CCC Public Supporters

500 Club Casino
Artichoke Joe's Casino
California Hispanic Chambers of Commerce
Capitol Casino
Casino 99
Casino Poker Club Inc.
Central Coast Casino
Certified Players, Inc.
Citrus Heights Regional Chamber of Commerce
Folsom Lake Bowl Cardroom
Gilroy Garlic City
Gold Gaming Consultants
Hayward Chamber of Commerce
Hub International (Gaming Practice Leader)
King's Card Club
Knighted Ventures
Lake Elsinore Casino
LE Gaming, Inc.
Limelight
Livermore Casino
Lucky Chances Casino
Marina Club
Napa Valley Casino
Oceana Casino
Oceanview Casino
Palace Poker Casino
Parkwest Casino 580
Parkwest Casino Cordova
Parkwest Casino Lodi
Parkwest Casino Lotus
Parkwest Casino Sonoma
Paso Robles Casino
Peninsula Citizens for Fair Taxes
Premier Player Providers
Racxx
Rhino Gaming, Inc.
Rogelio's Inc.
Seven Mile Casino
Star's Casino
The Saloon at Stones Gambling Hall
The Tavern at Stones Gambling Hall
Towers Casino
Turlock Poker Room
Valley Industry and Commerce Association

COMMUNITIES 4 California CARDROOMS

February 5, 2021

Susanne George
Bureau of Gambling Control
P.O. Box 168024
Sacramento, CA 95816-8024
Submitted via email: BGC_Regulations@doj.ca.gov

Re: California-Style Blackjack Regulations - Draft Concept Language

Dear Ms. George:

We write to comment upon the Bureau of Gambling Control's ("Bureau") Draft Concept Language of January 5, 2021. The Bureau has been considering promulgating regulations governing the review and approval of Blackjack games that are offered for play in California gambling establishments for quite some time and has devoted significant resources, including numerous public meetings, regarding this issue. However, the Bureau has failed to address the need, the legality, or the impact of such sweeping changes to games that have been legally offered in California for over two decades.

The Bureau's Draft Concept Language for California Blackjack Regulations exceeds the authority granted to the Bureau, is not supported by any rationale or citation to relevant statutory or case law, would amount to a governmental taking of property without due process, and would have a severe economic impact without any articulated justification. For all of the following reasons, we urge the Bureau to heed the well-established maxim that a regulatory agency should do no more than necessary to achieve its statutory objective.

The Concept Language Exceeds The Bureau of Gambling Control's Authority.

The Bureau's Concept Language would effectively revoke existing game approvals for cardrooms. The Gambling Control Act does not give the Bureau the authority to eliminate games on a statewide basis.

Each regulation adopted shall be within the scope of authority conferred and in accordance with standards prescribed by other provisions of law, otherwise it has no effect. (Govt Code § 11342.1.) The Bureau, "like all administrative agencies, has no inherent powers; it possesses only those powers that have been granted to it by the Constitution or by statute." (*Sec. Nat'l Guar., Inc. v. Cal. Coastal Comm'n* (2008)

159 Cal.App.4th 402, 419. See also *Louisiana Pub. Serv. Comm'n v. FCC* (1986) 476 U.S. 355, 374 ["[A]n agency literally has no power to act . . . unless and until [the Legislature] confers power upon it."].) "That an agency has been granted some authority to act within a given area does not mean that it enjoys plenary authority to act in that area." (*Sec. Nat'l Guar*., 159 Cal.App.4th at 419.) Accordingly, if the Bureau "takes action that is inconsistent with, or that simply is not authorized by [statute], then its action is void." (*Id*. See also *BMW of North America, Inc.v. New Motor Vehicle Bd*. (1984) 162 Cal.App.3d 980, 994 ["It is fundamental that an administrative agency has only such power as has been conferred upon it by the constitution or by statute and an act in excess of the power conferred upon the agency is void."]; *B. C. Cotton, Inc. v. Voss* (1995) 33 Cal.App.4th 929, 955-56 ["[A]n attempt by an administrative agency to enlarge the scope of the powers conferred upon it is unlawful and void."].)

The Gambling Control Act only gave the Bureau the authority to "receive and process", "monitor", "investigate", "initiate disciplinary actions", "adopt regulations", "approve". (Bus. & Prof. Code § 19826.) The statutory scheme assigns the Bureau a prosecutorial role, while the Commission adjudicates whether a game approval should be withdrawn. Specifically, Section 19842(a) gives the sole authority of determining game legality to the Commission and expressly prohibits the Commission from restricting "on a statewide basis, the play of any game or restrict the manner in which any game is played, unless the commission, in a proceeding pursuant to his article, finds that the game, or the manner in which the game is played, violates a law of the United States, a law of this state, or a local ordinance." Thus, it expressly prohibits even the Commission from issuing regulations as sweeping as those proposed by the Bureau.

Accordingly, there is no statutory authority for the Bureau to unilaterally revoke the approval of a game it previously authorized. If the Bureau wishes to revoke a game approval, it must bring a formal accusation and succeed in proving to the Commission that the game violates federal, state, or local law. That process is essential to preserving the due process rights of cardrooms. (See, e.g., *Bauer v. City of San Diego* (1999) 75 Cal.App.4th 1281, 1294 [providing that the State may revoke a business permit "only upon notice to the permittee, upon a hearing, and upon evidence substantially supporting a finding of revocation"]. The sweeping language of the Concept Language exceeds the Bureau's authority by unilaterally invalidating games that have been held to be valid and legal by the Courts, the Commission, and the Bureau for more than 20 years.

The Concept Language Is Not Supported By Relevant Law or Rationale.

The Bureau rests its authority to promulgate these proposed regulations on three statutes: Business and Professions Code sections 19801, 19826, and 19866. The Concept Language is not specific as to which sections of Business and Professions Code Section 19826 it relies upon. However, section (f) grants the Bureau the right to adopt regulations reasonably related to its functions and duties as specified within the Gambling Control Act. But this power is limited to promulgating regulations that implement, interpret, or make specific certain provision of the Gambling Control Act related to the Bureaus functions. (Gov't Code § 11342.600.) This statute does not allow wholesale revocation of an existing system of games and substitution of an agency created system in its place. The Bureau is empowered to receive and process applications and fees, monitor the conduct of licensees, investigate suspected violations of the laws related to gaming, investigate complaints, initiate discipline, adopt regulations related to the scope of its authority, and to approve the play and make restrictions on how a game is played. (Bus. & Prof. Code § 19826.) The Bureau has not been granted the authority to systematically revoke approvals for games and institute an entirely new system. There is nothing in Business and Professions Code section 19801 that grants such sweeping authority to the Bureau and Business and Professions Code section 19866 applies to applicants for licensing, not the Bureau's ability to promulgate, regulate, or invalidate law or regulations.

Because none of the listed statutes grant the Bureau the power to unilaterally revoke the approval of previously authorized games and create an entirely new interpretation of Blackjack that is not supported by any law, the Bureau lacks the authority to enact they system sought by the Draft Concept Language.
The Draft Concept Language also cites *People v. Gosset* (1892) 93 Cal. 641 as support for the Agency created California Blackjack. This case discuses hearsay, evidentiary admissibility, and jury instructions regarding the game of Faro. There is nothing in this case that supports the Bureau's Concept Language creating a new form of California Blackjack or invalidating the existing long standing game approvals or a grant of authority allowing this action by the Bureau. Clearly, *Gosset*, had been around for over 100 years before the Bureau began approving the games it now seeks to unilaterally revoke; thus, it should have considered *Gosset* in its prior approvals.

The Bureau has had a consistent interpretation of legal Blackjack for twenty years and there has been industrywide reliance on that interpretation. There has been no

new case law or statutes that inform or warrant re-examination of the approved game rules. All of the cases relied upon by the Bureau were in effect years before the Bureau conducted its initial analysis and began approving games for play beginning in 2001.

The Bureau is not charged with addressing or mitigating political disputes among competing factions within California gaming. These tasks rest solely with the Legislature. The political issues amongst gaming entities within California is well known to our Legislature. Millions of dollars per year are spent on lobbying and informing the Legislators of the competing claims. The Legislature has not determined that any change in the current rules regarding Blackjack are needed. Nor has the California Gambling Control Commission ("Commission") who is charged with prohibiting games, (Bus. & Prof. Code §19842), made any determination that a new regulation is judicious or necessary.

The Bureau's lack of a rationale for why games that have been long approved, are functioning without any notable issues, and are clearly not illegal banked games now require change appears to be an overreach of authority and an inappropriate engagement with the politics of tribal versus non-tribal gaming in California.

The Bureau has not supported the Draft Concept Language with any reference to statute, court cases or any other rationale for the change or the Bureau's authority to make such a change after decades of approvals.

The Bureau Has Failed To Articulate Any Need For Change In The Status Quo Which Appears To Be Acceptable To The Legislature And The Courts.

Whenever by the express or implied terms of any statute a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, no regulation adopted is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute. (Govt Code § 11342.2.) To date, the Bureau has not articulated any statute that grants it the authority to make changes to the existing system. Nor has the Bureau articulated why the proposed Draft Concept Language would not be in conflict with existing law.

The Draft Concept Language is modeled on the assumption that Blackjack is, if not prohibited, a problematic game. The law and the history of Blackjack in California do not support such an assertion.

In 1885, the game of Twenty-One was added to Penal Code section 330 as a prohibited game. The game of Blackjack is not specifically listed in Penal Code section 330. Blackjack style games did not develop until approximately 1915, 30 years after Twenty-One was added to section 330. The Draft Concept Language seems to simply assume without analysis that contemporary versions of Blackjack are equivalent to the historical game of Twenty-One. However, this is not correct, and case law clearly establishes that only those specific games listed in section 330 are prohibited.

Card games, even those that have evolved from games listed in section 330, are not prohibited unless the games are played as banking or percentage games. Since 1885 the Legislature has not added to the list of prohibited games. Rather, the applicability of section 330 has rested on whether unlisted games are played as banking or percentage games.

> "Thus, a card game played for money not specifically listed under section 330 and not played as a banking or percentage game is not prohibited." (*Tibbetts v. Van De Kamp* (1990) 222 Cal. App. 3d 389, 393, *rev. den*., 1990 Cal Lexis 4733; *accord, Oliver v. County of Los Angeles* (1998) 66 Cal.App.4th 1397, 1404.

This holding is consistent with two rules of statutory interpretation. When a statute lists items, such as prohibited games, all other items or games not listed are not prohibited. (*Henderson v. Mann Theatres Corp*., (1976) 65 Cal. App. 3d 397, 403 ("A recognized rule of statutory construction is that the expression of certain things in a statute necessarily involves exclusion of other things not expressed.) Moreover, as with any criminal statute, section 330 is subject to the rule of lenity that requires any ambiguity in criminal laws to be interpreted in favor of the persons subjected to them. (*Tibbetts,* supra*,* 222 Cal. App. 3d at 395.) The decision in *Tibbetts* also established that even though games evolve over time, the courts would look to how a game was played when the game was added to section 330 in determining what was prohibited.

Tibbetts held that section 330 applied only to games "plainly within its terms" and was intended to only ban "a limited number of games." (*Id* at p. 395.) The Court rejected the State's argument to sweep within section 330 any poker games similar to the game at issue.

Similarly, the Supreme Court has held that the Legislature did not intend to ban any other games. Section 330, the principal statue on the subject, prohibits 12 specific games, as well as any "banking" or "percentage" game. If the legislature had intended to regulate the play of any game which is ordinarily played for money or other evidence of value, it would have said just that. Not only did the Legislature fail to do that, but by other legislation it clearly indicated that it recognized the existence of other gambling games not included in the prohibition of the code section. *In re Hubbard*, (1964) 62 Cal. 2d 119, 126 (overruled on other grounds, *Bishop v. San Jose*, (1969) 1 Cal. 3d 56).

In 1991, the Legislature amended section 330 to remove "stud horse poker." In doing so, the Legislature specifically cited the *Tibbetts* decision, and said its purpose was to amend section 330 "in conformance with the holding in *Tibbetts*." (*Id*. §2). The Legislature approved of *Tibbetts'* interpretation of section 330. *Marina Point, Ltd. v. Wolfson* (1982) 30 Cal. 3d 721, 734 ("the Legislature is presumed to have been aware of and to have acquiesced in the previous judicial construction."). The Blackjack games currently offered in California card clubs are not the prohibited game of Twenty-One added to section 330 in 1885, but rather are separate games that have been approved by the Bureau and played for over twenty years. In fact, despite repeated requests from the industry, the Bureau still has not provided the game that forms the basis of its purported conclusion that Blackjack is the identical game of Twenty-One added in 1885. While some of these features are reflected in the proposed Concept Draft Language, the Bureau has not articulated any reason why it is challenging the existing structure that appears to be acceptable to the courts and the Legislature.

The Concept Language Raises Issues of U.S. and California Constitutional Violations.

Further, the games the Bureau seeks to restrict are federally recognized as distinct games. The United States Office of Patent and Trademarks has repeatedly found new versions of Blackjack are sufficiently unique to issue patents on those games. The Cardrooms have entered into Bureau approved contracts with the patent holders to offer these games, invested in equipment to play these games, and the patrons have enjoyed these games over the last two decades. The Concept Language seeks to invalidate these previously approved and unique games without any hearing, without compensation, and without rationale. This wholesale invalidation of approved, and legally valid contracts amounts to a government taking requiring due process.

The Fifth Amendment of the United States Constitution states that "private property [shall not] be taken for public use, without just compensation." While the Fifth Amendment by itself only applies to actions by the federal government, the Fourteenth Amendment extends the Takings Clause to actions by state and local government as well. The California Constitution states: “Private property may be taken or damaged for a public use and only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner.” (Cal. Con. Article 1, section 19.)

Interests in intangible as well as tangible property are subject to protection under the Taking Clause. (*Lynch v. United States*, 292 U.S. 571, 579 (1934); *Omnia Commercial Corp. v. United States*, 261 U.S. 502, 508 (1923*), James v. Campbell*, 104 U.S. 356, 358 (1882), *Hollister v. Benedict Mfg. Co.*, 113 U.S. 59, 67 (1885), *Ruckelshaus v. Monsanto Co*., 467 U.S. 986 (1984).) Further, the Due Process Clause of the 5th and 14th Amendments guarantee “due process of law” before the government may deprive someone of “life, liberty, or property.”

The Bureau’s Draft Concept language implicates Constitutional issues that will surely result in expensive and protracted litigation. Given the lack of rationale requiring change, or any authority supporting Bureau’s actions, promulgating rules is a waste of governmental resources and does nothing to protect the People of California. To the contrary, the People will have to foot the bill for needless litigation over an issue that was settled by the Office of the Attorney General decades ago. The adoption of any such rules injures the People of California.

The Economic Impact Outweighs The Need For Any Unarticulated Need.

The proposed Concept Draft Language would have an extremely detrimental effect on municipalities as well as the many small businesses and their employees at perhaps the worst possible time. The Bureau began this quest well prior to the pandemic, but the economic impact of the pandemic on the cardrooms and the taxes they pay to municipalities is severe. Just when public services are needed more than ever, the cardrooms are not open to generate the taxes that support those services. The cardrooms themselves have been subjected to long periods of closure, minimal reopening in outdoor facilities that were costly to create and are subject to the winter weather, and then more closure. The businesses and the employees have suffered and the taxes they generate for their communities have

been ravaged. The proposed Concept Draft Language would have a devastating effect on all of those involved.

Despite the repeated requests of industry representatives at the public meetings to explain the necessity for changes, the Bureau has not presented any statements of what benefit the public would derive its Concept Draft Language. The Bureau has not addressed what the problem really is and how sweeping change with severe economic impact is the answer.

Conclusion

The law does not support the Bureau's proposed Draft Concept Language. The authority to make the sweeping changes proposed by the Draft Concept Language, including the revocation of game approvals without hearing, has not been granted to the Bureau. The revocation of game approvals without hearing would give rise to legal challenges of the validity of the Bureau's actions. There is no benefit to the People of the State of California by the Bureau overreaching its authority and incurring the ensuing legal costs.

We ask that this letter, and others opposing the Concept Draft Language be thoroughly considered by the Bureau before proceeding any further with this folly. The Legislature wisely perceived that the party subject to regulation is often in the best position, and has the greatest incentive, to inform the agency about possible unintended consequences of a proposed regulation. Moreover, public participation in the regulatory process directs the attention of agency policymakers to the public they serve, thus providing some security against bureaucratic tyranny. (See *San Diego Nursery Co. v. Agricultural Labor Relations Bd.* (1979) 100 Cal.App.3d 128, 142–143.)

Thank you,

Clarke Rosa

Clarke Rosa
President