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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, DC 20005

Attn: Lael Echo-Hawk

Re: Comments on Preliminary Discussion Draft of 25 CFR Parts 580-585, Subchapter H –Proceedings Before the Commission.

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

On behalf of the Seminole Tribe of Florida (the "Tribe") we offer the following comments in response to the National Indian Gaming Commission's ("NIGC") Preliminary Discussion Draft of 25 CFR Subchapter H, Parts 580-585 –*Proceedings Before the Commission*. The Tribe appreciates the opportunity to participate in this consultation process and its comments on Parts 580-585 are as follows.

As a general matter, we believe that these regulations are a step in the right direction and will result in clearer, more transparent and more efficient resolution of disputes in proceedings before the Commission. However, there are several issues that could benefit from further review in the proposed draft. First, we believe that clarification is required as to how these proposed regulations will interact with the existing regulations at 25 CFR Part 577. It is unclear whether Parts 580-585 are intended to replace, or merely supplement existing Part 577. If the intent is to replace Part 577, then for example issues such as how to request a hearing before a presiding official, which are not included in Parts 580-585, will need to be addressed. If the intent is merely to supplement Part 577, then additional attention should be paid as to how various new provisions might either duplicate or conflict with existing rules at Part 577, such as Part 577's existing rules for service, conduct of the hearing and disclosure of confidential information.

We also believe that additional attention should be paid to the inter-relationship between Part 581 and Parts 582-585, which may add unnecessary complexity to the process.

The Tribe's specific comments on Parts 580-585 are below.

1. Part 580 – Rules of General Application in proceedings before the Commission¹.

The definition of *ex parte communications*, and the procedures surrounding the occurrence of an *ex parte communication* at §§ 580.1(e) and 580.5, warrant further consideration. The proposed definition is as follows:

Ex parte communication: A communication, directly or indirectly, regarding any issue in the proceeding, (other than communications necessary to procedural aspects of maintaining an orderly process), with any person employed by the agency without notice and opportunity for all parties to participate.

It is not clear what constitutes an indirect communication within the definition. Additionally, the definition broadly encompasses "any issue in the proceeding" (except procedural matters), and covers "any person employed by the agency." This broad definition may not be appropriate, particularly in situations where a tribe is the only party before the Commission. In that scenario, the government-to-government relationship that should allow for open and transparent communication between the Commission and a tribe may be hindered.

At §580.5(a), "[p]arties, limited participants, their representatives, or persons outside the agency" are not allowed to make an *ex parte* communication with a "Commission member or employee" in connection with "any issue of fact, law, or discretion relevant to the proceedings." In § 580.5(b) Commission members or employees are prohibited from making *ex parte* communication with "any tribe, management contractor, limited participant, or representative" which is a different prohibited group than the group identified in § 580.5(a). These should be revised for consistency, and additional consideration should be given to the impact that this prohibition may have on the open and transparent communication necessary for a government-to-government relationship.

Further, prohibited communications emanating from the Commission include "any issue of fact or law relevant to the proceedings" but prohibited communications directed to the Commission include "any issue of fact, law, or discretion relevant to the proceedings." These differing standards of what is prohibited depending on who is making the communication should be reconciled.

Language in § 580.5(d) provides that when a Commission member receives or makes a prohibited "oral communication," a written summary of that communication is to be served on

¹ For consistency, we recommend that the discussion draft should either use the term "Commission" or "agency" throughout Subchapter H, rather than use both terms interchangeably.

all parties and placed in the record.² There should be some duty by the Commission to ensure that when this type of oral communication does occur, the other person or party involved in that oral communication is given notice and has an opportunity to provide input on its view of the conversation. This will ensure that the Commission does not place a version (or interpretation) of an oral communication into the record that another party may dispute.

2. Part 581 – Motions in Appellate Proceedings before the Commission

In § 581.4(a), leave of the Commission is required for any motion "other than a motion to participate as a limited participant." It should be clarified whether leave is also required to file a motion to intervene in the appeal proceedings. Further, it appears that the term "limited participant" is not defined but is used extensively in this section and throughout the Subchapter H draft.

Pursuant to § 581.4(d) the movant is not permitted to file a reply brief unless the Commission grants permission in "compelling circumstances, such as where the movant demonstrates that it could not reasonably have anticipated the arguments to which it seeks leave to reply." This standard is much too restrictive, and effectively forces a movant to argue against itself by anticipating arguments and refuting them in its opening brief. We believe this standard should be modified in a manner consistent with general rules of practice, which permit reply briefs, but limit their content to responding directly to arguments made in a response brief and disallowing new arguments. There is no indication of how long the Commission may take to make a decision to grant permission to file a reply brief, and if granted how many days the movant will have to file its reply.

Proposed § 581.6 describes how to supplement the record. We believe the rules should be altered to provide a process for defining what the record is in the first place, and a process that guarantees that interested parties have access to the record prior to filing an appeal.

In § 581.7 the terms "motion for reconsideration" and "petition for reconsideration" are used interchangeably. One term should be used for consistency. For the reasons stated above, we also believe the standards for filing a reply brief in this section are too restrictive.

Other than in § 581.7(h), concerning filing a motion (or petition) for reconsideration, there is no language in the Subchapter H draft indicating whether a filing has the effect of a stay on the decision being appealed from.³ We suggest that a clarification should be made, at some

²See § 580.5(d) ("Any Commission member or employee who receives, makes, or knowingly causes to be made a communication prohibited by this section shall ensure that it, and any responses to the communication, are promptly served on the parties and placed in the record of the proceeding. In the case of oral communications, a written summary must be served on the parties and placed in the record of the proceeding.")

³See § 581.7(h). ("The filing of a petition will not stay the effect of any decision or order and will not affect the finality of any decision or order for purposes of judicial review, unless so ordered by the Commission.")

point in the Subchapter H draft indicating whether the effect of a Commission decision will be stayed by filing a Notice of Appeal under: Parts 582- 585. There is no prohibition in IGRA of staying the effect of the decision being appealed.⁴

3. Part 583 – Appeals from approvals or disapprovals of management contracts or amendments to management contracts.

We question whether § 583.5 should be clarified. It answers the question as to whether motions are permitted with a "yes," and then states that no motions are permitted except motions to supplement the record and motions for reconsideration.

4. Part 584 – Appeals before a presiding official of notices of violation, proposed civil fine assessments, orders of temporary closure, the Chair's decision to void or modify a management contracts, and notices of late fees and late fee assessments.

As discussed above, as an initial matter, if the Part 580-585 regulations are intended to replace the existing Part 577 regulations in their entirety, then we believe they should be amended to include the process in existing §577.3 regarding the election of a hearing.

The language at § 584.10(b) concerning limiting the disclosure of confidential information needs to be revised, or stricken in its entirety. The language, which reflects standards in existing § 577.8(b), provides that one party may request the Commission to direct another party that has submitted information it has deemed confidential, to disclose that confidential information:

A party to a proceeding may request that the presiding official direct a person submitting information under paragraph (a) to provide that information to the party. The presiding official shall so direct if the party requesting the information agrees under oath and in writing:

- (1) Not to use or disclose the information except directly in connection with the hearing; and
- (2) To return all copies of the information at the conclusion of the proceeding to the person submitting the information under paragraph (a) of this section.

Once information that is confidential has been disclosed, the protections suggested above may not be sufficient in the view of the submitting party to protect the confidential nature of that

⁴ 25 U.S.C. § 2714 provides that decisions made by the Commission pursuant to §§2710-13 may be appealed in Federal district court pursuant to "chapter 7 of Title 5." Under that chapter at § 705, "[w]hen an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review."

information. This provision should be stricken.⁵Pursuant to § 584.10(d), the Commission must make a determination on whether the information should be treated as confidential, and an appropriate process is set forth, allowing the submitting party to protect confidential information from being disclosed. The provisions of § 584.10(b) noted above, nullify any protection afforded by the language in § 584.10(d). Finally, we also believe that the Commission should clarify how confidential information is treated in cases that do not involve more than two parties, which we understand to mean cases where there is a party in addition to the tribe and the Commission.

5. Part 585 – Appeals to the Commission on written submissions of notices of violation, proposed civil fine assessments, orders of temporary closure, the Chair’s decision to void or modify a management contracts, and notices of late fees and late fee assessments.

Part 585 covers the same type of appeals to the Commission as Part 584, except for instances where the appellant does not elect a hearing and instead elects to have appeal decided solely on written submissions. § 585.1(a) provides as follows:

This part applies to appeals of the following where the appellant does not elect a hearing before a presiding official and instead elects to have the matter decided by the Commission solely on the basis of written submissions:

- (a) (1) A violation alleged in a notice of violation under § 573.3;
(2) Proposed civil fine assessments under part 575 of this chapter;
(3) Orders of temporary closure under § 573.6;
(4) Late fee notifications and assessments under part 514 of this chapter; and
(5) The Chair's decision to void or modify a management contract under part 535 of this chapter subsequent to initial approval.

There does not appear to be a provision in the section that addresses the situation where one party to a management contract under § 585.1(a)(5) above, elects to proceed under Part 585, however another party to the same management contract wishes to proceed under Part 584 and participate in the hearing process.

⁵ To the extent that Parts 580-585 are intended only to supplement existing Part 577, then Part 577.8 would need to be revised as well.

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On behalf of the Seminole Tribe of Florida, we appreciate the opportunity to comment on the draft changes to the Commission's regulations. We look forward to working with the Commission through this regulatory review process as it further develops and refines these important regulations.

Sincerely,

HOBBS, STRAUS, DEAN & WALKER, LLP

A handwritten signature in black ink, appearing to read "Joseph H. Webster". The signature is fluid and cursive, with a large initial "J" and "W".

By: Joseph H. Webster

cc: Jim Shore, Esq.