

**Kevin F. O’Toole, Executive Director
Pennsylvania Gaming Control Board
Testimony before the Senate Democratic Policy Committee
on “Skill Games in Pennsylvania”
August 23, 2023**

Good morning, Chairwoman Muth and Members of the Senate Democratic Policy Committee. My name is Kevin O’Toole and I serve as the Executive Director of the Pennsylvania Gaming Control Board (“Board”). I would like to thank the Committee for extending an invitation to me, on behalf of the Board, to testify on the topic of “Skill Games in Pennsylvania”.

My testimony will provide information on the history and landscape of Slot Machine gaming and gambling generally in the Commonwealth. I will also highlight the legal differences between statutorily-authorized Slot Machines and the “skill-based games”.

As a preliminary matter, the Board filed an Application to Intervene in a case presently before the Commonwealth Court that involved the legality of skill-based games in Pennsylvania. On August 14, 2023, the Commonwealth Court denied the Board’s Application to Intervene in that case.

Although the Board will not have intervenor status in that case, there was an Opinion issued by the Court on November 20, 2019, in conjunction with a Declaratory Judgement Petition. That Opinion was not dispositive of the case but did contain significant findings. The Commonwealth Court, sitting *en banc*, ruled that skill-based games would meet the definition of a “Slot Machine”¹ in the Pennsylvania Race Horse Development and Gaming Act (“Gaming Act”) were the machines to be located in a Licensed Facility and therefore subject to the Gaming Act².

History and Landscape of Gambling in the Commonwealth:

After much debate, and indeed compromising, the legalization of Slot Machine gaming was established in Pennsylvania by Act 71 of 2004. Act 71 of 2004 established three categories of Slot Machine Licensee: Category 1³ (“racino”), Category 2⁴ (stand-alone casino), and Category 3⁵ (resort casino) Slot Machine licenses were authorized. The Gaming Act has been amended several times since 2004 to authorize additional forms of gambling, including table games in 2009 and gaming expansion initiatives in 2017 that added iGaming, Sports Wagering, VGTs at Truck Stop establishments, Fantasy Contests, and Category 4⁶ Slot Machine Licensees of which there are presently 4 facilities.

¹ 4 Pa.C.S. §1103

² POM of Pennsylvania, LLC v. Dep’t of Revenue, 221 A.3d 717, 725 (Pa. Commw. Ct. 2019)

³ 4 Pa.C.S. §1302

⁴ 4 Pa.C.S. §1304

⁵ 4 Pa.C.S. §1305

⁶ 4 Pa.C.S. §1305.1

Most importantly from my perspective, Act 71 of 2004 created the Board to oversee all gaming as provided for in the Gaming Act and vested the Board with broad-ranging powers and duties, including ⁷ “sole regulatory authority over every aspect of the authorization, operation and play of Slot Machines”. ⁸Despite the Board’s exclusive authority given to it by the General Assembly, operators of so-called skill-based machines continue to operate their Slot Machines outside of a regulatory structure established by the legislature.

Player Protections Within the Gaming Act:

When the General Assembly authorized Slot Machine gambling within the Commonwealth, it endeavored to put in place a number of provisions which were, and currently are, designed to uphold the integrity of gaming and to protect the public. Notably, in the Gaming Act the General Assembly declared: “[t]he primary objective of [the Gaming Act] to which all other objectives and purposes are secondary is to protect the public through the regulation and policing of all activities involving gaming and practices that continue to be unlawful.”⁹ To implement this legislative intent, the Gaming Act stipulates, among others, that the Board shall enforce:

- That no one under the age of 21 can Game in a licensed facility¹⁰;

⁷ 4 Pa.C.S. §1305.1

⁸ 4 Pa.C.S. §1102(1)

⁹ 4 Pa.C.S. §1102(1)

¹⁰ 4 Pa.C.S. §1208(8)

- That the Board must work with DDAP to establish Compulsive and Problem Gambling programs to assist those members of the public who need help¹¹;
- Monitoring of suspicious financial transactions within a Licensed Facility¹²;
- That Slot Machines themselves are to be tested and certified and maintain, among other regulatory requirements, an 85% theoretical payout percentage¹³;
- A self-exclusion program to assist problem gamblers¹⁴; and
- General player protections to be implemented by the Board through internal controls and a regulatory presence by the Board to oversee and enforce these provisions¹⁵.

In addition to these player protections, a very important difference between licensed and regulated Slot Machines and the unlicensed and unregulated “skill-based Slot Machines” relates to the significant amount of financial benefits that are obtained by the Commonwealth and its governmental subdivisions from license fees and gaming tax assessments.

License Fees and Gaming Taxes on Slot Machines:

As authorized under the Gaming Act, there are substantial license fees and taxes owed on the various Categories of Slot Machine Licensees. A Category 1 or 2 Slot Machine License,

¹¹ 4 Pa.C.S. §1509

¹² 4 Pa.C.S. §1518.1

¹³ 4 Pa.C.S. §1207(10)

¹⁴ 4 Pa.C.S. §1516

¹⁵ 4 Pa.C.S. §1207(3)

which allows a Licensee to operate between 1,500 and 5,000¹⁶ Slot Machines at their Licensed Facility, comes with a \$50,000,000 license fee¹⁷. A Category 3 Slot Machine License, which allows a Licensee to operated up to 600¹⁸ Slot Machines, comes with a \$5,000,000 license fee¹⁹. And a Category 4 Slot Machine License, which allows a Licensee to operate between 300 and 750²⁰ Slot Machines, was awarded through bids with a minimum bid of \$7,500,000²¹ (and attracted bids significantly higher). Furthermore, the Slot Machine Tax for a Slot Machine located at a Category 1, 2, or 3 facility is 34% (but once the Licensee adds in additional assessments that are statutorily required it is effectively 54%) and the Slot Machine Tax on a Slot Machine located at a Category 4 facility is 50%²².

In addition to these fees and taxes, the Gaming Act further imposes upon the Licensee a “Local Share Assessment” to help offset the costs of hosting a casino for the host county and host municipality, which is another 4% of Gross Terminal Revenue²³. Taken together, through June 30, 2023, the regulated Gaming Industry has paid Slot Machine taxes to the Commonwealth totaling almost \$10 billion and Local share distributions totaling almost \$1 billion²⁴.

¹⁶ 4 Pa.C.S. §1210

¹⁷ 4 Pa.C.S. §1209(a)

¹⁸ 4 Pa.C.S. §1305(c)

¹⁹ 4 Pa.C.S. §1305(d)

²⁰ 4 Pa.C.S. §1305.1(d)(1)

²¹ 4 Pa.C.S. §1305.2(c)(5)

²² 4 Pa.C.S. §1403 *et seq.*

²³ 4 Pa.C.S. §1403(c)

²⁴ [Slot Revenue Summary -by FY thru 6.30.20 for website.xlsx \(pa.gov\)](#)

By contrast, unregulated and untaxed skill-based gaming have paid none of these taxes or fees to the Commonwealth. To be clear, the Board is not stating that operators of the skill-based games, in general, are not paying any taxes it may owe. The Board is simply pointing out that, by the present legislatively adopted definitions in the Gaming Act a skill-based Slot Machine and a Slot Machine are both part of the Gaming Act and simply based upon where one is located, it is either subject to a substantial license fee and additional gaming taxes or no license fee and no gaming taxes. That scenario, in all likelihood, was never contemplated by the legislature when Slot Machine gaming was legalized and clearly not contemplated when the Act was amended in 2017 to add skill-based Slot Machines.

Final Thoughts:

The legal landscape by which skill-based gaming operates is certainly unsettled and not legislatively determined. To resolve this uncertainty, a legislative determination one way or the other will need to be made. As a policy matter, it is entirely up to the General Assembly whether to legalize and tax these machines or to prohibit them. The Board has pointed out all of the taxes/fees that Slot Machines located in Licensed Facilities are subject to and all the player protections the regulated commercial casino industry in the Commonwealth are subject to in order to ensure integrity and fairness in gaming activity. It is the Board's hope that the thought and care the General Assembly put into the Gaming Act would continue into whatever legislation were to govern skill-based gaming, should that be the determination. It is also the Board's position that should the General Assembly decide to legalize and regulate skill-based

gaming that the regulation of this activity be put under the Board's jurisdiction as the Board is the only Agency with the ability and experience to regulate Slot Machine activity.

Thank you for your time and I would be glad to answer your questions.