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AUGUST 13, 2012

VIA E-mail to reg.review@nigc.gov

Tracie L. Stevens, Chairwoman
Steffani A. Cochran, Vice-Chairperson
Daniel Little, Associate Commissioner
National Indian Gaming Commission
1441 L Street, N.W., Suite 9100
Washington, D.C. 20005

Re: *Comments on proposed rule Part 547: Technical Standards for Class II Gaming, and proposed rule Part 543: Minimum Internal Control Standards for Class II Gaming*

Dear Chairwoman Stevens, Vice-Chairperson Cochran and Commissioner Little:

The Osage Nation ("Nation") appreciates the opportunity to submit the following comments on the National Indian Gaming Commission's ("NIGC") Proposed Rule implementing the Class II Technical Standards, which was published in the *Federal Register* on June 1, 2012. 77 Fed. Reg. 32465-32481 (June 1, 2012). The Nation greatly values the Tribal consultation process instituted by the NIGC throughout this rulemaking. The comments herein address our concerns with the proposed rule. In addition to our comments we offer recommendations that we believe will assist the NIGC to create a more effective regulation. We appreciate your consideration of our comments and suggestions.

I. Technical Standards – Part 547

We note that the NIGC has amended the proposed regulation based on discussion during the consultation process and previously submitted tribal comments, in addition to NIGC independent review. The Nation approves of these changes and regard the same as vast improvement to the proposed rule. In regard to those improvements we comment as follows

A. Tribally-owned Testing Labs

We are pleased with the changes to 547.5(f) which allows tribally-owned testing labs to test and certify gaming machines and systems. Such amendment will allow Tribes to utilize the technical resources in which some tribes have made considerable investment. This change also recognizes tribal sovereignty.

We very much appreciate the NIGC recognition of tribal sovereignty that is reflected in this proposed rule.

B. UL Certification

The removal of the Underwriters Laboratory certification requirement from 547.7 represents a very positive change in the regulation. As you are aware, the Underwriters Laboratory would have been granted the right to a monopoly under the regulation as the same existed yet gaming systems would have been no better protected having UL certification. The alternative testing requirements are better suited to achieve the regulatory purpose of the regulation. Moreover, the requirement would have been a significant financial burden on the gaming industry that would have provided no regulatory benefit. Your correction of this section of the rule is appreciated.

C. Retention of Entertaining Display

The requirements of 547.8(a)(2)(ii) and 547.8(d)(2) that require retention of previous screen displays have no application to Class II gaming. We are very pleased that the current commission recognizes that the entertaining display is for entertainment purposes only and does not affect the game of bingo. Standards that require the player station recall of prior entertaining displays lends the erroneous impression that the entertaining display dictates the outcome of the game. The correction of this part reflects the current Commission awareness of the basic premises of Class II gaming.

II. Grandfathering provisions

A. Impact on Class II Gaming

The grandfathering section contained within the proposed rule is an area of great concern for the Nation that we believe will substantially affect the Nation's gaming operations. The proposed rule threatens the continued success and viability of the Class II gaming industry by requiring the forced removal of certain game products and systems from tribal governmental gaming locations. The rule also works to exclude other gaming systems that may not have been in play at the time of implementation of this regulation and were never submitted as grandfathered games. Therefore, tribes who may be able to derive some economic value from the play of those systems are deprived the ability to utilize those systems in the future merely because they were not submitted for certification in 2008. Since those games are not currently in use the economic impact cannot be identified with any measure of certainty.

However, it is certain that tribal governments at the risk of both criminal and civil penalty have obtained federal court decisions that determine that the games excluded under this rule are indeed lawful Class II games. In addition to

undermining tribal sovereignty, this proposed regulation will invalidate those court decisions. Although, we are cognizant that the grandfathering provisions of the proposed regulation are not determinative of game classifications per se, the regulation effectively prohibits a certain class of games and renders relevant federal court decisions a nullity.

The economic impact of removal of those games currently in play that are subject to the grandfathering provisions will be disastrous for the tribal gaming industry and will have a devastating effect on a vitally important portion of tribal gaming. Tremendous tribal resources have been invested by tribal governments in establishing gaming systems that generate much needed revenue and that are consistent with controlling law. As discussed in tribal consultations, tribal gaming supports tribal governmental programs that supply tribal elders, children and other tribal members with a number of services. Those services are critical to tribal member health, safety and continuing education.

The basis for this existing rule and the proposed rule has never been provided by either the past or present Commission. In fact, this rule was implemented with absolutely no independent data to support the claims of the former Commission that the games pose a substantial threat to gaming. To institute or perpetuate such a regulation the Commission should undertake an economic study to determine the economic consequence of this rule. Further, the NIGC should demonstrate with a relative degree of certainty the defect(s) in these gaming systems that establish there is a threat to the integrity and security if these gaming systems are utilized in Class II gaming locations. We request that the NIGC excise these provisions in their entirety from the proposed rule.

B. The Sunset provision

The stated purpose of the proposed rule is to protect the integrity and security of Class II gaming. However, no evidence exists that suggests that the games subject to these regulations pose such risks. We are aware of no industry that would require the wholesale recall of a product without a showing of defect that would cause substantial threat of harm to life or property. In fact, the previous Commission expressly allowed the play of the games subject to the proposed rule for a period of five (5) years. Clearly, implicit in the sunset clause of this section, is the determination that no substantial threat to the security or integrity of Class II gaming would result from the play of the grandfathered games for a five (5) year period. If any evidence existed that these games posed a significant threat to Class II gaming, the games could not have remained in play for a five (5) year term. Technical Standards that prohibit use of a product merely due to the lapse of time and in reliance on no evidence of harm can only be considered arbitrary and capricious.

The intent of Congress to promote tribal economic development and self-sufficiency is clearly set out in the language of the Indian Gaming Regulatory Act (IGRA) at 25 U.S.C. 2702(1). If promulgated as currently proposed, the regulations will directly defeat IGRA's goal "to promote tribal economic development, tribal self-sufficiency, and strong tribal government." *Id.* We are aware that the NIGC has requested certain economic impact data to support the amendment of the current rule. The Nation does not desire to publish such sensitive information in a document that may be viewed by the public. However, we believe that the economic impact of the gaming machines subject to removal under the current draft rule will result in the loss of millions of dollars across Indian country. This approximate impact does not include the unquantifiable losses such as losses that may be associated with the replacement of these games with games that may be less desirable to patrons. We request that the NIGC consider the impact of this regulation on Class II gaming and remove this provision from the proposed regulation.

III. The Minimum Internal Controls – Part 543

A. Tribal Advisory Committee Recommendations

The Nation appreciates the fact that the NIGC utilized a Tribal Advisory Committee (TAC) as a resource in consideration and review of the Minimum Internal Controls, Part 543 and the Technical Standards Part 547. This process resulted in very intelligent and thoughtful commentary on the regulations. In addition, the TAC supplied detailed analysis of the regulation with comment to the NIGC. It is our belief that the recommendation of the TAC should be adopted by the NIGC. As proposed by the TAC, the Nation supports the suggestion of the use of guidance documents which supply examples of procedures that would satisfy the standards and general standards. We agree with the TAC that generally the Minimum Internal Control Standards are set out as procedures rather than internal controls. The regulations would be more effective and adaptable to evolving technology if the method proposed by the TAC was utilized in the regulation. We strongly urge the NIGC to consider this alternative approach to achieve the maximum benefit of internal controls in Class II gaming.

IV. NIGC Regulation Authority

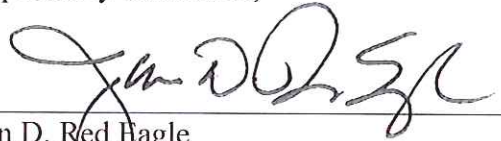
The IGRA sets out the NIGC "powers" in the regulation of Class II gaming at 25 U.S.C. 2706(a) and (b). The powers granted to the NIGC therein do not include powers that allow the NIGC to regulate activities that do not constitute Class II gaming. The current regulation and the proposed regulation purport to regulate Player tracking, gaming promotions, complimentary items, patron deposit accounts and lines of credit. The regulation of these activities are outside the scope of NIGC authority. The Tribal Gaming Regulatory Authority (TGRA) is the appropriate authority for establishing and enforcing proper standards to govern these types of interaction with the patrons in the Nation's

governmental gaming locations. Ultimately, in accordance with the IGRA, the TGRA is the primary regulatory authority of Class II gaming. We recommend the NIGC delete these sections and allow the TGRA to regulate these matters consistent with the stated policy of IGRA.

CONCLUSION

We appreciate your consideration of our comments and suggestions regarding the proposed regulations. The Nation commends this current Commission on its efforts to improve the existing regulations and the diligence with which you have undertaken in your efforts to consult with the Tribes on this matter. As noted above it is our opinion that your efforts have improved the proposed rule in many sections. We urge you to consider further changes that are critical to sustaining the viability of Class II gaming. The grandfathering section should be withdrawn from the regulation along with the sunset provisions contained therein. The Technical Standards should only apply prospectively thereby removing confusion and the negative impact of the proposed rule on Class II gaming. Again, thank you for your time and consideration of this matter.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "John D. Red Eagle", written over a horizontal line.

John D. Red Eagle
Principal Chief
Osage Nation

JDR/tmm/cr