

COMMONWEALTH OF PENNSYLVANIA

GAMING CONTROL BOARD

* * * * *

IN RE: PHILADELPHIA ENTERTAINMENT AND DEVELOPMENT
PARTNERS, LP (FOXWOODS), OFFICE OF ENFORCEMENT COUNSEL
MOTION FOR SUMMARY JUDGMENT, REVOCATION

* * * * *

PUBLIC INPUT HEARING

BEFORE: Gregory C. Fajt, Chairman
Raymond S. Angeli,
Jeffrey W. Coy, James B. Ginty,
Kenneth T. McCabe, Gary A. Sojka,
Kenneth Trujillo
Jorge Augusto, representing Russell
Redding, Secretary of Agriculture
Aviv Bliwas, representing State Treasurer's
Office

HEARING: Wednesday, October 27, 2010
10:00 a.m.

LOCATION: PUC Keystone Building
Hearing Room 1
400 North Street, Plaza Level
Harrisburg, PA 17120

Reporter: Cynthia Piro Simpson

Any reproduction of this transcript is prohibited
without authorization by the certifying agency.

A P P E A R A N C E S

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

OFFICE OF ENFORCEMENT COUNSEL

DALE MILLER, ESQUIRE

Assistant Enforcement Counsel

PA Gaming Control Board

P.O. Box 69060

Harrisburg, PA 17106-9060

Counsel for Pennsylvania Gaming Control Board

STEPHEN A. COZEN, ESQUIRE

F. WARREN JACOBY, ESQUIRE

Cozen O'Connor

1900 Market Street

Philadelphia, PA 19103

Counsel for Philadelphia Entertainment and
Redevelopment Partners, LP

ROBERT A. GRACI, ESQUIRE

Eckert, Seamans, Cherin & Mellott, LLC

213 Market Street, 8th Floor

Harrisburg, PA 17101-2132

Counsel for Philadelphia Entertainment and
Redevelopment Partners, LP

I N D E X

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

OPENING REMARKS

By Chairman Fajt 4 - 11

PRESENTATION

By Attorney Miller 12 - 21

By Attorney Cozen 21 - 53

By Attorney Miller 53 - 56

QUESTIONS BY THE BOARD 56 - 102

CLOSING REMARKS

By Presiding Officer 102 - 104

P R O C E E D I N G S

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CHAIRMAN:

Good morning, everybody. If I could ask everyone to please take their seats, we'll get started. I'm Greg Fajt, Chairman of the Pennsylvania Gaming Control Board. I'd like to ask everyone as is our normal practice to please turn off your PDAs and cell phones as they tend to interfere with our communication system. Thank you.

Joining us today is George Gusto, representing Secretary of Agriculture, Russell Redding. And Aviv Bliwas is also here representing the State Treasurer's Office. Welcome to both of you.

All members being present, I'll call today's meeting to order. As the first order of business, please join me in the Pledge of Allegiance.

PLEDGE OF ALLEGIANCE RECITED

CHAIRMAN:

We have several items before the Board today by way of oral argument or public hearings which will take place prior to our public meeting. At the conclusion of all of these matters, the Board will take a recess to conduct quasi judicial deliberations for before returning to conduct our regularly

1 scheduled meeting.

2 The first couple of oral arguments on the
3 agenda are the Office of Enforcement Counsel (OEC) and
4 Philadelphia Entertainment and Development Partners
5 cross Motion seeking Summary Judgment. There are
6 three preliminary motions relating to PEDP's
7 revocation proceedings which we must address. Each of
8 these matters touch upon requests by PEDP for
9 confidentiality related to these proceedings. The
10 Board has reviewed each of those motions and discussed
11 them in our Executive Session yesterday. We are
12 therefore now ready to act upon each.

13 The first motion is PEDP's motion to
14 close hearing to protect confidential information.
15 This motion asks for four forms of relief. First, an
16 order closing the revocation hearings which I assume
17 includes today's oral arguments. Second, a
18 designation that all information exchanged in
19 Discovery is confidential. Third, the designation
20 that all confidential privileged and proprietary
21 testimony elicited during the revocation hearings be
22 maintained as confidential. And finally, a
23 designation that all confidential, sensitive,
24 proprietary, privileged evidence and documents used or
25 introduced at the revocation hearings be treated as

1 confidential.

2 I'm going to ask for a motion on this
3 request in a second. But before I do, I'd like to
4 state once again for the record that while the Board
5 understands the desire to protect confidential
6 information, we also have the competing interest of
7 making sure these proceedings are as transparent as
8 possible. As a result, I think I speak for the entire
9 Board when I say that we are unlikely to provide broad
10 blanket confidentiality like is requested here today
11 no matter how frequently you ask.

12 What we will do is evaluate whether
13 evidence is confidential or not on a case by case
14 basis as the need arises. And upon the request of
15 Counsel and a proffer of why something is
16 confidential. With that being said, may I have a
17 motion, please?

18 MR. ANGELI:

19 Mr. Chairman, I move that the Board deny
20 PEDP's motion to close the revocation proceedings,
21 including but not limited to today's arguments on
22 summary judgment motion consistent with the Chairman's
23 comments.

24 MR. COY:

25 Second.

1 CHAIRMAN:

2 All in favor?

3 ALL SAY AYE

4 CHAIRMAN:

5 Opposed? Motion passes. The second
6 preliminary motion the Board has reviewed and
7 considered is entitled Philadelphia Entertainment and
8 Development Partner, LP, d/b/a Foxwoods Casino,
9 Philadelphia's motion to designate as confidential and
10 filed under seal Foxwood Casino and Philadelphia's
11 Motion for Summary Judgment and brief verifications
12 and exhibits in support thereof. BIE's response
13 thereto and a reply to such response and all other
14 documents or testimony filed or submitted in support
15 of any of the foregoing. As can be gleaned from the
16 lengthy title in this motion, PEDP essentially
17 requests that all the documents relating to its Motion
18 for Summary Judgment be deemed confidential and
19 sealed. Again, the Board is not going to paint with a
20 broad brush on these motions for confidentiality and
21 grant blanket protections. Rather, each document or
22 piece of evidence will be evaluated individually.
23 Again, may I have a motion?

24 MR. COY:

25 Mr. Chairman, I move the Board deny

1 PEDP's motion to designate as confidential PEDP's
2 Motion for Summary Judgment and other documents
3 related thereto.

4 CHAIRMAN:

5 Second?

6 MR. GINTY:

7 Second.

8 CHAIRMAN:

9 All in favor?

10 ALL SAY AYE

11 CHAIRMAN:

12 Opposed? Motion passes. Before we move
13 on I'd note for the record that the Board has reviewed
14 all of the documents for which this motion sought
15 confidentiality and has prepared redacted versions of
16 the Motions for Summary Judgment and Answers which
17 removes all of the information which the Board
18 believes is truly confidential. These redacted
19 versions are available for review at the Board's
20 Office of Hearings and Appeals (OHA). Taking this
21 action we believe is in the public interest and is
22 consistent with the Board's position that when
23 performing a confidentiality review, each piece of
24 evidence must stand or fall on its own merits.

25 The final motion is a bit redundant with

1 the first motion we considered in that it, too, asked
2 the Board to grant PEDP's request to have all
3 documents, exhibits, testimony and other evidence
4 produced, prepared or exchanged during Discovery be
5 maintained as confidential, including, during and for
6 the purpose of all hearings. May I have a motion,
7 please?

8 MR. COY:

9 Mr. Chairman, I move that the Board grant
10 PEDP's motion requesting all Discovery proceedings and
11 all documents, exhibits, testimony presented and other
12 evidence exchanged during the Discovery period be
13 maintained under seal. However, if any such
14 information is used in the revocation proceedings,
15 this blanket grant of protection shall be removed and
16 Counsel will have to seek confidentiality for each
17 piece of information that it feels deserving of such
18 treatment.

19 CHAIRMAN:

20 May I have a second?

21 MR. GINTY:

22 Second.

23 CHAIRMAN:

24 All in favor?

25 MR. TRUJILLO:

1 Mr. Chairman, my understanding is the
2 reason for this motion, ordinarily the parties
3 exchanging Discovery during the Discovery process do
4 not file that Discovery with the court. In this case,
5 the Discovery has been filed with the Board in the
6 ordinary course of things that which would not be
7 generally available to the public. That's the reason
8 why the Board, I think, deems it's appropriate for
9 that information not to be generally publically
10 available.

11 CHAIRMAN:

12 You are correct.

13 MR. TRUJILLO:

14 Thank you, Mr. Chairman.

15 CHAIRMAN:

16 Anyhow, where were we? Second?

17 MR. GINTY:

18 Second.

19 CHAIRMAN:

20 All in favor?

21 ALL SAY AYE

22 CHAIRMAN:

23 Opposed? The motion passes. With
24 respect to this final motion the Board understands and
25 agrees that during the course of Discovery and in

1 furtherance of the free exchange of information, that
2 the parties should be confident that the information
3 will not be readily shared. At the conclusion of
4 Discovery, however, when there is a desire to use
5 information obtained in Discovery in subsequent
6 proceedings, a fresh look at the particular
7 information can and should be performed. As a result,
8 the Board believes the parties are entitled to have
9 Discovery materials maintained under seal, but each
10 piece of evidence must stand on its own merits with
11 respect to confidentiality in subsequent hearings as
12 Commissioner Trujillo stated.

13 Having dealt with the preliminary
14 matters, we'll now call upon the OEC and Counsel for
15 PEDP to hear oral arguments on their Summary Judgment
16 Motions. The way this is going to work is that the
17 moving party will make their argument. The opposing
18 party will have a chance to respond. And then the
19 moving party can make a brief rebuttal. There are no
20 time limits on your arguments; however, we obviously
21 do have the motions, the briefs, the answers before us
22 so there is no need for Counsel to go into great
23 detail.

24 First we will hear the motion of OEC as
25 the moving party. Mr. Miller, you may begin.

1 ATTORNEY MILLER:

2 Thank you, Mr. Chairman. I'm Dale
3 Miller, that's D-A-L-E, M-I-L-L-E-R, Deputy Chief
4 Enforcement Counsel for the Eastern Region of the
5 Pennsylvania Gaming Control Board. Good morning and
6 thank you for listening to us this morning. We're
7 here for ---.

8 CHAIRMAN:

9 Mr. Miller, could you please speak up a
10 little bit or move the microphone a little closer to
11 you. There you go.

12 ATTORNEY MILLER:

13 We're here this morning for our Motion
14 for Summary Judgment. And if I had any common sense,
15 I think I'd say to the members of the Board that we'll
16 rest on the pleadings. But since I'm a lawyer, I feel
17 compelled to at least give you some argument and I
18 will this morning.

19 The reason we're here is that as you all
20 know on April 29th of this year we filed a complaint
21 against PEDP alleging four causes of action. Count
22 one is for failing to comply with Board orders of
23 September 1st, 2009 and March 3rd, 2010. That order
24 of September 1st, 2009 includes nine conditions, five
25 and six are the most important. And require PEDP to

1 submit or to have submitted architectural renderings,
2 artists renderings and any documents related to
3 construction of a facility substantially similar to
4 the one approve by the Board back in December of 2006.

5 Condition six requires PEDP submit a
6 timeline for commencement and completion of all phases
7 of construction of its facility. Condition five
8 requires PEDP, in count two, to maintain its
9 suitability. Count three, PEDP's approve facility
10 will take 22 months to build. They have until May
11 29th of 2011 which is seven months away and we
12 maintain that they cannot build that facility in the
13 time that they have available to them.

14 Count four that we filed in our complaint
15 is that PEDP is simply not financially suitable. They
16 have no funds. They have no financial backers. And
17 without additional investors they can't build a casino
18 in the appropriate amount of time. That's how we got
19 started.

20 The history of this license is that on
21 December 20th, 2006, the license was awarded by this
22 Board after a competitive process. The license was
23 issued on May 29th, 2007. Section 1210(a) of the
24 Gaming Act requires a slot licensee to open their
25 casino and make 1,500 slot machines available for play

1 within one year of the issuance of the license. PEDP
2 had at the time the license was issued until May 29th,
3 2008 to open their casino. They ran into problems
4 with local authorities who would not issue permits,
5 problems with losing applicants who appealed and other
6 opposition and problems causing delays which led PEDP
7 to believe they would not be able to open the casino
8 in time. Because they believed that, they filed a
9 petition to extend the time under Section 1202(a) of
10 the Gaming Act asking for an additional period of time
11 to open the casino. On September 1st after a hearing
12 in 2009 the Board granted that petition with nine
13 conditions, several of those conditions are again,
14 subject of the complaint.

15 Because PEDP believed it could not comply
16 in time with conditions five and six of that order,
17 they filed a petition to extend the time to comply
18 with that order. The Board heard that case and on
19 March 3rd, 2010 after Mr. Steve Wynn testified that
20 PEDP had reached an agreement with him to finance and
21 build a casino, the Board did find that PEDP had made
22 substantial progress on the conditions that they set
23 and ordered that conditions five and six be met by
24 April 26, 2010. But of course, we know that on April
25 8 Mr. Wynn called off the deal. No further documents

1 have been submitted regarding those conditions.

2 Since the complaint was filed, PEDP and
3 OEC have conducted Discovery. Discovery is limited in
4 Administrative Law, but the Pennsylvania Gaming
5 Control Board Regulations and the Administrative Law
6 Code allow limited Discovery. We took depositions in
7 this matter. We took depositions of principals from
8 Foxwoods, principals from PEDP, outside individuals.
9 Several of our agents were deposed. Sworn statements
10 were taken. Interrogatories and Answers were
11 exchanged. Both sides provided a witness list and
12 documents they reasonably believed would be introduced
13 at a hearing. That Discovery consists as you can see
14 of depositions, interrogatories, exchange of documents
15 but in addition, it's not part of the Discovery, but
16 the pleadings are also before you. The pleadings in
17 this matter being the complaint that we filed and the
18 Answer filed by PEDP.

19 Summary Judgment is a motion that's
20 permitted under law after Discovery is completed. If
21 there's no genuine issues of material fact as to
22 unnecessary element of any cause of action where added
23 Discovery or additional Discovery won't help, then the
24 party is entitled to relief. It's basically a motion
25 that allows the Board to say, there's nothing to take

1 to a Jury in this case, there's nothing to decide.
2 Everything has either been admitted or the Discovery
3 process through depositions, interrogatories and the
4 pleadings have shown that there's just no issues to be
5 decided.

6 The Board can grant summary judgment on
7 all or part of the complaint. We filed four counts
8 against PEDP. Our motion asks that all four counts be
9 granted summary judgment by this Board. That would
10 allow the Board to then fix a punishment for PEDP and
11 in our case, the punishment can be up to and including
12 revocation and that's what we ask be done in this
13 matter.

14 Additional Discovery won't change
15 anything. It won't add anything to this case. A
16 hearing won't add anything to this case. Summary
17 judgment is permitted under Board Regulation 493(a),
18 point ten, and again, it stated that after the
19 pleadings are closed, a Motion for Summary Judgment
20 can be --- and Discovery, the Motion for Summary
21 Judgment can be filed. The Board must consider the
22 pleadings and depositions, the answers, admissions and
23 any supporting affidavits by the parties. When you
24 get to a Motion for Summary Judgment, obviously we
25 haven't had a hearing. People don't testify. The

1 Board doesn't hear that testimony but either side is
2 permitted to file affidavits by parties who they feel
3 have something important to say. We filed an
4 affidavit. PEDP filed several affidavits and they
5 filed some yesterday which I will add we don't object
6 to. Those affidavits should be considered with the
7 Board along with all the other information.

8 Again, under the Rules of Civil
9 Procedures summary judgment is appropriate when there
10 are no genuine issues of material fact. And the
11 entire record is to be considered by the Board. As
12 you stated earlier, you have the entire record. We
13 ask that you consider it.

14 These are the elements that we believe we
15 have to prove on count one. We believe we've proven
16 them up to this point. These are the elements we
17 believe we have to prove on count two. We believe
18 we've proven them up to this point. These are the
19 elements we have to prove on count three. We believe
20 we've proven them up to this point. And these are the
21 elements on count four relating to general
22 suitability.

23 Suitability standards of the Gaming Act
24 are clear. PEDP argued in opposition to our motion
25 that they're unclear and that they're

1 unconstitutionally vague and that's ridiculous.
2 Suitability elements were known to PEDP prior to their
3 hearing. Their initial licensing hearing. They
4 didn't object at that time. They never objected.
5 They never objected until now. They cite cases, PEDP
6 does, that say that a statute can't be --- a statute
7 has to be understandable to the ordinary person;
8 otherwise, it's unconstitutionally vague. Well, PEDP
9 does not stand in an ordinary person's shoes. They
10 are supposed to be gaming experts. They're gaming
11 experts that understand what you have to do to be
12 suitable. They never objected to suitability when
13 they got their license. It's only when that license
14 is in jeopardy that they object to it. Gaming Act
15 Section 1313 sets it out. Our Regulation 441(a)(9)
16 sets it out. They were given notice of the
17 suitability issues and the suitability report that was
18 given to them at the initial licensing hearing. And
19 those considerations that the Board undertook at the
20 licensing hearing were upheld by the Supreme Court.
21 This Board has the authority to grant
22 this motion, has the authority to grant it under the
23 Gaming Act. You have sole authority over gaming in
24 Pennsylvania. You have the power under Section
25 1202(b)(12) to issue a license and to revoke a

1 license. In this case you have the power to do that
2 by granting this motion. Again, you have before you
3 the issues. You have before you the documents that
4 were taken in Discovery.

5 Here's the bottom line. There's a vacant
6 lot on Columbus Boulevard in South Philadelphia that
7 doesn't have a casino on it. Gary Armentrout from
8 Foxwoods, the people that were going to develop this
9 casino, testified at the licensing hearing back in
10 December, actually November 14, 2006 that it would
11 take 22 months to build a casino on that lot. That's
12 the casino this Board approved. Mr. Armentrout was
13 deposed and said recently that it would still take 22
14 months to build that casino. PEDP can come in here
15 and say we have plans, we have all kind of new plans,
16 but right now the only plan that's authorized for them
17 is to build the casino that you voted on back on
18 December 20th of 2006. That casino takes 22 months to
19 build. They have until May 29th, 2011 to build it.
20 And they can't do it. They absolutely can't do it.

21 PEDP's defenses to this complaint are
22 inappropriate and irrelevant. Their defenses to this
23 complaint are it's not fair, it's not our fault.
24 Steve Wynn pulled out and it just wasn't our fault.
25 We tried to build a casino but somebody else stopped

1 us. These aren't defenses. They're pleas for
2 sympathy and they might be pleas to you to reduce the
3 penalty in this case which we believe is revocation.
4 But they're not defenses to the counts and the charges
5 against them. It's just that simple. There's no need
6 to send this case to a hearing. Representatives of
7 PEDP and Foxwoods have admitted they can't build the
8 casino in time. There's been no petition in front of
9 you showing a different plan for a casino. There's
10 been no petition in front of you asking for more time.
11 They have until May 29, 2011 to build the casino they
12 were authorized to build and they can't do it because
13 they don't have the money to do it. They don't have
14 the financial backers to do it.

15 PEDP may tell you and we had people come
16 in in depositions and tell us that they felt PEDP was
17 financially suitable because they had the ability to
18 borrow money. They own a piece of land which is
19 mortgaged to the hilt. They have the ability to go to
20 a bank and ask for money. Sure, I can do that also.
21 That doesn't mean they have the finances to build the
22 casino. They don't. They never say anywhere in their
23 responses to the pleadings, in their depositions,
24 interrogatories, anything in the Discovery that we
25 took that said we have the finances today to build

1 that casino. Because they don't have them, it's just
2 that simple. And because they don't have the
3 finances, they have no plan. Because they have no
4 plan, they're unable to comply with the Board's
5 conditions. Because they haven't complied with the
6 Board's conditions, they're subject to revocation.

7 They signed a Statement of Conditions
8 when they got this license. That Statement of
9 Condition says we will maintain our financial and
10 operational suitability. It also said we'll obey all
11 and we'll carry out all orders of the Board. They
12 haven't done it. The complaint, the Answer, the
13 pleadings, the Discovery, the depositions, the
14 interrogatories all show there's no issues here. We
15 ask the Board to grant this Motion for Summary
16 Judgment and revoke the slots license of PEDP. Thank
17 you.

18 CHAIRMAN:

19 Thank you. Counsel for PEDP, your
20 response.

21 ATTORNEY COZEN:

22 Thank you very much, Mr. Chairman. Steve
23 Cozen together with Fred Jacoby and Bob Graci on
24 behalf of PEDP. Preliminarily, we appear before you
25 as a quasi judicial body to determine whether on the

1 basis of undisputed facts and the basis of clear law
2 the BIE can strip us of our license without so much as
3 an evidentiary hearing in the case of first
4 impression.

5 We are also here because of our Motion
6 for Summary Judgment. I'm going to argue both
7 together my opposition to theirs and my advocacy for
8 ours. Because we seek dismissal of the complaint for
9 revocation on two legal grounds. First, you can't
10 look at this case or the law or the regulations
11 without looking to their constitutionality. The
12 Constitution entitles us to know the legal standards
13 by which we are to be judged and neither the Gaming
14 Act nor the Regulations define or give objectivity to
15 some newly defined term by the BIE which is
16 maintenance of financial fitness and suitability. I
17 dare you to find that language in any one of the
18 sections that they have cited or in any regulation
19 that you have issued or in any condition of our
20 license. And I'll get to that.

21 But in any event, the BIE has refused to
22 define financial fitness and suitability and the
23 standard is therefore void for vagueness. Now make no
24 mistake about it, PEDP is and remains financially fit
25 and suitable because it continues to have the

1 wherewithal to continue operations and to secure
2 funding, financing and development skills to complete
3 the casino project for which it was licensed. And if
4 you stop and think about it you'd know that within a
5 period of six months we have brought two world-class
6 casino operators with money to the table. Mr. Wynn
7 back in March and April and now Harrah's. As you know
8 we have entered into a term sheet with Harrah's. It's
9 an entity well-known to this Board. It's licensed by
10 you. It's contributing on an everyday basis to their
11 surrounding community. And is highly regarded as an
12 operator and a manager.

13 Second, the law on public policy of the
14 Commonwealth simply do not permit the Board to impose
15 the ultimate sanction of license revocation because we
16 were for a time unable to meet three conditions of
17 your September 1, 2009 order. As you recognized, Mr.
18 Chairman, when you wrote the adjudication back in
19 March, there was no question about the fact that we
20 had demonstrated substantial compliance with those
21 conditions. I submit that any fair reading of the law
22 and the record requires granting our Motion for
23 Summary Judgment.

24 Now, I want to make it clear before this
25 Board that PEDP appreciates and has always appreciated

1 the Board's frustration that the casino has not been
2 built and commenced operations. PEDP whose partners
3 have sunk over \$160 million into this project is
4 equally frustrated that it has fallen victim to market
5 conditions, the improper opposition of others,
6 recognized by this Board in its adjudication granting
7 our extension of time. And by our Supreme Court. And
8 has neither realized any return on anyone's
9 investment, nor has been able to contribute millions
10 to charity which some of its partners envisioned and
11 jobs and tax revenues to the city and the state.

12 With all due respect, members of the
13 Board, our frustration and yours is not a substitute
14 for the rule of law. And that's what we're really
15 here about today. You see, the crux of BIE's
16 complaint, now I'll respond a little bit later on to
17 some of Mr. Miller's comments, but the crux of BIE's
18 complaint for revocation is in counts two and four in
19 which it asserts that PEDP's license should be revoked
20 and its \$160 million investment completely destroyed
21 because it has not yet closed on the funding and
22 financing necessary to complete development of its
23 licensed casino. The essence of the argument is,
24 we're upset by the fact that you haven't performed as
25 expected even if you were victimized by the financial

1 markets, by the city or by Steve Wynn, so we're going
2 to take your license away. No matter that there is no
3 statutory or regulatory standard by which we can
4 measure your fitness and suitability as a licensee.
5 No matter that we have demonstrated the wherewithal
6 twice now to deliver a legitimate project, developers
7 and operators to the table. No matter that the Board
8 has the ability to extend our time to commence
9 operations until December 31, 2012 which we made clear
10 we were going to ask for when we had Mr. Wynn here
11 back in March of this year.

12 No matter that we can deliver thousands
13 of jobs and tax revenues to the city and state. Or
14 that an alternative process, including exhaustion of
15 all of our appellate rights would take three to five
16 years. We're upset, you've got to go, whether the law
17 requires it or not. No matter that we as is any
18 litigant licensee entitled to due process, full and
19 meaningful Discovery and a hearing to resolve genuine
20 issues of material fact, we will shortcut the process,
21 apply an undefined standard and strip you of your
22 license even though our precedent is to the contrary
23 because we're upset.

24 We respectfully suggests, members of the
25 Commission, that even justifiable frustration that you

1 and we both feel does not supplement or change the
2 rule of law, that licensees are entitled to due
3 process. That hard work and painstaking negotiations
4 have brought to the table a good deal with a licensed
5 operator and a builder of great repute. A lender
6 willing to restructure debt and take an equity
7 interest in the deal. And that at the very least
8 there are either genuine issues of material fact which
9 preclude revocation as a matter of --- or the
10 complaint should be dismissed because it is premised
11 on an unsupported, untenable and wrong view of the
12 legal standard to be applied.

13 Given the nature of the proceeding and
14 recognizing that in sitting as a quasi judicial body
15 for purposes of determining questions of law, the very
16 essence of summary judgment, it's incumbent upon me to
17 make a complete record and argue the law to you. And
18 I hope you'll give me that opportunity and I'll do it
19 as briefly as I can.

20 At the same time, however, I recognize
21 that it is also my job to deal with you as a
22 regulatory body and to demonstrate to you that there
23 are either, either no genuine issues of material fact
24 which preclude you from dismissing the revocation
25 complaint as a matter of law, or there are genuine

1 issues of material fact which absolutely preclude you
2 from granting summary judgment to the BIE and taking
3 away a \$50 million license and destroying an already
4 existing \$160 million investment without so much as an
5 evidentiary hearing. Please bear with me as I try to
6 do both at the same time and in the time that you've
7 allotted.

8 Now, for the record, let me state a
9 couple of caveats. To the extent I do not touch upon
10 one or more of the alternative arguments which support
11 our position, it does not mean we abandoned that
12 position but rather that we rely upon our memoranda of
13 law and the record in this case in that regard and
14 your acknowledged diligence in reading it and
15 understanding it. Also, as a second caveat, the fact
16 that I appear before you today to make these
17 arguments, though my client has been consistently
18 denied the most basic meaningful Discovery is not nor
19 should it be taken as a waiver of our due process
20 rights which we believe have been denied and which we
21 now once again reserve.

22 So let's start with what's really at the
23 heart of the BIE's complaint, the heart of the
24 question. What is financial fitness and suitability
25 of a licensee --- not an applicant. We're a licensee.

1 Both the Gaming Act and the regulations do nothing
2 more than express this concept in the most conclusory
3 fashion and provide no concrete meaningful standard
4 for the licensee or the Board to objectively apply.
5 Such a standard, the sole dispositive standard
6 asserted by BIE in counts two and four is
7 unconstitutionally vague and therefore void. BIE, if
8 you'll note when you read their papers, primarily
9 relies upon Section 1313(a) of the Gaming Act which
10 purportedly establishes the standard for evaluating
11 financial fitness and suitability.

12 Now, you can read it, I won't worry about
13 reading it to you right now. It applies to applicants
14 and it doesn't say what I just said they say. That
15 statute provides no meaningful guidance whatsoever as
16 to what a licensee must do to maintain financial
17 fitness or suitability or how the Board is to evaluate
18 a licensee's continued financial fitness or
19 suitability. You can see that there are issues of
20 fitness and suitability and honesty and integrity that
21 are all encapsulated as a licensee in condition five
22 of our license, and I'll refer to that later. But the
23 specific language that the BIE is relying upon either,
24 A, applies to a licensee or B, is defined in any way,
25 shape or form by the Act or the Regulations

1 promulgated by this Board.

2 Now, I didn't make the law, it is what it
3 is. Under the state and federal constitutions PEDP is
4 entitled to know the meaning of the laws and the
5 standards it is being judged by. If the laws are so
6 vague that someone like us can't understand what they
7 mean, or the standards they impose, then a regulated
8 party such as us cannot be sanctioned for allegedly
9 violating a law that is so vague that a party had no
10 notice so as to reasonably conform its conduct.

11 I'm going to get to it but remember
12 again, what they said throughout their arguments, and
13 it's kind of changed from time to time, what my
14 colleague had said today is still the guts of it.
15 They don't have funds in their pocket to build this
16 thing today. That was a standard nobody would pass
17 muster. And no standard has been articulated in that
18 regard in the law or in the regs.

19 Now, the Pennsylvania courts, gentlemen,
20 have set forth two tests as to whether a law passes or
21 fails vagueness review. The statute or regulation is
22 unconstitutionally vague if it traps the innocent by
23 failing to give a person of reasonable intelligence
24 the opportunity to know what he may or may not do.
25 Or, or, results in arbitrary and discriminatory

1 enforcement in the absence of explicit guidelines for
2 its application. The United States Supreme Court has
3 explained that if arbitrary and discriminatory
4 enforcement is to be prevented, laws must provide
5 explicit standards for those who apply them. A vague
6 law impermissibly delegates basic policy matters to
7 policemen, to judges, to juries, for resolution on an
8 ad hoc and subjective basis with the attendant dangers
9 of arbitrary and discriminatory application.

10 Here it is apparent that the conclusory
11 statutory requirement that the BIE relies upon and
12 similarly conclusory language in condition five which
13 never once says maintenance of financial fitness and
14 suitability, whatever that means, that it does nothing
15 to expound on what the requirement and the elements
16 are and what standards apply in evaluating whether the
17 requirement has been met. It fails to provide any
18 meaningful standard both for PEDP to perform and to
19 conform its conduct or more importantly, quite
20 frankly, for this Board in this context to guide and
21 constrain its discretion. It is therefore,
22 unconstitutionally vague as applied to PEDP in this
23 case.

24 The bottom line, gentlemen, is that PEDP
25 cannot, I submit, be deprived of its license under an

1 undefined nebulous standard which fails to pass
2 constitutional muster. There are two legal
3 propositions which govern here. The laws must be
4 sufficiently definite to give meaningful notice as to
5 what they proscribe, the courts of this Commonwealth
6 and the United States have long provided for
7 constitutional vagueness review. We've cited all the
8 cases at page 19 of our Memorandum of Law. Vague laws
9 are unconstitutional and violate due process of law
10 where an ordinary citizen in our situation cannot
11 understand all that the law may require of them in its
12 application. The teaching of the Supreme Court is
13 particularly relevant here.

14 The Supreme Court in the Grayned versus
15 City of Rockford case, and I'm just going to quote
16 part of what they said. They stated as follows: If
17 arbitrary and discriminatory enforcement is to be
18 prevented, laws must provide explicit standards for
19 those who apply them. A vague law impermissibly
20 delegates basic policy matters to policemen, judges
21 and juries for resolution on an ad hoc and subjective
22 basis with the attendant dangers arbitrary and
23 discriminatory application. That's what we have here.
24 Vagueness review protects a regulated party from a
25 decision by the regulating agency or board based upon

1 purely subjective criteria. I'll get to why they
2 admit that it's purely subjective criteria in a
3 moment.

4 And unfortunately, that criteria can
5 derive from our own personal predilections, our own
6 professional lives. That's not a constitutionally
7 permissible standard. Because where there is such
8 incomplete guidance by the decision-maker, the risk of
9 arbitrary determinations makes that language
10 unconstitutionally vague. Bottom line is that if a
11 phrase is subjected to different meanings, it cannot
12 be used to refuse to grant a right or worse, to strip
13 someone of a right.

14 Section 1313(a) and condition five of the
15 license offer absolutely no meaningful concrete
16 standard for evaluating financial fitness and
17 suitability. Or to act as a guide to a licensee. Nor
18 do they constrain the Board's discretion in assessing
19 the licensee's continued fitness and suitability from
20 an objective standpoint. And this Board's discretion
21 by law must be constrained to follow the specific
22 dictates of the law.

23 The other sections that evidently they're
24 not going to rely upon but are mentioned in their
25 memoranda don't even address the issue of financial

1 suitability, they address issues of honesty and
2 integrity. Moreover, the very limited Discovery which
3 is basically them giving us back the documents that
4 we've given them over the years and a couple of
5 limited, limited depositions, that limited Discovery
6 that PEDP was allowed included the depositions of
7 Agents Morace and Dobbins. We've made clear what they
8 testified to on our papers. It made clear that there
9 are no meaningful standards to evaluate a licensee's
10 financial fitness and suitability by which we are to
11 be judged. They said well, financial suitability
12 means financial suitability.

13 That's not a constitutionally permissible
14 standard. We are left with nothing more than a
15 conclusory statement that we must maintain financial
16 fitness and suitability so the Board can make that
17 determination on an ad hoc basis according to your own
18 personal views and in a vacuum created by the lack of
19 standards to guide decision-making. That is the meat
20 and potatoes of unconstitutionally vague language and
21 denial of due process of law. Having argued before
22 the Supreme Court I have little doubt that they would
23 agree with everything that I have said on this subject
24 matter to this point. For this reason alone counts
25 two and four of the complaint should be dismissed as a

1 matter of law and summary judgment should be entered
2 for PEDP.

3 Additionally, this court in order to
4 maintain fair adjudicatory process and due process and
5 compliance with stare decisis really shouldn't judge
6 us any differently and may not judge us any
7 differently than PITG. We know what happened with
8 PITG. And we know that the Board found in its
9 adjudication with respect to PITG that it had secured
10 necessary funding and financing to develop its casino
11 at the time it applied for licensure. But subsequent
12 events forced it to secure alternate funding and
13 financing to complete the project. The Board allowed
14 PITG the time it needed to secure that alternate
15 funding and financing and did not find that PITG had
16 failed to maintain financial fitness or suitability.

17 If my recollection serves me correct, you
18 guys could correct me if I'm wrong, but I think we
19 have a pretty good idea what went down with PITG
20 because we had some related representation in there.
21 Credit Swiss pulled their funding and said we're
22 taking over your position. Nobody said you're not
23 financially fit and suitable. They might have been.
24 Because I'm not sure they had the wherewithal at that
25 time to really complete the project, except that it

1 was under construction, and I'll get to that in a
2 moment.

3 In contrast, however, to the
4 accommodation made to PITG, the BIE here is
5 inconsistently contending that PEDP has failed to
6 maintain fitness and suitability and wants to revoke
7 our license. This is an inconsistent adjudication
8 which would violate due process of law and fundamental
9 public policies underlying foundational American
10 jurisprudential policies of stare decisis. And by the
11 way, if the Board please, please note that by arguing
12 that PITG, in their papers, that PITG was different
13 because it was under construction even though it had
14 lost its financing, its builder had walked off the
15 job, it couldn't complete the project, what BIE is
16 conceding is that this is as, and I'll get to it in a
17 second, that Commissioner Ginty and Mr. Pitre had a
18 little conversation back on March 3rd at the hearing
19 that Mr. Wynn testified at about PITG.

20 But what the BIE is really conceding is
21 that the real issue is timely delivery of a project.
22 That either makes the two cases identical and
23 precludes summary judgment on revocation because it
24 didn't happen there, or it raises a genuine issue of
25 material fact which requires the denial of their

1 motion for summary judgment and an evidentiary hearing
2 with regard to are there meaningful differences in the
3 facts.

4 You recall, Commissioner Ginty, you had
5 that conversation with Mr. Pitre and we cited it in
6 our brief about how similar these two situations were.
7 Like PITG, PEDP had a commitment for financing from
8 Merrill Lynch sufficient to develop the licensed
9 facility at the time it was awarded the license. Like
10 PITG we had already invested substantial financial
11 resources in developing our license. In fact, we have
12 to this date invested more than they ever had, \$160
13 million. Like PITG we were unable to conclude a prior
14 definitive financing agreement. Like PITG PED was
15 also faced by the significant deterioration in the
16 credit markets from 2006 virtually to the present
17 date, although they're loosening up as we know today.

18 Like PITG, PEDP, too, was forced to seek
19 new equity funding and debt financing to complete
20 development of its licensed casino. And like PITG
21 PEDP face difficulties in its negotiations to secure
22 new funding and financing for its project which
23 required PEDP to continue to negotiate the proposed
24 transaction with Wynn over time and ultimately for
25 reasons still unbeknownst to us but permitted under

1 the agreement, Mr. Wynn pulled the plug to have to go
2 out and find somebody who could still do that job.

3 In addition to the difficulties that face
4 PITG, PEDP had the additional impediments caused by
5 government and citizen groups obstructionism which
6 this Board has already laid out in detail, I needn't
7 reread your words to you, Commissioner Fajt, Mr.
8 Chairman, but you laid it out in your adjudication of
9 September 2nd and recognized that that obstructionism
10 was an interference that was so severe and disruptive
11 as to merit the maximum then available extension of
12 the opening date for the casino.

13 In PITG the Board did not find that PITG
14 had failed to maintain financial fitness and
15 suitability. But rather afforded PITG sufficient time
16 to close an alternate funding and financing.
17 Consistent with due process and decisional consistency
18 the Board is absolutely bound to reach that same
19 decision here. Given that there is no financial
20 fitness or suitability standard defined in the Gaming
21 Act or Regulations and that the only references to the
22 standard which do exist at all, not definitions but
23 references, in the law relates only to applicants and
24 not licensees. Even if the Act were to pass
25 constitutional muster which it does not, still the BIE

1 suggests an illogical unsupportable and unsupported
2 test, do you have the current ability today to self-
3 fund a casino project in a timely way. That cannot be
4 the test, nobody would be able to pass it.

5 Extrapolating from PITG and the Station
6 Square case which the Supreme Court rejected the
7 objections to the granting of the license to the PITG,
8 clearly the focus of the requirement is not whether
9 PEDP at this instant has financing in place on its own
10 to complete development of the casino. Nothing in the
11 Act or the regs or the case law supports such a
12 fatally flawed and illogical notion. The financial
13 fitness and suitability inquiry must focus on PEDP's
14 wherewithal. Do they have the wherewithal to continue
15 operations and sustain their efforts to close on an
16 agreement with a development partner thereby securing
17 the funding and financing to complete the project.
18 The uncontradicted facts demonstrate that PEDP not
19 only has such wherewithal, but it has delivered on it.

20 We filed as my colleague said under Rule
21 1035 affidavits in support of our Motion for Summary
22 Judgment in contra to theirs, as well as affidavits
23 which supplement discovery which are required by the
24 rules. We couldn't file them until yesterday because
25 we couldn't deliver all the signed and executed

1 commitments and documents and everything to Mr. Pitre
2 until yesterday morning. But we told him last Friday
3 what we had.

4 I would refer you to --- and this is fine
5 in terms of transparency, no objection, we want it to
6 be public. Probably most of the stuff that you ruled
7 on today, it's going to be public. We'd like it to be
8 public. Mr. Jacoby, who's had a daily relationship
9 with this project, I'm not sure whether he thanks me
10 or condemns me for that, but he's had a daily
11 relationship with this project, and paragraph nine of
12 his affidavit says the following. This process
13 resulted in PEDP entering into a term sheet with a
14 subsidiary of Harrah's Entertainment, RBS Citizens
15 National Association, Citizens Bank, certain other
16 parties providing for, among other things, A, the
17 restructuring of PEDP provided, however, that
18 representatives of new equity investors will have a
19 role in the governance of the partnership. B, an
20 incremental capital investment of \$275 million in the
21 project including a substantial new equity commitment
22 that includes equity from the current partners of WPI
23 or their affiliates, a new project debt bringing the
24 total investment in the project to approximately \$438
25 million including previously expended capital. C,

1 restructuring of the existing Citizens Bank debt. D,
2 the conversion of Harrah's debt to equity in PEDP, the
3 amount allowed under the law. And E, the development
4 construction operation and management of the proposed
5 casino by Harrah's. And F, payments for the benefit
6 of charitable organizations upon the opening of the
7 proposed casino and thereafter annually from the net
8 revenues earned from the operation thereof. These
9 payments are significantly enhanced over those
10 ultimately available under the arrangements attendant
11 to the original licensure of PEDP.

12 In paragraph ten, Mr. Jacoby continues.
13 The term sheet, a copy of which with related documents
14 has been submitted to BIE on a confidential basis,
15 specifically provides and contemplates that the
16 parties will prepare and execute definitive documents
17 promptly, which will be submitted to BIE for their
18 review and comment. One of the closing conditions
19 under the definitive documents will be the receipt of
20 all required approvals for the proposed transaction
21 from this Board.

22 As it's evident from the term sheet, the
23 resulting transaction will provide PEDP with the
24 funding and financing to complete the project and
25 clearly confirms and establishes that PEDP has, at all

1 times relevant to its license, the wherewithal to
2 effectuate its commitments with respect to the
3 license. At the same time, and directly addressing my
4 colleague's comments, Mr. Miller's comments, is an
5 affidavit from Dan Keating. The Board is familiar
6 with Mr. Keating and Keating Building Corporation.
7 And he goes through and describes what he has been
8 working on for quite some time and what he has done in
9 terms of design, plans, timelines, et cetera, the
10 permits that he needs. A lot of this material has
11 been delivered to Mr. Pitre so that he has --- can
12 take a look at it appropriately. And Mr. Keating
13 concludes by --- in his affidavit by saying, based
14 upon our efforts to date, it is clear to Keating that
15 the investors in and principals of PEDP have a firm
16 commitment to the development and construction of the
17 proposed casino, based upon the scope and timelines
18 referenced above and as such, Keating is --- Keating
19 is highly confident that the subject project as
20 contemplated can and will be designed and constructed
21 as outlined above on a timely basis. That project
22 conforms, as did Sugarhouse. This project conforms to
23 the license that was given in the original application
24 that was made for that license.

25 We have demonstrated at about

1 constitutional, which I still say wipes this thing
2 out. Forget about PITG and your obligation to follow
3 it, which I say wipes this thing out. But we have
4 demonstrated in commonsense terms the wherewithal.
5 Either we pass the test, or if we don't as a matter of
6 law, then there is a need for an evidentiary hearing
7 to make that determination.

8 Now, with respect to counts one and
9 three, I'll remind you, counts one and three are we
10 entered an order on September 1, we continued it in
11 our February order. You've met all the conditional
12 requirements except four, five, and six, but you
13 haven't met four, five, and six recently, so we want
14 to take your license away.

15 With respect to counts one and three of
16 the revocation complaint, there are some basic
17 principles of Pennsylvania law which govern the
18 outcome that were not referred to by Mr. Miller, but I
19 need to refer to them because they govern what you as
20 an adjudicatory body, and I'm sure Mr. Sherman will
21 confirm this, have the ability to do. First, punitive
22 sanctions, especially those which are not proportional
23 to the failure to meet the conditions of an order
24 where other alternatives are available may not be
25 imposed for violation of a coercive civil order, where

1 compliance with the order is impossible despite good
2 faith efforts. Second, the law and strong public
3 policy of this Commonwealth abhors a forfeiture. And
4 third, lesser rather than greater sanctions are always
5 favored where they achieve the agency's objectives.
6 And that's the Hui case and it needs to be read.

7 In light of what we all seek to achieve
8 by compliance with conditions four, five, and six of
9 the September 1, 2009 order and given the Board's
10 prior conduct in similar situations such as PITG, the
11 maximum sanction of revocation, because since April we
12 haven't re-met four, five, six, and are about to
13 embark to do so now, is simply unjustifiable and
14 unsupportable, especially where it is clear that any
15 non-compliance is solely due to a temporary inability
16 to comply despite our best efforts, and substantial if
17 not complete compliance previously. Weighing
18 reporting requirements on the one hand against the
19 loss of \$160 million investment on the other, the law
20 will simply not countenance a forfeiture.

21 Now, Mr. Miller says they're not fit and
22 suitable because they've got 22 months to --- it takes
23 22 months to build. Of course Mr. Keating, I think,
24 has said 20 months, but give or take two months.
25 Twenty-two (22) months to build, you can't do it by

1 May of '11. Well, my recollection is twofold. One,
2 when we came here for Wynn, we said one of the
3 conditions is we've got to get the extension that the
4 Gaming Act now permits for good cause shown, it's up
5 to you, we have to prove our case in that regard. But
6 for good cause shown, the Gaming Act under Section
7 1210 gives you the leeway of giving us until December
8 31, 2012 to get this thing up and running. And if Mr.
9 Keating is right about 20 months, we can do it before
10 then.

11 And we have a motion. We have a motion
12 --- I don't know why nobody has referred this,
13 referred to it. On June 1, we filed a motion seeking
14 an extension of time to comply with conditions four,
15 five, and six. In your judgment and wisdom, you said,
16 well, we'll hear that motion but we're not going to
17 hear it now. We're going to hear it when we hear all
18 of the evidence with regard to revocation, so it's
19 premature. You haven't yet heard it. And we have
20 good cause. We're prepared to show that we have good
21 cause, particularly with the arrangement that we now
22 have with Harrah's and based upon Mr. Keating's
23 timelines. I think that you all know that we had
24 justifiable reliance upon --- maybe improved reliance,
25 but justifiable nonetheless, upon the fact that we had

1 a deal with somebody who had the money to do what we
2 needed to do back in March and April, and
3 unfortunately he pulled the rug out from under us. My
4 recollection of his testimony was that he felt bound
5 to comply with the term sheet in good faith. He in
6 fact went to definitive documents very quickly and he
7 --- and they executed them. He had all the plans and
8 specs and timelines, and he said he could finance it
9 out of his pocket but he would finance it through bank
10 debt as well, and then he pulled the rug out from
11 under us. So we were in substantial compliance
12 before, and we had justifiable reliance upon the
13 representations that Mr. Wynn and his organization
14 made to us.

15 Permit me to say a word, and I need to do
16 this, Mr. Chairman, if you'll bear with me. I need to
17 do this for the record, because in their brief, the
18 BIE has taken a very unique and unusual position as a
19 complainant with regard to the issue of burden of
20 proof. But permit me to say a word about the rather
21 legally absurd notion that the parties seeking to
22 revoke a license or to deprive someone of a valuable
23 property right does not have the burden of proof and
24 persuasion as to each and every allegation of its
25 complaint. The assertion by the BIE is that PEDP has

1 the burden of disproving its allegation. That stands
2 Pennsylvania law on its head and is contrary to
3 decades of clear legal precedence, see the Hui case,
4 H-U-I. Plain as day. Commonwealth agencies are held
5 to the same time-honored standard. Hui brings the
6 complaint, has the burden of proof. And this rule is
7 specifically applicable in administrative licensure
8 revocation proceedings.

9 This new, novel, and rather tortured view
10 of who has the burden of proof is cavalierly asserted
11 by the BIE as follows. Follow this, please. Although
12 we are the complainant, says the BIE, we don't have to
13 prove our case. Rather, PEDP has to prove that we
14 can't prove our case. This is not now, nor has it
15 ever been, the law of Pennsylvania. And I must note
16 in passing that the BIE, in its papers and again today
17 in its PowerPoint, has made much of the elements of
18 proof. It contends it must be met to prove or
19 disprove its claims. It says we have to disprove its
20 elements of proof. The problem is that BIE has
21 created these elements of proof out of whole cloth.
22 PEDP has no legal obligation to proffer evidence that
23 BIE has not satisfied these elements. Such alleged
24 elements stem from no cited case authority, no cited
25 statutory authority, no cited regulation. They simply

1 are a creation of the BIE in its musings.

2 Burdens of an applicant, an applicant
3 under Section 1310(a)1 and 1313(a) and (b), people
4 asking to be licensed do not, by their very terms,
5 apply to a licensee whom the agency is trying to strip
6 of his license. The Hui case makes that abundantly
7 clear. Here, BIE goes even further than the approach
8 rejected in Hui and asks this Board without basic law
9 to require BIE to not only disprove its allegations,
10 but to do so in the vacuum which has been created by
11 an unconstitutionally vague standard. That can't
12 stand and it won't stand review by the Supreme Court.
13 No applicable statute, rule, regulation, or
14 established case law would permit shifting the burden
15 of proof and making it a burden to disprove. As this
16 position of the BIE fails, so must its entire flimsy
17 house of cards that they have tried to build upon
18 collapse.

19 Finally, and since the burden of disproof
20 does not rest with PEDP, the point is moot but BIE
21 insists upon talking about clear and convincing
22 evidence. With all due respect to Commissioner
23 Trujillo, which when we said we thought you were wrong
24 in a prior hearing, it's wrong, clear and convincing
25 evidence, yes, when you're an applicant. Clear and

1 convincing evidence as a licensee? Uh-uh (no).
2 That's no burden of the licensee. That elevated
3 standard of proof rests upon an applicant in
4 specifically designated areas, grant or renewal of a
5 license. This has nothing to do with revocation.
6 There is no law to support that. Since the rule
7 appears only with regard to granting or renewing a
8 license, under the law you must draw an irrefutable
9 inference that it cannot otherwise apply.

10 Now, I'll reserve a few minutes for
11 rebuttal after my colleague responds, and I won't go
12 into all of the disputed facts, but I would refer you
13 to pages 10 and 11 of our --- or excuse me, pages two
14 through five of our Memorandum of Law which set out
15 all of the factual disputes that we have. If those
16 disputes of fact are material, and I think some of
17 them are because they deal with Mr. Armentrout's
18 testimony with regard to the capabilities of PEDP to
19 bring about a result here. They deal with Mr.
20 Armentrout and Mr. Ford's testimony with regard to
21 PEDP having the wherewithal to continue on and
22 continue on and find a new investor and a new operator
23 and a new developer. They refer to PEDP's
24 relationship with Citizens Bank which obviously is
25 okay and ongoing and agreed --- with an agreement from

1 Citizens to restructure their loan. They refer to our
2 relationship with the City of Philadelphia. We don't
3 owe the City of Philadelphia one dime in taxes. All
4 our taxes have been paid. They may dispute that. I'd
5 like to see the proof. I haven't seen it. We have an
6 agreement with the city, a settlement agreement with
7 the City of Philadelphia that doesn't require a dime
8 of taxes to be paid until January of 2011 and then we
9 have a real issue with them as to whether or not we
10 owe them anything. So we're up to date. They also
11 testified that the partners in PEDP have not only
12 invested but have loaned millions of dollars to the
13 partnership in order that it have the wherewithal to
14 bring this project to fruition.

15 Now, I'm going to conclude, and I'm sure
16 you're thankful that I'm going to conclude, but before
17 I do, I want to respond to one or two things that Mr.
18 Miller said. I think he conceded that if you look at
19 1310 or 1313, it doesn't say anything about
20 maintenance of financial fitness or suitability. And
21 it doesn't say anything about it with respect to a
22 licensee, it talks about applicants. But it did
23 mention condition five. I think that's appropriate.
24 So let me go to condition five. One of the conditions
25 of our license is to exercise due diligence to ensure

1 at all times that PEDP meet and maintain the
2 suitability requirements of the Act, including but not
3 limited to those relating to good character, honesty,
4 integrity, and financial fitness. What does that tell
5 you about how you test suitability and financial
6 fitness? It doesn't. It gives you an aspirational
7 obligation to exercise due diligence to make sure that
8 you have the wherewithal at all times to go forward
9 and complete the project. The question is whether the
10 project can or cannot be completed in a reasonable
11 time that is allowed by law. We have to make the case
12 to you when Mr. Pitre is finished with his review, and
13 we can file our applications with our definitive
14 documents. We have to make the case to you that we
15 can do it. If we can demonstrate to you good cause to
16 let us do it on or before, substantially before, as
17 allowed by Section 1210, December 31, 2012.

18 Now, Mr. Miller also says that there is
19 no need to have the hearing, that it's apparent on its
20 face, and I quote, they have no funds of their own to
21 build. When was that a standard? Who made that up?
22 What regulation, Mr. Miller, says that? What
23 statutory provision says that? The bottom line
24 conclusion on the basis of the record before you is
25 that summary judgment as a matter of law should be

1 entered in favor of PEDP as to counts two and four.
2 Since neither the Gaming Act nor the implementing
3 regulations express anything other than a concept, not
4 a concrete, meaningful standard for a licensee to
5 maintain financial fitness and suitability, nor for
6 the Board to objectively analyze whether the licensee
7 has done so. Such a clearly constitutionally vague
8 standard cannot be the basis for revoking our license.
9 The law will not permit it.

10 Moreover, given the Board's application
11 of such a standard to PITG and the result it reached
12 in such a strikingly similar matter, it must apply the
13 same standard here even assuming arguendo that it
14 wasn't unconstitutional because its failure to do so
15 would be a failure to --- and its failure to do so
16 even in light of the fact that we have not been
17 allowed any discovery is not only unconstitutionally
18 discriminatory unfair, but requires as a matter of law
19 that the Board grant our motion, deny BIE's motion
20 consistent with the adjudications in PITG and Station
21 Square.

22 At worst, at the very worst, if it passes
23 constitutional muster, if you're not bound by PITG,
24 which I contend both of which are the case,
25 nevertheless at worst both the application of this

1 undefined standard in PITG and the fact that PEDP has
2 at all times demonstrated and clearly passed the
3 wherewithal test, which I have articulated, means that
4 at worst there is a genuine issue of material fact
5 with precludes the entry of summary judgment and
6 requires an evidentiary hearing.

7 Now, as to counts one and three of the
8 complaint, the law could not be clearer. Good faith
9 efforts to comply with three conditions which were
10 already complied with once and which now, through no
11 fault of PEDP, require compliance again, vitiate any
12 effort to apply the excessively draconian and
13 unwarranted sanction of revocation. A temporary
14 inability to comply with an order despite one's best
15 efforts has never, under Pennsylvania law, satisfied a
16 holding of contempt, let alone the stripping of a \$50
17 million license.

18 For all of the reasons which I have
19 attempted to articulate to you this morning, and I
20 thank you for your patience and your attention in
21 hearing me, and given the status of the project that
22 we know exists today, as a matter of record, I
23 respectfully suggest that the Board one, grant PEDP's
24 motion for summary judgment and dismiss counts two and
25 four of the complaint; two, deny the BIE's motion for

1 summary judgment in its entirety, and three, postpone
2 any evidentiary hearing on counts one and three, if
3 necessary at all, until such time that our motion for
4 an extension of time to comply is scheduled to be
5 heard by the Board. Thank you, Mr. Chairman.

6 CHAIRMAN:

7 Thank you, Mr. Cozen. Mr. Miller, any
8 rebuttal?

9 ATTORNEY MILLER:

10 Just briefly. I'll say this. Mr. Cozen
11 is a good lawyer and he does what good lawyers do.
12 When you don't have the facts on your side, you argue
13 the law. In this case, he doesn't even have the law
14 on his side. Mr. Cozen and PEDP have the nerve to
15 come in here and tell you they don't understand the
16 Gaming Act. They don't understand it. They got a
17 license but they don't understand how they got the
18 license. That argument and PEDP's argument in this
19 whole case is flawed.

20 Now, I would ask PEDP, have they been to
21 that lot on Columbus Boulevard and Reed Street,
22 because I'll tell you, I've been there. And what's in
23 that lot is what's in their argument. It's full of
24 weeds and rubbish. That's it. The Supreme Court,
25 which Mr. Cozen didn't cite, tells us how a law can be

1 constitutionally vague. It also tells us how it
2 applies to people, and what they said in the Supreme
3 Court is that the degree of vagueness that the
4 Constitution tolerates as well as the importance of
5 fair notice and fair enforcement depends in part on
6 the nature of the enactment and that's the law.
7 Economic regulation is subject to a less strict
8 vagueness test because its subject matter is narrow
9 and because businesses which face economic demands to
10 plan their behavior carefully can be accepted --- can
11 be expected to consult relevant legislation in advance
12 of action. The regulated enterprise may have the
13 ability to clarify the meaning of the regulation in
14 its own inquiry or by resort to an administrative
15 process. They're held to a higher standard. They're
16 telling you they come in here with the ordinary
17 person's shoes on. That's not true. They're held to
18 the higher standard. Their argument that they don't
19 understand suitability is ridiculous. Their argument
20 that the Act doesn't apply to them because they have a
21 license is ridiculous. After they got that license,
22 they signed a Statement of Conditions, and the
23 Statement of Conditions said, as a licensee, I will
24 maintain my suitability. And we cited that condition
25 five times in our complaint. We're not saying they're

1 an applicant; we're saying they're a licensee that
2 agreed to maintain the suitability that they brought
3 in front of this Board on December 20th, 2006.

4 For them to come in here and say now,
5 well, you can't judge us financially because we don't
6 have the ability to build this casino or because we
7 don't have the money in our pockets to build it, they
8 weren't saying that when they brought in Steve Wynn
9 who said to this Board, I can write a check for this,
10 when he bailed out all of a sudden, hey, we don't need
11 that. They are subject to the law. They are subject
12 to the regulations. This Board has the power and the
13 authority to grant this motion and revoke this
14 license. Mr. Keating, whose affidavit they submitted
15 yesterday comes in, and Mr. Cozen would like you to
16 believe that Mr. Keating will give you what you want,
17 will give you what you authorized. But Mr. Keating,
18 if you read his affidavit, says I'm going to build you
19 a casino in 20 months. It's not the casino that Mr.
20 Armentrout told you he would build in 22 months back
21 in 2006, it's SugarHouse South. It's 1,700 machines
22 and 40 tables. That's not what Foxwood's and PEDP
23 said they would build and it's not the casino that
24 they're obligated to build now. They don't have the
25 financial ability to do it. They violated the Board's

1 conditions. The Board has the authority to revoke
2 their license. They can plead all they want that it's
3 draconian. I heard that word many times. It's
4 draconian to revoke the license. Well, I think it's
5 draconian to the taxpayers to not have a casino that's
6 generating dollars for this Commonwealth. They can't
7 do it, they won't do it. Revoke their license.

8 ATTORNEY COZEN:

9 Just briefly ---.

10 CHAIRMAN:

11 Bear with me here, Mr. Cozen. I said at
12 the beginning, they would make their moving motions;
13 you would make your arguments, they would get a chance
14 for rebuttal. We're now going to have Board
15 questions. You can get a chance on your motion when
16 we take that up. I know you said you were going to
17 consolidate them. I'll give you a chance to make your
18 comments, but I'm going to now entertain Board
19 questions.

20 ATTORNEY COZEN:

21 Okay.

22 CHAIRMAN:

23 Questions from the Board? Commissioner
24 Sojka?

25 MR. SOJKA:

1 I do have one. My question will be to
2 Mr. Cozen. You did raise a question for me and
3 understand that mine is not a lawyerly question, but
4 it's to try to get around this very complex issue in
5 constitutional law, and it strikes me that you clearly
6 raised the question about the lack of precise clarity
7 of the concept for the words financial suitability.
8 But if you take that out, something has to be in
9 there. And then the word wherewithal began to appear
10 regularly in your argument. We even heard about the
11 wherewithal test. I need to know exactly where that
12 came from, how that can substitute for suitability,
13 why that is less vague. You defined it for us, I
14 think, by describing how you would have the
15 wherewithal, but I think I can take that English word
16 and make it mean other things, hence I want to know
17 why is it any less vague than financial suitability.

18 ATTORNEY COZEN:

19 Very, very, as usual, fair question.
20 Here's the problem, Commissioner. It was the job of
21 the legislature and/or the job of the Board, both in
22 terms of statute and in terms of regulation, to define
23 terms that were going to be used by this Board in
24 implementing its responsibilities. Unfortunately,
25 unfortunately, we start with the proposition that the

1 section that they rely upon totally, Section 1313 (a),
2 doesn't apply to licensees at all. Everybody would
3 say that because it talks about applicants' financial
4 information. And if you go back and you read your
5 adjudication of February 1, 2007, everybody passed the
6 test. The test that they applied, by the way, was not
7 are you able to build this today out of your own
8 pocket? It was, are you a legitimate guy? Do you
9 have legitimacy in this field? Can you put the deal
10 together? Now, 1313(a) doesn't use the words
11 financial fitness and suitability at all. And it only
12 applies to applicants, I think we can agree to that,
13 but it talks about financial stability of the
14 applicant, whatever that means. I think we can maybe
15 get some kind of consensus of the parameters of it.
16 It talks about responsibilities but that's --- when it
17 talks about financial, it just says financial
18 stability.

19 Okay. So I go to condition five for you
20 because that's the one that the Board imposed upon my
21 client. It says exercise due diligence to insure that
22 at all times you, and I'm just putting that word you
23 in, because it says Philadelphia, da-da-da, meet and
24 maintain the suitability requirements of the Act
25 without reference to where they appear. I don't what

1 it refers to, whether it's 1313(a), 1310, some other
2 section. Just whatever the suitability requirements
3 of the Act are including, but not limited to, those
4 relating to good character, honesty, integrity and
5 financial fitness. Doesn't define what financial
6 fitness is. Doesn't mention suitability, you know, in
7 terms of anything other than the words it uses here,
8 and that's the problem. What the Supreme ---.

9 MR. SOJKA:

10 I understand that.

11 ATTORNEY COZEN:

12 I want to get to the wherewithal.

13 MR. SOJKA:

14 Please?

15 ATTORNEY COZEN:

16 Sure. I think the Supreme Court of the
17 United States and the Supreme Court of the
18 Commonwealth of Pennsylvania require more than that if
19 they're going to take somebody's property away. They
20 require that you be very specific as to what you mean
21 and provide you all guidelines for how to apply it.
22 You haven't done it. They haven't done it. I'm not
23 casting blame or aspersions. I'm just saying it's a
24 fact.

25 Now, what about wherewithal? What I

1 tried to do is I tried to take the statute. I tried
2 to take PITG and I tried to take like common business
3 sense and I tried to apply it and I came out with the
4 wherewithal test because that seemed to apply to PITG.

5 Now, does it pass constitutional muster?
6 No, it does not because it's just a subject to
7 subjective application as these other words. That
8 doesn't solve their problem that they can't get some
9 re-judgment because it's unconstitutionally vague. It
10 simply means if it isn't unconstitutionally vague.

11 CHAIRMAN:

12 If you were a legislator ---

13 ATTORNEY COZEN:

14 Yes?

15 CHAIRMAN:

16 --- and we're writing the law and took
17 your arguments into account we might assume that, that
18 word wherewithal might have been in the legislation.
19 Is it not true that if that were the word that were in
20 here and we were in the situation in which you find
21 yourself today you would have provided precisely the
22 same arguments to say that, that was not sufficient?

23 ATTORNEY COZEN:

24 Probably, yes because ---.

25 CHAIRMAN:

1 That helps me understand this whole ---.

2 ATTORNEY COZEN:

3 Probably yes, because I have one meaning
4 for wherewithal and you may have a different one. It
5 would still be constitutionally impermissible. I have
6 not had the privilege of being a legislator, but I
7 have reviewed both Federal and State legislation in my
8 representation of the variety of State agencies as a
9 for instance and have always, you know, looked to the
10 definitional sections of the Act to determine how
11 words were intended. Now, I can get some of that from
12 legislative history and to be quite frank with you,
13 Commissioner, trying to leave no stone unturned, we
14 went to the legislative history and we didn't cite
15 anything because there was nothing that dealt with it.
16 Nothing dealt with it, but I think this colloquy
17 between us just, proves my case as a matter of law.
18 As a matter of law, this Board in my judgment cannot
19 grant summary judgment to BIE. It has to grant
20 summary judgment to us because the words that are
21 flying out there are undefined subjectively, subject
22 to different interpretations, but I do think and I
23 must be absolutely, and I try to be absolutely frank
24 about this, as I think Mr. Jacoby has been with this
25 Board in the past and Mr. Graci.

1 I have to be absolutely frank about it.
2 You know, I do think that wherewithal means that you
3 have to have the ability to put the deal together and
4 to deliver it within the time parameters that are
5 available under the existing legislation if you show
6 good cause. I think that's a fair thing, but I guess
7 you'd want to hear some evidence and testimony on
8 that.

9 CHAIRMAN:
10 Commissioner McCabe?

11 MR. MCCABE:
12 I have to agree with my fellow
13 Commissioner about your presentation. It was very
14 educational and after reading this I don't know if
15 people realize how much information we have. And with
16 my JHJD, which is jailhouse lawyer from Mike Baisley,
17 FBI I think I'm ready to take the Pennsylvania Bar and
18 then probably pass it after hearing your lecture.

19 But I have a few questions. If we, on
20 the suitability and determining financial suitability
21 would it be fair, would you believe it was fair if we
22 used the same standards when we issued the License to
23 determine your financial suitability to use those same
24 standards now, when we're looking at you for your
25 financial suitability, if we use the same standards?

1 ATTORNEY COZEN:

2 I think that's a great question. Can I
3 start my answer with a caveat? Here's my caveat.
4 It's a slippery slope. Every applicant you had before
5 you passed. Whatever that meant, they passed the
6 test. You follow me? They were substantial people.
7 They had experience in the business. They had access
8 to the markets. They had net worth. So, they passed
9 the financial --- as an applicant, they passed the
10 financial stability question.

11 I don't want to pre-judge what would
12 happen if you turned somebody down under this
13 language. I'm not going to pre-judge that.

14 MR. MCCABE:

15 Then when we license you and with those
16 conditions then required you to maintain those same
17 conditions that you put before us in your application,
18 we said, okay, we're going to award you a license so
19 now, therefore, you have to maintain that financial
20 suitability, where the others because they didn't get
21 the license no longer had to maintain that
22 suitability.

23 ATTORNEY COZEN:

24 Fair enough. Fair enough. And what that
25 means is --- what that means is to me, with all due

1 respect, Commissioner Sojka, what that means is do you
2 have the wherewithal to continue to bring about the
3 project we licensed you for?

4 Now, now, up until this moment in time,
5 up until this moment in time, even though the Foxwoods
6 parent ran into financial difficulty, which made it
7 difficult if not impossible for them on their own, to
8 develop this project. Nonetheless, the partner in
9 PEDP, FDC, Foxwoods Development Company, has met every
10 call, every requirement and has lent money to this
11 partnership in order to give it the wherewithal to
12 bring about what we have, hopefully will have before
13 you in short order, but we have ---.

14 MR. MCCABE:

15 Get back to just the wherewithal.

16 ATTORNEY COZEN:

17 Yes?

18 MR. MCCABE:

19 Where in all this do we have, before us
20 that we've read in preparation for today, have you
21 shown us that you do have the wherewithal? Foxwoods,
22 initially was a partner with you. They're no longer
23 financially able to do it.

24 You brought Mr. Wynn before us. He's now
25 pulled out. That's what we have before us. We have

1 nothing new about --- you alluded to, what we're
2 reading in the press we have not seen any other deals.
3 So, we're going to rely at least on today's hearing on
4 the information before us right now.

5 ATTORNEY COZEN:

6 No, no, Commissioner. No, no, no,
7 please. You know I didn't think it was necessary for
8 me to go through all the factual disputes that we
9 have, but were I to do so I would point to the
10 testimony, the testimony of the witnesses. I'm
11 talking about witnesses such as Gary Armentrout from
12 FPC, Brian Ford who heads up PEDP, the verified
13 affidavit of A.J. Agarwal.

14 MR. MCCABE:

15 I guess the point I'm trying to bring out
16 is we have not seen anything on this new deal.

17 ATTORNEY COZEN:

18 Whoa, whoa, whoa. If you're talking
19 about --- no, no, no.

20 MR. MCCABE:

21 Okay. I guess that's what the point is
22 and maybe once that gets presented to us --- and I
23 want to question also about having due process ---.

24 ATTORNEY COZEN:

25 Excuse me, sir.

1 MR. MCCABE:

2 I believe you've had due process with all
3 these hearings, all these filings, testimony. I don't
4 think we've not allowed you to have due process going
5 down this path here.

6 ATTORNEY COZEN:

7 Let me just say two things. First, I
8 want to make it clear with regard to your last
9 question, that Mr. Ford, Mr. Armentrout, Mr. Moles,
10 whose statement they took, et cetera, all said that
11 there never was a point in time where they didn't have
12 the wherewithal to go forward and get the right person
13 to come into the deal. We think they now have it.
14 That'll be judged going forward. Okay?

15 With respect to the last point that you
16 make about due process as a --- I have a buddy by the
17 name of Floyd Clark and Floyd and I have done
18 extensive traveling representing a client together and
19 had a lot of due process arguments. He knows due
20 process about as well as I do. I suspect, probably as
21 well as you do. And it's pretty clear to me that if
22 you take somebody and accuse them of a crime, but
23 don't let them take advantage of any of the rules of
24 criminal procedure to get the information that the law
25 requires them to get, the fact that they may have an

1 appeal once they throw their can in jail isn't due
2 process. You have to have meaningful Discovery in
3 order to have due process. You have to be able to
4 defend yourselves.

5 We were limited in what we could ask the
6 agents who were delightful men and totally honest, we
7 were limited in what they would allow them to answer.
8 They couldn't define what financial stability meant.
9 What we wanted to know was, and we wanted to know that
10 from Mr. Pitre as well. We weren't allowed to depose
11 him. When you went through PITG, what are the
12 similarities, what are the dis-similarities, what were
13 the standards that you used? Were they totally
14 subjective? How did you define it? I think that's
15 kind of basic if you want to defend yourselves.

16 So, my belief not casting blame or
17 aspersions at anyone, I am preserving the record. I
18 can't go to a hearing without meaningful Discovery and
19 defend my client on the theory that when the case gets
20 up in front of the Supreme Court I can argue to them,
21 you know what it would have been different if I had
22 really learned enough to defend myself. To me that's
23 a denial of due process maybe even recognized by the
24 FBI.

25 MR. MCCABE:

1 Thank you.

2 CHAIRMAN:

3 Commissioner Angeli?

4 MR. ANGELI:

5 Just Mr. Jacoby, a point of
6 clarification.

7 ATTORNEY COZEN:

8 Cozen. That's Jacoby. You're used to
9 seeing him.

10 MR. ANGELI:

11 I know. I know, I just ---.

12 ATTORNEY COZEN:

13 But he's been busy so I substituted.

14 MR. ANGELI:

15 I was going to ask him. In fact, he
16 looked bored over there.

17 ATTORNEY COZEN:

18 He's been tied up.

19 MR. ANGELI:

20 During your presentation several times
21 you made a reference to a difference between an
22 applicant and someone who has a license. If you go
23 through the Act there are many points during the Act
24 where they treat the applicant as someone who already
25 has a license. And I need a clarification of why you

1 think that's different because if you have a license
2 and you come for a renewal, you become an applicant
3 again. The way I see it the term applicant and
4 someone who has a License are interchangeable
5 throughout the Act.

6 ATTORNEY COZEN:

7 No, they're not. I'm sorry I disagree
8 with you, sir, but they're not. And I think if you'd
9 look --- do you want to give me specific sections
10 I'll ---.

11 MR. ANGELI:

12 Look at 1326, where it talks about
13 renewals.

14 ATTORNEY COZEN:

15 Yeah, yeah, but 13 ---.

16 MR. ANGELI:

17 Someone who has a license now becomes an
18 applicant for the renewal, so why is that different?

19 ATTORNEY COZEN:

20 No, no. If you become an applicant for
21 renewal okay, then you're treated as an applicant and
22 we go back to clear and convincing evidence, which you
23 have the burden. You have the burden of proof and you
24 have the burden of proof by clear and convincing
25 evidence. Okay? So, there is a difference between an

1 applicant and a Licensee.

2 The problem that I have and that any
3 court is going to have is that once you become a
4 Licensee what is the specific statutory provision?
5 What is the specific regulation? What is the specific
6 condition of your License that addresses the issue
7 that is now before the Board? I suggest to you, there
8 are none. It's a problem. You can fix the problem,
9 but it's a problem today. I didn't create it. I only
10 have to have to deal with it, but there's no doubt in
11 my mind that this never passes the Supreme Court of
12 our Commonwealth. Never.

13 I hope I answered your question, Mr.
14 Angeli. I tried my best.

15 MR. ANGELI:

16 I appreciate your comment. I'm not sure
17 it's clear to me, but thank you.

18 ATTORNEY COZEN:

19 I'm sorry.

20 CHAIRMAN:

21 Commissioner Ginty?

22 MR. GINTY:

23 I just want to follow-up on Commissioner
24 Angeli's question. I'm wrestling with the same issue
25 of applicant/licensee. You have pending before us an

1 application for renewal of your License and the
2 statute requires you to do that I believe, on an
3 annual basis; is that true?

4 Now, there must be a reason that the
5 legislature required that. Don't you have a
6 continuing obligation to demonstrate a number of
7 factors, but the wherewithal being one of them with
8 the burden of proof? In other words, we don't need
9 this revocation proceeding in order to de-license you.
10 You have a petition before us to be re-licensed.

11 ATTORNEY COZEN:

12 The answer to your question is, yes. In
13 that context we will have to demonstrate all the
14 requirements of the Act with regard to renewal.
15 There's no question about that. I don't deny that.
16 What I'm saying is you can't strip us of our existing
17 License on some nebulous basis that doesn't that
18 doesn't exist in the law or in the legislation.

19 Now when the time comes, Commissioner,
20 that's not --- by the way, you and I both understand
21 that that's not why we're here today. It's a
22 legitimate question, but that's not the purpose of
23 this hearing. And I now consider myself forewarned
24 that in the context of that hearing I better be able
25 to carry by clear and convincing evidence, my burden.

1 But that's not his hearing.

2 MR. GINTY:

3 I understand.

4 CHAIRMAN:

5 Commissioner Trujillo?

6 MR. TRUJILLO:

7 Thank you, Mr. Chairman. I guess, I have
8 a number of questions primarily around standards and
9 burdens. And part of it is really just to understand
10 it as my fellow Commissioners are trying to understand
11 it. And first, I want to get to --- and I'm going get
12 to Mr. Miller on this, but you open with the concept
13 that the suitability standard, I don't want to talk
14 about wherewithal, because wherewithal as I understand
15 your discussion, you're talking about financial
16 wherewithal. You're not --- and suitability at least,
17 as I read the statute is a broader concept that
18 includes character and other traits.

19 But you suggest in your papers again in
20 the argument today that it is unconstitutional and
21 that we should grant your motion for summary judgment
22 because the standard, because of the constitutionality
23 and so what I'm trying to understand is how we as a
24 regulatory body can be asked to declare
25 unconstitutional statute or provisions of the statute

1 that --- we're regulators. We're not a Federal
2 District Court. We're not a State Court of general
3 jurisdiction. We're a regulatory body. So, I'd like
4 to get some enlightenment on what basis we would have
5 the ability to declare a portion of the statute
6 unconstitutional?

7 ATTORNEY COZEN:

8 Great question. I am not scholar on
9 administrative law. I appreciate the comments of the
10 panel on the presentation that I have made, but I am I
11 am not a scholar on administrative law. Having given
12 you that caveat ---.

13 CHAIRMAN:

14 By the way, I've seen you do better.

15 ATTORNEY COZEN:

16 Well, it might have been when I was
17 arguing in front of the Supreme Court in SugarHouse
18 five times. But my recollection is, we won. I don't
19 know that there is an easy answer to your question,
20 because what you're really asking is this. Do we, in
21 effect, have jurisdiction to declare the Act that
22 created us unconstitutional? The answer to the
23 question, I think, is generally no; but in this
24 context, absolutely yes. And here's why. Nobody's
25 asking you to declare the Act unconstitutional. We're

1 simply telling you that you cannot impose upon us to
2 deprive us of our property, an unconstitutionally
3 vague standard. And you, as an administrative body
4 that has quasi judicial power, based upon the question
5 before you, there is little doubt in my mind, although
6 I'll reserve my right on this because you may have
7 given me another argument. But quite frankly between
8 you and me, I think it's within your purview on this
9 question; can we strip a licensee of a license based
10 upon a standard which is undefined and does not meet
11 constitutional muster? And by the way, the subsidiary
12 question is, and if we do that, should we not then get
13 Mr. Sherman and the team together about how we fix
14 this by regulation and definition in the regulation
15 that will meet constitutional muster? That's the best
16 I can do.

17 MR. TRUJILLO:

18 You discussed Section 1313 of the Act, by
19 looking back at the transcript of discussions that you
20 heard I had back in March earlier this year, I was
21 referring back to the regulations. What we have here
22 is a combination of Act, the regulations and those
23 least conditions. Out of the Statement of Conditions
24 there are ---. To me, and again, I need help in
25 understanding this, Mr. Miller. I'd like that as

1 well. There's a difference, to me, between the
2 standard that's applied and the process. And this
3 gets back, also, to Mr. Ginty's question. I think
4 you'll agree with me, will you not, that as a
5 licensee, the statute under 1313, the Statement of
6 Conditions, PEDP is required to maintain suitability.

7 ATTORNEY COZEN:

8 I think the PEDP is required to maintain
9 suitability not because of 1313(a), because it doesn't
10 apply to PEDP today, but because of condition five.
11 It's required to maintain suitability, whatever that
12 means.

13 MR. TRUJILLO:

14 And condition five, as I read it, states
15 that, quote, to exercise due diligence to ensure that
16 at all times, PEDP, meet and maintain the suitability
17 requirement of the Act, including but not limited to
18 those relating to good character, honesty, integrity
19 and financial fitness. As I understand your argument,
20 financial fitness is your wherewithal test.

21 ATTORNEY COZEN:

22 I think financial fitness and suitability
23 both fit within the wherewithal test. And I would
24 refer you back to the Act in 1313(a). And just kind
25 of run your finger, if you have it in front of you.

1 MR. TRUJILLO:

2 I have it in front of me.

3 ATTORNEY COZEN:

4 Okay. Just kind of run your finger
5 through the Act, okay? Just kind of run your finger
6 through it. Do you see the word suitability in there
7 anywhere?

8 MR. TRUJILLO:

9 I see financial fitness requirements in
10 the ---.

11 ATTORNEY COZEN:

12 No. Come on, Commissioner. As a
13 disappointed applicant who went to the Supreme Court,
14 you certainly know the Act. So, come on. Is the word
15 suitability in there?

16 MR. TRUJILLO:

17 In the statute?

18 ATTORNEY COZEN:

19 In 1313(a), which they're relying upon.

20 MR. TRUJILLO:

21 I don't see it in 1313(a), but Mr. Cozen,
22 what we're talking about here is not simply 1313(a).

23 ATTORNEY COZEN:

24 I'm talking about condition five. I
25 thought you and I agree.

1 MR. TRUJILLO:

2 Condition five, Mr. Cozen, as signed on
3 by Gary Armentrout, not as imposed by PEDP, says that
4 it will exercise due diligence to ensure that at all
5 times that it will maintain financial fitness, right?
6 And good character and maintain the suitability
7 requirements. So, what due diligence was conducted by
8 PEDP to ensure that it maintained those standards?

9 ATTORNEY COZEN:

10 Fair enough. Go to the deposition
11 testimony of Mr. Ford, Mr. Armentrout and the
12 interview statement with Mr. Moles and Mr. Agarwal's
13 verified statement, all of which demonstrated that
14 from the very beginning, even when the parent company
15 of FDC fell on hard times, they all stepped forward,
16 every party.

17 By the way, not a single capital call,
18 because out of their own pocket, Principals lent money
19 to the partnership, in order to make sure that it
20 maintained its financial integrity and its capability
21 to bring about a deal that would deliver a casino with
22 the requisite number of slots and now tables, as well;
23 but we're only dealing with slots, you know, within
24 the time period allowed by law.

25 That's what they have done. And they

1 have worked ---. And I think you appreciate this. I
2 don't know more than anybody else, but you certainly
3 appreciate this. You know, I'm not particularly today
4 a fan of Mr. Wynn's. I think you might imagine that.
5 Okay? But for this group to have brought within six
6 months' time two of the biggest casino companies,
7 managers, operators, developers in the country, maybe
8 even in the world, to this project, with an agreement
9 to proceed with it; I think that speaks to the
10 suitability of this partnership. They've been able to
11 do that.

12 MR. TRUJILLO:

13 But I want to ask you about being billed.
14 I think the wherewithal test --- wherewithal --- the
15 project. And let me just clearly put out what
16 concerns me; a casino, a casino versus The Casino that
17 was licensed and substantial compliance with the
18 license. And without going into the document, I want
19 to clearly lay out what my concern is. Deloitte and
20 Touche, your auditors, include in one of their notes
21 that the project has been abandoned. The casino as
22 originally licensed was abandoned. And I'd be happy
23 to read that to you; but if not, you can take a look.
24 Are you familiar with that note?

25 ATTORNEY COZEN:

1 I'm familiar with the Deloitte and
2 Touche's comments. I'm familiar with that note. I
3 not only disagree with it, but I suggest to you that
4 in the same manner, in the same vein, but differently,
5 that Mr. Wynn was proposing to meet all of the
6 original requirements. Harrah's and PEDP intend to
7 meet all the original requirements of the license.

8 MR. TRUJILLO:

9 Here's the concern. And whether it is
10 that note within the audited financial --- or --- and
11 I appreciate completely your remarks which said, in
12 brief, you can't look at one moment in time to
13 determine whether somebody literally has their money
14 in their pocket in order to build a casino. I totally
15 appreciate that. And this is not reality. That's not
16 business reality. You have financings. So, you don't
17 look at a moment in time. But what the Board has
18 before it is not a moment in time. I went through the
19 transcripts of everyone you deposed and it is
20 difficult for me to read that and not come away with
21 anything but the understanding that going back to at
22 least 2009, but perhaps as far back as 2008, from that
23 time to present, not at one point in time but during
24 the entirety of that time, there has not been the
25 ability to build a casino. And when I say the casino,

1 I'm talking about the casino that was licensed by the
2 Board. So, that's my fundamental problem when it
3 comes back to what we have in front of us, which is a
4 Motion for Summary Judgment, which is asking us, based
5 on the pleadings and the transcripts and the
6 depositions that we have and the exhibits, those
7 exhibits demonstrate, at least as best I can read
8 them, that during the last year and a half, not at one
9 moment but during the entire year and a half, there
10 has not been the ability to --- and in fact, your
11 auditors then say that the original plans have been
12 abandoned. So, that's the problem that I have. And
13 perhaps if you can address that, that would be really
14 helpful.

15 ATTORNEY COZEN:

16 I will and I'm going to ask Mr. Jacoby to
17 address it as well, if you don't mind, because he was
18 more privy to the deposition process and the exhibit
19 process. The fact of the matter is that, A, nothing
20 was abandoned and B, I don't think that this
21 partnership was able to generate what it's generated
22 in the last six months, utilizing among others the
23 services of my law firm and Blackstone, which is
24 acknowledged as one of the premiere investment banks
25 in the country. Given the expertise that exists in

1 this partnership on the Foxwoods side and the business
2 expertise that exists on the WPI side of this
3 partnership, I don't know how anybody could
4 legitimately come to the conclusion that you seem to
5 have come to; particularly, with the background you
6 bring to this controversy. But I'd be happy to duke
7 it out with you in an evidentiary hearing. I don't
8 think we've had that. I think, at the very least,
9 we're entitled to that because you just can't throw
10 the standards out as if they didn't exist and as if
11 they were unconstitutional. Now I know you want to
12 hear from Mr. Jacoby, so ---.

13 ATTORNEY JACOBY:

14 Good morning, Commissioner.

15 MR. TRUJILLO:

16 Good morning.

17 ATTORNEY JACOBY:

18 Two things. Just one observation, first
19 of all. I believe that Mr. Savarese's deposition is,
20 as the Chairman indicated, confidential and sealed.
21 And I think we need to be cautious about what's said
22 on the record about anything in that deposition.
23 Number two, I believe the financial statement is also
24 either confidential, because the process by which it's
25 submitted and/or was produced during discovery. In

1 either event, I just want to make sure that the Board
2 appreciates the fact that we're not waiving that and
3 would possibly ask that any specific citation
4 according to the notes, be stricken from the
5 testimony. I didn't have a chance to object. I
6 didn't want to interrupt the Commissioner.

7 CHAIRMAN:

8 I'm going to overrule that.

9 ATTORNEY JACOBY:

10 Okay. Number two ---.

11 ATTORNEY COZEN:

12 Can we take an exception; but thank you.

13 CHAIRMAN:

14 Thank you.

15 ATTORNEY JACOBY:

16 Thank you, Mr. Chairman. Number two, Mr.
17 Savarese indicated that, if you recall, the statement
18 was for the period ending December 31st, 2009. Even
19 though his letter was issued in March at the time we
20 had a term sheet with Mr. Wynn, Mr. Wynn had already
21 testified; and in fact, were in the process of
22 negotiating definitive documents. Mr. Wynn's view of
23 the world was that he wanted to start over.

24 And I think what you describe as
25 abandonment is really a decision --- an accounting

1 decision by Mr. Savarese from Deloitte and Touche to
2 write off certain items because he felt that, given
3 Mr. Wynn's mandate, that he wanted to just create
4 everything himself from the start, which I think is
5 very obvious about on March 3rd. And that's why they
6 made that decision. I asked him.

7 Number two, as Mr. Savarese indicated,
8 without going into his testimony; again, without a
9 Waiver, he indicated that the counting rules prevented
10 him from considering dependency of the Wynn
11 investment. It was very precise in the deposition.
12 I'm sure you saw that. And it also prevented him even
13 from considering the fact that, historically and
14 currently and prospectively, loans were made available
15 --- would be made available from the partners. He
16 couldn't consider those.

17 And I spent quite a bit of time speaking
18 to him off the record, as well as on the record. So,
19 I hope you understand that what you might describe as
20 an abandonment was really more an accountant's
21 reaction to Mr. Wynn's expression of intention to not
22 use, possibly, some of the old plans, traffic studies,
23 impact reports, and to get his own and start over
24 again. And that's what that was; that was a write-off
25 of certain capitalized expenses. If I don't answer

1 your question, I'll be glad to ---.

2 MR. TRUJILLO:

3 No, that's very helpful, actually. The
4 main thing I wanted to focus with Mr. Cozen on --- and
5 I appreciate the fact that that's what the auditors
6 are saying, that that's an accountant's words, not
7 your client's words. I understand that. But this
8 concept of a casino versus The Casino, I guess I'd
9 like to hear from you on --- or whether you want to
10 amend your definition of the wherewithal to the
11 project you licensed as a casino. In other words,
12 what can we or can we not consider in that respect?

13 ATTORNEY COZEN:

14 If I said, a, rather than, the, I would
15 correct it to say, the, because I think that what
16 we're talking about is something that has got to
17 be --- I did say, subject to the approval of the
18 Board. So, just as happened in SugarHouse, you know,
19 it's going to have to be, here's what you came in
20 with, here's what you got now. Is it substantially
21 similar? Okay? Yes, it's substantially similar. Are
22 you building it in phases; are the phases different?
23 We have to go through that. And we will be prepared
24 to go through that with you at the appropriate time,
25 which isn't today, obviously.

1 MR. TRUJILLO:

2 So, you're clear, I guess, then, it is
3 The Casino that was licensed, or something
4 substantially similar?

5 ATTORNEY COZEN:

6 Yes, yes.

7 MR. TRUJILLO:

8 Okay. I just wanted to be clear with
9 that. And Mr. Miller, I guess I would like to hear
10 from you of Mr. Cozen's point for an approval where
11 original sin there lies. But as I read the statute
12 and I read the regulations, I look at clear and
13 convincing evidence in terms of the burden that's
14 established on the applicant. And I still am having
15 trouble, I think, at some point. Is there a
16 distinction in the statute or in the law between an
17 applicant's --- and I want to focus on suitability,
18 something that needs to be passed on by the Board to
19 an applicant; correct?

20 ATTORNEY MILLER:

21 That's true. And I'll tell you, I don't
22 believe that in the Act, they talk about licensees.
23 It wasn't contemplated at that point but that's why,
24 once you get a license, you sign a Statement of
25 Conditions agreeing, as we said so many times, to

1 maintain that suitability that you presented to the
2 Board as an applicant. So once you sign that
3 Statement of Conditions, then you're bound by the same
4 standards that you were when you received that
5 license. That's our position. And that position and
6 that statute was addressed by the Supreme Court in the
7 Station Square case, when the Supreme Court said that
8 the Board has to look at whether the applicant in this
9 suitability and financial fitness argument --- they
10 have to look. And I'll quote that the applicant is
11 likely to maintain a financially successful, viable
12 and efficient business operation and will likely be
13 able to maintain a steady level of growth of revenue
14 to the Commonwealth.

15 And that's quoting from the Station
16 Square case. That's what you looked at when you gave
17 them the license. That's what you look at when you
18 see whether they have maintained that suitability,
19 which you said they had. This distinction between
20 applicants and licensees, I think, is smoking mirrors
21 and to me, it's irrelevant to this Board because they
22 have agreed in that Statement of Conditions --- they
23 have agreed --- to maintain that suitability. That's
24 our position.

25 MR. TRUJILLO:

1 And in that case, what is the standard
2 that the Board, in order to grant a Motion for Summary
3 Judgment in this case; what is the burden that you
4 must establish? What burden is on ---?

5 ATTORNEY MILLER:

6 Do they have the finances to maintain a
7 financially successful, viable and efficient business
8 operation, et cetera, et cetera, exactly like the
9 Supreme Court said they have to do? We maintain they
10 don't. PEDP, through their current partner, Foxwoods,
11 don't have the financial ability, whether it's through
12 loans, whether it's in a checking account or whether
13 it's loans from partners, to not only maintain a
14 business but --- excuse me --- a financially
15 successful business, but to establish one. They have
16 shown you up to now that they can't do that.

17 And for them to come in and say that they
18 have the ability to go out and get money, they have
19 the ability to build this casino, they have the
20 ability to generate financial wherewithal --- and I
21 say the proof is in the pudding and it's not there.
22 Everybody has the ability to go to a bank and ask for
23 money. Not everybody gets that money when they walk
24 out of the bank. Prove it to me. They haven't done
25 it.

1 ATTORNEY COZEN:

2 Excuse me, Commissioner. You know, this
3 is the perfect time to ask, why wasn't that same
4 standard applied to PITG? Could Don Barden have gone
5 to the bank and gotten the money from the same bank
6 that pulled his line?

7 MR. TRUJILLO:

8 First of all, I was not here ---.

9 ATTORNEY COZEN:

10 I know, but you got the adjudication.

11 MR. TRUJILLO:

12 Just a minute, Mr. Cozen. But the one
13 thing I'm fairly certain of --- and I think you've got
14 --- understanding and you think you know the facts,
15 that as I know, there was not a Motion for Revocation
16 before the Board to act on.

17 ATTORNEY COZEN:

18 My point; my point, exactly.

19 MR. TRUJILLO:

20 And BIE, I think you know, under all acts
21 in effect as the prosecutor, and we act as a quasi
22 judicial body. So, you're asking us a question ---
23 you're asking the Board to consider something that was
24 never before the Board. Mr. Miller, for purposes of
25 summary judgment, the material facts --- and as I read

1 the pages, it appears there were a total of 13 real
2 facts that PEDP stated were in dispute, but the rest
3 were not in dispute. Am I correct in that?

4 ATTORNEY MILLER:

5 I think so; I believe so. That's
6 correct.

7 MR. TRUJILLO:

8 And as to those material facts, and I
9 think that Mr. Cozen --- I would like to know what
10 your position is as to those 13 material facts that
11 PEDP stated were in dispute.

12 ATTORNEY MILLER:

13 And again, you have to assume from PEDP's
14 point of view, that those material facts are material
15 enough that if they are in dispute, would have an
16 effect on the causes of action. They may be material,
17 but they may not go directly to the elements that we
18 have to prove. And if they don't, then it really
19 doesn't matter whether they dispute them or not.

20 MR. TRUJILLO:

21 I understand. They have to be material;
22 right?

23 ATTORNEY MILLER:

24 Correct.

25 MR. TRUJILLO:

1 So, I appreciate that. But Mr. Cozen's
2 argued that there are 13 --- and if those 13 material
3 facts, A, are either not material or are not in
4 dispute, then as I read the papers, you're entitled to
5 summary judgment. But if they are in dispute and
6 they're material, then the Board may or may not enter
7 summary judgment. Would you just state your ---?

8 ATTORNEY MILLER:

9 That's a correct interpretation of law,
10 and it's up to the Board.

11 ATTORNEY COZEN:

12 No disagreement. And I think if you read
13 pages two to five of our Memorandum, which you
14 obviously have, I don't see how you can say they're
15 not material and that they're genuine issues of
16 material fact that preclude the entry of summary
17 judgment on their motion; not on ours, because ours is
18 on an entirely different basis, a legal basis of
19 unconstitutionality. I just don't see how they cannot
20 conceive that each and every one of those disputed
21 facts must require an evidentiary hearing, so ---.

22 MR. TRUJILLO:

23 I think I have my last question, Mr.
24 Chairman. And Mr. Cozen, I suggested sanction of
25 revocation was too severe, at least as to counts two

1 and four.

2 ATTORNEY COZEN:

3 No, counts one and three.

4 MR. TRUJILLO:

5 I'm sorry. Counts one and three, rather.

6 So, in terms of --- I think you will all agree client

7 has --- the question I have is, what sanctions, then,

8 should the Board entertain if it does not entertain

9 revocation?

10 ATTORNEY COZEN:

11 You want me to give you the sanction that

12 I want you to impose upon my client?

13 MR. TRUJILLO:

14 Yes.

15 ATTORNEY COZEN:

16 I respectfully decline to do so, because

17 that's your function, not mine. However, I would

18 remind you, Commissioner, of something. When you said

19 pay the fines, we paid the fines. When you entered an

20 order and said, we're going to accrue them until such

21 time as we dispose of this issue, we've accrued them.

22 So, if we have to be fined because from April until

23 now or whenever Mr. Pitre can, you know, be satisfied

24 that we have a viable venture here and we proceed to

25 work with him and work with you to get it approved, I

1 guess it's within your discretion to say, you really
2 haven't purged yourself of your inability to meet
3 those conditions. You have given them to us now, but
4 you still have to pay a fine.

5 MR. TRUJILLO:

6 And what you're saying is, you're
7 suggesting that your client has shown good faith by
8 either attempting to fulfill or by paying the fines as
9 directed. And I appreciate what you're saying.

10 ATTORNEY COZEN:

11 Absolutely. We know they're there.

12 MR. TRUJILLO:

13 But what I need to know, when you suggest
14 to us that revocation ---. If we find that you have
15 continued to --- BIE is entitled to summary judgment.
16 You suggest to us, though, that there are other
17 alternative sanctions that are available and
18 appropriate. I think it is a fair question for me to
19 ask you. What are the other sanctions that are
20 available?

21 ATTORNEY COZEN:

22 It's like putting the rabbit in the hat.
23 You're a good lawyer. You can't put the rabbit in the
24 hat. We have filed on June 1, which is a pending
25 application to be heard at the time of what we

1 anticipated would be an evidentiary hearing on
2 revocation, relief from conditions four, five and six,
3 in terms of timely filing. It's premature to even get
4 to that issue. Right now, we're obliged to pay a fine
5 when you tell us to pay a fine. And that's all I can
6 say. You know, if there's some other sanction that
7 goes along with it at the time you consider our June 1
8 application as part of and parcel of the whole
9 application for, you know --- which would then be
10 change of control, extension of time, et cetera. So
11 be it. We'll deal with it at that point of time. But
12 all I'm saying is --- and I'm not saying it, the
13 Supreme Court and the Commonwealth Court said it. You
14 know, you've got to take the least draconian measure
15 and the least severe measure when somebody has tried
16 in good faith to meet your requirement, even in a
17 contempt proceeding. Even in a contempt proceeding,
18 you can't hold somebody in contempt because it was
19 impossible for them to comply and they tried. Yeah,
20 you might fine them. You might do something else to
21 them. But you just can't hold them in contempt and
22 throw them in jail; not that you would do that to me.
23 I don't think you would do that.

24 MR. TRUJILLO:

25 That's all I have, Mr. Chairman.

1 CHAIRMAN:

2 Cyrus?

3 ATTORNEY PITRE:

4 I've sat quietly here for a while now.
5 Several things. PITG, totally different scenario.
6 There was a petition pending for change of ownership
7 and control. There has never been a petition pending
8 in this matter, not with Wynn, not with Harrah's. The
9 record before the Board today can rest solely on count
10 three. Count three, can they build the casino by May
11 29, 2011, and get it open? No, they can't. As the
12 record sits today, they cannot. There have been no
13 petitions filed. There has been no petition filed for
14 change of ownership, change of design, change of
15 timeline. As the record stands today, they have until
16 May 29, 2011, to open a casino. That cannot be done.
17 Mr. Cozen said it today, Mr. Keating says it in his
18 affidavit. Everybody knows it; it can't be done. So
19 as it stands today on the record, they cannot open
20 that casino by May 29, 2011; no. Is there a chance
21 they can do it by December 2012? Yeah.

22 But those petitions have not been filed.
23 Those petitions are not pending before the Board. And
24 as the record stands today, they cannot meet that
25 requirement. And that's the only requirement that

1 they have to meet in order to maintain their license.
2 And they admit they can't do it. So based upon the
3 record today, I think we're entitled to summary
4 judgment.

5 CHAIRMAN:

6 Commissioner Ginty?

7 MR. GINTY:

8 And that, Cyrus, gives me a little bit of
9 a problem because for the last two hours, we have been
10 basically arguing yesterday's news. I mean, there's a
11 new deal on the table. You haven't had time to look
12 at it. As you mentioned, the petitions that are going
13 to be necessary haven't been filed yet. But I mean,
14 should we go forward with revoking a license today,
15 knowing that there's something else that may possibly
16 resolve the issue?

17 ATTORNEY PITRE:

18 That's up to the Board. I mean, there's
19 always a chance that you'll be the jilted bride at the
20 altar again. But that's up to the Board to make that
21 determination. And if the Board is so inclined, then
22 when the documents come in and the petitions are filed
23 --- I always say that we'll deal with these things on
24 a dual track. And I'm always committed to doing that.
25 But that's not what the record shows today.

1 MR. GINTY:

2 I understand. I think you've been very
3 patient, by the way. Thank you.

4 ATTORNEY COZEN:

5 May I just respond?

6 CHAIRMAN:

7 Yes.

8 ATTORNEY COZEN:

9 With all due respect to Mr. Pitre, who
10 has been very accessible and very fair throughout this
11 whole thing --- again, it's a little bit of a rabbit
12 in a hat. The law prohibits us from filing the
13 petition that he says doesn't exist today, until such
14 time as we can deliver to him, after his initial
15 review, not just the term sheet that we've given him,
16 not just the plans that we've given him, not just the
17 commitment letters for new equity that we've given him
18 and not just the renderings that we've given him; but
19 we have to deliver definitive documents.

20 We have to have definitive agreements
21 that he can approve or recommend, anyway, and we can
22 submit to the Board, together with an Application for
23 Change of Control and Ownership --- maybe, not change
24 of control, Change of Ownership. Okay. It won't be
25 change of control but change of ownership because of

1 the government's provisions in the term sheet. And as
2 Mr. Pitre well knows, there are conditions in the term
3 sheet that will be set forth in the definitive
4 documents, one of which relates to the same thing that
5 existed, Commissioner Ginty, at the time that Mr. Wynn
6 was here which is, the law now allows you, if you
7 determine that we've shown you good cause to do it, to
8 give us up until December 31, 2012, obviously.

9 ATTORNEY PITRE:

10 I have to disagree with Mr. Cozen. The
11 law doesn't require that I receive anything ahead of
12 time. They are free to file a petition any time that
13 they like. The conditions in the Board order, when we
14 established a timeline at the very beginning, said
15 okay, give these documents on time. That time is long
16 past. Okay? All the law requires is that they file a
17 petition whenever they're ready. Those petitions have
18 never been filed. Now in fairness to Foxwoods ---
19 well, to PEDP, they have been diligently at work
20 trying to find a new investor.

21 I have met with them. I have seen some
22 renderings. I have received an executed term sheet.
23 But that's not what's before the Board today. As it
24 stands today, the project cannot be completed by May
25 29th, 2011. I think everybody's in agreement with

1 that. It's up to the Board to decide whether they
2 want to make that decision today or if they want to
3 hold off and maybe something else will come through
4 the pipeline. But right now, that's not what's before
5 the Board today.

6 CHAIRMAN:

7 Commissioner McCabe.

8 MR. MCCABE:

9 Point of clarification, then, for me is,
10 is it right for us to make a decision today, knowing
11 now that there's possibly other information that will
12 affect our decision?

13 ATTORNEY PITRE:

14 I basically can't answer that question
15 for you, Commissioner. That's a question that the
16 Board will have to answer.

17 CHAIRMAN:

18 Let me ask one question, Cyrus. I was
19 going to ask about the PITG issue and what
20 differentiates that in response to Mr. Cozen's
21 question, because I did not hear an answer before you
22 answered it. So, thank you. Mr. Cozen, let me just
23 say this. As I've said before, you know, in my
24 opinion, we have been immensely and almost over-the-
25 top patient with this project. Your folks, your

1 client, was granted a license in December of 2006.
2 Here we are four years later, four years later. Mount
3 Airy is up and running. Rivers is up and running.
4 Sands is up and running. SugarHouse is up and
5 running. You are not. And you mentioned the term,
6 commonsense, before. I think that a court, be it the
7 Supreme Court, this quasi judicial body, can use, you
8 know, commonsense. And my commonsense is that, yes,
9 there have been lawsuits; yes, the financial markets
10 have crashed; yes, there have been political setbacks.
11 But each of those other entities that I mentioned have
12 gone through some or all of those same problems as
13 have you. They are up and running, you are not, four
14 years later. I understand that there's a potential
15 new deal with Harrah's. We heard the same thing, with
16 all due respect, with Steve Wynn. And you had
17 mentioned that, you know, in the last six months, nine
18 months, whatever the time frame was, that you brought
19 two prominent, national, international gaming
20 entities, to the Board.

21 You know, my answer to that is, where
22 were you in the last three and a half years? Nothing
23 has been done on this project. You are arguably and
24 I'll say, you know, more than arguably, definitely,
25 further away from putting a shovel in the ground today

1 than you were in December of 2006. We owe it to the
2 taxpayers of this Commonwealth to get a casino up and
3 running in Philadelphia. They deserve that. That's
4 why you got the license --- your client got the
5 license in 2006. Let me end there.

6 ATTORNEY COZEN:

7 Can I respond?

8 CHAIRMAN:

9 You may respond.

10 ATTORNEY COZEN:

11 Good. I can't argue with your factual
12 presentation except to this extent. I wasn't around
13 for the last four years. I haven't been around as has
14 Mr. Jacoby and Mr. Graci, for the last year and a half
15 --- almost a year and a half. I read very carefully
16 the opinion that you signed, Commissioner,
17 Chairman, on February --- on September 2; September 2,
18 2009, a little over a year ago, in which you granted
19 the application to extend the time period, at that
20 time, allowable two additional years, to May of 2011.

21 I thought you made a very, very, very
22 convincing argument as to how Foxwoods had been
23 victimized in a way that others hadn't been. We have
24 a little bit of a familiarity with the process. We
25 represented SugarHouse. We represented Mount Airy.

1 We were involved in PITG for the lenders. We know
2 what all the problems that lots of people had. But I
3 think you demonstrated an appreciation in September of
4 2009, that besides the markets, there was a reason why
5 they hadn't been able to achieve what all of us would
6 have liked them to achieve. So, I think we really
7 have to judge this as, what's happened since September
8 of 2009? Two deals with two valid companies.
9 Hopefully, this one will be the one. But I don't know
10 that we could move heaven and earth to do any better.
11 And do I respect your frustration? Yes, absolutely.

12 CHAIRMAN:

13 Let me just say, you and I may disagree
14 with the order and you know, my level of understanding
15 of the problems that your client ran into. I respect
16 that you weren't the counsel then. But the facts, as
17 you stated, are the facts. That's what we're dealing
18 with here today. Having said that, you had mentioned
19 earlier that you were going to consolidate your
20 arguments into one motion. Is that still the case?

21 ATTORNEY COZEN:

22 Still the case.

23 CHAIRMAN:

24 Okay. So you do not want to have an
25 argument on your Motion for Summary Judgment? You

1 made that argument in response.

2 ATTORNEY COZEN:

3 I think I have, sir.

4 CHAIRMAN:

5 Thank you very much.

6 ATTORNEY COZEN:

7 Thank you.

8 CHAIRMAN:

9 Do we have any final comments from OEC on
10 your motion or their motion that they're not making
11 for summary judgment?

12 ATTORNEY MILLER:

13 We have nothing further to say.

14 CHAIRMAN:

15 Okay. Let me do one other matter, and
16 then we're going to break for lunch and come back and
17 take the other two hearings on Aristocrat and Konami.
18 But there is one other matter related to this. It's
19 my understanding that through today's date, the
20 outstanding \$2,000-a-day fine for PEDP's failure to
21 comply with the Board's September 1, 2009 order,
22 stands at \$362,000. At this time, I'd ask for a
23 motion with respect to those fines. Do I have a
24 motion, please?

25 MR. MCCABE:

1 Yes, Mr. Chair. I move that PEDP pay
2 \$362,000 in outstanding fines for violating the
3 Board's September 1st, 2009 order, by November 12th,
4 2010.

5 CHAIRMAN:

6 Second.

7 MR. SOJKA:

8 Second.

9 CHAIRMAN:

10 All in favor?

11 ALL SAY AYE

12 CHAIRMAN:

13 Opposed? Motion passes. We're going to
14 break for an hour, maybe an hour and five minutes, and
15 we'll come back at 1:41.

16 SHORT BREAK TAKEN

17 CHAIRMAN:

18 What we're going to do is to take both of
19 the PEDP motions for summary judgment under advisement
20 and place them on the agenda for consideration at our
21 next board meeting, which is going to be held on
22 November 18th, 2010. In the meantime, what we've
23 heard here today is that PEDP now has a restructuring
24 plan in the works. Unfortunately, we don't know
25 whether this plan would or would not be acceptable to

1 the Board. But at this point we're not going to stall
2 our revocation proceedings based upon a plan that we
3 don't know anything about. So with all that being
4 said, we'll list the Board's decision on the motions
5 for consideration at our next meeting. Thank you.

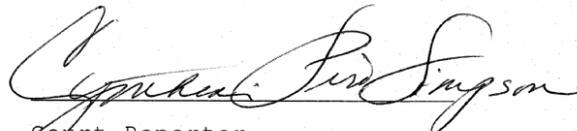
6 * * * * *

7 HEARING CONCLUDED

8 * * * * *

9
10
11
12
13
14 CERTIFICATE

15 I hereby certify that the foregoing
16 proceedings, hearing held before Chairman Fajt, was
17 reported by me on 10/27/2010 and that I Cynthia Piro
18 Simpson read this transcript and that I attest that
19 this transcript is a true and accurate record of the
20 proceeding.

21 
22 Court Reporter
23
24
25