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August 15, 2012

Ms. Tracie L. Stevens, Chairwoman
National Indian Gaming Commission
1441 L St. NW, Suite 9100
Washington, DC 20005

Re: Comments on Proposed Rule of 25 C.F.R. Part 547: Class II Technical Standards

Dear Chairwoman Stevens:

The following comments are submitted to the National Indian Gaming Commission (NIGC) in response to its request for comments on the proposed rule of 25 C.F.R. Part 547, which sets forth the technical standards for Class II gaming. The Quapaw Tribal Gaming Agency (QTGA) appreciates the opportunity to share its views on the proposed Class II technical standards and hopes the comments below prove helpful to the NIGC as it moves towards the final rulemaking stages for this proposed rule.

The QTGA would like to begin by expressing its support for the hard work and efforts of the Tribal Advisory Committee (TAC) and the Tribal Gaming Working Group (TGWG). We applaud the NIGC for recognizing the need for a more collaborative rulemaking process and taking advantage of the technical expertise and knowledge provided by the diverse group of members in the MTAC and TGWG. We appreciate the NIGC's willingness to work together with the TACs and TGWG in identifying remaining issues in the various drafts of the rule and proposing recommendations that will ensure that the final rule achieves the NIGC's regulatory objectives in the least burdensome and most effective manner possible.

I. GRANDFATHERING PROVISIONS

To begin, the QTGA is very concerned with the potential harm that may result if the proposed grandfathering provisions are not amended to clarify that a compliant Class II gaming system manufactured before November 10, 2008 can remain in operation after November 10, 2013. Prior to the issuance of the NIGC's Bulletin No. 2012-02, it appeared as though the proposed rule was requiring all grandfathered Class II gaming systems, including those certified as compliant under the technical standards, to be removed from operation by the sunset date of November 10, 2013. The NIGC has since clarified with its Bulletin that such a draconian outcome was not what was intended in drafting the grandfathering provisions.

Nonetheless, we are concerned that the proposed grandfathering clause does not fully effectuate the NIGC's intent as stated in the Bulletin. As drafted, proposed § 547.59(b) provides that "Grandfathering Class II gaming systems may continue in operation for a period of five years from November 10, 2008." In the proposed rule, a grandfathered Class II gaming system is defined as any Class II gaming system manufactured before November 10, 2008. The proposed definition does not provide an exception for the category of Class II gaming systems manufactured before November 10, 2008 that have since been certified as compliant with the technical standards. Thus, the proposed sunset clause operates to require all Class II gaming systems manufactured before November 10, 2008, to be removed from operation by the arbitrary date of November 10, 2013. The economic impact of such effect would prove catastrophic for the Class II gaming industry and impose a tremendous economic hardship that would fall disproportionately on those tribal governments who stand to lose their entire investments in grandfathered Class II gaming systems.

In the preamble, the NIGC indicated that consideration was being given as to whether substantive amendments to the grandfathering provisions are necessary and appropriate. To better understand the potential impact of the proposed grandfathering provisions on tribal gaming operations, the NIGC is requesting specific data and information from tribal governments regarding their Class II gaming systems. While we appreciate the NIGC's efforts to reach out to tribal governments in this regard, we do not believe we are in a position to provide the NIGC with such information at this time. As an initial matter, we note that some of the information being requested is extremely sensitive and we are reluctant to disclose such information in a form accessible to the public. But more importantly, even if we provided the NIGC with data specific to our gaming operations, we note that our data would only be useful to the extent that it is used in conjunction with data gathered from the Class II gaming industry as a whole. However, without a focused effort to conduct a comprehensive economic analysis, it is simply not possible to gather and compile the necessary data of the entire Class II gaming industry.

With respect to the specific impacts to our gaming operations, we note that such information is largely dependent on how the NIGC ultimately proceeds in relation to its grandfathering provisions. Even with the two-week extension of the deadline, a 60-day period is insufficient to conduct a full scale economic analysis of the various scenarios described in the preamble. Moreover, while we appreciate the clarification provided in Bulletin No. 2012-02, we note that the Bulletin has inadvertently complicated the possible scenarios described in the preamble since the proposed rule continues to read inconsistently with the Bulletin. In spite of this, however, we can state with certitude that, without modification, the proposed grandfathering provisions, as drafted, will have an immense negative economic impact on tribal governments by eliminating an important source of revenue that has become critical to the health and well-being of many tribal governments.

Thus, as a matter of practicality, we are simply unable to calculate all of the costs and impacts associated with the proposed grandfathering provisions. In the event, however, the NIGC determines that additional data and information is vital to determining whether substantive amendments are necessary and appropriate, particularly in relation to the sunset clause, we would urge the NIGC to prepare in advance a regulatory analysis of the proposed rule pursuant to Executive Order 12866, which requires agencies to conduct a cost-benefit analysis in

connection with any significant regulatory action. We note that it is common practice for other independent regulatory agencies such as the Securities and Exchange Commission to conduct a cost-benefit analysis with their rulemakings. Among other benefits, a cost-benefit analysis would assist the NIGC in identifying the most efficient, cost-effective, and least burdensome means of achieving its regulatory objective with the technical standards.

With these comments in mind, the QTGA would like to offer the following recommendations for the NIGC's consideration:

1. ***Amend the Definition of a Grandfathered Class II Gaming System***. As noted above, one of our primary concerns with the proposed rule is that the sunset clause, when read together with the proposed definition of a grandfathered Class II gaming systems, could operate to eliminate a significant number of Class II gaming systems that have never been linked to any security or integrity concerns. The underlying issue here concerns the definition of a grandfathered Class II gaming system, which includes *all* Class II gaming systems manufactured prior to November 10, 2008, including those systems that have subsequently become certified as compliant with the technical standards. Because the definition does not account for those grandfathered systems that have since become certified pursuant to the technical standards, the definition effectively creates two categories of grandfathered Class II gaming systems. The proposed rule does not account for the fundamental difference between these two types of grandfathered systems, nor does it protect the certified status of those grandfathered systems that have since been brought into compliance.

Furthermore, under the proposed definition, certified grandfathered Class II gaming systems manufactured *after* November 10, 2008, will not be considered grandfathered systems for purposes of the final regulation. Thus, once the final rule becomes effective, these certified non-grandfathered Class II gaming systems will be subject to the new testing requirements contained in the final regulation. Although the revisions in the proposed rule are relatively limited in nature, they would nonetheless operate to produce this undesirable result.

We believe these issues could be easily addressed by revising the definition of a grandfathered Class II gaming system to include all Class II gaming systems that have been certified prior to the effective date of the new final rule, not just those systems manufactured before November 10, 2008. Our recommended changes would allow all Class II gaming systems certified before the effective date of the next final rule, and any final rule issued thereafter, to be deemed grandfathered for purposes of that rule. It would thus create a clear distinction between those gaming systems that have already been certified and those systems whose certifications will be based on the standards contained in the new regulation.

From the regulatory perspective, one of the advantages of incorporating our recommended changes to the definition of a grandfathered Class II gaming system is that it does not create a new category of grandfathered systems with each revision of the technical standards. Since our recommended definition of a grandfathered Class II gaming system applies to any Class II gaming system certified prior to the effective date of the new final rule, it will remain relevant and applicable to all future rulemakings. In other words, if our recommended definition

is adopted, the NIGC will not have to revisit the issue of defining a grandfathered Class II gaming system in future rulemakings.

2. Update Compliance Requirements. Proposed § 547.5(a) sets forth the specific compliance requirements for grandfathered systems, including a requirement to submit software within 120 days after November 10, 2008. By the time the final rule is enacted, however, all of these requirements will have been met since no additional systems can be grandfathered in under the new final rule. We respectfully request deleting the requirements set forth in proposed §547.5(a) that have now become obsolete. We note that such deletions will not hinder the overall purpose of the regulation since each system is subject to certification under the standards in effect at the time it was placed into operation. In fact, we believe they will make it much simpler for the NIGC to revise the standards in the future since there will be no need to craft language to address multiple categories of grandfathered Class II gaming systems with each revision.

3. Withdraw the Sunset Clause. We respectfully request the removal of the proposed sunset clause in its entirety. We believe the sunset clause is arbitrary, capricious, and not supported by any objective standard. The proposed sunset clause has the potential to cause significant harm without generating any appreciable benefits to the safety and soundness of the Class II gaming industry. We are not aware of any evidence showing that grandfathered Class II gaming systems pose a potential or actual risk to the public health and safety, nor is there a basis for concluding that a compelling public need exists to remove Class II gaming systems from operation simply because they were manufactured prior to November 10, 2008. Thus, the link between the sunset clause and the desired regulatory goal is unclear and uncertain at best.

We believe it is a far more reasoned regulatory approach to allow market forces or attrition to determine the time at which a grandfathered system should be removed from operation than to impose new obligations and costs with each revision of the technical standards. We therefore urge the NIGC to withdraw the sunset clause in its entirety in the final rule.

4. *Clarify Intent to Apply Standards Prospectively.* We strongly believe that the Class II technical standards should be applied prospectively as a matter of fairness and responsible rulemaking. As drafted, the proposed grandfathering provisions do not protect the status of *any* compliant Class II gaming systems but rather impose additional standards that may invalidate their existing certifications. We do not believe this is how a true grandfathered clause should operate. By potentially disturbing the certifications of all Class II gaming systems in operation today, it appears as though the technical standards would have retroactive application, which we note is generally disfavored under federal law.

The final rule should therefore clarify that the technical standards contained therein will be applied prospectively with respect to any Class II gaming system that has not been certified prior to its effective date.

II. TECHNICAL COMMENTS

1. ***Testing of Player Interfaces***. We recommend that the NIGC amend proposed § 547.5(c)(4) to clarify that laboratory testing will not be required for "each player interface." We believe it would be unnecessarily burdensome to subject each and every player interface to the requisite testing and certification. For some tribal gaming operations, the number of player interfaces requiring testing could run in the thousands. A more reasonable alternative would be to require the testing of "each submitted model" of a player interface.

2. Game Initiation. Proposed § 547.8(b)(1) provides that "there must be no automatic or undisclosed changes of rules." While we agree that all rules and changes thereof should be fully disclosed to the patron before game play, we are concerned that the proposed language, as drafted, may inadvertently limit the use of certain technologies. We believe that the removal of the word "automatic" will achieve the intended regulatory objective without producing such unintended consequences.

3. Bias Reporting. We respectfully request that the bias standard in proposed § 547.14(f)(4) be revised to reflect the bias standard contained in the NIGC's Bulletin 2008-4. In this Bulletin, the NIGC includes what we perceive to be a reasonable and workable threshold of 1 in 50 million for reporting purposes. We believe tribal governments should be required to report only those biases that exceed 1 in 50 million.

CONCLUSION

In closing, the QTGA wishes to thank the NIGC for this opportunity to share our views and concerns regarding the proposed rule of the Class II MICS. We believe the NIGC has a great opportunity to promulgate a final rule that is fairer, less costly, more reasonable, and simpler to modify in the future. It is our hope that our comments above prove useful in the development of the NIGC's final decisions on the proposed rule, particularly in relation to the grandfathering provision.

Sincerely,

Barbara Kyser-Collier
Director, QTGA