

CALIFORNIA GAMBLING CONTROL COMMISSION
FINAL STATEMENT OF REASONS
CGCC-GCA-2013-02-R

HEARING DATE: *(None Scheduled or Requested)*

SUBJECT MATTER OF PROPOSED REGULATIONS: **Issuance of Subpoenas in Matters Before the Commission**

SECTIONS AFFECTED: California Code of Regulations, Title 4, Division 18:
Section 12014

UPDATED INFORMATION:

The Initial Statement of Reasons, as published on May 10, 2013, is included in the file and is hereby incorporated by reference as if fully set forth herein. The information contained therein is updated as follows:

PROPOSED ACTION:

This proposed action will make changes within Chapter 1, Division 18, Title 4 of the California Code of Regulations. The proposed changes are as follows:

Adopt Section 12014. Subpoenas.

This proposed action establishes new Section 12014 within Chapter 1, Division 18, Title 4 of the California Code of Regulations. Section 12014 provides rules governing the issuance of subpoenas in non-Administrative Procedure Act (non-APA) proceedings before the California Gambling Control Commission (Commission) by applying the provisions of Articles 11 and 12 of Chapter 4.5 of Part 1 of Division 3 of Title 2 of the Government Code.

Subsection (a) provides direction and authorization for the Commission, any presiding officer or any party's attorney of record to issue a subpoena or subpoena duces tecum. This subsection also provides a form that may be used for that purpose; however, the use of the form is intended to be optional and any other method that complies with Article 11 may be used. By providing clear authority, a timeline and guidance in the issuance of these subpoenas, it allows all parties to participate and understand their rights in non-APA Commission adjudicative proceedings.

Subsection (a) provides all parties in a non-APA adjudicative proceeding before the Commission with the ability to exercise their due process rights by gaining access to the information they require to meaningfully present their case. The proposed method utilizes a

pre-existing and known method for issuing subpoenas, established through the Administrative Procedure Act¹ (APA), to implement the Commission's subpoena authority.

Subsection (b) provides guidelines to those receiving subpoenas and subpoenas duces tecum for the making of motions in response to the subpoenas. This subsection also provides guidelines for the timing of a motion and any response to a motion, and specifies the actions the presiding officer may take in considering a motion. By providing clear guidelines for filing motions in response to receiving subpoenas and subpoenas duces tecum, it allows all parties and the recipients to participate and understand their rights.

Subsection (c) allows the presiding officer to modify the timelines specified in subsections (a) and (b) upon a showing of good cause. Since circumstances can vary from case to case, subsection (c) was included to provide a means to adjust the timelines, when necessary. Good cause will be determined on an individual case-by-case basis through an evaluation of the specific facts and circumstances of the particular matter. This enables the presiding officer to respond appropriately when conditions or circumstances do not allow adherence to the specified time periods, and a party makes a persuasive showing that those time periods should be modified.

In determining reasonable and appropriate time periods to be included in subsections (a) and (b), existing statutes and regulations governing the issuance of subpoenas were reviewed. In addition, industry representatives and representatives from the Department of Justice were informally consulted. While the statutes and regulations that were reviewed provided little or no guidance as to appropriate time limits in general, Title 1 Cal. Code Regs. Section 1022 did provide some guidance in terms of the filing of motions and responses to motions in APA proceedings. The individuals that were consulted generally supported including time periods in this regulation, but were not consistent in suggesting any specific number of days. Therefore, time periods were established according to what little guidance was available in other regulations and what seemed to be reasonable considering the information offered by the individuals who were consulted.

UNDERLYING DATA:

Technical, theoretical, or empirical studies or reports relied upon:

None.

REQUIRED DETERMINATIONS:

Local Mandate:

A mandate is not imposed on local agencies or school districts.

¹ Article 11 (commencing with section 11450.05) and Article 12 (commencing with section 11455.10) of Chapter 4.5 of Part 1 of Division 3 of Title 2 of the Government Code

BUSINESS IMPACT:

The Commission has determined that the adoption of these regulations would have no significant statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states.

This proposed action imposes no mandatory requirement on businesses. The regulation simply provides a clear process to follow should a party to a proceeding wish to exercise their rights to present witnesses, information, and documents in proceedings before the Commission. While there may be some cost to a business in issuing or requesting the issuance of a subpoena, the cost would be at the discretion of the party. In addition, any cost associated with the issuance of a subpoena by a business should be to that business's benefit in the adjudicative proceeding. Lastly, any business that has a subpoena issued to it would be able to recover at least some costs pursuant to section 11450.40 of the Government Code.

ECONOMIC IMPACT ASSESSMENT/ANALYSIS:

IMPACT ON JOBS/NEW BUSINESSES:

The Commission has determined that this regulatory proposal will not have a significant impact on the creation of new jobs or businesses, the elimination of jobs or existing businesses, or the expansion of businesses in California.

BENEFITS OF PROPOSED REGULATION:

This proposed action will likely result in the hearing procedures of the Commission progressing smoothly as every party is able to ensure that required documents and witnesses are available to be presented to the Commission. Under the existing practice, there is no certainty that required documents or witnesses will be available for a Commission hearing. In addition, the Commission will be able to consider all pertinent facts and information when considering the suitability of an applicant.

CONSIDERATION OF ALTERNATIVES:

No reasonable alternative to the regulation would be either more effective in carrying out the purpose for which the regulation is proposed, would be as effective as and less burdensome to affected private persons than the adopted regulation, or would be more cost effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

Set forth below are the alternatives that were considered and the reasons each alternative was rejected:

- (1) Maintain Status Quo: Currently the Commission has statutory authority but does not have regulations to allow for the issuance of subpoenas and subpoenas duces tecum. With the primary responsibility of insuring the safety and security of the public in the operations of controlled gambling, it is important for the Commission to have the

necessary information from which to make a decision when determining an applicant's suitability. This alternative was rejected because the current inability to require the attendance of witnesses or the production of documents could limit the Commission in ensuring that all relevant information is considered.

COMMENTS, OBJECTIONS OR RECOMMENDATIONS / RESPONSES:

45-DAY WRITTEN COMMENTS:

The following written comments/objections/recommendations were received regarding the proposed action during the 45-day comment period that commenced May 10, 2013 and ended June 24, 2013:

ADOPT SECTION 12014. SUBPOENAS.

This proposed action would establish new Section 12014 within Chapter 1. Section 12014 would provide procedures for the issuance of subpoenas and subpoenas ducus tecum during Commission hearings.

1. The following comments were received about the general nature of the regulatory proposal, but not directly linked to any specific sections.
 - a. **George Forman, Forman & Associates:** Mr. Forman requested clarification as to whether the proposed regulations would apply to the dealings with Tribes under the Tribal-State Gaming Compacts (Compacts).
 - b. **Dale A. Miller, Chairman, Elk Valley Rancheria, and Andrew Freeman, Chairman, The Paskenta Band of Nomlaki Indians of California:** Chairman Miller and Chairman Freeman, requested clarification as to whether the proposed regulations would apply to the dealings with Tribes under the Compacts. Both Chairman Miller and Chairman Freeman specifically are concerned about parties involved in Commission adjudications seeking subpoenas that request the presence of Tribal officials and/or the production of Tribal documents. They requested revisions expressly stating that the proposed regulations do not extend to tribal gaming operations.

Response (a and b): These comments were accepted, in part, and the following response offered:

The Commission currently has statutory authority to issue subpoenas and subpoenas ducus tecum to compel attendance of witness and the production of documents at meetings and hearings. The Commission is simply promulgating regulations to establish procedures and guidance for parties to use in issuing or requesting the issuance of a subpoena in proceedings before the Commission. The ability to require the attendance of witnesses or the production of documents is a vitally important part of ensuring that the Commission makes informed decisions and furthers the State's interest in fairly and effectively regulating gambling.

The goal of the regulation is to facilitate the production and presentation of all documents, testimony and other information which may be relevant and material to a Commission decision thereby enhancing the fairness of the decision and the legitimacy of the decision making process. In addition, this regulation will also enhance and ensure the due process rights for all parties.

The regulation does not reflect a desire to change any existing aspect of Commission relations with Tribes or tribal regulators but simply provides clarity to the parties that appear before the Commission, primarily in licensing matters. The intent is for the regulation to apply where a notice of hearing has issued, pursuant to Title 4, California Code of Regulations, Section 12050 (b) (2), to resolve any issues related to applications for a gambling license, or for findings of suitability under the Compacts. It would not apply to dealings between the State of California and Compact Tribes. An individual or entity that receives an administrative subpoena from a party in a matter before the Commission may move to quash the subpoena. The regulation cannot alter or affect applicable sovereign immunities from such a process which may currently be available to Tribes.

While many subpoenas issued to a Tribe may be inappropriate, this does not mean that this would be the case for all subpoenas. Therefore, to protect the due process rights for all parties, the Commission cannot propose barring the issuance of all subpoenas to Tribes or tribal gaming operations.

No changes in the text of the proposed regulation are necessary to accommodate these comments.

2. Subsection (a), specifies that the issuance and enforcement of subpoenas and subpoenas duces tecum in an adjudicative hearing held pursuant to the Gambling Control Act (Act)² shall be in accordance with Articles 11 and 12 of Chapter 4.5 of Part 1 of Division 3 of Title 2 of the Government Code and may utilize form CGCC-Sub 001. This subsection also provides a timeline for issuance of at least 30 days prior to the date of the hearing, or the date of appearance or production of records.
 - a. **James R. Parrinello, Artichoke Joe's**: Mr. Parrinello requests a reconsideration of the language on the form CGCC-Sub 001 that allows for the category of "other." Mr. Parrinello requests reconsideration if the Commission should be allowed this function as it is the proper role of the Commission to be an impartial decision maker and not a party to the adjudicative hearing.

Response (a): This comment is rejected. Business and Professions Code³ sections 19823, 19824, 19856 and 19857 make it clear that the Commission is not merely an impartial adjudicator. The primary goal of the adjudicative hearing process is for the

² Business and Professions Code, Division 8, Chapter 4, section 19800 et seq.

³ All statutory references hereinafter are to the Business and Professions Code unless otherwise specified.

Commissioners to receive any and all pertinent information that they feel is required to determine if the applicant is suitable, or not suitable, for the requested license. The objection to the inclusion of the “other” category on form CGCC–Sub 001 is not well founded. This category can include interveners and “interested parties,” as the latter are specifically noted in subdivisions (b) and (c) of section 19872, as well as the Commission and its staff.

The Commission, pursuant to section 19823, is charged with the duty of both:

“(1) Assuring that licenses, approvals, and permits are not issued to, or held by, unqualified or disqualified persons, or by persons whose operations are conducted in a manner that is inimical to the public health, safety, or welfare.”

and,

“(2) Assuring that there is no material involvement, directly or indirectly, with a licensed gambling operation, or the ownership or management thereof, by unqualified or disqualified persons, or by persons whose operations are conducted in a manner that is inimical to the public health, safety, or welfare.”

Since the Commission is granted, pursuant to section 19824, “...all powers necessary and proper to enable it fully and effectually to carry out the policies and purposes of this chapter...,” including the power, pursuant to subdivision (h), to issue a subpoena, it is reasonable to allow the Commission on its own motion to issue a subpoena for a hearing of the Commission. Subdivision (h) of section 19824 includes a specific grant of this power to compel attendance and production of records not only “at a meeting or hearing of the commission,” but also meetings of “its committees, including advisory committees.”

The Commission’s subpoena power is much closer to the Legislature’s subpoena power, found under Government Code section 9401, than that in Article 11 of the APA. This similarity is necessary due to the broad authority and duties granted by the Legislature to the Commission. This notion is further supported by section 19971 which reads:

“This act is an exercise of the police power of the state for the protection of the health, safety, and welfare of the people of the State of California, *and shall be liberally construed* to effectuate those purposes.” [Emphasis added]

- b. **James R. Parrinello, Artichoke Joe’s**: Mr. Parrinello requests that the term “notice of hearing” be defined. Mr. Parrinello notes that the definition already included in Government Code section 11509 does not apply to non-APA proceedings, which would be covered by the proposed regulations.

Response (b): This comment is rejected. Subsection (b) of Section 12050 already uses the term “hearing” and subparagraph (2) of the same subsection refers to “notice shall be effected by the Commission.” This provides sufficient context to show how the term “notice of hearing” should be interpreted and applied in non-APA adjudicative hearings.

- c. **James R. Parrinello, Artichoke Joe's**: Mr. Parrinello notes that Government Code section 11450.05 authorizes the issuance of subpoenas only “at the request of a party, or by the attorney for a party...” and that as the Commission is not a party to its own hearing it is not authorized under the Government Code to request that a subpoena be issued.

Response (c): This comment is rejected. Government Code section 11450.20 does not prohibit the Commission from requesting a subpoena. Government Code section 11450.20 makes the issuance of a subpoena or subpoena duces tecum a ministerial act when the request is made by a party or the attorney of record for the party. Section 19823 provides that the Commission’s responsibilities include, without limitation, the responsibility to ensure that “unqualified persons” not be associated with gambling activities. It is therefore reasonable to allow the Commission to exercise its authority under section 19824 which states, in pertinent part, “The Commission shall have all powers necessary and proper to enable it fully and effectually to carry out the policies and purposes of this chapter, including, without limitation, the power to... [i]ssue subpoenas to compel attendance of witnesses and the production of documents and other material things...”

- d. **James R. Parrinello, Artichoke Joe's**: Mr. Parrinello suggest that other non-parties should not be authorized to request the issuance of subpoenas and that allowing it could be burdensome to an applicant.

Response (d): This comment is rejected. Unlike the attorneys for Bureau of Gambling Control (Bureau) or the applicant, the “other” category is not authorized to issue subpoenas on its own behalf because the form requires the signature of either the attorney for the Bureau, the attorney for the applicant, or the presiding officer; therefore, any requests under the “other” category will be required to be submitted through the presiding officer prior to being issued.

This category can also include interveners and a “person who has a direct or indirect interest in the outcome of a proceeding,” as the latter is noted in section 19872. This category is not designed to burden the applicant by requiring him or her to satisfy intrusive inquiries from previously unknown persons but to allow the Commission every available avenue to obtain a more complete picture of the applicant and to be more informed before rendering a decision on an application. This is particularly important in light of the Commission’s charge, pursuant to section 19823.

Courts have recognized the need for departure from a pure adversarial model in contexts with lesser statutory authority for departure than that provided to the Commission under the Act. In *Nightlife Partners* the court stated that:

“The *Howitt* court did recognize that administrative procedures may depart, to some extent, ‘from the pure adversary model of a passive and disinterested tribunal hearing evidence and argument presented by partisan advocates,’ and yet still comply with constitutionally mandated due process when used as the

means for resolving disputes in ‘the incredible variety of administrative mechanisms [utilized] in this country...’ (Howitt, supra, 3 Cal.App.4th at p. 1581, quoting Withrow, supra, 421 U.S. at p. 52, 95 S. Ct. at p. 1467.)⁴ As it noted, ‘the mere fact that the decision maker or its staff is a more active participant in the fact-finding process--similar to the judge in European civil law systems--will not render an administrative procedure unconstitutional.’ (Ibid.)”⁵

- e. **James R. Parrinello, Artichoke Joe’s**: Mr. Parrinello expresses concern that a presiding officer would not be able to impartially hear a motion to quash a subpoena issued by the presiding officer on behalf of the Commission and that a party submitting a motion to quash such a subpoena would risk the enmity of the Commission, raising impartiality concerns.

Response (e): This comment is rejected. The presiding officer, be it an administrative law judge or member of the Commission’s legal staff, will be sufficiently segregated to allow the impartial consideration of any request to quash a subpoena, even if previously issued by the presiding officer on behalf of the Commission. Current Commission regulation, Section 12050(b)(2)(D), allows for the selection of a presiding officer, “which shall be an administrative law judge or an attorney designated by the Commission,” to rule on the admissibility of evidence and on any objections raised. Therefore, it is reasonable that a Section 12014(b) motion be disposed of by the presiding officer, as would any other evidentiary motions that raise objections.

The Supreme Court observed in *Morongo*⁶ that it presumes that all persons indispensable to the conduct of a hearing will act fairly and make reasonable decisions. The Court in *Morongo* stated:

“In construing the constitutional due process right to an impartial tribunal, we take a more practical and less pessimistic view of human nature in general and of state administrative agency adjudicators in particular. In the absence of financial or other personal interest, and when rules mandating an agency's internal separation of functions and prohibiting ex parte communications are observed, the presumption of impartiality can be overcome only by specific evidence demonstrating actual bias or a particular combination of circumstances creating an unacceptable risk of bias. Unless such evidence is produced, we remain confident that state administrative agency adjudicators will evaluate factual and legal arguments on their merits, applying the law to the evidence in the record to reach fair and reasonable decisions.”

⁴ Howitt v. Superior Court (1992) 3 Cal.App.4th 1575, 1585, 5 Cal. Rptr. 2d 196

⁵ Nightlife Partners, Ltd. v. City of Beverly Hills, 108 Cal. App. 4th 81, page 94 (Cal. App. 2d Dist. 2003)

⁶ Morongo Band of Mission Indians v. State Water Resources Control Bd., 45 Cal. 4th 731, 741-742 (Cal. 2009)

In a specific proceeding, should there be evidence demonstrating actual bias or a particular combination of circumstances creating an unacceptable risk of bias, section 19804 provides an aggrieved person the ability to obtain relief.

Furthermore, it is the sworn duty of each Commissioner⁷ to defend the Constitutions of both the United States and California, and part of that duty is to ensure the due process of each applicant and the integrity of the hearing process. Punishing an applicant who has requested that a subpoena be quashed would seem contrary to that oath.

- f. **James R. Parrinello, Artichoke Joe's**: Mr. Parrinello expresses concern that Commission or Commission staff requesting the issuance of a subpoena would be an investigatory function. Mr. Parrinello observes it is beyond the Commission's role to investigate applications since that function was assigned exclusively to the Bureau of Gambling Control (Bureau) by the Governor's Reorganization Plan No. 2 of 2012.

Response (f): This comment is rejected. The Governor's Reorganization Plan No. 2 of 2012 (GRP No. 2) did not alter the Commission's charge pursuant to section 19823, nor did it remove or alter the Commission's authority to issue subpoenas pursuant to section 19824 (See also response to 2.c.)

In addition, current Commission regulation Section 12050(b)(2)(A), allows either the Bureau, Commission staff, a Deputy Attorney General or other representative presenting the case to act as the Complainant in a matter before the Commission. When a Commission staff member is designated a Complainant they present the case and become a party in the proceeding. As allowed in Government Code section 11450.20, Section 12014 would allow the Commission staff, as a potential party, to request issuance of a subpoena.

- g. **James R. Parrinello, Artichoke Joe's**: Mr. Parrinello expressed concern that the proposed subpoena regulations would run afoul of a pending *ex parte* communication regulation. Mr. Parrinello recommended that these proposed regulations should be carefully analyzed to avoid unintended consequences.

Response (g): This comment is rejected. The proposed regulations are designed for the current regulatory structure. Should this proposal be approved, and any *ex parte* regulations are proposed, changes to the appropriate sections will be proposed accordingly.

3. Subsection (b), specifies that motions pertaining to issued subpoenas must be made pursuant to Government Code section 11450.30 and shall be filed no later than 15 days prior to the required appearance or production of records. Any response to a motion must be filed and served no later than five days before the motion is to be heard. In addition, this subsection specifies the actions that can be taken by the presiding officer.

⁷ Business and Professions Code section 19814(b).

- a. **James R. Parrinello, Artichoke Joe's**: Mr. Parrinello recommends requiring that a response to a motion be linked to the receipt of the motion by the responding party and not the more amorphous language in the proposed regulation.

Response (a): This comment is rejected. The language of the proposed regulation is clearer and more precise than the suggested change. The date that a motion is scheduled to be heard will be known to all parties in advance, while the date of “actual receipt” of the motion will only be known to the recipient. The suggested change would make it more difficult to determine the timeliness of a response to a motion.

There were no further comments, objections or recommendations received within the 45-day public comment period regarding the proposed action.

A hearing to receive oral and written comments regarding the proposed action was not scheduled, nor was a hearing requested pursuant to Government Code section 11346.8.

COMMENTS RECEIVED OUTSIDE THE PUBLIC COMMENT PERIOD:

The comments listed below were not received during the above-mentioned public comment period. While they are included in the rulemaking file, they have not been summarized or responded to, and were not considered in the adoption of the proposed action.

- Oral comments of James Parrinello, Artichoke Joe's, at the July 25, 2013 Commission meeting. (See July 25, 2013 transcript at pg. 98, line 12 through pg. 102, line 5)

There were no further written or oral comments, objections or recommendations received either during or outside the public comment period regarding the proposed action.