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The Honorable Chris Stearns
Chair, Washington State Gambling Commission
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Dear Chair Stearns:

By letter previously acknowledged, your predecessor, Mr. Mike Amos, requested an opinion on the following questions, which I paraphrase for clarity:

1. **Does the Gambling Commission have authority to adopt an administrative rule requiring licensed manufacturers of gambling products to sell their products to all licensed distributors?**
2. **Can the Gambling Commission adopt an administrative rule requiring licensed manufactures of specific types of gambling products to sell its products to all licensed distributors?**

BRIEF ANSWER

The Gambling Commission has implied statutory authority to impose restrictions on licensed manufacturers and licensed distributors of gambling equipment and products if those restrictions are found to be essential to achieving the declared legislative purpose of the Gambling Act. However, based on the information you have provided, I see no evidence of a regulatory need for a blanket requirement that all licensed manufacturers must sell products to all licensed distributors. If there were evidence of a need for these rules related to the Commission's statutory authority, e.g., "to keep the criminal element out of gambling" (RCW 9.46.010) or achieve another of the Commission's statutory purposes, the result would likely be different. But absent such evidence, a rule would likely be found to be invalid if challenged. A court, applying the standards set out in the Administrative Procedure Act, RCW 34.05.570(2)(c), would likely find that such a blanket requirement—applying to all licensed manufactures of all gambling products—goes beyond the implied authority of the Commission to regulate gambling, or is arbitrary and capricious absent a showing that a rule is needed to accomplish the responsibilities of the Commission.

Limiting the rule to specific manufacturers of products, for example pull tab and bingo paper manufacturers, might improve the chances of a court upholding the administrative rule if

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there was a specific factual basis demonstrating the regulatory need for such a rule. However, based on the available facts, it seems equally likely that a court would conclude that a more targeted rule is invalid.

BACKGROUND

The Gambling Commission in the past has imposed “price and terms” restrictions on licensed manufactures and distributors of gambling equipment and products. *See, e.g.*, former WAC 230-12-330 (Supp. 1998) (Rule 330). Former Rule 330 provided in relevant part that “[m]anufacturers and distributors shall make their products and services available to all licensees without discrimination” and that, subject to certain exceptions, manufacturers of gambling equipment or related products must offer those products for sale to any licensed distributor “for the same price and terms.”

The Commission repealed former Rule 330 in 2005. The decision to repeal former Rule 330 was primarily a policy decision made after considering stakeholder testimony. *See* Excerpt from June 2005 Commission Meeting Minutes.¹

Since former Rule 330 was repealed, the Commission has received and addressed several petitions from the public asking the Commission to adopt administrative rules reinstating price and terms restrictions on manufacturers of gambling related products. The Commission denied petitions filed in 2006, 2007, and 2011. The most recent petition was filed in January 2014 and asks the Commission to adopt a rule requiring licensed manufacturers of bingo and pull-tab products to make those products available to all distributors on an equal basis. The Commission has initiated a rule-making proceeding in response to that 2014 petition. Your predecessor asked these questions to help the Commission determine the scope of its authority to require licensed manufacturers of gambling products to sell to all licensed distributors, and whether that requirement can be limited to specific types of manufacturers of gambling products such as pull-tab and bingo paper.

ANALYSIS

1. Does the Gambling Commission have authority to adopt an administrative rule requiring licensed manufacturers of gambling products to sell their products to all licensed distributors?

The Gambling Commission, as an administrative agency, possesses only those powers expressly granted to it by the legislature or necessarily implied from statutory grants of

¹ This excerpt is available online as part of the Proposed Rules Changes on the Commission’s July 2014 Meeting webpage. <http://www.wsgc.wa.gov/agenda/july.aspx> (follow “Proposed Rule Changes” to open large .pdf document, then GoTo page 140 titled “Excerpt from June 2005 Commission Meeting Minutes”).

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authority. *Washington Pub. Ports Ass'n v. Dep't of Revenue*, 148 Wn.2d 637, 646, 62 P.3d 462 (2003); *Human Rights Comm'n v. Cheney Sch. Dist. 30*, 97 Wn.2d 118, 127, 641 P.2d 163 (1982). "Administrative agencies do not have the power to promulgate rules that would amend or change legislative enactment." *Washington Pub. Ports Ass'n*, 148 Wn.2d at 646. However, an agency may promulgate rules to "fill in the gaps" where necessary to effectuate the general statutory scheme. *Hama Hama Co. v. Shorelines Hearings Bd.*, 85 Wn.2d 441, 448, 536 P.2d 157 (1975); AGO 1978 No. 21. If an enabling statute does not authorize a particular agency rule, either expressly or by necessary implication, "that [rule] must be declared invalid." *Kabbae v. Dep't of Soc. & Health Servs.*, 144 Wn. App. 432, 440, 192 P.3d 903 (2008).

Judicial review of an agency rule is governed by the state Administrative Procedure Act. Agency rules are presumed valid; therefore, the burden of demonstrating the invalidity of an agency rule is on the party challenging the rule. RCW 34.05.570(1)(a). An administrative rule is invalid if it (1) violates constitutional provisions, (2) exceeds the express or necessarily implied statutory authority of the agency, (3) was adopted without complying with the statutory rule-making procedures, or (4) is arbitrary and capricious. RCW 34.05.570(2)(c). A rule is arbitrary and capricious "if it is willful and unreasoning and taken without regard to the attending facts and circumstances." *Washington Indep. Tel. Ass'n v. Utils. & Transp. Comm'n*, 148 Wn.2d 887, 905, 64 P.3d 606 (2003). To answer your questions, my primary focus is on the second and fourth requirements, statutory authority and the arbitrary and capricious standards.

The starting point for analyzing the Gambling Commission's rule-making authority is the statute creating and empowering the Commission. The Commission is authorized by statute to implement and enforce the gambling laws of this state. The Commission has express authority to issue and revoke various types of licenses, including licenses permitting the manufacture of gambling devices for use within this state. RCW 9.46.070(4). The Commission also has the express authority to "regulate and establish the type and scope of and manner of conducting the gambling activities authorized by this chapter" and to "perform all other matters and things necessary to carry out the purposes and provisions of this chapter." RCW 9.46.070(11), (22). To further its ability to enforce the state's gambling laws, the Commission may "adopt such rules and regulations as are deemed necessary to carry out the purposes and provisions" of RCW 9.46. RCW 9.46.070(14).

The Gambling Act does not expressly authorize the Commission to require licensed manufacturers to sell to all licensed distributors on an equal basis. Nor is there any express prohibition against such a requirement. Consequently, the analysis shifts to whether the proposed regulation is within the Commission's necessarily implied statutory authority.

An administrative rule is within the implied statutory authority of an agency if it promotes "those powers that are essential to the declared purpose of the legislation" and is "not

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simply convenient, but indispensable to carrying out the legislative purpose.” *In re Impoundment of Chevrolet Truck*, 148 Wn.2d 145, 156 n.10, 60 P.3d 53 (2002) (internal quotation marks omitted).

RCW 9.46.010 sets forth the legislative declaration of policy with respect to gambling. That policy “is to limit the nature and scope of gambling activities” by “strictly regulating and controlling such activities.” *Edmonds Shopping Ctr. Assocs. v. City of Edmonds*, 117 Wn. App. 344, 353, 71 P.3d 233 (2003). More specifically, the declared purposes of the Gambling Act include “to keep the criminal element out of gambling,” “to promote the social welfare of the people by limiting the nature and scope of gambling activities and by strict regulation and control,” and to “avoid restricting participation by individuals in activities and social pastimes . . . [that] are more for amusement rather than for profit[.]” RCW 9.46.010. The legislature has specifically declared that “[a]ll factors incident to the activities authorized in [RCW 9.46] shall be closely controlled, and the provisions of this chapter shall be liberally construed to achieve such end.” RCW 9.46.010.

As noted above, the Commission has implied statutory authority to adopt administrative rules that are “indispensable to carrying out” the purposes of the Gambling Act. However, in the absence of compelling facts and circumstances, I see no reason why a blanket requirement that all licensed manufactures must sell to all licensed distributors on an equal basis would be necessary to effectuate the general statutory scheme or to promote the legislative purpose of the Gambling Act. Of course, if the Commission became aware of evidence that such a rule was necessary to achieve some legislative purpose recognized in the Gambling Act, this result might change. But the letter submitted by Mr. Amos offers no such evidence.

Similarly, in the absence of any factual showing that a rule regulating market participants is necessary, it is likely that a court would conclude that the proposed rule is arbitrary and capricious. My conclusions, however, are narrow and limited by the absence of any factual record that would support the need for such a rule. Unlike the Commission—an agency with authority to make rules—the Attorney General’s Office does not possess expertise in regulation of gambling and does not gather the type of factual information that might, hypothetically, demonstrate that there is a need for an industry-wide regulation described by your question. Accordingly, my opinion is limited to the basic facts provided in your predecessor’s letter.

2. Can the Gambling Commission adopt an administrative rule requiring licensed manufactures of specific types of gambling products to sell its products to all licensed distributors?

The follow-up question asks whether the Gambling Commission has the authority to adopt targeted rules requiring manufacturers of specific types of products such as pull tab and bingo paper to sell to all licensed distributors. Again, this question depends on the existence of facts that demonstrate to the Commission, with its expertise over gambling, that such a rule is

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necessary to accomplishing the purposes of the Gambling Act. In my opinion, the Commission might have a better chance of defending a challenge to an administrative rule that applies narrowly and is designed to remedy a specific and identified problem. *See Puget Sound Harvesters Ass'n v. Dep't of Fish & Wildlife*, 157 Wn. App. 935, 950-51, 239 P.3d 1140 (2010). On the other hand, a narrower rule might reveal facts showing that the rule is even less necessary to the purposes of the Gambling Act. The best answer to your question is that the limited facts and circumstances described in your letter are likely insufficient to establish a rational connection between the Commission's express statutory authority under RCW 9.46.070 and a targeted regulation requiring the even-handed sale of specific types of gambling products. Put another way, on the available facts, it is unlikely that a court would conclude that such a rule is necessary to effectuate the Commission's express statutory authority to regulate gambling.

I hope the foregoing information will prove useful. This is an informal opinion and will not be published as an official Attorney General Opinion.

Sincerely,



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