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Via Email (brian.considine@wsgc.wa.gov)

July 26, 2018

Commissioner Bud Sizemore, Chair  
Commissioner Julia Patterson, Vice-Chair  
Commissioner Chris Stearns  
Commissioner Ed Troyer  
Commissioner Alicia Levy  
Brian Considine, Esq., Legal and Legislative Manager

Washington State Gambling Commission  
4565 7th Avenue S.E.  
Lacey, WA 98503

## Re: Big Fish Games, Inc. Petition for Declaratory Order

Dear Mr. Chairman, Commissioners, and Mr. Considine:

Thank you for the opportunity to present to the Commission at its July 12, 2018 meeting. We look forward to further opportunities to address the Commission as it considers Big Fish Games Inc.'s petition for a declaratory order confirming the Commission's earlier guidance that Big Fish Casino games are not subject to the Commission's jurisdiction as "gambling" under RCW 9.46.0237 because their virtual tokens are not things "of value," cannot be cashed out, are prohibited by the games' terms of use from being transferred for profit, and have no real-world value.

We are writing this letter in response to a question discussed at the July 12 meeting regarding whether Cheryl Kater is a necessary party to these proceedings within the meaning of WAC 230-17-180(5), such that her failure to consent to the proceeding could bar the Commission from acting on our declaratory order petition.

As you are aware, the Commission's regulations provide that it "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." WAC 230-17-180(5); *see also* RCW 34.05.240(7) (providing the same for state agencies under Washington's Administrative Procedure Act). Whatever interest Ms. Kater may have in the legal arguments at issue in these proceedings, she does not qualify as a "necessary party" within the meaning of this regulation, and thus cannot prevent the Commission from issuing the requested declaratory order.

The requested declaratory order will not substantially prejudice any "rights" of Ms. Kater's that could render her a necessary party. Although Ms. Kater may have an interest in what state law means and how it is interpreted by the Commission, such an interest is not a

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“right” specific to her that would enable her to prevent Commission action on the declaratory order petition. Other agencies that have similarly adopted regulations under RCW 34.05.240(7) have made clear that the “necessary party” provision protects a third party from having an agency directly adjudicate in a declaratory order proceeding that party’s specific rights without that party’s consent. The regulation has not been applied, however, to prevent agency action merely because a third party has an interest in the meaning of a state statute that may also be implicated in litigation.

For example, the Public Employees Relations Commission held in *In re SEIU, District 925*, 1997 WL 810875 (1997), that an employer was a necessary party to a declaratory order proceeding where the petitioner labor union sought an order declaring that the union’s collective bargaining agreement with the employer no longer covered certain union employees. As a party to the agreement, of course, a declaratory order would affect the employer’s contractual rights and obligations. The order sought here, by contrast, would not have any direct legal force against Ms. Kater. In like fashion, the Pollution Control Hearings Board held in *The Boeing Co. v. Dep’t of Ecology*, 2011 WL 3546624 (2011), that the Department of Ecology was a necessary party to the declaratory order proceeding there because the petitioner sought to have the Board enter an order that would legally invalidate the Department’s own guidance. The order sought here, on the other hand, would have no such legal effect on any right of Ms. Kater. And the Utilities and Transportation Commission explained in *re AT&T Commc’ns of Pac. Nw., Inc.*, 1996 WL 760070 (1996), that a company was a necessary party to the declaratory order proceeding there because the order sought would declare that the company specifically was not permitted “to unilaterally determine that its status as designated toll carrier and as carrier of last resort . . . ended simply because a customer determine[d] to use another toll provider.” Again, the declaratory order sought here would not adjudicate Ms. Kater’s rights, nor would it constitute any type of legal order against Ms. Kater.

That Ms. Kater’s pending lawsuit contains allegations involving the Big Fish Casino games does not change the fact that she has no “right” that would be prejudiced by a declaratory order confirming the Commission’s earlier guidance that virtual tokens in social games like Big Fish Casino, which cannot be redeemed for “real” money, and are prohibited by the games’ terms of use from being transferred for profit, are not things “of value” under Washington’s gambling laws and regulations, and that such games are not “gambling” in Washington because the required “prize” element is not present.

The Commission is not being asked to enter a declaratory order denying relief to Ms. Kater on her legal claims in her lawsuit. That is a matter for the federal court in which the lawsuit is pending. Indeed, the Ninth Circuit ruling that created the uncertainty necessitating the declaratory order request will remain unchanged by any order issued by the Commission. That ruling was based on a reading of the allegations (not *evidence*) in Ms. Kater’s lawsuit, at a preliminary phase of litigation, that differ from the evidence before the Commission in the sworn affidavit supporting the declaratory order petition. That federal court ruling did not determine the application of Washington law to the facts as presented to the Commission, which the Commission has authority to determine pursuant to state law. Indeed, the Ninth Circuit’s opinion expressly noted that it was constrained by the allegations in Kater’s complaint and could not consider the actual evidence at this preliminary stage of the case. *See Kater v. Churchill*

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*Downs Inc.*, 886 F.3d 784, 787 (9th Cir. 2018) (“Churchill Downs argues that this does not matter, because users receive free chips throughout gameplay, such that extending gameplay costs them nothing. But because Churchill Downs’ allegation is not included in the complaint, we do not further address this contention.”).

That Ms. Kater’s “rights” are not at issue in this declaratory order is reinforced by the fact that Ms. Kater’s interest in the legal interpretation and application of state law is shared by a vast number of other members of the public, who desire to know whether the longstanding meaning of the Washington Gambling Act continues to recognize that online social games involving tokens that lack real-world value and that cannot be transferred for commercial gain under the terms of use, do not constitute gambling under the Act. Game owners and players alike throughout Washington have relied on this understanding for years as set forth in the Commission 2014 guidance document, and have a strong interest in the Commission confirming the lawfulness of their business conduct and game-playing. Indeed, the Commission is charged by its authorizing statute, RCW Chapter 9.46, with responsibility for interpreting and enforcing the State’s gambling laws, and for deciding where they do not apply, as well.

Neither the language of the “necessary party” regulation, nor the agency orders applying it, contemplate preventing agency action when the issue of state law is of such general interest to members of the public. Were it otherwise, the declaratory order authority of state agencies could be thwarted unilaterally by a wide range of persons, including apparently thousands of putative class members in pending lawsuits that involve the same state law, claiming a right to foreclose agency action on a declaratory order petition. Litigation brought by plaintiffs in federal court does not supplant or reduce a state agency’s authority or responsibility for interpreting and providing public guidance concerning the laws it is charged with implementing and enforcing. State law interpretation and application are the province of the state legislature and the agencies it creates by legislation, not of the federal courts.

The letter submitted by Ms. Kater’s counsel on July 11, 2018, mistakenly suggests that the Commission’s “necessary party” regulation, WAC 230-17-180(5), is governed by the meaning of Washington Superior Court Civil Rule 19, entitled “Joinder of Persons Needed for Just Adjudication,” which applies when parties must be joined in civil lawsuits in court. But the two provisions are worded differently, serve different purposes, and have not been held by a court to impose the same standard.

First, the text of WAC 230-17-180(5) addresses the situation where a party has “rights” that would necessarily be “substantially prejudiced” by the declaratory order sought, whereas Civil Rule 19 is much broader, addressing any party that “claims *an interest relating to the subject matter of the action.*” Civil Rule 19 (a)(2) (emphasis added). Second, their purposes are distinct, such that it makes sense that there would be a higher showing of rights being substantially prejudiced under the regulation in order to strip an agency of its decision-making authority, as compared to a lower showing of interest relating to the subject matter of a court action in order for a party to be joined to participate. Third, Ms. Kater’s counsel does not cite any authority from Washington courts equating these two provisions or somehow reconciling such a view with the fact that they say different things and serve different purposes. *See also The Boeing Co.*, 2011 WL 3546624 (applying WAC 230-17-180(5) without reference to Civil Rule

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19); *In re SEIU, District 925*, 1997 WL 810875 (same); *In re AT&T Commc'ns of Pac. Nw., Inc.*, 1996 WL 760070 (same).

Moreover, Ms. Kater would not qualify as a necessary party under Civil Rule 19 even if that standard did apply. The case that Ms. Kater provides in support of her position shows only that Civil Rule 19 requires that a party be joined in a court action where that party's legal interests would otherwise be directly adjudicated in its absence. *See Burt v. Washington State Dep't of Corr.*, 168 Wash. 2d 828, 833, 836-37 (2010) (holding that a "requester of public documents (records) . . . is a necessary party to an action . . . seeking to enjoin disclosure of those records"). In addition, it is well established that "[a] mere financial stake in [an] action's outcome," which is what Ms. Kater purports to claim here, "will not suffice" to require joinder under Civil Rule 19. *Auto. United Trades Org. v. State*, 175 Wash. 2d 214, 223 (2012). To satisfy Civil Rule 19's joinder requirement, a party's interest in an action must be "sufficiently weighty" and "legally protected," like a litigant's interest in enforcing a contract to which it is a party. *Id.* at 223-24. Should the Commission's determination of Ms. Kater's purported necessary party status be appealed to a Washington court, there would be no basis for the court to impose a less demanding standard to constitute a necessary party under WAC 230-17-180(5) than under Civil Rule 19; for the reasons discussed above, a higher showing should be imposed, consistent with the text and purpose of WAC 230-17-180(5).

Furthermore, even if Ms. Kater could somehow qualify as a necessary party to the declaratory order petition, the requested order would not "substantially prejudice" any rights she might claim, as required under WAC 230-17-180(5), so her refusal to consent does not preclude the entry of the order sought. The order would not have a legally binding effect against any right of Ms. Kater's; how any application of state law in the Commission's order is weighed by the federal court or arbitrator presiding over her litigation would be a matter for that court or arbitrator to determine. *See In re Tanner Elec. Co.*, 1991 WL 11864524 (Utils. and Transp. Comm'n 1991) (Nintendo was not a necessary party to declaratory order petition seeking "a ruling whether RCW 80.28.110 require[d] Puget Sound Power & Light Company . . . to serve Nintendo . . . on request," because "Nintendo would not be bound by the stipulated facts [underlying the proceedings] if it chose to participate in later litigation" regarding the same issue).

To the extent Ms. Kater has an interest in her views being heard by the Commission, the Commission has accommodated that interest and can continue to do so, by allowing her counsel's appearance before the Commission

We appreciate the opportunity to provide this information to the Commission regarding the question of the applicability of WAC 230-17-180(5).

Sincerely,

  
Beth Brinkmann