

July 12, 2018
Washington State Gambling Commission Meeting Transcript for
Big Fish Games, Inc. Petition for Declaratory Order

0:31:43 MS: All right, thank you, Haylee. The next item we have on our agenda is a Petition for Declaratory Order for Big Fish Casino, and we will have Brian Considine, Legal and Legislative Manager representing the agency, and Beth Brinkmann, Counsel for Petitioner. Good afternoon.

0:32:14 MS: Good afternoon.

[pause]

[background conversation]

0:32:26 Brian Considine: Thank you, Mr Chair, members of the commission, Brian Considine, your Legal and Legislative Manager. Before you, I believe is Tab 9, is a Petition for Declaratory Order from Big Fish Games Incorporated. The petition was received by the Gambling Commission on July 3rd of last week. Ms. Brinkmann is next to me, she is counsel on behalf of the petitioner, Big Fish Games Inc. I will just give a quick brief rundown of how this stands procedurally, and then I will turn it over to her to give a short summary of her client's petition. But as you know, we've talked about the Kater v. Churchill Downs case where the Ninth Circuit interpreted Washington state law and determined that in that case, based on the procedural posture, and just as a reminder, it was a motion dismissed, where basically in the Federal Court...

0:33:20 BC: The Federal Court was supposed to take the allegations as true, and if whether or not the allegations by law were gambling. The Federal Trial Court in Seattle said, "Nope, it's not gambling." And then the Ninth Circuit as we've talked about several times said, "We disagree, we think based on the allegations that it is gambling." So there hasn't been a trial, there hasn't been a fact finding by a court in that Kater v. Churchill Downs.

0:33:43 BC: If you'll recall, the defendant in that case, Churchill Downs asked for the Ninth Circuit to have a larger panel of judges review it. En Banc Review is what it's called. And just I think two weeks ago, the Court denied that request and issued a mandate, basically a final order, affirming their decision and so now that case is remanded back to the Federal District Court in Seattle. Technically, there's 90 days for them to file a petition with the Supreme Court and ask for the US Supreme Court to review it, but as of right now it's with Federal Court. I do not know exactly what the litigation posture of that is, but Mr. Tievsky is counsel for Ms. Kater in that case. He is here, and my understanding is that he'll want to have some public comment, so if you have any questions about that, you'll be able to ask him.

0:34:37 Julia Patterson, Vice-Chair: I have a question, Mr. Chair.

0:34:40 MS: Yes.

0:34:41 JV: So, I'm not an attorney, Brian. Essentially, what I think I heard you say is that the

case isn't over yet?

0:34:47 BC: That's a great summary, Commissioner Patterson. Yes, [laughter] the case is not over yet. Thank you for always reminding me that I sometimes do lawyer speak. So my apologies for that. Yes, the case is not over yet.

0:34:58 JV: Thank you. [chuckle]

0:35:00 BC: Nope. My apologies. I know, I'm still learning that part of it. Anyways...

0:35:06 JV: I might have your job now, I think.

0:35:08 BC: It is. [laughter] You know, you're right. Very true, very true. I put on the attorney hat more than I did the... Yes. Anyways yes, not over yet, back to court. And this petition is now here before you. Just as a reminder, there are at least four other cases where this issue has been raised. Also, none of those cases are final either, they're still in the process of figuring that out. You have the Administrative Procedures Act, and our rule basically say that there are specific things that should happen when the commission receives a Petition for Declaratory Order like this. One of them is within 15 days to give notice to, "all persons whom notice is required by law and may give notice to any other persons it deems desirable." I sent an email out to all the parties in the cases that this issue has come up in.

0:36:02 BC: So in both the Kater and Churchill Downs case and the other four cases, I let all of the attorneys know that this was happening, which is probably why we have such a great crowd today, and we tried to let other stakeholders who usually want to know these things as possible. I expect that we will post this information on our website next week as well, and along with any comments or any other letters that we receive on this. Along with the petition, you should have received today, three letters. There are two letters in support of the petition and there is one letter opposing the petition and asserting that they are a necessary party to this petition, and they do not consent. And I say that to kind of preface what the procedural posture is for you today moving forward, but...

0:36:55 JV: Mr. Chair?

0:36:56 MS: Yup.

0:37:00 JV: So Brian, if the case isn't over yet and we make some sort of a decision here today, would our decision potentially influence the way the case is ultimately decided?

0:37:13 BC: Yes, Commissioner Patterson, it could, which is why... Ms. Brinkmann can speak to why they brought the petition, but from the legal perspective, yes, the whole purpose of a declaratory order which this commission, I think, most recently did in the last few years with Microsoft is, this is an order that does have precedential value, is something that a state court would take into consideration because you are the folks that get to interpret our state laws within the capacity of how your authority is. So if you were to issue a declaratory order, quite frankly, one way or the other, yes, it is gambling, no it is not gambling, that is something that any party

could take to a court and use as a reason to a court go one way or the other. Yes, it would provide the clarification that they believe is potentially lacking based on the Ninth Circuit decision. And also, Ninth Circuit decision isn't necessarily... Doesn't bind state courts, so your declaratory order would be something that someone could take into state court.

0:38:23 BC: Any additional questions? All right. So just quickly, the posture to set it up for you and then I'll give Ms. Brinkmann the microphone, is within 30 days after receiving this petition, which is approximately on or about August 1st, but today will definitely do. You're asked to enter an order declaring the applicability of the statute rule order essentially, is it gambling, is it not gambling, answering their question, and clearly it can be more sophisticated than that, but that's the basic gist of it. Set the matter for a specified proceedings to be held no more than 90 days after receipt of the petition. So you could set it for our August commission meeting or September commission meeting, so that you have more time, staff have more time to review this, and to come up with possibilities, what your options are. Also, you can set a specified time in which you'll enter a declaratory order saying, "We'll take this matter under consideration and by our September commission meeting or by September 31st, or whatever time you choose, we will have a declaratory order on this." Or you can decline to enter a declaratory order and give good reason for that.

0:39:33 BC: The time limits, for the 90 days, you also can extend. So right now I think the 90th day is on or about October 1st. So let's say we set this in August and you wanna take a few more months to figure this out because we need more time, you need more time, you need more information, you would be able to go on the record, so long as you had good cause, you could push it out past those 90 days. The one letter that you've received from Mr. Tievsky relates to the one part that says, "An agency may not enter a declaratory order that would substantially prejudice the rights of a person who would be a necessary party and who does not consent in writing to the determination of the matter by a declaratory order proceeding."

0:40:14 BC: You do not need to reach that decision today, you can if you want, but you don't have to. That is just one more thing that will be... That's gonna come before you for consideration and Mr. Tievsky, when there's public comment, I'm sure can come up and explain that a little bit more. So basically, the gist of it is you don't have to do anything today, you can reset this for our August or September meetings but you're also... You're perfectly able to make a decision today if you so choose. Are there any questions about the procedure or process? All right. I will turn it over to Ms. Brinkmann.

0:40:50 Beth Brinkmann: Thank you so much, and may it please the commission, we very much appreciate the opportunity to kinda walk through our petition. My name's Beth Brinkmann, I'm here on behalf of the petitioner, Big Fish Games. I'd like to give a summary of the petition, I think, and walk through and I'd also like to take a couple of minutes to then after that to address the letter that was filed yesterday. So the questions that you asked, Commissioner, are really, I think, very significant to understand how all of this fits together. And one thing that's really important to understand that this is a question of state law. So that litigation that's been referenced is in Federal Court, and those Federal Courts look to what the state courts, how they would interpret it.

0:41:31 BB: So that's, I think, part of how it interacts, and we're here, Big Fish Games, as the owner of Big Fish Casino, to have a declaratory order about our games. So we can resolve uncertainty that was created by that opinion. And that opinion didn't exactly decide this issue, so I can explain that too. But a declaratory order here today is about the responsibility that the state legislature has charged you all with as a law enforcement agency to apply the statute to these games. So that's all that's before you in this declaratory order. So our petition is to ask for a declaratory order that confirms that Big Fish Games, Casino Games are not gambling because their virtual tokens cannot be redeemed for real money, they have no real world value and their terms of use expressly prohibit the transfer or resale for commercial gain.

0:42:32 BB: And I know one thing that has been looked at in the state over the past year, other situations like skins gambling that involves a market where there actually is monetary real world value. That's not this situation. That's expressly prohibited by the terms of use here. So that's a different situation. So the declaratory order we're asking for is only about the Big Fish Casino Games, not about anything broader that might... Because I know there had been some legislative discussion of that earlier in the year. And the order that we're requesting is consistent with the long-standing and common understanding of owners, players and with guidance publications from the commission since 2014. There was a brochure that's attached to the declaration, one of the declarations in support, and it makes clear that these kinds of social games, no real world value for any kind of virtual tokens, do not constitute gambling. It doesn't include the prize factor.

0:43:38 BB: That understanding... So we looked back at that and we tried in the petition to kind of just give some highlights of how that is clearly the appropriate understanding of the statute, all indicators of how you would interpret a state statute support that reading. We've gone through some of these principles of statutory construction, what they're called, they use Latin names all the time to kind of... It's like your grammar class back in high school or something, about how you look at a sentence and how you read it. And when they talk about thing of value it talks about property, money, things that are monetized, that have real world value, not something that was just a virtual token that doesn't have any real world value.

0:44:20 BB: We also looked at the purpose of the law and the legislature was very clear when they enacted the Gambling Act that this wasn't to outlaw games for amusement, that type of thing, where it wasn't a professionally for profit enterprise. And also the history, as I mentioned, there's the brochure that was provided as guidance and the brochure talks about explicitly giving guidance to both players and owners. And that was published back in 2014. Also I think it's consistent with the enforcement actions of the agency. There's been no enforcement actions over the years. And so there's just been this common understanding by anyone that if you look at the guidance that was presented, that none of these factors that would make it gambling are met.

0:45:12 BB: So it's very important to Big Fish Games as a business to resolve the uncertainty that was created by the Court of Appeals case that was referenced. And that didn't decide this exact issue because what that Court of Appeals, as Mr. Considine very well explained, it was at this preliminary phase so they were just looking at what was alleged in the complaint. And they read it to say that in order to play Big Fish Casino Games you had to pay real money after you first signed on, after that you had to pay real money to get virtual chips. So those chips had to be

worth real money, but that's not the fact. There's regular repeated inner rails where additional chips are automatically provided, and there's a declaration, a valid declaration in support of our petition that makes that clear.

0:46:05 BB: So the Court of Appeals did not decide the facts of this where you don't have to pay to play, you get these virtual tokens all of the time. But it's certainly created confusion. And even to hear people, I think, Commissioner Patterson's questions. Everything's, "Oh, the Ninth Circuit decided this. Oh, we'd be reversing it." No, they were looking at different kinds of facts, allegations saying, "Well, you have to pay this game, so this is... Have value." That's not the facts, our declaration supports it. And that uncertainty though, it's important for us, for our business to have resolved. And one of the things too is we were talking about is I think it's important because that is the state's job to decide what state law does. And Federal Courts are supposed to look to state law. So here what happened is, the Court of Appeals saw the brochure because we had submitted it, and they said that was too informal. And then they went off and said, "Well, this is what we think gambling means, but in a much more generic sense."

0:47:06 BB: So we would request a declaratory order because we think that would be the formal action that would be clear and reinforce the common understanding that has always been, that this does not constitute gambling. So that's how I think the procedural posture plays at. And we do think it's part of that, what the legislator has tasked the commission with as a law enforcement agency to apply that law here. I wanted to address briefly the letter that was filed yesterday that Mr. Considine mentioned because it suggests that the plaintiff from that other suit is a necessary party whose rights would be substantially prejudiced in a way that they can prevent this proceeding and that's under WAC 23-17180. But that is not the purpose nor the scope of that provision in the regulation. Just for a couple things, I wanna say a couple factual things and then get to the law. This isn't a situation where Big Fish Games petitioner here is a party in that case. In fact, the attorney who filed the letter in their counsel opposed participation in that case, Big Fish Games being substituted.

0:48:23 BB: So it's not that we're a party in that case. But regardless of that, and really getting to the law, more importantly, the letter does two things. One, it talks about the standard for Rule 19. That's different from WAC 230-17-180. Rule 19 is a rule about when a court has to join a party in a court action. The WAC provision is about when this necessary party kicks in. They use different language. And just to be clear for rule... They're not a party that's necessary under either standard, but I just wanna make clear what the two standards are because they cite a case. So Rule 19 says if you have an interest relating to the subject of the action, and that might be impeded or impaired, you should be joined. That's not what WAC says. WAC says that it's only if you have a right that will be substantially prejudiced. So the case they cite is a Rule 19 case, but even under that, it's much more of a direct interest.

0:49:29 BC: That was the case where a prisoner wanted some records from the Department of Corrections, and Department of Corrections went into court to get an order against that. So that was the situation where they said, "Well there's a right, there's something connected there." Under the WAC provision, we went and looked to see what other kind of agencies, how they treat this necessary joinder, because it's also in the general administrator provision. And when you look at that, the right that has to be substantially impaired, is much more kin to like a

contractual right. There is a... And again, we were looking since yesterday. There's this case that where it went to the public employment agency, the public employment commission, and it was a labor union trying to get a determination about whether a collective bargaining agreement covered them or not. And the commission said, "No, the other party to that agreement, that contract was a necessary party. They had a right there."

0:50:30 BC: So that is a much higher standard than Rule 19, but even under Rule 19, this is just an interest in how the law is applied. What you decide doesn't adjudicate any of these other cases. It's state determining what state law means. And if you took that... I realize I just have a minute left, but if you take the broad breadth of the interest that anybody who had a case pending, who had an interest in what the state law meant, that would mean any member of the purported class could be a necessary party, any of the plaintiffs in the other cases, and if I could just finish my sentence, and also, I mean, even any player of a game might say, "I have an interest in how this law is applied."

0:51:17 BB: But that's not what that necessary party provision, you have to have a right that's at stake. And it's good it's a high standard because that would be really exceptional to prevent you from exercising your authority that the legislature gave you. So we would ask that you enter the declaratory order for Big Fish Games Casino so this uncertainty about their games is resolved. And we really appreciate it. We also obviously ask any opportunity if we can provide you any kind of further information, we'd be happy to do that.

0:51:51 MS: Commissioner Troyer.

0:51:55 Ed Troyer, Commissioner: So this is all really new to us. I know it's something that we're gonna have to deal with as the different laws are changing around, let it be sports betting or free betting. Let me ask you a scenario so I can get this in my head. If a 14 or 15-year-old kid signs on to play a free game, and I'm only gonna use Frogger because that already exists, where you try and cross the road with frogs and when they all get hit by cars, the game's over, right? What if you could buy more frogs? Is that legal? A 15-year-old kid's on there and his 30 frogs get hit by a car, can he go on and spend \$20 and buy another 25 frogs and continue playing?

0:52:35 BB: I think that the question is whether it fits the gambling provision. I mean, people pay to watch movies and people pay for all kinds of amusements. So we know that paying...

0:52:44 EC: Right, but they're paying to gamble. When you're talking about playing Big Fish Poker, they're playing to gamble. What about the problem gambler that's sitting at home and how much money could somebody spend on playing Big Fish Poker? How much money could somebody spend? \$500 a month in buying free chips? Is that possible?

0:53:06 BB: If that's the kind of amusement they want. What here is the question though is whether there is the consideration, chance and prize, because there are many types of any kind of video game, there's such a swath of video games that have virtual items that can be purchased. It's in the world of amusement. It can't be monetized. I think the skins gambling is a very different scenario from what I looked at from the legislative efforts there. It has to do with this whole market where it became real money and that's the line. That is...

0:53:41 EC: And we're aware of that, we've really taken a look at that. But on the back end of what you're doing, you're still gambling. Even though it's virtual nothing, you're still playing against other people and gambling.

0:53:51 BB: Well, if you look at...

0:53:53 EC: You basically have created a system where there's no chance to win. You can spend money as much as up to \$1,000 a month on free chips, and there's no way you're getting any of it back. Is that right? Am I wrong?

0:54:04 BB: But it's not gambling. The gambling isn't... If you look at the statutory provision, it's not how much money you could spend on an amusement, to be regulated as gambling you look at that definition of course, of the gambling, but then it refers you to thing of value. And when you look at thing of value, it talks about property, money, or extension of play without charge, it's something that has a real world value. That's what the gambling structure, because this provision would criminalize these things. That there's been this reliance for years that everyone understands that this isn't something that is subject, because this is the same definition that applies to all of the provisions in the Gambling Act that would have...

0:54:47 EC: But I'm understanding those answers, but what you're talking about, possibly, and I don't know if it's right, it'd still have real world consequences with people with gambling issues. It could have real world large amounts of money going just in one direction. I think that we need to do a lot more education on this and learn more about it.

0:55:08 BB: All we're asking for is a declaratory order of the current statute, and what the words of that statute mean and the words of that statute is very clear. It has to have that kind of real world value. There may be, certainly, other social issues. I know that the Commission has given great concern to addiction and all kinds of social issues that are very important. But the question here is whether this is gambling and a thing of value under the words of the statute, and it's not. I mean, you look at the purpose and I think the common understanding is really well reflected in that brochure when you talk to the idea of these virtual items that cannot be monetized in the real world. I mean, there were... The problems you suggest are just other problems, they're not regulating it as gambling and subjecting it to the criminal and other provisions that would arise if that were really what the breadth of that term meant.

0:56:02 EC: What would happen if this commission, I'm not saying it is, if we studied it and did a declaration that we believe that it is gambling?

0:56:11 BB: Then that would change, we believe, the meaning of what the statute says under the terms of what gambling and a thing of value is. So, we're just asking...

0:56:20 EC: But this is probably something the court should figure out.

0:56:23 BB: But you are charged as a law enforcement agency to...

0:56:25 EC: Well that's... I'm only saying maybe you should be careful what you ask for, because if it goes the other way, I don't think it's gonna do anybody any good. And I myself would like to learn a lot more about this before we do anything. I'd like to take a couple of months and educate myself more before we went one way or another on something that's this big.

0:56:42 MS: Okay. Commissioner Stearns?

[background conversation]

0:56:54 Chris Stearns, Commissioner: Hello, okay. [laughter] Wow. Thank you. Can you just maybe talk a little bit about how long games like this have been in existence, and have any other jurisdictions had any issues with this at all?

0:57:13 BB: I have to say, can't go back. I just know it's been for years. The brochure and the hearing before the commission was back in 2013, so five years ago these social gamings were already out there. There's this whole social component with friends and all kinds of things. So that was a hearing back in 2013 and they were well established and it wasn't just Big Fish Casino Games, Candy Crush, there were lots of other games that were there. And I think the commission had a great hearing about it and realized amusement games, that's one thing the legislature didn't need to... Gambling and where you're trying to get more, you can try and do this to get more real money and all, that's gambling, that's not this case. You might spend a lot, but you're not gambling, trying to get more money, something of value.

0:57:52 BB: That's what gambling is. So, at least since 2013, and I can tell you there have been several cases having to do with other states that have comparable statutes. None of them have found this gambling. We didn't go into all of that because when the Ninth Circuit looked at this, each statute is worded a little differently, but all of them when you get down to it, they come back to this thing, "Is this about real world, like you're doing this to try and win more money? No." Then that's not gambling.

0:58:21 BB: I'm over simplifying, I'm moving out of my lawyer language there but... So these other states have also said that it's not. I just want to be fair that they're slightly differently worded statutes, but it's the question about whether it's gambling, not whether there are other issues that wanna be addressed, a policy or whatever, but it doesn't constitute gambling. So they've been around a long time, they haven't been viewed as gambling. And I have to say when I saw the brochure, when I was looking at this brochure, was quite good because what it actually did was, it cited the statute, it talked about what exactly could get you, raise questions for you, because it was... The thing that I think is so funny about the federal court, they said it was too informal, and yet, it did exactly what you wanted it to do. You were talking to everyday people to understand this and it wasn't written in legalese. So they talk about the three elements and they explain it's just not a prize when you can't resell or redeem anything for the item for real money or a prize.

0:59:28 BB: Down there on it, it has a little date that says 3/14. So I assume that was issued in March 2014. It's GC5-027, and that would have been less than a year after the hearings, so it's

been years and years. And my client certainly, and other owners of games rely on it, our employees that we employ in the state, certainly players, and the law enforcement approach that the commission has taken consistent with this. And again, I think that's different than the other areas where you have looked, with skin gambling, where it really is about trying to get and wager for real money.

1:00:07 MS: Are there any other questions for Ms. Brinkmann? Senator?

1:00:20 S?: I assume you are aware that we did have loot box legislation in front of the legislature this last session.

1:00:25 BB: Mm-hmm.

1:00:25 S?: And so, the legislature has been looking at this issue, not taken action, but you're aware of it, right?

1:00:31 BB: Yes, but I would say this is a different issue, that's what I... Those issues having to do with something that can ultimately be monetized... I mean, here the terms of use expressly and unequivocally prohibit any type of transfer or exchange for financial gain. And I think these social games generally do. I can't represent that, they're not my client, but that's different than these situations where I think there was a concern about facilitating the transferability of items, for example, that they can be turned into real money. That is not this situation. And we do have a declaration from the valid declaration that attest to that.

1:01:16 S?: And for my information, I would like to know what other states. You may say other states have looked at this issue and taken action. What other states?

1:01:24 BB: I don't... There are a couple of District Court Act cases that I don't have before me, but we can certainly provide you with that.

1:01:31 S?: Good. I'd like to know what other states have taken any kind of action on this as a legislator.

1:01:38 BB: Sure.

1:01:39 S?: And I'm a little confused because when I read the other letter here that you've made reference to, I see that the client lost money, feels that she lost money. What is your explanation of that? If you read her letter she says she was unable to recover the thousands of dollars she lost.

1:02:01 BB: I think that is allegations and actually, first, I'd say that highlights exactly why whatever this declaratory order doesn't resolve that, because that's what would be adjudicated before the court. Also I think, although certainly an interpretation of state law would be highly relevant. Someone might feel they lost money because they went to a... They paid a lot of money to go to a big, big boxing match, and somebody got knocked out in a minute. Did they really get what they paid for? They could feel that they got gypped out of the \$1,000 they paid for the seat. You pay for amusement, you might not think that you get what you paid for, but that's very

differently than gambling where under the statutory definition and what law enforcement regulates is, you have something of consideration and you're paying for this chance and then you're hoping to get something of value that's greater than that in the real world monetized.

1:02:54 BB: That's gambling, that's not... That's different than being, perhaps, dissatisfied with the amusement you got. But that's very important, I think, because the reach of the law enforcement of gambling in the state involves very significant criminal penalties. And so, I do think that the legislature was careful when they did that and said, "This is to go to that kind of gambling, it's not for amusements."

1:03:20 S?: Of course, I think you recognize that we're living in a very interesting age. [chuckle]

1:03:25 BB: Yes.

1:03:29 S?: The statutes... We're living in an age where there's an awful lot of new kinds of electronic interaction, and that's probably what's happening with loot boxes, [chuckle] and so, it's a really... I don't know... Well, I'll just leave it at that.

1:03:46 BB: I think we very much respect the fact that there are a lot of other policy issues and all about things that are down the road, but right now, this is not skins, this is not loot boxes, this is this very long standing group of social games that involve virtual tokens that have no real world value. That's all we're asking for. It's a very... And it is just adhering to the law, adhering to the reliance that has been for at least five years, probably much longer than that.

1:04:20 S?: But it's still poker on the back end. You're spending money to play poker, and poker is gambling. So that's why I think we need to take a look at this more.

1:04:31 BB: But poker is not gambling if it's not for real money.

1:04:35 S?: It is, if somebody's losing thousands of dollars and it's causing problems and it's an issue. All of a sudden the socialness and the fun-ness comes out of it.

1:04:45 BB: That may be a different issue but it doesn't make it gambling. It's like candy themed games also that... People play the games for various... But nobody's walking away with real money.

1:04:57 S?: But it's not poker. That's known as gambling, you can go really gamble and get addicted to poker and you could probably get addicted to gambling.

1:05:03 BB: But you're not gambling to get any money.

1:05:05 S?: We can agree to disagree, but I'm just saying I'd like to learn more about this.

1:05:09 BB: I totally respect that. I would just...

1:05:11 S?: Before somebody can talk me into saying that people... You've created a game where

you just continually pay money and never get it back to play poker, and you have the ability to spend a \$1,000 a month doing it.

1:05:22 S?: That's what Amazon.com is.

1:05:24 BB: Yeah. I definitely respect that. I just wouldn't... I guess the question is, it pre-decides the issue to call it gambling.

1:05:29 S?: You play poker on Amazon?

1:05:31 S?: Yeah. You spend money...

[overlapping conversation]

1:05:33 S?: And stuff comes to your porch.

[chuckle]

1:05:33 MS: We seem to be re-hashing a little bit here, so Brian, you have a comment or... So my comment just for your education, I guess is, certainly four of the five of the current commissioners have felt burned in the past, due to a lot of unintended consequences that have occurred when we've authorized something, when we've made a decision. So I think that we are going to generally be quite deliberate as we face issues like this. And I know that you have laid out the case and it's pretty clear cut in your mind, but as we deliberate these sorts of things, certainly in the last couple of years, we are a pretty deliberative body before we venture out into this fresh territory.

1:06:43 BB: We appreciate that. We think this is... Well, it is, it's maintaining the status quo that people have relied on. But we nonetheless absolutely appreciate it. And I have to say, I think that this is very impressive to have this kind of civic involvement and commission considering this. We appreciate that and we appreciate the quickness with which we were allowed to come and just present our petition. We do think it's confirming the status quo and that everybody has been relying on it for years here. But we very much respect that and do appreciate that and anything we can provide, we would be happy to do. We offered, we can demonstrate the game, whatever you might like.

1:07:21 S?: Mr. Commissioner, I'd like to make a motion.

[overlapping conversation]

1:07:24 MS: I'd like to have some public comments.

1:07:25 S?: Oh more... Oh, I thought I saw her put up the minute sign a while ago. [chuckle]

1:07:31 MS: No, I was just gonna remind... I believe there are other people here in the public who would like to speak to this. So thank you, and Brian, if you don't mind staying there just in

case we need you.

1:07:41 BC: Certainly, yup.

1:07:43 MS: Certainly, Cheryl Kater's representative is here, and I'd certainly... If that's you...

1:07:51 S?: It's me.

1:07:51 MS: I'd certainly allow you first. And then, before we get started, by show of hands are there other folks that would like to participate in public comments related to this topic? Okay. Oh, we've got one, all right, two, maybe? Okay.

1:08:12 Alexander Tievsky: I'd like to...

1:08:13 MS: Introduce yourself for the record please.

1:08:15 AT: My name is Alexander Tievsky, I'm counsel for Cheryl Kater. I'm at Edelson PC in Chicago. I'd like to thank the chair and the commissioners for allowing me to speak today. I do really appreciate it. I will try to keep my remarks very short. Commissioner Troyer, I think you had it exactly right. This is a big deal. We heard a lot about how, well, this isn't really about money, this is just fun games. Big Fish. So the reason we sued Churchill Downs is because they used to own Big Fish. Big Fish has since been sold to an Australian gambling machine manufacturer for \$950 million. My client, Ms. Kater, lost more than \$10,000 playing this game. I have another client Adrian Benson in Spokane who lost \$3,000 playing a similar game. These games are extremely addictive.

1:09:10 AT: If the commission is interested in learning more about the science behind it, there's an excellent book by Natasha Dow Schüll called *Addiction by Design*. It explains that people don't play, even slot machines where you can win money, they don't play them to win. They play them for the... They call it getting into the machine zone. It's the psychology of being addicted. And all of the things that the commission does to help mitigate those risks in the casinos of this state are just entirely absent from the unregulated, not even regulated as amusement games, the unregulated gambling games that they have here.

1:09:54 AT: As far as the arguments you heard a moment ago, this is not the first time those arguments have been made. Those arguments were made to the United States Court of Appeals for the Ninth Circuit, which disagreed. It also saw the law as very clear. It saw the law as very clear, saying, "Yes, this is in fact a gambling game." If the commission grants the petition that they ask for, I'm not gonna say that it's definitely going to cause my client to lose because obviously you know I'm a lawyer, I've got a hedge for everything, right. So I'll be able to make my argument to the court that, "Oh, you shouldn't listen to it." But at the end of the day, it will severely, severely impact her pending case.

1:10:35 AT: That's certainly why they're here asking for it. There were some technicalities discussed regarding who the defendant in the case is. The case, as Mr. Considine cogently explained, just got back to the trial court. So we haven't had a chance. You get a chance to amend

your complaint to add more parties. We haven't gotten any discovery, we haven't gotten any information from the defendants. We think it's likely that Big Fish Games Inc will be added as a defendant. Just haven't gotten there yet. As I said, this is still all going on. It's in the... Despite the fact that the case has been pending for years, it's still going on.

1:11:17 AT: And then the last thing regarding the ability of the commission to enter this declaratory ruling, there was a discussion of a... There was just two factors that say whether someone has to give consent before a ruling is issued. It's is there prejudice? Well there's prejudice here, she'd lose her case. And it's is she a necessary party? And there was some discussion of that being a high standard. The Washington Supreme Court hasn't said that, they said it's a low standard. It's might my client be affected by it? Is there a possibility? And I say, yeah, speaking very candidly, there's a very strong possibility that her case would be affected by a decision here and not that I don't trust this commission to do the right thing. Actually, I very much do, but just think it's in her best interest now respectively to decline to consent to that. And with that, I'm happy to answer any questions the commission has. I'm happy to submit more detailed written submission if the commission wants me to, happy to come back to another month.

1:12:24 MS: So yeah, I would certainly have expected for you to be able to make the case for your client to be a necessary party. I don't know if you wanna take a little more time...

1:12:45 AT: Sure.

1:12:47 MS: Right now to really state that case so that I can evaluate that, because I think that is a pretty important aspect and something that you can speak to that's related to the matter before us, not the case back at the District Court.

1:13:06 AT: Sure, so the necessary party rule and your rules and then the administrative code hasn't been, as far as I can tell, directly interpreted by a Washington Court. So, kinda have to look to other times when the same phrase is used. And that's why we cited the civil rules. We figured, well, if there's absolutely no cases talking about this, then an explanation of the phrase by the Washington Supreme Court in a similar context, would really, I think, speak to what it means. And what the Washington Supreme Court has said is, someone is a necessary party if their interests might be affected by the outcome of the case there, and that doesn't necessarily mean you're on the other side of a contract, because when you have a lawsuit, that's also considered a valuable interest, right? And in this case, she has a lawsuit, she says that she's entitled to a certain amount of money under the law of Washington.

1:14:08 AT: If this Commission decides in the way that Big Fish has asked, then that severely impacts her ability to get that money that she says she is owed. And the Washington Supreme Court says you don't even have to have a... It doesn't have to necessarily... Necessary party is kind of this term that, it makes it sound much more strict than it is. What it means is, is there a possibility that she could be affected? And if there is, then she's got to be a part of this. And your rules say that if she doesn't want to be a part of it, if she doesn't consent in writing, then that's the end of that matter. I hope that helped explain it.

1:14:51 MS: She wouldn't consent.

1:14:52 AT: She does not consent, no.

1:14:56 MS: Further questions? Commissioner Stearns?

1:15:02 CC: Okay. So did you say that your opinion is that the game manufacturer designed this game to be addictive?

1:15:13 AT: Yes, absolutely. They designed these intentionally. There was some discussion of the free chips that they give you. These are basically free samples in just a little bit, in just the right amounts to make you keep playing again. They give you just enough to get you going again, and then they pop up in big letters, "Buy more," and they give you sometimes what they call a special discount. They also have the numbers really big, so you buy 20 million chips and this helps you, "Oh, I'm... " It makes you feel like you're getting a lot of value. So it also helps addiction.

1:15:51 CC: So, would I be right then in assuming that you would also say that if the same manufacturer, if they were making a slot machine that that would also be designed to be addictive?

1:16:02 AT: Yes. Yes, those slot machines are designed to do... The company that owns Big Fish Casino makes slot machines. It's the same. Same people, same science.

1:16:18 MS: Commissioner Patterson.

1:16:19 JV: Could you refer us to some literature on the matter, maybe through staff, so that that they could send that to us?

1:16:25 AT: Sure, absolutely. As I said, the best book is that Schüll book, and I can send Mr. Considine the link. It's outstanding, it explains it in great detail. And Professor Schüll, she's at NYU, she's quoted in the newspapers relatively frequently about this topic, she's very knowledgeable.

1:16:44 MS: Okay. Any other further questions? Any further? All right.

1:16:49 AT: Thank you very much, I really do appreciate your time.

1:16:52 MS: Thank you sir. Please come forward. Could we get one more chair up there?

[background conversation]

1:17:13 MS: And please, if you could identify yourself for the record, please.

1:17:18 Cyrus Ansari: Mr. Chair, Commissioners, my name is Cyrus Ansari. I am with Davis Wright Tremaine, and I'm here with our client, Mr. Joe Sigrist, who is the General Manager of DoubleDown Interactive, that is a video game development company, headquartered and

incorporated in this state, that makes social online games similar to the Big Fish games at issue in the Big Fish petition. You should have received... I hope you've received our letter, which we wrote in support of the petition. And I'd like to introduce Mr. Sigrist to make just a few brief comments, if you'll allow it.

1:17:52 Mr. Sigrist: Thank you very much, commissioners. We really appreciate the opportunity to speak today, I'll be very brief. As was mentioned, we submitted a letter in support, strong support of Big Fish's petition, and we believe that their arguments as stated in their petition are quite strong and quite compelling. We have been offering... DoubleDown Casino, is a similar type entertainment activity for almost 10 years, and are obviously very familiar with the business and with players associated with this game, our game, and similar games.

1:18:34 MS: And I'll simply say that as the commission continues to look at this, we wanna offer ourself as a resource, we're right up the road. We're Washington-based, as mentioned Seattle-based, have a number of employees and players in the state of Washington who are quite interested in the outcome of these proceedings. And so, we'll again, make ourself available at any time to support you in your discussions and deliberations.

1:19:04 MS: Questions? I guess I have one. I don't know if it's appropriate, so stop me if it's inappropriate. Are you... Is your company a party to litigation similar to what Big Fish is facing?

1:19:23 MS: Yes, we are.

1:19:25 MS: Okay. Troyer.

1:19:30 EC: When you say games, DoubleDown Casino, what would the games be on the backend?

1:19:36 MS: Well, our games are casino-style games, so we offer through DoubleDown Casino. We have other applications but through DoubleDown Casino, we offer casino-style games, so poker, video poker, blackjack, and slots. As is the case with this industry, slots is the predominantly played game within the category worldwide. As you may know, it's a \$4 billion category, mobile and online gaming category worldwide, and a large percentage of that comes through the play of slots which seem to be exciting for players to play online.

1:20:20 EC: Are there limits to how much somebody could spend a month?

1:20:25 MS: There are no specific limits, at least in our game. We obviously monitor activity, as I get good stewards of our player base and our consumers, but we don't have any specific limits to purchases.

1:20:43 MS: All right.

1:20:43 MS: Thank you very much.

1:20:44 MS: Yeah. Thank you. Is there anyone else that would like to add to the public record on

this? Brian, do you have any final thoughts? Summary?

1:21:00 BC: Yes. Mr. Chair. I'd just do a quick summary, to help bring this home. Is you don't have to make a decision on anything you've been asked to do today. You're welcome to, but you don't need to. From what I'm hearing, it sounds like we would like that you may want more information which we can certainly do on anything. We've looked at the calendar, we have clearly our August meeting is two days in Pasco. There is definitely things on for that meeting, but we have space if you wanna dedicate an hour plus, I'm pretty sure we can accommodate to that. We also have two days in September in Spokane.

1:21:38 BC: Right now, what we've kind of slotted is gonna be a pretty full agenda at that point, but we can clearly move stuff around to put stuff on there, because we only are meeting a couple times at most a month. Amy can disagree with me and say it, but I think it's probably a good idea to set something for August, and then that way, we're talking about this in August, we're talking about it in September if you wanna go that far. And then if you wanna move it past September, you're going to probably have the ability to do that. And if you want briefing on necessary party or something like that, these parties have clearly good legal minds that have come before you, they have a system that they can provide that information to you, and sometimes having it in writing is better than trying to do it on the spot verbally. So that is something we can also ask them for if that is something you want to be able to have for the August meeting. And so, in reading the room, it sounds like we probably want to push this to our August meeting. You're welcome to do that.

1:22:40 MS: Well, I believe our rules allow us to deliberate in a closed session.

1:22:46 BC: Right.

1:22:47 MS: And I think that we probably ought to do that, and maybe shoot for a 10, 15 minute deliberation and then come back.

1:22:55 BC: Okay.

1:22:56 MS: So is that... Any opposition to that? All right. Well, we will allow you another trip to the restrooms and we'll go have this conversation. So we'll be back in about 15 minutes.

[background conversation]

1:23:36 MS: All right. Sorry for the delay. I appreciate everyone's patience. So in the matter of the petition of Big Fish Games Inc for a declaratory order, we will be signing an order continuing review of petition for declaratory order. So this petition came on for review before the undersigned commissioners of the State Gambling Commission at the commission's regular scheduled meeting on July 12th in Tacoma, Washington. The commission reviewed and considered the petition, comments by the petitioner and staff, and any written or oral comments by the public. The commission finds that it needs additional time to review the petition and allow for additional public comment, therefore, it is ordered that review of the petition for a declaratory order in this matter be continued and scheduled for further review and consideration at the

commission's August 9th and 10th, 2018 commission meeting in Pasco.

1:24:29 MS: So, I have signed it and the rest of the commission shall as well. If all interested parties could provide any additional information to the commission a week before, so maybe by August 2nd or 3rd, that would be... Give us a little time to be able to review that. Some specific areas of interest by the commission are further discussion on thing of value, and also on the term "necessary party" as it relates to this matter, or any other factors that you would like to send in writing ahead of time, and then there will also be opportunity to have more oral communication at that meeting in Pasco. So Brian?

1:25:30 BC: I was just gonna say anyone who wants to submit something can submit it to me at brian.considine@wsgc.wa.gov. And if you received the notice, you have my contact information. Otherwise, come find me after we adjourn today.

1:25:50 MS: Oh, and yeah, I guess another area was other states that have dealt with this matter, if there's any similar law that we can review.

1:26:07 BC: And Mr. Chair, what I'll do to kinda help with this is, we'll post this on our website so that folks know what's going on. The two parties that at least spoke today, or their attorneys will... We have a record of this, so I'll distill it into writing, and I'll ask them for this information along with sending out an additional notice to parties, if they want us to provide information related to those topics that they can do so. And we'll give them a date. I think you said a week before the commission meeting, but we'll have a date set for that as well.

1:26:39 MS: Okay, perfect, thank you. Any further input from the rest of the commission on that? Okay. Excellent. So, we will move on. Now we get some presentations. I noticed Chairman Bill Iyall in the crowd, I'd like to invite him forward, or certainly introduce him. And we were going to have a presentation on the Cowlitz Ilani Casino Resort Phase II review. So welcome.