



June 24, 2005

Mr. Scott Walker, Esq.  
Senior Consultant  
Electronic Game Card Inc.  
3800 Howard Hughes Parkway, Suite 850  
Las Vegas, NV 89109

Re: Electronic Game Cards, classification opinion

Dear Mr. Walker:

This is in response to your request for an opinion classifying Electronic Game Cards Inc.'s electronic game cards ("the cards"), which you would like to offer in Indian casinos as a Class II pull tabs game under the name, "Tribal Numbers." My staff and I have reviewed two versions of the cards, together with explanatory technical information and the arguments you provided in letters, discussions, and e-mails. The first version you provided us ("Version 1") was a credit-card-sized, single-use electronic pull tab. The second version ("Version 2") adds a scratch off pull tab card to the back of the electronic card. I conclude that the Version 1 is Class III because it is an electronic facsimile of a game of chance. Version 2, however, is Class II. The game is in the scratch off card, and the electronic display – an alternate means of play – is a technologic aid.

#### **The cards – features common to both versions**

The cards are presented as a pull tabs game. As traditionally played, pull tabs uses two-ply paper cards. The player removes paper flaps or "tabs" from the top layer, thus revealing printed symbols arranged in winning or losing combinations. The electronic game cards, as their name implies, essentially allow the player to do this electronically.

Each card is approximately the size of a credit card and is made of plastic. Each is a slim case containing a 40mm-wide liquid crystal diode for the display of game results, a circuit board, a microprocessor, game software, and a battery with upwards of nine months of shelf life. The game software and the game results are written to the microprocessor at manufacture. Thus, like paper pull tabs, the cards contain predetermined winning and losing games. Like paper pull tabs, the cards will be sold to an operator in a deal containing a specified number of cards, discreet prize levels, and a predetermined number of winning cards at each prize level. Thus, like paper pull tabs, a deal of the

cards has a prescribed, calculated house edge – the percentage of sales kept by the operator after it pays all prizes.

Each card, moreover, is made to be tamper proof. Opening the case destroys the card, and the microprocessor, sealed within the case, is not rewritable. Similarly, the cards can be made with unique serial numbers and bar codes for the purposes of inventory, accounting, and verification of game results.

### The cards – features added in Version 2

Version 2 adds a 32 mm by 48 mm (approx. 1” by 1½”) scratch-off pull tab to the back of the electronic card. The scratch off card has a vinyl cover that can be removed with the edge of a coin or fingernail to reveal results below.

### Pull Tabs as played on the cards – Version 1 (electronic only)

Players purchase the cards from designated retail outlets in the casino at a price fixed by the operator. In Version 1, as shown to us, each card contains eighty plays.<sup>1</sup> Each play requires the patron to press the ‘Play’ button on the card twice. The first press displays the number of plays remaining on the card. The second causes the LCD to display a ‘scroll’ effect, which is followed by the appearance of three numbers from 1 to 7 on the LCD, one at a time in each of three small windows.

Each card has printed on the front of it a table of winning combinations and corresponding point values. Should numbers appear in the windows in a winning combination, the LCD will flash ‘Win’ for three seconds, together with the number of points awarded for that combination. The card will then display the player’s cumulative point total. Should the numbers appear in a losing combination, the card will display only the player’s cumulative point total. The cumulative total is significant because it is upon this, and not the results of the eighty individual plays, that the prizes are based.<sup>2</sup> A paper insert provided with the card provides a paytable of points and prizes, along with complete instructions on how to play.

While the number combination for each play is transient – it cannot be recalled after the player starts the next play – the cumulative point total is not. The card tracks the player’s cumulative points through all eighty plays. When all plays are exhausted, pressing ‘Play’ further only displays the cumulative point total.

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<sup>1</sup> We understand that there is no necessity to having eighty plays and that Electronic Game Card may in the future offer cards with more or fewer plays, depending on customer demand. Provided that all other features remain the same, this opinion will apply to the cards so modified.

<sup>2</sup> We understand that as a matter of attractiveness to the patron, rather than of any mathematical or legal necessity, there are no zero point cards. Each card will be redeemable for some prize, even if it is a prize less than the cost of the card.

Players redeem the cards only at designated locations in the casino. An electronic code in the card or a bar code on the card back allows the operator to verify the cumulative total, and therefore the player's prize, when a card is presented for redemption. The code or bar code makes it unnecessary for the patron to run through all, or even any, of the eighty plays on the card before redeeming it. Whenever redeemed, the player is paid for the entire value of the card.

#### **Pull tabs, Version 1, cont'd. – random number generation**

Though the results of the eighty plays are pre-programmed, the software in each card nevertheless contains a random number generator, which we understand to have two functions. One is to display the pre-determined results in a random order so as to maintain player interest. Specifically, each card will display at least one win in the first eight plays, at least one win in the last eight plays, and no more than thirteen consecutive losing plays. All other results are randomly distributed.

The RNG's other function is to fill in non-essential numbers for display. For example, if two 7s is a winning combination, the RNG will fill in the display of the third number by picking a random number from 1 to 6. Similarly, if the cards have losing combinations with three non-repeating numbers, the RNG will select three different numbers from 1 to 7 in order to display the losing result. This function we understand to be a matter of programming efficiency.

#### **Pull Tabs as played on the cards – Version 2 (combined cards)**

Version 2 of the cards can be played either as above or, simply, by scratching off the covering of the pull tab. This reveals a series of eighty point values and their cumulative total, specifically the cumulative point value of the card that entitles the player to a prize.<sup>3</sup> Playing the electronic card will reveal the same eighty results and cumulative point value.

#### **Legal analysis**

IGRA divides the world of Indian gaming into three classes. Class I, which is not at issue here, encompasses "social games" played "solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations." 25 U.S.C. § 2703(6). Class II encompasses, in relevant part:

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<sup>3</sup> The eighty point values are printed in 6 point type, and the cumulative total in 8 point. Though 6 point type may present some with reading difficulty, we raise no objection. Type of that size has been found sufficient in other regulatory contexts. The Food and Drug Administration, for example, mandates a minimum type size of 6 points for text in over the counter drug labeling. 21 C.F.R. § 201.66(d)(2). Moreover, as stated above, it is only the cumulative total, printed in larger type, that is significant.

the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith) -- ... including (if played in the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo....

25 U.S.C. § 2703(7)(A)(i). Class III is a catchall category and includes "all forms of gaming that are not Class I gaming or Class II gaming." 25 U.S.C. § 2703(8). Class III also includes any banking card game and any electronic or electromechanical facsimile of any game of chance. 25 U.S.C. § 2703(7)(B)(i)-(ii); 25 C.F.R. § 502.4(b).

Viewed against this background, classification of the cards presents two separate questions. First, are the cards, in both versions, pull tabs or some other, similar game? If the latter, the cards do not fall within the definition of Class II and are Class III. Second, if the cards do play pull tabs, are they, in the two versions, technologic aids to the play of pull tabs or electronic facsimiles of it? If the former, the cards are Class II. If the latter, they are Class III.

#### Pull tabs

Neither IGRA nor the Commission's regulations define pull tabs. The game is, however, well known. It is, as alluded to above, a game of chance traditionally played with two-play paper cards. *Cabazon Band of Mission Indians v. National Indian Gaming Comm'n*, 14 F.3d 633, 635 (D.C. Cir. 1994). Players purchase these cards from the operator, which sells them from a set known as the 'deal,' and a typical deal contains up to 100,000 cards. When the players remove the top layer or "tab" of a card, the bottom layer reveals a pattern of symbols indicating whether the player has won a prize. A typical card will have three tabs, each an opportunity to win, and a pre-determined number of winning cards is randomly spaced within the deal. *Seneca-Cayuga Tribe of Oklahoma v. National Indian Gaming Comm'n.*, 327 F.3d 1019, 1024 (10<sup>th</sup> Cir. 2003).

In traditional pull tabs, bingo hall clerks sell the cards from retail counters or mobile carts. Clerks also redeem winning cards for cash prizes. *Diamond Game Enterp. Inc. v. Reno*, 230 F.3d. 365, 367 (D.C. Cir. 2000). More recently, operators have sold pull tabs from dispensing machines that read the card results through a bar code printed on the card back and display those results on video monitors. Some displays mimic the play of slot machines by displaying spinning reels. *Id.* at 367-368. Other innovations put a large number of pull tab games on a card sold for a single price. The card can then be read by the patron in the traditional fashion or by inserting it into an electronic reader. *Id.* at 370.

Given this history and these variations, the cards, in both versions shown to us, play pull tabs. In both versions, the cards, like both traditional pull tabs and recent innovations, are sold for a fixed price from a deal containing a finite number of pre-designated winners, have multiple plays or opportunities to win, and can be redeemed for prizes if

pre-designated winning results are revealed. That prizes are awarded for points accumulated over eighty plays, rather than for each individual play on the card, is immaterial. In this, the cards are similar in their play to both to pull tab dispensing machines and to electronic card readers that read multiple games on a card. In each case, players are effectively playing, and are paid for, the value of the card as a whole. That Version 2 includes a scratch off pull tab with a vinyl, rather than a paper, covering is likewise immaterial. See, letter to Native American Indian Enterprises, Inc., May 23, 1994.

### Technologic Aids or Electronic Facsimiles

The question of classification thus reduces to whether the two versions of the cards are technologic aids to the game of pull tabs or are electronic facsimiles of that game of chance. In a relevant part, the Commission's regulations define a technologic aid as equipment that

- (1) assists a player or the playing of a game; [and]
- (2) is not an electronic or electromechanical facsimile....

25 C.F.R. § 502.7(a). Version 1, and the electronic component of the Version 2, easily satisfy the first requirement. One can easily imagine, for example, the cards making pull tabs easier to play for a patron with limited dexterity in his or her fingers. The question thus becomes whether the cards are electronic facsimiles.

The Commission's regulations define facsimile, in relevant part, as "a game played in an electronic or electromechanical format that replicates a game of chance by incorporating all of the characteristics of the game...." 25 C.F.R. § 502.8. In *Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535 (9<sup>th</sup> Cir 1994), the Ninth Circuit was faced with the question whether the "Autotab Model 101 electronic pull tab dispenser" was a Class III facsimile or a Class II aid. *Id.* at 541-543. The Autotab was a wholly-electronic implementation of pull tabs. Patrons played at a video terminal which displayed a video representation of a pull tab and electronically revealed concealed numbers. There was an electronic deal containing a finite number of pull tabs, with pre-determined winning and losing tabs, stored in a central computer and passed to the video terminal for play. *Ibid.*

The Ninth Circuit had no difficulty finding the Autotab to be an electronic facsimile: "the pull tab machines in issue here are not, in our view, readily distinguishable" from paper pull tabs. *Id.* at 543. The machines, in other words, retained all of the fundamental characteristics of the paper version of the game – "a pre-determined and known number of winning tickets from a finite pool of tickets with known prizes; when all tickets have been played, all the prizes will have been awarded." *Id.* at 541.

Similarly, in *Cabazon Band*, above, the D.C. Circuit found another wholly electronic version of pull tabs to be a Class III facsimile. This game, like the Autotab, had a

computer that "randomly selects a card for the gambler, pulls the tab at the gambler's direction, and displays the result on [a video] screen. The computer version ... has a fixed number of winning cards in each deal." *Id.* at 635. This, the D.C. Circuit found, exactly replicated paper pull tabs and was thus a Class III facsimile. *Id.* at 636.

Here too, the cards exactly replicate paper pull tabs. There is a finite deal; there is a pre-determined number of winning and losing electronic cards; there are pre-determined results for each card that are electronically stored and electronically revealed. In short, the cards are electronic facsimiles because the pull tab game exists only electronically.

It is true that unlike the networked systems in *Sycuan Band* and *Cabazon Band*, the cards must be purchased and redeemed at a retail station. Even so, all characteristics of the game of pull tabs are electronic. Purchase and redemption, in other words, are not essential characteristics of the game. One could, for example, play the same pull tabs game for free in a promotion or tournament. Further, the Autotab system did not redeem the electronic pull tabs for the player. The system provided a voucher that the player had to cash in at a retail station. *Sycuan Band*, 54 F.3d at 541. This did not stop the Ninth Circuit from holding that Autotab is a Class III facsimile. So too here. I conclude that Version 1 of the cards is an electronic facsimile under 25 C.F.R. § 502.8 and does not satisfy the elements of a technologic aid in 25 C.F.R. § 502.7(a). Version 1 is therefore Class III under 25 U.S.C. § 2703(8).

Version 2 of the cards, however, is Class II. The reasons are best illustrated by *Diamond Game Enterprises v. Reno*, 230 F.3d 365 (D.C. Cir. 2000). The machine at issue there was the Lucky Tab II pull tabs dispenser. When activated, the machine cut a paper pull tab from a roll of some 7,500 cards and dropped it a tray for the player. As it was traveling, the machine read a bar code on the back of the card and displayed the winning or losing result on a video screen using the spinning reels of a slot machine. Regardless of the display, the player still had to redeem winning cards from a clerk. *Id.* at 367-368.

The D.C. Circuit specifically rejected the Government's argument that the machine was a Class III facsimile:

The game is in the paper rolls, not ... in a computer.... For players using the Lucky Tab II, the machine functions as an aid--it "helps or supports," or "assists" the paper game of pull-tabs. Without the paper rolls, the machine has no gaming function at all. It is, in essence, little more than a high-tech dealer. Viewed this way, the game played with the Lucky Tab II is not a facsimile of paper pull-tabs, it *is* paper pull-tabs.

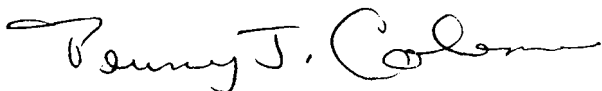
*Id.* at 370. *Accord*, *Seneca-Cayuga*, above, 327 F.3d at 1042-1043 (finding the Magical Irish pull tab dispenser, a substantively identical machine, to be Class II for these same reasons). (Emphasis in the original.)

Version 2 of the cards is no different. With the addition of the scratch off pull tab, the game no longer exists only electronically, as with Version 1. The game now exists in a tangible medium. The player has the option to play pull tabs through the tangible, scratch off card or through the electronic card. Since the result is identical whichever way the patron chooses to play, the electronic card is an entertaining display that is not necessary to the play of the game and that the player can ignore if he or she so chooses. As in *Diamond Game*, the game is in the tangible pull tab.

Accordingly, I conclude that Version 2 of the cards is not an electronic facsimile. It satisfies all three elements of technologic aid under 25 U.S.C. § 502.7(a). It is therefore Class II, provided that it is played in the same location as bingo. 25 U.S.C. § 2703(7)(A)(i)(III).

If you have any questions or require anything further, please contact Michael Gross, Staff Attorney, at 202-632-7003.

Sincerely,



Penny J. Coleman  
Acting General Counsel