

**WEST VIRGINIA
SECRETARY OF STATE
JOE MANCHIN, III
ADMINISTRATIVE LAW DIVISION**
Form #8

Do Not Mark In This Box
Filing Date

FILED

2001 OCT -2 A 8: 44

OFFICE WEST VIRGINIA
SECRETARY OF STATE

Effective Date

NOTICE OF AN EMERGENCY AMENDMENT TO AN EMERGENCY RULE

AGENCY: WEST VIRGINIA STATE LOTTERY COMMISSION TITLE NUMBER: 179

DATE EMERGENCY RULE WAS ORIGINALLY FILED: June 21, 2001

FIRST EMERGENCY AMENDMENT TO AN EXISTING RULE: YES NO

SECOND EMERGENCY AMENDMENT TO AN EXISTING RULE: YES NO

DATE OF FIRST EMERGENCY AMENDMENT: AUGUST 1, 2001

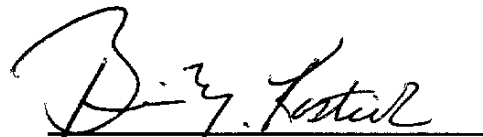
SERIES NUMBER OF RULE: 5

TITLE OF RULE: LIMITED VIDEO LOTTERY RULE

THE ATTACHED IS AN EMERGENCY AMENDMENT TO AN EXISTING EMERGENCY RULE. THIS EMERGENCY AMENDMENT BECOMES EFFECTIVE AFTER APPROVAL BY SECRETARY OF STATE OR 42ND DAY AFTER FILING, WHICHEVER OCCURS FIRST.

THE FACTS AND CIRCUMSTANCES CONSTITUTING THE EMERGENCY AMENDMENT ARE AS FOLLOWS:

Use additional sheets if necessary


Authorized Signature



FILED

2001 OCT -2 A 11: 07

OFFICE WEST VIRGINIA
SECRETARY OF STATE

MEMORANDUM

TO: Office of Secretary of State Joe Manchin III
Administrative Law Division

FROM: John C. Musgrave, Director

DATE: September 18, 2001

RE: **Second Amendment to the Lottery Commission's Emergency Rule 179-5**

The Legislature enacted Senate Bill 5002, effective from passage. This bill was proposed by Governor Wise. The bill's passage requires a change to the Amended Emergency Limited Video Lottery Rule, §179-5-6.1.k that now prohibits a person from holding a limited video lottery license and a regular lottery license.

At its August monthly meeting, the West Virginia State Lottery Commission voted to amend this rule to accommodate changes in the bid-opening process. The Lottery staff has met with the Director of the Purchasing Division and representatives of the State Auditor concerning bid-opening procedures covered by W.Va. Code §29-22B-1107, part of the new Limited Video Lottery Act. As a result of that meeting and the suggestions of both the Auditor's representatives and Purchasing Director David Tincher, the Commission is modifying certain language in section 179-5-46 to reflect what office will be responsible for what functions and to eliminate the listing of fax numbers for the Auditor and the Purchasing Division.

The citations for the changes in this amendment are as follows:

§ 6.1.k	Allowing a limited video lottery license to have a regular lottery license
§46.2.c	Deletion of Fax Numbers
§46.8.a thru d	Assigning a Lottery Representative to announce that a bid is insufficient in some way


John C. Musgrave, Director

cc: Brian Kastick, Cabinet Secretary
Lottery Commission Members
Debra Graham, Counsel
Legislative Rule-Making Review Committee
David Tincher, Purchasing Director
Russell Rollyson, Director-County Collections Div.



EMERGENCY RULE QUESTIONNAIRE

DATE: JULY 27, 2001

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: (Agency Name, Address & Phone No.) WEST VIRGINIA STATE LOTTERY COMMISSION
P.O. BOX 2067, CHARLESTON WV 25327-2067; 304-558-0500

EMERGENCY RULE TITLE: 179-5 LIMITED VIDEO LOTTERY EMERGENCY RULE

1. Date of filing INITIAL FILING - JUNE 21, 2001 AMENDMENT JULY 27, 2001

2. Statutory authority for promulgating emergency rule:

W.Va. CODE 29-22b-402(3)

3. Date of filing of proposed legislative rule: INITIAL-JUNE 19, 2001/AGENCY - 7-26-01

4. Does the emergency rule adopt new language or does it amend or appeal a current legislative rule? NEW LANGUAGE

5. Has the same or similar emergency rule previously been filed and expired?

NO

6. State, with particularity, those facts and circumstances which make the emergency rule necessary for the immediate preservation of public peace, health, safety or welfare.

THE LIMITED VIDEO LOTTERY ACT IS NEW. THE FIRST STATUTORY DUE DATE IS AUGUST 1, 2001.

7. If the emergency rule was promulgated in order to comply with a time limit established by the Code or federal statute or regulation, cite the Code provision, federal statute or regulation and time limit established therein.

~~W.VA. CODE 29-22b-402(3) ALLOWS EMERGENCY RULES IN FILED BY
AUGUST 1, 2001.~~

8. State, with particularity, those facts and circumstances which make the emergency rule necessary to prevent substantial harm to the public interest.

~~LIMITED VIDEO LOTTERY IS DESIGNED TO YIELD SUBSTANTIAL INCOME
TO THE STATE OF WEST VIRGINIA THAT THE LEGISLATURE HAS ALREADY
APPROPRIATED FOR FISCAL YEAR 20002.~~

**Proposed New
WEST VIRGINIA
LEGISLATIVE RULE
WEST VIRGINIA LOTTERY
TITLE 179
SERIES 5
2002**

LIMITED VIDEO LOTTERY RULE

A BRIEF SUMMARY of the PROPOSED RULE:

The first Extraordinary Session of the 2001 West Virginia Legislature enacted new article 29-22B to restrict, reduce and regulate the illegal use of video poker machines in the state. The Limited Video Lottery Rule is proposed to regulate this issue.

“Video gambling machines” are illegal contraband subject to seizure and destruction as of January 1, 2002. This rule provides due process for the seizure and destruction of these devices.

Video lottery terminals are limited to a total of 9,000, statewide. Video lottery terminals of the kind initially used by the racetracks [ticket-printing machines; not coin drop] will be available in a limited number of adult environment locations: ABCC licensees for “private clubs” [liquor by the drink] and Class A Beer licensees [beer by the drink] would qualify if they also met certain other conditions. On or before August 1, 2001, persons who were licensed by ABCC for a private club liquor license or a Class A beer license may apply to the Lottery for a limited video lottery retailer license. At that time, they must say how many video lottery terminals they wish to operate, and whether they wish to purchase or lease video lottery terminals from a manufacturer or whether they will contract with a licensed Operator for the video lottery terminals. This rule regulates the application for video lottery terminals.

The Act creates four license categories: Manufacturer; Operator; Limited Video Lottery Retailer; Service Technician. No person or entity is allowed to have more than one kind of these licenses except that Operators and Retailers may also be Service Technicians. This rule regulates the application for licenses.

Operators and Retailers that can own video lottery terminals are called Permittees because they receive, in addition to their annual licenses, a ten-year PERMIT. Permittees must meet a 4-year state residency requirement. This rule regulates the application for permits.

ABCC license holders may own or reserve without bidding up to two video lottery terminals, or an operator may supply up to five video lottery terminals to them. ABCC

license holders that are fraternal clubs or veterans organizations may own or reserve up to seven video lottery terminals without bidding, or an operator may supply up to ten video lottery terminals to them. Reserved video lottery terminals under this part of the rule require the permittees to pay \$1,000-per-video-lottery-terminal "permit fee" initially and again every May first. When applicants have qualified, the total of all video lottery terminals reserved, including those to come from Operators, will be deducted from the 9,000 total, and the remainder will be bid by Operators and Retailers. Operators can have no more than 675 video lottery terminals at any one time. The Lottery will set the minimum per-terminal bid amount. This rule regulates the bidding process.

Cash-in less cash-out is "Gross Terminal Income." From Gross Terminal Income, the Lottery takes 2% for administrative costs. The remainder is called "Net Terminal Income." Net terminal income from this bill [wagers-less-prizes] is divided as follows:

1. Until at least June 30, 2002, the state share is 30%
2. Beginning June 1, 2002, the Lottery will calculate the aggregate average per-terminal daily gross terminal income.
3. If the rate changes because of the calculation, the rate will be in effect for the new calendar quarter.
4. So long as the average daily rate does not exceed \$60, the rate stays at 30%;
5. If the rate exceeds \$60, but is not more than \$80, the rate is 34%;
6. If the rate exceeds \$80, but is not more than \$100, the rate is 38%;
7. If the rate exceeds \$100, but is not more than \$120, the rate is 42%;
8. If the rate exceeds \$120, but is not more than \$140, the rate is 46%;
9. If the rate exceeds \$140, the rate is 50%;
10. From the state rate, 2% of net terminal income is divided on a population basis among all municipalities and counties.

The State's share, less payments to counties and cities, is deposited into the State Excess Lottery Revenue Fund created by new section 29-22-18a. This rule regulates the collection and deposit of gross terminal income and net terminal income.

Certain "mini-casinos" prevention measures are in the bill. Locations that acquire their ABCC licenses after January 1, 2001 [a date now past] cannot qualify as a video lottery location if they are nearer than 150 feet to an existing location [measured by the closest outside walls], or in a single structure under a single roof with an existing licensee. This is designed to prevent using a 30-room former motel or shopping mall from being used as a casino, five machines per room. This rule regulates the location of retailer facilities.

**PROPOSED
WEST VIRGINIA LEGISLATIVE REGULATIONS
WEST VIRGINIA LOTTERY
TITLE 179
SERIES 5 - New
2002**

LIMITED VIDEO LOTTERY RULES

A STATEMENT of CIRCUMSTANCES WHICH REQUIRE THIS RULE:

The First Extraordinary Session of the 2001 Legislature enacted House Bill 102 to reduce, restrict and regulate video poker machines in the state. Section 402 [W.Va. Code §29-22B-402] permits the West Virginia Lottery Commission to propose a legislative rule to provide implementation and enforcement of new article 22B.

□
APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: 179 CSR 5 -- LIMITED VIDEO LOTTERY RULE

Type of Rule: Legislative Interpretive Procedural

Agency: THE WEST VIRGINIA STATE LOTTERY COMMISSION

Address: P.O. BOX 2067

CHARLESTON WV 25327-2067

1. Effect of Proposed rule:

	ANNUAL FISCAL YEAR				
	INCREASE	DECREASE	CURRENT	NEXT	THEREAFTER
ESTIMATED TOTAL COST	\$2,911,164		-- 0 --	\$2,911,164	\$2,475,472
PERSONAL SERVICES	1,698,164			1,698,164	1,698,164
CURRENT EXPENSE	542,400			542,400	542,400
REPAIRS & ALTERATIONS					
EQUIPMENT	520,600			520,600	
OTHER	150,000			150,000	150,000

2. Explanation of Above Estimates:

47 new employees: 1 new program manager, 24 investigators II, 2 licensing clerks, 2 accountant II's, 6 auditors II, 2 information services coordinators II 6 computer operators II, 1 attorney II, 1 payroll assistant, 1 internal auditor III and 1 marketing program specialist. "Other" is for the mandatory contribution to a compulsive gambling program.

3. Objectives of These Rules:

To regulate and collect state revenue from the 9,000 limited video lottery terminals in adult environments.

Rule Title: Limited Video Lottery

4. Explanation of Overall Economic Impact of Proposed Rule:

A. Economic Impact on State Government:

The State of West Virginia will gain \$31 million from limited video lottery in fiscal year 2002, and \$121 million in fiscal year 2003.

B. Economic Impact on Political Subdivisions; Specific Industries; Specific Groups of Citizens:

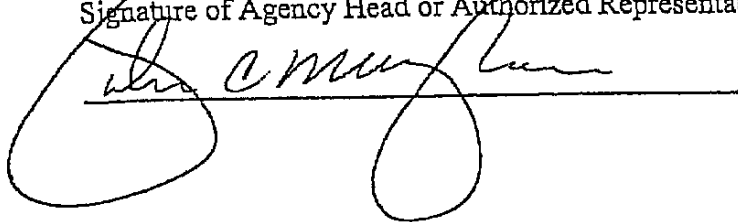
Cities and counties will share \$900,000 in fiscal year 2002, and thereafter \$5.6 million per year. Persons licensed as limited video lottery operators and limited video lottery retailers will share \$32.6 million in fiscal year 2002 and thereafter, \$163 million per year.

C. Economic Impact on Citizens/Public at Large.

Citizens will benefit from government programs funded by this new revenue source.

Date: June 12, 2001

Signature of Agency Head or Authorized Representative:



A handwritten signature in black ink is written over a horizontal line. The signature is cursive and appears to read "W. C. Muffler".

FILED

TITLE 179
AMENDED EMERGENCY RULE
Second Amendment
WEST VIRGINIA LOTTERY

2001 OCT -2 A 8: 44

OFFICE WEST VIRGINIA
SECRETARY OF STATE

SERIES 5
LIMITED VIDEO LOTTERY RULE

§179-5-1. General.

1.1. Scope and Purpose. - The purpose of this legislative rule is to implement, clarify and explain provisions of the Limited Video Lottery Act codified in W. Va. Code § 29-22B-1 *et seq.*

1.2. Authority. - W. Va. Code - § 29-22B-402

1.3. Filing Date. -

1.4. Effective Date. -

§179-5-2 Definitions of terms and words.

2.1. "ABCC" means the office and agency known as the alcohol beverage control commissioner created in W. Va. Code § 60-2-1.

2.2. "Act" and "the act" mean the Limited Video Lottery Act codified in W. Va. Code § 29-22B-1 *et seq.*

2.3. "Applicant" means any person applying for a video lottery license under the Act.

2.4. "Associated equipment" means any hardware located on the premises of a limited video lottery retailer that is connected to the video lottery terminal or to the central computer for the purpose of performing communication, validation or other functions. "Associated equipment" does not include the video lottery terminals or the communication facilities of a regulated public utility.

2.5. "Background investigation" means a security, criminal and credit investigation of an applicant who has applied for the issuance of a limited video lottery license, or who holds a current limited video lottery license.

2.6. "Central computer", "central control computer" or "central site system" means any central site computer provided to and controlled by the commission to which video lottery terminals communicate for purposes of information retrieval and terminal activation and to disable programs. "Central computer" includes the computer at the commission's hot backup site when it is functioning as the central control computer.

2.7. "Commission" or "state lottery commission" means the West Virginia state lottery commission created by W. Va. Code § 29-22-4.

2.8. "Control" means the authority to direct the management and policies of an applicant for a license or a holder of a license. The following persons are deemed to have control of an applicant:

2.8.1 a. *Each person associated with a corporate applicant, including any corporate holding company, parent company or subsidiary company of the applicant, but not including a bank or other licensed lending institution which holds a mortgage or other lien acquired in the ordinary course of business, and also not including institutional investors and investment advisors who are registered with the United States Securities and Exchange Commission and whose beneficial interest in the applicant is held strictly for investment purposes, who has the ability to control the activities of the corporate applicant or elect a majority of the board of directors of that corporation. In the case of institutional investors, the applicant or licensee has the burden of proving that the interest is held for investment and not for direct or indirect control of the applicant or licensee.*

2.8.2 b. Each person associated with a noncorporate applicant who directly or indirectly holds any beneficial or proprietary interest in the applicant or who the commission determines to have the ability to control the applicant.

2.8.3 c. Key personnel of an applicant, including any executive, employee or agent, having the power to exercise significant influence over decisions concerning any part of the applicant's business operation.

2.9. "Director" means the individual appointed by the governor to provide management and administration necessary to direct the state lottery office.

2.10. "Disable" or "terminal disable" means the process of executing a shutdown command from the central control computer which causes video lottery terminals to cease functioning.

2.11. "Display" means the visual presentation of video lottery game features on the video display monitor or screen of a video lottery terminal.

2.12. "EPROM" or "erasable programmable read-only memory chips" means the electronic storage medium on which the operation software for all games playable on a video lottery terminal resides and can also be in the form of CD ~~RAM~~ ROM, flash ~~RAM~~ ROM or other new technology medium that the commission may from time to time approve for use in video lottery terminals. All electronic storage media are considered to be the property of the state of West Virginia.

2.13. "Gross profits" means the portion of gross terminal income collected by the commission from the permittee that remains after the commission deducts two percent of gross terminal income for administrative expenses.

2.14. "Gross terminal income" means the total amount of cash inserted into video lottery terminals operated by a licensee, minus the total value of game credits which are cleared from the video lottery terminals in exchange for winning redemption tickets printed by the video lottery terminals. Subtracting total credits won from total credits played will yield the same gross terminal income for the period as the cash-in / cash-out method described in the first sentence of this definition.

2.15. "Identification document" means a document made or issued by or under the authority of the United States government, a state, a political subdivision of a state, a foreign government or a political subdivision of a foreign government, which, when completed with information concerning a particular individual, is of the type intended or commonly accepted for the purpose of identifying individuals.

2.16. "Indirect ownership" means an interest a person owns in an entity or in property solely as a result of application of constructive ownership rules without regard to any direct ownership interest (or

Proposed 179 CSR 5

3

other beneficial interest) in the entity or property. "Indirect ownership" shall be determined under the rules applicable to determining whether a gain or loss between related parties is recognized for federal income tax purposes provided in section 267 of the Internal Revenue Code and regulations of the Secretary of the United States Treasury.

2.17. "License" or "video lottery license" means the written authorization granted by the commission pursuant to the Act and this rule that permits the person named in the license to engage in the activity for which the license was issued during the period of time for which the license was issued, unless the license is surrendered by the licensee, or is cancelled or revoked by the director or the commission, before its expiration date. The activity for which the license was issued may not be engaged in during any period of time for which the license has been suspended by the director or the commission. The commission issues four types of licenses: (A) a limited video lottery retailer's license, (B) a manufacturer's license, (C) an operator's license and (D) a service technician's license.

2.18. "Licensee" means a person who holds a license.

2.19. "Limited video lottery retailer" or "retailer" means a person who holds a license issued by the commission that permits the person to have one or more video lottery terminals for play by customers of the retailer in a restricted access adult-only facility on the premises stated in the license.

2.20. "Location" means a restricted access adult-only facility located on the premises stated in a limited video lottery retailer's license.

2.21. "Lottery" means the public gaming systems or games established, regulated, controlled, owned and operated by the state lottery commission as provided in W. Va. Code §§ 29-22-1 *et seq.*, 29-22A-1 *et seq.*, 29-22B-1 *et seq.*, and 29-25-1 *et seq.*

2.22. "Manufacturer" means a person who holds a license granted by the commission that allows the person to engage in the business of designing, building, constructing, assembling or manufacturing video lottery terminals, the electronic computer components of video lottery terminals, the random number generator of video lottery terminals, or the cabinet in which the video lottery terminal is housed, and whose product is intended for sale or lease to a person who holds a permit issued by the commission that allows the person to own or lease the number of video lottery terminals stated in the permit, which the permittee may acquire from one or more licensed manufacturers.

2.23. "Modified terminal not approved by the commission" as used in subsection 40.1 of this rule, means a video lottery terminal whose assembly or operational functions are not identical to the video lottery terminal that was tested by the commission's independent testing laboratory and approved by the commission for sale or lease to a permittee in West Virginia

2.24. "National criminal history background check system" means the criminal history record system maintained by the federal bureau of investigation based on fingerprint identification or any other method of positive identification.

2.25. "Net terminal income" means the state's percentage of gross profits.

2.26. "Operator" means a person who holds a license granted by the commission that allows the person named in the license to (A) own or lease a specified number of video lottery terminals from one or more licensed manufacturers, (B) provide for service and repair those video lottery terminals, and (C) enter into contracts with licensed limited video lottery retailers for placement of those video lottery terminals in a restricted access adult-only facility located on the premises of the retailer.

Proposed 179 CSR 5

4

2.27. "Other act beyond the control of the permittee," as used in section 51.2 of this rule, means a natural or man-made occurrence that was not caused by any person having direct or indirect ownership or control of the permittee. These occurrences include, but are not limited to, the following:

2.27.1. Failure of the electric power utility, the telephone utility, the water utility or the natural gas utility to provide electric power, telephone service, water or (if needed) natural gas to the restricted access adult-only facility;

2.27.2. The rendering of the restricted access adult-only facility uninhabitable by reason of smoke or water damage from a fire in an adjacent location of the building or structure in which the restricted access adult-only facility is located;

2.27.3. A declaration of a civil emergency that closes the premises in which the restricted access adult-only facility is located; or

2.27.4. A hardware or software malfunction in a video lottery terminal that can be corrected only by the licensed manufacturer that built the video lottery terminal, if the malfunction is registered by the manufacturer with the commission before the downtime limit expires.

2.28. "Own" means any beneficial or proprietary interest in any property and includes but is not limited to, any direct or indirect beneficial or proprietary interest in any business of an applicant or licensee.

2.29. "Permit" means the authorization issued by the commission allowing the person in whose name the permit is issued to own or lease from licensed manufacturers the number of video lottery terminals stated in the permit.

2.30. "Permittee" means a licensed operator or a licensed video lottery retailer who has a permit from the commission to own or lease video lottery terminals.

2.31. "Person" means an individual, and any corporation, association, partnership, limited partnership, limited liability company or other entity, regardless of its form, structure or nature, other than a government agency or instrumentality.

2.32. "Player" means an individual who plays a video lottery game on a video lottery terminal in a restricted access adult-only facility of a licensed video lottery retailer.

2.33. "Pin ball machine" as it appears in W.Va. Code §29-22B-331 means an electro-mechanical amusement device in which a solid metal ball propelled by a plunger scores points as it rolls down a slanting surface among pins and targets. Flippers located on each side of the slanted surface allow the person playing the machine to keep the ball in play thereby scoring more points. "Pinball machine" does not include any electronic simulation that does not use a mechanical plunger, mechanical flippers or a physical solid metal ball to operate the game.

2.34. "Resident of this state" means an individual who meets all of the following requirements:

2.34.1. The individual maintains a bona fide full time primary place of abode in this state;

2.34.2. The individual is not registered to vote in any other state;

Proposed 179 CSR 5

5

2.34.3. The individual, if licensed to drive, holds a valid driver's license in this state and does not hold a current drivers license issued by any other state;

2.34.4. The individual filed timely personal income tax returns as a resident of this state for the four calendar years preceding the date of filing an application for a license or for renewal of a license. A return was filed timely if it was filed on or before the fifteenth day of the fourth month following the close of the taxable year or during an authorized extension of time for filing the return; and

2.34.5. The individual does not claim to be a resident of any other state for any purpose whatsoever.

2.35. "Restricted access adult-only facility" means and is limited to:

2.35.a. A private club licensed by the alcohol beverage control commissioner under W. Va. Code § 60-7-1 *et seq.* that is also licensed by the commission as a limited video lottery retailer to allow members and their guests to play video lottery games, subject to the following restrictions:

2.35.a.1. When a private club is frequented by minors and their parents, the private club is not a restricted access adult-only facility unless all of its video lottery terminals are located in a separate room suitable for the location of video lottery terminals with adult-only restricted access, the interior of which is not visible to persons outside the room. The commission shall determine whether the separate room is suitable for the location of video lottery terminals.

2.35.a.2. When a place of business includes a private club licensed under W. Va. Code § 60-7-1 *et seq.* and the place of business sells petroleum products, the private club may not have a limited video lottery retailer's license. This restriction applies even though the video lottery terminals would be located in a separate room, or in a building that is part of, contiguous to or adjoining a place of business that sells petroleum products. This restriction applies even though the private club or the business that sells petroleum products, or both business, is located in space that it owns or leases and even though the private club and the business that sells petroleum products are owned or operated by unrelated parties for purposes of application of section 267 of the Internal Revenue Code.

2.35.b. A place of business that (A) does not sell petroleum products, (B) has a "Class A" nonintoxicating beer license issued by the alcohol beverage control commissioner under W. Va. Code § 11-16-1 *et seq.* allowing the holder to sell nonintoxicating beer for consumption on the premises, and (C) meets all of the following:

2.35.b.1. The business derives at least 40% of its annual gross receipts at that location from sales of nonintoxicating beer to consumers and of the gross receipts from sales of nonintoxicating beer, at least 80% are from sales of nonintoxicating beer for consumption on the premises.

2.35.b.1.A. Example 1. ZXY pizza shop has a Class "A" nonintoxicating beer license. Annual gross receipts at that location from all sources is \$2 million. Of this amount, \$750,000 is from sales of nonintoxicating beer. Because gross receipts from sales of nonintoxicating beer is less than 40 percent of gross receipts from all sales of goods and services, the pizza shop is not eligible for a limited video lottery license.

2.35.b.1.B. Example 2. ZXY pizza shop has a Class "A" nonintoxicating beer license. Annual gross receipts at that location from all sources is \$2 million. Of this amount, \$850,000 is from sales of nonintoxicating beer. Annual gross receipts from sales of

Proposed 179 CSR 5

6

nonintoxicating beer for consumption on the premises is \$637,500 while annual gross receipts from sales of nonintoxicating beer for off-premises consumption is \$212,500. In this example, more than 40 percent of annual gross receipts are from sales of nonintoxicating beer. However, because annual gross receipts from sales of nonintoxicating beer for consumption on the premises is less than 80 percent of gross receipts from all sales of nonintoxicating beer, the pizza shop is not eligible for a limited video lottery license.

2.35.b.1.C. A business that has a Class "A" nonintoxicating beer license and wants to obtain or retain a limited video lottery license shall make and retain adequate records of its sales of goods and services. At a minimum, the records must show, for each business location, total annual gross receipts, total annual gross receipts from all sales of nonintoxicating beer and total annual gross receipts from sales of nonintoxicating beer for consumption on the premises. When the business location has a Class "A" nonintoxicating beer license, the records shall separately show for each business day gross receipts derived from sales of nonintoxicating beer for consumption on the premises and that derived from sales of nonintoxicating beer for consumption off the premises. Whether nonintoxicating beer is sold for consumption on or off the premise is determined at the time nonintoxicating beer is sold to the customer. If nonintoxicating beer is sold for consumption off the premises, the sale is to be recorded as a sale for off-premises consumption even though the customer, after receiving the nonintoxicating beer in a sealed container, opens the container and consumes the product in whole or in part on the premises.

2.35.b.1.D. In the absence of adequate records, the commission shall presume that annual gross receipts from sales of nonintoxicating beer is less than 40 percent of total annual gross receipts from all sales of goods and services at the business location.

2.35.b.1.E. When the business does not keep adequate books and records of gross receipts from sales on nonintoxicating beer for consumption on the premises and of gross receipts from sales of nonintoxicating beer for consumption off the premises, the commission shall presume that gross receipts from sales of nonintoxicating beer for consumption on the premises is less than 80 percent of all sales on nonintoxicating beer.

2.35.b.2. The business maintains a suitable kitchen and dining facility and related equipment for serving meals for on-premises consumption;

2.35.b.3. The business regularly prepares and sells meals for consumption on the premises;

2.35.b.4. The business has a separate room suitable for the location of video lottery terminals with adult-only restricted access, the interior of which is not visible to persons outside the room. The commission shall determine whether the separate room is suitable for the location of video lottery terminals; and

2.35.b.5. The business meets any additional requirement(s) or standard developed by the commission for a Class A beer licensee.

2.36. "Service technician" means an individual who holds a license granted by the commission that allows the licensee to service, maintain and repair video lottery terminals that are registered with the commission as provided in section 54 of this rule. A corporation, limited liability company, partnership or other legal entity may not be licensed as a service technician.

2.36.a. A licensed service technician may be an employee of a licensed manufacturer, a licensed operator, a licensed limited video lottery retailer or a business that is not licensed under the Act.

Proposed 179 CSR 5

7

2.36.b. A licensed service technician may be an officer of a corporation.

2.36.c. A licensed service technician may be a member of a limited liability company.

2.36.d. A licensed service technician may be a partner in a partnership.

2.36.e. A licensed service technician may be a sole proprietor who is licensed, or is not licensed, as either an operator or a limited video lottery retailer.

2.37. "Ten days after the date the ticket is printed," as that phrase is used in subsection 28.3 of this rule, is calculated by excluding the day the ticket was printed and including the tenth subsequent day until the close of video lottery gaming that began on the tenth subsequent day.

2.38 "Video lottery" means a lottery that allows a game to be played utilizing an electronic computer and an interactive terminal device, equipped with a video screen and keys, a keyboard or other equipment allowing input by an individual player, into which the player inserts coins or currency as consideration in order for play to be available, and through which terminal device, the player may receive free games or a voucher that can be redeemed for a cash or non-cash prize, or nothing, determined wholly or predominantly by chance.

2.38.a. "Video lottery" does not include a lottery game that merely utilizes an electronic computer and a video lottery screen to operate a lottery game and communicate the results of the game and which does not utilize an interactive electronic terminal device allowing input by one or more players.

2.39. "Video lottery game" means a commission-approved, owned and controlled electronically simulated game of chance that is displayed on the screen or video monitor of a video lottery terminal and which:

2.39.a. Is connected to the commission's central control computer by an on-line or dial-up communication system;

2.39.b. Is initiated by a player's insertion of coins or currency into a video lottery terminal, which causes game play credits to be displayed on the video lottery terminal and, with respect to which, each game play credit entitles a player to choose one or more symbols or numbers or to cause the video lottery terminal to randomly select symbols or numbers;

2.39.c. Allows the player to win additional game play credits based upon game rules which establish the random selection of winning combinations of symbols or numbers or both and the number of free-play credits to be awarded for each winning combination of symbols or numbers or both and the number of free-play credits to be awarded for each winning combination of symbols or numbers or both;

2.39.d. Is based upon computer-generated random selection of winning combinations based totally or predominantly on chance;

2.39.e. In the case of a video lottery game which allows the player an option to select replacement symbols or numbers or additional symbols or numbers after the game is initiated and in the course of play, either:

Proposed 179 CSR 5

8

2.39.e.1. Signals the player, prior to any optional selection by the player of randomly generated replacement symbols or numbers, as to which symbols or numbers should be retained by the player to present the best chance, based upon probabilities, that the player may select a winning combination;

2.39.e.2. Signals the player, prior to any optional selection by the player of randomly generated additional symbols or numbers, as to whether the additional selection presents the best chance, based upon probabilities, that the player may select a winning combination; or

2.39.e.3. Randomly generates additional or replacement symbols and numbers for the player after automatically selecting the symbols and numbers which should be retained to present the best chance, based upon probabilities, for a winning combination, so that in any event, the player is not permitted to benefit from any personal skill, based upon a knowledge of probabilities, before deciding which optional numbers or symbols to choose in the course of video lottery game play; and

2.39.f. Allows a player at any time to simultaneously clear all game play credits and print a redemption ticket entitling the player to receive the cash value of the free plays cleared from the video lottery terminal; and

2.39.g. Does not use game themes of roulette, dice or baccarat card games commonly associated with casino gambling, except that the commission may allow games having a video display depicting symbols that appear to roll on drums to simulate a classic casino slot machine, game themes of other card games or keno.

2.40. "Video lottery terminal" means a commission-approved machine or device, that is compatible with the commission's central computer system, and that is used for the purpose of playing commission-approved video lottery games by no more than one player at a time. A video lottery terminal that allows more than one individual to simultaneously or at the same time to play the same game may not be approved by the commission.

2.41. Wager" means a sum of money or thing of value risked on an uncertain occurrence.

§179-5-3. Types of licenses issued for participation in limited video lottery activities.

3.1 The lottery commission may issue four types of limited video lottery licenses, as follows:

3.1.a. A manufacturer's license;

3.1.b. An operator's license;

3.1.c. A limited video lottery retailer's license; and

3.1.d. A service technician's license.

3.2. A manufacturer's license is required for all persons who act as a manufacturer, as defined in section 2 of this rule.

3.3. An operator's license is required for all persons who engage in the business of placing and operating limited video lottery terminals on the premises of a licensed limited video lottery retailer. A licensed operator and a licensed limited video lottery retailer who hold a permit issued by the commission may obtain video lottery terminals only from a licensed manufacturer.

Proposed 179 CSR 5

9

3.4. A limited video lottery retailer's license is required for all persons conducting limited video lottery on their premises. Each person licensed as a retailer shall have and maintain sole and exclusive legal possession of the entire premises for which the limited video lottery retailer's license is issued.

3.5. Each license described in this section expires one year from the date of its issuance unless it is surrendered by the licensee, or is canceled or revoked by the commission, before the expiration date.

3.5.a. A license that is surrendered expires on the day the license is surrendered to the commission.

3.5.b. A license that is cancelled or revoked by the commission expires on the day set forth in the order of the commission that cancels or revokes the license.

3.6. A license may be successively renewed upon the filing and approval of an application for renewal and payment of the applicable annual license fee provided the licensee continues to satisfy all requirements for licensure set forth in the Act, this rule, a final order of the commission, and any other provision of the West Virginia Code.

§179-5-4. General qualifications for all types of limited video lottery licenses.

4.1. No limited video lottery license or license renewal may be granted unless the lottery commission has determined that the applicant satisfies all of the following qualifications:

4.1.a. The applicant is a person of good character, honesty and integrity;

4.1.b. The applicant is a person whose background, criminal record, if any, reputation, habits and associations do not threaten to:

4.1.b.1. Compromise the public interest of the citizens of this state;

4.1.b.2. Weaken the effective regulation and control of limited video lottery gaming;

4.1.b.3. Breach the security and integrity of the lottery; or

4.1.b.4. Introduce corrupt, unfair, or illegal practices, methods and activities into the operation of limited video lottery or the business or financial transactions incidental to the operation of limited video lottery; and

4.1.c. The applicant has not been convicted of any violation of W. Va. Code §19-23-1 et seq., relating horse and dog racing and pari-mutuel wagering; W. Va., Code §29-22-1 et seq.; the State Lottery Act, W. Va. Code §29-22-1 et seq.; the Racetrack Video Lottery Act, W. Va. Code §29-22A-1 et seq.; the Limited Video Lottery Act, W. Va. Code §29-22B-1 et seq.; or the W. Va. §29-25-1, et seq., pertaining to one authorized limited gaming facility;

4.1.d. The applicant has not been convicted of any felony related to theft, bribery, gambling or involving moral turpitude in this state or in any other state or foreign country;

4.1.e. The applicant has disclosed to the lottery commission the identity of each person who has control of the applicant, as defined in section 2 of this rule, and those persons satisfy all

Proposed 179 CSR 5

10

qualifications required by the act and this rule;

4.1.f. The applicant has provided a set of fingerprints and has completed and signed the statement required by W. Va. Code §29-22B-603;

4.1.g. The applicant has furnished all information, including financial data and documents, certifications, consents, waivers, individual history forms and other materials requested by the lottery commission for purposes of determining qualifications for a license; and

4.1.h. The applicant is not in default under the unemployment compensation laws or workers compensation laws of this state as provided in W. Va. Code §21A-2-6.

§179-5-5. Additional qualifications for an applicant for an operator's license.

5.1. No operator's license or license renewal may be granted unless the lottery commission has determined that, in addition to the general requirements set forth in section four of this rule, the applicant satisfies all of the following qualifications:

5.1.a. If the applicant is an individual, the applicant has been a citizen of the United States and a resident of this state for the 4-year period immediately preceding the application;

5.1.b. If the applicant is a corporation, partnership or other business entity, the chief executive officer and the majority of the officers, directors, members and partners (to the extent each of these groups exists with respect to a particular business organization), both in number and percentage of ownership interest, have been citizens of the United States and residents of this state for the 4-year period immediately preceding the application;

5.1.c. The applicant has demonstrated the training, education, business ability and experience necessary to establish, operate and maintain the business for which the license application is made;

5.1.d. The applicant has secured any necessary financing for the business for which the license application is made, and the financing:

5.1.d.1. Is from a source that meets the qualifications of this section; and

5.1.d.2. Is adequate to support the successful performance of the duties and responsibilities of the licensee. A licensee shall request commission approval of any change in financing or leasing arrangements at least thirty days before the effective date of the change;

5.1.e. The applicant has disclosed all financing or refinancing arrangements for the purchase, lease or other acquisition of video lottery terminals and associated equipment in the degree of detail requested by the lottery commission;

5.1.f. The applicant has filed with the lottery commission a copy of any current or proposed agreement between the applicant and any manufacturer for the sale, lease or other assignment to the operator of video lottery terminals, the electronic computer components of the terminals, the random number generators of the terminals, or the cabinets in which they are housed; and

5.1.g. The applicant does not hold any other license under W. Va. Code §19-23-1 *et seq.*, pertaining to horse and dog racing and pari-mutuel wagering; the State Lottery Act, W. Va. Code 21-29-

Proposed 179 CSR 5

11

22-1 et seq.; the Racetrack Video Lottery Act, W. Va. Code §29-22A-1 et seq.; the Limited Video Lottery Act, W. Va. Code §29-22B-1 et seq.; or W. Va. Code §29-25-1 et seq., pertaining to an authorized limited gaming facility; except that an applicant, if an individual, may also be licensed as a service technician under the Limited Video Lottery Act..

5.2. A person or a member of his or her immediate family who has an ownership interest in a business entity that submits an application for an operator's license may not:

5.2.a. Submit an application for another operator's license as an individual;

5.2.b. Serve as an officer, director, member or partner of a business entity that submits an application for another operator's license; or

5.2.c. Have an ownership interest in any other business entity that submits an application for an operator's license.

5.3. Business entities that have common owners or common officers, directors, members or partners may not submit an application for more than one operator's license.

§179-5-6. Additional qualifications for an applicant for a limited video lottery retailer's license.

6.1. No limited video lottery retailer's license or license renewal may be granted unless the lottery commission has determined that, in addition to the general requirements set forth in section 4 of this rule, the applicant satisfies all of the following qualifications:

6.1.a. If the applicant is an individual, the applicant has been a citizen of the United States and a resident of this state for the 4-year period immediately preceding the date the application for a license or for renewal of a license was filed with the commission;

6.1.b. If the applicant is a corporation, partnership or other business entity, the chief executive officer and the majority of the officers, directors, members and partners (to the extent each of these groups exists with respect to a particular business organization), both in number and percentage of ownership interest, have been citizens of the United States and residents of this state for the 4-year period immediately preceding the date the application for a license or for renewal of a license was filed with the commission;

6.1.c. If the applicant is a voluntary association organized under the laws of West Virginia, the majority of the officers, directors, and members have been citizens of the United States and residents of this state for the 4-year period immediately preceding date the application for a license or for renewal of a license was filed with the commission;

6.1.d. The applicant has disclosed to the lottery commission the identity of each person who has control of the applicant as defined in section 2 of this rule;

6.1.e. The applicant holds either:

6.1.e.1. A valid license issued under W. Va. Code §60-1-7 et seq. to operate a private club;

6.1.e.2. A valid Class A license issued under W. Va. Code §11-16-1 et seq. operate a business where non-intoxicating beer is sold for consumption on the premises; or

6.1.e.3. Both licenses; and

6.1.f. The applicant has demonstrated the training, education, business ability and experience necessary to establish, operate and maintain the business for which the license application is made;

6.1.g. The applicant has secured any necessary financing for the business for which the license application is made, and the financing is:

6.1.g.1. From a source that meets the qualifications of this section; and

6.1.g.2. Adequate to support the successful performance of the duties and responsibilities of the licensee; and

6.1.h. The applicant has disclosed all financing or refinancing arrangements for placement on the applicant's premises of video lottery terminals and associated equipment in the degree of detail requested by the lottery commission;

6.1.i. The applicant has filed with the lottery commission a copy of any current or proposed agreement between the applicant and a licensed operator for the placement of video lottery terminals on the applicant's premises;

6.1.j. The applicant has filed with the lottery commission a copy of any current or proposed agreement between the applicant and a licensed operator or other person for the servicing and maintenance of video lottery terminals by licensed service technicians; and

6.1.k. The applicant does not hold any other license under W. Va. Code §19-23-1 *et seq.*, pertaining to horse and dog racing and pari-mutuel wagering; ~~the State Lottery Act, W. Va. Code 21-29-22-1 et seq.~~; the Racetrack Video Lottery Act, W. Va. Code §29-22A-1 *et seq.*; the Limited Video Lottery Act, W. Va. Code §29-22B-1 *et seq.*; or W. Va. Code §29-25-1 *et seq.*, pertaining to an authorized limited gaming facility; except that an applicant may also be licensed as a service technician under the Limited Video Lottery Act..

§179-5-7. Additional qualification for an applicant for a service technician's license.

No service technician's license or license renewal may be granted unless the lottery commission has determined that, in addition to the general requirements set forth in section 4 of this rule, the applicant has passed a technical competence test administered or approved by the lottery commission.

§179-5-8. Additional qualifications for an applicant for a manufacturer's license.

8.1. No manufacturer's license or license renewal may be granted unless the lottery commission has determined that, in addition to the general requirements set forth in section 4 of this rule, the applicant satisfies all of the following qualifications:

8.1.a. The applicant has obtained, or can obtain, certification of compliance under the provisions of 47 C.F.R. 15, radio frequency devices, of federal communications commission regulation for all video lottery terminals placed in this state;

8.1.b. The applicant has demonstrated the capacity to manufacture terminals and associated equipment for placement in this state in accordance with the hardware and software

Proposed 179 CSR 5

13

specifications and procedures set forth in the Act and this rule;

8.1.c. The applicant has demonstrated the ability to maintain and provide an inventory of spare parts so as to assure the timely repair and continuous operation of licensed limited video lottery terminals placed in this state; and

8.1.d. The applicant has demonstrated the capacity to timely deliver video lottery terminals and associated equipment to licensed operators and to licensed limited video lottery retailers who hold permits issued under this rule to own or lease video lottery terminals from licensed manufacturers.

§179-5-9. Persons having control of an applicant for a limited video lottery license.

9.1. The following persons are considered to have control of an applicant:

9.1.a. Each person associated with a corporate applicant, including any corporate holding company, parent company or subsidiary company of the applicant, but not including a bank or other licensed lending institution which holds a mortgage or other lien acquired in the ordinary course of business, and also not including institutional investors and investment advisors who are registered with the United States Securities and Exchange Commission and whose beneficial interest in the applicant is held strictly for investment purposes, who has the ability to control the activities of the corporate applicant or elect a majority of the board of directors of that corporation. In the case of institutional investors, the applicant or licensee has the burden of proving that the interest is held for investment and not for direct or indirect control of the applicant or licensee;

9.1.b. Each person associated with a non-corporate applicant who directly or indirectly holds any beneficial or proprietary interest in the applicant or who the commission determines to have the ability to control the applicant; and

9.1.c. Key personnel of an applicant, including any executive, employee or agent, having the power to exercise significant influence over decisions concerning any part of the applicant's business operation.

§179-5-10. Commission action on applications.

10.1. The commission may not issue any original license until after the background investigations required by the Act are concluded.

10.2. The commission shall review a licensee's background prior to renewing a license by using the West Virginia information exchange (WVIX) operated by the West Virginia State Police.

10.3. The commission shall make an affirmative determination that the applicant is qualified under the Act and this rule and that the applicable license fees have been paid prior to issuing any license to an applicant for a license or for renewal of a license.

§179-5-11. Incomplete application not to be considered.

11.1. The commission shall notify the applicant in writing if an application is incomplete and the notification shall state the deficiencies in the application.

11.2. The commission may consider an application only when:

11.2.a. The applicant has completed and executed all forms and documents required by the commission; and

11.2.b All application fees and costs have been paid.

§179-5-12. Burden of proving qualification for license.

The burden of proving qualification for any limited video lottery license, or for renewal thereof, is on the applicant.

§179-5-13. Issuance of order refusing to issue or renew license, or suspending or revoking it.

13.1. The commission shall notify applicants and licensees in writing of the denial, suspension or revocation of a license and the reasons for the denial, suspension or revocation in accordance with the provisions of section 19 of this rule.

13.2. An applicant may request a hearing to review a license denial, suspension or revocation as provided in section 73 of this rule.

§179-5-14. Review of continuing eligibility for license.

14.1. The commission shall determine on a continuing basis the eligibility of licensees to hold a license by one or more of the following means:

14.1.a. The commission will review the qualifications of each licensee on at least an annual basis;

14.1.b. The commission will perform spot audits at retailer locations and at operator locations; and

14.1.c. The commission will review reports of violations discovered by lottery investigators and ABCC inspectors during site visits to locations of operators, limited video lottery retailers and service technicians.

14.2. Each operator and each limited video lottery retailer must continue to meet the residency requirements during the period for which the license is issued. If the licensee is a corporation, association, partnership, limited liability company or other legal entity, the chief executive officer and the majority of the officers, shareholders directors, partners of or members of the entity as a class, both in number and percentage of ownership interest, must satisfy the residency requirements during the period for which the license is issued

14.3. Each limited video lottery retailer must continue to hold either a private club license or a class A nonintoxicating beer license issued by the West Virginia alcohol beverage control commissioner;

14.3.a. If the alcohol beverage control commissioner suspends the retailer's private club license or class A nonintoxicating beer license, the director shall disable and cause not to operate the retailer's video lottery terminals at the location where the ABCC license is suspended and shall re-enable the video lottery terminals only when the suspension is lifted by the alcohol beverage control

commissioner; and

14.3.b. If the alcohol beverage control commissioner revokes the retailer's private club license or class A nonintoxicating beer license, the director shall disable and cause not to operate the retailer's video lottery terminals at the licensed location and shall recommend to the commission that the limited video lottery retailer's license for that location be revoked.

14.4. If any condition that a licensee must meet for licensure changes after a license is granted, other than conditions in subsection 14.3 of this rule, the director shall suspend the license until the condition is corrected, and shall disable and cause not to operate during the period of suspension the licensee's video lottery terminals.

14.5. If the limited video lottery license is suspended during the time when limited video licenses are renewed, renewal of the suspended license and the collection of the annual license fee will be held in abeyance until the reason for the underlying suspension is remedied.

14.6. Whenever a suspension lasts longer than 30 days, whether the suspension is by the alcohol beverage control commissioner or by the commission, the commission may proceed to revoke the limited video lottery license.

§179-5-15. Application forms and other documents.

15.1. The commission shall approve the forms of application to be used, including, but not limited to:

15.1.a. An application form;

15.1.b. A personal data form;

15.1.c. FBI fingerprint cards; and

15.1.d. IRS form 8821 to disclose income tax filings, when necessary.

15.2. All application, registration and disclosure forms and other documents submitted to the lottery commission, by or on behalf of an applicant for purposes of determining qualification for a limited video lottery license, shall be sworn to or affirmed before an officer qualified to administer oaths.

§179-5-16. Failure to reveal material fact; false or misleading material.

16.1. An applicant who knowingly fails to reveal any fact that is material to qualification or who knowingly submits false or misleading material information is ineligible for a limited video lottery license.

16.2. An applicant who is issued a license or renewal of a license shall give the commission written notification of any material change in the information previously submitted in or with the application for the license or for renewal thereof, whichever is the most recent document filed with the commission, within 30 days after the material change occurs or the licensee becomes aware of the material change, whichever event occurs last.

§179-5-17. Bonding requirements for operators and limited video lottery retailers who are permittees.

Proposed 179 CSR 5

16

17.1. Before any operator or limited video lottery retailer is issued a permit to own or lease video lottery terminals from a licensed manufacturer, the permittee shall post a bond executed by a surety company authorized to transact surety business in West Virginia, or an irrevocable "letter of credit," as defined in W. Va. Code §46-5-103, issued by a national or state bank or other financial institution acceptable to the commission to ensure the performance of the permittee's duties and responsibilities under the Act and this rule and indemnification of the commission.

17.1.a. For the license year beginning the October 1, 2001, the annual bond or irrevocable letter of credit posted shall be in an amount equal to \$1,500 multiplied by the number of video lottery terminal stated in the permit. When an amended permit is issued for additional video lottery terminals, the permittee shall post a supplemental bond or irrevocable letter of credit for the additional lottery terminals or, in the permittee's discretion, a replacement bond or irrevocable letter credit for the number of video lottery terminals stated in the amended permit;

17.1.b. For license years beginning after September 30, 2002, the commission shall obtain a single financial guarantee bond covering all permittees as provided in W. Va. Code §29-22B-515.;

17.1.b.1. The commission shall obtain a blanket bond covering all permittees by competitive bidding procedures through the purchasing division of the department of administration and shall apportion the cost of the bond premium among all participating permittees on a per-terminal basis;

17.1.b.2. Each permittee shall participate in the financial guarantee blanket bond program provided by the commission in the amount of at least \$2,000 for each terminal owned or leased by the permittee. The commission shall renew the blanket bond on an annual continuing basis. Bonding premium payments shall be made by electronic funds transfer from the permittee's bank accounts to the commission's revenues and transfers account each year; and

17.1.b.3. If it is determined by the director that one or more permittees should be bonded for an amount and in a form and manner different from the financial guarantee bond of at least \$2,000, or if other security should be provided by the permittee to ensure the performance of the permittee's duties and responsibilities or the indemnification of the commission, the director shall determine and impose the amount, form and manner of the coverage, and shall also report his or her determination to the commission.

17.2. The bond must be issued by a surety company authorized to transact surety business in West Virginia and the company must be approved by the West Virginia insurance commissioner as to solvency and responsibility.

17.3. A permittee who is a video lottery retailer that has permits for two or more restricted access adult-only facilities may post a blanket bond or irrevocable letter of credit for the number of video lottery terminals stated in all permits held by the permittee

17.4. Whenever a permittee has no valid bond or irrevocable letter of credit under this section, for the amount determined by this section, the commission shall disable and cause not to operate every video lottery terminal of the permittee that is placed in a licensed retail location until the appropriate bond or irrevocable letter of credit is received by the commission and becomes effective.

§179-5-18. Applicant bears the risk of adverse publicity.

Proposed 179 CSR 5

17

18.1. Each applicant for a limited video lottery license bears all risks of adverse public notice, embarrassment, criticism, damages or financial loss which may result from any disclosure or publication of any material or information obtained by the commission pursuant to action on an application.

18.2. The applicant must, as a part of the application, expressly waive any and all claims against the commission, the state of West Virginia and the employees of either for damages as a result of any background investigation, disclosure or publication relating to an application for a limited video lottery license.

§179-5-19. Renewal of licenses.

The commission shall renew video lottery licenses annually as of the first day of October, if each person seeking license renewal submits the applicable renewal fee, completes all renewal forms provided by the commission, and continues to meet all qualifications for a license.

§179-5-20. Annual license fees.

20.1. The following license fees shall be paid annually by each licensed operator, manufacturer or service technician:

- 20.1.a. Operator: \$10,000;
- 20.1.b. Manufacturer: \$10,000;
- 20.1.c. Service technician: \$100; and
- 20.1.d. Limited video lottery retailer: \$500.

20.2. The applicable fee shall be paid to the commission at the time the application for a license is submitted to the commission and upon the annual renewal date each year thereafter, at which time the license may be renewed.

20.3. A manufacturer who ceases supplying any additional video lottery terminals to permittees in this state may continue to supply repair parts and service for video lottery terminals previously provided to permittees, if an annual renewal fee of \$1,000 is paid to the commission and the manufacturer is otherwise eligible for licensure under the Act and this rule.

§179-5-21. Establishment of procedures for background investigations.

21.1. The commission and the West Virginia state police will, if considered desirable, establish procedures for conducting background investigations for the purpose of determining whether an applicant for a limited video lottery license has been charged with, indicted for, or convicted of a crime that may have bearing upon the applicant's fitness to hold a license under the Limited Video Lottery Act and this rule.

21.2. A background investigation includes, but is not be limited to:

- 21.2.a. Accessing the national criminal history background check system; and
- 21.2.b. Reviewing any other readily accessible state or federal criminal history records that may be pertinent to the background investigation.

Proposed 179 CSR 5

18

21.3. The state police will, if considered desirable, determine whether the applicant has been convicted of, is under indictment for, or is under pending indictment for, a crime that bears upon the applicant's fitness to hold a license under the Limited Video Lottery Act and will convey that determination to the commission.

§179-5-22. Responsibility of state police in conducting background investigations.

22.1. The state police, on the commission's behalf, will, if considered desirable, establish and maintain an adequate system for background investigations that:

22.1.a. Ensures that timely background investigations are conducted on applicants for limited video lottery licenses, current licensees, and other persons required to be investigated by the commission in accordance with the provisions of the Limited Video Lottery Act and this rule;

22.1.b. Provides for review and oversight of applicants, current licensees, and other persons on an ongoing basis;

22.1.c. Provides that upon receipt of a background check report lacking disposition data, further research will be conducted in whatever state and local record keeping systems are available in order to obtain complete data;

22.1.d. Provides for prompt notification to the commission of the results of background investigations before the issuance or renewal of any limited video lottery license; and

22.1.e. Defines a standard whereby a person's prior activities, criminal record, if any, or reputation, habits and associations are such as to pose a threat to the public interest or to the effective regulation of limited video lottery, or create or enhance the dangers of unsuitable, unfair, or illegal practices and methods and activities in the conduct of gaming, thereby rendering that person ineligible for licensing.

§179-5-23. Guidelines for background investigations.

23.1. The commission may not request a background check of an applicant unless the applicant first provides two sets of completed FBI fingerprint cards, and completes and signs a statement that:

23.1.a. Contains the name, address, and date of birth appearing on a valid identification document of the applicant;

23.1.b. Declares that the applicant has not been convicted of a crime or, if the applicant has been convicted of a crime, contains a description of the crime and the particulars of the conviction;

23.1.c. Notifies the applicant that the commission will request a background check; and

23.1.d. Notifies the applicant of the applicant's rights under W. Va. Code §29-22B-604.

§179-5-24. Applicant's rights regarding background investigations.

24.1. Each applicant who is the subject of a background check is entitled to a copy of his or her background investigation report.

Proposed 179 CSR 5

19

24.2. Each applicant who is the subject of a background check has the right to challenge the accuracy and completeness of any information contained in the report and to obtain a prompt determination as to the validity of the challenge before a final determination is made by the commission that would deny issuance of a limited video lottery license or renewal of a license.

§179-5-25. General duties of all licensees.

25.1. All limited video lottery license holders shall:

25.1.a. Promptly report to the commission any facts or circumstances related to limited video lottery operations that constitute a violation of state or federal law;

25.1.b. Conduct all limited video lottery activities and functions in a manner that does not pose a threat to the public health, safety or welfare of the citizens of this state, and which does not adversely affect the security or integrity of the West Virginia lottery;

25.1.c. Hold the commission and the state of West Virginia harmless from and defend and pay for the defense of any and all claims that may be asserted against a license holder, this state or the commission and its employees arising from the license holder's participation in the video lottery system authorized by the Limited Video Lottery Act;

25.1.d. Assist the commission in maximizing limited video lottery revenues;

25.1.e. Maintain all records required by the commission;

25.1.f. Provide the commission access to all records and the physical premises of the business or businesses where the license holder's limited video lottery activities occur, when requested by the commission or any designated agent of the commission, for the purpose of monitoring or inspecting the license holder's activities and the limited video lottery games, terminals and associated equipment;

25.1.g. Keep current in all payments and obligations to the commission; and

25.1.h. Notify the commission in writing of any proposed change of ownership or control of the license holder and of all other transactions or occurrences relevant to license qualification, and receive commission approval prior to any change of ownership or control of a licensed manufacturer, operator or limited video lottery retailer.

§179-5-26. Additional duties of limited video lottery retailers.

26.1. In addition to the general duties imposed on all licensees by section 25 of this rule, a limited video lottery retailer shall:

26.1.a. Attend all commission-mandated meetings, seminars and training sessions concerning operation of video lottery terminals, the validation and redemption of video lottery winning tickets and the operation of all ticket validation terminals and equipment;

26.1.b. Maintain all skills necessary for the accurate validation of limited video lottery tickets;

26.1.c. Supervise limited video lottery operations and ticket validation procedures at the applicable retail location;

Proposed 179 CSR 5

20

26.1.d. Permit no person to tamper with or interfere with the operation of any limited video lottery terminal;

26.1.e. Ensure that telephone lines from the commission's central control computer to the limited video lottery terminals located at the approved location are at all times connected, and prevent any person from tampering or interfering with the operation of the telephone lines;

26.1.f. Ensure that the computer controller/validator unit is at all times turned on, supplied with electric power, supplied with paper tape and connected to each limited video lottery terminal and to the telephone connection to the commission's central computer;

26.1.g. Ensure that limited video lottery terminals are within the sight and control of designated employees of the limited video lottery retailer;

26.1.h. Acquire and install one or more security cameras, at least one video cassette recorder, memory disk or other device that will record the video feed from the security cameras, and the necessary cabling to connect the cameras to the video cassette recorder or other device in the restricted access adult-only facility on the premises of a licensed limited video lottery retailer;

26.1.i. Ensure that video lottery terminals and security cameras are placed and remain placed in the specific locations that have been approved by the commission, and are not relocated within the facility without the prior written approval of the director;

26.1.j. Monitor video lottery terminals to prevent access to or play by persons who are under 21 years of age or who are visibly intoxicated;

26.1.k. Ensure that security cameras are correctly aimed at the video lottery terminals and are always operating 24 hours a day;

26.1.l. Ensure that video recorders tied to the security cameras are operating 24 hours a day;

26.1.m. Ensure that videotapes or other storage media are changed when they are completely recorded, and that no tape or other storage media are reused more than the tape or media manufacturer's recommended number of times;

26.1.n. Ensure that videotapes or other storage media are retained for at least 60 days after they are recorded;

26.1.o. Maintain at all times sufficient change and cash in the denominations accepted by the video lottery terminals;

26.1.p. Provide no access by a player to an automated teller machine (ATM) anywhere in the restricted access adult-only facility where limited video lottery games are played;

26.1.q. Accept no credit card or debit card from a player for the exchange or purchase of video lottery game credits or for an advance of coins or currency to be utilized by a player to play video lottery games;

26.1.r. Extend no credit, in any manner, to a player so as to enable the player to play a

Proposed 179 CSR 5

21

video lottery game;

26.1.s. Pay for all credits won upon presentment of a valid winning video lottery ticket from a video lottery terminal located on the premises where it is presented for payment;

26.1.t. Report promptly in writing to the operator and the commission all video lottery terminal malfunctions and notify the commission in writing of the failure of an operator or service technician to provide prompt service and repair of the terminals and associated equipment;

26.1.u. Conduct no limited video lottery advertising or promotional activities;

26.1.v. Refrain from using the words "video lottery" in the name of the approved location;

26.1.w. Refrain from using the words "video lottery" in any directions or advertising visible from outside the retailer's establishment;

26.1.x. Install, post and display prominently within or about the approved location signs, redemption information and other material as required by the commission;

26.1.y. Permit limited video lottery to be played only during those hours established and approved by the commission;

26.1.z. Clear printer paper jabs jams and bill acceptor jabs jams and replace paper rolls in the printer unit in a competent and timely manner based on training received from a licensed service technician;

26.1.aa. Contract with no more than one licensed operator for the placement of video lottery terminals at the licensed location;

26.1.bb. Maintain insurance covering all losses as the result of fire, theft or vandalism to video lottery terminals and associated equipment; and

26.1.cc. Comply with all applicable provisions of the Limited Video Lottery Act and rules and orders of the commission.

§179-5-27. Additional duties of limited video lottery retailers who are permittees.

27.1. In addition to the general duties imposed on all licensees by section 25 of this rule, and the additional duties imposed on all limited video lottery retailers by section 26 of this rule, a limited video lottery retailer who is also a permittee shall:

27.1.a. Acquire video lottery terminals by purchase or lease only from licensed manufacturers;

27.1.b. Acquire no video lottery terminals in excess of the number he or she is authorized to operate in this state as stated in the permit issued by the commission;

27.1.c. Pay for the installation and operation of commission approved telephone lines to provide direct dial-up or on-line communication between each video lottery terminal and the commission's central control computer;

Proposed 179 CSR 5

22

27.1.d. Purchase or lease and install computer controller units and other associated equipment required by the commission for video lottery terminals owned or leased by the permittee;

27.1.e. Ensure that telephone lines from the commission's central control computer to the video lottery terminals located at the approved location are at all times connected, and prevent any person from tampering or interfering with the operation of the telephone lines;

27.1.f. Assume financial responsibility for proper and timely payments of all credits awarded to players in accordance with this rule;

27.1.g. Enter into contracts with a licensed operator, licensed manufacturer or other businesses to provide for the maintenance and repair of video lottery terminals and associated equipment only by individuals who are licensed service technicians or employ one or more licensed service technicians, and to provide for the placement of video lottery terminals pursuant to the provisions of the Limited Video Lottery Act and this rule;

27.1.h. Promptly notify the commission in writing of any breaks or tears to any logic unit seals; and

27.1.i. Assume liability for all amounts due to the commission in connection with any money lost or stolen from any video lottery terminal.

§179-5-28. Duties of limited video lottery retailer regarding payment of credits.

28.1. A limited video lottery retailer shall not make payment for credits awarded on a video lottery terminal unless the ticket meets the following requirements:

28.1.a. The ticket is fully legible and printed on paper approved by the commission and the ticket contains all information required by the Limited Video Lottery Act and this rule;

28.1.b. The ticket is not mutilated, altered, unreadable or tampered with in any manner;

28.1.c. The ticket is not counterfeit, in whole or in part; and

28.1.d. The ticket is presented by a person authorized to play video lottery pursuant to the Act.

28.2. Each limited video lottery retailer shall redeem tickets during the business hours of operation.

28.2.a. The retailer shall pay credits immediately in cash or by check when a player presents a valid ticket for payment;

28.2.b. The retailer shall not pay credits in tokens, chips or merchandise;

28.2.c. The retailer shall be responsible for all income tax reporting of prize payments paid to players above the threshold set by the United States Internal Revenue Service;

28.2.d. A retailer may not redeem tickets for credits awarded on a video lottery terminal

that is not located on its premises; and

28.2.e. A retailer shall deface all redeemed tickets in a manner that prevents any subsequent presentment and payment.

28.3. A ticket must be presented for payment no later than ten days after the date the ticket is printed.

28.3.a This ten-day calculation will not be extended regardless of whether the tenth day falls on a Saturday, Sunday or legal holiday; and

28.3.b When an act of god such as a flood renders the video lottery gaming system at a retail location inoperative in the opinion of the West Virginia State Lottery Commission, the ten-day time period will be deemed to be interrupted until such time as the video lottery gaming system is restored to operation.

28.4. The permittee is solely responsible for any wrongful award or denial of credits.

28.5. The commission:

28.5.a. Is not liable for the payment of any video lottery ticket credits; and

28.5.b. Is not responsible for any video lottery terminal malfunction that causes a credit to be wrongfully awarded or denied to players.

§179-5-29. Additional duties of manufacturers.

29.1. In addition to the general duties imposed on all licensees by section 25 of this rule, a manufacturer shall:

29.1.a. Manufacture terminals and associated equipment for placement in this state in accordance with the specifications and procedures specified in this rule;

29.1.b. Manufacture terminals and associated equipment to ensure timely delivery to licensed permittees;

29.1.c. Maintain and provide an inventory of spare parts to assure the timely repair and continuous operation of licensed video lottery terminals intended for placement in this state;

29.1.d. Pay no compensation or inducement of any kind to any operator or retailer, or give or transfer anything of value to any operator or retailer, beyond a nominal consideration of one dollar per year. "Anything of value" does not include the following transactions:

29.1.d.1. A lease agreement for video lottery terminals with the option to purchase the video lottery terminals at the end of the lease term, so long as the terms are reasonable and customary as determined by the commission; and

29.1.d.2. A loan for the purchase of video lottery terminals so long as the terms are reasonable and customary as determined by the commission; and

29.1.e. Provide technical assistance and training to permittees in the service and repair of video lottery terminals and associated equipment so as to assure the continuous authorized operation and

play of the video lottery terminals;

29.1.f. Obtain certification of compliance under the provisions of 47 C.F.R. part 15 of the federal communications commission regulations for all video lottery terminals placed in this state;

29.1.g. Prepare training courses for applicants seeking to be licensed as service technicians and prepare and administer course proficiency tests approved by the commission at the conclusion of each course;

29.1.h. Comply with all applicable provisions of the Act and rules and orders of the commission; and

29.1.i. Sell or lease video lottery terminals or associated equipment to a permittee who is a limited lottery retailer under terms and conditions that are no more favorable than the terms and conditions under which similar terminals or equipment are generally sold or leased to permittees who are licensed operators in this state.

§179-5-30. Additional duties of operators.

30.1. In addition to the general duties imposed on all licensees by section 25 of this rule, an operator shall:

30.1.a. Acquire video lottery terminals by purchase, lease or other assignment only from licensed manufacturers;

30.1.b. Acquire no video lottery terminals in excess of the number they are authorized to operate in this state as stated in the permit issued by the commission;

30.1.c. Contract with licensed limited video lottery retailers for a secure location for the placement, operation and play of the video lottery terminals;

30.1.d. Pay no compensation of any kind to any retailer or give or transfer anything of value to any retailer, that is in addition to the consideration stated in the written agreement between the operator and the retailer concerning the placement and operation of limited video lottery terminals, except that

30.1.d.1. The retailer's contractual share of the operators statutory portion of gross profits shall not be less than 40 percent; and

30.1.d.2. The retailer's contractual share of the operators statutory portion of gross profits shall not be in excess of 50 percent; and

30.1.e. Pay for the installation and operation of commission approved telephone lines to provide direct dial-up or on-line communication between each video lottery terminal and the commission's central control computer;

30.1.f. Purchase or lease and install computer controller units and other associated equipment required by the commission for video lottery terminals owned or leased by the permittee;

30.1.g. Permit no person to tamper with or interfere with the operation of any video lottery terminal;

Proposed 179 CSR 5

25

30.1.h. Ensure that telephone lines from the commission's central control computer to the video lottery terminals located at the approved location are at all times connected, and prevent any person from tampering or interfering with the operation of the telephone lines;

30.1.i. Ensure that video lottery terminals are placed and remain placed in the specific places within the approved restricted access adult-only facility that have been approved by the commission.

30.1.j. Ensure that no video lottery terminal in a restricted access adult-only facility is relocated within the restricted access adult-only facility without the prior written approval of the commission;

30.1.k. Assume financial responsibility for proper and timely payments by limited video lottery retailers of all credits awarded to players in accordance with this rule;

30.1.l. Enter into contracts with licensed retailers to provide for the maintenance and repair of video lottery terminals and associated equipment only by licensed service technicians;

30.1.m. Conduct no video lottery advertising or promotional activities;

30.1.n. Install, post and display prominently within or about the approved location signs, redemption information and other material as required by the commission;

30.1.o. Maintain general liability insurance coverage for all video lottery terminals in an amount of at least one million dollars per claim;

30.1.p. Promptly notify the commission in writing of any breaks or tears to any logic unit seals;

30.1.q. Assume liability for all amounts due to the commission in connection with any money lost or stolen from the operator's video lottery terminal; and

30.1.r. Comply with all applicable provisions of the Act, rules and orders of the commission.

§179-5-31. Additional duties of service technicians.

31.1. In addition to the general duties imposed on all licensees by section 25 of this rule, a service technician shall:

31.1.a. Maintain all skills necessary for the timely repair and service of licensed video lottery terminals and associated equipment so as to ensure the continued, approved operation of those terminals;

31.1.b. Attend all commission-mandated meetings, seminars and training sessions concerning the repair and maintenance of licensed video lottery terminals and associated equipment;

31.1.c. Promptly notify the commission in writing of any electronic or mechanical video lottery terminal malfunctions;

Proposed 179 CSR 5

26

31.1.d. Train retailers and their employees how to clear printer paper jams and bill acceptor jams and replace paper rolls in the printer unit in a competent and timely manner; and

31.1.e Comply with all applicable provisions of the Act, rules and orders of the commission.

§179-5-32. Manufacturer seeking approval of terminal must be licensed; prohibition against placement of unapproved terminal.

32.1. Only a licensed manufacturer may apply to the commission for approval of a video lottery terminal or associated equipment.

32.2. A manufacturer may not sell or lease or otherwise transfer ownership or possession of a video lottery terminal for use in West Virginia unless the terminal has been approved by the commission.

§179-5-33. Testing of video lottery terminals and associated equipment.

33.1. The commission shall review and approve one or more independent testing laboratories for the purpose of inspecting and testing video lottery terminals, associated equipment and software to be operated or used in West Virginia under this rule;

33.1.a. Any testing laboratory appointed by the commission for these functions shall, at the time of appointment, have a minimum of 5 years of experience testing video gaming equipment on behalf of government regulators of video gaming devices such as the video lottery terminals regulated by this rule;

33.1.b. The appointed testing laboratories shall report all testing results to the commission, both video lottery terminals, associated equipment and software that comply with the Act and this rule, as well as video lottery terminals, associated equipment and software that do not comply;

33.1.c. The testing laboratory shall test to assure the commission in writing that the video lottery terminals, associated equipment and software tested comply with all requirements and specifications set forth in the Act and this rule;

33.2. The commission may require that the manufacturer transport two working models of a video lottery terminal with all components as it will be set up in retail locations, including any associated equipment that may be used, to the designated testing laboratory for testing, examination and analysis. When this is required:

33.2.a. The manufacturer shall pay all costs of testing, examination, analysis and transportation of the video lottery terminal models directly to the designated testing laboratory;

33.2.b. The manufacture shall provide technical documents, manuals and schematics including documents for associated equipment and any other information or documents required by the testing laboratory;

33.2.c. The testing, examination and analysis of any video lottery terminal model may require dismantling of the terminal, and some tests may result in damage or destruction to one or more electronic components of the terminal model; and

33.2.d. The commission may require the manufacturer to provide specialized equipment

Proposed 179 CSR 5

27

or to pay for the services of an independent technical expert to test the terminal.

33.3. The manufacturer shall pay the cost of transportation of one video lottery terminal to lottery headquarters and a second video lottery terminal to the commission's hot backup computer site.

33.4. The commission shall conduct an acceptance test to determine terminal functions and central system compatibility. If the video lottery terminal fails the commission conducted acceptance test, the manufacturer shall make all modifications required by the commission.

33.5. The commission may require that the manufacturer transport two sets of software including all video, sound, printer, touchscreen and bill validator software that may be used, to the designated testing laboratory for testing, examination and analysis. When this is required:

33.5.a. The manufacturer shall pay all costs of testing, examination, analysis and transportation of the software directly to the designated testing laboratory;

33.5.b. The manufacture shall provide copies of all information and other documents required by the by the testing laboratory to test the software;

33.5.c. The testing, examination and analysis of any software may result in damage or destruction to the software; and

33.5.d. The commission may require the manufacturer to provide specialized equipment or to pay for the services of an independent technical expert to test the terminal.

33.6. The commission may require that hardware modifications and modifications of software also be submitted to a designated testing laboratory by the commission. Modified hardware and software must be approved by the commission before it may be used in limited video lottery in West Virginia.

§179-5-34. Reporting of testing results.

After each test has been completed, the commission shall provide the manufacturer with a report containing findings, conclusions and pass/fail results. The report may contain recommendations for hardware or software modifications to bring the hardware or software into compliance with the provisions of the Act and this rule.

§179-5-35. Video lottery hardware and software specifications.

35.1. A surge protector must be installed on the electrical power supply line to each video lottery terminal.

35.2. A battery or equivalent power back-up for the electronic meters shall be capable of maintaining accuracy of all accounting records and terminal status reports for a period of ninety days after power is disconnected from the terminal. The power back-up device shall be located within the locked logic board compartment of the video lottery terminal.

35.3. An on/off switch that controls the electrical current used in the operation of the terminal shall be located in an accessible place within the interior of the video lottery terminal.

35.4. The operation of each video lottery terminal may not be adversely affected by any static discharge or other electromagnetic interference.

35.5. A minimum of one electronic or mechanical coin acceptor or other means by which to accurately and efficiently establish credits must be installed on each video lottery terminal.

35.5.a. Each video lottery terminal may also contain bill acceptors for one or more of the following: one-dollar bills, five-dollar bills, ten-dollar bills and twenty-dollar bills;

35.5.b. All coin and bill acceptors must be approved by the commission prior to use on any video lottery terminal in this state; and

35.5.c. A video lottery terminal shall not allow more than two dollars to be wagered on a single game; however, the following game options do not violate the two dollar wager limit on a single game because none require the insertion of more than \$2.00 to play the game:

35.5.c.1. The double-up option in poker games;

35.5.c.2. The splitting option in blackjack games;

35.5.c.3. The insurance option in blackjack games; and

35.5.c.4. The let-it-ride option in blackjack games.

35.6. A video lottery terminal may not be designed or configured to allow more than one individual to use video lottery terminal at the same time.

35.7. Access to the interior of video lottery terminals shall be controlled through a series of locks and seals.

35.7.a. The main logic boards and all erasable programmable read-only memory chips (EPROMS) are considered to be owned by the lottery commission and shall be located in a separate locked and sealed area within the video lottery terminal;

35.7.b. The cash compartment shall be located in a separate locked area within or attached to the video lottery terminal;

35.7.c. Hardware switches, jumpers, wire posts or any other means of manipulation may not be installed which alter the pay tables or payout percentages in the operation of a game;

35.7.d. Hardware switches on a video lottery terminal intended to control the terminal's graphic routines, speed of play, sound and other purely cosmetic features may not be used without the written approval of the commission; and

35.7.e. All video lottery terminals shall have a security system which will temporarily disable the gaming function of the terminal while opened.

35.8. Each video lottery terminal must contain a single printing mechanism capable of printing an original ticket and retaining an exact legible copy within the video lottery terminal, or other means of capturing and retaining an electronic copy of the ticket data as approved by the commission for at least ninety eleven days after the ticket is printed. If an impact printer is used by the video lottery terminal, the retained audit tape must be a different color paper from the ticket paper received by the player; if a thermal printer is used and the duplicate information is stored electronically in the video lottery terminal,

Proposed 179 CSR 5

29

any duplicate ticket printed by the terminal must have the prominent word "DUPLICATE" printed on the face of the ticket. The following information must be recorded on the ticket when credits accrued on a video lottery terminal are redeemed for cash:

35.8.a. The number of credits accrued;

35.8.b. The value of the credits in dollars and cents displayed in both numeric and written form;

35.8.c. The time of day and date;

35.8.d. The validation number; and

35.8.e. The license unique terminal identification number ~~of the retailer.~~ and

~~35.8.f. The license number of the permittee; and~~

~~35.8.g. The license number of the manufacturer.~~

35.9. A permanently installed and affixed identification plate shall appear on the exterior of each video lottery terminal and the following information shall be on the plate:

35.9.a. The manufacturer of the video lottery terminal;

35.9.b. The serial number of the terminal; and

35.9.c. The model number of the terminal.

35.10. All information required by this subsection must be displayed under the glass or another transparent substance on the side of the video lottery terminal facing the player:

35.10.a. The rules of play for each game shall be displayed on the video lottery terminal face or video display screen, which may be rejected by the commission if the rules are incomplete, confusing, misleading or inconsistent with game rules approved by the commission;

35.10.b. For each video lottery game, there shall be a display detailing the credits awarded for the occurrence of each possible winning combination of numbers or symbols.

35.10.c. No stickers or other removable devices shall be placed on the video lottery terminal screen or face without the prior written approval of the commission;

35.10.d. A label provided by the commission prominently displaying information on how to locate and contact persons or organizations available for help, assistance or treatment for persons who may have a gambling addiction, together with the telephone number "1-800-GAMBLER" or another help line telephone number that the commission may later choose; and

35.10.e. Each limited video lottery retailer shall conspicuously post the following printed statement provided by the commission in at least 24-pitch type size: "CAUTION - Gambling and playing this machine can be hazardous to your health, your finances, and your future."

35.11. Communication equipment and devices shall be installed to enable each video lottery

Proposed 179 CSR 5

30

terminal to communicate with the lottery commission's central computer system.

35.12. The commission shall provide to licensed manufacturers, or applicants applying for a manufacturer's license, the protocol documentation data necessary to enable the respective manufacturer's video lottery terminals to communicate with the commission's central computer for transmitting auditing program information and for activation and disabling of video lottery terminals.

35.13 Each video lottery terminal shall have a random number generator to determine randomly the occurrence of each specific symbol or number used in video lottery games. A selection process is random if it meets the following statistical criteria:

35.13.a. Each symbol or number shall satisfy the ninety-nine percent confidence limit using the standard chi-square statistical analysis of the difference between the expected result and the observed result;

35.13.b. Each symbol or number may not produce a significant statistic with regard to producing patterns of occurrences. Each symbol or number is random if it meets the ninety-nine percent confidence level with regard to the "runs test" for the existence of recurring patterns within a set of data;

35.13.c. Each pair of symbols or numbers is random if it meets the ninety-nine percent confidence level using standard correlation analysis to determine whether each symbol or number is independently chosen without regard to another symbol or number within a single game play; and

35.13.d. Each symbol or number is random if it meets the ninety-nine percent confidence level using standard serial correlation analysis to determine whether each symbol or number is independently chosen without reference to the same symbol or number in a previous game.

35.14. Each video lottery terminal shall meet the following maximum and minimum theoretical percentage payout during the expected lifetime of the terminal:

35.14.a. Video lottery games shall pay out no less than eighty percent and no more than ninety-five percent of the amount wagered. The theoretical payout percentage shall be determined using standard methods of probability theory;

35.14.b. Manufacturers shall file a request and receive written approval from the commission prior to manufacturing for placement in this state video lottery games programmed for a payout greater than ninety-two percent of the amount wagered. Commission approval shall be obtained prior to applying for testing of the high payout terminals; and

35.14.c. Each game shall have a probability greater than 1 in 17 million of obtaining the maximum payout for each play.

35.15. Each video lottery terminal shall be capable of continuing the current game with all current game features after a video lottery terminal malfunction is cleared. If a video lottery terminal is rendered totally inoperable during game play, the limited video lottery retailer shall return the current wager and all credits appearing on the video lottery terminal screen prior to the malfunction to the player.

35.16. Each video lottery terminal shall at all times maintain electronic accounting regardless of whether the terminal is being supplied with electrical power.

35.16.a. Each meter shall be capable of maintaining a total of no less than eight digits in

Proposed 179 CSR 5

31

length for each type of data required. The electronic meters shall record the following information:

35.16.a.1. The number of coins inserted by players or the coin equivalent if a bill acceptor is being used;

35.16.a.2. The number of credits wagered;

35.16.a.3. The number of credits won;

35.16.a.4. The number of credits paid out by a printed ticket;

35.16.a.5. The number of times the logic area was accessed;

35.16.a.6. The number of times the cash door was accessed;

35.16.a.7. The number of credits wagered in the current game;

35.16.a.8. The number of credits won in the last complete video lottery game;

and

35.16.a.9. The number of cumulative credits representing money inserted by a player and credits for video lottery games won but not collected; and

35.16.b. No video lottery terminal may have any mechanism that would allow the electronic accounting meters to clear automatically.

35.16.b.1. Electronic accounting meters may not be cleared without the prior approval of the commission; and

35.16.b.2. Both before and after any electronic accounting meter is cleared, the limited video lottery retailer shall record all meter readings in the presence of a commission employee.

§179-5-36. Manufacturer must be licensed.

A manufacturer of video lottery terminals may not sell, lease or otherwise transfer ownership or possession of any video lottery terminal to any permittee for use in this state unless the manufacturer possesses a current manufacturer's license issued by the commission under the Limited Video Lottery Act.

§179-5-37. Manufacturers may sell or lease only to permittees.

37.1. A licensed manufacturer of video lottery terminals may only sell, lease or otherwise transfer ownership or possession of video lottery terminals for use in this state to a person who possesses at the time of delivery a valid permit to own or lease one or more video lottery terminals and a valid operator's license or a valid limited video lottery retailer's license issued by the commission.

37.2. One permittee may not sell, lease or otherwise transfer ownership or possession of a video lottery terminal to another permittee.

37.3. With the prior written approval of the commission, a licensed manufacturer may broker the sale of video lottery terminals it has manufactured from one permittee to another permittee provided the acquiring permittee is authorized by the commission to acquire the video lottery terminals.

§179-5-38. Terminals must be approved.

A licensed manufacturer may not sell or lease a video lottery terminal for placement by any permittee in this state unless the terminal has been approved by the commission as provided in the Act and this rule.

§179-5-39. Modifications to previously approved video lottery terminals.

39.1. The licensed manufacturer and the licensed permittee are jointly responsible for the assembly and installation of all video lottery terminals and associated equipment.

39.2. The licensed manufacturer and licensed permittee may not change the assembly or operational functions of a terminal licensed for placement in West Virginia unless a request for modification of an existing video terminal prototype is approved in writing by the commission;

39.2.a. Changes to previously-approved EPROMs, the motherboard or any other hardware within the logic area of the video lottery terminal, as well as coin acceptors, bill acceptors and printers shall be approved in writing by the commission before live wagering at retail locations may occur using any modified hardware or software;

39.2.b. Changes to previously approved software that affects in any way the operation or payout of a video lottery terminal must be approved in writing by the commission before live wagering at retail locations may occur using any payout;

39.2.c. Changes to the video lottery terminal cabinet, including all printed material that appears on the cabinet or its clear glass or plastic front must be approved in writing by the director prior to use with the modification;

39.2.d. The request for modification shall contain a detailed description of the type of change, the reasons for the change and technical documentation of the change; and

39.2.e. Each video lottery terminal approved for placement at a licensed location shall conform to the exact specifications of the video lottery terminal prototype tested and approved by the commission for use in limited video lottery in this state.

§179-5-40. Unapproved video lottery terminals; seizure and destruction

40.1. If a manufacturer or other person supplies a video lottery terminal or a video lottery terminal modification to a licensed permittee or license limited video lottery retailer, and the new or modified terminal has not been approved by the commission, the video lottery terminal is deemed *prima facie* to be contraband. The commission or any law enforcement officer having jurisdiction may seize and destroy all of the licensed operator's and manufacturer's unapproved video lottery terminals, following the procedures set forth in sections seventy-seven through eighty-one of this rule.

40.2. When video lottery terminals have been seized and destroyed, the commission shall

suspend the licenses of the permittee and the licensed manufacturer for not less than one week or more than five weeks;

40.2.a. When the license of an operator is suspended, the commission shall disable and cause not to operate all video lottery terminals owned or leased by the operator in the state of West Virginia;

40.2.b. When the license of a limited video lottery retailer who is a permittee is suspended, the commission shall disable and cause not to operate all video lottery terminals owned or leased by the licensee at the retail location for which the license was suspended; and

40.2.c. When the license of a manufacturer is suspended, the commission shall disable and cause not to operate all video lottery terminals manufactured by the manufacturer and operating in the state of West Virginia.

40.3. In addition to suspension of licenses, the commission may impose a civil money penalty as provided in W. Va. Code §29-22B-1601

§179-5-41. Limitation on number and location of video lottery terminals.

41.1. The Act allows the commission to authorize the placement of not more than 9,000 video lottery terminals in restricted access adult-only facilities in this state.

41.2. No person may directly or indirectly operate more than 675 video lottery terminals, which shall be located only in restricted access adult-only facilities.

41.3. No licensed limited video lottery retailer may be authorized to have on the premises for which the license was issued more than 5 video lottery terminals, unless the licensee is a fraternal beneficiary society, a domestic fraternal society or veterans organization as defined in subsection 41.4.

41.4. No licensed limited video lottery retailer that is a fraternal beneficiary society, a domestic fraternal society or veterans organization, as defined in this subsection, may be authorized to have on the premises for which the license was issued more than 10 video lottery terminals.

41.4.a. The fraternal beneficiary society shall be a fraternal beneficiary society, order or association that is exempt from federal income tax under section 501(c)(8) of the Internal Revenue Code of 1986, as amended.

41.4.b. The domestic fraternal society shall be domestic fraternal society, order or association operating under the lodge system that is exempt from federal income tax under section 501(c)(10) of the Internal Revenue Code of 1986, as amended.

41.4.c. The veterans' organization shall be a post or organization of past or present members of the armed forces of the United States, or an auxiliary unit or society of such a post or organization that is exempt from federal income tax under section 501(c)(19) of the Internal Revenue Code of 1986, as amended.

§179-5-42. Permits to operate video lottery terminals; expiration date; annual fee to be paid by May first.

42.1. The commission shall provide forms for an operator's permit to own or lease and operate video lottery terminals acquired from a licensed manufacturer and for a permit for a limited video lottery

retailer that allows the holder to own or lease video lottery terminals acquired from a licensed manufacturer. The number of video lottery terminals that a person may own or lease shall be stated on the permit issued by the commission. Whenever the number of video lottery terminals a permittee is authorized to own or lease increases or decreases, the commission shall issue an amended permit and the previously issued permit shall be void and of no further effect.

42.2. Permits shall be issued for the period that begins on the day the permit is issued by the commission and expires at 12:00 a.m. on July 1, 2011, unless the permit is sooner surrendered by the permittee or revoked by the commission as provided in the Limited Video Lottery Act or this rule. An amended or modified permit also expires at 12:00 a.m. on July 1, 2011 unless it is sooner surrendered or revoked.

42.3. For the privilege of holding a permit that authorizes the licensee to own or lease video lottery terminals from a licensed manufacturer, the person shall pay an annual fee of \$1,000 per video lottery terminal for which the permit is issued.

42.3.a. The annual renewal fee shall be due and payable on May 1, 2002 and each first day thereafter.

42.3.b. The initial \$1,000 per terminal fee, shall be due and payable as follows:

42.3.a.1. For persons authorized to own or lease video lottery terminals without going through the bid process, the fee shall initially be paid at the time the permit is issued for the number of video lottery terminals stated on the permit.

42.3.a.2. For persons authorized to own or lease video lottery terminals as a result of a bidding process, the amount bid per terminal shall be paid in lieu of the initial \$1,000 per terminal fee.

42.4. For subsequent 10-year permit cycles, the payment pattern set forth in section 42.3 of this rule shall apply.

42.5. A permit does not create any property right in the holder. A permit may not be transferred to any person except that the permit may be surrendered to the commission. A permit does create any vested right to the permit, which may be revoke by the commission for cause, or modified as provided in the Limited Video Lottery Act and this rule. All permits issued for the 10-year period ending June 30, 2011 shall expire at 12:00 a.m. on July 1, 2011. All permits issued for the 10-year period ending June 30, 2021 shall expire at 12:00 a.m. on July 1, 2021.

§179-5-43. Reservation of authority to have video lottery terminals on or before August 1, 2001 by persons who held a private club license or Class "A" nonintoxicating beer license on January 1, 2001.

43.1. On or before August 1, 2001, every person who on the January 1, 2001 held a private club license issued as provided W. Va. Code §60-7-1 *et seq.*, or a class "A" nonintoxicating beer license issued as provided in W. Va. Code §11-16-1 *et seq.*, and who wants to offer video lottery terminals, as defined in this rule, for the enjoyment of the licensee's customers may file an application to be licensed as a limited video lottery retailer under this rule.

43.2. The applications shall be submitted on forms supplied by the director. Each application shall:

Proposed 179 CSR 5

35

43.2.a. Be signed by the applicant or a person authorized to sign the application filed for a person who is not an individual; and

43.2.b. Provide all of the information requested by the commission.

43.3. The commission shall return to the applicant, for completion and re-filing an application that is incomplete in any material respect. When possible, an incomplete application will be returned to the applicant for completion and re-filing by August 1, 2001.

43.4. An application filed on or before August 1, 2001 for a limited video lottery retailer's license shall state the number of video lottery terminals to be located on the premise of the applicant. This number may not exceed 5 video lottery terminals, except that eligible fraternal societies and veterans' organizations may have up to 10 video lottery terminals on the premises for which the limited video lottery license is issued.

43.5. The application shall also elect and state whether the applicant intends to own or lease up to 2 video lottery terminals (up to 7 in the case of eligible fraternal and veterans' organizations) from a licensed manufacturer or obtain them from a licensed operator.

43.6. A licensee who elects to own 2 video lottery terminals (or 7 in the case of certain fraternal and veteran organizations) may obtain additional video lottery terminals from an operator or by being a successful bidder under section 45 of this rule provided the total number of video lottery terminals on the licensee's premises does not exceed the number specified in subsection 43.4.

43.7. If the applicant held a private club license on January 1, 2001, and the applicant elects to own or lease up to 2 video lottery terminals from a licensed manufacturer (or up to 7 video lottery terminals in the case of an eligible fraternal or veterans' organization), and the applicant qualifies as a private club for a limited video lottery license, the applicant, upon payment of \$1,000 per video lottery terminal the applicant intends to own or lease, shall be issued a permit to purchase or lease from a licensed manufacturer the number of video lottery terminals stated in the permit.

43.8. If the applicant held a Class "A" nonintoxicating beer license on January 1, 2001, but did not also hold a private club license on that date for the location for which the application for a limited video lottery retailer's license is submitted, and the applicant qualifies as a Class "A" nonintoxicating beer establishment for a limited video lottery license, the applicant, upon payment of \$1,000 per video lottery terminal the applicant intends to own or lease, shall be issued a permit to purchase or lease from a licensed manufacturer the number of video lottery terminals stated in the permit.

43.9. If the applicant held a private club license on January 1, 2001, and the applicant does not elect to own or lease up to 2 video lottery terminals from a licensed manufacturer (or up to 7 video lottery terminal authorizations in the case of an eligible fraternal or veterans' organization), then, if the applicant qualifies as a private club for a limited video lottery license, the commission when issuing the applicant a limited video lottery retailer's license shall also issue the applicant a certificate reserving up to 2 video lottery terminal authorizations (or up to 7 video lottery terminals authorizations in the case of an eligible fraternal or veterans' organization) as requested in the application filed on or before August 1, 2001. The licensee after contracting with an operator for video lottery terminals may give the certificate of reservation to the operator. The operator, upon submitting to the commission a true copy of its contract with the licensed video lottery retailer along with the certificate of reservation issued to the retailer by the commission and payment of \$1,000 per video lottery terminal stated in the certificate of reservation shall be issued a permit or an amended permit as provided in section 49 of this rule.

43.10. If the applicant held a Class "A" nonintoxicating beer license on January 1, 2001, but did not also hold a private club license on that date for the location for which the application for a limited video lottery retailer's license is submitted, and the applicant does not elect to own or lease up to 2 video lottery terminals from a licensed manufacturer (or up to 7 video lottery terminal authorizations in the case of an eligible fraternal or veterans' organization), then, if the applicant qualifies as a Class "A" nonintoxicating beer establishment for a limited video lottery license, the commission when issuing the applicant a limited video lottery retailer's license shall also issue the applicant a certificate reserving up to 2 video lottery terminal authorizations (or up to 7 video lottery terminals authorizations in the case of an eligible fraternal or veterans' organization) as requested in the application filed on or before August 1, 2001. The licensee after contracting with an operator for video lottery terminals may give the certificate of reservation to the operator. The operator, upon submitting to the commission a true copy of its contract with the licensed video lottery retailer along with the certificate of reservation issued to the retailer by the commission and payment of \$1,000 per video lottery terminal stated in the certificate of reservation shall be issued a permit or an amended permit as provided in section 49 of this rule.

43.11. If the applicant held a private club license or class "A" nonintoxicating beer license on January 1, 2001, and if on August 1, 2001, the person does not qualify for issuance of a limited video lottery license the person shall not be issued a permit to purchase or lease video lottery terminals from a licensed manufacturer or a certificate of reservation. Should the person qualify in the future for a limited video lottery retailer's license the person shall be required to obtain all video lottery terminals from a licensed operator or be a successful bidder under section 45 of this rule.

43.12. If the applicant held a class "A" nonintoxicating beer license on January 1, 2001 but not a private club license as of that date, and if on August 1, 2001, the person does not qualify for issuance of a limited video lottery license as a holder of a class "A" nonintoxicating beer license, the person shall not be issued a permit to purchase or lease video lottery terminals from a licensed manufacturer or a certificate of reservation. Should the person be issued a private club license after December 31, 2000, and qualify for a limited video lottery retailer's license the person shall obtain all video lottery terminals from a licensed operator or be a successful bidder under section 45 of this rule for authorization to purchase or lease video lottery terminals from a licensed manufacturer.

43.13. The number of video lottery terminals a limited video lottery retail licensee is authorized to have on its premises shall be stated in the limited video lottery retailer's license issued to the licensee. This number will be 5 unless under the Act and this rule the licensee may have up to 10 video lottery terminals on the premises for which the license was issued.

43.14. The number of video lottery terminals a limited video lottery retailer is authorized to own or lease from a licensed manufacturer shall be stated in the permit issued to the licensee.

43.15. After the permit is issued, the permittee may purchase or lease from a licensed manufacturer the number of video lottery terminals stated in the permit.

43.16. A limited video lottery retailer who elects to obtain video lottery terminals from an operator may contract with a licensed operator for no more than the number of video lottery terminals stated in the license.

43.17. A permit to own or lease video lottery terminals issued after April 20, 2001, expires at 12:00 a.m. in this state on July 1, 2011, unless it is surrendered or revoked before that time. When the number of video lottery terminals a permittee is allowed to own or lease increases or decreases, the commission shall issue an amended permit which shall expire at 12:00 a.m. in this state on July 1, 2011.

Proposed 179 CSR 5

37

43.18. A permit to own or lease video lottery terminals issued after July 1, 2011 for the 10-year period that ends June 30, 2021, expires at 12:00 a.m. in this state on July 1, 2021, unless it is surrendered or revoked before that time. When the number of video lottery terminals a permittee is allowed to own or lease increases or decreases, the commission shall issue an amended permit which shall expire at 12:00 a.m. in this state on July 1, 2021.

43.19. A person licensed as a limited video lottery retail shall continuously meet the qualifications for issuance of that license. If the limited video lottery license is surrendered or revoked by the commission, the licensee's permit to own or lease video lottery terminals shall also be surrendered or revoked.

43.20. If a person's license as a limited video lottery retailer expires and the license is not renewed within 30 days after the expiration date, the permit shall expire at 12:00 a.m. on the 31st day. If the person subsequently reapplies for a limited video lottery retailer's license and the license is issued, the person shall obtain all video lottery terminals on the premises for which the license is issued from a licensed operator or as a result of a successful under section 45 of this rule.

43.21. A permit to own or lease video lottery terminals is a revocable privilege granted pursuant to the provision of the Limited Video Lottery Act and this rule. Issuance of a permit or a license under the Act does not create (A) any property in the permit or the license, (B) any right to transfer or encumber the permit or license, (C) any vested right in the permit or license, or (D) the accrual of any value to the privilege of participating in any limited video lottery activity.

43.22. An application for a limited video lottery retailer's license may not include more than one physical location. If a person owns or operates two or more physical locations licensed by the alcohol beverage control commissioner, a separate application shall be submitted for each location at which the applicant wants to offer video lottery terminals.

§179-5-44. Determination of authorizations to be issued without bid and number of authorizations to be bid.

44.1. When properly completed applications provided for in section 43 of this rule are received by the commission on or before August 1, 2001, and the application shows that applicant elects to purchase or lease video lottery terminals, the commission shall reserve no more than 2 video lottery terminal authorizations for each applicant who is not a fraternal society or veteran's organization and no more than 7 terminal authorizations for an applicant who is a fraternal society or veterans' organization as defined in this subsection.

44.1.a. "Fraternal society" means a fraternal beneficiary society, order, or association that is exempt from federal income tax under section 501(c)(8) of the Internal Revenue Code of 1986, as amended.

44.1.b. "Fraternal society" also means a domestic fraternal society, order, or association operating under a lodge system that is exempt from federal income tax under section 501(c)(10) of the Internal Revenue Code of 1986, as amended.

44.1.c. "Veterans' organization" means a post or organization of past or present members of the armed forces of the United State, or an auxiliary unit or society of such a post or organization, that is exempt from federal income tax under section 501(c)(19) of the Internal Revenue Code of 1986, as amended.

44.2. The commission shall then determine the total number of video lottery terminal authorizations to be reserved under subsection 44.1 of this section and subtract that number from 9,000. This establishes the number of authorizations available for the first round of bidding as provided in section 45 of this rule.

44.3. If an application for a video lottery retailer's license is received from a person who on January 1, 2001, did not have either a private club license or a class "A" nonintoxicating beer license for the location stated in the application then, if a limited video lottery retailer's license is issued for the location, the licensee must acquire video lottery terminals from a licensed operator or submit a successful bid under section 45 of this rule allowing the person to purchase or lease the video lottery terminals.

44.4. If an application for a limited video lottery retailer's license is received after August 1, 2001 from any applicant, the applicant, if granted a limited video lottery retailer's license, may acquire video lottery terminals by:

44.4.a. Contracting with a licensed operator to furnish video lottery terminals; or

44.4.b. Submitting a successful bid for authorization to purchase or lease video lottery terminals from a licensed manufacturer as provided in section 45 of this rule.

44.5. As used in this section, the term "received" means physically received in the state lottery headquarters in Charleston by 4:30 p.m. on August 1, 2001.

§179-5-45. Allocation of authorization to own or lease video lottery terminals by sealed bid.

45.1. The number of video lottery terminal authorizations that remain after subtracting the number of video lottery terminal authorizations allocated under section 44.1 of this rule shall be allocated to licensed operators and licensed video lottery retailers by sealed competitive bid.

45.2. Bids for authorizations to purchase or lease video lottery terminals from licensed manufacturers shall be governed by the provisions of this section and sections 46 through 48 of this rule.

45.3. A permit to own or lease one or more video lottery terminals, may only be issued to a person who is licensed as an operator or a limited video lottery retailer under this rule.

45.4. All permits issued under this section shall be based on sealed competitive bids in accordance with the provisions of this section.

45.5. Before each first publication of a legal notice soliciting bids, the commission may by order set a new minimum bid for each video lottery terminal authorization that is available for bid .

§179-5-46. The bidding process.

46.1. Bids for issuance of permits shall be obtained by public notice published as a Class II-0 legal advertisement in compliance with the provisions of West Virginia Code §59-3-1 *et seq.*

46.1.a. The commission shall publish the invitation-to-bid notice as a statewide legal advertisement;

46.1.b. The notice shall run once each week for two successive weeks; and

Proposed 179 CSR 5

39

46.1.c. The second publication of the notice shall appear more than 60 days next preceding the final day for submitting a bid.

46.2. Bids for authorizations to own or lease video lottery terminals shall be submitted to the director of the purchasing division, West Virginia department of administration;

46.2.a. Bids delivered or mailed to the director of purchasing shall be in the possession and control of the purchasing division on or before the time and date specified in the class II-O advertisement;

46.2.b. A duplicate bid shall be mailed to the State Auditor's bid observer's office;

46.2.c. Mailed and courier-delivered bids shall be addressed as follows:

Submit one (1) original bid to:

State of West Virginia
Department of Administration
Purchasing Division
2019 Washington Street, East
P.O. Box 50130
Charleston, WV 25305-0130
Fax: (304) 558-3970

Submit one (1) copy of the bid to:

State Auditor's Office
Bid Observer
State of West Virginia
1900 Kanawha Blvd., East
Bldg. 1, Room W116
Charleston, WV 25305-0230
Fax: (304) 340-5098

46.2.d. The outside envelope/package(s) should be clearly marked:

46.2.d.1. Buyer: _____, Director;

46.2.d.2. Req.: Video Lottery Permit Bids;

46.2.d.3. Date: (opening) _____; and

46.2.d.4. Time: (opening) 2:00 p.m.; and

46.2.e. Bids submitted to either office by facsimile shall be rejected; and

46.2.f. Failure of the United States Postal Service or a courier service to make timely delivery of any bid shall not act to validate any bid not in the hands of the Purchasing Division or the State Auditor's Bid Observer's Office by the time and date specified in the class II-O advertisement.

46.3. Each bid shall indicate both the number of video lottery terminals for which the permit is sought and the per-terminal bid for which the permit is sought;

46.4. No bid may be altered or withdrawn after the appointed hour for the opening of the bids;

46.5. Subject to the provisions of subsection 46.6 of this rule, permits shall be awarded to the persons submitting the highest per terminal bids, except:

Proposed 179 CSR 5

40

46.5.a. No person may be authorized to directly or indirectly own or lease more than 675 video lottery terminals;

46.5.b. If a high bidder already holds a permit issued under this section, the bid shall be awarded to that bidder, only to the extent the total number of video lottery terminals the operator is authorized to directly or indirectly own or lease does not exceed 675 terminals; and

46.5.c. If the high bidder is a person who is a license limited video lottery retailer, the number of authorizations awarded to bidder may not exceed the maximum number of video lottery terminals that may be located on all premises for which the bidder holds a limited video lottery license.

46.6. No bid shall be considered unless the bond required by section 48 of this rule accompanies the bid or was submitted to the West Virginia state treasurer before the time designated for opening of the bid.

46.7. No bid shall be considered unless the amount of the bid equals or exceeds the minimum bid amount for a video lottery terminal specified by the commission.

46.8. The Auditor's representatives and Purchasing Division officials will open all received bids in the same room and will match bids to each duplicate.

46.8.a. ~~The Auditor's representatives and Purchasing Division officials~~ Lottery's representatives shall reject any bid for which there is no duplicate, or where the original and copy differ in amount or in any other material way;

46.8.b. ~~The Auditor's representatives and Purchasing Division officials~~ Lottery's representatives will next determine whether the original bid sent to the Purchasing Division contains a bid bond equal to 100 percent of the per-terminal bid amount multiplied by the number of video lottery terminal authorizations requested by the bid;

46.8.b.1. If no bond or State Treasurer's receipt is found, the bid shall be rejected; or

46.8.b.2. If the amount of the bond is less than 100 percent of the per-terminal bid amount multiplied by the number of video lottery terminal authorizations requested, the bid shall be rejected;

46.8.c. ~~The Auditor's representatives and Purchasing Division officials~~ Lottery's representatives shall next reject any bid as non-responsive if the per terminal bid amount is less than the minimum per-terminal bid amount established by the West Virginia State Lottery Commission prior to the first publication and included in the published notice;

46.8.d. ~~The Auditor's representatives and Purchasing Division officials~~ Lottery's representatives shall reduce the number of terminal authorizations requested in the bid if a successful bid would grant to the bidder a total number of video lottery terminals greater than 675 if the bidder is an operator, 10 if the bidder is a retailer that is a fraternal or veterans organization, or 5 if the bidder is a retailer who is not a fraternal or veterans organization with a single licensed retail location. When the bidder is a video lottery retailer who has more than one licensed retail location, the number of video lottery terminal authorizations may not exceed 5 multiplied by the number of retail locations for which the bidder holds a limited video lottery retail license;

Proposed 179 CSR 5

41

46.8.e. Whenever there are two or more bids of the same dollar amount and the number of authorizations for which the bids were submitted exceeds the number of authorizations still available to fill the bids, the commission shall award the permit based upon the drawing of lots among the bidders;

46.8.f. Once all bids are opened, those bids that have passed all qualitative checks mentioned above will be arranged in per-terminal amount from highest bid to lowest bid and the results posted by representatives of the Lottery in a spreadsheet or on a marker board. Each listing shall show the following information:

46.8.f.1. Name of the Bidder;

46.8.f.2. Per terminal amount bid in US dollars;

46.8.f.3. Number of terminal authorizations requested; and

46.8.f.4. Number of terminal authorizations remaining after this bid opening is completed; and

46.8.g. All bids for a permit may be rejected by the commission if the commission determines that all the bids are inadequate because they are for less than the minimum bid amount set by the commission. In this event, the commission shall begin anew the bidding process for the permits.

46.9. After the award of a permit, the director of the lottery shall indicate upon the successful bid that it was the successful bid and the number of video lottery terminal authorizations for which a permit is awarded to the bidder;

46.9.a. This number shall be the number of video lottery terminal authorizations for which the bid was submitted, or the remaining number of video lottery terminal authorizations to be awarded when the number of video lottery terminal authorizations remaining is less than the number of terminal authorizations for which the bid was submitted; and

46.9.b. A copy of the bid and the bidder's application for an operator's license or a limited video lottery retailer's license shall be maintained as a public record at the commissions' offices and shall be open to public inspection during its normal business hours.

46.10. Prior to issuing a permit to a successful bidder, the bid price for the number of video lottery terminals authorized in the permit shall be paid to the commission by money order, certified check or cashier's check; and

46.11. All permits shall be signed by the director of the lottery in the name of the state of West Virginia and shall state number of video lottery terminals the permit authorizes the holder to own or lease from licensed manufacturers.

46.12. If the successful bidder fails to pay to the commission the bid price and the operator's annual license fee or the limited video lottery retailer's license fee for the first license year, at the time specified by the commission, the bond provided for in section 47 of this rule shall be forfeited and the bidder shall not be issued the permit.

46.13. In the event of a default, the commission shall then issue the permit to the next highest bidder for video lottery terminal authorizations, or reject all remaining bids, in which case the

Proposed 179 CSR 5

42

commission shall start anew the bidding procedure for the remaining number of video lottery terminal authorizations.

46.14. If after a permit is awarded, an operator or limited video lottery retailer surrenders the permit, in whole or in part, or the permit is revoked or canceled by operation of law, the commission may seek bids for video lottery terminals for which authorization was surrendered or revoked, subject to the limitations and requirements of this rule.

46.15. During the fiscal year of the state ending June 30, 2011, the commission shall seek bids for the 10-year period beginning the July 1, 2011 and ending June 30, 2011.

§179-5-47. Preference for current permit holders.

47.1. When awarding bids for the 10-year period that begins July 1, 2011 and ends at 12:00 a.m. on July 1, 2021, the commission shall, in determining the amount a then current holder of a permit issued under this rule shall pay for a new permit or for authorization to place additional video lottery terminals in this state, afford the bidder a preference, if the bidder submitted at least the minimum per terminal bid amount prescribed by the commission. The amount of preference shall be determined as provided in subdivision 47.1.a of this subsection.

47.1.a. The preference allowed by subsection 47.1 shall be computed by adding 5 percent of the bid price submitted by the current permit holder to the amount of the bid submitted by that holder.

47.1.b. Example. Operator "A" holds a current permit to own or lease 500 video lottery terminals. Operator "A" submits a bid of \$3,000 per terminal for authorization to own or lease 500 terminals during the 10-year period that begins July 1, 2011. The minimum bid amount set by the commission is \$3,000 per terminal authorization. When the bids are opened and the amounts of the per terminal bids are arrayed from highest to lowest, it is apparent that operator "A" is not a successful bidder for some or all of the sought operator "A." Before the permits are awarded, the commission will apply the 5 percent preference to bids submitted by a current permittee whose bids equal or exceed the minimum per terminal bid authorization amount set by the commission. With this preference added, operator "A's" bid of \$3,000 per terminal authorization is effectively \$3,150 per terminal authorization. Because of this preference, operator "A" is a successful bidder for 500 video lottery terminal authorizations. The amount due from operator "A" will be \$1.5 million plus applicable license fees. The amount due shall be paid to the commission on or before the date set by the commission.

47.1.c. The preference allowed under subsection 47.1 may not be calculated on any bid that is for less than the minimum per terminal authorization bid price set by the commission.

47.2. If a current permittee submits a bid that equals or exceeds the minimum bid per terminal authorization set by the commission and after consideration of the preference allowed under section 47.1 of this rule the current permittee is not a successful bidder for some or all of the video lottery terminals for which the bidder holds a current permit, then the commission shall notify the current permit holder that, upon payment of an amount equal to the highest bid per terminal authorization received by the commission in the current round of bidding that exceeds the minimum bid price set by the commission, the current permittee will be awarded a permit for the number of video lottery terminal authorizations for which the permittee was not a successful bidder.

47.3. When awarding bids for the 10-year period that begins July 1, 2021 and ends at 12:00 a.m. on July 1, 2031, the commission shall, in determining the amount a then current holder of a permit issued

Proposed 179 CSR 5

43

under this rule shall pay for a new permit or for authorization to place additional video lottery terminals in this state, afford the bidder a preference, if the bidder submitted at least the minimum per terminal bid amount prescribed by the commission. The amount of preference shall be determined as provided in subdivision 47.1.a of this section.

47.3.a. The preference allowed by subsection 47.2 shall be computed by adding 5 percent of the bid price submitted by the current permit holder to the amount of the bid submitted by that holder.

47.3.b. Example. Operator "A" holds a current permit to own or lease 500 video lottery terminals. Operator "A" submits a bid of \$4,000 per terminal for authorization to own or lease 500 terminals during the 10-year period that begins July 1, 2021. The minimum bid amount set by the commission is \$4,000 per terminal authorization. When the bids are opened and the amounts of the per terminal bids are arrayed from highest to lowest, it is apparent that operator "A" is not a successful bidder for some or all of the sought operator "A." Before the permits are awarded, the commission will apply the 5 percent preference to bids submitted by current permittee whose bids equal or exceed the minimum per terminal bid authorization amount set by the commission. With this preference added, operator "A's" bid of \$4,000 per terminal authorization is effectively \$4,200 per terminal authorization. Because of this preference, operator "A" is a successful bidder for 500 video lottery terminal authorizations. The amount due from operator "A" will be \$2 million plus applicable license fees. The amount due shall be paid to the commission on or before the date set by the commission.

47.3.c. The preference allowed under subsection 47.3 may not be calculated on any bid that is for less than the minimum per terminal authorization bid price set by the commission.

47.4. Whenever the commission determines that some portion of the 9,000 video lottery terminal authorizations that may be permitted have not been permitted, the commission may solicit bids for those authorizations as provided in section 45 of this rule. The commission shall first allow current permit holders to bid on the remaining video lottery terminals before opening up the bidding to other persons.

§179-5-48. Bid bond required.

48.1. Each person submitting a bid under section 46 shall also furnish a bond guaranteeing payment of 100 percent of the amount bid for the permit sought by the bidder.

48.2. The bond required by this section shall be furnished in the form of: (A) cash, (B) negotiable securities (C) a corporate surety bond issued by a company authorized by the West Virginia insurance commissioner to do surety business in the state of West Virginia, or (D) an irrevocable letter of credit issued by a national or state bank or other financial institution acceptable to the commission.

48.3. If the bid bond is furnished in cash or negotiable securities, the principal shall be deposited without restriction in the West Virginia state treasurer's office and credited to the commission, but any income shall inure to the benefit of the bidder. A true copy of the receipt issued by the state treasurer shall be included in the sealed bid.

48.4. If the bid bond is furnished in the form of a corporate surety bond or irrevocable letter of credit, the bond or letter of credit shall be included in the sealed bid.

48.5. The bond shall be returned to the bidder following the bidding if the bidder is not a successful bidder for authorization to purchase or lease video lottery terminals from licensed manufacturers for use in this state, as provided in the Limited Video Lottery Act and this rule.

48.6. If the bidder is a successful bidder, the bid bond shall be released after the permit is issued.

48.7. If a successful bidder defaults in paying the amount due by the date specified by the commission, the bid bond shall be forfeited to the state of West Virginia.

48.8. If the defaulting bidder was successful only in part because the bid submitted was for authorization to place more video lottery terminals than were awarded to the bidder, the amount of the bid bond shall be prorated and the portion of the bid bond attributable to video lottery terminal authorizations not awarded to the defaulting bidder shall be returned to the bidder and the rest shall be forfeited to the state of West Virginia.

§179-5-49. Operator permit.

49.1. A licensed operator who holds a permit issued under this section shall be allowed to operate the number of video lottery terminals specified in the permit;

49.1.a. The number of video lottery terminals authorized in the permit shall be the sum of the number of authorizations for which the operator is the successful bidder under section 46 of this rule plus the number of authorizations reserved under section 43 of this rule for eligible video lottery retailers that elect to obtain video lottery terminals from the operator;

49.1.b. The operator shall apply to the commission for a supplemental permit to operate the number of video lottery terminals set forth in the application; and

49.1.c. A true copy of all contracts the applicant has entered into with persons who hold a limited video lottery retailer's license issued under the Limited Video Lottery Act for placement of video lottery terminals in the premises of the limited video lottery retailer for whom authorizations were reserved under section 43 shall be attached to the application along with a true copy of the certificate of reservation issued by the commission to that video lottery retailer.

49.2. The contract between the operator and the limited video lottery retailer shall be in writing and be signed by the parties, or their duly authorized representative when the party is a person who is not an individual;

49.2.a. The commission shall supply a contract elements form to provide quick and easy review of the important terms and elements of each contract;

49.2.b. The operator submitting each contract shall list the required information and contract terms from the signed contract onto the commission-supplied form and shall staple the form onto the appropriate contract prior to filing the contract with the commission; and

49.2.c. The operator shall provide to the commission an affidavit stapled to each contract, which is signed and attested to by the operator's chief executive stating that this contract is the only contract, agreement or understanding, written or oral, between the operator and the licensed video lottery retailer concerning the placement and operation of limited video lottery terminals, and that the operator will execute no further limited video lottery agreements with the retailer so long as this attached agreement is in force for video lottery terminals on the premise of the retailer stated in the contract. Any other agreements between the operator and the limited video lottery retailer shall be identified by the operator and shall be subject to review by the commission. Those agreements shall be arms length and

Proposed 179 CSR 5

45

for fair market consideration, and shall not be for excess or unreasonable consideration designed to circumvent the requirement of this subdivision 49.2.c.

§179-5-50. Reduction of video lottery terminals authorized in a permit..

50.1. If after a permit is issued to a licensed limited video lottery retailer or to a license operator, the operator or retailer surrenders the permit, in whole or in part, or the permit is modified, revoked or canceled by the commission or by operation of law, the authorizations surrendered, revoked or canceled shall revert to the commission.

50.2. Video lottery terminal authorizations in the inventory of the commission shall be allocated through the competitive bid process described in section 46 of this rule, subject to the limitations and requirements of Limited Video Lottery Act and this rule. The commission has sole discretion to determine when bids shall be solicited.

§179-5-51. Operation of authorized video lottery terminals; forfeiture of authorization for failure to operate.

51.1. A person who holds a permit or license to operate video lottery terminals in this state shall place in operation the number of video lottery terminals authorized in the permit or license:

51.1.a. Within 90 days after the person receives the permit or license that first authorizes operation of the terminals, except that when the permit or license is issued on or before January 1, 2002, the terminals shall be placed in operation within 6 months after the person receives the permit or license that first authorizes operation of the video lottery terminals.

51.1.b. When an amended permit is issued authorizing operation of additional video lottery terminals, the number of additional video lottery terminals authorized shall be placed in operation within 90 days after the amended permit is received by the permittee.

51.2. After a video lottery terminal is connected to the commission's central site system of monitoring video lottery terminals, the terminal may not be off-line for more than 5 consecutive days, unless the terminal is off-line "due to fire, flood, or other act beyond the control of the operator" as this phrase is defined by section 2.27 of this rule. If the terminal is off-line due to fire, flood, or other act beyond the control of the operator, the terminal shall be reconnected to the commission's central site by the date ordered by the commission.

51.3. Authorization to operate a video lottery terminal that is not connected to the commission's central site system of monitoring lottery terminals in conformity with the requirements of this section shall be forfeited to the commission on the day after the date specified in this section, or the day after the date ordered by the commission as provided in subsection 51.2.

§179-5-52. Placement of video lottery terminals.

52.1. Video lottery terminals allowed by the Limited Video Lottery Act may be placed only in licensed limited video lottery locations approved by the commission.

52.2. All video lottery terminals in approved locations shall be physically located as follows:

Proposed 179 CSR 5

46

52.2.a. The video lottery terminals shall be continuously monitored through the use of a closed circuit television system capable of identifying players and terminal faces and of recording activity for a continuous 24-hour period;

52.2.a.1. All video tapes or other recording medium approved in writing by the commission shall be retained for a period of at least 60 days and be available for viewing by an authorized representative of the commission or the commissioner of alcohol beverage control; and

52.2.a.2. The cost of monitoring shall be paid by the limited video lottery retailer;

52.2.b. Access to video lottery terminal locations shall be restricted to persons legally entitled by age to play video lottery games;

52.2.c. The permittee shall submit for commission approval a floor plan of the area or areas where video lottery terminals are to be operated showing terminal locations and security camera mount location and such other details as the commission may require; and

52.2.d. No video lottery terminal or video lottery camera may be relocated without prior written approval from the commission.

52.3. Personnel of the limited video lottery retailer shall be present during all hours of operation at each video lottery terminal location and shall make periodic inspections of the restricted access adult-only facility in order to provide for the safe and approved operation of the video lottery terminals and the safety and well-being of the players.

52.4. Security personnel of the commission and inspectors of the alcohol beverage control commissioner shall have unrestricted access to video lottery terminal locations.

§179-5-53. No limited video lottery retailer license for premises within 150 feet of another licensed premises; no two license retailer locations within a common structure; exceptions; limits to exceptions.

~~53.1. No more than one restricted access adult-only facility may hold a limited video lottery retailer license to offer video lottery terminals in any single structure under one roof.~~

~~53.2 1. If an applicant for a limited video lottery license for a specific premise possessed a valid and continuing private club liquor license or a class "A" nonintoxicating beer license on or before January 1, 2001 for that specific premise, and if that ABCC license were still in effect at the time of the filing of the application for a limited video lottery license for the same premise, under the same ownership as the ABCC license, then so long as the applicant did not propose to conduct limited video lottery in a structure where another limited video lottery licenses was already licensed to conduct video lottery games, as disallowed by section 53.1 of this rule, the license would not be denied based solely on the proposed establishment being closer than 150 feet to an existing limited video lottery retail licensee or in a structure where another limited video lottery licensee was already licensed to conduct video lottery games so long as the initial application for a limited video lottery retailer license for the premises was applied for on or before July 1, 2002.~~

53.2. After July 1, 2002, whenever a premises that has initially been licensed by the commission as a limited video lottery retail location ceases to offer limited video lottery gaming for at

Proposed 179 CSR 5

47

least 180 consecutive days, the initial exemption from the 150-foot restriction and the single structure under one roof restriction as stated in subsection 53.1 of this rule shall be considered waived for the premises.

53.3. If an applicant for a limited video lottery retailer's license for a specific premise obtained a valid and continuing private club liquor license or a class "A" nonintoxicating beer license after January 1, 2001, for that specific premise, then the commission shall not grant a license to that applicant for operation of video lottery terminals on that premise if, at the time of application for the license, the applicant's premise is in a structure where another limited video lottery licensee was already licensed to conduct video lottery games or is within 150 feet of, or has an external structural connection not amounting to a common internal wall to, a premise that already has a license for video lottery terminals and if the two premises have one or more common owners.

53.3.a. The measurement of the distance between two premises shall be taken between the nearest exterior wall of each premise; and

53.3.b. When two or more applications for a limited video lottery retailer's license are pending at the same time, where the proposed premise of each applicant would be in the same structure under one roof, and each applicant meets all requirements for a license other than the restriction in subsection 53.3 of this rule, the award of the license shall be determined based on the date the applications were received in the state lottery office. The license shall be awarded to the applicant who first filed a complete application. If the applications were received on the same day, the license shall be issued by the commission by lots.

53.3.c. When two applications for limited video lottery retailer's licenses are pending at the same time for premises that are within 150 feet of each other, and neither premise is within 150 feet of an existing licensee, the award of the license shall be determined based on the date the applications were received in the state lottery office. The license shall be awarded to the applicant who first filed a complete application. If the applications were received on the same day, the license shall be issued by the commission by lots.

53.3.d. When more than two applicants for limited video lottery retailer's license are pending at the same time for premises that are within 150 feet of one or more other applicants, the award of the license shall be determined based on the date the applications were received in the state lottery office. The license shall be awarded to the applicant who first filed a complete application. If complete applications were received on the same day, the commission shall first eliminate one or more applicants if by doing so, the remaining applicants would comply with the 150-foot restriction. If elimination of one or more applicants will not make other applicants eligible, the award of the license shall be determined by the commission by lots.

§179-5-54. Registration decals.

54.1. Each video lottery terminal placed in operation in this state shall have a commission registration decal with a West Virginia video lottery terminal registration control number permanently affixed to the video lottery terminal. This decal must be displayed on the video lottery terminal so that it is easily readable by the public.

54.2. No person other than authorized commission personnel shall affix or remove a commission registration decal.

54.3. The affixing of the commission decal on a video lottery terminal evidences that the

Proposed 179 CSR 5

48

terminal has been registered, inspected, and approved for operation in this state.

54.4. No video lottery terminal may be transported out of this state until after authorized commission personnel have removed the commission registration decal, except when the transportation of the terminal both begins and ends in this state.

§179-5-55. Installation of approved lottery terminals.

55.1 The video lottery terminal manufacturer and licensed permittee are jointly responsible for the assembly and installation of all video lottery terminals and associated equipment.

55.2 The manufacturer and licensed permittee may not change the assembly or operational functions of a terminal licensed for placement in West Virginia unless a request for modification of an existing video terminal prototype is approved in writing by the commission;

55.2.a. The request for modification shall be made directly to one of the commission's designated independent testing laboratories; and

55.2.b. The request for modification shall contain a detailed description of the type of change, the reasons for the change and technical documentation of the change;

55.3. Each video lottery terminal approved for placement at a licensed location shall conform to the exact specifications of the video lottery terminal prototype tested and approved by the independent testing laboratory, and approved by the commission.

55.4. If any video lottery terminal or any video lottery terminal modification which has not been approved by the commission is supplied by a manufacturer and operated by a licensed permittee, the video lottery terminal shall be seized and destroyed as illegal contraband as provided in W. Va. Code §§29-22B-1801 through 1807.

55.4.a. The commission or any law-enforcement officer having jurisdiction shall seize all of the licensed permittee's and manufacturer's non-complying video lottery terminals, as provided in W. Va. Code §29-22B-1804.

55.4.b.. Proceedings for forfeiture of the seized property shall be instituted as provided in W. Va. Code §29-22B-1805.

55.4.c. Forfeited moneys, securities or other negotiable instruments shall be disposed of as provided in W. Va. Code §29-22B-1806.

55.4.d. Other forfeited property shall be disposed of as provided in W. Va. Code §29-22B-1807.

55.5. In addition to seizure of contraband property as provided in subsection 55.4, the commission shall suspend the licenses of the licensed permittee and the licensed manufacturer for the period of time the commission considers to be appropriate under the circumstances and may impose a civil penalties as provided in W. Va. Code §§29-22B-1604(b) and 1605(c).

55.5.a. When an operator's license is suspended, the director shall disable and cause not to operate during the suspension period every video lottery terminal supplied by the operator to all licensed video lottery retailers; and

55.5.b. When a the license of a video lottery retailer who is also a permittee is suspended the director shall disable and cause not to operate during the suspension period every video lottery terminal owned or leased by the permittee.

55.5.c. When a manufacturer's license is suspended, the director shall disable and cause not to operate during the suspension period every video lottery terminal supplied by the manufacturer to permittees that are placed in licensed video lottery retailer locations.

§179-5-56. Transportation from manufacturer and registration of video lottery terminals.

56.1. A manufacturer transporting or arranging for the transportation of one or more video lottery terminals into this state shall, prior to shipment, provide the commission with the following information on forms prescribed by the commission:

56.1.a. The full name and address of the person shipping the video lottery terminals;

56.1.b. The method of shipment and the name of the carrier;

56.1.c. The number or other identification mark that identifies the security seal on the container within the cargo compartment of the carrier delivering one or more video lottery terminals to a permittee;

56.1.d. The full name and address of the permittee to which the video lottery terminals are being sent and the destination of the terminals if different from the address of the permittee;

56.1.e. The number of video lottery terminals in the shipment;

56.1.f. The serial number of each video lottery terminal in the shipment;

56.1.g. The model number and description of each video lottery terminal in the shipment; and

56.1.h. The expected arrival date of the video lottery terminals at their respective destination within this state.

56.2. A permittee that purchases or leases a video lottery terminal shall, upon receipt of the terminal, provide the commission with the following information on forms prescribed by the commission:

56.2.a. The full name and address of the limited video lottery retailer who will receive the video lottery terminal;

56.2.b. The full name and address of the manufacturer from whom the video lottery terminal was received;

56.2.c. The serial number of each video lottery terminal received;

56.2.d. The model number and description of each video lottery terminal received;

56.2.e. The date and time of video lottery terminal arrival; and

Proposed 179 CSR 5

50

56.2.f. The expected date and time of video lottery terminal installation.

56.3. If a video lottery terminal is not placed in operation, the permittee shall notify the commission in writing of the location where the terminal is stored.

56.4. Notices required by this section fifty-six may be by United States mail, by courier service, by facsimile or by Internet electronic mail using the format prescribed by the commission.

§179-5-57. Any other transportation of video lottery terminals.

57.1. No person may transport a video lottery terminal from one location to another in this state, other than for repair or servicing purposes, unless that person shall have provided the following information to the director on forms required by the commission and shall have received authorization from the director prior to the transportation of the terminal:

57.1.a. The full name and address of the person or entity transporting the video lottery terminal;

57.1.b. The reason for transporting the video lottery terminal;

57.1.c. The full name and address of the person or entity to whom the terminal is being sent and the destination of the video lottery terminal if it is different from the address;

57.1.d. The serial and model number of the video lottery terminal;

57.1.e. The video lottery terminal license number, if affixed;

57.1.f. The manufacturer of the video lottery terminal; and

57.1.g. The expected date and time of video lottery terminal installation or reinstallation.

57.2. No operator or limited video lottery retailer who holds a permit to own or lease a video lottery terminal may transport, or arrange for the transportation of, a video lottery terminal to a non-licensed retail location, or to a licensed limited access adult-only location if the transported terminal or terminals will result in more video lottery terminals in the new location than has been authorized by the commission.

57.3. Any person shipping video lottery terminals to a destination outside of this state shall, prior to the shipment, provide the commission with the following information on forms prescribed by the commission:

57.3.a. The full name and address of the person shipping the video lottery terminals;

57.3.b. The method of shipment and the name of the carrier;

57.3.c. The number or other identification mark that identifies the security seal on the cargo compartment of the carrier transporting one or more video lottery terminals to a point outside West Virginia;

57.3.d. The full name and address of the person to whom the video lottery terminals are being sent and the destination of the video lottery terminals if different from the address;

Proposed 179 CSR 5

51

- 57.3.e. The serial number of each video lottery terminal being shipped;
- 57.3.f. The model number and description of the video lottery terminal being shipped;
- 57.3.g. The video lottery terminal control number, if affixed;
- 57.3.h. The manufacturer of the video lottery terminal being shipped; and
- 57.3.i. The expected date and time of the shipment.

57.4. Notices required by this section fifty-seven may be by United States mail, by courier service, by facsimile or by Internet electronic mail using the format prescribed by the commission.

§179-5-58. Maintenance of video lottery terminals.

58.1. No video lottery terminal may be placed in operation in this state until the manufacturer provides training in the service and repair of each approved video lottery terminal model and service technicians complete the training.

58.2. Manufacturers shall submit to the commission the following information on each training program conducted:

58.2.a. An outline of the training curriculum;

58.2.b. A list of the instructors and their qualifications;

58.2.b.1. Instructors shall be employed by the manufacturer or be retained by the manufacturer under contract; and

58.2.b.2. No individual may act as an instructor who is an officer, principal or employee of a person that holds a limited video lottery license as an operator, retailer or service technician; and

58.2.c. Instructional materials; and

58.2.d. The time, dates and location of the training programs.

58.3. Manufacturers shall notify all licensed permittees who have purchased or leased the manufacturer's video lottery terminals of all scheduled training programs.

58.4. The manufacturers shall schedule training programs at convenient locations within this state to facilitate attendance by service technicians.

58.5. Manufacturers shall inform licensed permittees of any new developments in the service and repair of video lottery terminals and provide appropriate subsequent training programs.

58.6. Each manufacturer shall file with the commission the following information within two weeks after the completion of a training program:

58.6.a. The name of each person who attended and completed the training program;

Proposed 179 CSR 5

52

58.6.b. The name of the manufacturer offering the course;

58.6.c. The manufacturer's video lottery terminal models on which training for service and repair was provided;

58.6.d. The date and location of the training program; and

58.6.e. Copies of all certificates of completion.

58.7. The manufacturers shall issue a training certificate to each person upon successful completion of a video lottery training program.

58.7.a. The certificate shall include the name of the person who completed the training program and the date and the location of the training program; and

58.7.b. A person who successfully completes training is eligible for a service technician's license.

58.8. No person may conduct maintenance, other than clearing paper ticket jams or clearing coin and bill acceptor jams, on any video lottery terminal or associated equipment unless the commission has issued a service technician license to that person.

§179-5-59. Maintenance log.

59.1. A written maintenance log shall be kept within the main cabinet access area in each video lottery terminal.

59.2. Every person, including lottery personnel, who gains entry into any internal space of a video lottery terminal shall sign the log, record the time and date of entry, record the mechanical meter readings and list the areas inspected or repaired.

59.3. The maintenance log forms shall be retained by permittees for a period of three years from the date of the last entry.

59.4. The maintenance logs shall be available upon request for inspection by the commission.

§179-5-60. Master keys.

~~60.1 Each licensed manufacturer shall provide the commission with 40 copies of the master key for access into the main cabinet door of the manufacturer's video lottery terminals placed in operation~~

60.2 1. Each licensed manufacturer shall provide the commission with 40 copies of the master key for access into the logic area door of the manufacturer's video lottery terminals placed in operation.

60.3 2. No manufacturer may provide any copies of the logic area access key to any operator, retailer, service technician or to any other person other than the commission.

60.4 ~~3~~. The object of subsections 60.1 and 60.2 is that one master key shall be capable of

Proposed 179 CSR 5

53

opening the logic areas of all video lottery terminals the manufacturer sells or leases to permittee for use in locations governed by the Limited Video Lottery Act and this rule.

§179-5-61. Sealing the logic area of the video lottery terminal and the controller unit.

61.1. The commission shall provide logic box and controller unit security seals.

61.2. The seal shall be affixed by commission personnel to prevent unauthorized access to the video lottery terminal logic unit or tampering with the controller unit.

61.3. Any licensee that discovers a broken or torn seal shall immediately report the incident to the lottery commission by telephone and shall also report to the commission in writing within thirty-six hours by facsimile or Internet electronic mail;

61.3.a. The reporting licensee shall identify himself or herself by name and by license number;

61.3.b. The reporting licensee shall identify the video lottery terminal by location, license number and decal number;

61.3.c. The reporting licensee shall report the date and time when the broken or torn seal was discovered; and

61.3.d. The reporting licensee shall state the ~~hard~~-mechanical meter reading of the video lottery terminal at the time the broken or torn seal was discovered.

61.4. Upon receipt of a report that a seal has been broken or torn, the commission shall disable the video lottery terminal. The video lottery terminal shall remain disabled until completion by the commission of an investigation of the seal damage.

§179-5-62. Repairs to logic board or circuitry.

62.1. No repairs to, or replacement of, the logic board or circuitry within the logic area shall occur unless authorized commission personnel are present and observe the repairs or replacement.

62.2. The logic area seal shall not be broken by anyone other than authorized commission personnel.

62.3. Each service technician shall submit a written report to the commission within 24 hours after the repairs or replacement are completed and the report shall include the serial number of any replacement board and the new logic area seal number. Reports required by this subsection may be delivered by United States mail, by courier service, by facsimile or by Internet electronic mail using the format prescribed by the commission.

62.4. The commission will test the software EPROMS on the logic board of each video lottery terminal prior to sealing the logic area.

62.5. License holders shall promptly notify the commission in writing of any discovered damage, tears or breaks in the logic area seal. This written notification shall be delivered electronically or by telephone facsimile machine whenever possible.

§179-5-63. Accounting for the state's share of gross terminal income.

63.1. The gross terminal income from all operating video lottery terminals of a permittee shall be calculated monthly by the commission based on the calendar month.

63.2. The commission shall send a statement to each permittee of the following information for each machine covered by the permittee's permit that was in service for any portion of the calendar month covered by the calculations:

63.2.a. Credits played;

63.2.b. Credits won;

63.2.c. Gross terminal income;

63.2.d. Two percent of gross terminal income for the commission's administrative expenses;

63.2.e. Gross profits;

63.2.f. The commission's share rate applicable to gross profits for the current quarter;
and

63.2.g. The commission's two percent of gross terminal income plus the commission's net terminal income to be swept from the permittee's account by electronic fund transfer.

63.3. Each licensed permittee shall maintain in its bank account an amount equal to or greater than the commission's two percent of gross terminal income plus the commission's net terminal income from its operation of video lottery machines, to be electronically transferred by the lottery commission on the tenth day of the month that follows the month for which the report is made. If the tenth day of the month falls on a Saturday, Sunday or legal holiday, as that term is defined in W. Va. Code §2-2-1, the due date shall be the next day that is not a Saturday, Sunday or legal holiday.

63.4. Upon a permittee's failure to maintain the bank account balance required in subsection 63.3 of this rule, the commission may disable all of a permittee's video lottery terminals until full payment of all amounts due is made;

63.4.a. If the commission receives a non-sufficient funds message from the permittee's depository bank:

63.4.a.1. The director shall suspend the permittee's license until the permittee has paid the full amount owed to the Lottery by cashier's check, or certified check, or money order, or cash, and also has paid the one hundred percent civil penalty provided for in section seventy of this rule; and

63.4.a.2. The director shall issue a warning letter containing an explanation the consequences of a future non-sufficient funds message; and

63.4.b. If the permittee does not settle for all moneys and penalties due to the commission within thirty days after the commission's demand for payment of non-sufficient funds amounts, the director shall recommend to the commission that the permittee's license and ten-year permit

be revoked; and

63.4.c. If the commission receives three non-sufficient funds messages within any twelve consecutive month period, the director shall recommend to the commission that the permittee's license and ten-year permit be revoked.

63.5. Interest shall accrue on any unpaid balance due the commission at the rates charged for state income tax delinquency under chapter eleven of this code;

63.5.a. The interest shall begin to accrue on the date payment is due to the commission and shall continue to accrue until the amount due, including applicable interest, is paid; and

63.5.b. Payments shall be applied first to interest and then to the balance of the amount due the commission.

63.6. The statement required by section 63 of this rule may be transmitted to the permittee by United States mail, facsimile or Internet e-mail.

§179-5-64. Resolution of discrepancies.

64.1. Each permittee shall report to the commission any discrepancies between the commission's statement and each terminal's mechanical and electronic meter readings.

64.2. The permittee is solely responsible for resolving income discrepancies between actual money collected and the amount shown on the accounting meters or on the commission's billing statement.

64.3. The licensed operator is solely responsible for paying the negotiated share of gross profits to each limited video lottery retailer to whom it has supplied video lottery terminals under the provisions of the Limited Video Lottery Act and this rule. The commission will not withhold from money it owes to an operator and pay that money to a retailer unless directed to do so by a state court of record.

64.4. Each limited video lottery retailer's periodic distribution from the appropriate operator shall be paid by check or by electronic funds transfer to the limited video lottery retailer's designated bank account.

64.5. Until an accounting discrepancy is resolved in favor of the permittee, the commission may make no credit adjustments.

64.6. For any video lottery terminal reflecting a discrepancy, the permittee shall submit to the commission the maintenance log that includes current mechanical meter readings and the audit ticket which contains electronic meter readings generated by the terminal's software.

64.7. If the meter readings and the commission's records cannot be reconciled, final disposition of the matter shall be determined by the commission.

64.8. Any accounting discrepancies that cannot be otherwise resolved shall be resolved in favor of the commission.

§179-5-65. Pay over of state's share of gross terminal income when electronic funds transfer is inoperative.

Proposed 179 CSR 5

56

65.1. The commission shall monthly transfer from each permittee's bank account the state's share of gross terminal income as calculated under subdivision 63.2.g of this rule.

65.2. The permittee shall remit payment by mail if the electronic transfer of funds is not operational or the commission notifies the permittee that remittance by this method is required.

65.3. Using the commission's statement under subsection 63.2 of this rule, the permittee shall report, for each video lottery terminal operated by a licensee, the following information on forms prepared and supplied by the commission:

65.3.a. Credits played;

65.3.b. Credits won;

65.3.c. Gross terminal income;

65.3.d. Two percent of gross terminal income for the commission's administrative expenses;

65.3.e. Gross profits;

65.3.f. The commission's share rate applicable to gross profits for the current quarter;
and

65.3.g. The lottery commission's two percent of gross terminal income plus the commission's net terminal income to be swept from the permittee's account by electronic fund transfer.

65.3.h. The permittee shall remit to the commission the amount calculated in subdivision 65.3.g of this rule. The remittance shall be sealed in a properly addressed and stamped envelope and deposited in the United States mail no later than noon on the tenth day of the month that follows the month for which the report is made. If the tenth day of the month falls on a Saturday, Sunday or legal holiday, the due date shall be the next day that is not a Saturday, Sunday or legal holiday.

65.3.i. The rule regarding non-sufficient funds messages from the permittee's depository bank contained in subsection 63.4 and subdivisions 63.4.a through 63.4.d of this rule also apply to payments made by check to the commission under provisions of section 65 of this rule.

§179-5-66. Additional reports available to permittees; fee.

66.1. A permittee may, upon request, receive additional reports of play transactions for their respective video lottery terminals and other marketing information not considered confidential by the commission.

66.2. The commission may charge a reasonable fee for the cost of producing and mailing any report other than the billing statements.

§179-5-67. Permittees must furnish bank authorizations.

67.1. Each permittee shall furnish to the commission all information and bank authorizations required to facilitate the timely transfer of moneys to the commission and from the commission to each

permittee.

67.2. Each permittee shall provide the commission thirty days' advance notice of any proposed account changes in order to assure the uninterrupted electronic transfer of funds.

§179-5-68. State's share of gross terminal income held in trust.

The commission's two percent administrative share of gross terminal income and the commission's net terminal income which each permittee is required to pay over to the commission, shall be deemed to be moneys held in trust for the state of West Virginia while in the possession or constructive possession of any operator or limited video lottery retailer and until the state's two percent administrative share of gross terminal income and the commission's net terminal income are paid over to the commission.

§179-5-69. Examination of permittee and retailer books and records.

69.1. The commission has the right to examine all accounts, bank accounts, financial statements and records in a permittee's possession, under its control or in which it has an interest and the licensed permittee shall authorize all third parties in possession or in control of the accounts or records to allow examination of any of those accounts or records by the commission.

69.2. The commission also has the right to examine all accounts, bank accounts, financial statements and records in a retailer licensee's possession, under its control or in which it has an interest, when the retailer is not also a permittee, and the licensed retailer shall authorize all third parties in possession or in control of the accounts or records to allow examination of any of those accounts or records by the commission.

§179-5-70. Civil penalty for failure to pay over state's two percent share of gross terminal income and its net terminal income.

70.1. Any person required by law or contract to collect, truthfully account for, and pay over any of the state's two percent share of gross terminal income or the state's net terminal income who willfully fails to truthfully account for and pay over the state's two percent share of gross terminal income or the state's net terminal income, or willfully attempts in any manner to evade or defeat any payment thereof, shall, in addition to other penalties provided by law, be liable for payment of a civil money penalty equal to the total amount of the state's share of gross terminal income and the state's two percent share of gross terminal income not paid over to the commission.

70.1.a. No penalty may be imposed under subsection 70.1 of this rule unless the director notifies the person in writing, delivered in person or by mail sent to the last known address of the operator or limited video lottery retailer, that he or she is subject to an assessment of this penalty;

70.1.b. The mailing of the notice described in subsection 70.1 of this rule or, in the case of notice delivered in person, the delivery, shall precede any notice and demand for payment of any penalty under subsection 70.1.a, by at least sixty days;

70.1.c. If a notice described in subdivision 70.1.a of this section, with respect to any penalty, is mailed or delivered in person before the expiration of the three-year period for the assessment of the penalty (determined without regard to this subdivision), the 3-year period provided for the assessment of a penalty shall not expire before the later of:

Proposed 179 CSR 5

58

70.1.c.1. Ninety days after the date on which such notice was mailed, or delivered in person; or

70.1.c.2. If there is a timely protest of the proposed assessment, 30 days after the director makes a final administrative determination with respect to the protest; and

70.1.d. The requirement that preliminary notice be given shall not apply if the director finds that the collection of the penalty is in jeopardy.

70.2. This penalty may be collected by civil action instituted within 3 years after the date the state's share of gross terminal income not paid over to the commission should have been paid over to the commission, except as provided in subdivision 70.1.a of this rule.

70.3. If more than one person is liable for the penalty under subsection 70.1 of this rule, with respect to any payment of the commission's two percent share of gross terminal income or the commission's net terminal income, each person who paid the penalty shall be entitled to recover from other persons who are liable for the penalty an amount equal to the excess of the amount paid by the person over that person's proportionate share of the penalty. Any claim for such a recovery may be made only in a proceeding which is separate from, and is not joined or consolidated with, an action for collection of such penalty brought by the state of West Virginia.

70.4. No penalty shall be imposed by subsection 70.1 of this rule on any unpaid, volunteer member of any board of trustees or directors of an organization exempt from tax under section 501 of the Internal Revenue Code of 1986, as amended, if such member:

70.4.a. Is solely serving in an honorary capacity;

70.4.b. Does not participate in the day-to-day or financial operations of the organization;
and

70.4.c. Does not have actual knowledge of the failure on which the penalty is imposed.

70.5. Subsection 70.4 of this rule shall not apply if it results in no person being liable for the penalty imposed by subsection 70.1 of this section.

§179-5-71. State's share of gross terminal income.

71.1. The commission shall deposit two percent of gross terminal income into the state lottery fund for the commission's costs and expenses incurred in administering the Limited Video Lottery Act. The resulting remainder is gross profits.

71.2. The commission's share of gross profits shall be calculated in the following way:

71.2.a. Until at least the June 30, 2002, the commission shall collect 30 percent of gross profits, and after paying one-fifteenth of that amount to county commissions and incorporated municipalities based on population, shall deposit the remainder into the State Excess Lottery Revenue Fund.

71.2.b. On the June 1, 2002, and thereafter on the first day of the month preceding the months of October, January, April and July of each year, the commission shall calculate the aggregate average daily gross terminal income for all operating video lottery terminal during the preceding 3-month

Proposed 179 CSR 5

59

period. This aggregate average will be determined in the following way:

71.2.b.1. Each day of the 3-month period, the director shall divide the total statewide gross terminal income by the number of video lottery terminals operating that day; and

71.3.b.2. All daily gross terminal income amounts calculated by the director shall be totaled and divided by the total number of days in the calculation period; and

71.2.c. The following rate schedule will use the results of the calculated aggregate average daily gross terminal income:

71.2.c.1. So long as the aggregate average gross terminal income per day for the operating video lottery terminals does not exceed \$60, the commission's share of gross profits shall continue to be 30 percent for the succeeding quarter of the year.

71.2.c.2. If the commission's calculation of aggregate average daily gross terminal income per video lottery terminal yields an amount greater than \$60, one of the following schedules will apply:

71.2.c.2.A. If the amount is greater than \$60 per day but not greater than \$80 per day, the commission's share of gross profits for the ensuing fiscal year beginning the first day of the next quarter, beginning on the first day of July, October, January, or April as the case may be, shall be 34 percent;

71.2.c.2.B. If the amount is greater than \$80 per day but not greater than \$100 per day, the commission's share of gross profit for the ensuing fiscal quarter shall be 38 percent;

71.2.c.2.C. If the amount is greater than \$100 per day but not greater than \$120 per day, the commission's share of gross profit for the ensuing fiscal quarter shall be 42 percent;

71.2.c.2.D. If the amount is greater than \$120 per day but not greater than \$140 per day, the commission's share of gross profit for the ensuing fiscal quarter shall be 46 percent; and

71.2.c.2.E. If the amount is greater than \$140 per day, the commission's share of gross profit for the ensuing fiscal quarter shall be 50 percent.

71.3. Permittees shall be entitled to the balance of gross profits remaining after deduction of the commission's share calculated as provided in subsection 71.2 of this section.

§179-5-72. Appeal of an order.

72.1. Any applicant or license holder adversely affected by an order issued the commission, or an agent or employee of the commission, under the Limited Video Lottery Act or this rule has the right to a hearing on the order before the commission or a hearing examiner designated by the commission, if a petition in writing requesting a hearing is served upon the commission within 10 days following receipt of the order by the applicant or license holder.

72.2. A petition for hearing shall be served on the commission by delivery in one of the following ways:

Proposed 179 CSR 5

60

72.2.a. Personal delivery to the West Virginia lottery's central office at the address stated in the order, during regular business hours and excluding Saturdays, Sundays and legal holidays;

72.2.b. United States mail, postage prepaid, addressed to the post office box stated in the order.

72.2.c. Delivery to the West Virginia lottery's central office by private companies such as Airborne, DHL, Federal Express and United Parcel Service; or

72.2.d. Facsimile transmission to telephone number stated in the order. When the petition is delivered by facsimile transmission, the original of the petition and required security shall forthwith be delivered to the commission using one of the delivery methods set forth in subdivisions 73.2.a, 73.2.b or 73.2.c, above.

72.3. Filing of the petition and subsequent documents is in each case effective upon delivery to the West Virginia lottery's central office and is not effective upon mailing or pickup by a private delivery company.

72.4. Copies of all documents filed in an appeal under this section must be served upon all other parties.

72.5. The service of a petition for hearing upon the commission shall not operate to suspend the execution of any suspension or revocation of a video lottery license or any other order of the commission with respect to which a hearing is being demanded.

72.6. The commission shall set a date for any hearing demanded and notify the person demanding the hearing not later than 10 days before the hearing date of the date, time and place of the hearing.

72.7. The hearing shall be held within 30 days after receipt of the petition.

§179-5-73. Contents of petition for hearing; security.

73.1. A petition for a hearing shall be in writing. The original and one copy of the petition shall be filed with the commission.

73.2. The petition shall contain the following:

73.2.a. A clear and concise statement of each error which the petitioner alleges to have been committed by the commission, or an agent or employee of the commission. Each assignment of error shall be stated in a separately numbered paragraph;

73.2.b. A clear and concise statement of facts upon which the petitioner relies as sustaining each assignment of error;

73.2.c. A statement or prayer setting forth the relief sought by the petitioner;

73.2.d. The signature of the petitioner; and

Proposed 179 CSR 5

61

73.2.e. A statement or verification by the petitioner that the contents of the petition are true and complete to the best of the petitioner's knowledge.

73.3. The person demanding a hearing shall give security for the cost of the hearing in the amount of \$300. The security shall be remitted in the form of a certified check, cashier's check or money order and be enclosed with the original of the petition demanding a hearing.

§179-5-74. Hearing procedures.

74.1. Hearings held under this rule shall be subject to the contested cases provisions of the State Administrative Procedures Act codified in W. Va. Code §29A-5-1 *et seq.*, except to the extent otherwise provided in the Limited Video Lottery Act. In case of any conflict, the provisions of the Limited Video Lottery Act shall control.

74.2. In all hearings held under the Limited Video Lottery Act and this rule, oral and documentary evidence may be required through the use of *subpoenas* and *subpoenas duces tecum*. The *subpoenas* or *subpoenas duces tecum* may be issued by either the commission or its duly appointed hearing examiner, and the following provisions shall govern and control:

74.2.a. Every *subpoena* or *subpoena duces tecum* shall be served at least 5 days before the return date thereof, either by personal service or by registered or certified mail.

74.2.a.1. Personal service. A *subpoena* or *subpoena duces tecum* may be served by any person who is not a party and is not less than 18 years of age. Proof of service shall be either an acknowledgment of service signed by the person served, or a statement of the date and manner of service and the name of the person served that is certified by the person who made the service.

74.2.a.2. Registered or certified mail. When a *subpoena* or *subpoena duces tecum* is served by registered or certified mail, a return acknowledgment signed by the person to whom the *subpoena* or *subpoena duces tecum* is directed is required to prove service by registered or certified mail;

74.2.b. All *subpoenas* and *subpoenas duces tecum* shall be issued in the name of the commission;

74.2.b.1. Service of *subpoenas* and *subpoenas duces tecum* issued at the insistence of the commission is the responsibility of the commission, but any party requesting issuance is responsible for service; and

74.2.b.2. Any person who serves any *subpoena* or *subpoena duces tecum* is entitled to the same fee as sheriffs who serve witness subpoenas for the circuit courts of this state, and fees for the attendance and travel of witnesses shall be the same as for witnesses before the circuit courts of this state; and

74.2.c. All fees shall be paid by the commission if the *subpoena* or *subpoena duces tecum* is issued, without the request of an interested party, at the insistence of the commission;

74.2.d. All fees related to any *subpoenas* or *subpoena duces tecum* issued at the insistence of an interested party shall be paid by the interested party;

74.2.e. All requests by an interested party for a *subpoena* and *subpoena duces tecum*

Proposed 179 CSR 5

62

shall be in writing and shall contain a statement acknowledging that the requesting party agrees to pay the fees; and

74.2.f. Any person receiving a *subpoena* or *subpoena duces tecum* issued under this section shall honor the *subpoena* or *subpoena duces tecum* as though it were issued by a circuit court of this state, and shall appear as a witness or produce such books, records or papers in response to the *subpoena* or *subpoena duces tecum*.

74.3. In cases of disobedience or neglect of any subpoena or subpoena duces tecum served on any person or the refusal of any witness to testify to any matter regarding which he or she may be lawfully interrogated, the circuit court of the county in which the hearing is being held, or the judge thereof in vacation, shall, upon application by the commission, compel obedience by contempt proceedings as in the case of disobedience of the requirements of a *subpoena* or *subpoena duces tecum* issued from the circuit court or a refusal to testify in the circuit court.

74.4. Hearings may not be delayed by a motion for continuance made less than 7 days before the date set for the hearing.

74.5. The commission may designate a hearing examiner to conduct the hearing.

74.6. The petitioner may appear individually, or by legal counsel.

74.7. The petitioner, or his or her duly authorized representative, may, with the approval of the commission, waive the right to a hearing and agree to submit the case for decision upon the petition and record, with or without a written brief. The waivers and agreements shall be in writing or upon the record.

74.8. The petitioner shall be given an opportunity for argument within the time limits fixed by the commission following submission of evidence.

74.8.a. The commission, upon request of the petitioner, shall accept briefs in addition to or in lieu of argument; and

74.8.b. Briefs shall be filed within 10 days after the hearing date, or such later date as ordered by the commission.

74.9. The commission may admit any relevant evidence, except that it shall observe the rules of privilege recognized by law.

74.10. A finding of fact shall be supported by the kind of evidence commonly relied upon by reasonably prudent men in the conduct of their affairs, whether or not the evidence would be admissible before a jury.

74.11. The commission may exclude any evidence that is irrelevant, unduly repetitious, or lacking in substantial probative effect.

74.12. A record shall be made of all hearings held pursuant to this rule. Testimony may be recorded electronically or by a court reporter.

74.13. After the conclusion of the hearing and within 10 days of receipt of the transcript of the hearing, and receipt of any briefs, the person designated by the commission as hearing examiner shall

Proposed 179 CSR 5

63

prepare a recommended decision, supported by findings of fact and conclusions of law, affirming, modifying or vacating the earlier order of the commission.

74.14. The commission, within 10 days of receipt of the recommended decision, shall either accept or reject the recommended decision.

74.14.a. If the commission accepts the decision, the director shall sign and acknowledge the decision as his or her own decision, after having reviewed the transcript and all exhibits attached and affixed to the decision; or

74.14.b. If the commission rejects the decision, the commission shall within 10 days thereafter prepare and issue a decision setting forth its own findings of fact and conclusions of law.

74.15. Whether the commission adopts the hearing examiner's decision or prepares its own decision, the decision is final unless vacated or modified upon judicial review of the decision.

74.16. A copy of the decision shall be served upon each party to the hearing and their attorney of record, if any, in person or by registered or certified mail.

§179-5-75. Judicial review.

75.1. The applicant or license holder who filed the petition for administrative review may appeal the decision of the commission issued under W. Va. Code §29-22B-1503 and section 74 of this rule to the circuit court of Kanawha County, West Virginia.

75.2. A petition for appeal may be filed no later than 30 days after the date upon which the petitioner receives written notice of the final decision of the commission. The petition for appeal shall be filed in conformity with the requirements of W. Va. Code §29A-5-4.

75.3. Any party to the proceeding in circuit court may appeal an adverse decision of the circuit court to the West Virginia supreme court of appeals as provided in W. Va. Code §29A-5-4(h). The application for appeal to the supreme court of appeals shall be filed within the time provided by law for civil appeals generally. See W. Va. Rules of Appellate Procedure West Virginia Supreme Court of Appeals.