





# INTEROFFICE MEMO

*Gary Grief, Executive Director*

*Alfonso D. Royal III, Charitable Bingo Operations Director*

**To:** J. Winston Krause, Chairman  
Carmen Arrieta-Candelaria, Commissioner  
Doug Lowe, Commissioner  
Robert Rivera, Commissioner

**From:** Bob Biard, General Counsel *AB*

**Date:** December 7, 2017

**Re:** Consideration of the Status and Possible Approval of Orders in Enforcement Cases

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The Legal Services Division staff recommends that the Commission approve each of the proposed orders in the enforcement cases presented under this item.

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TEXAS LOTTERY COMMISSION



**Commission Order No. 18-0025**

**Date: DECEMBER 7, 2017**

<b>IN THE MATTER OF</b>	<b>§</b>	<b>BEFORE THE STATE OFFICE</b>
	<b>§</b>	
	<b>§</b>	<b>OF</b>
<b>THE REVOCATION OF CERTAIN</b>	<b>§</b>	
<b>LOTTERY RETAILER LICENSES</b>	<b>§</b>	<b>ADMINISTRATIVE HEARINGS</b>

**ORDER OF THE COMMISSION**

During an open meeting in Austin, Texas, the Texas Lottery Commission (Commission) heard the license revocation cases listed on Attachment A hereto, in which the Texas Lottery Ticket Sales Agent (Respondent) in each referenced case did not appear at the scheduled hearing before the State Office of Administrative Hearings (SOAH) to respond to the allegations set forth in the Commission's notice of hearing.

**I. Findings of Fact**

1. Timely and adequate notice of the hearings in the referenced cases before SOAH was provided to each Respondent, pursuant to TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052, and 1 TEX. ADMIN. CODE §§ 155.401 and 155.501(b). Each notice of hearing included a disclosure in at least 12-point, bold-face type, that the factual allegations listed in the notice could be deemed admitted, and the relief sought in the notice of hearing might be granted by default against the party that fails to appear at hearing.

2. After timely and adequate notice was given in each case, each case was heard by a SOAH Administrative Law Judge (ALJ). In each case, the Respondent did not appear at the hearing.

3. The Commission, by and through its attorney of record, filed a motion to dismiss each of the referenced cases from the SOAH docket and to remand each case to

**Commission Order No. 18-0025**

**Date: DECEMBER 7, 2017**

the Commission for informal disposition, in accordance with TEX. GOV'T CODE ANN. § 2001.058(d-1) and 1 TEX. ADMIN. CODE § 155.501(d).

4. The ALJ dismissed the referenced cases from the SOAH docket and remanded these cases to the Commission for informal disposition under TEX. GOV'T CODE ANN. § 2001.056.

**II. Conclusions of Law**

1. The Commission has jurisdiction over this matter pursuant to TEX. GOV'T CODE ANN. § 466.155 and 16 TEX. ADMIN. CODE, Chapter 401.

2. The Respondent in each of the cases listed on Attachment A violated the State Lottery Act and the Commission's Rules as set forth in the Commission's notice of hearing applicable to such Respondent. Specifically, each Respondent failed to deposit money due to the State received from lottery ticket sales under the State Lottery Act, in violation of TEX. GOV'T CODE ANN. § 466.351 and 16 TEX. ADMIN. CODE §§ 401.351 and 401.352.

3. The relief sought by the Commission Staff is fair, reasonable, and adequately protects the public.

**III. Order**

NOW, THEREFORE, IT IS ORDERED that, after review and due consideration of the administrative record, each of the cases listed on Attachment A hereto, which is incorporated into this Order for all purposes, is hereby disposed by default, and:

1. All allegations set forth in each notice of hearing in the cases listed on Attachment A are deemed admitted; and

**Commission Order No. 18-0025**

**Date: DECEMBER 7, 2017**

2. The Texas Lottery Ticket Sales Agent License for each Respondent in the cases listed on Attachment A is hereby revoked.

Passed and approved at the regular meeting of the Texas Lottery Commission in Austin, Texas, on the 7<sup>TH</sup> day of DECEMBER, 2017.

Entered this 7<sup>TH</sup> day of DECEMBER, 2017.

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J. WINSTON KRAUSE, CHAIRMAN

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CARMEN ARRIETA-CANDELARIA,  
COMMISSIONER

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DOUG LOWE, COMMISSIONER

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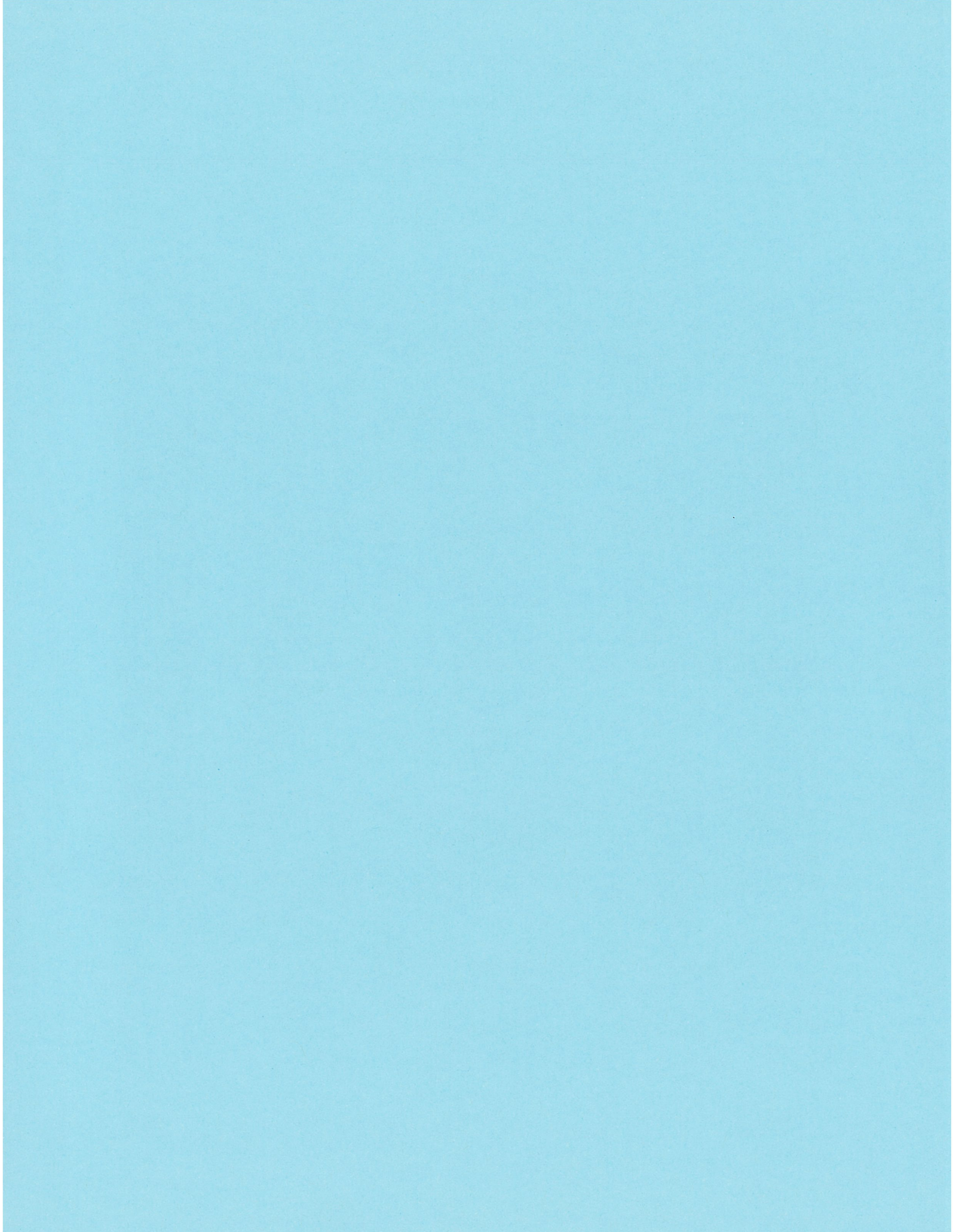
ROBERT RIVERA, COMMISSIONER

**Commission Order No. 18-0025**

**Date: DECEMBER 7, 2017**

**ATTACHMENT A**

<b>TAB NO.</b>	<b>SOAH DOCKET NO.</b>	<b>TICKET SALES AGENT NAME</b>	<b>TICKET SALES AGENT ADDRESS</b>	<b>LOTTERY LICENSE NO.</b>
A.	362-18-0213	NJK Smoke N More LLC d/b/a N J K Smoke N More LLC	149 N. Friendswood Dr. Friendswood, TX 77546	176586
B.	362-18-0214	Starr Biz Enterprise LLC d/b/a Fuel Mart 2	1820 Shiloh Rd., Suite 1209 Tyler, TX 75703	183196
C.	362-18-0215	Starr Biz Enterprise LLC d/b/a Fuel Mart	1820 Shiloh Rd., Suite 1209 Tyler, TX 75703	183085
D.	362-18-0390	AGS Fabrication Inc. d/b/a Oscar Lloyd's Beer and Wine	P.O. Box 962 Nash, TX 75569	178836
E.	362-18-0391	Sher-Pak LLC d/b/a Liberty Crossing	15834 FM 2493 Tyler, TX 75703	180721





**TEXAS LOTTERY COMMISSION**  
**SUMMARY SUSPENSION HEARINGS**  
**STATE OFFICE OF ADMINISTRATIVE HEARINGS**

**ATTACHMENT A**

**HEARING HELD: OCTOBER 12, 2017**

SOAH DOCKET NO.	RETAILER NAME	RETAILER ADDRESS	RETAILER NUMBER
362-18-0213	NJK Smoke N More LLC, Agent DBA N J K Smoke N More LLC	149 N. Friendswood Dr. Friendswood, TX 77546	176586
362-18-0214	Starr Biz Enterprise LLC, Agent DBA Fuel Mart 2	1820 Shiloh Rd., Suite 1209 Tyler, TX 75703	183196
362-18-0215	Starr Biz Enterprise LLC, Agent DBA Fuel Mart	1820 Shiloh Rd., Suite 1209 Tyler, TX 75703	183085

**DOCKET NO.: SEE ATTACHMENT A**

**IN THE MATTER** § **BEFORE THE STATE OFFICE**  
§  
**OF THE REVOCATION OF** § **OF**  
**CERTAIN LOTTERY RETAILER** §  
**LICENSES** § **ADMINISTRATIVE HEARINGS**

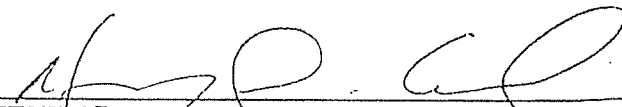
**ORDER REMANDING CASE(S) TO COMMISSION**

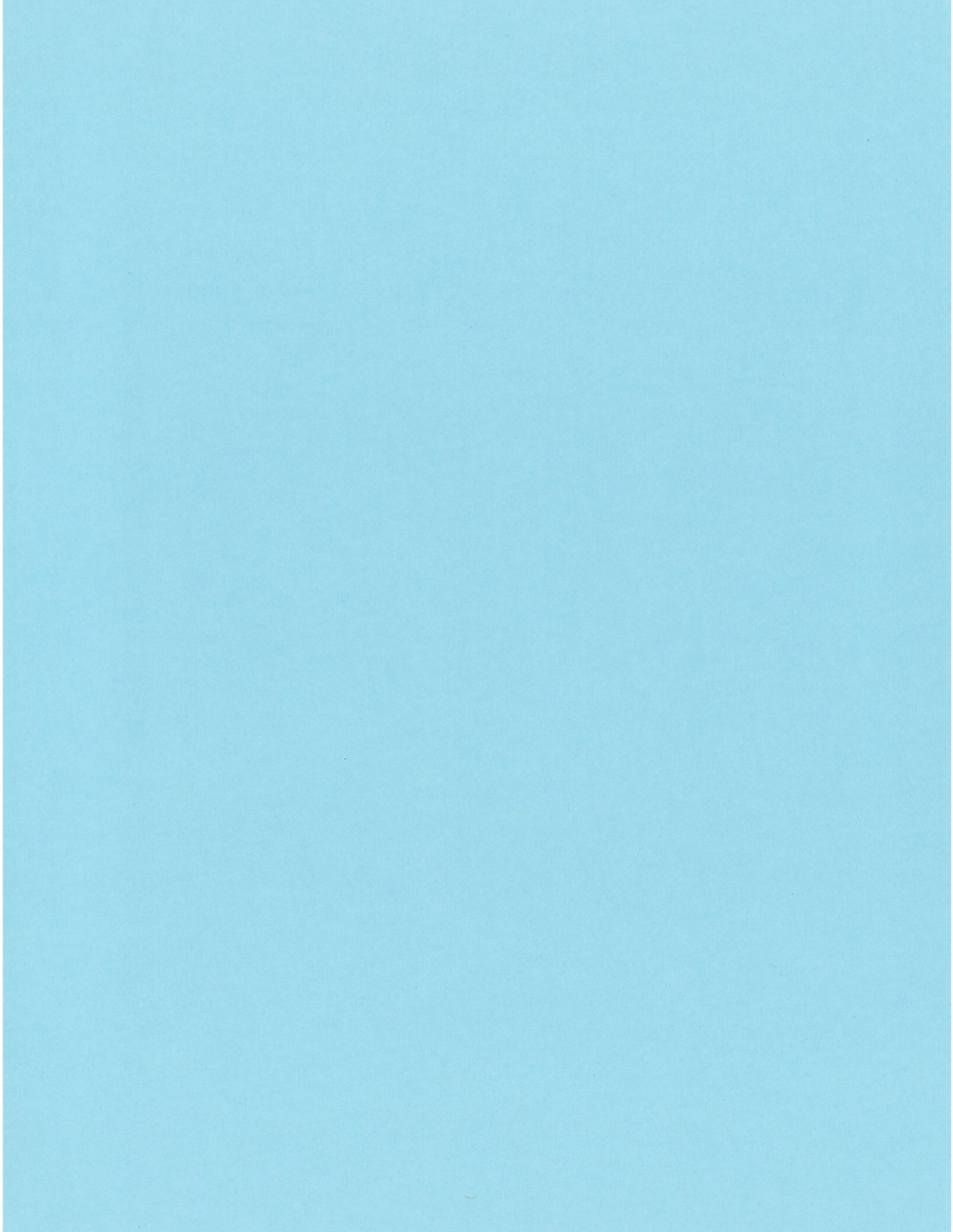
On October 12, 2017, a hearing was convened before the State Office of Administrative Hearings (SOAH) on the revocation of the lottery sales agent license held by each retailer listed on Attachment A. Notice of the hearing was provided to each retailer in accordance with 1 Texas Administrative Code § 155.501(b)(2). The Texas Lottery Commission (Commission) served the notice of hearing via certified mail at each retailer's last known address as it appears in the Commission's records, as authorized by 16 Texas Administrative Code § 401.205(4). Each notice of hearing contained a statement of the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing would be held; a reference to the particular sections of the statutes and rules involved; a short, plain statement of the factual matters asserted; and a statement in at least 12-point, bold-face type that the factual allegations listed in the notice could be deemed admitted and the relief sought might be granted by default against a party that failed to appear at the hearing.

The Commission's staff (Staff) appeared at the hearing. None of the referenced retailers appeared. Based on a retailer's failure to appear, Staff filed a motion to dismiss the case(s) from SOAH's docket and to remand the case to the Commission for informal disposition in accordance with Texas Government Code § 2001.058(d-1) and 1 Texas Administrative Code § 155.501(d). The ALJ concludes that the motion has merit and should be granted.

Accordingly, the motion to dismiss each case listed on Attachment A is granted, and the case(s) are dismissed from SOAH's docket and remanded to the Commission for informal disposition under Texas Government Code § 2001.056.

**SIGNED October 24, 2017.**

  
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**HENRY D. CARD**  
**ADMINISTRATIVE LAW JUDGE**  
**STATE OFFICE OF ADMINISTRATIVE HEARINGS**



TEXAS LOTTERY COMMISSION

REVOCATION HEARINGS

STATE OFFICE OF ADMINISTRATIVE HEARINGS

ATTACHMENT A

HEARING HELD: \_\_\_\_\_ October 26, 2017 \_\_\_\_\_

SOAH DOCKET NO.	RETAILER NAME	RETAILER ADDRESS	RETAILER NUMBER
362-18-0390	AGS Fabrication Inc. d/b/a Oscar Lloyd's Beer and Wine	P. O. Box 962 Nash, TX 75569	178836
362-18-0391	Sher-Pak LLC d/b/a Liberty Crossing	15834 FM 2493 Tyler, TX 75703	180721

DOCKET NO.: SEE ATTACHMENT A

IN THE MATTER § BEFORE THE STATE OFFICE  
OF THE REVOCATION OF §  
CERTAIN LOTTERY RETAILER § OF  
LICENSES § ADMINISTRATIVE HEARINGS

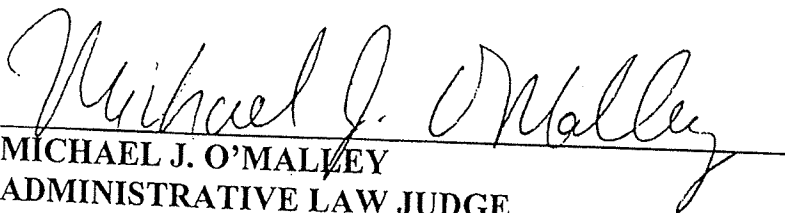
**ORDER REMANDING CASE(S) TO COMMISSION**

On October 26, 2017, a hearing was convened before the State Office of Administrative Hearings (SOAH) on the revocation of the lottery sales agent license held by each retailer listed on Attachment A. Notice of the hearing was provided to each retailer in accordance with 1 Texas Administrative Code § 155.501(b)(2). The Texas Lottery Commission (Commission) served the notice of hearing via certified mail at each retailer's last known address as it appears in the Commission's records, as authorized by 16 Texas Administrative Code § 401.205(4). Each notice of hearing contained a statement of the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing would be held; a reference to the particular sections of the statutes and rules involved; a short, plain statement of the factual matters asserted; and a statement in at least 12-point, bold-face type that the factual allegations listed in the notice could be deemed admitted and the relief sought might be granted by default against a party that failed to appear at the hearing.

The Commission's staff (Staff) appeared at the hearing. None of the referenced retailers appeared. Based on a retailer's failure to appear, Staff filed a motion to dismiss the case(s) from SOAH's docket and to remand the case to the Commission for informal disposition in accordance with Texas Government Code § 2001.058(d-1) and 1 Texas Administrative Code § 155.501(d). The ALJ concludes that the motion has merit and should be granted.

Accordingly, the motion to dismiss each case listed on Attachment A is granted, and the case(s) are dismissed from SOAH's docket and remanded to the Commission for informal disposition under Texas Government Code § 2001.056.

SIGNED October 31, 2017.

  
MICHAEL J. O'MALLEY  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARING

































**Commission Order No. 18-0038**

**Date: DECEMBER 7, 2017**

DOCKET NO. 362-17-4986.B

TEXAS LOTTERY COMMISSION	§	BEFORE THE TEXAS
PETITIONER	§	
	§	
VS.	§	
	§	
IOWA PARK OPTIMIST CLUB	§	
RESPONDENT	§	LOTTERY COMMISSION

ORDER OF THE COMMISSION

TO: Mr. Walter Beeman  
Iowa Park Optimist Club  
P.O. Box 9903  
Wichita Falls, TX 76308

During open meeting in Austin, Texas, the Texas Lottery Commission finds that, after proper and timely notice was given, the above-styled case was heard by an Administrative Law Judge (ALJ) who made and filed a Proposal for Decision (PFD) containing the ALJ's Findings of Fact and Conclusions of Law. The PFD was properly served and all parties were given an opportunity to file exceptions and replies as part of the record herein.

The Texas Lottery Commission, after review and due consideration of the PFD and exceptions and replies filed, if any, adopts the ALJ's Findings of Fact and Conclusions of Law as if fully set out and separately stated herein. All proposed Findings of Fact and Conclusions of Law not specifically adopted herein are hereby denied.

NOW, THEREFORE, IT IS ORDERED that the Iowa Park Optimist Club's license to conduct bingo is hereby revoked.

**Commission Order No. 18-0038**

**Date: DECEMBER 7, 2017**

Passed and approved at the regular meeting of the Texas Lottery Commission in Austin, Texas, on the 7<sup>TH</sup> day of DECEMBER, 2017.

Entered this 7<sup>TH</sup> day of DECEMBER, 2017.

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J. WINSTON KRAUSE, CHAIRMAN

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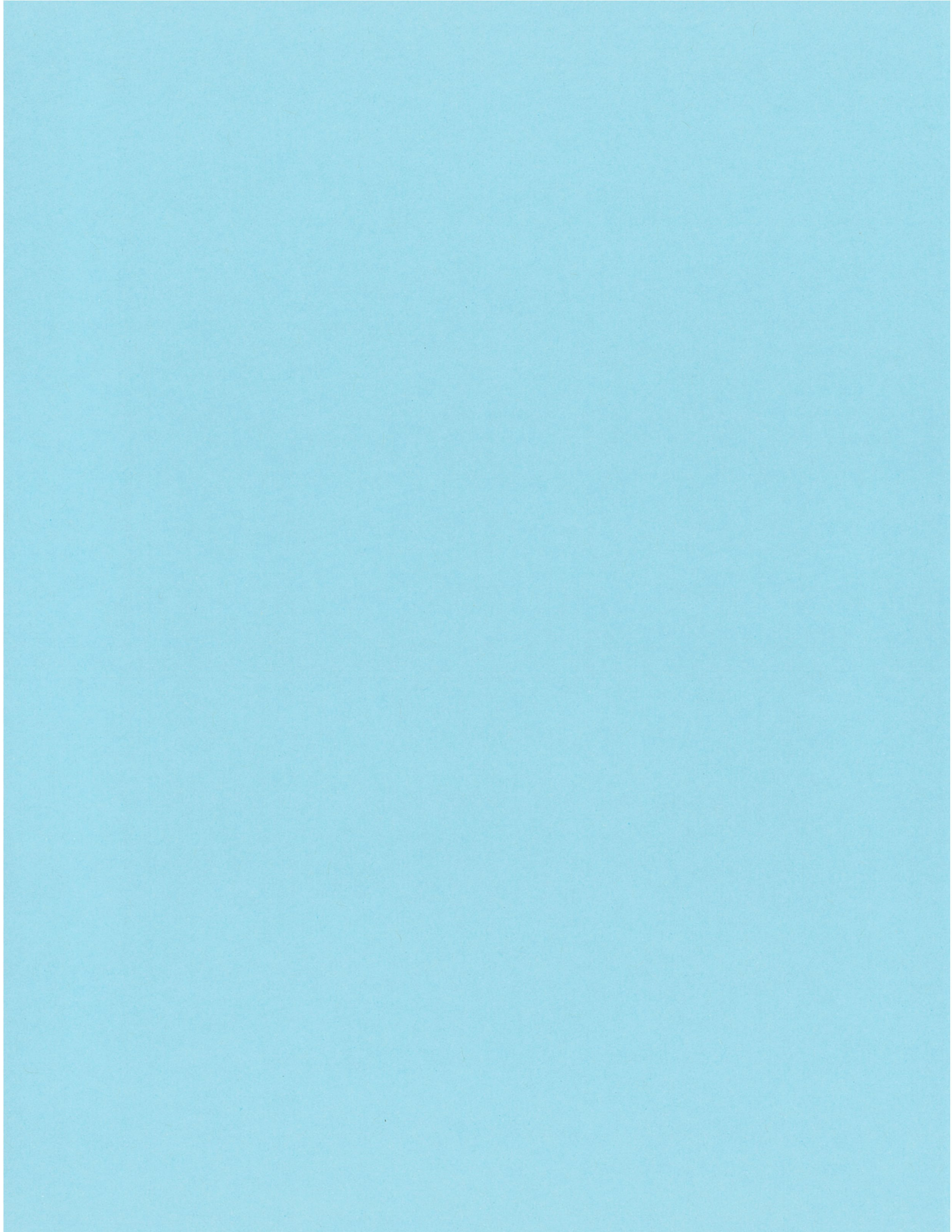
CARMEN ARRIETA-CANDELARIA,  
COMMISSIONER

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DOUG LOWE, COMMISSIONER

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ROBERT RIVERA, COMMISSIONER



SOAH DOCKET NO. 362-17-4986.B

TEXAS LOTTERY COMMISSION,  
Petitioner

v.

IOWA PARK OPTIMIST CLUB,  
Respondent

§  
§  
§  
§  
§  
§  
§

BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

In this case, the staff (Staff) of the Charitable Bingo Operations Division (Division) of the Texas Lottery Commission (Commission) proposes to revoke Iowa Park Optimist Club's (Club) license to conduct charitable bingo operations. Staff proposes to revoke the license because Club failed to have positive net proceeds during its previous license year, in violation of the Bingo Enabling Act (the Act)<sup>1</sup> and a Commission rule. The Administrative Judge Law Judge (ALJ) concludes Staff proved the Commission was entitled to revoke Club's license and recommends that the Commission revoke the license.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

The Commission has jurisdiction over this matter pursuant to Texas Occupations Code chapter 2001. The State Office of Administrative Hearings (SOAH) has jurisdiction over all matters relating to the conduct of a hearing in this proceeding, including the preparation of a proposal for decision with findings of fact and conclusions of law, pursuant to Texas Government Code chapter 2003. Staff has the burden of proving that the Commission is entitled to revoke Club's license for failing to meet the statutory and legal requirements. To the extent Club is seeking to prove that it is entitled to a waiver of a requirement, Club has the burden of proof.<sup>2</sup>

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<sup>1</sup> Tex. Occ. Code ch. 2001.

<sup>2</sup> 1 Tex. Admin. Code § 150.427.

On May 23, 2017, Staff sent a letter notifying Club that it was proposing to initiate administrative disciplinary action against Club.<sup>3</sup> On June 23, 2017, Club requested a hearing to contest the disciplinary action.<sup>4</sup> A notice of hearing was sent to Club on July 10, 2017.<sup>5</sup> The adequacy of the notice is not in dispute.

The hearing was convened before ALJ Joanne Summerhays on August 16, 2017. Staff attorney Kristen Guthrie represented Staff. Brad Thomas Beard, the president of the commercial lessor, Superior Bingo, Inc., and Walter Beeman, the bingo chairperson for Club, (both non-attorneys) represented Club. The hearing was adjourned and the record closed the same day.

## II. APPLICABLE LAW

When an “authorized organization,” such as a fraternal organization, wishes to conduct charitable bingo operations in Texas, it must first obtain a license from the Commission.<sup>6</sup> Licenses are generally effective for one year.<sup>7</sup> The Commission may revoke a license if the licensee has violated any provision of the Act or any Commission rules adopted pursuant to the Act.<sup>8</sup>

Among many other requirements, the bingo operations of a licensed authorized organization must result in “net proceeds [as opposed to net losses] over the organization’s license period” (the Net Proceeds Requirement).<sup>9</sup> The net proceeds of a license holder with a one-year license must be calculated based on the license holder’s quarterly reports for the four calendar quarters immediately preceding the license expiration date.<sup>10</sup>

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<sup>3</sup> Staff Ex. 1.

<sup>4</sup> Staff Ex. 2.

<sup>5</sup> Staff Ex. 3.

<sup>6</sup> Tex. Occ. Code § 2001.101(a).

<sup>7</sup> Tex. Occ. Code § 2001.105(c).

<sup>8</sup> Tex. Occ. Code § 2001.353(a).

<sup>9</sup> Tex. Occ. Code § 2001.451(g)(1).

<sup>10</sup> Tex. Admin. Code § 402.452(c).



A licensed authorized organization may apply to the Commission for a waiver of various requirements, including a waiver of the Net Proceeds Requirement.<sup>11</sup> The Commission “may” grant such a waiver if the applicant shows “good cause . . . that compliance with [the requirement for which a waiver is sought] is detrimental to the organization’s existing or planned charitable purposes.”<sup>12</sup> “Good cause” may be proved by providing to the Commission:

- (1) credible evidence of circumstances beyond the control of the organization, including force majeure; or
- (2) a credible business plan for the organization’s conduct of bingo or the organization’s existing or planned charitable purposes.<sup>13</sup>

The Commission has adopted a rule specifying detailed and extensive requirements for a waiver application.<sup>14</sup> An application for a waiver must include the following:

- (A) the reason for the request;
- (B) an explanation of how compliance with the requirement is detrimental to the organization’s existing or planned charitable purposes;
- (C) the intended purpose of future charitable distributions;
- (D) the specific calendar quarter or license year for which the waiver is being requested, as applicable; and
- (E) either of the following:
  - (i) a credible business plan; or
  - (ii) if the request is due to force majeure as defined in § 402.453 of this subchapter, documentation from outside sources supporting force majeure. Examples of acceptable documentation include newspaper articles, copies of local ordinance changes, police or fire department reports, notification of road construction, or photographs.<sup>15</sup>

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<sup>11</sup> Tex. Occ. Code § 2001.451(k); 16 Tex. Admin. Code § 402.452(e).

<sup>12</sup> Tex. Occ. Code § 2001.451(k).

<sup>13</sup> Tex. Occ. Code § 2001.451(k).

<sup>14</sup> 16 Tex. Admin. Code § 402.450(b).

<sup>15</sup> 16 Tex. Admin. Code § 402.450(b)(2).

“Force majeure” is defined as “[s]ome unforeseen event beyond the control of the licensed authorized organization or unit that results in non-compliance with specific sections of the Act or Rules.”<sup>16</sup>

### III. EVIDENCE PRESENTED

Club is a fraternal organization that is part of the Superior Bingo Trust (unit trust) and holds an annually-renewed license to conduct charitable bingo in Wichita Falls, Texas.

The unit trust is required to submit quarterly accounting reports to the Commission of the unit trust’s operations of a bingo hall. According to the quarterly reports for the year 2016, the unit trust’s net proceeds were as follows:

2016 Q1	\$13,417
2016 Q2	(\$6,228)
2016 Q3	(\$11,383)
<u>2016 Q4</u>	<u>(\$2,844)</u>
<b>2016 Annual Total</b>	<b>(\$7,078)<sup>17</sup></b>

As a member of the unit trust, Club is jointly and severally liable for the unit’s compliance with the statutes and rules governing bingo.<sup>18</sup> Therefore, based on the unit’s quarterly reports for the four calendar quarters immediately preceding the license expiration date, Club did not have net proceeds but rather had net losses, and failed the Net Proceeds Requirement.

Desira Glenn, who is the Licensing and Accounting Manager of the Commission, testified on behalf of Staff. She stated that the purpose of the Net Proceeds Requirement was to ensure that charities did not lose money conducting bingo. She testified that charities can request a waiver for failing to meet the Net Proceeds Requirement. The unit trust of which Club was a

<sup>16</sup> 16 Tex. Admin. Code § 402.453(a)(1).

<sup>17</sup> Staff Ex. 10.

<sup>18</sup> Tex. Occ. Code § 2001.438(f), (g).

member had applied for waivers in 2012 and 2014 which were granted on the basis of force majeure. Ms. Glenn stated that she was not in the Commission administration at the time of the previous waivers. She explained that currently the waivers would not have been granted because, under the current administration's policies, the applications did not have enough detail or meet the current interpretation of force majeure.

In February 2017, Staff notified the unit trust that it was proposing to revoke the license of each of the unit trust's members, including Club's license, because the unit trust did not meet the Net Proceeds Requirement.<sup>19</sup> In the letter, Staff stated that an application for a waiver from the Net Proceeds Requirement could be submitted no later than February 24, 2017. On February 21, 2017, Club applied for a waiver from the Net Proceeds Requirement.<sup>20</sup> The waiver request explained why compliance with the Net Proceeds Requirement would be detrimental as follows:

The compliance to be waived . . . is detrimental to [Club's] existing charitable purposes as it will eliminate the organization's primary source of funding for children's sports programs and other community efforts. The bingo hall is experiencing increased/renewed interest in bingo from patrons who [did] not play bingo in prior years due to the smoking environment. 2017 will prove to be a positive year for renewed bingo interest and charitable funding efforts.<sup>21</sup>

Under the section titled "Required Supplemental Information Attachment," a box was checked by the following statement: "If the waiver request is due to force majeure or circumstances beyond the control of the organization, submit: Documentation from outside sources supporting force majeure or evidence of circumstances beyond the control of the organization . . . ." Examples of acceptable documents were listed, which included newspaper articles and copies of local ordinance changes. The following was typewritten into the document following the statement: "Comprehensive Smoking Ordinance went into effect June 17, 2016."

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<sup>19</sup> Staff Exs. 5-6.

<sup>20</sup> Staff Ex. 7.

<sup>21</sup> Staff Ex. 7.

Under the statement “List specific reasons the waiver is needed,” was typed:

- (1) The commercial lessor closed the building formerly used by [Club] (through the Superior Bingo Trust) and relocated bingo operation to a separate building. The move resulted in a loss of some regular attendees who are unable to commute to new location.
- (2) The City of Wichita Falls passed a non-smoking ordinance which went into effect on June 17, 2016. All smoking in public places (including the bingo hall) ceased on June 17, 2016. This ordinance essentially eliminated overnight 50% of our regular bingo patrons.

Attached to the waiver application was (1) a copy of the Wichita Falls ordinance adopting a smoking ban; (2) copies of news articles regarding the ordinance; and (3) a letter to the Commission from Mr. Beard regarding the reasons for moving the operations to another location. In addition, a letter from Mr. Beard to Mr. Beeman was attached stating that Mr. Beard had personally worked with the City Council to secure a delay in the enforcement of the smoking ordinance from 2014 until July 2017, to allow the lessor to construct a designated non-smoking area on the bingo premises. When it became apparent to the lessor that such construction was cost prohibitive, the lessor arranged for the relocation of the bingo premises to another location.<sup>22</sup>

The Commission denied Club’s waiver request by letter dated March 23, 2017.<sup>23</sup> Ms. Glenn testified that the grounds for a waiver stated in the application—a smoking ban and relocating the facilities—did not meet the definition of force majeure. She explained that force majeure involved circumstances beyond the control of the licensee that were shown to adversely impact the business and that did not involve a business decision. She opined that the evidence was not sufficient to establish that the smoking ban caused the negative net proceeds. She stated that Club had notice in 2014 that the ban was enacted and worked with the city to delay the effective date until 2016 to allow them to prepare for the consequences from a business standpoint. Therefore, Club had an opportunity to address the issue, but did not do so. Furthermore, she stated, the move was not force majeure because it was entirely within the

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<sup>22</sup> Staff Exhibit 5 at 5-6.

<sup>23</sup> Staff Ex. 6.

control of Club. Also, she noted, there was no evidence submitted that the negative net proceeds were due to the relocation.

Mr. Beard testified that multiple casinos have opened in recent years near Wichita Falls that have negatively affected bingo charities. He said that, as a result of the competition from casinos, multiple bingo halls in Wichita Falls have closed. Club is the last charity still providing bingo in Wichita Falls. He stated that Club's bingo proceeds support a youth gym in Iowa Park, Texas and if its license is revoked, the gym will be forced to close down. He admitted that the smoking ban was not really a force majeure. However, he stated that the smoking ban definitely affected the unit trust's revenue because smoking and bingo were inextricably linked. He also agreed that it was a business decision to move the bingo operations. However, he pointed out that Club has positive net proceeds for the first two quarters of 2017, and stated that he believed the trend toward positive proceeds indicated that Club's move was a good business decision. Therefore, in his opinion, Club should be granted a waiver.

Mr. Beeman stated that he expected Club to continue having positive net proceeds due to the fact that they are now the only bingo operation in Wichita Falls.

#### IV. ANALYSIS

There is no dispute that, based on the unit trust's quarterly reports for the four calendar quarters in 2016, Club failed to have net proceeds over its 2016 license period, thereby violating the Net Proceeds Requirement set forth in the Act and the Commission's rules.<sup>24</sup> For this reason, the Commission is entitled to revoke Club's license.<sup>25</sup>

The only question is whether Club proved it was entitled to a waiver of the Net Proceeds Requirement. The statute provides that the Commission "may" grant a waiver if good cause is shown. The use of the word "may" indicates that the Commission may also choose *not* to grant a

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<sup>24</sup> Tex. Occ. Code § 2001.451(g)(1); 16 Tex. Admin. Code § 402.452(a).

<sup>25</sup> Tex. Occ. Code § 2001.353(a)(1).

waiver even if good cause is shown. Stated differently, the statute gives the Commission a substantial amount of discretion in its decisions on waiver applications.<sup>26</sup> The issue to be addressed in this case is whether Club has shown good cause “that compliance with [the Net Proceeds Requirement] is detrimental to the organization's existing or planned charitable purposes.”<sup>27</sup>

The waiver statute provides that good cause may be proved by one of two methods. First, a waiver applicant can offer “credible evidence of circumstances beyond the control of the organization, including force majeure” (a Force Majeure Waiver).<sup>28</sup> Club’s waiver application stated that it was seeking a Force Majeure Waiver because of the smoking ordinance that went into effect in June 2016. The application form reinforces that an ordinance could be the basis for a Force Majeure Waiver by stating that copies of ordinances could be attached as proof of force majeure. However, force majeure is defined as an “unforeseen event” which causes a licensee to violate the legal requirements. In this case, the evidence indicated that Club had negotiated with the city and obtained an extension of the imposition of the smoking ban for two years, to allow it to deal with any fallout from the ban. Steps that Club could have taken included providing outdoor smoking areas.<sup>29</sup> The ordinance was therefore not an unforeseen event out of the control of Club.

Furthermore, the evidence did not support Club’s allegation that the ordinance caused it to violate the regulations. The ordinance went into effect in mid-June 2016, but Club had negative net proceeds during the second quarter of 2016, prior to the effective date of the ordinance. Furthermore, according to the evidence submitted, the bingo hall actually profited from the smoking ordinance by attracting patrons who did not smoke. Club cited the ordinance as one basis for improved proceeds in 2017 and a trend upward.<sup>30</sup> Therefore the evidence did not support Club’s position that the smoking ordinance was a force majeure.

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<sup>26</sup> Tex. Gov’t. Code § 311.015(1).

<sup>27</sup> Tex. Occ. Code § 2001.451(k).

<sup>28</sup> Tex. Occ. Code § 2001.451(k)(1).

<sup>29</sup> Staff Ex. 5 at 15.

<sup>30</sup> Staff Ex. 5 at 1, 18.

Likewise, the relocation of the bingo hall was not an unforeseen event out of the control of Club. Club made a reasoned business decision to move the premises to another location based on economic considerations. Assuming Club was forced by the lessor to move its premises from the current location, the evidence was insufficient to prove that Club was forced to move to a location far from the current patrons, or that the move was the reason that Club's net proceeds did not meet the statutory requirement.

An applicant can also seek a waiver by providing "a credible business plan for the organization's conduct of bingo or the organization's existing or planned charitable purposes" (a Credible Business Plan Waiver).<sup>31</sup> It was undisputed that Club did not submit a business plan, or request a Credible Business Plan Waiver. However, Club's argument regarding the relocation appeared to resemble a Credible Business Plan Waiver rather than a Force Majeure Waiver. Since Club did not present a credible business plan as part of its application, it is not entitled to rely on that argument as the basis for a waiver. Furthermore, the fact that Club has shown profits in 2017 is not a basis in law for a finding that good cause exists for waiving the requirement.

Based on the evidence presented and the applicable legal authorities, the ALJ concludes that: (1) Club failed to meet the Net Proceeds Requirement; (2) the waiver application did not establish good cause for excusing compliance with the Net Proceeds Requirement; and (3) Club's license may be revoked.

## V. FINDINGS OF FACT

1. The Iowa Park Optimist Club (Club) is a fraternal organization that holds an annually-renewed license to conduct charitable bingo in Wichita Falls, Texas.
2. The license held by Club is issued by the Charitable Bingo Operations Division of the Texas Lottery Commission (Commission).
3. Club's license became effective on January 1, 2016, and was to expire on December 31, 2016.

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<sup>31</sup> Tex. Occ. Code § 2001.451(k)(2).


4. Club uses its revenue from its bingo operations for charitable purposes, including funding a youth gym in Iowa Park, Texas.
5. Club is one of three charitable organizations that banded together as a “unit trust” named Superior Bingo Trust to operate charitable bingo out of a single location.
6. Net proceeds from the unit trust are distributed equally among the three charitable organizations.
7. Superior Bingo Trust (and, by extension, Club) did not have net proceeds but, rather, had net losses for the 2016 calendar year.
8. In February 2017, the staff (Staff) of the Commission notified Club that it was proposing to revoke its license because Club did not have net proceeds in 2016 as required by state law (Net Proceeds Requirement).
9. In February 2017, Club applied for a waiver from the Net Proceeds Requirement.
10. The waiver application did not establish good cause why compliance with the Net Proceeds Requirement should be waived.
11. The smoking ordinance was not an unforeseen event out of the control of Club which caused it to fail to comply with the Net Proceeds Requirement.
12. The relocation of the bingo premises was not an unforeseen event out of the control of Club which caused it to fail to comply with the Net Proceeds Requirement.
13. On May 23, 2017, Staff notified Club that it was proposing to revoke Club’s license.
14. On June 22, 2017, Club appealed the proposed denial and requested a hearing.
15. A Notice of Hearing was sent to Club on July 10, 2017. The notice contained a statement of the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the factual matters asserted.
16. The hearing was held before ALJ Joanne Summerhays on August 16, 2017. Staff attorney Kristen Guthrie represented Staff; Brad Thomas Beard and Walter Beeman, non-attorneys, represented Club. The hearing ended and the record closed on the same day.

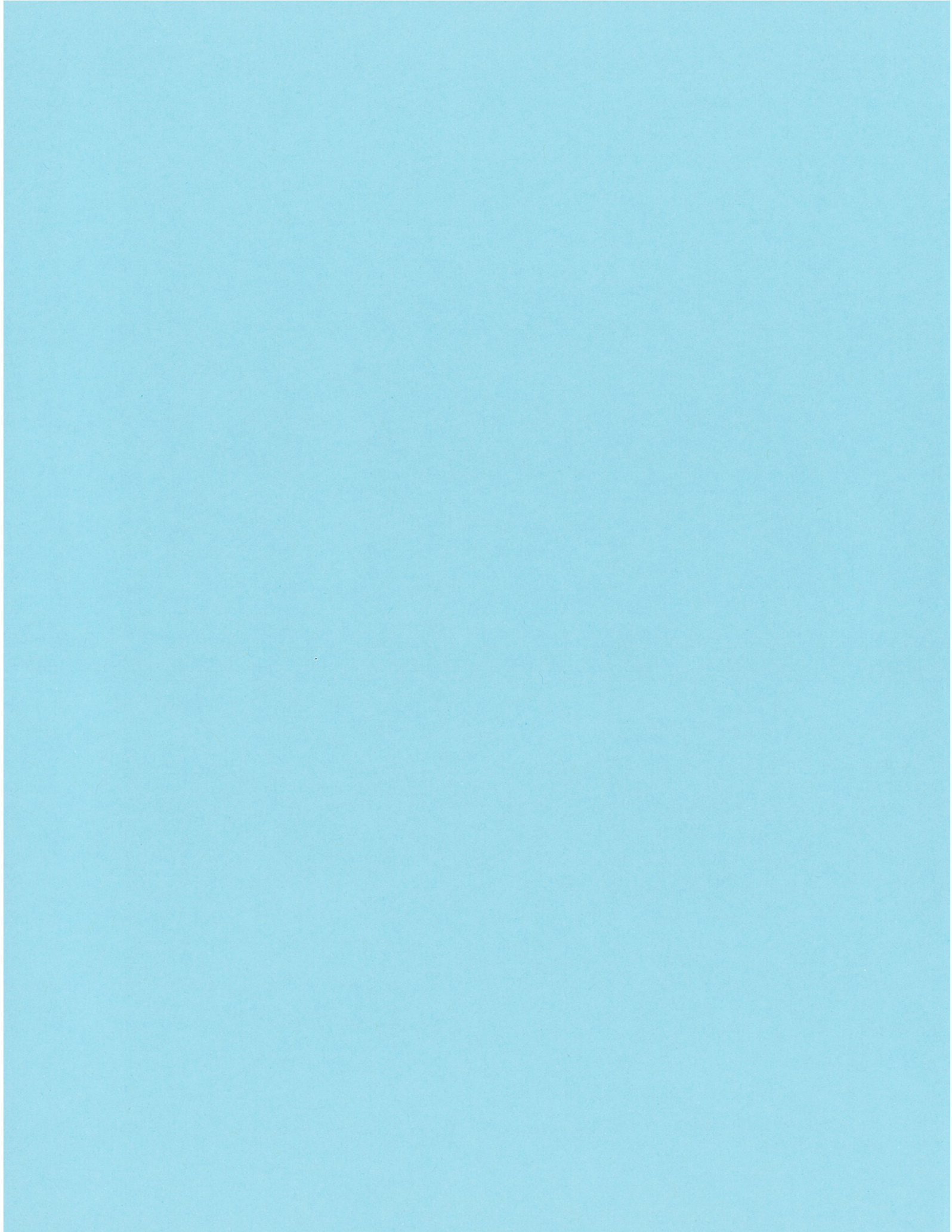


## VI. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter. Tex Occ. Code ch. 2001.
2. SOAH has jurisdiction over all matters relating to the conduct of a hearing in this proceeding, including the preparation of a proposal for decision with findings of fact and conclusions of law. Tex. Gov't Code ch. 2003.
3. Staff has the burden of proving that the Commission was authorized to revoke Club's license. 1 Tex. Admin. Code § 155.427.
4. Club has the burden of proving that it was entitled to a waiver of statutory requirements. 1 Tex. Admin. Code § 155.427.
5. Adequate and timely notice of the hearing was provided. Tex. Gov't Code §§ 2001.051-.052.
6. The Commission may revoke a license if the licensee has violated any provision of the Bingo Enabling Act or any Commission rules adopted pursuant to the Act. Tex. Occ. Code § 2001.353(a).
7. By failing to have positive net proceeds in 2016, Club violated Texas Occupations Code § 2001.451(g)(1) and 16 Texas Administrative Code § 402.452(a).
8. Club failed to prove that it was entitled to a waiver of the statutory and regulatory requirement because it failed to prove good cause that compliance with the requirement for positive net proceeds is detrimental to its existing or planned charitable purposes. Tex. Occ. Code § 2001.451(k); 16 Tex. Admin. Code § 402.452(e).
9. Club's license should be revoked.

**SIGNED September 11, 2017.**

  
\_\_\_\_\_  
JOANNE SUMMERHAYS  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS



**IOWA PARK OPTIMIST CLUB**

Walter Beeman, Bingo Chairperson

PO Box 9903

Wichita Falls, TX 76308

*Xcd: Grief  
Beard-Handle  
Royal*

September 22, 2017

**VIA FACSIMILIE TO: (512) 475-4994**

Honorable Joanne Summerhays  
Administrative Law Judge  
State Office of Administrative Hearings  
300 W. 15<sup>th</sup> St., Suite 504  
Austin, TX 78701

**RE: Docket No. 362-17-4986.B; Texas Lottery Commission v. Iowa Park Optimist Club**

Dear Honorable Joanne Summerhays:

We are in receipt of your letter dated September 11, 2017 regarding the above reference Case. We appreciate your thorough review of such matters and respect your Proposal for Decision as communicated to the Mr. Gary Grief, Executive Director of the Texas Lottery Commission.

Iowa Park Optimist Club requests an opportunity to communicate its exception(s) to your Proposal for Decision, as follows:

1. Ms. Desire Glenn, Licensing and Accounting Manager for the Charitable Bingo Division/Texas Lottery Commission testified on behalf of the Charitable Bingo Division that Iowa Park Optimist Club (through Superior Bingo Trust ("Unit Trust")) applied for waivers for the Net Proceeds Requirement in 2012 and 2014 based on force majeure.

The "2012 Application for Waiver" dated August 20, 2012 (for the License Period July 1, 2011 through June 30, 2012) was based on evidence of circumstances beyond the control of Iowa Park Optimist Club (through Superior Bingo Trust) and **not based on force majeure**. The waiver appears to have been granted on basis of general business environment and competition within proximity to the bingo operations hosted by Iowa Park Optimist Club.

A copy the "2012 Application for Waiver" is included at **Exhibit 9** of the binder submitted into record by the Texas Lottery Commission on August 16, 2017.

The "2014 Application for Waiver" dated November 25, 2014 (for the License Period October 1, 2013 through September 30, 2014) was based on circumstances well within the control of the Unit Trust and **not based on force majeure**. It appears the waiver request was granted pursuant the Unit Trusts ability to negotiate more favorable terms with one of its key vendors. There is no evidence in the waiver application to suggest the waiver application was made based on force majeure.

A copy the "2014 Application for Waiver" is included at **Exhibit 8** of the binder submitted into record by the Texas Lottery Commission on August 16, 2017.

Texas Lottery Commission/Charitable Bingo Division Form ID 119, Conductor Request for Waiver indicates a waiver can be requested due to force majeure or circumstances beyond the control of the organization. The "2016 Application for Waiver" was submitted based on evidence of circumstances beyond the control of the organization. The comprehensive smoking ban was known by the organization; however, compliance with such ordinance proved unattainable at the premises used for hosting charitable bingo. *The delayed enforcement of the smoking ban ordinance simply delayed the resulting financial harm to charitable bingo efforts another two years. This is not uncommon for charitable bingo efforts facing similar circumstances statewide as evidenced in further detail below.*

2. We would like to clarify our testimony regarding the smoking ban passed by the City of Wichita Falls.

The City of Wichita Falls passed a comprehensive smoking ban ordinance in 2014; however, actions by a representative of the commercial lessor was able to secure a delayed enforcement of such ordinance for 2+ years. The delayed enforcement allowed bar owners and the bingo hall to make adjustments to its business environment (structural and operational) before strict enforcement and compliance of the comprehensive smoking ban was to take place in June 2016.

Iowa Park Optimist Club (through Superior Bingo Trust) occupied premises owned by Superior Bingo, Inc., the commercial lessor. Superior Bingo, Inc. had hoped to make structural improvements to the building used by Iowa Park Optimist Club to comply with the comprehensive smoking ban; however, the cost estimates provided by architect and general contractor deemed such improvements to be cost prohibitive. Costs of such improvements as required by the City of Wichita Falls would have been unjustified based on the buildings overall fair value.

For Iowa Park Optimist Club to relocate to a different building suitable for charitable bingo efforts, the building owner (not necessarily the existing commercial lessor) and/or Iowa Park Optimist Club would have been forced to secure city rezoning approval and incur significant improvements to ready premises for compliance with revised building

ordinances. There were no suitable premises available to relocate the bingo operations without incurring significant costs. Also, the City of Wichita Falls (among many jurisdictions around the State) is apprehensive in rezoning premises just to expand gaming efforts. Iowa Park Optimist Club was not forced to relocate to another building controlled by the existing commercial lessor. Its decision was based on the subject property's condition and past use as a bingo hall. Neither the Iowa Park Optimist Club nor the property owner were required to make significant improvements as the building fully complied with existing local ordinances, codes and regulations.

Ms. Glenn testified at the hearing that Iowa Park Optimist Club had the opportunity to simply relocate to another building to continue bingo operations since the existing commercial lessor was unable to make structural improvements to its building. The costs that would have been required of Iowa Park Optimist Club and/or a building owner would have been prohibitive.

Iowa Park Optimist Club was able to relocate to another premise controlled by the commercial lessor in August 2016 after the commercial lessor made improvements. The premises was already zoned for arcade/bingo use so no lengthy rezoning issue was required. Also, since the premises was formerly used for hosting charitable bingo, no significant structural improvements were required for the premises to comply with current building codes and regulations.

Iowa Park Optimist Club had limited to no options for easily relocating to another building as suggested and testified by Lottery Commission staff. The commercial lessor and Iowa Park Optimist Club (etal) were provided a two-year window to comply with the comprehensive smoking ban ordinance; however, little could be done to fend off the ultimate reality that smoking bans have on bingo halls.

3. There was testimony that suggested smoking bans have little effect on charitable bingo operations. Iowa Park Optimist Club admits that the smoking ban had no effect on charitable bingo operations prior to June 2016; however, the remainder of 2016 activity was most caused by the ultimate enforcement of the comprehensive smoking ban as the organization lost a significant number of bingo patrons overnight. While no scientific study was performed to identify the exact impact, Iowa Park Optimist Club entered into the hearing record compelling evidence that smoking bans caused detrimental financial harm to organization even if just for a short term.

Evidence entered into hearing record indicate the Superior Bingo Trust incurred negative net proceeds of \$11,383 for the third quarter ended September 30, 2016; however, the negative net proceeds was lessened to \$2,844 for the fourth quarter ended December 31, 2016. This result, although negative, shows a marked improvement of \$8,539 over the third quarter results. This may provide some evidence that smoking bans have negative effect on charitable bingo operations even if for a short period.

It was further testified that Iowa Park Optimist Club had in fact benefited from the smoking ban. This is true; however, it has benefited over an extended period. We are unable to “measure” a benefit over a week, month, quarter, etc. No immediate benefit was realized in the summer and fall of 2016. The benefit was gradual once non-smoking patrons learned of the ordinance change. Iowa Park Optimist Club continues to benefit from the smoking ban but such benefit was/is gradual.

4. Iowa Park Optimist Club entered into the hearing record credible evidence to support the financial impact the comprehensive smoking ban had on charitable bingo operations for the two quarters ended December 31, 2016. A comparison of the quarters ended December 31, 2015 and December 31, 2016 clearly indicate a significant financial impact as bingo patron participation dropped by 66.72%. Such a significant change would cause any fundraising efforts to be financially harmed given that certain fixed costs remain constant.
5. Iowa Park Optimist Club entered into the hearing testimony creditable evidence to support the overall impact smoking ban ordinances have on charitable bingo operations, as follows:

**Fort Worth Star-Telegram** article dated April 11, 2017 regarding City of Arlington’s efforts to pass comprehensive smoking ban. Opponents to the smoking ban including Arlington Lions Club and the Knights of Columbus and others feared a smoking ban would “likely financial strap or close business”. Thomas Martin, president of the Arlington Lions Club, commented that if city council members were confident that targeted businesses would survive, they should back it up with insurance. Mr. Martin was fully aware of the financial harm such an ordinance would have on his organizations charitable bingo efforts. *(Please refer to pages 36 through 40 of the packet submitted into hearing testimony)*

An 11<sup>th</sup>-hour revision to the smoking ban ordinance exempted charitable bingo halls in Arlington.

**Waco Tribune-Herald** article dated January 26, 2017 regarding recent enactment of comprehensive smoking bank. The subheading of the newspaper article claims “Charitable bingo playing is down in Waco, putting more than one dozen local non-profit organizations in a bind”. Owners of bingo rooms operating in Waco city limits are putting most of the blame on the city’s ordinance to ban smoking, which went into effect in January 2016. The article indicates charitable distributions were down for 13 of the 16 charities receiving bingo funs in Waco. The Boys & Girls Club saw a reduction of \$39,000 in bingo funding while the YMCA of Central Texas incurred an even bigger decline of \$133,500 when comparing 2015 and 2016 charitable bingo efforts. *(Please refer to pages 41-42 of the packet submitted into hearing testimony)*

**Denton Record-Chronicle** article dated February 2015 regarding comprehensive smoking ban. Nanci Kimmey with the North Texas Fairgrounds said a comprehensive smoking ban would likely close down North Texas Bingo which operates on the

**Iowa Park Optimist Club**

Docket No. 362-17-4986.B; Texas Lottery Commission v. Iowa Park Optimist Club

Page | 5

fairgrounds. *(Please refer to pages 43-44 of the packet submitted into hearing testimony)*

6. The net proceeds requirement for the license periods indicated in these proceeds is measured based on efforts of the Superior Bingo Trust until January 2017 as the Unit Trust disbanded then. Iowa Park Optimist Club could prove (if allowed) that its charitable bingo sessions would have resulted in positive net proceeds for the periods indicated above. Its efforts essentially supported the dismal efforts put forth by the other two charities that were members of the Unit Trust. Iowa Park Optimist Club desired to disband the Unit Trust long before the ultimate action taken in January 2017 as the other charitable organizations were unwilling to disband and distribute the net assets (bingo equipment, supplies, etc.) unless Iowa Park Optimist Club paid them an amount far in excess of fair value.
7. Iowa Park Optimist Club and Superior Bingo, Inc. (commercial lessor) made a well thought out business decision to relocate charitable bingo operations to another location given the circumstances with respect to costly improvements to existing facility, lack of alternative locations, etc. Any such move compounded with enforcement of smoking ban ordinance would most likely result in financial strain to the organization for the short term for any business or charitable efforts; however, the relocation continues to prove positive in terms of bingo patron participation and financial efforts.

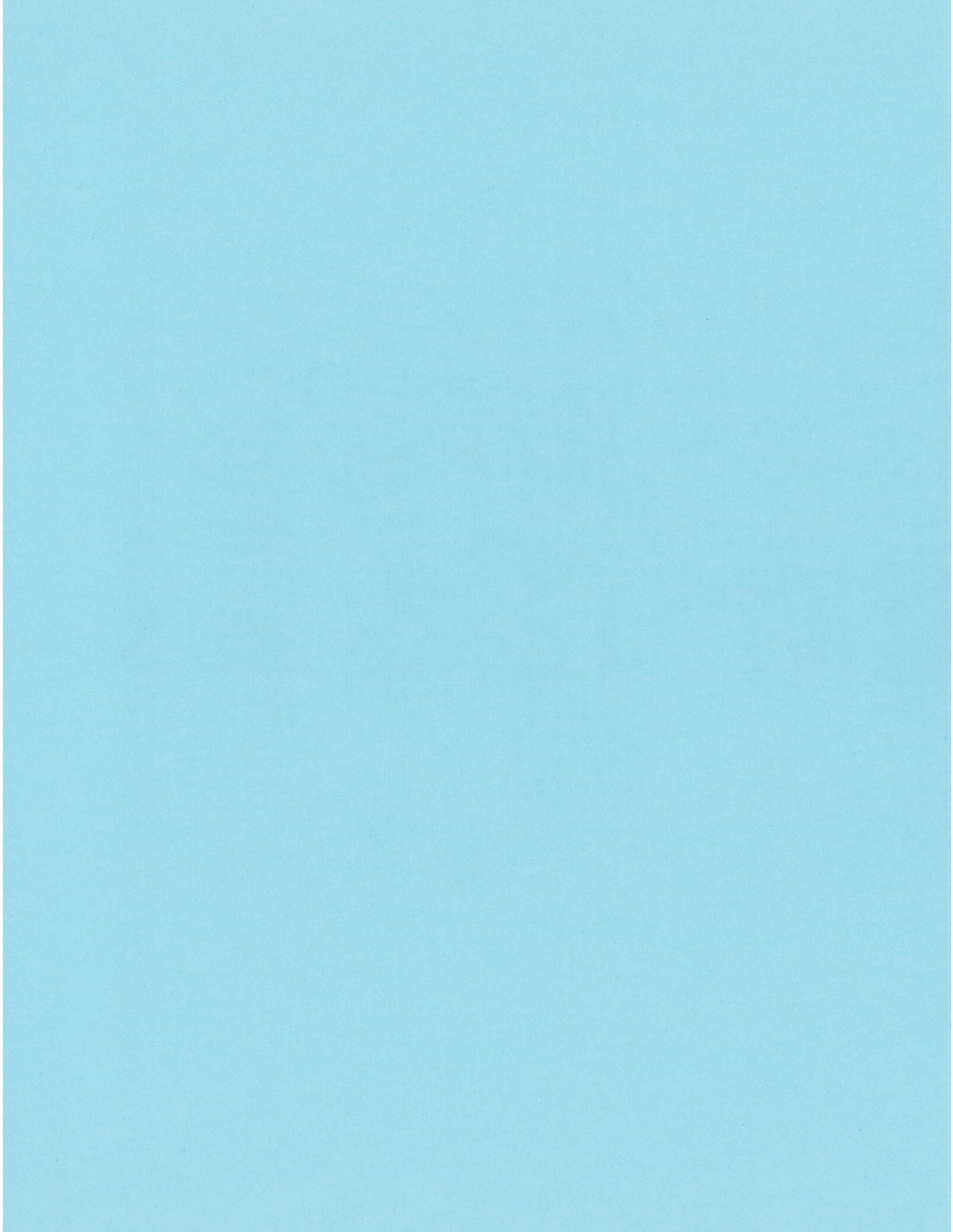
Iowa Park Optimist Club respectfully requests a review of our response to the Proposal for Decision communicated by the Honorable Joanne Summerhays in her letter dated September 11, 2017.

Sincerely,



Walter Beeman  
Bingo Chairperson  
Iowa Park Optimist Club

cc: Mr. Gary Grief  
Executive Director  
Texas Lottery Commission  
611 East 6<sup>th</sup> Street  
Austin, TX 78701





SOAH DOCKET NO. 362-17-4986.B

TEXAS LOTTERY COMMISSION, Petitioner	§	BEFORE THE STATE OFFICE
	§	
v.	§	
	§	
IOWA PARK OPTIMIST CLUB, Respondent	§	OF
	§	
	§	ADMINISTRATIVE HEARINGS

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THE COMMISSION'S REPLY TO RESPONDENT'S EXCEPTIONS TO THE  
ADMINISTRATIVE LAW JUDGE'S PROPOSAL FOR DECISION

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE JOANNE SUMMERHAYS:

Texas Lottery Commission, Charitable Bingo Operations Division (the Commission), files its *Reply to Respondent's Exceptions to the Administrative Law Judge's (ALJ) Proposal for Decision (PFD)*.

I.  
Introduction

The Commission objects to Respondent's attempt, in its Exceptions, to improperly submit additional evidence after the record has closed. The Commission has had no opportunity to present testimony and other evidence to dispute or explain the evidence Respondent attempts to submit. Therefore, ALJ should disregard this information provided in Respondent's Exceptions as improper and outside the evidentiary record. Additionally, Respondent sought additional newspaper articles be admitted into evidence to prove the waiver should have been granted. The Commission objected to the articles at hearing as being late-submitted, the day before the hearing, and not submitted with the application for waiver.

Further, without waiving this objection, and as discussed below, Respondent's Exceptions do not support a change to the ALJ's recommendation to revoke Respondent's license to conduct bingo. The ALJ correctly found that Respondent failed to have positive net proceeds for the

subject period and failed to establish it was entitled to a waiver of the net proceeds requirement, and that the Commission is entitled to revoke Respondent's license.

**II.  
Respondent Failed to have Positive Net Proceeds.**

As correctly noted in the PFD and undisputed by Respondent, Respondent had net losses for the 2016 calendar year, in violation of the Bingo Enabling Act (Act), (Chapter 2001, TEX. OCC. CODE ANN.). TEX. OCC. CODE ANN. § 2001.451(g)(1).

**III.  
Respondent Failed to Establish It Was Entitled to a Waiver of the Net Proceeds Requirement.**

TEX. OCC. CODE ANN. § 2001.451(k) specifies that the Commission "may" grant a waiver of the net proceeds requirement if the applicant shows "good cause...that compliance with [the net proceeds requirement] is detrimental to the organization's existing or planned charitable purpose."<sup>1</sup> Tex. Admin. Code § 155.427 places the burden of proof on Respondent to establish its entitlement to a waiver of the net proceeds requirement.

The PFD correctly outlines the rule requirements for a waiver application, and that Respondent failed to provide sufficient proof of force majeure or circumstances beyond the control of the organization, as well as any plan going forward to maintain positive net proceeds.

In Respondent's waiver application, under the section specifying why the waiver is needed, Respondent gives the following two reasons:

1. The move to a new location resulted in a loss of regular attendees; and
2. The City of Wichita Falls enacting a non-smoking ordinance.<sup>1</sup>

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<sup>1</sup> Commission Ex. 5.

Respondent applied for a waiver under the section of the application which states the waiver is “due to force majeure or circumstances beyond the control of the organization”. Respondent argues its application was not due to force majeure, but due to circumstances beyond its control. Specifically, Respondent notes in its application the Wichita Falls smoking ordinance enacted in 2014 as force majeure or circumstances beyond its control.<sup>2</sup>

The application form specifies the acceptable documents to be included for such an application, including “newspaper articles, copies of local ordinance changes, police or fire department reports, notification of road construction or photographs”. Although Respondent provided the language of the smoking ordinance with the application, Respondent failed to provide several newspaper articles relating to the ordinance until the day before the hearing. Even then, Ms. Desira Glenn, the Bingo Division’s Licensing and Accounting Manager, testified she reviewed the last-moment documentation and the waiver should still be denied.<sup>3</sup> As Ms. Glenn testified, “force majeure” or “circumstances beyond its control” in the context of a waiver application means a one-time occurrence.<sup>4</sup> Ms. Glenn gave an example of a shooting that occurred in another bingo hall and how that had an effect on the net proceeds.<sup>5</sup> In contrast, in this proceeding, the Wichita Falls smoking ordinance was enacted in 2014, which gave Respondent ample opportunity to make business arrangements to attempt to mitigate the ordinance’s impact on Respondents’ bingo operations.<sup>6</sup>

Respondent further argues that its move to a new location was its business plan to ensure profitability.<sup>7</sup> This is contrary to the statements in its waiver application. In the section for the

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<sup>2</sup> *Id.*

<sup>3</sup> Transcript (Tr.) at 35.

<sup>4</sup> Tr. at 15, 58.

<sup>5</sup> Tr. at 15, 59.

<sup>6</sup> Tr. at 68.

<sup>7</sup> Tr. at 53, 71.

specific reason the waiver is requested, Respondent states, “The move resulted in a loss of some regular attendees who are unable to commute to new location.”<sup>8</sup>

In addition, Respondent states it applied for two previous waivers within the past few years,<sup>9</sup> and, in its Exceptions, suggests its previous waivers were granted for business reasons and not force majeure. Therefore, Respondent argues, the 2016 waiver should have been granted. Ms. Glenn was not employed in the Commission’s Bingo Division at the time of the previous waiver applications.<sup>10</sup> Ms. Glenn testified that the previous applications failed to provide enough detail to meet current standards for granting the waiver for either force majeure or any other grounds, and the waivers would have been denied if reviewed under current Commission standards.<sup>11</sup>

Respondent also argues that it has been profitable in 2017 and is on an uptick for business. However, Respondent has a pattern of profitability followed by loss.<sup>12</sup> Current information and Respondent’s history suggests Respondent is likely to operate at as loss again in 2018.<sup>13</sup>

In summary, none of Respondent’s arguments establish its entitlement to a waiver of the net proceeds requirement or support a change to the ALJ’s recommendation to revoke Respondent’s license to conduct bingo.

#### **IV. Respondent’s Late-filed Evidence Should Be Disregarded.**

All new evidence submitted with Respondent’s exception must be disregarded. Respondent has improperly submitted additional evidence after the record has closed. The Commission has had no opportunity to present testimony and other evidence to dispute or explain

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<sup>8</sup> Commission Ex. 5.

<sup>9</sup> Commission Exhibits 8 and 9.

<sup>10</sup> Tr. at 15.

<sup>11</sup> *Id.*

<sup>12</sup> Tr. at 37.

<sup>13</sup> Tr. at 38.

this evidence. Furthermore, Respondent submitted newspaper articles at hearing that could have been included in the application for waiver but were not. Respondent waited until the day before the hearing before submitting articles and other information to the Commission regarding the smoking ordinances effect on bingo. This evidence cannot support any change in the recommendation. Last, Respondent presented testimony at the hearing that illegal gambling contributed to their loss of proceeds.<sup>14</sup> However, that evidence and contention was not part of its waiver application and should be disregarded as well.

V.

#### Conclusion

The ALJ properly found that Respondent failed to have positive net proceeds and failed to establish it was entitled to a waiver of the requirements for positive net proceeds. For the reasons stated above, the Commission respectfully requests the ALJ to reject the Respondent's Exceptions.

Respectfully submitted,



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KRISTEN GUTHRIE  
Assistant General Counsel  
Texas Lottery Commission  
P.O. Box 16630  
Austin TX 78761  
Tel. 512-344-5475  
Fax 512-344-5189

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<sup>14</sup> Tr. at 42.

CERTIFICATE OF SERVICE

I hereby certify that on October 9, 2017, a true and correct copy of *The Commission's Reply to Respondent's Exceptions to the Administrative Law Judge's Proposal for Decision* was served on the following individuals at the locations and in manners listed below, pursuant to 1 TEX. ADMIN. CODE § 155.101 and TEX. R. CIV. P. 21.

Mr. Walter Beeman  
Iowa Park Optimist Club  
P.O. Box 9903  
Wichita Falls, TX 76308

(Certified Mail No. 91 7199 9991 7030 8544 4805  
and First Class U.S. Mail)

Mr. Howard Smith  
807 Vogel St.  
Iowa Park, TX 76367-1245

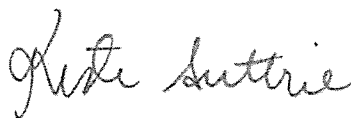
(Certified Mail No. 91 7199 9991 7030 8544 4812  
and First Class U.S. Mail)

Mr. Brad Beard  
Superior Bingo, Inc.  
P.O. Box 715  
Wichita Falls, TX 76307

(Certified Mail No. 91 7199 9991 7030 8544 4829  
and First Class U.S. Mail)

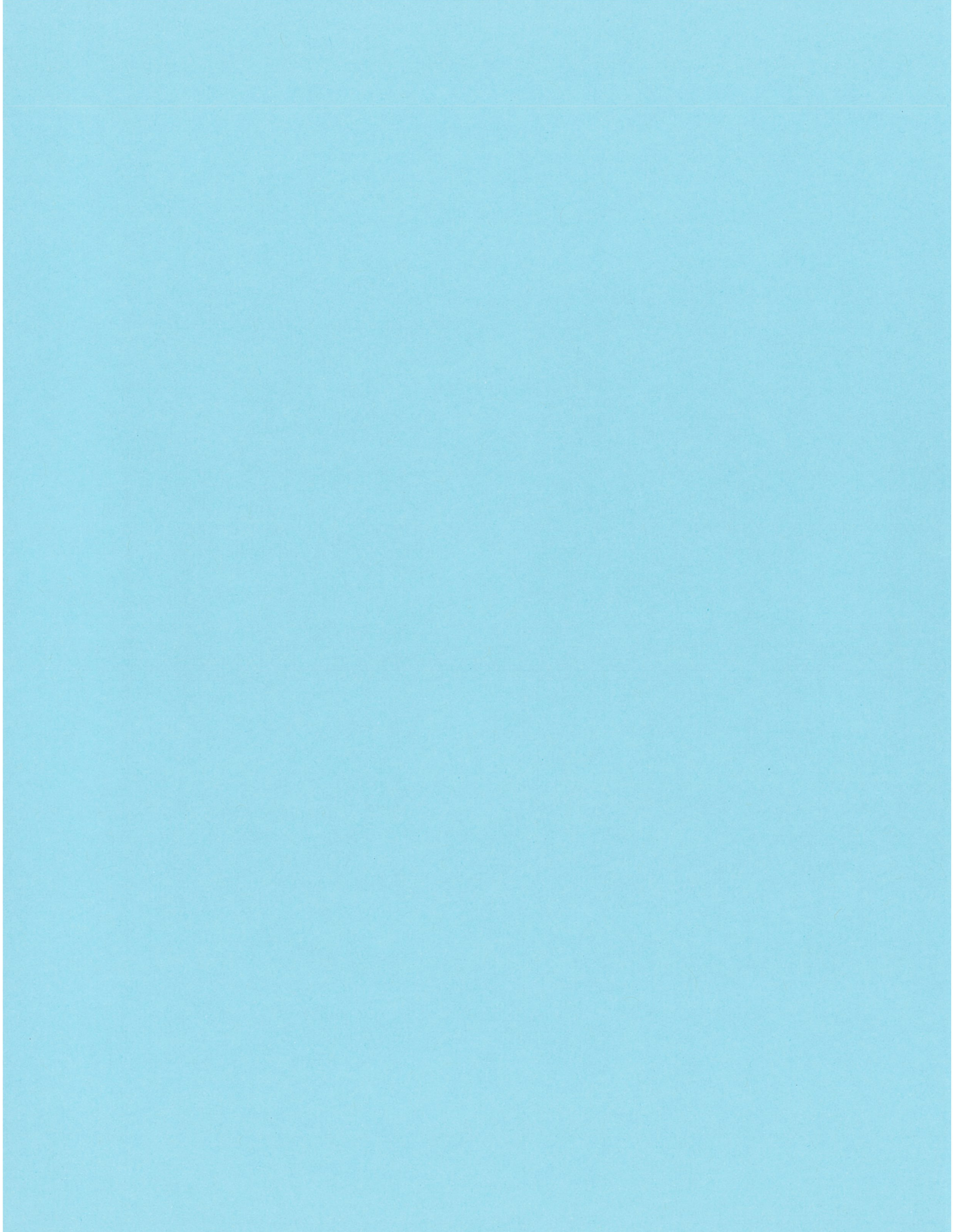
Mr. Gene Buchanan  
Superior Bingo Trust  
P.O. Box 33646  
Fort Worth, TX 76162-3646

(Certified Mail No. 91 7199 9991 7030 8544 4836  
and First Class U.S. Mail)



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Kristen Guthrie  
Assistant General Counsel



# State Office of Administrative Hearings



Lesli G. Ginn  
Chief Administrative Law Judge

October 11, 2017

Gary Grief  
Executive Director  
Texas Lottery Commission  
611 East 6th Street  
Austin, Texas 78701

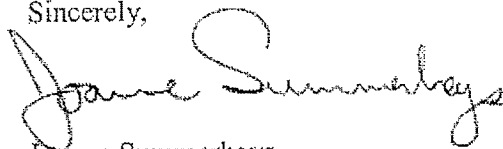
VIA FACSIMILE NO. (512) 478-3682

**RE: Docket No. 362-17-4986.B; Texas Lottery Commission v. Iowa Park Optimist Club**

Dear Mr. Grief:

I have reviewed the exceptions to the Proposal for Decision (PFD) filed by Iowa Park Optimist Club and the reply filed by the Commission Staff. The evidence and the law presented in the case were considered and weighed carefully before the PFD was issued. The exceptions do not raise any evidence or legal analysis that I did not previously consider or that change my mind about the issues I have addressed in the PFD. Therefore, it is my recommendation that the PFD be adopted without change.

Sincerely,



Joanne Summerhays  
Administrative Law Judge

JS/mle

cc: Kristen Guthrie, Assistant General Counsel, Texas Lottery Commission, 611 E. 6<sup>th</sup>, Austin Texas 78701 - VIA FACSIMILE NO. (512) 344-5475  
Walter Beeman, Iowa Park Optimist Club, P.O. Box 9903, Wichita Falls, Texas 76308 - VIA REGULAR MAIL





Date: DECEMBER 7, 2017

**DOCKET NO. 362-17-5939.B**

<b>TEXAS LOTTERY COMMISSION</b>	<b>§</b>	<b>BEFORE THE TEXAS</b>
<b>PETITIONER</b>	<b>§</b>	
	<b>§</b>	
<b>VS.</b>	<b>§</b>	
	<b>§</b>	
<b>TEENS ADDRESSING THE</b>	<b>§</b>	
<b>COMMUNITY TODAY (T.A.C.T.)</b>	<b>§</b>	
<b>RESPONDENT</b>	<b>§</b>	<b>LOTTERY COMMISSION</b>

**ORDER OF THE COMMISSION**

TO: Ms. Jacqueline Thomas  
Teens Addressing the Community  
Today (T.A.C.T.)  
P.O. Box 130983  
Houston, TX 77219-0983

During an open meeting in Austin, Texas, the Texas Lottery Commission (Commission) heard the above styled case in which Teens Addressing the Community Today (T.A.C.T.) (Respondent) did not appear at the scheduled hearing before the State Office of Administrative Hearings (SOAH) to respond to the allegations set forth in the Commission's notice of hearing.

**I. Findings of Fact**

1. Timely and adequate notice of the hearing in the referenced case before SOAH was provided to the Respondent, pursuant to TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052 and 1 TEX. ADMIN. CODE §§ 155.401 and 155.501(b). The notice of hearing included a disclosure in at least 12-point, bold-face type, that the factual allegations listed in the notice could be deemed admitted, and the relief sought in the notice of hearing might be granted by default against the party that fails to appear at hearing.

**Commission Order No. 18-0039**

**Date: DECEMBER 7, 2017**

2. After timely and adequate notice was given to the Respondent, the case was heard by a SOAH Administrative Law Judge (ALJ). The Respondent did not appear at the hearing.

3. The Commission, by and through its attorney of record, filed a motion to dismiss the case from the SOAH docket and to remand the case to the Commission for informal disposition, in accordance with TEX. GOV'T CODE ANN. § 2001.058(d-1) and 1 TEX. ADMIN. CODE § 155.501(d).

4. The ALJ conditionally dismissed the case from the SOAH docket and remanded the case to the Commission for informal disposition under TEX. GOV'T CODE ANN. § 2001.056, provided the Respondent did not file a motion to set aside the default no later than 15 days from the date of the Order Conditionally Dismissing Case issued by the ALJ.

5. The Respondent did not file a motion to set aside the default within the 15 days from the date of the Conditional Order issued by the ALJ.

**II. Conclusions of Law**

1. The Commission has jurisdiction over this matter pursuant to TEX. OCC. CODE ANN. §§ 2001.312(e) and 2001.353(a), and 16 TEX. ADMIN. CODE, Chapter 402.

2. The Respondent violated the Bingo Enabling Act, (Chapter 2001, TEX. OCC. CODE ANN.); and/or the Charitable Bingo Administrative Rules, (Title 16 TEX. ADMIN. CODE, Chapter 402) as set forth in the Commission's notice of hearing.

3. The relief sought by the Commission Staff is fair, reasonable, and adequately protects the public.

**Date: DECEMBER 7, 2017**

**III. Order**

NOW, THEREFORE, IT IS ORDERED that, after review and due consideration of the administrative record of the above styled case, this matter is hereby disposed of by default, and:

1. All allegations set forth in the Commission's notice of hearing in the case are deemed admitted; and
2. The license application of Teens Addressing the Community Today (T.A.C.T.) to conduct bingo is hereby denied.

Passed and approved at the regular meeting of the Texas Lottery Commission in Austin, Texas, on the 7<sup>TH</sup> day of DECEMBER, 2017.

Entered this 7<sup>TH</sup> day of DECEMBER, 2017.

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J. WINSTON KRAUSE, CHAIRMAN

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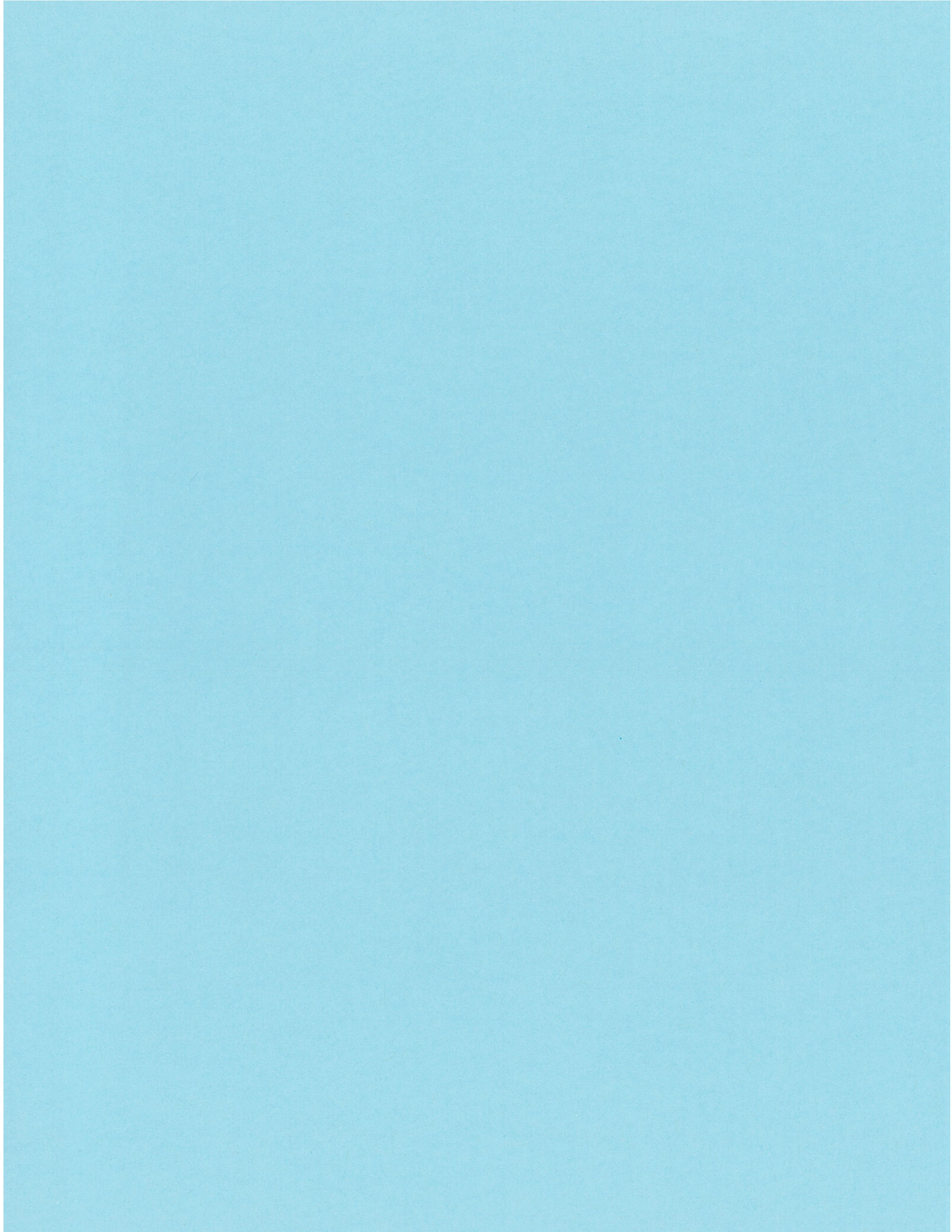
CARMEN ARRIETA-CANDELARIA,  
COMMISSIONER

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DOUG LOWE, COMMISSIONER

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ROBERT RIVERA, COMMISSIONER



SOAH DOCKET NO. 362-17-5939.B

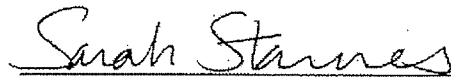
TEENS ADDRESSING THE	§	BEFORE THE STATE OFFICE
COMMUNITY TODAY (T.A.C.T.),	§	
Applicant	§	
	§	
v.	§	OF
	§	
TEXAS LOTTERY COMMISSION,	§	
Respondent	§	ADMINISTRATIVE HEARINGS

ORDER NO. 1  
CONDITIONALLY DISMISSING CASE

Teens Addressing the Community Today (T.A.C.T., or Applicant) contested the denial of its application for a license to conduct charitable bingo. The contested case hearing was set for 9:00 a.m. on October 17, 2017, at the State Office of Administrative Hearings (SOAH), before Administrative Law Judge (ALJ) Sarah Starnes. At the hearing, attorney Kristen Guthrie appeared on behalf of the Texas Lottery Commission (Commission), but Applicant did not appear. The ALJ admitted Commission Exhibits 1-3, which established that adequate notice of the hearing was provided to Applicant.<sup>1</sup>

Due to Applicant’s failure to appear at the hearing it requested, this matter may be dismissed from the docket of the State Office of Administrative Hearings for failure to prosecute.<sup>2</sup> **IT IS, THEREFORE, ORDERED** that this matter is **CONDITIONALLY DISMISSED** from SOAH’s docket, pursuant to 1 Texas Administrative Code § 155.503(a). **This order of dismissal will become final, without further action by the ALJ, unless Applicant files a motion to retain the case not later than 15 days from the date of this order.** Such a motion must show good cause for reopening the hearing, or show that the interests of justice require setting aside the conditional dismissal.

SIGNED October 17, 2017.

  
 SARAH STARNES  
 ADMINISTRATIVE LAW JUDGE  
 STATE OFFICE OF ADMINISTRATIVE HEARINGS

<sup>1</sup> 1 Tex. Admin. Code § 155.503(a). The ALJ only reviewed the adequacy of the notice and not the sufficiency of the Department’s factual allegations.

<sup>2</sup> At the hearing, the Commission moved for a default dismissal pursuant. See 1 Tex. Admin. Code § 155.501(d). However, because Applicant bears the burden of proof in this proceeding, see Tex. Occ. Code § 2001.352(b), the appropriate remedy for Applicant’s failure to appear at the hearing is a dismissal for failure to prosecute. See 1 Tex. Admin. Code § 155.503(a).



# Texas Lottery Commission



Commissioners:

J. Winston Krause, Chairman • Carmen Arrieta-Candelaria

Peggy A. Heeg • Doug Lowe • Robert Rivera

Alfonso D. Royal III  
Director

FIRST CLASS UNITED STATES MAIL  
and  
CERTIFIED MAIL NO. 91 7199 9991 7030 8536 7623

September 1, 2017

Ms. Jacqueline Thomas  
Teens Addressing the Community Today (T.A.C.T.)  
P.O. Box 130983  
Houston, TX 77219-0983

RE: **NOTICE OF HEARING CONCERNING ORIGINAL APPLICATION DENIAL  
DOCKET NO. 362-17-5939.B  
TEENS ADDRESSING THE COMMUNITY TODAY (T.A.C.T.), CONDUCTOR  
APPLICANT  
TAXPAYER NUMBER – 14714686798**

Dear Ms. Thomas:

Be advised that a public hearing will be held to consider the Texas Lottery Commission's denial of Teens Addressing the Community Today (T.A.C.T.)'s original application to be licensed to conduct charitable bingo based on the violations of the Bingo Enabling Act, TEX. OCC. CODE ANN. Chapter 2001, and/or the Charitable Bingo Administrative Rules, Title 16 TEX. ADMIN. CODE, Chapter 402, as outlined below.

The hearing has been set as follows:

<b>TIME OF HEARING:</b>	<b>9:00 a.m.</b>
<b>DATE OF HEARING:</b>	<b>October 17, 2017</b>
<b>LOCATION OF HEARING:</b>	<b>State Office of Administrative Hearings William P. Clements Building 300 West 15<sup>th</sup> Street, 4<sup>th</sup> Floor Austin, Texas 78701</b>

**I.**

**Factual Matters Asserted**

1. Teens Addressing the Community Today (T.A.C.T.) failed to submit supplemental information requested by the Commission, in violation of TEX. OCC. CODE ANN. § 2001.302(a) and (b). Specifically, Item 5 on the application states: “Does this organization now have a 501(c) exemption from the Internal Revenue Service (IRS)?” This item was marked “no.” Teens Addressing the Community Today (T.A.C.T.) failed to provide a written statement signed and dated by the bingo chairperson providing an answer to this question.
2. Teens Addressing the Community Today (T.A.C.T.) failed to submit supplemental information requested by the Commission, in violation of TEX. OCC. CODE ANN. § 2001.302(a) and (b). Specifically, on its application, Teens Addressing the Community Today (T.A.C.T.) indicated the organization was affiliated with a state or national organization. However, failed to provide the applicant’s group exemption number.

**II.**

**Applicable Statutes and Rules**

TEX. OCC. CODE ANN. § 2001.351 states:

The commission may deny an application for a license or renewal of a license issued under this chapter for a cause that would permit or require the suspension or revocation of a license issued under this chapter.

TEX. OCC. CODE ANN. § 2001.102(c) states:

A copy of the Internal Revenue Service letter that approves an applicant’s exemption from taxation under Section 501(c), Internal Revenue Code of 1986, is adequate evidence of the person’s tax-exempt status. A letter of good standing from a parent organization that holds an exemption from taxation under Section 501(c), Internal Revenue Code of 1986, for both the parent organization and its affiliate is adequate evidence of the affiliate organization’s tax-exempt status.

TEX. OCC. CODE ANN. § 2001.353(a)(1) and (2) states in part:

After a hearing, the commission may suspend, revoke, or refuse to renew a license issued under this chapter for: (1) failure to comply with this chapter or a commission rule; or (2) a reason that would allow or require the commission to refuse to issue or renew a license of the same class.

TEX. OCC. CODE ANN. § 2001.302(a) and (b) states:

- (a) In addition to any required application form, a license applicant or license holder shall submit any supplement information requested by the commission.



- (b) The commission may deny a license application or revoke a license based on a failure to submit requested supplemental information when required.

16 TEX. ADMIN. CODE § 402.400(a)(2) states:

Any person who wants to engage in a bingo related activity shall apply to the Commission for a license. The application must be on a form prescribed by the Commission and all required information must be legible, correct and complete. An application is incomplete if the following information is not provided: ... (2) All supplemental information requested during the pre-licensing investigation period...

16 TEX. ADMIN. CODE § 402.400(e) states in pertinent part:

If an application is incomplete, the Commission will notify the applicant. The applicant must provide the requested information within 21 calendar days of such notification. Failure to provide the requested information within the 21 calendar day time line may result in the denial of the license application.

TEX. OCC. CODE ANN. § 2001.352(b) states:

The burden of proof is on the applicant to establish by a preponderance of the evidence its eligibility for a license.

TEX. OCC. CODE ANN. § 2001.601 states:

The commission may impose an administrative penalty against a person who violates this chapter or a rule or order adopted by the commission under this chapter.

TEX. OCC. CODE ANN. § 2001.602 states in part:

The amount of the administrative penalty may not exceed \$1,000 for each violation. Each day a violation continues or occurs may be considered a separate violation for purposes of imposing a penalty.

All visitors to the William P. Clements Building without an agency or DPS issued ID card will be required to sign a log and receive a visitor's pass. Persons going to a hearing at the State Office of Administrative Hearings will need to identify to the security officer the hearing that they are attending. Persons must provide the officer with the SOAH docket number to be allowed access to the hearing room. Individuals should allow additional time to go through the security process. Failure to provide the docket number may result in delaying the individual's arrival to the hearing.

The hearing will be conducted in accordance with the Bingo Enabling Act, the Texas Government Code, Chapter 2001; the Texas Rules of Evidence; Title 16 of the Texas Administrative Code, Chapter 402; and the Rules of Procedure of the State Office of

Administrative Hearings, Title 1, Texas Administrative Code, Chapter 155. You are entitled to be represented by a lawyer, but it is your responsibility to obtain and pay for such representation. A court reporter will be present, and a record of the proceedings will be created. It is, however, the sole and exclusive responsibility of each party to request and pay for any printed transcript.

**FAILURE TO APPEAR AT THE HEARING WILL RESULT IN THE FACTUAL ALLEGATION AGAINST TEENS ADDRESSING THE COMMUNITY TODAY (T.A.C.T.) SET OUT IN THIS NOTICE OF HEARING BEING ADMITTED AS TRUE AND THE RELIEF REQUESTED INCLUDING DENIAL OF YOUR LICENSE APPLICATION AS WELL AS THE ASSESSMENT OF ADMINISTRATIVE PENALTIES MAY BE GRANTED BY DEFAULT.**

The State Office of Administrative Hearings (SOAH) is now offering you the ability to receive service of orders and other documents issued by SOAH through email rather than mail or fax. To elect to receive service of SOAH-issued documents by email, go to the SOAH website ([www.soah.state.tx.us](http://www.soah.state.tx.us)), click on the "Service by Email" tab, and follow the instructions. **NOTE: Your request to receive SOAH-issued documents by email does not change the procedures you must follow in order to file documents with SOAH. The requirements for filing documents and providing copies to the other parties are set out in Sections 155.101 and 155.103 of SOAH's Procedural Rules, which are available on SOAH's website under the "Procedural Rules" tab.**

**Parties that are not represented by an attorney may obtain information regarding contested case hearings on the public website of the State Office of Administrative Hearings at [www.soah.texas.gov](http://www.soah.texas.gov), or in printed format upon request to SOAH.**

The Commission reserves the right to amend this Notice of Hearing.

Respectfully,



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KRISTEN GUTHRIE  
Assistant General Counsel  
Texas Lottery Commission

**CERTIFICATE OF SERVICE**

Pursuant to the Texas Rules of Civil Procedures, Rule 21a, I do hereby certify that on this the 1 day of September, 2017, a true and correct copy of the foregoing **NOTICE OF HEARING CONCERNING ORIGINAL APPLICATION DENIAL**, Docket No. 362-17-5939.B, has been served by First Class United States Mail and Certified Mail No. 91 7199 9991 7030 8536 7623, by depositing each mailing in a post office or official depository under the care and custody of the United States Postal Service, enclosed in a postpaid wrapper properly addressed to Ms. Jacqueline Thomas, Teens Addressing the Community Today (T.A.C.T.), P.O. Box 130983, Houston, TX 77219-0983.



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Austin, Texas 78761-6630  
(512) 344-5475  
(512) 344-5189 Fax

cc: State Office of Administrative Hearings  
Charitable Bingo Operations Division

Mr. Darien Lewis  
19530 Creek Bend Dr.  
Spring, TX 77388-3067

(Certified Mail 91 7199 9991 7030 8536 7630  
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Mr. Brad Porter  
Lucky Numbers, Inc.  
6220 Valley Forge Drive  
Houston, TX 77057-1122

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