

Chapter 11 Commission Hearing Procedures

1101 Applicability

A. Introduction. The Commission is an independent regulatory agency. The Commission is independent from the Tribe's leadership and from the Gaming Operations it regulates. The Gaming Commission is subject to the laws of the Tribe, and when applicable, to the laws of other sovereigns.

Under the Gaming Regulatory Act, the Gaming Commission is two entities. The Commission is comprised of three Commissioners and certain duties are delegated to the Commissioners. The second entity created by the Gaming Regulatory Act, is the Agency that is responsible for the day-to-day regulation of gaming establishments within the Tribe's jurisdiction. As part of their duties, the Commissioners serve as hearing officers when certain disputes arise under the Gaming Regulatory Act. These hearing procedures, in addition to the rules and standards set forth in the Gaming Regulatory Act, define protocols the Commissioners use when serving as hearing officers.

B. Types of Hearings. Pursuant to Gaming Regulatory Act Section 8.5-27(F) and 8.5-100(A) the Commission has the power to hear appeals from the final orders or decisions of the Agency as follows:

1. Decisions to deny, suspend, restrict or revoke a license under the circumstances defined in Gaming Regulatory Act Section 8.5-27(F);
2. Any direct order of the Executive Director under the circumstances defined in Gaming Regulatory Act Section 8.5-27(F);
3. Patron disputes following the exhaustion of the procedures prescribed in Gaming Regulatory Act Section 8.5-97;
4. Exclusions of persons from a Gaming Operation or Enterprise.
5. Conduct oversight hearings wherein the Commission can request information and reports in the Commission's mission to be more effective or other good cause;
6. Conduct a hearing when a party disputes the issuance of a subpoena by the Commission or by the Agency;
7. Conduct a hearing if the Agency issues an adverse audit finding;
8. Conduct a hearing on an appeal of an Agency regulatory action in the enforcement of the Tribe's Liquor Code.

C. *Application.* These rules for hearings before the Commission shall be used by persons and entities in preparing for and participating in hearings before the Commission. These rules shall be interpreted in a manner which promotes fairness to the persons and entities appearing as a party at a hearing before the Commission. For hearings before the Commission, the Commission shall be a quorum of the Commissioners and the Agency shall be the Executive Director of the Gaming Commission and/or the Executive Director's designee. Parties appearing before the Commission may include the Agency, an applicant for a license, a licensee, an excluded person, a patron or other person who is challenging a Commission decision. These persons and entities shall be referred to as the Party or Parties. These hearing procedures shall govern hearings in connection with licensing matters, patron disputes, and exclusions

D. *Parties.* For the purpose of these hearing procedures, in licensing hearings the Petitioner shall be the prospective licensee or licensee and the Agency shall be the Respondent, in exclusions the Petitioner shall be the person subject to the proposed exclusion or excluded person and the Respondent shall be the Gaming Operation or the Agency or both and in patron disputes the Petitioner shall be the patron and the Respondent shall be the gaming enterprise or the Agency or both.

1102 **Service of a Notice and Setting the Hearing Date**

Notices and other hearing documents shall be served by the Parties by personal service or by registered or certified United States mail. Proof of service shall be memorialized by a certificate signed by the person effecting service.

A. *License Denials.* A candidate for a license that has received notice of intent to deny or has been denied by the Agency can request a hearing on the denial before a quorum of the Commission. The deadline for requesting a hearing is seven business days from the date of the intent to deny or denial of the license. The request for a hearing shall be in writing and served upon the Executive Director at the following:

Executive Director
Gaming Commission
11177 E Michigan Ave
Battle Creek, MI 49014

B. *License Suspensions or Revocations.* A licensee can request a hearing before a quorum of the Commission if the licensee has received written notice from the Agency of a temporary suspension or an intent to suspend or revoke the licensee's license. The deadline for requesting a hearing is seven business days from the date of the notice. The Gaming Commission shall schedule a hearing within fourteen days of the written request for a hearing. The request for a hearing shall be in writing and served upon the Executive Director at the following:

Executive Director
Gaming Commission

11177 E Michigan Ave
Battle Creek, MI 49014

C. *Patron Disputes.* The minimum threshold for a patron dispute hearing before the Commission is \$500. Prior to requesting a hearing before the Commission, patrons must first comply with and exhaust a Gaming Operation's process for resolving the dispute directly with the Gaming Operation. After a patron has exhausted the Gaming Operation's process for resolving disputes, the patron may request a hearing before the Commission. The deadline for requesting a hearing before the Commission is seven business days from a final denial from the Gaming Operation. Patrons shall request a hearing in a writing addressed to:

Executive Director
Gaming Commission
11177 E Michigan Ave
Battle Creek, MI 49014

With a copy to:

General Manager
Firekeepers Casino Hotel
11177 E Michigan Ave
Battle Creek, MI 49014

The Gaming Commission shall schedule a hearing within fourteen business days of the written request for a hearing. In a proceeding before the Commission, the Patron shall have the burden of proving the Patron's claim. The Gaming Operation shall have the opportunity to respond to the Patron. If the Agency investigated the Patron's disputed claim, the Agency may also provide evidence at the hearing. The Commission's decision is final and shall not be subject to further appeal. Even though the Patron has the burden of proof, the Commission may organize the hearing wherein the Gaming Operation (or Agency or both) presents its evidence first and gives the Patron an opportunity to respond to the evidence presented.

D. *Exclusions.* A person may be excluded from a Gaming Operation by (1) a self-exclusion; (2) trespass or other order from a court of competent jurisdiction; (3) a Gaming Operation decision; (4) a Gaming Commission decision. The criterion for exclusions is set forth in Gaming Regulatory Act Section 8.5-98. The Commission maintains a list of excluded persons. Excluded persons shall not enter any Gaming Operations or Establishments within the Tribe's jurisdiction.

An excluded person can request a hearing before the Commission to review an exclusion only if the exclusion was generated by a self-exclusion, a decision by the Gaming Commission or Agency to exclude the person. The Commission will not review and will not provide a hearing when a person is excluded from a Gaming Operation

because of a court order or when a Gaming Operation excludes a person for policy reasons as expressed in Gaming Regulatory Act Sections 8.5-98(D)(6) and 8.5-98(L).

As to Gaming Operation exclusions, the exclusion process starts with a written referral from a Gaming Operation manager who, in writing, transmits an exclusion request to the Agency. The Agency thereafter investigates the allegations supporting the exclusion request. The Agency's investigation of the relevant facts and the Agency's recommendation as to whether the person should be excluded in accordance with the standards defined by the Gaming Regulatory Act is submitted to the Commission. A copy of the recommendation is served upon the person under consideration along with notice that the person can appear before the Commission and present evidence and testimony regarding the recommendation. The person who is subject to the exclusion has seven days from the date on the Agency's recommendation to request a hearing before the Commission. If the person does not request a hearing before the Commission within the seven-day deadline, the Commission shall consider the Agency's recommendation without a formal hearing.

A person on the exclusion list may petition the Agency in writing for removal from the exclusion list. A person may not petition the Agency more than one time in 365 days. Upon receipt of a request, the Agency will forward the request to the Commissioners. The Commissioners may review the paper file and decide on the request or the Commissioners, at their sole discretion, may notice a hearing to consider the matter.

E. Setting the Hearing Date. Unless a different standard is expressed in the Gaming Regulatory Act, a hearing before the Commission shall be set for a date no later than fourteen days after the date a Party files a written request for a hearing. The day the Party receives the notice shall be considered a full days' notice. A Party shall file a request for a hearing within seven business days from the date the Party receives notice of an action. The Commission may, on its own, schedule a hearing notwithstanding the lack of written request for a hearing from a Party.

Hearing Notices shall include at a minimum:

1. Date, time and place of the hearing;
2. The action being considered by the Commission;
3. Whether the Commission is holding the hearing for the purpose of obtaining further information from a Party;
4. Whether the Commission will be considering the grant or denial of a license application;
5. Whether the Commission will be examining any alleged violations of the Gaming Regulatory Act, the Compact, IGRA, the conditions of any license issued by the Commission, any Commission order or other applicable laws, regulations or agreements;
6. Whether any other sanctions or penalties will be considered;
7. A short, plain statement of the reasons the Commission determines the hearing is necessary.

Additional requirements for Primary Management Officials: Before the Agency issues a Notice of Suspension or Notice of Revocation to a licensee who is a primary management official and the grounds do not involve criminal conduct, the Agency shall issue a Notice for Show Cause which shall, if feasible, suggest measures the licensee may pursue to resolve the licensing issue or problem. The Agency shall endeavor to meet with the licensee within three business days of the first day of a scheduled hearing wherein an Agency representative will be available to answer questions related to the hearing. If the licensing issue or problem is not resolved prior to the hearing, the hearing may proceed.

F. Use of Technology. At the Commission's discretion, hearings may be conducted wherein technology is used to enable Commissioners, Agency employees and representatives, Parties, witnesses and others to participate remotely through a product like Zoom or other similar product.

1103 Prohibition of Ex Parte Communication

Unless required for the disposition of ex parte matters authorized by law or by the Gaming Commission:

- A. A member of the Commission (this does not include Agency staff) shall not communicate, directly or indirectly in connection with any issue of fact or law related to a proceeding under this regulation with any Party or their representative except upon notice and opportunity to all Parties to participate;
- B. This section shall not preclude Agency staff from having contact with Parties at any stage of the proceedings under this regulation.
- C. Any member of the Commission who receives an ex parte communication shall immediately report such communication to the Commission's legal counsel.

1104 Delegation to Chairperson

The Chairperson, or his/her designee, of the Commission may issue rulings on discovery matters, scheduling matters, protective orders, continuances, the admissibility of evidence and other procedural or pre-hearing matters that are not dispositive of the case or any portion thereof. The Chairperson's rulings are subject to consideration by a quorum of the Commission upon the request of any Commissioner or upon the request of a party or person affected by the ruling. The failure of such person or party to request such relief shall not be deemed to consent to the ruling nor waiver of any objection for purposes of judicial review.

1105 Appearance through an Advocate

Parties to proceedings governed by this regulation may appear personally or through an advocate. If a party appears through an advocate, the party also must attend hearings unless excused by the Commission or its Chairperson. Parties retaining an advocate shall retain the advocate at their own cost.

- A. When a party has appeared through an attorney, service of all notices, motions, orders, decisions and other papers shall thereafter be made upon the attorney.
- B. When a party is represented by an attorney, the attorney shall sign all motions, oppositions, notices, requests and other papers on behalf of the party.
- C. The Commission reserves the right to directly question the licensee or applicant at a hearing.
- D. Any attorney appearing before the Commission must be duly admitted and authorized to practice before the Tribe's Courts. Parties must provide at least five days' written notice of their intent to be represented by an attorney.

1106 Pre-hearing Conferences

Prior to a hearing on the merits under this regulation, the parties shall meet to expedite the disposition of the action, resolve discovery issues, and facilitate settlement of the case. The Agency's Director shall initiate this process. Absent unusual circumstances, the Commission will not participate in the pre-hearing conference, however at the request of the parties, or upon request of a party, and good cause shown, the Commission Chairperson, or his/her designee, may participate in the pre-hearing conference.

- A. The participants at the pre-hearing conference shall be prepared to consider and take action with respect to any or all of the following:
 - 1. Formulation and simplification of the issues;
 - 2. Possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof, stipulations regarding the authenticity of documents;
 - 3. Identification of witnesses and documents;
 - 4. Possibility of settlement;
 - 5. Such other matters as may aid in the disposition of the action.

- B. After the pre-hearing conference the parties shall set forth in writing any agreements reached during the conference and be prepared to submit the agreement to the Commission at the commencement of the hearing on the merits.

1107 **Discovery and Mandated Exchanges**

No later than five business days before the hearing, the parties shall (1) exchange copies of all documents or tangible things which are intended to be offered as evidence in support of the party's case in chief; (2) Exchange written lists of persons each Party intends to call as a witness in support of that party's case in chief. Each witness shall be identified by name, position, business address, and a brief description for which the witness will be called. It shall be the continuing obligation of the parties to produce documents, witness lists and other matters governed by this section as such become identified by and available to the parties. Any document, tangible thing or witness not identified in accordance with this process may be precluded from consideration by the Commission.

1108 **Confidential and Privileged Materials**

Confidential and privileged materials are governed by Gaming Regulatory Act Section 10.07 and the Tribe rules on privilege.

1109 **Depositions**

A party may take the oral testimony of any witness whose name appears on the witness list of an adverse party or other persons that may become a witness in a hearing on the merits. Unless waived by the party that listed the witness, the scope of the deposition testimony shall be limited to the subject matter of the witness' expected testimony at the hearing. A person deposed under this section may be examined and cross examined in the same manner as if the person were called as a witness at a hearing on the merits.

- A. The deposition of a party may be compelled by directing a notice of the deposition to that party. The notice must contain the title and number of the proceeding, the name and address of the person to be deposed, the date, time and place of the deposition and the name and signature of the requesting party or their attorney. The notice must be served on all parties to the proceeding.
- B. The deposition of a non-party may be taken as described above if the non-party agrees to the deposition. If the non-party does not agree to the deposition, the non-party may be compelled to appear and participate by and through the issuance of a subpoena pursuant to this regulation.

- C. Depositions shall be taken before an officer authorized to administer oaths. A deposition shall not be taken before a person who is a relative, employee, attorney or counsel of any of the parties or is a relative or employee of such attorney or is interested in the proceeding. Testimony shall be taken upon oath or solemn affirmation. Unless the Gaming Commission orders otherwise, the testimony shall be recorded by stenographic means. The cost of transcription shall be borne by the party requesting the deposition. Such party shall provide a copy of the transcript to all parties involved in the proceeding. A deposition may be used in a proceeding under this regulation for the same or similar purposes as depositions may be used in a court of law or for any other purpose allowed by the Gaming Commission. Objection may be made at the hearing on the merits to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying. If a deposition is received in evidence, any party may rebut any relevant evidence contained in the deposition.

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Subpoenas

The Commission or the Agency's Executive Director may issue subpoenas, including subpoenas for production of documents and other tangible things and for compelling witnesses to participate in a matter, upon the request of a Party (including the Agency), for the following purposes:

- A. To compel a non-party to appear and give oral testimony at a deposition;
- B. To compel any person to appear at the hearing on the merits of the case to give oral testimony alone, or to produce documents or other tangible evidence.
- C. Draft subpoenas shall be submitted to the Commission or the Agency's Executive Director for issuance on a form approved by the Commission. Concurrently, with the submission of the subpoena of the subpoena request to the Commission or the Agency's Executive Director, the requesting party shall serve a copy on all other parties to the proceeding. Subpoenas will not be issued in blank. A subpoena submitted for issuance must contain the title and number of the case, the name of the person to whom it will be directed, the date, time and place of hearing or deposition and the name and signature of the requesting party or their attorney. A subpoena for the request of documents must in addition contain a complete description of specific documents or tangible things that the witness will be required to produce at the hearing.

1111 Protective Orders

Upon motion by a Party or by a person to whom a subpoena is directed, or from whom discovery or testimony is sought, the Commission may make any order which justice requires to protect a Party or person from annoyance, embarrassment, oppression or undue burden or expense, including one or more of the following:

- A. That a subpoena be quashed or modified;
- B. That the discovery not be had or that it be had only on specified terms and conditions including a designation of the time or place;
- C. That certain matters not be inquired into or produced or that testimony or production is limited in certain matters;
- D. That a deposition be conducted with no one present except persons designated by the Commission or that a deposition transcript be sealed; or
- E. That a trade secret or other confidential research, development or commercial information not be disclosed or be disclosed only in a designated way.

1112 Discovery Disputes

The Parties shall make every effort to resolve disputes regarding discovery. Disputes that are unresolved may be brought to the Commission or its Chairperson for resolution by way of motion to compel discovery, motion for protective order, or other appropriate motion. The filing of such motion shall not extend the time to complete discovery nor provide probable cause for a continuance of the hearing on the merits unless the Commission or its Chairperson otherwise orders.

1113 Sanctions

If any Party or their attorney fails to reasonably comply with any provision of this regulation, the Gaming Regulatory Act, or any order entered regarding any matter, including discovery, the Commission upon motion or upon its own initiative, may impose upon such Party or attorney, or both, appropriate sanctions in regard to the failure as are just, including the following:

- A. An order prohibiting the use of any witness, document or tangible thing which should have been disclosed, produced, exhibited, or exchanged pursuant to this regulation or order of the Chairperson or Commission;
- B. An order that designated facts shall be taken to be established;

- C. An order to the disobedient party may not support or oppose designated claims or defenses;
- D. An order striking out pleadings or parts thereof, or staying further proceedings or dismissing the proceedings or any part thereof, or entering a judgment by default against the disobedient party.

1114 **Conduct of Hearings**

The Chairperson of the Commission shall preside over hearings. The Chairperson may designate another Commissioner to serve as Chairperson or may, in writing, designate a hearing officer to preside over a hearing. The Chairperson, the Chairperson's designee or a hearing officer shall preside over the hearing, shall call the proceedings to order and control the presentation of evidence.

Witnesses. Testimony presented at a hearing shall be under oath. Testimony, as well as the other parts of the hearing, will be recorded. The Commission may sanction a failure to appear or testify at a hearing (*See Gaming Regulatory Act 8.5-107(B)*). Any Party to the hearing may call and examine witnesses. The Commission, primarily through the Chairperson, shall exercise the discretion to limit the testimony of witnesses where the testimony is irrelevant, argumentative or repetitive. The Commission, primarily through the Chairperson, shall eject from the hearings any person who is disruptive, disorderly, or who shows lack of proper respect for the Commission or the nature of the proceedings. Any member of the Commission may ask questions of witnesses and may request or allow additional evidence at any time. Any Party to the hearing may conduct cross-examination reasonably required for a full and true disclosure of the facts. The Commission, primarily through the Chairperson may, sequester witnesses.

The hearing before the Commission will proceed as follows:

- A. Chairperson of the Commission makes opening comments regarding the hearing process.
- B. Petitioner will present its opening statement on the merits. The Respondent will then be permitted to make an opening statement of the defense or reserve time until commencement of the presentation of the defense.
- C. Petitioner will present its case in chief.
- D. Upon conclusion of Petitioner's case in chief, the Respondent may move for dismissal of the matter. The Commission may hear arguments on the motion, or may grant, deny, or reserve decision thereon, with or without argument.

- E. If no motion to dismiss is made, or if such motion is denied or decision reserved thereon, Respondent shall thereupon present the case for the defense.
- F. Upon conclusion of Respondent's case, Petitioner may present its case on rebuttal.
- G. Upon conclusion of Petitioner's rebuttal, Respondent may present their rebuttal.
- H. After rebuttal, Petitioner will present its closing argument and Respondent shall present their closing argument. At that time, the matter will stand submitted for decision.

1115 Evidence

The Commission shall admit all testimony having reasonable probative value, but shall exclude immaterial, irrelevant or unduly repetitious testimony. The Commission shall give full effect to the rules of privilege unless such privilege is waived. The technical rules relating to evidence and witnesses shall not apply. Basic principles of relevancy, materiality and probative force shall govern the proof of all questions of fact. Objections to evidentiary offers and offers of proof of evidence not admitted may be made and shall be noted in the record.

The Commission may take official notice of any generally recognized fact or any established technical or scientific fact. If the Commission takes official notice of a fact, the Parties shall be given notice either before or during the hearing and any opposing Party shall be given an opportunity to contest the fact. For example, in the category of generally recognized fact, the City of Battle Creek is in Michigan. The Commission can take notice of the fact that the City of Battle Creek is in Michigan without a Party calling a witness to prove this fact.

1116 Failure to Testify

If a party fails to testify in their own behalf or asserts a claim of privilege in response to any question, the Gaming Commission may infer that such testimony or answer would have been adverse to the Party's case.

1117 Amended Pleading

Upon motion of a party made before submission of the case for decision, the Commission may permit the filing of an amended notice or response. If such a motion is granted, all parties shall be permitted to introduce additional evidence with respect to any new matter contained in the amended notice or response.

1118 **Motions**

Motions shall follow these guidelines:

- A. All motions shall be in writing unless made during a hearing on the record.
- B. A motion shall state with particularity the grounds for relief requested.
- C. A motion may be presented informally by letter.
- D. Every motion filed must also be served upon all parties to the proceeding. Proof of service is required.
- E. An opposing party has five business days to file and serve a response to the motion. Proof of service of the response shall be filed.

1119 **Continuances**

Continuances will not be granted except for good cause shown.

1120 **Default**

Failure of a Respondent to appear personally at the hearing on the merits without having obtained a written waiver of appearance shall constitute admission of all matters and facts contained in the Notice preceding the hearing process and shall be deemed a waiver of the opportunity for an evidentiary hearing before the Commission. In such cases the Commission may take action based upon such admission or upon other evidence and without further notices whatsoever to the Respondent.

1121 **Remedies**

The Gaming Regulatory Act sets forth the legal basis for the Commission to address remedies in connection with hearings.

In addition to the standards set forth in the Gaming Regulatory Act, the Commission shall consider:

- 1. The risk to the public and to the integrity of gaming created by the conduct;
- 2. The seriousness of the conduct;
- 3. Whether the conduct was intentional;
- 4. Any justification or excuse for the conduct;
- 5. The person's history of compliance or non-compliance;
- 6. The corrective action taken by the person;
- 7. In the case of a monetary penalty, the amount of the penalty in relation to the severity of the conduct and the financial means of the person;

8. The number of infractions.

1122 Decision of the Gaming Commission

Findings of fact shall be based upon the evidence standard defined in the Gaming Regulatory Act or these regulations. For employee licenses, the burden of proof is on the employee licensee by clear and convincing evidence to establish eligibility and maintain a license. The clear and convincing evidence standard is met when the evidence is highly and substantially more likely to be true than untrue. If an evidentiary standard is not explicitly defined the Commission will use the preponderance of the evidence standard. The preponderance of the evidence standard is such evidence as when considered and compared with that opposed to it has more convincing force and produces in the minds of the Commission a belief that what is sought to be proved is more likely true than not true. The clear and convincing evidence standard requires a party to prove that a fact is substantially more likely than not to be true.

The Commission's decision shall be in writing and sent to the parties within ten days of the close of evidence. The Commission, in its discretion, may include findings of fact and determinations of law in its decision.

1123 Appeals

Parties may request a rehearing of final decisions of the Commission. Adverse Commission decisions may be appealed to the Tribe's Courts pursuant to Gaming Regulatory Act Sections 8.5-111 and 113.