

THE COMMONWEALTH OF MASSACHUSETTS
MASSACHUSETTS GAMING COMMISSION
PUBLIC MEETING #99

CHAIRMAN

Stephen P. Crosby

COMMISSIONERS

Gayle Cameron

James F. McHugh

Bruce W. Stebbins

Enrique Zuniga

December 16, 2013, 1:00 p.m.

BOSTON EXHIBITION AND CONVENTION CENTER

415 Summer Street, Room 151

Boston, Massachusetts

1 P R O C E E D I N G S :

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3 CHAIRMAN CROSBY: We are going to
4 stay in temporary abeyance of the Wynn
5 suitability hearing and spend a few minutes
6 taking care of another important piece of
7 business, which we have published to take place
8 at this time. So, I think, since some people
9 have come in to participate in that, we need to
10 get that done. Hopefully, we will not impose
11 on our applicant's time to watch.

12 So, this is convening public meeting
13 number 99, and at about 1:00 on Monday,
14 December 16. And with that we will go to the
15 one item on the agenda, which I think starts
16 with Ombudsman Ziemba.

17 MR. ZIEMBA: Thank you, Mr.
18 Chairman. In regard to the timeliness of this,
19 as you know Category 2 applicants are in the
20 process of negotiating surrounding community
21 agreements. The deadline for those agreements
22 is 12/26. And arbitration begins the following
23 day 12/27.

24 So, because there have been some

1 questions that have been raised about
2 arbitration and what it means and how it is
3 connected to negotiations, we thought we should
4 try to get this before you as quickly as we
5 possibly can.

6 I will just summarize very quickly
7 what the major issues are, what we've been
8 providing as a response. And I think that
9 potentially what this could be is just a
10 confirmation of that understanding. And then
11 we have some questions about how we move going
12 forward.

13 Our regulations call for the parties
14 to submit a best and final offer at the
15 conclusion of the 30-day negotiation period.
16 And then the arbitrator or the arbitrators make
17 decisions based on that best and final offer.

18 What we have told applicants and
19 others involved in the process is that as was
20 anticipated in our regs. that best and final
21 offer is what it says in the plain and simple
22 words is best and final offer is the final
23 offer that is presented to the arbitrator at
24 the time of -- at the beginning of arbitration.

1 But communities have requested us to
2 take a look at that issue because they say that
3 this could potentially stymie some of their
4 negotiations. As in a situation that could
5 come about would be parties are negotiating
6 towards a conclusion. A number of offers are
7 transferred back and forth. And then one of
8 the parties could then potentially say well,
9 we're not going to provide that same offer at
10 the time of the arbitration. And that that
11 could be a stumbling block to further
12 negotiations prior to arbitration.

13 So, that is one thing that we are
14 bringing to you to think about as in do we go
15 for continuing to provide that advice as we
16 have been doing at a staff level of what best
17 and final offer means, what we think it means
18 pursuant to our regs. Do we modify that
19 somehow? And what do we do for some of the
20 other ancillary questions?

21 We recommended also that the
22 Commission issue a guidebook for arbitrators.
23 We have prepared a model guidebook on what
24 should be included in arbitrations. And that

1 guidebook pretty much reiterates a lot of
2 what's included in the regulations but in a
3 much more straightforward form. It includes
4 some other sections that state that the
5 arbitrator shouldn't have conflicts. That they
6 shouldn't be from the surrounding community
7 itself and other things like that.

8 Catherine, I don't know if you want
9 to add any further to the conversation.

10 MS. BLUE: The arbitrator guidebook
11 that we put together, which is still in review
12 and in draft form just fleshes out our
13 regulations and tries to give some clarity to
14 the municipalities and to the applicants as
15 they go through this process.

16 We have gotten a number of different
17 questions. Some of them I'm sure we tried to
18 anticipate in the guidebook. But the biggest
19 one has been this issue of the best and final
20 offer. So, we want to get appropriate advice
21 out to the parties as soon as we can before
22 they start their process.

23 CHAIRMAN CROSBY: Okay. Principally
24 we're focusing on the bofo interpretation.

1 Commissioners, anybody want to kick off?

2 COMMISSIONER MCHUGH: That's what
3 our regulation does say. But it also says that
4 the arbitrator can take account of other
5 surrounding community agreements -- take
6 account of surrounding community agreements
7 that the applicant has with other communities.
8 They are to be filed as well. So, it seems to
9 me that's part of the evidence, if you will,
10 about the content of agreements that the
11 arbitrator can consider.

12 So, the question as to whether or
13 not the community, surrounding community can
14 say we got a better offer before this best and
15 final offer was in place is an interesting
16 theoretical one, but it seems to me they could
17 point to surrounding community agreements with
18 others to the extent that they want and whether
19 or not they are allowed to put that evidence on
20 the table.

21 That's a sort of thinking out loud
22 answer to the proposition that they shouldn't
23 be able to do it.

24 MS. BLUE: I think when I looked at

1 that part of the regulations, my thought was
2 those agreements will be submitted for the
3 purpose of determining reasonableness.

4 So, we get questions sometimes from
5 municipalities that say what happens if the
6 applicant comes back and puts in an offer of
7 zero, for example? My thinking would be that
8 by seeing the other surrounding community
9 agreements, the arbitrator could use that to
10 determine that say a hypothetical zero offer is
11 unreasonable. That applicant had signed other
12 agreements with other surrounding communities.

13 That's how we see the interplay
14 between the best and final and the introduction
15 of other surrounding community agreements.

16 MR. ZIEMBA: Nothing in our
17 regulations prohibits municipalities from
18 bringing in other evidence that would go to the
19 reasonableness of a best and final offer, even
20 though the best and final offer is the one
21 that is presented to the arbitrator at the time
22 of the arbitration.

23 And so unless the parties agree to a
24 particular rule of arbitration such as the JAMS

1 arbitration that prohibit certain settlement
2 requests prior to arbitration be brought into
3 the arbitration itself. Potentially, the
4 community or the applicant could bring in as
5 evidence to counter the reasonableness of that
6 offer in the arbitration itself. And it's up
7 to the arbitrators to decide the merit of that
8 argument.

9 COMMISSIONER MCHUGH: So, what's
10 your recommendation with respect to the advice
11 that should be given to the surrounding
12 communities and the applicant?

13 MR. ZIEMBA: So, we've received
14 advice from our outside counsel that a proper
15 course of action would be that the best and
16 final offer is very much that. It is the best
17 and final offer that is presented to the
18 arbitrator based on new. It doesn't have to be
19 based on prior negotiations.

20 But that the parties could bring in
21 evidence when they're arguing whether or not
22 that is the most reasonable approach.

23 They could say there was a prior
24 offer in settlement negotiations. Unless of

1 course the parties came to their own agreement
2 that nothing should prior to that arbitration
3 should be brought in to arbitration.

4 COMMISSIONER MCHUGH: This is an
5 area that I'm not terribly familiar with, but
6 does best have an independent meaning? I.e. if
7 it's your best and final offer, does that mean
8 it's better than the others?

9 MS. BLUE: That's not my
10 understanding of it. It is the best offer at
11 that time that you put forward. The idea is
12 that you have given it as much thought as
13 possible, and this is as far as you're willing
14 to go. In the negotiation practice that's
15 usually what happens.

16 CHAIRMAN CROSBY: Best defined by
17 the offer at that moment in time.

18 COMMISSIONER MCHUGH: The best
19 today.

20 CHAIRMAN CROSBY: Right.

21 COMMISSIONER ZUNIGA: I would agree
22 with that notion. There are so many factors to
23 these negotiations that there's multiple
24 aspects. Communities think about that they're

1 going to be impacted in very different ways.
2 And some communities are going to be impacted
3 in ways different from their neighbors.

4 That focusing on the monetary piece
5 by itself in this notion of best that maybe
6 taking into account prior offers may be
7 misleading. So, I would be of the opinion of
8 best at the time of entering the arbitration
9 process is really what's incumbent upon that
10 process.

11 Otherwise, there would be a lot of
12 disincentive to negotiate the prior phase or
13 concluding a negotiation with the anticipation
14 of that process.

15 CHAIRMAN CROSBY: Right. Anybody
16 else, Commissioner Stebbins?

17 COMMISSIONER STEBBINS: No.

18 CHAIRMAN CROSBY: As I see it, there
19 are three different dimensions to this. The
20 first one I think we're clear on, what we mean
21 now is the two parties are invited, are free to
22 put in what they deem to be their best and
23 final offer at that moment in time by their
24 definition, unconstrained by whatever has gone

1 on before.

2 Two, the parties may bring into the
3 conversation other offers, other information,
4 other data. They are unconstrained from
5 bringing into the subsequent or previous
6 conversation other information.

7 The third one I'm not clear on. --
8 And I think we were clear on that. The third
9 one I'm not clear on. When they put up best
10 and finals, are the arbiters then empowered to
11 merge them? Or are they picking one versus the
12 other informed by whatever research they do but
13 they have to pick one or the other?

14 MS. BLUE: They have to pick one or
15 the other. The only leeway that they have is
16 they can modify an offer to make it conform to
17 Chapter 23K.

18 CHAIRMAN CROSBY: Right.

19 MS. BLUE: So, there is some
20 flexibility there. But at the end of the day,
21 they need to pick one or the other.

22 CHAIRMAN CROSBY: But Chapter 23K
23 would give them pretty broad range, right,
24 because it talks about the broad right adverse

1 effects and the positive effects. It's pretty
2 broad.

3 MS. BLUE: It would probably give
4 them more flexibility on terms other than
5 monetary terms, for example. So, some of the
6 advice we've given to the parties is that they
7 should try to work out as many of the
8 nonmonetary terms as possible before they go to
9 the arbitrator. Whatever they can work out,
10 they should agree to, submit jointly, and then
11 leave the remaining terms for the arbitrator to
12 address.

13 But I think in terms of nonmonetary
14 terms, yes, there is a broad flexibility for
15 the arbitrator.

16 CHAIRMAN CROSBY: Discretion, right.
17 Is that question whether the arbitrator must
18 pick one or the other with this one room for
19 discretion, is that before us today as a
20 discussion topic too or that's a given?

21 MR. ZIEMBA: That's part of our
22 regulations.

23 CHAIRMAN CROSBY: That's part of our
24 existing regs.

1 COMMISSIONER MCHUGH: That's what
2 the regs. say. But the conformity to 23K does
3 provide, it seems to me, a great deal of leeway
4 in some circumstances where it talks about the
5 statutory requirement that there be the best or
6 has value judgments built into the requirements
7 of the statute, provides a mechanism for the
8 arbitrator to use those value judgments in
9 making the ultimate award. Maybe not
10 monetarily on the monetary side, but on other
11 pieces of the award. So, I think that works
12 its way out.

13 CHAIRMAN CROSBY: We are basically
14 delegating to the arbitrator the authority to
15 interpret how 23K can affect the selection
16 between those two choices.

17 COMMISSIONER MCHUGH: Right.

18 CHAIRMAN CROSBY: Okay. So, have we
19 answered the question?

20 MR. ZIEMBA: Yes. And we can follow
21 up with Commissioners on an individual basis as
22 we put forward this here to make sure it
23 doesn't exceed what we are talking about here
24 today.

1 COMMISSIONER MCHUGH: This going to
2 be followed up by a written set of guidelines
3 that we're going to be able to take a look at
4 before it goes out, right?

5 MS. BLUE: Yes.

6 CHAIRMAN CROSBY: Well, we have the
7 handbook already, right, which I forgot to
8 bring in with me --

9 MS. BLUE: A draft is available.

10 CHAIRMAN CROSBY: -- and I thought
11 was 99 percent there. I thought it was a
12 really nice job.

13 COMMISSIONER MCHUGH: Okay. I
14 missed that. But there will be time to comment
15 on that before it goes out if we work quickly.

16 MR. ZIEMBA: If we work quickly.
17 There's another meeting this week. But that
18 predominant question of what is best and final
19 meaning impacts negotiations hopefully going on
20 today.

21 COMMISSIONER MCHUGH: Right, okay.

22 CHAIRMAN CROSBY: Okay. So, you
23 don't need a motion from us? Do I have a
24 motion to adjourn meeting number 99?

1 COMMISSIONER CAMERON: So moved.

2 CHAIRMAN CROSBY: All in favor?

3 COMMISSIONER MCHUGH: Aye.

4 COMMISSIONER CAMERON: Aye.

5 COMMISSIONER ZUNIGA: Aye.

6 COMMISSIONER STEBBINS: Aye.

7 CHAIRMAN CROSBY: The ayes have it
8 unanimously. Thank you very much General
9 Counsel Blue, Ombudsman Ziemba you came in at
10 13 minutes, well done.

11 MR. ZIEMBA: I predicted five. So,
12 I'm still wrong.

13

14 (Meeting adjourned at 1:14 p.m.)

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22 MASSACHUSETTS GAMING COMMISSION STAFF:

23 Catherine Blue, General Counsel

24 John Ziemba, Ombudsman

C E R T I F I C A T E

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I, Laurie J. Jordan, an Approved Court Reporter, do hereby certify that the foregoing is a true and accurate transcript from the record of the proceedings.

I, Laurie J. Jordan, further certify that the foregoing is in compliance with the Administrative Office of the Trial Court Directive on Transcript Format.

I, Laurie J. Jordan, further certify I neither am counsel for, related to, nor employed by any of the parties to the action in which this hearing was taken and further that I am not financially nor otherwise interested in the outcome of this action.

Proceedings recorded by Verbatim means, and transcript produced from computer.

WITNESS MY HAND this 18th day of December, 2013.

LAURIE J. JORDAN My Commission expires:
Notary Public May 11, 2018