PUBLIC SAFETY & SECURITY COMMITTEE

INFORMATIONAL FORUM ON FEBRUARY 23, 2017

TESTIMONY OF URI CLINTON, MGM RESORTS INTERNATIONAL

Good morning Chair Representative Verrengia, Co-Chairs Senator Larson and Senator Guglielmo; Vice Chairs Senator Witkos, Senator Cassano, and Representative Orange; Ranking Member Sredzinski, and other distinguished members of this Committee. My name is Uri Clinton, and I am a Senior Vice President and Legal Counsel for MGM Resorts International.

We appreciate the opportunity to submit testimony for this informational forum on the possible establishment of a new commercial gaming industry within the State of Connecticut.

As the Committee is well aware, Special Act 15-7 requires additional enabling legislation that would actually issue a gaming license on a noncompetitive, no bid basis. In effect changing state law to allow a tribal business entity jointly owned by the two tribes that operate casinos in Connecticut only on tribal land—an entity called MMCT Venture, LLC—to open a new, off-reservation, commercial casino.

This off-reservation commercial casino would be distinctly different from the current on-reservation tribal gaming governed by the Indian Gaming Regulatory Act ("IGRA") and the Tribal Gaming Compacts.

MGM continues to assert that if Connecticut decided to authorize the establishment of a commercial casino industry the citizens of Connecticut deserve to benefit from an open transparent, and competitive process.

The State of Connecticut has a rare opportunity to apply the lessons learned by other states -- its neighbor the Commonwealth of Massachusetts, and the State of Maryland for example -- both of which recently completed open, competitive processes for the establishment of their commercial gaming industries that resulted in:

- Billions of dollars of private capital investment;[1]

[1] See, https://malegislature.gov/Laws/SessionLaws/Acts/2011/Chapter194 – Section 10(a) "a gaming licensee shall make a capital investment of not less than $500,000,000 into the gaming establishment which shall include, but not be limited to, a gaming area, at least 1 hotel and other amenities as proposed in the application for a category 1 license"

- Host and Surrounding Community Agreements, which among other things required the Casino companies to fund Infrastructure improvements and mitigation plans[2];

- Tens of millions of dollars in annual payments to local municipalities[3] and surrounding communities[4] -- in Maryland 1.5 billion dollars has gone into the Education Trust Fund since 2010[5];

- Market driven tax rates on both Slots and Table Games[6];

- Regulatory Structures required to ensure gaming integrity,[7] and protect the public[8];

- Thousands of new jobs[9] ; and

- Mandatory construction timelines[10], local procurement and hiring obligations, Project Labor Agreements, and workforce development programing[11].

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[2] 205 CMR 127.00: Reopening Mitigation Agreements; Chapter 194 of the Public Acts, Section 15(8)

[3] 205 CMR 123.00: Host Communities; http://massgaming.com/about/2017-community-mitigation-fund/host-surrounding-communities/host-community-agreements/

[4] 205 CMR 125.00: Surrounding Communities ; Chapter 194 of the Public Acts, Section 6(a)-(e) "Investigation and Enforcement Agency"

[5] Maryland Gaming Commission

[6] § 2–1246 Maryland State Government
http://mgaleg.maryland.gov/2012s2/chapters_noln/Ch_1_sb0001E.pdf

[7] 205 CMR 142.00: Regulatory Monitoring And Inspections ; Chapter 194 of the Public Acts, Sections 15 (7)-(9); 17(a) and 18(1).

[8] Chapter 1, Acts of 2012 2nd Special Session of Maryland

[9] 2016 State of the States – Study by the American Gaming Association; *See also* MGC Workforce Development and Diversity Division, "It is estimated that over 30,000 individuals will need to be considered for employment in order to fill the 10,000 needed positions projected."

[10] M.G.L. c. 23K § 10(a). "...Monies received from the applicant shall be held in escrow until the final stage of construction, *as detailed in the timeline of construction submitted with the licensee's application and approved by the commission*, at which time the deposit shall be returned to the applicant to be applied for the final stage."(emphasis added).

[11] 205 CMR 135.00: Monitoring of Project Construction and Licensee Requirements ; See also (M.G.L. c. 23K, § 15(15)). Applicants are required to formulate their own specific diversity goals related to minority, women and veteran owned businesses to participate as contractors in all stages of building their gaming establishments (design, construction, and operation).

Everyone here is aware of the budgetary challenges this Legislature and Governor are grappling with this legislative session. Thus, further complicating the policy decision before you today is the fact that the State of Connecticut is home to two established tribal casinos that are located on tribal lands operating under two compacts that were entered into in the early 1990s.

If not properly anticipated the existing compacts could pose real systemic risk to the state of Connecticut and its immediate and future budgets. This risk extends to the budgets of approximately 161 municipalities that depend on the Pequot Fund. Moreover, there are additional risks in complying with federal law related to tribal gaming that extends even if the Tribes jointly own and operate an off reservation satellite casino.

Thus, a key question for legislators and the Governor alike is this: how can the State of Connecticut establish its first commercial casino in a way that maximizes the number of jobs created and tax revenue to the state, while simultaneously off-setting the associated risk to the Pequot Fund?

We believe the answer to that question is that the Legislature should replace Special Act 15-7 with new legislation that puts in place a new process that is fair, open, transparent, and competitive; in keeping with what has become best practice for new and expanding gaming jurisdictions. Furthermore, we would suggest that a precondition for entry into the application process would be the requirement to preserve the Pequot Fund monies should they go away when the tribal exclusivity is broken. In practice this would mean that all applicants must be required to agree to a market driven tax rate on both table games and slots designed to off-set any loss to the Pequot Fund.

As you consider a new policy approach to gaming, I will take this opportunity to discuss four related policy questions:

Question # 1 - What Would Happen to the Tribes' Revenue-Sharing Obligations?

The Tribes' compacts and memoranda of understanding with the State contain revenue-sharing provisions that require the Tribes to pay the State a 25 percent royalty on all slot-machine revenues. In recent years, the Tribes have paid nearly $300 million annually to the State. Of that $300 million in annual revenues, approximately $60 million is deposited into the Pequot Fund and then paid out to municipalities.

Authorizing a commercial casino—even one run by MMCT—would jeopardize the Tribes' revenue-sharing obligations. The compacts contain termination clauses that require the Tribes to make revenue-sharing payments to the State **only** "so long as no change in State law is enacted to permit the operating of . . . commercial casino games *by any other person*."[12] The revenue-

[12] Mohegan MOU ¶ 1 (emphasis added); Mashantucket Pequot MOU ¶ 1 (emphasis added).

sharing obligations also terminate if "the existing laws or regulations of the State are amended to authorize operation of any video games of chance for any purpose by *any person, organization or entity*."[13]

There is a real risk that simply ratifying a development agreement between MMCT and any municipality would trigger these termination clauses, and thus end the Tribes' revenue sharing payments, because, under Connecticut law MMCT, a legally separate LLC, is "quote another person." End quote, according to Connecticut Law.[14]

Indeed, when Attorney General George Jepsen wrote to legislative leaders in April 2015 he explained that authorizing a third casino "arguably would violate both [memoranda of understanding] by allowing someone" else to operate a casino.

Question # 2 - Can This Risk Be Addressed by Amending the Tribes' Compacts?

Apparently recognizing that risk, the Tribes have proposed amending their compacts to allow a third casino to open without terminating their revenue-sharing obligations.

That, however, does not eliminate the risk, because under the federal IGRA a compact amendment cannot go into effect until it is reviewed and approved by the U.S. Department of the Interior.[15] The Interior Department does not automatically approve compact amendments; instead, it conducts a detailed review and may disapprove a compact amendment if it finds that the amendment violates any provision of IGRA or any other Federal law.[16] In fact, this exact scenario has played out several times, including, most recently, in Massachusetts.

Moreover, when a compact amendment is submitted for review, the Department evaluates both the amendment and any pre-existing tribal-state agreements "as a whole" to ensure compliance with IGRA.[17] Thus, when a tribe submits an amendment for review, the Department may disapprove not only the amendment, but any other part of the existing compact.

Therefore, there is double exposure. First, if the State agrees to the Tribes' potential compact amendments and they are submitted to the Interior Department for review, there is, as Attorney General Jepsen put it, "no certainty as to whether the Secretary [of the Interior] would approve the amendment." Second, because the Department reviews amendments and

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[13] Mashantucket Procedures § 15(a) (emphasis added); *see also* Mohegan Compact § 15(a) (substantially identical provision).

[14] CT Gen Stat § 34-124(a)-(d) (2012) (https://www.cga.ct.gov/current/pub/chap_613.htm)

[15] 25 C.F.R. § 293.4; *see also* Dept. of Interior, Policy Letter – Class III Tribal State Gaming Compacts, at 2 (June 15, 2012), https://bia.gov/cs/groups/webteam/documents/text/idc1-028392.pdf.

[16] *See* 25 C.F.R. § 293.14.

[17] 73 Fed. Reg. 74,004, 74,005 (Dec. 5, 2008).

underlying agreements "as a whole," there is a further risk that the Department could invalidate not only the amendment, but also the existing revenue-sharing provisions in the compacts.

These risks exist because the Department evaluates revenue-sharing provisions "with great scrutiny" and "has sharply limited the circumstances in which Indian tribes can make direct payments to a State."[18] Most notably, IGRA prohibits states from using tribal-gaming revenues for general-fund programs.[19] Even where revenue-sharing is allowed, IGRA limits the *percentage* of revenue that may be shared with states, and the Department has rejected compacts—such as one in Massachusetts in 2012—for having revenue sharing rates even *lower* than 25%.[20]

These requirements have evolved, and the Interior Department's review has become more stringent, since the compacts were initially approved in the early 1990s. That's why Connecticut needs to weigh the risk that the Interior Department, or a court, would find that the Tribes' *existing* agreements with the State violate IGRA if amendments are submitted to the Department for review.

Question # 3 - What Has the Interior Department Said About the Potential Compact Amendments?

The Interior Department recently discussed the potential compact amendments in an April 2016 "technical assistance" letter. The letter addressed whether the potential compact amendments, if approved, would "make clear that this joint venture [the MMCT commercial casino] will in no way alter or compromise the Tribes' existing agreements with the State relating to the Tribes' gaming under [IGRA]." The Department answered that if the amendments were adopted and approved, the "existing exclusivity arrangement would not be affected by a new [commercial] casino" operated by the Tribes.

The letter, however, does not address whether the Department would approve the potential compact amendments. In fact, the Department expressly stated that its letter "does not provide" and "should not be construed as a preliminary decisio[n] or advisory opinio[n]" regarding the amendments' legality because the Tribes had not "formally submitted [the amendments] to the Department for review and approval."

It also bears emphasis that the letter does not bind the Department. Federal agencies such as the Interior Department generally have inherent power to reconsider their own

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[18] Dept. of Interior, Habematolel Pomo of Upper Lake – Disapproval Decision, at 1 (Aug. 17, 2010), https://bia.gov/cs/groups/xoig/documents/text/idc1-024698.pdf; Dept. of Interior, Jena Band of Choctaw Indians – Disapproval Decision, at 1 (Mar. 7, 2002), https://bia.gov/cs/groups/xoig/documents/text/idc1-029778.pdf; Dept. of Interior, Forest County Potawatomi Community of Wisconsin – Disapproval Decision, at 1 (Jan. 9, 2015), https://bia.gov/cs/groups/xoig/documents/text/idc1-029286.pdf.

[19] *Rincon Band of Luiseno Mission Indians v. Schwarzenegger*, 602 F.3d 1019 (9th Cir. 2010).

[20] Dept. of Interior, Mashpee Wampanoag Tribe – Disapproval Decision, at 1 (Oct. 12, 2012), https://bia.gov/cs/groups/webteam/documents/text/idc1-028222.pdf.

decisions.[21] Many federal agencies are exercising that authority to reconsider actions taken under the Obama Administration. Under the Trump Administration, the Interior Department may reconsider previous decisions, including the technical assistance letter.

Question # 4 - What Are the Constitutional Implications of the Enabling Legislation Required Under Special Act 15-7?

Finally, there is also an open question as to whether the enabling legislation required under Special Act 15-7 would even be constitutional. Arguably, that enabling legislation violates the Equal Protection Clause because it grants rights exclusively in favor of two tribes, but not to other tribes or anyone else. Additionally, we believe the required enabling legislation also violates the dormant Commerce Clause[22] by granting rights to the two in-state Tribes but not out-of-state competitors. Once again, Attorney General Jepsen recognized both these risks in his April 2015 letter.

As the members on this Committee are aware, on November 28, 2016 we argued the Constitutionality of Special Act 15-7 before the 2nd Circuit U.S. Court of Appeals. We are expecting a ruling in the near future. However, there is no need for Connecticut to run the risk of enacting additional legislation that would also be subject to attacks on constitutional grounds because there is a better solution: legislation creating an open and transparent competitive process. An open and transparent process would help ensure the best result for Connecticut by ensuring selection of the best casino-development proposal—one that maximizes jobs and tax revenue in and for the State.

Conclusion

Thank you for your consideration of this testimony. Connecticut cannot afford to make the wrong choice, and we respectfully encourage the Committee to take a hard look not only at the potential benefits, but also the risks and alternatives to the proposed legislation. Again Connecticut has the ability to apply lessons learned from other jurisdiction.

I would be happy to answer any questions you might have, including any question regarding the Oxford Economic Study which has been included in your supporting materials.

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[21] *See, e.g., Ivy Sports Medicine, LLC v. Burwell*, 767 F.3d 81, 86 (D.C. Cir. 2014) (collecting authority for the proposition that "an agency has the inherent power to reconsider and change a decision if it does so within a reasonable period of time"); *Tokyo Kikai Seisakusho, Ltd. v. United States*, 529 F.3d 1352, 1360 (Fed. Cir. 2008) ("[T]he courts have uniformly concluded that administrative agencies possess inherent authority to reconsider their decisions, subject to certain limitations, regardless of whether they possess explicit statutory authority to do so.").

[22] United States Constitution, Article 1, Section 8, Clause 3.