

**WEST VIRGINIA  
SECRETARY OF STATE  
BETTY IRELAND  
ADMINISTRATIVE LAW DIVISION**

Form #5

**FILED**  
Do Not Mark In this Box  
2008 DEC -1 PM 2:11  
OFFICE WEST VIRGINIA  
SECRETARY OF STATE

**NOTICE OF AGENCY ADOPTION OF A PROCEDURAL OF INTERPRETIVE RULE  
OR A LEGISLATIVE RULE EXEMPT FROM LEGISLATIVE REVIEW**

AGENCY: State Lottery Commission TITLE NUMBER: 179

CITE AUTHORITY W.Va. Code §29A-3-4

RULE TYPE: PROCEDURAL \_\_\_\_\_ INTERPRETIVE X

EXEMPT LEGISLATIVE RULE \_\_\_\_\_

CITE STATUTE (s) GRANTING EXEMPTION FROM LEGISLATIVE REVIEW  
\_\_\_\_\_

AMENDMENT TO AN EXISTING RULE: YES X NO \_\_\_\_\_

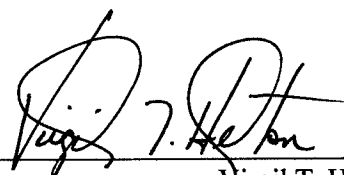
IF YES, SERIES NUMBER OF RULE BEING AMENDED: 179 CSR 7

TITLE OF RULE BEING AMENDED: "Lottery Interpretive Rule"  
\_\_\_\_\_

IF NO, SERIES NUMBER OF NEW RULE BEING ADOPTED: \_\_\_\_\_

TITLE OF RULE BEING ADOPTED: \_\_\_\_\_  
\_\_\_\_\_

THE ABOVE RULE IS HEREBY ADOPTED AND FILED WITH THE SECRETARY OF STATE. THE  
EFFECTIVE DATE OF THIS RULE IS January 1, 2009



Virgil T. Helton  
Cabinet Secretary

West Virginia Department of Revenue



# ORDER

## THE WEST VIRGINIA STATE LOTTERY COMMISSION

(Order adopted November 21, 2008)

*Amend the Interpretive Rule – Americans with Disabilities Act*

---

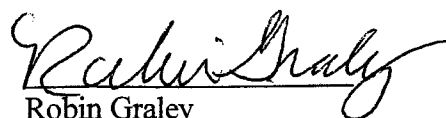
On the twenty-second day of January, 1995, this Commission by unanimous vote during public meeting, approved a proposed legislative rule, designated as 179 CSR 3 and titled "Licensees and the Americans with Disabilities Act," concerning compliance with the Americans With Disabilities Act by present and future West Virginia Lottery licensees.

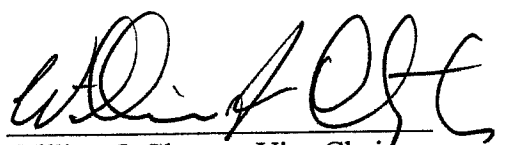
On August 27, 2008, this Commission approved the filing for comments of an amendment to the Lottery Interpretive Rule that stated the procedures outlined in the Commission's ADA rule 179 CSR 3 applied to all locations licensed by the State Lottery Commission and not just persons and types of lotteries licensed at the time of the adoption of the ADA rule.

**Comes now** John C. Musgrave, Director of the State Lottery Office, by Counsel Katherine Casto, to present his request that the Commission vote to approve the adoption of the amended Lottery Interpretive Rule. The Commission received a total of nine comments, and after review of the comments, found no reason to change the text of the rule.

After fair and frank discussion of the issue, the Commission voted to approve the amended Lottery Interpretive Rule and to make the change effective January 1, 2009.

The Director of the State Lottery Office is authorized to make the necessary entries to give effect to this **ORDER**.

  
Robin Graley  
Recording Secretary

  
William I. Clayton, Vice Chairman  
West Virginia State Lottery Commission

**AMENDMENT TO A  
WEST VIRGINIA INTERPRETIVE RULE  
WEST VIRGINIA LOTTERY  
TITLE 179  
SERIES 7  
2008**

**Lottery Interpretive Rule**

**REASON FOR THE AMENDING OF THIS AMENDED INTERPRETIVE  
RULE:**

In 1996, the West Virginia Supreme Court of Appeals ruled that the sale of lottery tickets was a 'government service' within the meaning of the Americans with Disabilities Act ["ADA"], and that since the Lottery sold its products through licensed retail stores, those stores could only be used if they were accessible to persons whose disabilities were covered by ADA. The same party who prevailed before the Supreme Court of Appeals sought clarification as to whether the Rule applied to only the sale of scratch off tickets and games such as PowerBall®, or to all licensed lottery locations. New section four to the Lottery Interpretive Rule makes it clear that the provisions of 179 CSR 3 apply to all lottery locations, including limited video lottery and racetrack locations.

**WEST VIRGINIA  
INTERPRETIVE RULE**

**WEST VIRGINIA LOTTERY  
TITLE 179  
SERIES 7  
2008**

**LOTTERY INTERPRETIVE RULE**

**A BRIEF SUMMARY OF THE PROPOSED RULE:**

The State Lottery Commission's *Lottery Interpretive Rule* was first adopted in 2004 and amended in 2006. The State Lottery Commission proposes to amend the rule a second time by adding a new section four that interprets the application of the Commission's legislative rule 179 CSR 3 pertaining to lottery licensees and the federal **Americans with Disabilities Act** ["ADA"]. The interpretation makes it clear that the procedures in 179 CSR 3 pertain to all Lottery licensed locations and not just locations that sell scratch off tickets and computerized games such as PowerBall®.

■  
APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: 179 CSR 7 - Lottery Interpretive Rule

Type of Rule:  Legislative  Interpretive  Procedural

Agency: State Lottery Commission

Address: P.O. Box 2067

Charleston WV 25327

1. Effect of Proposed rule:

	ANNUAL FISCAL YEAR				
	INCREASE	DECREASE	CURRENT	NEXT	THEREAFTER
<b>ESTIMATED TOTAL COST</b>	-0-	-0-	-0-	-0-	-0-
<b>PERSONAL SERVICES</b>					
<b>CURRENT EXPENSE</b>					
<b>REPAIRS &amp; ALTERATIONS</b>					
<b>EQUIPMENT</b>					
<b>OTHER</b>					

2. Explanation of Above Estimates:

The Lottery does not know whether anyone will complain to the Human Rights Commission about ADA accessibility and trigger the process. The Lottery may lose small amounts of revenue if a mandated alteration is required and not accomplished within 30 days of the Lottery's notice to the retailer to do so.

3. Objectives of These Rules:

To interpret existing legislative rule 179 CSR 3 - Licensees and the Americans with Disabilities Act - as applying to all lottery licensed locations and not just locations that sell Powerball and scratch-off tickets. The clarification affects limited video lottery retailers whose law was created five years after 179 CSR 3 was adopted by the Legislature, unless the limited video lottery retailer also has a regular lottery license to sell PowerBall and Scratch-off tickets. Racetracks also sell Powerball and scratch-off tickets and are already covered.

Rule Title: 179 CSR 7 - Lottery Interpretive Rule

4. Explanation of Overall Economic Impact of Proposed Rule:

A. Economic Impact on State Government:

Revenues to the Excess Lottery Revenue Fund may be affected in some negative way if a licensee cannot respond to the Human Rights Commission's assessment within 30 days of notification. The Human Rights Commission may receive additional complaints to investigate.

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

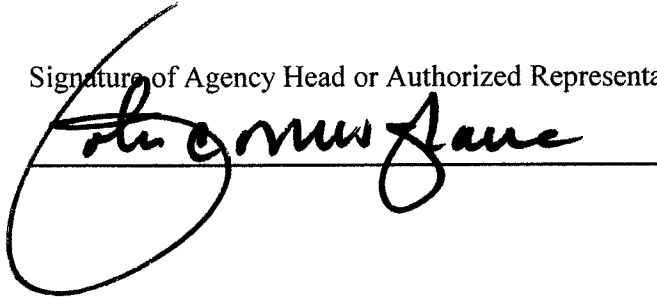
Municipal building officials have a role in the rule being interpreted. Holders of limited video lottery retailer licenses may be financially, although ADA is a federal law that has covered almost every business in West Virginia since 1994. Citizens with disabilities covered by ADA who wish to play limited video lottery

C. Economic Impact on Citizens/Public at Large.

Minimal impact to no impact.

Date: September 8, 2008

Signature of Agency Head or Authorized Representative:



A handwritten signature in black ink, appearing to read "John M. Lane", is written over a horizontal line. The signature is stylized and cursive.

**State Lottery Commission**  
**179 CSR 7 – Interpretative Rule**  
*Written comments received by October 10, 2008*

**RULE TEXT: §179-7-4. Interpretation of the application of procedures found in 179 CSR 3 pertaining to lottery licensees and the Americans with Disabilities Act.**

In definition section 179 CSR 3; §2.2, the word “Act” means the State Lottery Act, West Virginia code §§29-22-1. It is the interpretation of the State Lottery Commission that the rule should apply to all licensees of the Commission. This is also to include licensees under the Racetrack Video Lottery Act, West Virginia Code §29-22A-1 et seq.; the Limited Video Lottery Act, W.Va. Code §29-22B-101 et seq.; the Racetrack Table Games Act, W.Va. §29-22C-1 et seq.; and the Limited Gaming Facility Act, W.Va. Code §29-25-1 et seq. Under this interpretation, the procedures of 179 CSR 3 apply to any finding by a building official or the West Virginia Human Rights Commission that a licensed lottery location is not in compliance with the ADA.

COMMENT	CHANGE/NO CHANGE
<p><b>Comment:</b> It would be unfair to apply 179 CSR 3 as it is written to all forms of lottery irrespective of their differences. What might be a reasonable requirement for lottery ticket retailers might be infeasible for limited video lottery. There should be completely different rules that apply to the different types of lottery licensees, rather than attempting to add an interpretive rule that holds all types under the same rule. The language is too brief and confusing, and would create unintended consequences and uneven enforcement. Further, this amendment is not required or mandated. The West Virginia Supreme Court in <i>Paxton v. Department of Tax and Revenue</i> applied its decision only to traditional lottery retailers, and there is no indication that it would mean to be broadened, especially given a more recent federal court decision has indicated that there might not be a sufficient connection between a state agency and its licensees.</p>	No change.
<p><b>Comment:</b> Licensee’s building is not currently ADA-compliant and it is not readily achievable to do so. Request change to the form in which licensees affirm compliance. Specifically, if a building is not accessible, but the changes to make it such are not “readily achievable”, then on the licensing and re-licensing form in which the applicant or licensee is asked if ADA-compliant there should be the option of indicating such, rather than simply having to check “yes” or “no.”</p>	No change. <sup>1</sup>
<p><b>Comment:</b> Licensee’s building is not currently ADA-compliant and it is not readily achievable to do so. Does not specifically recommend changes to the amendment’s language.</p>	No change.
<p><b>Three Comments:</b> Licensee’s building is ADA-compliant. Does not specifically recommend changes to the amendment’s language.</p>	No change.

<sup>1</sup> There may be a change to the form itself. Although the Legislature mandates that the specific question is asked, the Lottery may add an explanation of what ADA-compliant means. However, this does not affect the actual language of the proposed interpretive rule.

**Three Comments:** The Lottery Commission should require retailers to eliminate customer's exposure to secondhand smoke. Title I of the ADA protects employees in the workplace from the effects of secondhand smoke exposure. Those with asthma, emphysema, diabetes, lung disease, cardiovascular disease, and other lung disorders should be protected from secondhand smoke when they play lottery games. The Commission should either require smoking and nonsmoking areas or completely eliminate smoking.

No change.

ZIMMERMAN LAW OFFICE, LC

1223 GARFIELD AVENUE  
P.O. BOX 349  
PARKERSBURG, WV 26102

RECEIVED  
OCT 10 2008  
WV LOTTERY

---

October 9, 2008

John C. Musgrave, Director  
West Virginia Lottery  
312 McCorkle Avenue  
Post Office Box 2067  
Charleston, WV 25327

**By Hand Delivery**

***In Re: Americans with Disabilities Act-Interpretive Rule Amendment***

Dear Mr. Musgrave:

Please consider this letter as a comment to the proposed Rule Amendment subject of your letter of September 5, 2008 to video lottery and retail licensees.

From time to time this office represents video lottery licensees and I have been asked by several clients to review and convey comment.

I believe that the genesis of the subject Rule Amendment lies in the interaction between 28 C.F.R. §35.101 *et seq.* and the holding and *Paxton v. Department of Tax and Revenue*, 192 W.Va. 213, 451 S.E. 2d 779 (1994). In response to the *Paxton* decision the director promulgated CSR 179, Series 3 (1996).

Please accept his comment as an objection and negative response to the proposed Interpretive Rule upon the following grounds:

1. With the adoption of the proposed rule amendment to the Limited Video Lottery Act, Racetrack Table Games Act 179-CSR-3 will become unworkable and unenforceable.
2. Any attempt to merely patch 179-CSR-3 with a modification of the applicability of the same creates confusion and invites litigation.
3. This amendment is not required or mandated.

In support of these observations we would like to point out that the decision in *Paxton v. Department of Tax and Revenue* was made only in the light of its applicability to video lottery ticket vendors. All of these vendors were retail lottery establishments and it was a simple matter to mandate ADA compliance to allow the vending of lottery tickets to all individuals

John C. Musgrave, Director  
West Virginia Lottery  
October 9, 2008  
Page 2

regardless of physical or mental disabilities. The retail ticket vendors are required to comply with ADA regulations independently of any mandated by the Department of Tax and Revenue.

However, the rule is more detailed than necessary for its intended use, *viz-a-viz* only Video Lottery ticket vendors. Unfortunately, and without much analysis, the court concluded that the State Lottery Commission is in the business of providing "aid, benefit or service" and rejected the suggestion that the Lottery Commission was merely issuing permits or licensing without substantial control over the premises or services. The same is not true with other licensees of the Commission, including the Racetrack Video Lottery Act, the Limited Video Lottery Act, the Racetrack Table Games Act, and the Limited Gaming Facilities Act. Thus, this current attempt to lump all of these licensees and force fit the definitions under 179-CSR-3 is unworkable because the Lottery Commission does not maintain the same control and is primarily a licensor and not an operator providing aid, benefit or service as defined by 28 C.F.R. §35.130(b)(1).

Compliance with 179-CSR-3 in 1996 could easily be remedied by the vendors by simply providing sales of lottery ticket at convenient locations and making minor facilities modifications, if necessary, to accommodate all persons within the requirements of the federal and state regulations and to address the more detailed requirements of 179-CSR-3. The same is not true with vendors and operators under the licensed activities that have been sanctioned by the West Virginia legislature since the adoption of 179-CSR-3. The Lottery Commission correctly argued in the *Paxton v. Department of Tax and Revenue* case that 28 C.F.R. §35.130(b)(4) cannot be read to impose a higher level of accessibility on a public entity than the entity would be required to meet if it owned or directly supplied the service to the public. The court concluded that the Lottery Commission under the ADA to require is lottery retail licensees to comply with the ADA by issuing the appropriate administrative rules and regulations. The rules and regulations which followed were crafted specifically with the limited application to video lottery ticket sales. Any attempt to extrapolate the provisions to all vendors under the Racetrack Video Lottery Act, Limited Video Lottery Act, Racetrack Table Games Act and the Limited Gaming Facilities Act is unworkable. One example is found in 179-CSR-3 Section 3.4 dealing with alternatives to barrier removal. The same kinds of accommodations are not possible among all of the activities which are now licensed and supervised by the State Lottery Commission. The excesses of 179-CSR-3, although benign as to lottery ticket vendors, is problematic as to enforcement to all the new licensees sought to be brought in under its umbrella.

Accordingly, the better approach, at this juncture, is to rescind 179-CSR-3 (1996) and redraft the regulation in view of the changed circumstances and with a view of the implications of the vendors under all of the acts.

The question as to whether or not the Video Lottery Commission maintains sufficient control and is not subject to 28 C.F.R. §35.130(b)(6) should be revisited with regard to

John C. Musgrave, Director  
West Virginia Lottery  
October 9, 2008  
Page 3

the Racetrack Video Lottery Action, the Limited Video Lottery Act, the Racetrack Table Games Act, and the Limited Gaming Facilities Act because none of those public laws, and the activities conducted thereunder, were reviewed or the subject of *Paxton*. *Paxton*, therefore, does not mandate, nor apply to any enactment by the State of West Virginia after September 28, 1994.

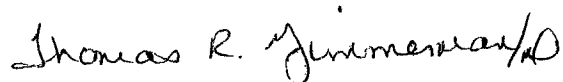
We respectfully refer the Commission to the case of *Reeves v. Queen City Transportation, Inc.*, 10 F.Supp.2d 1181, USDC CO (1998). The United States District Court determined that the Queen City PUC did not engage in discrimination because the PUC's primary function and activity is certification, registration and permitting of public utilities and further that the programs or activities of licensees or certified entities are not themselves programs or activities of the public entity merely by virtue of license or certificate. Likewise, it cannot be concluded that the activities of the entities and individuals sought to be swept into the provisions of 179-CSR-3 constitute activities of the West Virginia State Lottery Commission or the State of West Virginia in the absence of mature and considered evaluation of the scope of the relationship of the Lottery Commission to its vendees, *viz-a-vie*, substantial control versus mere licensing or certification.

The brief new language the Commission proposes to add to the Interpretive Rule is destined to create unintended consequences. In addition, it is neither mandated nor directed by *Paxton* or by any of the provisions of the Americans with Disabilities Act.

The Commission's proposed enforcement policy is doomed to create uneven and unfair enforcement. Any one vendor who is the subject of a complaint, which may possibly run afoul of 179-CSR-3, will be required to implement cost prohibited upgrades, even where such upgrades are not required by federal law. Whereas, some other vendor in the same community, also previously in compliance with federal law, would not be required to make changes and would retain its license. The result of uneven and unequal application is not only unfair, but unconstitutional. The situation is rife with the opportunity for "vendor wars" using the Commission as a tool of business sabotage.

The undersigned respectfully requests that in lieu of the patch supplement to the existing Interpretive Rule that the State Lottery Commission undertake a definitive study and thereafter replace 179 CSR, Series 3 with a more reasoned and comprehensive rule that both accommodates the dictates of *Paxton* the needs of its licensees.

Very truly yours,



Thomas R. Zimmerman

Charles A. Hammons  
Charlie Bob's Bar, Inc.  
5357 Midland Drive  
Charleston, WV 25306

RECEIVED  
OCT 06 2008  
WV LOTTERY

October 3, 2008

Mr. John C. Musgrave, Director  
West Virginia Lottery  
P.O. Box 2067  
Charleston, West Virginia 25327

Re: Americans with Disabilities Act – Interpretive Rule Amendment  
Thirty Day Comment Period

Dear Mr. Musgrave:

I appreciate the notice of the Rule Amendment listed above. I am a small business owner with not a lot of lottery customers, but the customers I have are vital to preserving my business. The building I currently own was built in the 1940s and is cinderblock construction. The doorways are currently not compliant for wheelchair access. I have been told that due to the age of the cinderblock structure, the blocks should not be disturbed, therefore in order for my business to comply with the new Rule, I would have to demolish the current building and build a new one. The proposed rule amendment would create a financial hardship that my business could not recover from.

I have reviewed your proposed amendment and acknowledge that 2.15 addresses my situation with the "Readily Achievable" language. However, further review of the amendment, leaves me to wonder how the Lottery will address relicensing where an establishment claims that the accommodation is not "readily achievable" or where it is not "easily accomplished and able to be carried out without much difficulty or expense," or that section 2.15.2 applies in that it is not financially sound. Will the Lottery allow for an exemption from the Rule based on this section?

As the Rule Amendment currently stands, §179-3-4, requires that an establishment must complete a form which states whether they are compliant with the Americans with Disabilities Act before the license will be issued. The current language states that you must choose between yes and no. It does not give the option to state whether you are exempt from the Act. Only those that choose the "yes" box will be eligible for licensing, or in my case, relicensing.

Because I am the owner, operator and only employee in my small tavern and rebuilding to continue to operate will cause a tremendous financial hard ship, this Amendment to Title 179 of the West Virginia Legislative Regulations regarding the West Virginia Lottery is near and dear to my heart. Over the last several years, it has appeared that the State of West

Mr. John C. Musgrave  
October 3, 2008  
Page Two

Virginia has, through regulation, attempted to ensure that the small business owner who holds a license for limited video lottery will soon be out of business.

I sincerely hope that you will reconsider your Amendment language to ensure that myself, as well as others, have the option of an exemption when we clearly meet the "readily achievable" language within the Amendment. It is my belief that those who are already licensed should have earned the consideration of the Lottery and be granted an exemption.

Sincerely,

CHARLES A. HAMMONS  
Lottery License #LR001333

A handwritten signature in cursive script that reads "Charles A. Hammons". The signature is written in black ink and is positioned below the typed name and license number.

To: West Virginia Lottery Commission  
From: The Legion Post of Newell Inc.,  
Subject: Americans With Disabilities Act.

RECEIVED  
SEP 22 2008  
WV LOTTERY

I am writing this letter to let the interested parties know that we are not in compliance with the regulations for disabled customers.

It is not readily achievable for us to get in compliance without much difficulty and expense, as our building was built in 1950, with no regard to consideration for ADA customers.

Our building has four flights of stairs, two restrooms, two entrances, it has three levels, an upstairs hall, ground level lobby with an office, a hallway and two restrooms, a canteen which is under ground in the basement, and is made of brick with marble floors.

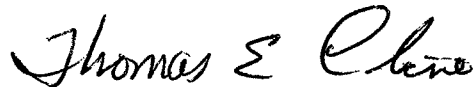
The task of getting in compliance with the ADA act could not be accomplished or carried out without a lot of difficulty and great expense.

We would have to widen all of our doors, install an elevator or put lift chairs on our stairs, make our restroom handicap accessible, along with many other repairs which would run into the tens of thousands of dollars.

In our building we have two employees, nearly twenty video cameras, and an alarm system which is directly connected to the Hancock County Sheriffs Department.

If you have any questions or comments please feel free to contact me and let me know how to stay in compliance, so we will not have any difficulties when we apply for a new lottery license.

Thomas E. Cline, Commander



Newell American Legion, Post 114  
538 Washington St.  
Newell, WV 26050

September 21, 2008

Coffee Talk Etc  
1805 Meighan Ave  
Moundsville WV 26041

RECEIVED  
SEP 29 2008  
WV LOTTERY

Subject: Americans With Disabilities Act  
Video Lottery

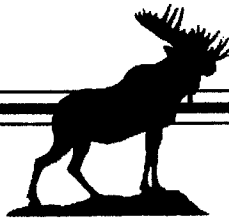
Dear John C. Meigsgrave

Our premises is in compliance with  
all the A.D.A requirements.

Thank You,

Joyce Simmons

Vice President



St. Marys Moose Lodge  
Family Center 2559  
P.O. Box 571 • St. Marys, WV 26170  
(304) 684-9494

RECEIVED  
SEP 12 2008  
WV LOTTERY

September 10, 2008

West Virginia Lottery,  
P.O. Box 2067  
Charleston, W.V. 25327

Dear Mr. Musgrave,

This letter is to inform the West Virginia Lottery,  
that the St. Mary's Moose Lodge #2559 is in compliance  
with accessibility to the public.

This organization is a private-non profit established,  
with members.

We readily achieved all necessary measures to remove  
any barriers for easy access for any person with any type  
of disability.

Our Moose Lodge is wheel chair accessible, + includes  
restrooms for men + women with easy access. Seeing eye  
dogs are also permitted.

We welcome any + all guests as we are handicap  
accessible + meet all license requirements.

Respectfully,  
Dennis Martin  
Administrator

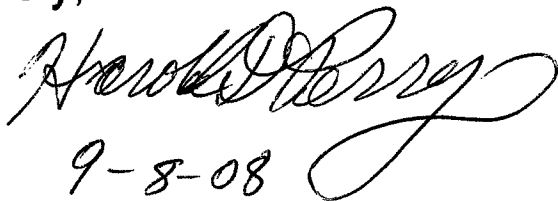
RECEIVED  
SEP 10 2008  
WV LOTTERY

Harold D. Perry  
The Place To Be  
587 Kenova Ave.  
Wayne, WV 25570  
L.V.L.R. LR004139  
Lottery Retailer 145645

To Whom It May Concern,

I have costumers with disabilities coming into my establishment daily. There has never been any problems with accessibility. As far as I know I am in compliance with Act ADA 42.

Sincerely,

  
9-8-08



STATE OF WEST VIRGINIA  
DEPARTMENT OF HEALTH AND HUMAN RESOURCES  
BUREAU FOR PUBLIC HEALTH

Joe Manchin III  
Governor

Commissioner's Office  
350 Capitol Street, Room 702  
Charleston, West Virginia 25301-3712  
Telephone: (304) 558-2971 Fax: (304) 558-1035

Martha Yeager Walker  
Secretary

October 10, 2008

John C. Musgrave, Director  
West Virginia Lottery  
Post Office Box 2067  
Charleston, West Virginia 25327

Dear Director Musgrave:

I am writing to comment on the Lottery Interpretive Rule, 179CSR7. As the Commissioner of the Bureau for Public Health, we support the Department of Health and Human Resources Position Statement on Clean Indoor Air Regulation in West Virginia: An Epidemiological Basis for an Occupational and Environmental Policy on Secondhand Tobacco Smoke (SHS) which was approved on March 17, 2006.

That policy concludes that the economic and epidemiologic evidence justifies the implementation and enforcement of "No-smoking" policies at the workplace and other public settings. The Department of Health and Human Resources strongly encourages the total elimination of smoking in the indoor environment as the best way to minimize the negative health effects of exposure to secondhand smoke.

We request that you consider requiring lottery facilities to eliminate all smoking as a matter of public policy.

Thank you for your consideration.

Sincerely,



A handwritten signature in cursive script that reads "Chris Curtis".

Chris Curtis, M.P.H.  
Commissioner

cc: John Law



West Virginia University  
ROBERT C. BYRD HEALTH SCIENCES CENTER

Date: October 8, 2008  
To: WV Lottery Commission  
From: Robert H. Anderson   
Valerie Frey-McClung   
Subject: Request for Public Comment

RECEIVED  
OCT 10 2008  
WV LOTTERY

Attached is our response to the Lottery Commission's request for public comment on a proposed amendment to its Lottery Interpretive Rule, Title 179, Series 7, 2008.

If any clarification is needed please feel free to contact us. Thank you.

Phone: 304-293-1988  
304-293-1699  
Fax: 304-293-3845

Translational Tobacco Reduction Research Program (T<sup>2</sup>R<sup>2</sup>)

Mary Babb Randolph Cancer Center in partnership with the Prevention Research Center  
PO Box 9190  
Morgantown, WV 26506-9190

Equal Opportunity/Affirmative Action Institution



Comment to the West Virginia Lottery Commission Regarding Compliance with the Americans with Disabilities Act: Statement of the Translational Tobacco Reduction Research Program (T2R2)  
October 9<sup>th</sup>, 2008

The Translational Tobacco Reduction Research Program (T2R2) submits this statement to the West Virginia Lottery Commission in response to its request for public comment regarding a proposed amendment to its Lottery Interpretive Rule, Title 179, Series 7, 2008.

West Virginia University's Translational Tobacco Reduction Research Program (T2R2) is a joint program of the Mary Babb Randolph Cancer Center (MBRCC) and the West Virginia Prevention Research Center. One of the main goal areas of the T2R2 is to disseminate effective tobacco interventions, policies, and regulations.<sup>1</sup>

Given what is known about the harmful effects of secondhand smoke, we believe that the West Virginia Lottery Commission should require retailers who sell lottery tickets and related products to eliminate customers' exposure to secondhand smoke. This should also extend to all video gambling parlors and racetrack gambling centers. This is can be done by prohibiting smoking in these facilities.

For millions of Americans, including many in West Virginia, secondhand smoke has the potential to trigger immediate, life-threatening asthma attacks and acute myocardial infarctions (heart attacks).<sup>2</sup> In 2006 the U.S. Surgeon General found that *there is no safe level of exposure to secondhand smoke*.<sup>3</sup> Hence the only effective way to protect people from these toxins is to have a policy that assures that no one will be exposed to them.

The ADA, which took effect in 1992, was adopted to provide a comprehensive national mandate to eliminate discrimination against people with disabilities.<sup>4</sup> The ADA may be used to protect people with asthma, cardiovascular disease, diabetes, lung disease, women who are pregnant, youth of all ages, and others whose daily activities are substantially limited by secondhand smoke exposure in private and public workplaces, and in other places of public accommodation. Since 2005, The American Society of Heating, Refrigerating, and Air Conditioning Engineers, which is the accepted authority in setting building indoor air standards in the US encourages elimination of smoking in the indoor environment as the optimal way to control secondhand smoke exposure.<sup>5</sup>

WV's Department of Health and Human Resources position has been that the best policy is to eliminate smoking in all workplaces. We agree with their statement. Rather than repeat the details here, we provide a citation below.<sup>6</sup>

It is a basic function of every State and local government agency to protect the health of citizens within their jurisdictions, including the health hazards of secondhand cigarette smoke inside buildings where government services are rendered. In light of the indisputable and overwhelming medical evidence that secondhand smoke is harmful to everyone and extremely harmful to some people—the very people for whom the ADA was enacted, the West Virginia Lottery Commission should require that facilities subject to their authority adopt and enforce a comprehensive smoke-free policy.

---

References:

- 1 Translational Tobacco Reduction Research Program (T2R2) website: <http://www.hsc.wvu.edu/mbrcc/t2r2/>
- 2 United States Department of Health & Human Services., *The Health Consequences of Involuntary Exposure to Tobacco Smoke: A Report of the Surgeon General* (2006), <http://www.surgeongeneral.gov/library/secondhandsmoke/report>
- 3 Air Resources Board, California Environmental Protection Agency, *Proposed Identification of Environmental Tobacco Smoke as a Toxic Air Contaminant*, June 24, 2005, <ftp://ftp.arb.ca.gov/carbis/regact/ets2006/app3part%20b.pdf>
- 4 Douglas CE, Tobacco Control Legal Consortium, *The Americans with Disabilities Act: Effective Legal Protection Against Secondhand Smoke Exposure* (2004), <http://tclconline.org/resources/Douglas.pdf>.
- 5 American Society of Heating, Refrigerating, and Air Conditioning Engineers, *ASHRAE Position Statement on Environmental Tobacco Smoke*, June 30, 2005.
- 6 West Virginia Department of Health and Human Resources Position Statement on Clean Indoor Air Regulation in West Virginia: An Epidemiological Basis for an Occupational and Environmental Policy on Secondhand Tobacco Smoke (SHS). <http://www.wvdtg.org/LinkClick.aspx?fileticket=buACqT2q6%2bI%3d&tabid=694>

Public Comment to the West Virginia Lottery Commission  
Regarding Compliance with the Americans with Disabilities Act:  
Public Comment and Statement by Bruce W. Adkins

October 9<sup>th</sup>, 2008

RECEIVED  
OCT 10 2008  
WV LOTTERY

Due to adding an additional reference to this document,  
I would ask that you please allow for this copy to be submitted for  
consideration, and that the copy mailed October 9<sup>th</sup>, 2008 be destroyed.

THANKS!

A handwritten signature in black ink, appearing to read "B. W. Adkins", with a long horizontal line extending to the right.

Bruce W. Adkins

**Bruce W. Adkins, M.S., PA**  
**1134 Main Avenue**  
**Nitro, West Virginia 25143**

**October 9<sup>th</sup>, 2008**

TO: John C. Musgrave, Director  
West Virginia Lottery Commission  
P.O. Box 2067  
Charleston, WV 25327

Regarding: The State Lottery Commission's Lottery Interpretive Rule regarding Compliance with the federal American's with Disabilities Act (ADA), which was first adopted in 2004 and amended in 2006. The Commission now proposes to amend the rule for a second time by adding a new section four that interprets the application of the Commission's legislative rule 179CSR3 pertaining to lottery licensees and compliance with the ADA.

Please see my 3 page public comment, and references: attached.

To clarify my knowledge and expertise in providing this comment to the Commission, please understand that I am a life long resident of West Virginia, was educated in West Virginia, and have worked my entire professional career in West Virginia. I worked many years in clinical medicine as an orthopedic and surgical physician's assistant, scrubbing-in on thousands of cancer and tobacco-related surgeries, before coming over to the public health arena. I have taught graduate level courses on organizational communication at local colleges.

I am currently the chair of the national Tobacco Control Network, and remain a member of the National Chronic Disease Director's Association Tobacco Prevention Council. Additionally, I serve on the Association of State and Territorial Health Officers Prevention Policy Committee and the Centers for Disease Control and Prevention's Wellness and Workplace Committee. I have served the past eight years on the National Network on Tobacco Prevention and Poverty. I have presented on various topics, including compliance with smoking and other tobacco prohibitions, at many local, state, and national tobacco prevention and health promotion conferences and trainings.

**I currently work as a director of a state chronic disease prevention division, but this response is my individual, personal observation, research and comments to the Commission.**

The main concern that I have is that the Commission, in considering its future compliance, fully address all aspects of the ADA in its entirety. The ADA not only protects people in workplaces, but also in places of public accommodation and when accessing the services of public entities. These provisions of the ADA are certainly most relevant to the Commission's proposed rule.

Sincerely yours;

*Bruce W. Adkins, M.S., PA*  
Bruce W. Adkins, M.S., PA

Public Comment to the West Virginia Lottery Commission  
Regarding Compliance with the Americans with Disabilities Act:  
Public Comment and Statement by Bruce W. Adkins

October 9<sup>th</sup>, 2008

In 1996, the West Virginia Supreme Court of Appeals ruled that the sale of lottery tickets was a 'government service' within the meaning of the Americans with Disabilities Act (ADA), and that since the Lottery sold its products through licensed retail stores, those stores could only be used if they were accessible to persons whose disabilities were covered by ADA. The same party who prevailed before the Supreme Court of Appeals sought clarification as to whether the Rule applied to only the sale of scratch off tickets and games such as PowerBall®, or to all licensed lottery locations.

The proposed new section four to the Lottery Interpretive Rule makes it clear that the provisions of (179CSR3) should apply to all lottery locations, including limited video lottery and racetrack locations.

This statement is respectfully submitted in my individual capacity for consideration by the West Virginia Lottery Commission regarding the question of whether the Commission may be in violation of the federal Americans with Disabilities Act (ADA) by failing to provide West Virginia residents and visitors with "meaningful access" to state services because it permits its licensed retailers to allow smoking on their premises. The ADA not only protects people in workplaces, but also in places of public accommodation and when accessing the services of public entities. These provisions of the ADA are certainly most relevant to the Commission's proposed rule.

Based on research and knowledge of the reach of the ADA and the issue at hand, it is recommend that the Commission require retailers who sell lottery tickets under license from the Commission to fully protect their customers against exposure to secondhand smoke, and that the Commission adopt the formal position that the only practical way to do so is by maintaining completely smoke-free premises. It is further recommended that video gaming parlors and racetrack gaming centers also be completely smoke-free.

The Commission should know that secondhand smoke is the third leading preventable cause of death in the United States.<sup>1</sup> Secondhand smoke annually causes 3,400 lung cancer deaths and 22,700 – 69,600 heart disease deaths among adult nonsmokers in the United States.<sup>2</sup> For millions of Americans, including many in West Virginia, secondhand smoke has the potential to trigger immediate, life-threatening asthma attacks and acute myocardial infarctions (heart attacks).<sup>3</sup> Indeed, there is no safe level of exposure to secondhand smoke, according to all major health authorities, including the U.S. Surgeon General.<sup>4</sup> The only effective way to protect nonsmokers is to effectively enforce a policy that genuinely prevents unwanted exposure to smoke.<sup>5</sup>

The ADA, which took effect in 1992, was adopted to provide a comprehensive national mandate to eliminate discrimination against people with disabilities.<sup>6</sup> The ADA may be used to protect people with asthma and others whose daily activities are substantially limited by

secondhand smoke exposure in private and public workplaces with fifteen or more employees (Title I); while accessing the services of, or participating in, state and local government (Title II); and in places of public accommodation (Title III).<sup>6</sup> The issue currently under consideration by the WV Lottery Commission falls within Title II, which provides that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”<sup>6, 7</sup>

Title I of the ADA requires private employers, employment agencies and labor unions to provide reasonable accommodation to qualified individuals with disabilities who are employees or applicants for employment, except when such accommodation would cause an undue hardship.<sup>6</sup> Title I also protects employees and applicants for employment against disability-related discrimination by state and local government entities. Title II provides that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity,” and protects individuals who are eligible to receive service or participate in programs or activities provided by state and local government entities. Since the ADA became law, several federal appellate courts have ruled on the applicability and reach of Titles I and II. A majority of the courts that have considered the question have upheld the constitutionality of the use of Title II against state governments.<sup>6</sup>

The ADA provides that an individual is “disabled” under the statute if he or she has a physical or mental impairment that:

- 1) substantially limits a major life activity, such as breathing, walking or working;
- 2) has a record of such an impairment; or
- 3) is regarded as having such an impairment.

One such impairment is difficulty breathing or other ailments, such as asthma, a cardiovascular disorder, emphysema or other lung dysfunction, or other illness caused or exacerbated by exposure to secondhand tobacco smoke. The bottom line is that, for a person who suffers from such health effects, secondhand tobacco smoke can pose as great a barrier to access as a flight of stairs poses to a person in a wheelchair.<sup>6</sup>

To satisfy the requirement that a disability constitute a “substantial” limitation of a major life activity, a person who is impaired by secondhand smoke exposure must demonstrate the impairment is both severe and predictably long-term. While disability determinations are made on a case-by-case basis, a person whose asthma, chronic bronchitis or angina, for example, is seriously aggravated by exposure to secondhand smoke – causing him or her to suffer restricted breathing, uncontrollable coughing or debilitating chest pain – is much more likely to be covered by the ADA than a person who experiences a temporary condition, such as bronchitis following the flu, since the former illnesses are chronic, underlying conditions and likely to be viewed as disabling.<sup>6</sup>

Since 2005, The American Society of Heating, Refrigerating, and Air Conditioning Engineers, who are the main authority in setting building indoor air standards in the US, because of its mission to act for the benefit of the public, encourages elimination of smoking in the indoor environment as the optimal way to control secondhand smoke exposure.<sup>6</sup>

As noted in the West Virginia Department of Health and Human Resources Policy on Clean Indoor Air Regulation in West Virginia: An Epidemiological Basis for an Occupational and Environmental Policy on Secondhand Tobacco Smoke (SHS) (approved 3/17/06).<sup>9</sup> Economic as well as epidemiologic evidence justifies the implementation and enforcement of no-smoking policies at the workplace and other public settings. For the benefit of all the public, DHHR encourages absolute elimination of smoking in the indoor environment as the optimal way to minimize SHS exposure. Failure to implement and enforce such clean indoor air policies will have predictable adverse health and economic outcomes for both employees and employers.<sup>9</sup>

Therefore, based upon strong scientific evidence, consensus of the medical community, and common accord of both private and public regulatory agency positions, the only way to effectively eliminate health risks associated with indoor exposure to SHS is to completely ban smoking.<sup>9</sup>

If secondhand smoke substantially impairs a disabled person in a location covered by the ADA, the ADA requires that the facility be made accessible to the disabled person by the making of reasonable modifications in policies and procedures.<sup>6</sup> A recurring theme in ADA cases is that many have involved disagreements over what constitutes a reasonable accommodation of an employee or member of the public. There are essentially two options for addressing the problem of secondhand smoke:

- 1) provide separate smoking and nonsmoking areas; or
- 2) eliminate the smoke.

The option of creating a smoke-free environment is the most efficient and least costly alternative. Instituting a smoke-free policy is also advisable because, for disabled and able-bodied persons, alike, there is, as already noted, no safe level of exposure to secondhand smoke. There is no known, affordable technology that can completely eliminate secondhand smoke from indoor premises in the absence of a completely enclosed, separately-ventilated room where the smoking takes place.<sup>6</sup>

It stands to reason that State and local government agencies have an obligation to protect the citizens within their jurisdictions against exposure to secondhand smoke inside buildings in which government services are rendered. It is reasonably clear, based on prior jurisprudence, that employees and members of the public who suffer from eligible secondhand smoke-related disabilities are entitled to protection against such exposure in state and local government facilities, and where government services are rendered. In light of the indisputable and overwhelming medical evidence that secondhand smoke is harmful to all and extremely harmful to some, the West Virginia Lottery Commission should require that retailers performing contractual services on behalf of the Commission abide by a blanket smoke-free policy.

The Lottery Commission should fully consider that the ADA not only protects people in workplaces, but also in places of public accommodation and when accessing the services of public entities, which are the provisions of the ADA most relevant to the Commission's proposed rule. In my personal opinion, the Commission needs to consider that failure to fully implement and enforce the ADA in its entirety will have predictable adverse health, economic, and legal outcomes.

References:

- 1** United States Department of Health & Human Services., *The Health Consequences of Involuntary Exposure to Tobacco Smoke: A Report of the Surgeon General* (2006), <http://www.surgeongeneral.gov/library/secondhandsmoke/report>
- 2** Air Resources Board, California Environmental Protection Agency, *Proposed Identification of Environmental Tobacco Smoke as a Toxic Air Contaminant*, June 24, 2005, <ftp://ftp.arb.ca.gov/carbis/regact/ets2006/app3part%20b.pdf>
- 3** R.P. Sargent, R.M. Shepard and S.A. Glantz, *Reduced Incidence of Admissions for Myocardial Infarction Associated with Public Smoking Ban: Before and After Study*, 328 Brit. Med. J. 977-80 (2004), available at <http://www.bmj.com/cgi/reprint/328/7446/977>
- 4** Surgeon General, 2006, at 65.
- 5** Surgeon General, 2006, at 641-42.
- 6** Douglas CE, Tobacco Control Legal Consortium, *The Americans with Disabilities Act: Effective Legal Protection Against Secondhand Smoke Exposure* (2004), <http://tclconline.org/resources/Douglas.pdf>.
- 7** 42 U.S.C. §§ 12131 (2000).
- 8** American Society of Heating, Refrigerating, and Air Conditioning Engineers, ASHRAE Position Statement on Environmental Tobacco Smoke, June 30, 2005
- 9** West Virginia Department of Health and Human Resources Position Statement on Clean Indoor Air Regulation in West Virginia: An Epidemiological Basis for an Occupational and Environmental Policy on Secondhand Tobacco Smoke (SHS). Approved by Secretary Martha Yeager Walker on 3/17/06.

**Bruce W. Adkins, M.S., PA  
1134 Main Avenue  
Nitro, West Virginia 25143**

**October 9<sup>th</sup>, 2008**

RECEIVED  
OCT 10 2008  
WV LOTTERY

TO: John C. Musgrave, Director  
West Virginia Lottery Commission  
P.O. Box 2067  
Charleston, WV 25327

Regarding: The State Lottery Commission's Lottery Interpretive Rule regarding Compliance with the federal American's with Disabilities Act (ADA), which was first adopted in 2004 and amended in 2006. The Commission now proposes to amend the rule for a second time by adding a new section four that interprets the application of the Commission's legislative rule 179CSR3 pertaining to lottery licensees and compliance with the ADA.

Please see my 3 page public comment, and references: attached.

To clarify my knowledge and expertise in providing this comment to the Commission, please understand that I am a life long resident of West Virginia, was educated in West Virginia, and have worked my entire professional career in West Virginia. I worked many years in clinical medicine as an orthopedic and surgical physician's assistant, scrubbing-in on thousands of cancer and tobacco-related surgeries, before coming over to the public health arena. I have taught graduate level courses on organizational communication at local colleges.

I am currently the chair of the national Tobacco Control Network, remain a member of the National Chronic Disease Director's Association Tobacco Prevention Council and the Centers for Disease Control and Prevention's Wellness and Workplace Committee, and have served the past eight years on the National Network on Tobacco Prevention and Poverty. I have presented on various topics, including compliance with smoking and other tobacco prohibitions, at many local, state, and national tobacco prevention and health promotion conferences and trainings.

***I currently work as a director of a state chronic disease prevention division, but this response is my individual, personal observation, research and comments to the Commission.***

The main concern that I have is that the Commission, in considering its future compliance, fully address all aspects of the ADA in its entirety. The ADA not only protects people in workplaces, but also in places of public accommodation and when accessing the services of public entities. These provisions of the ADA are certainly most relevant to the Commission's proposed rule.

Sincerely yours;



Bruce W. Adkins

Public Comment to the West Virginia Lottery Commission  
Regarding Compliance with the Americans with Disabilities Act:  
Public Comment and Statement by Bruce W. Adkins

October 9<sup>th</sup>, 2008

In 1996, the West Virginia Supreme Court of Appeals ruled that the sale of lottery tickets was a 'government service' within the meaning of the Americans with Disabilities Act (ADA), and that since the Lottery sold its products through licensed retail stores, those stores could only be used if they were accessible to persons whose disabilities were covered by ADA. The same party who prevailed before the Supreme Court of Appeals sought clarification as to whether the Rule applied to only the sale of scratch off tickets and games such as PowerBall®, or to all licensed lottery locations.

The proposed new section four to the Lottery Interpretive Rule makes it clear that the provisions of (179CSR3) should apply to all lottery locations, including limited video lottery and racetrack locations.

This statement is respectfully submitted in my individual capacity for consideration by the West Virginia Lottery Commission regarding the question of whether the Commission may be in violation of the federal Americans with Disabilities Act (ADA) by failing to provide West Virginia residents and visitors with "meaningful access" to state services because it permits its licensed retailers to allow smoking on their premises. In considering its future compliance, fully address all aspects of the ADA in its entirety. The ADA not only protects people in workplaces, but also in places of public accommodation and when accessing the services of public entities. These provisions of the ADA are certainly most relevant to the Commission's proposed rule.

Based on research and knowledge of the reach of the ADA and the issue at hand, it is recommended that the Commission require retailers who sell lottery tickets under license from the Commission to fully protect their customers against exposure to secondhand smoke, and that the Commission adopt the formal position that the only practical way to do so is by maintaining completely smoke-free premises. It is further recommended that video gaming parlors and racetrack gaming centers also be completely smoke-free.

The Commission should know that secondhand smoke is the third leading preventable cause of death in the United States.<sup>1</sup> Secondhand smoke annually causes 3,400 lung cancer deaths and 22,700 – 69,600 heart disease deaths among adult nonsmokers in the United States.<sup>2</sup> For millions of Americans, including many in West Virginia, secondhand smoke has the potential to trigger immediate, life-threatening asthma attacks and acute myocardial infarctions (heart attacks).<sup>3</sup> Indeed, there is no safe level of exposure to secondhand smoke, according to all major health authorities, including the U.S. Surgeon General.<sup>4</sup> The only effective way to protect nonsmokers is to effectively enforce a policy that genuinely prevents unwanted exposure to smoke.<sup>5</sup>

The ADA, which took effect in 1992, was adopted to provide a comprehensive national mandate to eliminate discrimination against people with disabilities.<sup>6</sup> The ADA may be used to protect people with asthma and others whose daily activities are substantially limited by secondhand smoke exposure in private and public workplaces with fifteen or more employees (Title I); while accessing the services of, or participating in, state and local government (Title II); and in places of public accommodation (Title III).<sup>6</sup> The issue currently under consideration by the WV Lottery Commission falls within Title II, which provides that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”<sup>6, 7</sup>

Title I of the ADA requires private employers, employment agencies and labor unions to provide reasonable accommodation to qualified individuals with disabilities who are employees or applicants for employment, except when such accommodation would cause an undue hardship.<sup>6</sup> Title I also protects employees and applicants for employment against disability-related discrimination by state and local government entities. Title II provides that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity,” and protects individuals who are eligible to receive service or participate in programs or activities provided by state and local government entities. Since the ADA became law, several federal appellate courts have ruled on the applicability and reach of Titles I and II. A majority of the courts that have considered the question have upheld the constitutionality of the use of Title II against state governments.<sup>6</sup>

The ADA provides that an individual is “disabled” under the statute if he or she has a physical or mental impairment that:

- 1) substantially limits a major life activity, such as breathing, walking or working;
- 2) has a record of such an impairment; or
- 3) is regarded as having such an impairment.

One such impairment is difficulty breathing or other ailments, such as asthma, a cardiovascular disorder, emphysema or other lung dysfunction, or other illness caused or exacerbated by exposure to secondhand tobacco smoke. The bottom line is that, for a person who suffers from such health effects, secondhand tobacco smoke can pose as great a barrier to access as a flight of stairs poses to a person in a wheelchair.<sup>6</sup>

To satisfy the requirement that a disability constitute a “substantial” limitation of a major life activity, a person who is impaired by secondhand smoke exposure must demonstrate the impairment is both severe and predictably long-term. While disability determinations are made on a case-by-case basis, a person whose asthma, chronic bronchitis or angina, for example, is seriously aggravated by exposure to secondhand smoke – causing him or her to suffer restricted breathing, uncontrollable coughing or debilitating chest pain – is much more likely to be covered by the ADA than a person who experiences a temporary condition, such as bronchitis following the flu, since the former illnesses are chronic, underlying conditions and likely to be viewed as disabling.<sup>6</sup>

As noted in the West Virginia Department of Health and Human Resources Policy on Clean Indoor Air Regulation in West Virginia: An Epidemiological Basis for an Occupational and Environmental Policy on Secondhand Tobacco Smoke (SHS) (approved 3/17/06).<sup>8</sup> Economic as well as epidemiologic evidence justifies the implementation and enforcement of no-smoking policies at the workplace and other public settings. For the benefit of all the public, DHHR encourages absolute elimination of smoking in the indoor environment as the optimal way to minimize SHS exposure. Failure to implement and enforce such clean indoor air policies will have predictable adverse health and economic outcomes for both employees and employers.<sup>8</sup>

Therefore, based upon strong scientific evidence, consensus of the medical community, and common accord of both private and public regulatory agency positions, the only way to effectively eliminate health risks associated with indoor exposure to SHS is to completely ban smoking.<sup>8</sup>

If secondhand smoke substantially impairs a disabled person in a location covered by the ADA, the ADA requires that the facility be made accessible to the disabled person by the making of reasonable modifications in policies and procedures.<sup>8</sup> A recurring theme in ADA cases is that many have involved disagreements over what constitutes a reasonable accommodation of an employee or member of the public. There are essentially two options for addressing the problem of secondhand smoke:

- 1) provide separate smoking and nonsmoking areas; or
- 2) eliminate the smoke.

The option of creating a smoke-free environment is the most efficient and least costly alternative. Instituting a smoke-free policy is also advisable because, for disabled and able-bodied persons, alike, there is, as already noted, no safe level of exposure to secondhand smoke. There is no known, affordable technology that can completely eliminate secondhand smoke from indoor premises in the absence of a completely enclosed, separately-ventilated room where the smoking takes place.<sup>8</sup>

It stands to reason that State and local government agencies have an obligation to protect the citizens within their jurisdictions against exposure to secondhand smoke inside buildings in which government services are rendered. It is reasonably clear, based on prior jurisprudence, that employees and members of the public who suffer from eligible secondhand smoke-related disabilities are entitled to protection against such exposure in state and local government facilities, and where government services are rendered. In light of the indisputable and overwhelming medical evidence that secondhand smoke is harmful to all and extremely harmful to some, the West Virginia Lottery Commission should require that retailers performing contractual services on behalf of the Commission abide by a blanket smoke-free policy.

The Lottery Commission should fully consider that the ADA not only protects people in workplaces, but also in places of public accommodation and when accessing the services of public entities, which are the provisions of the ADA most relevant to the Commission's proposed rule. In my personal opinion, the Commission needs to consider that failure to fully implement and enforce the ADA in its entirety will have predictable adverse health, economic, and legal outcomes.

References:

**1** United States Department of Health & Human Services., *The Health Consequences of Involuntary Exposure to Tobacco Smoke: A Report of the Surgeon General* (2006), <http://www.surgeongeneral.gov/library/secondhandsmoke/report>

**2** Air Resources Board, California Environmental Protection Agency, *Proposed Identification of Environmental Tobacco Smoke as a Toxic Air Contaminant*, June 24, 2005, <ftp://ftp.arb.ca.gov/carbis/regact/ets2006/app3part%20b.pdf>

**3** R.P. Sargent, R.M. Shepard and S.A. Glantz, *Reduced Incidence of Admissions for Myocardial Infarction Associated with Public Smoking Ban: Before and After Study*, 328 Brit. Med. J. 977-80 (2004), available at <http://www.bmj.com/cgi/reprint/328/7446/977>

**4** Surgeon General, 2006, at 65.

**5** Surgeon General, 2006, at 641-42.

**6** Douglas CE, Tobacco Control Legal Consortium, *The Americans with Disabilities Act: Effective Legal Protection Against Secondhand Smoke Exposure* (2004), <http://tclconline.org/resources/Douglas.pdf>.

**7** 42 U.S.C. §§ 12131 (2000).

**8** West Virginia Department of Health and Human Resources Position Statement on Clean Indoor Air Regulation in West Virginia: An Epidemiological Basis for an Occupational and Environmental Policy on Secondhand Tobacco Smoke (SHS). Approved by Secretary Martha Yeager Walker on 3/17/06.

TITLE 179

FILED

INTERPRETIVE RULE

2008 DEC -1 PM 2:11

WEST VIRGINIA LOTTERY

OFFICE WEST VIRGINIA  
SECRETARY OF STATE

SERIES 7

**LOTTERY INTERPRETIVE RULE**

**§179-7-1. General.**

1.1. Scope and Purpose. - The purpose of this interpretive rule is to disclose how the State Lottery Commission will interpret, clarify and explain provisions of either the Racetrack Video Lottery Act codified in W.Va. Code §29-22A-1 et seq., or the Limited Video Lottery Act codified in W.Va. Code §29-22B-101 et seq., or in both acts.

1.2. Authority. - W. Va. Code - §29A-3-4

1.3. Filing Date. - November 24, 2008

1.4. Effective Date. - January 1, 2009

**§179-7-2 Interpretation of terms and words found in the Limited Video Lottery Act.**

2.1. "Fraternal society," as the term is found in W.Va. Code §29-22B-1101(c), means a retail licensee that is either a fraternal beneficiary society that is exempt from federal income tax under section 501(c)(8) of the Internal Revenue Code of 1986, as amended, or a domestic fraternal society that is exempt from federal income tax under section 501(c)(10) of the Internal Revenue Code, and was an existing chapter or local unit of a national tax exempt fraternal benefit society or a domestic fraternal society organized under the lodge system on the first day of January two thousand one.

2.2. "Licensed limited video lottery location approved by the commission," as the term is found in W.Va. Code §29-22B-1201(a), means the location in excess of the following straight-line distances from any of the following places:

2.2.a. The location is at least one hundred fifty feet from, or has an external structural connection not amounting to a common internal wall to, a premises that already has a retail license for video lottery terminals;

2.2.b. The location is at least three hundred feet from a church, school, daycare center, or the perimeter of a public park; or

2.2.c. The location is at least three hundred feet from a business that sells petroleum products capable of being used as fuel in an internal combustion engine.

2.3. "Monitor," as the word is found in W.Va. Code §29-22B-702, means that the licensed premises must be staffed at all times when limited video lottery games are being played. This interpretation means that a person who views the video lottery licensed premises on a video screen in a place outside the premises described in the licensee's license from the Alcohol Beverage Control Administration and the license from the State Lottery Commission is not monitoring "...video lottery terminals to prevent access or play by persons who are under the age of twenty-one years or who are visibly intoxicated," as required by section 702(8) of the Act. This interpretation is also in keeping with W.Va. Code §29-22B-1201(c) that says, Personnel of the limited video lottery retailer shall be present during all hours of operation at each video lottery terminal location. These personnel 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.

2.4 "Veterans organization," as the term is found in W.Va. Code §29-22B-1101(c), means a retail licensee that is exempt from federal income tax under section 501(c)(19) of the Internal Revenue Code and was an existing chapter, post or local unit of a national tax exempt veterans organization organized under the lodge system on the first day of January two thousand one.

### **§179-7-3. Interpretation of terms and words found in the Racetrack Video Lottery Act.**

3.1. As used in W.Va. Code §29-22A-8(1), the word "voids" in the sentence that says, *The sale of more than five percent of a license or permit holder's voting stock, or more than five percent of the voting stock of a corporation which controls the license or permit holder or the sale of a license or permit holder's assets, other than those bought and sold in the ordinary course of business, or any interest therein, to any person not already determined to have met the qualifications of section seven of this article voids the license unless the sale has been approved in advance by the commission*, means that the license is void after due process has been afforded to the licensee or permit holder and a final order has been entered. In that same sentence, the word "person" does not include acquisition of common stock of a licensee or permit holder by a state or federally licensed banking institution, nor does it include acquisition of licensee or permit holder's stock by an institutional investor such as a pension fund or a mutual fund registered with the United States Securities and Exchange Commission, as well as a registered investment company, a registered investment advisor, a collective trust fund or a qualified insurance company as those entities are defined in the Investment Company Act of 1940 and the Investment Advisors Act of 1940, that is holding the stock only as an investment and not for purposes of control of the licensee or permit holder.

3.2 W.Va. Code §29-22A-6(c)(3) now reads in part as follows:

*(c) Each video lottery terminal shall meet the following maximum and minimum theoretical percentage payout during the expected lifetime of said terminal: ...*

*(3) Each terminal shall have a probability greater than one in seventeen million of obtaining the maximum payout for each play.*

The Commission's interpretation of W.Va. Code §29-22A-6(c)(3) is that the word "play" means the initial time a video lottery terminal's play button is pushed, or its play lever is pulled, or the initial spin of its reels after the video lottery terminals receive a base wager. When there are several "plays" within a game as the term "game" is defined by W.Va. Code §29-22A-3(y), only the initial play is used to determine the 1-in-17 million odds calculation. Odds for subsequent optional selections such as bonus features are not used in determining compliance with W.Va. Code §29-22A-6(c)(3). In addition, where the game being played is an interstate or international lottery game authorized under W.Va. Code §29-22-5(a)(5), the odds of the

interstate or international game shall be set by the participating government lotteries by contract or agreement.

**§179-7-4. Interpretation of the application of procedures found in 179 CSR 3 pertaining to lottery licensees and the Americans with Disabilities Act.**

In definition section 179 CSR 3; §2.2, the word "Act" means the State Lottery Act, West Virginia code §§29-22-1. It is the interpretation of the State Lottery Commission that the rule should apply to all licensees of the Commission. This is also to include licensees under the Racetrack Video Lottery Act, West Virginia Code §29-22A-1 et seq.; the Limited Video Lottery Act, W.Va. Code §29-22B-101 et seq.; the Racetrack Table Games Act, W.Va. §29-22C-1 et seq.; and the Limited Gaming Facility Act, W.Va. Code §29-25-1 et seq. Under this interpretation, the procedures of 179 CSR 3 apply to any finding by a building official or the West Virginia Human Rights Commission that a licensed lottery location is not in compliance with the ADA.