

**COMMISSION MEETING  
THURSDAY, FEBRUARY 13, 2003  
MINUTES**

**Chair Orr** called the meeting to order at 1:30 p.m., at the Labor & Industries Headquarters Auditorium in Olympia. He acknowledged L & I and the special efforts of Ivan Johnson in accommodating the WSGC in their facility on a short notice. He welcomed the attendees and introduced the members and staff present:

**MEMBERS PRESENT:**                   **COMMISSIONER GEORGE ORR, Chair;**  
   **COMMISSIONER LIZ McLAUGHLIN, Vice Chair;**  
   **COMMISSIONER CURTIS LUDWIG;**  
   **COMMISSIONER JANICE NIEMI;**  
   **COMMISSIONER ALAN PARKER;**

**OTHERS PRESENT:**                   **RICK DAY, Executive Director;**  
   **ROBERT BERG, Deputy Director;**  
   **ED FLEISHER, Special Assistant, Policy & Gov't. Affairs;**  
   **DERRY FRIES, Assistant Director, Licensing Operations;**  
   **CALLY CASS-HEALY, Assistant Director, Field Operations;**  
   **AMY PATJENS, Administrator, Communications and Legal;**  
   **JERRY ACKERMAN, Assistant Attorney General;**  
   **SHIRLEY CORBETT, Executive Assistant**

**Employee Service Recognition Awards:** **Director Day** and **Chair Orr** presented Assistant Director Derry Fries with a 20-year service award. Mr. Fries served 21 years with the U. S. Army before joining the staff of the Gambling Commission. He currently serves as an assistant director responsible for licensing services. **Director Day** pointed out that several special agents graduated from the Basic Law Enforcement Academy: Kevin Maxwell and Travis Vessey in October 2002, Jim Dibble in December 2002, and Roger Sauve in January 2003.

**1. REVIEW OF AGENDA AND DIRECTOR'S REPORT:**

**Director Day** identified additional handouts and copies of new legislation inserted in the agenda packet after publication, and briefly reviewed the agenda for Thursday and Friday.

Legislative Update:

House Bill 1637 and Senate Bill 5613-Promoting Education on Compulsive Gambling: **Director**

**Day** noted the Commission canceled its contract with the Council on Problem Gambling because of

a legal problem with the authority that was provided for the Commission in statute. The house bill proposed by Representative Wood is an attempt to correct that legal problem in order to provide the Commission with the ability to enter into a similar contract. The Commission was contracting for approximately \$300,000 a biennium under a broader application. The Commission is now contracting approximately \$22,000 per year for services specifically relating to the 1-800 number. This legislation clarifies the authority, provides that we "may" provide funding (not mandated), and allows the Commission to enter into the contract. **Chair Orr** asked for comments. There were none.

House Bill 1227-Promotional Contests of Chance–**Director Day** noted this bill was designed to plug a hole and to clarify the promotional contest of chance law in the state of Washington. Staff has worked with Representative Pflug to clarify that the outcome of the game cannot be determined by a vending machine. This is an attempt to clarify the law so machines like "Freespin" would not be permitted under the statute.

House Bill 1446 and 1366 -Operating Budget–**Director Day** explained these bills establish an appropriation line for a proposed Department of Gaming, eliminates the commissions, and contain an appropriation for Horse Racing funds. He noted that if the consolidation bill creating the Department of Gaming does not pass, the funding section of the statute would not apply. The bills also proposes the transfer of \$1.5 million from the Gambling Commission to the General Fund.

House Bill 1397-Gambling Activity Zoning–**Director Day** reported these bill clarifies that cities and counties could zone relative to gambling issues. He asked the Commission to consider, and if appropriate, support an alternate to the proposal, and/or to provide staff with direction to discuss with the bill sponsors. A memorandum from Ed Fleisher outlined a change which says, “a city or county may apply such prohibition throughout its jurisdiction or to designated geographical areas within its jurisdiction.” Under the prohibition they now have authority for in their entire area/jurisdiction, they could do that just as a geographical area. Currently the Commission has interpreted that the local authorities cannot zone or place moratoriums solely based on gambling activities, or not. This would allow the local jurisdiction to actually then zone out a geographical area with no gambling whatsoever. What it would not do is enter the Commission into one of the problems that has often been a discussion about potential corruption, which is selecting one or more establishments at a particular location—it would have to be the entire area, or not at all.

**Commissioner Niemi** thought Mr. Fleisher’s suggestion was a good one to a certain extent, and hoped that either Director Day and/or a Commissioner would testify on the bill. She was concerned that under this suggestion, one could still establish a red-light district, and could still pick a place outside of town which was undesirable, or pick a manufacturing area, or some place that would (in the long run) allow counties to be able to, in effect, bunch all of these areas together. Commissioner Niemi felt that would not be appropriate with the initial statute, which was not to allow any of that kind of thing.

**Commissioner Parker** asked if staff would have any more information to offer in terms of helping the Commissioners evaluate and understand the compromise proposed, and the pros and cons of this issue. **Mr. Fleisher** commented that this has been an on-going issue. The commission's attorney general and some of the city attorneys disagree on how the Gambling Statute, Chapter 9.46, relates

to the zoning law. He noted the lawyers and the courts have to figure out how to read the two of them together. In a general sense, it has been staff's position that if a city chooses to use the authority granted under 9.46.295 to absolutely prohibit a type of zoning in their area, they could do so and the Commission would not issue a license in that area. Generally, if the city doesn't use the powers granted under that statute, but uses the zoning powers instead, the Commission has not been in the business of interpreting the local jurisdiction's zoning powers and the Commission has issued a license. Mr. Fleisher believed the bill, as written, doesn't say to the cities exactly what their zoning powers are—what it does say is that nothing in the gambling statute diminishes those zoning powers. In other words, someone questioning a city's zoning authority could not turn to this section of law and say that it was intended to diminish its zoning powers. He believed the debate would continue to exist between the various attorneys as to how the two laws interrelate. Mr. Fleisher noted this language was created in 1973. There were many sections of the gambling statute that were written to address the corruption and problems that came with the tolerance years in Seattle and King County, and for the state to preempt this area of law while giving the cities the choice whether to allow gambling or not. One of the real goals was to avoid spot zoning or picking and choosing which kind of licensees would be allowed. Mr. Fleisher affirmed he has watched this debate in the Legislature the last three years, and it's clear that there are two issues involved as cities make this decision. One is, what geographical areas of the town will gambling be allowed in. Current gambling law says it's all or nothing; you prohibit in your town or you don't. The proposed alternative allows the designation of geographical areas—that would allow a city to pick some small area of town and call it a red light zone, and that would be the only place gambling could occur. The other issue relates to limiting the numbers, which is where the original concern of the gambling law came into play. Mr. Fleisher noted that we have seen cities pass ordinances that name three or four gambling establishments, already in their city, and say those can stay, but no new establishments may come in. It has been the position of this agency, via the advice from their previous attorney general in his memo several years ago, that to a large extent, that is in direct conflict with the prohibition in Title 9.46—the Commission is not allowed to deny a license in an effort to limit the number of licenses. The alternative language would allow geographical zoning and does not change the authority of local jurisdictions to execute other zoning powers that effectively limit the numbers.

**Jerry Ackerman** advised that when he looked at the underlying new language in HB1397, it says, nothing in this chapter limits the authority of any city, town, or county to exercise its land use and zoning powers granted or recognized under the law with respect to any land uses involving gambling activities authorized under this chapter. He honestly believed that language would muddy the waters rather than clarify it. He noted that in his opinion, there is nothing in 9.46 that in any way diminishes the standard zoning powers of a city or county. They may zone for height, for signs, for minimum parking; they may zone for all the things that a city or county can zone for. He believed the language was intended to create an argument that one could now zone for what that last line says: “any land use involving gambling activities authorized under this chapter.” He predicted that if this bill passed in this form, it would lead to litigation as to whether or not the Legislature actually intended to retrench on the preemption that currently exists in state law which prohibits cities or counties from limiting licenses that have been granted by this Commission. Mr. Ackerman believed that Mr. Fleisher's proposed language is the preferable and more direct language. It says that a city or county may in fact, zone for gambling. The issue before the Commission is the policy call of whether the Commission wanted to support a bill which, in essence, changes the existing situation that requires a municipality to say gambling is either in, or it is out, and changes it to a situation

where a municipality would be allowed to say where, within their jurisdiction gambling could take place. Mr. Fleisher's proposed language puts that squarely out there for the Commission and for the Legislature. The language that exists in 1397 doesn't, and Mr. Ackerman believed it was really a back door approach with the assumption being that the Legislature would not be prepared to give up that preemption. He didn't know if that assumption was correct or not, and he didn't know if giving municipalities this authority to designate where within their jurisdiction gambling can't take place is something that the Commission wanted to do or not, however, that is the policy issue. Were that not the case, the language that has been added in 1397 is actually pointless because the cities' and counties' zoning power was not diminished by RCW 9.46.

**Commissioner Ludwig** responded that with respect to Mr. Ackerman's comments, he was in favor of spelling out to local jurisdictions that they may consider locations that should not allow gambling. He believed the Commission didn't have any right to consider the specific location, whether it's next to a school, church, or in an undesirable area for gambling most of the day and night. Right now, cities don't have anything but their general zoning provisions. Commissioner Ludwig cited a case in his hometown, wherein the Commission granted a card room license to a facility that borders on a parish church and school, as well as being in close proximity to two other schools. He personally thought that was a poor location given those facts. He affirmed they are running a good operation, however, somebody—the state, county, or city—ought to have that jurisdiction and authority, and to his knowledge, no one has that authority at this time. Commissioner Ludwig noted cities zone for taverns, cocktail lounges, and whatever else. They do that, and they sell food and beverages. The Commission has to grant the license if everything else is all right. However, right now, no one has the authority to zone out or prohibit gambling. The Legislature hasn't given the Commission that authority (like they have to the Liquor Board), but someone—and he suggested the local government—should have the authority to control that activity.

**Commissioner Parker** asked if staff would have any idea of the impact to jurisdictions if this authority was enacted by the Legislature—would they go ahead with restricted zoning. He addressed the correspondence from the Recreational Gaming Association, which advocates for 1397 as proposed. **Mr. Fleisher** said he didn't have any idea in terms of numbers, and he couldn't speak for the cities and counties, however, he believed quite a few of them would. He noted there are many cities as well as a couple of counties that have struggled with this issue—they don't want to prohibit gambling completely, but they don't want to have too much of it either. There are a couple of cities that have specifically zoned that gambling may exist in one part of town and not in another. Mr. Fleisher believed they would welcome this as a tool, and that quite a number of them would use this tool. He was not sure whether it goes as far as what the cities and counties want. Commissioner Parker asked if this could then be interpreted as an expansion of gambling in the sense that the Commission has talked about there being a broad policy that is recognized by policymakers in this state that opposes essentially "expansion of gambling." Could this be a statute that would, in effect, bring about an expansion of gambling. **Director Day** responded that from the extent that if there were cities that chose to totally prohibit gambling because that's their only option; the proposal would now allow them to choose an option, which would be to allow gambling in some zones. Obviously it would provide the potential for additional licensed places that aren't in existence today. **Chair Orr** commented that in reality, in the state of Washington, there are rules that say if one is going to build a facility, there are hoops to jump through that are controlled by the local government, and it doesn't include or exclude any of those facilities except gambling, and it is not a commentary

on whether the activity is good or bad. **Commissioner Niemi** understood Chair Orr's argument and assured him that if that was the case, then there wouldn't be any gambling establishments within so many blocks of any church, school, or school bus stop. She cautioned against minimizing what a jurisdiction would do when a gambling request comes up.

**Commissioner McLaughlin** agreed with Mr. Fleisher's amendment to this bill. Having been in local government, she affirmed that zoning issues are difficult. There are hearings after hearings, after hearings. She was aware of a couple of cities that would probably allow one or two gambling establishments if they had a specific zone they could put them in. However, they are still commercial ventures, and she noted that we are talking about card rooms. This isn't a Bingo hall issue; this is a card room issue, and she believed they would either fly in that area, or they wouldn't, and the citizens will either support the activity, or not. She noted that Everett has five or six establishments which are mostly on a busy avenue of some sort. Commissioner McLaughlin commented that land use isn't something that happens in a vacuum in a local government. She believed it's a good idea to allow the local jurisdiction to have a place if they want it, or they can decide that they do not want gambling in their city.

**Commissioner Ludwig** noted there was a former commissioner in the audience with experience and expertise in land use and zoning matters, and he asked for Mr. Tull's comments about this particular proposed legislation. **Chair Orr** called for public comments.

**Bob Tull**, Bellingham land use attorney and former Commissioner for 11 years, said he has been involved in a number of matters that involve zoning and card rooms, and litigation involving those issues. He said he is now in the Court of Appeals on a case that may be affected by one of the suggested revisions. The basic bill, and to say that nothing diminishes local authority is a way of saying that local jurisdictions have plenty of authority, and there are those local city attorneys who already believe that and have testified to that in previous sessions. There are those who are concerned. Part of that goes back to the fact that this whole issue has been driven by circumstances. There was a big concern five years ago about the possibility of King County banning card rooms, and that made small jurisdictions throughout King County and nearby King County become very concerned about all of the card rooms being driven into their towns. In the end, a ban did not pass; there was no huge proliferation, but there were problems. The difficulty with the suggestion to say that cities can use their 9.46 jurisdiction in some parts of town and not in others relates to the case they have in the Court of Appeals relating to the city of Edmonds. In that case, the judge determined that a licensee, notwithstanding his investment in card room construction, facilities, equipment, training, and so forth, that all they have is an expectation for one year of operation, one year of licensure. If the local takes the option of banning that form of gaming—card room, pull-tab, or Bingo—at the end of the year, they are done. If they have the ability to do that in one part of town and not another, then they are going to be under tremendous economic pressure to try to make sure that the decision goes one way and not another. That will put them back in the potential set of circumstances for tolerance policies, for intense local politics that everyone wishes to avoid. If local jurisdictions want to say that a certain part of town won't have card rooms, they have to address what it takes to be a card room. It has to be a food and beverage establishment, and typically, it needs to operate later than 10 o'clock at night. Typically, it's going to be bigger than a small family restaurant or tavern. They can use a fine brush under the existing comprehensive planning and zoning regulations to deal with it. The rub has been preexisting, nonconforming uses. Local

jurisdictions have had five years to determine how they want to address these types of uses. His personal opinion would be that the basic bill saying that nothing diminishes their power would be a relief for many cities and counties. They could then start trying to do a careful job of determining how big of a restaurant is allowed in a particular area. They have lots of powers and they should use them. Letting them use their 9.46 power on a discriminatory basis could be a dangerous evolution. Mr. Tull thought it would be better to stay out of the issue, or support the fact that there's no prohibition on zoning, and let local jurisdictions, if they really want to work this issue, work on it.

**Mr. Tull** reported that the frightening issue about the Edmonds case that is currently in the courts was that the judge was uncomfortable. He didn't like the fact that he could tell a perfectly lawful business that they would have to go away without a reason. He was uncomfortable, but he felt that was the way the statute read, and we will eventually see what the courts at higher levels think. In all other regulatory situations, if one complies with the laws regulating land use at the time of commencement, they get to keep functioning. There are circumstances where local jurisdictions can abate nonconforming uses, can require upgrades of certain types of equipment notwithstanding their original conformance, and certainly this agency does not let someone get by with yesteryear's technology. When the rules change, there is time for everyone to come up to speed. He also noted there is a specific part in the Gambling Commission Statute that doesn't let people claim that they have a vested right in the old rules, and that notion of vested rights is part of this litigation. Mr. Tull thought that for operators who have followed the zoning laws, and that have done all the appropriate things necessary, to then be aced out a year later was unfair. To be aced out in favor of a guy across the street, because there might be an ability to split hairs could be interesting. Under land use regulation, those types of results are moderated by grandfathering or vested rights. But in the 9.46 context, the argument is, and the current Superior Court of Snohomish County ruling is, "the year is up, you are gone." Mr. Tull said he believed the basic bill is intended to let cities use their existing zoning authority and not have an argument that they can't mention gambling or that they can't regulate the facilities in which gambling takes place. He believed they can, and he believed some cities already share that belief, and some have gone ahead and done so. He believed the mechanisms are already in place, and quite a few jurisdictions share that view. This bill is an effort to make this issue go away so they don't come to the Legislature on other gaming-related issues and say we're concerned about it.

**Commissioner McLaughlin** asked why a town could zone a certain area for adult bookstores and not be able to zone for gambling. **Mr. Tull** said he was not saying they couldn't. The adult bookstore/adult entertainment—that line of cases—usually comes out of the First Amendment constitutional routes. He was not aware, so far, of gambling being invested with a constitutional protection. He affirmed that cities have been concerned about so-called adult entertainment issues and have worked very hard and been thwarted by the constitutional protection of free speech attached to these different uses. Mr. Tull could see no reason why a jurisdiction couldn't say for example, that food and beverage establishments larger than 1,500 square feet could not be closer together than X, and food and beverage establishments that operate after 10 o'clock at night could not be closer together than Y.

**Commissioner Parker** acknowledged this is a confusing issue and the Commission knew it from the previous discussion. He again asked for more information before the Commission takes a position. Is there an expectation that if the Commission takes a position, it would be helpful to the

Legislature as they consider this bill or related question—is it feasible, or practical to do a survey of local jurisdictions and get a reading on how many would exercise their authorities if the Ed Fleisher amendment became law. **Deputy Director Berg** offered a suggestion. He advised that he sits on the WASPC Legislative Committee, and they meet concurrently with the representatives from the Association of Washington Cities and Washington Association of Counties, and he believed those two groups either have taken, or are taking a position on these issues. He believed we could ask them to poll their members for answers to the questions posed.

**Commissioner Parker** believed it was a separate question to ask if the group had a position, as opposed to asking what the members of their group would do. As a group, they could stand for the principle of local government rule, which doesn't tell the commission anything other than the fact that that group agrees with something. Commissioner Parker asked to get some assessment, in terms of a poll or survey, of what the impact would be. He believed the commissioners could use the information garnered to try to anticipate the results if the law changed as proposed. He noted that in terms of the competing policy argument—on one hand there is a meat/hammer policy assessment that the public is opposed to expansion of gambling, and we know from polls that have been reported, that there is a strong percentage of the public that just says no expansion of gambling. That is a meat/axe way of determining what the policy should be, as opposed to the metaphor of using the scalpel as a way of determining what public policy should be. Likewise, the issue of local government rule—we can all be in favor of local government rules. What troubled Commissioner Parker was the fact that the participation of informed citizenry in those local government rules was largely a myth. The only people that participate are those who have a monetary stake. If people don't have an interest, or don't know about it, or are not in a position to protect their citizens' interest in a matter, then it can all happen and the public will find out about it after the fact. Local governments have zoning commissions and they will exercise the powers of government to determine whether or not gambling activities should be allowed. Commissioner Parker wanted the Commission to be practical when they considered this issue.

**Mr. Fleisher** explained that commercial gaming is a secondary activity, and affirmed that does create some theoretical issues for the local governments. One has to be a food and drink establishment primarily engaged in the sale of food and drink in order to get a gambling license. There is no business that is a stand-alone gaming operation—the food and drink comes first. A number of the zoning attorneys have raised the issues that Mr. Tull raises about putting the conditions down—the number of square feet, the parking—and Mr. Fleisher believed that was possible. He hears the cities saying (in their testimony) that maybe they could do that, but they don't want to have to get the fine pencil out; they want the clear authority to just say we'll allow restaurants in all the non-single family zones; we only want the gambling in certain zones, and they want to argue that they have the clear authority to address gambling directly rather than indirectly. **Commissioner Ludwig** disagreed with Mr. Fleisher regarding the requirements to have food and beverages, saying that only in theory. In practicality, if they find a spot where they want to put in a card room, they'll apply for an application before they even finish construction. He specifically cited Freddie's in Everett—they didn't buy a food and beverage business; they bought a gambling location.

**Assistant Attorney General Ackerman** responded that the policy choice with regard to giving cities and counties greater power to in essence spot-zone gambling is the Commission's policy call.

However, if the Commission wanted to change the status quo—which is that a municipality must either ban the type of gambling in its entirety, or it isn't banned and it can go anywhere it is lawful within that jurisdiction—if they want to make that change, then Mr. Fleisher's language would accomplish that. The language in 1397 is being sold as not changing anything, simply confirming a municipality's existing zoning power. He believed that was a red herring. Mr. Ackerman believed the language in this bill is going to cause significant litigation if it goes through in the current form. If this changed nothing, there would be no need for the language. The statutory construction of this amendment would be that it had a purpose—it was intended for a reason—it changed the status quo in some way. The way it will be argued by city attorneys is with reference to the last line—that this amendment allows zoning with respect to any land uses involving gambling activities authorized under this chapter. That is going to be the argument, that the Legislature did something; that it wasn't pointless. They will be getting into litigation over how this relates to the existing preemption of the authority that's contained in the rest of the section. He suggested that if the commissioners did not want to give up that total preemption of the ability to impact gambling licenses, then the language in the proposed bill was a problem. If they, as a matter of policy want to repose that spot-zoning authority in the municipalities, then what Mr. Fleisher has suggested clearly does that. Mr. Ackerman submitted that there is not a city attorney in this state who does not think that they have zoning power to control how big a building a gambling establishment can be in; how big a sign they can have; how big their parking lot has to be; whether or not they have to comply with the Uniform Building Code; or whether they can restrict a gambling establishment to something that is zoned commercial rather than residential. He didn't think they would find any city attorney who would say they don't have that zoning authority. Mr. Ackerman believed this was a red herring that would suck the Commission into litigation, and they needed to consider that when making this policy choice.

Commissioner Ludwig stated that in view of Mr. Ackerman's and Mr. Tull's comments, he proposed a motion to let the Legislature solve this problem as they are determined to, and that the Commission take no official position on House Bills 1397/1667. There was no second, the motion died.

**Director Day** reminded the commissioners that the last time they discussed this issue, the Commission had a 3-1-1 vote opposed to the exact same bill; however, they did not discuss the amendment that Mr. Fleisher proposed at this meeting. **Commissioner Parker** commented that he would like to have a response to his earlier questions because it would impact how he would vote on one of these options discussed. He asked if it would be possible to conduct a survey or poll and to get some kind of response back. **Mr. Fleisher** said staff could try to get that out to cities and counties, but he questioned how quickly they would get a response. He believed the biggest problem would be that the letter would arrive at a staff members' desk, who would not provide an opinion on what the City Council or the Planning Commission would or would not do. Commissioner Parker concurred.

Commissioner Niemi made a motion seconded by Commissioner Parker to oppose any change to the current legislation. Commissioner Niemi said it was her hope that the kind of arguments that have been made today would be explained to the Legislature so they could understand what the commissioners think these changes would do. **Commissioner Ludwig** verified with Commissioner Niemi that her motion was based on Mr. Ackerman's comments. Commissioner Niemi affirmed.

**Commissioner Parker** said he was also persuaded by Mr. Ackerman's comments. **Commissioner McLaughlin** agreed and supported informing the Legislature. Commissioner Niemi emphasized that the Commission should testify on the bill. Commissioner McLaughlin agreed.

**Mr. Ackerman** clarified the motion, which was that the Commission was opposed to any change to the existing statute. **Commissioner Niemi** affirmed. **Commissioner Ludwig** expressed his support for the motion and affirmed that the Commission would regulate wherever gambling activity is lawfully located. Vote taken; the motion passed unanimously. **Director Day** said staff would develop testimony around the topics discussed.

House Bill 1446-Operating Budget/Consolidation-Director Day recalled that at the last Commission meeting, discussion was generated dealing with the Governor's proposal to eliminate the Horse Racing and Gambling Commission, and to create a Department of Gaming. At that time, there was no specific legislation. Since then, a bill has been introduced at the request of the Office of Financial Management called Consolidating State Functions. There are sections within the bill that apply to the Gambling Commission, and if passed as written, would eliminate the Gambling Commission, the Horse Racing Commission, and combine their functions under the Department of Gaming. Director Day addressed the written proposal along with summaries, budget information, and other explanatory materials that supported the consolidated proposal. In effect, the proposal reduces the Commission's approved budget by 14 positions and would reduce the Horse Racing Commission by 1.5 FTE, and reduces the budget available by about \$1.3 million. The proposal in writing comes in two pieces: the budget, largely in the form of a computer database, and consolidated legislation to support what is reflected in that budget. Director Day affirmed the end result would be elimination of this Commission and the Horse Racing Commission, in a non-appropriated fund under the direction of an appointed director who reports to the Governor. **Chair Orr** reported that he had talked to the budget personnel in the House and the Senate about the consolidation bill and the budget bill, and that he shared the Commission's concern. He advised that he wasn't sure how it would shake out.

Commissioner Ludwig made a motion seconded by Commissioner McLaughlin to oppose both of the bills, especially the consolidation portion of the bills. He explained that his reason was primarily so that as the director speaks to the bill, he could speak for the Commission, and that the director should follow through with the same thoughts conveyed in the letter written by the Commission at the last meeting. There were no further comments. Vote taken; the motion passed 4-1, Commissioner Niemi abstained.

**Commissioner Niemi** commented that she believed there were two important things that should be brought out in testimony by the Commission. One is the fact that the legislation doesn't seem to save much money, if that is what they're going for, and, while the Commission's letter stated how competent this organization is, she believed the stronger argument for opposing the bill and for keeping the Commission was the fact that the Commission was appointed by the Governor. Commissioners don't run for office; they don't raise money to run for office, and they are immune from any lobbyist buying them off. Commissioner Niemi emphasized that when it comes to gambling, that's probably the most important point they can offer, and the Legislature should be made aware of that. **Chair Orr** concurred. He believed Legislators have not asked the ex officios what is going on, and the ex officios have not had an opportunity to explain to their colleagues or

constituents what the Commission does, and in the zeal for efficiency, this kind of proposal was submitted without any real idea or understanding about what the commissioners' responsibilities are and what services are rendered by the commission.

**Director Day** clarified the Commission's position on HB 1637 and 1227. He noted that Commissioner Ludwig made a motion seconded by Commissioner McLaughlin to approve both bills; however, Mr. Ackerman also suggested that it might be better to vote on them separately so an individual commissioner would not be placed in a position of having to vote for or against both bills. The Chair, Commissioners Ludwig and McLaughlin agreed, and new motions were made as follows:

**Commissioner Ludwig** made a motion seconded by **Commissioner McLaughlin** to support HB1227-Promotional Games of Chance. *Vote taken; the motion carried unanimously.*

**Commissioner Ludwig** made a motion, seconded by **Commissioner McLaughlin** to support HB 1637-Compulsive Gambling. *Vote taken; the motion passed 4-1, with Commissioner Niemi voting nay.*

**Director Day** completed his Director's Report and addressed the adjusted cash flow report, which provides information on the various Bingo licensees that may be facing adjusted cash flow problems. **Chair Orr** called for a recess at 2:55 p.m. and reconvened the meeting at 3:15 p.m.

## **2. New Licenses, Changes, and Tribal Certifications:**

**Commissioner Niemi** made a motion seconded by **Commissioner Ludwig** to approve the new licenses, changes and tribal certifications. *Vote taken; motion passed unanimously.*

**Commissioner McLaughlin** commented before proceeding to the Sno-King Hockey issue, that she needed to make an open disclosure. After January's meeting, she accepted a ride home from Matt Blondin and at the time, did not think of the Sno-King issue as being a quasi-judicial issue. She advised the audience that they did not discuss the issue. **Commissioner Ludwig** reported Mr. Blondin also dropped him off in Seattle, and he also affirmed the matter was not discussed.

## **3. Petition for Variance:**

### **Sno-King Amateur Hockey Association, Inc., Kirkland**

**Amy Patjens**, Administrator, Communications and Legal Department, and **Matt Blondin**, Executive Director for Sno-King Amateur Hockey Association presented their case. A transcript of the proceeding is available upon request.

**Commissioner Ludwig** made a motion, seconded by **Commissioner McLaughlin** that the Sno-King Amateur Hockey Association Petition for Variance be granted, and the variance be extend until June of 2004. Commissioner Ludwig commented this case depended on how the Commission interprets their own rule. However, it is the Commission's rule, not the petitioner's rule, and Commissioner Ludwig explained that he read it literally; that all the licensee has to have as a prerequisite is a long-term financial obligation as of April 1, 2001, and according to Ms. Patjens'

testimony they had one. Other than that, they have a plan, and, if they follow their plan, they will be in compliance by June of 2004. He believed they have met the requirements, and that is the basis for his motion.

**Commissioner Parker** explained the he intended to vote against the motion by Commissioner Ludwig because he sees the rule differently. He believed that the rule is a long-term financial obligation as of the time that the Commission made the variance rule effective, which was after a one-year moratorium following its initial action in April of 2000. The Commission had its operators on notice in April of 2000 that there was going to be this rule. There was a one-year moratorium, and the rule was that if a licensee had a long term financial obligation, then that justified as a basis to request a variance. He noted that the petitioners exercised their option under a lease to renew the lease. Commissioner Parker believed the action of renewing the lease should not qualify under this rule because the long-term financial obligation was at the time that the Commission's rule became effective. He affirmed the licensee had a financial obligation, but when they took action affirmatively to extend it, that made it a different instrument. Commissioner Parked did not believe the licensee could link the two and say that as long as they keep renewing it, they would be re-qualified, and, that this lease qualifies the licensee for the variance. He believed that as a matter of interpretation, the Commission's schedule for tomorrow contained an agenda item to consider a proposal to adopt a new rule that would eliminate the whole variance procedure. Commissioner Parker affirmed the Commission needed to come to closure on this case. He reminded the commission that the attorney general representative advised it could take up to three months for final closure. Commissioner Parker felt that if the commission takes action to grant the petition, that action would open the door for other operators who are in a similar situation to come before the commission, and the commission would be obliged to treat them the same. He stated for the record, that it has nothing to do with this particular petitioner—everything the commission has heard about the licensee and their work, they have a very respectable operation; this is a matter of how we interpret our rules – and Commissioner Parker reaffirmed that he would not interpret it the same way as Commissioner Ludwig.

**Commissioner McLaughlin** responded that she interprets it more liberally than Commissioner Parker, and she felt that at the time the licensee extended their lease, it was a thing they would do at that point in time – they were operating in compliance; so, why wouldn't they extend their lease. She read it as being in a long-term lease at the time.

**Commissioner Niemi** reported that she intended to vote against granting the variance because she believed that there was not a long-term financial problem, and because they didn't extend that lease until October. They waited many months after the moratorium to extend the lease. She affirmed that her interpretation is the same, and different, from Commissioner Ludwig's interpretation.

There were no further comments. **Chair Orr** called for the vote. *Commissioner Ludwig and Commissioner McLaughlin voted aye, Commissioner Parker and Commissioner Niemi voted nay, the Chair voted nay; the motion failed with three nay votes.*

#### **4. Petition for Review:**

**David Yamashita, Card Room Employee, Tukwila**

**Paul Goulding**, Assistant Attorney General, announced that Mr. Yamashita is making a Motion for

Continuance and counsel is not opposed. Staff sent a case binder to Mr. Yamashita, and apparently, he never received it. Therefore, it has been requested that this review be set over until March. The Petitioner and the Commissioners concurred. An Order of Continuance will be prepared for signature at Friday's meeting.

**5. Requests for Continuances:**

**Seattle Skating Club, Mountlake Terrace**

**Yakima YWCA, Yakima**

**Amy Patjens**, Manager, Communication and Legal, reported that both requests may be removed from the agenda because both licensees stopped operating, surrendered their licenses, and have withdrawn their Petitions for Variance. She advised that staff did not have the withdrawal requests at the time agenda packets were mailed. The Commission concurred.

**6. House-Banked Public Card Room Reviews:**

**Harrell Enterprises, Inc. d/b/a Magic Lanes Restaurant, Seattle:**

**Dawn Warren**, Licensing Services Division Supervisor, reported this organization has applied for a license to operate nine tables of house-banked card games. They were incorporated as a privately-held corporation and the corporate headquarters is located in Seattle. The membership of the corporation consists of James Harrell, President and Chairperson owning 25 percent of the corporate stock; Douglas Harrell, Treasurer, owning 50 percent of the corporate stock, and Doris Harrell, owning 25 percent of the corporate stock. The applicant has no other house-banked licenses at this time. Special agents from the Financial Investigative Unit conducted a criminal and personal history background investigation on all substantial interest holders and initiated and completed a financial investigation on both the corporation and personal stockholder finances. No disqualifying information was found. Special agents from the commission's Field Operations Division completed an onsite preoperational review and evaluation (PORE), and the applicant was found to be in compliance. Based on the licensing investigation and the onsite review and evaluation, staff recommends Harrell Enterprises, Inc. d/b/a Magic Lanes Restaurant be licensed as a house-banked public card room and be authorized to operate up to nine tables with a maximum betting limit of \$25.

**Doug Harrell** introduced himself. **Commissioner Ludwig** asked when they planned to open. **Mr. Harrell** responded that this evening would be wonderful.

**Commissioner Ludwig** made a motion seconded by **Commissioner Niemi** to approve licensure of Magic Lanes Restaurant located in Seattle, as a house-banked card room authorized to operate up to nine tables with a maximum betting limit of \$25. *Vote taken; the motion passed with five aye votes.*

**House-Banked Public Card Room Statistical Report**

**Ms. Warren**, reported the with today's approval, there are 76 licensed, house-banked card rooms currently operating; three are licensed, but not operating at this time.

**7. Group IV Qualification Review:**

**Loyal Order of Moose #1774, Vancouver**

**Special Agent Keith Schuster**, Financial Investigations Unit, explained this report covered the year ending April 30, 2002. The organization was formed in 1957 and is located in Vancouver,

Washington and has been licensed since 1974. They are currently licensed with a Class J Bingo license and a Class J Pull-tab license. The stated purpose for the organization is to provide assistance to members and families in times of need, and to support various community services. The organization is qualified as a nonprofit organization and has made significant progress toward their stated purpose. Staff recommends that the Loyal Order of Moose #1774 be certified to conduct gambling activities in the state of Washington as a nonprofit organization. Agent Schuster noted that on January 16, 2003, staff received a letter from the organization that stated in part that they had officially terminated their Bingo operations because their long-range plans were to do a physical realignment of their facilities and to eventually restart their Bingo operations on a smaller scale. The lodge governor and Bingo manager were present earlier, and before they left, they indicated that they were undergoing discussions to surrender their license within the next two weeks. Currently, their license is in good standing, and they still possess a punchboard/pull-tab license.

Commissioner Parker made a motion seconded by Commissioner Ludwig to certify the Loyal Order of Moose #1774 located in Vancouver, to conduct gambling activities in the state of Washington as a nonprofit organization.

Commissioner McLaughlin noted her concern about some material submitted by the lodge. *Vote taken; the motion passed with four ayes.* Commissioner McLaughlin voted nay.

**8. Other Business/General Discussion/Comments from the Public:**

**Chair Orr** called for public comments. **Director Day**, due to the lateness of the day, recommended the executive session slated for this afternoon be facilitated on Friday, and that the charitable gambling presentation also be conducted on Friday, before discussion on the variance provisions. **Commissioner Parker** pointed out that he had a conflict and would prefer to discuss the variance issue earlier because he needed to leave the meeting by 10:30 a.m. **Chair Orr** affirmed.

At 5:25 p.m., **Chair Orr** adjourned the meeting.

**COMMISSION MEETING  
FRIDAY, FEBRUARY 14, 2003  
MINUTES**

**Chair Orr** called the meeting to order at 9:30 a.m., at the Labor & Industries Headquarters Auditorium in Olympia, and welcomed the attendees.

**MEMBERS PRESENT:**                   **COMMISSIONER GEORGE ORR, Chair**  
**COMMISSIONER LIZ MCLAUGHLIN, Vice Chair;**  
**COMMISSIONER CURTIS LUDWIG;**  
**COMMISSIONER JANICE NIEMI;**  
**COMMISSIONER ALAN PARKER;**

**OTHERS PRESENT:**                   **RICK DAY, Executive Director;**  
**ROBERT BERG, Deputy Director;**  
**ED FLEISHER, Special Assistant, Policy & Gov't. Affairs;**  
**DERRY FRIES, Assistant Director, Licensing Operations;**  
**CALLY CASS-HEALY, Assistant Director, Field Operations;**  
**AMY PATJENS, Administrator, Communications & Legal;**  
**MR. ACKERMAN, Assistant Attorney General;**  
**SHIRLEY CORBETT, Executive Assistant;**

**Chair Orr** explained that the agency has a Partnership Program wherein employees visit the Commission meeting to observe how the Commission operates. He introduced and welcomed staff member Melanie Bowdish. He also noted that agenda items would be taken out of order to accommodate Commissioner attendance timeframes.

**1. Charitable Gambling Presentation:**

Cally Cass-Healy, Assistant Director identified the legislative purpose of nonprofit gambling in Washington State as defined in RCW 9.46.010. It states that raising funds for bona fide nonprofit and charitable organizations through certain gambling activities is in the public interest. Only certain nonprofit charitable organizations qualify and primarily organizations classified exempt by the IRS for federal income taxes qualify. All organizations must be organized for at least one of the following purposes: They must be charitable, benevolent, eleemosynary, educational, patriotic, political, social, fraternal, civic, athletic, and agricultural. Additional requirements to conduct charitable or nonprofit gambling activities include that they must be organized for at least 12

months; they must have no less than 15 voting members that elect the governing body. They must have the ability to demonstrate significant progress toward their stated purpose, and this is measured by compliance with the organization's bylaws and articles of incorporation, providing services to the public that relate to its stated purpose, and financial standards set forth in WAC 230-08-255, which is a financial analysis of how gambling income is used during the fiscal year.

Certain types of gambling activities can be conducted by nonprofit charitable organizations. They include Bingo, punchboard and pull-tab, raffles, amusement games, and fundraising events. **Ms. Cass-Healy** noted that fundraising events (FREs), which are typically known as Reno Nights, have been declining in number and dollar volumes since the mid 1980s. There were only seven FREs held in the last 12 months in Washington. Part of the reason cited for this decline is the \$10,000 annual net receipts that each organization is limited to by law. There are a broad variety of programs operated by nonprofit charitable organizations that are driven by the purpose of each particular organization. Many of them have been seen in the qualification reviews and the program reviews that come before the Commission. These programs commonly include social services, education, athletics, and youth development. In Washington, more than 67 percent of licensees have less than \$100,000 in annual gross receipts. Less than 13 percent of licensees (Bingo licensees) have more than \$2 million in annual gross receipts. Prize payouts currently average between 68 and 75 percent for all Bingo games. Of these proceeds, for the fiscal year 2000, Bingo had a total net income of \$9,600,000 which was 6.08 percent of gross. In fiscal year 2002, that decreased to \$7,989,000, but the percentage went up slightly to 6.23 percent of gross. All other nonprofit charitable gambling activities in 2000 were slightly over \$11 million; and in 2002, they were slightly over \$9 million. The majority of the expenses for Bingo goes back to the players in prize payouts. The other gambling mainly consists of pull-tabs, but also includes drawings and fundraising events.

The Gambling Commission has several key tools they use to regulate nonprofit gambling in Washington. One is the Qualification Reviews for organizations whose gross is greater than \$3 million. This is to determine compliance with significant progress according to the dollars spent on their programs. Those findings are presented to the Commission every three years for each organization. Program reviews are also conducted for organization with greater than \$3 million in gross receipts and the content of their programs are analyzed and confirmed. In addition, financial records and statements are reviewed to ensure the organization is meeting their stated purposes.

Cash flow compliance procedures are also one of the agency's regulatory tools. This is done to ensure the nonprofit charity is making a profit to benefit the organization's stated purpose. It sets the minimum requirement according to the gross receipts earned. The Legislature intended these organizations to use gambling as a fundraiser; so, cash flow or net income requirements were created to prevent charitable and nonprofit organizations from gambling for the sake of gambling. Compliance and records inspections are conducted in the field to ensure games are operated fairly and records are accurate.

**Ms. Cass-Healy** displayed several charts that described the advent of gambling from 1992 to 2002. She noted that the net income task forces were conducted in 1995, 1998, and 2001, and she displayed charts showing the Bingo payout percentages by class over that period of time. There were significant increases in the higher classes which have gone from about 68 percent to about 72 percent on average; however, she pointed out that the percentages are still lower than the other

classes. The other classes average in the mid to high 70s. Total payout percentage for Bingo was also reviewed. History showed that it has been all over the board. In 1998, during a task force, prize payout percentages were deleted. They were taken out and staff decided that the best way to regulate, was to regulate the bottom line.

Bingo attendance by license class reviews showed a very significant drop, especially Classes F through J; however, Bingo gross receipts per player increased especially in the higher classes. The number of Bingo licenses over the 10 years goes from about 500 down to 275, and she noted that almost half of the Bingo licenses have ceased within the last 10 years.

**Commissioner Niemi** asked if the commissioners could get a further description of the net incomes, assuming that that net income is what goes to the charitable purpose (is it athletic—or whatever kind of thing they donate to), and how much of that includes salaries and how much goes to an individual person. She requested a breakdown on the net. **Ms. Cass-Healy** asked if this was a one-time basis, or as organizations are brought forward for the qualification reviews. **Commissioner Niemi** responded that she meant over the last two years, about eight quarters for each licensee.

## **2. Bingo Adjusted Cash Flow and Variance Procedures:**

### ***WAC 230-20-059***

**Amy Patjens**, Administrator, Communication and Legal Department, reported that staff was asked to bring forward a rule that would repeal the variance process that is currently in the adjusted cash flow rule. This rule proposal deletes Section 5, containing the two variances. One is when an organization is within 10 percent of the requirement, and the other variance is when the licensee has a long-term financial obligation. She noted the current process, in effect, adds an additional step – what is the usual administrative process. Currently, after the Director issues charges, the licensee can do two things: 1) They can request a variance if they feel they meet either of the provisions; and 2) They may request a regular administrative hearing. If they submit a variance request that comes before the Commission, and, if the variance request is denied, then the case still goes back to an administrative law judge for a revocation hearing. Then, either party may appeal that decision. If there is no variance process, **Ms. Patjens** explained that the way that this rule is set out, the case would then be more similar to the agency's other administrative cases. The Director would issue charges for revocation; the party could request an administrative hearing, which would be held before an administrative law judge, either party could appeal, and the Commission would continue to sit as the appellate decision maker in that event.

Staff also updated the definition of "Bingo operation" to state that it consists of drawings that are done at the Bingo hall itself, not raffles that are conducted outside of the Bingo hall. Bingo operation is part of the cash flow calculation. The cash flow calculation is meant to include revenues and expenses that are part of the Bingo game. For example, typically a licensee that has a Bingo license has a pull-tab license. Staff purposely meant to include those revenues and expenses in the cash flow calculations. If the licensee happens to have a raffle as part of their Bingo game, that is meant to be included as well. It is not meant to be included if an organization is doing a raffle completely separate—if they're selling the tickets at a totally different function, not related to the Bingo game. Those revenue and expenses were not meant to be part of the cash flow calculation.

**Ms. Patjens** referred to a letter received from Don Kaufman of Big Brothers/Big Sisters-Spokane County, wherein he expressed concerns about not having the variance process. This was discussed extensively at the study session with the industry, and she anticipated some members would wish to testify. Staff recommends filing for further discussion.

**Commissioner McLaughlin** said it was clear that whatever the Commission is doing, it wasn't working. She asked if there was anything in between, or if there are any procedures that might work better than a variance. **Ms. Patjens** said the Commission Action Team discussed other alternatives and the potential downside of eliminating the variance process. The feelings of those who were at the meeting, including people who were around for the '95, '98, and the '01 task force, was that the variance process under the old net return rules did not work very well either. There was one case that came before the Commission and at about that time, the commissioners believed that they needed to place a moratorium on sanctions because of the big decline in the industry. Ms. Patjens believed the benefit of going to an Administrative Law Judge, is the same benefit the Commission has with the other cases they have heard—the ALJ conducts the fact-finding and fact gathering. She concurred the current process has been cumbersome for everyone involved—the commissioners, the licensees, and staff.

**Commissioner McLaughlin** noted the Commission revoked a license at yesterday's meeting. **Ms. Patjens** clarified the Commission denied a petition, and that licensee will now go back to a revocation hearing before an administrative law judge. Without the variance process, that is how the cases would work—they would go to an ALJ first, and either the agency or the licensee may appeal to the Commission. **Commissioner Parker** noted the licensee also has the option of not going to the ALJ and simply applying for a license at a lower level, where the facts would seem to indicate they would then be able to meet the net return requirement. Ms. Patjens affirmed that in most cases the licensee would surrender the existing license and probably reapply for whatever level they thought they would be able to start at. Commissioner Parker asked if a fee is incurred when a licensee requests a hearing before an administrative law judge. Ms. Patjens responded that fee is covered as part of their regular license fee, the only additional cost they might have is if they decided to hire an attorney.

**Director Day** affirmed addressing two possibilities at the January commission meeting: one was the repeal of a variance, and secondly, the possibility of a clean up, which would be to take the current two variances, collapse them, and make one general variance. The Commission directed staff to bring back a repeal, which is before the commission today. As staff reviewed the whole variance concept, it was noted that it had been increasingly difficult to develop something that provided consistent results, but also had a process. There appears to always be a struggle with one way or the other. If a variance is granted for a specific dollar amount for instance, and the licensee doesn't get to the dollar amount, there is a problem. If an open-ended variance is granted, then the Commission has basically given the licensee permission to not return any profits to its charity. Director Day affirmed the struggle the Commission is having with the variance process is how to design something that can be applied consistently and fairly, and preserves the Commission's ability to ensure that money goes back to the nonprofit over time. That has been a tremendous challenge, which is obvious from the multiple task forces that have occurred over the years.

**Don Kaufman**, General Managing Director, Big Brothers/Big Sisters-Spokane County shared some of the issues he sees developing. In response to Commissioner McLaughlin's question as to whether there is another alternative, he believed there are alternatives. He believed the Commission has found themselves to be in the front line in the waiver process, and that they could be in the secondary position if they desired. He believed the waiver issues need to stay in the rule—that the appellate judge should be assigned the task of dealing with the variables for why an organization is out of compliance; then it boils down to being above or below the bar. The appeal process back to the Commission is whether the appellate judge made the right or the wrong decision—and not why they made the decision. He supported leaving the waiver issues in the rule and instructing an ALJ to take those considerations into account in their decision making process. He referred to the legislative intent: "the Legislature further declares that the raising of funds for the promotion of bona fide charitable or nonprofit organizations is in the public interest as is participation in such activities and social pastimes." In reference to the Sno-King ruling, Mr. Kaufman did not think the Commission took into account what would happen to the population in Kirkland that has been playing Bingo. Now players have to drive 25 miles either direction to find that same level of Bingo. That is the part of the legislative intent that was not considered. He commented that we got to this point through a negotiated process. Now, decisions are being made at the Commission level, and the negotiated process possibilities are being eliminated. He inquired why staff and the commissioners aren't sitting down with the licensees and trying to solve the problem jointly as opposed to solving it at the top and cutting up an issue with very little input. He believed everyone ought to go back to the drawing board and see what they can come up with. The dollar spent per customer has been going up, that has geographic ramifications—it goes up in some areas and down in others. In 2002, Mr. Kaufman reported his buy per player peaked at \$52.58 for Bingo and pull-tabs. Last year they were at \$49.96. During that period of time his organization lost 29,000 plays and lost almost \$2.50 a head in the process. Before, the buy was going up and it was cushioning the loss of player count. He emphasized that if the Commission does away with the variance, as proposed, they have no possibility of taking individual circumstances into consideration.

**Commissioner Parker** asked if would be helpful to compare the contributions made by the Bingo operators to their charitable purposes, to contributions made by tribal casinos out of their 1 or 2 percent—the kinds of contributions, for what purposes, and the dollar amounts. He inquired if that would be talking apples and oranges. **Mr. Kaufman** thought they were two different issues. He noted that regarding his Bingo games, he must turn over the proceeds for his nonprofit purpose—it is not a charitable contribution; it is supplying a source of revenue for his program purpose/mission, and his nonprofit purpose. Most of that money, as in most social services, goes to salaries, benefits, taxes, and rent. They are supplying the salaries to provide actual services. They are not writing contribution checks to other organizations. Mr. Kaufman reported that in 1992, he funded his program at 95 percent from Bingo. This past year he funded it at about 20 percent from Bingo, and he has had to make up that revenue through other fundraisers. In the past, he was competing only with other gaming people to fund a nonprofit purpose—now he is competing with a charity that the public contributes to for the charitable dollars for special events, for annual campaigns, for endowments, for grant money, and foundation money. He affirmed that he is now taking dollars away from other nonprofits, and there are only so many dollars in the pool.

**Commissioner Parker** responded that if one believes there are only so many dollars in the pool, which is essentially a zero sum analysis of the marketplace (and we are a public regulatory body),

and we are trying to figure out the best way to implement the public purposes of the law, it appeared that one of the public purposes of the law was to authorize Bingo operations because they contribute to the charitable purposes for which they were established. **Commissioner Parker** indicated that if there are only so many dollars in that marketplace, whether those charitable contributions come from tribal casinos or whether they come from nonprofit organization operating Bingo licenses, might essentially all be the same. **Mr. Kaufman** asked if Commissioner Parker was suggesting that the tribal casinos would make up the difference. Commissioner Parker responded that he did not mean that at all, noting that Mr. Kaufman had made the point earlier that one of the reasons the commissioners should consider maintaining this variance policy was because Big Brothers/Big Sisters and other entities have been negatively impacted by the expansion of tribal casinos. Following the logic of that statement, he asked if they are negatively impacted, does that mean the public is receiving less, or is it all the same—tribal casinos are making charitable contributions as required by their compacts. Mr. Kaufman responded that he hasn't seen any of those dollars, and affirmed they were required. He said the only dollars coming out of the current casino in his area are sponsorship dollars. They have not gotten their committee together to give away money, and they have been in operation now for two years.

**Commissioner Parker** asked staff whether the Kalispel Casino has been making their charitable contributions. **Director Day** confirmed that they had not made their two percent contributions at this point, and he reported Mr. Fleisher has been working with the tribe to complete the Memorandum of Understanding to get the committee process formulated. **Mr. Fleisher** affirmed he is continuing to work with the Kalispel Tribe. He reported there are only two types of contributions the tribes were required to make under the compact. One is the two percent contribution, which is not the charitable side. However, the impact affects police, fire, and other services. He noted he half percent of the machine revenue that is required to go to charity, doesn't go through that committee—it is facilitated by the tribe itself, and, he was not familiar with what that particular tribe has done with those contributions.

**Commissioner McLaughlin** commented that she was surprised that 13 of the top 40 operations had closed. When the rule was changed from net income to adjusted cash flow, she recalled that Mr. Kaufman was one individual who testified that perhaps certain Bingo halls should close. She asked Mr. Kaufman how he reconciled that statement with being concerned about the 13 that have closed. **Mr. Kaufman** responded that those that he was referring to have closed, and were part of the process. They weren't part of these 13. Mr. Kaufman reported there were some games in the Spokane area that didn't have a strong nonprofit purpose, or a budget that they were funding to, and that particular game no longer exists. His concern was where are we heading, and what do we have to rely on. His correspondence to the commission outlined a dozen different variance issues that won't be able to be addressed in the process if variances are eliminated. He emphasized that if the Commission didn't want to be the front line or handle that first hearing, to keep the variance process in some fashion; assign them to the ALJ, and make sure the ALJ has to deal with the reasons for why someone is out of compliance, and not just whether they are out of compliance. If the variances are thrown out, it eliminates the appeal process. The Commission will be deciding whether or not the ALJ made the right decision or not, and the licensee would not be able to address why they are out of compliance with the Commission. Commissioner McLaughlin thought that made sense, and asked if the reasons for variances could be retained in the WAC, and have the process go to the ALJ. **Director Day** affirmed that was a possibility, and that staff may have to draft guidelines. He

cautioned that the end result might be that we have the same issues to deal with; only later, and there would be a larger record of what was discussed to draw from.

**Commissioner Ludwig** explained that he generally considers himself sympathetic to nonprofits and charities, and that he keeps reminding himself of the comments regarding non-tax dollars at work. However, when the reasons for variances are discussed, the list of reasons may be unending—economics, local issues, competition, and everyone that is in the business could have some identifiable reason, other than poor management. He asked if the Commission would be stepping out of one hole into another one. **Mr. Kaufman** said he didn't know, however, circumstances are different for each and every licensee. The real issue in his mind was whether or not licensees could survive, or could they do better for their nonprofit if given a period of time. Commissioner Ludwig questioned whether forgetting about the negative return rule for two months, and extending it for a year, and looking at it at the annual qualification review would help. Even then, if they looked back and noted the organization didn't made any money; or lost money all year—they would be out of business—that's a tough position. Mr. Kaufman said he understood. He advised that he has a very responsible board, and if they lost money, he guaranteed his building would be up for sale, even if they had to take loss. **Chair Orr** commented that unfortunately the Commission is not just dealing with one organization; it has the whole state to deal with—and, if in fact the tribe is not complying with the regulations, the Commission would address and fix that issue.

In closing, **Mr. Kaufman** wanted the Commission to know how important \$150,000 to \$200,000 is. Yesterday, the Commission voted against an organization that gave \$150,000 in grants over the last 12 months. Having a business opportunity that generates \$150,000 represents money and services that go a long, long way.

**Mr. Ackerman** believed the issue before the Commission is whether there are there alternatives. He indicated this is limited only by one's imagination. If there is an alternative process, (the legal consideration), it needs to have clearly-defined, articulated standards that the Commission would apply to the cases that come before the Commission, whether it is on appeal, or whether the Commission is hearing them as the frontline. Mr. Ackerman noted the tough times that the Bingo facilities have been undergoing, have been occurring at least since he has been advising the Commission. First, under the old net return rules, and now under the variance process. It is unfortunate, but it appears to be a sign of the times. He acknowledged that every case he has heard surrounding this issue has brought forward articulate, well-meaning people to talk about the very good works that their organization does. The Commission is always torn with wanting to help out good people who are trying to fulfill the good cause. The question becomes, is there going to be a standard that the Commission will adhere to and use to make these decisions, or is the Commission going to essentially decide these things case-by-case, based on the Commission's assessment of whether or not the organizations are doing a good job of running their businesses and/or whether the Commission is sympathetic to the cause that they exist to further. Mr. Ackerman believed that is standard-less discretion. He cautioned that if the Commission adopts that sort of ad hoc approach, the Commission would be susceptible to a legal challenge that the Commission is operating in an arbitrary fashion. To the extent that there may be alternatives, they would have to be things that provide standards against which the commissioners could judge the petition or the appeal (whatever process is ultimately established) and that is exactly what this Commission and its predecessors have been groping for, for years. **Mr. Ackerman** affirmed it was not fair to suggest that this Commission

has operated without wanting to hear input from the industry on their problems and the possible alternatives that could be created to allow for variances, waivers, or whatever other terminology the licensees would want to use. **Mr. Ackerman** noted that has been going on for a decade or more, and the Commission and its predecessors have been trying different ways to try and accommodate all of this. Despite a decade's worth of effort, here we are today, with a process that some suggest, flatly doesn't work.

The rule before Commission, if a decision is made to file it today, will be up for hearings for at least three more months. **Mr. Ackerman** suggested that if someone has an alternative process to offer, and they can define what the appropriate standard is, and can define it in a way that doesn't simply throw it in the commissioners' laps, asking the commission to listen to their story and feel sympathy when the time comes; then they should bring it forward. The proposed rule is susceptible to amendment, and if any of the concerned individuals want to bring forward an amendment at the next hearing, certainly they can do that if the Commission wants to entertain such amendment, rather than convening yet another task force, and going the route that's been tried repeatedly. Mr. Ackerman emphasized that if the Commission wants its decisions to be upheld, the Commission needs clearly defined standards that a court can look at and say, yes, the Commission applied this in good faith, and not in an arbitrary fashion, and came to their decision.

**Commissioner McLaughlin** asked if the Commission could put in certain reasons such as they heard in the variance. **Mr. Ackerman** responded that the answer was yes and no. If the amended rule being proposed is enacted, the ALJ would not be in a position to say this is a good business; this is a bad business; they operate well; I'm sympathetic; I'm not sympathetic. An ALJ wouldn't be able to do that. Mr. Ackerman didn't know what would be gained by giving an ALJ standard-less discretion to say I like this business or I don't; I'm sympathetic or not. If the ALJ says, I don't think these are good reasons and rules against the facility, then the appeal would come to the Commission, and they will hear exactly the same arguments the ALJ heard, and there would be no standard, other than the five commissioners as individuals approving or disapproving the organization.

Commissioner McLaughlin asked if the organization was out of compliance, for whatever reason the Commission set, would they go to the ALJ. Mr. Ackerman affirmed there could be different reasons. One of them could be that they could stay in business for a while. They may also be faced with applying for a license at a different level. Those are decisions the licensee has to make, and that may not be desirable for different reasons. Mr. Ackerman acknowledged that going to a lower class of licensure may not be a good thing for some people, but the Commission is faced with some difficult choices.

**Commissioner Ludwig** made a motion seconded by **Commissioner McLaughlin** to file the rule for further discussion. **Commissioner Ludwig** commented that he thought it would be best to file the rule now and not delay a decision until later by not filing it because staff and the industry would be working on it over the next three months. **Chair Orr** asked for the audience to postpone their comments until the next, and future meetings, where there would be ample opportunity for their viewpoints to be heard. He then called for the question. *Vote taken; the motion passed 5-0.*

**Chair Orr** called for a recess at 10:30 a.m. and recalled the meeting at 10:45 a.m. (Commissioner Parker left the meeting.)

### **3. Approval of Minutes: Regular Meeting, January 9 and 10, 2003:**

**Commissioner Niemi** made a motion seconded by **Commissioner Ludwig** to approve the Regular Meeting Minutes of January 9 and 10, 2003, as presented. *Vote taken; the motion passed with four votes.*

### **4. Staff Presentation - Electronic Gambling Lab:**

**Dallas Burnett, Program Manager**, presented a brief overview of the functions of the Electronic Gambling Lab (EGL) and the successful regulation of electronic gambling in the state of Washington. He advised the mission of the lab is to test, review, and document electronic gambling equipment for compliance and integrity for the protection of the public. The EGL performs several key processes.

Submission Testing – The lab looks at every piece of hardware and software—all the controls/components of how the game is played, the settings, the operating systems, and its software. They review the records of how the play has occurred; both on and offline, and they look at all unique identification codes that identify the different hardware, firmware, or software components. In evaluating software and hardware, the EGL looks at security—the processes to protect the integrity of that game.

Inspection and Investigative Reviews – The EGL verifies compliance and integrity, and assists all regulatory personnel by using inspection reviews and investigative reviews. Staff may go to the facilities and look at their systems and make sure they are the exact same systems that have approved.

Notice of System Incidents (NSI) – Anything that happens that is not normal is documented via the NSI process. For example, a system might crash—the EGL can document that it crashed, why it crashed, if there's something wrong with the chip, and whether something was wrong with the software. It could be a component or the whole system. The EGL has also had theft investigations put on an NSIs. Once a NSI is dropped, efforts are undertaken to identify the problem, to have the manufacturer fix it immediately, or pull the game from play.

Training – The EGL offers hands-on introductory and advanced training activities in the lab, which is provided to the tribal gaming agencies and in-house special agents. They also train coordinators to conduct other training.

Pre-Operational Checks – When a facility first gets their system, the EGL conducts some initial training. Many times, that initial training may be the first time the regulatory agents have seen that device.

Database and Application Development – The EGL creates their own databases and applications to help them track, manage, document and verify all the components they approve or disapprove. **Mr. Burnett** described the submission testing process for a Tribal Lottery System (TLS) and all other electronic submissions. Currently there are over 10,267 player terminals in the state; there are 1,377 signed components, and over 104 different games. He explained that the Electronic Gambling Lab is the regulatory professional when it comes to electronic compliance.

**5. Vote to Re-Adopt WAC 230-08-017:**

**Amy Patjens**, Administrator, Communication and Legal Department, reported that at the November meeting the fee rules were passed to be effective June 30, 2003. After they were passed, staff found that the term “annual” was inadvertently left out of the identification stamp rule when it was reformatted. The rule as currently written, means the licensee would only have to get a stamp once rather than getting one every year. Staff’s intent was that licensees should obtain a new stamp every year. Staff inserted that appropriate language, and is asking the Commission to readopt the rule with this clarification. The effective date would remain the same, June 30, 2003. Staff recommends readopting with the correct language, and Ms. Patjens affirmed the rule is up for final action.

**Commissioner Ludwig** made motion seconded by **Commissioner Niemi** to readopt WAC 230-08-017 with an effective date of June 30, 2003. **Chair Orr** asked for public comments, there were none. *Vote taken; the motion passed with four aye votes.*

**6. Digital Surveillance for Card Rooms:**

**WAC 230-40-625, WAC 230-40-825, WAC 230-40-550, WAC 230-40-815, WAC 230-40-860, WAC 230-40-875, and, WAC 230-40-895:**

**Cally Cass-Healy**, Assistant Director, reported that currently Gambling Commission rules require card room surveillance to be recorded onto VHS tapes. There have been several requests from licensees and manufacturers to allow this type of system in order to keep up with the technology and allow more effective surveillance. These rules were discussed with staff, stakeholders, and industry experts over many months. Staff decided that rather than including the technical details in the rules, which may become obsolete over time; the rules should set forth minimum standards for digital surveillance.

**Item 13A – WAC 230-40-625** – Currently, this rule has regulatory requirements for closed circuit television system surveillance in Poker rooms or what staff classifies as Class F establishments. Language was added to authorize digital surveillance in the Class F card rooms. Safeguards were established under Section 3 to ensure the authenticity, integrity, and readability of recordings, and to ensure their current regulatory program is not compromised by the use of digital surveillance. Under subsection 5, staff added the reporting requirements so they would be included in the surveillance rule itself. Under subsection 9(c), the retention period for recording jackpot payouts of \$500 or more was increased from 7 days to 30 days, to maintain consistency with the Commission’s current retention requirements for recording of jackpot payouts. In addition, there were some housekeeping changes. The word “tapes” was removed and recording will be used to encompass both analog and digital recording.

**Item 13B – WAC 230-40-825** – Sets out similar requirements for the house-banked card rooms. Language was added to authorize digital surveillance in these house-banked card rooms. Safeguards were also added to this rule in subsection 3 to ensure the authenticity, integrity, and readability of those recordings. Subsection 5 was added to include the suspicious activity reporting requirements for surveillance in the surveillance rule itself. Again, there were housekeeping changes, including changing the word “picture” to “images” and “tape” to “recording.”

Items 13C to 13G – Involved housekeeping changes only. They include WAC 230-40-550 Incompatible functions defined; WAC 230-40-815 Administrative and accounting control standards; WAC 230-40-860 Table inventory and opening procedures; WAC 230-40-875 Table closing procedures; and WAC 230-40-895 Key control. Terminology was changed to make the language compatible with digital surveillance requirements. The word “tape” was removed or changed to “recording.” In addition, headers were added to some rules for clarity. Staff recommends filing the rules for further discussion with a proposed effective date of July 1, 2003.

Commissioner McLaughlin made a motion seconded by Commissioner Niemi to file the rules package for the Digital Surveillance Rules for Card Rooms.

**Commissioner Ludwig** commented that these rules were proposed by staff and he didn’t know whether anyone was currently using a digital surveillance system. **Ms. Cass-Healy** responded that they were not currently in the card rooms, however, there is one tribe who is testing a digital surveillance system to see how it works, and may then move it to their casino. Ms. Cass-Healy advised that staff has had requests for digital surveillance, and there are some new card rooms that want to install that in place of the taped surveillance. Commissioner Ludwig inquired if the rule was really needed. Ms. Cass-Healy believed so because technology was moving that direction. The industry believes it is a much more effective system. Commissioner Ludwig commented that this rule would have no significance until a Class F or greater card room goes to a digital surveillance, and would be available when they need it. Ms. Cass-Healy affirmed, and anticipated that it would happen very quickly.

Mr. Ackerman confirmed for the record that the motion was to amend WAC 230-40 and then the following subsections -625, -825, -550, - 815, - 860, -875 and -895 as indicated by Ms. Cass-Healy. **Commissioner McLaughlin** affirmed. *Vote taken; the motion passed 4-0.*

## **7. Other Business/General Discussion/Comments from the Public:**

**Chair Orr** called for public comments.

**Clyde Bock**, Sno-King Bingo, advised he had two issues to address, perhaps out of disappointment, and to look for clarification. It appeared to him there is the potential that the date of April 2001 had three purposes. If a new licensee came into being and they elected to develop a lease, they had something to look at. However, if a licensee already had a small Bingo license and wanted to expand and lease a larger facility, they had the same criteria to look at. If an organization was out of compliance and subsequently extended their lease, they knew what they were doing, and would have to live with the consequences. Mr. Bock emphasized that at the time Sno-King renewed their lease, they were in compliance. He believed that in effect, the Commission was saying that any organization that has a building, whether they refinance or put in a new lease, or extend a lease, if at any time in that extension period they should fall out of compliance, they risk potentially losing their license. He called into question whether any organization could consistently predict six months, two years, or five years into the future, and hoped to get some clarification on that issue.

The second issue related to the funds raised. **Mr. Bock** noted their organization made \$150,000. If he told the Commission that they donated \$20,000 to domestic violence program; another \$20,000 to feed the homeless; and another \$20,000 to help the fire department buy a new engine; and provided

\$20,000 for organization purposes, the Commission would say that was good—that is a lot of money. That is exactly what Sno-King did; only the Commission called it a gambling tax. He advised that he fully expects to pay business taxes that support the substructure of business. He expects to pay gambling fees because that furnishes the regulations. Beyond that, the licensees are required to pay a gambling tax that goes directly to the city or county within which they operate. That means Sno-King not only generated the \$150,000 that went to his organization, but they also generated \$110,000 they had to pay in that same time period. If he could have kept \$64,000 of that revenue, their organization would have been in compliance. **Mr. Bock** questioned why the licensee isn't getting credit some place for the gambling tax consideration. Sno-King generated \$150,000 plus the \$110,000 and yet that \$110,000, because it's called a gambling tax, goes through as an expense. He believed that is a significant issue, and it somehow gets lost in the process. He welcomed comments and thoughts.

**Commissioner McLaughlin** responded that when the net return process was used, the Commission did take into consideration the gambling tax. **Mr. Bock** responded that the net return effort was an attempt to simplify the process of net return as much as possible. The unfortunate thing is that the gambling tax is variable throughout the state, and they decided to put it all into a pot and try to come up with something that everybody then would be semi-equal. He asked the commissioners to understand and appreciate that when they talk about net return, there is an additional \$110,000 expended that they don't get credit for. Mr. Bock advised that he was looking to create an environment where an appreciation is built for that figure—it's not just a tax figure—it is above and beyond the taxes they pay for the infrastructure that allows any business to operate. **Chair Orr** affirmed Mr. Bock brought up some very good points. Mr. Bock responded that all he was looking for was an explanation as to why the \$110,000 doesn't come into play at some point. Chair Orr promised the Commission would endeavor to answer his questions.

**Steve Strand**, Interim Executive Director, Big Brothers/Big Sisters of King and Pierce Counties, addressed comments in reference to the compliance issue being a broken function, and that one of the symptoms of that breakdown was the need to readdress it. He disagreed. Given that the RCW requires that profits be transferred to the organization and that the general stated mission and purposes be accomplished, it does not set that minimum and, therefore, it is upon the organization and the industry to set them. In 1973, when the Gambling Act was enacted, the purpose towards charitable nonprofit was a single and primary force, and the single and primary vehicle for that was Bingo. Given a gambling industry without major components, and given a monopoly, a licensee would be expected to do well and minimum requirements were certainly appropriate in that fashion. However, if one takes a wider look at the gaming industry, Bingo as a component of the gambling industry (including house-banked table games, games of chance, lottery, horse racing), has never been the most promotable, the most profitable, or the most glamorous. It was chosen as a vehicle and offered as a virtual monopoly of gambling activities in the state of Washington, and at that time, appropriate net return requirements were put in place. Mr. Strand emphasized those requirements need to be revisited as the marketplace adjusts. If this were a static system or industry, then static and consistent rules that don't change would be appropriate. That certainly hasn't been the case in the state of Washington. Other major opportunities such as house-banked table games, electronic gambling, and other components have been introduced into the marketplace. Mr. Strand noted it was appropriate to expect different results out of each of the components, and referred specifically, to Bingo, which in the national scheme of things is not the top performer. Accordingly, Mr. Strand

believed the revenue expectation from Bingo needed to be reviewed as new influences are approved. He didn't think the sign to revisit the minimum revenue expectations, on a regular basis, was a sign that the system was broken.

**Commissioner Ludwig** asked Mr. Strand if the nonprofits and charities were part of the entertainment coalition. **Mr. Strand** affirmed for the WCCGA. Commissioner Ludwig asked if that meant that because they were pushing the EIC bill, they have abandoned their previous efforts for electronic Bingo machines. Mr. Strand said they have discovered that anything to do with electronics seems to have a strong stigma. They have found that standing alone, they did not have the leverage in the Legislature to push something as large as an electronic anything—it could be both products. Commissioner Ludwig noted that while Mr. Strand was only member of the coalition, his organization had the prestige or reputation of the very humanitarian purposes that they are in existence for. Commissioner Ludwig also commented that they have a broad enough bill that someone may find fault with at least part of it. Mr. Strand concurred.

**Chair Orr** commented that last evening, a hearing was conducted by Representative Conway that had to do with the merger of the Horse Racing Commission and the Gambling Commission into the Department of Gaming (House Bill 1446). Several individuals, commissioners, and agency staff provided testimony. He urged the industry to read the legislation, check with their legislators, and share their concerns, either in opposition or in support of the legislation.

**Chair Orr** called for public further comments.

**Ray Orme** with AAHC Inc., Renton, Washington, commented on the digital video surveillance rule before the Commission. He began offering technical suggestions in order for the digital video recording system to meet and/or exceed the analog systems currently in effect. **Commissioner Niemi** interrupted Mr. Orme and suggested that due to the technical nature of his comments and suggestions, he should contact staff directly with his recommended proposals. Mr. Orme distributed packets of information, which were provided to staff for subsequent action.

**8. Executive Session To Discuss Pending Investigations, Tribal Negotiations, and Litigation:**

**Chair Orr** called for an executive session at 11:40 a.m., and reconvened the meeting at noon. With no further business, Chair Orr adjourned the meeting at noon. The next meeting is scheduled for March 13 and 14, 2003, in Olympia.

Minutes submitted by:

Shirley Corbett  
Executive Assistant