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STATE OF MINNESOTA

OFFICE OF ADMINISTRATIVE HEARINGS

OAH Docket No.: 21-9017-36565

In the Matter of the Petitioner of the Shakopee Mdewakanton Sioux Community for a Declaration that the Minnesota Gambling Control Board Engaged in Unlawful Rulemaking	**POST-HEARING REPLY MEMORANDUM OF THE MINNESOTA GAMBLING CONTROL BOARD**

The above-captioned matter is before this Court on a Petition by the Shakopee Mdewakanton Sioux Community ("SMSC") to have certain actions by employees of the Minnesota Gambling Control Board ("Board") relative to electronic pull-tab game approvals declared unadopted rules, pursuant to Minn. Stat. § 14.381 (2018). Petitioner's argument fails because the Board is not "attempting to enforce a policy, guideline, bulletin, criterion, manual standard, or similar pronouncement as though it were a duly adopted rule." Minn. Stat. § 14.381, subd. 1(a) (2018). Petitioner has provided no support for its claim that the Board even considered a Petitioner-described "open all" feature independently, let alone enforced an unwritten unpromulgated policy relating to such a feature.

ARGUMENT

The Petition in this matter should be denied because Petitioner lacks standing to bring a challenge under Minn. Stat. § 14.381.[1] Petitioner's argument should be rejected because it is both counter-factual and internally inconsistent. First, the Board's game approvals are entirely consistent with the relevant statutes and rules. Second, either the Board's interpretation is not a rule because it is a case-by-case analysis or the Board's interpretation is longstanding and

[1] This argument has been fully briefed and Petitioner raises no new arguments in its post-hearing briefing. The Board relies on its previous arguments.

entitled to deference. Petitioner argues that there need be no "writing" for an unadopted rule to exist, but also argues that because the Board never committed its interpretation to writing its interpretation cannot be longstanding. This argument is internally inconsistent, either a writing is required or it is not. Under either theory, however, Petitioner's argument fails and the Petition should be denied.

I. THE APPROVAL OF INDIVIDUAL GAMES WITH PETITIONER'S ALLEGED "OPEN-ALL" FEATURE IS CONSISTENT WITH THE RELEVANT STATUTES AND RULES BECAUSE THE PULL-TAB GAMES DO NOT MIMIC A SLOT MACHINE, DO NOT HAVE ANY PROHIBITED FEATURES, AND THE DEVICE REQUIRES A PLAYER TO OPEN EACH INDIVIDUAL LINE, ROW, OR COLUMN BEFORE MOVING ON TO THE NEXT TICKET.

A. Petitioner's Reliance On Minn. Stat. § 349.12, Subd. 12(b)(3) To Challenge Game Approvals Is Misplaced Because That Section Does Not Apply To Game Approvals.

The prohibition that Petitioner relies on so heavily is contained in subdivision 12(b)(3), which only governs devices, not games. Electronic pull-tab game requirements – which is what Petitioner is contesting here – are controlled by subdivision 12c. Subdivision 12c does not contain any such language as in 12b(3) on which Petitioner relies. Specifically, subdivision 12b(3) ensures each ticket in electronic form is played completely before allowing the player to play a new ticket, regardless of the game, and that is why "each individual line, row, or column of each electronic pull-tab ticket" is not also stated in subdivision 12c that defines the pull-tab game.

B. Even If Minn. Stat. § 349.12, Subd. 12b(3) Applied To Electronic Pull-Tab *Games*, Petitioner's Argument Fails Because The Statute Must Be Read Harmoniously And Interpreted In Light Of The General Purpose Of The Electronic Pull-Tab Statute: To Create A Facsimile Of A Pull-Tab Ticket.

The portion of the statute that regulates electronic pull-tab games – Minn. Stat. § 349.12, subd. 12c – clearly lays out the purpose of the subdivision in its first mandate that an electronic pull-tab game must contain "facsimiles of pull-tab tickets that are played on an electronic pull-

tab device." This instruction requires that electronic pull-tab tickets approximate paper pull-tab tickets to the extent possible. That is precisely the view adopted by the Board and implemented through the game approvals. Affidavit of Gary Danger ("Danger Aff.") ¶8; Barrett Aff. ¶9.

Petitioner's argument assumes that all pull-tab games with more than one row of symbols is a multiple-window game. Petitioner's assumption is incorrect. As noted by the Board in affidavits and with video evidence, many of these games are facsimiles of one-window, multiple-row, paper tickets. Barrett Aff. ¶7(b); Danger Aff. ¶5(b). The Board has provided a video showing how a game like "Wild Walleye" is a facsimile of a one-window ticket with multiple lines. Danger Aff. ¶16(2). The ability to reveal nine-symbols in a three-by-three grid is nothing new. It is exactly how one-window tickets exist in paper. Moreover, where the player has the option of opening each row sequentially (one at a time), or simultaneously (all at once), this is a facsimile of the manner in which multiple-row, multiple-window paper tickets have been played for decades. *See* Danger Aff. ¶16(3). The language of Minn. Stat. § 349.12, subd. 12b(3), even if it did apply to game approvals, must be interpreted consistently with the requirements of Minn. Stat. § 349.12, subd. 12c, which does apply to game approvals. Therefore, electronic pull-tab games that create facsimiles of paper-pull tab games, as they have existed, are permissible.

C. The Electronic Pull-Tabs With An Alleged "Open-All" Feature Do Not Mimic A Slot Machine Because Revealing All Symbols With A Single Player Action Is Not Unique To Electronic Slot Machines And Is Simply An Animated Win Determination, Which Is Expressly Allowed By Rule.

The manner in which winning symbols and denominations are displayed on the pull-tab device for any given game is largely a function of animation. Animated win determinations are expressly allowed by Minn. R. 7864.0235, subp. 18(C). When this rule was amended in 2019 to expressly allow for "animated win determinations," Petitioner challenged the propriety of the rule. Administrative Law Judge LaFave ruled in favor of the Board, holding that:

> An "animated win determination" on a pull-tab device is a visual enhancement or amusement feature allowed by law. As explained earlier, the issue of whether the Board is approving electronic devices that violate the prohibition against displays that mimic a video slot machine or have win displays that directly violate the law is outside the scope of this proceeding.

ITMO Proposed Amendments to Rules Governing Lawful Gambling, Final Report, OAH 60-9017-35616 (May 28, 2019). While Petitioner points to the second portion of this statement that Judge LaFave did not rule expressly on the "mimicking" issue, Petitioner entirely ignores the first part. Judge LaFave ruled, and it is now codified in Rule, that animated win determinations are allowed. Petitioner's argument in this matter is premised on its view that animated win determinations mimic a video slot machine. But those animated win determinations are permitted by law. Petitioner's bare allegations to the contrary are without merit.

Petitioner again relies on the fact that two features may function or operate similarly to argue that pull-tabs mimic a slot machine. But Petitioner cannot claim ownership to every feature of electronic gaming, simply because someone, at some point, incorporated that feature into a slot machine. There are a series of particular features that have been prohibited by statute and rule to prevent electronic pull-tabs from mimicking an electronic slot machine.[2] An "open-all" feature is simply not one of the prohibited features. Petitioner is asking this court to read something into law that is not there and to write a new administrative rule adding "open-all" features to the prohibited item's list.

[2] Some of the features that are per se prohibited include: (1) spinning reels (Minn. Stat. § 349.12, subds. 12b(5) and 12c(9)); (2) scatter pays (Minn. R. 7864.0235, subp. 4(K)(26)); (3) non-straight-line win determinations (Minn. R. 7864.0235, subd. 18.); (4) the use of coin, currency, or tokens to activate play (Minn. Stat. § 349.12, subd. 12b(2)); (5) large stand-alone cabinets (Minn. Stat. § 349.12, subd. 12b); (6) changing bet denominations within a game (Minn. Stat. § 349.12, subd. 12c(3)); and (7) a tethered power cord (Minn. R. 7861.0210, subp. 26a).

D. Petitioner's Evidence Regarding Legislative Intent Is Not Appropriate, Is Irrelevant, And Is Counter To The Actual Legislative History.

Petitioner continues to rely on an email string of proposed statutory language between the Board, the Allied Charities of Minnesota ("ACM"), and the Minnesota Indian Gaming Association ("MIGA") as though it was evidence of legislative intent. Brodeen Aff. Ex. B. This reliance is misplaced because this email string is not part of the legislative record of the 2012 law. "If legislative history is to be considered, it is preferable to consult the documents prepared by Congress when deliberating." *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 580 (1995). "Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms." *In re Gillette Children's Specialty Healthcare*, 867 N.W.2d 513, 520 (Minn. Ct. App. 2015), *aff'd*, 883 N.W.2d 778 (Minn. 2016) (citing *Exxon Mobil Corp. v. Allapattah Servs., Inc.*,545 U.S. 546, 568 (2005)).

There is no indication that these revisions were considered or even seen by a relevant subcommittee of either house of the legislature. There is also no evidence that the alternative language was in any way considered by the legislators when voting on the language in 2012. Moreover, the alternative language proposed by the different parties does not mean what Petitioner suggests. In the ultimate enactment, which was the ACM proposed language, the statute states: *a player must activate or open* each electronic pull-tab ticket and *each individual line, row, or column* of each electronic pull-tab ticket. Minn. Stat. § 249.12, subd. 12b(3). The requirement is that a player must take some action, and that action must result in the activation or opening of each line, row, or column. The statute does not require that the player take multiple actions to open each line, row, or column.

The Board's proposed language, upon which Petitioner mistakenly relies, used the word "individual" entirely differently. Instead of modifying the noun "each line, row, or column," the Board's language used the phrase "individual opening" of each line, row, or column. This language has a different meaning because the word "individual" modifies the nominalization "opening" not the noun list "line, row, or column." Petitioner's reading of the statute is contrary to the plain meaning of the text. Even if the statute is ambiguous, Petitioner's purported legislative history evidence is *not* part of the legislative record and is therefore not actual legislative history. It should be disregarded. The Board has cited, in its Response to the Petition, actual legislative history from the full floor debates that support the Board's position.

E. As An Alternative Basis To Reject The Petition, If Petitioner's Argument That The Board Does Have A "Policy" In Place Regarding "Open-All" Games Is Accepted, That Policy Would Be Longstanding, Entitled To Deference, And Not A Rule.

An interpretive rule that has not been properly promulgated is nonetheless valid, although not enforceable as a rule, if the interpretation is consistent with the plain meaning of the statute, or if the agency's interpretation of an ambiguous statute is a longstanding one. *In re PERA Salary Determination*, 820 N.W.2d 563, 570 (Minn. Ct. App. 2012). If an interpretive rule meets one of these exceptions, the agency is "not deemed to have promulgated a new rule." *Id.*

In *PERA* the court of appeals noted that there is relatively little guidance on what constitutes "longstanding" but held that PERA's interpretation of the statute was not long-standing for three reasons: (1) the court could not determine when the interpretation began based on the record; (2) the interpretation was unwritten and therefore "indefinite" in that case; and (3) PERA's interpretation was not consistent over time. *Id.* at 572. In this case, the record, or Petitioner's own argument, distinguishes this case and shows that the Board's interpretation is longstanding. First, the Affidavits of Gary Danger, Thomas Barrett, and Jon Weaver all show

that the Board has consistently approved games that have Petitioner's purported "open all" feature since 2012. In fact, the Board has never rejected a game for having such a feature.[3] Second, while the alleged "policy" in this case is unwritten, it is Petitioner's own argument that the policy has been clear, definite, and communicated to the industry through game approvals. Third, the Board's interpretation has been consistent over time. Petitioner's only argument otherwise is that the Board has a different interpretation in 2012 or a different interpretation in 2019. These arguments are without merit, as discussed below.

II. The Board Has Consistently Approved Or Denied Electronic Pull-Tab Game Submissions On A Case-By-Case Basis And Has Not Issued Any Policy, Guideline, Bulletin, Criterion, Manual Standard, Or Similar Pronouncement.

Not all agency interpretations are considered "rules." *Cable Communications Board v. Nor-West Cable Communications Partnership*, 356 N.W.2d 658, 667 (Minn. 1984). Generally, when an agency's interpretation of a statute in a written directive coincides with the plain meaning of that statute, the agency is deemed to have not engaged in rulemaking. *Id*.

A. Petitioner's Purported "Open-All" Feature Is Not An Independent Consideration In Statute Or Rule, Was Created By Petitioner From Whole Cloth, Has No Clear Definition, And A Prohibition Could Not Be Implemented Without This Court Writing A Rule For Petitioner.

Petitioner has agreed that the Board must approve or deny electronic pull-tab games when they are submitted. The Board ruling on each game as submitted is required by Minn. Stat. § 349.163, subd. 6(b). The process for these game submissions and the requirements have been clarified in rule. *See* Minn. R. 7864.0235. There is no evidence that the Board considered, much less made a policy decision, regarding which games were permissible or impermissible based on the chosen mechanics used to trigger the animated win determination that reveals the windows

[3] The Affidavit of Gary Danger at paragraph 10 shows that the Board never rejected a game before 2015 for inclusion of such a feature. Petitioner's own argument is that the Board has never rejected one since.

on the electronic pull-tab. The notion of an "open all" feature being an independent consideration in game approval was entirely created by Petitioner. In fact, the only time the Board attempted to classify games by their opening mechanics was in response to Petitioner's data practices request. *See* Affidavit of Phillip Brodeen ("Brodeen Aff.") Ex. A.

Petitioner's allegation that the Board initially interpreted Minn. Stat. § 349.12 as prohibiting games with "open-all" features is without merit and misconstrues the record. Petitioner continues to rely on a 2012 email exchange between Former Executive Director Barrett and a game vendor for the notion that Mr. Barrett believed that "open-all" games were prohibited.[4] The email from the game vendor states:

> The "swipe" is only a mechanism for touching all 3 pull tabs individually. To work, the finger has to pass over each window individually. If you only swipe 2 of 3 windows that is all you will see.
>
> Our belief is that it is fully compliant.

Brodeen Aff. Ex. D.[5] Mr. Barrett responds to the last line only, stating "[t]hat is my belief too." *Id.* Mr. Barrett's response is limited to the conclusion and does not opine on the reasoning in the email. Mr. Barrett's response also speaks only to the compliance of the game in question and never expresses an opinion that other games with other opening mechanics would be noncompliant, contrary to Petitioner's claim.. Mr. Barrett has presented sworn testimony herein that the ability to reveal all symbols under a "single window" would be compliant with Minnesota Statutes. Barrett Aff. ¶8. The Board has consistently approved games on a case-by-

[4] As the Board has noted, there is no statutory or rule-based definition of what constitutes an "open-all" game. The game being described by Mr. White in the email exchange referenced herein may very well have been an "open-all" game, as Petitioner defines that term. This is a significant flaw in Petitioner's argument. To even begin to consider issuing an injunctive order in this matter, this Court would need to first craft a definition of "open-all" games that exists nowhere in statute or rule, as discussed below.

[5] The formatting herein is the actual formatting of the email. This is significant because the "our belief" statement is in a separate line and distinct from the initial explanation.

case basis that are compliant with Minnesota Statutes. The Board has never adopted or changed an interpretation of these statutes. Whether in 2012, 2015, or 2019, the Board has never interpreted the statute as Petitioner alleges, and the Board has never issued a general proclamation categorically prohibiting or allowing Petitioner's alleged "open-all" feature. Simply put, there is no rulemaking here.

B. There Was No Unadopted Rule In 2019 And No Guidance Was Issued Consistent With Petitioner's Interpretation; The Board Merely Paused Game Submissions To Provide Time To Work With Petitioner And Petitioner Rejected That Opportunity.

In 2019, after Petitioner had brought its concerns to the Board, the Board responded reasonably. Barrett Aff. ¶14. The Board temporarily paused game considerations to provide an opportunity to work with MIGA to propose joint legislation. *Id.* Once it became clear that MIGA did not want to work with the Board in such a manner, the Board resumed game considerations. *Id.* This is not an unreasonable approach, does not show that the Board ever agreed with Petitioner's interpretation, and most certainly does not constitute rule-making.

Petitioner argues that Mr. Danger's email of March 13 constitutes a change in interpretation and a concession to Petitioner's interpretation. Brodeen Aff. Ex. F, pgs. 3-4. Petitioner is wrong. Mr. Danger states in the email that "the board *will not authorize* proposed games," that contain what could be described as an open-all feature. Mr. Danger did not say that those games would be *denied*. By not authorizing the games those games would simply sit in a pending status, not being approved or denied. If the Board had agreed with Petitioner's interpretation, Mr. Danger would have said that such games would be denied. He did not. Mr. Danger's Affidavit supports that this was just a temporary delay. Danger Aff. ¶19. The letter sent by Acting Director Peggy Mancuso on September 18, 2019, confirms that this pause was to give the Board time to "study the issue raised at the rules hearing." Danger Aff. Ex. A.

Taking time to consider the concerns raised by the Petitioner is not rule-making. It shows that the Board was being objective and deliberative. The Board's transparent and thoughtful response should be encouraged, not used as a cudgel against the agency in future litigation.

CONCLUSION

Petitioner has no standing to bring this Petition. Even if the Court considers this Petition, the approval or disapproval of an electronic pull-tab game involves a case-by-case analysis of each game. The Board's approval decisions are also entirely compliant with the relevant statutes and rules. The Board has not enforced any unadopted rule in this matter, and the Petition should therefore be denied.

Dated: March 27, 2020

Respectfully submitted,

KEITH ELLISON
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/s/ Stephen D. Melchionne

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STATE OF MINNESOTA

OFFICE OF ADMINISTRATIVE HEARINGS

OAH Docket No.: 21-9017-36565

In the Matter of the Petitioner of the Shakopee Mdewakanton Sioux Community for a Declaration that the Minnesota Gambling Control Board Engaged in Unlawful Rulemaking	**AFFIDAVIT OF SERVICE**

STATE OF MINNESOTA)
) ss.
COUNTY OF RAMSEY)

ANNABEL FOSTER RENNER, being first duly sworn, deposes and says:

That at the City of St. Paul, County of Ramsey and State of Minnesota, on March 27, 2020, she caused to be served the **POST HEARING REPLY MEMORANDUM OF THE MINNESOTA GAMBLING CONTROL BOARD**, by e-mail to:

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/s/ Annabel Foster Renner
ANNABEL FOSTER RENNER

Subscribed and sworn to before me on
March 27, 2020.

/s/ Shari Olmstead
NOTARY PUBLIC - Minnesota
My Commission Expires Jan. 31, 2025