143-44.

<sup>22</sup> CCA Report at 13. While CCA somehow concludes that a northeast market with four casinos would not be oversaturated, it is noteworthy that its entire analysis rides on the accuracy of this dubious conclusion.

<sup>23</sup> TMG Report at 25-33; Fine Point Report at 28.

<sup>24</sup> TMG Report at 28.

<sup>25</sup> Sands PowerPoint at 11; Fernwood 2008 Suitability Presentation at 40.



Bushkill's new numbers are so rosy - 11% first year declining to zero percent (0%) stabilized year cannibalization - as to be incredulous.<sup>26</sup>

Perhaps more telling was the testimony of Bushkill's management consultant, Mr. Steve Snyder from Penn National, who explained to the Board that Bushkill expects 30%-40% of its revenue to come from within Pennsylvania.<sup>27</sup> Given that Bushkill is not expected to increase or change the gaming behavior of patrons in the surrounding market,<sup>28</sup> and given the existence of Mt. Airy, Sands and MSPD as established gaming facilities in that market, the Board could conclude that, by definition, the 30%-40-% of revenue Bushkill expects to receive from Pennsylvania residents would otherwise already be going to the existing facilities. As such, Bushkill's cannibalization rate could reach as high as 40% of its revenues.

Ultimately, the record is persuasive that Bushkill fails to satisfy the requirements and policies lodged in Sections 1102(3) and 1313(e) of the Gaming Act. Both hard data from the current market and consistent projections from multiple experts, including Bushkill's own 2008 expert, show that Bushkill will generate the least gaming revenue of the Category 3 applicants. Moreover, of that revenue, the evidence shows that a substantial percentage will simply be pirated away from existing licensees. As a result, the net, new gaming revenue generated by Bushkill does not pass the test, and cannot support its licensure.

**C. Bushkill's "Room Keys" and Business Model Are Not a Panacea**

In an attempt to explain away these fatal flaws in its project, Bushkill invokes the power of its various overnight accommodations (its 906 "room keys") and unique business model.<sup>29</sup>

Contrary to the experience of Pennsylvania's other licensed casinos, Bushkill claims that it will

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<sup>26</sup> CCA Report at 14.

<sup>27</sup> Tr. 76.

<sup>28</sup> TMG Report at 25.

<sup>29</sup> Tr. 32-35, 80-81.

draw the vast majority of its revenues from a radius of between 50-100 miles from its facility.<sup>30</sup>

Numerous problems exist with Bushkill's attempted rationalization.

First, as noted, Bushkill's model is contradicted by the four years of experience of Pennsylvania's existing licensees. As MSPD testified, the vast majority of its business comes from patrons within 30 miles of their facilities.<sup>31</sup>

Second, and consistent with the experience of existing casinos, Bushkill itself anticipates 77% of its revenue in its first year of operations to come from *within 50 miles* of its facility. This fact was confirmed by Mr. Snyder in response to questions from Commissioner Ginty.<sup>32</sup> Of course, as noted above, those revenues will almost by definition be received at the expense of Mt. Airy, Sands and MSPD.

Third, Bushkill's theory was already taken into account by both TMG and the Innovation Group (in producing Bushkill's 2008 report) in making their revenue projections. TMG accounted for various types of resort and tourism gaming visits, and assumed that between 68%-88% of Bushkill's gaming revenue, depending on type of patron, would be coming from out-of-state.<sup>33</sup> Likewise, Innovation Group's 2008 report for Bushkill focused on the market within a 100 mile radius in the Tri-State area and assumed that 72% of its gaming visits would be from out-of-state.<sup>34</sup> Yet, both experts consistently predicted win per unit and gross terminal revenue

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<sup>30</sup> Tr. 76, 80.

<sup>31</sup> Tr. 142.

<sup>32</sup> Tr. 103-04.

<sup>33</sup> TMG Report at 23-25, 29.

<sup>34</sup> Sands PowerPoint at 10-11; Fernwood 2008 Suitability Presentation at 36, 40.

figures that were far lower, and cannibalization rates that were far higher, than Bushkill's current projections.<sup>35</sup>

Finally - and most compellingly - is the "burning question" raised by Chairman Fajt<sup>36</sup> and testified to by MSPD's Mr. Bean.<sup>37</sup> If Bushkill's theories were valid, why is Mt. Airy realizing the exact opposite results of those claimed by Bushkill?<sup>38</sup> As noted, Mt. Airy is a resort and boasts a sizeable hotel, like Bushkill.<sup>39</sup> Mt. Airy and Bushkill share a heavily overlapping market. Mt. Airy targets the New York-New Jersey market, as Bushkill hopes to do.<sup>40</sup> Yet, despite all of these similarities, Mt. Airy has the state's lowest, not the highest, win per unit results and generates the least revenue of any Pennsylvania casino. If Bushkill's model actually worked, Mt. Airy would be experiencing radically different results.<sup>41</sup>

Chairman Fajt aptly described Bushkill's application and financial projections as asking the Board to make a "leap of faith."<sup>42</sup> As the reality of Mt. Airy's performance shows, the Board's leap would have a very rocky ending. In fact, that leap will be made even more difficult once the Sands' hotel opens in May 2010 and becomes established well before Bushkill is even operational, neutering Bushkill's purported key advantage of overnight accommodations.<sup>43</sup>

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<sup>35</sup> TMG Report at 5-6, 25-33; Sands PowerPoint at 11; Penn Harris Notice at 3; Fernwood 2008 Suitability Presentation at 39.

<sup>36</sup> Tr. 168.

<sup>37</sup> Tr. 143-44.

<sup>38</sup> Tr. 168.

<sup>39</sup> While Mt. Airy has 200 hotel rooms versus 900 rooms at Bushkill, no one has suggested that Mt. Airy could reverse its revenue performance simply by increasing its room count.

<sup>40</sup> Tr. 143-44, 168; Downs Racing Exh. 1 at 1, 3.

<sup>41</sup> Tr. 143-44.

<sup>42</sup> Tr. 168.

<sup>43</sup> Tr. 37. In addition, the average lengths of stay of guests in the resort villas [4.2 days currently, 5.5 days projected according to the Bushkill testimony] and the multiple bedrooms in those villas may actually detract from the average win per day per gaming device if patrons are only gaming on certain days of their trips or are visiting the

Significantly, the Gaming Act requires more than a leap of faith – it requires that the financial success and steady growth of new revenue to the Commonwealth be "likely." 4 Pa. C.S. § 1313(e).

**D. Bushkill's Financial Projections Are Not Credible**

Another basis upon which the Board should find that Bushkill has failed to satisfy Section 1313 of the Gaming Act and deny its application is the complete lack of credibility of its financial projections. As noted above, Bushkill was before the Board for a suitability hearing in 2008. At that time, Bushkill sponsored financial testimony, provided under oath, that is radically different than the financial projections it is sponsoring today.<sup>44</sup> These differences are so great that they undermine the credibility of Bushkill's entire application and make it impossible for the Board to include Bushkill in a valid comparison with the other facilities.

In 2008, Bushkill sponsored an Innovation Group report as evidence of its financial suitability. The report called for stable year patronage of 407,553, a win per unit of \$157, and gross terminal revenue of \$28.7 million.<sup>45</sup> In this proceeding, just two years later, Bushkill is relying on Penn National for its financial projections.<sup>46</sup> The product of this simple change in authorship is astonishing:

- Projected patronage is now 1.345 million – a 230% increase
- Projected win per unit is now \$513 – a 226% increase
- Projected gross terminal revenue is now \$93.6 million – a 226% increase<sup>47</sup>

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resort with children who are not able to enter the gaming area. Average spending per visit by adult patrons and the total number of such visits may be a better measure of the projected revenue.

<sup>44</sup> See, Fernwood 2008 Suitability Presentation at 39.

<sup>45</sup> Penn Harris Notice at 3; Fernwood 2008 Suitability Presentation at 39.

<sup>46</sup> Tr. 33-34.

<sup>47</sup> Tr. 142-43; Downs Racing Exh. 1 at 5; Penn Harris Notice at 3.

As the record shows, these revised financial projections are contradicted by the actual data from existing Pennsylvania licensees and are inconsistent with the projections offered in this proceeding by TMG and Fine Point Group.<sup>48</sup> Finally, Bushkill's exorbitant projections were offered despite the reservations expressed by Mr. Albert Federico, the Commonwealth's traffic expert, who testified that the access to Bushkill's facility is unacceptable for a gaming use and is likely to result in excessive delays for those trying to come to the casino.<sup>49</sup>

Commissioners Ginty and Trujillo were rightly skeptical of Bushkill's new-found success, and asked the applicant for an explanation.<sup>50</sup> Bushkill first pointed to the advent of table games, but this could not describe the discrepancies with other existing and proposed facilities since they, too, have or will have tables.<sup>51</sup> Instead, Bushkill cited Penn National's involvement in the casinos management as the "biggest difference."<sup>52</sup>

However, this explanation falls flat as well. First, as good of a gaming company as Penn National is, a management company cannot reasonably be expected to produce differences in results of 225%-230%. Nor are such inflated results consistent with Penn National's experience at Hollywood casino. Despite being in a market that is essentially devoid of competition (as opposed to the three Category 1 and 2 facilities Bushkill will face), Hollywood's win per unit figure is only \$286 - a far cry from \$513.<sup>53</sup> Furthermore, as Commissioner Sojka cogently noted,

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<sup>48</sup> Downs Racing Exh. 1 at 2, 4; Fine Point Report at 8-16; TMG Report at 5-6.

<sup>49</sup> Tr. 160-62.

<sup>50</sup> Tr. 95-102, 157.

<sup>51</sup> Tr. 157.

<sup>52</sup> *Id.*

<sup>53</sup> Fine Point Report at 12.

Penn National has no involvement with the single element of the Bushkill project to which the applicant assigns the greatest import for its success: its hotel and villas.<sup>54</sup>

A far more likely reason for Bushkill's bloated projections in this second round of Category 3 licensing was inadvertently provided by the applicant. As Bushkill noted, in the 2008 proceedings, only two applicants were before the Board for two available licenses.<sup>55</sup> To the contrary, in this proceeding, Bushkill is in a heavy competition, as one of four applicants seeking a single license (and the last license for which Bushkill will be eligible), and accordingly, it apparently felt the need to become more "sophisticated" in packaging its application.<sup>56</sup> Such repackaging of the same product cannot suffice to satisfy the requirements in Section 1313 of the Gaming Act.

### **III. BUSHKILL'S GAMING OPERATIONS WILL ADVERSELY IMPACT HARNESS RACING AT MSPD.**

As indicated above, the Horsemen's Association operating at MSPD, the Pennsylvania Harness Horsemen's Association ("PHHA"), joined MSPD in its participation in Bushkill's Category 3 slot machine application proceeding.<sup>57</sup> The interest of PHHA in this proceeding is to prevent award of the Category 3 license to an entity, like Bushkill, which will adversely impact harness racing at MSPD by decreasing PHHA's distribution from the Pennsylvania Race Horse Development Fund ("Horse Racing Fund").

There has been a lively debate in this proceeding as to the magnitude of cannibalization of revenues by Bushkill from the three existing casinos, including MSPD, in the northeastern Pennsylvania gaming market segment. While the parties strongly disagree on the magnitude of

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<sup>54</sup> Tr. 81.

<sup>55</sup> Tr. 97.

<sup>56</sup> Tr. 97.

<sup>57</sup> See October 29, 2010 Notice of Intent to Contest Application submitted jointly by MSPD and PHHA; Tr. 145-148.

cannibalization, it is a given that some Bushkill cannibalization would occur from all three casinos, whether that being very small in magnitude as Bushkill asserts or very substantial, as MSPD and Sands claim.

On pages 145-47 of the transcript at the Bushkill's suitability hearing, Commissioner Sojka asked a number of questions as to whether the horsemen's (here the PHHA) will benefit if the new Category 3 licensee's operation increases the overall slots pie (total Gross Terminal Revenue or "GTR") in Pennsylvania even if GTR is reduced at the specific facility at which a given horsemen's association operates – in this case MSPD. As testified by Mr. Izzo from the PHHA in response to Commission Sojka's questions, the PHHA will lose \$.18 in support from the Horse Racing Fund for each \$1 that MSPD loses in GTR, as a result of Bushkill's operations, regardless of whether overall GTR in the Commonwealth increases.<sup>58</sup> While Mr. Izzo's response is factually correct (with one exception explained below), there appears to be some remaining confusion as to why this is the result under the Gaming Act, which requires additional explanation.

Section 1406 of the Gaming Act establishes the system of contribution to and distribution from the Horse Racing Fund to the various horsemen's associations (for purses, breeders, and health and pension benefits.) Under the system of distribution, there is both a contribution cap of 12% of GTR applicable to each slot machine licensee, and a distribution cap applicable to the horsemen's association of 18% of the GTR of the specific slot machine licensee operating the licensed facility located at the horsemen's association's racetrack.

The two caps work in tandem with each other. So, in the early days of slot operations in Pennsylvania when initially only Category 1 facilities were operating, the 12% of GTR

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<sup>58</sup> Tr. 146-47.

contribution from each Category 1 licensee essentially flowed through as a 12% distribution to that facility's horsemen's association. This evolved under the statutory formula as Category 2 facilities came on line and the 12% GTR Category 2 contributions were essentially divided on a *pro rata* basis between the Category 1 horsemen's associations (because the Category 2, and in the future Category 3, facilities do not have a racetrack or horsemen's association to share in the distribution – essentially these non-horse racing facilities subsidize the various Category 1 horsemen).

Mathematically, these contributions to the Horse Racing Fund from the Category 2 facilities supplemented the Category 1 contributions, driving the horsemen's association's associated distributions above 12% of the GTR of the associated Category 1 licensee. As additional Category 2 facilities opened, the horsemen's distribution rate reached the statutory cap of 18% of the GTR of the associated Category 1 licensee.<sup>59</sup> Accordingly, with the operation of four Category 2 facilities, the contribution from the Horse Racing Fund to each horsemen's association operating at a given Category 1 facility will equate to exactly 18% of the GTR of the slot machine license at that facility.<sup>60</sup>

As a result, as testified by Mr. Izzo of the PHHA, the distribution received by the PHHA from the Horse Racing Fund is determined solely by the level of MSPD's GTR. The level of the total amount of GTR in the Commonwealth (once Category 2 facilities become operational) has no impact one way or another on the level of PHHA's distribution.

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<sup>59</sup> Additional contributions above that required to reach an 18% distribution rate to the horsemen then act mathematically to start to reduce the contribution rate of all slot machine licensees below the 12% contribution cap.

<sup>60</sup> To make a complicated formula even more complicated, as a result of Act 1 of 2010 (Table Games Amendment), there is an exception to this system of distribution for the remainder of this fiscal year through the 2012-2013 fiscal year. For the remainder of this period, the General Assembly allocated 17% of the monies contributed to the Horse Racing Fund to the General Fund. As a result, while the distribution rate to the Horse Racing Fund remains at 18% of Category 1 GTR, the actual distribution rate to the horsemen for this period is reduced to somewhere in the area of 15% of the GTR of the associated slot machine licensee. Once this period expires, the distribution formula will return to that included in the original Gaming Act and described herein.



To put this in perspective within the context of the evidence of record, if Bushkill is correct and its GTR reaches \$93.6 million annually, and hypothetically, if 15% of these revenues are cannibalized from MSPD, then PHHA will lose approximately \$2.52 million a year as a direct result of Bushkill's operation.<sup>61</sup> Such an amount is far from nominal and represents a significant, and, in fact, fairly dramatic negative impact on MSPD's horsemen's association, PHHA, to the material detriment of PHHA's purses, breeders, and health and pension benefits – not to mention the positive impact on Pennsylvania agriculture and farm land preservation often noted by Commissioner Sojka in addressing the benefits that gaming has delivered.

As Commissioner Sojka stated in addressing this issue at Bushkill's suitability hearing, "I would simply say that this is an area that is of – I think real importance. I'm hearing you. I'm going to want to get more clarification. Thank you."<sup>62</sup> Hopefully, the explanation above provides the clarification Commissioner Sojka seeks. The fact of the matter is that any cannibalization of a Category 1 slot machine licensee's GTR has a direct, and very real, negative impact on the level of distribution to the associated horsemen's association. As Commissioner Sojka indicated, this is a very important issue which should be seriously considered by the Board in this proceeding.

#### **IV. BUSHKILL HAS NOT MET ITS BURDEN OF DEMONSTRATING THAT IT HAS COMMITTED FINANCING IN PLACE.**

Section 1313 of the Gaming Act requires applicants to produce the information, documentation and assurances that the Board deems necessary to demonstrate the applicant's financial fitness by clear and convincing evidence. Within the context of slot machine license

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<sup>61</sup>  $\$93.6 \times .15 \times .18 = \$2.5272$  million. This presumes that the temporary general fund distribution period has expired (see footnote 60 above). At a 10% MSPD cannibalization rate, the PHHA loss would be approximately \$1.68 million annually.

<sup>62</sup> Tr. 147-48.

applications, the Board has uniformly proscribed that a required element of financial fitness is that the applicant demonstrate it has committed financing for the proposed gaming facility in place.<sup>63</sup> Promises, even if made with a high degree of confidence, have generally not been accepted by the Board.

As the Board is aware, the lack of committed financing has been an ongoing issue for Bushkill throughout its efforts to receive a slot machine license, which, in the past, has deferred consideration of its application by the Board. Bushkill now claims that this problem has been fixed by the addition of Penn National to its project.

Unfortunately, due to the Board's confidentiality procedures, MSPD does not have access to underlying agreements and financing documents which would allow it to evaluate whether there is actually real committed financing in place. Until such time as it has access to such documents, MSPD maintains its position that Bushkill has not met its evidentiary burden to demonstrate by clear and convincing evidence that Bushkill has committed financing in place and is financially fit to pursue its proposed Category 3 facility.

**V. BUSHKILL HAS NOT MET THE CATEGORY 3 CASINO ACCESS ELIGIBILITY CRITERION.**

Section 1305(a) of the Gaming Act entitled "Eligibility" establishes the eligibility criteria applicable to a Category 3 applicant. One of the criterion is that the applicant meet a licensure condition that restricts patron access to the gaming floor to overnight guests and patrons of the amenities consistent with the parameters of the subsection. Although framed as a condition of licensure, gaming floor access restriction is a part of the eligibility criteria, which requires a Category 3 applicant to submit a compliant access plan in order to qualify for eligibility.

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<sup>63</sup> 4 Pa. C.S. § 1313(b).

Again, MSPD may not have access to all of the documents in this proceeding which pertain to Bushkill's gaming floor access plan, and until it does, maintains the position that Bushkill has not adequately demonstrated fulfillment of this eligibility criterion. However, at Bushkill's suitability hearing, Penn National representative Ken Snyder, testified about a "game plan" for compliance with the casino access requirement, which apparently represents Penn National's "thought process" towards compliance with Section 1305(a).<sup>64</sup> While the scheme described by Mr. Snyder may be a step in the right direction, it apparently only represents Mr. Snyder's thoughts on the subjects, which in his words, "we have spoken with the Fernwood folks about . . . ."<sup>65</sup>

The crux of Mr. Snyder's testimony is that Penn National has some preliminary thoughts regarding compliance with the gaming floor access requirement which have been discussed with Bushkill, however, there is no indication in the record of the suitability hearing that Bushkill has adopted Mr. Snyder's thoughts as Bushkill's final plan. Even if it had, Mr. Snyder's thoughts as to compliance have nowhere near the detail necessary to determine if such a plan complies with Section 1305(a). For example, the complete list of amenities which will be included in the access plan and details as to the nature and ownership of those amenities are not discussed by Mr. Snyder. And other necessary issues remain open.

Accordingly, even interpreted in its most favorable light, Mr. Snyder's testimony does not represent a gaming floor access plan which meets the requirements of Section 1305(a). Accordingly, Bushkill has failed to fulfill this eligibility criterion, and its application should be dismissed.

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<sup>64</sup> Tr. 24-25.

<sup>65</sup> Tr. 24-25.

**VI. CONCLUSION**

For all of the foregoing reasons, Bushkill's application for a Category 3 slot machine license should be denied or dismissed.

Respectfully submitted,



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Dated: November 29, 2010

**CERTIFICATE OF SERVICE**

I hereby certify that I have, this 29th day of November, 2010, served a true and correct copy of the foregoing document in the manner indicated, addressed to the following individuals:

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