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VIA FAX TO 202-632-0045, E-MAIL TO techstds@nigc.gov, AND U.S.P.S.

National Indian Gaming Commission
Suite 9100
1441 L Street, NW
Washington, D.C. 20005

Attn: Penny Coleman, Acting General Counsel
Michael Gross, Senior Attorney

Re: Comments on Class II Classification Standards and Class II Technical Regulations
Our File No. 97.9.20

Dear Ms. Coleman and Mr. Gross:

Our office is special counsel to the Ho-Chunk Nation ("Nation"). The Nation is a federally recognized Indian tribe organized under the provisions of the Indian Reorganization Act, 25 U.S.C. §476, pursuant to a written constitution which has been approved by the Secretary of the Interior.

The Nation presently operates the Ho-Chunk, Majestic Pines and Rainbow Casinos in the State of Wisconsin ("State") under a Tribal-State Class III Compact with the State.

In addition, the Nation owns and operates the DeJope Casino, a Class II gaming facility. At DeJope, the Nation presently offers for play to the general public 346 Class II gaming devices. Beginning on January 1, 2007, that number will be increased to 1,413.

The National Indian Gaming Commission ("NIGC" or "Commission") has proposed, presumably under the authority granted to it by the Indian Gaming Regulatory Act, 25 U.S.C. §2701, et seq. ("IGRA"), to amend the definitions of "Electronic or electromechanical facsimile" and "Other games similar to bingo" presently set forth in 25 CFR Part 502 and has proposed promulgation of a new Part 546, entitled "Classification Standards for Bingo, Lotto, Other Games Similar to

Bingo, Pull Tabs and Instant Bingo as Class II Gaming When Played Through an Electronic Medium Using "Electronic, Computer, or Other Technologic Aids," published together in the Federal Register at 71 FR 30238-30261 (May 25, 2006). This letter is being submitted by the Nation to the NIGC as its formal comments on the proposed regulations.

In addition, this letter contains the Nation's comments on proposed 25 CFR Part 547, "Technical Standards for 'Electronic, Computer, or Other Technologic Aids' Used in the Play of Class II Games" published in the August 11, 2006 Federal Register at 46336-46361 because proposed Part 547 must be read in conjunction with proposed Part 546, "Classification Standards for Bingo, Lotto, Other Games Similar to Bingo, Pull Tabs and Instant Bingo as Class II Gaming When Played Through an Electronic Medium Using "Electronic, Computer, or Other Technologic Aids."

These proposed regulations, if adopted, will have an adverse economic impact on the Nation by reducing the type or variety of machines and games that the Nation can offer for play at its DeJope and other casinos. This in turn will result in a reduction of revenue to the Nation that it uses to fund essential governmental services. The Nation, therefore, opposes the adoption of the proposed regulations for the reasons set forth below.

INTRODUCTION

As proposed, Part 547 "establish[es] the minimum technical standards governing the use of [technologic] aids." §547.1, at 71 FR 46340. Under Section 546.9, a Tribe or supplier would submit any games and documentation to a testing laboratory that would "evaluate and test the submission to the standards established by [Part 546."] §546.9, 71 FR 30259. The NIGC Chairman would review the laboratory certification [of Class II status under the IGRA] and could "interpose an objection to any [such] certification. §546.9(e). If a testing laboratory and the Chairman could not agree, "the testing laboratory and the requesting party will notify any tribal gaming regulatory authority . . . that the Chairman has objected to the certification and that the certification is no longer valid." §546.9(e)(3), 71 FR 30260. Part 547 spells out what must be submitted (547.4(c)), and establishes minimum standards for evaluating the equipment. It is clear that, through the adoption of Parts 546 and 547, the NIGC proposes to establish minimum technical standards ("MTS") for Class II devices and games and seeks to regulate gaming test laboratories.

The proposed amendments to Parts 502.8"Electronic or electromechanical facsimile" and 502.9 "Other games similar to bingo" at 71 FR 30255 (adds a new paragraph "c") must be read with another proposed amendment at 71 FR 30235.[1] That proposed amendment inserts the word

[1] If adopted as proposed, the definition would read as follows:

§502.8 Electronic or electromechanical facsimile.

"fundamental" into the definition of "Electronic or electromechanical facsimile.

Proposed Part 546 would establish classification standards providing a bright line distinction between what constitutes Class II games played with "technologic aids" (allowed) from Class III games that are "electronic or electromechanical facsimiles" (prohibited without a Compact). Included in Part 546.9(a) [2] is the requirement that technologic aids be certified as such by testing laboratories that are approved by the NIGC.

Proposed Part 547 would also require that all Class II games and aids, or modifications of such games and aids, be submitted to a testing laboratory for review and analysis. 71 FR 46338.

Proposed Parts 546 and 547 therefore raise the following issues: (1) Whether the NIGC exceeded its authority under the IGRA when it proposed Parts 546 and 547; (2) Whether the NIGC should withdraw the proposed regulations and consider another regulatory scheme similar to the 1999 proposed rule the NIGC published earlier to classify Class II games, and (3) Whether the reasons for withdrawing the 1999 proposed rule apply as well to the presently proposed regulations.

I.

THE IGRA DOES NOT GRANT THE COMMISSION JURISDICTION TO PROMULGATE THE PROPOSED REGULATIONS.

A. Commission Authority Under The IGRA.

> (a) *Electronic or electromechanical facsimile* means a game played in an electronic or electromechanical format that replicates a game of chance by incorporating the fundamental characteristics of the game.
>
> (b) Bingo, lotto, and other games similar to bingo are facsimiles when:
>
> (1) The electronic or electromechanical format replicates a game of chance by incorporating all of the fundamental characteristics of the game, or
>
> (2) An element of the game's format allows players to play with or against a machine rather than broadening participation among competing players.
>
> (c) 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 game of chance.

[2] Under §546.9(a), a Tribe, supplier, manufacturer, or game developer "must submit the games and equipment to a testing laboratory under this part."

The IGRA grants the Commission the authority to approve tribal ordinances "concerning the conduct, or regulation of Class II gaming" (25 U.S.C. §2710(b)(1)(B)). The IGRA spells out what must be included in such ordinances:

> (1) that the Tribe would have "the sole proprietary interest and responsibility for the conduct of any gaming activity" (25 U.S.C. §2710(b)(2)(A));
>
> (2) parameters for use of gaming revenues (25 U.S.C. §2710(b)(2)(B));
>
> (3) that there be annual outside audits of the gaming (25 U.S.C. §2710(b)(2)(C));
>
> (4) that contracts in excess of $25,000 annually be subject to outside audits (25 U.S.C. §2710(b)(2)(D));
>
> (5) that construction and maintenance of the gaming facility be done in an environmentally sound manner (25 U.S.C. §2710(b)(2)(E));
>
> (6) that there be an adequate system of background investigations and licensing (25 U.S.C. §2710(b)(2)(F)); and
>
> (7) licensing or regulation of class II gaming owned by an entity other than a Tribe (25 U.S.C. §2710(b)(4)(A))

The IGRA further gives the Commission: (1) authority over management contracts (25 U.S.C. §2711); (2) authority "to levy and collect civil fines" against a tribal operators or management contractors (25 U.S.C. §2713); (3) subpoena and deposition authority (25 U.S.C. §2715); and (4) the:

> (1) authority to monitor class II gaming "conducted on Indian lands on a continuing basis." (25 U.S.C. §2706(b)(1));
>
> (2) authority to "inspect and examine all premises located on Indian lands on which class II gaming is conducted" (25 U.S.C. §2706(b)(2));
>
> (3) authority to conduct background investigations (25 U.S.C. §2706(b)(3));
>
> (4) authority to examine, photocopy and audit all records respecting gross revenues of class II gaming conducted on Indian lands "and any other matters necessary to carry out the duties of the Commission under [the IGRA]" (25 U.S.C. §2706(b)(4));
>
> (5)authority to contract in accordance with Federal law and regulations (25 U.S.C. §2706(b)(6));

> (6) authority to contract with entities for activities necessary to discharge the duties of the Commission and to contract with Tribes to enforce the Commission regulations (25 U.S.C. §2706(b)(7));
>
> (7) authority to hold hearings and administer oaths (25 U.S.C. §2706(b)(8)(9)), and
>
> (8) authority to "promulgate such regulations and guidelines as it deems appropriate to implement the provisions of [the IGRA] (25 U.S.C. §2706(b)(10)).

Notably absent from the IGRA is any express authority granting the Commission jurisdiction to establish minimum technical standards for Class II games or authority over testing laboratories as proposed in Parts 546 and 547.

B. Laboratory Certification Process.

Under the proposed regulations, the Commission asserts jurisdiction over testing laboratories. That the Commission is doing so is made clear in various portions of proposed Part 546. Proposed Part 546 would establish "a process for establishing Class II certification of 'electronic, computer, or other technologic aids' and the games they facilitate." §546.1, at 71 FR 30255. To be used in conjunction with Part 546 is Part 547 which "establish[es] the minimum technical standards governing the use of such aids." §547.1, at 71 FR 46340. Under Section 546.9, a Tribe or supplier would submit any games and documentation to a testing laboratory that would "evaluate and test the submission to the standards established by [Part 546."] §546.9, 71 FR 30259. The NIGC Chairman would review the laboratory certification [of Class II status under the IGRA] and could "interpose an objection to any [such] certification. §546.9(e). If a testing laboratory and the Chairman could not agree, "the testing laboratory and the requesting party will notify any tribal gaming regulatory authority . . . that the Chairman has objected to the certification and that the certification is no longer valid." §546.9(e)(3), 71 FR 30260. It is therefore clear that the NIGC proposes to regulate testing laboratories through Parts 546 and 547.

C. Case Law Is Clear That An Agency Has No Power To Act Unless And Until Congress Confers Power Upon It.

It is a well settled rule of law that an administrative agency, such as the NIGC, has no authority to enact regulations governing a specific activity absent express authorization from Congress. *Colo. River Indian Tribes v. Nat'l Indian Gaming Comm'n*, 383 F.Supp.2d 123 (D.D.C. 2005). Most recently, this principle of administrative law was reiterated in the recent federal court decision concerning whether the Commission had authority to enforce its minimum internal controls ("MICs") on a tribe's Class III gaming operations. In *Colo. River Indian Tribes v. Nat'l Indian Gaming Comm'n*, 383 F. Supp. 2d 123 (D.D.C. 2005) ("*CRIT*"), aff'd 2006 U.S. App. LEXIS 25980 (D.C. Cir. 2006), the Tribes challenged the application of the MICs, to their Class III casino. The NIGC had asserted jurisdiction to enforce its MICs over Class III gaming when it

promulgated Part 542, Minimum Internal Control Standards. In promulgating those standards, the NIGC stated that they applied to "gaming operations on Indian land" (64 FR 590, 596, January 5, 1999, as corrected at 64 FR 4966, Feb. 2, 1999, 25 C.F.R. 542.1), making no overall distinction between Class II and Class III gaming.[3]

In defending its assertion of authority to review Class III internal controls in *CRIT, supra*, the Commission also cited §2706(b)(10) of the IGRA to support its assertion of jurisdiction to impose the MICs on Class III gaming. That section of the IGRA gives the Commission authority to "promulgate such regulations and guidelines as it deems appropriate to implement the provisions of this chapter." That power, the Commission argued, was sufficiently broad to enable it to assert jurisdiction over Class III gaming for purposes of imposing the MICs, citing to the Supreme Court's statement in *Mourning v. Family Publ. Servs., Inc.*, 411 U.S. 356, 365 (1973)[4] (quotation omitted), that where "the empowering provision of a statute states simply that the agency may 'make . . . such rules and regulations as may be necessary to carry out the provisions of this Act,' we have held that the validity of a regulation promulgated thereunder will be sustained so long as it is reasonably related to the purposes of the enabling legislation." *Id.* The *CRIT* Court, however, rejected that argument, stating:

> The notion that a court is free to interpret a statute to conform to some view of its

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[3] Part 542.4 did address minimum internal control standards established in a Tribal-State compact, stating that (1) where the was a direct conflict between the standard in Part 542 and a compact, the compact standard would prevail; (2) where a compact standard was stricter than the standard in Part 542, the standard under the compact would prevail, and (3) where the standard in Part 542 was stricter than the standard under the compact, the standard under Part 542 would prevail.

[4] In *Orca Bay Seafoods v. Northwest Truck Sales*, 32 F.3d 433 (9th Cir. 1994), the Secretary of Transportation sought to promulgate a regulation that would allow certain sales of trucks to proceed without disclosure of accurate odometer readings. The court reversed the judgment and held that the exemption was not within the Secretary of Transportation's power to grant. The court held that the Secretary had a rational policy reason for the large truck exemption, but needed authority.

Similarly, the NIGC has a rational policy reason for establishing standards for the playing of Class II devices and for asserting jurisdiction over independent testing laboratories, i.e., to determine which games are class II games over which the Commission has jurisdiction (and by implication which games are class III games which must be conducted, if at all, pursuant to a Tribal-State Compact). However, as in *Orca, supra*, the Chairman lacks authority to do so. Hence, the Commission must withdraw the regulation and either ask Congress for authority over MTS for Class II devices and jurisdiction over testing laboratories, or, as it began to do in 1999, establish a process for classification that would be carried out by the Commission. Thus, the Commission lacks the proper authority to proceed with the present rulemaking.

> general purposes, even if the resulting interpretation is at odds with the statute's clear language, structure, and legislative history, has long since been rejected. As the Supreme Court has explained: Application of "broad purposes" of legislation at the expense of specific provisions ignores the complexity of the legislative problems Congress is called upon to address and the dynamics of legislative action. Congress may be unanimous in its intent to stamp out some vague social or economic evil; however, because its Members may differ sharply on the means for effectuating that intent, the final language of the legislation may reflect hard-fought compromises. Invocation of the "plain purpose" of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent. *Bd. of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 373-74(1986). **The law is therefore clear that courts and agencies "are bound, not only by the ultimate purposes Congress has selected but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes.**" *MCI Telecomm. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 231 n.4,(1994)*; see also *Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 220, 151 L. Ed. 2d 635, 122 S. Ct. 708 (2002)* ("vague notions of a statute's basic purpose are . . . inadequate to overcome the words of its text regarding the specific issue under consideration" (quotation and emphasis omitted)); *Orca Bay Seafoods v. Northwest Truck Sales, Inc.*, 32 F.3d 433, 436 (9th Cir. 1994) ("We would be writing a different statute, not just construing it, by treating the words as having no meaning and looking instead to the values underlying the language to be construed so that we can create law effectuating those values.") (Emphasis added.)

CRIT, *supra*, at 144.

Applying that law here, it is clear that the NIGC is bound "by the means [the IGRA] has deemed appropriate" to distinguish between Class II and Class III gaming. Those "means" do not include establishing MTS for Class II devices or regulating testing laboratories. Hence, proposed parts 546 and 547 must be withdrawn.

Similarly, while the statute grants the Commission limited authority to determine whether a device is a Class II device, it does not indicate that it may determine the standards by which a game is played on a Class II device or whether games are Class II games by regulating testing laboratories.

In CRIT, the Court of Appeals went on to find the three arguments advanced by the Commission concerning why it had authority over Class III gaming internal controls to be without merit. Those arguments, although not advanced by the Commission in its proposed rulemakings, cannot be used to justify the instant proposed rules.

First, to the Commission's argument that it had "oversight" authority over Class III gaming

thereby giving it "supervisory" authority, the Court of Appeals responded that the statute did not give the Commission "oversight" authority. *Id.*, at 12. In fact, the word "oversight" was found only in the Senate Report accompanying the IGRA. *Id.* ("In addition to the point that a committee report is not law, it is perfectly clear that whatever the Senate Committee thought "oversight" might entail, the Committee did not foresee the Commission regulating class III gaming.") *Id.*, at 13. The Court of Appeals having disabused the Commission of the notion that it had supervisory authority over Class III gaming when that authority was not present in the IGRA, the Commission cannot now assert supervisory authority over testing laboratories or establish MTS for the operation of Class II devices based upon an "oversight" authority because the IGRA does not give the Commission authority to do so. *Id.*, at 12.

Second, in *CRIT*, the Commission asserted that its authority in the IGRA to require submission of an outside audit of Class III gaming revenue translated into authority to impose minimum internal controls on Class III gaming. To that assertion, the Court of Appeals responded:

> We cannot see how the right to receive an outside audit, presumably conducted in accordance with Generally Accepted Auditing Standards, translates into a power to control gaming operations. Under the Securities Exchange Act of 1934, public companies must file reports necessary to the protection of investors. *See 15 U.S.C. §78m(a).* If the public company happened to be in the casino business, such as Harrah's Entertainment, Inc., the Commission's logic here would entitle the SEC to dictate the details of how Harrah's conducts its casino operations because the SEC receives reports from the company. The SEC obviously has no such authority, and neither does the Commission.

Id., at 14.

Applying the analogy offered by the Court of Appeals to the Commission's assertion of jurisdiction to establish MTS for Class II devices or regulate gaming test laboratories, the fact that the Commission has limited jurisdiction to interpret the IGRA in the first instance to determine if a device is a Class II device does not entitle the Commission to "dictate the details" of how a tribe operates a device or how a testing laboratory conducts its business. Thus, the Commission may not extend its authority over Class II gaming to establish MTS for Class II devices or regulate testing laboratories based on its audit authority.

Finally, the Court of Appeals in *CRIT* found the Commission's reliance on its authority to promulgate rules (§2706(b)(1)) and the Supreme Court's decision in *Mourning, supra*, misplaced. The Court stated that "[a]n agency's general rulemaking authority does not mean that the specific rule the agency promulgates is a valid exercise of that authority." *Id.*, at 14-15. The Court went on to state, in language particularly pertinent to the present issue:

> Agencies are therefore "bound, not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for the

> pursuit of those purposes." *MCI Telecomms. Corp. v. AT&T, 512 U.S. 218, 231 n.4(1994)*. The Commission is correct that Congress wanted to ensure the integrity of Indian gaming, but it is equally clear that Congress wanted to do this in a particular way.

Id., at 16.

Thus, absent an express grant of jurisdiction from Congress to the NIGC contained in the IGRA, the NIGC lacks the authority to promulgate the proposed regulations.

D. The IGRA Contains No Express Grant of Jurisdiction To The NIGC To Promulgate The Proposed Regulations.

The IGRA grants to tribes, not the NIGC, the exclusive authority to regulate Class II gaming.

> (a) **Jurisdiction over . . . class II gaming activity** . . . (2) any Class II gaming on Indian lands shall continue to be within the jurisdiction of the Indian tribes, but shall be subject to the provisions of this Chapter.

25 U.S.C. §2710(a)(2) (Emphasis added).

Nowhere in the IGRA is there an express grant of jurisdiction to the NIGC to regulate Class II gaming. Instead, the IGRA grants the NIGC the authority to: (1) approve management contracts for Class II and III gaming as provided in 25 U.S.C. §§2710 and 2711; (2) approve tribal ordinances or resolutions regulating Class II and III gaming as provided in 25 U.S.C. §2710; (3) levy and collect fines for violations of the IGRA as provided in 25 U.S.C. §2713; (4) monitor, inspect and conduct background investigations regarding Class II gaming as provided in 25 U.S.C. §2706, and (5) issue closure orders as provided in 25 U.S.C. §2713(b).

In addition, the IGRA authorizes the NIGC to "promulgate such regulations and guidelines as it deems appropriate [but only to the extent necessary] to implement the provision of]the IGRA]." 25 U.S.C. §2706(b)(10). Thus, the NIGC only has authority to promulgate those regulations that are necessary to implement the express powers that have been granted to it in the IGRA.

Absent any such authority in the IGRA, the NIGC by itself lacks authority to: (1) promulgate MTS for Class II games, or (2) promulgate regulations that regulate independent gaming test laboratories. *Colo. River Indian Tribes v. Nat'l Indian Gaming Comm'n*, 385 F.Supp. 2d 123 (D.D.C. 2005).

In *CRIT, supra*, the NIGC had asserted jurisdiction on a variety of grounds including that the MICs were reasonably related to the purposes of the IGRA, one of which was to assure that the Indian Tribes are the primary beneficiaries of the revenues from Indian gaming (25 U.S.C. §2702(2)). Here, the implied purpose of the regulation is to distinguish between gaming over

which NIGC asserts it has jurisdiction and gaming over which NIGC clearly lacks jurisdiction. However, that implied purpose is insufficient to find an express grant of jurisdiction in the NIGC over testing laboratories or to establish standards for how Class II games will operate under the IGRA, because that authority is vested exclusively in the Tribes (the tribes will have "the sole proprietary interest and responsibility for the conduct of any gaming activity.") (Any Class II gaming on Indian lands shall continue to be within the jurisdiction of the Indian tribes, but shall be subject to the provisions of this Chapter) 25 U.S.C. §2710(a)(1); 25 U.S.C. §2710(b)(2)(A).

Addressing the issue of ambiguity, the Court, in *CRIT*, found none in the IGRA concerning the lack of authority of the Commission to impose MICs on Class III gaming. *CRIT, supra,* at 131-132. Similarly, there is no ambiguity in the IGRA concerning the lack of authority to impose MTS on Class II devices or to assert jurisdiction over testing laboratories. Nowhere in the IGRA is there any mention of testing laboratories. It is clear from the language of the statute, that the IGRA grants the Commission jurisdiction to approve tribal ordinances that establish procedures for how Class II gaming shall be conducted but does not grant the NIGC authority to establish Class II MTS or regulate testing laboratories.

Further support for the Nation's position is found in *United States v. Seminole Nation of Okla.*, 321 F.3d 939 (10th Cir. 2002). There, the Tenth Circuit Court of Appeals found the jurisdiction of the NIGC to close a facility extended beyond the literal language of the statute. In overturning the lower court's decision in *United States v. Seminole Nation of Okla.*, 321 F.3d 945 ("Seminole Nation"), the Court found authority in the language of the IGRA which granted the Commission authority to close an entire gaming facility. There, when *25 U.S.C. §2710*(b)(2)(E) (requiring tribal ordinances to include standards for construction and maintenance of gaming facilities) and §2713(b)(1) (granting Chairman authority to close "an Indian game") were read together, the Court found the Chairman's authority to issue temporary closure orders clearly included the power to close an entire gaming facility. *Id.*, at 945. That contrasts sharply with the assertion of jurisdiction here to establish MTS for Class II devices or regulate testing laboratories for purposes of classifying gaming equipment.

In another case, *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204 (U.S. 1988), the Secretary of Health and Human Services sought to apply a cost-limiting rule retroactively. The Court affirmed the lower court's decision invalidating the promulgation of retroactive cost-limit rules, as there was no express statutory authorization for retroactive rulemaking. That is similar to the proposed rulemaking by which the Commission would assert jurisdiction over Class II devices presently in play or seek to regulate independent testing laboratories. In upholding the invalidation of retroactive cost-limiting, the Court stated:

> It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress. In determining the validity of the Secretary's retroactive cost-limit rule, the threshold question is whether the Medicare Act authorizes retroactive rulemaking.

Id., at 208.

Here, as in *Bower*, the question is whether the IGRA authorizes retroactive regulation of Class II devices and independent testing laboratories. It does not. In granting the Commission some jurisdiction to determine whether a device is a Class II device and even more limited jurisdiction over Class III gaming, nowhere does the IGRA, or its legislative history, mention the establishment of MTS for Class II devices or independent testing laboratories. To assert such jurisdiction in the absence of a legislative mandate to do so is contrary to law. For that reason, the proposed rulemaking must be withdrawn.

II.

PREVIOUSLY PROPOSED COMMISSION CLASSIFICATION REGULATION PLACING THE BURDEN ON THE NIGC TO CLASSIFY GAMES WAS WITHIN THE COMMISSION'S JURISDICTION.

In a previous proposed rulemaking, the Commission began to establish a process for classifying games. 64 FR 61234 (November 10, 1999). Under that proposal, a tribe or a tribe's designated agent would supply the Commission with certain information, which the Commission would use to determine whether the game was a class II game. The Commission, however, withdrew the proposal in the face of four criticisms: (1) that the rule failed to recognize the tribal government's role in the classification of games (64 FR 61235-61236); (2) that the rule was "far too sweeping in that no game, even those games unquestionably falling within the Class II criteria, could be introduced for play without first receiving a classification decision from the Commission" (64 FR 61236); (3) the heavy workload imposed on the Commission; and (4) expected substantial expense due to "difficult technical issues" and the time involved. *Id.* The Commission reiterated that the lack of a uniform process for making gaming classification decisions "fosters a climate of uncertainty, exacerbating disputes and increasing the likelihood of long, drawn out litigation." *Id.*

Although tribes apparently objected to the previous proposed rule's ignoring the role of tribal governments, there could be no sound objection to the jurisdiction of the NIGC over itself and tribes as set out in that proposed rule. In contrast, the present proposal, which would assert jurisdiction over testing laboratories and establish MICS for Class II devices is being proposed without a grant of such jurisdiction by Congress to do so.

In fact, the Commission's previous rules drew a bright line distinction between Class II and Class III gaming devices. 57 FR 12382-12393 (April 9, 1992). There, the Commission used the Johnson Act, in defining an "electronic or electromechanical facsimile." ("*Electronic or electromechanical facsimile* means any gambling device as defined in 15 U.S.C. 1151(a) (2) or (3)." *Id.*, at 12393. That distinction was upheld in *Cabazon Band of Mission Indians v. National Indian Gaming Comm'n*, 827 F. Supp. 26 (D.D.C. 1993); aff'd *Cabazon Band of Mission Indians v. National Indian Gaming Comm'n*, 304 U.S. App. D.C. 335 (D.C. Cir. 1994). In 2002,

however, in a split decision by the Commissioners[5], the NIGC deleted the reference to "15 U.S.C. 1151(a) (2) or (3)" (the Johnson Act) in the definition of "Electronic or electromechanical facsimile." 67 FR 41166, 41172. After that change, there was more, not less, confusion regarding which machines were properly classified as Class II or Class III. The present proposed rule attempts to eliminate the confusion, but does so without benefit of authority under the IGRA. For that reason, the present proposal must be withdrawn.

III.

REASONS FOR WITHDRAWING THE 1999 PROPOSED RULE APPLY AS WELL TO THE INSTANT PROPOSALS.

Two reasons, in particular, apply to the present proposal. With respect to the sweeping nature of the instant proposed rule, proposed " 25 CFR 547 Technical Standards for "Electronic, Computer, or Other Technologic Aids' Used in the Play of Class II Games" published in the Federal Register at 71 FR 46336-46341 (August 11, 2006) also prohibits use of "any [class II] gaming equipment, game software, or modification of gaming equipment or game software" absent certification by a testing laboratory certified by the Commission and a finding by a tribal gaming authority that the game or equipment conforms to the standards in proposed Part 547. (Proposed §547.4, 71 FR 46342). Indeed, the present proposal exceeds the 1999 proposal in its sweeping nature in that it would set standards for servers, electronic player stations ("EPS"), EPS critical memory, EPS meters, EPS "events", last game recall, money and credit handling, client-server implementation, formal application configuration (FAC), downloading, changing software or pay tables, game program storage media, random number generators, data communications, encryption, game artwork, and interface with casino monitoring. Thus, the instant proposal

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[5] In dissenting from the change in the regulations, the then Chairman stated in the Federal Register Notice:

> I respectfully dissent from the views of the majority. My reasons are set forth below:
>
> In summary, my vote against changing the definition of facsimile and technological aid reflects my belief, and my agreement with Judge Lamberth of the United States District Court for the District of Columbia, that the definition of facsimile which the Commission chose in its initial rulemaking in 1992 was the only definition possible in order to implement Congress' explicit intent, as expressed in IGRA.

67 FR 41166, 41172

should be withdrawn for the same reason that caused the Commission to withdraw the 1999 classification proposal, i.e., its "sweeping nature."

With respect to costs, it is clear that proposed Parts 546 and 547 together will impose substantial costs on tribes.[6] Only because Indian tribes are apparently not considered to be small entities for purposes of the Regulatory Flexibility Act, 5 U.S.C. §601 ("Act"), is the Commission permitted to propose them without any relevant cost information. If Indian tribes were covered by that Act, the Commission would have been required to:

> . . . describe the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.

5 U.S.C. §604(5).

Indeed, the present proposal should be withdrawn because it fails to disclose the costs to tribes for compliance. Although the costs could be borne by manufacturers eager to have their games classified, some of the manufacturers could be "small entities" under the Regulatory Flexibility Act. For that reason as well, the proposal should be withdrawn until an analysis under that Act, or otherwise, is performed.

CONCLUSION

For the reasons stated above, the Commission must withdraw the proposed Parts 546 and 547

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[6] In an article concerning tribal gaming in California the author states:

> Product approvals from a recognized gaming testing laboratory in the gaming industry are required for certain Gaming Devices (e.g., slot machines, automatic shufflers, etc.) before such Gaming Devices may be sold to tribal casinos. There are privately owned accredited testing laboratories . . . [as well as] state run gaming laboratories . . .
>
> * * *
>
> The cost of these approvals in terms of time and dollars depends on the sophistication of the technical submission from the manufacturers. **The initial product approvals can take many months and cost thousands of dollars.** (Emphasis added.)

John Mahoney, *Tribal Gaming in California: A Guide to the Regulatory Process*, CASINO LAWYER Winter 2005, at 18.

and reformulate the requirements to impose the classification duties on itself, or, alternatively, request authority from Congress to establish MTS for Class II games and extend its jurisdiction over independent testing laboratories.

On behalf of the Ho-Chunk Nation, I would like to thank the Commission for this opportunity to comment on its proposed regulations. If you have any questions regarding these comments, please direct them to me, rather than to my client, at the address or telephone number on the above letterhead.

Yours very truly,

LESTER J. MARSTON
Special Counsel to the Ho-Chunk Nation