

**WASHINGTON STATE  
GAMBLING COMMISSION MEETING  
THURSDAY, JANUARY 8, 2009  
MINUTES**

**Chair Peggy Ann Bierbaum** called the meeting to order at 1:45 p.m. at the Holiday Inn located in Renton and introduced the members present:

**MEMBERS PRESENT:**           **Commission Chair Peggy Ann Bierbaum**, Quilcene  
   **Commissioner Alan Parker**, Olympia  
   **Commissioner John Ellis**, Seattle  
   **Commissioner Keven Rojecki**, Tacoma  
   **Commissioner Mike Amos**, Yakima  
   **Representative Gary Alexander**, Olympia  
   **Representative Geoff Simpson**, Covington (*arrived late*)

**STAFF PRESENT:**           **Rick Day**, Director  
   **Mark Harris**, Assistant Director – Field Operations  
   **David Trujillo**, Assistant Director – Licensing Operations  
   **Amy Hunter**, Administrator – Communications & Legal  
   **Jerry Ackerman**, Senior Counsel – Attorney General’s Office  
   **Gail Grate**, Executive Assistant

**1. Agenda Review/Director’s Report:**

**Director Day** reviewed the Thursday and Friday agendas, noting there were no staff recommended changes. He then pointed out the inserts added to the agenda packet since publication. Director Day drew attention to a letter behind the Director’s Report tab from Chief Operating Officer Dale Fuga of the Manitoba Gaming Control Commission. In the letter, Mr. Fuga thanked the Commission for allowing Agent Supervisor Rick Herrington and Agent Jim Dibble to present training regarding internet gambling and investigation. There were people from Minnesota, the Secret Service, as well as Manitoba, in attendance. This definitely underscores for the Commission the reputation of the agency and the quality and knowledge of its staff, which is international in scope.

**Net Gambling Receipts - 2008**

**Director Day** explained that net receipts, which is the amount wagered minus the amount paid out as prizes, increased to over \$2.1 billion in Washington and was led by an increase in tribal gambling. Lottery and Horse Racing reflected a small increase over the previous year; however, licensed gambling generally decreased. The amount of decrease in 2008 for bingo and pull-tabs was less than it was in 2007.

**Commissioner Ellis** asked if Director Day had any insights on why the Lottery increase was pretty substantial – \$186 million in 2006, about \$188 million in 2007, and then up to \$206 million in 2008. Commissioner Ellis had not read anything about the Lottery doing so well these days and wondered if there was a known reason for that. **Director Day** replied he was not aware of a reason but understood they had been very aggressive with their advertising campaign. The director of the Lottery would probably say it was just good marketing by the Lottery Commission. **Commissioner Ellis** agreed it was outstanding performance by the director and his staff. **Director Day** noted he has periodic meetings with the Lottery Commission and would ask if that increase could be attributed to any particular game or step the Lottery has taken.

### **Report on G2E Conference**

**Director Day** explained that Senator Prentice had expressed a particular interest in a way for the Commission to stay up-to-date to some degree on what was going on relative to technology and advancements without actually attending the various technology conferences. Director Day noted it was unfortunate Senator Prentice was not present. Staff from our agency's electronic gambling lab usually attends this conference, and Paul Dasaro, the acting administrator of our electronic gambling lab, will briefly share some observations about the technology he saw at the G2E Conference.

**Paul Dasaro**, Acting Electronic Gambling Lab (EGL) Administrator, provided some background information about himself. He started with the Commission eight years ago as a testing engineer, has a background in information technology, and a bachelor's degree from the Evergreen State College in organizational management. Mr. Dasaro summarized some of the things seen at the Global Gaming Expo (G2E). Global Gaming Expo is the largest gaming conference in the world and is held annually in Las Vegas. They provide excellent training opportunities and an excellent opportunity to interface with fellow regulators and some of our licensees. Training included computer hacking, fraud detection, and server-based gaming. A round table meeting organized by the Nevada State Gaming Lab provided an excellent opportunity to meet technical regulators from about 11 or 12 other states and talk about various issues that affect us all. One of the best aspects of going to G2E is being able to talk to our existing manufacturers about products they will be submitting to the Commission over the next year. Mr. Dasaro reported that electronic table games seemed to be an increasing item and included PokerPro, various types of electronic poker, electronic blackjack, card facsimiles, fully electronic tables where the cards are real but the chips are facsimiles, electronic roulette tables and electronic craps tables where the tables are real but the players are playing from electronic kiosks. An increase in player terminal technology is being seen, like changes in the interface where the video screens are enhanced, electronic flares, electronic glass, and very unique cabinet designs. Also, there are many different types of progressive and bonusing systems, machine configuration management with the ability to change games on the fly at the touch of a button, and a lot of different changes in cash handling, cash counting, and accounting systems.

**Chair Bierbaum** asked if there was any technology in Washington where the game on a machine could be changed on the fly. **Mr. Dasaro** replied not yet, but the possibility for it exists. Some of the manufacturers already have the technology that would allow that to occur, but have not yet submitted it. **Director Day** asked Mr. Dasaro to describe why the electronic glass would be more entertaining. **Mr. Dasaro** responded electronic glass on the player terminal itself, like an electronic flare, has been approved for quite some time and is primarily intended for advertising purposes and is not interactive or changeable, but remains static. Now the manufacturers have taken two different LCD screens and put them one on top of the other so the top part of the screen is transparent but the back part is not. At first glance it appears to be physical slot machine reels instead of electronics, but it is just a trick of the eyes that makes that happen.

**Representative Alexander** was interested in what the elements of these electronic machines are in terms of their pluses and minuses. Is it a question of cost savings from the standpoint of labor? Is it a question of accuracy of information or avoidance of any kind of foul play? How do the players respond? Does this recruit additional players, and would some of them have concerns about a person being there versus an electronic machine? **Mr. Dasaro** responded it was all of the above. Some technological changes have definitely been to improve efficiency and to allow casinos to reduce staff. Some want to improve the players' experiences. The main focus seems to be on bonusing, player tracking, and those types of technologies that attempt to bring the players back to the facility rather than going to another facility. If a physical blackjack table or a physical poker table is geared towards electronics, the players can be offered player tracking points or bonuses, which is something that is going to appeal to the casinos.

**Commissioner Ellis** asked if Mr. Dasaro had gotten any new information about the extent of the market acceptance by players of electronic tables. He wondered how many players would be attracted to play at an electronic table versus playing at a standard table with real cards and real chips. **Mr. Dasaro** replied it was hard to tell, but during the course of meetings with other regulators during the round table hosted by the Nevada Gaming Commission, the response had been both positive and negative, depending on the target demographic they were trying to reach. When there is more of an electronic type of interface, like a poker table, younger players may be more attracted than more traditional poker players. The results of those types of technologies have been mixed so far, but it is still early in their adoption throughout the industry to give a good summary of whether or not it is going to be that effective.

### Legislative Update

**Administrator Amy Hunter** reported that on Monday the Legislature is scheduled to begin the 2009 session, which is classified as a "long session" lasting 105 days. Adjournment should be in April depending on whether there are special sessions. Ms. Hunter recapped the process that has been used with past legislation. The current chairs of the committees that hear gambling bills, the Commerce and Labor Committees, appreciate the Commission's positions and find them very helpful. Senator Kohl-Welles is the Chair on

the Senator side and Steve Conway is the Chair on the House side. In the past when there have been gambling-related bills, or bills that directly affect the Gambling Commission, staff would recommend a position for the Commission to take, pro, con, or neutral. Then at the hearing, staff was able to explain to the committee the Commission's position and the reasons for that position. If the Commission is neutral on a bill, staff would explain at the hearing what they see as the pros and the cons of that bill. If the Commission votes to go either pro or con on a bill, staff would write a position statement and coordinate with the Commission Chair to sign a letter that staff would send to the Committee Chairs.

**Ms. Hunter** reported staff was able to pre-file House Bill 1040 and Senate Bill 5040, which is the bill on penalties for underage gamblers. The Senate plans to schedule a hearing on the bill next Thursday and the House will likely schedule its hearing the following week. Staff was not able to get the bill pre-filed that allows the Commission to decide where amusement games can be located in addition to those set by the Legislature. The good news on the bill is that it was initially conditionally approved by the Governor's office. House Bill 1053, which increases the amount of a raffle ticket from \$25 to \$100, or a greater amount as determined by Commission, was also pre-filed. This bill could help charitable/nonprofit organizations increase their revenues, but could expose those organizations to higher risks. The biggest risk is not selling enough tickets to make the raffle profitable. There have been times when raffles have been a negative event where the organization did not raise any money, but actually took money away from the organization. Staff recommends a neutral position on this bill, which is the same position recommended last year.

**Commissioner Ellis** noted that the bill would increase the maximum amount of the ticket to \$100 or a greater amount, as determined by the Commission by rule. Does Ms. Hunter know what was anticipated by that language; did it just anticipate that the Commission could say \$100 is too little and make it \$125 across the board statewide? Or was it anticipated that on a raffle-by-raffle basis the Commission might by rule permit individual raffles to exceed the \$100? Commissioner Ellis was thinking about the Asian Legal Society's raffle that the Commission approved not too long ago where the prize was a Mercedes Benz or an Audi. The Commission approved a higher prize than the maximum. **Ms. Hunter** thought it meant that the Commission would be doing it across the board, not on a raffle-by-raffle basis; although that is a good question and she would follow-up with the sponsor of the bill to see what he intended. Ms. Hunter read it to just mean that if the Commission decided that \$100 was not enough, they could pass a rule at a higher amount.

**Commissioner Ellis** asked AAG Ackerman whether, in his view, there was an issue with the way this is drafted on delegation of legislative authority; that the Legislature on the one hand says the maximum ticket should be \$100 but the administrative agency can make it \$200 if it sees fit. **AAG Ackerman** did not believe so, but an argument could be made to that effect. Given the manner in which the Legislature has on other occasions delegated the authority to set the amount of wager in house-banked card games, AAG Ackerman tended to believe this would be a proper delegation from the Legislature. It would require a 60 percent super-majority to do this because the Legislature is changing an existing statute that

authorized raffles and at a set amount. That would be a question to be addressed to the presiding officer in each house of the Legislature. It would certainly be an issue that would have to be considered. AAG Ackerman believed that was something the Legislature could delegate if it chose to do so. **Commissioner Ellis** agreed, but it struck him as a little odd that on the one hand the Legislature specifies the amount themselves, but on the other hand they delegate authority to an administrative agency to change it; unlike the wager amount as he recalled. **AAG Ackerman** thought another way to look at it would be that the Legislature is delegating to the Commission the authority to set what the maximum amount of a ticket might be. If the Commission did not act to exercise that delegation, then the ticket maximum would default to the \$100 that was set in the statute. It is a curious way to draft a statute, but AAG Ackerman was not sure that meant the Legislature could not do it that way.

**Chair Bierbaum** asked if she had heard Ms. Hunter to say there was a legal opinion suggesting this was not an expansion of gambling – raising the price of a raffle ticket to \$100. **Ms. Hunter** affirmed that was actually a ruling made in 1995 by the Lieutenant Governor when the Legislature was considering increasing the raffle prize from \$5 to \$25. With a different Lieutenant Governor, a different ruling could be made on whether it is an expansion of gambling and needs the 60 percent majority. Ms. Hunter pointed out it was just a summary of the different rulings and was not truly an AG Opinion. **Chair Bierbaum** noted the information was in a chart and asked if she could get a copy of the narrative of the Opinion. **Ms. Hunter** affirmed she would get a copy to Chair Bierbaum.

**Ms. Hunter** reported House Bill 1070 deals with the Lottery Commission and was pre-filed. This bill would require the Lottery to conduct two to four new scratch ticket games each year that would benefit veterans and their families. The net revenues from those games would be transferred into the Veteran's Innovations Program account. Ms. Hunter mentioned that next week the Senate Labor, Commerce and Consumer Protection Committee plans on having Commissioner Amos' confirmation hearing. Commissioner Ellis had a confirmation hearing last year but the Legislature ran out of time. Because Commissioner Ellis already testified last year, the Legislature is not requiring him to go back for another hearing but will likely take executive action on his confirmation. Ms. Hunter explained that on Thursday, the Senate Committee has asked the Lottery Commission, Horse Racing Commission, and the Gambling Commission to give an overview of their agency's budget and some of their general activities. Ms. Hunter expected the House Commerce and Labor Committee to have a similar hearing the second or third week of session.

**Director Day** acknowledged the excellent job Ms. Hunter and the agency's legislative team have done to get these bills ready for pre-filing and preparing the Commission for this upcoming session. They have also contacted and met with the legislators on both sides relative to the committees dealing with these pieces of legislation. Director Day thanked our Ex-Officio members for their interest and support with this agency request legislation and in being able to bring it forward to the Legislature. Director Day explained that when the

Commissioners take a pro or con position on legislation, staff immediately notifies the sponsor to make sure they are not taken off guard by the Commission taking a position on the bill. If time permits, staff also provides them a copy of the written position. After the Chair signs the Commission's Position, it is posted on the agency website so the public can see what that position is. Staff monitors the bills as they come forward, and in many cases the legislator or legislator's staff will contact Ms. Hunter asking her to take a look at a piece of possible legislation from the technical aspect. The Chairs will ask Ms. Hunter to come over and talk with them about our agency's perspective on the possible impact from a particular bill.

**Representative Alexander** noted a lot of his fellow legislators did not know exactly what ad hoc members do, but the legislators usually looked to them to provide some advice on bills that are coming through that have a gambling impact. Representative Alexander asked that commission staff alert the respective offices of the Ex-Officio members of bills coming forward that have a gambling impact so they would be aware of and be able to respond to fellow legislators on the gambling pro or con issues. **Director Day** affirmed staff would be happy to do that.

### Correspondence

**Director Day** explained the letter from Frank Miller dated December 17 confirmed the process for the PokerTek table, which was set over indefinitely to allow the petitioner time to resubmit the table to our Lab for full testing. Staff plans to have a report available for the February Commission meeting.

**Chair Bierbaum** pointed out Mr. Miller's letter said the EGL may provide its opinion whether the PokerPro is a permissible electronic mechanical gambling device. Chair Bierbaum thought all gambling devices were prohibited by statute. **AAG Ackerman** explained that equipment that meets the definition of gambling devices set forth in the Gambling Act are illegal, but there are certain exceptions. For instance, there is a limited ability for some gambling devices to be possessed when used in conjunction with an authorized activity like Reno Nights so long as they are used consistent with the legislative authorization and the rules promulgated by the Commission. Absent an authorized activity that allows the use of something that meets the definition of a gambling device, the whole laundry list of ways to run afoul of that criminal prohibition applies. **Chair Bierbaum** asked for clarification on whether gambling devices are prohibited or are not prohibited. Is there another statute that says they are all prohibited except certain ones? **AAG Ackerman** replied the Gambling Act sets forth a definition for what is a gambling device. There is a criminal prohibition that says if a person uses, possesses – there is a laundry list of other ways a gambling device can be utilized other than in an authorized activity – the person is committing a criminal offense. There are certain authorized activities that will, by their terms, allow the use, possession, etc, of a gambling device. **Chair Bierbaum** asked where in statute, under what RCW, those activities are listed. **AAG Ackerman** did not recall which statute listed the activities, but it included activities like fund raising events, or Reno Nights, where there may be roulette wheels, blackjack tables, and other things that are used

for a fund raising purpose for an organization. The events are limited in the number of events a year, number of days per event, must use script not cash, plus a whole laundry list of regulations. But if an organization meets the requirements of the statutes, they can possess a gambling device for a limited period of time. **Chair Bierbaum** asked what permitted activity Mr. Miller, or who he is representing, suggests this falls under, since he says it is a gambling device. **AAG Ackerman** was not sure.

**Director Day** clarified that he only referred to Mr. Miller's letter, but it did not mean he agreed with everything Mr. Miller said. There is a lot of confusion between gambling device and gambling equipment. For instance an electronic shuffler and a blackjack table are gambling equipment that is authorized for use in the state. The gambling lab will review the poker table, will look at the complete analysis, and will determine whether they think it is a gambling device meeting the definition in the RCW. At that point, the Commission would then apply their factual opinion. **Chair Bierbaum** had been confused by Mr. Miller calling it a gambling device. **Director Day** agreed Mr. Miller may have been a little broader with his use of the term gambling device than applied. **Chair Bierbaum** thought Mr. Malone may want to clarify that during public comments. **Director Day** pointed out the response letter to Joan Mell clarifying the WAC process related to decisions regarding gambling equipment submissions, along with Ms. Mell's letter dated November 18.

#### Monthly Update Reports

**Director Day** noted the Seizure Report included a successfully conducted investigation that our Field Operations staff was involved in that resulted in the seizure of cash and jewelry related to a book making investigation

#### News Articles

**Director Day** pointed out an article on online gambling being made illegal in Norway. The Commissioners might recall that Norwegian and Danish delegates visited the Washington State Gambling Commission in part to review the practice of internet gambling enforcement here in the state of Washington and in the United States. The delegates explained during their visit that they were considering adopting more stringent enforcement in Norway. It was an interesting connection and it was interesting to have them visit our agency.

**Chair Bierbaum** asked if the reporter had reported the wrong information in his news article about the Elwha Casino. They are a Class II operation, but the article talks about a Class III operation. **Director Day** agreed the reporter had it exactly backwards; the Elwha Tribe has a Class II casino with bingo-related devices, not Class III.

#### Comments from the Public Regarding Director's Report

**Chair Bierbaum** called for public comment on the Director's Report.

**Ms. Dolores Chiechi**, Executive Director of the Recreational Gaming Association (RGA), reported on the zoning bill relating to card room locations in local jurisdictions. Ms. Chiechi

has personally been working on the zoning issue for about 10 years. This bill essentially gives the local governments another option besides the all or nothing that is currently in statute. The RGA has met with over 70 legislators over this interim and have received positive feedback that this may be the year to resolve the issue. The RGA is also working closely with the Association of Washington Cities, as well as with specific cities like Lakewood and Kirkland that are very interested in getting this issue resolved so they may determine what is best for their community by way of keeping the four card rooms they have and not allowing anymore coming in. The annexation piece is still in negotiations regarding when unincorporated King County locations get incorporated into Seattle where card rooms are not allowed whether those facilities would be allowed to continue to operate without having to open up the entire city to more licensees. Ms. Chiechi said a meeting was scheduled next week with the chairs of the committees, Chair Conway and Chair Kohl-Welles, as a joint effort, along with Jim Justin the lobbyist for the Association of Washington Cities, and the lobbyist from the City of Lakewood, in hopes of honing in on that language to determine what is going to be acceptable to all parties, and then moving forward with introducing a bill and hopefully getting the issue resolved. Once the bill is introduced, the RGA will present its case to the Commission in hopes of getting either a supportive position from the Commission or at least a neutral position. Most, if not all, of the changes recommended by the staff relating to the Commission's position, as it has been in the past, are being incorporated into the bill. This bill is the RGA's exclusive and primary legislative effort this session.

**Mr. Dave Malone**, Miller Malone and Tellefson, stated, in answer to Chair Bierbaum's question, that the exception to the gambling device rule is RCW 9.46.215(2), which is what he believed AAG Ackerman was referring to regarding the authorized activities underlying the game. What the firm was opposing was the classification of the PokerPro as a gambling device, as video poker, or a slot machine. The gambling lab is to test the device and give the Commission a narrative description of what it does. Mr. Malone was under the impression the lab had already done that in 2006, based on some of the representations in the petition. It had come to Mr. Malone's attention that the lab had not done so, that the lab had been presented with a conceptual description and from that flowed the opinions that have been circulating in the materials. So the goal would be for the gambling lab to look at the table and provide the Commission with an objective narrative on whether they think it is or is not a per se gambling device, or if it is something that affects social card games under the statutory definition. If so, the Commission has the authority delegated to it by the Legislature to control the scope, the type, and the manner of conducting social card games as an authorized activity. That would be Mr. Malone's point – is it a gambling device, perhaps; but does it then fall within a subcategory of approvable gambling equipment. For the record, the Commission's forms call this a submission for gambling devices or mechanical equipment, so there is an approval process for gambling devices inherent, and Mr. Malone deferred to the gambling lab about the specifics on their form, which seemed an odd wording. Mr. Malone drafted part of the letter and had quoted strictly from the forms that called it an approval of a gambling device.

## 2. X-2 Implementation Update (PowerPoint Presentation)

**Julie Lies**, Assistant Director of the Tribal and Technical Gambling Division, explained the Tribal and Technical Gambling Division is a combination of the Tribal Gaming Unit and the Electronic Gambling Lab. The Tribal Gaming Unit works with the tribes to monitor Compact compliance and the Electronic Gambling Lab tests the electronic equipment that comes into this state. According to Compact language, the Commission is to protect the health, welfare, and safety of the citizens of the tribe and of the state and to implement regulations that ensure fair and honest operation of gaming activities and maintains the integrity of those gaming activities. The Tribal Gaming Unit works in a co-regulatory partnership with the Tribal Gaming Agencies and also performs independent reviews and provides training. The Electronic Gambling Lab participates in providing training, plus they review equipment that is submitted to the state.

**Paul Dasaro**, Acting Administrator of the Electronic Gambling Lab, provided some background to the Tribal Lottery Systems (TLS). The original Tribal Lottery System was approved under Appendix X to the Tribal-State Compacts and was signed in 1999. The TLS machines appear to be slot machines in the tribal casinos, but they are actually an electronic version of a scratch lottery ticket. Appendix X-2 was the first major modification to Tribal Lottery Systems and was signed in March 2007 and published by the Department of the Interior on May 30, 2007. There are significant differences between Appendix X and Appendix X-2, including the inclusion of a single button push to purchase and reveal ticket results and allowing cash in. Also, the number of allocations per tribe was increased somewhat, along with significant improvements in security and reporting and improved links to Appendix A, which deals with accounting and internal controls. Mr. Dasaro reviewed the process for submissions, testing, and approvals.

**Commissioner Parker** asked Mr. Dasaro how the Meltdown Progressive machine being shown on the slide compared to what looks like a slot machine. **Mr. Dasaro** replied the picture of the Meltdown Progressive machine was just to provide an example of the type of submission that would qualify as a modification. The Gambling Lab has a very in-depth process for testing everything received from the manufacturers. **Chair Bierbaum** indicated that Mr. Dasaro may have put that particular picture up for illustration but wondered if there was something about that machine that was different under Appendix X-2 than it would have been under Appendix X. **Mr. Dasaro** replied there was no difference. It was just an illustration to show a type of game.

**Mr. Dasaro** reported that significant modifications had to be made to the lab's testing process and significant changes had to be made to the submission tracking and databases. The gambling lab also made a larger effort to involve the Gambling Equipment Team. The GEES is an agency team that is composed of five or six members of the electronic gambling lab and tribal gaming agents who are trained to deal specifically with technology issues with tribal lottery systems. The GEES needed to improve and update their training because they are crucially involved in the approval of this process by developing internal control

guidelines. They also had to implement new inspection forms and provide training to their co-regulators in the tribal governments.

**Chair Bierbaum** asked if GEES was the gambling equipment team. **Mr. Dasaro** replied GEES was Gambling Electronic Equipment Specialists. **Chair Bierbaum** wondered why they were not called GET. **Mr. Dasaro** replied there is also a GET team, which is a different team for non-tribal types of submissions. It was thought this would be a quick turnaround time, but there were a lot of aspects of the submissions from manufacturers that did not quite meet the new requirements of X-2. From the middle of 2006 to 2007, the lab received about 236 submissions, and there was almost a three-fold increase the subsequent year.

**Cathy Harvey**, Supervisor of the Tribal Gaming Unit, reviewed the Tribal Gaming Unit's role in the X-2 onsite process working with the lab, the tribal gaming agency, the operation, and the manufacturer. Meetings were held with all the parties involved to outline the rules and responsibilities, including Tribal Gaming Agencies taking a more primary role in completing some of the pre-operation checklists and setting out with the manufacturer some of the expectations. Ms. Harvey briefly explained the onsite review process and installations. There was about a four-month delay between when the installations actually occurred and when the Appendix was signed or became effective. Some of the old Appendix X systems had to be upgraded or replaced to handle the new X-2 technology, the count room structures were not large enough to accommodate all the cash from every player terminal, additional staff had to be hired, and with the addition of cash new equipment had to be introduced like plastic drop boxes, smart drop boxes, bar code readers, and new currency counters. The chart shows the player terminal allocations as a comparison between pre-Appendix X-2 and Appendix X-2. Appendix X authorized 18,225 total player terminals in the tribal casinos and, at that time, all but 191 were in play. Then X-2 increased that limit to 27,300 with 21,554 in play. 9,598 X-2 terminals were converted or added into play, which allows 5,756 remaining player terminals to be put into play.

**Chair Bierbaum** indicated something was wrong with the graph, asking if the numbers were correct or if the graphic representation was right. The 9,598 is smaller visually than the 5,756. **Supervisor Harvey** replied the graph was probably not to scale. **Commissioner Parker** felt it was important for the graph to be to scale and asked if it would be much trouble to make a new graph. **Chair Bierbaum** agreed, asking which was correct; the numbers or the graph. **Supervisor Harvey** replied the numbers were correct and staff would revise the graph. **Assistant Director Lies** pointed out the numbers were only an estimate.

**Mr. Dasaro** reported that one of the biggest challenges was with the flip of the switch mentality where the assumption among many in the industry, including regulators, was that existing Appendix X systems that are already configured to allow cash would be able to be turned immediately into X-2 systems, that only a couple of system modifications would need to be done to be able to start running X-2, including cash and single touch. The

problem was that X-2 also included a lot of reporting and security enhancements that required significant modifications to the way the existing systems operated. There was also a lot of new technology that was submitted with X-2 and the number of system changes was quite a bit higher than was originally expected. Staff did a very good job of adapting to and overcoming the challenges. Mr. Dasaro believed staff coordinated well with the Tribal Gaming Agencies and did an absolutely fantastic job of keeping up with the changes and making the installs work effectively and efficiently.

**Commissioner Ellis** asked how many of the tribes maintain technical labs that are capable of doing the same kind of technical analysis that the gambling lab does. **Mr. Dasaro** responded that some of the tribes have technical staff in their Tribal Gaming Agencies that are very well trained and more knowledgeable on technical issues, but they do not have an actual lab.

**Chair Bierbaum** understood that they send it out to an independent testing lab prior to, or simultaneously with, sending it to the gambling lab. **Mr. Dasaro** affirmed, noting the process under Appendix X and Appendix X-2 is that it goes to an independent test lab first, they do their testing on it, and then it comes to our lab where the state has approval or disapproval authority on it. **Chair Bierbaum** asked if there was one, or more than one, testing lab that everybody uses. **Mr. Dasaro** replied that for X-2 approvals, they use Gaming Labs International, which is the largest private test lab in the world. There are two other authorized test labs that the tribes have the option to use as well.

**Commissioner Ellis** asked if all of this testing occurs after the manufacturer has made the changes to the equipment and is in compliance. **Mr. Dasaro** affirmed that was how it was supposed to work.

**Assistant Director Lies** reported that with X-2 systems being approved and installations being done, staff anticipates that all the tribal facilities will likely upgrade in the next two years to the X-2 type of system. Training programs will have to be created based on new systems and new technology as they come through so that those regulating the activity are all on the same page and understand the complexity of the systems. There are going to be new components, and new systems. There is a new system the gambling lab is looking at right now that is going to be the fourth X-2 manufacturer in this state. New technology being developed and improved is going to better protect the system and technical standards and Appendix A are being modernized. Appendix X-2 includes new problem gambling and smoking cessation payments, which staff will be verifying around the end of this month or beginning of February. Also there is the community investment report that is required from the tribes under Appendix X-2.

**Commissioner Parker** said he was trying to get a sense of the impact of these changes in terms of the volume of business and the success of the business. His impression was that, essentially, the changes that the tribes negotiated for in their compact amendment, Appendix X-2, have been successful as far as allowing their casino operations to be more profitable.

**Assistant Director Lies** explained this was only the first year of operation and the information in the graphs was a year old. Anecdotally, staff has heard there has been an increase in revenues but will not know for sure until the actual numbers are compiled in about another year. **Commissioner Parker** thought the fact that people are using these machines and the tribes are approaching the upper ceiling or limit in terms of the numbers of machines that can legally be put into play shows an increase. **AD Lies** agreed, adding the wider variety may appeal to other customers.

**Chair Bierbaum** indicated she was sort of surprised at the numbers and asked why a tribe would go through this whole process of getting the machine independently tested, then tested by the gambling lab, and paying the community reinvestment instead of just putting in Class II machines in their casinos. They have cash in and one touch, so why bother going through the process for the Class III machines when the Class II machines do exactly what the X-2 machines do – or don't they? **AD Lies** explained that the Class II machines function differently behind the scenes because they are supposed to be a bingo enhancement. There is actually a live bingo game behind the graphic representation that is seen on the terminal. Some tribes have chosen to do a mix of both Class III and Class II machines. Some tribes have chosen to have facilities that are completely Class II machines. Sometimes the tribes make more money on the Class III; sometimes they make more money on Class II. Each tribe experiences it a little differently, depending on their demographics, their geography, where they are, and what their customers want. **Chair Bierbaum** thought the Commission should keep informed of the number of Class III machines and the number of Class II machines and how that mix changes over time. It would be useful information as time goes on. **AD Lies** responded that our agents perform semi-annual counts in January and July. While those counts are being done, our agents also look at Class II. They do not physically go out and count every single machine but can get a ball park number from talking to the Tribal Gaming Agency and seeing what they have done. **Chair Bierbaum** thought the public might think there are only 21,000 machines out there, but in fact there are probably significantly more than 21,000 machines. **AD Lies** replied the last time the counts were done there were still more Class III machines than Class II. Staff should have a better idea after the counts are done the end of this month. **Chair Bierbaum** clarified that the according to the graph, 21,000 represents only Class III machines, but there are a lot of other machines out there, so it is important to keep track of those also. **Commissioner Ellis** felt that was a good point. **AD Lies** asked if the Commission would like that information included for the next meeting. **Chair Bierbaum** replied it did not have to be next month; just whenever it gets on the top ten list of things to do.

**AAG Ackerman** noted the graph shows the total number of machines in play was roughly 18,000 in pre-May 2007. The December number, which includes the X-2 machines, was up to a total of over 21,000 in play. AAG Ackerman was wondering if that 3,000 machine difference was attributable to the Snoqualmie casino opening and adding in the Spokane Tribe's casinos. **AD Lies** replied that 600 machines were for the Spokane Tribe and roughly 2,000 were for the Snoqualmie Tribe. The numbers were compiled by taking the July counts, adding in those two facilities that were not included in the July counts, and then

adding in whatever additional machines staff knew about. It is just an estimate, but most of that could be attributed to those two tribes. **AAG Ackerman** said it seemed that most of these new machines were being added by tribes that were newly brought into the equation, not so much a matter of existing tribes adding a lot of machines. It looks like a lot of machines have been converted to X-2, but the growth in total numbers of machines is due to two new tribes coming on board, not the existing 26 tribes adding a huge number of machines. **AD Lies** explained there were a few tribes that were operating a small number of machines and allocated the rest, and when the additional 300 machines came to those tribes, they were able to put more machines in their facility.

**Chair Bierbaum** said her observation was the same as AAG Ackerman's. Keeping the Spokane Tribe and Snoqualmie Tribe in mind, it did not seem like a very big number, which was why Chair Bierbaum wondered if it was because they were using Class II machines instead of Class III machines. She thought the increase would have been higher. **AD Lies** responded that staff thought things were going to happen a lot faster than they did during this entire X-2 implementation process. It was six months before the first system was approved and another four months until the installs. There are only about 8 tribes that actually operate X-2 right now out of 22, so the low numbers are part of the entire implementation impact.

### **3. New Licenses and Class III Certifications**

**Assistant Director Trujillo** reported that staff recommends approval of all new licenses and Class III certifications listed on pages 1 through 31.

**Commissioner Rojecki** made a motion seconded by **Commissioner Ellis** to enter an order approving the list of new licenses, changes, and tribal certifications as listed on pages 1-31. *Vote taken; the motion passed unanimously.*

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

**Chair Bierbaum** called for public comments.

**Mr. Clyde Bock**, primary bingo manager for the Ruth Dykeman Children's Center, testified his bingo was one of the 14 remaining large bingo games in the state that are required to have a percentage return. In the coming weeks he will be working with agency staff on two primary issues. One is to request that the organizations be able to throw out the month of December for their compliance concerns. Mr. Bock has been in this business for 34-35 years and only once before has there been a month that the organizations across the state lost as many bingo days as they did this year. The other issue is to modify the current net return policies to better reflect the current industry.

**Mr. Ric Newgard**, Washington Charitable and Civic Gaming Association and Executive Director for Seattle Junior Hockey, the state's largest nonprofit bingo and pull-tab operation, testified in support of Mr. Bock's request. The month of December was an absolute disaster

and the bingo facilities were closed for almost two full weeks, which included almost three complete weekends. That meant a net loss for the bingo operators. Mr. Newgard stated that was the money that goes in the checking account that pays for the hockey players of approximately \$74,000 – a huge hit. It was also a huge hit in the compliance calculations. Mr. Newgard requested the Commission throw out the month of December, which has been done once before many years ago. This hit has been statewide, and Spokane is still dealing with it. Mr. Newgard said he would work with staff on this.

**5. Executive Session to Discuss Pending Investigations, Tribal Negotiations, and Litigation, and Adjournment**

At 3:25 p.m. **Chair Bierbaum** called for an Executive Session to address pending investigations, tribal negotiations, and litigations. **Chair Bierbaum** called the meeting back to order at 5:00 p.m. and immediately adjourned.

**WASHINGTON STATE  
GAMBLING COMMISSION MEETING  
FRIDAY, JANUARY 9, 2009  
MINUTES**

**Chair Peggy Ann Bierbaum** called the meeting to order at 9:10 a.m. at the Holiday Inn located in Renton and introduced the members present:

**MEMBERS PRESENT:**           **Commission Chair Peggy Ann Bierbaum**, Quilcene  
  **Commissioner Alan Parker**, Olympia  
  **Commissioner John Ellis**, Seattle  
  **Commissioner Keven Rojecki**, Tacoma  
  **Commissioner Mike Amos**, Yakima  
  **Representative Gary Alexander**, Olympia  
  **Representative Geoff Simpson**, Covington

**STAFF PRESENT:**           **Rick Day**, Director  
  **Mark Harris**, Assistant Director – Field Operations  
  **David Trujillo**, Assistant Director – Licensing Operations  
  **Amy Hunter**, Administrator – Communications & Legal  
  **Jerry Ackerman**, Senior Counsel – Attorney General’s Office  
  **Gail Grate**, Executive Assistant

**6. Approval of Minutes – Regular Meeting – November 13 and 14, 2008**

**Commissioner Ellis** made a motion seconded by **Commissioner Parker** to approve the minutes of the November 13 and 14, 2008, regular commission meeting. *Vote taken; the motion passed unanimously.*

**RULES UP FOR FINAL ACTION**

**7. Petition for Rule Change – Recreational Gaming Association-Minimum cash on hand**

**a) Amendatory Section WAC 230-15-050 – Minimum cash on hand requirements**

*Alternative #1 filed at the November 2008 Commission Meeting*

**b) Amendatory Section WAC 230-15-050 – Minimum cash on hand requirements**

**Assistant Director Mark Harris** reported the petitioner is requesting that licensees meet the minimum cash requirement within three hours of opening, as opposed to at opening, and to allow the cash in the safe in the vault to be included with the cage in the count towards this requirement. The Commission originally adopted the rule in January 2008 to make sure

there were minimum cash requirements to ensure adequate funds were in the cage to pay for prizes. At the May 2008 meeting, the Commission denied a similar petition because the petitioner wanted to include cash from the ATMs in the count. An alternative had to be filed at the November meeting because of the approval of a rule increasing the betting limits to \$300, which affected the calculation of the minimum cash requirement. The petitioner requested an effective date of 31 days from filing, which staff would agree with based on the delays that have happened on this petition.

**Chair Bierbaum** asked if there were any questions or public comment.

**Mr. Max Faulkner**, President of the Recreational Gaming Association, testified that the RGA had failed to realize some of the implications of the rule change and worked with staff on the concerns, which Mr. Faulkner really appreciated. The most important thing is being able to count the vault in with the bank roll so all of the eggs are not in one basket, as much money does not have to be kept in the cage, and it is good for public safety. Mr. Faulkner asked the Commission to pass this rule change.

**Commissioner Ellis** made a motion seconded by **Commissioner Rojecki** that the Commission approve proposed Amendment to WAC 230-15-050, in the form presented in Alternative #1, with an effective date of 31 days from filing. *Vote taken; the motion passed unanimously.*

**8. Petition for Rule Change – Coalition for Responsible Gaming and Regulation: Administrative Hearings**

- a) **Amendatory Section WAC 230-17-025** – Appointment of administrative law judge or “presiding officer”
- b) **New Section WAC 230-17-137** – Adjudicative proceedings – Consideration of aggravating and mitigating circumstances

***Amendment #1 – Up for discussion and possible final action***

**Ms. Amy Hunter** reported there was a possible short amendment that the petitioner suggested to item 8 b) to change “shall” to “may.” This rule was filed at the October 2008 meeting and was on the agenda for discussion last month. There has been comprehensive discussion of the rule at past meetings.

**Chair Bierbaum** asked if these should be taken together or separately. **Ms. Hunter** thought it would be easiest to take them separately since the first one is not controversial. **Chair Bierbaum** agreed.

**Ms. Hunter** reviewed the information provided in the Rule Summary for WAC 230-17-025, noting that staff has no concerns with this rule change.

**Chair Bierbaum** asked if anybody from the Coalition for Responsible Gaming and Regulation wanted to comment.

**Mr. Malone**, Miller, Malone and Tellefson on behalf of the Coalition, urged the Commission's support for this rule, asking that it be effective within 30 days. There was no provision for asking when it would be applicable and if the judges are already considering this, Mr. Malone did not think it would be a hardship to have it codified and recorded within 30 days instead of effective on July 1.

**Chair Bierbaum** asked what Ms. Hunter's reaction was to the request. **Ms. Hunter** replied her only reaction would be that, unless it is filed as an emergency rule, the effective date needs to be 31 days from filing. Staff would not have a problem with 31 days from filing.

**Commissioner Ellis** indicated there was discussion during the previous hearings about the fact that it would be useful for the Commission on both of these proposals to get some examples of actual situations demonstrating the problem in both cases: the ALJs not feeling they have the authority to depart from a recommended sanction from the Commission, and situations where the ALJs were not willing to take into account any of the mitigating factors that were included in the second proposal. Commissioner Ellis noticed in going over the materials that there appears to be one example that staff presented that may actually highlight the issue that Mr. Malone sees with this. There is an initial order in the materials for Ms. Keo, who was a gambling card room employee and apparently had cheated and testified that she had cheated and made a mistake, and the ALJ was willing to hear that testimony and specified in his findings of fact that Ms. Keo credibly testified that she made a mistake and learned her lesson. The ALJ then goes on to say the material facts were not in dispute and Ms. Keo conceded all of the facts giving rise to a violation. Then the ALJ says therefore, the only thing to decide is whether the Commission has the authority under such facts to deny Ms. Keo's license, which arguably is quite a different thing than saying since they found a violation, they have to consider what the appropriate sanction would be. Commissioner Ellis asked if that was basically the problem Mr. Malone had with this issue. **Mr. Malone** affirmed. He believed other licensees would have examples of either factors not being considered or ALJs unwilling to modify penalties based on what they have seen. Not all of the ALJ decisions are published, and most of them involve individual card room employees. Mr. Malone could think of only a handful where the ALJs have actually dealt with a commercial licensee because most of the commercial licensees are represented by counsel. And most of the time counsel recognizes the significance of the charges and are able to work towards a settlement. What the Coalition is looking for is to know the sideboards or the parameters, what the rules are as they go into these proceedings, what can and cannot happen, rather than being subject to the whim of something at a hearing and not knowing. An example that comes to mind was about five years ago a card room employee, David Yamashita, an off duty employee, was playing cards at a facility and the dealer cheated. Commission staff and the ALJ revoked the player's license because he was an off duty employee while the dealer participated in a cheating scheme, but there was no knowledge that the two were in collusion. The judge's order does not specify what happened other than "I'm here and I'm going to revoke the license." The Commission's decision rescinded the revocation. Mr. Malone did not recall what the actual penalty was,

but thought it may have been a six-month suspension or something of that nature. Mr. Malone believed it was Commissioner Ludwig who said that because the ALJ refused to consider the extenuating circumstances, the Commission would modify the penalty sought. That was the only example that Mr. Malone was able to find; although he did not have access to all the administrative orders because they are not published anywhere readily available. **Commissioner Ellis** asked if Mr. Malone had submitted the order relating to the Yamashita case. **Mr. Malone** replied he had not, but he could provide it if the Commission would like. **Commissioner Ellis** said that would be helpful.

**Mr. Chris Kealy**, Vice President of the RGA, testified he was also involved in this Coalition process. Mr. Kealy wanted to get into the record that his understanding of what the Coalition was trying to achieve was a reliable format. A violation for Mr. Kealy's license, in typical form, is an employee licensed in his facility commits an infraction that Mr. Kealy readily admits happened and most likely would also have been involved in bringing the prosecution forward because he works collectively with the Commission on a self-reporting basis. Mr. Kealy is obligated to report the violation, so he gets involved in situations where he knows the infraction occurred and wants to stipulate at the outset. But Coalition members regularly deal with Commission staff and attorneys representing Commission staff that are unwilling to look at the aggravating and mitigating circumstances to that situation. They deal with penalties that are heavy handed and egregious. Mr. Kealy does not like them, and wants an ALJ to listen to the situation and say okay, we all agree this situation occurred, but maybe Mr. Kealy can pay a \$1,000 or \$2,000 fine and not a \$7,500 fine, a \$68,000 fine, a \$28,000 fine, or an \$18,000 fine. There are many examples where a person is in settlement because their counsel is telling them that if the person gets outside this box, the only thing an ALJ is going to be able to consider is down time, which would shut down the facility and which the licensees cannot consider. So what the licensees see is a Gambling Commission legal department that is able to negotiate to settlement basically every case with licensees because the only thing the ALJs think they are allowed to consider is down time. And that is what their lawyers are advising them. So the Coalition is trying to get something that puts it up there and gives a licensee due process outside of the people that are regulating them and making the decisions; sort of a judge, jury, and executioner format. It has been almost three years during this Coalition process to negotiate through that discussion point, and it regularly aggravates the other side when we say this judge, jury and executioner position. Mr. Kealy absolutely believes that due process should allow for a situation where licensees can explain to an ALJ what happened and take their chances with an ALJ on economic circumstances, not the destruction of their entire business. If a business is closed for 30 days, the operator may as well not reopen it. The licensees cannot roll the dice like that, so they have to settle for numbers that are not appropriate to the situation. Mr. Kealy does not regularly, constructively ask his employees to violate the law and is disappointed when it happens and frustrated as a licensee. Mr. Kealy is paying people to do things and he does not want them to let underage people in. He does not have a profit center around 18 year olds gambling at his facility, but these situations occur. They need to pay a fine and get on with the process, but there is no due process in that area. That is what the Coalition is trying to get with this.

**Commissioner Ellis** said one of the really frustrating things for him, as a Commissioner and having been on the Commission for three or four years, is the Commission fairly regularly has card room employees come forward. At the last meeting, there was the case of Ms. Jimenez who felt that the sanction imposed on her for violations of the regulations was excessive. Ms. Jimenez went through the ALJ process, and then she came before the Commission and argued for a different sanction. As Commissioner Ellis recalled, Ms. Jimenez got a different sanction than what had previously been imposed. The Commission sees that fairly regularly. Sometimes the explanations the pro se card room employees give are ones the Commission cannot accept; but sometimes the explanations are accepted and the Commission will mitigate the penalties. Except for the one exception of the Porterhouse case, Commissioner Ellis could not think of a single instance where the various corporations have ever come to the Commission and said they have gone through this process, the ALJ has issued an order affirming what the Commission recommended, and it is excessive. Not one instance and he is still looking for one; there is not one in the materials, except for the Porterhouse case where the argument was made by the owners of the Porterhouse that if they were subjected to a 15-day suspension, as the Commission recommended, they would be out of business.

**Mr. Kealy** said Commission Ellis had hit the nail on the head; things that make you go huh. Licensees have violations because things happen; these are people doing jobs. There are 7,000 people working on the commercial side and there are about another 15,000 working on the tribal side; a lot of people interactions and things happen. But the licensees cannot take the chance of coming to the Commission because they are not sure which quorum they are going to face or what could happen if the licensee gets a bad day, a snow day, or something that changes the situation with the Commissioners. The licensee's counsel is advising that here is what they are looking at, they can go in there and make the case and they can end up making their case and prevailing for the day, but if they do not, if something goes bad for them that day, the licensee is looking at being closed; and closure is an unacceptable risk as opposed to the size of the penalty. So the licensees have been settling for years – that is why the Commission does not see people coming forward for the appeal process because they cannot take the risk. They settle, and they settle for fairly large numbers. Mr. Kealy gave a specific example where he had a violation related to an underage gambler. It happened; an underage agent came in, got through the system, sat down, was delivered a drink, and the ID was checked. The person checking the ID misread it, handed it back, and dealt him some cards. The drink server saw that the ID had been checked and started delivering drinks. Mr. Kealy incurred a violation. So where does he go from there? Who made the penalty and who deserves the penalty in that situation? So the licensee does not dispute what happened; it did happen, so what is the size of the fine appropriate for that action for the licensee. Mr. Kealy provides all these training modules and has been proactive in every element related to underage gaming, trying to keep it out of the facility. It is not a profit center; he is not out there with cheerleaders trying to bring in 18 year old boys to gamble, he does not want them; 17 year olds, he does not want them. Nonetheless, the size of the fine Mr. Kealy was presented with was \$7,500. His average

profit in a single day or a single week at that facility last year was 0. Any given day it was 0, because the whole year was 0. So when a licensee writes a check for \$7,500 for something they did not support and are actively training and working forward to, and there is the guy down the road that never cares and certainly is happy if anybody is in there. That is what Mr. Kealy wants to work forward on, but he does not get any latitude on that. It fell on deaf ears because a standard was created that was invented, literally, in a conference room that the Commissioners have not participated in on the size of that fine. Mr. Kealy could not bring the case forward because his alternative was to take his chances with the Commission related to the size of that fine versus being closed. The negotiating position of the Gambling Commission staff is that if the licensee takes it this distance, the Commission is no longer going to talk about fines but only about the number of days the licensee is going to be closed. That has been the negotiating position and it is an untenable one for the licensees. There are other manufacturers here that have a pretty decent story. Mr. Kealy concluded by saying the things that make you go huh is the fact that you do not see it because they cannot take the chance.

**Commissioner Rojecki** asked Mr. Kealy if, in his specific instance, he entered into an agreement to pay the \$7,500 fine because if he took it to the ALJ the fine of record would be the closure for a period of time. **Mr. Kealy** affirmed, adding that licensees have been warned repeatedly by Commission staff and their counsel that currently an ALJ will not be able to consider anything other than how many days the licensee will be closed. A business cannot consider being closed; it is just not a consideration. So that is their negotiating position, which leaves them empty to the negotiating position; just close and be done – surrender their license. That is really the steps that are going forward. In the Porterhouse case where they continued to not do their paperwork correctly, the outcome was that the Commissioners supported the 14-day closure, or whatever it was, and the net effect was the destruction of the business. **Commissioner Ellis** pointed out Porterhouse had filed bankruptcy prior to when they came to the Commission. **Mr. Kealy** said that was the way it goes.

**Mr. Dave Malone**, Miller, Malone and Tellefson, felt they were getting somewhat off the tangent of the ALJs ability to modify penalties, but thought Commissioner Ellis asked a very valid question in why the Commission was not seeing business licensees coming forward. Mr. Malone knew there was counsel for other tribal vendors present. Mr. Malone represents several tribal vendors and to put it in the context of that category. What they face is if publicly traded companies like most of these tribal vendors are has their license suspended and they go down for 15, 30 days or whatever the Commission's request is, the machines go dark on the tribal reservations. That is the threat that has been put to people in the past and that is the action they are faced with. It is not something they would do, because what would happen is if Mr. Malone's clients went dark on the tribal reservation, Mr. Galanda's clients would be happy to jump in at that point in time and exercise the business opportunity that would be presented. So we are somewhat held hostage to the system. The fines are enormous for some of these companies, and the risk they run – and also with the license suspension hanging over their heads – is reporting that in the other jurisdictions; if they are

publicly traded, there are SEC fines, etc. So a license suspension for some companies has a dramatic affect beyond the borders of Washington, which he has tried to explain to the staff in different instances. They are making some progress, but it is a growing frustration, which he will leave to the other machine manufacturing counsel to share. Mr. Malone thought it was something that would be addressed in greater detail, along with the mitigating and aggravating factors discussion.

**Commissioner Ellis** observed that Mr. Malone was right that this discussion was more pertinent to the second issue than the first. Generally, it is hard to distinguish between the value of this provision telling the ALJs they have authority to deviate from the Commission staff's recommendation and the mitigating circumstances. It is hard to set that aside from just the normal give and take of settlement negotiations. There is not a company in the United States that is negotiating with the IRS, or the SEC, or any criminal prosecutor that does not feel they are in roughly the same circumstances that Mr. Kealy and Mr. Malone described. **Mr. Malone** replied he thought the difference would be that in those instances, the ground rules are set forward for the administrative law judges dealing with the Treasury service and the IRS. People know what the judge can do. The frustration the licensees have is, again, they hear that informally ALJs already consider these factors. So, the Coalition's position is what is the problem with codifying that practice so that all licensees know?

**Mr. Dave Pardey**, owner of Skyway Park Bowl and Casino, testified he has had his license since 1998 or 1999 and was the third licensee in the state to have a house-banked card room license. In the year 2003 he was more profitable than he is now. For tax reasons, Mr. Pardey owns his business, the corporation, and also has another entity that is his building and land that he leases from his business. A couple days before the end of the year, Mr. Pardey's CPA told him to write a rent check for \$20,000 to his partnership that owns the building and land and then loan that money back the same day, which for tax purposes would save a little bit of money, which was all legal. He did not think he had done anything wrong, but a few months later when he turned in his audit and everything, the Gambling Commission said Mr. Pardey loaned money back to his company but did not let staff know. Mr. Pardey thought the corporation with the casino made the money, paid rent, and then loaned it back. Mr. Pardey had a \$10,000 fine or three days closure facing him from the Gambling Commission, so he hired Mr. Malone and Mr. Miller to investigate the situation. Mr. Malone and Mr. Miller advised Mr. Pardey that if he protested this all the way, the fine would double or more; it was going to go to \$20,000 or even more. So Mr. Miller advised Mr. Pardee that his best option was to pay the \$10,000 because there were too many consequences. Mr. Pardey was pretty upset; the consequences if he protested and lost would be a big fine, and he definitely could not close for three days. Anyway, that was a very upsetting situation. Mr. Pardey was sorry that over the past few months he had not been up here before, but after hearing the discussions, he felt he was just such a good example of a ridiculous fine over no intent of doing anything wrong. The \$10,000 fine was just ridiculous; it was licensee's money going to one spot and then going back. The attorneys of the Gambling Commission would not hear anything of it; there were no rights for Mr. Pardee to negotiate. He felt it should have been a 0 fine.

Commissioner Rojecki made a motion seconded by Commissioner Ellis that the Commission approve amending WAC 230-17-025, as presented by staff, with an effective date 31 days from filing. *Vote taken; the motion passed unanimously.*

**Ms. Hunter** reviewed the information in the Rules Summary for WAC 230-17-137, pointing out there have been several letters and testimony in support of this proposal. Staff's recommendation is for final action, but with neither the original nor the alternative being adopted. The amendment that was proposed is better than what the original was, but it still does not take care of concerns that staff had with the original petition, including the lack of the aggravating factors, making it clear that the Commission would not have to consider factors not raised before an administrative law judge, and the possibility of creating the penalty phase to the hearings where staff are having to sort through the longer list.

**Chair Bierbaum** clarified the rule change language that is currently being proposed is not mandatory; it is "may" language. **Ms. Hunter** affirmed. **Chair Bierbaum** asked why, given it is now "may" language, staff would care whether an ALJ was allowed to consider those if they can already consider them. **Ms. Hunter** replied that part of the reason was just adding balance to what the list looks like and staff felt the aggravating factors should be included in the list, which they were during discussions with the Coalition. Ms. Hunter did not think it was a huge concern, but was just pointing out there had been months of discussion and, for whatever reason, that other language was not added in the amendment. Ms. Hunter thought there was still a question about whether the length of a hearing was going to increase. She was concerned that all the things that have been raised were not necessarily addressed in the amendment. Ms. Hunter thought it was a choice for the Coalition to make on whether they want to do that or not. **Chair Bierbaum** asked if staff had proposed additional aggravating factors and the Coalition refused to include those in their proposal. **Ms. Hunter** replied that staff had proposed that list during the discussions with the Coalition and also pointed out that when dealing with the first petition it does not have that list. The alternatives before the Commission still do not have the list of factors included. **Chair Bierbaum** asked if staff would not be opposed to the change if the Commission included the additional aggravating factors that were recommended to the Coalition. **Ms. Hunter** thought that would be better, but it still did not address the matter of how the language was currently worded. Ms. Hunter felt there was a question regarding if the mitigating and aggravating factors are not raised before the administrative law judge, could they be raised at the Commission level. Typically, the Commission does not do that; they raise everything at the administrative law judge level so they know when coming into it what is before the Commission. Ms. Hunter thought Mr. Malone understood there might be two interpretations and is not in disagreement. But the language that is before the Commission on either of the alternatives still talks very specifically about the Commissioners. Ms. Hunter did not think that was cleaned up as well as it could be. The Commission was still going to have this long list and staff would probably see more discovery about that list, which will cause extra preparation when these are raised. **Chair Bierbaum** asked if there was any empirical evidence to suggest that the Liquor Board

hearings are longer than administrative law hearings related to gambling. Chair Bierbaum wondered if their opinions and hearings were longer and whether the staff at the Liquor Control Board spends more time preparing for administrative law hearings than our staff does. **Ms. Hunter** thought their systems are quite different from ours. Because our systems of settlement are not the same, it is hard to compare the two. Her understanding was that the Liquor Board has a matrix, as does the Horse Racing Commission, and the only way to get off that matrix was by proving one of those aggravating factors or mitigating factors. Our staff has talked with the Liquor Board's AAG a couple of different times and her comment was that they sometimes do go on and on. Ms. Hunter could not give more specifics. She did not want to mislead anyone into thinking that staff has looked at the length of opinions or those things that Chair Bierbaum was asking, because staff has not done that.

**Commissioner Rojecki** asked if the issues that Ms. Hunter could not agree to were discussed during the negotiations, and if that was why there is a petition before the Commission. Or were there other issues; were those three points the three issues the Commission staff was stuck on? **Ms. Hunter** affirmed, noting Mr. Malone's thoughts may be a little different. The discussion was, to some extent, a fair amount different. Mr. Malone commented this morning, and would probably say it publicly, that they think the system has been improved since the discussions began. The list of settlement guidelines was hard to find, so staff agreed to put them on the agency website. That way someone who is not represented has the same access to the settlement guidelines as an attorney. One thing heard over and over was when they are ready to go into a hearing they want to know exactly how many days are going to be asked for at the hearing, so staff agreed to come up with something. To answer the question about whether these were the same issues that were discussed when working with the Coalition, a final draft did include the aggravating factors that are missing here. The real difference, though, was that it was meant to stay confined to settlements, not to the hearings process. There was also the issue about the error of the copy Mr. Malone had been sent and thinking it was going to apply to the hearing. It is a bit hard to compare the two because staff was talking about the list to be used in settlements. Staff's overall feeling was those factors had already been heard during the settlement process. It is okay to codify them if that is what the Commission wants, but this rule is dealing with the hearings and the appeal process, not the settlement negotiations, which is what Ms. Hunter thought the Coalition felt might help.

**Chair Bierbaum** called for public comment.

**Mr. Malone**, Miller, Malone and Tellefson representing the Coalition, tried to put this in perspective. It has been a process that has gone on for almost three years. The licensees were frustrated by penalties that were being put forward and in 2006 they got together. The Coalition consists of tribal manufacturers, commercial card rooms, charities, nonprofits, distributors; it runs the gamut of all the licensees. They all expressed problems with the way the process worked, so the Coalition set forward trying to work out a joint proposal with the Commission. The process from the industry's perspective was broken, which is why we have been engaged in this process for so long, why we continue to be before the

Commission with this petition, and why we continue to fight for what the Coalition believes are essential due process guarantees. That is all the Coalition is looking for; to see what other agencies have done across the country in the gaming arena and model ourselves and other state agencies after them. Addressing the Commission's concern in past meetings, the Coalition has changed the language from "shall" to "may" to make it discretionary; that was a fair compromise because it was a concern noted and thought it would still work because other jurisdictions have been able to make that work. The Coalition was not wedded to the language of "shall." Mr. Malone thought the Commission's position on why the aggravating factors were dropped was interesting. It was included in the original package discussed as part of the negotiations with the agency last year at this time. The aggravating factors though were buttressed on the fact that there were penalty standards in the proposal that were going to be brought forward. It does not make sense for the Commission to say they want to suspend a license for 15 days and then go before the judge and ask for five more days because there is something else going on; the agency set the standards. In the case of the Liquor Control Board, they have a rough guideline to use. Aggravating circumstances only make sense if there is a standard upon which to aggravate. If the prosecutor is seeking the penalty, they should not ask the judge for an additional sum based on the fact that they get to set the penalties. A generic aggravating circumstance was included in case the judge found that, for whatever reason, a licensee at hearing was recalcitrant, uncooperative, or just generally not demonstrating a level of competence to be in this industry. The Coalition did not make them specific as the Gambling Commission sought in the negotiations. They are for underage gambling and things like that, and the Coalition tried to make more generic mitigating and aggravating factors. Some of these factors would go both ways. If it is a threat to the public, that could be aggravating if it was, in fact, a player supported jackpot violation. It could not be a threat to the public if it were something more innocuous than just a simple record keeping mistake. Regarding the Commission's consideration on factors brought before them; this would not be retrying cases in front of the Commission; that was never the intent. WAC 230-17-090(3) says it has to specify on the record what is being appealed to the Commission if that were the case. Mr. Malone did not think that changed; the Coalition's intent was never to have cases brought before the Commission anew. The Commission was not supposed to be doing a de novo review of the entire record. If the Commission wanted to strike out the "or Commissioners," that is something Mr. Malone could live with. He did want to emphasize that under the hearing rules, the Commission can designate themselves to hear a case on first impression. It does not have to go through the ALJ process, they could just en banc have a case in front of the Commission. That is why Mr. Malone kept that language in there; because it allows Commissioners to hear the facts. So, in that instance, Mr. Malone would be prevailing upon the commission. He did not think that was a major issue one way or the other; it was just a matter of interpretation. Mr. Malone was somewhat at a loss as to the Commission's concern about how this would take longer in a penalty phase portion of the hearing. If ALJs are already hearing these factors, how would it somehow make the cases longer? Mr. Malone was still lost on that one because if they are doing it, it should not be an issue. The Coalition thinks this would expedite the procedure greatly because most of the commercial licensees, the vendors, and what have you, are represented by counsel when they get to these proceedings. This sets

forward the standards by which the attorneys handling these matters, and pro se litigants for that matter, will know what to argue in settlement. It will narrow the parameters. Right now an exhaustive amount of time is spent in discovery and other issues trying to turn over every stone looking for what may be a mitigating factor. Addressing the issue of underage gambling, Mr. Malone said he would defer to Mr. Kealy, but his was a prime example of why this process was started; because of the fact that the card rooms were being held strictly liable for the actions of their employees. None of the Commission staff attorneys would allow any sort of mitigation in any factor. Mr. Kealy was able to prevail at one point, and Mr. Malone would let him address how that came about. Mr. Kealy's compliance program where they had policies in place, and training, and education became the Commission standard that now applies to other licensees. It is now considered a mitigating factor, but it was not originally. The Coalition is trying to get those sort of things codified to allow everyone to know what is out there. There are other attorneys from some of the other companies that would like to address the Commission as well. One point that Mr. Malone made was that there was a reference in the Commission's petition materials that were provided to him at this time last year that said that while these practices are already being done and these factors are already considered, this would codify the standards so the licensees would be aware of them. The Coalition is asking the Commission to codify the factors. There are limited aggravating circumstances because we no longer have the standards, which was part of the original penalty project. Mr. Malone just wants the licensees to be able to know what they face and what they can argue, and to allow the judges, the ALJs, to know what the parameters are. If someone is going off tangent in a hearing, the judge can ask how it fits these particular mitigating or aggravating circumstances and put the person back to task and limit the nature of the proceeding and not let it go all across the board. In the Bayside appeal that was before the Commission in November, the first 30 pages of that trial transcript were the parties trying to understand what was going on and why they were there. This kind of alleviates that concern and allows people to focus on the true issues as they go forward.

**Mr. Gabriel Galanda**, a lawyer with Williams, Kastner and Gibbs in downtown Seattle on behalf of Bally Technologies, along with his colleague Anthony Broadman, said he was present to testify and offer some information in support of the new Section WAC 230-17-137. Mr. Galanda represents Bally Technologies, which has been a licensed manufacturer and distributor for the past five years since it acquired Sierra Design Group in 2004. Bally is the leading video lottery terminal distributor in Washington State, having sold or distributed over 1,600 machines in the state of Washington. They are publicly traded on the New York Stock Exchange. By way of those 1,600 machines they have approximately 75 percent of the video lottery terminal market share in Washington. Bally's philosophy has always been, in coordination with Director Day, with the CLD, the EGL, the TGU, this Commission, to be a business partner with the Washington State Gambling Commission. And that is the philosophy under which Mr. Galanda and Mr. Broadman were present today in support of the new rule, WAC 230-17-137. It is a rule that the Coalition has been working on for almost three years, so the rule is by no means half-baked, it has been given a lot of time and energy. Mr. Galanda said he would not rehash the somewhat tortured history

of the negotiation process, but wanted to focus on a response to the Chairwoman and Commissioner Ellis' request last meeting for an anecdote or two that could help centralize and synthesize some of these issues. Mr. Galanda told a story about Bally Technologies in a threatened suspension process and its settlement story that may help illuminate a lot of the issues and highlight the profound policy implications that are at issue here today for the Commission. This is not just about writing a check; it is far from that. There are significant policy implications. In fact, Mr. Galanda would venture to say no licensee standing before the Commission today is trying to run from a mistake they made. In fact they are trying to be as honest, and transparent, and candid about mistakes they have made, self-report those mistakes, and then hopefully receive a punishment that fits the crime, as the saying goes.

**Mr. Galanda** felt it was important to recognize that Bally, despite having 1,600 machines on the floor in Washington tribal casinos in Washington, those machines rotate so they have probably placed tens of thousands of machines in Washington over the course of the last five years. They have been charged by the Gambling Commission on three occasions in five years, on occasions Mr. Galanda believed were de minimis but where very active and pro active steps were taken to resolve. Mr. Galanda told about one or two that are related that arose in June of 2006 when Bally had 16 video lottery terminals placed in the Nooksack Casino. Seven days after those machines were installed, again 16 of 1,600, Bally realized there was improper backplane, which is a piece of hardware in those 16 machines; specifically two power connectors, a 5-volt and 24-volt power connector, and an extra resistor, so basically powering equipment, equipment that would power the machines but has no affect on play whatsoever – it is hardware, and was, in fact, simply the wrong model of hardware. It had those two extra power connectors and an extra resistor as opposed to another hardware that was approved and in other machines in Washington. Again, it was hardware, not software, and had no affect on play. It was there for a period of seven days, and as soon as Bally realized that the hardware was installed improperly, they self-reported it, which is precisely the type of behavior the Commission wants from its licensed manufacturers, distributors, and other licensees. In fact Bally self-reported it directly to Julie Lies at the Tribal Gaming Unit and then took appropriate action thereafter. Because it had no effect on play, neither the TGU, the EGL, or the TGA at Nooksack believed those machines needed to be pulled out of play. It was simply a de minimis violation. Bally then took steps to make sure that hardware was approved, and by the next month, July of 2006, that piece of hardware, that backplane hardware with those power connectors and that extra resistor, had been approved. Mr. Galanda apologized for belaboring the Commission with the details, but wanted to give a concrete sense of how these violations occur for a manufacturer like Bally. What Mr. Galanda learned was that this same issue had arisen at Tulalip and when the staff issued its case report, they said IGT made the same mistake; wrong backplane in machines, when installing them at Tulalip. Mr. Galanda was not aware that any violation had ever arisen in that instance, and so he was kind of scratching his head. He did not see any information that was publicly available that suggested that Tulalip IGT was somehow sanctioned or brought on charges for this same violation. Presumably they self-reported it. Mr. Galanda wondered if this was an arbitrary application of the law as it pertains to Bally. Perhaps, but perhaps not, because he did admit they had a prior settlement

order in place arising from a situation at Kalispel in September of 2004 when they had 8 terminals there, again of 1,600 in the state, where the maximum bet had been wrongly calibrated. These machines were being played at a dollar higher than they were allowed; \$5 versus \$6. But again, that matter was reported and resolved and Bally paid a fine of \$20,000 in that instance and agreed to be good for basically a year. To get back to the Nooksack situation, Bally now committed a second snafu. These machines had the wrong hardware in them for a period of a week at Nooksack within that one year time period in which Bally was supposed to be good. So Bally self-reported it, of course, admitted they had done it. Bally had a handful of machines of the 1,600 in play in Washington that just happened to have the wrong piece of hardware installed in them. It had no effect on player play whatsoever. What did Bally do about it; they self-reported it. Then the staff report came out and a suspension is threatened by way of administrative charges. Bally answered the administrative charges and then proceeded into a settlement discussion. The initial settlement offer was a 20-day suspension and an offer of \$180,000 in payment. Bally said, wait a second, \$188,000, in fact, for a handful of machines that had an improper piece of hardware that had no effect on play that was self-reported and then promptly remedied? The punishment did not fit the crime. Mr. Galanda noted that the offer was made by staff counsel who are not present today. More specifically, it was \$8,000 on the underlying offense, the Nooksack violation, and \$180,000 on the settlement order violation relative to Kalispel, again which was self-reported. Mr. Galanda asked staff counsel why \$188,000 and was told there was no precedent other than a situation involving a manufacturer named G Tech. Mr. Galanda believed there was a fine somewhere in the order of \$300,000 or \$400,000 once upon a time because G Tech was not forthright with the Commission, was doing business with a number of unlicensed manufacturers in the state of Washington, and was not maintaining records. And over a tortured history with them, that high of a fine was negotiated, given the most egregious facts ever encountered relative to a licensed manufacturer in the state of Washington. Mr. Galanda pointed out those were not Bally's facts. Come to find out it was not a \$300,000 or \$400,000 fine that G Tech paid, but was actually \$230,000, and the facts were as egregious as Mr. Galanda described them: a number of situations where things were not being disclosed to the agency, were later identified to the agency, charges were brought, and a fine that perhaps did fit that crime was paid. Mr. Galanda said this was not that situation and he could not get his hands on any factors that suggested that G Tech's facts were somehow similarly situated to Bally's, and asked why Bally's should be held to that standard. Again, in light of the IGT Tulalip situation and now this G Tech comparison, they were left feeling like this request was rather arbitrary and respectfully disagreed that any such punishment of a 20-day suspension and \$188,000 fine fit this crime which Bally's admitted. So we said well what if we don't pay this

**Commissioner Ellis** asked what the 20-day suspension would have been a suspension of. **Mr. Galanda** replied it was his manufacturers and distributors license. **Commissioner Ellis** said that meant for 20 days Mr. Galanda would not be able to sell or place any machines in the state. **Mr. Galanda** replied that was exactly where he was going with his story. He said, well what are the consequences if Bally does not agree to pay a \$188,000 fine because they do not believe it is commiserate with the crime committed and admitted. The answer

was that Bally's machines go dark. Bally's said wait a second, 1,600 machines in 24 tribal casinos in the state of Washington going dark for the period of 20 days, did they understand the colossal mess they would find themselves in jurisdictionally – did they think the tribes would allow that, to go down without a fight. And if successful, is it in the best interest of Washington to have 1,600 machines go down for 20 days and the loss of tens to hundreds of millions of dollars for the state of Washington? Thankfully Bally was able to avoid a discussion like that, or having to take such a discussion to hearing. In fact what Bally was able to avoid was an argument to an ALJ, and maybe to this Commission, and ultimately to the Supreme Court of this state and maybe the United States. The Gambling Commission does not even have licensing authority over the likes of Bally, or IGT, or Multimedia, whose business is exclusive to the reservations. They have certification power, yet they were threatening to suspend a license that arguably the agency does not even have authority to issue, but that is a whole other discussion and probably not one to get into on these facts. Again, all because of a handful of machines at Nooksack that had the wrong piece of hardware in them. Bally's paid a fine of about \$20,000 at the end of the day, but asked themselves a number of questions. How was that discussion even happening; the threat that 1,600 machines in Washington would go dark if Bally's did not agree initially to a \$188,000 fine for what they believed was a de minimis violation, particularly given that they self-reported it and did everything they could to remedy the matter after the fact and prevent it from happening again. Mr. Galanda then learned of the Coalition process that was underway in 2006 and for the past three years has been working with that anecdote in mind to try to bring some order to this process. There must be some order in the settlement discussion and ultimately before an ALJ or these Commissioners where aggravating and mitigating factors can be brought forward so that a licensee does not have the Hobson's choice that was presented in the settlement, or ultimately that choice is not given to an ALJ or the Commissioners in the event they have someone that made a mistake. This is bound to happen. There are tens of thousands of machines running through Washington. Bally's admitted the mistake and then only asked that the Gambling Commission impose a fine that was commiserate with the mistake they made.

**Mr. Galanda** asked what the policy was that is really at issue here. He wanted to step away from the check writing examples that have been given because, at least in Bally's instance, it is not a question of running from any wrongdoing. In fact, Mr. Galanda did not believe in any licensee's instance was it a question of that, or even writing a check. Bally is publicly traded; they have officers that are formally set as regulators on the Nevada Control Commission; they understand there needs to be accountability and transparency, and there needs to be a partnership with the state of Washington in a jurisdiction like this one. But in situations like the one described, the punishment simply did not fit the crime. Mr. Galanda wanted to at least quote to the Commission what he said in their papers, language the Commission may recall from the Rule Simplification Project, which Mr. Galanda also participated in on this point of due process. The point of due process of the law in general is to allow citizens to order their behavior, which is what he is talking about here, ordering behavior before the matter is ever brought to charges, ever brought to the settlement conference room, or ever brought before an ALJ or this board. A state can have no

legitimate interest in deliberately making the loss so arbitrary that citizens would be unable to avoid punishment based solely upon bias or whim. And when Bally's was presented with a settlement offer of \$188,000 on a de minimis violation, that was not ordering behavior. And the behavior the Commission wants is self-reporting, like they are getting from a lot of the licensees. At the end of the day, that is not something that is anything other than arbitrary and capricious when the threatened punishment, if taken to hearing, after basically admitting wrongdoing and it is now a question of suspension or fine, and suspension happens to be 20 days with all the machines going dark in Washington, that simply does not comport with due process. The paramount value here that the Coalition has been working on for the better part of three years is due process of law and the words that Mr. Galanda just quoted of the Supreme Court where the punishment does fit the crime. Ultimately the behavior, again it bears repeating, that the Commission is trying to order, is compliance, pro-active compliance, self-reporting, and cooperation with the state of Washington. If there are not standards in place, or if the status quo is allowed to prevail, there will be more situations like G Tech, Bally, or some of the other licensee stories that the Commission has heard today. One of the perennial opposition points has been this is going to create more work for the staff, and no disrespect to the agency, but Mr. Galanda did not think that when constitutional liberties and property rights are at stake that creating more work is a valid defense to the point the Coalition is making, which is that due process must prevail. Mr. Galanda did not believe that more work would be created. If that situation is used and during a discussion with staff counsel they are saying \$188,000 and the licensee or counsel has a set of aggravating and mitigating factors, they are going to have an intelligent discussion about all those mitigating factors that were just described. In fact, there are aggravating factors in the rule as well. In this instance Bally violated a settlement order that was agreed to relative to the Kalispel incident, and in Mr. Galanda's estimation they are stated neutrally, and they actually cut in both directions. These criteria can be aggravating and they can be mitigating, but when Mr. Galanda was in that settlement discussion he then could have sideboards, as Dave Malone termed them, in which he could have a discussion and prevent the Hobson's choice that was described. Ultimately Bally was in that situation where one of the charges was brought before an ALJ or a hearing, and in Bally's interest, there was a genuine question presented about whether this agency even has authority to license VOT providers like Bally. Those are issues that Mr. Galanda did not think needed to be addressed at this moment in this agency's history, and are better left for policy discussions and settlement discussions. That is what these criteria facilitate. These criteria are completely consistent with the spirit of alternative dispute resolution, which is one of our mantras through the Rule Simplification Process. Make the process so clear, so transparent, and to some extent so simple that even the pro se litigant, or certainly parties represented by counsel, can actively get engaged in a process that is an alternative to traditional litigation, even administrative litigation. It just increased the cost of the agency's work, increased the cost of the industry, and in an economy like this, ways need to be found to decrease costs. So a process represented by these rules whereby licensees and the agency can have discussion about aggravating and mitigating factors, perhaps in the settlement room rather than in front of the ALJ, is good. And Mr. Galanda believed it would actually create less work for the agency rather than create more work. For all those reasons, but the most

important reason being the due process of law and the punishment must fit the crime, Mr. Galanda and Mr. Broadman were in whole-hearted support of this rule and urged its adoption by the Commissioners today. Thank you.

**Commissioner Ellis** asked, at the risk of repeating the question he asked at the last meeting of Mr. Broadman, if there was anything in the list of mitigating factors that Mr. Galanda, as an attorney, if he went before an ALJ in the situation described, that it would not have occurred to him to present on behalf of his client. There seems to be a general agreement that an ALJ will hear all of the types of factors that are in the mitigating factor list, as well as lots of other factors. Commissioner Ellis thought Mr. Broadman agreed last meeting that if he had a situation where it was clear that a violation was inadvertent or very technical as Mr. Galanda described the situation today, it was something certainly a good attorney would present on behalf of the client. There does not really need to be a list of mitigating factors to be able to tell the attorney that. **Mr. Galanda** disagreed – he would need the list because as he understood it – and, in all honesty, he has never been to a hearing – and it kind of makes his point and the point that has been made by others, there is simply too much at risk. Bally Technologies, publicly traded, licensed in hundreds of domestic tribal and international jurisdictions, cannot afford a 20-day license suspension, and they certainly cannot afford the colossal mess that would ensue in the event the Gambling Commission attempted to shut down 1,600 machines for 20 days. It would be a mess of colossal magnitude. But, unfortunately, as Mr. Galanda understood the process right now, if they took that example to hearing and admitted that the hardware was in those machines for seven days, that the Commission was seeking a 20-day suspension based on that violation and a violation of a settlement order, that Bally would only pay \$188,000 as the offer was originally made to have that go away. So Bally admitted they did it, then the question was, as Mr. Galanda understood it, for the ALJ, their question is whether they should suspend the license for 20 days and then suffer those consequences with them, or deny their license all together. This, as Mr. Galanda understood it, gives discretion for the ALJ, and more importantly for the parties in settlement discussion, to figure out what those factors really are, and it guides the discussion in a way that Mr. Galanda thought they wanted it, or they will see that 20-day suspension and the mess that would ensue therefrom.

**Commissioner Ellis** thought the Commission just adopted a rule that would make it clear to the ALJ that they are free to deviate from the recommended 20 day suspension, if that is what the licensee was facing when they got to a hearing. As Commissioner Ellis understood it, in the situation Mr. Galanda described, he was able to work it out with the Commission attorneys and come up ultimately with a sanction that he was willing to live with. But it seemed to Commissioner Ellis that the Commission has to focus on one hand on the penalty, and there is nothing in the list of mitigating factors per se that specifies penalties. Commissioner Ellis was sure Mr. Galanda was familiar with the case history matrix where the Commission gets into what the history of the Gambling Commission has been in dealing with various types of violations based on the number of violations of past history. But that is one thing, and then mitigating factors, of course, addresses the question of what the ALJ can consider, or what the Gambling Commission should consider by way of defenses, such

as the fact the violation was inadvertent or perhaps highly technical and did no damage; obvious factors that any lawyer would seize upon when representing a client. Commissioner Ellis thought there had been a lot of talk about the penalty side, but it seems to be somewhat severed from the issue before the Commission, which is the list of mitigating factors. **Mr. Galanda** understood Commissioner Ellis' point and said his point was well taken, given the rule that was just made. But again, they are trying to keep these matters, in some respects, out of the litigation process, because that is a process that is a zero sum game for the agency and for the industry. There was a companion set of rules, and Mr. Malone can speak to it better, that would actually codify penalty standards, as is done in a number of jurisdictions. Given the discussions the Coalition has had with staff over the course of the past two and a half to three years, that was ultimately beyond what was thought within plausible reach altogether. The Coalition thought this was a rule that was about as good as they could possibly do given the circumstances, and given the staff's opposition to what they had been working so hard to accomplish for the past two and a half to three years.

**Chair Bierbaum** said her question was way off the subject, but she was so curious that she had to ask anyway. When Bally puts machines in a casino, do they sell the machines to the tribes or are they just leasing them? **Mr. Galanda** replied there are both purchase and sale relationships with the casinos, and there are also lease and revenue sharing relationships with the casinos. **Chair Bierbaum** was just thinking that if they were just sold to the tribes, the Commission would not be able to shut down machines that were sold to somebody else. But this is probably a discussion for a later day, if ever.

**Director Day** said Mr. Galanda talked about the risk of the penalty or fine and that they cannot afford to go forward with that discussion with the ALJ. Director Day was missing what this list would do in order to change that risk. If staff is still recommending the penalties that Mr. Galanda was talking about, that recommendation would still be there and the potential for suspension would still be there – this list would not change that. **Mr. Galanda** responded that it creates a more certain environment, for day-to-day business operation. In fact, if you look at some of these things, it is talking about basically giving benefit or favor to the fact that someone had a compliance program in place, that someone took remedial measures, that someone self-reported the matter, or that someone took steps to ensure compliance moving forward. Again, that is the behavior that is trying to be ordered using the Supreme Court's language. So on some level these rules motivate behavior before there is ever a threat of a fine, or even administrative charges. That is really what the Coalition is trying to get at. There will be a recommendation, but once that recommendation is made and counsel or licensee does not feel like it, there are certain criteria that can then be argued when that recommendation is made. There is the settlement matrix, but in the instance of Bally, they were not able to figure out even the G Tech circumstance from this, and were not able to figure the Tulalip IGT circumstance from this, and there was no way to really figure out what the sideboards, as Dave Malone has been calling them, really are. So the Coalition was looking for some certainty that would guide a discussion either in settlement or before an ALJ or this Commission that would basically order the behavior they want before they even get to that moment, but then create an environment where there is an

expectation of what the ground rules really are when they get into hearing. It is not an either/or; either the licensee pays the check or they face the suspension for up to 20 days.

**Mr. Chris Kealy**, Vice-President of the RGA, repeated he has been involved in this Coalition process. Mr. Kealy is not an attorney, so he learned a lot during the process. He sat in rooms and five, six attorneys would have deep discussions about things Mr. Kealy cared very little about; the difference between the words shall and may, and all these other things that happened. But what Mr. Kealy got repeatedly was a good spirit of understanding about how everything works. And yet he is the guy that has dealt with some of these settlement negotiations and dealt with a lot of the stories from the industry side of this. So Mr. Kealy listened to stories from Mr. Pardey and many other people about the other situations they have been in. A list like this really does give people that do not understand the law something to look at. Attorneys have had many clients in their past that want to talk about stuff that is absolutely irrelevant, so it is sometimes nice to have a list to hand to the client and say “here, if you can find something that applies, let me know, otherwise you are in trouble.” And it helps. The original list was 27 points that got whittled down for lots of reasons. During the discussions items kept being taken out. Four or five other items that would be aggravating that could get added back on the list to possibly find an acceptable list to go forward with that Mr. Kealy was not the least bit afraid of because he does not know enough about the law to be afraid of it. Any list gives someone something to look at, and it gives something for an average client to go “hmm, okay, that’s pretty aggravating. That’s not good, so let’s settle here, or let’s do that. Or no, there’s a real point here. There is a real point and this is why. And we’ll take this to an ALJ.” Mr. Kealy has dealt with ALJs in other business concerns and knows they want to operate fairly quickly and efficiently; they want to get a settlement done with and they usually like people to settle and not have to make a decision. They will force that list on both parties several times during any typical hearing looking for a solution and if people are listening to them, they find the solution. The list helps the process go forward in a more constructive, defined fashion. Thanks.

**Mr. Galanda** corrected, for the record, that his reference to the number of machines in play as a result of Bally’s efforts in Washington is 16,000, not 1,600. But the Hobson’s choice becomes: pay the significant fine or run the risk of 16,000 machines going dark in about 24 tribal casinos for a period of 20 days. There is significant economic consequence to such a proposition.

**Mr. Malone** followed up on something Mr. Kealy said that struck a chord with him. Maybe Mr. Galanda already brought this up, and if so, Mr. Malone apologized because he was talking to one of his other clients at that time. These factors would be instrumental in effectively streamlining this process. And Mr. Malone hesitated to say this, but the kernel of this idea came from an ALJ during mediation with the Commission and the staff attorneys. It was confrontational and it was a knock down-drag them out situation. The ALJ commented to Mr. Malone during a caucus that there were no sideboards on these things, which are where Mr. Malone came up with that phrase – there is nothing to constrain them; there is nothing reining them in and saying this is what they can and cannot do. From that

and the complaints of the other licensees, many of whom are rightly or wrongly afraid to appear before the Commission because they think there will be retribution if they speak out on some of these issues, that is the nucleus of this cause and why we are here. The fact that we have standards, as other jurisdictions do, would allow us in a mediation with an ALJ – for the ALJ as Mr. Kealy pointed out, and this is what really sold Mr. Malone on this and struck it home, the ALJ could give this list to the Commission staff attorneys and say “why aren’t you considering these things, these are relevant factors.” We spend months arguing about what is even relevant in some of these cases. Mr. Malone gave the example of Mr. Kealy and the mitigation for underage gambling policy. That took months and months to evolve, and months of confrontation between staff attorneys. That is the issue that is here now. If there are rules that are applicable to all sides, then these things can be approached in a much more economical and judicious manner. The difference that Mr. Malone has sensed over the past three years with the Commission staff and from his perspective is they are viewing this as everything works from a settlement up basis. Mr. Malone wants to settle cases and none of his clients want to pay for attorney’s fees and the risk, the real risk, of having 16,000 machines down for 20 days is enormous to some of these folks. But what the Coalition is looking for is if the Commission sets the standard of what would happen if someone goes to hearing, they will work underneath that. They will work the problems out in 99 percent of the cases and would be much more efficient in doing so.

**Commissioner Ellis** asked if Mr. Malone was saying that if he were representing Chris Kealy in the situation regarding the underage gambler, and if he went into settlement negotiations with Commission staff, he thought that Commission staff really would reject any thought of taking into account Mr. Kealy’s casino policies and procedures to prevent underage gamblers from being in the casino. Commissioner Ellis asked if Mr. Malone did not think that any good attorney representing the Commission was going to take into account that an ALJ is almost certainly going to listen to that defense and is going to give it some weight and that it would color the approach that the Commission attorney would take in deciding what an appropriate settlement would be. **Mr. Malone** responded in answer to the first question, those issues were brought up with Commission staff and they did refuse them. That is why there are now specific mitigating factors for underage gambling; the risk is just simply too great. This process has been the first that Mr. Malone has heard that they think ALJs actually hear these factors. Mr. Malone has spoken with ALJs who say some ALJs will consider some things and some will not. Mr. Malone deferred to Chair Bierbaum’s experience with Liquor Control Board issues and the rules that are set forward there. Some of the judges are very conservative in their approach to the authority they are granted and will not go beyond that authority. Some have even said it was a quasi-law enforcement agency and therefore the laws are supposed to be construed strictly against. Others will throw back the fact that the intent provision of the RCW says all factors are supposed to be construed liberally in favor of the Commission. It goes both ways. So no pun intended, it is a crap shoot; and it is a crap shoot that cannot be dealt with when talking about the livelihood of the licensees. There are some egregious fines out there, but the choice and the uncertainty going forward is just too significant. Mr. Malone wanted to address the matter of the settlement matrix, which is not the penalties they would be seeking

at hearing, at least in the past. Generally those would double, if not triple, if someone proceeded to hearing. In the last year there have been modifications of the Commission's policies on that. Standard practice before was that the licensee would get a notice of charges, which would not say what the penalty would be, but just said at the very end that if the licensee defaulted, the penalty sought above would be imposed; a 30-day license suspension. Nowhere in the language did it really say what would be seen – that is what is faced as the penalty at hearing.

**Mr. Jim Beaulaurier**, counsel for IGT Nevada, is a licensed distributor and manufacturer in Washington, said he had submitted a letter in support of this proposed rule before the last meeting. Mr. Beaulaurier testified that IGT supports the proposed alternative with the permissive language of “may” that is before the Commission today. Thank you.

**Mr. Faulkner**, gambling service supplier, asked if Commissioner Ellis was satisfied that there are probably a number of cases of licensees who chose not to go through the process of attending because of what Mr. Kealy and Mr. Pardey talked about.

**Commissioner Ellis** had concerns about the significance of the examples, as he indicated in the questions he asked Mr. Malone and Mr. Galanda. Frankly, it would have been helpful if the Commission had received those examples in advance, particularly the one that Mr. Galanda mentioned. Commissioner Ellis did not know what the Commission's response would have been and did not know if Director Day was sufficiently familiar with the situation that Mr. Galanda was describing to be able to provide the Commission's view of it. So the Commission has heard what they heard and it is somewhat helpful. Commissioner Ellis was concerned that there was a heavy emphasis on the penalty side of these cases that was not specifically addressed, and he did not see that the mitigation list would help very much beyond telling attorneys and judges things they already knew. **Mr. Faulkner** had an example to share, although he did not want to spend the time or go into it if the Commissioners were satisfied there are a number of card room licensees that were scared off by the process. **Commissioner Ellis** said if Mr. Faulkner had an example, to go ahead. **Mr. Faulkner** explained he was an 8 percent stockholder in the gambling service supplier for Atomic Bowl and Joker's Casino in Richland. **Commissioner Ellis** asked if it was the Runner Runner. **Mr. Faulkner** replied it was Railbirds. When it was related to him that Mr. Frank had closed the casino and went to Reno, Mr. Faulkner thought maybe it could be reopened and they could make a go of it. When the annual review was resubmitted there were two charges; that the accountant had mixed the pull-tab revenues with the card room revenues, and that there was another holding company that had the land and building. It was the same family, Mark Frank's family, that owned the business and the land and building, and the accountant had included the land and building in the balance sheet, but made a note of it. The Commission Financial Investigations Unit fined the business for the two accounting errors, which was at least \$10,000. Mr. Faulkner advised and actually pleaded with his partners to go through the ALJ hearing, to be found in violation, and to come here and present their case. But they were scared off with the threat of closure.

**Chair Bierbaum** asked if Mr. Ackerman had a legal opinion about this proposal. **AAG Ackerman** had some legal thoughts about what was being proposed. To be fair to the speakers, the Commission invited them to describe what they have gone through. The speakers are simply being responsive to prior comments from the Commission and AAG Ackerman understood that. At prior hearings the Commissioners asked for stories and examples, and that certainly invites anecdotes to come forward, which is what the Commission got this morning. AAG Ackerman thought one of the problems with trying to decide policies or to promulgate rules based on anecdotes was that if a process is not set up that allows both sides of the story to be heard, the Commission gets what they heard this morning, which is the empty chair. Staff is sitting here being tried in absentia. The Commission is being told they are unreasonable, that they are unfair, that they do not listen, and that their motives are suspect. And those people, frankly, are not here to give their side of the case. AAG Ackerman suspected, without actually knowing, that in many of these instances staff would have an entirely different view of the facts of those cases. AAG Ackerman did not mean to cast aspersions on anyone that has come before the Commission; he was sure their views were sincerely held and they offered them as such. But the Commission is now being asked to make a policy decision and to promulgate a rule based on, in essence, one side of the story, which is unfortunate because the normal human emotion is to say all these people have been wronged, that no one has countered a word that they have said; therefore, the Commission should do what they want. Ultimately the Commission will make the decision. Especially in light of the first action the Commission took this morning, which was to amend WAC 230-17-025 to say that the presiding officer is authorized to modify an administrative penalty sought by Commission staff against the applicant, licensee, or permittee, AAG Ackerman was concerned as to whether the proposal that the Commission now has in front of them is a solution in search of a problem. The Commission has just said an ALJ can decide what the penalty should be, and what would go into that decision making process for any judge would be based upon relevancy and materiality. The Commission has just said the penalty is relevant, that it is material – the judge can hear anything. AAG Ackerman was also concerned about the notion that it is important to state mitigating factors, but it is somehow inappropriate to state aggravating factors. And it is not a matter of simply saying the reason for having aggravating factors is so staff could try to escalate a penalty from what had been sought before. Frankly, the reason for having aggravating factors is to offset the argument for the mitigating factors. AAG Ackerman thought it was a little bit specious to say that the aggravating factors should be left out. But assuming that the Commission needs to say once again what they already said when they approved the prior amendment, the list of factors in AAG Ackerman’s view is unnecessary and will highlight certain things to an ALJ, and perhaps to licensees like Mr. Kealy and others who read them, in a way that is misleading. And quite frankly, to do what has been proposed here, the Commission could ignore this entire list.

**AAG Ackerman** said he had tried to sketch out what this rule would say that would encompass both aggravating and mitigating factors within what the Commission has been told is the spirit of this page-and-a-half proposal. The Commission could simply modify the first paragraph and have it say “at the request of any party, the presiding officer or the

commissioners may consider such aggravating and mitigating circumstances as they determine to be relevant in order to determine whether or not to modify a penalty sought by the Commission.” Then strike all the rest of it and the Commission would have done what these speakers have said they are actually proposing to do because (9) of Alternative # 1 is any other aggravating or mitigating circumstances the Commissioners deem relevant. AAG Ackerman also said that, in his experience, it is problematic to try to promulgate legislation or rules of broad general applicability based on horror stories and worst case scenarios because these rules are intended to apply broad brush. AAG Ackerman thought the due process issue was a non-starter. The reason there is an appeal process in the first place when licensees are unhappy with a penalty that has been proposed or assessed by staff is so they can have due process in front of an ALJ. If they do not like what the ALJ said, they then get further due process in front of this Commission. This Commission has not been hesitant to modify initial orders where they felt the penalty was too harsh or inappropriate. But even if the Commission was hesitant, due process then allows an appeal to the Superior Court where superior court judges certainly have that power and have exercised it; and right on up the chain, as all the lawyers sitting in the audience know, through the Court of Appeals to the Supreme Court. So in light of what the Commission has done, this really is a solution in search of a problem. If the Commission needs to clarify it further, AAG Ackerman would suggest that the way to avoid interpretive issues, the way to avoid an undo emphasis on particular circumstances at the exclusion of others, is simply to create a one paragraph rule along the lines of what he just outlined. Maybe there is better language; this was just a suggestion. AAG Ackerman said he was very concerned. To some degree the Commission asked for it, but they have gotten a very one-sided recitation of a parade of horrible, and AAG Ackerman felt a bit sorry for the staff that are not present to at least, if not justify, explain their views of these various cases.

**Chair Bierbaum** responded she did not want the staff to think the Commissioners do not understand that there are two sides to every story; they most certainly do. Chair Bierbaum thought our staff knew how highly the Commissioners think of them. She did not view this as an attack on the staff, and did not think that was what the licensees were intending to do. Chair Bierbaum applauded the staff’s professionalism; that they do not feel the need to jump up and say no, no, no, it did not happen quite that way. So for the record, Chair Bierbaum said that she was not viewing this proposal as an attack on the staff, because the licensees have told the Commission over and over again how highly they view the legal staff, the licensing staff, and all of them. Chair Bierbaum did not want this to turn into a referendum on the performance of the legal staff. **Mr. Malone** reiterated, for the record, that there has been no problem with individual staff; it is a procedural issue they are trying to address. Mr. Malone he was somewhat perplexed about one of Mr. Ackerman’s comments. The Coalition did not draft this proposal out of whole cloth; he only has one copy, this is his record. What Mr. Malone had in his left hand was what the Commission provided us last year at this time, and in his right hand was what the Coalition came up with. They are essentially the same, so Mr. Malone was somewhat perplexed about why the staff was willing to go forward as a joint proposal last year if these factors were limited to settlements only, and then came back with that whole issue, which Mr. Malone did not want to go into

again. But the factors are the same if they are being considered. Mr. Malone will have them available if the Commission would like to look at them. The Coalition did not just create these; this was a product of three years of negotiation. Mr. Malone was somewhat taken aback saying they just came up with these ideas and somehow were trying to create a solution when there was no problem. Staff seemed to recognize it a year ago during the process. So again, the factors were there; they have been slightly modified. Mr. Malone agreed that they dropped a couple of the aggravating factors, but the Coalition did not just draft these themselves out of whole cloth, they were mirrored after other jurisdictions, other state agencies, and with the Commission's input over a about a three-year period.

**Mr. Galanda**, on behalf of Bally Technologies, responded to one other aspect of the due process counterpoint that Mr. Ackerman mentioned. And there is certainly the penal component to it. Punishment must fit the crime, and whether and to what extent someone has rights beyond the ALJ, beyond this Commission, beyond the superior court, beyond the Supreme Court. But again, the paramount value here in terms of due process of law is ordering citizen behavior or, in this case, ordering applicant, permittee, or licensee behavior. And if those factors are looked at, the behavior trying to be ordered is voluntary and pro-active compliance: taking remedial measures when a mistake has been made, ensuring future compliance, and above all, self-reporting. That is the due process value that is paramount in this discussion and that is why Mr. Galanda continues to urge adoption of this rule. Thank you.

*Chair Bierbaum called for a break at 10:50 a.m. and reconvened the meeting at 11:05 a.m.*

**Chair Bierbaum** admitted she was in a bit of a quandary and was going to ask other members of the Commission how to proceed at this point. Chair Bierbaum thought they had two choices: to do the normal motion, and second, and then discussion; or simply have a discussion prior to a motion. **AAG Ackerman** affirmed the Commission could do it either way, or both ways if they chose. **Chair Bierbaum** said that, in the spirit of having a discussion and having members of the public and the proponents of this petition have a sense of what the Commissioners are thinking, Chair Bierbaum invited discussion by the other members of the Commission about what their reaction was to this proposed rule change.

**Commissioner Ellis** indicated that, since he was the one who had asked the most questions, it was probably his responsibility to step forward. On the one hand, Commissioner Ellis was impressed by the work that has been done by the Coalition and by staff on these issues, but thought that his questions had pretty much indicated most of his thinking. Commissioner Ellis said he started with the reaction of then Chair Niemi when this topic first arose about a year ago when she felt that it would be a serious mistake for the Commission to adopt a list of mitigating factors based on her experience with that kind of a process. Commissioner Ellis had been waiting to hear of problems that would be resolved, or be addressed at least, by such a list of mitigating factors. As indicated before, he is very sympathetic with the testimony that the Commission has had from various people about problems they have had.

Commissioner Ellis thought that many of those problems could be solved readily and would be solved by the step that the Commission has taken in making it clearer to ALJs that they have the authority to make their own determination of an appropriate penalty if a violation is found, and that they are not locked in to the Commission's recommendations. But going beyond that, most of the situations that have been described to the Commission really deal more with the magnitude of penalty rather than the issues that are raised by the list of mitigating factors. And so Commissioner Ellis thought that, as Mr. Malone has indicated, the Coalition has already not only accomplished a goodly part of its purposes by getting the first provision adopted by the Commission, but has also sensitized the Commission to these issues and perhaps Commission staff to some extent. Commissioner Ellis felt it would be a mistake at this point to cast in stone a list of mitigating factors, absent a stronger case that such a list would really address the problems that are being described. Commissioner Ellis' feeling at this point would be to deny the petition.

**Commissioner Parker** asked what would become of this list if the Commissioners do not agree to adopt it as a rule. **AAG Ackerman** replied it has no legal effect that he was aware of. Clearly, by the action the Commission took earlier, they have made evidence and argument regarding the penalty to be imposed in an administrative proceeding both legally relevant and legally material. So certainly counsel for both sides could argue what the appropriate penalty is. AAG Ackerman assumed that if counsel for a licensee felt that one or more of the items that are on this proposed list were in play, in other words factually they occurred, then they would make the appropriate arguments to the ALJ. But there is no legal effect to a proposed rule that is not adopted.

**Chair Bierbaum** said that she was going to go ahead and take this opportunity to share with the other Commissioners and the ex-officios what her views are, since this is the sole opportunity the Commissioners have to share with each other their thoughts on the rule proposal. Chair Bierbaum thought she was addressing this because she has three hats she wears: in her professional life she is a practicing lawyer, the only practicing lawyer on the Commission; she is also a judicial officer in the jurisdiction where she practices; and she is a member of the Commission. Chair Bierbaum has evaluated the rule change wearing each of those hats, and in each of those capacities she found that the rule change would be enormously helpful. As a practicing attorney, it is always helpful to know what kinds of factors are permissible to bring before a judicial officer. Chair Bierbaum did not think the argument that a good lawyer would think of the factors anyway was necessarily a strong argument because there are good lawyers and there are bad lawyers. Neither Mr. Malone nor Mr. Galanda is going to come up and admit they had not thought of that. Who would admit it, even if it were true? So as a practicing lawyer Chair Bierbaum would find these factors extremely helpful; and they are non-exclusive. As a judicial officer Chair Bierbaum has always found guidance as to what can be considered and not considered helpful. The Commission goes into executive session to consider the appeals from the ALJs decisions, and it should come as no secret that they talk about these aggravating and mitigating factors in executive session. Chair Bierbaum has always felt a little uncomfortable about that because she wondered whether they were able to do that. But the Commissioners are behind

closed doors and so they do talk about those things. It would be nice to have those codified so there is no question that they can think about those factors. That was Chair Bierbaum's observation wearing the three hats that she wears. The other thing Chair Bierbaum thought about was the staff's objections and recommendation that the original not be adopted because it creates a mandatory nondiscretionary obligation, which is no longer on the table. It is incorrect that it creates a new process that is not consistent with what other gambling jurisdictions or Washington State regulatory agencies do. Most Washington regulatory agencies do have aggravating and mitigating factors. They say presiding officers already have discretion when setting penalties, so what is the problem with codifying those? The Commission recognizes that they have that discretion; the ALJs already have broad discretion; so again there is no problem. They say there is no demonstrated information that the current hearings process is not working; but clearly there is significant evidence from our licensees that they believe it is not working. It is kind of like a marriage: it does not count if one of the spouses thinks that everything is hunky-dory, if the other one does not think it is working, it is not working. The Commission issues surveys from time-to-time asking for input from the public and our licensees about what is and is not working. If the Commission is not willing to listen to legitimate concerns about what is not working, then they may as well not do the surveys any more. The licensees have spent an enormous amount of their time, and Chair Bierbaum suspected that the lawyers they hired to further this cause have not come cheaply, so it is probably important to them that these rules get adopted. Chair Bierbaum viewed this as a way of being responsive to the licensees because she did not see any reason not to do it. If it were up to her alone, Chair Bierbaum would pass the rule change and if a motion was made, she would vote in favor of it.

**Commissioner Amos** believed he would end up being in favor of the motion when it is presented because he was quite impressed with some of the testimony. Commissioner Amos thought there needed to be some clean up language in regards to some of this, and would definitely be in favor of it.

**Commissioner Rojecki** stated he was not in favor of it the way it stands right now, primarily because of WAC 230-17-025 that the Commission amended. Commissioner Rojecki would agree, whether perception or real, the way the licensees feel or perceive, it is of direct importance to the Commission to make sure that there is a fairer process, or that the licensees feel there is a fairer process. Commissioner Rojecki believed the amendment that was previously passed steps in the right direction as to requiring an ALJ, Commissioner, or presiding officer the leeway, or to clarify the fact that they can modify the penalty, and it does not limit mitigating circumstances.

**Chair Bierbaum** said, after talking to Director Day about it, she would vote for Alternative #1; although, she was a little troubled that there are no aggravating circumstances in the list. But Director Day had also pointed out that there is some language in Nevada's Code, some introductory language that would help. **Director Day** pointed out that the document was labeled Exhibit 3 in the agenda packet, called Guidelines of Imposing Penalties in Disciplinary Action, and it starts out with a very clear statement that says "without in any

manner limiting the authority granted pursuant to” and then it cites the Nevada statute. Director Day thought that it gives a strong introduction that the list is not intended to limit the Commission’s ability or authority and the broad discretion that is in statute. **Chair Bierbaum** asked if the language, instead of saying at the request of any party, would say without in any manner limiting the authority granted pursuant to whatever RCW to impose the level of discipline it may deem appropriate at the request of any party, the presiding officer may ... **Director Day** replied that was his initial thought.

**Chair Bierbaum** asked what the Commission’s ability was to not take action on this and request that the staff and the licensees work together to try to see if they can reach agreement with adding this kind of language, as well as aggravating circumstances. **AAG Ackerman** noted the publication date on this rule was November 5, 2008, so basically the Commission has until the May meeting, if they wish to leave this matter or to place it on future agendas and have staff and concerned members of the public continue to work to try to develop a second alternative along the lines of the Nevada Regulation 7.240. All that would be required would be to just set this over to a future agenda and direct staff to engage in further discussions for a possible alternative. **Chair Bierbaum** asked if a Commissioner would be able make a motion to add that now. **AAG Ackerman** replied he did not think it was a substantive change in the APA sense, which is another way of saying yes, the Commission could do that. **AAG Ackerman** cautioned the Commission to make sure that what Nevada has set out in their regulation will actually work in toto for the state of Washington. In other words, read it comprehensively and make sure it would all translate to Washington. **Chair Bierbaum** clarified she did not think Director Day was recommending adopting their mitigating and aggravating standards, just the prefatory language. **Director Day** replied, based on whether the Commissioners think some version of the list of this kind of thing would be appropriate, that there are three primary areas where staff had significant concerns. One was making the introduction stronger, and staff thought Nevada had a good example. The second was making sure aggravated circumstances were involved. And the third was the question about the original argument at the Commission level and whether that was the intention. Director Day said that was what he was trying to convey; that if the Commission is interested in this kind of a list, staff could work to resolve those three concerns and bring an alternative back to the Commission. Director Day suggested drafting the language and bringing it back to the Commission rather than amending it here. He understood the Commission may be weary of the discussion; however, he thought that would be the more secure route to make sure the language was workable.

**Commissioner Parker** said he was looking at the Alternative #1, and asked if the material from the Nevada rules would be proposed to be added to that. **Director Day** affirmed, noting that he was only suggesting the introductory line. Then staff is talking about adding aggravating circumstances that were originally in the proposal. Staff would start with the alternative that is before the Commission, and then make two, maybe three, modifications, if the Commission feels it is warranted. **Commissioner Parker** said he was in favor of that. He was also impressed with the presentations made about the value of having this. Commissioner Parker was not of the same mind as Commission Ellis or the former Chair

Niemi about having these things essentially codified. He thought it was better to have it laid out; that it would be a step in the right direction. If it is not ready to be acted on today, because Commissioner Parker wanted to be responsive to Director Day's proposal, could the Commission have that in front of them at the next meeting in a form that could be acted upon? **Director Day** affirmed.

**Chair Bierbaum** pointed out that the Commission cannot vote to approve it; all they can do at this point is to indicate that they are inclined to approve it, subject to these changes. Chair Bierbaum asked how that should be done. **Director Day** thought the Chair could simply set it aside to the next meeting and direct staff to work to resolve the questions that were raised in the Alternative.

**Chair Bierbaum** asked if any of the public had a comment.

**Mr. Malone** indicated the Coalition would welcome that suggestion and they would work diligently with staff. Mr. Malone understood that Ms. Hunter would be busy with legislative session starting next week. Mr. Malone said he would be happy to draft the revised changes, add the language back in, and circulate it to Ms. Hunter's staff to expedite that so it could be on the agenda for next month.

**Chair Bierbaum** thought staff had said May. **AAG Ackerman** clarified that the Commission had until May to act upon it. **Director Day** promised staff would not take that long. **Commissioner Parker** pointed out that he was not going to be here in May. He planned on submitting his resignation, and thought it would be effective at the end of January, but was more than happy to make it effective the end of February so he could be present for the February meeting, but not May. **Chair Bierbaum** agreed that would be helpful because she would hate to start this discussion all over. Staff and the licensees will be working on the changes to the prefatory language and the inclusion of aggravating factors, and this will be put back on the February agenda.

## **RULES UP FOR DISCUSSION AND POSSIBLE FILING**

9. **Petition for Rule Change – Recreational Gaming Association – Wager increase from \$40 to \$500 for non-house-banked card games**
  - a) **Amendatory Section WAC 230-15-135** (*Original petition first filed May 2008*) – Wagering limits for non-house-banked card games
  - b) **Staff's Alternative #1** – Wager increase to \$500 for Texas Hold'em "all in" bet only
  - c) **RGAs Alternative #2** – Wager increase to \$300 for all best in Texas Hold'em only

**Assistant Director Harris** reviewed the information in the Rules Summary. This was originally filed in May 2008 and at the November meeting the Commission requested to hold this item over, and Commissioner Ellis asked for an alternative to be filed. During that period a filing deadline was missed by staff, similar to what AAG Ackerman expressed on the last item. The original will be up for filing again, along with Alternative #1, and then a second alternative that was filed by the RGA. Two petitions in the past three years have been filed to increase the betting limits. One was in 2005 by the RGA to increase it from \$25 to \$100, which the Commission denied based on the reasoning that increasing the wagering limits would constitute an expansion of gambling. The second one was a petition by a poker player in 2007 who requested an increase from \$25 to \$40, which the Commission approved. Alternative #1 would leave the betting limit at \$40 except allow an “all in” wager in Texas Hold’em up to \$500. Alternative #2 is the RGA version that would increase the betting limits to \$300 for Texas Hold’em type games and leave it at \$40 for all other non-house-banked games. Based on the original petition, there are eight statements supporting and five against it.

**Chair Bierbaum** asked for clarification where it says the original petition and Alternatives #1 and #2 are up for discussion and possible filing, but the original petition is not in this package. Are all three of them up for filing? **Assistant Director Harris** affirmed that was correct because of the missed filing deadline, the original petition would have to be filed again. **Chair Bierbaum** did not see the original petition in the package. **Assistant Director Harris** thought it was on a green sheet. **Chair Bierbaum** replied she found it. **Director Day** wanted to make sure the Commission knew there was not a requirement that they have to actually re-file the original petition; they could actually file any one of the alternatives, none of the alternatives, or any combination thereof. **Chair Bierbaum** asked if the Commission could just say: no they are not filing the original petition; yes they would file Alternative #1; yes they would file Alternative #2; or they could file any combination. **Director Day** affirmed that was correct. **Chair Bierbaum** clarified these were just up for filing. **AD Harris** affirmed.

**Commissioner Ellis** said he appreciated the fact that staff prepared Alternative #1, which is consistent with what he had requested at the last meeting. As he looked at it, the original petition addressed an increase in the wager to \$500, and as a result, the \$500 number was used in Alternative #1. Commissioner Ellis did not have a firm opinion at this point on what, if any, the amount of the increase should be. Of course, if there is no increase, there is no need for a petition. Commissioner Ellis said his opinion was completely open at this point as to the amount of the increase, and asked if it was feasible to adopt, for example, Alternative #1 and to simply leave the amount of an increase blank; or if that became too nebulous to be an appropriate petition as part of the rule making process. Commissioner Ellis clarified he was asking what if the Commission adopted Alternative #1 as it is written, but simply struck \$500 and left it open for the Commission’s discussions and ultimate decision on what to do with Alternative #1, if that is the option adopted. There may be some negative reactions among members of the public if they think the Commission is seriously considering, or is likely to adopt, a petition that would increase the maximum wager to \$500. There have

already been some negative views about that. **AAG Ackerman** responded this might be one of those difficult legal issues that would require interpretation of the APA, but thought there may be notice issues if the Commission does not put in at least some place holder number. The Commission could then possibly get into a situation where they were going to contemplate an increase that would be so extreme that it might amount to something the APA would call a substantial change from what the Commission has given notice of. So there is probably a notice issue. **Commissioner Ellis** agreed that was the kind of concern he had. And of course there is Alternative #2, which uses the \$300 number instead of the \$500 number, so that flexibility is before the Commission already. **AAG Ackerman** thought the notice issue cut both ways; for instance, if the Commission left a blank there and an interested member of the public looked at it and assumed that whatever the Commission did, it was not going to decrease the wager limit, so the public might not bother to come and express their views or write letters. **Commissioner Ellis** agreed.

**Commissioner Rojecki** pointed out this was a mistake made by the Commission and he thought they should just re-file the whole thing in its entirety, just to keep it clean and fresh. The Commission has heard discussion and discussed this. **Commissioner Rojecki** asked how the Commission would do that. **AAG Ackerman** replied the Commission would simply make a motion to that effect. **Director Day** is correct, the Commission can re-file the whole package and it will all be alive. **Commissioner Rojecki** clarified that it would basically stay the same. **AAG Ackerman** affirmed; it would be up for consideration. **Commissioner Rojecki** thought that was the cleanest, simplest, and easiest thing to do, regardless of opinions. **Chair Bierbaum** agreed, noting this deserves a lot of discussion and it is not going to happen today because of time constraints. It gives a heads up that **Chair Bierbaum** was troubled that the Commission was discussing this issue again after having just looked at it in April 2007. So when the Commission gets to the discussion, **Chair Bierbaum** was not inclined to do any wager limit increases unless there were time limits about the frequency with which they could be brought before the Commission. **Commissioner Amos** said he was fine with that.

**Commissioner Parker** said he was in favor of filing Alternative #2, the RGA proposal, which sets the limit at \$300. It is the same as Alternative #1, which is the staff proposal, except the staff proposal says not to exceed \$500 and the RGA's says not to exceed \$300. **Assistant Director Harris** clarified there was actually a variation between all three. The original one was all non-house-banked games up to \$500; staff's Alternative #1 would be just an "all in" bet of \$500 for Texas Hold'em; and Alternative #2 is \$300 for Texas Hold'em no matter what type of bet it is. Each of the three is a little different. **Commissioner Parker** asked if the Commission could file both alternatives. **Director Day** affirmed the Commission could file all three or any combination. **Commissioner Rojecki** said that was kind of what he was trying to get at was that in fairness, it was the Commission's mistake, so just re-file the whole petition as it stands and continue. **Chair Bierbaum** agreed, except that as a practical matter, she did not think the Commission would ever adopt the original petition and did not want to send signals to everybody that there was a chance that was going to happen, because it is not going to happen. **Commissioner**

**Rojecki** agreed. **Chair Bierbaum** did not want to get anyone who watches the activities of the Gambling Commission wondering whether that was even a possibility because she did not think it was.

**Chair Bierbaum** called for public comment.

**Mr. Chris Kealy**, Vice President of the RGA, stated that as the petitioner for this, he really appreciated everybody here. This is another one of those examples of complimenting staff and all the work they do. There was no intention to miss this filing, so Mr. Kealy appreciated the attitude of filing it just out of fairness. Mr. Kealy absolutely agreed with the Chair that there has been enough dialogue here, and there was significant discussions that pointed in the direction that said to limit this down, downsize this whole concept, which is what Alternative #2 does; it is a downsized regulatory efficient request. So as the petitioner and respecting all of the processes at hand, Mr. Kealy respectfully requested Commissioner Parker's position that the Commission file Alternative #2 and leave it go, and even suggest that maybe in May a time could be set for one more dialogue over it and then get it done or not done, let letters and people come here and support or not support it. The signal to the public, at least at this point given the process it has already been through, should narrow the discussion in some fashion. Mr. Kealy welcomed that narrowing, whether it was Alternative #1 or #2. He would welcome either one of those to be filed, but not the original petitioner.

**Chair Bierbaum** clarified that Mr. Kealy had no problem with the Commission filing Alternative #1 or #2? **Mr. Kealy** affirmed, adding he would appreciate the Commission just filing anything and being done with it for the day.

**Commissioner Rojecki** asked if the Commission was to file one of the alternatives or two of them, it did not matter, could the Commission set a time line for that. Could the Commission limit testimony to one more month and say the Commission was going to take final action in February. Rather than prolong this legally another six months, at least set a date that the Commission would make a determination. **AAG Ackerman** replied the short answer was yes, the Commission can absolutely limit the number of times they take testimony on this to one if they choose to do so, but because of filing deadlines, the Commission would not be able to take final action on this in February; it would have to go to March. **Commissioner Rojecki** asked if that was because of public notification. **AAG Ackerman** replied it was because of the re-filing requirement. So the Commission could not go final until March, but could limit the number of times it is up for consideration and the number of times testimony is taken on it. **Commissioner Rojecki** said his opinion was that there be one public hearing, but that public hearing should be when the Commission does the final determination. **Director Day** advised that whatever the Commissioners filed, it could be moved to the study session in February, and then back for final action in March. **Chair Bierbaum** agreed that sounded like a good idea and asked if that was what Commissioner Rojecki wanted. **Commissioner Rojecki** affirmed.

**Commissioner Ellis** made a motion seconded by **Commissioner Parker** to accept for filing and further discussion Alternatives 1 and 2 amending WAC 230-15-135, as presented by staff. *Vote taken; the motion passed unanimously.*

**Commissioner Rojecki** noted the motion did not limit the discussion to one hearing. **AAG Ackerman** replied that did not have to be done as part of the motion; the Chair can direct that it be placed on the agenda at any time the Commission chooses. **Commissioner Rojecki** felt that was okay.

#### **10. Petition for Rule Change – ZDI Gaming, Inc.**

- a) **Amendatory Section WAC 230-14-047** – Standards for electronic video pull-tab dispensers

**Assistant Director David Trujillo** reported this petition was up for discussion and possible filing today. The rule should seem fairly familiar as it was part of discussion early in 2008 and late 2007. **AD Trujillo** reviewed the information provided in the Rule Summary. Staff recommends filing this for further discussion and that the Commission direct staff to prepare an alternative.

**Commissioner Rojecki** said it appears tribal lottery must submit to an independent laboratory test and the timelines in this proposal mirrors the 15 and 60 day requirements. **Commissioner Rojecki** asked if it was regularly practiced by non-tribal to have an independent test. **AD Trujillo** replied that has not been required and he was not aware that anybody who has not been required to go through that process has gone through it. **Commissioner Rojecki** asked if the time lines in Appendix X-2 are based on an already tested machine by an independent lab. So not only is staff looking at the machine itself in whole, but they are also looking at the lab results from the independent, similar to how UL tests things that are factory neutrals. **Commissioner Rojecki** asked if some of the concern with the timeline was based on either there is no requirement to have non-tribal independently tested and also because of the timelines. **AD Trujillo** affirmed that was correct. Staff does not view the request as insurmountable, but just needs a bit of time to be able to look and see whether alternative time lines would work better for staff and to see what the process is that needs to be created.

**Chair Bierbaum** asked if the changes to WAC 230-14-047 that are being proposed are with the amount of time and has to do with the scope of the review. **AD Trujillo** affirmed.

**Chair Bierbaum** asked what it had to do with WAC 230-06-050. **AD Trujillo** believed that section was included as information only because it outlines what staff does when it comes to gambling equipment, whereas this petition is specific to electronic video pull-tab dispensers. **Chair Bierbaum** asked if staff wanted the Commission to go ahead and file it. **Director Day** clarified that part of what was just described was with the tribal system; a lab is required to test and certify to staff that it is in compliance, which occurs before the 15 day time limits even start. Although staff does not agree with the timelines or the limits on the

scope of their review, and the process described in WAC for submission of electronic devices was not very complete, staff thought it would be possible to work to resolve and improve the WAC to make it clearer. So staff was attempting to say that, although they do not agree with what the petitioner has asked, there would appear to be an opportunity for improvement, which is why staff recommends filing this for discussion.

**Commissioner Ellis** asked, focusing on the staff recommendation, whether staff thinks it is appropriate to specify any specific timelines for completing the review process for non-tribal equipment. **AD Trujillo** replied staff always avoided putting specific timelines into a rule, but having said that, there may be some processes that can be set out without timelines.

**Commissioner Rojecki** thought Mr. Gerow would clearly explain this from his perspective, but asked what happens today if it does not meet compliance or staff does not think a machine meets compliance. **Assistant Director Trujillo** explained there would be an interaction or a dialogue between two different stages. When the system is in the lab, there could be some dialogue between the lab personnel and the technical people for the manufacturer, the submitter, and they may be able to work out some technical problems. If it turns out that staff does not believe it complies with the rules or RCW, it would be up for AD Trujillo to actually deny it. Prior to that, AD Trujillo would also have some dialogue with the submitter to see whether there were some options that could be done – is the entire submission non-compliant, or just part of the submission non-compliant. Sometimes that dialogue can take a bit of time. **Commissioner Rojecki** asked if staff may not have enough time under this proposal and may just automatically deny it, and then the petitioner would have to fix something and bring it back – part of a formal process. **AD Trujillo** replied that was one of the things staff would have to clarify are the timelines and what happens if the timelines are not met. Would that mean it was automatically approved? Mr. Ackerman had used the term eye of the beholder yesterday – what is the substantive change? AD Trujillo thought staff would have to further define that as well; so the timelines are a problem that staff would not encourage having actually codified.

**Chair Bierbaum** asked what a person could do if after all that happens and staff still says no. **Assistant Director Trujillo** replied, practically speaking, process wise, he would issue a letter for denial as the Director's designee, at which point staff would move to WAC 230-06-050. **Chair Bierbaum** clarified they would have to file a petition for declaratory order, and asked if that was required by the APA. **AAG Ackerman** explained there has to be a means for someone to challenge agency action, and if the declaratory order process was not clarified, a letter from the Commission declining to approve equipment would constitute other agency action and would then kick in to an administrative review process. AAG Ackerman was not sure whether that would start with an ALJ or not and would have to go back and look, but the Commission would get into a hearing process.

**Chair Bierbaum** called for public comment.

**Mr. Jay Gerow**, ZDI Gaming, requested the Commission file this right now because the system that is in place is broken and the process takes way too long; the system is bogged down and Mr. Gerow would like to see something changed. If staff is unhappy with having a time limit on it, Mr. Gerow was sure that could be readdress. What Mr. Gerow did not like was the fact that his company makes a submittal and it takes anywhere from four to six months to get it through. Part of the problem is the fact that, bottom line, no matter what they are doing here, with what they have submitted, and what they are proposing, the end result is there is a paper pull-tab in the player's hand that they see and that has all the results on it. So the process that Mr. Gerow has to go through for something that is already there and has been in existence since 1973 and beyond is very frustrating. If Mr. Gerow did not have a paper pull-tab and was running TLS machines where there is nothing there for the player to deal with, he could totally see the issue on why it would take so long. Right now there are so many submissions for TLS that Mr. Gerow gets put in a cue and because staff has a timeframe when they have to get tribal reviews done, Mr. Gerow's stuff comes out whenever. By the time his product makes it out through the lab, whether it is a substantive change or just a minor change, it matters not because they are currently required to put in a new S3-18 form and make a submission for any software change that they do, whether it is moving a button from the left side of the screen to the right side of the screen. It takes way too long, so Mr. Gerow would like to see something filed today, and if it needs to be amended, then he can work with staff to amend it. Mr. Gerow addressed the question Commissioner Rojecki asked about what happens if something is not approved. That has happened and Mr. Gerow was in the middle of it. It probably should have been brought up yesterday with the letter from Director Day to Ms. Mell regarding the fact that when they have something that was turned down – a submission had been made and part of it was approved and part of it was not approved. However, the change was made to the equipment according to what was felt was in the new rules, WAC 230-14-047, and yet staff turned it down because they were afraid of anything that might happen. So Mr. Gerow asked what needed to be done to try to work it out. They came to AAG Ackerman and AAG Marvin with what, hopefully, would have been an alternative to going back to litigation over another matter having to go before an ALJ again, which would save not only this agency money but would save Mr. Gerow money. Then they received a letter that told them they could not do it; there was no alternative and if that was what they wanted to do then they needed to do that. Mr. Gerow would like that addressed a bit more as well.

**Chair Bierbaum** asked if anybody had any questions of Mr. Gerow.

**Commissioner Ellis** asked, just to put the magnitude of the problem in perspective, assuming Mr. Gerow has a piece of equipment that represents a significant change from his point of view, not just moving a button from one side of the screen to another, how long does he think is a reasonable time for the lab to be able to complete the process of examining the new equipment and making a decision?

*Chair Bierbaum interrupted to say she was going to leave for five minutes and Vice Chair Rojecki would be in charge.*

**Mr. Gerow** responded it could be 30 days; 45 days maximum. But four to six months is too long for the changes that Mr. Gerow had brought forward, which were not substantial. He was still dealing with the end result where the player gets a paper pull-tab.

**Commissioner Rojecki** asked, in regards to what AD Trujillo said about being able to work with Mr. Gerow or other vendors on this equipment, if Mr. Gerow felt there was good back and forth discussion to address some of these problems. Clearly outside of pending litigation it sounds like from staff's perspective there can be some advantages to not having timelines. **Mr. Gerow** replied the biggest problem was the fact that, unfortunately, there is no timeline, so Mr. Gerow did not know if he was getting pushed back, and as seen yesterday on the PowerPoint presentation, staff has hundreds of submissions in the lab. Unfortunately, of those 100 submissions in the lab, there is less than 1 percent that affects the general public and the licensees.

**Ms. Chiechi**, Executive Director of the Recreational Gaming Association, testified the RGA stands in support of filing this proposal. It flows in line with the uniformity and consistency and the rules that all manufacturers, regardless of who their constituents are or which licensees they serve, should be treated the same when it comes to everything the Commission does in reviewing what is approved and what is not approved. The RGA would support the petition for change and ask that staff work with the petitioner to revise the rules making it feasible for the staff to accommodate. Thank you.

**Commissioner Ellis** made a motion seconded by **Commissioner Amos** to accept for filing and further discussion Amendatory WAC 230-14-047, as presented by staff. *Vote taken; the motion passed unanimously* (Chair Bierbaum was not present for the vote).

**AD Trujillo** asked for clarification purposes, whether the recommendation included preparing an alternative or to simply work on the current petition. **Commissioner Rojecki** believed that was the intent. **Commissioner Ellis** affirmed that his intent was an alternative.

## **11. Petition for Rule Change – Harmon Consulting, Inc.**

### **a) Amendatory Section WAC 230-15-740 – Preparing required financial statements**

**Assistant Director Trujillo** reported that petitioner Monty Harmon of Harmon Consulting is requesting the requirement for house-banked card game licensees with over \$3 million in gross receipts no longer be required to submit audited financial statements to the Commission. AD Trujillo reviewed the information provided in the Rule Summary. Staff received three letters in support of the petition: one letter from Roxanne Hanson of Diamond Lil's who cites that cost is the major reason for her supporting the petition, along with the fact that her organization is randomly audited by other governmental agencies; one letter from David Pardey who also cites cost, indicating he would save approximately \$10,000 going from an audit to a review; and one letter from Margaret Rhoads, Hawks Prairie Casino, who also cites costs and a dwindling availability of CPAs who are willing to take on

that engagement. Staff recommends denying the petition because it reduces the reliability of the accuracy of the information reported to the Commission and Legislature, and ultimately to the public, plus it increases the risk of violations concerning unknown related parties and undisclosed loans.

**Chair Bierbaum** asked if there were any questions or public comment.

**Mr. Monty Harmon**, Harmon Consulting, thanked Melinda Froud who helped him during the holiday season to get this petition to the rules team and Susan Arland and Amy Hunter for allowing him to speak to the rules team in December. Mr. Harmon said he also felt like he was wearing three hats here: as a CPA, as a former member of the Commission staff, and as a member of the RGA and licensee of the Commission. In November the RGA had a meeting where the members mentioned the costs of audits was becoming prohibitive; Mr. Harmon mentioned to them that when this rule came up in the first place they were in favor of it and as he sat there he thought be careful what they ask for. What they wanted was accurate reporting for the legislative body to act on and some information that would go to the public that would reflect their entire business operation. Mr. Harmon did not testify at that time; however, he would submit to the Commission that the information that could be provided through a review, as well as an audit, was going to be basically the same information for that legislative body. The layout, the format, the content, and the disclosures are the same. Staff has mentioned that with the reviews they have found quite a few irregularities; not just late reporting. An audit takes longer to complete, it involves cost to the licensee of the employees, as well as financial burdens, and it takes longer for the accounting firm to complete the work. And when looking at the audits, the violations that are before the Commission are related to not submitting the report in a timely manner. Mr. Harmon would submit to the Commission that the number of violations would be reduced if they went with the reviews. Mr. Harmon acknowledged there is a concern with the lower level of assurance placed on the financial statements, but the purpose of an audit tends to be for public companies to provide investment information. The accountants are giving their assurances that those numbers are not materially misstated. There are insurance costs to the industry that cause the cost of an audit to go up substantially for the firm, and they also do additional testing and work. As has been seen with Enron and other problems in the industry for accounting, accounting firms do not always catch the problems that are within a business. The reason they do not is because they have to test a small amount of transactions in the performance of their duties; they do not look at every individual transaction when they go in to audit a company. The Gambling Commission agents are in these businesses on a regular basis testing the transactions and they should be able to find hidden ownership and payments to individuals that are not listed on the license file much quicker and easier, and recognize it better than an outside auditor who does not know what has been filed with the Gambling Commission as far as agreements and loans, although they should know the ownership. Mr. Harmon wanted to present enough information so that the Commission could make a decision whether they would like to look at these issues and have time to consider and weigh any arguments that Mr. Harmon could provide in writing in response to

staff's rule preparation. Mr. Harmon asked how much time the Commission would like to spend on this. Mr. Harmon was here today just to see if it was worthy of being filed.

**Commissioner Rojecki** pointed out staff's presentation indicated that in 2003 staff had contacted nine states to see if they required audits. All but two of them required audits regardless of gross receipts, and two of them required audits based on a certain dollar amount of those gross receipts. Commissioner Rojecki said it sounded like, with what Mr. Harmon was proposing, to some degree Washington would be one that would not require audits. Clearly the other states that also have a vested interest in these issues have chosen to require them, so how is this proposal different from that? **Mr. Harmon** responded that with regard to other states and what they are auditing and who they are looking at, the Gambling Commission has a pull-tab licensee that can go up to \$8 million dollars, but they are not required to submit audited financial statements. Mr. Harmon was not sure where the Commission wanted to define the gambling entity that is going to be audited. He was not familiar with the seven states that require audits and if they also have machines. He did not know the states that require those audited statements, if they have gambling agents in the businesses testing the transactions individually themselves, so it is a difficult question. If this petition was filed, Mr. Harmon would work with staff to gain further information and give Commissioner Rojecki a better response. **Commissioner Rojecki** thanked Mr. Harmon. Since some of the information being relied upon is from 2003, have there been other resource checks since that period of time? **Assistant Director Trujillo** responded that staff has not actually contacted any jurisdictions since 2003, but he was aware that more jurisdictions have more gaming and the accounting profession itself is moving towards a more complex and more expansive role when it comes to overseeing the reporting and testing the transactions. **Director Day** added the Commission has always had an audit requirement for large house-banked card rooms. The requirement has been consistent; the level was reduced and the types of audits changed over the years.

**Commissioner Ellis** asked if the \$3 million threshold in gross receipts underlying the audit requirement really meant gross receipts in that sense, or if that was the same as net receipts: total receipts minus prize payouts. **Assistant Director Trujillo** responded that, generally speaking, the annual summary staff provides has that break out; it is not all the money that comes in, but is after prizes paid. **Commissioner Ellis** thought that, focusing on that \$3 million minimum figure, some of the letters received referred to a cost of an audit being in the range of \$20,000, and asked Mr. Harmon if that was correct. **Mr. Harmon** replied he asked licensees to send him that information, which he is still compiling because of the shortness of time. However, the cost of an audit averages about \$17,000, based on historical data, and the cost of a review is around \$8,000, which is less than half. **Commissioner Ellis** said it does not seem like an extreme cost when talking about a minimum of a \$3 million firm having to pay about \$17,000, or about \$20,000-\$22,000 when looking at Mr. Pardey's letter that uses slightly higher numbers. Commissioner Ellis thought Mr. Harmon must feel like he is swimming upstream, considering the fact that there is a national economic crisis that has been triggered in part by what many people call lax regulatory oversight by a variety of federal agencies in the mortgage and investment banking and various other areas.

Commissioner Ellis was concerned that at this point in time Mr. Harmon wanted the Commission to relax their audit requirements in the gaming industry. **Mr. Harmon** responded it was a regulatory issue and the Commission would be mistaken to place undue reliance on the accounting profession and its ability to detect the kind of errors they would likely discover. Mr. Harmon submitted that the special agents are much better equipped and qualified, and they are presently testing those types of transactions more often than the accounting profession. What Mr. Harmon sees happening on a national basis is there are CPA firms that go in and perform an audit, but they do not test every individual transaction; they go in and they do their work. They have cost pressures on them; they have their clients they need to serve, they have the users of the financial statements. Mr. Harmon was not saying the profession is sub-standard in what they do; he was trying to say the public places way more reliance on the term audit than they understand the reality of what an audit is. The accountants are to provide the information in a format and place a report, but they do not guarantee that they found every piece of fraud or every irregularity, but that is what Mr. Harmon thought the perception was.

**Chair Bierbaum** indicated there has not been a proposal in a very long time that she has not voted to file, but there was absolutely no way she would ever vote for this. Chair Bierbaum was a little shocked it was even being proposed to not require audits anymore because they are too expensive, especially in a time when the industry was asking for increased wager limits and increased seats at tables. Chair Bierbaum imagined the headline: Gambling Commission does away with audited financial statements. She could not even imagine a set of circumstances or a discussion that would change her mind; with only the justification it has gotten too expensive and the public does not understand that there is really no guarantee with the audited financial statements. **Mr. Harmon** responded the reason he was before the Commission today was to look at the cost between a review and an audit being twice as much and to look at the regulatory benefit that is received. Mr. Harmon did not see the information that is being provided on the entity as a whole changing substantially, whether it is one type of service, the review or the audit. As a CPA, when a client comes to him and says they would like to have an audit done, Mr. Harmon asks if they really mean an audit. Does the client really mean they want to have an opinion expressed on their financial position as far as the value of the assets, the liabilities that are there, and the owner's equity if the client were to go and buy this business? If someone wants to sell their company, then what they might want to have is an audit. Banks maybe just want a compilation; maybe they just want a review. Mr. Harmon admitted it was a lower level of assurance placed on that report, but the basic content, the disclosures, the financial numbers on those statements, are sound, and they have been reviewed. In a review process, the accountant has to make inquiries, has to look at the numbers, and needs to make judgment. On a compilation, the client gives the CPA the numbers and the CPA puts them in the right format and sends them off to the Gambling Commission. Mr. Harmon was not looking to have compilations allowed at higher levels, but was asking what level of service was necessary, and what he hears in the response is that an audit is an audit and that is something that can be relied on. There are professional standards established by the Washington State Board of Accountancy and the AICPA national board; there are all kinds of regulatory bodies that say this is what

has to be done when doing a review. The reason Mr. Harmon was here today was to ask the Commission to look at the levels of assurances and make sure that an audit is really what is needed.

**Commissioner Parker** thought maybe Mr. Harmon was talking to the wrong regulatory body; that he should have that agency reassure the Commission that a review is sufficient. **Chair Bierbaum** agreed. If the accountant's association wants to come and tell the Commission not to worry because a review is just as good as an audit; fine. **Mr. Harmon** replied he did not mean to represent to the Commission that a review was just as good. **Chair Bierbaum** pointed out Mr. Harmon was asking the Commission to lower their standard of review. **Mr. Harmon** responded he was asking the Commission to consider the regulatory purpose of the service they are requesting licensees to pay for. When it comes to information that shows the health of the industry and the business taken as a whole and provides a report to the ex-officio members and their colleagues in making decisions with regard to the performance of this industry, a review should be sufficient. Mr. Harmon was submitting to the Commission that the types of assurances they would like to find in an audit are better provided by their own agents being in those businesses testing individual transactions and looking and verifying information that was submitted to the Commission as far as loans and owners. Mr. Harmon said the Commission was just duplicating something they already have, and asked if the regulatory benefit to having an independent accountant go in and do that work was necessary. Mr. Harmon was asking the Commission to have an open mind and to consider that fact. It is always easier to say they want audits, but Mr. Harmon was trying to tell the Commission that the accounting profession is going to stricter regulation on audits and higher costs on audits, and asked if that level of service was really going to provide what is necessary.

**Mr. Dave Pardey**, Skyway Park Bowl, provided some history. Back in 2001, the agencies just put the top ten mini-casinos, or card rooms as they were called back then, on the website. Skyway Park Bowl was in the top ten. King County, back in 2001, saw that Skyway Park Bowl's gross revenues were \$5 million and decided to raise their tax from 11 percent to 20 percent. Mr. Pardey had to go plead, and in fact take many employees down to King County, to stop them from raising the tax to 20 percent because they thought Skyway Park Bowl was making all that money. Mr. Pardey asked staff to call King County and they explained that Skyway Park Bowl was not making all that money. Back in 2001, Mr. Pardey started a dialogue with the Gambling Commission that better records were needed because the quarterly and yearly reports that pull-tab operators and card rooms did, did not show their profitability; it just showed gross revenue and wages and a few things, but did not show all expenses. The RGA back then backed the Gambling Commission. Mr. Pardey wanted to do some form of paper trail to show Olympia legislators and counties and cities what the real profits or losses were. That was part of how all this started many years ago. So when the rule came up and went from instead of a full audit just to a review, as it turns out it was audit. Mr. Pardey said his gross revenue was \$5 million a year and he was making profits, and he did not protest that and went with that full audit. A review would also show the Gambling Commission, King County legislators, if a business is profitable or

not, and would also show loans. A review is going to show loans, which showing hidden ownership has always been a concern of the Gambling Commission. So that was how the dialogue started before 2002. Since then, many counties and cities have lowered taxes on card room revenue because these audits helped show that the card rooms were not making money. Mr. Pardey's revenue has gone down significantly; he is a single ownership, not a company with four or five casinos owned publicly by stockholders. There are many big companies Mr. Pardey has already talked to that own multi-locations and they would probably still do a full audit because it is required by their stockholders. Mr. Pardey, as an individual owner, thought a review would do the trick for the Gambling Commission. It would show that Dave Pardey is still the owner of Skyway Park Bowl and whether he is making money or losing money. Mr. Pardey said it would save him \$10,000. In these tough times, Mr. Pardey is losing money and it would help him immensely as an individual mom and pop business to lower his expenses by \$10,000.

**Chair Bierbaum** asked AAG Ackerman if the Commission could take no action on this and decide whether to file it next month, or if something had to be done now. **Commissioner Ellis** asked whether action had to be taken within 60 days. **AAG Ackerman** replied he was trying to find the date of receipt, which determines the amount of time. **Commissioner Rojecki** indicated it was November 26, 2008. **AAG Ackerman** stated holding it over to February would fall outside the 60-day rule; however that could be done if Mr. Harmon was agreeable to having it set over.

**Chair Bierbaum** explained to Mr. Harmon that the Commission would like to set his petition over to next month and asked what his opinion was. **Mr. Harmon** appreciated the Commission's willingness to do that. His only concern would be with the effective date, which as shown on the petition would be July 1. Mr. Harmon had hoped to help the licensees this year, so maybe the effective date could be adjusted, if it were to pass, to be 31 days after filing. **Chair Bierbaum** agreed.

**Commissioner Parker** commented that Mr. Harmon should consider whether he could provide the Commission with more information about the comparison between a financial review and an audit, and whether there was some other way to provide public testimony that would provide some ammunition to support his petition. Commissioner Parker's reaction was that he did not think Mr. Harmon had really covered his bases. **Mr. Harmon** appreciated Commissioner Parker's suggestion, adding he hoped Commissioner Parker would still be around.

**Commissioner Rojecki** asked for staff to just look into – he honestly did not know if it was relevant or not – but to talk to the state auditor as to processes the state has employed in other arenas within our own state to address some of these. Commissioner Rojecki assumed we were not the only Commission out of the hundreds where this has been addressed, or the chair of the local government committee, Representative Simpson. **Chair Bierbaum** agreed that sounded good.

**Director Day** clarified that this petition has been set over until next month, with the agreement of the petitioner. **Chair Bierbaum** affirmed

**12. Minors Selling Raffle Tickets**

- a) **Amendatory Section WAC 230-06-010** - Age restriction for players
- b) **Amendatory Section WAC 230-11-030** - Restrictions on ticket sales

**Director Day** suggested the Commission set this over to next month. **Chair Bierbaum** agreed – *Held over to the February Commission meeting.*

**Other Business/General Discussion/Comments from the Public/Adjournment**

**Chair Bierbaum** called for public comment.

**Mr. Chris Kealy** asked for clarification on whether the rule passed today related to the fines situation and whether it was clear that an ALJ would be able to amend a fine on economic terms, not just number of days closed. **Chair Bierbaum** replied that was not before the Commission. **Mr. Kealy** thought what was passed today authorized the ALJ to look at a penalty and adjust it. He wanted to know if that involves time closed or economics. **Chair Bierbaum** said the Commission did not address that; the change was just to modify a proposed sanction. It will be up to each of the ALJs to decide what that means to him or her. **Mr. Kealy** was just trying to clear up whether the Commission addressed that or not. **Chair Bierbaum** replied it was not addressed; it was not an issue before the Commission. She did not think the members of the Commission considered it because nobody asked that question, so it is what it is. **Mr. Kealy** said he still did not know what it was. He would ask again next month because he needed to understand what the Commission's understanding and/or what the law was. **Mr. Kealy** said he lost all the lawyers in the room too and was trying to understand what happened. **Chair Bierbaum** suggested he consult with an attorney.

**AAG Ackerman** agreed, adding that **Mr. Kealy** might want to talk to the Coalition. **AAG Ackerman** thought the language was to modify a penalty, so that language is going to have to stand. It means whatever it ultimately will be legally determined to mean. **AAG Ackerman** was trying to say that the Commission really is not going to be in a position to answer that question for **Mr. Kealy**. In other words, **Chair Bierbaum** might say she thinks penalty means this and **Commissioner Ellis** might say he thinks it means something else. Frankly **AAG Ackerman** did not think it was going to be a big bone of contention, but suggested **Mr. Kealy** talk to the lawyers on the Coalition. **AAG Ackerman** assumed that the Coalition did not raise that because they were comfortable that they knew what it means since they participated in the drafting of the language. That might be a starting place. **Chair Bierbaum** agreed. **Mr. Kealy** said that sounded like a lawyer answer. **Chair Bierbaum** pointed out there would be another chance to talk about it next month.

*With no further business, Chair Bierbaum adjourned the meeting at 12:40 p.m.* The next meeting will be held in February at the Great Wolf Lodge in Grand Mound.