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January 3, 2023

Josh Rosenstein,
Legislative and Regulatory Specialist
Legislative and Regulatory Affairs Division
California Gambling Control Commission
2399 Gateway Oaks Drive, Suite 220
Sacramento, CA 95833-4231

VIA Email:lawsandregs@cgcc.ca.gov

Re: ***CGCC-GCA-2022-06-R:"Subpoenas"***

Dear Mr. Rosenstein,

We write in opposition to the adoption of the proposed language of CCR §12060(b) and (g). We have read and considered the reasons set forth by the Commission for the proposed changes and the proposed language. The proposed changes are in conflict with existing appliable law, overbroad, potentially violative of Constitutional rights, and subvert the basic notions of fairness that our legal system rests upon.

The proposed regulations seem to be trying to exempt Commissioners from "civil type discovery". The intent appears to be to protect the Commission and the Commissioners from the burden and annoyance of having to comply with a subpoena issued by an applicant at a Gambling Control Act hearing. While avoiding annoyance and costs may seem to be worthwhile goals, the proposed language is concerning on many levels.

First, the Administrative Procedures Act ("APA") is applicable to the hearings conducted by the Commission. (Govt. Code §11410.10.) There is nothing in the Gambling Control Act that specifically exempts the Commission from applying the APA, To the contrary, Business and Professions Code ("B&P Code") §19825 specifically states that adjudicative hearings are required to be conducted pursuant to the rules the APA provides for formal hearings. The APA has an entire section devoted to subpoenas in administrative hearings. (Govt. Code §§ 11450.05-11450.50). Thus, there is applicable statutory law with which the proposed regulations would be in direct conflict. The statutory authority does not allow the Commission to create regulations to exempt itself from the procedures prescribed by the Legislature. As statutory law takes precedence over regulations, there is also an argument that the adoption of the proposed

language would be null ab initio. The Commission has no authority or ability to promulgate regulations that would exempt it from the statutory requirement to follow the APA.

The proposed language of §12014(b) allows the presiding officer to quash or modify a subpoena upon its own motion. This is antithetical to the fundamental precepts of justice in our system of jurisprudence as one category of "presiding officer" is defined by §12060(c) as a member of the Commission's legal staff. Thus, an employee of the subpoenaed party would be empowered to modify or quash a subpoena to that party, or to modify or quash a subpoena an applicant served on a third party in support of their case. The potential bias in this situation is plain. An employee subject to the power and authority of the Commission and Commissioners would be making the determination. The opportunity for self-dealing and even workplace intimidation is blatant and ill advised.

The possibility of depriving an applicant the full right to put all relevant issues before the trier of fact is a deprivation of a fair hearing. Applicants must have the ability to subpoena the witnesses and documents they believe necessary to their case and not be second guessed or limited by a hearing officer with an inherent bias. The APA already has a system in place and that statutory authority musty be followed.

Given that there is no indication that the Commission provides judicial training to the Commissioners or even meets its obligation under the APA for the Commissioners to comply with the Code of Judicial Ethics, there is a real concern that an applicant's rights to a full and fair hearing, that complies with some system of jurisprudence and protection of rights, is further being undermined by this proposed change. The burden of suitability is on the applicant, and the applicant should have every opportunity to provide relevant evidence to support that burden. If relevant evidence exists the burden or cost of complying with a subpoena may be annoying, but it is what fairness and good government demand. An employee of the Commission should not be allowed to interfere with a subpoena to protect or shield what could be important and relevant information.

Take for example the situation where during a GCA hearing a commissioner received an ex parte communication regarding the applicant's suitability for licensure. The commissioner then told the parties that he had received the communication, and he had destroyed the actual communications. The Commission had no policy regarding retention of such communications. The commissioner should not have deleted the information but provided copies of said communications to all parties in the interest of fairness and justice. The applicant should have the ability to subpoena the records of those communications. The substance of those communications may show bias, prejudice, or animus to the applicant. It is also entirely possible that the communications would not show that, but the point is the applicant can't know without seeing them. Without the power of subpoena, the applicant is left to rely upon the word and good graces of a commissioner who may be tainted or biased against them. This is but one example of where the power of subpoena is necessary and relevant for a fair hearing.

While subpoenas may be annoying, and even expensive, the annoyance must be counter balanced by fairness to all parties. Justice does not consider annoyance and expense as equals to fairness.

We believe that the adoption of the proposed language will subject the Commission to litigation. We therefore request that the Commission not adopt this proposed language, and instead follow the existing statutory law in place within the APA.

Very Truly Yours,

Jarhett Blonien

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Via E-mail Transmission
and U.S. Mail

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Re: Proposed Regulations - Licensing, CGCC-GCA-2022-06-R

Dear Mr. Rosenstein:

These comments are submitted on behalf of the Department of Justice, Indian and Gaming Law Section (IGLS) regarding the above regulations proposed by the California Gambling Control Commission (Commission). I have indicated suggested edits to the proposed regulatory text within the section of this letter entitled, "Proposed Regulatory Text." IGLS's proposed edits appear in bold text while the underlined text are the changes currently proposed by the Commission.

Proposed Regulatory Text

California Code of Regulations, title 4, section 12014. Subpoenas.

(a) The issuance and enforcement of a subpoena or subpoena duces tecum in any adjudicative proceeding held pursuant to the Act for which a notice of hearing has been issued will be in accordance with Article 11 (commencing with section 11450.05) and Article 12 (commencing with section 11455.10), respectively, of Chapter 4.5 of Part 1 of Division 3 of Title 2 of the Government Code. The issuance of a subpoena or subpoena duces tecum may be on the form entitled "Subpoena," CGCC-CHI-02 (new 05/20), which is attached in Appendix A to this chapter, or in a manner that otherwise complies with Article 11 of Chapter 4.5 of Part 1 of Division 3 of Title 2 of the Government Code. All subpoenas and subpoenas duces tecum must be served, in accordance with Government Code section 11450.20 and with a copy to the presiding officer, at least 30 days prior to the date specified for commencement of the hearing in the notice

of hearing, or the date specified in the subpoena for the appearance of a witness or the production of records. **No subpoena duces tecum may be served upon an applicant or complainant.**

Justification for IGLS's Proposed Addition

The new California Code of Regulations, title 4, section 12060, subsection (g),[1] as proposed by the Commission, directs that section 12060 subsection (f) provides the exclusive right to and method of discovery between the applicant and the complainant during a California Gambling Control Act hearing before the Commission. IGLS's proposed addition to section 12014, subsection (a) buttresses this directive by preventing a party to the hearing from conducting discovery upon another party by serving a subpoena duces tecum and appending to it, a request for production or a request for admissions, for example. Without IGLS's proposed addition, a party may argue that insofar as sections 12014 and 12060 do not explicitly prevent a party from serving upon another party a subpoena duces tecum accompanied by a request for production (or any other method of discovery), such activity is permissible. IGLS's addition to section 12014, subsection (a) explicitly prevents using the subpoena duces tecum as a vehicle to circumvent section 12060, subsection (g)'s clear directive that section 12060, subsection (f) provides the exclusive right to and method of discovery between the applicant and the complainant.

Sincerely,

JEREMY STEVENS
Deputy Attorney General

For ROB BONTA
Attorney General

JS:pc

cc: Stacey Luna Baxter, Executive Director
Jason Pope, Chief Counsel
Yolanda Morrow, Director, Bureau of Gambling Control
Lisa Wardall, Assistant Director, Bureau of Gambling Control
Nathan DaValle, Assistant Director, Bureau of Gambling Control

[1] All further statutory references are to California Code of Regulations, title 4.