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and Representatives McGeehan,

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and B. Josephs

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In re: Philadelphia Entertainment	:	COMMONWEALTH OF PENNSYLVANIA
Development Partners, L.P., D/B/A/	:	BEFORE THE PENNSYLVANIA GAMING
Foxwoods Casino Philadelphia	:	CONTROL BOARD
	:	
	:	Docket No. 1367

**HEARING REQUESTED**

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**OPPOSITION OF LEGISLATORS AS AMICUS CURIAE TO MOTION TO EXTEND TIME OF PEDP, L.P. D/B/A FOXWOODS CASINO PHILADELPHIA**

The Legislators, Senators Lawrence M. Farnese, Jr. and Michael J. Stack, and Representative Michael H. O'Brien, Representative Michael P. McGeehan, Representative John Taylor, and Representative Babette Josephs hereby oppose Petitioner Philadelphia Entertainment and Development Partners, L.P.'s ("PEDP") Motion for additional time to make its submissions in response to Condition 5 and 6 of the Board's September 1, 2009 Order granting PEDP's Petition to Extend the Time to Make Slot Machines available to play, and respond to the averments in the Motion as follows:

1. Admitted.
2. Denied as stated. It is denied that good cause exists to grant the requested extension of time or that PEDP has moved diligently forward in its efforts to

develop a Category 2 Slot License facility at the Columbus Boulevard site. The Legislators are without knowledge and information sufficient to form a belief as to the truthfulness of the averment that PEDP has timely satisfied all prior conditions of the Board's Order.<sup>1</sup>

3. Denied as stated. PEDP's May 22, 2009 petition sought not only an extension of time to make 1,500 slot machines available,<sup>2</sup> but implicit approval to relocate its licensed facility to 801 Market Street.<sup>3</sup>

4. Denied as stated. The Board's Orders and Adjudications speak for themselves.

5. Denied as stated. The Board's Orders and Adjudications speak for themselves.

6. Denied as stated. The Board's Orders and Adjudications speak for themselves.

7. Denied as stated. The Board's Orders and Adjudications speak for themselves.

8. Denied as stated. The Legislators are without knowledge or information sufficient to form a belief as to the truthfulness of the averments in Paragraph 8, therefore same are denied and PEDP should be required to provide evidence of same at a full evidentiary hearing. (See Fn. 1).

9. Denied. The Legislators are without knowledge or information sufficient to form a belief as to the truthfulness of the remaining averments in Paragraph 9, therefore

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<sup>1</sup> All submissions by PEDP as required by the Board's September 1, 2009 Order have been deemed confidential because such submissions are part of an "ongoing investigation" of PEDP by the Bureau of Investigations and Enforcement.

<sup>2</sup> In Re: PEDP Petition to Extend Time to Make Slot Machines Available at 15.

<sup>3</sup> *Id.* at ¶ 30-31, and 36.

same are denied and PEDP should be required to provide evidence of same at a full evidentiary hearing. (See Fn. 1).

10. Denied. The Legislators are without knowledge or information sufficient to form a belief as to the truthfulness of the averments in Paragraph 10, therefore same are denied and PEDP should be required to provide evidence of same at a full evidentiary hearing. (See Fn. 1).

11. Admitted.

12. Denied. The Legislators are without knowledge or information sufficient to form a belief as to the truthfulness of the averments in Paragraph 12, therefore same are denied and PEDP should be required to provide evidence of same at a full evidentiary hearing. (See Fn. 1).

13. Denied. It is denied that funding of the development of the facility is the *first* and most critical hurdle in ensuring that PEDP has at least 1,500 slot machines available for play on May 29, 2011, or that the source, manner and timing of amounts of funding dictate the timing and direction of development issues. Mr. Brian Ford, CEO of Philadelphia Investors, testified before the Board on behalf of Foxwoods Philadelphia Casino on August 28, 2009 that "when you go out to acquire financing, you have to have all of your plans, all of your approvals in place. Once we've had all of the plans and approvals in place, we are very confident that we could obtain the necessary funds to move forward with construction."<sup>4</sup> It is further denied that the realities of the national credit and financial markets since September 1, 2009 are materially different from the reality of those same markets at the time of Mr. Ford's testimony on August 28, 2009,

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<sup>4</sup> In Re: PEDP Petition to Extend Time, Hearing Transcript, page 35, lines 14-19.

therefore same are denied and PEDP should be required to provide evidence of supporting this averment at a full evidentiary hearing.

14. Denied as stated. It is denied that PEDP is required to provide "detailed" timelines for commencement and completion of all phases of development of the Foxwoods project. The Board's Order of September 1, 2009 requires submission of a timeline, not a "detailed timeline." Further, the Order requires submission of all phases of development regarding a facility with a minimum of 1,500 slot machines, not full build-out of all future phases.

15. Denied. It is denied that PEDP has stated legally sufficient reasons amounting to good cause for failing to meet the submission requirements of Conditions 5 and 6 of the Board's Order of September 1, 2009, as will be more fully set forth below, therefore same are denied. Further, to the extent that PEDP has developed any and all renderings, proposals, opinions or other documents and timelines for construction, PEDP should be required to immediately provide same to the Board for evaluation of PEDP's efforts and commitment in developing the Columbus Boulevard site.

In addition, it is clear that on October 16, 2009, a full six weeks after the Board's Order, PEDP had not even hired the necessary professionals to design a facility and prepare the plan of development required by the Board's September 1, 2009 Order.<sup>5</sup> Failure of a licensee to hire the required personnel to develop designs, drawing, plans and timelines is not good cause to extend time.

16. Denied. It is denied that the source, manner, timing and amounts of financing and funding for the facility dictate the details of rendering, proposals and other

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<sup>5</sup> Foxwoods' letter of October 16, 2009 to Chairman Gregory C. Fajt, Esquire at page 4, ¶ 1 states: "At present Foxwoods is consulting with various design and construction professionals to evaluate *how to prepare an updated development plan* for the facility and *who to retain* as part of that process."

documents and timelines required by Conditions 5 and 6 of the Board's Order of September 1, 2009, for the reasons set forth in Paragraph 13 above and Paragraph 25 below, therefore same are denied and PEDP should be required to provide evidence supporting this averment at a full evidentiary hearing.

In addition, PEDP is on record against constructing a temporary facility due to the difficulties in financing both a temporary and permanent facility simultaneously and correctly acknowledges that the same development hurdles exist whether building an interim or temporary facility.<sup>6</sup> Further, the Board's Order of September 1, 2009 directed that the "Foxwoods" project be built as proposed,<sup>7</sup> and one factor in selecting the Foxwoods project for licensing was the fact that PEDP did not plan to build a temporary facility,<sup>8</sup> therefore, the Board should deny any request by PEDP to construct a temporary facility.

17-21. Denied. The Legislators are without knowledge or information sufficient to form a belief as to the truthfulness of the averments in Paragraphs 17-21, therefore same are denied and PEDP should be required to provide evidence of same at a full evidentiary hearing. (See Fn. 1).

22. Denied as stated. PEDP was granted a Category 2 Slot License by the Board. PEDP is obligated under the Board's September 1, 2009 Order to construct a Category 2 Slot License facility substantially similar to that approved by the Board in December, 2006. PEDP committed to the financing and construction of a Category 2 Slot license facility. The impact of proposed table game legislation on project financing the development of a Category 2 Slot License facility should therefore not be

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<sup>6</sup> In Re: PEDP Petition to Extend Time, Hearing Transcript, page 36-37.

<sup>7</sup> In Re: PEDP Petition to Extend Time, Adjudication at 14.

<sup>8</sup> In Re: Adjudication of Category 2 Slot Licenses, ¶ 158.

considered by the Board in deciding the requested relief. It is further evident that PEDP's short list of "interested parties" is unwilling to finance the development of a Category 2 Slot License facility. The Legislators therefore deny that the proposed table game legislation in any way impacts financing of a Category 2 Slot License facility and PEDP should be required to provide to the Board a list of parties interested in financing a Category 2 Slot License facility at the Columbus Boulevard site, and further question PEDP on financing commitments at a full evidentiary hearing.

23. Denied. The Legislators are without knowledge or information sufficient to form a belief as to the truthfulness of the averments in Paragraph 23, therefore same are denied and PEDP should be required to provide evidence of same at a full evidentiary hearing. (See Fn. 1).

24. Denied. The Legislators are without knowledge or information sufficient to form a belief as to the truthfulness of the averments in Paragraph 24, and therefore same are denied and PEDP should be required to provide evidence of same at a full evidentiary hearing. (See Fn. 1).

25. Denied. It is denied that PEDP has stated sufficient reason amounting to good cause for failing to make its required submissions to the Board. PEDP avers that it is unable to meet the submission deadline because investors will only commit to financing of a Category 2 Slot License facility if table games are approved.<sup>9</sup> PEDP is not licensed for table games and the Legislators respectfully suggest that any averment tying financing of the Slot facility to table games should be ignored by the Board.

PEDP further avers that it is unable to meet the submission deadlines of Conditions 5 and 6 because financing dictates design elements, but that PEDP is willing

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<sup>9</sup> In Re: PEDP Motion to Extend Time, ¶ 22.

to construct a temporary facility.<sup>10</sup> This averment is contrary to the testimony of PEDP that plans and approvals are necessary in order to obtain funding (See ¶ 13 and Fn. 4 above), and also that construction of a temporary facility is impractical because of the need to fund both the temporary facility and the interim or permanent facility simultaneously. (See ¶ 16 and Fn. 5 above).

PEDP further avers that the credit markets have changed since the Board issued its Order on September 1, 2009, and that the changes make funding the development of the facility the first and most critical hurdle. This averment is contrary to the testimony of the PEDP (See ¶ 13 and Fn. 4 above), and therefore PEDP should be required to provide evidence of same at a full evidentiary hearing.

PEDP further avers that its renderings, proposals, opinions or other documents and timelines for construction lack an appropriate level of specificity and detail to submit to the BIE.<sup>11</sup> It is inappropriate for PEDP to solely determine whether to withhold required submissions from the BIE that it is obligated to provide as Conditions of its license imposed by a Board Order. The Legislators respectfully suggest that it is for the BIE, not the Licensee, to determine whether such submissions are of the appropriate level of specificity and detail. Further, and more importantly, the BIE may glean from such submissions the degree of commitment and effort of PEDP, thus far, in designing, financing and constructing the “Foxwoods” project which may assist the BIE in assessing PEDP’s continuing suitability.

26. Denied. For the reasons set forth more fully above, it is specifically denied that PEDP has shown good cause for extending the time in which to submit responses to Conditions 5 and 6 of the Board’s Order of September 1, 2009, therefore same are

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<sup>10</sup> *Id.* at ¶¶ 13,16.

<sup>11</sup> *Id.* at ¶ 15.

denied and PEDP should be required to submit its responses to Conditions 5 and 6 without further delay.

### **REQUEST FOR RELIEF**

27. The Legislators incorporate all paragraphs of their Opposition as though fully set forth herein.

28. Denied as stated. The regulation speaks for itself.

29. Denied as stated. The Board has only defined "good cause" to be "substantial reason amounting to a legal excuse for failing to perform an act required by law as determined on a case-by-case basis."<sup>12</sup> The Board has held that "litigation, community opposition and obstacles from Philadelphia City Council are good cause to grant an extension of time."<sup>13</sup>

30. Denied. It is denied that PEDP has shown good cause to extend the time in which to submit responses to Conditions 5 and 6 for the reasons set forth above and those in the supporting memorandum of law.

31. Denied. The Legislators are without knowledge or information sufficient to form a belief as to the truthfulness of the averments in Paragraph 31, therefore same are denied and PEDP should be required to provide evidence of same at a full evidentiary hearing. (See Fn. 1).

32. Denied. The Legislators are without knowledge or information sufficient to form a belief as to the truthfulness of the averments in Paragraph 32, therefore same are denied and PEDP should be required to provide evidence of same at a full evidentiary hearing.

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<sup>12</sup> In Re: PEDP Petition to Extend Time, Adjudication at 13, citing BLACKS LAW DICTIONARY, 6<sup>th</sup> Edition (1990).

<sup>13</sup> In Re: HSP Gaming, L.P.'s Application for Extension of Time to Make slot Machines available to Play.

33. Admitted.

34. Denied. It is specifically denied that any factor beyond PEDP's control has forced PEDP to reorder its priority in which to pursue development goals or that PEDP has the authority to do so, and therefore same are denied and PEDP should be required to provide evidence of same at a full evidentiary hearing.

35. Denied as stated. The Board's Order of September 1, 2009 requires that PEDP submit any and all renderings, proposals, opinions or other documents and timelines for construction, not necessarily "final" documents. The Legislators, therefore, respectfully suggest that the Board should ignore PEDP's assertion that the national credit and financial markets bear upon their ability to submit "*any and all* renderings, proposals, opinions or other documents and timelines for construction." Further, such averments do not amount to good cause for the reasons stated above and in the supporting memorandum of law.

36. Denied in part. The requested extension of time is double that authorized by the Board in its Order of September 1, 2009, therefore, said request is not minimal. The Legislators are without knowledge or information sufficient to form a belief as to the truthfulness of the remaining averments in Paragraph 36, therefore same are denied and PEDP should be required to provide evidence of same at a full evidentiary hearing. (See Fn. 1).

37. Denied. PEDP has averred that it must obtain financing prior to finalizing the plan of development and construction timeline.<sup>14</sup> PEDP also avers that it does not have financing commitments from any interested parties and that the interested parties are unwilling to commit to funding until the final form of the pending table game

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<sup>14</sup> In Re: PEDP Motion to Extend of Time, ¶ 16.

legislation is known.<sup>15</sup> PEDP also avers that its renderings, proposals, opinions or other documents and timelines for construction lack an appropriate level of specificity and detail.<sup>16</sup>

Given the absence of progress to date, in the financing and design of the Foxwoods Category 2 Slot License facility, and PEDP's mistaken reliance upon funding of a Slot facility upon passage of table games legislation in a form acceptable to investors, it is highly likely that PEDP will miss the March 1, 2010 deadline for submission of financing documents and financial commitments, and the ultimate deadline of May, 29, 2011 to make 1,500 slot machines available to play, therefore same are denied and PEDP should be required to provide evidence of same at a full evidentiary hearing.

38. Denied. The Legislators are without knowledge or information sufficient to form a belief as to the truthfulness of the averments in Paragraph 38, therefore same are denied and PEDP should be required to provide evidence of same at a full evidentiary hearing. (See Fn. 1).

WHEREFORE, the Legislators respectfully submit that PEDP's Motion fails to aver facts sufficient to show good cause for an extension of time pursuant to 58 Pa. Code § 497a.5. It is, therefore, respectively requested that the Board deny PEDP's Motion and require that PEDP immediately provide to BIE the current version of "all architectural renderings, artist renderings, conceptual proposals, engineering opinions, any and all documents relating to construction of a facility substantially similar to that approved by the Board on December 20, 2006, and a timeline for commencement and completion of all phases of development regarding its facility in accordance with

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<sup>15</sup> *Id.* at 22.

<sup>16</sup> *Id.* at 15.

Conditions 5 and 6 of the Board's September 1, 2009 Order. It is further respectfully suggested that the Board conduct a full evidentiary hearing in the interest of transparency wherein the Board may assess PEDP's efforts and commitment; and that should the Board find that PEDP's efforts toward meeting the requirements of Conditions 5 and 6 shows a lack of effort or commitment sufficient to raise doubt of PEDP's continuing suitability and ability to meet its deadline of May 29, 2011 to make 1,500 slot machines available to play, that the Board take the necessary steps to revoke PEDP's Category 2 Slot license and reissue said license to a suitable applicant so that the tax relief intended by the Gaming Act not be further delayed.

A hearing on the Motion to Extend Time is requested.

Respectfully submitted,

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Dated: December 10, 2009

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IN RE:	: COMMONWEALTH OF PENNSYLVANIA
THE APPLICATION OF	: BEFORE THE PENNSYLVANIA GAMING
PEDP L.P., D/B/A	: CONTROL BOARD
FOXWOODS CASINO PHILADELPHIA :	:
FOR AN EXTENSION OF TIME	: Docket No. 1367

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**VERIFICATION**

Michael H O'Brien hereby state that the facts set forth in the attached Opposition to the Motion of PEDP, L.P. to Extend Time are true and correct to the best of my knowledge, information and belief. I understand that the statements herein are made subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities.

By: Michael H O'Brien

Date: 12/8/09