APPLICATION WITHDRAWALS AND ABANDONMENTS, AND HEARING PROCEDURES

CGCC-GCA-2014-02-R

COMMENTS AND RESPONSES FOR PROPOSED REGULATIONS

WORKSHOP WRITTEN AND ORAL COMMENTS

The following written comments/objections/recommendations were received regarding the text of the proposed action during the 45-day written comment period that commenced February 21, 2014 and ended April 7, 2014:

A. AMEND SECTION 12002. GENERAL DEFINITIONS.

This proposed action would amend Section 12002 within Article 1. Section 12002 includes general definitions used throughout the Division.

1. Subsection (a) [pg. 1, line 16][1], would define an "Administrative Procedure Act Hearing" or "APA Hearing" to mean an evidentiary hearing which is conducted pursuant to the requirements of Chapter 5 (commencing with section 11500) of Part 1 of Division 3 of Title 2 of the Government Code, and section 1000 et seq. of Title 1 of the California Code of Regulations. An APA hearing includes those evidentiary hearings which proceed pursuant to Business and Professions Code sections 19825 as well as 19930 and under Chapter 10 of this division.

a. **Robert Mukai, The Indian and Gaming Law Section of the Attorney General's Office (IGLS)**: Mr. Mukai commented that it should be simple enough to define an APA hearing as a hearing held pursuant to the provisions of the Administrative Procedure Act. Mr. Mukai suggests that the second sentence of the proposed definition is unnecessary and that the other references are either unneeded or incorrect. Mr. Mukai then offers that APA hearings could also be held pursuant to Business and Professions Code sections 19870 and 19871.

Recommended Response: This comment was considered but was not incorporated. First, the second sentence of the definition provides guidance as to what APA hearings the Commission is referring to and authorized to conduct under the Gambling Control Act (Act). This eliminates any ambiguity in using the terms which are broadly applicable beyond the Act and used in a variety of administrative matters. Second, APA hearings could not be conducted according to Business and Professions Code sections 19870 and 19871 due to the different level of statutory requirements. While the reverse may be possible, the intent of this regulation is to clearly craft two separate pathways to a Commission decision that is expeditious and fair to the applicant and public.

[1] All page and line references refer to the published specific language dated February 10, 2014, included as attachment 5.

2. Subsection (d) [pg. 1, line 28], defines "Bureau report" to mean a final determination by the Chief of the Bureau regarding his or her recommendation to the Commission on any application.

a. **Alan Titus, Artichoke Joe's**: Mr. Titus commented that the definition is unclear. Mr. Titus notes that Business and Professions Code section 19868 requires that the Bureau Chief investigate and if recommending either conditions or denial prepare and file written reasons with the Commission. The definition does not tie back to the section 19868 requirement, and in addition other sections of the proposed text allow for supplemental repots to be filed by the Bureau. Should the Bureau change its recommendation through any supplementary report the original recommendation would not have been a final determination. The Bureau should be allowed to revise its recommendation, and doing so is not inconsistent with the act.

Recommended Response: This comment was considered but was not incorporated. The use of the terms "final action by the department" and "final determination by the Chief" are not intended or designed to provide any restriction to the Bureau from continuing to participate in the application process. These references provide a clear delineation of which agency, the Bureau or the Commission, bears the responsibility for handling the application. There is a point in time where the Bureau provides a "recommendation of the chief" as required under Business and Professions Code section 19871. This time period is critical as it represents not only the shift of responsibility; but, is needed for other timelines, such as withdrawal requests and *ex parte* restrictions.

It is possible that during public meetings and hearings the Commission may request additional investigation by the Bureau. This additional investigation may precipitate additional reports or cause the Bureau to revise its recommendation. This is at the request of the Commission and therefore does not fall under the initial requirement of issuing the Bureau report or any initial recommendation.

3. Subsection (i) [pg. 2, line 13], would define "Employee of the Commission" to mean staff employed by the Commission including the Executive Director and all staff under the direction of the Executive Director.

a. **Robert Mukai, IGLS**: Mr. Mukai suggests that individuals are employed "by" the Commission and not "at" the Commission. Mr. Mukai expresses concern that other individuals are employed "at" the physical premises of the Commission, but who are not Commission employees.

Recommended Response: This comment was accepted.

4. Subsection (n) [pg. 2, line 27], would define "Member of the Commission" to mean an individual appointed to the Commission by the Governor pursuant to Business and

Professions Code sections 19811 and 19812, and does not include an employee of the Commission.

a. **Robert Mukai, IGLS**: Mr. Mukai comments that any definition for "member of the Commission" must include employees of the Commission that serves in an advisory capacity to a Commissioner in any adjudicative proceeding.

Recommended Response: This comment was considered but was not incorporated. It is acknowledged that for many adjudicative proceedings there are few differences between the deciding body (Commission) and any advisors (employees of the Commission). However, as there are some instances, such as for disqualification, where a difference is required, the definitions have been crafted to separate the two entities. This has not prevented the proposed text from imposing relevant restrictions on both groups consistent with the requirements of treating advisors the same as the deciding body for many adjudicative functions.

B. ADOPT SECTION 12006. SERVICE OF NOTICES, ORDERS AND COMMUNICATIONS.

This proposed action would establish new a Section 12006 within Article 1. Section 12006 provides a consistent method of providing notices to applicants that can be cited within other regulation sections.

1. Subsection (a) [pg. 3, line 10]specifies that notices will be sent to an applicant, the licensee or designated agent by certified mail at the address of record. This helps make clear what parties can expect in advance as well as provide guidance to Commission staff of what must occur.

a. **Robert Mukai, IGLS**: Mr. Mukai commented that there is no definition of "address of record." In addition Mr. Mukai expressed a concern that the inclusion of too many alternative addresses is vague and confusion and is likely to result in mischief. Mr. Mukai recommends including a definition for "address of record" for this purpose.

Recommended Response: This comment was considered but was not incorporated. As amended, Section 12004 requires that any change in contact information, including "…residence address, address of record or mailing address…" be reported to the Commission within ten days of the change.

C. ADOPT SECTION 12012. *EX PARTE* COMMUNICATIONS.

This section is added to address and clarify "*ex parte*" communications. The Act[2] imposes prohibitions on communication between "members of the Commission" and an applicant or an agent of an applicant under certain conditions. These prohibitions are ambiguous. Section 12012 is added to clarify and provide guidance regarding prohibited communications to members of the Commission, Commission staff, Bureau staff, and the regulated industry.

[2] Specifically Business and Professions Code section 19872

1. The following comments were made on Section 12012 in general [pg. 3, line 18]:

a. **Robert Mukai, IGLS**: Mr. Mukai comments that the proposed limitations do not cover communications that are about an application that has not yet been submitted to the Bureau but which shall be at some future time.

Recommended Response: This comment was considered but was not incorporated. Business and Professions Code section 19872 doesn't provide for any restrictions during a period pre "investigated by the department." Nor would the Government Code apply as the application for a hearing would not have been submitted. Therefore, there does not seem to be any legal standing to impose *ex parte* restrictions prior to the actual submission of an application.

2. Subsection (a) [pg. 3, line 19] provides that "*ex parte* communication" means a communication without notice and opportunity for all parties to participate.

a. **Alan Titus, Artichoke Joe's**: Mr. Titus expresses a concern that the definition for *ex parte* is too vague and does not capture the essence of the type of communication being prohibited. The restrictions should not be limited to proceedings involving applications or just "material matters" or to who makes any communication.

Recommended Response: This comment was considered but was not incorporated. The definition of "*ex parte*" is consistent with subdivision (e) of Business and Professions Code section 19872. However, the definition has been proposed to be changed as addressed in C.7.a, below.

3. Subsections (b) and (c) [pg. 3, line 22] provide for the specific periods when the limitations of Business and Professions Code section 19872, subdivisions (a) through (c), inclusive, apply.

a. **Stacey Luna-Baxter, Bureau of Gambling Control (Bureau)**: Ms. Luna-Baxter expresses concern that Business and Professions Code section 19872 does not provide for the regulation's exception to the *ex parte* prohibition for "communications without notice and opportunity for all parties to participate in the communication."

Recommended Response: This comment was considered but was not incorporated. Subdivision (e) provides that "*ex parte*" means a communication without "notice and opportunity for all parties to participate in the communication." The inverse would provide that "*ex parte*" doesn't mean a communication with "notice and opportunity for all parties to participate in the communication." Therefore, each falls out of the notice and opportunity either requiring the item to not be upon the merits of the application or have been properly noticed.

b. **Alan Titus, Artichoke Joe's**: Mr. Titus expresses concern that the various provisions of the *ex parte* regulations apply at different times. He notes that there is no explanation for having different rules during different periods of the process. Mr. Titus proposes that the same prohibitions should apply from the time an application is submitted unit a decision is final. In addition, Mr. Titus expressed a desire that there should be no communications on the merits of an application between a party and the Commission.

Recommended Response: This comment was considered but was not incorporated. Subdivisions (a) though (c), inclusive, of Business and Professions Code section 19872 refers to time periods each subdivision is effective. These references include, "while…being investigated by the department" or "pending disposition before…" the Bureau or Commission. Proposed subsections (b) and (c) seek to clarify the various timelines expressed in the three subdivisions. To create some new structure, or prevent communication in any form, while possibly providing clarity across the process, would ignore the structure contained in Business and Professions Code section 19872.

c. **Stacey Luna-Baxter, Bureau and Alan Titus, Artichoke Joe's**: Ms. Luna-Baxter expresses concern that the regulation as crafted allows for communications between the Commission and the Bureau, an allowance that Business and Professions Code section 19872 does not allow.

Mr. Titus expresses a concern that the regulation fails to prevent communications between the Bureau and the Commission while the investigation is proceeding. Mr. Titus states that subdivision (c) of that Business and Professions Code section 19872 prevents this specific communication and states that this is because "pending disposition before the Commission" begins upon an application being submitted to the Bureau.

Recommended Response: These comments were considered but were not incorporated. Of the *ex parte* provisions included in subdivisions (a) through (c) of Business and Professions Code section 19872, only subsection (c) mentions a restriction of communication with the department and that restriction is limited to an "application…pending disposition before the Commission." Unlike Mr. Titus' statement, an application is not "pending disposition before the Commission" when an application is submitted to the Bureau. Prior to the implementation of the Governor's Reorganization Plan No. 2 of 2012 (GRP No. 2), applications were first submitted to the Commission and then would transition to the Bureau for review. At that time "pending disposition before the Commission" would apply upon the submittal of an application, as the application had come to the Commission. However, post GRP No. 2, the Commission does not receive any prior notice that an application is being considered by the Bureau and so it is not "pending disposition before the Commission."

d. **Alan Titus, Artichoke Joe's**: Mr. Titus expresses a concern that the restriction of subdivision (b) of Business and Professions Code section 19872 only apply while an application is "pending disposition before the department."

Recommended Response: This comment was considered but was not incorporated. The Legislature, pursuant to GRP No. 2, altered who received the applications. Applications are no longer received by the Commission, but rather applications are being received by the Bureau. The Legislature could have modified the text of Business and Professions Code section 19872 at that time to comport with the understanding of the comment, but did not do so, indicating that they had a different understanding of section 19872.

e. **Alan Titus, Artichoke Joe's**: Mr. Titus expresses a concern that the proposed structure does not mirror the *ex parte* structure governed by Government Code section 11430.10 in other administrative contexts. Mr. Titus observes that the proposed structure sets a lower standard and that Government Code section 11430.10 should be used as a minimum standard for due process.

Recommended Response: This comment was considered but was not incorporated. First, the split nature is not caused by the regulation proposal but rather by the respective *ex parte* statutes themselves. The Government Code, under section 11430.10(c), defines when a proceeding is pending as "from the issuance of the agency's pleading or from an application for an agency decision whichever is earlier." The first clause is irrelevant to the Commission's practice as there is no "agency pleading." For the second clause, at first glance, the comments would seem to be correct; however, the California Law Revision Commission (CLRC) comments found in connection to this section clearly indicated that "application for an agency decision" actually means "application for a hearing" and not what these comments essentially imply - "application for license."[3] If this were the case, then every single state agency, including the licensing agencies within the Department of Consumer Affairs, the Department of Motor Vehicles, and others, would be required to adhere to strict APA *ex parte* guidelines from the moment an applicant walked in the door. The interpretation as "application for a hearing" is also consistent with the overarching intent of the APA where APA hearings are generally, though not always, quasi appellate in nature, reviewing an underlying agency decision. Here, there is no such underlying agency decision, as all approvals must go before the Commission. The Legislature no doubt in its wisdom therefore deemed it necessary to craft different standards from the APA, and include them in the Act under Business and Professions Code sections 19870, 19871, and, specifically, 19872.

[3] Furthermore, the principal consultant to the CLRC comments, Professor Michael Asimow who performed background studies and described the adjudicatory process in a law review article referenced by the CLRC, has indicated to Commission staff that "application for an agency decision" does mean "application for a hearing."

In addition, while interpreting the language of Government Code section 11430.10 as an "application for hearing" could be interpreted to refer to the "meeting" as defined by Business and Professions Code sections 19870 and 19871 (defined here as a GCA hearing), there are two problems with this. First, interpreting this "meeting" as the "hearing" referred to above would apply the APA *ex parte* rules under Government Code section 11430.10. This would have the effect of rendering Business and Professions Code section 19872 as irrelevant and is not consistent with general principals of statutory interpretation. Rather, these statutes must be harmonized to give effect to the Legislature's intent, not simply allowing one to supplant the other. Second, an application made under the Act does not necessarily result in or require a "meeting," and certainly not the above referenced "application for a hearing," to result in a license approval. Such a dynamic would be inefficient, costly and detrimental to the applicant and public.

4. Paragraph (1) of subsection (d) [pg. 3, line 32] provides that communications related to undisputed issues of practice and procedures are not considered *ex parte* communications.

a. **Stacey Luna-Baxter, Bureau**: Ms. Luna-Baxter expresses concern that Business and Professions Code section 19872 does not provide for this exception to the *ex parte* prohibition for "communications without notice and opportunity for all parties to participate in the communication."

Recommended Response: This comment was considered but was not incorporated. The exceptions provided in this paragraph only relate to issues "not based upon the merits of the application."

5. Paragraph (2) of subsection (d) [pg. 4, line 1] provides that communications made at a public hearing or meeting and which concern a properly noticed matter are not *ex parte*.

a. **David Fried**: Mr. Fried inquired if the comments made during a public comment portion of a non-evidentiary hearing meeting would be considered noticed.

Recommended Response: This comment was accepted. Every meeting noticed by the Commission includes a period to allow for comments not related to an item on the agenda. These comment periods are noticed, and any comments made during these periods, even on the subject of a pending application, would not be considered *ex parte*. The requirement to provide these comment periods is covered under the Bagley-Keene Open Meeting Act (Government Code section 11120, et seq.).

b. **Stacey Luna-Baxter, Bureau**: Ms. Luna-Baxter expresses concern that Business and Professions Code section 19872 does not provide for this exception to the *ex parte* prohibition for "communications without notice and opportunity for all parties to participate in the communication."

Recommended Response: This comment was considered but was not incorporated. The exception follows subdivision (f) of Business and Professions Code section 19872, in allowing communications made at a public hearing.

6. Paragraphs (3), (4) and (5) of subsection (d) [pg. 4, lines 3-12] provide that the sharing of information or documents by either the Bureau, applicant or other interested party must be provided to both the Bureau and applicant at the same time they are provided to the Commission.

a. **Stacey Luna-Baxter, Bureau and Alan Titus, Artichoke Joe's**: Ms. Luna-Baxter expresses concern that Business and Professions Code section 19872 does not provide for this exception to the *ex parte* prohibition for "communications without notice and opportunity for all parties to participate in the communication."

Mr. Titus expressed concern that the provision that information or documents provided simultaneously does not match the requirement in subdivision (e) of Business and Professions Code section 19872 of "notice and opportunity for all parties to participate in the communication."

Recommended Response: These comments were considered but were not incorporated. These paragraphs consider the concept of allowing all parties to participate in a communication, which is addressed in subdivision (e) of Business and Professions Code section 19872, and provides clarity that information that may be exchanged outside of a public meeting is allowed as long as everyone receives the information simultaneously. It is not to the benefit of any party to create a process where parties may not meet outside of a hearing, including through electronic methods or over the phone.

b. **Alan Titus, Artichoke Joe's**: Mr. Titus expressed concern that the provision of information could include testimony. Mr. Titus does not feel it is appropriate to exempt testimony provided outside of a noticed hearing. In addition, Mr. Titus does not see the purpose of any information being provided to members of the Commission when staff is available to handle any requests or process filings.

Recommended Response: This comment was considered but was not incorporated. The distribution of information as a personal conversation could not be simultaneously provided to another party except in a medium in which the other party would be able to participate, such as over the phone. In addition, pursuant to subdivision (a) of Business and Professions Code section 19871, oral evidence can only be taken upon oath or affirmation which would require someone with the authority to administer such an oath.

In addition, for the purposes of *ex parte*, members of the Commission and employees of the Commission (presumably acting as advisors) are seen as a single entity by the law. Therefore, there is no way to separate staff from the Commissioners for the

suggested purpose. While there are other needs for which employees of the Commission have been defined as separate from members of the Commission, this is not one of those situations and so both must be included here.

c. **Robert Mukai, IGLS**: Mr. Mukai suggests revising the language from "based upon the merits of an application" to "relating to the merits of an application."

Recommended Response: This comment was considered but was not incorporated. However, to bring the proposed language more in line with the language in statute the word, "based" was removed in the various usages in the proposed text.

7. Paragraph (5) of subsection (d) [pg. 4, line 9] provides that communications made by an interested person are not *ex parte* if the communication is simultaneously provided to both the Bureau and the applicant.

a. **Robert Mukai, IGLS**: Mr. Mukai recommended that "any other interested person" be revised to "any other person." Mr. Mukai asserts that "any other person" is defined in the Act or other existing regulation. Mr. Mukai comments that the particular interest of the person should not be relevant to the *ex parte* nature of the communication, that any communication is prohibited. Mr. Mukai suggests clarifying that an employee or agent of the Commission is not a "person" for this purpose.

Recommended Response: This comment was considered but was not incorporated. Business and Professions Code section 19872 references "person[s]" with an "interest" in a proceeding. Interested person is just a derivation of these two words. For reference, the similar *ex parte* sections of the APA use the term "interested person" seemingly without definition. Any person sufficiently involved in an application who would also communicate with either an employee of the Commission or a Commissioner would by default be an "interested" person based upon the common definition of the word.[4]

8. Paragraph (6), subsection (d) [pg. 4, line 13], provides an exception to *ex parte* communications to allow confidential information provided to the Commission to remain confidential.

a. **Stacey Luna-Baxter, Bureau**: Ms. Luna-Baxter expresses concern that Business and Professions Code section 19872 does not provide for this exception to the *ex parte* prohibition for "communications without notice and opportunity for all parties to participate in the communication."

[4] From Encarta Dictionary: English (North America), [From Microsoft Word, 6/20/2013]. 1. curious or concerned: paying attention to something or devoting time to something because of curiosity, concern or enjoyment. 2. wanting something: involved or wanting to be involved in something *interested parties.

Recommended Response: This comment was considered but was not incorporated. The exception provided in this paragraph attempts to balance the requirement that information in a hearing must be made available to all parties with the requirement of the Commission to keep specific information confidential.

b. **Stacey Luna-Baxter, Bureau**: Ms. Luna-Baxter asserts that the provision of Business and Professions Code section 19822, subdivision (b), provides that the files of the department are open to inspection by members of the Commission at the Bureau's offices, and not that the documentation must be provided to the Commission.

Recommended Response: This comment was considered but was not incorporated. While Business and Professions Code section 19822 does state "members of the commission," the Act necessarily considers the heads of the Commission and the Department acting through surrogates. The Act specifically envisions the appointment of the Executive Director and any other staff necessary for its mission (Business and Professions Code section 19816). Furthermore, it should be noted that for the purposes of an adjudicative body and what information may or may not be provided there is no difference between the acting body and the advisors to that acting body. Employees of the Commission are restricted in the same manner as members of the Commission, including in their inability to disclose confidential information pursuant to subdivision (d) of Business and Professions Code section 19821. In addition, there is no limitation in subdivision (b) of section 19822 that indicates that the Commissioners may only view the documents at the Bureau's office. Requiring the Bureau to provide the relevant documents helps alleviate any perceived bias or prejudicial impact with the members of the Commission or Commission staff access Bureau files while a matter is pending disposition because it limits the scope of access to just the specific information requested.

c. **Stacey Luna-Baxter, Bureau**: Ms. Luna-Baxter expresses concern that the sharing of confidential information with the Commission or a redacted version to an applicant may harm the integrity of its relationships with law enforcement partners. In addition, the sharing of such information could put at risk sensitive information such as information about victims, witnesses, confidential informants and suspects that otherwise may not have been provided to the applicant.

In addition, Ms. Luna-Baxter notes that the Bureau preforms its investigation and provides its report so that only non-confidential information about the application may be used to support any action being considered. To provide some of the information in these confidential documents, such as uncharged offenses would have a prejudicial effect with the possible cost of releasing victim information.

Recommended Response: This comment was considered but was not incorporated. While the Commission appreciates the Bureau's relationships with fellow law enforcement agencies, any information provided to the Bureau by those agencies has

never been subject to any confidentiality restrictions that excludes the Commission. Pursuant to subdivision (b) of Business and Professions Code section 19822 any files provided by law enforcement agencies are already available to the Commission for review. In addition, to the extent that the law enforcement agency desires confidentiality from Commission review, subdivision (a) of section 19822 provides that the law enforcement agencies records are open to the Bureau for review and such sharing does not invalidate the confidential or privileged status of the information. Based upon these two requirements, that law enforcement share with the Bureau without a loss of confidentiality and the Bureau must share with the Commission, and combined with subdivision (d) of Business and Professions Code section 19821, it is reasonable to conclude that the Bureau sharing information with the Commission does not violate their confidential or privileged status.

In addition, the proposed process contained within paragraph (6) is designed to alleviate the exact concerns expressed in this comment. While requested documents would be redacted, the redaction would be done by the Bureau, allowing them to ensure that the most sensitive information not be provided to the applicant. Only after a second request could the related information be requested by the Commission. The application could then request a third party (a judge) review in order ensure that any information provided to the Commission needs to be protected and is relevant to the Commission's needs.

d. **Alan Titus, Artichoke Joe's and Robert Mukai, IGLS**: Mr. Titus expressed concern that this paragraph essentially allows the Bureau to make *ex parte* communications to the Commission. Despite the statute allowing the Bureau's papers to be open to the Commission, once a hearing is set on an issue there are going to be other due process issues that will come up and the Commissioners should not have full access to the Bureau's files.

In addition, Mr. Titus proposes that this provision may cause the Bureau to offer assurances to a witness that information provided may be maintained confidential. The Bureau may do this for the express purpose of abusing this allowance and controlling the presentation to the Commission. If this occurred it would limit the applicant's rights. Finally, Mr. Titus expresses concern that 14 days is insufficient for any judicial review.

Mr. Mukai expressed concern that the providing of information without providing to the applicant as well would allow for an *ex parte* communications to the Commission. In addition, Mr. Mukai proposes that the allowance of judicial measures are insufficient to overcome this concern.

Recommended Response: These comments were considered but were not incorporated. Initially, it is important to note that the Commission does not generally seek access to information that the applicant does not already have. However, the plain reading of the statutes allow for Commission access to all of the

Bureau's files. When read together with the balance of the Act, it is necessary to preserve the Commissioners' access to information which they believe is necessary to reach a decision on the suitability of applicants for licenses and other approvals. The intent of this section was not to abrogate the applicant's due process right to a fair hearing but to provide notice of the confidential evidence presented and opportunity to respond to it. To address the abuse issue, by either the Bureau or another law enforcement agency, the proposal includes an outside entity's review prior to any further review by the Commission, and in a timeframe that allows 14 days for a request to be made, not completed, with unlimited time being provided once requested until judicial remedies have been exhausted.

9. Subsection (e) [pg. 4, line 28] provides that the limitations on *ex parte* communications imposed by Government Code sections 11430.10 through 11430.80 begin at the election to hold an evidentiary hearing and provides a list of those possible election methods.

a. **Robert Mukai, IGLS**: Mr. Mukai recommends the removal of paragraph (3) as the APA's *ex parte* proscriptions apply of their own force to accusations pending under Business and Professions Code section 19930. In addition, Mr. Mukai suggested that the reference to Section 12554 is unnecessary as Section 12554 is only in effect when section 19930 is as well.

Recommended Response: This comment was considered but was not incorporated. In a section intended to show when *ex parte* limitations are in effect, it would be inconsistent and unclear to intentionally leave out one section even if that section does initiate *ex parte* provisions on its own.

b. **Alan Titus, Artichoke Joe's**: Mr. Titus expressed concern that the inclusion of paragraph (3) confuses other parts of the section as only paragraph (3) makes reference to Business and Professions Code section 19930. Mr. Titus suggests that if paragraph (3) is the only part of Section 12012 to apply to accusatory pleadings it should be separated into its own subsection.

Recommended Response: This comment was considered but was not incorporated. As noted in the comment, subsections (b) and (c) are based on a process that is not applicable to accusatory pleadings and directly reference the status of an application. In addition, subsection (a) links directly to this section, while Government Code sections 11430.10 through 11430.80 provide their own definitions as appropriate. Subsection (d) makes direct reference to subsections (b) and (c) and subsections (f) and (g) make reference to an applicant which is not relevant to an accusatory pleading.

10. Paragraph (1) of Subsection (g) [pg. 5, line 16] provides that if a member of the Commission participates in an *ex parte* communication certain disclosure steps are required, and a voluntary disqualification of the member would be allowed if it would not leave the Commission without a quorum to act on the application.

a. **Alan Titus, Artichoke Joe's**: Mr. Titus expresses a concern that the language is unclear and doesn't reflect if the restriction covers only communications made by Commissioners or also those received by Commissioners.

Recommended Response: This comment was accepted and the following revision proposed:

(g)(1) A member of the Commission who is involved in a communication~~es~~ on an *ex parte* basis with an applicant, the Bureau, or other interested persons must publicly disclose the communication, and provide notices to both the applicant and Bureau pursuant to Section 12006. The notice shall contain any information or document(s) conveyed and shall be provided to the applicant and the Bureau as soon as possible so that they may participate in the communication. Any meeting or hearing following the provision of this communication may be delayed as necessary to allow for the full participation of all parties. The member of the Commission may voluntarily withdraw from consideration of an application as long as the withdrawal would not prevent the existence of a quorum qualified to act on the particular application.

b. **Alan Titus, Artichoke Joe's**: Mr. Titus expresses a concern that the requirement to publically disclose is insufficient and that any requirement should require a more specific requirement, such as in writing.

Recommended Response: This comment was considered but was not incorporated. Any public disclosure by a Commissioner, if not done in a written form, would be at a noticed hearing and would therefore have an accompanying transcript which would provide a written record of the disclosure.

c. **Robert Mukai, IGLS**: Mr. Mukai suggests that the language should be modified to allow for either the applicant or the Bureau to request a voluntary withdrawal.

Recommended Response: This comment was considered but was not incorporated. There is nothing to prevent either the applicant or the Bureau, or any other individual, from speaking at a hearing and requesting a voluntary withdrawal over an *ex parte* issue. A regulatory provision detailing such is unnecessary. What is necessary is for all parties, including the Commissioners to know that a voluntary

withdrawal is available should a disclosure warrant such an action and what the restrictions on such an action would be.

11. Paragraph (2) of Subsection (g) [pg. 5, line 25] provides that a Commission member may be disqualified by an act of the Commission if requested by the applicant.

a. **Robert Mukai, IGLS**: Mr. Mukai suggested that both the applicant and the Bureau should be able to request the Commission consider the disqualification of a member.

Recommended Response: This comment was considered but was not incorporated. Subdivision (d) of Business and Professions Code section 19872 provides two possible outcomes for an inappropriate communication; using the communication as a basis for (1) denial, and (2) disqualification. Should the applicant be responsible for the *ex parte* communication, denying the application is appropriate and could be a recourse requested by the Bureau. In the event that the Bureau participates in an *ex parte* communication, it would not be appropriate to deny the application. Therefore, the applicant needs some other recourse. The subdivision suggests only one other recourse, that of disqualification and so the ability for the applicant to request disqualification was proposed. With the ability to request denial for a violation, it does not seem that the Bureau needs the additional recourse of requesting the disqualification of a Commissioner, even in cases where the Bureau has initially not recommended denial. It should be noted that for less extreme communications, the option of requesting a continuance is proposed and available to both the Bureau and applicant.

b. **Alan Titus, Artichoke Joe's**: Mr. Titus suggested that it would be more appropriate for an Administrative Law Judge to consider a request for a Commission member to be disqualified (that one Commissioner should not consider the removal of another).

Recommended Response: This comment was considered but was not incorporated. The value of these comments is greatly appreciated. Airing issues related to *ex parte* communications and possible disqualification of a Commission member could be difficult. However, it is paramount to note that the APA already requires members to determine whether to disqualify another member under Government Code section 11512, subdivision (c). According to the specific recommendations, there is no statutory authorization allowing an Administrative Law Judge to determine whether a member should be disqualified. Furthermore, having a staff member making that decision, including the Executive Director, Chief Counsel, or the presiding officer, would be problematic as it would be difficult if not impossible to ensure proper independence.

12. Alternative 1; Paragraph (2) of Subsection (g) [pg. 5, line 31] provides that a Commission member may be disqualified by judicial order at the request of the applicant.

a. **Robert Mukai, IGLS**: Mr. Mukai suggested this option is unnecessary as without it an applicant is already entitled to request judicial intervention.

Recommended Response: This comment was considered but was not incorporated. The proposal provides guidance and adds consistency.

b. **Alan Titus, Artichoke Joe's**: Mr. Titus expressed concern that it is not clear if the courts would have the authority to hear this type of matter.

Recommended Response: This comment was considered but was not incorporated. Business and Professions Code section 19804 and other sections allow for judicial review of Commission decisions and discretion.

13. Alternative 2; Paragraph (2) of Subsection (g) [pg. 6, line 6] would not be included and the only method for disqualification of a Commissioner would be through a voluntary disqualification.

a. **Robert Mukai, IGLS**: Mr. Mukai expressed that this option is most consistent with normal practices and would still allow for judicial remedy to be requested. This option also preserves collegial relations by not forcing Commissioners to consider the disqualification of a fellow member.

Recommended Response: This comment requires no response and can be considered by the Commission as they deliberate on whether this alternative should be selected.

b. **Alan Titus, Artichoke Joe's**: Mr. Titus expressed that he would not support this option, as a Commissioner might not appreciate the appearance of prejudice or actual prejudice.

Recommended Response: This comment requires no response and can be considered by the Commission as they deliberate on whether this alternative should be selected.

c. **David Fried**: Mr. Fried expressed that he would support this option, but would recommend a revision to allow the courts to disqualify a Commissioner at any time, even after the Commission has rendered a decision.

Recommended Response: This comment requires no response and can be considered by the Commission as they deliberate on whether this alternative should be selected. Additionally, an applicant may currently seek a judicial writ; however, the proposal does not provide a specific time period to allow for the proceedings to be completed before the continuation of the hearing process.

14. Subsection (h) [pg. 6, line 9] would provide that communications going from an employee of the Commission must also be conveyed to both the applicant and the Bureau if the communication is upon the merits of an application.

a. **Alan Titus, Artichoke Joe's**: Mr. Titus questions the necessity of this subsection. Mr. Titus notes that the Commission is usually a recipient of information and it is unclear what information the Commission would convey.

Recommended Response: This comment was considered but was not incorporated. Mr. Titus is correct, in that the Commission should most often be a recipient of information that is upon the merits of an application. However, if for some reason the Commission does have information, of any nature, it needs to convey, this subsection provides clarity that the Commission must follow the same guidelines as anyone else and insure that both the applicant and Bureau receive the communication following the same *ex parte* standards.

D. ADOPT SECTION 12015. WITHDRAWAL OF APPLICATIONS.

Previous Section 12047 is moved to Section 12015. This new section continues the current application withdrawal procedures and clarifies them. The application process can be lengthy, especially for those applying to be owners of a cardroom, and requires a significant investment in time and funds for the applicant, the Bureau, and the Commission. If at any point in the process, the applicant no longer wishes to proceed with the application, it is beneficial to all parties to have a procedure by which the application can be terminated. The Act, in section 19869, provides for a request to withdraw an application and differentiates between a withdrawal granted "with prejudice" and one granted "without prejudice."

1. Subsection (c) [pg. 7, line 1] specifies that unused portions of any background investigation deposit shall be returned if the withdrawal request is granted.

a. **Stacey Luna-Baxter, Bureau**: Ms. Luna-Baxter recommended removing this section as it is redundant to the Bureau's own regulations, Title 11, CCR Section 2037(a).

Recommended Response: This comment was accepted, in part. It is not the intent of the Commission's regulations to subvert the Bureau's regulations governing deposits. However, Business and Professions Code section 19869 specifically states that "no fee or other payment relating to any application is refundable by reason of withdrawal of an application" unless the "Commission otherwise directs." This section therefore merely affirms in the positive a refund of unexpended amounts which may otherwise be precluded from return by the Bureau's regulations. No change is required to the regulation.

E. ADOPT SECTION 12017. ABANDONMENT OF APPLICATIONS.

Previous Section 12048 is moved to Section 12017. This new section continues the practice of allowing the abandonment of applications under specified circumstances.

1. Paragraph (2) of subsection (a) [pg. 7, line 31] specifies that when an application has been deemed abandoned by the Bureau, the Bureau shall notice the application and provide a copy to the Commission. The notice shall state the reasons for abandonment and allow for reconsideration by the Bureau if the applicant responds within 30 days.

a. **Stacey Luna-Baxter, Bureau**: Ms. Luna-Baxter expressed a concern that in the case of third-party players an application is linked to the employer, and so notice pursuant to subparagraph (B) of paragraph (1) would come from the employer and not the applicant. Additionally, providing notice of abandonment to the applicant would not be fruitful, as the applicant cannot be independently licensed.

Recommended Response: This comment was accepted, in part. The submittal of notification pursuant to subparagraph (B) may be provided by the designated agent. However, the Bureau providing notice to the applicant would not be fruitful in this situation, and so the proposal is revised as follows:

(2) If an application has been deemed abandoned, a notice of abandonment shall be sent to the applicant or his, her or its designated agent, with a copy to the Commission, stating the reasons for abandonment of the application and that the Bureau will consider the application abandoned unless the applicant contacts the Bureau within 30 days from the date of the notice.

2. Subsection (d) [pg. 9, line 19] specifies that unused portions of any background investigation deposit shall be returned if the withdrawal request is granted.

a. **Stacey Luna-Baxter, Bureau**: Ms. Luna-Baxter recommended removing this section as it is redundant to the Bureau's own regulations, Title 11, CCR Section 2037(a). Additionally, Ms. Luna-Baxter requests the removal of the phase, "if possible."

Recommended Response: This comment was considered but was only incorporated in part. It is not the intent of the Commission's regulations to subvert the Bureau's regulations governing deposits. As the abandonment regulations proposal utilizes the Commission's general rulemaking authority, it is important to affirm in the positive a refund of unexpended amounts which may otherwise be precluded from return by the Bureau's regulations. No change is required to the regulation. Additionally, in cases of abandonment which could be due to a failure of

an applicant to respond to the Bureau, it may not actually be possible to refund any unexpended portion of the deposit and so providing a specific requirement that funds *must* be refunded may place an impossible requirement upon the Bureau.

F. ADOPT ARTICLE 2. PROCEDURES FOR HEARINGS AND MEETINGS ON APPLICATIONS.

Article 2 will contain the regulation sections in which the process for Commission meetings and hearings for the purposes of considering and approving licenses and other applications will be detailed.

1. The following comments are pertaining to this article [pg. 14, line 10].

a. **David Fried**: Mr. Fried questioned how these regulations would apply to current proceedings. Mr. Fried suggested the following additional language:

> These regulations shall apply to any proceeding now pending or which has not resulted in a final decision, unless as of the effective date of these regulations the applicant or person has obtained, or the application of these regulations to that person would interfere with, a vested right pursuant to state law.

Recommended Response: This comment was considered but was not incorporated. While synergy is needed, it is better handled on a case-by-case basis based on which specific stage each application is currently at in the process. In addition, this would allow the transition process to work for each application by working with the applicant, Bureau and IGLS.

G. ADOPT SECTION 12050. BUREAU RECOMMENDATION AND INFORMATION

The current Section 12050 is amended, divided, and renumbered as Sections 12056, 12058 and 12060. The Act, in subdivision (a) of section 19826, allows the Bureau to recommend the denial or limitation, conditioning, or restriction of any license, permit, or approval, after the completion of the background investigation. The new Section 12050 details the manner in which any recommendation shall be provided to the applicant and how the information may be considered by the Commission.

1. Paragraph (1) of Subsection (a) [pg. 14, line 15] specifies that when the Bureau report is issued with a recommendation to deny or limit a license that the Bureau must provide to the applicant specific documentation.

a. **Alan Titus, Artichoke Joe's**: Mr. Titus notes that there is no regulation defining the content of the Bureau report. Mr. Titus expresses that the report cannot be a substitute for a hearing. Mr. Titus requests the addition of an earlier process where the applicant may comment on any evidence in the report and that the lack of such a process creates a situation where the applicant is not able to respond to the report until long after the Commissioners have been exposed to prejudicial materials.

Recommended Response: This comment was considered but was not incorporated. Nothing precludes the applicant from submitting documents or comments earlier than the prescribed processes.

b. **Stacey Luna-Baxter, Bureau**: Ms. Luna-Baxter recommends the deletion of this section as Business and Professions Code section 19868 details the requirements and this section does not clarify any perceived ambiguity in the statute.

Recommended Response: This comment was considered but was not incorporated. The proposed regulations provide specificity to the requirements of Business and Professions Code section 19868, subdivision (b), by detailing what documents and information shall be provided to the applicant upon any recommendation that is not approval.

2. Paragraph (2) of Subsection (a) [pg. 14, line 21] specifies that when the Bureau report is issued confidential information need not be included.

a. **Robert Mukai, IGLS and Alan Titus, Artichoke Joe's**: Mr. Mukai recommends the deletion of this section as Business and Professions Code section 19868 already makes it clear that this information need not be provided.

Mr. Titus requests clarification if paragraph (2) provides exceptions to paragraph (1). If an exception is provided, Mr. Titus notes that this would create a situation where confidential information is not being shared with the applicant but could still be utilized by the Commission when making a decision.

Recommended Response: These comments were considered but were only incorporated in part. Paragraph (2) is intended to provide an exception to the requirement to provide information to the applicant. This provision does not provide for the Commission to receive information that is unavailable to the applicant and discussion of that concern is better discussed in the relevant regulatory section. To provide additional clarity, the following revision is proposed:

(2) The documents or information provided under paragraph (1) ~~Bureau~~ need not include ~~provide~~ anything ~~documents or information~~ inconsistent with paragraph (6) of subsection (d) of Section 12012~~Business and Professions Code section 19868, subdivisions (b)(3) and (c)(2)~~.

3. Subsection (b) [pg. 14, line 23] specifies the Commission or an Administrative Law Judge sitting for the Commission will determine what, if any, significance

recommendations by either the Bureau or Commission's staff shall have on the merits of the application.

a. **Stacey Luna-Baxter, Bureau and Robert Mukai, IGLS**: Ms. Luna-Baxter recommends the deletion of this section as the Bureau recommendation is already considered by both Commissioners and any Administrative Law Judge and is therefore unnecessary.

Mr. Mukai recommends that this subsection be deleted as it serves no purpose.

Recommended Response (a through b): These comments were considered but were not incorporated. The Commissioners must make a decision regarding the suitability of applicants and it is important to clarify how any provided recommendations apply in that decision making process. Without direct guidance through this regulation it is possible that some may view a recommendation similarly to other agency actions to approve or deny an application in advance of an appeal heard at an APA hearing. That is not appropriate under the Act. A Bureau recommendation is based on a thorough review of the background of an applicant based on the Bureau's collective experience and training. It does not however carry any binding or precedential weight towards the application of the Commissioner's discretion and thereby the Administrative Law Judge's decision making process.

H. AMEND SECTION 12052. COMMISSION MEETINGS; GENERAL PROCEDURES; SCOPE, RESCHEDULING OF MEETING.

The new Section 12052 provides general procedures regarding the hearing process.

1. Subsections (a) and (b) [pg. 14, line 32] clarify Commission authority and that this article does not apply to disciplinary proceedings. This helps all parties understand their rights and obligations.

a. **Stacey Luna-Baxter, Bureau and Robert Mukai, IGLS**: Ms. Luna-Baxter recommended the deletion of these two subsections as they do not deal with the scope created by the title of this section.

Mr. Mukai recommends the deletion of both of these subsections. Mr. Mukai believes that the disclaimer in subsection (a) is incorrect, and that by adopting these regulations the Commission will be limiting both authority and discretion. Additionally, Mr. Mukai believes that the disclaimer in subsection (b) is not necessary as it is already clear that the proposed rules cannot apply to accusations.

Recommended Response: These comments were considered but were not incorporated. While it is possible that regulations in general may limit the authority and discretion of the adopting body, the regulations in this package generally do not do so. In short, these regulations have no impact on how the Commissioners review an application or an applicant's suitability. Commissioner's must still look to their

role under the Act and specific statutes such as Business and Professions Code sections 19856, 19857 and 19859 and apply their discretion in furtherance of the public interest of the state. All that is delineated by these regulations are hearing and related procedures which largely comport with current practice. Finally, to the extent these sections are perceived as limiting the Commission's authority or discretion in regards to this procedure, they should be viewed subject to this comment, not an exception to it.

Additionally, subsection (b) provides clarity by spelling out the process to a lay reader.

2. Subsection (c) [pg. 15, line 6] provides notice requirements that are based on the type of item the application will be agendized for.

a. **Alan Titus, Artichoke Joe's**: Mr. Titus notes that the proposed 10-day timeline would apply to notices for both the non-evidentiary hearing meeting and to an evidentiary hearing and that in the case of the evidentiary hearing subsections (a) and (b) of Section 12060 provide other timelines that make the 10-day timeline unnecessary.

Recommended Response: This comment was accepted. The following revision is proposed:

(c) An applicant for any license, permit, finding of suitability, renewal, or other approval shall be given notice of the meeting at which the application is scheduled to be heard ~~at least 10 days prior to the meeting date~~. Notice shall be given pursuant to Section 12006.

(1) If the application is scheduled at a non-evidentiary hearing meeting, the notice shall be provided at least 10 days prior to the meeting date and shall inform the applicant of the following:

b. **Robert Mukai, IGLS**: Mr. Mukai notes there is nothing in this paragraph that indicates who is responsible for issuing the notice.

Recommended Response: This comment was considered but was not incorporated. It is the Commission's responsibility to provide proper noticing for its own meetings and specific identification of that shouldn't be required.

3. Subparagraph (C) of paragraph (1) of Subsection (c) [pg. 15, line 19] provides that any individual making an oral statement at a non-evidentiary hearing meeting may be required to be placed under oath.

a. **Alan Titus, Artichoke Joe's**: Mr. Titus believes that this requirement is improper and does not provide sufficient notice that an individual could be placed under oath to undergo additional preparation and have legal counsel present.

Recommended Response: This comment was considered but was not incorporated. Whether making unsworn comments or testimony under oath, an applicant is expected to reply honestly. It is unclear why one presentation type would require additional preparation. An applicant may choose to have an appointed representative present at any presentation or may choose to not answer until counsel is present.

4. Subparagraph (E) of paragraph (2) of Subsection (c) [pg. 16, line 2] provides that a notice of defense will be included in the notice of evidentiary hearing if it has not already been provided.

a. **Robert Mukai, IGLS**: Mr. Mukai expresses a concern that the requirement to submit "unless already provided by Commission staff or the Bureau" is unclear. In addition, as the Notice of Defense form is practically a waiver of an evidentiary hearing, the title is incorrect and could cause confusion.

Recommended Response: This comment was considered but was not incorporated. It is possible that the applicant could be provided the Notice of Defense form prior to the notice of hearing being mailed. If that occurs, then there is no reason to provide another copy, and should staff be unclear if the applicant has received a previous copy of the form, one could still be provided with the notice of hearing. What is important is that the applicant be provided the form no later than the notice of hearing, not that the applicant be provided the form only with the notice of hearing.

Additionally, the name of the form is immaterial to the specific content of the form. The directions provide clarity in what the form accomplishes. No additional change is required.

5. Subparagraph (F) of paragraph (2) of Subsection (c) [pg. 16, line 4] provides that waiving an evidentiary hearing may result in either a default decision by the Commission or the Commission holding an evidentiary hearing on the date previously noticed without the applicant's attendance.

a. **Robert Mukai, IGLS**: Mr. Mukai expresses a concern that the subparagraph does not clearly explain what could happen if a waiver of an evidentiary hearing is submitted and recommends the following revision:

(F) That the waiver of an evidentiary hearing, or failure of the applicant to appear at the evidentiary hearing, may result in (a) a default decision being issued by the Commission based upon the Bureau report, any supplemental reports by the Bureau, and any other documents or testimony already provided or which may be provided to the Commission, or (b) ~~that~~ the hearing being~~may be~~ held as originally noticed without applicant participation.

Recommended Response: This comment was accepted and the following revision is proposed:

(F) That the waiver of an evidentiary hearing, failure by the applicant to submit a Notice of Defense, or failure by the applicant to appear at the evidentiary hearing, may result in:

1. ~~a~~A default decision being issued by the Commission based upon the Bureau report, any supplemental reports by the Bureau, and any other documents or testimony already provided or which may be provided to the Commission, or

2.~~that t~~The hearing being~~may be~~ held as originally noticed without applicant participation.

6. Subsection (e) [pg. 16, line 13] provides that individuals at non-evidentiary hearings who provide testimony may be required to do so under oath.

a. **Alan Titus, Artichoke Joe's**: Mr. Titus notes that there is insufficient notice to require an applicant to provide sworn testimony. With needed advanced preparation, an individual may feel her or she is unable to decline to testify under oath without incurring the enmity of the Commission and yet not be prepared or have counsel present and therefore risk waiving constitutional rights.

Recommended Response: This comment has been previously addressed at H.3.a.

b. **Robert Mukai, IGLS**: Mr. Mukai suggests that this subsection is inconsistent with Business and Professions Code section 19871 which requires oral evidence to be taken upon oath or affirmation, and therefore this subsection should not provide the option for unsworn testimony.

Recommended Response: This comment was accepted. Subsection (l) of Section 12060 specifies that for evidentiary hearings oaths must be administered. Subsection (e) is intended to provide clarity that in other cases oaths may be required, versus unsworn public comment. However, as this subsection seems to have created confusion, and the requirement is already included for non-evidentiary hearing meetings in subparagraph (C) of paragraph (1) of subsection (c), subsection (e) was removed.

I. ADOPT SECTION 12054. APPROVAL; COMMISSION ELECTED HEARINGS.

This section provides a delineation of a non-exhaustive list of possible Commission actions at a non-evidentiary hearing.

1. Subsection (a) [pg. 16, line 19] specifies the options the Commission can take in regards to an application at a non-evidentiary hearing.

a. **Stacey Luna-Baxter, Bureau and Robert Mukai, IGLS**: Ms. Luna-Baxter recommends allowing the Commission to apply conditions and deny an application for mandatory reasons at non-evidentiary hearings and recommends the following revisions:

> (1) Issue or condition a license, temporary license, interim license, registration, permit, finding of suitability, renewal or other approval.
> (2) Deny a license when an application meets the criteria of a mandatory denial as outlined in Business & Professions Code sections 19858 and 19859 subsections (c), (d) and (g).

Mr. Mukai asserts that Business and Professions Code section 19870 allows for the denial or conditioning of a license without an evidentiary hearing. Mr. Mukai provides legal case history in support of a denial before evidentiary hearing not being a violation of due process.

Recommended Response: These comments were considered but were not incorporated. First, they presuppose that a mandatory denial is always a clear issue and does not warrant the taking of evidence at an evidentiary hearing. However, a cursory review of Business and Professions Code section 19859 reveals a host of ambiguities ripe for debate and discussion. A limitation, as the comments envisioned, would need exceptions and other relief valves which would likely render any benefits moot. Second, and most importantly, an applicant is entitled to a "meeting" under Business and Professions Code sections 19870 and 19871 regardless of whether there are discretionary or mandatory basis for denial. The applicant still has the right to introduce evidence, cross-examine opposing witnesses and offer rebuttal evidence even if the Commission is precluded by Business and Professions Code section 19859 from approving the application.

In addition, section 19870 does not provide for the exception Mr. Mukai asserts. It states "…after considering the recommendation of the chief and any other testimony and written comments as may be presented *at the meeting*…" (emphasis added). Section 19870 clearly contemplates a meeting of some sort. Mr. Mukai argues that this meeting requirement is met by a non-evidentiary hearing meeting; however, section 19871 provides further guidance on what "the meeting" might mean when it states, "The commission meeting described in section 19870 shall be conducted in accordance with regulations of the commission and as follows:…" Section 19871 then goes on to provide very specific requirements such as submitting rebuttal

evidence and calling witness to give testimony under oath. It would not simplify or clarify the process if the regulations allowed for the rights set forth in section 19871 to be conducted at both an evidentiary hearing and a non-evidentiary hearing meeting nor would it provide any cost savings as the Bureau could be expected to provide for witnesses and introduce exhibits for each application considered at any non-evidentiary hearing meeting, nor would it be fair to the applicant to prepare a full case when such may not be necessary. Finally, the Commission is required in section 19870 to prepare and file a detailed statement of its reasons for any denial which necessarily requires evidence and testimony on the record. It is simpler to defer any applications that require this additional level of scrutiny to a later meeting to allow both the Bureau and the applicant to focus to a higher level once it has been determined that such is required.

b. **David Fried**: Mr. Fried questioned why the applicant is not allowed to request an evidentiary hearing.

Recommended Response: This comment was considered but was not incorporated. There is no provision for the applicant to request an evidentiary hearing; however, when the Commission is considering what action to take at an open meeting, anyone is able to participate in the discussion including the applicant. In addition, as the proposed process only requires an evidentiary hearing to be held when an application is not being approved, there may be limited reasons for an applicant to desire an evidentiary hearing.

2. Paragraph (2) of subsection (a) [pg. 16, line 23] specifies the Commission may elect to hold an evidentiary hearing and shall identify the issues related to the applicant's suitability it would like to consider.

a. **Robert Mukai, IGLS**: Mr. Mukai expresses concern that the requirement that the Commission identify issues lacks clarity and is badly conceived. Mr. Mukai is concerned that requiring such identification is an unwise limitation of agency discretion.

Recommended Response: This comment was considered but was not incorporated. There will be situations where the Bureau has recommended approval, or has provided no recommendation and after review of the application the Commission decides that there is an issue preventing them from approving the application and they would like to hold an evidentiary hearing to discuss these issues and receive additional information. If the Commission didn't identify any issues, then the applicant would be required to establish their suitability in every aspect of their life; while the proof of suitability is the burden of the applicant, it is not good for the process to require every aspect of the applicant to be detailed when the simple identification of relevant key issues could both simplify and speed up the evidentiary hearing process. In cases where the Bureau has recommended denial, and the Executive Director has not directly scheduled the application for evidentiary hearing,

the Commissioners can simply identify the Bureau report as being the issue they wish to discuss.

J. ADOPT SECTION 12056. EVIDENTIARY HEARINGS.

The Act provides two ways by which the Commission may consider matters. Business and Professions Code sections 19870 and 19871 describe the manner by which the Commission shall conduct meetings and section 19825 allows the Commission to require any matter that the Commission is authorized to consider in a hearing or meeting of adjudicative nature to be conducted according to the APA. In order to expedite the handling of applications, this regulation defines the "meeting" required by Business and Professions Code sections 19870 and 19871 as a GCA evidentiary hearing.

1. Subsection (a) [pg. 17, line 14] specifies that the Commission's default selection for an evidentiary hearing is a GCA hearing, but that it may instead direct the hearing to the APA.

a. **Alan Titus, Artichoke Joe's**: Mr. Titus expressed concern that there is no criteria to determine when an application would be handled as a GCA or APA hearing nor does the Initial Statement of Reasons provide any guidance.

Recommended Response: This comment was considered but was not incorporated. The application of a GCA hearing as primary over an APA hearing is consistent with the Act. The first requirement is that the hearing be held is pursuant to sections 19870 and 19871 of the Business and Professions Code, while the authorization for the use of the APA (Business and Profession Code section 19825) allows for matters requiring a hearing to instead be heard pursuant to the APA. Additionally, section 19825 provides no conditions or requirements for this replacement, and so none have been imposed through the proposed regulations. Due to this, the application of the APA will be handled on a case-by-case basis.

b. **Robert Mukai, IGLS**: Mr. Mukai proposes the following language to provide clarity and consistency:

> (a) If the Commission elects to hold an evidentiary hearing, the hearing will be a GCA hearing conducted pursuant to Section 12060, unless the Executive Director, or the Commission acting pursuant to Business and Professions Code section 19825, determines that the hearing ~~matter~~ should be conducted as an APA hearing underpursuant to Section 12058.

Recommended Response: This comment was accepted. The following revision is proposed:

> (a) If the Commission elects to hold an evidentiary hearing, the hearing will be conducted as a GCA hearing ~~conducted~~ underpursuant to

Section 12060, unless the Executive Director, or the Commission acting pursuant to Business and Professions Code section 19825, determines that the hearing ~~matter~~ should be conducted as an APA hearing underpursuant ~~to~~ Section 12058.

2. Alternative 3; Subsection (a) [pg. 17, line 19] specifies that the Commission's default selection for an evidentiary hearing is a GCA hearing, and that it may only direct the hearing to the APA if the Bureau has recommended denial.

a. **David Fried**: Mr. Fried contends that the Commission should have the discretion to choose an APA hearing regardless of the Bureau's recommendation.

Recommended Response: This comment requires no response and can be considered by the Commission as they deliberate on whether this alternative should be selected.

b. **Alan Titus, Artichoke Joe's**: Mr. Titus expresses a concern that the limitation of the APA process to just when the Bureau recommends denial is the exact opposite of the Legislature's intent. Mr. Titus argues that with a GCA hearing the Commission is required to consider the recommendation of the Bureau, but that there is no requirement for the Bureau's recommendation to be considered at an APA hearing allowing the APA hearing to act as a fresh venue for the Commission to hear evidence without having to consider the recommendation of approval.

Recommended Response: This comment requires no response and can be considered by the Commission as they deliberate on whether this alternative should be selected.

c. **Robert Mukai, IGLS**: Mr. Mukai notes that this alternative is preferable and recommends revision to the language to mirror his previous comments

Recommended Response: This comment was accepted and the following changes proposed:

(a) If the Commission elects to hold an evidentiary hearing, the hearing will be conducted as a GCA hearing ~~conducted~~ underpursuant ~~to~~ Section 12060, unless the Bureau is recommending denial and the Executive Director, or the Commission acting pursuant to Business and Professions Code section 19825, determines that the hearing ~~matter~~ should be conducted as an APA hearing underpursuant ~~to~~ Section 12058.

3. Subsection (b) [pg. 17, line 24] specifies that any requirements in the evidentiary hearing rules that require disclosure do not apply to confidential information. In addition, any confidential information that the Commission may receive through *ex parte* exception of Section 12012(b)(2)(D) must be provided to the applicant, though it may be redacted. It

also clarifies that exculpatory or mitigating information may not be withheld from the applicant.

a. **David Fried**: Mr. Fried suggested that the subsection should add the following:

> (b) Nothing in this section, Section 12058 or Section 12060 confers upon an applicant a right to discovery of the Commission's or Bureau's confidential information or to require production of any document or the disclosure of information which is otherwise prohibited by any provision of the Act, or is privileged from disclosure or otherwise made confidential by any other provision of law. Documentary evidence may be redacted as needed to prevent the disclosure of confidential information. Exculpatory or mitigating information shall be provided to the applicant, but any confidential information may be redacted by the Bureau. However, if the confidential information redacted by the Bureau is potentially exculpatory or mitigating information, the Bureau will notify the Commission and the applicant of that fact. An applicant that wishes to challenge the Bureau's redaction or withholding of any information shall have 14 days from learning that the information has been redacted or withheld to file an action compelling disclosure.

Recommended Response: This comment was considered but was not incorporated. The current regulations already allow for redacted information or documentation to be considered by the Commission. If the Bureau were to redact potentially exculpatory or mitigating information, this regulation would require notification to the applicant. The Commission could request access to the information pursuant to paragraph (6) of subsection (d) of Section 12012.

b. **Alan Titus, Artichoke Joe's**: Mr. Titus expressed concern that the ability of the Commission to consider information unavailable to the applicant is a denial of due process for the applicant. Mr. Titus also commented that it was against the licensing scheme enacted by the Legislature which sets one agency with the role of investigating allegations [Bureau] and the other [Commission] with an unprejudiced adjudicative role based on admissible evidence.

Recommended Response: This comment was considered but was not incorporated. Mr. Titus' comments, also provided pursuant to the *ex parte* provision, are adequately addressed in response, C.9.c. The comment pertaining to the licensing scheme is not relevant as the proposed regulations do not invest investigatory authority on the Commission, but simply allow Commissioners to ask questions and participate in the evidentiary hearing process.

4. Subsection (c) [pg. 18, line 1] clarifies that each party is responsible for any costs associated with their side of the evidentiary hearing, with the exception that the Bureau may require additional deposit amounts for any necessary supplemental investigations.

a. **Stacey Luna-Baxter, Bureau**: Ms. Luna-Baxter recommends that this subsection be deleted. While the Bureau is able to request additional funds, it is unlikely that the applicant would be receptive to a requested in advance of the hearing to cover any additional investigatory costs. Ms. Luna-Baxter also asserts that costs associated in the participation in the hearing are eligible for reimbursement.

Recommended Response: This comment was considered but was not incorporated. As drafted the language allows for additional costs for investigations to be reimbursable to the Bureau. If an applicant is unable or unwilling to pay for additional costs associated with any additional investigation requested by the Commission, the issue should be raised to the Commission without delay.

In addition, the Act does not allow for the reimbursement of costs associated with the evidentiary hearing itself and therefore those costs, as indicated in this section, must be borne by the parties. While Business and Professions Code section 19930 does state under subsection (d) that costs of investigation and prosecution are reimbursable and does use the terms applicant and "deny a license," there are three problems with directly applying it to this section.

First, Business and Professions Code section 19930, subdivisions (d) through (f), inclusive, were modeled after Business and Professions Code section 125.3. This section does not provide a basis for cost recovery for a denial proceeding but speaks to enforcement or disciplinary proceedings against a current licensee not an applicant for a license. This is consistent with the Department of Consumer Affairs' (DCA) practices and interpretation.

Second, the legislative history seems to be against allowing costs in this instance. By example the last two analyses before the Senate and Assembly on Senate Bill (SB) 1812 (Vincent, Chapter 487, Statues of 2003) which added subdivision (d) of Business and Professions Code section 19930 stated:

> Without explicit language in the Act, the Division is unable to seek reimbursement from violators, who should bear the enforcement costs.
>
> The sponsor adds that most licensing programs have authority to recover enforcement costs, using the example of licensing boards within the State Department of Consumer Affairs, which have an express right to recover reasonable costs of investigation and enforcement once a licensee has been found to have violated applicable law (Business and Professions Code section 125.3). If enacted, this bill places the Division on the same kind of footing. (Emphasis added.)

The key is "on the same footing," not a greater footing.

Third, because of the forgoing and the apparent uncertainty caused by the use of the terms "denial" and "application," there are presented two options. On the one hand section 19930 could be interpreted in a wholly new manner which was not sought by the Legislature, but which is unlike similar statutes in the Business and Professions Code, and is contrary to practices of DCA, not to mention questionable from the perspective of ensuring the Commissioners receive the relevant facts on an application and protecting an applicant's right to a hearing. On the other hand, a harmonized interpretation of the language in subdivision (d), with Section 125.3 and related sections (Business and Professions Code sections 3753.5(a), 4990.17, and 5107(b)), provides a clear legislative intent of SB 1812. The latter is more appropriate.

K. ADOPT SECTION 12058. APA HEARING.

This section specifies some initial processes followed by the Commission should an APA Hearing be selected. The majority of the process is contained within the APA's own laws and regulations.

1. The following comments are pertaining to this section [pg. 18, line 8].

a. **Robert Mukai, IGLS**: Mr. Mukai recommends that this entire section, except subsection (d), should be deleted as duplicative to the normal APA process.

Recommended Response: This comment was considered but was not incorporated. This section is necessary to explain the process for the APA hearing to the applicant and other parties.

2. Subsection (d) [pg. 18, line 18] specifies that the Bureau is not required to recommend or seek any particular outcome, but to only present the facts and law related to the applicant and the background investigation.

a. **Robert Mukai, IGLS**: Mr. Mukai indicates that in prior discussions between the Commission's staff and the Bureau it was indicated that the desire of the Bureau to not be forced to support a position contrary to its recommendation was only true during APA hearings but that during a GCA hearing the Bureau is willing to act as the complainant at all times, even when having previously recommended approval.

Recommended Response: This comment requires no response and can be considered by the Commission as they deliberate on which alterative pertaining to Section 12056 should be selected.

L. ADOPT SECTION 12060. GCA HEARINGS.

This section specifies the process of a GCA Hearing, including a minimum timeline from when a GCA hearing is selected to when documents need to be exchanged. The section also

includes other procedural items such as what documents must be exchanged, who the presiding officer shall be and who is responsible for presenting each position.

1. Subsections (a) and (b) [pg. 18, line 33] provide the minimum timelines for the scheduling of a GCA hearing once it has been determined that an application will be subject to one. Subsection (a) authorizes the Executive Director to directly schedule an application prior to the application being addressed by the Commission at a non-evidentiary hearing meeting and provides a minimum 90 day time period. Subsection (b) provides a minimum 60 day timeframe once the Commission has elected to hold an evidentiary hearing.

a. **Alan Titus, Artichoke Joe's**: Mr. Titus expressed concern that the notice periods in advance of a hearing are not the same. Mr. Titus notes that the time necessary to prepare for a hearing will be the same either way.

Recommended Response: This comment was considered but was not incorporated. Subsections (a) and (b) provide only minimum time periods between the determination that an evidentiary hearing will be held and the possible beginning of the hearing. Both time frames provide the same approximate timeframe, not from the determination that a hearing will be held, but from the issuance of the Bureau's report. In this way, the regulations attempt to provide a consistent time frame working under the assumption that it takes, at a minimum, 30 days from the Bureau providing its report to the Commission for the item to be scheduled for Commission consideration.

2. Subsection (c) [pg. 19, line 14] specifies that the Executive Director selects the presiding officer and that it shall be either a properly segregated member of the Commission's legal staff or an Administrative Law Judge (ALJ).

a. **Alan Titus, Artichoke Joe's**: Mr. Titus expressed concern in the selection of an attorney employed at the Commission to serve as a hearing officer. Mr. Titus raised three specific concerns.

1. ALJs have specific training and experience in the issues and tasks of a hearing officer. A staff attorney will rarely have this type of experience. The regulations do not even allow a staff attorney to administer an oath.
2. A hearing officer needs to be independent. A staff attorney, while in a position to council the Executive Director and the Commission is not in a position to direct them and is instead directed by them. A staff attorney may therefore be unable to make decisions that would add to either the cost or workload of the Commission.
3. A hearing officer needs to be impartial and free of the appearance of bias. Staff attorneys are career employees at the Commission and could be influence in decisions made based on the effects it could have on their career path. The appearance of bias should be avoided.

Mr. Titus notes that while the proposal does limit communication prior to the evidentiary hearing, it is insufficient as it does not protect during the hearing. Additionally, it relies on self-enforcement and there is no ability to monitor and enforce.

Recommended Response: This comment was considered but was not incorporated. The Commission's legal staff has sufficient training and experience. Hearing officers for evidentiary hearings do not need to be ALJs. There are examples in case law to support staff acting in this capacity.

3. Subsection (d) [pg. 19, line 19] specifies that the applicant or Bureau may request a continuance which can be approved by either the Executive Director or the Commission.

a. **Alan Titus, Artichoke Joe's**: Mr. Titus recommended that the presiding offering be in control of the hearing dates.

Recommended Response: This comment was considered but was not incorporated. It is up to the Commission to set its own calendar and the Executive Director is in charge of this administrative function. It should not be the responsibility of the presiding officer to set the Commission's calendar or bind the Commissioners' schedules.

4. Subsection (e) [pg. 19, line 22] specifies the manner in which the Bureau and applicant will conduct a pre-hearing exchange of documents and witness lists and statements. For the Bureau this exchange is in addition to the one required under Section 12052 when the Bureau has recommended denial. The timelines for this exchange require the Bureau to provide to the applicant 45 days in advance of the hearing date with the applicant providing 30 days prior.

a. **David Fried**: Mr. Fried suggested an additional, mutual 15-day exchange prior to the hearing date for any supplementary information.

Recommended Response: This comment was considered but was not incorporated. Parties can voluntarily submit the information or ask the presiding officer to issue an order to allow for it on a case-by-case need.

b. **Robert Mukai, IGLS**: Mr. Mukai expresses concern that the requirement in paragraph (4) is overbroad. Mr. Mukai opines that any comments or writings that are not reports or statements of parties or witnesses would not need to be exchanged and those that do are sufficiently covered by paragraphs (1) through (3), inclusive.

Recommended Response: This comment was considered but was not incorporated. If there is any information that is relevant it needs to be provided and this paragraph provides a final catch.

c. **Alan Titus, Artichoke Joe's**: Mr. Titus notes that while the current regulation for the exchange of documents is insufficient, the proposed regulation would be unfair to the applicant. After this initial exchange by the Bureau the applicant should have time to prepare their case. This preparation could take as few as 45 days but could easily take 60 days or even more. The Commission should be liberal about granting the applicant the time needed to prepare a response. Mr. Titus asserts that the Commission has no economic stake and no particular reason to cut short the time needed by an applicant and that the applicant has little reason to stall the process.

Mr. Titus additionally notes that the proposed process differs from the APA in significant respects.

Recommended Response: This comment was considered but was not incorporated. The parties are able to exchange information earlier as necessary before the hearing on their own agreement. However, where more time is needed the parties are able to request a continuance from the Commission. The Commission has an interest in promptly determining the suitability of an applicant. It is the Commission's responsibility to ensure that licenses are not held by unqualified persons (Business and Professions Code section 19822), and while this is not a reason to prematurely hold a hearing without every party having a reasonable chance to prepare their case, it is a reason to provide tight minimum timelines and then to extend upon need instead of requiring expansive timelines that would be followed even in situations where they are not needed by either party. Long timelines, combined with the automatic issuance of an interim renewal license provides plenty of incentive for an applicant to stall the process, as to do so would ensure a longer chance to operate under the temporary license.

Additionally, there is no need for this process to mirror every aspect of the APA even if the proposal has taken from the APA in other areas.

d. **Alan Titus, Artichoke Joe's**: Mr. Titus notes that the documents and information required to be exchanged, while largely similar to Government Code section 11507.6, fail to include all aspects, including the names and addresses of witnesses. Section 11507.6 also notes that witness list need not be limited to just those who will be called to testify and requires statements from not just witnesses but "persons having personal knowledge of the acts, omissions, or events which are the basis for the proceeding."

Section 11507.6 additionally requires the disclosure of "[i]nvestigative reports made by or on behalf of the agency…to the extent that these reports (1) contain the names and addresses of witnesses or of persons having personal knowledge of the acts, omissions or events which are the basis for the proceeding, or (2) reflect matters perceived by the investigator in the course of his or her investigation, or (3) contain or include by attachment any statement or writing..."

Mr. Titus recommends that the proposal be modified to include the missing provisions of section 11507.6. To do otherwise would be to limit the rights of the applicant by not recognizing the minimum protections established by the APA.

Finally, Mr. Titus notes that current regulation requires "exculpatory or mitigating information shall not be withheld" and not such protection was included in the proposed revisions.

Recommended Response: This comment was considered but was not incorporated. The Legislature established the Act separately from the APA and allows the Commission to separately utilize the APA. The GCA hearing process is not intended or required to mimic the APA in all respects.

5. Subsection (h) [pg. 20, line 21] specifies that the Bureau shall present all facts and information contained in the Bureau's report, the results of its investigation and the basis for any recommendation. The Bureau is not required to defend any position related to the application.

a. **Alan Titus, Artichoke Joe's and Robert Mukai, IGLS**: Mr. Titus comments that this subsection is unclear. As the Commissioners already have the Bureau's report, and thus the facts and information in the report, Mr. Titus notes that the hearing should involve evidence supporting the facts and information contained in the report. Mr. Titus asserts that the focus should be on whether the applicant has met their burden of proof but does not detail what the applicant must prove. Additionally, Mr. Titus recommends the following change:

> (h) The Bureau shall present all facts and information in the Bureau's report, the results of its background investigation, and the basis for their recommendation already filed with the Commission according to Business and Professions Code sections 19868 so that the Commission can make an informed decision on whether the applicant has met his or her burden of proof. The Bureau may but is not required to recommend or seek any particular outcome during the evidentiary hearing, unless it so chooses.

Mr. Mukai comments that there are situations where the Bureau does not issue a report or a recommendation and so suggests the following revision:

> (h) The Bureau shall present all facts and information in the Bureau~~'s~~ report, if any, the results of its background investigation, and the basis for its~~their~~ recommendation, if one was~~already~~ filed with the Commission according to Business and Professions Code section~~s~~ 19868, to enable~~so that~~ the Commission can make an informed decision on whether the applicant has met his or her burden of proof. The Bureau is not required

to recommend or seek any particular outcome during the evidentiary hearing, unless it so chooses.

Recommended Response: These comments were accepted and the following changes proposed:

(h) The Bureau shall present all facts and information in the Bureau~~'s~~ report, if any, the results of its background investigation, and the basis for their recommendation, if one was~~already~~ filed with the Commission according to Business and Professions Code section~~s~~ 19868, to enable~~so that~~ the Commission to~~can~~ make an informed decision on whether the applicant has met his,~~ or~~ her, or its burden of proof. The Bureau may but is not required to recommend or seek any particular outcome during the evidentiary hearing, unless it so chooses.

6. Subsection (i) [pg. 20, line 27] specifies that the burden of proof is on the applicant to prove their qualifications to receive an approval under the act.

a. **Alan Titus, Artichoke Joe's**: Mr. Titus comments that the repeated reference to the burden of proof being on the applicant creates confusion. Mr. Titus notes that although the burden might be on the applicant, the Bureau makes the charges and the applicant responds to them. Therefore, the applicant is more like a defendant in a licensing proceeding.

Recommended Response: This comment was considered but was not incorporated. The Bureau does not make charges. The Bureau conducts a background investigation and presents the results to the Commission. This is not an accusation.

7. Subsection (j) [pg. 20, line 29] specifies that the applicant may choose to be represented or to retain an attorney or lay representative.

a. **Robert Mukai, IGLS**: Mr. Mukai expresses concern that the allowance of representation by a lay representative may raise issues concerning the unauthorized practice of law. Mr. Mukai recommends Commission staff consult with the State Bar of California on this issue. Mr. Mukai also suggests that additional limitations be applied to lay representatives.

Recommended Response: This comment was considered but was not incorporated. Commission staff has consulted with the State Bar of California on this issue and has confirmed what was already known. Lay representatives are permissible in administrative hearings and the standards are sufficient as written.

M. ADOPT SECTION 12062. ISSUANCE OF GCA HEARING DECISIONS.

This section specifies the process of how a GCA decision is drafted and approved including who may participate in any discussion and voting.

1. Subsection (a) [pg. 21, line 19] specifies that the presiding officer shall prepare for the Commission a proposed decision within 30 days of the conclusion of the GCA hearing.

a. **Alan Titus, Artichoke Joe's**: Mr. Titus comments that any staff attorney who is going to write a decision needs to have never been exposed to any inadmissible evidence or the acts as the presiding offer, must have attended the hearing and watched and heard the witnesses, may not have discussed the case with others or prejudged the case prior to discussing it with the Commissioners and finally, the staff attorney may not have been involved in the case in any way that might have caused them to be prejudiced.

Recommended Response: This comment was considered but was not incorporated. An ALJ both hears the case and writes the proposed decision. A presiding officer (staff attorney) acts in a lesser role than an ALJ and should be able to draft any decision that is ultimately approved by the Commission.

N. ADOPT SECTION 12066. FINAL DECISIONS; JUDICIAL REVIEW.

This section specifies the process under which the Commission's decision becomes final subject only to judicial review.

1. Subsection (c) [pg. 23, line 14] specifies that any judicial review will be subject to Business and Profession Code section 19870, subdivision (e) and that not seeking reconsideration does not affect the right to petition for judicial review.

a. **Robert Mukai, IGLS**: Mr. Mukai suggests that the word "appeal" is incorrect as Commission decisions are reviewed by writ.

Recommended Response: This comment was accepted and the following revision proposed:

> (c) A~~n appeal~~ request for review of a denial or imposition of conditions by the Commission shall be subject to judicial review as provided in Business and Professions Code section 19870, subdivision (e). Neither the right to petition for judicial review nor the time for filing the petition shall be affected by failure to seek reconsideration.

O. ALTERNATIVE 4. APA IS ALWAYS AN OPTION BUT PRESENTER CHANGES DEPENDING ON BUREAU RECOMMENDATION.

This option proposes to change various sections and would allow for Commission staff to serve as the presenter of facts in APA hearings for applications where the Bureau has not recommended denial.

1. Subsection (b) of Section 12002 [pg. 28, line 6], defines "Advisor to the Commission" to mean any employee of the Commission except those designated as advocates of the Commission.

a. **Robert Mukai, IGLS**: Mr. Mukai notes that while the definition is Advisor to the Commission, the usage in the rest of the proposed regulation is advisor of the Commission.

Recommended Response: This comment was accepted. The following change is proposed:

(g) "Advisor of~~to~~ the Commission" shall be all employees of the Commission except those designated as an advocate of the Commission.

2. Paragraphs (3), (4) and (5) of subsection (d) of Section 12012 [pg. 30, line 24] provides the sharing of information or documents by either the Bureau or advocate of the Commissions, applicant or other interested party must be provided to both the Bureau and applicant simultaneously as when they are provided to the Commission.

a. **Robert Mukai, IGLS**: Mr. Mukai commented that by equating an advisor of the Commission with the Bureau for the purposes of *ex parte*, the two employees of the Commission will be prevented from communicating on any topic.

Recommended Response: This comment was accepted. The following revision is proposed to subsection (a):

(E) For purposes of this section, "*ex parte* communication" or "e*x parte*" means a communication upon the merits of an application without notice and opportunity for all parties to participate in the communication.

To ensure communication between the Bureau and Commission is not blocked on other issues, the same revision is proposed for the non-alternative subsection (a).

3. Subsection (a) of Section 12056 [pg. 33, line 5] specifies that the Commission's default selection for an evidentiary hearing is a GCA hearing, and that if the Bureau has not recommended denial, the Commission shall designate its own staff to act as advocates of the Commission.

a. **Alan Titus, Artichoke Joe's**: Mr. Titus comments that using Commission staff to act in the presenter role during an APA hearing contradicts the Act as it places Commission staff into a position of investigator and prosecutor, a position reserved for the Bureau. In addition, because the Commission is so small, this option creates additional *ex parte* concerns. Mr. Titus suggests that the Bureau should present the evidence regardless of a recommendation and does not understand the Bureau's insistence in avoiding this role.

Recommended Response: This comment was considered but was not incorporated. Mr. Titus' comment can be considered by the Commission as they deliberate on whether this alternative should be selected. Additionally, the Act does not discuss a role for either the Bureau or Commission staff when it comes to the presentation of facts. Business and Professions Code section 19871 makes reference to a party but does not directly identify the Bureau. Agencies can provide a segregation of functions. This is quite common in unitary agencies.