Seneca Cayuga Gaming Commission
23701 S. 655 Rd
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918-787-9703 fax 918-787-2430

August 14, 2012
Ms. Tracie L. Stevens, Chairwoman
National Indian Gaming Commission
1441 L St. NW, Suite 9100
Washington, DC 20005

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

Dear Chairwoman Stevens:

On behalf of the Seneca-Cayuga Gaming Commission (SCGC), I am pleased to submit comments on the National Indian Gaming Commission's (NIGC) proposed rule implementing the Class II Technical Standards. We appreciate the opportunity to express our views on the NIGC's proposed amendments to 25 C.F.R. Part 547, particularly in relation to the grandfather provisions. We recognize the tremendous effort set forth by the Commissioners and the staff during this regulatory review process and commend the NIGC for its continual outreach efforts utilizing various consultative mechanisms. As the NIGC moves forward with finalizing this proposed rule, we respectfully seek your favorable consideration of the recommendations we have outlined below, as well as those set forth by the Tribal Advisory Committees (TACs) and Tribal Gaming Working Group (TGWG).

Before proceeding with our comments on the proposed rule, we wish to address the NIGC's August 8, 2012 Bulletin No. 2012-02 (Bulletin), which clarifies the NIGC's intent with respect to grandfathered Class II gaming systems that have been brought into compliance with the technical standards. As the NIGC is aware, there has been a great deal of uncertainty surrounding the operation of the grandfathering provisions, specifically with respect to the continued operation of compliant grandfathered Class II gaming systems after the sunset date of November 10, 2013. With the issuance of the NIGC's Bulletin, however, it has now become clear that the NIGC does not intend to require the removal of *all* grandfathered Class II gaming systems from operation after the sunset date, but rather that any grandfathered system may continue in operation so long as that system has been made compliant with applicable technical standards.

While we appreciate the NIGC's clarification on this point, we are concerned that the proposed rule may operate to effect a different outcome notwithstanding the NIGC's Bulletin. As drafted, the sunset clause in the proposed rule, when read together with the proposed definition of a "grandfathered Class II gaming system," could operate to require the removal of *all* grandfathered Class II gaming systems, including those that have already been certified as compliant with the technical standards. Specifically, because proposed § 547.5(b)(1) states that "[g]randfathered Class II gaming systems may continue in operation for a period of five years from November 10, 2008," and does not explicitly provide an exception for grandfathered

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systems that have become compliant, it appears as though *all* grandfathered systems will be prohibited from remaining in operation after November 10, 2013. Such an outcome would be utterly devastating to tribal governments and their economies and would result in millions, if not billions, of dollars in lost capital and revenue.

For this reason, as well as those outlined below, we believe that substantive revisions to the grandfathering provisions are necessary before the NIGC moves forward with issuing a final rule.

- **Sunset Clause.** In the preamble to the proposed rule, the NIGC indicated that it is considering amending the duration of the proposed sunset clause by extending the sunset period by an additional three to five years or removing the sunset period altogether. We do not believe that a sunset period of any duration is necessary or even advisable and therefore urge the NIGC to withdraw the sunset clause in its entirety.

  We believe that a more reasoned regulatory approach would be one in which grandfathered Class II gaming systems are eliminated from operation through attrition and/or as a result of market forces. There is simply no basis for concluding that a Class II gaming system must be removed from operation by a set date simply because it was manufactured before November 10, 2008. We are unaware of any evidence showing that the continued operation of grandfathered Class II gaming systems pose a threat to the security and/or integrity of Class II gaming, nor do we have any reason to believe that any such evidence ever existed. If the regulatory objective of the proposed sunset clause is to protect the integrity and security of the Class II gaming industry, the link between the sunset clause and this regulatory objective is unclear and uncertain at best. Thus, we do not believe that the proposed sunset clause is likely to produce any net benefit with regard to the regulation of Class II gaming.

  The costs of the proposed sunset clause far outweigh any regulatory benefit that may result from the removal of grandfathered Class II gaming systems. Unless otherwise amended to apply prospectively and protect the status of grandfathered Class II gaming systems, the proposed sunset clause will operate to cause tremendous economic harm to tribal governments by placing tribal governments at a competitive disadvantage relative to other gaming operations that have not made similar investments in grandfathered Class II gaming systems.

  In the preamble to the proposed rule, the NIGC invited tribal governments to provide the NIGC with specific facts and information concerning their Class II gaming systems to assess the potential impact of the proposed sunset clause on tribal gaming operations. While the SCGC welcomes the opportunity to assist the NIGC in this regard, we do not believe we are in a position to provide the NIGC with such information at this time. Due to the proprietary nature of some of the requested information, we are reluctant to

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disclose this data in a form accessible to the public. Moreover, we note that the disclosure of our own data will only be useful to the extent that it is used in connection with reliable data from the Class II gaming industry as a whole. However, without a focused effort to conduct a comprehensive economic impact analysis of the proposed sunset clause, it is simply not possible to gather and compile the necessary data at the national level.

Given these limitations, we urge the NIGC to prepare a cost-benefit analysis prior to making a final decision with respect to the proposed sunset clause. We note that a cost-benefit analysis is one of the key tools used in conducting a regulatory analysis pursuant to Executive Order 12866, which requires federal agencies to carry out such an analysis for economically significant rules. Among other benefits, this type of analysis will help ensure that the NIGC's proposed actions in relation to the sunset clause are informed by economic findings and based on the maximization of net benefits.

- **Definition of Grandfathered Class II Gaming System**. We urge the NIGC to amend the proposed definition of a grandfathered Class II gaming system to encompass any and all Class II gaming systems certified prior to the effective date of the final regulation, rather than just those systems manufactured before November 10, 2008. In addition to suggesting that all grandfathered systems must be removed from operation by November 10, 2008, the proposed definition essentially creates two separate categories of grandfathered Class II gaming systems by failing to make an exception for those systems that have since come into compliance with the technical standards. Moreover, the definition fails to account for those certified Class II gaming systems manufactured after November 10, 2008 and essentially leaves those systems in limbo for purposes of the new final rule.

  We believe the final rule would benefit significantly from a definition of a grandfathered Class II gaming system that clearly distinguishes games certified prior to the new regulation from those whose certifications will be based on the standards contained in the new regulation. To that end, we recommend expanding the definition of a grandfathered Class II gaming system to include all previously certified Class II gaming systems, regardless of the date of manufacture. While the manufacture date of November 10, 2008 may have some relevance for purposes of this particular rulemaking, we note that it will be rendered obsolete as new categories of grandfathered systems are born with each subsequent rulemaking. By adopting a more generic definition of a grandfathered Class II gaming system, the NIGC could eliminate the need to develop new language to address multiple categories of grandfathered systems in subsequent rulemakings. Otherwise, a new category of grandfathered Class II gaming systems would be created with each revision of the technical standards, and each category of grandfathered systems would require a new definition.

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For these reasons, we ask that proposed § 547.5(b) be amended to read as follows:

All previously certified Class II gaming systems, including those manufactured before, on, or after November 10, 2008, but prior to the effective date of this Part, constitute grandfathered Class II gaming systems for which the following provisions apply:

- **Prospective Application.** In the legislative and regulatory context, a grandfather clause is typically used to exempt person or entities already engaged in an activity from future rules affecting that activity. Grandfather clauses also help ensure that a statute or regulation will not be applied retroactively. Retroactive changes in an agency's rules are generally disfavored in accordance with fundamental notions of justice and fairness, especially when the change has a material retroactive effect on the regulated party.

  As drafted, the proposed rule would operate to negatively affect the certifications of all Class II gaming systems in operation today by potentially invalidating their existing certifications. To guard against the possibility of such an unjust outcome, we recommend adding language clarifying that the technical standards will be applied prospectively and that the standards contained therein will only apply to those systems that have not yet been certified.

In addition to the above recommendations in relation to the grandfathering provisions, we would like to offer the following comments on specific provisions of the proposed rule:

- **25 C.F.R. § 547.5(c)(4).** As drafted, this provision requires that "each player interface" be tested to meet the applicable standards. We are concerned with the potential costs associated with testing each and every player interface as opposed to *models* of each interface. We recommend amending proposed § 547.5(c)(4) to reflect that "submitted model(s) of a player interface" must be tested prior to certification.

- **25 C.F.R. § 547.8(b)(1)**. We have some drafting concerns with this provision which, as drafted, prohibits automatic changes to the rules. Specifically, we are concerned that the prohibition against "automatic changes" may operate to limit the use of certain technologies that may otherwise provide for full and clear disclosure of all rules and any changes thereof. We recommend replacing this provision with the following: "Undisclosed changes of rules are prohibited."

- **25 C.F.R. § 547.16(b).** We are concerned that by requiring player interfaces to "continually display" certain disclaimers, the proposed rule may inadvertently limit the use of certain technologies and devices. Assuming the regulatory objective here is to ensure that the patron reads and understands the required disclaimers, we believe that a requirement that all disclaimers be continually displayed *or displayed until acknowledged*

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by the patron represents a less burdensome approach to achieving the same regulatory outcome.

In closing, the SCGC would like to again express its appreciation for this opportunity to comment on the proposed rule. As the NIGC moves forward in finalizing this proposed rule, we urge it to consider a regulatory approach to the grandfathering provisions that will accomplish the goal of preserving the honesty and integrity of Class II gaming without compromising its economic stability and future viability. It is our hope that the above comments and recommendations are helpful to the NIGC in promulgating a final rule that reflects this careful balance in a manner consistent with the purposes and goals of the Indian Gaming Regulatory Act.

Sincerely,

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Richard Wood
Gaming Commissioner
Seneca-Cayuga Gaming Commission