



KAW NATION

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March 5, 2008

Comments on Electronic or Electromechanical Facsimile Definition; Class II Classification Standards; Class II Minimum Internal Control Standards; Technical Standards

National Indian Gaming Commission
ATTN: Penny Coleman, Acting General Counsel
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Washington, DC 20005

VIA FACSIMILE: (202) 632-7066

Dear Chairman Hogen and Commissioner DesRosier:

I write on behalf of the Kaw Nation to object to your proposed new regulations for Class II gaming. The Class II Technical Standards and MICS proposals should be withdrawn and NIGC should engage in 180 days of consultation concerning these regulations before they are republished for notice and comment. The Class II Definition and Classification proposals should be withdrawn completely.

The NIGC notice and comment rulemaking has been fundamentally flawed from the start. First of all, while the original publication of the Class II regulatory proposals on October 24, 2007 stated that an economic report was attached. NIGC only belatedly made its economic impact report available on February 1, 2008. When the report finally was issued, it showed that Class II gaming revenues would be cut by \$1.2 billion annually. That's one-third of the Class II market, or more. The high cost of these regulations is not justified by the "clarity" they purportedly seek to provide. Moreover, no cost-benefit analysis has been performed on the regulation, and such analysis would show that the cost of the regulations is too high relative to the expected benefit.

Moreover, the NIGC has not made serious efforts to avoid intrusion on tribal self-government, as required by Executive Order 13175. For example, tribal governments have repeatedly made clear that tribal gaming regulatory agencies are the appropriate governmental body to determine whether a Class II technologic aid is permissible or

whether it is an electro-mechanical facsimile. Yet, rather than work out this important point, the NIGC persists in its efforts to outsource the primary regulatory authority over Class II technologic aids to private gaming laboratories.

The NIGC followed different processes on the Class II Technical Standards and Minimum Internal Control Standards and the Class II Definitions and Classification Regulation. As to the Class II Technical Standards and Class II MICS, the NIGC informally worked with a manufacturers working group, which included some tribal government representatives to produce draft regulations designed to meet agency objectives without infringing on tribal government rights to use Class II Technologic Aids. This process was not a substitute for the NIGC's obligation to engage in government-to-government consultation with tribal government leaders, but at least if the NIGC had the benefit of an industry perspective in the development of these regulations.

Yet, after months of hard work by the manufacturers working group on the Class II Technical Standards and the Class II MICS, just prior to Federal Register publication and without consultation, NIGC re-inserted sections of its existing Class III MICS through incorporation by reference at 25 CFR §§542.14 through 542.15, 542.17 through 542.23, 542.30 through 542.33, and 542.40 through 542.43 of this chapter establishes the minimum internal control standards for the conduct of Class II bingo and other games similar to bingo on Indian lands as described in 25 U.S.C. 2701 *et seq.*

NIGC's course of action creates confusion and potential conflict because there was no effort to harmonize or revise the old regulations to avoid running afoul of new set. The NIGC also inserted a requirement that Class II operators maintain a record of not only the Class II game, but also "the entertaining display," which has no legal relevance.

The proposed new Class II definition for "electro-mechanical facsimile" of a game would be even more damaging. It says:

- (a) Electronic or electromechanical facsimile means a game played in an electronic or electromechanical format that replicates a game of chance by incorporating all the fundamental characteristics of the game.
- (b) Bingo, lotto, other games similar to bingo, pull-tabs, and instant bingo games that comply with part 546 of this chapter are not electronic or electromechanical facsimiles of any games of chance.

This definition does not draw the "bright line" that NIGC has said that it is looking for because it does not reference player participation. If a Class II technologic aid incorporates elements of the game in electronic format but requires live player participation, does that take it outside of the proposed re-definition of the prohibition on electro-mechanical facsimiles? NIGC does not answer this question, instead it simply states that despite inclusion within the new definition of electro-mechanical facsimile, a Class II technologic aid is permissible if it comports with the balance of the NIGC's Class II regulations. Since the prohibition on "electro-mechanical facsimiles" is

statutory, the Federal Courts might well rule that the NIGC did not have authority to exempt Class II technologic aids from its scope, so the proposed Class II definition regulation should be rejected. The existing regulation has been approved by the Federal Courts, and there is no need to change it!

Given the length of the proposed regulations, we have attached a list of objections to the NIGC's proposed Class II regulations and we ask you to give serious consideration to these objections. Once again, the NIGC should withdraw its regulations and find common ground with tribal governments because the NIGC is not regulating a private industry; it is working with sovereign Indian tribes.

Please give our comments full consideration and come back to the table to develop workable regulations for Class II gaming.

Sincerely,



Guy Munroe
Chairman/CEO
Kaw Nation

OBJECTIONS TO THE NIGC'S PROPOSED CLASS II REGULATIONS

Key problems with National Indian Gaming Commission (NIGC) proposed Class II Regulations for Technologic Aids:

1. NIGC PROPOSALS ARE CONTRARY TO IGRA STATUTORY PURPOSES

- Through IGRA, Congress sought to protect Indian gaming as a means to promote "tribal economic development, self-sufficiency and strong tribal governments."
- In accordance with IGRA, Tribal Governments developed Class II Indian gaming as a viable industry, generating \$3.5 billion annually -- despite the long-time opposition of the NIGC. Five of the U.S. Courts of Appeals have ruled in favor of tribal governments, yet NIGC now seeks to reverse those gains.
- The NIGC proposed Class II regulations would destabilize a mature industry, slash revenues, cut jobs and create a downward economic spiral that would destroy tribal economic development in the most vulnerable communities.

2. THE FEDERAL COURTS HAVE APPROVED THE EXISTING CLASS II DEFINITION, SO NIGC MAY NOT DESTABILIZE THE CLASS II GAMING INDUSTRY WITH A NEW DEFINITION THAT IS CONTRARY TO IGRA

- NIGC's existing Class II definition regulation has been approved by the Federal Courts and there is no reason, other than bureaucratic make-work, to change the existing definition.
- NIGC's new proposed definition would re-define all Class II Technologic Aids that present Class II games in electronic format as prohibited "electro-mechanical facsimiles," regardless of the facts that the aids simply use technology to facilitate the actual play of Class II games and enhance Class II player participation as IGRA envisioned.
- NIGC's proposal to transform the Class II definition into a broad prohibition on electro-mechanical facsimiles, with only a limited and constricted exception for NIGC approved Aids turns the IGRA is contrary to the statute. NIGC's proposal would change the fundamental statutory structure of the Class II gaming provisions from an authorization to a prohibitory measure.
- The NIGC's attempts to avoid this outcome by creating an exemption for games that can "jump through" countless new regulatory hoops is a

complete failure because the NIGC cannot authorize "facsimiles" when IGRA prohibits them. In other words, NIGC cannot declare a game to be a "facsimile," which Congress has prohibited by statute, *and* then say that it's okay NIGC allows it because it has passed through the agency's new regulatory maze. NIGC should stick with the Federal Court approved definitions that are on the books.

3. FEDERAL LAW PROHIBITS OUTSOURCING TRIBAL SOVEREIGNTY

- NIGC's proposes to usurp tribal sovereignty by replacing tribal governments as the primary regulators of Indian gaming under IGRA and giving that role to private, commercial game testing laboratories.
- Under the proposed regulations the NIGC gives itself the right to reverse a favorable laboratory determination *at any time* and to sanction such laboratory by removing it from its list of approved game testing laboratories.
- In sum, NIGC plans to outsource tribal sovereignty to private, commercial gaming labs but keep a bureaucratic thumb on the scale in case a decisions is made in favor of an Indian tribe. Franklin Roosevelt ended the 19th Century model of ruling Indian lands by an unchecked bureaucracy in the 1934 Indian Reorganization Act. In the 21st Century, NIGC must not be allowed to turn back the clock to those dark days.

3. IMMENSE ECONOMIC HARM TO TRIBES

- Under NIGC's new proposal, all of today's Class II games would have to be modified or replaced. Class II games satisfying the proposed regulations (if developed) will be less appealing and of questionable economic viability.
- The NIGC admits within its own economic impact study that tribal governments stand to lose approximately \$1.2 BILLION a year under the proposed regulations. Tribal governments can also expect increased compliance costs of up to \$347.9 million.
- Many smaller Class II operations will likely be driven out of business. Additional losses would result from the thousands of lost jobs and wages; investment losses; transition costs; reduced spending in local economies, and other direct and indirect negative economic impacts. The regulations could mean the loss of 50,000 to 75,000 jobs even by NIGC's conservative impact estimates.
- The proposed regulations affect *all* tribes by taking away the remaining leverage left to tribes in compact negotiations with states. Class II gaming will no longer be a viable alternative to the compacting process.

4. IMPOSES ARBITRARY AND UNLAWFUL REQUIREMENTS

- The proposed game classification regulations add arbitrary requirements that must be satisfied for a game to remain Class II. These requirements include limitations on prize payouts and game displays, restrictions on game math and unnecessary game delays. These limitations are *not* supported in IGRA, its legislative history, case law, or, in many cases, the NIGC's own opinions on permissible Class II game features. In sum, on the 20th Anniversary of IGRA, NIGC is seeking to overturn 19 years of precedent.
- By adding these arbitrary requirements and disregarding its statutory directives, the NIGC is amending IGRA through the regulatory process – and treading on the authority of Congress.
- Because NIGC's requirements are newly minted bureaucratic red-tape, none of today's Class II games can meet them. NIGC's new regulations would eliminate all of the current Class II technologic aids and strip tribal governments of their ability to use Class technology, contrary to IGRA's intent. Accordingly, all of today's Class II games would have to be modified or replaced.
- NIGC's so-called "grandfather clause" provides no relief because it is circular in nature. NIGC posits that: If a Class II technologic aid does not meet the new regulatory mandates, then it is not Class II according to NIGC and it is not covered by the grandfather clause. Ultimately, the "grandfather clause" is a sham because it will encompass none of today's Class II games.

5. DISREGARDS NIGC'S OWN PRECEDENT

- Since 1992, the NIGC has issued numerous Class II advisory opinions, yet even those Class II electronic bingo games previously approved by the NIGC would become Class III under the proposed regulations. NOT ONE Class II technologic aid to bingo approved by the NIGC since IGRA was enacted would be considered Class II by NIGC under the proposed regulations.

6. BUREAUCRATIC REVERSAL OF JUDICIAL DECISIONS

- Tribes have won important victories in the courts regarding Class II games – 5 Federal Court of Appeals victories that the proposed regulations would overturn.
- While the courts have confirmed that Class II games can be both fast and profitable, and have made clear that tribes are not limited to "traditional" bingo, the proposed regulations limit bingo to a slower, traditional game played only with a 5x5 grid card and a draw of 75 numbers. Not even

MegaMania, a game found to be Class II by two separate federal appeals courts, would remain Class II under the proposed regulations.

7. VIOLATION OF DUE PROCESS

- While the NIGC established a Tribal Advisory Committee (TAC) to assist in the development of its Class II regulations, this committee was limited to seven members expected to represent all of Indian country. Even worse, virtually all drafting was done by the NIGC behind closed doors with no TAC involvement.
- Although the TAC unanimously objected to unreasonable restrictions on Class II games, none of its significant objections were accepted by the NIGC. The same is true of recommendations made by tribal leaders and tribal regulators.
- The NIGC's failure to consider tribal input demonstrates that its so-called consultation process represents nothing more than an agency going through the motions. Meaningful consultation with tribal governments would have eliminated the proposed regulations' unnecessarily harsh impacts on the financial, social, political and economic interests of tribes.

8. TECHNICAL STANDARDS AND CLASS II MICS FLAWED

- The proposed technical standards require compliance with the game classification standards. To avoid, unintended bureaucratic conflict, the two regulations should stand alone.
- The proposed technical standards fail to include Class II player interface components within the grandfather clause. This significantly increases the cost of compliance, creating a financial hardship on tribal governments.
- The game recall provisions of the proposed technical standards require the player interface to display results of any alternate display. This requirement not only confuses the reality of the game, but threatens to obscure the distinction between the legal relevance of a bingo game and any alternate entertaining display.
- The proposed minimum internal control standards fail to include a provision that provides that only applicable standards apply. This failure will cause tribes to adopt unnecessary standards for systems that they do not use.

TRIBAL GOVERNMENT RECOMMENDATIONS

- NIGC should withdraw the Class II definition regulation and game classification proposals.
- NIGC should extend the comment period for six months on the Technical Standards and the Class II MICS to provide for thorough consultation with tribal governments to iron out all of the remaining technical problems.
- Congress should mandate that NIGC follow Executive Order 13175 as a matter of statutory law and should mandate that NIGC work with tribal governments cooperatively through negotiated rule-making to avoid intrusion on tribal sovereignty and self-government.
- Congress should review the NIGC's GPRA plan, including its plan to provide training and technical assistance to tribal governments, to ensure that the NIGC is not creating new rules simply to justify the agency's existence.

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NUMBER OF PAGES INCLUDING COVER SHEET: 9

TRANSMITTED BY: Sue TIME: 10:10

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