APPLICATION WITHDRAWALS AND ABANDONMENTS, AND HEARING PROCEDURES

CGCC-GCA-2013-0#-R

COMMENTS AND RESPONSES FOR PROPOSED REGULATIONS

WORKSHOP WRITTEN AND ORAL COMMENTS

The following written comments/objections/recommendations were received regarding the proposed text either prior to or during the round table that commenced June 12, 2013:

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), would define a "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. **Alan Titus, Artichoke Joe's**: Mr. Titus comments that this definition seems to be in conflict with section 19825 by defining all hearings pursuant to 19825 as APA hearings, even though not all hearings under section 19825 would be APA hearings, but some would be GCA hearings.

Recommended Response (a): This comment is rejected. The text of Business and Professions Code section 19825 states that any matter may be "heard and determined in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code." As a result, all hearings pursuant to section 19825 would be conducted pursuant to the APA.

b. **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 (b): These comments were rejected. 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. This eliminates

any ambiguity in using the terms which are broadly applicable beyond the Gambling Control 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.

2. Subsection (c), defines "Bureau" to mean the Bureau of Gambling Control in the California Department of Justice. The definition has been amended to remove the requirement that information, reports or forms be filed at the Sacramento office.

a. **Robert Mukai, IGLS**: Mr. Mukai commented that the Gambling Control Act refers to "the department" as the acting agency and not the Bureau. Mr. Mukai suggests either a general change within the Commission's regulations to accurately reflect this or a redefinition of "Bureau."

Recommended Response (a): This comment is accepted and the definition of "Bureau" is modified as follows:

(c)~~(b)~~ "Bureau" means the Bureau of Gambling Control in the California Department of Justice, acting as "the department" as provided in section 18 of the Business and Professions Code. ~~For the filing of any information, reports or forms, Bureau refers to the Sacramento office of the Bureau of Gambling Control.~~

While the Act assigns certain powers and authority to the department, in actual practice the responsibility for fulfilling the obligations imposed upon the department is delegated to the Bureau of Gambling Control, pursuant to Business and Professions Code section 19810.

3. Subsection (e), with proposed change to subsection (f), currently defines "Conviction " to mean a plea or verdict of guilty or a plea of *nolo contendere*, irrespective of a subsequent order of expungement under the provisions of Penal Code section 1203.4, 123.4a, or 1203.45, or a certification of rehabilitation under the provisions of Penal Code section 4852.13. Any plea entered pursuant to penal Code section 1000.1 does not constitute a conviction for purposes of Business and Professions Code section 19859, subdivisions (c) or (d) unless a judgment of guilty is entered pursuant to Penal Code section 1000.3.

a. **Robert Mukai, IGLS**: Mr. Mukai comments that the second sentence of the definition is superfluous and incorrect and if not deleted in its entirety should have the words "any plea" replaced with "a plea of guilty."

Recommended Response (a): This comment is rejected. The definition of conviction over rides the exemptions provided by expungement orders. The inclusion of the second sentence provides an exception so that this specific type or order is not ignored. The use

of "any plea" over "a plea of guilty" provides maximum allowance in the consideration of these types of cases.

4. Subsection (h), would define "Employee or Agent 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 individual Commissioners are agents of the Commission.

Recommended Response (a): This comment is accepted, in part, and the proposed draft is revises the definition to "Employee of the Commission."

5. Subsection (i) defines Executive Director to mean either as provided in Business and Professions Code section 19816, the designee of the Executive Director or any officer or employee as designated by the Commission while the position of Executive Director is vacant.

a. **Robert Mukai, IGLS**: Mr. Mukai commented that the definition is unnecessary since Business and Professions Code section 19816 identifies the position and the duties of the position. Mr. Mukai notes that there is no authority for the position to appoint another through designation.

Recommended Response (a): This comment is rejected. The purpose of the revision for this subsection is to align it correctly with other changes within Section 12002. It is not the intent or desire to consider revisions for other purposes within this regulation package.

6. Subsection (j), would define "Final Action by the Bureau" or "Final Action" to mean a final determination by the Chief of the Bureau regarding his or her recommendation to the Commission on any application.

a. **Stacey Luna-Baxter, Bureau of Gambling Control (Bureau)**: Ms. Luna-Baxter expressed that in the term "final action" is unnecessary and inaccurate. The term does not take into account any actions that may occur after this 'final' action is issued, such as follow up investigations as requested by the Commission. Ms. Luna-Baxter notes that while the term is used in Business and Professions Code section 19869, its use is restricted for the request for withdrawal of applications and thus it does not have a unilateral application.

b. **Robert Mukai, IGLS**: Mr. Mukai commented that the term "final action" is unnecessary, undesirable, not "final" and fails to consider that the Bureau may act with an action other than the issuing of a recommendation. Business and Professions Code section 19867 limits the term and has been improvidently borrowed with no reason for such language to have a broader usage.

c. **Alan Titus, Artichoke Joe's**: Mr. Titus objects to the use of the term "final action" in that the Bureau does not actually take action on the application. He recommends the use of recommendation of the Bureau.

d. **Marty Horan, Bureau**: Mr. Horan expressed a concern about the "final action" term as sometimes a recommendation is not made, or if there is a recommendation and afterwards the Commission may request additional investigation. This could cause an issue, if "final," where additional costs could not be recovered.

Recommended Response (a through d): These comments are accepted. There is agreement that the Bureau does not take "action" on an application and that any "action" would not be "final" for purposes of Administrative or Judicial review. However, the term "final action" is still a term used in Business and Professions Code section 19869. Section 19869 uses this exact term when detailing when a withdrawal request can and cannot be submitted to the Commission. Therefore, there is a need to define a point in time where the Bureau has completed its initial investigation and has prepared a report for the Commission's consideration. To accommodate this need, the following revisions have been made to the proposed text:

…

~~(j) "Final action by the Bureau" or "final action" means a final determination by the Chief of the Bureau regarding his or her recommendation to the Commission on any application.~~

…

(n) "Primary report" means a final determination by the Chief of the Bureau regarding his or her recommendation to the Commission on any application as defined in Business and Professions Code section 19869 as "final action by the department."

…

Appropriate changes have been made in other sections of the proposed text to replace "final action" with "primary report."

7. Subsection (n), 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 or agent of the Commission.

a. **Robert Mukai, IGLS**: Mr. Mukai comments that this definition is unnecessary because the Business and Professions Code already identifies who Commission members are and what they do. Mr. Mukai then offers 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 (a): This comment is accepted, in part, and rejected in part. Initially it is noted that advisors to the Commissioners in an adjudicative proceeding are subject to much of the same obligations, such as *ex parte* considerations, as the Commissioners themselves. However, the balance of this comment is uncertain. It first asserts that that the definition within the Business and Professions Code is clear, despite making no mention of advisors, and yet then states that an expansion of the definition beyond the Business and Professions Code is needed in order to include individuals that are advisors. Regardless, the purpose of this definition is different. As it focuses upon the specific individuals themselves in order to provide a clear separation of the various levels within the California Gambling Control Commission. This is done so that, in subsequent regulation sections, specific levels can be addressed including where advisory communications occur and cannot occur.

8. Subsection (j), with proposed change to subsection (p), currently defines "Surrender" to mean to voluntarily give up all legal rights and interests in a license, permit, registration, or approval.

a. **Stacey Luna-Baxter, Bureau**: Ms. Luna-Baxter advised that when first drafted a key term of "findings of suitability" was inadvertently omitted from this definition.

Recommended Response (a): This comment is accepted and the following revision proposed:

> (p)~~(j)~~ "Surrender" means to voluntarily give up all legal rights and interests in a license, permit, registration, finding of suitability, or approval.

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

This proposed action would establish new 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) 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. **David Fried, California Gaming Association (CGA)**: Mr. Fried recommended that notices to the Bureau and Commission should not be required to be certified mail.

Recommended Response (a): This comment is rejected. Nothing in the regulation package requires that notices sent to the Bureau or Commission be sent by certified mail nor is that the intent. Indeed, Section 12006 is only being proposed to be used for Commission notices to applicants and does not require any specific notice be mailed in

any manner. Rather Section 12006 provides a consistent method of mailing that is required to be used for service of documents as required by other sections. Any future requirement directed at applicant mailings that could utilize this section would be required to go through an independent rulemaking process.

b. **Alan Titus, Artichoke Joe's**: Mr. Titus expressed concern that certified mail is both slow and lacking in any tracking services and is considered below business standards. Mr. Titus suggests that notices be sent through private overnight carrier. Mr. Titus also suggests that notification be allowed through email, if an email address is on file.

Recommended Response (b): This comment is rejected. Certified mail is the current Commission practice and remains a suitable method of providing service of notices. The Commission is open to sending notices through e-mail when on file as a courtesy, but maintains that the primary method of communication should be through the mail.

c. **Robert Mukai, IGLS**: Mr. Mukai commented that there is no definition of "address of record." Mr. Mukai also makes reference to this section imposing a service requirement to some Bureau notices and communications.

d. **Tina Littleton**: Ms. Littleton suggested that the address of record would be what the Bureau and Commission had listed in the Licensing Information System (LIS), a database shared between the Bureau and Commission staff.

e. **Ron Diedrich, IGLS**: Mr. Diedrich commented that information, especially the older information, in LIS is not accurate.

f. **Stacey Luna-Baxter, Bureau**: Ms. Luna-Baxter commented that LIS does not provide a complete information list for an applicant as it does not allow for at least all designated agent information to be included when multiple designated agents are reported by an applicant.

Recommended Response (c through f): These comments are accepted, in part. This section was drafted prior to the approval of amendments to Section 12004 and has been revised in consideration of that approval. 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. In addition, there is no intent to impose this section's notice requirements onto any notice or mailing except those where it is explicitly required. At this point, it has not been proposed to apply to any Bureau or applicant notice, though the Bureau does have its own Section 2020 providing similar requirements. The proposed language has been revised as follows:

(a) When service of any notice or other written communication is specifically required to be made pursuant to this ~~S~~section, service shall be

made by certified mail, addressed to the residence address, address of record or mailing address of the applicant, licensee, or designated agent as last reported to the Commission~~, unless a different address is otherwise designated by the applicant, licensee, or designated agent~~.

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

This section is added to address and clarify "*ex parte*" communications. The Act[1] 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.

1. Subsection (a) 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. **David Fried, CGA**: Mr. Fried expressed concern that the possible election methods do not include the applicant requesting an evidentiary hearing.

Recommended Response (a): This comment is rejected. Current Commission hearing regulations require an applicant to either present evidence at a meeting or request an evidentiary hearing though both have essentially been allowed. Additionally, current practice has placed applicants in a position of requesting an evidentiary hearing sometimes before the Commission makes an initial determination on an application and sometimes after. The proposed regulation removes this ambiguity and any potential perceived prejudice to applicants which may subsequently occur. The Commission will instead refer any application that is not unqualifiedly approved at an open meeting to an evidentiary hearing. Due to this, there is no longer any purpose in allowing the applicant to request an evidentiary hearing as the only situation where an evidentiary hearing would not be provided would be for an approval.

b. **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 (b): This comment is rejected. 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.

[1] Specifically Business and Professions Code section 19872

c. **Robert Mukai, IGLS**: Mr. Mukai objects to the split structure of the regulation, fearing it may lead to mischief and cause confusion. Mr. Mukai further comments that the regulations interpret the general *ex parte* provisions of the APA in an un-useful manner which limits its application to later in the Commission's licensing process. Mr. Mukai recommends a unified approach to *ex parte* communications, recognizing that the proscriptions of the two parts have the same purpose and act in the same manner and under the same circumstances.

d. **James R. Parrinello, Artichoke Joe's**: Mr. Parrinello expressed concern that this subsection's definition of "when a proceeding is pending" is not consistent with Government Code section 11475.70. Mr. Parrinello suggests that the definition be revised to incorporate the actual language of the statute.

e. **Alan Titus, Artichoke Joe's**: Mr. Titus expressed concern that the Government Code sections are being changed greatly redefining the included definition of when an application pending. Mr. Titus recommended having a unified *ex parte* structure.

Recommended Response (a and b): These comments are rejected. 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."[2] 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 Gambling Control Act under Business and Professions Code sections 19870, 19871, and, specifically, 19872.

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

[2] 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."

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 "surplusage" 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 Gambling Control 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.

2. Subsection (b) provides that the limitations on *ex parte* communications imposed by Business and Professions Code section 19826 begins upon the submittal of an application to the Bureau.

a. **Alan Titus, Artichoke Joe's**: Mr. Titus notes that in chronological order subsection (b) actually takes place before subsection (a) and recommends that the regulations should be revised to reflect this.

Recommended Response (a): This comment is accepted and the proposed regulation has been revised accordingly.

(a)~~(2)~~ "*Ex parte*" means a communication without notice and opportunity for all parties to participate in the communication. When the *ex parte* provisions of subsections (b) or (c) apply, the following communications shall not be considered *ex parte*~~:~~ ~~*Ex parte* communication does not include any of the following:~~

(1)~~(A)~~ Communications related to procedure and practice that are not based upon the merits of an application or those made on the record at a public meeting or hearing concerning a properly ~~agendized~~noticed matter.

(2)~~(B)~~ The ~~Bureau or~~ applicant providing information or documents based upon the merits of an application pending disposition before the Bureau or Commission to an employee ~~or agent~~ or member of the Commission which is simultaneously provided to the Bureau~~other party~~.

(3) The Bureau providing information or documents based upon the merits of an application pending disposition before the Commission to an employee or member of the Commission which is simultaneously provided to the applicant.

(4)~~(C)~~ Any other interested person providing information based upon the merits of an application pending disposition before the Bureau or Commission to an employee ~~or agent~~ of the Commission which is simultaneously provided to both the Bureau and the applicant.

(5)~~(D)~~ The Bureau providing confidential information or documentation upon the merits of an application pending disposition before the Commission to an employee or member of the Commission

pursuant to Business and Professions Code section 19822, subdivision (b), but that is not provided to the applicant pursuant to Business and Professions Code section 19821, subdivision (d), and section 19868 subdivisions (b)(3) and (c)(2) as long as that information is first provided to both an employee or member of the Commission and applicant in a redacted format. If an employee or member of the Commission again requests the confidential information, the Bureau shall provide the unredacted information only to an employee or member of the Commission, but only after notice has been provided to the applicant, pursuant to Section 12006, with at least 14 days for the applicant to object and pursue any necessary judicial steps appropriate to challenge the request and seek a judicial in camera review of the information.

(b) The limitations on *ex parte* communication imposed by Business and Professions Code sections 19872, subdivisions (a) and (b) shall apply when an application is submitted to ~~pending disposition~~ the Bureau for investigation until the Bureau issues its primary report and the communication is upon the merits of the application. ~~For purposes of Business and Professions Code section 19872:~~

(c) The limitations on *ex parte* communication imposed by Business and Professions Code sections 19872, subdivisions (a) and (c) shall apply when the Bureau issues its primary report to the Commission until a decision is final pursuant to Section 12066 and the communication is upon the merits of the application.

(d)~~(a)~~ The limitations on *ex parte* communication imposed by Government Code sections 11430.10 through 11430.80 shall apply from when ~~a proceeding is pending. For purposes of Government Code section 11430.10, a proceeding is pending when one of the following occurs~~:

(1) ~~t~~The Executive Director has elected to hold an evidentiary hearing under subsection (a) of Section 12060 until any decision is final pursuant to Section 12066;

(2) ~~t~~The Commission has elected to hold an evidentiary hearing under paragraph (2) of subsection (a) of Section 12054 until any decision is final pursuant to Government Code section 11519; or,

(3) ~~t~~The Bureau has filed an accusatory pleading under Section 12554 or~~f~~ Business and Professions Code section 19930 until any decision is final pursuant to Section 12068.

~~(1) Pending disposition shall mean the time after an application has been filed with the Bureau, including while the Bureau performs a background investigation pursuant to Business and Professions Code section 19826, up to when the Commission's decision is final pursuant to Section 12066; and,~~

(e)~~(c)~~ If an applicant, the Bureau or other interested person communicates directly or indirectly on an *ex parte* basis with a member of the Commission, including indirectly through submission of information or documentation to an employee ~~or agent~~ of the Commission, then:

(1) All information and documentation shall immediately be provided to the Bureau, applicant or Bureau and applicant.

(2) That communication, if by the applicant, may be used as a basis for denial of the application pursuant to Business and Professions Code sections 19856, 19857 and subdivision (d) of section 19872.

(3) Any meeting or hearing following the provision of this communication may be delayed as necessary to allow for the full participation of all parties.

(f)(1)~~(d)~~ A member of the Commission who communicates on an *ex parte* basis with an applicant, the Bureau, or interested persons must publicly disclose the communication, and provide notices to both the applicant and Bureau pursuant to Section 12006. The notice shall contain ~~A~~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 ~~be disqualified~~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.

(2) A member of the Commission who has participated in an *ex parte* communication may be excluded from consideration of an application by ~~Disqualification may take place by:(1) The member's determination that withdrawal is warranted.(2) A~~an order ~~motion~~ of the Commission ~~upon~~ made at the request of the applicant.

(g)~~(c)~~ An employee ~~or agent~~ of the Commission may communicate and convey information or documents upon the merits of an application ~~pending disposition~~ as long as it is simultaneously conveyed to both the applicant and the Bureau so that they may participate in the communication.

~~(f) Where a proceeding is pending under both subsections (a) and (b), the more stringent relevant rule or remedial measure contained herein, under the Act or under Chapter 4.5 (commencing with section 11400) of Part 1 of Division 3 of Title 2 of the Government Code, shall apply.~~

b. **Alan Titus, Artichoke Joe's**: Mr. Titus notes that section 19872 includes three paragraphs each having their own duration in the process and that the proposed regulatory language does not follow that structure but instead installs its own structure. There are also a few concepts introduced in section 19872 which should be defined in regulation.

Recommended Response (b): This comment is accepted in part, and the proposed regulation has been revised. It should be noted that the Section 12012(b) was initially drafted prior to the Governor's Reorganization Plan No. 2. However, in light of initial applications being given to the Bureau first as opposed to the Commission, the language

of proposed Section 12012(b)(1) is no longer accurate. This section, shown above, has been revised to reflect the new process of application review.

c. **Robert Mukai, IGLS**: Mr. Mukai notes that the proposed regulation states what is not *ex parte* communication but does not clarify what is prohibited. Mr. Mukai provides a suggested revision, should it be intended that any communication not explicitly exempted is *ex parte* communication.

Recommended Response (c): This comment is rejected. Business and Professions Code section 19872 already specifies what is not allowed.

3. Subsection (b), paragraph (2), subparagraph (A), provides that communicating with the Commission or Commission staff is not considered *ex parte* if that communication pertains to procedures or practices that are not based upon the merits of the application. It also allows for comments on any topic that are made relative to a properly agendized matter at a public meeting or hearing.

a. **James R. Parrinello, Artichoke Joe's**: Mr. Parrinello expressed concern that the exception for procedural issues may allow for prejudicial procedural issues that could affect the fairness of the process. Mr. Parrinello suggests that section be revised to only allow uncontested procedural issues to be an exception for *ex parte*.

Recommended Response (a): This comment is rejected. Either party should be allowed to be in contact with Commission staff to discuss procedural issues not related to the merits of the application. Should those procedural comments go too far and end up violating *ex parte* limitations, there are other provisions to deal with this. Furthermore, this is entirely consistent with similar APA *ex parte* exceptions.

4. Subsection (b), paragraph (2), subparagraphs (B) and (C), provide that the Bureau, applicant or other interested party cannot communicate with an employee or agent of the Commission unless both the Bureau and applicant are provided with all information.

a. **James R. Parrinello, Artichoke Joe's**: Mr. Parrinello recommended that proof of service be required to demonstrate that the information was provided simultaneously.

Recommended Response (a): This comment is rejected. The Commission does not believe it is reasonable to require that every notice be supported by a proof of service. This would be inefficient. Communications occur via letter, email, or phone call and simply do not warrant a proof of service.

b. **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 Gambling Control 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.

c. **Tracy Buck-Walsh**: Ms. Buck-Walsh asked for clarification on what is an "interested person".

d. **James R. Parrinello, Artichoke Joe's**: Mr. Parrinello requested clarification as to who would qualify as "any other interested person." He included possible examples such as members of the public, commission staff members of other governmental agencies.

Recommended Response (b through d): This comment is rejected. 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.[3]

e. **Tracy Buck-Walsh**: Ms. Buck-Walsh asked for clarification if *ex parte* communication affected someone's ability to communicate with the Bureau.

Recommended Response (e): *Ex parte* communication rules affect only communication directly to members of the Commission or indirectly through employees of the Commission and do not deal with communication directly to either the applicant or the Bureau unless that communication is from a member or employee of the Commission. Reciprocal communications from the Bureau to the applicant, and other interested persons are also permissible.

5. Subsection (b), paragraph (2), subparagraph (D), provides an exception to *ex parte* communications to allow confidential information provided to the Commission to remain confidential.

a. **David Fried, CGA**: Mr. Fried expressed concern that there can be allowable disclosure between the Commission and the Bureau related to the licensing or discipline without disclosure to the applicant or licensee. Mr. Fried objects to the provision and suggests that revision be made so that the Commission receives only the redacted information available to the applicant.

[3] 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.

b. **Alan Titus, Artichoke Joe's**: Mr. Titus expressed concern that this subparagraph essentially allowed 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 that the Commissioners should not have full access to the Bureau's files.

c. **James R. Parrinello, Artichoke Joe's**: Mr. Parrinello expressed concern that the sharing of information with the Commission by the Bureau under this subparagraph would be manifestly unfair and a denial of due process as it would allow the Commission to receive *ex parte* information and then allow for a decision to be made based upon this information without the opportunity for the applicant to rebut it.

   Mr. Parrinello contends that the proposed rule is illegal and that the referenced statutes, sections 19822(b), 19868(b)(3) and 19868(c)(2), do not expressly authorize confidentiality in the context of an adjudicative hearing. In addition, the referenced statutes allow for any information to be maintained confidential, without regard to whether that information is actually confidential. While Mr. Parrinello continues his objection to the information being provided to the Commission, he does recommend that if the information continues to be allowed as an exception to *ex parte* communication that, at a minimum, the applicant be simultaneously noticed that such a communication did occur even if the contents are withheld.

d. **Marty Horan, Bureau**: Mr. Horan commented that he believes this subparagraph raises fair hearing and due process issues. Mr. Horan commented that it was his belief that the records of the Bureau are open to the Commission, providing that the matter is not currently open for investigation or current investigation that may be coming to the Commission for an ultimate decision. Mr. Horan stated that the concern of the Bureau is that if the Commission were to have access to current investigations it would prejudice the decisions.

Recommended Response (a through d): These comments are accepted in part and corresponding changes were made to the regulation. Initially, it is important to note that the Commission does not generally seek access to information that the applicant does not have. However, the plain reading of the statutes in conjunction allow for Commission access to all of the Bureau's files. When read together with the balance of the Gambling Control 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 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 that end, changes have been made in two instances. First, information that is confidential and used in support of a Bureau's investigation report on an application pending disposition before the Commission will be identified as confidential and redacted before being provided to the Commission and applicant.

Second, if the Commissioners believe that the disclosure of confidential redacted information is necessary for their decision, they shall inform the applicant and the Bureau of this desire along with when and where it will receive that information. This would allow the applicant the opportunity to challenge this action through any necessary judicial steps as he or she believes is appropriate. The revised language is provided under C.2.a, starting on page 9.

e. **Stacey Luna-Baxter, Bureau**: Ms. Luna-Baxter recommends the removal of subparagraph (D) as the relevant cited statutes already provide for the confidential treatment of Bureau information or documentation.

f. **Robert Mukai, IGLS**: Mr. Mukai recommends the removal of the subparagraph. Mr. Mukai opines that it is undesirable to attempt to resolve issues of Commissioner access to Bureau information through a rulemaking process that attempts to create a fair hearing processes. Mr. Mukai further recommends that issues of access should be handled during a proceeding based upon an appropriate motion before the presiding officer.

Recommended Response (e and f): These comments are rejected. The relevant statutes providing for the Bureau's treatment of confidential information do not address how the Commissioners may obtain access to that information when an application is pending disposition before the Commission or how that affects the due process rights of an applicant. Leaving these issues to future endeavors does not alleviate the present statutory ambiguity and arguably exacerbates the due process issues that might *potentially* arise. Therefore, a solution that weighs heavily in favor of the due process rights of the applicant against the competing interests of disclosure to the Commissioners in the public interest is warranted and appropriate.

6. Subsection (c) provides that if there is an *ex parte* communication to a member of the Commission, even if through an employee or agent of the Commission, then: (1) the information must be immediately provided to all parties; (2) any scheduled meeting or hearing may be delayed to allow for full participation by all parties; and, (3) that if the applicant is the cause of the *ex parte* communication that this may be a basis for denial.

a. **James R. Parrinello, Artichoke Joe's**: Mr. Parrinello repeated his request from C.5.c, page 14, that proof of service be provided.

Recommended Response (a): This comment has been addressed previously.

b. **James R. Parrinello, Artichoke Joe's**: Mr. Parrinello suggested that a direct reference be included within subsection (c) to show that subsection (d) is clearly the next step in consideration of an *ex parte* violation.

Recommended Response (b): This comment is accepted, in part. Revised language has been included in the revised proposed text under C.2.a, starting on page 9.

c. **James R. Parrinello, Artichoke Joe's**: Mr. Parrinello expressed a concern that the penalty for the applicant for violating *ex parte* prohibitions of possible denial was disproportionate than should another party violate *ex parte*.

Recommended Response (c): This comment is rejected. Business and Professions Code section 19872 already addresses the possible consequences of *ex parte* communications. The proposed text has attempted to balance those results as fairly as possible, providing that violation by the applicant can result in the denial specified in subdivision (d) of Business and Professions Code section 19872, with the ability for the applicant to request the disqualification of the Commissioner involved. Another solution has been included which provides for a delay in the evidentiary hearing to allow all parties to become familiar with the communication. Any other remedy would be specific to the facts of the particular *ex parte* communication.

d. **Robert Mukai, IGLS**: Mr. Mukai repeats his objection to "other interested persons" as addressed in C.4.b, page 13.

Recommended Response (d): This comment has been addressed previously.

7. Subsection (d) provides that if a member of the Commission participates in an *ex parte* communication, and a disqualification of the member would not leave the Commission without a quorum to act on the application, the Commission member may be disqualified based on the member's own determination that withdrawal is warranted or by an act of the Commission if requested by the applicant.

a. **James R. Parrinello, Artichoke Joe's**: Mr. Parrinello expressed concern that the requirement for a member of the Commission to disclose an *ex parte* communication was not robust enough and should include the requirement of a notice to each party disclosing the communication.

Recommended Response (a): This comment is accepted, in part. The appropriate revisions are included in the revised proposed text under C.2.a, starting on page 9.

b. **James R. Parrinello, Artichoke Joe's**: Mr. Parrinello recommends a change in the wording of paragraph (2) of subsection (d) to improve clarity. Mr. Parrinello also suggested a revision to allow any party to be able to file a motion to request the disqualification of a Commissioner and that such an event should be reviewed by an Administrative Law Judge and not by the Commission.

Recommended Response (b): This comment is accepted in part. The regulation already provides that an applicant may request that the full Commission disqualify a member of the commission after the Commissioner discloses an impermissible communication and that Commissioner has not already recused him or herself. However, there is no statutory authority to allow for the review of the potentially disqualifying disclosure by an

Administrative Law Judge. Indeed the similar and related APA process requires the members to determine any motion for disqualification. The revised proposed text is provided under C.2.a, starting on page 9.

c. **Robert Mukai, IGLS**: Mr. Mukai commented that the use of the word "motion" is incorrect. The Commission does not act by motion and should instead refer to an order of the Commission, that the Commission would make a motion for an order at the request of an applicant.

Recommended Response (c): This comment is accepted in part. The only authority regarding disqualification of a Commissioner at all is under Business and Professions Code section 19872(d) which states that a Commissioner may be disqualified and that the Commission shall implement this by regulation. Corresponding changes have been made to the regulation. The revised proposed text is provided under C.2.a, starting on page 9.

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

e. **Commissioner Schuetz:** Commissioner Schuetz stated that he does not agree that any method should be available to remove a Commissioner against his will even if that allows for grounds for an appeal.

f. **Commissioner Hammond:** Commissioner Hammond stated that there is probably a better way than to have the Commission consider disqualifying a member. Commissioner Hammond suggested that it would just be up to the Executive Director or Chief Council to convince the Commissioner that they had a conflict and should recuse themselves.

g. **Commissioner Conklin:** Commissioner Conklin stated a belief that it harms the applicant to have the Commissioners making determinations about each other and suggested that someone who is not a Commission member make that decision.

Recommended Response (d through g): 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(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 Council, or the presiding officer, would be problematic as it would be difficult if not impossible to ensure proper independence. The revised proposed text is provided under C.2.a, starting on page 9.

8. Subsection (e) provides that Communication by employees of the Commission must also be provided to all parties if pertains to a pending application.

a. **James R. Parrinello, Artichoke Joe's**: Mr. Parrinello proposes that once a hearing has been set there should be no conveyance of information or documents to the Commission by Commission staff if it is upon the merits of the application. Mr. Parrinello expresses concern that staff could cause considerable prejudice towards an applicant.

Recommended Response (a): This comment is rejected. This section does not concern providing information to Commissioners at any particular point in time. Rather, it relates to all parties and states that it is not *ex parte* and communication is permissible provided it is simultaneous to both parties.

9. Subsection (f) provides that if there is ever a conflict between the *ex parte* provisions of the APA and subsection (b), that the more stringent of the two rules or remedial measures shall apply.

a. **Robert Mukai, IGLS**: Mr. Mukai repeats his general comment pertaining to Section 12012, above.

Recommended Response (a): This comment is addressed as a general comment, above.

D. ADOPT SECTION 12015. WITHDRAWAL OF APPLICATIONS.

Previous Section 12047 is moved to with 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. The following comments pertain to this Section.

a. **Commissioner Norman H. DesRosiers, San Manuel Band of Mission Indians (San Manuel)**: Commissioner DesRoisers suggests that language be added to the beginning of this section clarifying that once submitted an applicant cannot withdraw an application without the approval of the Commission of a written request. Further, Commissioner DesRosiers suggests adding language indicating that there is no guarantee that a withdrawal request will be approved.

Recommended Response (a): This comment is accepted, in part. The appropriate revisions are included in the revised proposed text.

(a) A request by an applicant to withdraw the submitted application may only be made ~~at any time~~ prior to the ~~final action by the~~ Bureau issuing its primary report~~taking final action by issuing a recommendation on the application~~. The request shall be made in writing to the Bureau and the Commission. ~~The Commission, pursuant to Business and Professions Code section 19869, may deny the request or may grant the request, with or without prejudice.~~ Upon receipt of the request to withdraw, Commission staff shall send written confirmation of receipt pursuant to Section 12006. ~~This written confirmation shall include a non-exhaustive list of possible consequences of withdrawal.~~ The Bureau shall stay its background investigation pursuant to Business and Professions Code section 19868 and the Executive Director shall place the request and any information provided by the Bureau, before the Commission at a regularly scheduled meeting for consideration under Section 12054.

2. Subsection (a) specifies that withdrawal may be requested at any time prior to the Bureau providing its report to the Commission. The Commission is required to send to the applicant a notice of confirmation which will include a non-exhaustive list of possible consequences of withdrawal. The withdrawal request shall be placed by the Executive Director on a regularly scheduled meeting agenda for Commission consideration.

a. **Commissioner Norman H. DesRosiers, San Manuel:** Commissioner DesRoisers expressed concern that the language does not expressly prohibit the applicant from making a request to withdraw after the Bureau has made its recommendation. Commissioner DesRoisers suggests adding more explicit language.

Recommended Response (a): This comment is accepted and changes have been made appropriately to the proposed text. The appropriate revision is included in the response for the comment D.1.a on page 19.

b. **Robert Mukai, IGLS**: Mr. Mukai expresses concern that the provision requiring a non-exhaustive list to the applicant requires Commission staff to provide an incomplete list and recommends a revision to the language which instead doesn't requires that the list be exhaustive

Recommended Response (b): This comment is accepted, in part. There are an infinite number of events that could happen as a result of any action and therefore it makes little sense to specifically exclude something in order to ensure compliance. The intent is to ensure the applicant's due process rights are protected through fair notice, but not penalizing staff for providing what most assuredly would be an incomplete list.

c. **Alan Titus, Artichoke Joe's**: Mr. Titus made a general comment pertaining to "final action' that is addressed in A.6.c, page 4.

d. **Robert Mukai, IGLS**: Mr. Mukai repeats his previous comment pertaining to the use of "final action", which is addressed above.

Recommended Response (c and d): These comments have been addressed previously.

3. Subsection (b) specifies that the Commission approve a withdrawal the request with or without prejudice.

a. **Commissioner Schuetz:** Commissioner Schuetz recommended the removal of the "with prejudice" option, as any person who wants out of the application process should be allowed out and that any derogatory information can just be saved until a future application is submitted, if one ever is, and that there is no reason to force someone to continue a process that they no longer want to participate in.

b. **Tracy Buck-Walsh**: Ms. Buck-Walsh commented that an applicant is paying for a service, and that should they wish to withdraw their request for that service, that should be enough to end the processes.

c. **Commissioner Conklin:** Commissioner Conklin expressed concern that withdrawal "with prejudice" involves that Commission making a decision without the benefits of a complete Bureau report and investigation.

Recommended Response (a through c): These comments are appreciated; however, Business and Professions Code section 19869 provides explicit authority to allow the Commission to determine a withdrawal is "with prejudice."

4. Subsection (c) 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 (a): This comment is 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

5. Subsection (e) specifies that if a withdrawal request is denied that the Bureau's review of the application must proceed.

a. **Commissioner Norman H. DesRosiers, San Manuel:** Commissioner DesRoisers suggests an inclusion of possible examples that would justify a denial of a request to withdraw.

Recommended Response (a): This comment is accepted, in part, with corresponding changes to provide for the standards with which a determination of prejudice can be determined.

> (b) The Commission may grant or deny a withdrawal request ~~with or without prejudice~~ based upon the public interest and the applicable provisions of the Act, including for example, where the applicant has failed to respond to Bureau or Commission inquires, or preliminary information has been provided by the Bureau which would indicate grounds for mandatory denial under Business and Professions Code section 19859. Any granting of a withdrawal request may be done with our without prejudice based upon the public interest and the applicable provisions of the Act.

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. The following comments are pertaining to this section.

a. **Stacey Luna-Baxter, Bureau**: Ms. Luna-Baxter suggests that this section be incorporated into Section 12015 and that instead of applications being abandoned they be "deemed a withdrawal." This would then allow the process to follow the same as that of withdrawal requests, including providing the opportunity for the Bureau to provide comments and for the Commissioners to vote to approve or deny that request.

b. **Robert Mukai, IGLS**: Mr. Mukai suggested that this section be removed and incorporated into Section 12015 with the concept of "deemed withdrawn." This would provide the Bureau the ability to have an opportunity to place on the record reasons why the application should instead be denied.

Recommended Response (a and b): These comments are rejected. Whether calling the concept "deemed withdrawn" or "abandoned," the concept is the same. The drafted provisions provide the Bureau with more flexibility in addition to all the proposed protections. Unlike the suggestions, the proposal reiterates the Bureau's inherent authority with a previously requested ability to abandon an application prior to final action should the applicant be non-responsive without having to seek Commission approval through a contortion of the language in Business and Professions Code section 19869. In addition, the only time the Executive Director is proposed to have the authority to deem an application abandoned is when the Bureau has either made no

recommendation or recommended approval. In contrast, for applications where denial has been recommended, only the Commissioners could deem the application abandoned. Current practice is to allow anyone to comment, especially the Bureau, prior to Commission action.

c. **Alan Titus, Artichoke Joe's**: Mr. Titus made a general comment pertaining to "final action' that is addressed in A.6.c, page 4.

d. **Robert Mukai, IGLS**: Mr. Mukai repeats his previous comment pertaining to the use of "final action", which is addressed in A.6.b, page 3.

Recommended Response (c and d): These comments have been addressed previously.

e. **Robert Mukai, IGLS**: Mr. Mukai suggests restricting abandonment determinations to only initial applications.

Recommended Response (e): This comment is rejected. There is no compelling reason provided that abandonment should be limited to initial applications. An abandonment of a renewal application would simply allow that license or other approval to remain until expiration.

2. Subsection (a) specifies the conditions under which the Chief of the Bureau may deem an application abandoned.

a. **Robert Mukai, IGLS**: Mr. Mukai repeats his previous comment pertaining to a non-exhaustive list from D.2.b, page 19.

Recommended Response (a): This comment has been addressed previously.

b. **Alan Titus, Artichoke Joe's**: Mr. Titus noted that during the Bureau review process there shouldn't be much need for Commission inquiries and suggested that it be removed from subparagraph (A) or paragraph (1).

Recommended Response (b): This comment is accepted and the suggested changes have been made to the proposed text.

> (a)(1) At any time before the Bureau has issued ~~taken~~ its primary report ~~final action~~, the Chief of the Bureau may deem an application abandoned based upon the following:
> (A) Failure of the applicant to respond to Bureau ~~or Commission~~ inquiries; or,
> …

3. Subsection (b) specifies the conditions under which the Executive Director may deem an application abandoned.

a. **Stacey Luna-Baxter, Bureau**: Ms. Luna-Baxter expressed concern that the Commission would approve abandonment without allowing consideration of the Bureau's investigation. In addition, Ms. Luna-Baxter expressed concern that applicants could request abandonment because the "application is no longer being pursued…" Ms. Luna-Baxter also continued her recommendation that the term "final action" not be used.

Lastly, Ms. Luna-Baxter suggested removal of the requirements for return of deposit as it is duplicative of the Bureau's own regulations, Title 11, CCR Section 2037(a).

Recommended Response (a): Much of this comment has been addressed previously. The balance of this comment is rejected. This subsection only allows for the Executive Director to deem an application abandoned, not approve a request for abandonment. In addition, the "application no longer being pursued…" language is followed by examples of an applicant no longer being employed or being deceased. However, the proposed regulatory language assumes that should an applicant no longer be interested in receiving an application, there is no reason to force them into such a process, especially where the Bureau did not recommend denial.

b. **Robert Mukai, IGLS**: Mr. Mukai suggests paragraph (2) be revised to remove the section allowing Commission discretion. Mr. Mukai states that the statutes do not provide the Commission with this discretion. In addition, Mr. Mukai recommends the deletion of paragraph (4) as not needed.

Recommended Response (b): This comment is rejected. The Gambling Control Act provides the Commission with broad authority regarding the handling of applications. Where the applicant and the Commission do not wish to move forward on an application, there is nothing in the Act that would require Commission action nor can anyone other than the Commission force this action. Thus abandonment at the Commissions' discretion is inherent and authorized. In addition, the entire concept of abandonment assumes that in some cases the applicant is non-responsive. This could make it impossible for a refund to be provided to the applicant. The Bureau should not be expected to return the unused portions of the deposit in all cases as that may be impossible. In those cases, there are other statutes that guide unclaimed property.

c. **Robert Mukai, IGLS**: Mr. Mukai provides a grammatical suggestion that subparagraph (C) refer to "its designated agent" instead of "their designated agent" since the possessive refers to the applicant in the singular.

Recommended Response (c): This comment is accepted. The appropriate revision is included in the revised proposed text.

(C) Notice by the applicant or ~~their~~his, her or its designated agent that the application is no longer being pursued ~~because, for example, the~~

~~applicant is no longer employed in a capacity that requires Commission consideration or is deceased~~.

d. **Marianne Estes**: Ms. Estes commented that current Commission policy is to allow for the abandonment of tribal key applications upon request or indication that the applicant is no longer working. The reason for this is that the application involves the Tribal Gaming Agency (TGA). Ms. Estes expressed concern that not allowing abandonment of these applications may cause conflict with the Tribal-State Gaming Compacts (Compacts) under which the applications are reviewed by the Commission.

e. **Tina Littleton**: Ms. Littleton commented that the Commission only reviews tribal key suitability applications for applicants with valid TGA licenses and should those TGA licenses no longer be valid there is no longer any need to continue the suitability determination on the part of the Commission. The compacts say the Commission only reviews suitability applications for those applicants who have valid TGA license.

f. **Stacey Luna-Baxter, Bureau**: Ms. Luna-Baxter expressed concern that allowing an applicant for a tribal key application to be automatically abandoned upon request would deny the Bureau the ability to present reasons for denial. In addition, Mr. Luna-Baxter expressed concern that failing to continue the process would not prevent the same person from applying at another casino and forcing the Bureau to begin the review process anew.

g. **Aisha Martin-Walton, Bureau**: Ms. Martin-Walton expressed concern that the allowing the tribal keys to request abandonment denies the Bureau the ability to go on record, even if a new application doesn't truly require the Bureau to begin the process again by reusing any old investigation information.

h. **Commissioner Hammond:** Commission Hammond expressed concern, based on comments, whether this proposal would be in conflict with the compacts and request that revisions be made so that it does not.

Recommended Response (d through h): These comments are accepted in part. Comments d. and e. appear to be in support of the regulation as written and require no revision. As for Comments f. and g., where the Bureau has recommended the denial, abandonment can only occur in an open meeting and by Commission action. The Bureau would absolutely be able and encouraged to present any facts that are pertinent to the application. However, where comments d. and e. would be inconsistent with f. and g., and a Tribal license was no longer valid, no denial would be necessary or indeed possible. Comment h. correctly observes this potential disconnect between the two. Where there is no underlying tribal license, the Commission potentially does not have jurisdiction under the Compacts to determine suitability under state law and send a matter to an evidentiary hearing. No change is required for this response.

i. **Commissioner Conklin:** Commissioner Conklin suggested the "for example" portion of the section be removed.

Recommended Response (i): This comment is accepted and corresponding changes to the regulation have been made and are provided at E.3.c, on page 24.

F. ADOPT SECTION 12035. ISSUANCE OF INTERIM RENEWAL LICENSES.

The term "interim license" is referenced briefly in Business and Professions Code section 19841, but no definition or other information is included in the statute. The Commission has already created a category of "interim gambling license" for use during specific qualifying events. This proposal adds a definition of "interim license" to Section 12002, and clarifies that an "interim license" includes both (1) an interim gambling license issued pursuant to Section 12349, and (2) an interim renewal license issued pursuant to Section 12035, created in this proposal.

1. Subsection (a) specifies that interim renewal license is to be granted at any time an application is to be sent to an evidentiary hearing or if an accusation is pending under Chapter 10.

a. **David Fried, CGA**: Mr. Fried expressed a general comment that included this section that is addressed in C.1.a, page 7.

Recommended Response (a): This comment has been addressed previously.

b. **Robert Mukai, IGLS**: Mr. Mukai recommends replacing the reference to "Chapter 10 of this division" in paragraph (3) with a reference to Business and Professions Code section 19930 as this is the operative section under which Chapter 10 operates.

Recommended Response (b): This comment is accepted, in part. The appropriate revisions are included in the revised proposed text.

(3) An accusation is pending pursuant to Business and Professions Code section 19930 and under Chapter 10 of this division.

2. Subsection (b) specifies the conditions that are to be placed on the interim renewal license.

a. **Stacey Luna-Baxter, Bureau**: Ms. Luna-Baxter expressed concern that any existing conditions or limitations would carry over without consideration to any changes in circumstances which may warrant modification. Ms. Luna-Baxter recommends language that has the existing conditions be at a minimum.

b. **Robert Mukai, IGLS**: Mr. Mukai suggests that new conditions be allowed to be imposed on an interim renewal license. Mr. Mukai recommends revisions to the language to clarify that existing limitations are at a minimum.

Recommended Response (a and b): These comments are rejected. The purpose of the evidentiary hearing is to provide a formal venue for the Commission to consider the denial and limitation of licenses or other approval. In conjunction with the evidentiary hearing, the interim renewal license provides a process which functions automatically during the evidentiary hearing process. To add new conditions to an interim renewal license is not automatic and is counterproductive, requiring another evidentiary hearing. Furthermore, adding conditions without consent and review is contrary to the intent of these proposed regulations.

c. **Robert Mukai, IGLS**: Mr. Mukai provides grammatical suggestions that in paragraph (2) the adverb "sooner" should be replaced by "earlier," use as an adjective, to modify "date." In addition, the phrase "has not, or will not be concluded" should be corrected to read, "has not been, or will not be concluded."

Recommended Response (c): This comment is accepted. The appropriate revisions are included in the revised proposed text.

> (2) An interim renewal license shall be valid for a period of two years from the date the previous license expires, or until a decision is final under Section 12066, whichever is earlier~~sooner~~, and is not subject to renewal. The Commission may issue additional interim renewal licenses if the hearing process has not been, or will not be concluded by the expiration date of the current interim renewal license.

G. ADOPT ARTICLE 3. HEARING PROCEDURES AND DECISIONS.

Article 3 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.

a. **Alan Titus, Artichoke Joe's**: Mr. Titus recommends changing the title of this article to "Procedures for Hearings on Applications" to make it clear that it governs hearings on applications and not accusations or disciplinary hearings.

Recommended Response (a): This comment is accepted, in part. The appropriate revisions are included in the revised proposed text.

> ARTICLE 2~~3~~. PROCEDURES FOR HEARINGS AND MEETINGS ON APPLICATIONS ~~Procedures and Decisions~~.

b. **Alan Titus, Artichoke Joe's**: Mr. Titus recommends a general reordering of the sections within Article 3 to better reflect the chronological order of the regulations.

Recommended Response (b): This comment is accepted, in part. The appropriate revisions are included in the revised proposed text but are too substantial to include here.

c. **Robert Mukai, IGLS**: Mr. Mukai provides a general suggestion that the Commission should reconsider if these regulations are in the interest of the applicant, the Bureau or the public. Mr. Mukai believes that the regulations are lengthy, complicated and create a procedural maze.

Recommended Response (c): This comment is rejected. These regulations serve as a map to the applicant, the public, and the Bureau regarding the hearing process before the Commission. They can be made clearer, but the elimination of a complicated map does not make the complicated terrain simple and easy to understand. Furthermore, in the absence of a delineated process, the Commission would still be required to take action consistently on applications, at least internally, which could result in the use of underground regulations.

d. **Marty Horan, Bureau**: Mr. Horan inquired if this regulatory package would mean that the Commission was no longer willing to make a "tentative" decision of denial without an evidentiary hearing.

Recommended Response (d): This comment is accepted. It is the intent of this proposed process to get to a final action of the Commission sooner. The old process had the Commission providing the applicant with a "decision" which was only effective if the applicant did not request an evidentiary hearing. As envisioned, this proposed process would consider the application at an evidentiary hearing only when appropriate with appropriate limitations in the scope of the hearing. The Commissioners would no longer provide the applicant with the psychological hurdle of a denial decision, even if that decision was entirely tentative and subject to the results of the evidentiary hearing, if requested. No change is required for this response.

H. AMEND SECTION 12050. COMMISSION MEETINGS; GENERAL PROCEDURES; SCOPE, RESCHEDULING OF MEETING.

The current Section 12050 is amended, divided, and renumbered as Sections 12056, 12058 and 12060. The new Section 12050 provides general procedures regarding the hearing process.

1. Subsections (a) and (b) clarify Commission authority and that this article does not apply to disciplinary proceedings which helps all parties understand their rights and obligations.

a. **David Fried, CGA**: Mr. Fried expressed a general comment that included this section that is addressed in C.1.a, page 7.

Recommended Response (a): This comment has been addressed previously.

b. **Stacey Luna-Baxter, Bureau**: Ms. Luna-Baxter recommended the deletions of these two subsections as they do not deal with the scope created by the title of this section.

c. **Robert Mukai, IGLS**: Mr. Mukai recommends the deletion of both of these subsections, but if they are kept Mr. Mukai has recommended a grammatical correction to subsection (a) for the construction of the expression be restated:

> Nothing in this article is intended to limit the manner in which the Commission reviews an application, or otherwise limit its authority or discretion under the Act.

Recommended Response (b and c): These comments are accepted in part and corresponding changes have been made to the regulations. However, these sections will not be deleted as they are important and provide clarity to the scope of Article 3.

> (a) Nothing in this ~~A~~article is intended to limit the manner in which the Commission~~'s authority or discretion under the Act or this division including, without limitation, the way it~~ reviews an application, or otherwise limit its authority or discretion under the Act.

2. Subsection (c) provides notice requirements that are based on the type of item the application will be agendized for.

a. **David Fried, CGA**: Mr. Fried expressed a concern that the applicant should be provided with any additional documentation provided by the Bureau to the Commission at the same time it is provided to the Commission.

Recommended Response (a): This comment is accepted. Section 12012 covering *ex parte* communications requires that any information, with limited exceptions, must be provided to the applicant if it is provided to the Commission. It would not be consistent with the applicant's due process rights of notice and opportunity to respond to provide otherwise. No change is required for this response.

b. **Alan Titus, Artichoke Joe's**: Mr. Titus comments that the use of the term meeting to refer to initial meetings of the Commission that are not evidentiary hearings is confusing as the term meeting is used within Business and Professions Code sections 19870 and 19871 to refer to the evidentiary hearing process. In addition, the proposed regulations define "the meeting" as a GCA hearing. Mr. Titus recommends revising the term to that of 'preliminary review meeting'.

Mr. Titus also recommends using the word 'considered' over 'heard' for the preliminary review meeting. Lastly, Mr. Titus believes that the reference to Section 12058 may be a typo as it is Section 12056 that governs evidentiary hearings.

Recommended Response (b): This comment is rejected. Both the Bagley-Keene Open Meeting Act and the Gambling Control Act use the term "meeting" to refer to their relevant gatherings. In the definition of "GCA Hearing", we attempt to provide clarity by introducing this new term to refer to meetings under the Gambling Control Act so that the use of meeting can be continued to be used for those meetings under the Bagley-Keene Open Meeting Act.

3. Subsection (e) 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 it is unfair to suddenly and without notice require the applicant to provide sworn testimony. As the applicant is entitled to have legal counsel present when under oath, the applicant should not be required to have to prepare for and have legal counsel attend every meeting as if live testimony will be taken when the chances are very slim. Mr. Titus recommends that sworn testimony on an application should only be taken when there has been notice to the applicant that such will be necessary.

b. **Commissioner Hammond:** Commissioner Hammond expressed the belief that even if oaths are not required, the Commission may still take the statements of the applicant as given, and any future statements that are in conflict with past, even unsworn statements, could still reflect poorly on the applicant.

c. **Marty Horan, Bureau**: Mr. Horan commented that it was his belief that it was the purpose of the evidentiary hearing to bring forth the applicant under oath. Mr. Horan did believe that doing it at non-evidentiary hearing meetings might expedite the process.

d. **Chairman Lopes:** Chairman Lopes noted that initial contemplations on the draft proposed language included having everyone sworn in at all times.

Recommended Response (a through d): These comments are accepted in part. It is the Commission's discretion and authority to require testimony to be sworn during Commission meetings. This requirement can be included in the notices as detailed in this section.

(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 ~~and a copy of any Commission staff report and any recommendation~~ at least 10 days prior to the meeting date. Notice shall be given pursuant to Section 12006.

(1) ~~If the application is to be scheduled as a consent item the notice shall inform the applicant of the following:~~

~~(A) The date, time and location of the Commission meeting at which the application is scheduled to be heard;~~

~~(B) That the item will not be discussed but may be rescheduled as an agenda item at a subsequent meeting at the discretion of a the Commissioner or the Executive Director.~~

~~(2)~~ If the application is ~~to be~~ scheduled as an agenda item, the notice shall inform the applicant of the following:

(A) ~~The date, time and location of the Commission meeting at which the application is scheduled to be heard;~~

~~(B)~~ That the applicant will be afforded the opportunity to:

1. Address the Commission by way of an oral statement, written statement, or both; and,

2. Submit documents in support of the application~~;, provided~~ however, ~~that~~ documents which are not provided to the Commission and Bureau with sufficient time for consideration may result in the documents not being considered or the application being continued, at the Commission's discretion.

(B)~~(C)~~ That the application may be rescheduled for consideration at an evidentiary hearing pursuant to Section 12058, by Commission action.

(C)~~(D)~~ Any testimony may be required to be sworn.

(2)~~(3)~~ If the application is to be scheduled at an evidentiary hearing, pursuant to subsections (a) or (b) of Section 12060, the notice of hearing shall inform the applicant of the following:

(A) The date, time and location of the evidentiary hearing at which the application is scheduled to be heard;

(B) The date, time and location of the pre-hearing conference, pursuant to subsection (f) of Section 12060;

(C) The individual assigned, pursuant to subsection (c) of Section 12060, as the presiding officer and his or her contact information;

(D) That the applicant will be afforded the opportunity to:

1. Address the Commission by way of an oral statement, written statement, or both;

2. Submit documents in support of the application;

3. Call, examine, cross-examine and impeach witnesses; and,

4. Offer rebuttal evidence.

(E) That a Notice of Defense, CGCC-ND-002 (New 10/13), which is attached in Appendix A to this chapter, will be included unless already provided by Commission staff or the Bureau.

(F) That the waiver of an evidentiary hearing may result in a default decision being issued by the Commission based upon the primary report, any supplemental reports by the Bureau and any other documents or testimony already provided or which may be provided to the Commission,

or that the hearing may be held as originally noticed without applicant participation.

e. **Robert Mukai, IGLS**: Mr. Mukai suggests that this subsection is both unclear and repetitive of statute and should therefore be deleted. If not deleted, Mr. Mukai provides a grammatical suggestion that the word "they" within the sentence leaves open the interpretation of who may swear in a witness.

Recommended Response (e): This comment is accepted, in part with corresponding changes to the text regarding the grammatical suggestion. However, Section 12050 is not part of an evidentiary hearing and therefore there should be no assumption that anyone speaking before the Commission is providing "oral evidence." This subsection informs that testimony could or could not be sworn because Business and Professions Code section 19871 does not apply to meetings that are not consistent with section 19870.

(e) Individuals who provide testimony at a Commission meeting may be sworn in by a member of the Commission~~ers~~ or the Executive Director~~as they deem appropriate~~.

I. ADOPT SECTION 12052. BUREAU RECOMMENDATION AND INFORMATION; COMMISSION STAFF RECOMMENDATION.

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. Section 12052 details the manner in which any recommendation shall be provided to the applicant and how the information may be considered by the Commission.

1. The following comments are pertaining to this section.

a. **David Fried, CGA**: Mr. Fried expressed a concern that included this section that is addressed in H.2.a, page 28.

Recommended Response (a): This comment has been addressed previously.

b. **Robert Mukai, IGLS**: Mr. Mukai proposes that this section is unnecessary and should be deleted as it poorly parrots requirements already in statute that need no reiteration in an agency regulation.

Recommended Response (b): This comment is rejected. This section provides helpful guidance and instruction to the applicant, Bureau, Commission and indeed an Administrative Law Judge which clarifies and expands upon statute.

2. Subsection (a) specifies that when final action is issued with a recommendation to deny or limit a license that the Bureau must provide to the applicant specific documentation.

a. **David Fried, CGA**: Mr. Fried expressed a general comment that included this section that is addressed in C.5.a, page 14.

b. **James R. Parrinello, Artichoke Joe's**: Mr. Parrinello repeated his comment addressed in C.5.c, page 14.

c. **Alan Titus, Artichoke Joe's**: Mr. Titus made a general comment pertaining to 'final action' that is addressed in A.6.c, page 4.

d. **Robert Mukai, IGLS**: Mr. Mukai repeats his previous comment pertaining to the use of "final action", which is addressed in A.6.b, page 3.

Recommended Response (a through d): These comments have been addressed previously.

e. **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 (e): This comment is rejected. The proposed regulations provides specificity to the requires 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.

f. **Robert Mukai, IGLS**: Mr. Mukai expresses concern that in the documents required to be provided to the applicant, a final report is included. Mr. Mukai notes that the Bureau does not always issue a report and that any report would include a recommendation. In addition, any report may not be final.

Mr. Mukai commented that the references to Business and Professions Code section 19868, subdivisions (b)(2) and (c)(3) did not need to be included as they provide their full protection directly through the statute. In the event that this paragraph is maintained, Mr. Mukai has provided a recommended grammatical correction that the words "that is" should be deleted so that the phrase "inconsistent with [the applicable statutory section]" will no longer be an adjectival clause incorrectly modifying the compound noun "documents or information," and will instead be an adverbial clause correctly modifying the verb "provide."

Recommended Response (f): This comment is rejected. The subsection presupposes that the Bureau has taken its "final action" with a recommendation to deny or limit an application. This means that this section does not apply when no recommendation is issued. In reference to Business and Professions Code section 19868, subdivisions (b)(2) and (c)(3), in a part of the regulation where a broad list of information is required to be provided, for clarity, it is important to make note of when information is exempt for the

requirement. However, as previously noted, "final report" and "final action" have been removed and replaced with "primary report."

> (a) When the Bureau issues ~~taken~~ its primary report ~~final action~~ with a recommendation to deny, limit, restrict, or condition a license, permit, finding of suitability, renewal, or other approval, as described in Business and Professions Code section 19868, subdivisions (b) and (c):
> (1) The Bureau shall provide to the applicant a copy of the following:
> (A) The ~~final~~primary report which shall include any Bureau recommendation to the Commission.
> …

3. Subsection (b) 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. **James R. Parrinello, Artichoke Joe's**: Mr. Parrinello proposes that this paragraph is unnecessary and should be deleted. As the Bureau's recommendation is not evidence it should already have no weight as actual evidence. As the Commission's staff isn't even charged with investigation there should be even less of a need for this clarification.

b. **Stacey Luna-Baxter, Bureau**: 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.

c. **Robert Mukai, IGLS**: Mr. Mukai recommends that this subsection be deleted as it serves no purpose. Mr. Mukai also expresses concern that both the Bureau and Commission staff's recommendation are referenced together despite the Gambling Control Act making no provision for any recommendation from Commission staff.

Recommended Response (a through c): These comments are accepted, in part. The Commissioners must make a decision regarding the suitability of applicants and it is important to clarify how any recommendations which may be provided 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 to the APA. That is not appropriate under the Gambling Control Act. A Bureau recommendation is based on 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. As the revised proposed regulations do not include any provisions for the segregation of Commission staff, it is no longer appropriate for staff to be providing an advocate position. As such, the regulation has been revised:

(b) The Commissioners, or Administrative Law Judge~~,~~ sitting on behalf of the Commission at an APA hearing, will determine what, if any, significance the Bureau's recommendation ~~and the Commission's staff recommendation~~ shall have regarding the merits of the application. The Commissioners and Administrative Law Judge are not bound by the recommendation's~~'~~ rationale or conclusions in any way.

J. 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) specifies the options the Commission can take in regards to an application at a non-evidentiary hearing.

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

b. **Robert Mukai, IGLS**: Mr. Mukai recommends explicitly allowing the Commission to apply conditions and deny an application for mandatory reasons at non-evidentiary hearings.

Recommended Response (a and b): These comments are rejected. 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 section 19870 and 19871 regardless of whether there are permissive 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. While the applicant may or may not wish to go through the wasted effort, an applicant's statutory and due process rights take precedence over Commission and Bureau efficiency.

c. **Alan Titus, Artichoke Joe's**: Mr. Titus recommended that if the Commission elects to hold an evidentiary hearing to consider a result stricter than the recommendation of the Bureau, the Commission needs to instruct the Bureau and the applicant on what evidence it wants presented and the position the Bureau should advocate.

Recommended Response (c): This comment is accepted in part. The proposed regulation has been revised to require the Commission to provide information on issues to be considered beyond those included in the recommendation of the Bureau at the meeting. It is however not the role of the Bureau to present evidence in support of a

particular position provided by the Commission, but the duty of the applicant to provide evidence in support of licensure or other approval. The Bureau however does have a very important and fundamental role in providing the requested information.

> (2) Elect to hold an evidentiary hearing in accordance with Section 12056 and, when for a renewal application, issue an interim renewal license pursuant to Section 12035. The Commission shall identify those issues for which it requires additional information or consideration related to the applicant's suitability.

d. **Robert Mukai, IGLS**: Mr. Mukai expressed concern that there is no indication of how the Commission can elect an evidentiary hearing, nor is there a way for the applicant or Bureau to request an evidentiary hearing.

Recommended Response (d): This comment is accepted in part. Section 12054 clearly states, "Commission may take…one of the following actions…elect to hold an evidentiary hearing…" There is no provision for either the applicant or Bureau 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 Bureau and applicant. Corresponding changes have been made to make clear that the applicant and Bureau may be provided the opportunity to address the Commission. No change is required for this response.

e. **Commissioner Conklin:** Commissioner Conklin inquired if an evidentiary hearing would be required to add conditions if the applicant was willing to consent.

Recommended Response (e): This comment is accepted. The "…but is not limited to taking…" language was intended to allow situations that included this comment; however, to make it more clear the draft proposed regulation has been revised to explicitly allow for conditions to be approved upon consent of the applicant without an evidentiary hearing. No change is required for this response.

f. **Commissioner Conklin:** Commissioner Conklin commented that the Commission should be able to impose conditions on a license at a non-evidentiary hearing meeting and that it would then be the burden of the applicant to request an evidentiary hearing.

Recommended Response (f): The comment raises an important issue about conditions in contrast to denials. Generally, applicants are willing to assent to a condition which renders the necessity of evidentiary hearings moot. However, where they are not willing to assent to those conditions the same statutory or due process issues revolving around the denial of a license apply for imposing conditions on a new or renewal license. Business and Professions Code section 19870 deals with the approval, conditioning and denial of a license together.

As approval of an application is the desired goal of any applicant, the proposed regulation assumes that where the application is approved the need for a full evidentiary hearing is impliedly waived. In contrast, for conditioning and denials, the applicant does not receive the desired outcome so the Commission cannot presume a waiver of their statutory and due process rights. As a result, the proposed regulations require an evidentiary hearing occur under Business and Professions Code section 19870 and 19871 to impose conditions. Creating a situation where a party must request an evidentiary hearing to challenge the imposition of a condition might move the goal posts a bit. However, there will ultimately be little gained by creating a divergent tract between conditions and denials where consent is not given. The same result is an evidentiary hearing; either the applicant requests an evidentiary hearing, or participates in the evidentiary hearing. In contrast, if the applicant consents to the condition, or does not want an evidentiary hearing, the condition would be imposed. As previously noted a revision has been included for when an applicant chooses to consent to the conditioning of a license.

g. **Marty Horan, Bureau**: Mr. Horan expressed a concern that the automatic requirement to move denials to evidentiary hearings could result in the Bureau preparing for unnecessary evidentiary hearings, including bearing the costs for such preparation.

h. **Stacey Luna-Baxter, Bureau**: Ms. Luna-Baxter expresses concern that this process does not give the applicant the opportunity to get out of the process. The current process allows for the applicant to accept the "tentative decision" of denial and avoid the evidentiary hearing process, this one does not.

i. **Commissioner Conklin:** Commissioner Conklin expressed concern that having an applicant wave their right to an evidentiary hearing at a non-evidentiary hearing meeting may cause due process issues as the applicant would be making such a call on the spot, possibly without council present and not fully understanding the impacts of their decision.

Recommended Response (g through i): These comments are accepted. The form Notice of Defense, CGCC-ND-002 (New 10/13) has been added to the proposed regulations. This form would provide the applicant the ability to "get out of the process" should they not want to continue; in addition, a failure to submit this form would be considered the same as a submitted waiver. This document would be provided at a point prior to the evidentiary hearing process, after either the Commission has made the decision to send the application to an evidentiary hearing, or the Executive Director has decided to directly schedule. This form would also allow the applicant to advise the Bureau and Commission of any representative. Should the applicant indicate they were no longer interested in making further arguments in proving their suitability, an abbreviated default hearing would be held.

2. Subsection (b) specifies that certain actions by the Commission are not eligible for the hearing process.

a. **David Fried, CGA**: Mr. Fried expressed a general comment that included this section that is addressed in C.1.a, page 7.

Recommended Response (a): This comment has been addressed previously.

b. **Robert Mukai, IGLS**: Mr. Mukai suggested that since abandonments are not approved or denied, that this subsection should be rephrased to reflect this.

Recommended Response (b): This comment is accepted and the proposed regulation has been revised to reflect this change.

> (b) If the Commission approves or denies a request for withdrawal pursuant to paragraph~~s~~ (5) of subsection (a) or makes a finding of abandonment pursuant to paragraph (6) of subsection (a), that decision is final when issued, unless the Commission specifies otherwise. An applicant shall not have a right to an evidentiary hearing pursuant to Section 12056.

K. 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) 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. In addition the applicant may supply information in support of either hearing method.

a. **David Fried, CGA**: Mr. Fried expressed concern that the Bureau could use licensing renewal procedures to present information that should be handled as a disciplinary issue. Disciplinary actions should be separately handled at APA hearings and renewals should be continued until such actions are handled. Mr. Fried suggested that specific language be added to accomplish this.

Recommended Response (a): This comment is rejected. While it might be true that the Bureau could avoid having to bring an issue as an accusation by instead bringing the information forward on an application for renewal, that should not prevent the Commission from both considering the application and considering all issues related to the applicant. Furthermore, while the burden is on the applicant and not the Bureau, the

facts are still important and must be shown pursuant to somewhat similar evidentiary rules. The Bureau would still be required to prepare relevant evidence and witnesses and the applicant would still be required to show that they are eligible for licensure. It should also be noted that by taking the route of an application hearing, the Bureau would lose its ability to recommend anything beyond denial or restrictions, there would be no settlement process and the Bureau could not request costs related to Business and Professions Code section 19930, and the costs for the hearing itself.

b. **James R. Parrinello, Artichoke Joe's**: Mr. Parrinello requested clarification that the applicant no longer needs to have the authority to request an evidentiary hearing as under the proposal the Commission can only elect approving an applicant or directing to an evidentiary hearing. Mr. Parrinello notes that should he be incorrect, he would strongly object.

Recommended Response (b): This comment is accepted. It is the intent of the proposal to remove the need of the applicant to request an evidentiary hearing by having anything that is not an approval be directed to an evidentiary hearing. No change is required for this response.

c. **Robert Mukai, IGLS**: Mr. Mukai notes that Section 12058 is not the section under which the APA hearing is being conducted and recommends the section be revised to be pursuant to Business and Professions Code section 19825. Mr. Mukai also offered a grammatical suggestion that the preposition "to" is required following each instance of the word "pursuant."

Recommended Response (c): This comment is rejected. These regulations provide clarifying guidance on the application of Business and Professions Code section 19825. An APA hearing could still be conducted entirely pursuant to section 19825 under the Commission's retained broad discretionary authority, but Section 12058 provides important limitations and guidance for most situations in the APA process and is ultimately controlling. It is also consistent with the text guiding the reader to the appropriate subsequent regulatory sections.

2. Subsection (b) 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, CGA**: Mr. Fried expressed a general comment that included this section that is addressed in C.5.a, page 14.

b. **James R. Parrinello, Artichoke Joe's**: Mr. Parrinello expressed a general comment that included this section that is addressed in C.5.c, page 14.

c. **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 aggressively investigating allegations [Bureau] and the other [Commission] with an unprejudiced adjudicative role based on admissible evidence.

Recommended Response (a through c): These comments have been addressed previously. Mr. Titus' comments, while not provided pursuant to the *ex parte* provision, is still pertaining to the sharing of confidential documents between the Bureau and the Commission and is adequate addressed by that previous response.

d. **James R. Parrinello, Artichoke Joe's**: Mr. Parrinello recommended that in referring to the required sharing of exculpatory or mitigating information, the language should affirmatively state the requirement.

Recommended Response (d): This comment is accepted, in part. The appropriate revisions are included in the revised proposed text.

> (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 ~~Gambling Control~~ 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 ~~not~~ be ~~withheld from~~ provided to the applicant, but any confidential information may be redacted by the Bureau.

3. Subsection (c) 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. As the Bureau is able to request additional funds, it is likely that such funds would be requested in advance of the hearing to cover any additional investigatory costs and those costs associated in the participation in the hearing.

b. **Robert Mukai, IGLS**: Mr. Mukai recommends that this subsection be deleted. Mr. Mukai suggests that this section is both inconsistent with itself but also with statute. Mr. Mukai also recommends grammatical changes should the subsection be maintained, such as; replacing the last clause of the first sentence with either, "all

parties will bear their own costs" or "each party will bear his, her or its own costs," and replacing "requesting" with "requiring" in the second sentence.

Recommended Response (a and b): These comments are accepted, in part. As drafted the language allows for additional costs for investigations to be reimbursable to the Bureau. However, 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. Grammatical and clarity changes have been made and are reflected in the revised proposed text.

> (c) Under either an APA or a GCA hearing, all parties will bear ~~his, her or its~~ their own costs. This does not prevent the Bureau from ~~requesting~~ requiring that additional sums be deposited pursuant to Business and Professions Code section 19867 for any necessary supplemental investigations.

c. **Ron Diedrich, IGLS**: Mr. Diedrich commented that the proposed subsection is contrary to Business and Professions Code sections 19867 and 19930 and that regulations cannot amend a section of the code. Business and Professions Code section 19930 mentions denials as one of its aspects in reference to cost recovery for hearings. This regulation would prevent the Commission from using its discretion to award the Bureau appropriate costs for conducting their half of the hearing.

d. **Commissioner Conklin:** Commissioner Conklin commented that the first sentence should be removed as it will not always be the case. Commissioner Conklin commented that "if someone is just a jerk…obviously it was… just for wasting everyone's time."

Recommended Response (c and d): These comments are rejected. Business and Professions Code section 19930 resides under Article 10, ostensibly titled "Disciplinary Actions." It addresses licensee disciplinary issues not licensing. While it does state under subdivision (d) that an Administrative Law Judge may order costs of investigation and prosecution and uses the terms applicant and "deny a license" there are three issues with applying Business and Professions Code section 19930 to evidentiary hearings or applicant suitability.

First, subdivision 19930, (d) through (f), was modeled after Business and Professions Code section 125.3 which allows for costs to be recovered at disciplinary proceedings not denial proceedings.

Second, the legislative history seems to be inconsistent with such an interpretation. By example, the last two analyses before the floor of Senate and Assembly on SB 1812 (Vincent, Chapter 487, Statutes of 2004), which added section 19930 (d), 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 examples of licensing boards with 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 would place the Division on the same kind of footing.* (Emphasis added).

Lastly, it would be inappropriate for the process to contain a possible future penalty to the applicant that could cause the Bureau's hearing costs to be awarded. The hearing process is the applicant's right under Business and Professions Code section 19870 and he or she should not be punished for exercising that right.

L. 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.

a. **Robert Mukai, IGLS**: Mr. Mukai notes that the reference citation includes Business and Professions Code sections 19870 and 19871, but that it should instead have section 19825.

Recommended Response (a): This comment is accepted, in part. This change has been reflected in the revised proposed text.

> Note: Authority cited: Sections 19811, 19823, 19824, 19840, and 19841, Business and Professions Code. Reference: Sections 19816, 19823, 19824, 19825, 19868~~, 19870, 19871~~, and 19876, Business and Professions Code; Section 11512 and 11517, Government Code.

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

Recommended Response (b): This comment is rejected. This Section is necessary to explain the process for the APA hearing to the applicant and other parties.

2. Subsection (b) specifies that the burden of proof is on the applicant to prove his or her qualifications to receive any license.

a. **David Fried, CGA**: Mr. Fried expressed a general comment that included this section and is addressed in K.1.a, page 37.

Recommended Response (a): This comment is has been addressed previously.

3. Subsection (d) 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. **Alan Titus, Artichoke Joe's**: Mr. Titus expressed concern that this subsection creates some confusion in the process. Mr. Titus offers that the role of the Bureau is not of a witness but of a prosecutor and advocate. Mr. Titus states that the applicant is like a defendant who needs to be able to respond to materials presented by the Bureau. Mr. Titus expressed concern that if the Bureau does not take a position, the applicant will not have sufficient notice to make a response and will therefore be denied due process.

Recommended Response (a): This comment has been addressed previously. The Commission will now indicate what the issues are that they want evidence on where the Bureau has not recommended denial.

b. **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 GCA hearings but that during an APA hearing the Bureau is willing to act as the complainant at all times, even when having previously recommended approval.

Recommended Response (b): This comment is rejected. Further discussions with the Bureau has clarified that the agreement does include both GCA and APA hearings.

M. 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. The following comments are pertaining to this section.

a. **James R. Parrinello, Artichoke Joe's**: Mr. Parrinello expressed a general concern that there is no requirement that the hearings be recorded and that the language in the previous version of the text is being repealed.

Recommended Response (a): This comment is rejected. Business and Professions Code section 19870, subdivision (d) specifies that all proceedings of the Commission

relating to a license application shall be recorded stenographically or by audio or video recording. As this is a clear requirement, no repetition in the regulations is needed.

b. **David Fried, CGA**: Mr. Fried expressed a concern that included this section that is addressed in K.1.a, page 37.

Recommended Response (b): This comment has been addressed previously.

2. Subsection (a) specifies that the Executive Director can directly set an application for a GCA hearing and provides the processes that would follow should that happen.

a. **Alan Titus, Artichoke Joe's**: Mr. Titus recommended that when the Executive Director sets a GCA hearing instead of a non-hearing review that the date itself not be set. Mr. Titus suggested that the setting of a hearing date should be placed in a separate subsection and set by the presiding officer after the applicant has received initial discovery on the Bureau's investigation. Mr. Titus is concerned that the process could be used to jam the applicant and his council and that while the Bureau has possibly been conducting its investigation for over a year, the applicant has not been preparing.

Recommended Response (a): This comment is rejected. The timelines in subsections (a) and (b) are designed to give an applicant comparable time to prepare. In addition, the Executive Director, through the presiding officer may alter the timeline at the request of either party to allow additional time to prepare. Finally, in most cases the Executive Director is not likely to have made a determination that an evidentiary hearing is appropriate unless the Bureau has recommended denial for reasons that would likely preclude approval at a non-hearing meeting and in this case the applicant would have already been provided with the Bureau's "initial discovery" as required in Section 12052.

b. **Alan Titus, Artichoke Joe's**: Mr. Titus expressed concern that the timeline for the Executive Director setting a GCA hearing would require an exchange of documents 30 days prior to the hearing. Mr. Titus does not believe that this timeline would work with the next subsection which allows the Commission to set a hearing date as soon as 30 days requiring disclosure of witnesses and evidence the day the Commission decides to hold an evidentiary hearing.

Recommended Response (b): This comment is rejected. The timelines in subsections (a) and (b), while designed to be somewhat parallel are separate. The timeline in subsection (a) assumes prior exchange of documents pursuant to Section 12052; while the timeline in subsection (b) assumes that the Commission has set the issues to be discussed at a non-hearing meeting. The timeline of (b) allows for an automatic extension should there be documents to be exchanged. This would allow for the timeline of the GCA hearing to be condensed should documents or witnesses not be desired by either party, such as when the issues to be discussed have been set quite narrowly by the Commission.

c. **Robert Mukai, IGLS**: Mr. Mukai expressed concern that the time limits in this subsection may be contradictory and should be simplified to avoid confusion. In addition, the time proposed between each step is too short and will require extension either through a revision of the draft or numerous requests for continuance.

Mr. Mukai suggests a grammatical change to ensure that two notices are required to be sent, one to the Office of the Attorney General and one to the Bureau.

Mr. Mukai suggests consideration on how and for what purpose the applicant and Bureau advise the Executive Director in the execution of this authority as the exact purpose and effect is unclear.

Mr. Mukai recommends the removal of the reference to the Commission retaining the authority to overrule the Executive Director's ability to directly set an application to a GCA hearing as this authority is clear under Section 12056 and its therefore unnecessary. Mr. Mukai does note that that this portion should remain if it is the intent to allow the Commission to change its mind after a GCA hearing has been chosen. If this redirection is the intent, Mr. Mukai recommends a revision to indicate upon whose request such a change will be entertained.

Recommended Response (c): This comment is accepted, in part. Clarifying revisions to the proposed text will be considered.

> (a) If the Executive Director determines it is appropriate, he or she may set an application for consideration at a GCA hearing in advance of a meeting pursuant to Section 12054. The Executive Director shall give notice to the applicant, pursuant to paragraph (2) subsection (c) of Section 12052~~Section 12006~~, and to the Office of the Attorney General and Bureau no later than ~~6~~90 days in advance of the GCA hearing.~~(1)~~ The Executive Director's decision will be based on information contained in the Bureau's report or other appropriate sources including, without limitation, a request from the Bureau or applicant as well as the Commission's operational considerations. The Commission retains the authority to refer the matter to an APA hearing pursuant to subsection (a) of Section 12056 or hear the matter at a Section 12054 meeting if the Commission deems it appropriate.

3. Subsection (b) specifies the timelines for when the Commission has elected to hold an evidentiary hearing.

a. **Alan Titus, Artichoke Joe's**: Mr. Titus repeats his concern about the timelines being proposed of either 30 or 60 days as noted in M.2.b, page 43.

Recommended Response (a): This comment has been addressed previously.

b. **Robert Mukai, IGLS**: Mr. Mukai suggests that the first clause is unnecessarily lengthy and has suggested revisions. In addition, Mr. Mukai suggests that the proposed timeline is too short. Mr. Mukai also suggested rewriting the clause to read:

> When an evidentiary hearing elected by the Commission is a GCA hearing, the scheduling of the hearing shall occur a minimum of 30 days following the election.

Recommended Response (b): This comment is accepted, in part. Changes have been provided in the revised proposed text.

> (b) When ~~If~~ the Commission has elected ~~elects~~ to hold ~~an evidentiary hearing pursuant to paragraph (2) of subsection (a) of Section 12054, and that evidentiary hearing is~~ a GCA hearing, the applicant shall be provided a notice of hearing pursuant to paragraph (2) subsection (c) of Section 12052, no later than 60 days in advance of the hearing date ~~the hearing shall be scheduled a minimum of 30 days following the action~~.

4. Subsection (c) 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.

a. **James R. Parrinello, Artichoke Joe's**: Mr. Parrinello expressed concern in the Executive Director's ability to select a properly segregated member of the Commission's legal staff. Besides the ability to properly segregate, the legal staff is already charged with the mission of keeping California gambling free of criminal elements and that does not make for an appropriate impartial hearing officer. Mr. Parrinello recommends that the regulation should be specific on what the term properly segregated entails and that at a minimum it should include the staff member being walled off from any discussions with Commissioners or other staff.

Recommended Response (a): This comment is accepted, in part. Commission legal staff has no stated mission beyond serving the Commissioners and there is nothing precluding a presiding officer, who essentially serves in a capacity to aid the Commissioners by handling and addressing technical and procedural matters, from being a legal staff member. Moreover, there is nothing that prevents the presiding officer from discussing matters with Commissioners or staff. This is not an APA hearing officer from a separate agency or a role which requires an advocate, advisor or decision maker. To reflect this, the regulation has been revised as follows:

> (c) The Executive Director shall designate a presiding officer which shall be:
> (1) A ~~properly segregated~~ member of the Commission's legal staff; or,
> (2) An Administrative Law Judge.

5. Subsection (d) 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 (a): This comment is rejected. 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.

6. Subsection (e) 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. Timelines for this exchange are under subsections (a) and (b) and differ depending on the path through which a GCA hearing has been initiated.

a. **David Fried, CGA**: Mr. Fried expressed concern that the exchange of information does not require the Bureau to provide their documents first. Mr. Fried contends that the respondent cannot provide the information at the same time as they have not had a chance to examine Bureau evidence and prepare their own case. Mr. Fried suggests an alternative that the Bureau provides their documents 45 days prior to the hearing with the applicant being required to provide their information 21 days before the hearing.

b. **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. Mr. Titus proposes that as soon as it is decided that an evidentiary hearing is necessary, the Bureau should be required to disclose that evidence including the names of those witnesses on whom it relied to make its recommendation. This list should not be just those to be called at a hearing but all-inclusive. This required provision of documents should also include any positive and exculpatory information the Bureau may have discovered about the applicant.

After this initial exchange by the Bureau the applicant should have time to prepare his case. This preparation could take as few as 45 days but could easily take 60 to 90 days or even more. The Commission should be liberal about granting the applicant the time needed to prepare a response. Right before the hearing there should be another exchange of information on witnesses and documentary evidence to be introduced at the hearing.

Recommended Response (a and b): These comments are rejected. The parties are able to exchange information 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.

c. **Alan Titus, Artichoke Joe's**: Mr. Titus suggests that if the Bureau wants to maintain the confidentiality of a witness or document, it needs to make a motion to the presiding officer. The presiding officer would be able to balance the applicant's due process rights to confront witnesses with the witness' claimed need for confidentiality. The Bureau should not be entitled to present a witness or information that has been kept confidential at a hearing.

Recommended Response (c): This comment is rejected. The Bureau has the authority under the Gambling Control Act to retain confidential information. It is its prerogative to determine what is confidential in their investigation and this rulemaking process is not the appropriate vehicle to determine otherwise.

d. **Robert Mukai, IGLS**: Mr. Mukai recommends that the portions dealing with the exchange timeline in subsections (a) and (b) should be moved into this subsection. Mr. Mukai also expressed concern that paragraph (4) is too global and should be reduced.

Recommended Response (d): This recommendation is accepted, in part. The timeline portion of the exchange of documents has been reorganized as included in the revised proposed language. The issue of documents to be exchanged is rejected. If a party has a pertinent document it should be exchanged so that the other party will have a chance to consider it when constructing its arguments regardless of the party's interest in the document.

(e) The Bureau and applicant shall exchange the following items at least 30 days prior to the GCA hearing:

7. Subsection (f) specifies that the presiding officer may conduct a pre-hearing conference where various issues may be addressed with both parties.

a. **Robert Mukai, IGLS**: Mr. Mukai expressed concern that the subsection does not indicate any purpose for the conference or a resulting order. The section does not contemplate revision to any order or if the order limits the parties in any way.

Recommended Response (a): This comment is rejected. The purpose of the conference and the resulting order will be highly specific to the application in question and based on the needs of the parties and issues. In addition, the proposed section is more robust than the equivalent APA sections, which can be informative to any issues that may come up.

8. Subsection (g) specifies what the Commission may do upon a showing of prejudice.

a. **Robert Mukai, IGLS**: Mr. Mukai comments that the word "delay" may have a negative connotation and so recommends changing the word to "continue."

Recommended Response (a): This comment is accepted and revised in the proposed regulation text.

(2) Continue ~~Delay~~ any meeting or hearing as necessary to mitigate any prejudice.

9. Subsection (h) 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.

a. **Stacey Luna-Baxter, Bureau**: Ms. Luna-Baxter advised that subsections (h) and (j) are redundant and can therefore be revised to limit this duplication.

Recommended Response (a): This recommendation is accepted, in part, and a revised subsection (h) has been proposed that encompasses both subsections (h) and (j).

(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 is not required to recommend or seek any particular outcome during the evidentiary hearing, unless it so chooses.

…

~~(j) The Bureau is not required to recommend or seek any particular outcome during the evidentiary hearing, unless it so chooses, but rather simply to present the facts and law related to the applicant and the Bureau's background investigation, along with any 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.~~

b. **Alan Titus, Artichoke Joe's**: Mr. Titus expressed skepticism that this subsection is required. The Bureau is an independent agency, and as the prosecutor is entitled to determine what evidence to present and should not be controlled by Commission regulation. In addition, the regulation focuses on the Bureau's report and recommendation, which Mr. Titus has contended under subsection (b) of Section 12052 [see Mr. Parrinello's comment I.3.a, page 33], is not evidence. Mr. Titus contends that the purpose of the GCA hearing is to allow the Commissioners to hear actual evidence, not just the Bureau's account of the evidence. Finally, Mr. Titus objects to the presentation of "all" information, even if the Bureau has determined that the information is incorrect, unreliable or irrelevant.

Recommended Response (b): This comment is rejected. Business and Professions Code sections 19870 and 19871 do not require the Bureau to adopt the role of prosecutor. The Gambling Control Act does however require the Bureau to conduct an investigation, and section 19870 subdivision (a) does require the Commission to make a determination of suitability, "…after considering the recommendation of the chief…" The lack of requirement for the Bureau to act as prosecutor in all cases reflects situations where the Bureau has recommended a less strict position than is possibly being considered by the Commission. In these cases, the Bureau does not desire to be placed in the position of arguing a position contrary to their recommendation. As the Act only requires that their recommendation be considered, the regulations have been proposed to not place further requirements on the Bureau. Ultimately, it is the applicant's burden to prove their suitability regardless of the Bureau's recommendation and as this is the primary purpose, the hearing process should be crafted as a forum to allow the applicant to do so.

c. **Robert Mukai, IGLS**: Mr. Mukai suggests that this subsection does not reflect the situation where the Bureau appears as under subdivision (j), after recommending approval. In such a situation a revised requirement to exchange documents is more limited.

Recommended Response (c): This comment is rejected. The Bureau does not sometimes appear to present the facts and law related to the application. In a GCA hearing, the Bureau's role will always to present the facts and law related to the applicant and background. In addition, the Bureau must still present its report, the results of its background investigation and any basis for their recommendation no matter the reports contents or any prior recommendation.

As part of a response to a previous comment subsection (j) has been removed and combined with subsection (h) as shown in the response to comment M.9.a, on page 48.

10. Subsection (i) specifies that the burden of proof is on the applicant at all times to show suitability under the act.

a. **Alan Titus, Artichoke Joe's**: Mr. Titus commented that, as the applicant's case is responsive in nature, the Bureau should have the initiative to present accusations of unsuitability for the applicant to respond to. Unless the Bureau takes a position, the applicant does not have sufficient notice to make a response and is denied due process.

Recommended Response (a): This comment is rejected. The requirement of the Act is not for the applicant to be able to counter any bad acts included within the Bureau's recommendation. The requirement of the Act is for the applicant to prove to the members of the Commission that they are suitable to work within the gambling industry. As such, the applicant has the burden of proof. While the Bureau's recommendation may contain all or part of the issues regarding an applicant's suitability, the Commission is not

limited to just that recommendation when making its decision. As such the applicant is ultimately responsible for resolving issues perceived by the members of the Commission. Because of this, the regulations have been created to provide the Commissioners with as much information as possible for them to make this determination. This may mean that even in instances where the Bureau has recommended denial and provided advanced documentation under Section 12052, during the GCA hearing process additional concerns for the applicant's suitability may arise. It is for this reason that the hearing process has been left open as much as possible, to allow the Commissioners to make careful consideration, while still allowing for continuances under which the Bureau can make additional investigations to answer Commissioner questions and the applicant can have sufficient time to prepare additional argument of suitability.

11. Subsection (j) specifies that the Bureau is not required to seek a specific outcome to the evidentiary hearing, but to only present the facts and related law based upon the applicant's background investigation, along with any recommendation previously filed to the Commission.

a. **Stacey Luna-Baxter, Bureau**: Ms. Luna-Baxter provided a general comment to that included this subsection, and it is included under M.9.a, page 48.

Recommended Response (a): The response to this comment has been previously addressed.

b. **Alan Titus, Artichoke Joe's**: Mr. Titus repeats his comment that is addressed in M.9.b, page 48 and M.10.a, page 49.

Recommended Response (b): The response to this comment has been previously addressed.

c. **Robert Mukai, IGLS**: Mr. Mukai suggests that in cases where the Bureau has recommended approval it is not necessary for the Bureau to act as a party, but to instead appear as a witness for a designated Commission staff member acting as the party.

Recommended Response (c): This comment is rejected. It is not the intent to further complicate the process by providing situations where one agency or another directly assists IGLS in presenting the Bureau's case. The Bureau is the most knowledgeable about the background investigation and fills the critical first half of the application process. They are therefore best suited in providing the assistance to the Commission in understanding that investigation and its support.

12. Subsection (k) 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 (a): This comment is rejected. Lay representatives are permissible in administrative hearings and the standards are sufficient as written as no particular limitations were suggested (however, the Commission is open to the consideration of appropriate limitations).

13. Subsection (m) specifies that GCA hearings need not be conducted according to the technical rules of evidence and provides direction to effect this.

a. **Robert Mukai, IGLS**: Mr. Mukai recommends the first sentence be revised to state:

> A presiding officer shall rule on the admissibility of evidence and on any objections raised except for objections raised under subsection (g).

Recommended Response (a): This comment is accepted and included in the proposed revised text.

> (l)~~(m)~~ The GCA hearing need not be conducted according to technical rules of evidence. Any relevant evidence may be considered, and is sufficient in itself to support findings if it is the sort of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule that might make improper the admission of that evidence over objection in a civil action. A presiding officer shall rule on the admissibility of evidence and on any objections raised except for objections raised under subsection (g). ~~A presiding officer shall rule on the admissibility of evidence and on any objections raised but for subsection (g).~~

N. 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) specifies that the presiding officer shall prepare for the Commission the proposed decision within 30 days of the conclusion of the GCA hearing.

a. **David Fried, CGA**: Mr. Fried recommended that that Bureau and applicant should be provided with a copy of the proposed decision for their review and they should be provided the opportunity to submit written comments to be considered by the Commission prior to adoption.

Recommended Response (a): This comment is rejected. The applicant and Bureau have both had the opportunity to present their cases during the evidentiary hearing and the issuance of the decision should be reflective of that hearing and no other statements for which the other party has not had a chance to cross examine or defend. If the applicant has additional information previously unavailable, the reconsideration process of Section 12062 has been included for just that purpose.

b. **Robert Mukai, IGLS**: Mr. Mukai expressed concern that the proposed decision includes the requirement to provide the conclusion of law. Mr. Mukai notes that conclusion of law are not normally required for administrative adjudication. Instead, Mr. Mukai recommends that conclusions are drawn from the facts under applicable law and should be referred to as "determinations of issues."

(a) Within 30 days of the conclusion of a GCA hearing, the presiding officer shall prepare and submit to the Commission a proposed decision ~~containing a detailed statement of its reasons, including:~~
~~(1) Findings of fact;~~
~~(2) Conclusions of law; and,~~
~~(3) An order~~.

Recommended Response (b): This comment is accepted, in part. Business and Professions Code section 19870 mandates the Commission prepare and file a detailed statement of reasons for the denial. The proposed language has been revised as follows:

2. Subsection (d) specifies that only members who participated in the evidentiary hearing may participate in voting for the license. The subsection allows for a Commission member to be "read in" to the record if there are insufficient participating members to make a quorum.

a. **Alan Titus, Artichoke Joe's**: Mr. Titus expressed a concern that Commissioners who are read into the record to make a quorum will not have the opportunity to review the full record with the requirement of recording the meetings being repealed. In addition, Mr. Titus feels that the Commissioners should all have the opportunity to listen and watch the interaction between the witnesses and the attorneys, as well as their demeanor.

Recommended Response (a): This comment is rejected. The issue of the recording of the meeting is responded to under Section M., above. As to the interaction between witnesses and attorneys, if the Commission feels that additional hearings are needed once the additional members have been read into the record, they can hold them. At these additional meetings any witness could be brought back and further questioned to the satisfaction of the Commission.

O. ADOPT SECTION 12064. REQUESTS FOR RECONSIDERATION.

This Section specifies the process under which an applicant may request the reconsideration of an issued decision prior to that decision becoming final.

1. The following comments are pertaining to this section.

a. **Stacey Luna-Baxter, Bureau**: Ms. Luna-Baxter expressed a concern that this section does not include a provision for Bureau cost recovery in the event that an applicant's request for reconsideration requires Bureau investigation.

Recommended Response (a): This comment is rejected. The more general Section 12056, which covers both APA and GCA hearings, includes subsection (c) which provides for Bureau cost recovery. As a request for reconsideration of a GCA decision is part of the GCA hearing process, cost recovery would be allowable for reconsideration which necessitated additional investigation.

b. **Robert Mukai, IGLS**: Mr. Mukai notes that there is no requirement for the request for reconsideration to be provided to the Bureau and requests that one be added.

Recommended Response (b): This comment is accepted and included in the revised proposed text.

> (b) A request for reconsideration shall be made in writing to the Commission, copied to the Bureau, and shall state the reasons for the request, which must be based upon either:

2. Subsection (a) specifies that the applicant may request reconsideration by the Commission within 30 days of the service of the Commission decision if that decision includes a denial or restriction.

a. **Alan Titus, Artichoke Joe's**: Mr. Titus commented that the citation under subsection (a) to a GCA hearing under 12056 may have been an incorrect citation and that the correct citation would be 12060.

Recommended Response (a): This comment is accepted. As the APA has its own reconsideration portion, there is no need for this Section to be expanded to include the APA. The proposed regulation has been revised to correct the citation.

> (a) After the Commission issues a decision following a GCA hearing conducted pursuant to Section 120~~5~~60, an applicant denied a license, permit, registration, or finding of suitability, or whose license, permit, registration, or finding of suitability has had conditions, restrictions, or limitations imposed upon it, may request reconsideration by the Commission within 30 days of service of the decision, or before the effective date specified in the decision, whichever is sooner.

3. Subsection (c) specifies that the Executive Director reviews the request for reconsideration to insure it is complete prior to placing it on the agenda of a Commission meeting for consideration.

a. **Robert Mukai, IGLS**: Mr. Mukai suggests that the second sentence is missing an apostrophe and should be modified to state:

> The applicant shall be given at least 10 days' advanced written notice, pursuant to Section 12006, of the date and time of the Commission meeting at which the request will be heard.

Recommended Response (a): This comment is accepted and included in the revised proposed text.

> (c) The Executive Director shall determine whether a request for reconsideration is complete and if so shall place the request on the Commission's agenda within 60 days of its receipt. The applicant shall be given at least 10 days' advance written notice, pursuant to Section 12006, of the date and time of the Commission meeting at which the request will be heard. The applicant, whether present at that meeting or not, shall be notified in writing of the Commission's decision on the request within 10 days following the meeting pursuant to Section 12006.

P. 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 (a) specifies under what conditions a Commission decision becomes final.

a. **Robert Mukai, IGLS**: Mr. Mukai suggests that the word "Upon" needs to be inserted before "[t]he effective date." In addition, Mr. Mukai expressed concern that the phrase "[i]mmediately after the Commission affirms its decision" is covered by the modifying clause "if reconsideration has been granted under Section 12064." Mr. Mukai suggests, in order to remove this ambiguity, the paragraph should be modified to read:

> If a request for reconsideration has been granted under Section 12064, immediately upon the Commission's affirmance of its decision or issuance of a reconsidered decision.

b. **Alan Titus, Artichoke Joe's**: Mr. Titus suggested grammatical changes to the subsection for purposes of clarity, including that the introductory phrase may require one or more additional words and that the conditional clause "if reconsideration has not been requested" is left dangling.

Recommended Response (a and b): These comments are accepted and included in the revised proposed text.

> (1) Upon ~~T~~the effective date specified in the decision or 30 days after service of the decision if no effective date is specified, and if reconsideration under Section 12064 has not been requested; or,
> (2) If a request for reconsideration has been granted under Section 12064, immediately upon the Commission's affirmance of its decision or issuance of a reconsidered decision ~~Immediately after the Commission affirms its decision or issues a reconsidered decision if reconsideration has been granted under Section 12064~~;

c. **Alan Titus, Artichoke Joe's**: Mr. Titus suggested that the effective date being specified by the Commission, having a maximum of 30 days should also have a minimum effective date to provide the applicant time to seek reconsideration or judicial review to stay the decision.

Recommended Response (c): This comment is rejected. The effective date does not have a maximum of 30 days to become effective. Rather this time is the date certain, should the Commission not otherwise specific a date. With that in mind, there is no need for a minimum date, which is immediately upon issuance if the Commissioners so choose.

Q. ADOPT SECTION 12068. DECISIONS REQUIRING RESIGNATION OR DIVESTITURE.

This section takes much of subsection (c) from former Section 12050 and relocates it here. It remains in substantially the same form.

1. Subsection (b) specifies how various types of possible licensed members of industry are treated in the event that they are denied an application.

a. **Stacey Luna-Baxter, Bureau**: Ms. Luna-Baxter suggests the inclusion of limited liability company in paragraph (1) of subsection (b).

Recommended Response (a): This comment is accepted and proposed language revised accordingly.

> (b)(1) If the denied applicant is an officer or director of a limited liability company or corporation that is licensed, registered, or found suitable by the Commission, the limited liability company or corporation shall remove that person from office according to the date specified in the Commission's decision and shall so notify the Commission in writing.