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Via Electronic Mail: reg.review@nigc.gov

March 30, 2012

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

Re: Notice of Proposed Rulemaking Subchapter H, 25 C.F.R. Parts 580 – 85, Appeal Proceedings Before the Commission

Dear Chairwoman Stevens:

The Quapaw Tribal Gaming Agency ("QTGA") would like to make the following comments on the National Indian Gaming Commission ("NIGC") published Notice of Proposed Rulemaking of Subchapter H 25 C.F.R. Parts 580 – 85. The January 31, 2012, version of this proposed rule contains significant improvements over the Preliminary Draft and the QTGA hopes that the following comments will help subsequent drafts continue that trend.

PART I – PROTECTING THE GOVERNMENT-TO-GOVERNMENT RELATIONSHIP

The QTGA is troubled by what appears to be the Commission's vision behind these rules on appeal proceedings before the Commission – a vision which seems to favor a rush to final agency decision in lieu of rules better suited to protecting the unique government-to-government relationship between the NIGC and regulated sovereign tribes. Regulating the actions of a sovereign tribal nation requires a more cooperative and flexible approach than may typically be required of federal agency regulation of private individuals and businesses. And while the QTGA agrees that clarity is an appropriate goal for all rulemakings, we emphasize that clarity must not be confused with a rigid efficiency which hinders collaboration between the Commission and regulated sovereign tribes.

1. 25 C.F.R. §580.2

With these principles in mind, § 580.2 stands out as a prime example of a proposed rule which causes the QTGA serious concern. Under this section, the Commission intends to bind itself unequivocally to the rigid rules of proposed subchapter H except, at the Commission's discretion, when "good cause [is] shown" and the "interest of justice so requires." This section also provides that in no case may the time for filing a notice of appeal be extended – even if good

cause is shown and the interest of justice so requires. The QTGA sees no principled reason for the Commission to bind itself and future Commissions to the rules and procedures of proposed subchapter H. The QTGA requests that the Commission modify this provision to state that exceptions should be granted based on *equitable* considerations in order to ensure that the Commission retains the flexibility to respond appropriately to developments before, after, and during an appeals proceeding.

2. 25 C.F.R. § 581.6

Under § 581.6, because a motion for reconsideration of a final decision can only be made in "extraordinary circumstances," this section allows the Commission to summarily throw out any petition for reconsideration that does not meet this standard. The QTGA asks the NIGC to remove the requirement of "extraordinary circumstances" from this proposed rule because it unnecessarily restricts a tribe's ability to work with the NIGC in reaching an agreeable solution after a final decision has been issued. The QTGA believes that any party should be entitled to file a motion for reconsideration without making a showing of an "extraordinary circumstance."

3. 25 C.F.R. § 584.10

The QTGA is concerned that § 584.10 could be construed as limiting the period during which parties to an appeal proceeding may pursue settlement or a consent decree. The option to pursue settlement agreements or consent decrees should always be made available to the parties and encouraged by the NIGC. The QTGA requests that § 584.10(a) be modified to expressly allow parties to negotiate the terms of a potential settlement agreement at any time during the appeal proceeding.

4. Filing Deadlines

The QTGA takes issue with the time periods allotted for the filing of various motions and briefs in this proposed subchapter. Appellants who miss a deadline are considered to have waived the right to appeal or file per § 580.5. In lieu of this harsh procedural penalty, the time periods for filing should be re-examined for reasonableness. The QTGA requests that the Commission take into consideration the time-consuming decision processes that tribal governments and agencies must follow internally, as well as the resource constraints in obtaining timely legal services. At a minimum, filing deadlines for major decisions, such as whether to file a notice of appeal or motion for reconsideration, should be no less than sixty (60) days from the date of the decision. Filing deadlines for briefs should be no less than forty-five (45) days *after* receipt of the record from the NIGC. All other appellant responses should be allotted at least twenty (20) days.

5. Ex Parte Communications

Finally, the QTGA responds to the NIGC's request for comments regarding ex parte communication prohibition provisions. As recognized in the preamble, ex parte prohibitions could become an impermissible restraint on the government-to-government relationship between tribal governments and the NIGC if construed to limit communications between the Commission and an appellant tribe. The QTGA believes that ex parte provisions are only relevant when an

appeal proceeding includes both an appellant and an additional adverse party other than the Chair. In cases where the tribal appellant is the only party, or the additional adverse party is the Chair, it would be unreasonable for either the Chair or the tribal appellant to cease communicating with the Commission. Thus, the QTGA requests that ex parte communication prohibition provisions apply only to hearings before a presiding official in cases where there is an additional adverse party other than the Chair.

PART II – PROTECTING DUE PROCESS AND THE RIGHT TO A FULL & FAIR APPEAL

1. Definition of Presiding Official

The proposed rule defines "presiding official" as simply the "individual who presides over the hearing and issues the recommended decision under part 584." The proposed rule would benefit from a clearer and more precise definition of a "presiding official" that addresses, at a minimum, the requirement that the presiding official be neutral and free from the direct supervision or control of the Commission. Presiding officials should be properly insulated from the influence of those within the NIGC who are involved in the prosecution of enforcement actions so that appellants are afforded a fair hearing consistent with due process principles.

2. 25 C.F.R. § 584.6

Although unlikely, we note the potential for an overlap between the time the presiding official is designated and the deadline for concluding the hearing in § 584.6(b). In the interest of ensuring that the presiding official can conduct a full and fair hearing, we believe the timeframe for designating a presiding official should be much shorter for appeals involving temporary closure orders. The QTGA suggests adding language to § 584.6(b) that requires the NIGC to appoint a presiding official within five to seven days after a timely notice of appeal is filed.

3. 25 C.F.R. § 580.10

Under IGRA, the Commission is responsible for issuing final decisions of matters on appeal matters, which can be reached through either a majority decision or by the adoption or rejection of a presiding official's recommended decision. Section 580.10 provides that, in the event the Commission is unable to reach a majority decision, the decision of the Chair will constitute the final decision of the Commission – i.e., a final agency action for purposes of judicial review. The QTGA is troubled by the implications of this provision, which essentially allows the Chair to serve as both the decision-maker with regard to a matter and the exclusive adjudicator of the Chair's decision in that matter. Such an outcome deprives the appellant of his or her right to have a matter on appeal adjudicated by a fair and neutral decision-maker. The QTGA therefore requests that the Commission carefully consider these implications and redraft § 580.10 appropriately.

4. Release of the Record; Supplementing the Record

Provisions regarding the record upon which the Chair bases his or her decision constitute the final area of concern for the QTGA. In order to ensure a full and fair appeal, timely access to

the record upon which the Chair based his or her decision is necessary. Proposed Parts 582, 583, and 585 state that the record will be provided to an appellant after the appellant files a notice of appeal. The QTGA believes, however, that a potential appellant should have access to the full record prior to filing a notice of appeal in order to make a fully informed decision regarding whether or not to file a notice of appeal at all.

Lastly, § 581.5 should mimic § 584.8 in allowing the parties to an appeal proceeding to supplement the record at any time prior to the issuance of the Commission's final decision.

CONCLUSION

In closing, the QTGA would like to thank you for this opportunity to provide the above comments to the NIGC's proposed changes. It is our hope that you will accept our comments in the constructive manner in which they are intended.

Sincerely,

Barbara Kyser-Collier

Barbara Kyser-Collier
Director, QTGA