

Rob Kohler
TC



Christian Life COMMISSION

February 15, 2024

Sunset Advisory Commission
Attn: Texas Lottery Commission
P.O. Box 13066
Austin, Texas 78711

Honorable Members of the Sunset Commission,

The Christian Life Commission (CLC) appreciates the opportunity to make comments on the upcoming Sunset Review of the Texas Lottery Commission (Texas Lottery). The CLC is the public policy arm of the Baptist General Convention of Texas. The CLC has a long history of participating in public policy questions relating to the expansion of gambling in the State of Texas. The CLC makes comments and gives suggestions to be considered to address its concerns where applicable. This letter addresses the following topics:

1. Texas Lottery rulemaking
2. Playing the Texas Lottery by telephone & "Electronic means" to communicate a playslip

There have been many attempts to expand gambling in our State over the past 20 years both through the Texas Legislature and through agency rulemaking by the Texas Lottery and Texas Racing Commission. The CLC characterizes past expansion efforts at the Texas Lottery as attempts to blur the lines of commonly understood games administered by the Texas Lottery. On September 23, 2003, then Attorney General Greg Abbott in Attorney General Opinion GA-0103 gave resolute guidance on potential changes to the Texas Lottery:

"In 1991, voters approved a "state lottery" based on the common understanding of the term at that time, as evidenced by popular dictionaries and the ballot proposition

presented to Texas voters. Moreover, Attorney General Opinion DM-302 (1994), issued less than three years after the adoption of article III, section 47(e), is a contemporaneous administrative construction of that amendment which concludes that voters in 1991 approved a narrow construction on the term "lottery."¹

The CLC agrees with the former Attorney General, and strongly encourages a return to this type of leadership. The CLC is optimistic the Sunset review process will result in recommendations for the Texas Lottery based upon what is constitutionally and statutorily required, rather than what certain members of the Texas Lottery's executive staff and the gambling industry desire.

Texas Lottery Commission Rulemaking

The CLC recognizes that the staff of the Texas Lottery operates in a controversial environment. Over the past twenty years the CLC has tried to respectfully monitor and participate in the Texas Lottery's rulemaking processes when appropriate. The CLC appreciated in the past when the leadership of the Texas Lottery proactively notified this organization of potential controversial rule changes and requested CLC input. Unfortunately, that has not been the case in the past several years.

The CLC has great concern and believes Sunset staff should carefully review recent rulemaking activities of the Texas Lottery. In particular, the Texas Lottery promulgated rules on June 11, 2020, via a zoom meeting during the height of COVID. The proposed rules made several substantive and controversial changes relating to the potential expansion of electronic instant games. Many of the substantive changes have been the subject of previous failed rulemaking attempts by the Texas Lottery.

On October 31, 2005, the Texas Lottery promulgated rules that contemplated future instant games in a different format (electronic version, not removing latex on paper). The CLC participated in the rulemaking process and submitted comments on the proposed rules a copy of which is attached to this letter as Appendix "A". In addition, the CLC engaged and communicated to statewide leaders its concerns (Appendix "B"). The following changes to innate characteristics of instant games that would open the door to electronic instant lottery games were of greatest concern to the CLC:

~~(9) (20) Instant game- A game in which winners are not determined by a drawing. An instant ticket lottery game, developed and offered for sale to the public in accordance with commission rules, that is played by removing the latex covered play area on an instant ticket to reveal the ticket play symbols.~~

~~18 (33) Play area- The latex covered area of a an instant ticket that when removed, reveals the ticket play symbols when uncovered~~

¹ Texas Attorney General Opinion No. GA-0103, <https://www.texasattorneygeneral.gov/sites/default/files/opinion-files/opinion/2003/ga0103.pdf>

~~(25) Play symbol— the printed data under the latex on the front of an instant ticket that is used to determine eligibility for a prize. The symbols for individual games will be specified in individual instant game procedures.~~

~~(37) Present at the terminal— A player remains physically present at the on-line terminal from the time the player's order for the purchase of on-line lottery tickets is paid for and accepted by the lottery on-line retailer until the processing of the order is completed and the tickets are delivered to the player at the licensed on-line retailer terminal location.~~

The proposed rules were eventually pulled down by the Texas Lottery. Additionally, a request for an Attorney General Opinion on the proposed changes, a copy of which is attached to this letter as Appendix "C", was also withdrawn by the Chairman of the Texas Lottery.

On July 8, 2009, the Texas Lottery again promulgated rules to alter the definition of instant games allowing terminal printed instant games. The CLC participated in the rulemaking process and submitted comments to the proposed rules a copy of which is attached to this letter as Appendix "D". The following changes to the innate characteristics of instant games that would open the door to electronic instant lottery games were of the greatest concern to the CLC:

~~[(20) Instant game—An instant ticket lottery game, developed and offered for sale to the public in accordance with commission rules, that is played by removing the latex covered play area on an instant ticket to reveal the ticket play symbols.]~~

(54) Terminal printed instant game--A terminal printed instant game, developed and offered for sale to the public in accordance with commission rules, and may be played in conjunction with a then existing online lottery product or as a stand-alone game, and is only available through a clerk assisted terminal. (The terminal printed instant game operates consistent with the instant scratch-off games, the main difference being terminal printed instant games reside in a game file maintained on the lottery operator's gaming system. Instead of being pre-produced for sale in paper form ("scratch-off"), the winning and non-winning plays are randomly and fairly distributed in a game file maintained on the lottery operator's gaming system in the same way as instant scratch-off ticket games. The winning and non-winning tickets are printed and distributed on demand from the gaming system in sequence, as game tickets are sold by licensed on-line retailers. The numbers and/or symbols appearing on the terminal printed instant game tickets are generated only as representations of the pre-determined win or non-win status of the sequential ticket purchased. There is no contemporaneous computation of a win/non-win status with the purchase of a ticket associated with the game.)

Like the previous attempt in 2005, the Texas Lottery faced public opposition to the rule changes which led to the proposed changes being abandoned by the Texas Lottery.

In a blatantly deceptive action, the Texas Lottery at their June 11, 2020, zoom meeting during the height of COVID proposed and eventually adopted the following changes:

(32) (30) Play area- The latex covered area of a scratch ticket that when removed, reveals the ticket play symbols.

~~(34) (32)~~ Play symbol- The printed data under the latex on a scratch ticket that is used to determine eligibility for a prize. The symbols for individual games will be specified in individual scratch ticket game procedures.

~~(37)~~ Present at the terminal—A player remains physically present at the terminal from the time the player's order for the purchase of draw games tickets is paid for and accepted by the retailer until the processing of the order is completed and the tickets are delivered to the player at the retailer terminal location.

~~(47) (46)~~ Scratch ticket- A scratch ticket lottery game, developed and offered for sale to the public in accordance with commission rules, that is played by revealing removing the latex covered play area on a scratch ticket to reveal the ticket play symbols. ~~Sometimes, scratch ticket games are called "instant games"~~

To summarize, the proposed changes to instant scratch games rejected in Texas Lottery rulemaking proceedings in 2005 and 2009 were proposed in the 2020 Texas Lottery zoom meeting during the height of COVID and eventually adopted. The Executive leadership of the Texas Lottery participated in the 2005 and 2009 failed rulemaking attempts and knew there was public opposition to the substantive changes described above and decided to move forward with these changes during this unprecedented time in the history of our State. As a direct result of these changes, the CLC has recently learned that Lotto.com is now selling multiple \$100, electronic instant Texas Lottery scratch tickets.² The CLC in the strongest of terms objects to these actions by the Texas Lottery and hope the Sunset staff will look for meaningful solutions to prevent such fraudulent action against the citizens of this State in the future.

Playing the Texas Lottery by telephone & "Electronic means" to communicate a playslip

The Texas Lottery is allowing offshore and other internet gambling companies like Jackpot.com, jackpocket.com, and thelotter.com to sell Texas lottery tickets from licensed Texas Lottery retailers via phone apps and computers. These internet gambling companies own the licensed Texas Lottery retailer locations where tickets are processed. Based on CLC research, the Texas Lottery is the only state lottery that has taken the position that these so-called "lottery courier" companies are "operating outside their jurisdiction." This decision by the Texas Lottery Commission was not discussed in any Texas Lottery public meetings. The CLC reviewed transcripts of all 50 Texas Lottery public meetings from and there was not a single mention of the invasion of so-called "lottery couriers" operating in the State. The first time "lottery couriers" were discussed was during a Texas Lottery public meeting was after the CLC raised this issue during the February 14, 2023, Texas Senate Finance budget hearing.

The Texas Lottery has allowed many of these unregulated internet companies to use the Texas Lottery's trademarked Texas Lottery game logos on their platforms. The Texas Lottery has been silent while these companies have been advertising on radio, social media platforms, and in newspapers and misleading Texans to believe that purchasing Texas Lottery tickets over

² Lotto.com: https://tx.lotto.com/?ltc_page=homepage_lcom

telephones and computers via the internet is legal). An example of such advertising is attached as Appendix "E" to this letter.

The Texas Lottery has publicly taken the position of a victim of these companies and has maintained they are helpless to stop internet gambling companies. The Texas Lottery erroneously claims that the appeals from the CLC that the Texas Lottery can end these illegal practices is "misinformation".

From the start of the Texas Lottery until August 28, 2020, purchasing a Texas Lottery ticket was a face-to-face transaction. A player would go to a convenience store, buy a Lotto Texas Ticket, and go back to the store and cash the ticket if they won (Appendix "F"). Texas Administrative Code rules governing the Texas Lottery Commission contained multiple provisions that clearly prohibited Texas Lottery licensed retailers from taking telephone requests to issue a ticket and or manually enter selected numbers. To further clarify this prohibition, the rules made clear that requests to play must be made in person. The provisions served as an administrative extension of Texas Government code 466.015(b)(4) that gives clear legislative intent on prohibitions of a person playing a lottery game by a telephone.

The following requirements to play lottery games in person, and the prohibitions of a retailer or player using a telephone to communicate requests to buy Texas Lottery tickets were deleted by the Texas Lottery at its June 11, 2020, zoom meeting during the height of COVID:

~~the retailer shall not accept telephone or mail-in requests to issue a ticket. The use of mechanical, electronic, computer generated or any other non-manual method of marking a playslip is prohibited.~~
(401.315 Mega Millions On-Line Game Rule)

~~the retailer shall not accept telephone or mail-in requests to issue a ticket.~~
(401.305 "Lotto Texas" Draw Game Rule)

~~the retailer shall not accept telephone or mail-in requests to manually enter selected numbers.~~
(401.312 Texas 2 Step Draw Game Rule)

~~No part of the sale may take place away from the terminal.~~
(401.304 Draw Game Rules (General))

~~A retailer may only accept a request for a play using a commission approved method of play, and if the request is made in person.~~
(401.305 Lotto Texas Draw Game Rule)

~~A retailer may only accept a request for a play using a commission approved method of play, and if the request is made in person.~~
(401.307 Pick 3 Draw Game Rule)

~~A retailer may only accept a request for a play using a commission approved method of play, and if the request is made in person.~~

(401.312 Texas Two Step Draw Game Rule)

~~A retailer may only accept a request for a play using a commission-approved method of play, and if the request is made in person.~~

~~(401.316 Daily 4 Draw Game Rule)~~

~~A retailer may only accept a request for a play using a commission-approved method of play, and if the request is made in person.~~

~~(401.320 All or Nothing Draw Game Rule)~~

~~A selection of a play may be made only if the request is made in person.~~

~~(401.308 Cash Five Draw Game Rule)~~

~~A selection of numbers for a Play may be made only if the request is made in person.~~

~~(401.315 Mega Million Draw Game Rule)~~

~~Present at the terminal—A player remains physically present at the terminal from the time the player's order for the purchase of draw game tickets is paid for and accepted by the retailer until the processing of the order is completed and the tickets are delivered to the player at the retailer terminal location.~~

~~(401.301 General Definitions)~~

It is obvious why the Texas Lottery chose to delete this language. A plain reading of the "Present at the terminal" language makes it clear that a player is to be physically present when he or she is purchasing a Texas Lottery ticket. The now deleted language would not allow a Texas Lottery sales agent or a lottery courier staff to act on the player's behalf during a lottery transaction. The player would be required to be present at the terminal during all parts of the sale. As previously referenced, the Texas Lottery unsuccessfully attempted to delete the "Present at the terminal" in 2005 rulemaking. Lottery couriers could not operate in this State if this language remained in the Texas Lottery rules.

In defense of the "COVID" period rulemaking changes at the June 21, 2023 Texas Lottery public meeting, Texas Lottery General Counsel erroneously conflated the "Present at the terminal" requirements of a player being present during all parts of the sale of a lottery ticket, and a lottery retailer's requirement to give prompt customer service to players present and players waiting at the terminal to purchase lottery tickets required by Draw Game Rules (General) 401.304(b)(2). Counsel cryptically explained:

"The term, quote, "Present at the terminal" was formerly a definition in the rules, but it only appeared one other place to address customer service requirements and it was deleted because those requirements were already adequately addressed. The only place this term appeared was in the general draw game rule at 401.304(b)(1), which, following those amendments, is now 401.304(b)(2), and that addressed ---that section addresses a retailer's customer service obligations. The rule said and still says today, quote, "Retailers must give prompt service to lottery customers present and waiting at

the terminal to purchase tickets for draw games.” So that change had nothing to do with the location of the sales transactions.”³

The other deleted provisions describe in greater detail the statutory prohibition of selling Texas lottery tickets using a telephone encompasses. It certainly appears as though Texas Lottery executive management preemptively deleted this language specifically to allow these lottery courier companies to operate in our State without directly conflicting with the existing rules of the Texas Lottery. The Texas Lottery maintains that these deletions changed nothing, but the CLC remains skeptical. Especially, when considering the Texas Lottery has maintained that the lottery courier companies are simply taking an order for a ticket over the telephone. That is exactly the type of activity that the above deleted language prohibited. During the June 7, 2022, Texas House of Representative Licensing and Administrative Procedures Committee hearing, the Texas Lottery Executive Director described the lottery courier as follows:

“Another way to think of these ticket delivery companies and something that is used very commonly in our industry, think of them as the Uber Eats of the lottery industry.”⁴

This statement highlights a major flaw with the Texas Lottery’s defense of its rulemaking actions: The so-called “Uber Eats of the lottery industry” would not be able to operate under rules that prohibit lottery retailers from accepting telephone requests for lottery tickets. There would be nothing to pick-up and deliver. Likewise, the real “Uber Eats” could not operate if there were a rule that prohibited restaurants from accepting telephone requests for food orders. There would be nothing to pick up and deliver.

Additionally, the Texas Lottery has deceptively suggested that the above deletions have no effect on prohibited play by telephone. At the June 21, 2023, Texas Lottery public meeting, the Texas Lottery’s General Counsel stated,

“The 2020 rule amendment made no changes to the prohibition on selling tickets by phone. And that prohibition still appears three places in the Commission’s rules...”⁵

The CLC has been unable to find the “three places in the Commission’s rules” referenced by the Texas Lottery General Counsel. The CLC has found one place in the rules, 401.355 Restricted Sales, where it is listed three times (phone, fax, or other similar method of communications). Assuming, for the sake of this letter, that same, lone reference in the Texas Lottery rules that addresses the prohibition of a lottery retailer selling lottery tickets by telephone, it reads:

³ June 21, 2023 Texas Lottery Commission meeting, pg. 26, line 20.

https://www.texaslottery.com/export/sites/lottery/Documents/legal/meetings/2023/06212023_TLCCommMtg.pdf

⁴ June 7, 2022 Texas House of Representative Licensing and Administrative Procedures Committee at 00:09:45 Time mark, <https://www.house.texas.gov/video-audio/committee-broadcasts/87/>

⁵ June 21, 2023 Texas Lottery Commission meeting, pg. 26, line 12.

https://www.texaslottery.com/export/sites/lottery/Documents/legal/meetings/2023/06212023_TLCCommMtg.pdf

401.355 Restricted Sales

(a) Retailers shall not sell lottery tickets by mail, phone, fax, or other similar method of communications. Retailers shall not sell a lottery ticket or any other document evidencing a right, privilege, or share in a lottery ticket from another jurisdiction by any means.

On its face, this provision would seem to prohibit the sell of Texas lottery tickets by telephone. However, it is subject to the definition of "sell". The key question is, "what does it mean for a Texas Lottery retailer to sell a ticket?" CLC research revealed that through specific inconspicuous and indistinguishable changes made to the Texas Lottery rules, the Texas Lottery executive management has changed what it meant to sell Texas lottery tickets. This effort also resulted in the addition of "electronic means" to the "Playslip" definition.

In June 2015, the Texas Lottery began substantial rulemaking initiatives to develop a mobile app for informational purposes and the use of a QR code; as well as the ability to offer "in-lane sales" at grocery store locations. The CLC participated in these rulemaking processes and did not object to the changes. These initiatives came with an extensive number of rule changes to all the draw games. In addition to these changes, there were subtle and unique changes made only to the multi-state draw game rules for Mega Millions and Powerball. The CLC has provided a timeline and supporting document of the rule changes attached to this letter as Appendix "G"). These changes ultimately created two processes in selling lottery tickets where there historically had only been one. The historic process of selling lottery tickets was "Method of Play", where the processing of tickets was incorporated in the definition. The term "Method of Play" was changed to "Entry of Play", and "Method of Play" described functions were split into two separate processes: 1. Entry of Play 2. Processing of tickets at the Terminal.

By the start of 2019, the Mega Millions game rule and Powerball game rule were the only draw games with the unique "Entry to Play" language, and the new electronic means "playslip" definition. CLC research revealed lottery couriers began publicly operating in the State during this time offering only multi-state draw games. The CLC does not believe this timing by the lottery couriers is a coincidence. At the June 11, 2020, Texas Lottery public meeting, these changes were made to all draw games in the rulemaking process. In recent publications, a Texas Lottery spokesperson has claimed that the rulemaking irregularities identified by the CLC were not possible because the changes were made during the agency's quadrennial rule review process. The fact that the changes came through that process does not change the outcome. Ultimately, the CLC suspects that, by design, an unknowing Texas Lottery staff member participating in the agency rule review process sometime in 2019 - 2020 identified the discrepancy in format and language between the two multi-state draw games (Mega Millions, Powerball) and the other draw games (Lotto Texas, Pick 3, Daily 4, Cash 5, Texas 2 Step, All or Nothing) and made a logical recommendation to make the language consistent in all the draw games. Instantly, what it meant to sell Texas lottery tickets was changed. The changes to the playslip definition also enabled certain retailers the ability to electronically process large

numbers of playslips for drawings that would have been logistically and physically impossible prior to the change.

Finally, the changes to what it means to sell Texas lottery tickets was consummated with the adoption of new language in 401.304 Draw Game Rules (General) proposed at the February 2022 Texas Lottery public meeting:

(6)Player Responsibility. It shall be the sole responsibility of the player to verify the accuracy of the game Play or Plays and other data printed on the ticket. The placing of Plays is done at the player's own risk through the licensed sales agent who is acting on behalf of the player in entering the Play or Plays.

In other words, a Texas lottery player is “placing a play” with the lottery courier gambling company, and the licensed sales agent is “acting on behalf of the player” when the “sell” happens at the terminal. Additionally, if a conflict arises between the player and the lottery courier, it is the player who bears the brunt of the loss (Appendix “H”).

In summary, offshore, and other internet gambling companies implying they are associated with the Texas Lottery are advertising through radio, print, and social media that it is legal for Texans to play the Texas Lottery by telephone and computer. The Texas Lottery maintains that the players are placing orders (“placing a play”), and they are not actually playing the lottery game on their telephone. At the February 14, 2023, Senate Finance Hearing, the Texas Lottery Executive Director stated:

“The Texas Lottery does not sell any tickets, any products over apps, over the telephone, over the internet, period.”⁶

On April 22, 2023, a “Montana fishing guide company” electronically processed \$11 million dollars of tickets in three days in a strip center located in Colleyville which sold a \$95 million winning Lotto Texas ticket. It was widely reported that the unknown group that won the jackpot had purchased a significant amount of the possible drawing outcomes at other known licensed retailers associated with lottery couriers as well. The combined effect was that the buying syndicate “cornered the market”. The Texas Lottery Executive Director maintains such purchases are legal:

“While there are no prohibitions on these type of purchases, it certainly generated unprecedented growth over the last few days of the jackpot run.”⁷

The Texas Lottery has failed to protect youth under 18 years of age in our State. Section 466.015 (b) (3) of the Texas Lottery Act requires the Texas Lottery to adopt rules that enforce

⁶ February 14, 2023, Texas Senate Finance Hearing at 2:22:45 time mark, https://tlcenate.granicus.com/MediaPlayer.php?view_id=53&clip_id=17231

⁷ “Syndicates are spending millions of dollars on Texas’ lottery to beat out everyone else”, Dallas Morning News, <https://www.dallasnews.com/news/watchdog/2023/04/27/bought-a-ticket-for-lotto-texas-recent-95-million-jackpot-you-had-heavy-competition/>

the prohibition on the sale of lottery tickets to individuals younger than 18 years old. At the February 14, 2023, Texas Senate Finance Hearing, Senator Nichols asked the Texas Lottery Executive Director about reports of kids playing the Texas Lottery via the phone:

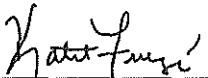
“What keeps kids under 18 yrs. old from doing it?” The Texas Lottery Executive Director replied: “That would be up to the individual third-party company, again we’re not involved in that.”⁸

The Texas Lottery’s abdication of the enforcement of this statutory requirement to unregulated “third party” offshore and internet gambling companies is indefensible.

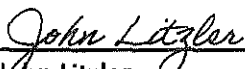
The CLC believes these problems are serious and call into question the integrity, security, honesty, and fairness of the Texas Lottery. These problems would never have been possible without the questionable and substantive rule changes discussed in this letter. Section 466.014 of the Texas Lottery Act gives the Texas Lottery Executive Director broad authority to exercise strict control and close supervision over all lottery games conducted in this State, to promote and ensure integrity, security, honesty, and fairness in the operation and administration of the Lottery. Sadly, the Executive Director has failed to uphold his responsibility. It is unlikely the Executive Director acted alone. The deceptive and precise changes made to the rules with a predetermined outcome in mind could not have happened without the legal guidance and implementation assistance provided by the Texas Lottery’s Deputy Executive Director and General Counsel.

The CLC appreciates the opportunity to provide this round of comments and looks forward to participating in the Sunset review process. The CLC is available and welcomes an opportunity to meet and answer any questions that may arise from these comments or other relevant issues.

Sincerely,



Dr. Katie Frugé
CLC Director



John Litzler
CLC Director of Public Policy

⁸ February 14, 2023, Texas Senate Finance Hearing at 2:26:50 time mark,
https://tlc.senate.granicus.com/MediaPlayer.php?view_id=53&clip_id=17231