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The Honorable Patricia Valentino Kutsch
Prosecuting Attorney of Ohio County
Ohio County Courthouse
Wheeling, West Virginia 26003

Dear Ms. Kutsch:

A 1984 amendment to the West Virginia Constitution and the passage of the State Lottery Act in 1985 authorized the operation of lotteries by the State of West Virginia. You have requested our opinion regarding the Mountaineer Magic® video lottery game in operation at Mountaineer Park, pursuant to an exclusive contract with the West Virginia State Lottery Commission. In your opinion, the video lottery terminals in question are "ordinary electronic slot machines which dispense lottery 'win' tickets in lieu of cash payout" in violation of State criminal statutes. You therefore ask the following questions:

1. Whether the authorization by the State Lottery Commission of the use of slot machines as State lottery games is constitutionally permissible;
2. Whether the amendment as stated above authorizes the Commission to assign the operation of lottery games to a private enterprise.

In order to answer your first question, we must begin with the constitutional provision providing for the establishment of a state lottery system. W. Va. Const. art. VI, § 36 provides, in part:

The legislature shall have no power to authorize lotteries or gift enterprises for any purpose, and shall pass laws to prohibit the sale of lottery or gift enterprise tickets in this State; except that the legislature may authorize lotteries which are regulated,

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controlled, owned and operated by the State of West Virginia in the manner provided by general law, either separately by this State or jointly or in cooperation with one or more other states and may authorize state-regulated bingo games and raffles for the purpose of raising money by charitable or public service organizations or by the State Fair of West Virginia for charitable or public service purposes. . . . (Emphasis added.)

Pursuant to the above provision, the Legislature established the West Virginia State Lottery Commission through the State Lottery Act, W. Va. Code §§ 29-22-1 through -28 (1986 and Supp. 1990). Among other things, the Legislature has charged the Commission with the responsibility for selecting, establishing and authorizing lottery games to be operated by and for the State of West Virginia, including video lottery games:

(c) The commission shall proceed with operation of such additional lottery games, including the implementation of games utilizing a variety of existing or future technological advances at the earliest feasible date. The commission may operate lottery games utilizing electronic computers and electronic computer terminal devices and systems, which systems must include a central site system of monitoring the lottery terminals utilizing direct communication systems, or other technological advances and procedures, ensuring honesty and integrity in the operation of the lottery.

W. Va. Code § 29-22-9(c) (Supp. 1990) (emphasis added).

The Legislature, in the State Lottery Act, also provided a preemption provision which made it clear that no other laws or regulations may interfere with the authorized operations of the Lottery Commission:

(a) No state or local law or regulation providing any penalty, disability, restriction, regulation or prohibition for the manufacture, transportation, storage, distribution, advertising, possession or sale of any lottery tickets or materials or for the operation of any lottery shall apply to authorized operations by or for the state lottery or commission.

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(b) The provisions of this article preempt all regulations, rules, ordinances and laws of any county or municipality in conflict herewith: Provided, That nothing herein shall invalidate any zoning law, or Sunday closing law under article ten [§ 61-10-1 et seq.], chapter sixty-one of this code.

(c) Nothing in this article shall be deemed to permit the operation of any lottery otherwise prohibited by the laws of this state, not owned and operated by this state and permitted by this article.

W. Va. Code § 29-22-25 (1986) (emphasis added).

Turning to the specifics of your first question, you have asked whether the video lottery game system as operated at Mountaineer Park is constitutionally permissible, given that you believe the terminals are "illegal and contraband gaming devices, subject to seizure and forfeiture" pursuant to W. Va. Code § 61-10-1 (1989), prohibiting the use of slot machines. Clearly, under the provisions of W. Va. Code § 29-22-25 cited above, the prohibition found in W. Va. Code § 61-10-1 would not apply to this video lottery system if the system is an "authorized operation" of the Lottery Commission within the meaning of the State Lottery Act and relevant case law.

In order to answer this question we must first determine whether the video game system in question is a "lottery." If not, then the Lottery Act's preemption provision would not control. We must therefore ascertain the legal definition of a lottery, and then apply this definition to the video lottery game. The Lottery Act is not fully illuminating; it defines a lottery to mean "the public gaming systems or games established and operated by the state lottery office." W. Va. Code § 29-22-3(c) (1986). The Act also provides that the lottery games must be totally predicated upon chance. W. Va. Code § 29-22-9(b)(5) (Supp. 1990). The West Virginia Supreme Court of Appeals, however, has been more instructive. According to the Court, three elements constitute a lottery: consideration, chance and a prize. State v. Wassik, 156 W. Va. 128, 191 S.E.2d 283 (1972); State v. Greater Huntington Theatre Corp., 133 W. Va. 252, 55 S.E.2d 681 (1949).

Pursuant to Paragraph No. 37 of the June 8, 1990 Agreement between the Lottery Commission and Mountaineer Park, the video game system must comply with all provisions of the State Lottery Act, and therefore the video games must be totally based upon chance.

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Consideration is necessary in order to play the games, and a prize is provided, as you indicated, in the form of win tickets which may be redeemed later. See Paragraph No. 26. Thus it appears that the video game system in question is a "lottery" within the meaning of the Lottery Act and case law. By virtue of the Agreement, it would also appear to be an "authorized operation" of the Lottery Commission within the meaning of W. Va. Code § 29-22-25 (1986), and thus exempt from other statutory or regulatory prohibitions.

You have emphasized the "size, configuration, operation and play" of the video lottery terminals in question, comparing them to "ordinary electronic slot machines." However, as we have previously noted, lottery games utilizing "electronic computer terminal devices and systems" are specifically authorized by W. Va. Code § 29-22-9(c), quoted above. Unlike "slot machines," these video terminals do not dispense coins or currency, which would be prohibited by the Lottery Act. W. Va. Code § 29-22-9(a)(4) (Supp. 1990).

Moreover, the 1990 Legislature amended the Lottery Act to eliminate the prohibition against styling lottery games to resemble casino gambling. When initially enacted in 1985, W. Va. Code § 29-22-9(b)(1) read: "No lottery may use the theme of bingo, roulette, dice or similar game, or similar games commonly associated with casino gaming." In 1990, the Legislature removed this prohibition. 1990 W. Va. Acts ch. 125. Because of this action, we must deduce that the Legislature intended to remove any question as to the legality of any state lottery game which may stylistically resemble a type of conventional gambling.

Accordingly, we are of the opinion that the video lottery game that is the subject of your inquiry is constitutionally permissible, and is not prohibited by other provisions of State law, including W. Va. Code § 61-10-1 (1989).

Turning to your second question, you have asked whether the assignment or delegation of video lottery operations to Mountaineer Park is authorized under the provisions of W. Va. Const. art. VI, § 36. This constitutional provision states that the State may regulate, control, own and operate a lottery "in the manner provided by general law." Accordingly, we must look to the general law, *viz*, the State Lottery Act, in order to determine if this contractual relationship between the Lottery Commission and Mountaineer Park is permissible.

To begin, the declaration of legislative intent in the Act is that the Lottery Commission and the Lottery Director "hold broad

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authority to administer the [lottery] system in a manner which will provide the state with a highly efficient operation." W. Va. Code § 29-22-2 (1986). Second, the Commission has the authority "[t]o make and enter into all agreements and do all acts necessary or incidental to the performance of its duties and the exercise of its powers under this article." W. Va. Code § 29-22-5(a)(13) (1986). Finally, the Act provides for the licensing of "lottery sales agents for the sale and dispensing of lottery tickets . . . and the operation of electronic computer terminals." W. Va. Code § 29-22-10(a) (Supp. 1990). Therefore, the "general law" of the State, *i.e.*, the State Lottery Act, calls for the delegation of certain lottery operations so as to effectuate a highly efficient lottery system.

By the Agreement of June 8, 1990, the Lottery Commission has delegated the daily operation of the video lottery system, Mountaineer Magic®, to Mountaineer Park, Inc. Pursuant to Paragraph No. 15 of the Agreement, "Mountaineer . . . must be [a] licensed agent[s] and shall be required to meet all requirements of licensing as stated in West Virginia Code 29-22-10 and any regulations pertaining thereto" Paragraph No. 17 requires that they post a bond as required by W. Va. Code § 29-22-10(a)(9) before commencing operations. This is a highly structured relationship wherein Mountaineer Park, as discussed above, agrees that all video lottery games will comply with the laws and regulations of the State. Paragraph No. 37. Pursuant to W. Va. Code § 29-22-9 (b)(2) and (c) (Supp. 1990) and Paragraph No. 18 of the Agreement, the Lottery Commission monitors the system through a central computer site. If the Commission determines that it wishes to terminate this contractual relationship, it may do so with 30 days' notice to Mountaineer Park. Paragraph No. 56. Although Mountaineer has developed and implemented this video lottery system, at the end of the contract period the Lottery Commission retains the right to use the Mountaineer Magic® trademark in association with its video lottery program. Paragraph No. 60. After reviewing these elements of the contract, we are of the opinion that the delegation of the operational duties pertaining to this video lottery system is constitutionally permissible, pursuant to the "general law" as embodied in the State Lottery Act.

We would also note that this contractual arrangement is very similar to the existing relationship between the Lottery Commission and Scientific Games, Inc. Since 1986, Scientific Games, as an agent for the Commission, has provided the property, personnel and

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daily supervision for the on-line lottery games. Thus, in short, the Mountaineer Park agency relationship is fashioned after the successful contractual relationship between Scientific Games and the Lottery Commission, which has produced a "highly efficient" and effective lottery system as envisioned by W. Va. Code § 29-22-2.

In conclusion, it is our opinion that the video lottery game Mountaineer Magic® does not violate W. Va. Code § 61-10-1 and that the assignment of the daily operation of this video lottery system to Mountaineer Park, pursuant to W. Va. Code § 29-22-10, does not violate W. Va. Const. art. VI, § 36.

Very truly yours,

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By:


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